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# THE STATE'S FAILURE TO PROTECT CHILDREN AND SUBSTANTIVE DUE PROCESS: *DESHANEY* IN CONTEXT

LAURA OREN†

*After years of abuse by his father, four-year-old Joshua DeShaney entered a hospital emergency room in a deep coma that left him permanently paralyzed and brain damaged. The child protection agency in Winnebago County, Wisconsin had intervened in Joshua's family before and had known for more than two years the history of abuse and the continuing serious risk the boy faced. Joshua and his mother filed a civil rights suit against the caseworkers and the agency, alleging that their failure to protect the child from his father violated the boy's substantive due process rights. The United States Supreme Court in DeShaney v. Winnebago County Department of Social Services held that Joshua and his mother had no cause of action, reasoning that the government had no constitutional duty to protect anyone from harm unless the state first deprived that person of liberty by placing her in its custody.*

*In this Article, Professor Laura Oren criticizes the Court's due process analysis. She questions the Court's embrace of an abstract philosophy about constitutional duty for "government services" and its adoption of a bright-line test based on custody. Using insights about context and power garnered from feminist scholarship and the domestic violence movement, Professor Oren places DeShaney back into the specific context of family violence and child protection from which the Court abstracted it. She explains that historically the state has treated children at risk from their parents' behavior differently from other victims of violence and has decriminalized child abuse, promoting a therapeutic, preventive treatment instead. Every state centers responsibility for child abuse in social service agencies that are the sole protectors of these children. Professor Oren powerfully argues that because the state placed Joshua in a special legal status, increased his isolation and vulnerability to abuse by his father, and left the boy only one avenue of protection—the social service agency—the agency bore fourteenth amendment responsibility for his life and bodily integrity. Finally, she proposes a solution to the "razor's edge" dilemma of child protection workers who, if DeShaney were overturned, might have to strike a precarious balance between constitutional liability for improper intrusion in the parent-child*

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*relationship and for failure to intervene promptly enough to protect a child at risk.*

## I. INTRODUCTION

Joshua DeShaney was born in 1979 and first encountered the power of the state when his parents were granted a divorce, and his father granted custody, in 1980.<sup>1</sup> The state of Wisconsin first learned of possible child abuse by Joshua's father in January 1982 when the police department, as it was required to do by state law,<sup>2</sup> notified Winnebago County Department of Social Services' Child Protection Unit that it had received a complaint that the toddler was being abused.<sup>3</sup> The Department of Social Services (DSS) had the sole authority to investigate a neglect or abuse report.<sup>4</sup> As in many other states, by the 1980s Wisconsin law imposed a mandatory duty to initiate such investigations within twenty-four hours of receiving the complaint and to conduct the investigation pursuant to certain guidelines.<sup>5</sup> The DSS had sixty days to conclude whether the abuse was indicated,<sup>6</sup> and it was the only agency that could take action, including referral to court, if it found cause to believe abuse had occurred.<sup>7</sup>

After receiving the first report, the protective services unit interviewed Joshua's father, Randy DeShaney, who denied the allegations.<sup>8</sup> Protective services did not see the child, despite their statutory duty to do so within twenty-

1. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1001 (1989).

2. WIS. STAT. ANN. § 48.981(2) (West Supp. 1989). Wisconsin's law imposed mandatory child abuse reporting duties on a variety of persons, particularly police, educators, health care professionals, and social workers. *Id.* Nationally, the first mandatory child abuse reporting laws were enacted in the 1960s. Within five years of the development of model legislation by the United States Children's Bureau, all 50 states had enacted some form of reporting act. Davidson, *Successful State Child Abuse Legislation—Creating a More Effective Legal Framework*, in CHILDREN AND THE LAW 1-2 (1988).

3. Brief for Petitioners at 4, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (No. 87-154) [hereinafter Petitioners' Brief].

4. WIS. STAT. ANN. § 48.981(3)(c)1 (West 1987); Petitioners' Brief, *supra* note 3, at 27.

5. WIS. STAT. ANN. § 48.981(3)(c)1; Petitioners' Brief, *supra* note 3, at 26.

The passage of the 1974 federal Child Abuse Prevention and Treatment Act, Pub. L. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5106 (1982 & Supp. V 1987)), "encouraged" all the states to amend their laws in the 1970s. The changes generally broadened the class of mandated reporters, expanded the types of reportable maltreatment, and designated specialized child welfare agencies rather than the police to be the "sole legal recipient of reports." Davidson, *supra* note 2, at 3. In addition, the statutes typically established time limits for completion of protective services investigations, added confidentiality provisions, and adopted 18 as the age limit for the protection of children under the abuse and neglect laws. *Id.* at 2-3.

