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DeShaney v. Winnebago County Department of Social Services: The Future of Section 1983 Actions for State Inaction

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Casenotes

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I. INTRODUCTION

Until the last decade, petitioners rarely relied on 42 U.S.C § 1983[1] to enforce constitutional rights under the fourteenth amendment.[2] Soon after the passage of section 1983, the Supreme Court limited it to situations in which state action directly deprived a person of a constitutional right.[3] As a result of the Court's narrow interpretation, persons who had been injured by government officials' tortious omissions sought remedies under state tort law rather than under section 1983.[4]

In 1961, however, the Supreme Court held that section 1983 provides a federal remedy when state officials fail to enforce state laws because of prejudice, intolerance or neglect, thereby depriving citizens of their rights as guaranteed by the fourteenth amendment.[5] Since then, courts have used common law tort principles to analyze section 1983 claims,[6] which has increased the amount of

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1. Section 1983 provides in pertinent part:

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

42 U.S.C. § 1983 (1981).

2. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 5 (1980).

3. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (Court limited Congressional enforcement of civil rights pertaining to person and property because protection of these rights was primarily a state function); *see also* United States v. Cruikshank, 92 U.S. 542 (1876) (fourteenth amendment authorizes federal legislation against *state* denials of constitutional rights).

4. *See* Whitman, *supra* note 2, at 5 nn.1 & 3.

5. Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). In *Monell*, the Supreme Court held that there is no doctrine of *respondeat superior* for municipal liability actions and that a section 1983 action may be maintained only when municipal policy or custom causes a constitutional deprivation. *Monell*, 436 U.S. at 691, 694.

6. *Monroe*, 365 U.S. at 187. The *Monroe* Court stated that section 1983 "should be

litigation in this area.[7] Suits formerly brought as common law tort actions were brought as deprivation of constitutional rights claims under section 1983[8] and included actions against government employees, agencies and service providers.[9] The scope of section 1983 in cases of government inaction was left an open question.

On February 21, 1989, the United States Supreme Court answered this question in a case involving a state agency's failure to act in a child abuse situation. In *DeShaney v. Winnebago County Department of Social Services*,[10] the Court held that states have no affirmative duty under the Constitution to protect an individual from actions by other private individuals.[11] The Court refused to impose such a duty on the basis of a "special relationship" between the state and the individual seeking protection.[12]

This Note analyzes *DeShaney*'s impact on section 1983 actions based on government inaction. It begins with background on the fourteenth amendment and section 1983 as they relate to liberty interests and state inaction. The Note next discusses the development of the Court's treatment of government inaction cases and the various federal circuit court approaches to the problem in relation to child abuse cases. Finally, after presenting the lower court and Supreme Court decisions in *DeShaney*, the Note will discuss the questions remaining and the possible impact of *DeShaney*'s holding on pending cases raising similar issues.

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read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.*

7. Whitman, *supra* note 2, at 6, points out that between 1961 and 1979, the number of federal filings under section 1983 (excluding suits by prisoners) increased from 296 to 13,168. Civil rights petitions by state prisoners increased from 218 in 1966, to 11,195 in 1979. *Id.* In 1976, almost one out of every three "private federal question suits filed in the federal courts was a civil rights action against a state or local official." *Id.*

8. The protected right most frequently involved in section 1983 litigation is the right to "liberty." For example, the Supreme Court has commented that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." Youngberg v. Romeo, 457 U.S. 307, 315 (1976) (mental patient's "liberty" interest in freedom from bodily restraint), *see infra* notes 46-49 and accompanying text. In Board of Regents v. Roth, 408 U.S. 564, 572 (1972), the Court stated that in a "Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

9. *See infra* notes 22-30 and accompanying text.

10. 109 S. Ct. 998 (1989).

11. *Id.* at 1003.

12. *Id.* at 1004-05. The Court would impose a duty only when the "special relationship" arose because the state had deprived the individual of a liberty interest by taking him or her into its custody. The "special relationship" doctrine is discussed *infra* notes 46-49, 52-65, 95-99, 112-22, 149-56.

II. BACKGROUND

Congress passed the fourteenth amendment[13] to the United States Constitution with the belief that the thirteenth amendment[14] and the Civil Rights Acts of 1866 did not go far enough in protecting the civil rights, as opposed to the civil liberties,[15] of the freed slaves. Although Congress intended the fourteenth amendment to authorize federal civil rights legislation regulating both private and state[16] action, the United States Supreme Court interpreted the fourteenth amendment and the Civil Rights Acts of 1871 to prohibit only state action that deprived persons of protected rights.[17]

Courts that have held a plaintiff may bring a section 1983 action for governmental inaction have imposed additional requirements beyond the mere demonstration that the state acted in violation of a protected right. First, the petitioner must allege that the state's action was a substantial factor in causing the violation of the protected interest.[18] Second, the petitioner must allege that conduct

13. The *DeShaney* analysis focused on the due process clause of the fourteenth amendment, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

14. The thirteenth amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

15. H. BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 108-09 (1978). Belz distinguishes civil rights from civil liberties. He states that "[c]ivil liberties refers to legal guarantees which protect individuals against governmental interference in a variety of freedoms that are mainly political in nature, such as freedom of speech, press, petition, and assembly. Civil rights refers to legal rules that protect individuals in their ordinary social and economic pursuits against injury or impediment from other private individuals as well as from government." *Id.*

16. The term "state" in this Note refers to state and local governments and their employees. An early draft of the fourteenth amendment by Rep. John Bingham of Ohio authorized Congress to "make all laws necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property." H. BELZ *supra* note 15, at 121 (citing CONG. GLOBE, 39th Cong., 1st Sess. Appendix 158 (1866) (remarks of Columbus Delano)). Bingham's draft supports the idea that the framers contemplated a Constitution that imposed an affirmative duty on the states to secure rights for their citizens rather than one that only prevented states from taking rights away. The former conceivably would involve protecting citizens from the actions of private individuals. *Id.*

17. *See* United States v. Cruikshank, 92 U.S. 542, 555 (1876). The language in the Civil Rights Act of 1871 requiring that actions complained of must have been taken "under color of law, statute, ordinance regulation, or custom" has been interpreted as requiring state action.

