

DeShaney v. Winnebago County: the Narrowing Scope of Constitutional Torts

Garrett M. Smith

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Note

DeSHANEY V. WINNEBAGO COUNTY: THE NARROWING SCOPE OF CONSTITUTIONAL TORTS

INTRODUCTION

In *DeShaney v. Winnebago County Department of Social Services*,¹ the Supreme Court held that a county's failure to protect a child from private violence of which the county was aware was not a violation of the child's rights under the due process clause of the fourteenth amendment.² Writing for the majority, Chief Justice Rehnquist agreed with the Seventh Circuit Court of Appeals³ that the negative language of the fourteenth amendment cannot be interpreted as imposing an affirmative obligation on states to protect individuals from third parties.⁴ Moreover, because the State had not acted affirmatively to restrain the child's personal liberty in any way, the State had no duty to protect the child on the premise that he was unable to protect himself.⁵

This Note discusses *DeShaney's* impact on actions against states that allege the state's failure to protect an individual. By rejecting the emerging doctrine of special relationships, *DeShaney* once again confines claims alleging fourteenth amendment due process violations for a state's failure to protect the narrow circumstances of custodial relationships. The Court sends a hard message to plaintiffs: "the fourteenth amendment . . . does not transform every tort committed by a state actor into a constitutional violation;"⁶ seek your remedy under state law. This Note, however, concludes that the Court need not have gone so far. The Court's focus on whether the due process clause charges states with an affirmative duty to act,⁷ and its perfunctory review of the facts,⁸ foreclosed inquiry as to whether the child actually was injured as a consequence of a state

1. 109 S. Ct. 998 (1989).

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

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

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

5. *Id.* at 1005-06.

6. *Id.* at 1007.

7. *Id.* at 1003.

8. *Id.* at 1006.

action. Furthermore, the overly narrow interpretation of the deprivation of liberty necessary to trigger a state's duty to protect an individual is wholly unnecessary to protect states. Existing doctrines already give governmental entities significant protection from liability.⁹

I. FACTS OF THE CASE

Shortly after his divorce in 1980, Randy DeShaney moved from Wyoming to Winnebago County, Wisconsin, with his one-year-old son, Joshua; there, DeShaney remarried and subsequently divorced again.¹⁰ At the time of the second divorce in early 1982, DeShaney's second wife informed the police that Randy had hit the boy and was "a prime case for child abuse."¹¹ The police then notified the Winnebago County Department of Social Services (DSS) of the charge pursuant to a Wisconsin law that directs citizens and governmental actors to rely on the DSS to protect children from abuse.¹² The DSS interviewed Randy DeShaney, but dropped its investigation when he denied all charges.¹³

One year later, Joshua was admitted with multiple bruises and abrasions to a local hospital.¹⁴ Emergency room personnel notified the DSS, which took temporary custody of Joshua and convened an ad hoc "Child Protection Team" three days later to consider his situation.¹⁵ The team found the evidence of abuse insufficient to keep Joshua in the court's custody. Before the DSS returned Joshua to his father, however, it obtained a voluntary agreement from Randy DeShaney to (1) receive counseling, (2) enroll Joshua in preschool,

9. See *infra* text accompanying notes 41-44.

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

11. *Id.* (quoting Appendix at 152-53, *DeShaney* (No. 87-15A)).

12. See *id.* at 1010 (Brennan, J., dissenting). The Wisconsin statute entitled "Persons required to report," exhaustively lists public and private workers who must report cases of suspected child abuse to the local DSS office or law enforcement agency. WIS. STAT. ANN. § 48.981(2) (West 1987 & Supp. 1989). A penalty of \$1,000 and/or six months in prison may be imposed on those who intentionally violate the statute by failing to report "as required." *Id.* § 48.981(6). Reports made to a local law enforcement agency, in turn, must be transmitted to the local DSS within 12 hours (excluding weekends). *Id.* § 48.981(3). At this point, duties arise within the DSS to (1) investigate within 24 hours, (2) provide immediate protection if necessary, (3) provide various services, (4) make determinations as to the likelihood of past or future abuse, (5) maintain records, (6) inform the original reporter of actions taken, (7) cooperate with the police and courts, (8) report to DSS headquarters, and (9) petition for restraining orders and injunctions. *Id.* § 48.981(3)(c)1-9.

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

14. *Id.*

15. *Id.*

and (3) move his girlfriend out of the home.¹⁶ During the next year, DeShaney reneged on his agreement and the hospital twice more admitted Joshua with suspicious injuries to the emergency room.¹⁷ Emergency room personnel again reported the injuries to the DSS.¹⁸ In addition, a DSS caseworker made nearly twenty visits to the home,¹⁹ which ultimately led her to state, "I just knew the phone would ring some day and Joshua would be dead."²⁰ In March 1984, Randy DeShaney beat Joshua so severely that the child suffered extensive, irreparable brain damage and, as a result, is expected to spend the rest of his life confined to an institution for the profoundly retarded.²¹ Joshua's father was tried and convicted of child abuse.²²

Joshua and his mother brought suit under title 42, section 1983 of the United States Code²³ in the United States District Court for the District of Eastern Wisconsin against Winnebago County, its Department of Social Services, and various individual employees of the Department.²⁴ The complaint alleged that the defendants had deprived Joshua of his liberty interest in "free[dom] from . . . unjustified intrusions on personal security"²⁵ without due process of law,

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 1010 (Brennan, J., dissenting).

20. *Id.* (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 300 (7th Cir. 1987)).

21. *Id.* at 1002.

22. *Id.*

23. 42 U.S.C. § 1983 (1982), the Civil Rights Act of 1871, reads as follows:

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

For the historical background of § 1983, see Note, *Section 1983 and the Due Process Clause: Crossing the Constitutional Line*, 10 CARDOZO L. REV. 789, 791-95 (1989). For the Supreme Court's construction of § 1983, see Annotation, *Supreme Court's Construction of Civil Rights Act of 1871 (42 USCS § 1983) Providing Private Right of Action for Violation of Federal Rights*, 43 L. Ed. 2d 833 (1976).

24. *DeShaney*, 109 S. Ct. at 1002. Not until *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), was § 1983 understood to implicate municipalities as "persons" subject to liability. *Id.* at 690 (holding that municipal entities can be held liable under § 1983 for deprivations pursuant to custom or policy). The *Monell* Court, however, did not address the full extent of municipal liability under § 1983. See *id.* at 694-95.

25. *DeShaney*, 109 S. Ct. at 1003 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

when they failed to intervene and protect him from the violence they knew or should have known his father would inflict upon him.²⁶ The District Court granted summary judgment for the defendants.²⁷ The Court of Appeals for the Seventh Circuit affirmed in a decision delivered by Judge Posner.²⁸ The Seventh Circuit held both that the State's failure to protect Joshua did not amount to a deprivation of a constitutionally protected liberty interest²⁹ and that the causal connection between the defendants' conduct and Joshua's injuries was not sufficient to establish a deprivation of constitutional rights by the State.³⁰ The Supreme Court granted certiorari in light of the lower courts' inconsistent approaches in determining when, if ever, a state or local government's failure to protect an individual violates that person's substantive due process rights.³¹

II. QUESTIONING THE LIMITS OF STATE LIABILITY UNDER SECTION 1983

A. *Restraining Lines*

Claims arising under section 1983 have been labelled "constitutional tort" claims.³² The *DeShaney* decision responds to a "perplex-

26. *Id.* at 1002.

27. *Id.*

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

29. *Id.* at 301.

30. *Id.* at 302-03. The court rejected the proposition that a special relationship arises between the state and the child once the state becomes aware of the danger that the child may be abused and imposes on the state an affirmative, constitutional duty to protect the child. *Id.* at 303.

31. *DeShaney*, 109 S. Ct. at 1002.