Other reforms in the 1970s included abolishing privileges such as doctor-patient or husband-wife, as they related to child abuse, and established specific legislative standards for emergency removal of children. Further changes have been made in the 1980s, for example, the creation of multidisciplinary teams to manage child abuse cases, such as the one that made the decision to return Joshua DeShaney to his father. See generally Davidson, *supra* note 2, at 5 (discussing recent state legislative developments).

6. Agency reports are classified as "indicated" or "unfounded." "Unfounded" (by reason of insufficient evidence) cases are purged from the agency's records after being transmitted to a central registry. WIS. STAT. ANN. § 48.981(3)(c). If a case is "indicated," however, the suspected person is notified and has a right to request a hearing to contest the finding. *Id.* § 48.891(3)(d).

7. *Id.* § 48.981(3)(c)4; Petitioners' Brief, *supra* note 3, at 26-27.

8. Petitioners' Brief, *supra* note 3, at 4.

four hours.<sup>9</sup> The state agency then closed its file.<sup>10</sup> In January of 1983 the local hospital emergency room saw Joshua, identified him as a victim of child abuse,<sup>11</sup> and reported this to DSS, as they also were required to do by state law.<sup>12</sup> In response, DSS placed Joshua in the temporary legal custody of the hospital while they investigated the complaint.<sup>13</sup> A multidisciplinary team consisting of physicians, a child psychologist, nurses, police officers, and the DSS caseworker and supervisor, together with the county's civil attorney, met to determine the state's further action. Despite indications of abuse, the county civil attorney was unwilling to bring the case to court for any level of child protection, for reasons that are not clear from the record.<sup>14</sup> The DSS, however, noted in an internal report that child abuse was strongly suspected. The caseworker in charge therefore recommended that the charges be dismissed "at this time" but that DSS refer the case back to the court if there were any further injuries to Joshua of unexplained origin.<sup>15</sup>

Although the state returned Joshua to his father's custody, DSS also entered into a contract with Randy DeShaney for his son's benefit. The father was to receive counselling, remove an allegedly abusive girlfriend from the home, and enroll Joshua in Head Start so that DSS could monitor the child outside of the isolation of his parent's home.<sup>16</sup> This agreement, plaintiffs later alleged, was ignored as soon as it was made, yet no action was taken by DSS.<sup>17</sup> Over the course of the next fourteen months the child was seen repeatedly in hospital emergency rooms for suspicious traumatic injuries.<sup>18</sup> On November 20, 1983, the hospital filed a written child abuse report on Joshua, but DSS neither interviewed the family nor observed the boy.<sup>19</sup> A Head Start worker, still trying to enroll Joshua pursuant to the agreement, found the four-year-old alone at home and phoned DSS three times without results.<sup>20</sup> The caseworker responsible for Joshua visited the home only intermittently.<sup>21</sup> She did not insist on seeing Joshua on those rare occasions when she visited the home, and she accepted his father's excuses for why he could not be interviewed.<sup>22</sup> Even after one visit in which she saw Joshua and observed cigarette burns on him, the caseworker did nothing to protect the child.<sup>23</sup> The worker, however, repeatedly documented in her casefile her continuing belief that Joshua was in danger, that she did not believe the excuses proffered by the adults for the frequent injuries to Joshua,

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9. *Id.*; see WIS. STAT. ANN. § 48.981(3)(c)1.

10. Petitioners' Brief, *supra* note 3, at 4.

11. *Id.*

12. See WIS. STAT. ANN. § 48.981(2) (West 1987).

13. Petitioners' Brief, *supra* note 3, at 4.

14. *Id.* at 5.

15. *Id.* at 4-5.

16. *Id.* at 5.

17. *Id.*

18. *Id.* at 6.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 7.