18. *See* Rizzo v. Goode, 423 U.S. 362, 376 (1976) (state failure to act in spite of knowledge of constitutional violations by its agents is not the same as action violating constitutional rights for § 1983 purposes).

on the part of an official or agency with a duty to act reveals a state of mind of deliberate indifference.[19] In cases in which a state's failure to act has lead to an injury, these two requirements have been difficult to meet.[20]

Federal courts have considered diverse situations in which plaintiffs have claimed redress under section 1983 for deprivations of constitutional rights as a result of state inaction.[21] The Supreme Court has decided cases of prisoner mistreatment,[22] injury of involuntarily committed mental patients,[23] corporal punishment in schools,[24] and assault by parolees.[25] The federal circuits have similarly addressed situations involving murder by parolees and released mental patients,[26] failure by police and firefighters to protect or to rescue victims from actions of private third parties or acts of God,[27] inadequate training of lifeguards resulting in failure to rescue from drowning,[28] failure to provide medical treatment[29] and

19. "Deliberate indifference" has been defined as more than mere negligence. *See* Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Estelle v. Gamble, 429 U.S. 97, 105 (1976).

20. *See Rizzo*, 423 U.S. at 376.

21. *See infra* notes 50-65 and accompanying text.

22. Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986); Parrat v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds*, 474 U.S. 327 (1986); Estelle v. Gamble, 429 U.S. 97 (1976) (eighth amendment rights).

23. Youngberg v. Romeo, 457 U.S. 307 (1982) (eighth and fourteenth amendment rights).

24. Ingraham v. Wright, 430 U.S. 651 (1977) (eighth amendment rights of students).

25. Martinez v. California, 444 U.S. 277 (1980) (fourteenth amendment right to life).

26. Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir.), *cert. denied*, 479 U.S. 882 (1986) (family of victim killed by an inmate on furlough had no section 1983 claim against county officials); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) (officials not liable when former inmate who violated parole was not reincarcerated and subsequently committed crimes against plaintiffs); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) (physicians not liable for failing to warn victim of dangerous mental patient's release).

27. Archie v. City of Racine, 826 F.2d 480 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 1338 (1987), *vacated*, 847 F.2d 1211 (1988) (en banc) (no liability for fire dispatcher who failed to send rescue squad requested by a woman who later died); Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988) (police not liable for failing to protect battered wife); Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) (no liability for failure of police body guard to protect a woman from an assailant); Beard v. O'Neal, 728 F.2d 894 (7th Cir. 1984) (no liability for FBI informant's failure to protect murder victim); Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (no liability for city's failure to provide equipment to fight a fire during a firefighter strike); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (no liability for police officer's failure to rescue persons from a burning car); Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983) (police and public official conspiracy to suppress information about crimes caused injury to plaintiff).

28. Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986).

29. Wideman v. Shallowford Community Hosp., 826 F.2d 1030 (11th Cir. 1987).

failure to provide adequate child protection services.[30]

Although history suggests that the framers of the fourteenth amendment intended it to impose upon the states an affirmative duty to secure broad civil rights for their citizens, many courts consistently have viewed the Constitution as "a charter of negative rather than positive liberties."[31] This characterization implies that the Constitution and the Bill of Rights contain prohibitions against certain state actions, not affirmative commands to the state to act.[32] In particular, the Court of Appeals for the Seventh Circuit has required that the state must act, not merely fail to act, in order for a plaintiff successfully to invoke section 1983 to enforce protection of fourteenth amendment rights.[33] Until *DeShaney*, the Supreme Court had not given clear direction as to whether and under what circumstances the Constitution imposes affirmative duties upon the states to protect the rights of their citizens.

A. The Supreme Court's Treatment of Government Inaction Cases

The threshold inquiry in a section 1983 action focuses on whether the conduct complained of is an affirmative act rather than a failure to act.[34] The Court had left open the possibility that

30. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989); Taylor *ex rel.* Walker v. Ledbetter, 791 F.2d 881 (11th Cir. 1986), *aff'd in part, rev'd in part on reh'g*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989) (foster care setting); Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923 (8th Cir. 1987); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); Doe v. New York City Dep't of Social Services, 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782 (1983), *cert. denied*, 464 U.S. 864 (1984) (foster care setting).

31. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (citing Harris v. McRae, 448 U.S. 297, 318 (1980)).

32. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986).

33. *See* DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 301-02 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989). The Seventh Circuit has been particularly unfavorable to section 1983 plaintiffs pleading state inaction. *See, e.g.*, Archie v. City of Racine, 826 F.2d 480 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 1338 (1987), *vacated*, 847 F.2d 1211 (1988) (en banc); Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). The majority of circuits do not favor imposition of liability unless the state action (rather than its inaction) caused the plaintiff's injury. *See infra* notes 51-52 and accompanying text.

34. *See* Parrat v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, 474 U.S. 327, 330 (1986) (prisoner, claiming that negligent loss by prison officials of his hobby materials violated due process, denied relief).

inaction could support a claim under section 1983, particularly in cases in which the state has a "special relationship" with the plaintiff.[35] In *Estelle v. Gamble*,[36] a prison inmate sued state corrections officials, claiming that their failure to provide him with adequate medical treatment subjected him to cruel and unusual punishment in violation of the eighth amendment. The Court held that state officials' deliberate indifference to the prisoner's medical needs could violate the constitutional ban on cruel and unusual punishment.[37] The Court reasoned that government has an affirmative duty to care for prisoners who, because they have been deprived of liberty by the state, cannot care for themselves.[38] Thus, at least in a prison setting, the government's breach of an affirmative duty constitutes a constitutional deprivation under section 1983.

The Court appeared to have extended this reasoning to situations in which the alleged victim of a constitutional deprivation was not in the physical custody of the state.[39] In *Martinez v. California*,[40] the Court implied in dicta that if a state official or agency knew that a particular individual was in danger, the state's failure to protect that person might be a deprivation of a constitutional right.[41] In *Martinez*, a parolee committed a murder five months after the parole board released him from prison.[42] The decedent's family brought suit against the state for deprivation of their daughter's life without due process of law.[43] The Court held that under the circumstances, the death was "too remote a consequence of the parole officers' action to hold them responsible" under section 1983.[44] The Court left open a possibility, however, that if the pa-

35. The Court has implied that the definition of "deprive" includes active taking or refusing of rights. *See* Board of Regents v. Roth, 408 U.S. 564, 573-76 n. 13 (1972). *See infra* note 159 and accompanying text (for further discussion of *Roth*). For further discussion of the "special relationship" doctrine, see *infra* notes 46-49, 52-65, 95-99, 112-122, 149-56 and accompanying text.

36. 429 U.S. 97 (1976).

37. *Id.* at 104.

38. *Id.* at 103.

39. *But see infra* text accompanying note 60.

40. 444 U.S. 277 (1980).

41. *Martinez*, 444 U.S. at 285.

42. *Id.* at 279-80. The parole board released the parolee despite his history as a sex offender. *Id.* at 279.

43. *Id.* at 279-81.