32. See Note, *supra* note 23, at 806. Professor Shapo is credited with coining the term "constitutional tort," which the Supreme Court has adopted to describe section 1983 claims. *Id.* at 806 n.108; see Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U.L. REV. 277 (1965).

The constitutional tort claim based upon a violation of substantive due process differs from the typical substantive due process claim in two respects: the nature of the remedy sought and the type of analysis employed. With respect to remedy, the plaintiff in a traditional case uses substantive due process to block the government's threatened action against him; the plaintiff in a constitutional tort case sues to collect damages for an injury the government already has inflicted on him. With respect to the type of analysis employed, the plaintiff in a traditional case attacks some legislatively-imposed obligation on the grounds that it is an affront to some aspect of his personal autonomy which is not protected under the Bill of Rights; the court then balances democratic values against the competing claim of personal autonomy. By contrast, the plaintiff in a constitutional tort case alleges that the government has invaded one of his substantive due process interests; the court determines under what circumstances such a claim will lie. Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 224-26 (1984).

ing" question raised in recent years as such actions have become more common.³³ What are the outer limits of state liability under section 1983?³⁴ The question arises because the statute creates no substantive rights;³⁵ instead, it provides a remedy for deprivations of rights established in the Constitution. Thus, the boundaries of state liability under section 1983 do not extend beyond the boundaries of the substantive rights that were violated. The fourteenth amendment due process clause, on which Joshua based his action, generally is understood by its language and history³⁶ and by prior case law³⁷ to limit a state's power to act, not to impose affirmative duties on it.³⁸ Joshua's attempt to show that the State had an affirmative duty to protect him failed in large part because the Supreme Court stood by its traditional interpretation of the underlying due

33. See Note, *supra* note 23, at 791-95 (discussing the paucity of actions brought under § 1983 during its first 50 years in existence and the significant expansion in its use following *Monroe v. Pape*, 365 U.S. 167 (1961)).

34. See *Jackson v. City of Joliet*, 715 F.2d 1200, 1201 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

No 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. § 1983, the ubiquitous tort remedy for deprivations of rights secured by federal law (primarily the Fourteenth Amendment) by persons acting under color of state law.

Id.

35. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) ("the statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere"); see also *Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979) ("first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'").

36. *DeShaney*, 109 S. Ct. at 1003-04.

37. Prior cases have established that "the Due Process Clauses generally [impose no duty on states to provide] governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive an individual." *Id.* at 1003; see, e.g., *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (holding that the State does not have an affirmative duty to fund abortions or to provide medical services; thus, funding restrictions on such services did not violate the fifth amendment due process clause); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that the State does not have an obligation to provide adequate housing).

38. See *Jackson*, 715 F.2d at 1203 ("The Fourteenth Amendment . . . [seeks] to protect Americans from oppression by state government, not to secure them basic governmental services."). For a discussion of *Jackson* and constitutional rights, see Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-67, 886-87 (1986). See also Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (supporting the position that the due process clause does not impose affirmative duties). But see Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407 (1966) (illustrating that constitutional rights play a large role in the war against poverty); Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (discussing both the equal protection and due process clauses and their role in providing minimum welfare for the people); Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199 (suggesting that the concept of affirmative governmental duties is evolving through Supreme Court decisions).

process right to liberty.³⁹

In addition to these substantive rights limitations, plaintiffs may confront one or more of three generic problems associated with section 1983 claims. First, although the Supreme Court has not decided what state of mind of the government actor is sufficient to support a section 1983 claim,⁴⁰ it has determined that mere negligence cannot work an unconstitutional deprivation of life, liberty, or property, and therefore is insufficient to support such a claim.⁴¹ Second, a plaintiff confronts a difficult causation problem when he or she is injured by a private third party rather than an agent of the governmental entity being sued.⁴² Third, a plaintiff bears an additional burden when the defendant is a local governmental entity. To establish a city's or county's liability, the plaintiff must show that the injury resulted from a custom, policy, or practice of the municipality.⁴³ Moreover, the Supreme Court, out of respect for federalist

39. *DeShaney*, 109 S. Ct. at 1003-04.

40. See *Daniels v. Williams*, 474 U.S. 327, 335 (1986) (stating simply that "the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear" overruling *Parratt v. Taylor*, 451 U.S. 527 (1981)). See generally Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?*, 55 *FORDHAM L. REV.* 1, 23 (1986) (after *Monroe*, lower courts in disagreement as to whether negligent state conduct can support § 1983 actions); Note, *supra* note 23, at 797-808 (discussing the confusion in the aftermath of *Monroe v. Pape*, 365 U.S. 167, 187 (1961), in which the Court held that a proper inquiry into a § 1983 claim should not focus on the government actor's state of mind); Note, *Daniels, Davidson and the Unlearned Lesson of Parratt v. Taylor: Eliminating Simple Negligence as a Basis for Procedural Due Process Claims (If At First You Don't Succeed, Overrule It)*, 62 *NOTRE DAME L. REV.* 98, 101 (1986) (courts in disagreement as to the level of tortious conduct required to support § 1983 claims).

41. See *Daniels*, 474 U.S. at 329-36; *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). From the time the Court decided *Parratt* in 1981, until it overruled that decision in *Daniels* in 1986, mere negligence was enough to state a good claim. *Parratt* held that "the alleged loss, even though negligently caused, amounted to a deprivation." *Id.* at 536-37. Prior to *Parratt*, no Supreme Court decision ever had held that a state official's negligent conduct, even though it caused injury, could constitute a deprivation under the due process clause. *Daniels*, 474 U.S. at 331. In the end, *Daniels* banished the § 1983 claim based upon simple negligence when it overruled *Parratt*. See *Archie v. City of Racine*, 847 F.2d 1211, 1218-20 (7th Cir. 1988) (en banc) (reiterating *Daniels* and holding that gross negligence also is insufficient to support a § 1983 claim—recklessness, which connotes intention, is the minimum requisite state of mind), *cert. denied*, 109 S. Ct. 1338 (1989).

42. *Martinez v. California*, 444 U.S. 277, 284-85 (1980) (holding that although the decision to parole an inmate was a state action, the parolee's taking of a life five months later cannot be fairly characterized as such; in other words, the chain of causation was too attenuated to support liability).

43. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 818-24 (1985); *Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1032 (11th Cir. 1987) (holding that to find a local governmental entity liable under § 1983, it is essential for the plaintiff to show that the injury resulted from a custom, policy, or practice of that entity); *Estate of*

principles, has attempted to restrict the scope of substantive due process claims by excluding those claims that also arise under state common law or statutes.⁴⁴

In light of these problems, it is understandable that constitutional tort claims historically have fared better when they alleged a violation of a specific and well-defined constitutional right—for example, a violation of the eighth amendment's cruel and unusual punishment clause⁴⁵—rather than a due process violation of life, liberty, or property in cases in which the plaintiff's injury is of a kind typically remedied by state tort law.⁴⁶ It was on the strength of eighth amendment claims brought under section 1983 that the courts began to expand the boundaries of state liability and to test the barriers discussed above.

Bailey by Oare v. County of York, 768 F.2d 503, 506-08 (3d Cir. 1985) (holding that a municipal policy must be shown, and a plausible nexus must exist between the policy and the injury). The expansion of § 1983's scope to include municipalities as persons subject to liability did not go so far as to impose municipal liability under the doctrine of respondeat superior. See *Tuttle*, 471 U.S. at 825-33 (Brennan, J., concurring).

44. Wells & Eaton, *supra* note 32, at 209. Wells and Eaton note that:

The importance of making the separation may be understood as part of the broader concern for preserving discretion and diversity in the development of tort law. The due process clause, fears the Court, could engulf all torts committed by all government officials. Such a development would unduly infringe upon the legitimate exercise of legislative and judicial discretion in the shaping of tort rules since constitutional tort cannot be modified by state law.

Id.

