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# AFFIRMATIVE DUTIES, SYSTEMIC HARMS, AND THE DUE PROCESS CLAUSE

Barbara E. Armacost\*

## INTRODUCTION

A woman suffers permanent injury when she is shot during a robbery. She brings suit under the Due Process Clause alleging that municipal police failed to protect her from the injury. Plaintiff challenges the city's policy of disregarding calls for assistance unless and until a crime actually has been committed and alleges that the city has failed to provide adequate police protection in a high-crime area.<sup>1</sup>

A mother brings suit under the Due Process Clause to recover for injuries to her young son who suffered permanent brain damage when his caseworker failed to remove the child from the custody of his abusive father. The social worker's notes indicate that she was worried about the child's safety, but she apparently failed to monitor the situation closely enough.<sup>2</sup>

Police officers arrest an intoxicated driver, impound his car, and leave his female companion stranded in a dangerous section of the city. The woman brings suit under the Due Process Clause for injuries sustained when she is mugged and raped while walking to a local convenience store to call for a ride home.<sup>3</sup>

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The scenarios above have a number of things in common: in each of them, the immediate cause of the injury was a *nongovernmental* actor. Also in each, the plaintiff sought to bring suit not against the private tortfeasor but against the government, on the theory that state or local officials deprived the plaintiff of a liberty

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1. See *Reiff v. City of Philadelphia*, 471 F. Supp. 1262 (E.D. Pa. 1979).

2. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989).

3. See *Hilliard v. City of Denver*, 930 F.2d 1516 (10th Cir. 1991).

interest by failing to prevent the injuries from occurring. The other commonality is that none of these scenarios ultimately resulted in governmental liability. The rationale for nonliability as expressed by the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*<sup>4</sup> is 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. It 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.<sup>5</sup>

In the oft-repeated words of Judge Richard Posner, "[T]he Constitution is a charter of negative rather than positive liberties."<sup>6</sup> Under the Supreme Court's jurisprudence, the only context in which it is *certain* that the government has an affirmative duty to protect citizens from harm by third parties is where the plaintiff is in the government's custody.<sup>7</sup>

The *DeShaney* holding has engendered a scholarly response that is impassioned and unequivocally negative.<sup>8</sup> The facts of *DeShaney*, which in part drive much of the criticism, are "undeniably tragic":<sup>9</sup> social workers followed a four-year-old child's case,

4. 489 U.S. 189 (1989).

5. 489 U.S. at 195.

6. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

7. Prisoners, pretrial detainees, and involuntarily committed psychiatric patients enjoy a right to be free from unreasonable risk of harm while in governmental custody. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that the Eighth Amendment requires the government to provide medical care to incarcerated prisoners); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) (holding that the Fourteenth Amendment requires the government to provide medical care to pretrial detainees); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that the Fourteenth Amendment requires the government to provide for the reasonable safety of involuntarily committed mental patients).

8. See, e.g., Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENTARY 403 (1993); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078; Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95 (1994); Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and Its Aftermath*, 66 WASH. L. REV. 107 (1991); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 1991 DUKE L.J. 507; Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659 (1990) [hereinafter Oren, *DeShaney in Context*]; Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENTARY 379 (1993); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

9. *DeShaney*, 489 U.S. at 191.

documented evidence of abuse by the child's father, but ultimately failed to remove him from his father's custody before he suffered beatings that left him permanently brain damaged.<sup>10</sup> The majority's reminder that Joshua's father inflicted the injury and that "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing"<sup>11</sup> is normatively unappealing; one might argue that the government exists, at least in part, to protect us from certain harms, and it should not be *permitted* to stand by and do nothing. Moreover, it is not wholly accurate to say that the government simply did nothing with regard to Joshua: in both general ways, by establishing a department of social services and passing laws regulating marriage and the family, and specific ways, by awarding custody of Joshua to his father and assigning a case-worker to follow him, the government took positive action with regard to Joshua and indeed may have discouraged potential private rescuers from taking action to prevent the harm.<sup>12</sup>

Although no one is inclined to object to the Supreme Court's holdings that those in custody have the right to receive some measure of protection from injury<sup>13</sup> — no one argues that the government can throw you in jail and take no responsibility for providing your basic needs — it is hard to articulate exactly why, as a constitutional matter, custody is special. The *DeShaney* Court reasoned that the government's duty to protect is triggered when it restrains an individual's ability to act on her own behalf or plays a part in creating or increasing the danger of harm.<sup>14</sup> That reasoning appeals to powerful and widely shared normative intuitions about appropriate governmental behavior; and certainly custody is the most dramatic example of the government limiting one's ability to care for oneself. But it is not clear how the normative intuitions captured in the Court's reasoning are derived from the Due Process Clause and — to the extent they are — why the same reasoning would not apply to a case like *DeShaney*. It is disingenuous to say that the government did not shape and constrain Joshua's ability to protect himself, even if less so than in the custodial setting.

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10. See 489 U.S. at 191-93, 208-09; see also *infra* notes 27-31 and accompanying text.

11. 489 U.S. at 203.

12. See 489 U.S. at 208-10 (Brennan, J., dissenting).

13. See *supra* note 7.

14. See *DeShaney*, 489 U.S. at 200-01.

In light of the nearly universal condemnation of *DeShaney*,<sup>15</sup> it might come as a surprise that “failure-to-protect”<sup>16</sup> claims in the broader legal context *only rarely result in liability*. *DeShaney* is not an outlier in the judicial landscape: in numerous cases spanning more than a decade prior to *DeShaney*, the lower federal courts were uniformly reluctant to hold the government liable for failures to protect and did so only in very narrow circumstances. In addition, there is a whole universe of ordinary tort cases virtually identical to the cases that have been brought under the Due Process Clause. In the tort context — contrary to a strong, general trend toward increased governmental liability — the overwhelming presumption *against* liability for failure to protect has held fast.

Critics of *DeShaney* have not given adequate consideration to this broader legal landscape and the clues it offers for understanding the Supreme Court’s rejection of constitutional failure-to-protect claims. This article suggests that the constitutional cases are better explained, not by constitutional text or history, but by judicial reluctance to second-guess legislative decisions about budgetary matters, the same concerns that account for the presumptive rule of nonliability in tort. This rationale for the nonliability rule makes *DeShaney* a much harder case on its facts and goes a long way toward a more satisfying positive account of the Supreme Court’s approach to this line of cases. It also provides a plausible counterargument to the moral and constitutional objections to nonliability in cases like *DeShaney*.

Part I of the article lays out the major academic criticisms of *DeShaney*. Part II describes the contours of liability for failure to protect in tort. Part III offers a positive explanation for the strong presumption against governmental liability<sup>17</sup> in failure-to-protect

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15. See *supra* note 8. Indeed, I have not found a single article purporting to offer a positive rationale for nonliability.

16. By “failure to protect,” for purposes of this article, I am referring to situations in which the immediate, physical cause of the injury was a nongovernmental actor or entity and the claim is that the government had a duty to prevent that injury. I understand that in many such instances governmental behavior could be described as either act or omission. The terminology is not important; the question in these cases is the extent of the government’s obligation to take precautions against injuries by third parties.

17. By “governmental liability,” I mean liability against states or localities or against state or local officers. In tort, the extent of governmental liability is determined by common law and statutory rules governing sovereign immunity. See *infra* notes 94-98 and accompanying text. In the constitutional context, 42 U.S.C. § 1983 (1988), which provides a cause of action for deprivations of constitutional rights, permits suits against municipalities for actions that execute a governmental “policy or custom,” see *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), as well as against local officials in their individual capacities. The Eleventh Amendment bars § 1983 suits for damages against states and state officers in their official capacities. Injunctive relief, however, may be obtained against state officials — and so as a

cases: permitting broad liability for failure to protect would involve the courts in second-guessing political decisions about the use of limited community resources. This explanation has two parts. First, as a matter of institutional competence, budgetary decisions about the appropriate level and distribution of public services are better suited to political rather than judicial resolution. Second, failure-to-protect claims are more likely to involve the courts in budgetary review than other kinds of claims against the government. One may question exactly where the line between political and judicial action ought to be, but the notion that there is a line somewhere — and that judges are seeking to draw such a line in these cases — resonates in many areas of the law. Part IV demonstrates that the resource-allocation rationale has significant explanatory power in constitutional failure-to-protect cases. To the extent these considerations are a significant part of what is driving the results in failure-to-protect cases, they have not been addressed adequately by *DeShaney's* critics.

## I. THE "DUTY-TO-PROTECT" IN THE CONSTITUTIONAL CONTEXT

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>18</sup> The text of the Clause has been interpreted to create certain substantive rights as well as to guarantee the right to adequate process. That is, there are certain things the government may not do, regardless of how much process it provides.<sup>19</sup> Perhaps the most well known of the substantive due process rights is the right to privacy.<sup>20</sup> The Due Process Clause also has been construed to forbid a category of tortlike deprivations of life, liberty, or property. For example, under certain circumstances,<sup>21</sup> a prison official who deliberately — or recklessly<sup>22</sup> —

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practical matter against the state itself — through the "fiction" of suing state officials in their individual capacities. See *Ex parte Young*, 209 U.S. 123 (1908).

18. U.S. CONST. amend. XIV, § 1.

19. See *Rochin v. California*, 342 U.S. 165 (1952).

20. See *Roe v. Wade*, 410 U.S. 113 (1973).

21. The Supreme Court has held that there can be no deprivation within the meaning of the Due Process Clause if there are adequate state postdeprivation remedies. See *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

22. The Due Process Clause requires more than negligence, see *Daniels*, 474 U.S. at 327, but the Supreme Court has not opined on exactly what level of intent — between negligence and willfulness — is required to make out a claim. See 474 U.S. at 334 n.3. The courts of appeals are divided on the issue. See, e.g., *Webber v. Mefford*, 43 F.3d 1340 (10th Cir.) (recklessness); *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir.), *aff'd. on reh'g*, 22 F.3d 1296 (3d Cir. 1994) ("shock the conscience"); *Temkin v. Frederick County Commr.*, 945 F.2d 716 (4th

lost<sup>23</sup> or damaged<sup>24</sup> a prisoner's personal effects could be charged with unlawful deprivation of property; an official who acted with deliberate indifference toward a serious threat of illness or injury could be found to have violated a liberty interest.<sup>25</sup> Although many of these tortlike cases have involved prisoners, a number of courts have permitted suits for such injuries outside the custodial setting, for example, injuries resulting from the reckless or intentional actions of police officers.<sup>26</sup>

In *DeShaney*, petitioners, four-year-old Joshua DeShaney and his mother, sought to extend the reasoning of these tortlike due process cases by arguing that the Winnebago County Social Services Department had deprived Joshua of "his liberty interest in 'free[dom] from . . . unjustified intrusions on personal security,' by failing to provide him with adequate protection against his father's violence."<sup>27</sup> For the two years prior to the serious injuries that gave rise to this suit, the Winnebago County Social Services Department had been monitoring Joshua, who had been in the official custody of his father since his parents' divorce when Joshua was still an infant, for suspected abuse by his father Randy Deshaney.<sup>28</sup> During these two years of monitoring, there were numerous incidents suggesting possible child abuse, including three emergency-room visits for suspicious injuries, reports of suspected abuse by neighbors and the father's second wife, and visits by a social worker who observed a number of suspicious injuries.<sup>29</sup> Although the social worker "du-

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Cir. 1991) (same); *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989) (same); *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987) (gross negligence or recklessness).

23. See *Parratt*, 451 U.S. at 527. In *Parratt*, officials who lost a prisoner's hobby kit were found to have deprived him of property but not without "due process of law" because there were adequate state postdeprivation remedies. See 451 U.S. at 543-44.

24. See *Hudson v. Palmer*, 468 U.S. 517 (1984). The claim in *Hudson*, alleging intentional destruction of property, ultimately failed because adequate state postdeprivation remedies were available. See 468 U.S. at 533-36.

25. See *Davidson v. Cannon*, 474 U.S. 344 (1986). The Court denied the prisoner's claim in *Davidson* because he had not made a showing that prison officials were more than merely negligent. See 474 U.S. at 347-48; see also *supra* note 22.

26. See, e.g., *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (holding that plaintiff whose decedent was killed when police officers mistook him for a fugitive and recklessly shot into his truck could recover under Due Process Clause); *Ragusa v. Streator Police Dept.*, 530 F. Supp. 814 (N.D. Ill. 1981) (holding that due process claim for intentional deprivation of property arising out of impoundment of plaintiff's truck by the police survived motion to dismiss).

27. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195 (1989) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

28. See 489 U.S. at 191-93.

29. See 489 U.S. at 192-93, 208-09. At one point when Joshua was admitted to a local hospital with multiple injuries, the examining physician notified the Winnebago Social Services Department that he suspected child abuse. The Department obtained a court order plac-

tifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua,"<sup>30</sup> no action was taken to remove him from his home. In 1984, Randy DeShaney beat Joshua so savagely that he suffered a series of cerebral hemorrhages, leaving him profoundly retarded and likely to spend the rest of his life in an institution.<sup>31</sup>

The Supreme Court rejected Joshua's due process claim. The Court concluded that neither the language of the Due Process Clause itself nor its history support the "expansive reading"<sup>32</sup> that would permit petitioner's claims. The Court reasoned that

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The 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. It 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.<sup>33</sup>

The Court also noted that, as a historical matter, the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other."<sup>34</sup>

At the same time, the Court affirmed its prior holdings involving affirmative duties owed to persons in governmental custody on the ground that the government's "act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty" triggers a duty to "assume some responsibility for his safety and general well-being."<sup>35</sup> Such duties arise when, as in the custodial

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ing Joshua in the temporary custody of the hospital. The hospital convened a "Child Protection Team," consisting of physicians and other hospital personnel, social workers, police, and the county's lawyer, which ultimately determined that there was insufficient evidence of child abuse to retain custody of Joshua. The Child Protection Team, however, did recommend a number of measures to protect Joshua, and Joshua's father entered into a voluntary agreement to cooperate with the Team in accomplishing these goals. Based on the Team's recommendation, the juvenile court dismissed the child-protection case and returned Joshua to his father's custody, where the abuse apparently continued. *See* 489 U.S. at 192.

30. 489 U.S. at 193.

31. *See* 489 U.S. at 193.

32. *See* 489 U.S. at 195.

33. 489 U.S. at 195.

34. 489 U.S. at 196.

35. 489 U.S. at 200.



setting, the government by the use of its power "so restrains an individual's liberty that it renders him unable to care for himself."<sup>36</sup>

Scholars have criticized *DeShaney*<sup>37</sup> on a number of grounds, all of which lead them to conclude that there should be liability under the facts of *DeShaney* or, at the very least, broader liability than the Supreme Court's holding appears to permit. Many of the criticisms are driven, at least in part, by the compelling and ultimately tragic story behind the case. The facts suggest that governmental officials may have acted irresponsibly in the face of significant evidence that harm was likely to occur. The government's failure to protect a helpless child from a known abuser conflicts with widely held norms requiring minimally reasonable behavior. It also bumps up against common expectations about how we think the *government*, in particular, ought to behave: many people would consider it "wrong" for a police officer to fail to respond to a call for help or for a social worker to ignore evidence that a child was being abused<sup>38</sup> and perhaps would be surprised if they found that there were no legal sanction for doing so.<sup>39</sup>

Another source of criticism is the *DeShaney* Court's rationale for, on the one hand, rejecting petitioners' claim that the Due Process Clause creates a general duty to protect and, on the other hand, affirming the existence of such a duty in the custodial context.<sup>40</sup> As David Currie and others have pointed out, constitutional cases have found affirmative governmental obligations in many

36. 489 U.S. at 200. The Court explicitly left open the possibility that government-ordered foster care might be sufficiently analogous to custody to give rise to a duty to protect. See 489 U.S. at 201 n.9.

37. See *supra* note 8 (citing articles).

38. See Eaton & Wells, *supra* note 8, at 128.

39. Ordinary citizens, of course, have no legally enforceable duty, except in narrow circumstances, to rescue their fellow citizens or protect them from threatened or impending harm. For articles critical of the no-liability rule for private rescuers, see, e.g., James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); and Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993); see also Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986).

40. See *DeShaney*, 489 U.S. at 200 ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g. food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the . . . Due Process Clause."); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) (holding that the Fourteenth Amendment requires the government to provide medical care to pretrial detainees); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that the Fourteenth Amendment requires the government to provide for the reasonable safety of involuntarily committed mental patients).

"negatively phrased provisions."<sup>41</sup> Indeed, the Due Process Clause itself has been construed to create certain positive duties in addition to the affirmative duties of protection owed to individuals in custody.<sup>42</sup> Moreover, as a purely linguistic matter, the operative word "deprive" certainly could support the more passive meaning urged by the *DeShaney* petitioners; it could mean, for instance, "to keep [a person from] what he would otherwise have."<sup>43</sup>

A number of scholars have sought to defend a broader reading of the Due Process Clause by attacking the Court's account of constitutional history and seeking to demonstrate that the historical meaning of the Clause included a general duty to provide protection against private harms.<sup>44</sup> These accounts may call into question the Court's conclusion that Fourteenth Amendment history *forecloses* a more broadly defined duty to protect. They do not, however, offer an explanation of the scope of liability in failure-to-protect cases prior to *DeShaney* nor do they provide a basis for deciding what the proper limits of such a right might be.<sup>45</sup>

The Court's identification of custody as the only context that gives rise to a duty to protect has also been the subject of strong criticism. The Court's logic for permitting liability in the custodial context seems to be that, although private action was not the immediate cause of the injury, "state action [was] present in the background; the state's action placed the victim in a position where he

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41. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986). See generally *id.* at 872-86; Eaton & Wells, *supra* note 8, at 122-23. Cases finding affirmative obligations in "negatively phrased provisions" include, for example: *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980) (holding that the government must provide access to certain information); *Cruz v. Beto*, 405 U.S. 319 (1972) (holding that a prisoner must be provided reasonable opportunity to pursue his religion); and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the government must provide counsel to indigent defendants).

42. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that a state may not deny, solely because of inability to pay, access to state-controlled divorce proceeding); *Truax v. Corrigan*, 257 U.S. 312 (1921) (holding that a state must provide a remedy against picketing by striking workers on employer's property).