44. *Id.* at 285. The Court concluded that the decision to release the prisoner was not related closely enough in time to the victim's death to have been its cause. *Id.* at 281. This reasoning allowed the Court to characterize the parole decision and subsequent murder as not being state action causing an unconstitutional deprivation of life. *Id.* Accordingly, the Court determined that a California statute granting absolute immunity to state officials for injuries resulting from parole decisions was not unconstitutional.

role board had been aware that the victim, "as distinguished from the public at large, faced any special danger," a court could find that a parole officer "deprived" her of life by his or her action.[45]

In 1982, in *Youngberg v. Romeo*,[46] the Court expanded the state's duty to protect certain individuals with whom it had some type of special relationship. In *Youngberg*, an involuntarily committed man named Romeo suffered injuries at a state mental institution.[47] He sued state officials for failing to prevent the injuries in violation of his rights under the eighth and fourteenth amendments.[48] Although the Court reaffirmed its opinion that the Constitution imposes no general duty on the state to provide services to its residents, it recognized that, because institutionalization leads to complete dependency, the state has a duty to provide certain care and services for institutionalized individuals.[49]

B. The Federal Circuit Split

Nearly every circuit has considered, in the context of section 1983 claims, whether the state has a duty to protect an individual not in state custody.[50] Some courts have concluded that states have no affirmative duty to protect those not in legal custody;[51]

45. *Martinez*, 444 U.S. at 281.

46. 457 U.S. 307 (1982).

47. *Id.* at 310. Romeo's injuries resulted from his own violent actions and from the reactions of other patients to him. *Id.*

48. *Id.* at 310. The amended complaint also included a claim that the defendants failed to provide Romeo with habilitation or training for his mental retardation. *Id.* at 311.

49. *Id.* at 317. The Court also noted the state's discretion to determine "the nature and scope of its responsibilities," *id.*, and that "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual and 'the demands of an organized society.' " *Id.* at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

50. *See supra* notes 24-30 and accompanying text.

51. The District of Columbia, First, Seventh, Eighth, and Eleventh Circuits each have held recently that no liability exists for the state's failure to provide protective services in the child protection area and other areas. *See e.g.*, Archie v. City of Racine, 826 F.2d 480 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 1338 (1987), *vacated*, 847 F.2d 1211 (1988) (en banc); Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923 (8th Cir. 1987) (state officials did not violate affirmative duties owed to, nor were they in a special relationship with, a child who was released into the custody of his mother who failed to save him from suffocating); Wideman v. Shallowford Community Hosp., 826 F.2d 1030 (11th Cir. 1987) (no constitutional right exists to county provided medical services); Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986) (reckless failure of state officials to provide safe prison conditions did not deprive prison guard of liberty interest); Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986), *cert. denied*, 479 U.S. 882 (1986) (failure of state psychiatrists, and other county officials to protect victim from attack by inmate not actionable under section 1983). *See supra* notes 27, 33 (for additional discussion of the *Archie* decision).

other courts have adopted the "special relationship" doctrine that could give rise to liability.[52] In *Fox v. Custis,*[53] the Fourth Circuit held that there is no general constitutional right to state protection. However, the court recognized that "such a right and corollary duty *may* arise out of special custodial or other relationships created or assumed by the state in respect of particular persons."[54] The court never defined what it meant by "other relationship." In *Jensen v. Conrad,*[55] however, the court recognized that *Fox* was significant because it expanded the right to affirmative protection beyond a custodial relationship.[56]

Jensen further concluded that a right to protection might exist, "given the proper facts."[57] In *Jensen*, civil rights actions were brought on behalf of children who died as a result of repeated abuse that previously had been brought to the attention of county social service agencies.[58] The court held that the state officials charged with failing to intervene and to provide protection to abused children were entitled to good-faith immunity because, at the time of the alleged violation of rights, the existence of a constitutional duty to protect a child from abuse was not clearly established.[59] Accordingly, it was unnecessary for the court to apply the "special relationship" analysis.

Despite this, *Jensen* set out three factors relevant to deciding whether a special relationship exists:

> (1) Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the

52. *See e.g.*, Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985) (abused child and state agency); Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988) (abused wife and police department). The Second and Eleventh Circuits have imposed liability in the foster care setting: Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782, *cert. denied*, 464 U.S. 864 (1983) (placement agency found liable under section 1983 for negligently failing to supervise a foster child in a home where she was sexually abused); Taylor *ex rel.* Walker v. Ledbetter, 791 F.2d 881 (11th Cir. 1986), *aff'd in part, rev'd in part on reh'g*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989). For a discussion of *Taylor*, see *infra* notes 153-55.

53. 712 F.2d 84, 88 (4th Cir. 1983). *Fox* involved the decision to release a prisoner who subsequently injured the plaintiff. *Id.*

54. *Id.* (emphasis in original). The court cited prison inmates and mental patients as examples of persons in special custodial relationships with the state, but its use of the term "other relationship" seemed to contemplate a situation like that in the foster care cases or possibly in *DeShaney*, as the petitioners in that case argued. Brief for Petitioner at 17, *DeShaney*, 109 S. Ct. 998 (1989).

55. 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

56. *Id.* at 194.

57. *Id.*

58. *Id.* at 187.

59. *Id.* at 194-95.

> incident . . . . (2) Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals . . . . (3) Whether the State knew of the claimants' plight.[60]

Only the Third Circuit has applied the *Jensen* factors. In a case involving similar facts to *DeShaney*, *Estate of Bailey by Oare v. County of York*,[61] the court of appeals refused to dismiss the case on the pleadings, and instead remanded the case with directions to the trial court to apply the special relationship factors as set out in *Jensen*.[62] Following the *Estelle-Martinez-Youngberg* line of cases,[63] the court stated that the pleadings alleged facts sufficient to establish a "special relationship" warranting the state's protection.[64] In both *Bailey* and *DeShaney*, a governmental agency was aware that an abused child was in danger. Unlike the Third Circuit, however, the Supreme Court rejected the special relationship doctrine and did not find a duty to protect.[65]

III. DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES[66]

A. The Facts

When Randy and Melody DeShaney divorced in 1980, a Wyoming court granted custody of their infant son, Joshua DeShaney, to his father.[67] Randy and Joshua moved to Wisconsin, where Randy remarried. After he and his second wife divorced, her attorney told the police that Randy " 'hit the boy, causing marks' and that this was 'a prime case for child abuse.' "[68] In January 1983, Randy's live-in girlfriend brought Joshua to a local hospital to be treated for bruises and abrasions. Hospital workers suspected child abuse and notified the Winnebago County Department of Social Services.[69]

The Department obtained a juvenile court order placing Joshua in the hospital's temporary custody.[70] Three days later, a "child protection team" determined that evidence of child abuse was in-

