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Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm

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I. Introduction 884
II. History and Development 888
A. *Estelle v. Gamble* 889
B. *Martinez v. California* and the Rise of the Duty to Protect 893
1. *Martinez* and *Estelle* Together 895
2. From *Martinez* and *Estelle* to *DeShaney* 896
a. The Process of Litigation 897
b. Divergent Paths 902
C. *DeShaney v. Winnebago County Department of Social Services* 905
III. Present Doctrine 910
IV. Suggested Models and Approaches 917
A. Five Models for Indirect Harm Cases 920
1. The Snake Pit Model 923
2. The Reliance Model 923
3. The Unseen State Actor Model 924
4. The Absent State Actor Model 924
5. The Absent Institution Model 925
V. Treating the Categories 925
A. Allocating Liability 926
1. Liability in a Snake Pit Case 926
2. Liability in a Reliance Case 929
3. Liability in an Unseen State Actor Case 938
4. Liability in an Absent State Actor Case 944
5. Liability in an Absent Institution Case 944
VI. Conclusion 945

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I. INTRODUCTION

For more than fifteen years, federal courts have struggled with the problem of defining the scope of liability under 42 U.S.C. § 1983[1] where the state defendant is not the immediate cause of harm to the plaintiff. These indirect harm cases arise in state institutions when inmates are injured by disease, by other inmates, or by their own actions; in families subject to state supervision when children are injured by their biological or foster parents; in schools when pupils are assaulted by other students; and in a multitude of disparate settings where citizens are attacked by unknown assailants or imperiled by the forces of nature. Moreover, the increasing involvement of the government in the lives of its citizens, whether through regulation or through provision of services, has multiplied the contexts in which indirect harm cases arise.

When plaintiffs seek to litigate these claims in federal court, they generally allege a violation of their right to substantive due process, which is guaranteed by the Fourteenth Amendment to the United States Constitution and is therefore actionable under section 1983.[2] Since the United States Supreme Court first recognized a constitutional cause of action for harm not directly attributable to the state,[3] it has made several efforts to define the contours of liability in this area. But despite—or perhaps because of—these efforts, the limits of liability for indirect harm remain confused and controversial. It is still true, as Justice White observed in considering this particular

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1. The statute provides:

> 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 persons 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 in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988). This brief statute is the subject of an enormous body of case law and scholarly commentary. For an excellent and comprehensive review of this complex area, see SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (3d ed. 1990). *See generally* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 60-77 (1983).

2. The Fourteenth Amendment provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

As is discussed in detail below, a limited class of indirect harm cases are litigated under the Eighth, rather than the Fourteenth, Amendment. *See infra* text accompanying notes 18-26.

3. Estelle v. Gamble, 429 U.S. 97, 102-03 (1976); *see infra* text accompanying notes 18-26.

issue ten years ago, that "[n]o problem so perplexes the federal courts today as determining the outer bounds of Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983."[4]

My purpose here is to find order amidst the chaos that predominates in analysis of indirect harm cases. It is my hope that such an effort will assist courts, scholars, and advocates who continue to be confronted by these cases, as well as identify a focused agenda for future commentary, inquiry, and action. I begin in Section I by tracing the development of existing law. While there have been a number of Supreme Court opinions that have addressed this topic, I focus on the three that have proven to be the most important: *Estelle v. Gamble*,[5] which first recognized liability in this area; *Martinez v. California*,[6] which attempted to define the limits of liability; and *DeShaney v. Winnebago County Department of Social Services*,[7] which is the Supreme Court's most recent effort to constrain the expansion of liability.[8]

It is essential to consider these cases together in order to appreciate the context in which the later cases were litigated. In the wake of *Estelle* and, subsequently, *Martinez*, the courts of appeals developed competing bodies of law governing cases of indirect harm. To understand the course chosen by the Supreme Court in *DeShaney* and to comprehend where it has led and may lead us, we must identify and understand the alternatives that the Supreme Court faced. We must consider these alternative paths not only in broad theoretical terms, but also as concrete and competing tests that had been developed by the courts of appeals.

In Section II, I offer a review of the current law. Even under the constraints imposed by *DeShaney*, courts have recognized many claims for indirect harm. Two principal lines of analysis have

4. Jackson v. City of Joliet, 465 U.S. 1049 (1984) (White, J., dissenting from denial of certiorari) (quoting City of Joliet v. Jackson, 715 F.2d 1200, 1201 (7th Cir. 1983)). Section 1983 is the vehicle by which these claims are brought, but the perplexing problem is actually determining the outer bounds of the due process guarantee contained in the Fourteenth Amendment. *Id.* at 1050-51.

5. 429 U.S. 97 (1976).

6. 444 U.S. 277 (1980).

7. 489 U.S. 189 (1989).

8. It is not my intention to critique *DeShaney* in detail in this Article. The weaknesses of the opinion and the constricted constitutional jurisprudence that supports it have been amply reviewed by a number of noted scholars. In addition, some recent commentary has focused on the application of *DeShaney* to relatively narrowly defined topics. *See* sources cited *infra* note 108. The broad outlines of liability after *DeShaney* remain unexplored and unexplained. My aim here is to place *DeShaney* in context, to examine its continuing impact on the entire range of indirect harm cases, to set forth a framework for analysis of these cases, and to identify an area where reform might reasonably be sought.

emerged. Under the first, which focuses on state inaction, liability turns on whether the plaintiff was in custody. The second, which focuses on state action, requires examination of the relationships between the state action, the harm, and the victim. Even the seemingly straightforward inaction/custody analysis has generated a range of conflicting opinions among the circuits. The second and more complex analysis has yielded a substantial number of elaborate and often fragmented opinions, but has failed to produce any coherent view of the rules governing liability.

In Section III, I propose a framework for considering indirect harm claims that promotes clarity and the recognition of constitutional rights and is also consistent with existing Supreme Court precedent. My framework divides indirect harm cases into five basic categories. Although the parties may contest the categorization of a case, once a case is categorized, the legal analysis should be relatively clear. For cases falling into the first two categories, there are viable theories of liability. Cases that fall into the third category are foreclosed by *DeShaney's* substantive due process analysis. In many of these cases, liability is both desirable and appropriate. It is in this area that the law most needs reform. I outline three alternative routes by which this reform could be accomplished: (1) expansion of an existing, but presently limited, exception to *DeShaney*; (2) increased reliance on state law; and (3) adoption of new legislation specifically crafted to address this problem.[9] The fourth and fifth categories present their own peculiar problems; liability in these instances is very doubtful.

In the concluding section of this Article, I recapitulate my proposals for organizing the legal treatment of claims for indirect harm and for remedying the most acute deficiency of existing law. In doing so, I identify a course for future inquiry, exploration, and action.

I use the complex process by which lawyers shape their clients' stories into narratives, and the ways in which this process is shaped by—and in turn shapes—the law as a touchstone throughout this

9. *See infra* text accompanying notes 92-101. It seems unlikely that *DeShaney* will be overruled or significantly undermined in the near future, given the shifts in the Court's composition since *DeShaney*. The Court appears to have moved ideologically to the right since the opinion was published. Justices Brennan and Marshall have been replaced by Justices Souter and Thomas, respectively. Justice Blackmun has recently intimated that his tenure is limited. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2854 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I am 83 years old. I cannot remain on this Court forever . . . ."). Justices Brennan, Marshall, and Blackmun were the dissenters in *DeShaney*. Even with the replacement of Justice White by Justice Ruth Bader Ginsburg, the *DeShaney* majority appears to be well in control of the Court.

Article.[10] Lawyers routinely transform multi-dimensional client stories into focused narratives that can be told in court.[11] A client's story can be presented as many cases, some of which may win, while others will probably lose.[12] Presenting a successful case depends on a lawyer's awareness of the multiplicity of possible cases that could be developed from a client's story, as well as on a refined understanding of the law.[13] The evolution of the law from *Estelle* through *DeShaney* to our present circumstances did not happen overnight, nor is it attributable to the forces of nature. Law does not develop by chance. Thus, throughout this Article, I explore the dynamics that shaped the litigation that shaped the law.

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10. The Article's focus on this process is at least in part attributable to my own experience as a civil rights litigator. I have engaged in this process of translation and transformation in countless cases. In hindsight, I see this as a much more complex and problematic process than it appeared to me at the time. It is also the focus of thought-provoking scholarship. *See* sources cited *infra* note 11.

11. The process by which lawyers translate their clients' stories into legal cases and the troubling implications and ramifications of that process is the subject of much current scholarship. *See, e.g.*, Anthony V. Alfieri, *Reconciling Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Learning Lessons*]; Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text, Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) [hereinafter Cunningham, *Lawyer as Translator*]; Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer/Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L. J. 861 (1992); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1605 (1989); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Sunday Shoes*]; *see also* JAMES BOYD WHITE, JUSTICE AS TRANSLATION 257-69 (1990).

12. More accurately, there may be several winning cases and several losing cases contained in any client's story. Further, I do not mean to suggest that simply by selecting a particular version of the story, the lawyer determines whether she will win or lose. The lawyer's choice of story, however, may dramatically alter the chances of success.

13. A lawyer must also recognize which stories will have the power to move a judge and/or jury and which will not. Thus, a litigator must also have an awareness of the persuasive power of different versions of the story. For works exploring the manner and ethics of persuasion, see JAMES BOYD WHITE, HERACLES' BOW 3-27, 215-37 (1985); Joseph W. Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989); Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195 (1993); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

II. HISTORY AND DEVELOPMENT

As noted above, the cases that raise the problem with which I am concerned arise in a wide variety of factual settings—in prisons, in hospitals, in schools, in families, and in all of the more ordinary settings of everyday life. Yet while they involve widely varying and often curious facts, they share a significant common trait. Unlike more traditional section 1983 claims, where the immediate cause of the harm is the state action giving rise to the complaint, in these cases the most immediate cause of the harm is independent of the state. Instead of claiming that an officer of the state used unreasonable force against the plaintiff or directly deprived the plaintiff of a constitutionally protected property interest without due process, these plaintiffs allege that they were injured by an intervening third party, by external conditions, or even by their own actions.[14] Nevertheless, they assert that the state bears legal responsibility for the indirect harm. Given this common and defining characteristic of the cases with which I am concerned, I call them "indirect harm" cases.

Although this denomination is both apt and useful, it is worth noting that it has not always been the most commonly used. Particularly during the early development of litigation in this area—from 1976 to 1987—plaintiffs generally contended that by virtue of the Constitution, and particularly the Fourteenth Amendment, the state had a duty to protect them from harm caused by sources independent of the state. Naturally enough, courts and commentators often framed the issue in these cases as whether there was a "duty to protect."[15]

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14. For example, in Joshua DeShaney's case the immediate cause of his harm was his father, who was certainly not a state actor. In other cases, the injury to the plaintiff was immediately caused by unknown assailants, by disease or injury, by fire, or—in perhaps the most startling cases—by the plaintiff's own suicidal actions.

15. *See, e.g.*, Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985) (holding that plaintiff stated civil rights claim when agency returned abused child to mother and child later died of abuse; agency did not adequately investigate situation to which it returned child); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984) (holding that social service agencies alleged to have violated children's civil rights by failing to protect them were entitled to good faith immunity where, at time of the alleged violation, constitutional right of affirmative protection was not clearly established); White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979) (finding duty of protection in state and local agencies where persons were not in custody; court reversed dismissal of claim that alleged that police subjected children passengers to "health-endangering situation" by abandoning them); Julie Shapiro, *Litigating Duty to Protect Cases*, *in* 3 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 53 (Jules Lobel & Barbara Wolvovitz eds., 1987); Lisa E. Heinzerling, Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986).

The shift from "duty to protect" to "indirect harm" represents more than a change in taxonomy.[16] While some duty-to-protect cases highlighted the actions of the state, generally the cases were presented as claims challenging state inaction. Most courts analyzed them as claims that the state had a duty to act and failed to act. The common question these cases raised was: When did the Constitution mandate that the state take action, so that inaction itself became actionable?[17]

As I discuss below, the identification—or perhaps, in hindsight, misidentification—of indirect harm cases as duty-to-protect cases had a profound impact on the current shape of the law in this area. It is the Supreme Court's broad rejection of liability based on an asserted duty to protect in *DeShaney* that has most dramatically defined current law. At the same time, from the perspective of an outside observer, this identification—an identification in part accomplished by plaintiff's attorneys—must seem perverse, for it is widely recognized that the Anglo-American legal tradition is generally hostile to claims based on assertions of inaction. In order to understand this paradoxical development, it is necessary to retrace the development of this line of cases, beginning with the first Supreme Court opinion that recognized constitutional liability for indirect harm in 1976.

A. Estelle v. Gamble

In *Estelle v. Gamble*, the Supreme Court upheld the constitutional claim of J.W. Gamble, a convicted prisoner who alleged that the state had failed to provide him with proper medical care, thereby

16. Duty-to-protect cases are, in fact, a subset of indirect harm cases, comprised of those indirect harm cases in which the plaintiff (or the court) is relying on a particular theory of liability similar to that enunciated in *DeShaney*. All indirect harm cases could be conceptualized as duty-to-protect cases. I will show, however, that indirect harm cases can also be conceptualized in other ways. *See infra* text accompanying notes 47-48, 145-232.

I use "duty to protect" to identify those cases premised on the theory of liability advanced by the plaintiffs in *DeShaney*—that the state, because of its inaction, should be liable for failing to protect an individual. I use "indirect harm" to identify the general category of cases with which I am concerned.

17. I do not mean to suggest that there is a sharp distinction between action and inaction. Before *DeShaney*, however, indirect harm cases were usually litigated as cases of inaction, and *DeShaney* and many other opinions rely on a distinction between action and inaction. Once a case is conceptualized as a duty-to-protect case, it is necessarily focused on the state's failure to act to fulfill that duty. The plaintiffs in *DeShaney* did not contest this designation; instead, they voluntarily assumed it and argued that inaction was, under their circumstances, actionable. *See infra* text accompanying notes 78-92.

subjecting him to cruel and unusual punishment.[18] The Court concluded that the Constitution is violated—and that liability can be imposed—when a state actor manifests "deliberate indifference to a prisoner's serious illness or injury."[19] The grounding for this decision, which was relatively noncontroversial at the time[20] and remains so even today,[21] was the Eighth Amendment.[22] The Court reasoned that a prisoner is obliged to rely on the state for medical care, that failure to provide medical care might result in unnecessary pain and suffering, and that unnecessary pain and suffering constitutes cruel and unusual punishment, which is expressly forbidden by the Eighth Amendment.[23] In order to fulfill the commands of the Eighth Amendment, the state is affirmatively obligated to provide medical care to prisoners, at least under certain circumstances.[24] In other words, given the particular relationship (custodial) between the individual and the state, there is a constitutional duty on the part of the state to provide medical care to protect a prisoner against

18. 429 U.S. 97, 101, 104-05 (1976). The Court rejected Gamble's claim against the particular doctor, but upheld the basic theory of the claim and remanded to the court of appeals for further consideration of whether a cause of action had been stated against other prison officials. *See id.* at 106-08.

19. *Id.* at 105.

20. Contemporary commentators did not question *Estelle's* grounding of the right to prison medical care in the Eighth Amendment. *Estelle* was seen, however, as a broadening of prisoners' rights. This was consistent with the trends established in the federal circuit courts and in the Supreme Court at the time. The only commentators who considered *Estelle* controversial expressed concern that the requirement of deliberate indifference on the part of prison officials would prove to be a major obstacle to practical relief. *See, e.g.*, Emily Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219, 244-46 (1977) (stating that *Estelle* represents broadening of constitutional rights to prisoners, but then erects substantial barriers in form of requirements for physical pain and subjective intent of prison officials); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 771-72 (1978) (stating that *Estelle* represents *sub rosa* recognition of government's interest in controlling costs in formulating constitutional standards and criticizing the decision for limiting government's affirmative duties to narrow context (prison), while articulating high standard (deliberate indifference) that creates no practical obligation on states to improve prison facilities); Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 922 (1977) (asserting that Court's amorphous constitutional standard of "deliberate indifference" is product of both limits of historical treatment of Eighth Amendment and fear of creating constitutional tort of medical malpractice, as well as suggesting that meaningful standard requires closer scrutiny).

21. *See, e.g.*, Helling v. McKinney, 113 S. Ct. 2475 (1993) (affirming, through a seven-member majority, essential principles of *Estelle*). *But see id.* at 2483-85 (Thomas, Scalia, JJ., dissenting) (strongly suggesting that *Estelle* is incorrect and should be overruled).

22. *Estelle*, 429 U.S. at 104. The Eighth Amendment provides, in relevant part, that "cruel and unusual punishment [shall not be] inflicted." U.S. CONST. amend. VIII.

23. *Estelle*, 429 U.S. at 103-05.

24. *Id.*

unnecessary suffering caused by disease or injury.[25] In short, *Estelle* recognized that the Eighth Amendment imposes, at least in some cases, an affirmative duty to protect upon the states. Liability in any particular case is predicated on the state's inaction; that is, its failure to protect the individual in its custody from harm.

In the litigation that followed, plaintiffs' lawyers sought to expand *Estelle*'s holding in two different directions. First, it was apparent that if the Eighth Amendment requires some protection against injuries caused by untreated injury or disease, it might also require protection against harms occasioned by other independent sources. Suffering caused by deliberate indifference to personal safety, for example, was indistinguishable from suffering caused by disease. Holdings soon established that, at least in some instances, prisoners could maintain actions for deliberate indifference to threats to their safety.[26] This extension of *Estelle* was relatively unproblematic and was limited to those individuals who could invoke the Eighth Amendment.

The second direction in which *Estelle* expanded ultimately proved to be far more troublesome. If the state had a duty to provide medical care to individuals who were in state custody because they had been convicted of crimes, it seemed unreasonable not to impose a similar duty to provide care for individuals who were in state custody awaiting trial. To illustrate, suppose there were two prisoners with identical physical needs sharing a cell, one proven guilty and the other a pretrial detainee presumed to be innocent. A rule of law that required medical attention for the convicted prisoner, but not for the innocent detainee, was unacceptable. The only acceptable legal conclusion was that the pretrial detainee had to have at least the same rights to medical care as the convict.[27] The question for

25. *See id.*

26. *See, e.g.*, Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (assault by guard); Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978) (assault by fellow mental patients or staff). A number of courts have recognized that this encompasses threats posed by the prisoner himself. Thus, a viable cause of action can be stated for deliberate indifference to the possibility of suicide or other self-inflicted injuries. *See, e.g.*, Elliot v. Cheshire County, 940 F.2d 7 (1st Cir. 1991) (holding that father of detainee who committed suicide could state cause of action against correction officials if jail personnel knew or reasonably should have known of detainee's suicidal tendencies); Buffington v. Baltimore County, 913 F.2d 113 (4th Cir. 1990) (holding that state may have affirmative due process obligation to prevent detainee from committing suicide, even though detention was at request of family members and not the result of any criminal violation).