23. *Id.*

and that she was extremely worried about him.<sup>24</sup>

Finally, on March 8, 1984, Joshua was taken to the hospital where emergency surgery saved his life but could not reverse the effects of longstanding trauma to the brain.<sup>25</sup> He lost nearly half the tissue in his brain and is now substantially paralyzed, profoundly and permanently retarded, and brain damaged. During this whole period the caseworker knew the natural mother's Wyoming address but did not contact her until it seemed that the child was dying. When Melody DeShaney arrived to see her son, the caseworker told her, "I just knew the phone would ring some day and Joshua would be dead."<sup>26</sup>

Notwithstanding the compelling factual allegations, the United States Supreme Court held in *DeShaney v. Winnebago County Department of Social Services*<sup>27</sup> that the state of Wisconsin's failure to protect four-year-old Joshua DeShaney from his father's serious and continuing abuse did not violate the child's substantive due process rights.<sup>28</sup> The Court therefore affirmed the trial court's summary dismissal of Joshua's lawsuit.<sup>29</sup> The *DeShaney* majority consciously resisted any impulse of sympathy evoked by the little boy's plight.<sup>30</sup> Instead, they insisted that there was an insurmountable obstacle to recognizing a constitutional violation based on the state's unwillingness or inability to take action to protect the child.<sup>31</sup> The *DeShaney* majority adopted a highly "formal"<sup>32</sup> constitutional analysis and confined the state's duty to protect individuals to "certain limited circumstances."<sup>33</sup> The Court held that a constitutional duty to assume some responsibility for a person's safety and well-being arose only when the state held someone in custody against that person's will.<sup>34</sup> Chief Justice Rehnquist explained the rationale for this restriction:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and

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24. *Id.* 6-7.

25. *Id.* at 7-8.

26. *Id.* at 8.

27. 109 S. Ct. 998 (1989).

28. *Id.* at 1001. The United States District Court for the Eastern District of Wisconsin dismissed the lawsuit on defendants' motion for summary judgment, and the Seventh Circuit Court of Appeals affirmed. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989). In this posture, disputed facts are viewed in the light most favorable to the plaintiff. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (*per curiam*).

29. *DeShaney*, 109 S. Ct. at 1002. Joshua and his mother filed suit under section 1983. Section 1983 provides a civil cause of action against those who violate federal rights while acting under color of state law:

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 (1982).

30. *DeShaney*, 109 S. Ct. at 1007; *id.* at 1012 (Blackmun, J., dissenting).

31. *Id.* at 1007.

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

33. *Id.* at 1004-05.

34. *Id.* at 1005.

at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.<sup>35</sup>

In contrast to this narrow custodial exception, the Court declared that the general rule was that the state has no obligation to provide its "citizens" minimal levels of safety and security or to protect them from the violence of "private actors."<sup>36</sup> Chief Justice Rehnquist's opinion, therefore, portrayed the guarantees of the due process clause as essentially negative: government must *refrain* from inflicting harm itself through oppressive *action*, but the framers allegedly left the decision to step in and protect citizens from the violence of others solely up to the "democratic political processes."<sup>37</sup>

In *DeShaney* the Court decreed that the state did not violate the Constitution even if it wholly and arbitrarily<sup>38</sup> denied helpless children protection from the violence of their parents. Little more than a month earlier, however, a unanimous Court acknowledged in a different context that the Ku Klux Klan Act of 1871,<sup>39</sup> the predecessor to the civil rights statute, 42 U.S.C. § 1983, was a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law."<sup>40</sup> The "paradigmatic section 1983 claim in 1871," Justice Marshall wrote, "involved a victim of violence or harassment who sued state officials for failing to prevent the harm."<sup>41</sup> It would seem, therefore, that there is nothing in the civil rights statute itself, nor in the fourteenth amendment, which it was designed to enforce,<sup>42</sup> that necessarily bars the cause of ac-

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35. *Id.* at 1005-06 (citations and footnote omitted).

36. *Id.* at 1003.

37. *Id.*

38. Because the *DeShaney* case was dismissed by the trial court on a motion for summary judgment, no conclusion was reached about the merits of the lawsuit. *Id.* at 1002. The dissent argued that in this posture, Joshua and his mother would never get the chance to prove whether the state's inaction was arbitrary and wholly irrational. Because the purpose of the due process clause was "to secure the individual from the arbitrary exercise of the powers of government," the three dissenting Justices would have permitted the petitioners to proceed with their lawsuit. *Id.* at 1011 (Brennan, J., dissenting) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

39. The Ku Klux Klan Act of 1871, ch. 99, § 1, 16 Stat. 433 (1871).

40. *Owens v. Okure*, 109 S. Ct. 573, 581-82 & n.11 (1989) (section 1983 action in a state with more than one statute of limitations is governed by the residual or general personal injury statute of limitations, rather than a statute of limitations for enumerated intentional torts) (citing *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961)).

41. *Id.*

42. The Ku Klux Klan Act of 1871 grew out of an urgent message sent to Congress by President Grant requesting legislation to combat lawless conditions in some states that made life and

tion that the *DeShaney* Court refused to recognize.