60. *Id.* at 194-95 n.11.
61. 768 F.2d 503, 511 (3d Cir. 1985).
62. *Id.* at 509-11.
63. *See supra* notes 36-49 and accompanying text.
64. *Id.*
65. *DeShaney*, 109 S. Ct. at 1004.
66. 812 F.2d 298 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).
67. *DeShaney*, 812 F.2d at 299.
68. *Id.*
69. *Id.* at 299-300.
70. *Id.* at 300.

sufficient. Accordingly, the juvenile court dismissed the case on the Department's recommendation.[71] The Department returned Joshua to his father's custody on the condition that he abide by an informal agreement with the Department.[72] The agreement provided that Randy would enroll Joshua in a Headstart program, that Randy would receive counseling from the Department, and that the girlfriend would move out of the home (Randy suggested that she might be abusing the boy).[73] Ann Kemmeter, a Department caseworker, was assigned to the DeShaneys.[74]

During the next year, Kemmeter received reports (including two phone calls from hospital emergency rooms) of numerous injuries to Joshua.[75] Kemmeter recorded the injuries in her file. After visiting the DeShaney home approximately thirteen times in twelve months, Kemmeter compiled a record of her suspicions that Joshua was being abused. Neither she nor the Department instituted any proceedings to remove him from the home.[76] In March 1984, Randy severely beat Joshua into a coma.[77] The Department removed Joshua from Randy's custody, and Randy was subsequently convicted and imprisoned for child abuse.[78]

Joshua and his mother brought suit in the United States District Court for the Eastern District of Wisconsin, under 42 U.S.C. § 1983. The complaint alleged that Winnebago County, the county Department of Social Services, Kemmeter, and her supervisor had deprived Joshua of his liberty without due process of law in violation of the fourteenth amendment of the United States Constitution.[79]

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71. *Id.* Wisconsin Statute § 48.205(1)(a) authorizes retaining custody of a child if "probable cause exists to believe that if the child is not held he or she will . . . be subject to injury by others." WIS. STAT. § 48.205(1)(a) (1987).

72. *DeShaney*, 812 F.2d at 300.

73. *See id.*

74. *Id.* at 299-300.

75. *Id.* at 300. Kemmeter also noticed that Randy DeShaney was not complying with the terms of the agreement in that he had not enrolled Joshua in the Headstart program, he did not attend counseling sessions, and his girlfriend had not moved out of the house. *Id.*

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

77. 109 S. Ct. at 1002. Doctors performed emergency brain surgery and discovered hemorrhages that were caused by traumatic injuries inflicted over a long period of time. The damage was so severe that Joshua will spend the rest of his life confined to an institution. *Id.*

78. *DeShaney*, 812 F.2d at 300.

79. *Id.*

B. The Lower Court Decisions

The district court granted summary judgment for the respondents.[80] The Seventh Circuit affirmed, finding that the complaint failed to support the two possible theories under which the DeShaneys could recover:[81] the State violated Joshua's fourteenth amendment rights by depriving him of a right (liberty or property) to be protected from the violent actions of his father, or that it deprived Joshua of his right to bodily integrity (a protected "liberty" interest) by failing to protect him from his father.[82]

With regard to the first theory, the court held that, because the state has no general duty under the Constitution to protect its citizens from private actions, Joshua did not have a right to be protected by the Department.[83] The court continued that "the state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty."[84] In other words, Joshua could not be deprived of a right to protection by the state because he never possessed that right in the first place.[85]

Analyzing the second theory, the court applied the common law tort principle of proximate causation;[86] the court determined that, although Joshua's injuries were a deprivation of a protected liberty interest,[87] in order for the state to be liable, it would have had to share responsibility[88] for the deprivation by having been a cause of

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

81. *DeShaney*, 812 F.2d at 301.

82. *Id.*

83. *Id.* Concluding that the framers intended the fourteenth amendment to prevent government's oppression of citizens and not to prevent government's failure to provide adequate social services, the court stated that the "Constitution is a charter of negative rather than positive liberties; and while there are exceptions to this as to virtually all legal generalizations . . . none of them is applicable here." *Id.*

84. *Id.* This view is well-established in the Seventh Circuit. *Id.* *See e.g.*, Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); Beard v. O'Neal, 728 F.2d 894 (7th Cir. 1984); Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). *See supra* note 33.

85. *DeShaney*, 812 F.2d at 301. This statement reiterates the view that the Constitution is a "charter of negative rather than positive liberties." *See supra* notes 31-33 and accompanying text.

86. *Id.* at 302-03.

87. *Id.* at 301.

88. *Id.* at 302. The court stated that the state had to share the responsibility "in a federal constitutional sense." *Id.* By this, the court meant that there had to be "more than a minimal or fictitious causal connection" between the deliberate action of the state and the plaintiff's injuries. *Id.* at 303. The increase in the probability that Joshua would be injured by his father would have to have been more than trivial to hold the State responsible. *Id.*

the injuries.[89] The court found that the causal link had not been established.[90]

The court also rejected arguments that the Department's actions constituted a botched rescue attempt[91] and that the state acquired a duty by placing Joshua in a position of danger from which it failed to protect him.[92] The court concluded that constitutional torts, unlike botched rescue attempts, require "deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others."[93] Moreover, unlike the situation in which the state places a person in a position of danger and then does not protect him, the state did not place Joshua in the position of danger.[94]

The court also rejected the "special relationship" doctrine[95] because it was inconsistent with the Seventh Circuit's earlier decisions[96] and because there was no basis in the due process clause, nor anywhere in the Constitution, for this doctrine.[97] The court acknowledged that a "special relationship" exists when the state places a person in a dangerous situation, such as a prison, and then fails to protect him.[98] According to the court, *DeShaney* involved

89. *Id.* at 302. The court stated that conventional tort principles of causation "are presumptively applicable to statutory and constitutional torts as well as to common law torts." *Id.* If the Department had never existed, Joshua would have still sustained the injuries for which he was seeking damages in this suit; therefore, the Department was not the cause-in-fact. *Id.*

90. *Id.*

91. *Id.* at 302-03. The common law rule is that the "rescuer [is] liable for his negligence in rescuing even if he had no duty to attempt the rescue in the first place." *Id.* The court opined that "a merely conjectural possibility that the state's inaction warned off other potential rescuers is not enough to make the state complicit (in a federal constitutional sense) in the private conduct that caused the victim's injury." *Id.* For its conclusion that the common law provided no basis for a finding of liability, the court relied upon Martinez v. California, 444 U.S. 277, 285 (1980) ("that state inaction might be deemed a proximate cause of the plaintiff's injury under evolving common law notions is not enough to establish a violation of the Fourteenth Amendment"). *DeShaney*, 812 F.2d at 302. For further discussion of *Martinez*, see *supra* notes 39-45 and accompanying text.