27. Indeed, it was arguable that the pretrial detainee had greater rights than the convicted prisoner. The Supreme Court has not resolved this question. Although most courts acknowledge that they are operating under the Fourteenth Amendment, many appellate opinions use Eighth Amendment standards for cases involving pretrial detainees. *See, e.g.*, Davis v. Hall, 992 F.2d 151, 153 (8th Cir. 1993) ("In the absence of a

the court would be not so much what conclusion should be reached in this instance, but rather by what reasoning the conclusion should be reached.

One possible approach would have been to apply the Eighth Amendment to prisoners generally. This possibility, however, was quickly foreclosed. During the same term that *Estelle* was decided, the Supreme Court limited the application of the Eighth Amendment. In *Ingraham v. Wright*, the Court rejected a claim that the Eighth Amendment applies to schoolchildren subjected to corporal punishment.[28] The Court found that schoolchildren and prisoners stand in "wholly different circumstances, separated by the harsh facts of criminal conviction *and* incarceration."[29] The Court continued that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."[30] Two years later, the Court confirmed what *Ingraham* had strongly suggested: the Eighth Amendment does not apply to pretrial detainees, either. In *Bell v. Wolfish*, the Court held that the Eighth Amendment guarantees become relevant only after criminal prosecution and conviction.[31]

Having eliminated the Eighth Amendment as the source of the constitutional duty to protect citizens held in custody but not convicted of any crime, the Court was left with little alternative but to invoke the relatively flexible terms of the Fourteenth Amendment. In *Youngberg v. Romeo*[32] and *City of Revere v. Massachusetts General Hospital*,[33] the Court recognized that the Due Process Clause of the Fourteenth Amendment imposes an affirmative duty on states to protect people in their custody from harm.

Romeo, in which the Court recognized a constitutional right to protection in the Fourteenth Amendment, had far reaching consequences. Nicholas Romeo was a profoundly retarded adult who had been involuntarily committed to a state hospital when he could no

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clearly established standard for pretrial detainees' claims of inadequate medical care, we apply the deliberate indifference standard in the analysis of this case."); Garcia v. Salt Lake County, 768 F.2d 302, 307 (10th Cir. 1985) (assuming, without deciding, that rights of pretrial detainees under Fourteenth Amendment are same as prisoners under Eighth Amendment); *see also* Cooper v. Dyke, 814 F.2d 941, 949 n.6 (4th Cir. 1987) ("[T]he 'deliberate indifference standard' is applicable to pretrial detainees under the Fourteenth Amendment.").

28. 430 U.S. 651 (1977).

29. *Id.* at 669 (emphasis added).

30. *Id.* at 671 n.40 (citing United States v. Lovett, 328 U.S. 303, 317-18 (1946)).

31. 441 U.S. 520, 535 n.16 (1979).

32. 457 U.S. 307 (1982).

33. 463 U.S. 239 (1983) (holding that city is liable for medical services rendered to suspect injured by police when they tried to apprehend him).

longer be cared for at home.[34] Romeo was injured on a number of occasions while he was institutionalized, both by his own violence and that of other residents.[35] He sued the state, alleging, *inter alia*, that it had breached its duty to protect him from himself and from others and had violated his rights under the Fourteenth Amendment.[36] A unanimous Supreme Court agreed. In accepting Romeo's claim that the state had a duty to protect him from danger, it reasoned that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[37] While the conclusion is clearly sound, the opinion provides no analysis of how the right originally grounded in the Eighth Amendment could also be derived from the Due Process Clause. Further, it does not provide any basis for understanding the dimensions of the right protected by the Fourteenth Amendment.

Recognition of an affirmative obligation to act arising under the Fourteenth Amendment opened new possibilities. Even before *Bell v. Wolfish*, it was clear that the Eighth Amendment was of limited scope because it prohibits cruel and unusual *punishment*. It had been relatively easy for the Court to limit its application to those convicted of a crime. By contrast, application of the Fourteenth Amendment could be argued in a vast array of circumstances. There was no obvious cut-off point. There was no historical or doctrinal reason why a right founded on the Fourteenth Amendment should apply only to those in custody. By careful analogy, litigators could argue that the relationship between their clients and the state was enough like that between Nicholas Romeo and the state that their clients too had a right to protection. Cases asserting a duty to protect outside of custodial settings thus began to appear.

B. Martinez v. California *and the Rise of the Duty to Protect*

Four years after *Estelle*, *Martinez v. California* was decided.[38] At the time, the case was not associated with *Estelle*, and the Court and counsel approached the question of liability from an entirely different direction.

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34. *Romeo*, 457 U.S. at 309.

35. *Id.*

36. *Id.* at 310.

37. *Id.* at 315-16.

38. 444 U.S. 277 (1980).

Mary Ellen Martinez was a fifteen-year-old girl murdered by a recklessly released parolee.[39] Her family sued the state officials who had decided to parole him.[40] In addition to a state-law claim that failed because of a statutory grant of immunity, the plaintiffs presented a section 1983 claim that the decedent was deprived of life in violation of the Fourteenth Amendment.[41] The plaintiffs' principal constitutional theory was not that the state was obliged to protect Martinez and failed to do so, but rather that the action of the state in releasing the parolee caused the harm suffered and therefore deprived the victim of life without due process of law.[42]

The Supreme Court rejected the plaintiffs' due process claim. The Court found that the victim's death was "too remote a consequence of the parole officers' action to hold them responsible under federal civil rights law."[43] Whether, as a matter of state tort law, the defendants owed the victim any duty or proximately caused the harm was deemed irrelevant for the purpose of assessing the constitutional claim. Instead, the Court specifically identified several factors that contributed or combined to lead to the plaintiffs' failure to state a claim: the victim was not murdered until five months after the parolee's release, the parole board was not aware of any particular danger to the victim—as opposed to the public generally—and the parolee was in no sense an agent of the parole board.[44] These factors supported the Court's conclusion that the harm was too attenuated under the facts alleged.

Even as it rejected the plaintiffs' claim, the Court left open the possibility of liability under different facts. It suggested that under the Fourteenth Amendment the state could, given the right circumstances, be liable to a plaintiff not in custody for harm that was not directly caused by a state actor.[45] This, of course, was consistent with the contemporaneous developments in the *Estelle* line of cases. Because, however, the Court had rejected reliance on state law gov-

39. *Id.* at 279. The victim is unnamed in the Supreme Court's opinion. Thus, she is hardly a powerful figure in the Court's narrative account of the case.

40. *Id.*

41. *Id.* at 279, 283.

42. *Id.* at 283-84.

43. *Id.* at 285.

44. *Id.* (citing, for comparison purposes, Scheuer v. Rhodes, 416 U.S. 232 (1973), which had held that immunity of officers of executive branch of state government for their acts is not absolute, but qualified and of varying degree, depending upon scope of discretion and responsibilities of particular office and circumstances existing at time challenged action was taken).

45. *Id.* Specifically, the Court stated: "We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." *Id.*

erning duty and causation, the terms of this liability would have to be determined on the basis of some body of federal common law.[46]

1. *Martinez* and *Estelle* Together

No connection was drawn between *Martinez* and *Estelle* at the time *Martinez* was litigated. *Estelle* is not cited in the petitioners' briefs before the Supreme Court or in the Supreme Court's opinion.[47] Upon examination, however, it is clear that *Martinez* and *Estelle* represent two possible approaches to the same problem. The common concern is the application of the Fourteenth Amendment to claims for indirect harm. *Estelle* and *Martinez* frame and analyze this problem in two different ways: *Estelle* as a problem of state inaction, and *Martinez* as a problem of state action.

Estelle focused on a relatively narrow frame of reference, limited in time to the period shortly before the harm occurred and limited in space to the immediate setting of the injury. The narrative began with Gamble already in prison. In that narrow frame of reference, there was no explicit state action. Instead, there was the state's consistent inaction in the face of Gamble's complaints. The problem was described as one concerning an untreated injury that the state ignored. The basis of liability is the state's inaction.

By contrast, *Martinez* employed a much broader frame of reference. The narrative began five months before the murder—at the parole board's meeting where the defendants decided to release the parolee. In that frame of reference, there is state action—the decision to release the prisoner—and so the case assumed a more traditional cast. The relevant inquiry was whether the action, in some meaningful sense, caused the right kind of harm.

It is easy to re-conceptualize *Estelle* as an action case or *Martinez* as an inaction one. In *Estelle*, we could widen the time frame to extend to the state's action in incarcerating the prisoner, thereby cutting him off from all other sources of aid. The plaintiff could then argue

46. At least two different readings of the Court's dismissal of state law principles of duty and causation are plausible. It could be understood as a direction to federal courts to develop their own principles of duty or causation, a new branch of federal common law. It could also be interpreted more generally as a direction that analyses based on concepts of duty and causation are inappropriate and that the correct approach is to focus on whether the state could be fairly said to have "deprived" the plaintiff of life or liberty. Ultimately, it has proved difficult for courts attempting to consider the meaning of "deprived" to avoid using the language of causation and duty.

47. It is cited in the appellees' brief in support of the state's argument that *Estelle* required proof of deliberate indifference, rather than simply a deviation from professional judgment, to establish liability under § 1983 liability. Brief for Appellees at 64-65, Martinez v. California, 444 U.S. 277 (1980) (No. 78-1268).

that this action indirectly caused the harm.[48] Similarly, in *Martinez*, we could narrow the focus to the time period immediately preceding the attack upon the plaintiff. Because no state action is apparent in that time frame, the plaintiff would have to argue that there was liability because the state had an obligation to take action to protect *Martinez* and that it failed to fulfill that obligation. Thus, *Estelle* and *Martinez* exemplify alternative approaches to the same problem: the problem of constitutional liability for indirect harm.

2. From *Martinez* and *Estelle* to *DeShaney*

As indirect harm cases were litigated through the late 1970s and into the early and mid-1980s, lawyers and judges had to choose between these two approaches as they shaped their narratives and determined the law. The initial choices were made by the lawyers—typically the plaintiff's lawyer.[49] Defense attorneys developed competing theories governing duty-to-protect cases in order to respond to plaintiffs.

As a practical matter, in many cases there may have been no real choice. If a case concerned an escaped or paroled prisoner, it was virtually inevitable that it would be analyzed under *Martinez*. If it concerned a prisoner in state custody, *Estelle* would be the controlling precedent.[50] It was the cases that were not precisely like either *Estelle* or *Martinez*—cases that involved plaintiffs who were more closely involved with the state than Mary Ellen Martinez, but not as closely as J.W. Gamble—that presented an opportunity for a real choice. Frequently one or the other option seemed more natural, usually because the factual analogy between one of the precedents and the potential case was more immediately apparent. But, to a large extent, it was the way that the lawyers shaped their narratives that determined which option seemed more appropriate. It is here

48. This is precisely how Justice Rehnquist reinterpreted *Estelle* in the Court's subsequent opinion in *DeShaney v. Winnebago County Department of Social Services*, as he sought to demonstrate that prior opinions supported liability only in cases of state action. 489 U.S. 189, 198-200 (1989); *see also infra* notes 98-99 and accompanying text. It is not, however, consistent with the original analysis in *Estelle*.

49. Of course, it may not have been initially apparent to all lawyers and judges that there were two different approaches from which to choose. Their choices may not always have been conscious ones.

50. While Federal Rule of Civil Procedure 8(e)(2) provides that it is permissible to litigate on the basis of alternative theories, it is very difficult to do so in practice, or at least not beyond a certain point. A number of complaints undoubtedly included allegations both that the state failed to protect the plaintiff and that the state's action harmed the plaintiff. For presentation to a jury or to a judge, and often even at an early stage of litigation, the plaintiff's attorney must be able identify and isolate the conduct that is deemed to be blameworthy.

that an understanding of the process by which litigation evolves becomes crucial.

a. The Process of Litigation

A plaintiff's lawyer seeking relief for a client may need to develop new theories of recovery, but she does not simply craft a legal theory or construct a case out of thin air. She begins with two elements—the story her client tells her and the existing legal precedents. Through the litigation process, a lawyer shapes and develops a client's story to construct a complex narrative—a version of the plaintiff's story that entitles the plaintiff to recovery under existing, or possibly new, law. In constructing this narrative, she must use the tools at hand to fashion her cases into a form that, in her estimation, is a faithful translation of the client's story, is consistent with the client's wishes, and has a reasonable—if not the best possible—chance of success in a court of law.[51]

This requires the intricate exercise of professional judgment, creativity, and persuasion. Many factors shape the construction of legal cases from clients' stories. First, it is, of course, the *client's* story. The extent to which the lawyer can or should alter that story must depend in large part on the client's desire or willingness to have her story altered.[52] Beyond that, there are many technical issues that constrain the lawyer's craft. For example, although each client's story may be retold in a variety of different ways, the ways in which it can be told in a court are more limited. A lawyer ultimately must be prepared to prove her client's case and, hence, is constrained by the evidence available and by the rules governing admissibility of evidence. Some versions of the narrative—versions a lawyer may judge to be highly effective—may be unprovable and therefore cannot be told in court.

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51. This cursory description is a vast over-simplification of a complex process that is crucial to the operation of our legal system. Recently, scholars have turned their attention to this process. Many have found it problematic. *See* sources cited *supra* note 11.

52. In practice, many lawyers may pay inadequate attention to the wishes of their clients in their efforts to construct a winning case. Even where lawyers are sensitive to the problems present in the attorney/client relationship, the lawyer's role as translator may nevertheless alter the client's story in ways that can be troubling. *See* Alfieri, *Learning Lessons*, *supra* note 11, at 2111; Cunningham, *Lawyer as Translator*, *supra* note 11, at 1301 n.12; Gilkerson, *supra* note 11, at 872; White, *Sunday Shoes*, *supra* note 11, at 8. At the same time, in my own experience, some clients are willing and even eager to have their stories transformed, or at least parts of their stories transformed, if it will make it more likely that their cases will be successful. *See* Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 984-85 (1992).

Even after the client has been consulted and the available evidence has been identified, the lawyer still faces a multiplicity of choices about the narrative she wants to present. At this point, she may consider such diverse factors as the strength of various witnesses and/or the narrative force and coherence of competing versions of the story in making the choices that result in the production of a single story.

Throughout this process of constructing the narrative that might eventually be presented to the judge or jury, an advocate must be concerned not only with the development of the facts, but also with the relationship between the facts and the law.[53] The existing framework of legal analysis dictates that some versions of the case have a greater chance of success than others. For lawyers pursuing claims which we may now recognize as indirect harm cases, *Estelle* and *Martinez* were the most influential precedents. Predicting the application of these precedents to their cases guided lawyers in shaping and forming their claims.[54]

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53. *See* Gilkerson, *supra* note 11, at 911-14.

54. All of these choices take place within the particular process of litigation. The first formal stage of the litigation is the filing of the complaint, which is merely "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The complaint serves two different functions in the development of the narrative. First, it sets out the essentials of the plaintiff's story. Second, it provides the raw material from which richer and more complex narratives will be constructed by both parties.

The complaint itself is rarely, if ever, a compelling narrative. The rules of pleading and good pleading practice are at odds with the techniques of effective storytelling. For example, the Rules require that "[e]ach averment of a pleading shall be simple, concise and direct." FED. R. CIV. P. 8(e)(1). The Rules also strongly suggest (and sound practice generally dictates) that each paragraph of a pleading should contain only one fact. *See* FED. R. CIV. P. 10(b). Similarly, each paragraph (i.e., each sentence) of a pleading must fairly stand alone so that it can be admitted or denied. Additionally, pleadings cannot contain language considered to be impertinent or scandalous. FED. R. CIV. P. 12(f). Because few lawyers are capable of producing the simple yet powerful prose of a Hemingway, a well-drafted complaint is often dry, unemotional, and oversimplified. It does, however, constitute a basic presentation of the plaintiff's story.

In the course of civil litigation, each side develops a series of more complex narratives, all leading toward one that may eventually be presented to a jury or a judge. These narratives appear in briefs under the heading "Facts of the Case" and are often presented in opening and closing statements. At the earliest stages of the litigation, these narratives are based entirely on the complaint. In contesting a motion to dismiss, for example, both the plaintiff and the defendant must construct narratives drawn only from the allegations of the complaint. Typically, these bare facts support two distinctly different narratives. The same phenomena may occur at summary judgment. Each side works, at least in large part, with the same uncontested facts; from those same facts, however, each side constructs its own narrative. The process of litigation is one of constantly refining, reforming, and retelling stories, with ultimately the judge deciding whether a case proceeds and on what theories it may be grounded.

In the years after *Estelle*, many section 1983 indirect harm cases were not governed by clearly established Supreme Court precedent. On the developing edge of the law, judges were largely free to rule for plaintiffs or for defendants.[55] But the general approach of their analyses, like those of the lawyers, was essentially determined by the preceding cases. For the participants in the litigation of indirect harm cases, lawyers and judges alike, the form of their arguments and the controlling analogies were determined in large part by the starting points of the line of cases—*Estelle* and *Martinez*.

In reviewing the results of the earliest indirect harm cases, it is apparent that cases modeled on *Estelle* met with greater success than those patterned on *Martinez*,[56] although this success was by no means uniform.[57] The underlying assertion that a failure to act

55. Many § 1983 defendants, including those in indirect harm claims, raise a qualified immunity defense. Qualified immunity defeats an otherwise valid § 1983 claim where the governing law was not clearly established at the time of the underlying actions. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

For a time, the absence of any clearly established law threatened to halt the development of law in this area because of the approach to the qualified immunity defense utilized in some circuits. Until 1991, some courts evaded the need to resolve novel constitutional questions presented in § 1983 cases by reasoning that, even assuming the existence of any constitutional right, it was certainly not a clearly established right and, hence, the defendant was entitled to prevail on the basis of qualified immunity. This allowed the court to dismiss the case without deciding its merits. The constitutional right at issue was no more clearly established at the end of the case than it had been at the beginning. This could have continued indefinitely and no additional rights would ever become clearly established. In 1991, however, the Supreme Court specifically disapproved this decisional process and directed the lower courts to decide the substantive questions of liability before the qualified immunity questions. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991). It is regrettable that despite the Supreme Court's direction, some courts persist in deciding cases on qualified immunity grounds instead of determining whether a constitutional claim is presented. *See, e.g.*, Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993); Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993) (holding no clearly established right without deciding whether there was any violation of the Constitution); Hilliard v. City & County of Denver, 930 F.2d 1516, 1519 (10th Cir.) (same), *cert. denied*, 112 S. Ct. 656 (1991).

56. *See, e.g.*, Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) (dismissing plaintiff's § 1983 claim against parole officers who knew that felon had violated parole, but allowed him to remain free, reasoning that felon's acts of violence against plaintiff did not constitute deprivation of due process); Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981) (using deliberate indifference standard of *Estelle*, holding that placement agency's nonperformance of duties was sufficient to give rise to § 1983 cause of action); White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Wagar v. Hasenkrug, 486 F. Supp. 47 (D. Mont. 1980) (denying defendant's motion to dismiss where plaintiff's decedent, found by police wandering streets in intoxicated state, was not taken into custody, but instead left outside under tree).