43. 4 THE OXFORD ENGLISH DICTIONARY 490 (2d ed. 1989), quoted in Eaton & Wells, *supra* note 8, at 116 (alteration in original). For example, it seems perfectly natural to conclude, in the context of a schoolyard fight, that those who prevent a student's buddies from intervening to protect him from the school bully have "deprived" him of the opportunity to avoid a bloody nose.

44. See, e.g., Eaton & Wells, *supra* note 8, at 118-21; Heyman, *supra* note 8, at 546-54, 557-63, 566-70; Oren, *DeShaney in Context*, *supra* note 8, at 687-92; Seidman, *supra* note 8, at 382-83; Soifer, *supra* note 8, at 1521-26. But see Currie, *supra* note 41, at 865-66 ("The Framers would have been astounded to hear it contended that by adopting the Bill of Rights they had managed to make mandatory the exercise of a Congressional power to help needy citizens . . .").

45. See Heyman, *supra* note 8, at 512.

or she could be injured.”<sup>46</sup> The intuition for finding affirmative duties in the custodial situation is undoubtedly strong: “When the state is obviously, visibly responsible for a person’s vulnerability to private violence, no court has denied that the state ought to provide some protection against the private wrongs that the person suffers.”<sup>47</sup> But, as David Strauss points out, the Court’s logic could be extended to other, noncustodial situations in which governmental action has compromised an individual’s ability to protect herself: “[S]tate action is always present in the background” in the sense that it “contributes to the condition in which all members of society . . . find themselves.”<sup>48</sup> The Court gives no clear explanation — constitutional or otherwise — for halting liability at the prison door.

A related criticism focuses on the Court’s characterization of the facts of *DeShaney* as a governmental failure to act — to which the Due Process Clause has nothing to say — rather than as governmental action. As the dissent in *DeShaney* pointed out, the distinction between action and inaction may simply depend upon how broadly in time one defines the injuring event:<sup>49</sup> Is the appropriate starting point for analysis the *action* of governmental officials in establishing a social services department and taking on the task of monitoring Joshua DeShaney for suspected child abuse but doing it badly?<sup>50</sup> Or is the case better characterized as governmental *failure to act* to prevent purely private harm, where the government had no role in creating the risk of harm in the first place and so has no duty to prevent it from occurring?

Along the same lines, Professor Beermann criticizes the very limited liability permitted under *DeShaney* as inconsistent with governmental responsibility in the modern welfare state.<sup>51</sup> He argues

46. Strauss, *supra* note 8, at 67.

47. *Id.*

48. *Id.*

49. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 205-11 (1989) (Brennan, J., dissenting).

50. See 489 U.S. at 208-11. An even broader temporal view would argue that the establishment of laws applicable to marriage and family, which by definition limit the possibilities of rescue from certain harms, is the starting point for analyzing governmental liability. See Strauss, *supra* note 8, at 64-65 (arguing that the state’s role is not limited to the custody award to Joshua’s father; the family unit itself is largely the product of state regulation).

51. See Beermann, *supra* note 8, at 1089; see also Bandes, *supra* note 8, at 2311 (“The welfare state, with its proliferation of government regulation and subsistence programs, little resembles the polity with which the Framers were familiar.”); Tribe, *supra* note 8, at 9-14 (calling for “circumspection and questioning in assessing how the distribution and direction of all public powers — including those of judges — define the legal space through which we all move”).

that the government's extensive involvement in modern society "creates dependencies that give rise to further responsibility."<sup>52</sup> The existence of "[g]overnment[al] institutions invite[s] people to rely on their programs," and, "[w]hen government fails to act as individuals legitimately anticipated, it is as if government has yanked a chair out from under a person as she settled into the chair."<sup>53</sup> Thus, citizens who rely on the existence of agencies that fail to deliver are made worse off because the existence of such entities discourages intervention by alternative private entities.<sup>54</sup> Building on the *DeShaney* dissent, Beermann argues that "the existence of a social services department . . . strengthens the case for judicial intervention by raising the possibility that absent the local agency, people in the community might have aided Joshua on their own."<sup>55</sup>

All of these criticisms seek to undermine the Court's nearly categorical rejection of duty-to-protect liability and provide a starting point for permitting broader liability, including liability under the facts of *DeShaney*. While almost no one seriously argues that the government should be liable for *all* external harms,<sup>56</sup> *DeShaney*'s critics argue for much broader liability than is currently available. A number of proposals have been offered for identifying what kinds of governmental behavior should give rise to liability for failure to protect.

Thomas Eaton and Michael Wells have proposed a framework for analyzing constitutional duty-to-protect claims which seeks to

52. Beermann, *supra* note 8, at 1089.

53. *Id.* at 1096.

54. *See id.* David Strauss makes the similar point that governmental failure to act, like a negligently performed rescue, "may have worsened the victim's situation by causing the victim to forgo other sources of aid or by discouraging other potential rescuers from coming to the victim's aid." Strauss, *supra* note 8, at 62; *see also DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) ("Wisconsin's child-protection program . . . effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him."); Oren, *DeShaney in Context*, *supra* note 8, at 695-97, 703-05 ("Having actively put the child in an isolated position and knowing of the specific danger that he faced, the state should not then escape all constitutional accountability."); Soifer, *supra* note 8, at 1518-20 ("The idea that the state did not worsen Joshua's situation by appearing to protect him, that it is absolved because it did not affirmatively erect an obstacle, is belied by the record.").

55. Beermann, *supra* note 8, at 1096. *But see* Seidman, *supra* note 8, at 386 (arguing that Justice Brennan's claim rests on "sheer speculation").

56. Jack Beermann appears to argue — astonishingly in my view — that the Due Process Clause *should* be understood to create a general duty to protect citizens from all civil harm of which governmental actors are aware. Beermann ultimately concedes that his argument taken to its logical stopping point "may even point toward unlimited government responsibility for all private misfortune and private misconduct — a plainly unacceptable result." Beermann, *supra* note 8, at 1089.

work within the boundaries set by *DeShaney*, while taking the broadest possible reading of its rationale.<sup>57</sup> They argue that liability for failure to protect should rest on two factors. First, liability should attach whenever the state's involvement in producing the plaintiff's plight is sufficiently egregious that it "imping[es] a plaintiff's constitutionally protected right to respectful treatment by government officers."<sup>58</sup> This factor would be satisfied when the state has "imposed limitations on self-help and private rescue,"<sup>59</sup> when the state affirmatively has contributed to the danger that caused the harm,<sup>60</sup> or when the government's actions have worsened the plaintiff's situation.<sup>61</sup> Second, government officials whose actions satisfy the first factor would be liable only if their actions amount to "deliberate indifference" to the risk of harm.<sup>62</sup> Eaton and Wells argue that the presence of these two factors identifies failures to act that are sufficiently "egregious and abusive"<sup>63</sup> to amount to constitutional violations.

Similarly, David Strauss argues that the Court's distinction between custodial and noncustodial situations should be abandoned and proposes that liability should attach whenever the government's withholding of protection constitutes an "abuse of power."<sup>64</sup> Envisioning the government as a "fiduciary," Strauss argues that governmental officials abuse their power whenever they fail to act with "the degree of prudence that an ordinary person would show in conducting his or her own affairs."<sup>65</sup> Under this approach, merely negligent actions or omissions would trigger liability under

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57. See Eaton & Wells, *supra* note 8. Although Eaton and Wells have chosen to craft their proposal to fit within the rationale of the *DeShaney* holding, in a world of their own creation, they apparently would support significantly broader liability. See *id.* at 166 ("The only firm rule laid down in *DeShaney* is that officials owe no duty to help a person unless the state played at least some part in creating a peril or in rendering the victim more vulnerable to it. . . . Hopefully, the Court will someday reconsider this rule in light of considerations of justice and the pervasive role of government in modern life.").

58. *Id.* at 144.

59. *Id.* at 147-49.

60. See *id.* at 149-55.

61. See *id.* at 155-58. Eaton and Wells suggest that these situations are ones that would comprise a common law "special relationship." See *id.* at 147. The tort-law special relationship giving rise to a duty to rescue by governmental officials is, however, significantly narrower than Eaton and Wells envision. See *infra* notes 83-90 and accompanying text.

62. See Eaton & Wells, *supra* note 8, at 159-65.

63. See *id.* at 159.

64. See Strauss, *supra* note 8, at 79-80. The underlying interest being deprived, according to Strauss, is the property interest in having governmental decisions made in a nonarbitrary and nonabusive way: the establishment of a governmental program "creates an interest, protected by the Due Process Clause, in a decision based on the government's agenda rather than the private agenda of the responsible official." *Id.* at 81.

65. *Id.* at 83-84.

the Due Process Clause.<sup>66</sup> Strauss's analysis would increase significantly the universe of tortlike due process claims — including those not involving failure-to-protect claims — permitted under current law.<sup>67</sup>

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The above criticisms point out the difficulties inherent in seeking to understand the Supreme Court's holding entirely on the basis of constitutional text and history. They also give expression to the normative objections raised by a rule that appears to permit governmental officials to behave irresponsibly. At the very least, these criticisms substantially undermine the Court's arguments for nonliability in cases like *DeShaney*.

The great amount of attention and criticism that followed the *DeShaney* decision has, however, left the mistaken impression that the Court's approach to liability for governmental failure to protect was unprecedented or without legal "pedigree." Those who push for expansive due process liability for failure to protect have not considered adequately that such claims are generally and strongly disfavored in the broader legal context, for example, in tort.<sup>68</sup> The

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66. See *id.* at 84.

67. Strauss concedes that his proposal threatens to turn a "variety of ordinary torts by state officials" into "federal constitutional claims." *Id.* at 84. He proposes to remedy that problem by: (1) requiring plaintiffs with procedural claims to look to adequate state remedies and (2) requiring "[m]any wrongs now viewed as violations of the Due Process Clause" — for example, "physical abuse by a state official . . . an unreasonable seizure of the person" — "[to be seen] as violations of more specific constitutional provisions." *Id.* at 84-85. It seems clear, however, that Strauss's proposal would substantially increase the scope of tortlike claims that could be litigated in federal court. Under current law, a plaintiff who alleges a tortlike substantive due process claim is precluded from bringing a federal claim if state remedies are available and adequate. See *Parratt v. Taylor*, 451 U.S. 527 (1981). Strauss's framework apparently would eliminate that requirement except where the claim is procedural. See Strauss, *supra* note 8, at 84-85. On Strauss's second point, it is unclear exactly what universe of due process claims *could* be litigated under more specific constitutional provisions if the current boundaries of those provisions were respected. For example, physical abuse by a state official would not be a seizure under the Fourth Amendment unless intentionally applied. See *Brower v. County of Inyo*, 489 U.S. 593 (1989). That means that anything less than "intentional" physical deprivation — which presumably is what interests Strauss — would continue to fall into a residual category of tortlike claims that could be litigated under the Due Process Clause.

68. Eaton and Wells recognize and briefly discuss the implications of "tort policy" in formulating their paradigm for analyzing failure-to-protect cases. See Eaton & Wells, *supra* note 8, at 110, 127-33, 142-43. However, they fail to appreciate the explanatory power of tort policies in accounting for the existing pattern of liability in this class of cases, and — perhaps for that reason — they do not take seriously enough the rationales behind the tort policies they identify. See also Beermann, *supra* note 8, at 1093 ("Because imposing positive duties on government raises questions about allocation of governmental resources, these problems may be somewhat less amenable to judicial resolution than other constitutional problems."); Michael Wells & Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1 (1982) (noting, in a pre-*DeShaney* analysis of failure-to-protect cases, that such cases are best viewed as a blend of constitutional and tort principles).

puzzle, then, is whether there is a sensible explanation for the rule of nonliability, which appears to conflict with powerful normative intuitions about governmental behavior but has a solid and long-standing legal pedigree. The pattern of liability in tort provides insights into a possible rationale for nonliability in the constitutional context.

## II. THE TORT-LAW PEDIGREE OF NONLIABILITY FOR FAILURE TO PROTECT

As a preliminary matter, one might question the relevance of tort law in analyzing constitutional damages claims. The simplest response is that section 1983,<sup>69</sup> which in two sentences of text provides the cause of action in damage suits for constitutional violations, simply leaves unresolved many basic issues, such as rules for determining causation and computing damages, the role of governmental immunities, and what statutes of limitations should apply. In adjudicating section 1983 claims, the federal courts have a long-standing practice of borrowing tort rules to fill those "gaps," reasoning that the drafters legislated against the background of common law rules applicable to analogous cases.<sup>70</sup> The kinship between section 1983 claims and common law civil-damages claims is so well accepted that the former have become known as "constitutional torts."<sup>71</sup>

More specifically, many section 1983 claims alleging deprivations of life, liberty, and property under the Due Process Clause are

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69. Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 in an action at law, suit equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

70. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978) (stating that the common law applicable to tort damages is the starting point for a damages inquiry under § 1983); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (stating that there is no reason to believe that the common law immunity applicable to judges was abolished by § 1983). Once adopted by the federal courts, the common law rules have evolved into a form that is distinctively federal, constituting a body of "federal common law" applicable to § 1983 claims. See, e.g., *Carey*, 435 U.S. at 258 (noting that the common law damage rules must be adapted to provide fair compensation for constitutional injuries); *Imbler v. Pachtman*, 424 U.S. 409, 420-29 (1976) (discussing common law prosecutorial immunity and considering whether "the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under § 1983").

71. The term "constitutional tort" first appears in the scholarly literature in Marshall Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277, 323-24 (1965).

factually indistinguishable from garden-variety tort actions against the government. Indeed, in many cases, the same underlying fact pattern and resulting injury could give rise to both constitutional and tort claims, and litigants often attempt to bring claims under both federal and state law.<sup>72</sup> It is not surprising, then, that courts adjudicating these tortlike injuries under the Due Process Clause have looked to tort law and policies in setting the boundaries of liability for constitutional damage claims.

Claims of governmental failure to protect in tort typically involve injuries by nongovernmental actors or instrumentalities, that governmental service providers — such as police, firefighters, social workers, and so on — failed to prevent. The most common fact pattern in these cases is that the government received a call for help or had knowledge of a particular risk of harm and failed to respond quickly or adequately in order to prevent the injury from occurring. When analyzing such cases, an overwhelming majority of jurisdictions start with a presumption that the government generally is not liable for failing to protect people from injuries by nongovernmental sources, even when governmental officials have been informed or are aware of the risk of harm.<sup>73</sup>

The doctrine that is most often invoked for denying liability in such cases is the so-called public duty rule. That rule provides that, in situations involving certain services such as police and fire protection, the government “has a duty to the general public, as opposed to [any] particular individual,” and thus the breach of that duty does not give rise to a private damage claim.<sup>74</sup> The purpose of the public duty rule is to “protect[ ] municipalities from liability for

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72. Plaintiffs may prefer to bring the federal claim, if possible, in order to gain access to a federal forum and take advantage of attorneys' fee awards available to prevailing plaintiffs under 42 U.S.C. § 1988 (1988). Section 1983 claims, of course, also may be litigated in state court. The elements of the constitutional claim, however, will differ in important respects from the elements of an analogous tort claim. For example, although § 1983 itself has no intent requirement, damage liability under the Due Process Clause requires that the actions giving rise to the deprivation be more than negligent. *See Daniels v. Williams*, 474 U.S. 327 (1986). In addition, the Supreme Court has held that the existence of an adequate state postdeprivation remedy forecloses many tortlike due process claims on the grounds that the plaintiff has received all the process that is due. *See Parratt v. Taylor*, 451 U.S. 527 (1981). Liability against the governmental unit itself under § 1983 also requires a showing that the deprivation resulted from a governmental “custom or policy.” *See Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

73. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1047-50 (5th ed. 1984); 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.04.50 (James Perkowitz-Solheim et al eds., 3d ed. 1993); Horace B. Robertson, Jr., *Municipal Tort Liability: Special Duty Issues of Police, Fire, and Safety*, 44 SYRACUSE L. REV. 943, 946-52 (1993).

74. 18 MCQUILLIN, *supra* note 73, § 53.04.25, at 165; *see also* *Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).



failure to adequately enforce general laws and regulations, which were intended to benefit the community as a whole.<sup>75</sup> So, for example, state or local governments may be required by law to *establish* and *operate* police, fire, social services, and other similar departments.<sup>76</sup> But their responsibility in doing so is to provide general protection to the public at large,<sup>77</sup> and, in most cases, no individual has a cause of action in damages if those services fail to prevent a particular injury from occurring.<sup>78</sup>

The general rule is illustrated in the well-known case of *Riss v. City of New York*.<sup>79</sup> In that case, a young woman, Linda Riss, had sought the arrest of Burton Pugach, a rejected suitor, who allegedly had threatened her repeatedly with death or bodily harm over a period of six months. When she became engaged to another man, Pugach again threatened her, and she notified the police. The following day, a thug hired by Pugach threw lye in Riss's face, causing disfigurement and serious vision loss. In affirming dismissal of the claim, the Court of Appeals of New York reasoned that to proclaim a general duty of protection based on a "showing of probable need for and request for protection"<sup>80</sup> would rearrange legislative-

75. 18 McQUILLIN, *supra* note 73, § 53.04.25, at 165.

76. The public duty itself is generally understood to derive from state or municipal law. *See, e.g., Steitz v. City of Beacon*, 64 N.E.2d 704, 705 (N.Y. 1945) (city charter provided that the city "may construct and operate a system of waterworks" and that "it shall maintain fire, police, school and poor departments." ). Such laws, however, are construed to require only that the government establish and operate certain services and departments. These provisions are not understood to provide a cause of action running in favor of any particular individual or group. *See, e.g., 64 N.E.2d at 706* ("[P]rovisions [of the city charter] were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community.").

77. *See Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968); 18 McQUILLIN, *supra* note 73, § 53.04.25, at 165; *see also Warren v. District of Columbia*, 444 A.2d 1, 8 (D.C. 1981) ("A person does not, by becoming a police officer, insulate himself from any of the basic duties which everyone owes to other people, but neither does he assume any greater obligation to others individually. The only additional duty undertaken by accepting employment as a police officer is the duty owed to the public at large.").