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

93. *Id.* at 302.

94. The court distinguished *DeShaney* from Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782, *cert. denied*, 464 U.S. 864 (1983). In *Doe*, the court found the state liable because it had placed a child in an abusive foster home. The court in *DeShaney* stated that if Wisconsin had placed Joshua in such a situation, it too might have been liable. *DeShaney*, 812 F.2d at 302. For further discussion of *Doe* and related cases, see *infra* notes 151-55 and accompanying text.

95. *DeShaney*, 812 F.2d at 302. *See supra* notes 46-49, 52-65, and *infra* notes 112-22, 149-56 and accompanying text.

96. *See supra* note 27 and cases contained therein.

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

98. *Id.* at 303-4.

an entirely different situation.[99]

Finally, the court cited the immense costs that would result if states could be sued for failure to provide protection in *DeShaney*-like situations. According to the court, public policy dictates that federal courts should not be open forums for cases relating to child welfare.[100] State courts, agencies and legislatures are better equipped to make decisions relating to family law.[101]

C. *The Opinion of the Court*

In affirming the decision of the Seventh Circuit, the United States Supreme Court held that, under the fourteenth amendment, the state has no general duty to protect citizens from violence by private individuals.[102] In addition, the Court held that the "special relationship" doctrine does not apply when the individual seeking protection is not in the state's custody.[103] The Court thus held that the state had no constitutional duty to protect Joshua from his father.

1. The Language and History of the Due Process Clause of the Fourteenth Amendment

After characterizing the petitioners' argument as placing a general affirmative duty on the state,[104] the Court found that the fourteenth amendment does not require the state "to protect the life, liberty, and property of its citizens against invasion by private actors."[105] Rather, the amendment is phrased as a limitation, not a guarantee of minimal levels of safety and security.[106] Although the

99. *Id.* at 304.

100. *Id.*

101. *Id.* The court stated that "[t]o place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principal." *Id.*

102. *DeShaney*, 109 S. Ct. at 1004-05. Chief Justice Rehnquist delivered the opinion of the Court in which Justices White, Stevens, O'Connor, Scalia and Kennedy joined.

103. *Id.* at 1005.

104. *Id.* at 1003. The DeShaneys argued that "[a]s a broad proposition there is no generalized duty on a state or municipality to provide affirmative protection to members of the public at large." Brief for Petitioners at 12, *DeShaney*, 109 S. Ct. 998. The petitioners never actually contended anything but that a duty might arise out of a relationship created by the state with respect to certain specific individuals. *Id.* Despite this, the majority characterized the petitioners' claim as a substantive due process argument that the State was "categorically obligated" to protect Joshua. *DeShaney*, 109 S. Ct. at 1003.

105. *Id.*

106. *Id.* The Court refused to recognize an affirmative right to government aid arising out of the due process clauses of the fifth and fourteenth amendments. The Court

fourteenth amendment forbids the state from depriving a person of protected rights without due process of law, it does not require the state to ensure that those rights are not deprived by private means.[107] The due process clause of the fourteenth amendment, like the fifth amendment's due process clause,[108] was intended to prevent government from abusing its power or from using its power to oppress.[109] Concluding that history supports only a narrow reading of the clauses,[110] the Court stated that the purpose of both amendments was to "protect the people from the State, not to ensure that the State protected them from each other."[111]

2. The Special Relationship Doctrine Rejected

The DeShaneys' argued that the state's actions created a "special relationship" between it and Joshua, giving rise to an affirmative duty to protect him from child abuse.[112] According to the argument, the Department knew who Joshua was and that he was at risk for child abuse.[113] Further, the state had expressed, through its policies and statutes, an intention to investigate and prevent

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concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 1003-04 (citing Harris v. McRae, 448 U.S. 297, 317-18 (1980) (due process clause of fifth amendment did not require government funding of medically necessary abortions or other medical services)); *see also* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (due process of fourteenth amendment did not require government to provide adequate public housing); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (no general constitutional duty of a state to provide substantive services).

107. *Id.*

108. The fifth amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. V.

109. *DeShaney*, 109 S. Ct. at 1003 (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986).

110. *Id.*

111. *Id.* The Court stated that the political process would ensure that people were protected from each other. *See also infra* note 126 and accompanying text.

112. The petitioners relied on the special relationship factors set out in Jensen v. Conrad, 747 F.2d 185, 194-95 n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). *See also supra* text accompanying note 60; *see also* Brief for Petitioners at 18-20, *DeShaney*, 109 S. Ct. 998. The petitioners argued that the state's failure to carry out its duty constituted a substantive due process deprivation because it was "conscience-shocking" and "violate[d] the most basic precepts of this society." *Id.* at 20 (citing Rochin v. California, 342 U.S. 165 (1952)).

113. The first factor in the *Jensen* analysis requires that the victim or the perpetrator be in state custody at the time of the incident of child abuse or that one of them had been in legal custody prior to the incident. *See supra* text accompanying note 60. The petitioners argued that Joshua was in state custody temporarily at one point. Brief for Petitioners at 18-20, *DeShaney*, 109 S. Ct. 998.

child abuse.[114] Thus, by virtue of its special relationship with Joshua, the state had a duty to protect Joshua, and had a duty to do so competently.[115] Because the state failed to provide competent protection, pursuant to this duty, its conduct violated substantive due process.[116]

The Court rejected this argument for several reasons. First, the Court held that its decisions in *Martinez* and the *Estelle-Youngberg* line of cases did not support the "special relationship" doctrine, nor did the *Estelle-Youngberg* reasoning apply to the *DeShaney* facts.[117] The circumstances in which the Constitution will impose affirmative duties with respect to certain individuals are much more limited than that doctrine would allow.[118] The Court distinguished the situations in *Estelle* and *Youngberg* by reasoning that the Constitution imposes affirmative duties of care and protection of a specific individual only when the state holds that person in its custody against his will.[119] Here, the state did not, at any relevant time, have Joshua within its custody.[120]

Second, the Court argued that even if the state acquired a duty under state tort law by "voluntarily undertaking to protect Joshua from a danger it concededly played no part in creating," the breach of that duty would not rise to the level of a constitutional violation.[121] The Court noted that if it accepted the petitioners' argument, every tort committed by a state actor would become a constitutional violation.[122] The Court refused to stretch section 1983 and the due process clause that far.

Finally, in dicta, the Court agreed with the Seventh Circuit that

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114. *Id.*

115. *Id.* at 20.