Wells and Eaton cite four cases which effectively have limited the scope of constitutional tort claims: (1) *Paul v. Davis*, 424 U.S. 693, 701 (1976) (fourteenth amendment would become a font of tort law to be superimposed upon whatever system is already administered by state); (2) *Ingraham v. Wright*, 430 U.S. 651, 674, 682 (1977) (state tort remedies provide due process of law; recognition of claim as constitutional tort would intrude into an area of "primary educational responsibility"); (3) *Baker v. McCollan*, 443 U.S. 137, 142 (1979) (false imprisonment claim may be good under tort law analysis, but is not enough for a constitutional claim); and (4) *Parratt*, 451 U.S. at 544 (granting constitutional status to claim would turn every alleged injury inflicted by state officials into a violation of the fourteenth amendment). Wells & Eaton, *supra* note 32, at 203-08.

Lastly, Wells and Eaton also comment that in these four decisions, the Court repeatedly stumbled by failing to articulate whether it perceived the claims it addressed to be violations of the substantive or procedural components of the due process clause. As a result, the four opinions taken together limit the scope of constitutional torts, but offer little guidance in analyzing a constitutional tort cause of action. *Id.* at 215-21.

45. U.S. CONST. amend. VIII. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

46. See Wells & Eaton, *supra* note 32, at 202.

B. Pushing the Limits

1. *The Estelle-Youngberg Line: Custodial Relationships.*—In 1976, the Court in *Estelle v. Gamble*⁴⁷ reasoned that the state must have a duty to care for those who are incarcerated because they are not free to care for themselves.⁴⁸ Specifically, the Court held that a state's deliberate indifference to a prison inmate's medical needs constitutes cruel and unusual punishment under the eighth amendment.⁴⁹ Following *Estelle*, the circuit courts began to impose on governments an affirmative duty of care to protect prisoners, under the eighth amendment.⁵⁰ The courts' growing recognition of an affirmative duty to care for prisoners led the Second Circuit in *Doe v. New York City Department of Social Services*⁵¹ to hold that *Estelle* also required the State to oversee a child in a foster home.⁵² Breaking new ground, the court applied an eighth amendment analysis to Doe's fourteenth amendment claim by analogizing the New York Department of Social Services' failure to protect a foster child to a state prison's failure to protect an inmate.⁵³ The court also stated that

47. 429 U.S. 97 (1976).

48. *Id.* at 103-05. The Court found that prison personnel's deliberate indifference to a prisoner's serious illness or injury constituted cruel and unusual punishment that contravened the eighth amendment. *Id.* at 104-05. Increasingly, the cruel and unusual punishment clause has been interpreted expansively to embody "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'" against which penal measures must be evaluated. *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

49. *Id.* at 104-05. The plaintiff in this case did not establish deliberate indifference. *Id.* at 106-08.

50. *See, e.g.*, *Walsh v. Mellas*, 837 F.2d 789, 795-96 (7th Cir.) (holding that the failure of prison officials to devise a procedure for screening inmates' files to insure some compatibility with cellmates constituted "deliberate indifference" and thus was a violation of the cruel and unusual punishment clause), *cert. denied*, 108 S. Ct. 2832 (1988); *Watts v. Laurent*, 774 F.2d 168, 172-74 (7th Cir. 1985) (holding that the failure of officials to protect a prisoner from attacks by other prisoners, when a "strong likelihood" of attack existed, constituted a violation of the prisoner's eighth amendment rights), *cert. denied*, 475 U.S. 1085 (1986). *But see* *Duckworth v. Franzen*, 780 F.2d 645, 653-56 (7th Cir. 1985) (holding that the conduct of prison officials, relating to a bus accident in which chained prisoners were injured, did not constitute deliberate indifference), *cert. denied*, 479 U.S. 816 (1986).

51. 649 F.2d 134, 141-42, 145 (2d Cir. 1981) [hereinafter *Doe I*] (applying the deliberate indifference test of *Estelle* when the State had placed a child in a foster home and the child subsequently was injured, and noting differences between foster home supervision and institutional supervision for purposes of the test); *see also* *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 791 (2d Cir.) (holding that there was sufficient evidence for the jury to infer deliberate indifference by the placement bureau), *cert. denied*, 464 U.S. 864 (1983).

52. 649 F.2d at 141-42.

53. *Id.*; *see* *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (explaining that a fourteenth amendment claim based upon an affirmative duty of care may overlap an

"[g]overnment officials may be held liable under section 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful."⁵⁴

In 1982, the Supreme Court itself extended *Estelle's* rationale—using the fourteenth rather than the eighth amendment—to an individual involuntarily confined to a nonpenal institution. In *Youngberg v. Romeo*,⁵⁵ the Court held that the State had a duty to provide a patient involuntarily committed to a state mental institution with "reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by these interests."⁵⁶ The plaintiffs in *DeShaney* relied on the *Youngberg* decision to support their claim that the State had an affirmative duty to protect Joshua from his father's violence. The Court, however, rejected this contention indicating that the *Estelle-Youngberg* analysis represents a narrow exception to the general rule that states have no affirmative duty to protect individuals; it is the state's affirmative acts of incarceration or institutionalization that, when coupled with its failure to provide for basic human needs, transgress substantive limits on state action set by the eighth amendment and the fourteenth amendment due process clause.⁵⁷

2. *The Evolution of Section 1983 Special Relationships.*—In 1980, the Supreme Court in *Martinez v. California*⁵⁸ implied in dicta that a state, under certain circumstances, might be deemed to have deprived an individual of a substantive due process interest in life if one of the state's parole officers released a prisoner who subsequently murdered the individual.⁵⁹ The Third, Fourth, and Ninth Circuits relied on *Martinez* to conclude that once a state perceives a danger to an individual from a third party and indicates a willingness to protect that individual, the state then has an affirmative duty

eighth amendment duty to prisoners when the state places an individual in danger; this could lead to the liability of prison personnel under § 1983 for prisoners' violence toward one another).

54. *Doe I*, 649 F.2d at 141.

55. 457 U.S. 307 (1982).

56. *Id.* at 307.

57. *DeShaney*, 109 S. Ct. at 1005-06.

58. 444 U.S. 277 (1980).

59. *Id.* at 285 (refusing to decide that a parole officer could never be deemed to deprive someone of life by actions taken in connection with a prisoner's parole release, but holding that, under the facts of the case, decedent's death at parolee's hands was too remote a consequence of the parole officers' actions to hold them responsible under § 1983).

to protect the potential victim.⁶⁰

These Circuits perceived a special relationship⁶¹ basis for liability in section 1983 claims that extended well beyond *Doe I*.⁶² As alternative bases for liability, these courts noted that either a state's knowledge of an individual's danger in conjunction with an expression of its intent to protect that individual, or an affirmative act of the state that places an individual in danger, creates a special relationship which can support a section 1983 claim under the fourteenth amendment's due process clause.⁶³ For example, the Fourth Circuit in *Fox v. Custis*⁶⁴ recognized that a citizen might have a constitutional right under the fourteenth amendment to protection from a dangerous parolee if a "special custodial or other relationship[]" existed between the state and the citizen.⁶⁵ The right was based on the fourteenth amendment, but "the shape and definition

60. See, e.g., *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985) (State's knowledge that child had been beaten and faced a special danger strengthens argument for a special relationship); *Jensen v. Conrad*, 747 F.2d 185, 193-94 (4th Cir. 1984) (right to protection and corollary state duty may arise out of "custodial or other relationships" created or assumed by states in respect of particular persons), cert. denied, 470 U.S. 1052 (1985); *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1426 (9th Cir. 1988) (affirmative undertaking of duty to protect and state's awareness of danger to a specific person create a "special relationship").