57. *See* Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986) (finding no § 1983 liability where undercover officers failed to intervene in bar-room fight that developed into shootout in which innocent bystander was killed).

could be actionable—that under some circumstances the Constitution gave rise to an affirmative duty to protect—was widely accepted.[58] The questions in duty-to-protect cases focused on whether the circumstances alleged were the right sort of circumstances and, if they were, whether the defendants acted with the requisite state of mind.[59] As an increasing body of cases articulating the right sort of circumstances developed, it became easier for plaintiffs to find supportive precedents. Lawyers developing cases could draw on these precedents to guide them in shaping and forming their claims.

Plaintiffs whose cases rested on facts that bore an obvious resemblance to *Martinez*—that is, those most likely to focus on action—fared far worse. Virtually all of them were unsuccessful.[60] Given a variety of fact patterns, the courts of appeals consistently concluded that the state action was too attenuated from the harm. Precedents supporting imposition of liability for indirect harm in cases where the plaintiff alleged that the blameworthy conduct was action—rather than inaction—were few and far between. A plaintiff who chose to relate a narrative of action rather than inaction would be

58. *See, e.g., id.* at 268; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978); *Wagar*, 486 F. Supp. at 53.

59. *See infra* note 141.

60. *See, e.g.*, Janan v. Trammell, 785 F.2d 557 (6th Cir. 1986) (finding no liability where defendants failed to reincarcerate parolee after he committed various parole violations and before he killed plaintiff's decedent); Jones v. Phyfer, 761 F.2d 642 (11th Cir. 1985) (finding no liability where defendants released a criminal on furlough who subsequently raped plaintiff, whose home he had broken into on several prior occasions); Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983) (finding no liability where plaintiff was raped by unknown assailant, despite allegation that defendants were aware of other rapes in same area and suppressed information); *Fox*, 712 F.2d at 84 (finding no liability where defendants failed to supervise and re-incarcerate parolee who was released April 12 and committed various crimes known to defendants before crime against plaintiffs on May 14); Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983) (finding no liability where plaintiff was raped by inmate after his transfer to corrections facility that allowed inmate greater freedom); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) (finding no liability where defendants released mental patient who, one year later, murdered plaintiff's decedent). *But see* Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (en banc). In *Nishiyama*, the plaintiffs' decedent was murdered by a prisoner who was allowed to drive a fully equipped police car back to the jail after dropping a deputy off at his home. *Id.* at 279. Instead of returning to jail, the prisoner used the police car to pull over citizens driving in the area. *Id.* After this conduct had been reported to the local officials, who took no action, he pulled over and killed Nishiyama. *Id.* Even on these seemingly extraordinary facts, the trial judge dismissed the complaint, holding that the harm was too attenuated from the state's action. *Id.* The complaint was reinstated, but only by a 7-6 vote of the en banc Sixth Circuit, which reasoned that the state's acting in supplying the equipment needed to commit the crime provided a basis for distinguishing *Martinez*. *Id.* at 281.

forced to distinguish many precedents and would find little support in previously decided cases.

Taken together, the lesson of the appellate cases was fairly clear: those cases that were litigated like *Estelle*—that focused on inaction and a duty to protect—were more likely to be successful than those that were litigated like *Martinez*. At least the plaintiff could point to precedents that supported liability. It is improbable that the lesson was lost on litigators. Surely lawyers prefer to litigate where there are supportive precedents, and thus the chances of success are greatest. Therefore, plaintiffs' attorneys would prefer cases that bore a resemblance to *Estelle* and *Romeo* rather than to *Martinez*. And in litigating cases that were not obviously like *Estelle* or *Martinez*, but that bore the potential of resembling either, they were likely to develop their cases so that they resembled *Estelle* rather than *Martinez*.

Perhaps this is speculative. Certainly it is counterintuitive, given the Anglo-American tradition of hostility to assertions of liability based on a failure to act. But, in fact, the reported cases employed the analysis and language of *Estelle*, emphasizing the failure of the state to take some action and the relationship between the plaintiff and the state, perhaps comparing it to custodial relationships. Plaintiffs consistently structured their narratives around an assertion of state inaction, and the results in these cases increasingly turned on the question of whether, under the particular circumstances presented, there was an affirmative duty to act. Cases patterned on the assertions of action that characterized *Martinez* virtually vanished from the field.

This is not to say that *Martinez* had no utility as a precedent. *Martinez* was employed to support the contention that the duty to act was not limited to prisoners. Additionally, it was employed to identify some factors that were arguably relevant to the determination of whether a duty to act existed. As is noted above, the circumstances giving rise to *Martinez* and *Estelle* are two different variants of the same problem—the problem of indirect harm. Initially the cases presented very different approaches to this problem, but over time this changed. In discussing *Martinez* and *Estelle*, courts gradually lost sight of the distinction that *Martinez* conceptualized: the problem as one of an action giving rise to the harm, while *Estelle* spoke of a failure to act that caused the harm. All indirect harm cases came to be seen as duty-to-protect cases, where the crucial question was whether the state had an affirmative obligation to act.

Martinez and *Estelle* could both have been portrayed as either state action or state inaction cases. Perhaps because *Estelle* preceded *Martinez* in time, or perhaps because plaintiffs' lawyers pressed develop-

ment of *Estelle*-like cases and eschewed the *Martinez* arguments, *Martinez* became an inaction case.[61] The prevalent form of analysis in indirect harm cases—by then seen to be duty-to-protect cases—focused on the relationship between the plaintiff and the state and the claim that the relationship gave rise to an affirmative duty to act on the part of the state. Courts viewed the facts of each new case through this lens, characterizing plaintiffs' claims as ones for entitlement to protection and characterizing government conduct as inaction, even where the plaintiff had presented the case in other terms.[62]

b. Divergent Paths

In time, two divergent strands of appellate case law governing duty-to-protect claims developed.[63] The more expansive analysis, typified by the United States Court of Appeals for the Third Circuit's approach in *Estate of Bailey v. County of York*,[64] recognized the existence of affirmative duties where there was a "special relationship"[65] between the state and the plaintiff. In defining what constituted a "special relationship," the Third Circuit drew on language

61. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 302 (7th Cir. 1987) (citing *Martinez* as authority for "the fact that state inaction might be deemed a proximate cause of the . . . injury under evolving common law notions"), *aff'd*, 498 U.S. 189 (1989).

62. For instance, the plaintiff's claim in *Wright* was that the police had suppressed information about earlier rapes in the area. *Wright*, 715 F.2d at 1513. Thus, it was not a complaint of inaction, but rather one of action. The court noted the basis of the complaint, but analyzed the case as a duty-to-protect claim, using the inaction framework. *Id.* The court noted that the Constitution does not, absent a special relationship, oblige the state to take action and affirmed the dismissal of the plaintiff's complaint. *Id.* at 1515.

63. The analysis of the process of litigation included above helps explain why judges and lawyers came to conceptualize indirect harm cases as inaction cases that raised questions about the scope of an affirmative duty to protect. *See supra* text accompanying notes 51-62. It does not, however, explain why particular courts answered the questions raised in particular ways in particular cases. Neither does it suggest what answers courts should have reached. These issues are beyond the scope of this Article. My primary concern is to explore how and why the law arrived at particular formulations of the critical issues and how these formulations continue to affect legal doctrine today. For extensive discussions of the normative questions raised by the indirect harm cases, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); *see also* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

64. 768 F.2d 503 (3d Cir. 1985).

65. *Id.* at 510-11. "Special relationship" is terminology borrowed from the *Restatement of Torts*. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373-85 (5th ed. 1984). It serves as a label for those circumstances under which an affirmative duty would be recognized. Thus, virtually all courts would agree that where there was a special relationship, there was an affirmative duty. The more significant question was when should a court find a special relationship

from *Martinez* and from other circuit court opinions.[66] Judge Sloviter recognized that the existence of a special relationship that gave rise to a duty to protect could exist in the absence of custody.[67] The additional factors to be considered included "whether the state had expressly stated its desire to provide protection to a particular class or specific individuals; and whether the state knew of the victim's plight."[68] Applying this test in *Bailey*, the Third Circuit determined that a "special relationship" existed between a child abused by her mother and the social services agency that was aware of the abuse.[69] Given this special relationship, the social services agency's failure to act was a proper basis for liability.

By contrast, the United States Court of Appeals for the Seventh Circuit led the way in developing a series of approaches, all of which were more restrictive.[70] Again, it is critical to note that, consistently, the question posed was whether and when the state could be held liable for inaction. The Seventh Circuit was particularly hostile to claims based on inaction. It made much of the distinction between action and inaction, sharply limiting liability for inaction to narrowly defined circumstances.[71] Various panels described these circumstances in different ways. One panel, for example, determined that "[t]he state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten."[72] An en banc opinion endorsed liability only when the state monopolized a means of rescue or assistance, as it did in

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existed. As discussed in the text, the Third Circuit identified specific factors that were to be used in determining whether a special relationship existed.

66. The court particularly relied on: Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); and Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981). *Bailey*, 768 F.2d at 508-11.

67. *Bailey*, 768 F.2d at 508-11.

68. *Id.* at 509.

69. *Id.* at 508-09.

70. *See* Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986) (finding no duty of prison to protect prison guards, who voluntarily exposed themselves to known danger, from injury or death from rioting inmates); Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (finding no duty of city to provide elementary protective services such as fire protection); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). *But see* White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

71. For the Seventh Circuit, it was crucial that "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *Bowers*, 686 F.2d at 618; *see* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); *see also Jackson*, 715 F.2d at 1200. For a more extensive discussion of *Jackson*, see *infra* text accompanying notes 188-96.

72. *Walker*, 791 F.2d at 511. This explained why prisoners were entitled to claim a duty to protect, while prison guards were not.

prison.[73] A concurring judge suggested that there should be liability only where the state created the danger.[74] But while there might have been fewer circumstances under which the state had a duty to act under the Seventh Circuit's analysis, Judge Posner still conceded that there were instances where such a duty did exist.[75]

Before turning to the *DeShaney* litigation, it is important to reiterate that the competing strands in the circuit courts reflected a common assumption that what was at issue in cases concerning indirect harm was the existence of an affirmative duty. In that sense, the vast majority of the cases were rooted in the concepts and analysis of *Estelle*—of the state's affirmative duty to protect—rather than in terms of *Martinez*. They were generally understood to be cases about inaction, not action.

Finally, of course, the distinction between action and inaction is relativistic, depending on the point of view of the observer. Clever advocates can transform action to inaction and back again. The line between an affirmative duty to act—to protect another—and a duty to refrain from acting so as to endanger, is based on the same distinction between action and inaction and is similarly manipulable. Nevertheless, the characterization of conduct as action or inaction was and is important. The same circumstances may be treated differently, depending on how the claim arising from those circumstances is described. It is my contention that the development of the case law after *Estelle* and *Martinez* and before *DeShaney* shaped the terms of the debate in a particular way. Cases of indirect harm—which could have been action cases—became inaction cases. They were seen as duty-to-protect cases, and the predominant claim was that the state had an affirmative obligation to protect various plaintiffs. While this claim was, and remains, viable in certain contexts—for example, prison—it was bound to fail at some point. The Anglo-

73. Archie v. City of Racine, 847 F.2d 1211, 1222 (7th Cir. 1988) (en banc) (finding no duty of city rescue dispatcher to provide rescue services unless dispatcher increased risk of harm). The en banc opinion was issued while *DeShaney* was pending in the Supreme Court and provided the appellate judges of that court with one last opportunity to present their analysis of the problem to the Justices. *See id.* at 1215, 1221.

74. *Id.* at 1226 (Posner, J., concurring). Judge Posner suggested that the crucial factor might be whether the state placed the victim in a position of danger in the first place, or whether it merely enhanced a danger that already faced the victim, through no initial fault of the government. *Id.* If, as he concluded was the case in *Archie*, the state merely enhanced a pre-existing danger, it was under no obligation to act and its inaction was not actionable. *Id.* Judge Posner's proposed test does not conform to accepted legal precepts. Under his test, the person needing medical care at the time of his or her incarceration would not have to be provided with medical care because the state would not have created the initial need for care.

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

American legal tradition would not support the unlimited imposition of affirmative duties.[76] *DeShaney v. Winnebago County Department of Social Services*,[77] the Supreme Court's most recent opinion in the area, turned out to be that point.

C. DeShaney v. Winnebago County Department of Social Services

The facts of *DeShaney*, as presented by the plaintiffs, closely paralleled those of *Estate of Bailey v. County of York*, which was successfully litigated in the United States Court of Appeals for the Third Circuit. According to the allegations of the complaint, the plaintiff, four-year-old Joshua DeShaney, had been repeatedly abused by his father over an extended period of time. The Winnebago County Department of Social Services (DSS) had been alerted and had taken on the case. DSS had expressed its willingness to intervene.[78] Months before the critical injuries were inflicted, DSS had temporarily placed Joshua in the custody of a hospital, but three days later had returned him to his father's custody.[79] The social workers, named as individual defendants in the litigation, assertedly became aware of the abuse and yet did nothing, except to note the ever-mounting evidence of abuse in their records. Ultimately, Joshua's father inflicted terrible injuries upon him. DSS and the individual public defendants had failed to protect Joshua DeShaney.

This was the crux of the case. The plaintiffs[80] consistently portrayed their case as one about inaction—about the failure to protect. The plaintiffs did not allege that Joshua was worse off or more vulnerable because of the actions of the state. They did not attempt to prove that someone would have tried to rescue Joshua but for the intervention of DSS.[81] It was not alleged that at the time DSS re-

76. The Anglo-American legal tradition is consistently hostile to claims that one was required to take action on behalf of another. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 314 (1965).

77. 489 U.S. 189 (1989).

78. Complaint at ¶¶ 17-24, *reproduced in* Joint App. at 1-2, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (No. 87-154).

79. *Id.* at ¶¶ 25-26.

80. The plaintiffs were Joshua DeShaney and his mother, Melody DeShaney. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 299 (7th Cir. 1987), *aff'd*, 498 U.S. 189 (1989).

81. The Complaint did contain allegations that Joshua's mother, Melody, would have intervened on his behalf had she been aware of the conditions of Joshua's life with his father. Complaint at ¶ 30. The theory presented, however, was apparently that the defendants failed to tell her of Joshua's abuse, rather than that they in any way prevented her from acting on her own. This is a failing that could readily be characterized as inaction.

turned Joshua to his father's custody, it was aware of the father's abusive conduct. It was not alleged that the state created the danger to Joshua. Consistent with their choice of theory of liability, the plaintiffs developed a record that focused on the defendants' awareness of the harms caused by Joshua's father, Randy DeShaney, and on the defendants' failure to take any action to prevent the harms.

The central contested issue in *DeShaney* was whether the public defendants had a constitutional obligation to act under the circumstances presented. Given the course of litigation preceding *DeShaney*, this is not surprising. As I have outlined above, cases of indirect harm were, in general, conceptualized as cases concerning the state's failure to act. All courts agreed that, under some circumstances, the failure to act was a proper basis for liability.[82] The struggle lay in defining those circumstances. Several circuits had held, or at least suggested, that Joshua DeShaney's circumstances were such as to warrant liability.[83] Even the United States Court of Appeals for the Seventh Circuit had allowed claims by recipients of state services alleging that their harm was caused by state inaction. By contrast, there were few models or precedents for an analysis that focused on the state's action.

In the district court, in the appellate court, and again in the Supreme Court, the *DeShaney* plaintiffs urged the adoption of the "special relationship" test from *Estate of Bailey*.[84] They lost before each court that considered their claim.

The district court granted the defendants' motion for summary judgment. It concluded that DeShaney's case was "not sufficiently similar" to other cases from the Seventh Circuit in which an affirmative duty to act had been imposed.[85] It explicitly rejected the plaintiffs' suggestion that it adopt the Third Circuit's test from *Bailey*.[86]

The court of appeals, in an opinion by Judge Posner, affirmed the district court.[87] It found the plaintiffs' claims "foreclosed by the rule, well established in this circuit, that the state's failure to protect people from private violence, or other mishaps not attributable to

82. *See supra* text accompanying notes 63-75.

83. *See* Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 186 (4th Cir. 1984); Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981); White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

84. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 197-98 (1989); *DeShaney*, 812 F.2d at 303-04.

85. DeShaney v. Winnebago County Dep't of Social Servs., C.A. No. 85-C-310, at *13-*18 (E.D. Wis. June 20, 1986) (petition for writ of certiorari No. 87-154, LEXIS, Genfed Library, Briefs File).

86. *Id.* at *17.

87. *DeShaney*, 812 F.2d at 298.

the conduct of its employees is not a deprivation of constitutionally protected property or liberty."[88] Consistent with the district court, the circuit court also refused to adopt the Third Circuit's "special relationship" test and, instead, specifically rejected it.[89] The court concluded that the state had a duty to act only in specific and limited circumstances, such as those where the state places the victim in a position of high risk.[90]

In the Supreme Court, the plaintiffs continued to urge adoption of the Third Circuit's test from *Bailey*. Eschewing any claim for general protective services, the plaintiffs instead characterized the rule that they sought as a narrow one, applying only in limited circumstances that were defined by the special relationship test. In those limited circumstances, they asserted, the state could be held liable for failing to act to protect an individual.[91] The plaintiffs did not argue before the Supreme Court that Joshua was in a worse position because of any of the conduct of the defendants than he would have been had DSS not existed. They had not developed a record that would support that conclusion.[92] Although the plaintiffs stressed

88. *Id.* at 301. The court also offered a second rationale for rejecting the plaintiffs' claim. It concluded that the state conduct, even if blameworthy, did not cause Joshua's injuries and that therefore it could not be said to have deprived him of his liberty interest. *Id.* at 302. Writing for the court, Judge Posner concluded that any increase in the probability that Joshua would be harmed attributable to the state's conduct was "trivial." He bolstered his conclusion by pointing out that if DSS had not existed, Joshua would "almost certainly" have suffered the same injuries. *Id.* Citing Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), as authority, he stated: "[A] merely conjectural possibility that the state's inaction warned off other rescuers is not enough to make the state complicit (in a federal constitutional sense) in the private conduct that caused the victim's injury." *DeShaney*, 812 F.2d at 301. In short, the state conduct complained of was too remote from the harm, and imposition of liability was inappropriate.

The introduction of this reasoning is significant in light of developments after *DeShaney*. *See infra* text accompanying notes 194-98. But it is also important to note that there was indeed, no evidence of record that the existence and action of DSS increased the probability of harm to Joshua DeShaney. While it is possible that this is because there was no such evidence to be had, it may instead simply reflect the plaintiffs' theory of the case. Plaintiffs did not argue that the state increased the probability of harm to Joshua and, hence, would have had no reason to produce any evidence to that effect. *See DeShaney*, 812 F.2d at 301.

89. *DeShaney*, 812 F.2d at 303.