78. Courts at times have articulated the nonliability rule for failure to protect in terms of immunity for "discretionary" functions. *See, e.g., Crouch v. Hall*, 406 N.E.2d 303 (Ind. Ct. App. 1980) (finding no liability for failure to apprehend rapist who subsequently raped and murdered the plaintiff's decedent). Alternatively, courts have reasoned that the provision of certain protective services, such as inspections required by municipal building or fire codes, was intended for the protection generally from particular hazards, rather than as a service to any particular individual. *See, e.g., Green v. Irwin*, 570 N.Y.S.2d 868 (N.Y. App. Div. 1991) (finding a town not liable for negligent issuance of a building permit simply because the issuance was shown to be in violation of the building code). The terminology is not important to my argument. My point is simply that such cases ordinarily do not give rise to governmental liability, whatever the doctrinal explanation for the result.

79. 240 N.E.2d 860 (N.Y. 1968).

80. 240 N.E.2d at 861.

executive decisions about how the community's limited resources should be allocated and result in liability "without predictable limits."<sup>81</sup> The court distinguished cases where "police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses."<sup>82</sup>

As noted in *Riss*, there is a limited doctrinal category of failure-to-protect cases — the so-called special relationship cases — that may give rise to liability. These cases represent an exception to the public duty rule in cases where "there was a 'special relationship' between a public official and a particular individual that [gives] rise to a duty to that individual separate from the official's duty to the general public."<sup>83</sup> The special relationship exception, according to the courts, permits liability for failure to protect when the plaintiff was injured while in government custody<sup>84</sup> or when government officials have given assurances or acted in a way that induced the victim reasonably to rely to his detriment on the promise of protection.<sup>85</sup> A finding of liability requires significantly more than a call for help;<sup>86</sup> the courts have required a showing that the gov-

81. 240 N.E.2d at 860-61.

82. 240 N.E.2d at 861 (citing *Schuster v. City of New York*, 154 N.E.2d 534 (N.Y. 1958)). In *Schuster*, a witness who had supplied information to the police leading to the arrest of a dangerous fugitive received threats to his life and subsequently was shot to death. His estate sued on the grounds that the police negligently had failed to provide him with a requested bodyguard or other protection. The court held the government liable on the ground that the police owe a special duty to protect those "who have collaborated . . . in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration." 154 N.E.2d at 537.

83. 18 McQUILLIN, *supra* note 73, § 53.04.25, at 166.

84. *See, e.g.*, *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. Ct. App. 1992) (declining to find a special relationship when victim was not in state custody); *Breaux v. State*, 326 So. 2d 481 (La. 1976) (finding a state liable for the death of a prisoner when officials reasonably should have anticipated attack); *Daniels v. Andersen*, 237 N.W.2d 397 (Neb. 1975) (finding a state liable to an intoxicated victim who was locked up in a "drunk tank" where he was beaten by another drunk).

85. *See Cuffy v. City of New York*, 505 N.E.2d 937, 938 (N.Y. 1987). There also may be liability for governmental failure to protect against harm by dangerous persons who are released from custody, when such persons have threatened harm to particular individuals. *Compare Johnson v. State*, 447 P.2d 352 (Cal. 1968) (finding liability for failure to warn when specific person is threatened) with *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980) (finding no liability for failure to warn neighbors when prisoner's threat to kill was not directed toward identifiable individual).

86. *See, e.g.*, *Hartzler v. City of San Jose*, 120 Cal. Rptr. 5 (Ct. App. 1975) (finding no liability for failure of the police to respond to a plea made 45 minutes before homicide); *Antique Arts Corp. v. City of Torrance*, 114 Cal. Rptr. 332 (Ct. App. 1974) (finding no liability for police radio dispatcher who delayed broadcasting burglary in progress for 10 minutes after alarm triggered); *McCarthy v. Frost*, 109 Cal. Rptr. 470 (Ct. App. 1973) (finding no liability when the police negligently failed to find a motorist who required medical aid); *Hines v. District of Columbia*, 580 A.2d 133 (D.C. 1990) (finding no liability for alleged failure to dispatch emergency medical care); *Warren v. District of Columbia*, 444 A.2d 1

ernment officer gave the plaintiff specific assurances of protection, that she relied on those assurances, and that the claimed injury resulted from the plaintiff's reliance on the promise to protect.<sup>87</sup> Thus, for example, a claim that police officers failed to protect a particular individual from injury by nongovernmental actors is generally not cognizable; a successful claim would require sufficient prior contacts between police and the individual to indicate a specific undertaking or promise by the police to provide protection and detrimental reliance by the individual. Absent such facts, there is generally no liability for failure to enforce laws and regulations in-

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(D.C. 1981) (finding no liability in a suit against the police by women assaulted in their homes by intruders); *City of Rome v. Jordan*, 426 S.E.2d 861 (Ga. 1993) (finding no liability for failure to respond to a call by the assault victim's sister-in-law informing the police that the perpetrator was at the victim's house); *Lewis v. City of Indianapolis*, 554 N.E.2d 13 (Ind. Ct. App. 1990) (finding no liability for failure to timely answer 911 call); *Trezzi v. City of Detroit*, 328 N.W.2d 70 (Mich. Ct. App. 1982) (finding no liability for 90-minute delay in sending police to the scene after 911 call when the behavior at most was negligent); *Doe v. Hendricks*, 590 P.2d 647 (N.M. Ct. App. 1979) (finding no liability for allegedly slow police response to a call for help by the neighbor of a child who was abducted and dragged into an abandoned house); *Merced v. City of New York*, 551 N.E.2d 589 (N.Y. 1990) (finding a municipality not liable for injuries resulting from failure reasonably to investigate a 911 call by the victim's neighbor when there was no evidence that the victim relied on assurances of assistance); *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989) (finding no liability when a police officer failed to act on a citizen report of abduction that resulted in the victim being raped and locked in a trunk for 12 hours); *Sawicki v. Village of Ottawa Hills*, 525 N.E.2d 468 (Ohio 1988) (finding no liability to family of a crime victim alleging negligent response to an emergency call); *Steiner v. City of Pittsburgh*, 509 A.2d 1368 (Pa. Commw. Ct. 1986) (finding no liability to a rape victim who sued the city for failure to respond to her emergency call). *But see Barth v. Board of Educ.*, 490 N.E.2d 77 (Ill. App. Ct. 1986) (finding the municipality liable to an injured student for misconduct of a 911 operator); *Schear v. Board of County Commrs.*, 687 P.2d 728 (N.M. 1984) (finding a municipality may be liable when a police department failed to respond to an emergency call for assistance from a woman who subsequently was raped).

87. *See, e.g., Delong v. Erie County*, 455 N.Y.S.2d 887 (N.Y. App. Div. 1982); *Chambers-Castanes v. King County*, 669 P.2d 451 (Wash. 1983). The court in *Cuffy* laid out the factors to be established in order to prove the existence of a special relationship:

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

505 N.E. at 940. In *Cuffy*, although police had given assurances that they would arrest the individual who allegedly posed a threat to plaintiffs, their injuries were not caused by reliance on these assurances. *See* 505 N.E. at 941.

tended to benefit the community as a whole,<sup>88</sup> failure to provide police or fire protection,<sup>89</sup> or failure to inspect.<sup>90</sup>

Significantly, the public duty rule as applied to failure-to-protect claims has remained the law in a substantial majority of jurisdictions,<sup>91</sup> despite criticism in the literature<sup>92</sup> and in the courts<sup>93</sup> and despite an overwhelming trend toward abrogation of sovereign im-

88. See, e.g., *O'Connor v. City of New York*, 447 N.E.2d 33 (N.Y. 1983) (finding no liability for negligence of a building inspector who certified that a new gas pipe conformed to city regulations despite an open gas pipe and the absence of a shut-off valve at the connection to the main line at the street).

89. See, e.g., *Frye v. Clark County*, 637 P.2d 1215 (Nev. 1981) (finding no governmental liability for an alleged failure to respond to an emergency call reporting a fire); *Steitz v. City of Beacon*, 64 N.E.2d 704 (N.Y. 1945) (finding no governmental liability for failure to maintain adequate fire-fighting equipment and failure adequately to maintain the water pressure and flow-regulating valve near the plaintiff's property). See generally *Robertson*, *supra* note 73, at 946-50; *supra* note 86.

90. See, e.g., *Motyka v. City of Amsterdam*, 204 N.E.2d 635 (N.Y. 1965) (finding no governmental liability for property damage and deaths resulting from a fire caused by a defective oil-heating stove even though the fire-department official had failed to report the defective stove after it had caused a previous fire). In some safety inspection cases, courts have found a special relationship based on the particular facts of the case. See, e.g., *Gordon v. Holt*, 412 N.Y.S.2d 534 (App. Div. 1979). Other courts impliedly or explicitly have abrogated the public duty rule with regard to negligent fire inspections, holding that such inspections are for the benefit of the occupants of the inspected buildings, a "special identifiable group of persons." *Robertson*, *supra* note 73, at 953; see, e.g., *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979).

91. See generally 18 McQUILLIN, *supra* note 73, § 53.04.25, at 165. For cases purporting to abandon the public duty rule, see, e.g., *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); *Leake v. Cain*, 720 P.2d 152 (Colo. 1986); *Commercial Carrier Corp. v. Indiana River County*, 371 So. 2d 1010 (Fla. 1979); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Stewart v. Schmieder*, 386 So. 2d 1351 (La. 1980); *Schear v. Board of County Commrs.*, 687 P.2d 728 (N.M. 1984); *Brennen v. City of Eugene*, 591 P.2d 719 (Or. 1979); *Catone v. Medberry*, 555 A.2d 328 (R.I. 1989); and *Wood v. Milin*, 397 N.W.2d 479 (Wis. 1986). In a number of these jurisdictions, however, the state legislatures have responded by passing statutes exempting particular emergency services from liability for failures to protect. See, e.g., ALASKA STAT. § 09-65.070 (1994); IOWA CODE ANN. § 670.4 (West Supp. 1993); LA. REV. STAT. ANN. § 9:2793.1 (West 1991). In addition, many jurisdictions have other immunity rules that protect municipalities from liability. See 18 McQUILLIN, *supra* note 73, § 53.04.25, at 167; see also *Gordon v. Bridgeport Hous. Auth.*, 544 A.2d 1185 (Conn. 1988) (finding a city immune from liability under discretionary-function exception for assault that occurred in public housing project). Other jurisdictions employ ordinary tort doctrines — such as the requirements of foreseeability and causation — to limit the scope of municipal liability. See 18 McQUILLIN, *supra* note 73, § 53.04.25, at 167.

92. See, e.g., *Stewart F. Hancock, Jr., Municipal Liability Through a Judge's Eyes*, 44 SYRACUSE L. REV. 925 (1993); *Albert J. Harno, Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); *Daniel C. Kramer, The Governmental Tort Immunity Doctrine in the United States: 1790-1955*, 1966 U. ILL. L.F. 795; see also *James T.R. Jones, Battered Spouses' State Law Damage Actions Against the Unresponsive Police*, 23 RUTGERS L.J. 1 (1991).

93. In New York, for example, after an extensive and impassioned debate in majority and dissenting opinions over a number of years, the rule ultimately was reaffirmed. See *O'Connor v. City of New York*, 447 N.E.2d 33 (N.Y. 1983). See generally *Hancock*, *supra* note 92. Similarly, when the Arizona state courts moved to abrogate the public duty rule, the legislature stepped in to reestablish the narrow limits of affirmative-duty liability in that state. See *Bird v. State*, 821 P.2d 287 (Ariz. Ct. App. 1991) (dismissing a negligence claim against a state on the ground that the earlier common law rule imposing liability had been overruled by state legislature).

munity for much negligent harm-causing behavior by governmental officials.<sup>94</sup> As a historical matter, both states<sup>95</sup> and municipalities<sup>96</sup> were largely immune from suit. In recent times, an increasing number of jurisdictions have abrogated or modified state sovereign immunity by statute.<sup>97</sup> Similarly, the modern trend is toward abrogation of traditional distinctions that protected municipalities from liability in certain circumstances — such as liability for proprietary functions but not governmental ones — and toward a general doctrine of liability for negligent actions.<sup>98</sup> Despite the general trend toward broader liability, the nonliability rule for governmental failure to protect has remained largely intact.<sup>99</sup> Indeed, a number of jurisdictions that have substantially abrogated municipal immunity by statute have carved out specific immunities disallowing failure-to-protect claims against police, firefighters, 911 and other protective-service providers.<sup>100</sup>

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94. See generally 5 FOWLER V. HARPER ET AL., JAMES AND GRAY ON THE LAW OF TORTS §§ 29.6, 29.11, at 620-22, 691-92 (2d ed. 1986).

95. States are generally immune from suit without their consent. See generally 5 *id.* § 29.2-29.4, at 599-600, 603-05.

96. Traditionally, municipalities were immune from suit for “governmental functions” — functions they performed as agents or representatives of the state — but not for other “proprietary functions.” See generally 5 *id.* § 29.6, at 622-39. The tests most commonly invoked for distinguishing governmental from proprietary functions are: “(1) whether the function is allocated to the municipality for its profit or special advantage or whether for the purpose of carrying out the public functions of the state without special advantage to the city, and (2) whether the function is one historically performed by the government.” 5 *Id.* § 29.6, at 627.

97. See generally 5 *id.* § 29.11, at 690-95.

98. See generally Note, *Municipal Tort Liability in Virginia*, 68 VA. L. REV. 639, 639 n.2 (1982) (noting that 43 jurisdictions have abolished or limited the scope of immunity for governmental functions); see also generally 5 HARPER ET AL., *supra* note 94, § 29.6, at 622-39; 18 McQUILLIN, *supra* note 73, § 53.02.05, at 130.

99. The public duty rule is a judicially created rule. However, courts have continued to apply the rule even after legislative abrogation of municipal sovereign immunity.

100. These statutes generally provide immunity from liability for failure to provide certain protective services or for harms done by third parties that city employees allegedly failed to prevent. See, e.g., ALASKA STAT. § 09.65.070 (1994) (providing that fire departments and 911 services have immunity for failed response); ARIZ. REV. STAT. ANN. §§ 12-820.01 to -820.05 (1992 & Supp. 1994) (providing immunity for police for failure to arrest or prevent a crime); CAL. GOVT. CODE §§ 845, 846, 850 (West 1995) (providing no liability for failure to provide police protection, fire protection, or failure to arrest); ILL. ANN. STAT. ch. 745, para. 10/4-103 to 10/4-107 (Smith-Hurd 1993) (providing immunity for failure to provide police protection or failure to arrest); IOWA CODE ANN. § 670.4 (West Supp. 1995) (providing immunity for failure to act if damage is caused by a third party and for failure of a 911 service to respond); LA. REV. STAT. ANN. § 9:2793.1 (West 1991) (providing immunity for damage caused by a crime or fire unless “grossly negligent”); MISS. CODE ANN. § 11-46-9 (1995) (providing that police and fire fighters are immune unless exercising “reckless disregard”); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (West 1986) (providing immunity for failure to provide police and fire protection and failure to respond to emergencies); UTAH CODE ANN. § 63-30-10 (1993) (providing immunity for failure to provide emergency medical assistance or fire service); W. VA. CODE § 29-12A-5 (1992 & 1995 Supp.) (providing immunity for failure to provide police and fire services).

The fact that the public duty rule has survived against the tide of increasingly broad governmental liability does not prove, of course, that courts have good or coherent reasons for invoking it.<sup>101</sup> I consider the question of what might explain the courts' line between liability and nonliability in Part III below. My purpose here is simply to point out that the strongly held presumptive rule in this class of tort cases is that there is generally no liability for governmental failure to protect. At the very least, the tenacity of that rule suggests that there may be a coherent rationale behind the courts' seeming reluctance to find liability in failure-to-protect cases.

### III. RATIONALE FOR THE NONLIABILITY RULE

In the preceding section I made an important — and, I believe, neglected — observation: contrary to what one might have predicted, at least from the overwhelmingly negative reaction to *DeShaney*, the ordinary rule in a whole universe of cases involving failure to protect in tort is that the government generally has no duty to protect from third-party harm. The observation itself is significant: *DeShaney*'s critics have tended to treat the case as a legal outlier and — perhaps as a result — have found little reason to consider whether there may be a plausible or persuasive explanation for it. The pattern of limited liability observed in tort is also important in another way: it mirrors the pattern found in the constitutional cases. That observation suggests that the primary driving force behind *DeShaney* and similar constitutional cases may not be constitutional text or history but the same kinds of considerations that have led to the rejection of such claims in the tort context. If so, it would go a long way toward explaining why the Court's constitutional analysis in *DeShaney* has proved so unsatisfying.

A standard rationale offered by the state courts for the so-called public duty rule in tort is that permitting liability for inadequate protection would make the courts the arbiters of decisions about how to allocate finite public resources and manpower that are best left to the political branches. The level of protection that the government plausibly can provide is determined, in large part, by the amount of resources the legislature has allocated to particular serv-

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101. The mere longevity of a rule or pattern of liability does not, of course, prove that the rule or pattern has a coherent or normatively defensible explanation. On the other hand, one ought at least to entertain the possibility that a rule for handling certain kinds of cases that endures over time — in this case against a legal environment moving in the opposite direction — could reflect a defensible, if not normatively satisfying, rationale. That is especially true when the general pattern of liability has been repeated, as we shall see, in two different legal contexts in which different patterns might have been predicted.

ices.<sup>102</sup> Permitting individuals to bring failure-to-protect claims would require the courts to review resource-allocation decisions and permit judges to mandate a level of protection different from the level determined by the political branches.<sup>103</sup>

The above rationale has two parts: first, it takes the view that resource-allocation decisions are political ones and that permitting judges to review them is inappropriate. Second, to the extent this explanation is used to defend nonliability for duty-to-protect claims — as opposed to other kinds of claims against the government — it assumes that duty-to-protect claims are significantly more likely to implicate judicial second-guessing of budgetary decisions. This Part fleshes out these two propositions in more detail in order to explore whether or not some version of the resource-allocation rationale for retaining sovereign immunity in this class of cases is defensible.