61. The common law of torts does not impose a duty on defendants to act affirmatively to prevent harm to plaintiffs unless they were in a "special relationship." For example, a defendant who gratuitously began to aid a plaintiff assumed a duty to act with reasonable care, and that duty could not be abandoned merely at will. The defendant would have been liable for injuries that the plaintiff suffered as a result of an aborted rescue attempt. See Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986). See generally RESTATEMENT (SECOND) OF TORTS § 324 (1965); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).

62. 649 F.2d 134 (2d Cir. 1981); see *supra* note 60.

63. *Balistreri*, 855 F.2d at 1425 (listing (1) custodial relationship, (2) awareness of a specific risk of harm to plaintiff, (3) affirmatively placing plaintiff in danger, or (4) affirmative state commitment to protect plaintiff as factors to be considered in determining whether special relationship existed); *Estate of Bailey by Oare*, 768 F.2d at 510-11 (State's knowledge that a child had been beaten and faced a special danger strengthens argument for a special relationship); *Jensen*, 747 F.2d at 194 n.11 (listing (1) present or past custody, (2) expressly stated desire to protect specific individuals, and (3) knowledge of plaintiff's plight as factors to be considered); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (the state is an active tortfeasor if it puts a man in a position of danger from private persons and then fails to protect him).

64. 712 F.2d 84 (4th Cir. 1983).

65. *Id.* at 88. A parolee, after committing several parole violations, burned a woman's house, stabbed and shot a second woman, and raped and set fire to a third woman. *Id.* at 86. The Fourth Circuit indicated that a fourteenth amendment duty could arise out of special custodial "or other" relationships, but said no such relationship existed in this case because the state actors were unaware of any special danger the claimants faced as distinguished from that faced by the general public. *Id.*

that [the court] gave to that right by using the term 'custodial relationship' was influenced in large part by the considerations that lay behind the eighth amendment cases."⁶⁶ That is, the court recognized that the fourteenth amendment could not be interpreted to impose on the states an affirmative duty to protect the general public. But it nevertheless defined a more limited duty to individuals by using a rationale similar to the one the Supreme Court used in *Estelle*: "where the state [takes] an individual from the public at large and place[s] him in a position of danger, the state [is] enough of an 'active tortfeasor' to make it only 'just' that the state be charged with an affirmative duty of protection."⁶⁷

Other circuits rejected the new special relationship doctrine.⁶⁸ The First,⁶⁹ Seventh,⁷⁰ Eighth,⁷¹ and Eleventh⁷² Circuits construed only involuntary custodial relationships as imposing on states an affirmative duty under the fourteenth amendment to protect an indi-

66. *Jensen v. Conrad*, 747 F.2d 185, 193-94 (4th Cir. 1984) (interpreting *Fox*, 712 F.2d at 84), *cert. denied*, 470 U.S. 1052 (1985).

67. *Id.*

68. *See, e.g., Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989). The court suggested that the term "special relationship" had "acquired a life of its own," and "become a magic phrase, a category in which to dump cases when a court would like to afford relief." *Id.*

69. *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir. 1986) (estate of a woman murdered by an inmate on furlough unable to recover under § 1983 due to the absence of a special relationship between the victim and the State), *cert. denied*, 479 U.S. 882 (1986).

70. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 303-04 (7th Cir. 1987) (state's awareness of danger that particular child may be abused does not give rise to a special relationship between the state and child which places on state a constitutional duty to protect), *aff'd*, 109 S. Ct. 998 (1989).

Although the Seventh Circuit voiced its opposition to the expansion of "special relationships," *see id.*, the court held in a 1982 decision that a state may incur § 1983 liability if it takes an active role in placing an individual in a position of danger. *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982). The Fourth Circuit, however, perceived the Seventh Circuit in *Bowers* as expanding § 1983 liability beyond custodial relationships because the Seventh Circuit did not distinguish between "custodial" and other relationships. Thus, the Fourth Circuit said that *Bowers* narrowed the gap between the eighth and fourteenth amendment analyses. *Jensen*, 747 F.2d at 193-94. In 1983, relying in part on *Bowers*, the Fourth Circuit itself finally closed that gap in *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983), *aff'd*, 479 U.S. 882 (1986). The *Fox* court held that a constitutional right based on the fourteenth amendment could arise from special "custodial or other relationships." *Id.*

71. *See Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 926-27 (8th Cir. 1987) (grandmother of a child killed by his mother after the state hospital released the child to the mother's custody was unable to recover under § 1983 due to absence of special relationship).

72. *See Wideman v. Shallowford*, 826 F.2d 1030, 1034-37 (11th Cir. 1987) (mother of prematurely-delivered infant had no claim against county for ambulance crew's refusal to take her to the hospital of her choice).

vidual's safety and well-being. By the time the Court granted certiorari in *DeShaney*, the split in the Circuits was pronounced.

III. ANALYSIS

A. A Traditional Position on the Issue of States' Duties

In *DeShaney*, the Supreme Court held that neither the language nor the history of the due process clause supported Joshua's contention that the fourteenth amendment imposes on states a duty to protect individuals from harms inflicted by third parties.⁷³ The language of the clause is cast in the negative as a prohibition, explained the Court, not in the affirmative as a command.⁷⁴ The Court also relied on historical interpretations denying that the due process clause imposes affirmative obligations on the State.⁷⁵ Thus, the Court stated that "[t]he Framers were content to leave the extent of governmental obligation [to protect people from each other] to the democratic political processes."⁷⁶

As further support, the Court pointed to prior decisions recognizing that the due process clause confers no affirmative rights to governmental aid, even when such aid is necessary to protect substantive due process rights.⁷⁷ Thus, the majority reasoned, the State

73. 109 S. Ct. at 1003.

74. See Currie, *supra* note 38, at 865:

"[N]or shall any State" is the equivalent of "a State shall not." Moreover, what the states are forbidden to do is to "deprive" people of certain things, and depriving suggests aggressive state activity, not mere failure to help. The contrast with provisions of the same document imposing duties to conduct a census, to return fugitives, and to guarantee a republican form of government—and with language in other constitutions explicitly recognizing affirmative rights to various social services—suggests that when constitution-makers impose affirmative government obligations they tend to say so.

Id. (footnotes omitted).

75. *DeShaney*, 109 S. Ct. at 1003 (citing *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (an inmate's action against prison officials cannot be based on negligence)); *id.* (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (negligent act was not enough to implicate the due process clause)); *id.* (citing *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (fact that prison officials negligently lost inmate's mail, while admittedly a deprivation, was not sufficient to constitute a violation of the fourteenth amendment)). For historical references, see *Daniels*, 474 U.S. at 331. See generally Currie, *supra* note 38.

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

77. *Id.* The Court cites *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (no obligation on states to fund abortions or other medical services), *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no obligation for states to provide adequate housing), and *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (states generally are under no constitutional duty to provide substantive services for those within their borders). But see *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting). Justice Brennan cites *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (striking down a filing fee required to commence a divorce action) and

cannot be held liable under the due process clause for injuries that it could have averted had it chosen to provide protective services.⁷⁸

But this part of the Court's holding was predictable: ample precedent can be, and was, marshalled to support the Court's position. Moreover, given the strength of the Court's conservative wing, it would have been surprising for the Court to deviate far from Judge Posner's position that "the Constitution is a charter of negative rather than positive liberties."⁷⁹

B. *Rolling Back Special Relationships*

A more controversial aspect of the *DeShaney* decision was the Court's rejection of the developing constitutional tort doctrine of special relationships. In *Youngberg*, the Court reconciled its traditional position that "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its

Schneider v. State, 308 U.S. 147, 160 (1939) (a local government may not foreclose the opportunity to speak in a public forum), for the proposition that "a State's actions—such as the monopolization of a particular path of relief—may impose upon the State certain positive duties." *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting). Justice Brennan relies upon *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (State held to be a joint participant in discriminatory activity when its tenant discriminated against black restaurant patron), for the proposition that "a State may be found complicit in an injury even if it did not create the situation that caused the harm." *DeShaney*, 109 S. Ct. at 1009. These cases, Brennan argues:

set a tone equally well established in precedent as, and contradictory to, the one the Court sets by situating the *DeShaneys'* complaint within the class of cases epitomized by the Court's decision in [*Harris*]. . . . To put the point more directly, these cases signal that a State's prior actions may be decisive in analyzing the constitutional significance of its inaction. I thus would locate the *DeShaneys'* claims within the framework of cases like *Youngberg* and *Estelle*, and more generally *Boddie* and *Schneider*, by considering the actions that Wisconsin took with respect to Joshua.