Judging by the attention given *DeShaney* in both specialized legal publications and the popular press, the case has touched a sensitive nerve in the current debate over child abuse policies.<sup>43</sup> *DeShaney* raises questions about our changing notions of the place of children in the family, the place of the family in society, and the role of the state in the family. The decision also provides significant insight into the current Court's philosophy of substantive due process and into the shortcomings of its approach.

Part II of this Article discusses the background of liability for the state's failure to protect children. It recounts the history of child protection in the United States, from the anticruelty societies of the 1870s through the development of the child protection system now in place in every state. It also examines the genesis and development of the pre-*DeShaney* lower court cases that had derived a constitutional duty to protect children from the "special relationship" created by state child protection laws and from the particular facts and circumstances that gave the state notice of the danger to the specific child at risk.

Part III analyzes the *DeShaney* decision and its due process methodology. In *DeShaney* the Court firmly repudiated the earlier emphasis on special relationships and instead adopted a bright line based solely upon "custody."<sup>44</sup> That

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property insecure due to the depredations of the Klan. Correction of these evils was, in President Grant's words, "beyond the control of State authorities," and he therefore invoked the federal power. 1 J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTIONS ¶ 1.27 (1989); see Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 939 n.18 (1989).

43. E.g., Reidinger, *Why Did No One Protect This Child?*, 74 A.B.A.J., Dec. 1988, at 48; *For the Record: Constitutional Physics*, N.Y. Times, May 12, 1989, at B11, col. 5 [hereinafter *Constitutional Physics*] (excerpt from 43rd Annual Cardozo lecture at the City Bar Association in New York by Laurence Tribe, who discussed *DeShaney* in the context of the "still-reigning paradigm of constitutional law," which ignores the pervasive relationship between subject, the state, and object, the citizen); *High Court Shields States in Abuse Suits*, Houston Post, Feb. 23, 1989, at A23, col. 5; *Court Says State Intervention in Child Abuse Isn't Mandated*, N.Y. Times, Feb. 23, 1989, at 1, col. 2; *High Court Ruling on Child Abuse Rejects Liability of Local Officials*, Wall Street J., Feb. 23, 1989, at B8, col. 1; Glaberson, *Determined to Be Heard: Four Americans and Their Journeys to the Supreme Court*, N.Y. Times, October 2, 1988, § 6 (Magazine), at 32; Nightline: Child Abuse (ABC television broadcast, May 9, 1988).

44. *DeShaney*, 109 S. Ct. at 1006. At the same time that the Court affirmed the *DeShaney* dismissal, it also denied certiorari to *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), cert. denied, 109 S. Ct. 1337 (1989), a case in which the Eleventh Circuit reinstated a section 1983 suit against Georgia protective services personnel and agencies for placing a child in a foster home where the two-year-old was so badly abused by her foster mother that she was rendered permanently comatose. See *id.* at 800. Although the denial of certiorari itself may not be meaningful, the Court had held the *Taylor* petition for an unusually long time before rejecting it. In *Taylor* the Eleventh Circuit also emphasized the element of "custody" in its decision, holding that a child involuntarily placed in a foster home is in an analogous position to a prisoner in a penal institution and a child confined in a mental health facility. *Id.* at 795-97.

In conjunction with the dismissal of *DeShaney*, the disposition of *Taylor*, therefore, leaves unclear under what circumstances the state's failure to protect a child might give rise to a constitutional cause of action. The question whether foster care placement is the kind of "custody" upon which the *DeShaney* Court grounded its bright line, however, is beyond the scope of this Article.

More recently, the Court denied certiorari to a Fourth Circuit decision denying section 1983 liability for abuse by foster parents when the child was "voluntarily" placed in the foster home pursuant to a contract between the parents and a Maryland social services department. *Milburn ex rel. Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474 (4th Cir. 1989), cert. denied, 110 S. Ct. 148 (1989).

approach followed from the Court's due process methodology: Chief Justice Rehnquist founded his conclusion about child protection in particular on an abstract syllogism about governmental protective services in general. Part III of the Article reexamines that logical syllogism and assesses the Chief Justice's embrace of an abstraction.

Part IV places *DeShaney* back into the specific context of family violence and child protection from which the Court has abstracted it. It considers the significance for a due process analysis of the state's differential treatment of children, with its policy of decriminalization of child abuse and its model of therapeutic prevention. Insights garnered from feminist scholarship and from the domestic violence movement, and from study of the history and practice of child protection teach us why the Court was wrong, and why a due process right *was* at stake in *DeShaney*.