### A. *Resource Allocation and Institutional Competence*

In our governmental system, it is uncontroversial that budgetary decisions are ordinarily political decisions. That is, judgments about what combination of goods and services will be provided by the government, how much money is required to supply such services, and how available funds will be allocated ordinarily are made by citizens through their elected representatives. To the extent that failure-to-protect cases involve the judiciary in second-guessing such decisions (an issue I discuss in the next section), they raise the question whether these cases are appropriate for judicial resolution.

As a matter of institutional design, budgetary decisions generally are thought to be political decisions rather than judicial ones, at least in part, because they involve a kind of decisionmaking that courts do not do well. Courts specialize in resolving disputes between two parties, each of whom can represent its interests before the court, “by declaring victory for one and a loss for the other.”<sup>104</sup> They are not, however, well-suited to resolving what have been called “polycentric”<sup>105</sup> problems. “Polycentricity” is “the property

102. See *Riss v. City of New York*, 240 N.E.2d 860, 860 (N.Y. 1968).

103. See 240 N.E.2d at 860; see also *Mann v. State*, 139 Cal. Rptr. 82, 85 (Ct. App. 1977) (Statutory immunity for failure to protect “was designed to prevent political decisions of policy-making officials of government from being second-guessed by judges and juries . . . . In other words, [the] essentially budgetary decisions of these officials were not to be subject to judicial review in tort litigation.”).

104. CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW* 396 (1994).

105. See William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645-49 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978). The concept of polycentricity apparently

of a complex problem with a number of subsidiary problem 'centers,' each of which is related to the others, such that the solution to each depends on the solution to all the others."<sup>106</sup> To illustrate, consider the task of deciding how one million dollars in research funds should be allocated among many competing scientific projects: the decision is never one of

Project A v. Project B, but rather of Project A v. Project B v. Project C v. Project D . . . bearing in mind that Project Q may be an alternative to Project B, while Project M supplements it, and that Project R may seek the same objective as Project C by a cheaper method, though one less certain to succeed, etc.<sup>107</sup>

The less the dispute at issue resembles the winner-takes-all model and the more polycentric elements it contains, the less amenable it is to judicial resolution.<sup>108</sup>

The budgetary process that allocates public money among governmental goods and services is polycentric in a way that makes judicial resolution problematic.<sup>109</sup> Budgetary decisions involve balancing the interests and preferences of individuals and groups with divergent demands for a finite "pot" of public monies. In a world of limited resources, every budgetary decision involving a particular good or service requires adjustment and readjustment of allocations applicable to other goods and services. For example, more resources for police protection means less for education or fire protection or public parks; more money for public parks or schools requires more money for infrastructure to service them; less money for police might affect the mix of other services that depend on police and so on. Thus, the point is not only that more of a particular service "x" means less of "y" and "z" but that the levels of x, y, and

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was derived from MICHAEL POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINERS* 171 (1951).

106. Fletcher, *supra* note 105, at 645. Lon Fuller compares a polycentric situation to a spiderweb: "A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions." Fuller, *supra* note 105, at 395.

107. Fuller, *supra* note 105, at 401.

108. As Fuller points out, polycentricity is a matter of degree; almost all problems presented for adjudication involve *some* polycentric elements. There is, however, a point at which the polycentric elements so dominate a problem that attempting to resolve it in a judicial forum may exceed the "proper limits of adjudication." *Id.* at 398-99. Legal scholars disagree as to where the dividing line ought to be drawn between functions that are appropriate for judicial resolution and those that are so polycentric as to exceed the capabilities of the judicial process. But the debate itself presupposes widespread agreement that there is — or ought to be — such a line and that the relative polycentricity of legal problems is relevant to the line-drawing process.

109. See generally GILLETTE, *supra* note 104, at 394-96.



z are intertwined such that effectuating a workable arrangement among them after increasing the level of x requires a number of interrelated adjustments and readjustments in order to reach a new, workable equilibrium. Courts are not institutionally equipped to make the adjustments and readjustments necessary to resolve budget-allocation issues.<sup>110</sup>

These kinds of decisions are best handled in a forum where all the affected interests can appear before the decisionmaking body and the "multiple centers can engage in exchange and consider the claims of others,"<sup>111</sup> a forum that looks much more like a legislative committee or other political entity than a court. Legislatures, unlike courts, have access to both the information and the deliberative processes necessary to permit that kind of exchange. Legislators are in contact with both the wide variety of citizen demands for and views about certain distributions of public resources and the administrative and fiscal realities faced by those who administer various public programs. They can gather information, hold public hearings, and promote negotiation and debate among affected interests in order to analyze various alternatives and consider the broader ramifications of those alternatives. Indeed, the legislative process is the consummate forum for this kind of multidimensional deliberation.<sup>112</sup>

The traditional judicial role, on the other hand, is to adjudicate particular cases involving the specific legal rights and interests of the parties before the court. While judges are clearly aware of — and, in some cases, influenced by — the broader consequences of their decisions, their ability to consider such consequences is quite limited. For example, courts generally do not permit nonparties to

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110. In the words of William Fletcher, resolution of such interlocking disputes requires mutual spontaneous adjustment by the constituent parts of the problem itself — rather like the bees in a hive finding their appropriate space and function by their sense of the bees around them, with each bee individually adjusting to its neighbors, and each neighboring bee in turn adjusting to the other's adjustment until a stable equilibrium is reached.

Fletcher, *supra* note 105, at 647 (citing POLANYI, *supra* note 105); see also HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 669 (tentative ed. 1958) (noting that polycentric problems "present so many variables as to require handling by the method either of *ad hoc* discretion or of negotiation or of legislation").

111. GILLETTE, *supra* note 104, at 396.

112. It is, of course, open to debate how well legislatures function in their deliberative capacity: whether they actually reflect the preferences of their various constituencies or whether they have been captured by special interests and lobbyists. That question is beyond the scope of this article. My only point is that, as a matter of institutional competence, there is reason to believe that legislatures are in a better position than courts to handle these sorts of questions.

argue the broader ramifications of the case at bar for other situations or issues not before the court.<sup>113</sup> Moreover, unlike legislatures, courts cannot hold hearings to gather information that might be relevant to the polycentric aspects or broader context of their decisions. They are limited to the facts and information made available by the parties before them. To make the point in the budgetary context, a court holding that a municipality must increase the level of a particular governmental service, such as police or fire protection, would not — unlike the legislature that made the initial allocation decisions — have sufficient information to consider the complicated effects of its ruling on other, interrelated budget allocations.<sup>114</sup>

The rise of structural-reform litigation has, of course, posed a challenge to the traditional judicial role described above. In structural-reform cases, the litigants seek, not so much to resolve a binary dispute between two or more parties, but to make systemic changes in governmental institutions, operations, or procedures.<sup>115</sup> For example, desegregation cases seek not simply to remedy specific instances of unlawful discrimination but rather to reverse the effects of years of enforced segregation through structural remedies such as busing and magnet schools. Structural-reform remedies involve the courts in such nontraditional functions as running the day-to-day operations of schools and prisons and even intervening to permit the taxation necessary to fund such activities.<sup>116</sup> Significantly, however, the farther such cases have moved away from the more traditional judicial role — for example, from prohibiting de

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113. Under certain circumstances, nonparties may be able to file *amicus curiae* briefs in order to bring additional information before the court, assure presentation of the complete factual scenario, or point out the broader implications of the court's decision. Such participation, however, is limited, and the rules regarding the participation of *amicus curiae* differ among various federal and state jurisdictions. See generally Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243 (1992); Randy S. Parlee, *A Primer on Amicus Curiae Briefs*, WIS. LAW., Nov. 1989, at 14.

114. See generally Ann Judith Gellis, *Legislative Reforms of Governmental Tort Liability: Overreacting to Minimal Evidence*, 21 RUTGERS L.J. 375 (1990). Gellis states:

A government decision to provide a good which is either unavailable in, or inadequately supplied by, the private sector involves various sub-decisions relating to the provision of that good: how much to produce, who should receive the good, how to finance it, and how to structure delivery of the good. These decisions are complicated political decisions, quite apart from the political nature of the budgetary process. . . . [T]he complexity of the decision-making process as to the entire output makes it far less certain that the judiciary has the information necessary to second guess as to any one decision.

*Id.* at 386.

115. See PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* 721 (2d ed. 1991).

116. See *Missouri v. Jenkins*, 495 U.S. 33 (1990).

jure discrimination to busing and requiring capital expenditures on magnet schools — the more they have been subject to criticism on institutional competence grounds.<sup>117</sup> That is because these broad remedies — the *exact* contours of which are not constitutionally compelled<sup>118</sup> — require judges to entertain such questions as what specific educational facilities and programs a locality should provide to its students<sup>119</sup> and what constitutes a well-run prison.<sup>120</sup> These kinds of decisions are not only highly polycentric, but they look more legislative or executive than judicial, in part, because there is very little in the way of legal norms to guide the discretion of the decisionmaker.<sup>121</sup> Scholars endorsing judicial intervention in structural-reform cases have found it necessary to defend the legitimacy of such cases against those who attack them on institutional competence grounds.<sup>122</sup> Moreover, the Supreme Court's restrictions on such remedies can be seen as an effort to cabin judicial discretion in order to address the nontraditional aspects of these cases.<sup>123</sup>

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117. See generally Fletcher, *supra* note 105, at 640-41.

118. In structural-reform cases, there are generally a number of permissible ways in which a constitutional violation could be remedied. For example, in a prison-overcrowding case the judge could order the release of prisoners, improvement of existing facilities, or the building of new facilities. See *id.* at 646-47.

119. For example, one district court decree required

high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; green-houses and vivariums; a 25-acre farm with air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

Missouri v. Jenkins, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part and concurring in the judgment).

120. Decrees in prison and mental hospital cases may specify, among other things, "precise staffing ratios, the temperatures in rooms or cells, the types and quantities of food to be served, [and] the manner of determining types of and times for isolation or solitary confinement." Fletcher, *supra* note 105, at 639.

121. See generally *id.* at 645-49. Fletcher argues that courts called upon to formulate broad structural remedies are dealing with nonlegal-polycentric problems that call into question their institutional authority because courts have "no guidance from legal norms as to the appropriate values to be served by the solution[s]." *Id.* at 647. Even when judicial intervention is itself "triggered by the violation of a legal standard," the court reaches beyond the limits of the judicial role when the remedy calls on the court to "reorganize the governmental functions of a political branch of [the government]." *Id.*

122. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 28-44 (1979); Fletcher, *supra* note 105, at 641-49, 692-97; David Rudenstine, *Institutional Injunctions*, 4 CARDOZO L. REV. 611, 624-37 (1983).

123. Examples of the Supreme Court's efforts to limit the potential reach of structural reform remedies are the requirement that the remedy be closely tailored to the constitutional violation, see *Milliken v. Bradley*, 418 U.S. 717, 744 (1974), and the enforcement of standing

To illustrate the problem in the budgetary context, imagine, for example, a claim by city residents whose property has been damaged in a fire that the city's one fire station is inadequate to provide reasonable fire protection to their neighborhood. Suppose further that remedying the situation would require the city to build a new fire station to serve that part of the city. The remedy would not only require the city substantially to increase the part of the budget allocated to fire protection, it would also affect other parts of the budget: the increase in money allocated to fire protection would have to come out of the funds originally allocated for some other service. But the requirement that more money be spent for fire protection — for example, by decreasing the budget for police services — would also involve deciding how the increase in fire protection and decrease in police protection would affect the mix of other services. Thus, the resolution of the one issue — the alleged need for more fire protection services — would require not just a substitution of funds from one service to another but a reallocation of a large part of the municipal budget.<sup>124</sup>

A court called upon to adjudicate the claim described above, unlike the political process that formulated the original budget, would not have before it the whole range of tradeoffs and interlocking budgetary issues that would be affected by its resolution of the claim. The court's view is limited to the parties before it (in this case, the injured plaintiff and the city as defendant) and consideration of one governmental service (fire protection) as if it existed in a vacuum. But fire protection does not exist in a vacuum; it is inextricably intertwined with many other items in the budget that originally were determined by balancing all manner of individual and collective preferences.

Given the institutional limitations of the judicial process, there is no reason to think that the court is likely to make a better allocation than the legislature that made the initial budgetary decisions. For example, how do we know whether more fire protection and less police protection — or perhaps more of both and higher taxes — would make citizens better off, even in the narrow sense of less lives and property being lost? Moreover, once we broaden the "better off" question and begin to weigh less police protection against less education or less sanitation, the question of "correct-

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requirements, see *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983); see also *infra* notes 229-231 and accompanying text.

124. See generally GILLETTE, *supra* note 104, at 394-95.

ness" seems impossible to answer as a legal matter.<sup>125</sup> To borrow a garden metaphor: In order "[t]o preserve some substance for the form of adjudication you have to judge pumpkins against pumpkins, not pumpkins against cucumbers, especially when there are some relevant cucumbers not entered in the show."<sup>126</sup> The point here is not that politicians do a perfect job at making these sorts of decisions but that there is no reason to think courts would do it better. It seems clear that courts have no apparent institutional advantage over the political processes in decisionmaking of this sort.

The notion that courts are not institutionally well suited to second-guessing certain kinds of decisions is not a new or particularly controversial idea; it resonates in many areas of the law. My point here is to show that it has great explanatory power in failure-to-protect cases. I turn, then, to the question whether failure-to-protect claims are more likely than other kinds of claims against the government to involve the court in second-guessing resource-allocation decisions.

### B. *Special Concerns Raised by Failure-To-Protect Claims*

As noted above,<sup>127</sup> the strong trend in tort law is toward increasingly broad governmental liability. Against that general trend, however, courts and legislatures have continued to adhere to a rule of nonliability for governmental failure to protect. The rationale that has been given for this special treatment is that these sorts of claims involve the courts in second-guessing resource-allocation decisions.<sup>128</sup> This Part explores whether the courts' distinction between failure-to-protect claims and other kinds of claims against the government is defensible.

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125. There are, of course, some judicially enforceable legal restraints on the *relative* distribution of goods and services, such as constitutional prohibitions against discrimination on the basis of race or sex. See U.S. CONST. amend. XIV, § 1; *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

126. Fuller, *supra* note 105, at 403.

127. See *supra* notes 91-98 and accompanying text.

128. Available state legislative history confirms that the rationale for statutes disallowing failure-to-protect claims is legislators' view that decisions about whether and at what level to provide certain protective services lies properly within the purview of the political process rather than the courts. See, e.g., *Sovereign Immunity Study*, 5 CAL. L. REVISION COMM. REPORTS 11, 464 (1963) (noting that the decision of whether to provide fire protection was primarily political and "quite unfitted to the processes of judicial administration"); *Tort Liability of Public Entities and Public Employees: Recommendation*, 4 CAL. L. REVISION COMM. REPORTS 807, 860-861 (1963) ("To permit review of these decisions [whether to provide police or fire protection] by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions.").

To begin, consider a claim of failure to protect brought by a city resident whose children were burned to death in a house fire.<sup>129</sup> Prior to the time of the fire, the city, for financial reasons, had begun closing a number of firehouses on a random, rotating basis. Plaintiff alleges that the firehouse nearest to her home was closed on the day of the fire, that the closure constituted negligence on the part of the city, and that this negligence was the proximate cause of her children's deaths. Plaintiff's theory of liability under these facts raises the specter of judicial budgetary review in a dramatic form: first, it seems clear that the government's failure to respond in this situation resulted from conscious policy decisions about how to manage municipal resources. Governmental officials apparently found it necessary to cut the level of services in order to remain within the budget that the legislature had allocated for the service. In addition, officials made resource-allocation decisions at the operational level when they decided to close firehouses on a rotating basis rather than, for example, closing one firehouse permanently or decreasing staffing at all fire stations. A court entertaining plaintiff's claim would be required to review these decisions based on the court's independent judgment as to whether the city's decision to cut services and its method for doing so were reasonable. For the reasons laid out above,<sup>130</sup> there is no reason to think that state courts are better equipped than members of the political branches to get the resource-allocation issues right.<sup>131</sup>

Of course, not all failure-to-protect cases raise resource-allocation issues so starkly as the fire protection example. Imagine, for example, claims by two different plaintiffs who are beaten by thugs in a city metro station and bring suit against the municipal police department for failure to prevent these injuries.<sup>132</sup> The first plaintiff alleges that police officers who arrived on the scene during the beating failed to intervene before he was seriously injured. In the second incident, police officers failed to arrive at all. The sec-

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129. These facts are drawn from *Chandler v. District of Columbia*, 404 A.2d 964 (D.C. 1979).

130. See *supra* notes 104-26 and accompanying text.

131. Of course, not all such cases would result in liability. Plaintiff would have to demonstrate that the government was at fault and that its actions were the legal and proximate cause of the injury; she ultimately may be unable to do so. But the argument against liability is that even *entertaining* cases that challenge resource allocations necessarily would involve the court in reviewing political decisions and raise institutional competence concerns.

132. The facts are based, with modifications, on *Crosland v. New York City Transit Authority*, 498 N.E.2d 143 (N.Y. 1986). I am indebted to Clay Gillette for the comparison of *Chandler* with *Crosland*, which appears in GILLETTE, *supra* note 104, at 714-18, and which he discussed with me at some length.

ond plaintiff alleges that the city was negligent in not having one or more police officers available or permanently assigned to this particular station because there had been a number of previous incidents of violent crimes there. The first claim is more likely to go forward and could lead to liability assuming that the plaintiff can make out the elements of the claim. The second claim will virtually never succeed because, as explained by one court, it "alleges a failure to properly allocate police resources."<sup>133</sup>

In what sense does the second claim involve the court in reviewing resource-allocation decisions that the first claim does not? Both claims *implicate* budgetary matters in that liability could require the government to spend more of its available resources on police services: permitting liability for failure to have enough officers at particular locations ultimately would force the city to hire more police officers, which would obviously require greater expenditures for police protection.<sup>134</sup> On the other hand, liability based on the theory that officials on the scene failed to intervene might also require more resources to be devoted to police services, for example, to provide better training and supervision or to hire more competent police officers.<sup>135</sup>

These two claims differ significantly, however, in the way they implicate underlying political decisions. In considering the first claim, the court is being called upon simply to enforce the decision of the political branches to provide a certain level of police protection to the public. That is, once the decision has been made to fund a police department and police officers are actually on the scene, liability simply requires them to do the job they were intended to

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133. *Crosland*, 498 N.E.2d at 145.