Id.; see *infra* text accompanying notes 87-92 for Brennan's argument that Wisconsin effectively monopolized child abuse protection, leaving Joshua with no possibility of rescue when the State failed to assist him.

In a recent essay, Professor Tribe argued that Justice Brennan should have distinguished *Boddie* from *Estelle* and *Youngberg* rather than drawing a parallel between them. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 12 (1989). Unlike *Estelle* and *Youngberg*, in *Boddie* "there had been no previous state action directed at the individual. It was the legal structure itself . . . that had isolated the person from the fulfillment of an important need." *Id.* Thus, Tribe derives from *Boddie* the proposition that when the state's interest in that legal structure does not override the individual plaintiff's interest, the creation of the legal structure is a state action that violates due process. *Id.*

78. *DeShaney*, 109 S. Ct. at 1004. But see *The Supreme Court, 1989 Term—Leading Cases*, 103 HARV. L. REV. 137, 168, 172 (1989) (questioning the strength of the Court's legal reasoning).

79. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

border,"⁸⁰ with its holding that the State had a duty to provide an involuntarily committed mental patient with "reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as may be required by these interests."⁸¹ The *DeShaney* Court, however, was not willing to compromise its traditional position by permitting a noncustodial relationship to provide a basis for section 1983 liability. The Court explained that custody based special relationships give rise to a state's affirmative duty to protect only because the state has restricted the individual's freedom to act in his own behalf.⁸² The Court emphasized that the State's duty does not arise "from the state's knowledge of the individual's predicament or from its expressions of intent to help him."⁸³ Implicitly, only claimants who survive a narrowly applied "*Estelle-Youngberg*"⁸⁴ analysis, that is, those who are "institutionalized—and wholly dependant on the State,"⁸⁵ can invoke the due process clause for a state's failure to protect. The Court's decision appears to limit "special relationships" that impose an affirmative duty on the state to protect an individual's constitutionally protected interests to custodial relationships or "other similar restraint[s] of personal liberty" that involve direct physical control of the individual.⁸⁶

In his dissent, Justice Brennan, joined by Justices Marshall and Blackmun, focused not on the State's inaction, but rather on the State's affirmative acts and framed them in terms of the common-law tort doctrine that imposes a duty of care on rescuers.⁸⁷ Brennan

80. 457 U.S. 307, 317 (1982).

81. *Id.* at 322-24. Because liberty interests in safe conditions and freedom from bodily restraint exist in patients involuntarily committed to mental institutions, the state has a duty to provide minimally adequate training when such training is necessary to preserve these interests.

82. *DeShaney*, 109 S. Ct. at 1006.

83. *Id.*

84. *See supra* text accompanying notes 47-57.

85. *Youngberg*, 457 U.S. at 317.

86. *DeShaney*, 109 S. Ct. at 1000.

87. 109 S. Ct. at 1010-12 (Brennan, J., dissenting); *see* RESTATEMENT (SECOND) OF TORTS § 323 (1965). Although Justice Brennan framed his argument in terms of the common-law tort rescue doctrine, constitutional tort law requires more to establish a defendant's liability. Judge Posner explained the difference between the two in his opinion for the Seventh Circuit in *DeShaney*:

[I]n any case of a botched rescue attempt . . . [one can] speculate that the victim would have been better off without the attempt, because it may have impeded competent attempts . . . that would have succeeded. This is one of the common rationales offered for the common law tort rule that makes a rescuer liable for his negligence in rescuing even if he had no duty to attempt the rescue in the first place. The rule, however, is broader than this rationale; the plaintiff com-

noted that Wisconsin law directs public workers who suspect child abuse to report their suspicions to the DSS.⁸⁸ He then argued that as a result of this policy, a worker "would doubtless feel her job was done as soon as she had reported her suspicions of abuse to DSS."⁸⁹ The situation he described is analogous to that in which the rescuer is held liable to the victim because he warned away other rescuers and then left the scene.⁹⁰ Moreover, Brennan characterized Wisconsin's child protection program as effectively confining Joshua within a violent home until the DSS decided to remove him.⁹¹ The majority disregarded this argument and noted only that the rescue doctrine could create a state's duty to protect under state tort law.⁹²

C. *The Potential for Section 1983 Liability After DeShaney?*

The Court's holding, following strict and traditional interpretations of the due process clause, nevertheless may be overcome by three arguments under which a state could be held liable for a failure to protect. The strength of the facts will determine whether a plaintiff may use any or all of these proposed arguments; the court's emphasis on and interpretation of the facts then will determine a plaintiff's success in using them. In addition, other barriers to constitutional tort liability—the plaintiff's burden of establishing more than mere negligence on the part of the government actor, causation, and when the defendant is a local governmental entity, attenu-

plaining of the defendant's negligent manner of rescue need not prove that, as a matter of fact, the defendant's failure to complete the rescue made it less probable that someone else would rescue him. Constitutional tort law, however, which ties a defendant's liability to *depriving* the plaintiff of some right, cannot follow this path of expansion. A state can . . . impose tort duties on persons who fail to rescue someone whose peril they did not cause—whose liberty they did not take away—but a constitutional tort requires deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others.

DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 302 (7th Cir. 1987) (emphasis in original) (citations omitted), *aff'd*, 109 S. Ct. 998 (1989).

88. *DeShaney*, 109 S. Ct. at 1011 (Brennan, J., dissenting); see WIS. STAT. ANN. § 48.981(2) (West 1987 & Supp. 1989).

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

90. See RESTATEMENT (SECOND) OF TORTS, § 323 comment (c) (1965). Under Wisconsin law, rescuers who acted privately would be penalized in many cases if they disregarded the codified procedures for reporting child abuse; therefore, Joshua was deprived of any possibility of rescue by anyone other than DSS personnel. See WIS. STAT. ANN. § 48.981(6) (West 1987): "Whoever intentionally violates this section by failure to report as required may be fined not more than \$1,000 or imprisoned not more than 6 months or both."

91. *DeShaney*, 109 S. Ct. at 1011.

92. *Id.* at 1006-07.

ated the requirement that state policy or custom be the cause of the injury—will suffice to defeat many claims.⁹³

The first argument posits that child protection statutes give claimants an “entitlement” to receive protective services as provided by the statute;⁹⁴ the procedural component of the fourteenth amendment due process clause protects claimants from the deprivation of such entitlements by arbitrary state action.⁹⁵ The second argument is in the nature of an exception to *DeShaney*: when a state places an individual in a position of danger, it incurs an obligation to protect that person.⁹⁶ Third, despite *DeShaney*, a state still may be liable under section 1983 if it has “quasi-custody” of the plaintiff, e.g., if the state places a child in a foster home and the child subsequently is injured.⁹⁷

1. *Entitlement.*—The first argument would have Joshua characterize his injury as a procedural due process claim for the loss of a protected property interest.⁹⁸ Under this characterization, Joshua

93. See *supra* notes 41-44 and accompanying text.

94. See *infra* notes 99-108 and accompanying text.

95. “Procedural due process guarantees . . . a fair decision-making process before the government takes some action directly impairing a person’s life, liberty, or property.” J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, § 10.6, at 322 (3d ed. 1986). By contrast, substantive due process “is concerned with the constitutionality of the underlying rule rather than with the fairness of the process by which the government applies the rule to an individual.” *Id.*