116. *Id.*

117. *DeShaney*, 109 S. Ct. at 1004-06. For a discussion of *Estelle*, *Martinez* and *Youngberg*, see *supra* notes 36-49 and accompanying text. In a footnote to *DeShaney*, the Court noted that the circuits supporting the "special relationship" doctrine had misinterpreted *Martinez* to mean that if a parole officer had known that the plaintiff's decedent had faced a special danger, an affirmative duty to protect her might have arisen. *DeShaney*, 109 S. Ct. at 1004 n.4 (citing Martinez v. California, 444 U.S. 277, 285 (1980)). The Court mentioned only in passing that varying interpretations of this language resulted in the split among the circuits. *Id.*

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

119. *Id.* at 1005-06.

120. *Id.* at 1006 n.9. The Court opined that if the state had placed Joshua in a foster home operated by state agents, then the situation would be analogous to the incarceration situation. Estelle v. Gamble, 429 U.S. 97 (1976) and Youngberg v. Romeo, 457 U.S. 307 (1982) then might apply. *DeShaney*, 109 S. Ct. at 1006 n.9.

121. *DeShaney*, 109 S. Ct. at 1006-07. The Court did not explain exactly what conduct would rise to the level of a constitutional violation.

122. *Id.* at 1007.

a decision imposing liability would put the state and its officials on a kind of "razor's edge,"[123] subjecting the state to section 1983 lawsuits from both parents and children.[124] For example, if the state had taken custody of Joshua before it had adequate evidence of abuse, it might have been accused of improperly intruding into the parent-child relationship.[125] The Court left it to the state law-making processes to ensure that children like Joshua were protected.[126]

D. The Dissent

In dissent, Justice Brennan argued that the majority erred in two respects: by starting its analysis from the wrong perspective, and by mischaracterizing the petitioners' argument as requiring a general duty of protection on the part of the state.[127] The dissent took issue with the majority's description of the petitioners' argument as being that the Constitution imposes a general affirmative duty on the state to take basic care of its citizens.[128] According to the dissent, the majority found erroneously that no such duty exists because the Constitution protects only "negative liberties."[129]

The dissent focused instead on the narrower issue presented by the petitioners, that the state, by its actions, acquired a positive duty to protect Joshua DeShaney.[130] Because Wisconsin's child protection statutes prevented access to aid from private sources as effectively as confining Joshua to an institution would have done,[131] the state's very enactment of the statutes constituted state action triggering a duty to protect.[132]

The dissenting justices argued that the majority incorrectly limited *Youngberg* to cases in which the state has restrained an individual's freedom to act on his own behalf by exercising physical

123. *Id.* *See supra* note 101 for full text of quote.

124. 109 S. Ct. at 1007.

125. *Id.* The parent-child relationship is a recognized, protected area under substantive due process. *See generally* G. GUNTHER, CONSTITUTIONAL LAW 550-59 (11th ed. 1985).

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

127. 109 S. Ct. at 1007-08 (Brennan, J., dissenting). Justices Marshall and Blackmun joined in Justice Brennan's dissent.

128. *Id.* at 1007.

129. *Id.* at 1008. *See also supra* notes 31-32 and accompanying text.

130. 109 S. Ct. at 1008 (Brennan, J., dissenting).

131. *Id.* at 1009. "Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse." *Id.* at 1010.

132. *Id.* at 1009.

control over him.[133] The majority had concluded that, because the state did not confine Joshua physically, the analysis of *Estelle* and *Youngberg* did not apply.[134] The dissent disagreed, stating that *Estelle* and *Youngberg* both stand for the broad proposition that "if a State [through any means] cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."[135] Thus, a state's initial action of confinement is relevant because it renders confined persons incapable of helping themselves or of seeking help from others besides the government; it is not relevant as a deprivation of a "liberty" interest in itself.[136] Accordingly, in *DeShaney*, because the state's prior actions may have been decisive in determining whether its later inaction constitutes a deprivation of a constitutional right,[137] the dissent would remand the matter for such a determination.[138]

Justice Blackmun, in a separate dissent, argued that, because the question presented in *DeShaney* was an open one, the Court could have read the fourteenth amendment precedents more broadly.[139] He argued that the majority opinion is too formalistic in its at-

133. *Id.* at 1008-09.

134. *Id.* at 1006.

135. *Id.* at 1009.

136. *Id.* at 1009. The dissent seems to be saying that it is not looking for "fundamental rights" that the state has a duty to protect in all situations; rather, once the state holds itself out as the sole provider of a service or protection, and then refuses to provide it, the person who is denied the service or protection has been deprived of an "expectation" interest. *Id.* This argument is similar to the entitlement argument advanced in Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986), discussed *infra* note 158 and accompanying text.

137. *DeShaney*, 109 S. Ct. at 1009-10 (Brennan, J., dissenting) (citing Boddie v. Connecticut, 401 U.S. 371 (1971) (filing fee for divorce cases brought by indigents held unconstitutional); Schneider v. State, 308 U.S. 147 (1939) (local government cannot completely prohibit speaking in a public forum)).

138. Because the district court dismissed this case on summary judgment, the Court could not know if Joshua was deprived of his constitutional right by arbitrary action against which the fourteenth amendment was intended to protect. *Id.* at 1011. The dissent conceded that, after Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), the Court should defer to professional judgment and should not find professionals liable for mere negligence. Substantive due process, however, serves the purpose of procedural due process by requiring "a State actor [to] stop and think before she acts in a way that may lead to a loss of liberty." *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting). The dissent argued that if the case had gone to trial, the court might have found a deprivation because inaction can be as abusive of power and as oppressive as action when a state undertakes, and then fails to perform, an important duty. *Id.* at 1011. The dissent would have allowed the petitioners to demonstrate that the state's failure to protect Joshua was based on some arbitrary reason, a failure to comply with proper procedure, or some other improper reason. *Id.*

139. *Id.* at 1012 (Blackmun, J., dissenting).

tempt to draw a bright line between action and inaction.[140] Compassion and a sense of justice require the Court to afford the petitioners "the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide."[141]

IV. ANALYSIS

The *DeShaney* decision follows the trend over the past several years of limiting the circumstances under which the due process clause and section 1983 are applied.[142] This narrowing stems from several concerns. First, there is a presumption against expanding governmental liability for torts.[143] Second, there is a fear of dire economic consequences that would result from increased governmental liability for failure to prevent or to remedy actions by private parties.[144]

With regard to the first concern, the Court does not want the due process clause to become "a font of tort law to be superimposed upon whatever systems may already be administered by the State."[145] The Court likely will continue to require that intentional state *action* and not mere *inaction* directly cause an injury in order to raise a tort to the level of a constitutional violation.[146]

As to the second concern, the Court feels that the government is simply not capable of assuming financial responsibility for the actions of third parties that its agents fail to prevent.[147] The

140. *Id.*

141. *Id.* at 1012-13.