90. *Id.* at 302 (citing White v. Rochford, 592 F.2d 381 (7th Cir. 1979), as an instance of such conduct).

91. Brief for Petitioners at 12-13, DeShaney v. Winnebago County Dep't of Social Servs., 389 U.S. 189 (1989) (No. 87-154).

92. The plaintiffs' litigation choices must be evaluated in the context in which they made them. The benefits of hindsight make the choice of litigation strategies much easier to criticize. And perhaps Joshua DeShaney's case could not have been won before the Supreme Court at that time, no matter what arguments had been used. In any event, when the plaintiffs were actually litigating their case in the district court, no court had

that the state had been actively involved in Joshua DeShaney's case—a prerequisite of the *Bailey* test—they did not contend that their case was therefore one arising from state action.

Justice Rehnquist wrote the opinion for the Supreme Court, rejecting the DeShaneys' claim. The majority held that "the State had no constitutional duty to protect Joshua."[93] Rehnquist characterized the plaintiffs' claim as one that the state should be held liable for "failing to intervene to protect him against a risk of violence at his father's hands."[94] This was essentially consistent with the plaintiffs' own characterization of their claim.[95] The Court rebuffed the plaintiffs' call for adoption of the special relationship test[96] and stated that a state's failure to protect an individual against private violence "simply does not constitute a violation of the Due Process Clause."[97]

In a dramatic shift, the Court recast *Estelle* and *Romeo* as cases where it was the state's *action*—taking a person into custody and thereby depriving him of the ability to help himself—that gave rise to the affirmative obligation to act on the part of the state.[98] The Court distinguished DeShaney's position—he was not in state custody, but was rather in the custody of his father.[99] Additionally, "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[100] Echoing the Seventh Circuit, the Court continued that even when the state took temporary custody of Joshua and then returned him to the custody of his father, "it placed him in no worse position than that in which he would have been had it not acted at all."[101]

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utilized a test that focused on whether the plaintiff was worse off than she would have been otherwise. By the time *DeShaney* reached the Supreme Court, there were two opinions that suggested such an analysis—the Seventh Circuit's opinions in *DeShaney* itself and its en banc opinion in Archie v. City of Racine, 847 F.2d 1211, 1222-23 (7th Cir. 1988). *See supra* notes 73-74.

93. DeShaney v. Winnebago County Dep't of Social Servs., 389 U.S. 189, 201 (1989).

94. *Id.* at 193.

95. *See supra* text accompanying notes 78-84.

96. *DeShaney*, 489 U.S. at 197 n.4.

97. *Id.* at 202. The Court did not rule out the possibility of a claim under the Equal Protection Clause. *Id.* at 197 n.3.

98. *Id.* at 199-200.

99. *Id.* at 201.

100. *Id.*

101. *Id.* The Court noted that the United States Court of Appeals for the Seventh Circuit had advanced an alternative reason for rejecting the plaintiffs' claim, but did not address the failure of causation argument directly. *See supra* note 88. The plaintiffs had not addressed the alternative ground in their briefs. *DeShaney*, 489 U.S. at 195.

The majority's opinion in *DeShaney* generated dissents by Justices Brennan[102] and Blackmun.[103] Justice Brennan, joined by Justices Blackmun and Marshall, contended that the majority had mischaracterized the case as one about the general obligation of the state to care for its citizens.[104] It was more appropriate to consider the actions that were taken by the state in the case—including the establishment of a child protective services agency. Brennan disagreed with the view that there was no state action in the case. After summarizing the facts of the case, he noted that "the state actively intervened in Joshua's life. . . ."[105] In any event, labeling the conduct "action" or "inaction" should not be determinative: "[I]f a state cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."[106] Justice Blackmun also rejected the view that the case was about inaction and the "formalistic reasoning" that led the Court to believe that action and inaction can be sharply distinguished.[107]

Perhaps the result in *DeShaney* was inevitable. That specific court at that specific time might have decided against Joshua DeShaney no matter what legal arguments were offered to support his claim. More subtly, once *Estelle* was decided, the evolution of the duty-to-protect cases, in part propelled by plaintiffs' lawyers, was set in motion. At some point, the limits of analogy would be reached. The plaintiff in a pending claim would be too far removed from custody, the case too unlike *Estelle*, and the court would draw the line. It would do so in the terms of *Estelle*—in terms of custody. It did so in *DeShaney*.

As is to be expected of a major Supreme Court decision, *DeShaney* occasioned a substantial body of commentary. The vast majority of it is critical of the Court's attempt to draw a sharp distinction between action and inaction and to limit the state's liability to cases of action.[108] With the passage of time, the flow of articles and notes

102. *DeShaney*, 489 U.S. at 203 (Brennan, J., dissenting).
103. *Id.* at 212 (Blackmun, J., dissenting).
104. *Id.* at 204 (Brennan, J., dissenting).
105. *Id.* at 210 (Brennan, J., dissenting).
106. *Id.* at 207 (Brennan, J., dissenting).
107. *Id.* at 212 (Blackmun, J., dissenting).
108. *See, e.g.*, Bandes, *supra* note 63, at 2288-89; Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1083-96; Karen M. Blum, Monell, DeShaney *and* Zinermon: *Official Policy, Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983*, 24 CREIGHTON L. REV. 1, 23-32 (1990); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1666-78 (1990); Laura Oren, DeShaney's *Unfinished Business: The Foster Child's Due Process*

has diminished, but it has not abated.[109] Most of the commentary attacks the foundations of *DeShaney*—its core value judgments, its formalistic reasoning, and its reliance on the distinction between action and inaction. These commentators offer a competing—and, in my judgment, a better—view of the world and an alternative legal analysis. These might someday be adopted by a different court writing a different opinion. But they offer little assistance for those who must live—and litigate—in the practical realms of the post-*DeShaney* world.[110] Regardless of its merit, or lack thereof, *DeShaney* is a Supreme Court precedent that will be with us for some time to come. My purpose here is to consider how we can live in the post-*DeShaney* world.

III. PRESENT DOCTRINE

It seems likely that the Supreme Court intended *DeShaney* to be a definitive precedent—one that resolved the persistent problem of the indirect harm cases. Yet, as is frequently the case, in many cases the problem remains unresolved. Multiple readings of *DeShaney* and multiple approaches to the problem persist.[111] A review of the case

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Right to Safety, 69 N.C. L. REV. 113 (1990) [hereinafter Oren, *Unfinished Business*]; Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990); Amy Sinden, *In Search of Affirmative Duties Towards Children Under a Post-*DeShaney *Constitution*, 139 U. PA. L. REV. 227 (1990); 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); Mark Levine, Comment, *The Need for the "Special Relationship" Doctrine in the Child Protection Context:* DeShaney v. Winnebago County, 56 BROOK. L. REV. 329 (1990).

109. *E.g.*, Thomas 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*, 41 DUKE L.J. 507 (1991); Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Circumstances Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992); Christopher Barr, Note, *The Duty of Public Schools to Protect Students from Other Students Under 42 U.S.C. § 1883*—D.R. v. Middle Bucks Area Vocational Technical School, 66 TEMPLE L. REV. 1063 (1993); Lynne Jodi Stern, Comment, *Young Lives Betrayed:* DeShaney v. Winnebago County Department of Social Services, 25 NEW ENG. L. REV. 1251 (1991).

110. This may be true in part because the major commentators tended to characterize *DeShaney* in sweeping and bleak terms. This strengthened their position that the case was important, of far-reaching significance, and wrong. At the same time, most of the student notes examined the impact of *DeShaney* on highly particularized and narrow situations—children in foster care, individuals living in community-based mental health facilities, etc.

111. Andrews v. Wilkins, 934 F.2d 1267, 1270-71 (D.C. Cir. 1991) (noting that law was not clearly established and holding that (1) police, as state officers, had no constitutional duty to rescue decedent, and (2) government officials did not violate decedent's constitutional rights when they interfered with private efforts to rescue

law following *DeShaney* illustrates the possible readings of *DeShaney* and the different results they yield.

At least two viable and competing lines of analysis remain. First, there are those opinions that focus on inaction—that consider the critical question to be whether the state is under a duty to protect the plaintiff.[112] *DeShaney* most clearly governs these cases. In order to prevail, in the view of most courts, a plaintiff in a post-*DeShaney* duty-to-protect case must demonstrate that she was in custody.[113]

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decedent because police enlisted private aid to begin with); McComb v. Wambaugh, 934 F.2d 474, 478-83 (3d Cir. 1991) ("The distinction between harm inflicted by a state agent and injury caused by a private individual is critical . . . . [D]efendant [foster care agencies] did nothing, and by inaction made it possible for the mother to harm her son. . . . That inaction . . . [is] within the scope of *DeShaney's* holding."); Harris v. District of Columbia, 932 F.2d 10, 13-16 (D.C. Cir. 1991) (holding that law was not clearly established and, regardless of possible state-imposed tort law obligations to provide police protection, police officers are likely under no constitutional obligation to obtain medical care for overdose victim taken into custody for purpose of obtaining medical care and not for law enforcement purposes, even if they know of victim's need for protection); Hilliard v. City & County of Denver, 930 F.2d 1516, 1520-21 (10th Cir.) (holding that law was not clearly established at time of incident in 1988 that state had constitutional obligation to protect victim of violence, where police impounded car in which victim had been a passenger, left her in high crime area, and she was subsequently robbed and raped), *cert. denied*, 112 S. Ct. 656 (1991); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (noting that *DeShaney* leaves unclear "how large a role the state must play in the creation of the danger and in the creation of the vulnerability before it assumes a corresponding duty to protect"). The *Freeman* court noted that a constitutional duty to protect an individual against private violence may arise absent state custody of that individual. *Id.* at 55; *see also* Gibson v. City of Chicago, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990) (stating that government has constitutional obligation to protect individuals from danger of police officer declared mentally unfit for duty, where the city has both played part in creating danger—by training and arming officer—and rendered public more vulnerable to danger by allowing officer to retain his weapon after mental instability was discovered and after his duties were suspended).

112. Sometimes, plaintiffs cast their own cases in this light and sometimes they are cast that way by the defense; in any event, this is the approach that the court accepts.

113. There is one exception to this rule. A number of courts have held that a police officer has an affirmative duty to intercede to protect an individual whose constitutional rights are being violated by other police officers. *See, e.g.*, McHenry v. Chadwick, 896 F.2d 184, 188 (6th Cir. 1990) (holding that corrections officer's failure to intervene when fellow officers physically assaulted inmate was a violation of inmate's § 1983 rights); O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir. 1988) (stating that although officer had no realistic opportunity to prevent fellow officer's initial blows, after seeing plaintiff beaten, officer had affirmative duty to protect plaintiff from further abuse); Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986) ("If a police officer . . . fails or refuses to intervene when a constitutional violation . . . takes place in his presence, the officer is directly liable under Section 1983."); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir. 1983) (holding that officer was under duty to prevent use of force against inmate even if those responsible for such force were officer's superiors); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) ("[O]ne who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who punish a third person in his presence."); Masel v. Barrett, 707 F. Supp. 4 (D.D.C. 1989) (noting that all circuits

Otherwise, *DeShaney* demands dismissal of the action.[114] "Custody" is not, however, a bright-line rule.[115] Courts have divided over what the essential features of custody are and why these features give rise to a duty to protect.[116] There is an ongoing debate over the contours of a doctrine of "functional custody."[117] Some courts have declined to find any duty to protect individuals who are voluntarily committed to state custody, finding that the distinction between voluntary restraint and involuntary restraint justifies different treat-

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recognize that police officer in special relationship with victim has constitutionally derived duty to protect victim from constitutional violations by other police officers).

114. Some courts continue to invoke a "special relationship" test. "Special relationship" describes those circumstances under which the state has an affirmative duty to protect. *See, e.g.*, Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 700 (9th Cir. 1990) (outlining four-prong test to determine whether special relationship exists). "Special relationship," however, is no longer defined in the flexible and expansive manner utilized by the United States Court of Appeals for the Third Circuit in *Bailey*. It is now essentially limited to custody situations. *But see* Swader v. Commonwealth, 743 F. Supp. 434 (E.D. Va. 1990) (employing flexible special relationship test); Eaton & Wells, *supra* note 109, at 147-59.

115. *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420 (1984); Oregon v. Mathiason, 429 U.S. 492 (1977).

116. Uncertainty over why custody should give rise to a duty to protect leads to the confusion over what the essential features of custody are, for purposes of imposing a duty to protect on the defendant. If custody gives rise to a duty to protect because the individual is placed in a dangerous situation by the state, then other instances where the individual is placed in a dangerous situation should also give rise to a duty, whether or not we think of them as custody. *See* discussion *infra* part III.B.1. If, on the other hand, custody gives rise to a duty to protect because an individual in custody is cut off from other sources of aid or protection and from self help, then other instances where the state cuts an individual off from sources of assistance should also give rise to a duty. *See* discussion *infra* part III.B.2.

117. The phrase apparently originates in Stoneking v. Bradford Area Sch. Dist. (Stoneking I), 856 F.2d 594, 601 (3d Cir. 1988), *vacated sub nom.* Smith v. Stoneking, 489 U.S. 1062 (1989), *reinstated on other grounds*, Stoneking v. Bradford Area Sch. Dist. (Stoneking II), 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

For an interesting custody analysis, see Horton v. Flenory, 889 F.2d 454, 457-58 (3d Cir. 1989). In *Horton*, plaintiff's decedent was being brutally interrogated by his private employer when the police arrived. *Id.* at 456. The police took no action, but left the victim in the "good hands" of the employer, who was a former police officer and well-known to them. *Id.* at 457. The victim subsequently died of injuries sustained after the police departed. The court upheld liability, concluding that because the police used their "official status to confirm" that the employer was free to continue the custodial, and eventually, fatal, interrogation, the victim was in *state* custody at the time of the fatal beating and therefore the police officers had an obligation to protect him. *Id.* at 458. On the basis of the active, rather than the passive, state actor, *DeShaney* was distinguished. *Id.* This conclusion that the victim was in state custody seems particularly strained. A more satisfactory route to the same result, clearly supported by the evidence in the case, would have been to find a conspiracy between the employer and the police. On this premise, the co-conspirators, public and private alike, could have been held liable.

ment.[118] Other courts have determined that children placed in an abusive foster home are in a position analogous to that of a prisoner and, hence, may pursue duty-to-protect claims, even where the immediate cause of injury is a nonstate actor.[119] The status of students, whose attendance at school is compelled by state compulsory education laws, has been litigated to various conclusions.[120] Thus,

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118. Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) (holding that retarded student voluntarily placed in state custody was not entitled to duty to protect); Monahan v. Dorchester Counseling Ctr., 961 F.2d 987, 991 (1st Cir. 1992) (finding no affirmative act by state where individual in custody was voluntarily committed); Fialkowski v. Greenwich Home for Children, 921 F.2d 459, 465-66 (3d Cir. 1990) (finding no affirmative act by state where parents voluntarily committed son); Wilson v. Formigoni, 832 F. Supp. 1152 (N.D. Ill. 1993) (finding that while patient was technically voluntarily committed, commitment was de facto involuntary and therefore had basis for claim for protection); Ridlin v. Four County Counseling Ctr., 809 F. Supp. 1343 (N.D. Ind. 1992) (holding that student voluntarily placed in state custody was not entitled to duty to protect); Halderman v. Pennhurst St. Sch. & Hosp., 784 F. Supp. 215 (E.D. Pa.) (finding that though some patients were not technically involuntarily committed, patients were effectively involuntarily committed because had no choice), *aff'd without opinion*, 977 F.2d 568 (3d Cir. 1992). *But see* McNamara v. Dukakis, No. 90-12611-Z, 1990 U.S. Dist. LEXIS 17565 (D. Mass. Dec. 27, 1990) (considering range of categories from involuntarily committed to out-patient treatment and concluding that some and perhaps all voluntarily committed patients are owed duty, as are those placed in state-supervised community residences).

Halderman and *Wilson* also demonstrate that what constitutes "involuntary" commitment may be open to debate. *See Wilson*, 832 F. Supp. at 1152; *Halderman*, 784 F. Supp. at 215.

119. Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 883, 891-94 (10th Cir. 1992); K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 848-50 (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, 795-97 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989). Here, too, a question may arise of whether the children were placed in foster care voluntarily or not. *See* Milburn v. Anne Arundel County Dep't of Social Servs., 871 F.2d 474, 476 (4th Cir. 1989). There are also pre-*DeShaney* cases that continue to be cited for this proposition. *See, e.g.*, Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981); *see also* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199 (1988) (arguing that foster children are dependent on state for their needs just as prisoners are and therefore have constitutional right to safety); Oren, *Unfinished Business*, *supra* note 108, at 133-40; Sinden, *supra* note 96, at 245-58.

120. *Compare* Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992) (student in functional custody), *cert. denied sub nom.* Caplinger v. Doe, 113 S. Ct. 1066 (1993), *reh'g granted en banc*, 987 F.2d 231 (5th Cir. 1993); *Stoneking I*, 856 F.2d at 601 (same); Robert G. v. Newburgh City, No. 89 Civ. 2978, 1990 U.S. Dist. LEXIS 91, at *3 (S.D.N.Y. Jan. 8, 1990) (same); and Pagano *ex rel.* Pagano v. Massapequa Pub. Schs., 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (same) *with Dorothy J.*, 7 F.3d at 732 (students not in functional custody); D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371-73 (3d Cir. 1992) (en banc) (same), *cert. denied*, 113 S. Ct. 1045 (1993); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990) (same); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993) (same); Russell v. Fannin County Sch. Dist., 784 F. Supp. 1576, 1582-83 (N.D. Ga.) (same), *aff'd*, 981 F.2d 1263 (11th Cir. 1992).

even in the area most clearly controlled by *DeShaney*, there is no clear understanding of when liability can be established.[121] If *DeShaney* was an attempt to clarify the law regarding indirect harm and restrict future litigation, it must be considered a failure.[122]

A second major line of analysis has also emerged. It is utilized in opinions that focus on some state action, as opposed to state inaction. These cases are neither viewed nor analyzed as duty-to-protect cases. Instead, courts critically examine the relationship between the state action, the victim, and the eventual harm. In doing so, courts rely on the Supreme Court's observations in *DeShaney* that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them"[123] and that the state's conduct "placed [Joshua] in no worse position than that in which he would have been had it not acted at all."[124] These observations clearly suggest that if these conditions were not met, a different conclusion might be reached.[125] Thus,

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In cases involving injury to schoolchildren where the assailant is a school employee, plaintiffs typically rely on alternative theories of liability. In addition to an indirect harm theory, plaintiffs also argue that supervisory defendants or school boards are liable under the principles of Monell v. Department of Social Services, 436 U.S. 658 (1978), for failing to supervise employees or for adopting policies of indifference to the rights of the schoolchildren. The most striking example of the use of alternative theories is the *Stoneking* litigation. In *Stoneking I*, the United States Court of Appeals for the Third Circuit ruled for the plaintiff on an indirect harm theory. The case was decided shortly before *DeShaney*. After *DeShaney*, the Supreme Court remanded *Stoneking* to the circuit court for reconsideration in light of *DeShaney*. The Third Circuit affirmed its initial conclusion, this time on a supervisory liability theory. Stoneking v. Bradford Area Sch. Dist. (Stoneking II), 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). Use of these alternative theories has grown more prevalent since *Stoneking*. *See, e.g.*, Black v. Indiana Area Sch. Dist., 985 F.2d 707, 709 (3d Cir. 1993); C.M. v. Southeast Delco Sch. Dist., 828 F. Supp. 1179 (E.D. Pa. 1993).