96. See *infra* notes 109-122 and accompanying text.

97. See *infra* notes 123-138 and accompanying text.

98. See *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1971); see also Comment, *supra* note 61, at 1063-73. There is a fundamental difference between requiring a state to provide services in the first place, and requiring a state to administer them fairly once it provides the services of its own accord. *Id.* at 1064. The Supreme Court in *DeShaney* and other cases held that a state is not required to provide services. What is not clear, however, is whether a citizen’s reliance on services extended by a state always obliges the state to comply with procedural due process requirements when it withdraws the service. In some cases, inaction effectively may withdraw a benefit. See *id.* at 1066-67. The availability of procedural due process protection depends, in part, on the nature of the entitlement, because the due process clause protects only those entitlements that are considered property interests. *Id.* at 1065.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. Property interests . . . are created by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577. Thus, “due process safeguards do not exist to protect benefits for their own sake, but rather to protect the expectation a state creates by making promises on which individuals rely.” Comment, *supra* note 61, at 1065; see also *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 798-99 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989). In *Taylor*, the Eleventh Circuit used the *Roth* Court’s holding that “procedural due process applies to the deprivation of interests encompassed within the four-

possessed a statutory entitlement to protective services that should have enjoyed procedural due process protection against state deprivation in accordance with the Court's decision in *Board of Regents v. Roth*.⁹⁹ *Roth* held that once an entitlement is created through a "source such as state law," the Constitution protects the entitlement as a property interest by requiring a hearing before the state can terminate the benefit.¹⁰⁰ The Court has yet to consider this argument in the context of a private individual's statutory entitlement to protection from harm. Because Joshua raised the argument for the first time in his brief to the Court, the Court declined to address the issue.¹⁰¹

The entitlement argument's success should hinge on specific provisions of the statute in question because, as *Roth* admonished, such interests are created through state law.¹⁰² For example, the Eleventh Circuit in *Taylor by and Through Walter v. Ledbetter*¹⁰³ held that the Georgia foster care statutes created an interest that consisted of the child's right to have the State investigate a foster home before it actually places the child there and to oversee the foster home in which it ultimately places the child.¹⁰⁴ If the State does less, it deprives the child of the protected interest without due process of law. In Joshua's situation, section 981(3)(c)(7) of the Wis-

teenth amendment's protection of liberty and property" in the case of a statutory entitlement, to find a deprivation of liberty interests when officials failed to protect a child from her foster parents' abuse.

[T]he Georgia scheme mandates that officials follow guidelines and take affirmative actions to ensure the well being and promote the welfare of children in foster care. These children can state a claim based on *deprivation of a liberty interest in personal safety* when the officials fail to follow this mandate.

Id. (emphasis added). The court, however, noted that the state was free to alter its statute to eliminate the entitlement on which the child relied. *Id.* at 800.

99. 408 U.S. 564 (1972); see also *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (welfare recipients are entitled to evidentiary hearings before a state may terminate benefits). In *Taylor*, 818 F.2d at 798-800, the Eleventh Circuit carefully analyzed the child's claim that she possessed an entitlement to particular services described in a Georgia statute which governed foster care programs. In reversing the district court's decision that the statute provided only procedural guidelines, the Eleventh Circuit found explicit mandates to investigate and supervise foster parents and to inspect foster homes through visits made at regular intervals. Thus, as *Roth* requires, the child's entitlement was firmly rooted in state law. 408 U.S. at 577. Moreover, in contrast to the Wisconsin statute at issue in *DeShaney*, the Georgia statute described in detail the services it generated. Compare GA. CODE ANN. §§ 49-5-3, 49-5-8, 49-5-9, 49-5-12, 290-2-12-.08 (1986 & Supp. 1987) with *infra* note 106.

100. 408 U.S. at 577.

101. *DeShaney*, 109 S. Ct. at 1003 n.2.

102. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1971).

103. 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989).

104. *Id.* at 798-99.

consin Children's Code required the local DSS units to "cooperate" with other governmental agencies to "prevent, identify and treat child abuse and neglect," and to "coordinate the development and provision of services to abused and neglected children."¹⁰⁵ The generality of this mandate stands in sharp contrast to detailed provisions in the immediately preceding Code subdivisions which describe the DSS's duties at the time a child abuse case first is reported and for sixty days thereafter.¹⁰⁶ Under this scheme, Joshua arguably had an interest in state protection for a specific period of time only after each incident of abuse was reported. But Joshua's ability to prove statutorily-defined protective services to which he was entitled diminishes as the statutory benefits lose clear definition in subsection (7).¹⁰⁷ The more specific the statutory provisions in question, the stronger the plaintiff's case will be.

2. "*Position of Danger.*"—Second, the *DeShaney* Court implicitly approved a rule that may be of use to some section 1983 plaintiffs: "[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."¹⁰⁸ This language acknowledges the "position of danger" rule that Judge Posner most colorfully articulated in *Bowers v. DeVito*:¹⁰⁹ "[I]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."¹¹⁰ Perhaps the best illustration of a state's action that placed individuals in a position of danger is to be found

105. WIS. STAT. ANN. § 48.981(3)(c)(7) (West 1987 & Supp. 1989).

106. See generally *id.* § 48.981(3)(c)(1)-(6). For example, subdivision (1) of the Wisconsin statute requires an investigation just like the Georgia statute under review in *Taylor*. See *supra* note 99. This investigation must include an observation of, or an interview with, the child and the statute recommends a visit to the home. Subdivision (4) requires a departmental determination based upon evidence produced in the investigation whether or not an abuse has "occurred or is likely to occur." WIS. STAT. ANN. § 48.981(3)(c)(1), (4) (West 1987 & Supp. 1989). It would seem that Joshua could assert successfully a property interest in, and entitlement to, both an investigation and a departmental decision. But, with respect to subdivision (7), even if Joshua could argue an entitlement to protection, the nature of that protection is not defined. Moreover, the operative language defining the State's duties is merely to "cooperate" and "coordinate." Surely the State could show that it fulfilled both obligations, even in this case.

107. WIS. STAT. ANN. § 48.981(7); see also *supra* note 106.

108. 109 S. Ct. at 1006.

109. 686 F.2d 616 (7th Cir. 1982); see Comment, *supra* note 61, at 1062-63.

110. 686 F.2d at 618.

in *White v. Rochford*.¹¹¹ In *White*, three minor children were riding in a car driven by two of the children's uncle. After police officers stopped and arrested the uncle for drag racing, the officers left the children in the abandoned car on the side of the road. The Seventh Circuit held that the police officers deprived the children of their rights under the fourteenth amendment due process clause.¹¹²

In *Bowers*, however, Posner held that the State had not placed the plaintiff in a position of danger merely because it failed to protect her adequately from a dangerous parolee.¹¹³ Posner chose, in *Bowers* and other cases,¹¹⁴ to restrict the rule's operation to the narrow circumstances in which the state actually took action, and where that action substantially increased the likelihood that the victim would suffer harm. The Supreme Court in *DeShaney* validated Judge Posner's narrow application of the rule.¹¹⁵

Two possible factual arguments that could invoke the rule can be constructed from the facts in *DeShaney*. First, if the DSS caseworkers had taken custody of Joshua and subsequently returned him to his father knowing that the father was an incorrigible child abuser, then arguably they recklessly placed the child in a position of great danger.¹¹⁶ This scenario, which applies the "position of danger" rule in a very straightforward fashion, "might" be accepta-

111. 592 F.2d 381 (7th Cir. 1979).

112. *Id.* at 384-85.