142. *See supra* notes 13-65 and accompanying text.

143. *See* Paul v. Davis, 424 U.S. 693, 701 (1976).

144. *See* Estate of Gilmore v. Buckley, 787 F.2d 714, 722-23 (1st Cir.), *cert. denied*, 479 U.S. 882 (1986).

145. *Paul*, 424 U.S. at 701.

146. The majority in *DeShaney* agreed with amicus United States, which argued that:

> [I]f petitioners' argument were correct the holding of *Daniels* that the Due Process Clause is not generally violated by negligent or inadvertent impositions but principally by intentional ones would be rendered nugatory in a class of case that bears even less relation to the Due Process Clause than those where the defendant official actually though unintentionally inflicts the harm. For in most cases of omissions the harm comes about, not because state officials intended it, but because they neglected to prevent it, a case that would seem to raise if anything less of a due process concern than *Daniels*.

Brief of Amicus, United States at 11, *DeShaney*, 109 S. Ct. 998.

147. In *Estate of Gilmore*, the court raised a similar alarm:

> "Enormous economic consequences could follow from the reading of the fourteenth amendment that [a petitioner like the DeShaneys would] urge . . . . Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called arrive late; and myriad other errors

DeShaney Court prefers to leave the allocation of resources for protective services to the legislatures and to the political process rather than to the courts. The Court seems to be telling potential plaintiffs that the federal courts no longer will supplement state tort remedies with section 1983 recoveries.[148]

A. The Future of the "Special Relationship" Doctrine

The "special relationship" doctrine probably will not serve as a basis for recovery under section 1983 in child abuse cases in which the child was not in state custody at the time of the abuse.[149] A possibility for recovery under section 1983 exists, however, if a child was in state-placed foster care.[150] The Supreme Court has denied *certiorari* in two cases involving abuse of children placed by the state in foster homes. In the first case, *Doe v. New York City Department of Social Services*,[151] the Court let stand the district court's finding of liability. The lower court found that the Catholic Home Bureau deprived a foster child's liberty rights when it failed to protect the child from sexual abuse by her foster father.[152]

In *Taylor ex rel. Walker v. Ledbetter*,[153] the Court let stand an Eleventh Circuit ruling that the Georgia child protection statutes created a special relationship between the child and the state from

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by state officials in providing protective services could all be found to violate the Constitution."

787 F.2d at 722-23.

148. *DeShaney*, 109 S. Ct. at 1006-07; *see also* Whitman *supra* note 2, at 8: "It has been suggested that the mere possibility that a factual situation can give rise to a state claim as well as a section 1983 suit should be sufficient to support a dismissal of the federal action." (quoting Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983 and the Federal Case Load*, 1973 L. & SOC. ORD. 557, 573-74).

149. *But see* First, *'Poor Joshua!': The State's Responsibility to Protect Children from Abuse*, CLEARINGHOUSE REV. 525, 532 (August/September 1989) (citing *DeShaney*, 109 S. Ct. at 1004-05). The author points out that "traditional 'custody' constitutional damage litigation involving prisoners and mental patients injured by nonstate actors continues to be good law, because the state has custody of such individuals." *Id.*

150. The *DeShaney* majority noted that this question was not before it, but did acknowledge that an "affirmative exercise of . . . power" in placing a child like Joshua DeShaney in a foster home, which resulted in injury to him by a private actor, might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *DeShaney*, 109 S. Ct. at 1006 n.9. *See also supra* note 94 and accompanying text; and First, *supra* note 149, at 532.

151. 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782, *cert. denied*, 464 U.S. 864 (1983).

152. *Doe*, 709 F.2d at 782.

153. 791 F.2d 881 (11th Cir. 1986), *aff'd in part, rev'd in part & remanded*, 818 F.2d 791 (11th Cir. 1987), *cert denied*, 109 S. Ct. 1337 (1989).

which arose a duty of protection.[154] The *Taylor* court held that, "a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights."[155]

In order for a special relationship, and therefore, state liability to arise, the state must act overtly to place the child in a dangerous situation.[156] Thus, liability might be imposed if the state awarded custody of a child to a natural parent or foster parent, deliberately disregarding a danger of child abuse by that parent, and the child subsequently was injured or killed.[157] This type of case, in which there is clearly state action followed by state inaction, readily fits into the *Estelle-Youngberg* reasoning. The first action (placement with the parent, who the state knows or suspects has been or will be abusive) creates the special relationship; the subsequent inaction (failure to intervene when abuse is reported, despite knowledge of abuse), results in the unconstitutional deprivation of liberty. Because the *DeShaney* Court rejected this "special relationship" argument, however, petitioners like Joshua likely must rely on a different theory.

B. Alternative Constitutional Sources of State Liability

Because of the Court's reluctance to find constitutional liability based on common law tort principles, section 1983 plaintiffs in inaction cases need to stand on firmer constitutional ground. Some plaintiffs and commentators have advanced arguments based on

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154. In *Taylor*, 818 F.2d at 795, the court found that

> [t]he state's action in assuming the responsibility of finding and keeping the child in a safe environment [action evidenced by the statute mandating reporting of child abuse and protection of abused children] placed an obligation on the state to insure the continuing safety of that environment. The state's failure to meet that obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment.

Wisconsin also has a mandatory reporting statute requiring certain health and education professionals and police officers to report their suspicions that a child has been abused to the county department of social services or a local sheriff or city police department. WIS. STAT. § 48.981(2) (1988).

155. *Taylor*, 818 F.2d at 797.

156. In *DeShaney*, the Seventh Circuit noted that the "Department of Social Services did not place Joshua in his father's custody; a Wyoming juvenile court did that." 812 F.2d at 303. *See also supra* note 94.

157. In Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982), the Seventh Circuit stated that "[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."

procedural rather than substantive due process.[158] For example, in *Taylor*, the plaintiff claimed that the Georgia foster care statutes created a "legitimate and sufficiently vested claim of entitlement," both to investigation of the foster home prior to placement, and to post-placement supervision of the home, and that "deprivation of that entitlement without due process of law impose[d] on her a grievous loss."[159] The court found this claim valid.[160] Accordingly, withdrawal of a statute-created entitlement might be actionable under section 1983.[161]

Arguments based on the language, logic and legislative history of the fourteenth amendment might provide a better constitutional basis for finding liability for omissions or inaction. The petitioners in *DeShaney* appended an unpublished article[162] to their reply brief in which the author suggests that the framers of the fourteenth amendment contemplated an affirmative duty on the states to secure individual rights to due process and equal protection.[163] Although early drafts of the amendment establishing municipal lia-

158. *See Taylor*, 818 F.2d at 798. The petitioners in *DeShaney* made a procedural due process "entitlement" argument, but because they raised the argument for the first time in their brief to the United States Supreme Court, the Court declined to consider it. *DeShaney*, 109 S. Ct. at 1003 n.2. *See also* Comment, *Actionable Inaction*, *supra* note 136, at 1063: "Even assuming that a state has no obligation to provide protection in the first place, it may violate the due process clause when it assumes such an obligation and then fails to fulfill it."