134. In the first instance, the police department could respond to liability for its failure to post officers at the metro station by shifting available officers from other locations, rather than by hiring additional officers. But the police department's ability to cover all locations where third-party harms are likely to occur is obviously limited by the number of available officers. It seems likely that, over time, liability based on the theory that *more* officers ought to have been stationed at *more* locations would put significant pressure on the city to hire substantially more police officers.

135. See *Riss v. City of New York*, 240 N.E.2d 860, 865 (N.Y. 1968) (Keating, J., dissenting). There is, however, a plausible argument that these two kinds of claims would differ significantly in the *degree* to which liability would affect the municipal budget. In many instances, one could expect that increasing the level of services — hiring more police officers, building more firehouses — would be more expensive than reasonably maintaining the level of services one already has. This difference in degree surely matters if we are concerned about liability that implicates resource allocation. Claims that would have an incidental effect on the municipal budget by requiring the government to spend more money on supervision and training are at one end of the spectrum, and claims that would require the reallocation of enough resources to increase the level of services, plausibly requiring resources to be moved from one service "box" to another, are at the other.

do in a reasonable manner. By permitting liability in this situation, the court is not requiring the government to do anything more than it already has committed itself to do. In essence, the court is enforcing the political bargain: the legislative decision to have a reasonably functioning police department.<sup>136</sup> Permitting such cases to go forward may have an effect on the budget — in that it may cost money — but it does not involve the court in reviewing the legislative allocations themselves.<sup>137</sup>

The second claim, however, would involve the court in quite a different kind of review: the number of police officers that are available to answer calls — the size of the police force and the level of police services that plausibly can be provided — is a direct function of the level of resources that the legislature has devoted to police services. Liability for failure to have more officers at particular locations would redefine the politically determined level of service by requiring a more extensive police force. Moreover, the very process of determining whether there *ought* to have been more police officers stationed at this or that place — or whether police should have been available to answer this or that call — inevitably requires the court to ask the resource-allocation questions: Was the level of police services that the government chose to provide adequate, or, at the very least, was the city's operational allocation of existing police services appropriate? It is hard to imagine what the legal standard for such review would be: What constitutes an appropriate level of any particular service? Further, how can that question sensibly be answered without knowing how an increase in the service at issue would affect the allocation of resources for other services? Permitting these sorts of claims to go forward means that the courts, rather than the political branches, are deciding what level and distribution of protective services the community will have.<sup>138</sup>

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136. This assumes, not implausibly, that the legislature intended to establish and fund a police force that would act nonnegligently in its interactions with the public.

137. In this regard, these sorts of failure-to-protect claims are very like governmental liability in situations not involving intervening third-party harm. For example, imagine a claim against the government for police brutality in which the plaintiff alleges that the police officers who arrested him on drug charges caused him to sustain a concussion and two broken arms. It is unlikely that these police actions were determined or limited *in principal part* by resource constraints, except in the limited sense that training and supervision costs money. Resolution of the claim would not involve the court in reviewing the kind of resource-allocation decisions implicated by the inadequate-fire-protection claim; the court simply would determine whether police officers used a reasonable amount of force under the circumstances, the sort of question courts are accustomed to resolving.

138. To give another illustration of the same idea, consider the difference between a claim for injuries due to a defective sidewalk and a claim for injuries resulting from failure to lay a sidewalk in the first place. The first claim will result in liability if the municipality had notice of a significant defect and failed to remedy it. *See, e.g.,* *Livingston v. City of Chicago*, 326



There is not, of course, as clear a line as I have drawn between claims that raise resource-allocation concerns and those that do not. For example, it is at least possible that the police officers who stood by and did nothing to aid our hypothetical plaintiff did so because the city lacked the money to arm and train them to intervene against violent third-party assaults or because they lacked sufficient "back-up." Conversely, perhaps there were, in fact, enough available police officers to patrol the metro station and the surrounding area. But, my point is that claims involving general failures to protect — claims that directly implicate the level of services — are more likely than other kinds of claims against the government to bump up against the realities of resource limitations. Furthermore, because courts are reluctant to interfere with political decisions, the likelihood that they will intervene in failure-to-protect cases will be quite low when the level of care or services in question is limited by scarce public resources.

Interestingly, while there is a strong argument that courts are not very good at monitoring claims involving the "level" of services, as opposed to the "quality" of services, there is reason to believe that the situation is exactly the opposite when it comes to political monitoring: the political process may be better at monitoring the *level* of services than it is at monitoring their *quality*. It is a well-accepted justification for permitting certain governmental immunities that the political process can also serve as an effective check against governmental misbehavior. For example, when governmental officials or employees in their agencies or departments cause harm — particularly in these days of extensive media coverage — the public can exert considerable pressure for offending officials to step down or be fired, and elected officials can be voted out of office.<sup>139</sup> This kind of political pressure would presumably be effective in controlling harms resulting from both level and quality of services.

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N.E.2d 170 (Ill. App. Ct. 1975). See generally 19 McQUILLIN, *supra* note 73, §§ 54.80-54.80d, at 256-68. Liability would require the city reasonably to implement a prior decision by the political branches to have a sidewalk in a particular location. Indeed, cities are required to close defective public ways if they cannot maintain them nonnegligently, for example, due to lack of funding. See *id.* § 54.23, at 75. By contrast, the second claim would involve the court in evaluating political decisions about how much money should be available for sidewalk construction (resource allocation at the legislative level) and how those resources ought to be allocated among all the possible locations where sidewalks might be needed (resource allocation at the operational level). Such claims virtually never succeed. See, e.g., Arvel v. City of Baton Rouge, 234 So. 2d 458 (La. Ct. App. 1970); Braithwaite v. West Valley City Corp., 860 P.2d 336 (Utah 1993).

139. A full discussion of the strengths and weaknesses of the political process in monitoring the behavior of governmental officials is beyond the scope of this paper.

There is, however, evidence that politicians — particularly elected officials — get considerably more mileage out of promises to *increase* goods and services than promises to *better maintain* existing ones.<sup>140</sup> Promises to put more cops on the street or hire more teachers for overcrowded public schools are more politically salient than simple assurances that existing police officers and teachers will do a better job. Similarly, there is empirical evidence that governmental agencies tend to neglect maintenance of existing services precisely because it is politically less rewarding.<sup>141</sup> Agencies have greater incentive to add new facilities or programs than to improve existing ones because the former is more likely to enable them to enlarge their budgets.<sup>142</sup> Failure adequately to maintain and supervise existing facilities has been shown to be linked to increased liability costs.<sup>143</sup>

Thus, along with the institutional-competence arguments against liability in situations that implicate the level of services, damage liability may also be less important in those situations than in situations involving negligent delivery of existing services because the political process is more likely to serve as an effective monitor against governmental misbehavior in the former than in the latter.

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140. See generally Gellis, *supra* note 114, at 389-90; see also Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 279 (arguing that because officials are confronted both with demands for increased public services and calls for lower taxes, they are under pressure to provide higher levels of public service at minimum cost).

141.

Maintenance is a low visibility service, and empirical evidence supports the theory that when a bureau is forced to reduce costs, maintenance will be at the top of its list. Maintenance is an operating expense funded out of the current budget for which the short-term political rewards are likely to be viewed as less compelling compared with those associated with adding new facilities or new programs.

Gellis, *supra* note 114, at 390 (footnotes omitted). See generally FRANK LEVY ET AL., *URBAN OUTCOMES: SCHOOLS, STREETS, AND LIBRARIES* 48, 59, 137, 185 (1974) (noting that a study of public services — primarily schools and streets — in Oakland, California found that routine maintenance was the first to suffer when funding cutbacks were made); see also generally HERMAN B. LEONARD, *CHECKS UNBALANCED: THE QUIET SIDE OF PUBLIC SPENDING* 169-75 (1986) (explaining why maintenance of infrastructure is a "no-reward" expenditure for public officials).

142. See generally ANTHONY DOWNS, *INSIDE BUREAUCRACY* 195-99 (1967) (giving reasons for expansionist tendency of agencies and bureaus); WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (arguing that, unlike a private firm, the survival of a public bureau depends on the size of its budget, rather than on the efficiency of its operations).

143. See Gellis, *supra* note 114, at 390 (citing BETTY VAN DER SMISSEN, *THE LEGAL LIABILITY OF CITIES AND SCHOOLS FOR INJURIES IN RECREATION AND PARKS* § 4.2, at 192 (1968) (showing the connection between maintenance and liability costs)).

### C. *The Rationale Applied*

The notion that failure-to-protect cases uniquely involve the courts in reviewing resource-allocation decisions provides a theoretical rationale for the presumptive rule of nonliability, the so-called public duty rule: state courts invoke the public duty rule when liability would involve the court directly in second-guessing political decisions about budgetary matters or when the facts or context strongly suggest that the level of care that was provided resulted from the realities of limited public resources. In other words, courts generally decline to entertain individual claims that challenge the level or distribution of services or complain that a different level or distribution would have prevented some particular harm. Implicit in the notion of public duty is the recognition that the higher level of services that may have prevented a particular harm could mean less of something else and a different — though not necessarily superior — distribution of harms. Rather than involving themselves in second-guessing whether the political branches got it “right” when they chose a particular use of resources, the courts have chosen to defer to the legislature on such matters.

Thus, the more a plaintiff’s theory of liability resembles the first claim in *Crosland*<sup>144</sup> — where police officers were on site but failed to perform reasonably — the *less* likely adjudicating the claim would involve the court in second-guessing budgetary decisions and the *more* likely liability could result. In doctrinal terms, courts are most likely to find a “special relationship” giving rise to liability when the government has involved itself in a particular situation to such an extent that resource decisions have already been made and resources have already been assigned.<sup>145</sup> On the other hand, the more governmental defendants plausibly can argue that the level of care afforded the plaintiff resulted from resource constraints — *Chandler*-like cases<sup>146</sup> — the *less* likely the claim will lead to liability.

The notion that courts are not institutionally competent to handle failure-to-protect claims is *most powerful* in explaining why

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144. See *supra* notes 132-33 and accompanying text.

145. See, e.g., *Kircher v. City of Jamestown*, 543 N.E.2d 443, 446 (N.Y. 1989) (“[W]here a municipality voluntarily undertakes to act on behalf of a particular citizen who detrimentally relies on an illusory promise of protection offered by the municipality, we have permitted liability because in such cases the municipality has by its conduct determined how its resources are to be allocated in respect to that circumstance and has thereby created a ‘special relationship’ with the individual seeking protection.”).

146. See *supra* notes 129-31 and accompanying text.

courts are strongly disinclined to permit liability in most failure-to-protect cases. It provides a persuasive and normatively defensible justification for a rule that is, for other reasons, unappealing. On the other hand, resource-allocation concerns only roughly predict when the courts will depart from the nonliability rule. As noted above, the special relationship cases are less likely to involve the courts in reviewing budgetary decisions. But the fact is that failure-to-protect cases implicate resource-allocation decisions along a continuum. Thus, while one can predict that claims like the one in *Chandler* will virtually never result in liability and claims like the first one in *Crosland* are more likely to lead to liability, the exact boundary line between liability and nonliability remains predictably fuzzy.

#### IV. IMPLICATIONS FOR FAILURE TO PROTECT UNDER THE DUE PROCESS CLAUSE

Claims alleging a governmental duty to protect under the Constitution appear to be relatively new.<sup>147</sup> For over a decade prior to the Court's holding in *DeShaney*, however, such cases had been percolating in the lower federal courts. Significantly, the pattern that emerges from the lower court cases is strikingly similar to the way state courts have treated analogous cases in tort. The presumptive rule in the constitutional cases as in the tort context is that there is no liability for governmental failure to protect.

This Part outlines the range of failure-to-protect claims that have been brought under the Due Process Clause and how the courts have handled such claims. A discussion of each category shows how concerns about resource allocation help to explain the courts' approach to liability.

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147. Constitutional duty-to-protect cases trace their roots back to the 1976 case of *Estelle v. Gamble*, 429 U.S. 97 (1976), in which the Supreme Court held that the government owes a duty under the Eighth Amendment to protect prisoners from certain injuries while in custody. Later, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), the Court held that the government owes a similar duty of protection under the Fourteenth Amendment to involuntarily committed mental patients and pretrial detainees, respectively. The Court first considered a claim of failure to protect outside the custodial setting in *Martinez v. California*, 444 U.S. 277 (1980), a case against the government for the release of a parolee who subsequently killed plaintiff's decedent. The Court dismissed the case on the grounds that there was no causation but left open the possibility that, under other circumstances, such a Fourteenth Amendment right might be upheld. See 444 U.S. at 284-85. Lower court cases prior to *DeShaney* involving noncustodial failure-to-protect claims under the Fourteenth Amendment relied on *Martinez*. See generally *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

The claims fall along a continuum roughly correlated with the extent of governmental involvement in the events giving rise to the harm: at one end of the spectrum are situations in which the government allegedly had reason to know of a particular risk of injury but no ongoing relationship with the potential victim. There is almost never liability in such cases. At the other end are cases in which the plaintiff was injured — for example, by another prisoner — while in custody, the one situation where liability is clearly permitted under *DeShaney*. A middle category of claims, where failure to protect may or may not lead to liability, involves situations in which governmental actors arguably have contributed in some way to the risk of harm.

### A. General Failures To Protect — No Liability

Claims at one end of the continuum involve allegations that governmental actors failed to provide protection against a risk of harm that they knew or should have known existed. The cases take a variety of forms from a general allegation of failure to enforce the laws to a single, unaddressed call for help, to a claim of reliance on explicit or implicit governmental assurances of help. Such claims almost never give rise to liability.

There are relatively few cases seeking damages for general failures to enforce the law or general failures to protect from the risk of harm. Such cases raise issues of resource allocation in the starkest form. For example, in *Reiff v. City of Philadelphia*,<sup>148</sup> plaintiff was shot during a robbery at a store where she was shopping. Plaintiff alleged that the government had failed to protect her by its policy of responding only when a crime actually had been committed<sup>149</sup> and by providing inadequate police protection in a high crime area. This case is just another version of *Chandler*;<sup>150</sup> litigation of the claim would require the court to consider both whether the total number of police officers was adequate for the city's needs (resource allocation at the legislative level) and whether the city's allocation of officers among the various needs in the community was appropriate (resource allocation at the operational level). As noted above, the courts have no institutional ad-

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148. 471 F. Supp. 1262 (E.D. Pa. 1979).

149. The facts recited by the district court suggest that the police never actually received a call for help from plaintiff or anyone else. See 471 F. Supp. at 1264.

150. See *supra* notes 129-31 and accompanying text.

vantage over the political process in assessing how available resources ought to be allocated.<sup>151</sup>

There are any number of such cases in which resource-allocation issues are even closer to the surface: for example, in *Dollar v. Haralson County*,<sup>152</sup> plaintiff, whose children drowned while she was attempting to cross a rain-swollen ford, brought suit against the county for failing to build a bridge across the ford.<sup>153</sup> The County Commissioner testified at trial that building a bridge over that particular ford was one of his "top priorities."<sup>154</sup> According to the Commissioner, however, it was county policy to wait for a state contract rather than spend local revenue on bridges.<sup>155</sup> The thrust of plaintiff's claim was that the county was negligent in failing to spend local funds to build the bridge.<sup>156</sup> It is hard to imagine a clearer case of judicial review of budgetary decisions.

Cases involving injuries allegedly caused by governmental failures to enforce state or local laws raise similar issues. For example, in *California First Bank v. State*,<sup>157</sup> plaintiffs alleged that injuries they sustained in an automobile accident resulted from police failure to enforce liquor control laws and drunk driving laws at certain "Indian Bars" that were notorious for excessive drinking. The intoxicated driver of the automobile that collided with plaintiffs' car had been drinking at one of the unregulated bars on the night in

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151. In a case raising similar issues, *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir. 1984), plaintiffs sought damages for governmental failure to prevent their children's deaths in an apartment fire. The deaths occurred during a firefighters' strike in which the city had closed a firehouse near plaintiffs' apartment building. See 738 F.2d at 1444-45. Thirteen minutes after the fire was detected a fire truck from a manned firehouse arrived and extinguished the blaze. See 738 F.2d at 1445. The case differs from *Chandler* in that picketing fire fighters who detected the fire were prevented by police guarding the nearby firehouse from gaining access to fire-fighting equipment. The decision to prevent access to certain firehouses was, however, clearly part of the city's strategy for conserving resources and protecting public property during the strike. (There was no evidence that police obstructed the efforts of rescuers to reach the burning building.) The court held the government not liable for the children's deaths. See 738 F.2d at 1448; see also *McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (finding no liability for failure to arrest a third party who subsequently injured plaintiff), *cert. denied*, 493 U.S. 1023 (1990); *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983) (finding no liability when a rape victim claimed that the city had failed to protect her by suppressing information about the number of rapes that had occurred in the city); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (finding no governmental liability to family of a victim killed by a mental patient who was released despite having committed an earlier killing and having been adjudicated not guilty by reason of insanity).

152. 704 F.2d 1540 (11th Cir.), *cert. denied*, 464 U.S. 963 (1983).

153. See 704 F.2d at 1541.

154. See 704 F.2d at 1542.

155. See 704 F.2d at 1542.

156. The Court of Appeals reversed a jury verdict finding the county negligent on plaintiff's theory. See 704 F.2d at 1544.

157. 801 P.2d 646 (N.M. 1990).

question.<sup>158</sup> This claim is obviously problematic from a resource perspective: the level of law enforcement that is possible, like the level of police protection in *Reiff*, is a direct function of the amount of resources allocated to the agency responsible for that function. A court called upon to answer the question whether there has been adequate enforcement of the laws cannot escape the necessity of reviewing the level and distribution of law-enforcement resources.<sup>159</sup>

A large number of cases in this category involve unanswered calls for help rather than general failures to protect. For example, the courts consistently have denied claims of failure to respond to a call or request for fire<sup>160</sup> or police protection<sup>161</sup> or for other emergency services.<sup>162</sup> Even when governmental officials have had

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158. See 801 P.2d at 648.