113. *Id.* In *Bowers*, an individual was convicted of aggravated battery with a knife. 606 F.2d 616, 617 (7th Cir. 1982). The Illinois state mental health facility diagnosed him as a "schizophrenic in remission" and released him. *Id.* He subsequently killed a young woman with a knife. *Id.* The court found him not guilty by reason of insanity and again committed him to the state mental health facility. *Id.* When the facility released him five years later, he murdered Marguerite Bowers with a knife. *Id.* The plaintiffs alleged that the defendants knew the individual was dangerous and that they acted recklessly when they released him. *Id.*

114. In *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983), Judge Posner held that a policeman's failure to save the occupants of a burning car was not actionable because the occupants were already in great danger before the police arrived. Similarly, Posner wrote in *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 302 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989), that because the increase in probability that Joshua would be injured by his father was "trivial," the State could not be held to have caused the injury. "The botched rescue must be distinguished from the case where the state placed the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becoming a cause of the harm." *Id.* at 303.

115. 109 S. Ct. at 1006.

116. *DeShaney*, 812 F.2d at 303. Judge Posner qualified this remark by noting that to so hold would require the court to go one step beyond *Doe I*, 649 F.2d 134, 141 (2d Cir. 1981), in which "the welfare department placed a child with foster parents and thus retained custodial responsibility." For a discussion of the custody issue, see *infra* notes 122-137 and accompanying text.

ble even to a Posnerian court.¹¹⁷ Under a second construction of the facts, the State itself placed Joshua in a position of danger because it encouraged individuals to rely on the DSS for services essential to child abuse prevention, and then failed to provide the services.¹¹⁸ This latter argument relies on a reading of the facts similar to Justice Brennan's.¹¹⁹

The first application of the rule is somewhat more viable, albeit narrower, in that a conservative court might find it more acceptable than the second.¹²⁰ Judge Posner almost certainly would have re-

117. There is language in the Supreme Court's opinion in *DeShaney*, however, which suggests that even if a Posnerian court accepted this application of the "position of danger" rule, the Supreme Court might not accept it.

That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

DeShaney, 109 S. Ct. at 1006.

118. See Comment, *supra* note 61, at 1063.

119. Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program, when the persons and entities charged with carrying it out fail to do their jobs.

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

120. For additional cases in which courts applied the logic of the "position of danger" rule even if it did not explicitly use that phrase, see *Nishiyama v. Dickson County*, 814 F.2d 277, 281 (6th Cir. 1987) (en banc) (woman was killed by inmate driving fully equipped official patrol car with authorization of sheriff); *White v. Rochford*, 592 F.2d 381, 384-85 (7th Cir. 1979) (officer arrested driver of car and left passenger children stranded in driverless automobile on eight lane highway); *Byrd v. Brishke*, 466 F.2d 6, 9-10 (7th Cir. 1972) (defendant police officers stood by as fellow officers beat plaintiff).

In *White*, the court also discussed an alternative approach to the due process claim at issue: instead of determining whether the officer's conduct should be characterized as malfeasance or nonfeasance, it considered the egregiousness of the State's conduct. Leaving the children unprotected on the highway violated the due process clause because the action fell within a class of state intrusions against personal integrity which "shock the conscience." *White*, 592 F.2d at 383-84. The court focused on the state's conduct that ran "counter to fundamental notions of fairness." *Id.* at 385. The phrase "shock the conscience" was coined in *Rochin v. California*, 342 U.S. 165, 172 (1952), in which police ordered a detainee's stomach pumped to obtain evidence. This was deemed by the Court offensive to "a sense of justice" and violative of due process. *Id.* at 166, 172-73.

It is unlikely that a "shock the conscience" argument would apply in Joshua's case because his injury was not inflicted directly by the State. See also *Taylor v. Waters*, 636 F. Supp. 181, 186-87, 188-89 (E.D. Mich. 1986) (police officers' conduct in standoff with gunman allegedly placed hostage in greater danger such that *Bowers* and *Jackson* were

jected the second application of the rule¹²¹ and it would be unlikely to succeed in many courts generally—such an application would appear to stretch the rule too far. The contrast between Justice Brennan's and Judge Posner's views suggests that the scope of the "position of danger" rule is at the court's discretion. Indeed, a comparison of the two interpretations of the "position of danger" rule highlights the significant role which judicial discretion plays in validating the argument in a particular case. Although its time has not yet come, a willing judiciary could give the rule broader scope.

3. *Quasi-custody*.—The decisions in *Doe I* and *Taylor* and the Court's dicta in *DeShaney* suggest the third argument for potential state liability for failure to protect children in foster homes.¹²² Even after *DeShaney*, it arguably is proper to impose liability on the state for having acted affirmatively to place children in foster homes in which they later were abused. Such children are in the quasi-custody of the state if the state has continuing obligations to assess the quality of the foster home it placed them in and to act to protect the children if its quality deteriorates.¹²³

Although the *DeShaney* facts did not raise the issue of a state's liability for foster child abuse, *DeShaney* will affect the development of the law in that and related areas. For example, in *Stoneking v. Bradford Area School District*,¹²⁴ the Third Circuit recently considered a public high school student's argument that she was in the "functional custody" of school authorities when she was sexually abused by a teacher because the student's freedom of movement was restrained by a state law that required school attendance.¹²⁵ The

distinguishable; facts also were analyzed in "shock the conscience" terms), *rev'd*, 655 F. Supp. 801, 803-04, 806 (E.D. Mich. 1987) (without qualified expert witness who could testify as to recklessness of police conduct, there was no support for the "shock the conscience" analysis and *Bowers* and *Jackson* were not distinguishable).

121. To accept the plaintiffs' syllogism would be to impose by another route a duty to provide basic services. Here the state acted promptly but, it is alleged, ineffectually. The next case if this one succeeds will be one where the police and fire departments, maybe because of budget cuts, do not arrive at the scene of the accident at all.

Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983).

122. *Doe I*, 649 F.2d 134, 141 (2d Cir. 1981); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989); *DeShaney*, 109 S. Ct. at 1006 n.9.

123. *Doe I*, 649 F.2d at 141. One might argue that a child also is in the state's quasi-custody when a court finds the child to be neglected, but then returns the child to the parent with the understanding that the state has a continuing obligation to monitor the child's welfare.

124. 882 F.2d 720 (3d Cir. 1989).

125. *Id.* at 723-24.

court said that the student's argument was "not inconsistent" with *DeShaney*, because of the uncertainty of the special relationship doctrine, however, the court decided the case on other grounds.¹²⁶ Nevertheless, in *Philadelphia Police and Fire Association for Handicapped Children v. Philadelphia*,¹²⁷ an earlier post-*DeShaney* decision, the same court had rejected a constructive custody argument that mentally handicapped citizens who lived in their own homes were in the State's custody because they had entered the state care system. The Third Circuit held that *DeShaney* foreclosed constructive custody arguments because only a state's affirmative act of restraining an individual's freedom to act on his or her behalf triggers a state's duty to provide care.¹²⁸

These two decisions give useful guidance to litigants searching for the outer boundaries of state custody in noninstitutional settings. It does not appear unreasonable to argue that once a state has placed a child in a foster home, it has restrained the child's personal liberty by placing the child under the foster parents' dominion. This may qualify as an "other similar restraint of personal liberty"¹²⁹ in satisfaction of the 'deprivation of liberty' requirement.¹³⁰ The *DeShaney* Court in a footnote observed, without deciding, that should foster parents be considered state agents, "we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."¹³¹ The Court's decision in *Youngberg*¹³² to extend 'special relationship' duties to a state mental institution supports this exception.

In a recent Fourth Circuit decision, *Milburn v. Anne Arundel County Department of Social Services*,¹³³ the court emphasized the importance of state agency in a case in which a Maryland youth sued his abusive foster parents under section 1983.¹³⁴ The court held

126. The court, without either rejecting or approving her functional custody argument, found the school district and principals liable, not because of an affirmative duty to protect, but because a state actor inflicted her injury and the school administration's deliberate indifference amounted to a state practice, policy, or custom. *Id.* at 724-26.