159. *Taylor*, 818 F.2d at 798. The plaintiff based this claim on Board of Regents v. Roth, 408 U.S. 564 (1972), in which the Supreme Court held that when state law provides for certain benefits, a person acquires an entitlement to those benefits that may not be taken away without procedural due process.

160. *Taylor*, 818 F.2d at 800. The court also stated that "since the child's claim under *Roth* is a procedural due process claim, the state of Georgia may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely." *Id.* The court left open the possibility that other courts might find constitutional liability without infringing on the state's ability to provide or to not provide services as it sees fit.

161. *See* Comment, *Actionable Inaction supra* note 136, at 1064, in which the author lists considerations relevant to inaction claims under the entitlement theory: "whether the state has created a protected property interest; what kind of procedural safeguards attach to that property interest, given the relative interests of the state and the individual; and what remedy, if any, the individual is entitled to have when those procedures are not given."

162. Keynes, The Fourteenth Amendment, 42 U.S.C. section 1983, and State Inaction: Did the Authors of the Enforcement Act of 1871 Intend Civil Liability for the States' Failure to Protect Individual Rights, (unpublished paper, Penn. State Univ. 1988) (available on LEXIS, Genfed library, Briefs file, Petitioners' Reply Brief, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989)). Keynes is a professor of political science at Pennsylvania State University.

163. *See* comments of Representative Bingham, *supra* note 16 and accompanying text, regarding the theory that the framers believed the states had an affirmative duty to secure individual rights.

bility for private deprivations of constitutional rights were rejected, the tenor of the debates suggested that the framers contemplated this liability, both for state action and inaction, in the face of private deprivations of constitutional rights.[164]

In addition, the debaters suggested that the use of the word "deny" in the equal protection clause,[165] in the context of the whole amendment, "is equivalent to the phrase 'fail or refuse to provide for,' and the true construction of the provision is: 'No state shall fail or refuse to provide for the equal protection of the laws to all persons within its jurisdiction.' "[166] Arguably, the framers intended the fourteenth amendment to apply to state inaction as well as action. A failure to provide security from the actions of private individuals would breach the state's fundamental duty to its citizens.[167] In the face of such a breach, plaintiffs should have the power under section 1983 to ask the federal government, through the courts, to step in and remedy the situation.

C. DeShaney's *Immediate Impact*

The Court already has used its holding in *DeShaney* in its controversial decision on abortion, *Webster v. Reproductive Health*

164. The debates favored granting power to the Congress and state legislatures to secure rights of the individual, and a government failure to do so was seen as a failure to perform its fundamental responsibility. These debates were carried out in the context of addressing the problem of securing constitutional rights to blacks and whites who had been subject to *private* violence (at the hands of the Ku Klux Klan and others) while government authorities had failed, refused or were unable to suppress the violence. Keynes, *supra* note 162.

165. The equal protection clause of the fourteenth amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The argument about the word "deny" can also apply to the use of the word "deprive" in the due process clause. Keynes, *supra* note 162.

166. Keynes, *supra* note 162. Section five of the fourteenth amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. According to Keynes, one of the framers, Senator Wilson, suggested that this section gives Congress the power to ensure that citizens are provided with the equal protection of the laws should the state fail or refuse to provide it. Similarly, Congress has the power to ensure that citizens are not deprived, whether by public or private actors, of life, liberty or property without due process of law. Keynes, *supra* note 162.

167. Keynes, *supra* note 162. Keynes argues that the framers contemplated four forms of state inaction giving rise to liability: (1) refusal to protect persons in enjoyment of constitutional rights; (2) knowing tolerance or acceptance of *private* deprivation of rights; (3) the state's unexplained or inexplicable failure to intervene even when its authorities know of *private* deprivations of life, liberty or property; and (4) inaction in the face of riots (no municipal liability in this situation because it would be too costly; however, the national government must step in with military intervention). *Id.*

Services,[168] as support for the proposition that the Constitution confers no affirmative right to government aid in securing life, liberty or property interests. In the lower court, the respondents in *Webster* had alleged, among other things, that a section of a Missouri statute prohibiting public employees and public facilities from assisting an abortion was unconstitutional because it denied women the free exercise of their right to have an abortion.[169] The Supreme Court did not need to rely on *DeShaney* to hold that the statute section did not violate the Constitution, but by citing to it, the Court placed *DeShaney* firmly in the line of cases supporting the view that states have no affirmative duties to secure individual rights.[170] As long as the current make-up of the Court exists, it seems as if petitioners like the DeShaneys will receive no relief from the Supreme Court.

V. CONCLUSION

By finding that there is no right to protection by the state, the *DeShaney* Court avoided a confrontation between the states' right to determine how they should allocate their resources among various services and the federal duty to enforce rights under the fourteenth amendment. The Court saved the states millions of dollars in potential judgments to plaintiffs alleging inaction. It also adhered to a long-standing view of the Constitution as a charter of negative liberties. The Court's reasoning that the government should not be held liable for failing to protect us from each other may have been sound; yet, by rejecting even the possibility of applying the special relationship doctrine in child protection cases, the Court has closed the federal courts to plaintiffs, alleging state failures to protect, who cannot analogize their situation to that of an institutionalized person.

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168. 109 S. Ct. 3040, 3051 (1989).

169. Reproductive Health Services v. Webster, 851 F.2d 1071, 1083 (8th Cir. 1987).

170. The *Webster* Court relied on Maher v. Roe, 432 U.S. 464 (1977) (upholding Connecticut welfare regulation prohibiting use of Medicaid for nontherapeutic abortions); Poelker v. Doe, 432 U.S. 519 (1977) (upholding St. Louis statute providing for publicly financed hospital services for childbirth, but not for nontherapeutic abortions); and Harris v. McRae, 448 U.S. 297 (1980) (upholding version of Hyde Amendment withholding Medicaid funds from states if funds to be used to reimburse abortions not performed to protect life of mother). The Court, in *DeShaney*, also had referred to *Harris*, and cases like it, to support its argument that the states have no general affirmative duty to provide services for the protection of life, liberty or property. *See DeShaney*, 109 S. Ct. at 1003-04.