121. *See, e.g.*, Gan v. City of New York, 996 F.2d 522, 534 (2d Cir. 1993) (finding no clearly established law and concluding that "[t]he parameters of what constitutes a special relationship . . . are hazy and indistinct").

122. A number of recent opinions continue to focus on whether a "special relationship" existed between the plaintiff and defendant. As it is presently used, a "special relationship" is nothing more than the label for the type of relationship that gives rise to an affirmative duty to act. Since *DeShaney*, this generally means some type of custodial relationship. *See, e.g.*, *Black*, 985 F.2d at 713; *Doe*, 975 F.2d at 145-46. The "special relationship test" devised by the Third Circuit in *Bailey* is no longer used. Indeed, the Third Circuit concluded that *DeShaney* overruled *Bailey*. Philadelphia Police and Fire Ass'n for Handicapped Children v. City of Philadelphia, 874 F.2d 156, 167 (3d Cir. 1989).

123. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989).

124. *Id.*

125. Some courts have been unwilling to permit liability under this reading of *DeShaney*, asserting that it would "convert most torts by state actors into constitutional violations." Monahan v. Dorchester Counseling Ctr., 961 F.2d 987, 993 (1st Cir. 1992).

DeShaney supports liability where the action of the state created the danger, rendered the plaintiff more vulnerable to a danger, or placed the plaintiff in a worse position than she would have been in had the state not acted at all.[126]

In sum, after *DeShaney*, plaintiffs who hope to succeed in indirect harm cases must satisfy one of two inquiries.[127] Either they must convince the court that they were in some meaningful way in custody, in which case the characterization of the events as action or inaction is irrelevant, or they must refocus their cases to make the state's conduct appear as action rather than inaction. Of these two options, the custody route is more limited. While custody may be a flexible concept, most individuals are not even arguably in custody. It is in the transformation of inaction into action that the path for most plaintiffs lies.[128]

This is incorrect. Not all torts committed by state actors rise to the level of § 1983 claims, because of a variety of doctrinal limitations developed by the courts over many years. Mere negligence, for example, is not an adequate basis for constitutional liability. Daniels v. Williams, 474 U.S. 327 (1986); *see also* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 734 (8th Cir. 1993) ("We cannot agree with those who have suggested that one comment towards the end of the *DeShaney* opinion—'nor did [the State] do anything to render him any more vulnerable to [the risk of private violence]'—signals the Supreme Court's approval of Section 1983 liability whenever a state actor has increased the risk of harm from private sources.") (quoting *DeShaney*, 489 U.S. at 201) (alterations in original); *infra* note 141. Plaintiffs must demonstrate conduct ranging from deliberate indifference to reckless disregard for their rights. The relevant question in *Monahan*, for example, would be was it deliberately indifferent or reckless for the defendants to decide to use a van to transport the plaintiff. Given all of the circumstances, the answer may well be that it was not, and hence, no claim for relief was stated.

126. It is true, as Susan Bandes stated in her critique of *DeShaney*, that the question, "Was the plaintiff worse off" is incomplete. Bandes, *supra* note 63, at 2284. It lacks a baseline. The first response, then, must be, "Worse off than what the plaintiff would have been under what circumstance?" *See id.* But this openness and indeterminacy may (for a litigator) be a virtue as well as a vice. If a plaintiff can identify and present an alternative version of the events, compared to which she is worse off, she can pose the question in a way in which it must be answered in the affirmative.

127. In some instances, plaintiffs sue supervisory defendants, asserting that a subordinate caused harm to the victim. These cases present the potential for two distinct theories of liability. First, under Monell v. Department of Social Services, 436 U.S. 658 (1978), and following cases, supervisory officials and governmental entities may be held liable where their policies or practices cause the individual violation of which plaintiffs complain. Proof of policy or practice may, however, be very difficult. As an alternative basis for liability, plaintiffs may advance an indirect harm theory—that the defendants are liable because they either failed to protect the victim or took action that caused her harm. There are several reported opinions arising from cases litigated under these dual theories of liability. *See supra* note 120.

128. Cases arising out of indirect harm, which might once have been viewed as inaction or duty-to-protect cases, can often be recast as cases about state action causing harm, albeit indirectly. The crucial questions in evaluating a case are: Did the state play a part in creating the danger, or perhaps in exposing the plaintiff to an already existing danger? Did it render the plaintiff more vulnerable to harm? As a result of state action, was the plaintiff placed in a worse position than she would have been had the state not

Of course, as many—including Justices Brennan and Blackmun—have noted, there may be no "real" difference between cases about action and cases about inaction or between duty-to-protect cases and cases about state action causing indirect harm.[129] The basic facts may be the same, with the difference only in emphasis and viewpoint. But whether or not the difference is "real," it can be substantial enough to lead to different results.[130] For if a case is viewed as an inaction case, then the plaintiff will probably be obliged to show custody if she is to prevail, while if a case is perceived to be an action case, she will not be required to do so.[131]

This potential is apparent in the post-*DeShaney* state action—as opposed to state inaction—cases.[132] These cases focus on the state's active participation in the circumstances of the case, and from that perspective, *DeShaney* is generally distinguishable.[133] While there is no guarantee that the plaintiff in a case perceived as an action case will win, the plaintiff may well surmount the *DeShaney* hur-

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acted at all? These overlapping questions should guide attorneys in developing narratives of their clients' cases and judges in assessing the application of law to the facts. As the cases discussed in the following section illustrate, a number of courts have utilized this analysis in the past five years.

129. *See DeShaney*, 489 U.S. at 211-12 (Brennan, J., dissenting); *id.* at 212-13 (Blackmun, J., dissenting); *see also* Bandes, *supra* note 63, at 2278-85; Kreimer, *supra* note 63, at 1324-26.

130. For example, in *Dwares v. City of New York*, the trial court viewed the plaintiff's claim as one that police officers failed to protect him. 985 F.2d 94, 97 (2d Cir. 1993). It found the case controlled by *DeShaney* and dismissed the complaint. *Id.* By contrast, the appellate court viewed the claim as one that the police officers engaged in actions that made the plaintiff's situation more dangerous. *Id.* at 99. This distinguished the case from *DeShaney* and allowed the appellate court to reinstate the complaint. *Id.* at 99-100; *see also infra* notes 206-20 and accompanying text.

131. It is well beyond the scope of this Article to explore the ways in which each viewer decides whether a case is about action or inaction. It is clear, however, that litigation strategy and advocacy plays a role in the process. If the plaintiff and the defendant agree that a case is about inaction, it is more likely that the judge will also adopt that view. If they disagree, each will employ techniques to support their view designed to persuade. *See* sources cited *supra* note 13; *see also* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993). In *Dorothy J.*, the court initially considered the plaintiff's claim as one for inaction, evaluating whether the child was in functional custody. *Id.* at 732-33. The court then shifted its analysis to consider whether the state created the danger and could therefore be held liable on an alternative theory. *Id.* at 733-34.

132. In a number of cases, the differing opinions are divided not only by their legal analyses, but also by their understanding or rendition of the plaintiff's story. Indeed, the conflicting opinions embark on separate legal analyses because they adopt different narrative versions of the case. The judge who accepts or constructs a narrative that revolves around state inaction will employ a legal analysis that turns on whether the plaintiff was in custody. *See supra* note 130.

133. As is discussed elsewhere, these cases present other difficult problems for plaintiffs, principal among them being proof of causation. *See infra* notes 194-98 and accompanying text.

dle. To date, courts and commentators have focused on relatively narrow problems presented in this area. Hence, the broad outlines of liability in indirect harm cases remain unexplored and unexplained. In the next section of this Article, I consider the cases from a broader perspective in order to explore and explain the scope of liability in this area.

IV. SUGGESTED MODELS AND APPROACHES

To begin, let me take a step back to the elemental question any lawyer or judge must ask when examining a claim: What must a plaintiff prove to succeed in a section 1983 case focusing on allegations of indirect harm? The Supreme Court has frequently noted that "the initial inquiry must focus on whether the two essential elements to a [s]ection 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or the laws of the United States."[134]

This two-element formulation of a section 1983 claim is deceptively simple, and further consideration quickly illustrates the actual complexity of the matter. In a due process case, for example, in order to establish the second element[135]—that the conduct deprived the plaintiff of a constitutional right—the plaintiff must prove that the defendant is a "state actor," that the interest at stake is recognized as either "life," "liberty" or "property," and that the conduct of the defendant "deprived" the plaintiff of the alleged interest. These requirements encompass terms of great legal complexity. For example, scholars have long discussed the many conflicting opinions and doctrines governing whether a defendant may properly be considered a state actor.[136] Similarly, there are extensive

134. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986). This formulation has also been quoted repeatedly by appellate courts.

135. The first element, color of state law, may create problems of its own. What constitutes "color of law" has been the focus of extensive scholarship. *See, e.g.*, Steven L. Winter, *The Meaning of "Under Color of Law,"* 91 MICH. L. REV. 323 (1992); Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985). The Supreme Court has also interpreted the phrase on several occasions. *See, e.g.*, Lugar v. Edmondson Oil, 457 U.S. 922 (1982); Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978). It is not, however, a requirement that is at issue in most indirect harm cases because the individuals being sued are state employees acting in the course of employment, which means that their actions are clearly under color of law.

136. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688-1720 (2d ed. 1988); Charles L. Black Jr., *The Supreme Court, 1966 Term—Forward: "State Action," Equal*

bodies of case law and commentary concerning the definition of constitutionally recognized liberty and property interests.[137] The plaintiff in a section 1983 due process action may be required to contend with these issues in order to withstand the initial scrutiny of a court.

Fortunately, in a typical indirect harm case neither of these two factors presents serious problems.[138] The defendants are, for the most part, employees of the state—police officers, social workers, school employees—who are "on-duty" at the time of the relevant incidents.[139] These defendants are state actors. In addition, the typical plaintiff complains of physical injury or loss of life. These injuries implicate the right to bodily integrity, a well-recognized liberty interest,[140] or to life itself.

In indirect harm cases, most of the legal complexity is generated by the multiple interpretations of the requirement that the plaintiff show a *deprivation* of the protected interest. In seeking to give content to this requirement, courts have imposed a range of obligations on plaintiffs. Plaintiffs may be required to prove some combination of the following elements: that the defendant was under a duty to

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Protection and California's Proposition 14, 81 HARV. L. REV. 69, 95 (1967) (describing the state action cases as "a conceptual disaster area"). There are numerous Supreme Court cases discussing the state action requirement. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982); *Edmondson Oil*, 457 U.S. at 921; Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

The relationship between the "color of state law" and state action requirements has been an additional source of confusion. Though the Court in *Lugar* stated that if conduct "constitutes state action as delimited by our prior decisions, then the conduct [is] also action under color of state law and will support a suit under § 1983," 457 U.S. at 922, it is not clear that action under color of state law will always constitute state action.

137. *See* Siegert v. Gilley, 111 S. Ct. 1789 (1991) (liberty); Paul v. Davis, 424 U.S. 693 (1976) (liberty); Board of Regents v. Roth, 408 U.S. 564 (1972) (liberty and property); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (liberty); *see also* Robert J. Glennon, *Constitutional Liberty and Property: Federal Common Law and § 1983*, 51 S. CAL. L. REV. 355 (1978); Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

138. It should be recalled that indirect harm cases are substantive, rather than procedural, due process cases.

139. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 189 (1989) (social workers); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 708-10 (3d Cir. 1993) (employee of private school bus company contracted by state); Dwares v. City of New York, 985 F.2d 94, 96 (2d Cir. 1993) (police); Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992) (school employee), *cert. denied sub nom.* Caplinger v. Doe, 113 S. Ct. 1066 (1993), *reh'g granted en banc*, 987 F.2d 231 (5th Cir. 1993); Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 883 (10th Cir. 1992) (social workers); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (police), *cert. denied*, 494 U.S. 938 (1990).

140. *See* Youngberg v. Romeo, 457 U.S. 307, 315 (1982); Ingraham v. Wright, 430 U.S. 651, 673-74 (1977).

the plaintiff; that the defendant acted, rather than failed to act; and/or that the defendant's action—or possibly inaction—was the cause of the plaintiff's injury.[141]

The remaining elements resemble the familiar requirements of tort law that a plaintiff prove duty, breach, and causation in order to make out a negligence claim.[142] Similarly, as in tort law, there is confusion about the overlap of the duty and causation requirements.[143] These elements may be used to explain the failure of various plaintiffs in various terms. In an indirect harm case, a court may conclude there is no liability because the police were under no duty to act, because there can be no liability for inaction, or because the intervening immediate cause of the harm broke the chain of causation.[144] The existence of these related but distinct legal rationales, all of which are widely used and occasionally misused, has deepened the confusion in this area.

By suggesting a systematic approach to indirect harm cases, I hope to make possible a more focused analysis of the problems of

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141. In some cases, courts require plaintiffs to prove that the defendant acted (or possibly failed to act) with a particular state of mind. This scienter requirement is clearly separable from the causation and duty-like requirements discussed above. Consideration of this topic is beyond the scope of this Article. For the remainder of this Article, I will simply assume that the requisite state of mind, whatever that may be, is properly alleged.

There is a substantial body of case law and scholarship on scienter and § 1983. *See* Daniels v. Williams, 474 U.S. 327 (1986) (overruling Parratt v. Taylor, 451 U.S. 527 (1981), to the extent that *Parratt* held that negligent deprivation of property was actionable under the Fourteenth Amendment, but not deciding what scienter is required); William Burnham, *Separating Constitutional and Common Law Torts: A Critique and a Proposed Theory of Duty*, 73 MINN. L. REV. 515 (1989); *see also* Eaton & Wells, *supra* note 109, at 159-65 (offering proposal for distinct state-of-mind requirement in indirect harm cases); Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 470-74 (1992) (asserting that state of mind of policymaker, not just that of municipal agent, should be considered in determining § 1983 liability).

142. The increasing use of tort rhetoric in § 1983 litigation has been noted by at least one scholar. *See* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1720 (1989) (asserting that Supreme Court, by using tort rhetoric, is trying to make § 1983 less protective of Fourteenth Amendment rights and is therefore able to send more proposed § 1983 actions to state courts).

143. *See, e.g.*, Martinez v. California, 444 U.S. 277, 285 (1980); *see also* Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 478-79 (1982) (noting that courts sometimes phrase issue of defendant's responsibility in terms of causation, although real issue involves whether and to what extent defendant owed duty to plaintiff).

144. As it has in torts, questions of duty and causation and the application of these concepts to particular cases have generated many opinions that are not easily harmonized. This is not a task I will attempt in this Article. As I discuss more fully below, in some instances it seems to me more useful to focus on questions of causation rather than of duty when analyzing cases of indirect harm. *See infra* text accompanying notes 194-98.

the duty/causation dilemma. Thus, it will be clear that in some instances causation is the more useful inquiry, while in others it may be the existence of a duty. With this additional aspiration in mind, I proceed with my analysis.

A. Five Models for Indirect Harm Cases

In the remainder of this Article, I develop my contention that indirect harm cases can be divided into five separate categories. For each category, I explore the appropriate legal analysis and identify the critical questions most likely to arise in cases within that category. Categorization is thus crucial, for it brings with it a particular legal analysis.[145]

In this section, I present models to illustrate each category. I have called these the snake pit model,[146] the reliance model, the unseen state actor model, the absent state actor model, and the absent institution model. Each is representative of a category that uses the same name. For each category there is a distinct legal analysis. Correctly categorizing a case is crucial, because once it is categorized, the legal analysis is determined, and the legal analysis shapes—and sometimes even dictates—a particular outcome. For example, if a case is categorized as an unseen actor case, it is in all likelihood unwinnable, while if it is conceptualized as a snake pit case, it is very winnable indeed.

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145. Categorization and the definition of legal consequences that flow from particular categorizations is a staple of legal analysis. As Martha Minow has demonstrated in her recent book, however, it can be a problematic process. Minow is particularly concerned with the categorization of people and its consequences, principal among them the creation of what she calls "the dilemma of difference." *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990) (explaining "the dilemma of difference" as two-part question—that is, (1) when does treating people differently emphasize their differences and stigmatize them on that basis, and (2) when does treating people the same become insensitive to their differences and stigmatize or hinder them on that basis—then reclassifying question as choice between integration and separation, similar treatment and special treatment, or neutrality and accommodation). While I accept Minow's critique of categorization and her identification of its narrowing potential, I nevertheless believe that the categorization of indirect harm cases is a valuable enterprise. Further, because I am engaged in the categorization of fact-patterns rather than of people, I do not believe the dangers she identifies are presented. On categorization more generally, see GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987).

146. The name is taken from the opinion in Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger . . . and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."). It is a phrase that often has been quoted in indirect harm cases. *See, e.g.*, Walker v. Rowe, 791 F.2d 507, 511 (7th Cir. 1986) (rejecting liability for injuries to prison guards and noting that "[t]he state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten").

At the same time, most cases—at least at the beginning of litigation—could fit into more than one category. Categorization turns on which facts are emphasized, which frame of reference and which viewpoint are chosen, when the story is understood to begin and end, and a host of other variable factors. For example, a case may be seen as one where the plaintiff was assaulted by a third party while the police failed to intervene. Viewed in this light, the case is one of inaction—an unseen state actor case—and liability is barred by *DeShaney*. By considering a broader frame of reference, however, we may find police action that encouraged the assault. This converts the case into one of action—a snake pit case—where liability might be proper. The consequences of categorization are dramatic. Understanding and manipulating the categories is therefore crucial.

I do not mean to suggest that the process of categorization is itself a simple one. To the contrary, because most cases may arguably fit into more than one category and because categorization is a critical juncture in determining the outcome of a case, the process of categorization should be a contested topic in litigation, either explicitly or implicitly. In many cases, the parties disagree about the correct categorization of the case at hand. Each offers a version of the case that fits more easily into the category that yields what she views as the "correct" result. And each employs the lawyer's craft to persuade the judge that her categorization is the better one.

Understanding the categories and the analysis I propose should help to dispel one frequently encountered argument against liability in particular indirect harm cases: that finding liability would amount to a first step down a slippery slope, at the bottom of which lies a constitutional requirement that a state have a police force.[147] This is, for every court that has considered the possibility, beyond the plausible interpretations of the Constitution.[148] The slippery slope argument is a device for rejecting a claim without regard to its own merit on the ground that it inevitably leads the court somewhere it

147. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1984).