159. See, e.g., *Jones v. City of Carlisle*, 3 F.3d 945, 947, 950 (6th Cir. 1993) (finding no liability when plaintiff who sustained injuries in an accident caused by an epileptic driver sued the government for alleged failure to investigate and report accidents with epileptic drivers), *cert. denied*, 114 S. Ct. 1218 (1994); *Edwards v. Johnston County Health Dept.*, 885 F.2d 1215, 1225 (4th Cir. 1989) (finding no liability for governmental failure to enforce state and federal migrant-housing statutes); *Hull v. City of Duncanville*, 678 F.2d 582, 585 (5th Cir. 1982) (finding no liability for failure to enforce train-speed ordinance); *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1466-67 (E.D. Wis. 1993) (finding no liability for deaths by fire when city allegedly failed properly to inspect apartment building for smoke alarms), *aff'd*, 41 F.3d 1510 (7th Cir. 1994); *Crosby v. Luzerne County Hous. Auth.*, 739 F. Supp. 951, 952, 956 (M.D. Pa.) (finding no liability for injuries to plaintiff's son, who was unable to escape from third floor of burning building, when local officials had inspected premises and permitted use of "fire ladder" that did not meet requirements under applicable state regulations), *aff'd*, 919 F.2d 134 (3d Cir. 1990); *Wright v. Bailey*, 611 So. 2d 300, 302, 306 (Ala. 1992) (finding no liability for death of plaintiff's wife in a two-car accident when government allegedly permitted the other driver, who was intoxicated, to get into his car and drive in order to enhance the charges against him).

160. See, e.g., *Shortino v. Wheeler*, 531 F.2d 938, 939 (8th Cir. 1976) (finding no liability for alleged inadequate fire protection throughout Kansas City, Missouri); *Westbrook v. City of Jackson*, 772 F. Supp. 932, 942-43 (S.D. Miss. 1991) (finding a municipality not liable for failure to provide fire protection due to inadequate water supply to property recently annexed to city); *Wooters v. Jorlin*, 477 F. Supp. 1140, 1148-50 (D. Del. 1979) (rejecting the argument that certain state and county laws had created a property interest in the provision of governmental services), *aff'd*, 622 F.2d 580 (3d Cir.), *cert. denied*, 449 U.S. 992 (1980); *Reedy v. Mullins*, 456 F. Supp. 955, 957-58 (W.D. Va. 1978) (finding no general right to adequate fire protection and rejecting the argument that vague contract with city based on payment of taxes created property right in adequate fire protection).

161. See, e.g., *Bryson v. City of Edmond*, 905 F.2d 1386, 1392-94 (10th Cir. 1990) (finding no liability for police failure to protect when gunman entered a post office and started shooting); *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988) (finding that members of general public have no constitutional right to be protected by the state against harm inflicted by third parties); *McClary v. O'Hare*, 786 F.2d 83, 88 (2d Cir. 1986) (finding no liability for failure to act); *Beard v. O'Neal*, 728 F.2d 894, 899 (7th Cir. 1984) (finding no duty to intervene when general public is imperiled); *Hynson v. City of Chester*, 731 F. Supp. 1236, 1240 (E.D. Pa. 1990) (finding that a state's Protection from Abuse Act did not create property interest under the Due Process Clause).

162. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1221 (7th Cir. 1988) (finding that failure of the city to send an ambulance driver to the home of a hyperventilating woman who later died did not violate due process), *cert. denied*, 489 U.S. 1065 (1989); *Wideman v. Shal-*

ongoing contact with an individual through repeated calls for help or prior responses to such calls, courts — well before *DeShaney* — denied liability for governmental failure to prevent injury-causing behavior. For example, prior to *DeShaney*, only one court had held social workers liable for injuries to a child not in state-sponsored foster care.<sup>163</sup> On the other hand, in the domestic violence context, the results — both before and after *DeShaney* — are more mixed; cases permitting liability for failure to protect have generally involved repeated complaints of threatened or actual violence coupled with the failure to enforce a restraining order against the abusive spouse.<sup>164</sup>

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lowford Community Hosp., 826 F.2d 1030, 1036 (11th Cir. 1987) (finding no liability when ambulance drivers refused to take pregnant woman to certain hospital); *Handley v. City of Seagoville*, 798 F. Supp. 1267, 1272 (N.D. Tex. 1992) (finding no liability for failure to provide ambulance service when requested); *Hendon v. DeKalb County*, 417 S.E.2d 705, 712 (Ga. Ct. App. 1992) (finding no liability to stroke victim for failure to respond to 911 call); *Doe v. Calumet City*, 609 N.E.2d 689, 694 (Ill. App. Ct. 1992) (finding no liability for failure to respond to 911 call); *Culver-Union Township Ambulance Serv. v. Steindler*, 629 N.E.2d 1231, 1234 (Ind. 1994) (finding no municipal liability for actions of city ambulance service in response to emergency call).

163. See *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 511 (3d Cir. 1985); see also *Jensen v. Conrad*, 747 F.2d 185, 194-95 (4th Cir. 1984) (finding no clearly established right of protection owed to children not in foster care but noting that special relationship could arise under certain circumstances), cert. denied, 470 U.S. 1052 (1985). But see *Milburn v. Anne Arundel County Dept. of Social Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) (finding no liability for alleged failure to report abuse and to remove child from abusive foster home); *Harpole v. Arkansas Dept. of Human Servs.*, 820 F.2d 923 (8th Cir. 1987) (finding no liability for injuries to child being monitored by social services). Cases after *DeShaney* have denied governmental liability for failure to prevent the abuse of children being followed by social services but not in foster care. See, e.g., *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991); *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990); *Edwards v. Johnston City Health Dept.*, 885 F.2d 1215 (4th Cir. 1989); *Sapp v. Cunningham*, 847 F. Supp. 893 (D. Wyo. 1994); *Burke v. Sheboygan County Human Servs.*, 790 F. Supp. 194 (E.D. Wis. 1992); *Chrissy F. v. Mississippi Dept. of Pub. Welfare*, 780 F. Supp. 1104 (S.D. Miss. 1991), cert. denied sub nom. *Chrissy F. v. Dale*, 114 S. Ct. 1336 (1994); see also *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990), cert. denied, 498 U.S. 1040 (1991) (finding no liability for failure to provide adequate information to adoptive parents). Some courts have held the government liable for injuries to children in state-sponsored foster care. See *infra* note 198.

164. See, e.g., *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988), *revd. in light of DeShaney*, 901 F.2d 696 (9th Cir. 1990); *Dudosh v. City of Allentown*, 629 F. Supp. 849 (E.D. Pa. 1985). Most failure-to-protect claims involving domestic violence after *DeShaney* have not resulted in liability, even when the claim alleged failure to enforce a protective order. See, e.g., *Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991); *Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283 (7th Cir. 1991); *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 501 U.S. 1218 (1991); *Coffman v. Wilson Police Dept.*, 739 F. Supp. 257 (E.D. Pa. 1990); *Hykson v. City of Chester*, 731 F. Supp. 1236 (E.D. Pa. 1990); *Duong v. County of Arapahoe*, 837 P.2d 226 (Colo. Ct. App. 1992); *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. Ct. App. 1992). But see *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (finding liability when defendant police officer was friend of attacker); *Pinder v. Commissioners of Cambridge*, 821 F. Supp. 376, 395 (D. Md. 1993) (finding liability when the government promised plaintiff that defendant-attacker would remain in jail but then released him); *Siddle v. City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991) (finding that protective order created property right in abused spouse to be protected from domestic vio-



Cases involving unanswered calls for help are more difficult because they implicate two possible underlying stories, one of which appears not to raise resource-allocation concerns.<sup>165</sup> To illustrate, imagine a version of *Reiff*<sup>166</sup> in which a store employee called the police to report that he had seen a suspicious individual enter the store with what looked like a gun hidden under his coat. The police fail to respond to the call, and plaintiff is injured in the ensuing robbery. She brings a due process claim against the municipality for its failure to respond to the call for assistance in a timely manner. Plaintiff also challenges the police department's policy not to respond to calls for assistance unless or until a crime actually has been committed.

Police failure to respond here implicates two possible stories of governmental behavior or misbehavior: one possibility is that the failure to respond resulted from shirking by individual governmental actors. For example, maybe police officers failed to respond because the police dispatcher neglected to communicate information to the appropriate persons or gave responding officers the wrong address. An equally plausible story, however, is that the officers' failure to respond resulted from institutional constraints or choices. For example, suppose police officers were unable to follow up on the call because they were compelled to place their priorities on other, more serious reports or to choose among many calls for assistance. In turn, the officers' need to set priorities is traceable to the realities of limited resources, budgetary constraints, and resulting institutional-level decisions about staffing and workloads. In that regard, it is quite likely that the police department's policy of placing first priority on calls for assistance when a crime has been committed is its way of responding to the reality of more calls than available officers can accommodate. Moreover, when the claim is simply that government officials failed to respond to a known risk of harm, it may be difficult or impossible to determine whether the injury resulted from individual behavior or systemic constraints or, most likely, a combination of the two.

The notion that there are two plausible stories behind these sorts of injury-producing failures to protect — and that one story

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lence but that police did not violate this right because they made reasonable efforts to protect her).

165. Cases involving general failures to protect theoretically could implicate two stories as well; but the "misbehavior" story is more difficult to make out when no identifiable governmental agent has been involved with the injured plaintiff.

166. See *supra* notes 148-51 and accompanying text.

involves the realities of institutional limitations — has important implications for liability. If the government's account strongly suggests that a resource-allocation story is behind an injury-causing failure to protect, the courts will be reluctant to entertain a claim against the government.<sup>167</sup>

To see why this makes *DeShaney* a harder case, consider again the facts of that case: plaintiff, the mother of a child who is being followed by a social worker, sues the government for failure to remove her child from the custody of her abusive ex-husband. Plaintiff argues that the social worker ignored evidence of child abuse contained in the child's file. At first glance, this case looks a lot like the metro-station hypothetical in which governmental officials were already "on the scene" and failed to intervene: the social worker apparently had committed the government's resources to following this particular child. She had made multiple visits to the child's home, taken copious notes about his situation, and indicated her clear impression that he was at risk. Yet the social worker failed to act in the face of significant evidence suggesting child abuse. Viewing these facts in isolation, *DeShaney* seems to be wrongly decided; it appears that the social worker acted negligently, if not recklessly, toward the risk of harm to this child.

It would be misleading, however, to view the social worker's behavior in isolation; her actions as to this child cannot fairly be assessed without reference to the whole range of serious cases she was currently monitoring. One can imagine what the social worker might say if she were called upon to defend her actions: she explains that, at the same time she was following Joshua DeShaney, she had 100 other children in her caseload. By definition, *all* of these children were at some significant risk of serious injury; the differences among them were only a matter of degree. Of these 100 children, she estimates that at least twenty had situations at least as serious as Joshua's.<sup>168</sup>

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167. It is not necessary to distinguish entity liability from individual-officer liability in this regard. In the event that injured victims pursue a judgment against the individual officer rather than the "deep pocket" governmental defendant, most states provide some form of indemnification against adverse judgments or settlements. See generally PETER H. SCHUCK, *SUING GOVERNMENT* 85-88 (1983). Thus, the burden of liability will ultimately fall upon the governmental entity.

168. These numbers are not unrealistic. Many caseworkers are required to carry much higher caseloads than they realistically can manage. In a District of Columbia case, one social worker testified that she was responsible for 69 families and 251 children, down from a high of 131 families and over 300 children. See *LaShawn A. v. Dixon*, 762 F. Supp. 959, 978 (D.D.C. 1991). To comply with state and federal law applicable to the District of Columbia, a social worker should have a maximum of only 20-40 families.

The social worker's defense is that she did the best she could — indeed, that she acted nonnegligently — given the range of her caseload and the resources available to her. Determining when to remove children from abusive homes is not an exact science; it may not be clear whether or not interventions short of removal are bringing about change and when the risk of injury has reached a crucial point. In addition, monitoring such situations is incredibly resource intensive, involving multiple visits, consultations, family counseling, and intermediate interventions. Moreover, a decision to separate a child from parental custody obviously has its own costs. Given that context, the level of care that plausibly can be tendered to any individual child by the social worker is significantly limited by the demands her total caseload places upon her, which in turn is a function of the resources allocated to child-protective services by the political process. What looks on its face like gross negligence or worse may look quite different when the social worker's broader responsibilities are considered.

But why couldn't the court consider whether the social worker acted reasonably *in light of these resource constraints*? A judge sensitive to budgetary issues could use qualified immunity or the due process requirement that defendant's actions be more than negligent to separate out cases with a plausible resource-allocation story.<sup>169</sup> Indeed, it is implicit in my argument here that courts *were* able to get to the "proper" results in resource-allocation terms even before the Supreme Court's categorical rejection of failure-to-protect claims in *DeShaney*. If so, why have a blanket rule against failure-to-protect claims?

I address that question more fully in discussing the Supreme Court's narrow holding in *DeShaney*.<sup>170</sup> One possible difficulty with a "resource-allocation defense," however, is that it would not entirely avoid judicial second-guessing. For example, the social worker with a resource-allocation story would have to explain her interventions and noninterventions in her other cases in order to justify her actions in the situation giving rise to the suit. We might worry that such an inquiry gets the court right back into the business of reviewing decisions about resource allocation and distribu-

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169. There is also reason to think that the "custom or policy" analysis applicable to municipal liability could be sensitive to resource-allocation issues. See *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (holding that claims against a municipality for inadequate training require a showing of deliberate indifference in order to avoid judicial "second-guessing [of] municipal employee-training programs").

170. See *infra* notes 196-236 and accompanying text.

tion,<sup>171</sup> the very inquiry it is seeking to avoid. Similarly, it is not clear that a threshold fault standard — something like “deliberate indifference” — is well-suited to separate out cases involving resource constraints. For example, suppose the court adopted an objective fault standard: the operative question could be whether the risk of serious harm to a particular individual was *so great* that the social worker’s failure to intervene should be considered blameworthy, notwithstanding her caseload. That standard would not necessarily identify governmental behavior constrained by resource limitations: by definition, the conscientious-but-overworked social worker likely would have files evidencing substantial risks of serious harm to children but be unable, through no fault of her own, to address all such cases.<sup>172</sup>

Putting aside for the moment the question why the Supreme Court apparently chose a categorical rule rather than case-by-case adjudication, my point here is that *DeShaney* is a much harder case than its critics acknowledge. Because the social-work context, almost by definition, will involve more cases of possible child abuse or neglect than plausibly can be addressed, the line between claims that raise resource-allocation concerns and those that do not is difficult to draw. That is exactly what makes *DeShaney* hard. It is, on the one hand, not an “easy” case for *nonliability*, as if it had involved a single report of child abuse that went uninvestigated or a claim that more social workers should have been assigned to a particular neighborhood. As noted earlier, these sorts of claims rarely result in liability because they raise the most serious resource-allocation issues. But *DeShaney* is also not simply a case where social workers “on the scene” stood by and failed to intervene. The picture is much more complicated. The social worker was “on the scene,” so to speak, of many potentially abusive situations involving many at-risk children. In order to evaluate the reasonableness of her behavior toward one child, one would want to know more

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171. Judicial reluctance to do this kind of review seems to have influenced the doctrine of absolute prosecutorial immunity in suits alleging malicious prosecution: it would be difficult or impossible to show malice in such cases without reviewing the prosecutor’s decisionmaking process, including past cases that she chose *not* to prosecute. Although this idea does not often appear in the literature, colleagues who teach criminal procedure have identified this notion as one strand of the rationale for prosecutorial immunity. See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299-300 (9th Cir. 1992).

172. One could defend the objective fault rule on normative grounds as simply a way of defining the minimal standard necessary to satisfy the demands of the Constitution, regardless of resulting budgetary implications. Indeed, courts are fond of saying that lack of funds is no excuse for unconstitutional governmental actions. That begs the question, however, of what exactly the Constitution requires in this class of cases.

about her obligations and behavior in connection with these other cases as well.

My point, then, is that cases like *DeShaney*, which might seem clear when viewed in isolation, are more difficult when viewed in the broader context in which there are countless demands on governmental resources, and street-level officials must make choices among them.

### B. *Failures To Protect in the Noncustodial Setting — Liability?*

In contrast to the cases cited above, there is a category of cases in which the lower federal courts — both before and after *DeShaney*<sup>173</sup> — have been willing to entertain duty-to-protect claims, whether or not governmental officials ultimately are found to have violated that duty. These cases arise out of a wide variety of fact patterns. But what they have in common is that they are less likely to require the courts to engage in a review of resource-allocation decisions than the general failure-to-protect cases discussed above.

Consider, for example, the following pair of cases alleging governmental failure to protect from death by drowning. In *Ross v. United States*,<sup>174</sup> plaintiffs brought a due process claim against the City of Waukegan and the County of Lake City, Illinois in connection with the death of their twelve-year-old son who had fallen off a breakwater into Lake Michigan and drowned. Plaintiffs alleged that a deputy county sheriff had deprived their son of a liberty interest by preventing available private divers from attempting a rescue.<sup>175</sup> County divers who were authorized to carry out the rescue did not arrive until twenty minutes after the private rescuers had made themselves available.<sup>176</sup> The Court of Appeals permitted the due process claim to go forward against the County and the Deputy

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173. After *DeShaney* — and despite language that could be read to foreclose failure-to-protect liability except in the custodial setting — courts have continued to permit liability in a subset of noncustodial cases. Courts have relied on the *DeShaney* Court's rationale for finding *no liability* in that case — that the government had played no part in creating the dangers that caused Joshua's injuries or in rendering him any more vulnerable to them, see *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 201 (1989) — to justify *liability* when governmental officials allegedly have played a part in creating or increasing the risk of injury to plaintiff. See, e.g., *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989).

174. 910 F.2d 1422 (7th Cir. 1990).