127. 874 F.2d 156 (3d Cir. 1989).

128. *Id.* at 168.

129. *DeShaney*, 109 S. Ct. at 1000.

130. See, e.g., *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) ("a child involuntarily placed in a foster home is in a situation analogous to a prisoner in a penal institution"), *cert. denied*, 109 S. Ct. 1337 (1989).

131. 109 S. Ct. at 1006 n.9.

132. 457 U.S. 307, 387 (1982); see *supra* notes 55-56 and accompanying text.

133. 871 F.2d 474 (4th Cir.), *cert. denied*, 110 S. Ct. 148 (1989).

134. The court focused almost exclusively on the issue of agency and analyzed both the facts and pertinent case law in detail. *Id.* at 476-79.

that the foster parents and the State were not in an agency relationship because the State of Maryland exercised little power over the foster parents, and "the care of foster children is not traditionally the exclusive prerogative of the State."¹³⁵ Moreover, the child's parents placed him in the foster home, not the State.¹³⁶ Ultimately, agency determinations will vary from state to state according to statutes, contracts, and other evidence.¹³⁷ Unfortunately, it appears that this argument will help plaintiffs only if they are able to prove state agency.

D. *The Outcome of DeShaney*

In spite of the "statutory entitlement," "position of danger" and "quasi-custody" arguments outlined here, *DeShaney* should put to rest much of the discord among the circuits with respect to the scope of constitutional tort liability based on the special relationship doctrine. *DeShaney* will affect constitutional tort law by restricting substantive due process claims based upon a state's failure to protect an individual to the narrow range of eighth amendment-like situations to which the claims were confined before the 1980s.¹³⁸ It also will dispatch the hopes of those who would have used the Third, Fourth, and Ninth Circuits' expansion of the special relationship doctrine to force states to improve their child abuse prevention programs.¹³⁹

The states and municipalities protected by the decision will reply that were *DeShaney* decided otherwise, the burden of liability would have stifled initiatives to introduce or improve local social service programs.¹⁴⁰ This argument makes sense only at first glance. In the long run, Joshua will cost Wisconsin taxpayers dearly whether the State pays a one-time judicial award or maintains him for the rest of his life in a state hospital.¹⁴¹ As such, the State would

135. *Id.* at 479.

136. *Id.* at 476.

137. *See id.* at 476-77.

138. *See* 109 S. Ct. at 1004-06.

139. *See* *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 723 (3d Cir. 1989) (after *DeShaney*, state common-law duties can no longer be the basis for a constitutional duty to protect students from harm); *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 476 (4th Cir.) (after *DeShaney*, failure to report child abuse not actionable under § 1983), *cert. denied*, 110 S. Ct. 148 (1989).

140. *See, e.g.*, *Martinez v. California*, 444 U.S. 277, 283 (1980); *Archie v. City of Racine*, 847 F.2d 1211, 1218, 1223-24 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989); *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).

141. *DeShaney*, 109 S. Ct. at 1002. In 1984, it cost the State of Wisconsin \$107.55 per

have much to gain if it instituted a more effective prevention program because the program's benefits would outweigh both the economic costs of funding and the likely social costs of ignoring child abuse. It seems tenable to argue that liability could increase the efficiency of inefficient state programs.¹⁴²

Even ignoring this argument and assuming that liability results in net losses for the State, the Court need not have eliminated special relationship-based liability or limited due process protections for individuals as sharply as it did to protect state governments. The evidentiary burden on plaintiffs of showing the government actor's state of mind,¹⁴³ reasonably direct causation,¹⁴⁴ and when the defendant is a local government entity, state policy or custom as the origin of the injury,¹⁴⁵ gives states a distinct courtroom advantage.

day to maintain a resident in its institutions for the mentally retarded or developmentally disabled. D. BRADDOCK, R. HEMP & R. HOWES, PUBLIC EXPENDITURES FOR MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES IN THE UNITED STATES: STATE PROFILES 850 (Public Policy Monograph Series, No. 5, The University of Illinois at Chicago, 1984). At that rate, the State ultimately will spend a great deal of money on Joshua regardless of whether it is judicially liable for his injuries. Of course, the State also loses whatever earnings Joshua would have contributed to its economy. And, where children are not injured as severely as Joshua was, there are important social costs associated with child abuse. See, e.g., Blager & Martin, *Speech and Language of Abused Children*, in THE ABUSED CHILD, A MULTIDISCIPLINARY APPROACH TO DEVELOPMENTAL ISSUES AND TREATMENT 83 (1976) [hereinafter THE ABUSED CHILD]; Martin & Breezeley, *Personality of Abused Children*, in THE ABUSED CHILD, *supra*, at 105; Martin & Rodeheffer, *Learning and Intelligence*, in THE ABUSED CHILD, *supra*, at 93. These social costs translate into heavy fiscal burdens on government. See D. DARO, CONFRONTING CHILD ABUSE 155-60 (1988) (estimating medical, foster care, juvenile delinquency, criminal rehabilitation, and lost earnings costs of child abuse in America in 1983).

142. If we assume, as Justice Brennan asserted, that the State of Wisconsin monopolized child abuse prevention services for all intents and purposes, then almost by definition, the State was not constrained by any market force to allocate its resources to provide the greatest benefit to its citizens at the lowest cost. See *DeShaney*, 109 S. Ct. at 1009-12 (Brennan, J., dissenting). And now *DeShaney*, together with the DSS's statutory immunity, see *infra* note 147, has effectively eliminated any liability considerations that might have encouraged the State to allocate its resources more efficiently or even to ensure that services are provided at all, once offered. The DSS directors currently have no incentive to improve services because a financial penalty is imposed on the state agency responsible for child abuse prevention only in the narrowest circumstances. The reason, in part, is because financial responsibility shifts to another agency. In Joshua's case, that responsibility fell to the agency that oversees the institutional care of the mentally retarded. There is an argument to be made that, under a cost-benefit analysis, the improved allocation of resources among the various prevention and intervention strategies used to confront child abuse can achieve both financial and social benefits. See D. DARO, *supra* note 141, at 149-98.

143. See, e.g., *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *supra* note 75.

144. See, e.g., *Martinez*, 444 U.S. 277; *supra* note 42.

145. See 42 U.S.C. § 1983 (1982); *Monell v. New York City Dep't of Social Servs.*, 436

These requirements are substantial barriers to liability and give states enough protection that their fear of liability should not extinguish their desire to legislate socially useful programs.

CONCLUSION

The *DeShaney* decision is rooted firmly in traditional constitutional interpretation. The Court has joined with its forbears who understood the negative language of the Constitution to protect the people of this country only from an overreaching government. With *DeShaney*, the Court drew the curtain on a decade in which the courts sought to protect members of society more effectively from government recklessness in the guise of its failure to act. In so doing, it explicitly encourages legislatures across the country to pass laws that will hold states liable for their reckless omissions.¹⁴⁶ To the extent that *DeShaney* prevails upon state legislatures to enact such laws, it is a laudable decision. But when proponents of change can no more prevail upon their legislatures than Joshua could prevail upon this Court, *DeShaney's* constitutional traditionalism will triumph at the expense of those who have no other recourse.¹⁴⁷

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U.S. 658, 690 (1978) (although official policy is a touchstone for § 1983 actions against the government, the showing of a government custom also will support a claim).

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

147. See WIS. STAT. ANN. § 48.981(4) (1987), entitled "Immunity from liability," which broadly protects individuals and institutions from liability resulting from action pursuant to § 48.981. The statute seems to support arguments for the tort immunity of both the DSS caseworker and the Winnebago County Social Services Department from any charges Joshua brought against them under the statute. Given this, it is obvious that appeals to the Wisconsin courts to provide Joshua with a remedy would fall on deaf ears. Joshua's fourteenth amendment attack was, therefore, the only avenue open to him.

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