148. *See Walker*, 791 F.2d at 509 ("[B]ecause the bill of rights is a charter of negative liberties, the state need not protect people from danger.") (quoting *Bowers*, 686 F.2d at 618); *Bowers*, 686 F.2d at 618 ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services even so elementary a service as maintaining law and order."). *But see* Heyman, *supra* note 109, at 546-54 (arguing that historical analysis demonstrates that the Fourteenth Amendment was originally understood and intended to incorporate the right to protection and that it obliged states to protect individuals from private violence).

does not wish to go.[149] Reliance on such an argument has been examined in detail elsewhere.[150] In this setting, however, invocation of a slippery slope concern is entirely inappropriate. The image of a slippery slope depends on our appreciation of gravity as an inexorable and ineluctable force. Once you start down a slippery slope, there is no turning back and—equally important—no stopping point. If the indirect harm cases fall along a gradient, however, surely it is one with distinct ledges. There are many points at which a jurist can say "I go this far and no further." The principle that the snake pit plaintiff may state a claim does not necessarily mean that the unseen actor plaintiff can, or even that the reliance plaintiff can.[151]

In order to make this discussion more intelligible, I illustrate these categories with a series of model cases. These are all cases of indirect harm and they fall along a rough spectrum. My initial presentation of the models is limited. Discussion of the legal analysis applicable to each category is reserved for the following section.[152] In each case I have specified circumstances that would support a conclusion that the defendants were deliberately indifferent to any risks to the victim.[153] I have intentionally structured these cases in this fashion in order to focus on the issues of liability that concern me in this Article. In particular, I have structured these models in a way that eliminates or minimizes any questions of intent. It should also be apparent that each model can be subjected to variation while maintaining its essential features. I have chosen to present the models in relatively strong forms so that the theories of liability can be clearly illustrated, but there are many less obvious cases in which liability might be premised on the same theories.

I provide two settings for each model case. First, I consider a discrete encounter between a single state actor—in this instance, a police officer—and an isolated plaintiff. While the actions of plaintiff and defendant vary with each model, in each the plaintiff is assaulted by an unknown third party as she walks down a street in a dangerous neighborhood. I call this the street assault setting. Each case is then recast in a second setting involving an interaction with an insti-

149. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 369 (1985). It is not the instant case that worries the court, but the possibility that allowing the instant case would lead to a future danger case, which the court seeks to avoid. *Id.*

150. *See id.*

151. The reliance case plaintiff may argue that her case is actually a snake pit case. This argument focuses attention on what the appropriate categorization of a particular case is and presents no slippery slope problem.

152. *See* discussion *infra* part III.B.

153. *See supra* note 141.

tutional bureaucracy. For purposes of this exercise, the institution concerned is a child protective services agency. Again, the actions of the plaintiff and defendant vary with the particular model, but in each, the plaintiff child is in a violent home and is injured by a party independent of the state.[154] I call this the abused child setting.

1. The Snake Pit Model

In the street assault setting of this model, the plaintiff is in the area where she is attacked because she was abandoned there by the police department. The police are aware that it is a dangerous area and are also aware that the victim has to walk some distance in order to leave the area. After the police depart, she is assaulted and injured.[155]

The model is similar in the abused child setting. A child is removed from her home—which may itself be a dangerous place—and placed in foster care by the child protective services agency. Unfortunately, the child is placed with a foster parent who is abusive. The agency is aware of the foster parent's violence. The foster parent injures the child.

2. The Reliance Model

In the street assault setting, the plaintiff is in the area by her own choice. She has had no previous contact with the police. As the plaintiff chooses which route out of the area she will take, she sees a police officer standing on a street corner. The officer assures the plaintiff that she (the officer) will offer protection. Plaintiff consequently turns down the street by the officer and, within several paces, she is attacked. The officer, who can clearly see the attack

154. Cases of indirect harm generally seem to arise in one of two settings—either an isolated and discrete encounter between a state actor and a victim: *e.g.*, Ross v. United States, 910 F.2d 1422 (7th Cir. 1990); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983); or an ongoing interaction with a social services agency: *e.g.*, K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990); DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 294, 299-301 (7th Cir. 1987), *aff'd*, 498 U.S. 189 (1989); Estate of Bailey v. York, 768 F.2d 503, 505-06 (3d Cir. 1985).

155. There are many possible variations of each hypothetical presented above. For example, in the snake pit street assault, instead of transporting plaintiff to the area, the police might impound her car, abandoning her in the area with no transportation, or they might arrest the driver of a car in which she was traveling, leaving her without transportation. *See, e.g.*, Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989). These are minor variations on the same theme. Plaintiffs in either instance may plausibly argue that the state action caused her to be exposed to the danger.

and could intervene to protect the plaintiff with complete safety, does nothing.[156]

In the abused child setting, the protective services agency is aware of paternal abuse and manifests some intention to deal with it. A case worker collects reports of the abuse from various neighbors or relatives, for example, or takes other action and creates the impression that she will take appropriate action. However, no action is taken. The reports are simply filed away. The agency does not remove the child and the case worker does nothing to prevent further harm to the child. The parent then seriously injures the child.

3. The Unseen State Actor Model

In the street assault setting, the plaintiff is again in the area by choice. She elects to walk down a particular street, and she is assaulted in the street. There is a police officer conducting surveillance on the street. Plaintiff does not see the officer, but the officer sees the plaintiff enter the street and observes the assault. Again, although the police officer could simply and safely intervene, she does nothing, and the plaintiff is seriously injured.

The abused child setting for this model is similar to the reliance model. Child protective services is aware of the abuse being inflicted by the parent. A case worker is assigned. She opens a file and maintains records, but does nothing that could be interpreted as taking any interest in the case. She takes no action to intervene, and the parent seriously injures the child.

4. The Absent State Actor Model

In the street assault setting, the plaintiff is again in the area by choice. She chooses her own route through the area. There is no police officer on the block or in the area. She is attacked and she calls for help. No police are present and none arrive in time to help her.[157]

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156. There may be many minor variants of the same theme. The plaintiff in the reliance street assault may ask the police officer if the particular block is safe or, more subtly, she may exchange nods with the officer. In each circumstance, plaintiff may argue that the police officer's action amounted to an assurance, on which she reasonably relied, that the officer would, within reason, provide the basic protective services expected of the police. Certainly the case where the officer offers explicit assurance is stronger than that in which the assurance is tacit, but the cases are similar in structure and rest on the same theory of liability.

157. It is possible that the absence of police assistance is attributable to chance, to an individual officer's actions, or to the police department more generally. The officer who should have been responsible for assisting the plaintiff may have taken an unauthorized break from patrolling and, hence, could be held responsible for the absence of police assistance. Or it may be that no officer was within range to assist the victim because of

In the abused child setting, although the child is abused and there is an established child protective services agency, the agency does not take up the case. No action is taken, and the child is severely injured.

5. The Absent Institution Model

In the street assault setting, there is no police department. Needless to say, no police officer intervenes in the assault. In the abused child setting, there is no child protective services agency.

V. Treating the Categories

All indirect harm cases can be analogized to at least one of these models.[158] Understanding the models and the appropriate legal analysis for each model is a valuable endeavor for two reasons. First, it enables us to identify and refine predictable and consistent patterns of liability in indirect harm cases. Plaintiffs whose stories can be portrayed as snake pit cases or reliance cases may succeed in a section 1983 action.[159] Unseen state actor cases probably cannot be won under section 1983, but may oe litigated under conventional tort doctrines.[160] Further, this is an area in which there are very compelling cases beyond the reach of current constitutional doctrine and, hence, it is an area where legislative reform is appropriate and perhaps plausible as well. Absent state actor and absent institution cases are extremely rare and present their own specific problems, quite distinct from those presented by the other indirect harm cases. Correctly categorizing a case helps identify stronger and weaker claims. More generally, understanding the categories assists in devising coherent and constructive approaches, including legislative approaches, to problems of indirect harm.

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poor patrolling patterns or inadequate staffing of particular shifts or areas. These are institutional failures.

158. I have not included a separate category for cases involving individuals in state custody. These may be viewed as either snake pit cases or reliance cases, depending on the particular circumstances. For example, if prison officials know that the prison is dangerous—that many assaults occur—then in placing a vulnerable individual in prison they are exposing her to danger. This is the equivalent of throwing someone into a snake pit. But if instead the victim is ill before imprisonment, perhaps under the care of a physician, then if she is imprisoned and denied medical care, the resulting case is really a reliance case. The prison officials neither created the harm, nor exposed her to a new risk. Rather, they cut her off from another source of aid on which she had relied.

159. Of course, the success of any particular plaintiff depends on many factors, including the available evidence. In addition to establishing that the state owed a duty or that it "deprived" plaintiff of a protected interest—the *DeShaney* question—plaintiffs must establish that the defendants acted with the requisite degree of culpability and causation.

160. *See infra* notes 223-27 and accompanying text.

Second, many indirect harm cases can be analogized to more than one model case. As is discussed above, a given client's story may be transformed into several different cases. The same underlying facts may form the basis for either a snake pit case or a reliance case. The decision to relate a case as a snake pit case or an unseen state actor case is one of the critical choices that helps to determine whether it is successful or not. Any lawyer and any judge confronting an indirect harm case should recognize and appreciate the far-reaching consequences that flow from describing the case as a snake pit case rather than an unseen actor case, and vice versa.

A. Allocating Liability

I now further consider and explore each category of case. I have two points to make in doing this. First, I want to illustrate what happens within each category and how the cases can be and are in fact dealt with. Second, in discussing real cases decided by real courts, I want to highlight the struggle between the parties for control of the narrative and the results of this struggle. This exemplifies my point that most cases could be categorized in several different ways and that the categorization has a direct impact on the outcome of the litigation.

1. Liability in a Snake Pit Case

These are the strongest cases for section 1983 liability. In a snake pit case, the client's story can be most readily shaped into a narrative that focuses on state action rather than inaction, thereby avoiding the pitfalls of *DeShaney*. Further, the narrative can demonstrate that the state action created the danger or at least caused plaintiff's exposure to the dangerous situation, as if the state had hurled the plaintiff into a snake pit.

The plaintiff in the street assault case, for example, can argue that the police transported her to the area, that they abandoned her there without assistance, that the state action exposed her to grave danger, and that as a result of that exposure, she was injured.[161] Her position is unlike that of Joshua DeShaney, where the state played no part in creating the danger or in rendering him any more vulnerable to it. Similarly, the state has been held to be liable for a constitutional violation as a doer of harm where it placed a child

161. The plaintiff would presumably also have to allege some degree of knowledge on the part of the defendants—that they knew or should have known that they were exposing her to grave danger, for example. The precise level of culpable conduct necessary to make out a cause of action is discussed *infra* note 141.

with abusive foster parents "just as the Roman state was a doer of harm when it threw Christians to lions."[162]

The appellate opinions are consistent with this analysis. Several cases that fit the snake pit model have been litigated, and the appellate opinions have favored imposition of liability, both before and after *DeShaney*. So, for example, the police may be held liable where they take a drag-racing driver into custody and then leave the three children who were with him alone in the abandoned car on a Chicago freeway,[163] or where they arrest a drunken driver, impound his car, and leave a passenger stranded in a high crime area at 2:30 A.M.[164] In each of these circumstances, the police have exposed the plaintiff to danger. Similarly, state defendants have been held liable where they permitted an unsupervised prisoner to have use of a patrol car, and the prisoner used the car—complete with flashing lights—to stop a civilian whom he assaulted and killed.[165] In this instance, the police actually participated in creating the danger. Liability has also been imposed in other snake-pit like circumstances.[166]

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162. K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990).

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

164. Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 494 U.S. 938 (1990). While the discussion of *DeShaney* is quite brief, the court dismisses its applicability to *Wood* by noting that the state played an active part in creating the danger here. *Id.* at 590. In its subsequent discussion rejecting the defendant's claim to qualified immunity, the court explicitly discussed the Seventh Circuit's snake pit reasoning with apparent approval. *See id.* at 592-94. *But see* Hilliard v. City & County of Denver, 930 F.2d 1516, 1520-21 (10th Cir.) (rejecting claim on facts similar to *Wood* on grounds that constitutional right to due process was not clearly established, and hence, defendants were entitled to qualified immunity), *cert. denied*, 112 S. Ct. 656 (1991). In *Hilliard*, the court based its decision on fact that state tort remedies may have existed and did not conclusively state whether the facts established a violation of constitutional rights. *Id.*

165. Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (en banc); *see also supra* note 60.

166. In addition to those discussed above, there are a number of other cases that I would categorize as snake pit cases. *See* Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) (police arrested original driver, leaving drunk driver with car and keys, thereby creating danger; drunk driver eventually caused accident with plaintiff); Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) (police conspired with assailants and therefore enhanced danger; they did not simply fail to intervene); L.W. v. Grubbs, 974 F.2d 119, 121-22 (9th Cir. 1992) (prison knowingly employed violent male sex offender to assist female nurse in solitary setting and offender attacked nurse), *cert. denied*, 113 S. Ct. 2442 (1993); Gibson v. City of Chicago, 910 F.2d 1510, 1519-24 (7th Cir. 1990) (reversing grants of summary judgment in favor of city and police lieutenant on § 1983 claims, where police had trained and armed officer and then had allowed him to retain his gun when he was relieved of duty due to mental illness); Cornelius v. Town of Highland Lake, 880 F.2d 348, 357-59 (11th Cir. 1989) (reversing summary judgment for defendants where town employed prison inmates to work in town hall and inmates then abducted town clerk), *cert. denied*, 494 U.S. 1066 (1990); C.M. v. Southeast Delco Sch. Dist., 828 F. Supp. 1179 (E.D. Pa. 1993) (student injured by abusive individual employed by school district as teacher); G-69 v. Degnan, 745 F. Supp. 254 (D.N.J. 1990)

While an assertion that the plaintiff is worse off may provide a basis for liability, the contrary assertion—that the plaintiff is no worse off—does not defeat liability. The defendant in a snake pit case cannot successfully resist liability on the ground that the victim faced danger even before the state acted and hence, is no worse off than she would have been absent the state action. It cannot claim, for example, in the abused child case, that the child was subject to physical abuse before any state action occurred and might well have suffered the same fate absent any state action. "The state, having saved a man from a lynch mob, cannot then lynch him on the grounds that he will be no worse off than if he had not been saved."[167] It is enough that state action caused the harm that injured the child. This satisfies the requirements of the Due Process Clause.[168]

Because a snake pit case is a strong one from the plaintiff's perspective, defendants may seek to retell a different story that resembles a different model—to dispute the characterization of the case as a snake pit case.[169] One way to do this is to begin the story at a later point, after the plaintiff in the street assault model has arrived at the location in question. In that time frame, there is no readily per-

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(finding that where police had induced individual to become informant with promises of personal protection, and state had benefitted from dangerous position of plaintiff, state had affirmatively assumed duty to plaintiff that it could not discard consistent with due process); *see also* Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993) (although properly categorized as snake pit case, court mistakenly upheld summary judgment for defendants on basis of qualified immunity); Medina v. City & County of Denver, 960 F.2d 1493, 1497 n.5, 1501 (10th Cir. 1992) (same); *Hilliard*, 930 F.2d at 1519; Swader v. Commonwealth, 743 F. Supp. 434 (E.D. Va. 1990) (where mother was employed as a nurse on state prison grounds, and lived outside fenced-in portion of prison, and state improperly allowed unaccompanied inmate outside fenced-in portion, who subsequently raped and murdered mother's child, mother stated a claim for relief based on duty of state to provide protection). For further discussion of cases erroneously deciding snake pit cases on qualified immunity grounds, see *supra* note 55.

167. K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990). It is difficult to harmonize this decision with the suggestion in the Seventh Circuit's opinion in *Reed v. Gardner* that if the first driver (the one arrested by the police) was also drunk, then there is no cause of action because the car would have been driven by a drunk driver in either event. *Reed*, 986 F.2d at 1125-26.

168. This can be understood as a struggle over when the relevant narrative begins. Plaintiff would begin with the state action that created or exposed the victim to danger—the placement of the child with the abusive foster home. The defendant would start at an earlier point that reveals the child's initial abuse by its biological parents. As the discussion above demonstrates, the condition of the child before the state action is not legally relevant.

169. In virtually all cases, the defendants will also dispute the plaintiff's factual claims. They will deny that they abandoned passengers or children in dangerous areas. These defenses raise factual questions that must be resolved by the jury. In addition, defendants may raise a defense of failure of causation. *See infra* text accompanying notes 170-72.

ceived state action, only inaction. The defendant's version of *Wood v. Ostrander* might be simply that plaintiff was assaulted by an unknown assailant while she was walking down the street at night, but she wishes to sue the police, alleging that they failed to protect her from the assault.[170] The defendants can then argue that because she was not in custody, there was no duty to protect her. If this construction of events is accepted, the claim parallels the unseen actor model. Such a claim fails under *DeShaney*.[171]

This is not to suggest that once a case is identified as a snake pit case the defendant is without defense. In virtually all cases, the defendants dispute the plaintiff's factual claims. They deny that they abandoned the passenger in dangerous areas, raising factual questions that must be resolved by the jury.[172] In addition, defendants may assert that an intervening cause has broken the legal chain of causation and absolves them of liability. This is a potential defense to an indirect harm case. However, the mere fact that the direct cause of harm is an actor independent of the defendant does not ensure the success of this defense. It is, for example, precisely the foreseeability of the independent act—the street assault—that made the defendant's conduct in abandoning the plaintiff problematic in the first place. That the foreseen act occurred does not defeat liability. In some cases, however, there may be additional intervening acts that do allow for a defense of lack of causation.[173]

2. Liability in a Reliance Case

Liability in a reliance case is consistent with *DeShaney*. Joshua DeShaney's claim failed in part because the state did not "do anything to render him more vulnerable" to harm.[174] To establish lia-

170. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 494 U.S. 938 (1990); *see* discussion *infra* notes 196-98 and accompanying text.

171. If the defendants' version of the narrative is accepted, the fact that the plaintiff may have been briefly in police custody while she was transported to the area will not save her. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-201 (1989).

A second defense available in a snake pit case might be that the intervening and independent actor who is the immediate cause of the harm severs the chain of legal causation. As a general matter, this is a weak defense in a snake pit case. It is the foreseeability of the intervening action that makes the state actor's original conduct problematic, and thus, the defense of intervening conduct is probably not available. Further, in § 1983 litigation, causation in generally viewed as a question for the fact-finder.

172. *See, e.g.*, *Wood*, 879 F.2d at 583. On remand, Wood was tried before a jury, and a verdict for defendants was returned, presumably because the jury did not consider that the plaintiff had proved the facts that formed the basis for the complaint.

173. *See, e.g.*, *infra* notes 206-20 and accompanying text.