175. The Deputy Sheriff apparently was following an explicit county policy prohibiting civilians from attempting rescues under any circumstances. See 910 F.2d at 1425.

176. See 910 F.2d at 1425.

Sheriff. In *Andrews v. Wilkins*,<sup>177</sup> plaintiffs sued the U.S. Park Police<sup>178</sup> in connection with the drowning death of their son, who had plunged into the Potomac River in an attempt to flee from officials threatening to arrest him for urinating in public. Police officers made several attempts to toss the young man a life ring and directed a private boat to go alongside him, but they also directed the occupants of the boat — who apparently were trained swimmers — not to go in after the young man.<sup>179</sup> The court rejected plaintiffs' due process claim that the Park Police had a duty to rescue their son from drowning.<sup>180</sup> The court apparently deemed cognizable plaintiffs' claim that officials had interfered with private rescuers, but it ultimately concluded that park officials had acted reasonably under the circumstances.<sup>181</sup>

What is significant about these two cases is that the claims the courts permitted do not implicate the kinds of resource-allocation concerns raised by general failure-to-protect claims: plaintiffs claimed that governmental officials on the scene behaved badly by restraining private rescuers from giving aid. Adjudicating that claim does not require the court to evaluate either the adequacy of the overall level of services (resource allocation at the legislative level) or the appropriateness of the distribution of those services among competing uses (resource allocation at the operational level). Rather, it calls upon the court to assess the appropriateness of governmental behavior after officials on the scene had undertaken certain actions toward the respective plaintiffs. That is exactly the kind of judgment that courts are accustomed to making. In *Ross*, the court concluded that the officials had behaved recklessly in the face of an obvious risk of danger,<sup>182</sup> while the court in *Andrews* concluded that those officials had behaved reasonably under the circumstances.<sup>183</sup>

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177. 934 F.2d 1267 (D.C. Cir. 1991).

178. Plaintiffs' claim was brought against federal officials under 42 U.S.C. § 1983 (1988) on the theory that they were acting under color of state law at the time of the injury. See 934 F.2d at 1269.

179. See 934 F.2d at 1269.

180. See 934 F.2d at 1270.

181. See 934 F.2d at 1271.

182. In *Ross*, the court noted that county officials failed to inquire whether the private rescuers were qualified to attempt a rescue, even when it became apparent that the governmental rescuers were not going to arrive in time to save the child's life. See *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990).

183. The *Andrews* court distinguished *Ross* on the grounds that both the officers' behavior and the underlying circumstances were materially different in the two cases. For example, the court noted that, in *Andrews*, police officers were reasonable in discouraging the private rescuers because the officers had no way of assessing the rescuers' level of skill, and — given

The largest category of cases that has given rise to liability involves situations where, according to the courts, the government recklessly or willfully has exposed plaintiffs to an increased risk of danger. For example, there are a number of cases involving injuries to passengers after traffic stops in which police arrest or detain the driver. In the seminal pre-*DeShaney* case, *White v. Rochford*,<sup>184</sup> the court entertained a due process claim for injuries to child passengers who suffered injury when they were left alone in a car on a busy highway after the driver was arrested for drag racing. Similarly, in *Wood v. Ostrander*,<sup>185</sup> a post-*DeShaney* case, the court permitted a claim by a plaintiff who was raped when police allegedly left her stranded in a high-crime district after the companion with whom she had been riding was arrested for driving while intoxicated, and the car was impounded.<sup>186</sup> Like the claims in *Ross* and *Andrews*, abandoned-passenger claims permit the court to consider the limited question of whether governmental officials acted reasonably in their actual encounter with the later-injured plaintiff; they do not require the court to inquire into the level and distribution of governmental services.<sup>187</sup>

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the victim's bizarre behavior — police reasonably thought he could have been dangerous. See *Andrews*, 934 F.2d at 1271; see also *Franklin v. City of Boise*, 806 F. Supp. 879, 888 (D. Idaho 1992) (finding police officers acted reasonably in prohibiting an intoxicated private rescuer from diving after an individual who fell into a pond and drowned while resisting arrest).

184. 592 F.2d 381 (7th Cir. 1979). Even judges who are generally hostile to duty-to-protect claims have indicated their agreement with *White*. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (Judge Easterbrook), cert. denied, 489 U.S. 1065 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983) (Judge Posner), cert. denied, 465 U.S. 1049 (1984).

185. 879 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990).

186. A number of jurisdictions have rejected such claims after *DeShaney*. For example, in *Hilliard v. City of Denver*, 930 F.2d 1516 (10th Cir.), cert. denied, 502 U.S. 1013 (1991), the court found no liability when a woman was robbed and sexually assaulted by a third party after the intoxicated driver of the car in which she had been traveling was arrested, and his car was impounded. *Hilliard* cannot readily be distinguished from *Ostrander* on factual grounds nor on grounds that it raises greater concerns about resource allocation. The court found *DeShaney* controlling and held that no duty to protect in that situation was "clearly established." See 930 F.2d at 1520. In two other cases, the courts apparently concluded that governmental officials behaved reasonably under clear law. See *Walton v. City of Southfield*, 995 F.2d 1331, 1339 (6th Cir. 1993) (finding that no clearly established law was violated when police officers permitted a fifteen-year-old and a two-year-old to find their own way home after officers arrested their grandmother, who had been driving the car); *Sewell v. Van Buren Township Police Dept.*, 806 F. Supp. 1315, 1320-21 (E.D. Mich. 1992) (finding no clearly established law violated when plaintiff, who was suffering from delusions, was arrested, released, and later injured while wandering down the median of an interstate highway as she attempted to walk home).

187. See, e.g., *Reed v. Gardner*, 986 F.2d at 1122 (7th Cir. 1993) (permitting liability when police left intoxicated passenger in car after arresting driver, after which passenger drove off and caused an accident that injured plaintiff); *Russell v. Steck*, 851 F. Supp. 859 (N.D. Ohio 1994) (permitting a due process claim when police officers insisted that plaintiff, who had

Another group of cases in which the courts have permitted liability for failure to protect includes ones loosely characterized by the fact that governmental officials are *actually* and *purposefully* on the scene before the injury-causing events take place. For example, in *Dwares v. City of New York*,<sup>188</sup> the court upheld a due process claim by an individual who was injured by skinheads while participating in a flag-burning demonstration. The court noted that, although police had no general duty to protect plaintiff based on past incidents of violence by skinheads, a duty arose where the attack occurred in the presence of police officers who had promised the skinheads that they would not intervene unless things "got out of control."<sup>189</sup> The court permitted only plaintiff's claim that governmental officials *on the scene* willfully failed to intervene to prevent ongoing harm. That claim did not involve the court in reviewing the level or distribution of police services; it merely required the court to consider the behavior of officers who were already on the scene performing the duties of their governmental offices.

Not all officer-on-the-scene cases, however, have resulted in governmental liability. For example, in *Tucker v. Callahan*,<sup>190</sup> the court did not permit a due process claim against a police officer who sat in his police car while a man was beaten in a hotel parking lot across the street. The court held that the officer was entitled to qualified immunity because the mere fact that the officer was on the scene and observed the beating did not create a duty under clearly established law.<sup>191</sup> Under my positive analysis of failure-to-protect cases, this result seems clearly wrong: the case does not appear to raise resource-allocation concerns. Plaintiff does not allege that there should have been more officers on hand, and there is no suggestion that the officer failed to intervene because he was engaged in other police activities. Moreover, unlike in many such cases,

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become disorderly at a hotel, get into his car and exit the premises despite evidence — and over his objections — that he was too intoxicated to drive); *Estate of Tittiger v. Doering*, 678 F. Supp. 177 (E.D. Mich. 1988) (permitting a due process claim for death of passenger who was killed when police stopped the car in which he had been riding, gave the teenage driver a number of sobriety tests, and then insisted that the intoxicated passenger ride his bicycle home at night with no lights rather than ride home with his intoxicated friend). *But see Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992) (finding no liability when police detained "designated driver" on outstanding traffic warrant, and passengers — who unbeknownst to police were also intoxicated — were injured when they attempted to drive themselves home), *cert. denied*, 113 S. Ct. 1265 (1993).

188. 985 F.2d 94 (2d Cir. 1993).

189. *See* 985 F.2d at 97, 99.

190. 867 F.2d 909 (6th Cir. 1989).

191. *See* 867 F.2d at 914.



there is no factual discussion in *Tucker* suggesting that the officer's nonliability turned on a lack of the requisite intent; the court simply fails to inquire into the "misbehavior" story at all.<sup>192</sup>

On the other hand, *Tucker* may illustrate the difficulty of making case-by case determinations on resource-allocation grounds. The court apparently was reluctant to open the door to such inquiries by holding that the mere observation of harm-causing behavior automatically gives rise to a duty to protect: an officer who happens to arrive on the scene where an injury is occurring — as opposed to being there by design as in *Dwares* — may not be much different from an official who receives a call for help or has knowledge of possible harm.<sup>193</sup> At the very least, one would want more information about what the officer in *Tucker* was doing while the beating was going on and what reasons he may have had for his failure to intervene.<sup>194</sup>

In sum, concerns about judicial review of resource allocations are most powerful in accounting for the strong presumptive rule against liability in failure-to-protect cases. The question whether adjudicating particular claims would involve the courts in such review is also useful in predicting what *sorts* of failure-to-protect claims are most likely to result in governmental liability.<sup>195</sup>

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192. By contrast, in *Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991), the court found no liability when plaintiff's decedent was murdered in the presence of a deputy sheriff who had accompanied her to a meeting with her estranged husband. Although the court's analysis, citing *DeShaney*, centers around the absence of a duty to protect, it appears from the court's detailed presentation of the facts that the deputy's actions at most were grossly negligent. See 946 F.2d at 550.

193. See *supra* notes 160-66 and accompanying text; see also *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983) (finding a police officer not liable for failing to determine whether anyone was still inside a burning automobile when the officer arrived at the scene of an accident), *cert. denied*, 465 U.S. 1049 (1984).

194. Cf. *Rogers v. City of Port Huron*, 833 F. Supp. 1212 (E.D. Mich. 1993) (finding no liability for injuries to an intoxicated man who was hit by a car after police left him on a grassy area of lawn by the curb). Courts have avoided *Tucker*-like claims on a number of grounds: for example, that plaintiffs failed to show causation, see, e.g., *Beard v. O'Neal*, 728 F.2d 894 (7th Cir. 1984) (holding FBI informant who was with a police officer when he carried out a contract killing not liable for failing to prevent the murder), or failed to prove that governmental officials had the requisite intent. See, e.g., *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986) (finding undercover police officers, who happened to be in a bar when a fight broke out, not liable for failure to prevent a shooting).

195. It might be objected that what really explains the line between liability and nonliability in failure-to-protect cases is that courts permit liability when governmental officials act in bad faith. That explanation would mean that none of the general failure-to-protect cases, including cases involving unanswered calls for help, involves bad faith. But there is no reason to think that general failures to protect *never* involve some element of bad faith. Rather, courts appear unwilling even to *consider* the question of bad faith where resource-allocation issues are significantly implicated.

### C. Failure To Protect in the Custodial Setting — Liability

Virtually every court of appeals that has considered the issue has held that there is a duty under the Due Process Clause to protect individuals whom the government has placed in custody,<sup>196</sup> and the Supreme Court reaffirmed that conclusion in *DeShaney*.<sup>197</sup> One reading of *DeShaney* would preclude liability *except* in the custodial setting and perhaps in circumstances closely analogous to custody, such as foster care.<sup>198</sup> As noted above, however, the lower courts have continued to permit liability in situations not remotely custodial.<sup>199</sup> I have argued that courts have allowed these cases to

196. See, e.g., *Ryan v. Burlington County*, 889 F.2d 1286 (3d Cir.), *cert. denied sub nom. Fauver v. Ryan*, 490 U.S. 1020 (1989) (finding that a pretrial detainee has clearly established right to safe environment and not to be housed with dangerous inmate); *Withers v. Levine*, 615 F.2d 158 (4th Cir.) (finding a duty to protect prison inmates from a known risk of harm from sexual assaults by other inmates), *cert. denied*, 449 U.S. 849 (1980); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Merideth v. Grogan*, 812 F. Supp. 1223 (N.D. Ga. 1992) (finding a duty to protect a person in custody with known suicidal tendencies from risk of suicide), *affd.*, 985 F.2d 579 (11th Cir. 1993); *Simmons v. City of Philadelphia*, 728 F. Supp. 352 (E.D. Pa. 1990) (finding that an intoxicated pretrial detainee was entitled to at least the same level of care as a convicted prisoner), *affd.*, 947 F.2d 1042 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *Gann v. Delaware State Hosp.*, 543 F. Supp. 268 (D. Del. 1982) (finding that the state has a duty to provide for the reasonable safety of an involuntarily committed patient in a state mental hospital); see also Strauss, *supra* note 8, at 67.

197. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989).

198. See 489 U.S. at 201 n.9. A number of lower courts, both before and after *DeShaney*, have permitted liability for injuries to children in government-mandated foster care when governmental officials were "deliberately indifferent" to the risk of harm to the child. See, e.g., *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993); *Yvonne L. v. New Mexico Dept. of Human Servs.*, 959 F.2d 883 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied sub nom. Ledbetter v. Taylor*, 489 U.S. 1065 (1989); *Doe v. New York Dept. of Social Servs.*, 709 F.2d 782 (2d Cir.), *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983); *Eric L. v. Bird*, 848 F. Supp. 303 (D.N.H. 1994); *Baby Neal v. Casey*, 821 F. Supp. 320 (E.D. Pa. 1993); *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991); *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989). After *DeShaney*, some courts have disposed of the cases on qualified immunity grounds, holding that a right to protection while in foster care was not clearly established. See, e.g., *Estate of Cooper ex rel. Cotturo v. Montgomery County Office of Children & Youth*, 1993 WL 477084 (E.D. Pa. 1993), *affd.*, 30 F.3d 1485 (3d Cir. 1994); *Eugene D. ex rel. Olivia D. v. Karman*, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990); *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990); *Coker ex rel. Coker v. Henry*, 813 F. Supp. 567 (W.D. Mich. 1993), *affd.*, 25 F.3d 1047 (6th Cir. 1994); *Lintz v. Skipski*, 807 F. Supp. 1299 (W.D. Mich. 1992), *affd.*, 25 F.3d 304 (6th Cir.), *cert. denied*, 115 S. Ct. 485 (1994). A few courts have distinguished cases involving *voluntary* foster care as not giving rise to a governmental duty of protection. See, e.g., *Milburn v. Anne Arundel County Dept. of Social Servs.*, 871 F.2d 474 (4th Cir. 1989); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874 (E.D. Va. 1991), *affd.*, 966 F.2d 1443 (9th Cir. 1992).

199. See *supra* notes 173-89 and accompanying text. A large number of jurisdictions have considered and rejected the claim that students in public schools are in custody within the meaning of the Due Process Clause. See, e.g., *Graham v. Independent Sch. Dist.*, 22 F.3d 991 (10th Cir. 1994) (finding school officials not liable for injuries to students by fellow students); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993) (finding school officials not liable for sexual assault of mentally retarded boy by another student in the boys' shower);

go forward because they tend not to involve judicial second-guessing of budgetary decisions. But how shall we understand the Supreme Court's focus on *custody* as the determining factor in failure-to-protect cases?

When *DeShaney* came before the Supreme Court, the Court already had recognized in *Revere*<sup>200</sup> and *Youngberg*<sup>201</sup> a duty to protect pretrial detainees and involuntary mental patients, respectively, under the Due Process Clause. These cases extended the duty of protection owed to prisoners under the Eighth Amendment<sup>202</sup> to individuals in other custodial settings. In the wake of these holdings and relying on certain language from the Court's analysis in *Martinez v. California*,<sup>203</sup> a number of jurisdictions had begun to extend the duty to protect to certain noncustodial situations. In particular, one line of cases held that, once the government learns a third party poses a particular danger to an identified victim and indicates its intention to protect against that danger, a "special relationship"<sup>204</sup> arises between the government and the potential victim, creating a duty to protect enforceable under the Due Process Clause.<sup>205</sup> The Supreme Court in *DeShaney* rejected the

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*Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) (finding school officials not liable for choking death of child in cloakroom of school), *cert. denied*, 113 S. Ct. 1266 (1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (finding compulsory school attendance is not analogous to custody, and state did not create or increase the danger giving rise to the injury), *cert. denied*, 113 S. Ct. 1045 (1993). *But see* *Waechter v. School Dist.*, 773 F. Supp. 1005 (W.D. Mich. 1991) (denying dismissal of due process claim when student died of cardiac arrhythmia following "gut run" imposed by teacher as punishment); *Pagano v. Massapequa Pub. Schs.*, 714 F. Supp. 641 (E.D.N.Y. 1989) (denying motion to dismiss when plaintiff had suffered 17 incidents of physical and mental injury by other students, and school officials failed to end the abuse).

200. *See* *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983).

201. *See* *Youngberg v. Romeo*, 457 U.S. 307 (1982).

202. *See* *Estelle v. Gamble*, 429 U.S. 97 (1976).

203. 444 U.S. 277, *rehg. denied*, 445 U.S. 920 (1980). In *Martinez*, the Court ultimately rejected a claim seeking to hold the government liable under the Due Process Clause for the death of a citizen at the hands of a parolee. The Court decided the case on causation grounds without facing the constitutional issue. The Court, however, left open the question whether a parole officer could, under some circumstances, be held liable for the injury-causing behavior of a parolee. The Court noted that in the extant case "the parole board was not aware that [the victim] faced any special danger." 444 U.S. at 285.

204. The scope of liability in the constitutional "special relationship" cases was significantly broader than the scope of liability defined by common law special relationships. In the leading case, *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), the court noted that a "special relationship" could arise if, for example, the government had expressly indicated its intent to protect, or the government merely had knowledge of the risk of harm. *See* 747 F.2d at 194 n.11.