174. *DeShaney*, 489 U.S. at 201.

bility, then, the plaintiff must distinguish herself from *DeShaney* by alleging and proving some action on the part of the state—that is, that the state "did" something.[175] Further, the state action must have made the victim more vulnerable to harm.

In a reliance case, these requirements may be met. First, some activity of a state actor leads a critical actor—either the plaintiff or a potential rescuer—to refrain from action of their own and instead rely on the state. It might be the assurances of the police officer, the case worker, or even the command of an officer at an accident scene. From the perspective of the critical actor, there is state action, rather than simple inaction. Second, because the action induces the critical actor to refrain from action of her own, it deprives the plaintiff of one potential avenue of rescue or protection, which may render the plaintiff more vulnerable to danger.[176] Liability in these instances is consistent with the duty to rescue imposed in torts.[177]

For example, in the street assault case, the best point of view for the plaintiff to use is that of the victim. From the police officer's perspective, this may not appear to be a case of action causing harm. An outside observer might reach the same conclusion. The victim can testify, however, that the police officer's assurance was action. She must also establish that the action rendered her more vulnerable to harm. To do this, she must establish that as a consequence of the state action, in reliance on it, she altered her behavior in a way that exposed her to greater danger or increased her exposure to existing danger. Perhaps she chose a particular street or was less alert to the activities on the street around her. Thus, the officer's action rendered her more vulnerable than she would otherwise have been. Where it is reasonable for the plaintiff to have relied upon the state actor and, as a result of that reliance, the plaintiff is rendered more vulnerable, and where this is predictable and foreseeable, there is a sound basis for liability.[178]

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175. This may mean that the story needs to be told from a perspective that reveals the state action. What we recognize as action depends on our point of view. From the point of view of one observer, a particular object may appear to be moving. But from the point of view of a second observer, the same object could appear stationary. Thus, one would report action, while the other would report no action.

176. This approach is similar in some regards to that pursued by Justice Brennan in his dissent in *DeShaney*. 489 U.S. at 207-10 (Brennan, J., dissenting). Yet it is not an approach rejected by the majority. Rather, the majority concludes there is no evidence to support the conclusion that state action made Joshua more vulnerable. *See id.* at 203.

177. *See* RESTATEMENT OF TORTS (SECOND) § 324 (1965) (imposing liability on one who comes to aid of person and then leaves that person in worse position).

178. It should be clear that the street assault model is one of many possible variations on the same theme. The case could be made much more difficult by envisioning police actions that are not such explicit assurances of protection. As long as the action of the

In the abused child reliance case, a different focus must be adopted. A child essentially is unable to protect herself, with or without action by the state. Therefore, a child—or other helpless person—cannot show that she altered her behavior in reliance on the state in a manner that made her more vulnerable than she would have been otherwise. Instead, she must incorporate the viewpoint of some other potential rescuer—a concerned relative or health professional, for example. The plaintiff initially must demonstrate some state action, which might be taking reports of abuse or otherwise demonstrating an interest in the case. From the would-be rescuers' point of view, the state action in manifesting its concern encourages—or, in some cases, may even compel—the potential rescuer to rely on the state instead, and hence prevents the rescuer from taking any action of her own. Again, plaintiff would do best to establish that because of the action of the state, a person who would have taken action to assist the plaintiff did not do so. The state's action thus renders the victim more vulnerable because it cuts her off from an alternative source of protection, and it may be a basis for liability under current Supreme Court case law.[179]

One extreme example of a reliance case is *Ross v. United States*.[180] Gordon Johnson, a Lake County, Illinois, police officer, intervened to prevent willing and apparently able rescuers—including members of the Waukegan police and fire departments—from going to the aid of a drowning boy.[181] The officer acted pursuant to a county policy that only county personnel would conduct rescues. When the county police failed to implement their own rescue in a timely fash-

police officer is such that a reasonable person would understand it as an assurance, the fundamental element of a reliance case could be shown.

179. Imposition of liability in reliance cases is sound from a policy perspective, as well. Citizens are frequently encouraged to rely on state professionals rather than on self-help. We are, at least in the view of many professionals, better off if we rely on trained firefighters and police officers than if we attempt to extinguish fires or apprehend criminals ourselves. Drivers approaching an accident are routinely waved on. It may well be desirable to keep traffic moving and allow those with special training to control the accident scene. Thus, it is better that other drivers obey the directives rather than stop and engage in their own ad hoc rescue efforts. Yet, if the officers on the scene have no obligation to do anything and can stand idly by while the victims perish, perhaps the concerned citizen should ignore the officer's directives and intervene at any cost. Recognition of the obligation to take action, in part achieved through imposition of liability where the officer has manifested assumption of responsibility for a situation, would encourage the desired reactions on the part of all concerned.

180. 910 F.2d 1422 (7th Cir. 1990).

181. *Id.* at 1424-25.

ion, the boy drowned. The boy would have been rescued and would have survived had Johnson not intervened.[182]

The plaintiff sued a number of defendants, including the City of Waukegan, Lake County, and Officer Johnson. The district court entered judgment against the plaintiff as to all defendants.[183] Plaintiff appealed, and the United States Court of Appeals for the Seventh Circuit reinstated the complaint as to Lake County and Johnson. The court readily distinguished *DeShaney* and Seventh Circuit precedent by noting that this was not a case of governmental failure to aid, which would be inaction and hence would not be actionable under *DeShaney*. Rather, this was an instance of the government affirmatively acting to cut off other sources of assistance: " 'When a state cuts off sources of private aid, it must provide replacement protection.' "[184] Indeed, the court went so far as to conclude that "a constitutional right that prevented a police officer from cutting off private avenues of lifesaving rescue without providing an alternative" was clearly established in 1985.[185] At the same time, the court upheld the dismissal of the claim against Waukegan, which was grounded in the failure of its officers to act, finding that its liability was foreclosed by *DeShaney*.[186]

As *Ross* is described by the Seventh Circuit, it is a reliance case.[187] The basis for liability is that the state took action and that others

182. *Id.* at 1425. For purposes of its decision, the court assumed that William would have survived had Johnson not stopped the rescuers. *Id.* The statement of the facts was taken from the complaint and included all favorable inferences. *Id.* at 1424. As the court made clear, whether the plaintiff could prove these facts was a question for a later stage in the litigation. *Id.* The police were allegedly acting pursuant to a policy that only official personnel could attempt rescues. *Id.* at 1425.

183. *Id.* at 1425-26.

184. *Id.* at 1431 (quoting Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) (en banc)).

185. *Id.* at 1432. This holding was necessary to support the court's denial of qualified immunity to Johnson. *See id.* at 1432-33. *But see* Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (finding no liability where police blocked striking firefighters access to firefighting equipment, thereby preventing them from rescuing victims in burning building).

186. *See Ross*, 910 F.2d at 1428-29.

187. Recent reliance cases include Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992) (parents, guardians, and children have little choice but to rely on school officials for protection and security), *cert. denied sub nom.* Caplinger v. Doe, 113 S. Ct. 1066 (1993), *reh'g granted en banc*, 987 F.2d 231 (5th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) (defendant police chief directed police officers to cease efforts to protect plaintiff); Pinder v. Commissioners of Cambridge, 821 F. Supp. 376 (D. Md. 1993) (mother relied on assurances of police that former boyfriend, who had threatened violence and had previous convictions for arson against plaintiff, would be held in custody); *see also* Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343 (E.D. Wis. 1992) (police responded to call for help from two women who had discovered drugged and beaten victim in street and then, despite women's protestations,

relied on that action, thereby rendering the victim more vulnerable to harm. *Ross* resembles the abused child model more closely than the street assault model, in that the state did not interfere with the victim's efforts to protect himself, but rather with the efforts of others to protect him. Further, *Ross* is an extreme case in that the reliance of the original rescuers was forced upon them when they were threatened with arrest if they attempted rescue. But *Ross* exemplifies the general principle of a reliance case—that the state took action on which the victim or others relied and thus increased the vulnerability of the plaintiff.

Ross might have been presented and understood as an unseen state actor case—a case of state inaction. The plaintiff might have claimed that Officer Johnson and Lake County were obliged to rescue the drowning boy and failed to do so. Had plaintiff relied on this theory, the dismissal of the case would have been upheld.[188] It was critical to the plaintiff's success in *Ross* that the story be perceived as one about state action rather than inaction. This perception was enhanced by the court's adoption of a broader view of the incident, which included the initial state action of preventing the earlier rescue as part of the incident. Had the court chosen to begin its version of the story with the county's failure to provide substitute rescue services, only state inaction would have been apparent. The active version of events is also strengthened by the inclusion of the perspective of the would-be rescuers. It is from their point of view that the state action is most clearly visible.

It is useful to contrast *Ross* with *Jackson v. City of Joliet*,[189] an earlier Seventh Circuit decision. In *Jackson*, a police officer came to the scene of a one-car accident within two minutes of the time when the accident occurred. The car was beginning to burn and its wheels were still spinning. The officer called for the fire department, but made no effort to see if the individuals in the car needed assistance or, indeed, were still alive. While waiting for additional rescue services to arrive, the officer directed traffic around the accident scene. After the fire department arrived and put out the fire, an ambulance was called. The people in the car died of their injuries. They would have survived had the officer aided them when he arrived at the

returned victim to custody of his assailant, Jeffrey Dahmer). *Sinthasomphone* could also be conceptualized as a snake pit case, but the opinion of the court clearly employs the reasoning of a reliance case.

188. This is clear from the court's affirmance of the dismissal of *Waukegan*. The court refused to permit the plaintiff to pursue a claim based on Waukegan's failure to rescue. *See supra* text accompanying note 185.

189. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1045 (1984).

scene, called for an ambulance immediately, or not directed traffic in a way that prevented potential rescuers from saving them.[190]

The Seventh Circuit focused principally on the claims that the officer had failed to rescue the accident victims or to call for an ambulance. Viewed in this fashion, *Jackson* is an inaction case.[191] Anticipating *DeShaney*, the court rejected the notion that there is an affirmative constitutional right to receive elementary protective services.[192] The court's consideration of the plaintiffs' final basis for liability was cursory. It simply noted that it was "extremely unlikely that a passing motorist would enter a burning car on the off chance that the occupants were still in it and if so were still alive, and it is even less likely that a passing motorist would have extinguished the fire."[193]

Comparing *Ross* and *Jackson* underscores two points. First, these are similar cases decided by the same circuit, yet reaching opposite results. The crucial difference between the cases is that *Ross* is deemed to be about state action—a reliance case—and *Jackson* about state inaction—an unseen state actor case. Yet *Ross* might have been seen as an inaction case and *Jackson* could have been seen as an action case. Thus, considering *Ross* and *Jackson* together demonstrates that the categorization of a particular case is critical and that it is also contestable in many instances. Second, if *Ross* and *Jackson* both are analyzed as reliance cases, they can be contrasted to illuminate the contours of liability within this category of cases.

It is important to understand the similarities and differences that the two cases present. There were neither allegations nor evidence of other potential rescuers in *Jackson*. Had other rescuers existed, from their point of view as well as the point of view of the victims, the state actor played a very similar role to that played by Officer Johnson in *Ross*. The difference between the state action in *Ross* and that in *Jackson* is one of degree. In *Ross*, the police threatened arrest if the rescue was attempted. In *Jackson*, they waved off potential rescuers. *Jackson* and *Ross* are two points on a continuum that runs from cases where the police physically bar others from assisting—as may be true in the case of a person held in prison—to cases where a police officer is simply present. Even the mere presence of a police officer may convey a message to many well-meaning citizens that the situation is under control and no action on their part is needed. Even that which, from the police officer's viewpoint, may seem like

190. *Id.* at 1201-02.
191. *Id.* at 1202-03.
192. *Id.* at 1202-05.
193. *Id.* at 1205.

pure inaction may convey an important message to a passerby and therefore be seen as action.

Jackson could have been seen as a reliance case. It was not seen this way because the court there adopted a narrow view of the scope of the relevant facts and did not consider the viewpoint of potential rescuers. In doing so, it categorized *Jackson* as an unseen state actor case. *Ross* could also have been seen as an unseen state actor case. It was not seen this way because, in that case, the court adopted a broad view of the scope of the relevant facts; one that included the viewpoint of the potential rescuers. The factor that distinguishes these two cases and determines their outcomes is the categorization of the case—whether the court saw action or inaction. This was one of the issues—and, as it turns out, a critical issue—that was determined during the course of the litigation. Judges and lawyers need to appreciate the importance of this issue and explicitly focus on it.[194]

This is not to say that there should be liability in all cases that can be categorized as reliance cases. Courts must draw a line somewhere on the spectrum of state involvement and decide that in some instances the state's conduct is not such as to warrant imposition of liability based on the Constitution. Liability cannot be limitless. Sometimes the state action is too tangential or too insignificant.

Development of a meaningful doctrine of causation would be the most desirable way of restricting liability in reliance cases. That the plaintiff has showed state action that rendered her at least theoretically more vulnerable does not complete the analysis of liability. The plaintiff must also establish that the state action caused the harm to the plaintiff.

This may well be a difficult problem in some reliance cases, as can be appreciated if *Jackson* is analyzed as a reliance case. Did the officer's action in waving away potential rescuers, the action for which he might be held liable, cause harm to the accident victims? Would someone have stopped? If so, would they have attempted rescue?

194. *DeShaney* itself could be reconceptualized as a reliance case; that is, a story told not from the point of view of the child (who was helpless to protect himself), but from the point of view of a concerned adult who might have intervened but for the actions of the state, which either deterred her or otherwise prevented her from intervening. Obviously, part of the plaintiff's difficulty might be in identifying and locating such a person. And it is impossible to say whether there was such an adult in DeShaney's case. But surely not all *DeShaney*-type cases are lost. If Joshua DeShaney's mother had returned to the scene and had attempted to remove Joshua from his father's custody to protect him from the violence that prevailed in that household, and if the state had instructed her to rely on DSS, the outcome might have been different.

If so, would it have been successful?[195] Each of these questions must be answered in the affirmative in order to establish liability.[196] If any one is not, then the plaintiff's case fails. If *Ross* and *Jackson* are both correctly decided, it is not because one is a reliance case and the other an unseen actor case, but rather because the evidence of causation was weaker in *Jackson* than in *Ross*.[197]

While careful scrutiny of causation is the appropriate means for limiting liability in reliance cases, in some instances the traditional doctrine must be modified, given the particular features of a reliance case. Where the scenario is similar to the street assault case and where the victim survives, the victim herself may be able to provide the necessary evidence that there was action on which she relied that can be shown to have caused her harm. Proof of causation—that the state action actually caused the victim to be more vulnerable—is possible through the victim's own testimony. Similarly, in some unusual cases—like *Ross*—it may be possible to identify the would-be rescuers and provide evidence that they would have acted. But frequently, it is impossible for the plaintiff to specifically identify people who might have helped but were prevented or deterred.

Given the peculiar circumstances of reliance cases, it may be appropriate, at least in some instances, to shift the burden of proof of noncausation to the defendant, because it is the defendant's conduct that made proof impossible for the plaintiff.[198] For example, the plaintiff in *Jackson* could not show that someone else would have stopped or how that person would have behaved had they stopped, because the action of the police scattered all possible witnesses. Under these circumstances, where the state exercise of power has denied the plaintiff the ability to produce the required proof, shifting the burden is the appropriate response.[199]

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195. These questions are briefly raised by the court in *Jackson*. *Id.* The court did not, however, ground its decision on the failure of causation. Instead, it declined to resolve these factual questions and based its holding on the absence of any duty to provide rescue services. *Jackson*, however, has subsequently been reinterpreted by its own author, Judge Posner, to rest on the failure of causation grounds. *See* DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 302 (7th Cir. 1987), *aff'd*, 498 U.S. 189 (1989). This approach is more consistent with a reliance analysis.

196. It should be noted that causation is generally considered to be a jury question in § 1983 cases. Thus, it is the jury that will most often have to answer these questions. This is difficult to do without indulging in speculation.

197. Given the analysis of the court in *Jackson*, it is not possible to assess the evidence of causation that was presented or available.

198. At a minimum, this would mean shifting the burden of production to the defendant.

199. An alternative approach that simplifies the causation problem would be to conclude that once the state acts to increase the danger to a person in some manner, it has a corresponding obligation to take action to mitigate against the increased risk of

Finally, it is important to recognize that the obligation imposed upon the state in a reliance case is limited. If the state increases the vulnerability of an individual through reliance, it need not undertake to protect the individual from the harm absolutely. It would be adequate to take action to negate the increased risk. Thus, it might be enough if the child protective services agency told all concerned that it would do nothing,[200] or if the police officer clearly informed the victim that she would receive no protection from the officer. This negates any possible reliance.

For the person in prison, this may lead to an anomalous result. If the basis for an obligation to provide medical care is that the person has been cut off from her own sources of care, then the jailer would only need to allow a prisoner to do what she would be able to do for herself on the outside. For many indigent prisoners, this would mean that they would receive no medical care, as might well be the case were they not in prison. For a convicted prisoner, that result would be inconsistent with *Estelle*. Standing idly by while a person unnecessarily suffers from an untreated injury or illness violates the Eighth Amendment. But for a pretrial detainee, the Fourteenth Amendment would demand nothing more. Thus, depending on the resources of the prisoner, we could find ourselves back in the position that was deemed unacceptable in *City of Revere* and *Romeo*—a situation where the convicted prisoner gets better treatment than the innocent.[201]

The resolution to this dilemma must be to recognize that there are two independent components to Fourteenth Amendment protections that can be invoked. First, for those in a traditional custody setting where the Eighth Amendment would apply, except for its limitation to cases of convicted criminals, the Fourteenth Amendment must give what the Eighth Amendment would give. It functions as an equalizer. In addition, the Due Process Clause ensures that the state may not make an individual more vulnerable to

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harm. Thus, if it prevents others from rescuing, it has an obligation to provide substitute rescue services. This appears to be the approach adopted in Ross v. United States, 910 F.2d 1422, 1432-33 (7th Cir. 1990). If the problem is conceptualized as a failure to rescue, it is a much simpler matter for the plaintiff to show that the failure to rescue caused the harm—that is, that the rescue could have been conducted. Plaintiffs could then assert that the initial state action gave rise to a duty to act and the failure to fulfill that duty to act caused the harm. Whatever its merits, this approach is less likely to meet with success, as it again frames the issue in terms of state inaction.

200. *See, e.g.*, Doe v. Milwaukee County, 903 F.2d 499, 501 (7th Cir. 1990). The court did not rely on this fact, but rather found that *DeShaney* barred liability. *Id.* at 502.

201. *See supra* text accompanying notes 27-34.

harm.[202] This second aspect of due process protection is applicable to all individuals, whether or not they are in custody. For those who are not in traditional custody, it is the only right to protection from indirect harm that may be claimed.

Liability in reliance cases is firmly grounded in the Fourteenth Amendment as it has been interpreted in *DeShaney*. Where a plaintiff can construct a narrative in which she or others relied on state action, and thus her peril was increased, she may state a viable claim for relief. Yet state liability in reliance cases is not limitless. Rather, it can be constrained through careful application of causation requirements.

3. Liability in an Unseen State Actor Case

DeShaney most directly controls liability in an unseen actor case. In such a case, a state actor may be present at an incident and may even engage in affirmative conduct, but the actor's presence and conduct has no discernible effect on the behavior of the other individuals involved in the incident because the actor is unseen. Under these circumstances, from any nonstate actor perspective, the incident would have unfolded in the same manner had the state actor been absent or nonexistent. In the view of the *DeShaney* Court, there is no "action" under these circumstances. The Court only recognizes action where conduct has some specific and visible effect on other individuals. If the state actor's presence and conduct does not change the behavior of other individuals, then no matter what the state actor does, the case will be treated as an inaction case. This leaves the plaintiff without recourse, unless it can be demonstrated that the victim was in custody.[203]

For example, in the street assault setting, although the police officer was aware of the peril to the victim, the victim was not aware of the police officer and therefore cannot demonstrate reliance. Nothing the police officer did increased the vulnerability of the plaintiff. The officer neither created the danger nor exposed the victim to a pre-existing danger. The story would have unfolded in the same manner had the officer not been present at all. The only complaint the victim can raise is that the officer failed to rescue her—the precise complaint foreclosed by *DeShaney*.

Similarly, because the child protective services agency manifested no interest in the case, there is no conduct that prevented or de-

202. For an opinion written by Judge Posner reaching the same conclusion, but reasoning by analogy to tort law, see K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990).

203. *See supra* notes 112-22 and accompanying text.

terred another potential rescuer. Child protective services did not do anything to affect the conduct of the other participants in the story, and hence, no agency action is perceived.

DeShaney is a more concrete instance of this model. The various actions taken by the defendants—receiving and recording information and communicating with various concerned parties—were judged by the majority to have had no effect on the actions of the other participants in the narrative.[204] Because these actions had no apparent effect on anyone else, it was, for the majority, the same as if they had never been taken at all—as if the actors were invisible or nonexistent. They were of no consequence. Hence the case is seen as one of inaction, for which the Court determined there can be no liability. This reasoning—that conduct is defined as action only where it has impact on others, and that there can be no constitutional liability without action[205]—dictates the result in unseen actor cases. Under *DeShaney*, there is no liability in a case viewed as an unseen actor case.[206]

An example of a recent case that was ultimately analyzed as an unseen actor case, and hence an instance where the plaintiffs' claim was dismissed, is *Gregory v. City of Rogers*.[207] *Gregory* is also a case where the parties contested the appropriate categorization of the case. Counsel for the plaintiffs offered a snake pit narrative, while

204. This is a reasonable conclusion to reach, given the record in the case.

205. There are circumstances where an institutional—as opposed to an individual—failure to act can give rise to constitutional liability. Liability will be imposed on a municipality for failing to train and/or supervise officers, where the failure amounts to deliberate indifference to the constitutional rights of citizens, and where the failure to train or supervise causes the underlying violation of constitutional rights. City of Canton v. Harris, 489 U.S. 378 (1989). Apparently, the state action of establishing a police force gives rise to obligations to train and to supervise.

This does not extend liability to new situations in cases of indirect harm, although it does broaden the range of potential defendants. In an unseen state actor case, there is no underlying violation of a constitutional right because there is no constitutional obligation to protect the plaintiff. As a result, failure to train to protect does not demonstrate deliberate indifference to constitutional rights of citizens. *See* City of Los Angeles v. Heller, 475 U.S. 796, 797-99 (1986) (per curiam) (holding that where jury had exonerated defendant police officer of violating plaintiff's constitutional rights, municipality could not be held liable). On the other hand, there is an underlying constitutional violation in a snake pit case. Failure to train or supervise would be an appropriate basis for municipal liability in a snake pit case.

206. *See, e.g.*, McComb v. Wambaugh, 934 F.2d 474 (3d Cir. 1991); Doe v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990).

207. 974 F.2d 1006 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1265 (1993). The proliferation of en banc opinions in indirect harm cases is a measure of how difficult these cases are.

the defendants' attorney formulated a case based on the unseen actor model.[208]

According to the undisputed facts that formed the basis for the defendants' motion for summary judgment, the police in Rogers, Arkansas, stopped a car driven by Stanley Turner at 2:30 A.M. after it ran a red light.[209] The passengers, Joe Edwin Gregory—who owned the car—and Donna Mae Fields, were drunk. Turner, who was the "designated driver," was not. Turner told the police that he was driving Fields and Gregory home. In checking Turner's license, the police discovered that he was wanted on a warrant for failure to appear in an unrelated matter. The police directed Turner to drive to the police station and there, at approximately 3:00 A.M., they took him into custody. Gregory and Fields remained in the car, in the parking lot of the police station. Soon after that, Gregory drove off and, within minutes, was in a very serious accident. Gregory was killed and Fields was injured.[210]

In the ensuing litigation, the district court granted the defendants' motion for summary judgment.[211] A panel of the United States Court of Appeals for the Eighth Circuit reversed the district court.[212] This opinion was subsequently withdrawn[213] and the en banc court affirmed the district court's dismissal.[214] The en banc court concluded that "a reasonable trier of fact could not find that Officer Howell affirmatively placed Gregory and Fields in danger

208. *See id.* at 1010. The defense attorney offered an alternative argument that was at least partially accepted by the court—that even if the case were a snake pit case, the intervening actions of an independent actor severed the chain of causation. *See id.* at 1011-12. The defendant "could not foresee Turner abdicating his responsibility as their designated driver, and it was his abdication that placed Gregory and Fields in danger, not officer Howell's performance of his official duty." *Id.; see also supra* text accompanying notes 170-72.

209. *Gregory*, 974 F.2d at 1007-08.

210. *Id.* at 1008. The majority concluded that there was not enough evidence to infer that the defendant police officers were aware that Gregory and Fields were drunk. *Id.* at 1010-11. *But see id.* at 1013-14 (Heaney, J., dissenting). If the officers did not know that Gregory and Fields were drunk, they would have had no reason to know that leaving them in the car might be analogous to hurling them into a snake pit, and without some knowledge (actual or presumed), there would be no liability. The majority, however, did not rest its opinion solely on the defendants' knowledge of the victims' condition. It rejected liability even if the defendant knew the victims were intoxicated, because the defendant police officer had not affirmatively placed Gregory and Fields in danger when they were left in the car by Turner at the police station. *Id.* at 1011.

211. *Id.* at 1009.

212. Gregory v. City of Rogers, 921 F.2d 750 (8th Cir. 1990), *vacated and withdrawn for reh'g en banc*, 939 F.2d 524 (8th Cir. 1991), *and opinion on reh'g en banc*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1265 (1993).

213. 939 F.2d 524 (8th Cir. 1991).

214. *Gregory*, 974 F.2d at 1012.

. . . ."[215] It rejected the plaintiffs' claims, essentially concluding that *Gregory* was not a snake pit case, but was instead an unseen actor case and that *DeShaney* controlled the result.

A review of the parties' briefs highlights the different narratives constructed from the same facts. In presenting their case to the Eighth Circuit, the plaintiffs framed their story as one where state action—the detention of Turner—jeopardized the lives of Gregory and Fields.[216] The action of the police interfered with the arrangement that Gregory and Fields had made to ensure their safety. The active intervention of the police distinguished this case from *DeShaney*. Under the circumstances, liability could be imposed.[217]

By contrast, the defendants framed the facts in a very different way. The defendants focused on the interactions between Turner and the police and on the absence of interactions between the passengers and the police.[218] The principal culprits were Turner and the passengers themselves, whose actions were seen as entirely unexpected.[219] The defendants' central point was that no action taken by the police endangered Gregory and Fields.[220] The defendants asserted that the plaintiffs' claims rested on the failure of the police to protect them and that therefore *DeShaney* would allow liability for failure to act only if the passengers were in custody. Because they were not, there was no liability.

The outcome in *Gregory* turned on which narrative the court adopted. Had the police acted to endanger Gregory and Fields, or had they simply failed to protect them from themselves? The district court viewed the case as a case of inaction governed by *DeShaney*. Because the passengers of the car were not in the custody of the defendants, *DeShaney* demanded dismissal. The original appellate panel accepted the plaintiffs' version, describing this as a

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215. *Id.* at 1011.

216. Brief of Appellant at 13, Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992) (No. 89-2863); *see also* Reply Brief for Appellant at 5-6; Appellants' Response to Petition for Rehearing and Suggestion for Rehearing En Banc at 4, 6.

217. Brief of Appellant at 20-23. The plaintiffs also contended that the police were obliged to arrest Fields and Gregory. *Id.* at 29-31. As a matter of federal constitutional law, this does not necessarily follow. There were a variety of different ways in which the police could have responded that would not have left Gregory and Fields alone in the unattended car.

218. Brief of Appellees at 7-8, 15, Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992) (No. 89-2863).

219. Given the grievous injuries suffered by the plaintiffs, it is an important part of the defendants' narrative to identify some blameworthy actor. Consistent with a narrative that begins after the arrival at the police station, the defendants allocated blame to Gregory and also to Turner, who allegedly left the keys in the car. This is the version adopted by the majority of the court.

220. Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc at 6-9.

case of action that created a new risk of harm. Having done so, it was a simple matter to distinguish *DeShaney* and uphold liability.[221] The en banc court returned to the view that the case was about inaction and concluded that *DeShaney* did indeed control.

Because *DeShaney* bars constitutional liability for state inaction where the plaintiff is not in custody,[222] noncustodial plaintiffs should not characterize their cases as unseen actor cases. For much the same reason, defendants should seek to recharacterize the cases as unseen state actor claims. Thus, the struggle to define the narrative in *Gregory* is a common feature of indirect harm cases.

There are unseen actor narratives that cannot readily be transformed into other more winnable stories. For example, given the facts presented in the model street assault case, it is difficult to see how the case could be viewed as anything other than a street assault case.[223] Similarly, if in fact there were no individuals who were concerned about Joshua DeShaney, then the case could not be reformed as a reliance case.

Some of these immutable unseen actor narratives present compelling cases for liability. Again, consider the street assault case. It is unacceptable for an officer charged with protecting public safety to sit idly by when she could safely intervene and save a citizen from grave injury.[224] Similarly, if a social worker had entered the DeShaney home at a moment when Joshua was in grave need of medical assistance and then recorded the situation and departed without taking steps to obtain or provide that assistance, her conduct would be deplorable. And yet, under current law, there would be no constitutional claim in these circumstances.[225]

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221. *See* Gregory v. City of Rogers, 921 F.2d 750 (8th Cir. 1990), *vacated and withdrawn for reh'g en banc*, 939 F.2d 524 (8th Cir. 1991), *and opinion on reh'g en banc*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1265 (1993).

222. *See supra* notes 97-100 and accompanying text.

223. This contrasts with *DeShaney* where, at least in theory, it is easy to see how the case could be transformed. Additional actors whose behavior is altered by the state conduct must be located and included in the story.

224. *See* Sam H. Verhovek, *Infected Nurse Wins $5.4 Million From New York State in AIDS Suit*, N.Y. TIMES, July 15, 1992, at A1 (reporting trial court order in case where prison guards stood by and failed to intervene in struggle between HIV-positive prisoner and nurse, during the course of which nurse was exposed to and infected with HIV; the article reports that the ruling was notable "for the anger expressed by the judge . . . who said testimony . . . left him convinced that the incident could easily have been avoided if the prison guards had done their duty rather than standing in the hallway observing the thrashing"); *see also* Jack Hopkins, *State Must Pay Rape Victim $204,752*, SEATTLE P. I., Feb. 25, 1992, at A-1.

225. It may be quite unlikely that an officer or a social worker would behave in this fashion. One reason for such neglect might be bias against the victim. In that instance,

These are cases in which there should be liability.[226] There are three different routes by which this result could be achieved. First, federal courts could carve out an exception to *DeShaney* that would permit liability in a limited number of unseen actor cases. This could be achieved by building on the case law that currently permits imposition of constitutional liability on police officers who fail to intervene while their colleagues use unlawful force against an individual.[227] The legal basis for liability in these circumstances remains unclear. Although there are cases affirming bystander liability after *DeShaney*, they do not discuss the applicability of *DeShaney* to the particular claim for failure to protect. A careful analysis of these cases and the circumstances they present might lead to the development of an exception to *DeShaney* that would permit liability in some unseen actor cases.

A second path to liability in some unseen actor cases is through state tort law. Although in some states there may be many barriers, including statutory or common law sovereign immunity, this has proven a viable route in some instances.[228] One substantial advantage of state tort law, where it is an option, is that proof of simple negligence might suffice.

Finally, liability could be imposed through legislation. In order to create a contained exception, such legislation might provide that where a state actor or agency is under an obligation to provide protection to another, and where the actor fails to exercise reasonable care in the discharge of that obligation, a person injured by such conduct shall have a cause of action.[229]

The rules governing liability in unseen actor cases are currently in need of reform. *DeShaney* is too restrictive and forecloses liability in cases where it is warranted. Given further exploration and develop-

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there might be an alternative basis for constitutional liability under the Equal Protection Clause.

226. My instincts as a lawyer tell me that these are winnable cases, despite the legal obstacles noted here. Certainly I would take such a case if it walked in the door. The results of cases litigated under state law also suggest that juries and judges are sympathetic to the victims in these cases. *See* Hopkins, *supra* note 224; Verhovek, *supra* note 224.

227. *See* cases cited *supra* note 113.

228. *See* Division of Corrections, Dep't of Health & Social Servs. v. Neakok, 721 P.2d 1121 (Alaska 1986) (imposing liability for failure to supervise parolee); Taggart v. State, 822 P.2d 243 (Wash. 1992) (en banc) (imposing liability for failing to supervise parolee); *see also* sources cited *supra* note 224.

229. If a legislature wanted to impose a standard of care more similar to that found in other § 1983 cases, it could provide for liability only where the defendant acts with reckless disregard for another or where the defendant fails to exercise professional judgment.

ment, the three approaches that I have sketched above offer the most practical remedies to this problem.

4. Liability in an Absent State Actor Case

Under currently prevailing law, there is no constitutional liability in an absent state actor case. It is well-accepted that the police are not insurers of public safety, to be held strictly liable when a citizen is injured by crime. Thus, in a typical absent state actor case, there is no liability at all. Where, however, the absence of state assistance is attributable to negligent or reckless actions of police supervisors or individual officers, liability may be permissible under state law. For example, in a case where the plaintiff is attacked, a witness calls the police, the police are unable to respond promptly because of departmental decisions that have left no patrol officers in that sector of the city, and the most serious injury to the plaintiff is inflicted after the time at which the police would have arrived had they utilized a standard patrolling pattern, the plaintiff might allege that the negligent or reckless staffing decisions caused the harm to her. Similarly, where the inability to respond can be attributed to the negligent or reckless actions of an individual officer, there may be a state law tort claim.[230] There is no federal claim because the police action did not create the danger, nor did it increase the risk to the victim.[231] Instead, it prevented her from being protected. There will be no claim for a due process violation.[232]

5. Liability in an Absent Institution Case

If a town decides to have no police force or not to create a child protective services agency, there is presently no remedy through constitutional litigation.[233] If the absence of the state institution is a

230. These plaintiffs will face very difficult problems regarding proof of causation—that absent the asserted reckless conduct, an officer would have responded in time to prevent some harm and, having responded, would have been able to prevent the harm.

231. This is different from a reliance case because there is no evidence that anyone—neither the victim nor the witness—relied on the response of the police in determining their own actions.

232. Where the absence of the police can be shown to result from actions motivated by impermissible bias, there could be an Equal Protection Clause challenge. For example, Reginald Denny and three other individuals injured in the riots that followed the first verdict in the Rodney King trials have filed a § 1983 claim against the City of Los Angeles for failing to provide adequate police protection. The critical assertion in their case is that the city discriminated against poor neighborhoods in the provision of police services. Jonathan M. Moses, *Legal Beat: Riot Victims' Suits*, WALL ST. J., May 4, 1993, at B6.

233. *But see* Heyman, *supra* note 109, at 554-66 (arguing that Fourteenth Amendment was intended to impose affirmative duty on state to protect citizens from private violence); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94

problem, then the solution must be found through the political process.

The failure of the courts to provide relief in this instance is not as troubling as the refusal to provide relief in unseen actor cases. In the event a political decision is made not to provide a particular service, it is at least possible that the affected populations can organize to change this policy. By contrast, in the unseen actor case, the obvious political decision—to have a police force or a child protective services agency—has already been made. The problem is that the existing state institution is not functioning properly in the instances giving rise to the complaints. This is a much more difficult problem to address through the political process because it does not obviously affect as many people as the decision not to establish the institution at all.

VI. CONCLUSION

Section 1983 liability in cases of indirect harm remains a subject of much dispute and confusion. A review of the cases at first discloses an array of disparate approaches relying on apparently conflicting—or, at best, unrelated—legal rules. As I have shown, however, closer examination and analysis can yield a more coherent picture. Indirect harm cases can be divided into five categories—snake pit, reliance, unseen actor, unseen institution, and absent institution—each of which I have exemplified with model cases. Every indirect harm case can be analogized to at least one model case, and thus can be identified with at least one category.

This is not to say that the process of categorization is simple, straightforward, or determinate. Indeed, categorization of a case frequently is—and should be—one of the most significant contested issues in litigation. One of the goals of this Article is to bring to the fore the importance of the categorization of a case in order to direct the attention of courts, commentators, and litigators to that critical stage in the legal process. Once a case has been categorized, the legal analysis is simplified. Each category is governed by a uniform legal analysis, each of which I have discussed above. Categorization of a case determines the appropriate legal analysis to be applied to it.

Under current law, there is a sound basis for liability in snake pit and reliance cases. Liability in unseen actor cases is precluded by

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W. VA. L. REV. 111 (1991) (arguing that plain meaning of Fourteenth Amendment is that no state may deny to any citizen the protection of its criminal and civil laws against private violence and violation).

DeShaney v. Winnebago County Department of Social Services, the Supreme Court's most recent major opinion in an indirect harm case. This rule is too restrictive. I have identified three alternative routes to a more satisfactory result. Finally, I conclude that substantive due process liability is essentially precluded for unseen and absent institution cases. These cases are scarce, if not nonexistent, however, and I do not find this result troubling.

Thus, I have tried to conduct a comprehensive examination of indirect harm cases and to provide a focused legal analysis of the liability issues presented by these cases. This project should assist commentators, judges, and lawyers in formulating their approaches to these difficult cases, in identifying the critical issues that must be resolved, and in attaining appropriate resolutions of them.

As the government becomes increasingly entwined in the lives of its citizens, indirect harm litigation continues to multiply. New cases arise from unexpected circumstances. Indirect harm cases continually challenge us to define the limits of liability under the Due Process Clause. This Article can be but one step on the path towards a reasoned, equitable, and just solution to this most perplexing problem.