205. *See, e.g.*, *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421, 1425-26 (9th Cir. 1988), *revd. in light of DeShaney*, 901 F.2d 696 (9th Cir. 1990); *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 510-511 (3d Cir. 1985); *Jensen*, 747 F.2d at 190-94 & 194 n.11 (*dicta*). *But see* *Wideman v. Shallowford Community Hosp.*, 826 F.2d 1030, 1034-37 (11th Cir. 1987); *Harpole v. Arkansas Dept. of Human Servs.*, 820 F.2d 923, 926-27 (8th Cir. 1987);

special-relationship analysis, purporting to limit liability to custodial or custody-like situations.<sup>206</sup>

The Supreme Court's approach in *DeShaney* is best understood as a way to cabin liability in a potentially troubling category of cases by restricting liability to an easily defined and relatively less troubling context. If general failure-to-protect claims are at one end of the spectrum of cases raising resource-allocation concerns, custody cases are clearly at the other. When the government has placed an individual in custody, it has already undertaken the task of providing — and paying for — that person's most basic needs: food, shelter, clothing, and so on. These expenditures have already been included in the budget allocated to prisons or other custodial institutions. Whatever extra expenditures are required to provide basic medical care and protection from injury are merely adjustments at the margin;<sup>207</sup> the basic allocations already have been made. Moreover, unlike society at large, the prison context is a limited environment in which governmental officials have a tremendous amount of control. That control gives them many more options for providing protection — options less likely to implicate resource allocation at the macro level — than are available outside the prison context. For example, prisoners can be prevented from harming one another by rearranging, separating, or isolating them from each other. In addition, even the total number of individuals who are subject to incarceration — and are thus guaranteed some minimal level of protection — is itself under the control of governmental officials; legislatures determine lengths of incarceration for various crimes, parole boards determine when prisoners will be paroled, and judges determine when alternatives to incarceration — for example, for juvenile offenders — might be warranted. All of these factors make the scope of liability for failure to protect in the custodial setting both more predictable and more limited. They also make it less likely that liability for failure to protect would involve the courts in reviewing resource-allocation decisions at the macro level.

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*DeShaney v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir.), *cert. denied*, 479 U.S. 882 (1986).

206. See *DeShaney*, 489 U.S. at 197-98 & n.4.

207. The duty of protection in this context is quite modest. The lower courts have held that prison officials are not liable for mere negligence; liability attaches only if they are "deliberately indifferent" to the risk of injury. In addition, the responsibility to provide medical treatment is limited to "serious medical needs." See, e.g., *Murphy v. Walker*, 51 F.3d 714, 717, 719 (7th Cir. 1995).

Thus, permitting liability in the custody setting is defensible from the standpoint of resource allocation.<sup>208</sup>

Perhaps more importantly, in *DeShaney*, the Supreme Court fastened upon a "bright-line" rule that permitted liability in the clearly defined context of custody, without inviting the more troubling variety and volume of such claims in the noncustodial setting.<sup>209</sup> The Court specifically disapproved a line of lower court cases that would have permitted broader liability in such contexts as social services<sup>210</sup> and police protection,<sup>211</sup> based on the broadly defined theory of "special relationship."<sup>212</sup> Further, despite certain statements made by the *DeShaney* Court that have led lower courts to extend the duty to protect beyond the custodial context,<sup>213</sup> the majority declined to cite with approval *any* case finding liability outside that setting. The Supreme Court's approach apparently was intended to avoid the difficult line-drawing problems occasioned by a more broadly defined duty to protect.

The Court's approach reflects its continuing concern that all manner of garden-variety torts not be turned into constitutional claims under the generic language of the Due Process Clause.<sup>214</sup> Given that the affirmative right to protection urged upon the Court in *DeShaney* has a very limited reach even in tort, it is not surprising that the Court sought to limit such liability under the Due Process Clause. Halting liability at the jailhouse door provides the obvious benefit of a clear rule with no danger of a "slippery slope"

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208. There is also a sense in which the custody cases do not *need* a resource-allocation rationale: the duty to protect in custodial settings has the normatively powerful rationale, captured in cases like *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), and *Youngberg v. Romeo*, 457 U.S. 307 (1982), that the government may not restrain an individual's ability to care for herself and then fail to provide her most basic human needs. But, when that rationale is pushed outside the custodial setting, as the plaintiffs in *DeShaney* tried to do, there is the need for a theory to explain why some cases result in liability and some do not.

209. See *DeShaney*, 489 U.S. at 199-200.

210. See, e.g., *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985); *Jensen v. Conrad*, 747 F.2d 185, 190-94 & n.11 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

211. See, e.g., *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421, 1425-26 (9th Cir. 1988), revd. in light of *DeShaney*, 901 F.2d 696 (9th Cir. 1990).

212. See *DeShaney*, 489 U.S. at 197-98.

213. See *supra* notes 173-89 and accompanying text.

214. See *Paul v. Davis*, 424 U.S. 693, 701 ("[A] reading" that would regard every injury perpetrated by the government as a violation of Due Process "would make of the Fourteenth Amendment a font of tort law . . ."), *rehg. denied*, 425 U.S. 985 (1976); see also *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986) (holding that due process claims require more than negligence); *Parratt v. Taylor*, 451 U.S. 527, 538 (1981) (holding that the existence of an adequate state remedy forecloses certain substantive due process claims).

toward generalized liability for failure to protect or failure to provide aid, a result that the Court obviously wished to avoid.<sup>215</sup>

To appreciate the full extent of the "risk" that clearly troubled the Court, consider the sheer volume of claims that could potentially be brought under a broader reading of the Due Process Clause: virtually every tort committed by a private individual that the government potentially could have prevented could give rise to a federal claim. The sheer number of such cases that would appear in the federal courts is truly staggering, especially when one considers that such liability could arise over virtually the whole range of public services. It seems likely that the deep pocket of governmental liability would encourage any individual who plausibly could claim the failure of protective services as a cause of her injuries to do so.<sup>216</sup> Even if many of these cases ultimately did not result in liability — for example, on grounds of causation, failure to show fault, or qualified immunity — the litigation burden on government entities and public officials would be enormous. It has been suggested, for example, that requiring a showing of "deliberate indifference" or "bad faith" would sufficiently limit liability. However, allegations of bad faith are easy to make but difficult and costly to litigate because they require fact-intensive inquiry into the mental processes of governmental officials.<sup>217</sup> Again, even if many such cases were ultimately dismissed, they would expose the governmental defendant to the burdens of broadranging discovery and the costs of trial.<sup>218</sup> The Court apparently took the view that given its

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215. The *DeShaney* opinion states:

[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.

See *DeShaney*, 489 U.S. at 196-97. Judge Posner, who wrote the lower court opinion in *DeShaney*, expressed the "slippery slope" concern in an earlier case, *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983) ("The next case if this one succeeds will be one where the police and fire departments, maybe because of budget cuts, do not arrive at the scene of the accident at all."), *cert. denied*, 465 U.S. 1049 (1984).

216. A similar argument has been made in the context of prosecutorial immunity. See *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) ("[S]uits [for malicious prosecution] could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the state's advocate. . . . Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor.").

217. This is one reason for the Court's move away from subjective bad faith as an element of the qualified immunity defense. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

218. See *Imbler*, 424 U.S. at 424-25.

slippery-slope concerns and the high cost of identifying meritorious claims not implicating budgetary issues, the game was not worth the candle.

Thus, the best way to understand the Supreme Court's decision to limit affirmative-duty claims to the custodial setting is as a rights-defining solution to the specter of a very intrusive remedy: the Court apparently chose to define the scope of the due process right narrowly in order to avoid liability that would intrude upon political decisions.<sup>219</sup>

This is not the first time the Supreme Court has responded to the troubling remedial implications of section 1983 liability by narrowing the scope of the underlying right. The Court seems to have taken a similar approach in the structural-reform cases. These cases are characterized by the grant of detailed affirmative injunctions requiring governmental defendants to take specific steps to eliminate unconstitutional behaviors or conditions.<sup>220</sup> The Supreme Court has sanctioned such broad relief in a very limited set of contexts, including school desegregation, prison reform, and voting reapportionment.<sup>221</sup> Once the courts find a constitutional violation in these contexts, they are understood to have broad powers to craft detailed affirmative remedies governing the specifics of how the offending institutions are to be run. It is not hard to see that such remedies are extremely intrusive into what are ordinarily highly discretionary executive and legislative decisions. One way the Supreme Court has responded to the remedial implications of these suits is to limit the scope of the right that can give rise to the remedy in the first place.<sup>222</sup> So, for example, in prison-reform cases the Court has upheld structural-reform decrees under the Eighth Amendment only when prison conditions are egregious under the

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219. A number of scholars have argued that the Supreme Court's general approach to tortlike due process claims has been to narrow the scope of the right in order to limit the reach of the remedy. See, e.g., Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

220. See *supra* notes 115-23 and accompanying text.

221. The federal courts also have granted structural-injunctive relief guaranteeing minimally adequate treatment to involuntarily confined mental patients. See, e.g., *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *revd. on other grounds*, 422 U.S. 563 (1975); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *affd. in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). At least one court has intervened in the foster care context. See *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994).

222. See generally *Fletcher*, *supra* note 105, at 683-91.

“totality of the circumstances”<sup>223</sup> but not on the basis of an isolated, questionable practice.<sup>224</sup> Similarly, the Supreme Court has indicated its hostility toward a claimed Fourteenth Amendment “right to treatment” owed to patients in state mental hospitals in cases where finding such a right implicated a broad structural remedy.<sup>225</sup>

Faced with the specter of another, potentially intrusive remedy — this time under the Due Process Clause — with implications for a wide range of governmental services including prisons, social services, police departments, fire departments, ambulance, and 911 services, the Supreme Court opted for a bright-line rule. As in the structural-reform context, the Court apparently sought to confine a category of cases with potentially troubling and intrusive remedial implications by narrowly defining the right.

It might be objected that the very existence of structural-reform litigation undermines the argument that courts are not institutionally competent to handle claims that implicate political decisions, such as the allocation of public resources: If courts are deemed competent to craft and administer intrusive structural remedies that impinge upon the prerogatives of the executive and legislative branches — and even to open the way for tax increases necessary to pay for such remedies<sup>226</sup> — then why not in the context of failure-to-protect claims? One answer is that, after nearly fifty years of experience with structural-reform litigation, it is not at all clear that courts *are*, in fact, good at micromanaging the decisions of the political branches. There is a significant literature questioning both whether courts ultimately are competent to craft and administer

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223. See *Hutto v. Finney*, 437 U.S. 678, 687 (1978) (permitting a district court order limiting to 30 days the time spent in punitive “isolation” in light of the “long and unhappy history of the litigation” and as a way of insuring “against the risk of inadequate compliance”).

224. See *Rhodes v. Chapman*, 452 U.S. 337, 341, 347-50 (1981) (reversing a district-court order that would have prohibited double-celling in an otherwise “topflight, first-class facility”); *Bell v. Wolfish*, 441 U.S. 520 (1979) (reversing a detailed remedial order that would have required a four-year-old prison to change a number of its practices). In *Bell*, the Court warned that the judiciary should not become “enmeshed in the minutiae of prison operations” and noted that the “wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.” 441 U.S. at 562.

225. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 n.12 (1981) (dismissing a class action suit brought on behalf of mentally retarded residents of a state institution without reaching the constitutional question and noting that “this Court has never found that the involuntarily committed have a constitutional ‘right to treatment,’ much less the voluntarily committed”). See generally *Fletcher*, *supra* note 105, at 688-91.

226. See *Missouri v. Jenkins*, 495 U.S. 33 (1990) (affirming a circuit court holding that the district court supervising a desegregation remedy may authorize a school board to submit a levy to the state tax-collection authorities and enjoin the operation of state laws hindering the school district from adequately funding the remedy).



structural-reform decrees<sup>227</sup> and whether such remedies are effective in bringing about their desired result.<sup>228</sup> Moreover, the trend in the Supreme Court is to constrain, if not contract, the reach of structural remedies. In addition to limiting the contexts in which such remedies are permitted,<sup>229</sup> the Court increasingly has reserved structural injunctions for extraordinary circumstances<sup>230</sup> and has continued to enforce the requirement that their scope not exceed the scope of the violation.<sup>231</sup> Thus, the mere existence of structural-reform litigation does not negate that such remedies are reserved for narrow circumstances, and they continue to be controversial on institutional competence grounds.

More importantly, whatever the merits or demerits of structural-reform litigation — and the more activist judiciary it represents — as a positive matter, courts adjudicating constitutional failure-to-protect claims largely have rejected the expanded judicial role represented by structural-reform cases and embraced a more traditional one. Those who broadly defend the propriety of structural-reform remedies may, for similar reasons, disagree with the courts' dispositions of failure-to-protect claims. That, however, suggests that a significant component of the controversy over

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227. For critical or cautionary views of structural reform litigation, see generally DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); and Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). For more favorable views, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Fiss, *supra* note 122; Fletcher, *supra* note 105; Rudenstine, *supra* note 122; David Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate over Political Structure*, 59 S. CAL. L. REV. 449 (1986).

228. See generally GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see also generally HOROWITZ, *supra* note 227.

229. In this regard, it is worth noting that in the one context where the Supreme Court has clearly permitted failure-to-protect liability — the custodial setting — it also has permitted structural relief. But in the law-enforcement context, where the Supreme Court disallowed structural remedies, see *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362 (1976), the federal courts also have eschewed failure-to-protect claims. The courts' reasoning for disallowing both kinds of relief in the latter context was to avoid micromanaging political decisions about the allocation and distribution of state and local law-enforcement resources. See, e.g., *Lyons*, 461 U.S. at 113 (holding that federal courts should avoid using structural injunctions to "oversee the conduct of law enforcement authorities on a continuing basis"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983) ("The next case if this one succeeds will be one where the police and fire departments, maybe because of budget cuts, do not arrive at the scene of the accident at all."), *cert. denied*, 465 U.S. 1049 (1984).

230. See *supra* notes 223-24 and accompanying text.

231. See, e.g., *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995); *Milliken v. Bradley*, 433 U.S. 267 (1977).

*DeShaney* and similar cases may involve a broader disagreement between those who embrace a more traditional view of courts as adjudicators of concrete disputes and those who view the courts as architects of broader political and social change.

Finally, it might be objected that whatever the restraints or policies applicable to tort claims, they are wholly irrelevant to the question of what standard of behavior is required by the Constitution: the operative question is what the Constitution requires, and, once determined, that is the end of the inquiry. As Thomas Eaton and Michael Wells have argued: “[T]here is nothing distinctly constitutional about a judicial policy favoring the preservation of executive and legislative discretion [to allocate public resources].”<sup>232</sup> To the extent that objection is a normative assertion about what considerations *ought* to be part of the inquiry in these cases, I do not purport to answer it in this article; my purpose here is to offer a positive rationale for the pattern of liability in this class of cases rather than primarily to defend the rationale on normative grounds. That having been said, Eaton and Wells are simply wrong in their assertion. Although the notion of judicial deference to the political branches appears in many legal contexts, it has particular salience in the task of analyzing constitutional claims: structural constitutional considerations, such as separation-of-powers and federalism, are surely implicated when contemplated judicial action could trench upon the prerogatives of the legislative and executive branches or involve micromanaging certain affairs of the states.

Moreover, the proper scope for failure-to-protect liability is not simply a question of constitutional *law* but a question of constitutional *remedies*; it is well-accepted that determining the scope of remedies under section 1983 involves legal and policy considerations that are not wholly constitutional.<sup>233</sup> Not every constitutional violation gives rise to a damages remedy; for example, governmental officials whose conduct is reasonable under clear law receive qualified immunity from damages even if their conduct violated constitutional norms.<sup>234</sup> Qualified immunity is justified on largely

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232. Eaton & Wells, *supra* note 8, at 129.

233. See *supra* notes 69-72 and accompanying text (discussing influence of common law on § 1983 jurisprudence). The Supreme Court could perhaps be faulted, in this regard, for discussing cases such as *DeShaney* in terms of constitutional rights rather than constitutional remedies.

234. See *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (arguing that qualified immunity, like other doctrines based on the jurisprudence of “new law,” is best located within the law of remedies).

nonconstitutional grounds, such as avoiding overdeterrence and preventing unfair surprise.<sup>235</sup> Similarly, the rationales for eschewing respondeat superior liability against governmental units — and embracing a “custom or policy” requirement — but also denying them qualified immunity rely heavily on policy considerations about the relative importance of compensation, deterrence, and risk spreading.<sup>236</sup> It is not surprising, then, that the scope of section 1983 liability for failure to protect also should be determined, in part, by broader policy considerations implicated by damage liability against the government.

### CONCLUSION

I have argued that the strong presumption against liability in constitutional failure-to-protect cases is largely the result of judicial reluctance to get involved in second-guessing political decisions. This notion that certain kinds of decisions should be left to the political branches rather than the courts reflects strongly held and normatively powerful beliefs about how our governmental system should operate. It is grounded in the separation of powers and includes the familiar idea that the various branches have different areas of institutional competence. This idea resonates in many areas of the law and can be seen in a number of doctrines, from the political question doctrine, to institutional constraints on judicial interpretation of statutes, to the granting of prosecutorial immunity.

Critics of *DeShaney* and other failure-to-protect cases have pointed out the possible moral and constitutional objections to *nonliability*, but they have not adequately considered objections to *liability* bottomed on the notion that failure-to-protect claims raise resource-allocation issues better left to the political branches. To the extent that failure-to-protect cases raise such issues, the call for broader liability is also a challenge to a conception of government — adhered to by the courts in these cases — that leaves to the legislative judgment how to arrange the relative spheres of public and private activities. Individuals might differ on exactly *where* the line ought to be drawn between political versus judicial action and, indeed, between governmental versus private responsibility. But the important point is that the line drawing in these cases may have less to do with constitutional law and more to do with judgments

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235. See *Harlow*, 457 U.S. at 813-817.

236. See *Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

about who should decide the limits of governmental responsibility and what those limits should be.

Proponents of broader liability who have couched the issues primarily in constitutional and moral terms have missed an important dimension of the debate; they have not acknowledged — or adequately defended — the broader, institutional implications of their proposals. Yet only adequate consideration of the institutional concerns raised by failure-to-protect claims can make sense of the strong presumption against liability in constitutional failure-to-protect cases.