Part IV also examines the razor's edge dilemma of child protective workers who, if *DeShaney* were to be rejected, arguably would be precariously balanced between the threat of constitutional liability for intervening too vigorously in an abusive family, and liability for acting too slowly and failing to protect. This section suggests a solution to the razor's edge predicament. In the Conclusion, the Article addresses policy concerns raised by child protection professionals who fear additional liability.

## II. LIABILITY FOR THE STATE'S FAILURE TO PROTECT CHILDREN: BACKGROUND

### A. *History of Child Protection*

Child abuse, along with other forms of family violence, is not a new social phenomenon. The American perception of the problem and our response to it, however, has a history that only recently has become the subject of serious scholarly attention.<sup>45</sup> In her study of the history of family violence from colonial times to the present, Elizabeth Pleck found that the contemporary concern with family violence was predated by two earlier reform periods in American history.<sup>46</sup> Between 1640 and 1680 the Puritans of colonial Massachusetts enacted the first laws "anywhere in the world" regulating wife beating and "'unnatural severity'" to children; between 1874 and 1890 there was another period of interest in family violence, marked by the establishment of societies for the prevention of cruelty to children (SPCCs).<sup>47</sup>

Historian Linda Gordon studied the Massachusetts SPCC, one of the earli-

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45. See, e.g., L. GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*; BOSTON 1880-1960 (1988); E. PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987); cf. G. BEHLMER, *CHILD ABUSE AND MORAL REFORM IN ENGLAND, 1870-1908* (1982) (English response to child abuse). Earlier American studies focused on the invention of juvenile delinquency and juvenile courts. See A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

46. E. PLECK, *supra* note 45, at 3-4.

47. *Id.* at 4.



est and most influential of the anticruelty societies.<sup>48</sup> She found that child abuse was "discovered" as a social problem in the 1870s, and by the end of the decade there were thirty-four SPCCs in the United States and fifteen elsewhere in the world.<sup>49</sup> The Boston anticruelty society began as the work of upper-class white Protestant charitable elites who were concerned about social control of the Catholic, ethnic, and immigrant working-class families in urban Boston.<sup>50</sup> Child protection grew out of more general child-saving charitable activity earlier in the century and out of women's reform and philanthropic energy, influenced by the nineteenth century feminist interpretation of social ills.<sup>51</sup> "The Cruelty," as it was called by its working-class clientele, at first aggressively searched the streets seeking abuses to correct, but very soon acted mostly in response to complaints, chiefly from family members.<sup>52</sup> The Society obtained legislative authorization to initiate prosecutions and to remove children temporarily, pending action by the courts.<sup>53</sup> The SPCCs' legislative influence, however, waned after the first decade of rapid takeoff.<sup>54</sup>

During the Progressive Era, around 1900 to 1920, child protection work became professionalized and integrated into the developing social work profession and the new field called "child welfare."<sup>55</sup> In this period, which also saw the establishment of special juvenile courts throughout the United States,<sup>56</sup> the reformers' emphasis became child "neglect" rather than "maltreatment," and they began to preach a preventive rather than punitive set of solutions.<sup>57</sup> Gordon argues that this Progressive transformation developed principles and practices that still form the basic system of state regulation of child raising in place today.<sup>58</sup> After the 1920s child protection lost its influential place in the child welfare establishment, partly, Gordon argues, because of the decline of feminism with its scrutiny of family relations.<sup>59</sup> By the 1930s psychoanalytic theory with its sexual understanding of family violence affected the way perpetrators were treated, and the psychiatric model of "treatment" became increasingly more important.<sup>60</sup>

Child abuse was rediscovered as a significant social problem in the 1960s, through the "pediatric awakening."<sup>61</sup> The medical discovery of child abuse was initiated by pediatric radiologists studying x-rays of children who suffered fractures or blows to the skull.<sup>62</sup> Dr. C. Henry Kempe presented the findings of his

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48. L. GORDON, *supra* note 45, at 12.

49. *Id.* at 27.

50. *Id.* at 28-29.

51. *Id.* at 32.

52. *Id.* at 37-38.

53. *Id.* at 50-51.

54. *Id.* at 63.

55. *Id.* at 60-61.

56. E. PLECK, *supra* note 45, at 126.

57. *Id.* at 126-30; L. GORDON, *supra* note 45, at 60-61, 69-77.

58. L. GORDON, *supra* note 45, at 60.

59. *Id.* at 79-80.

60. E. PLECK, *supra* note 45, at 146-56.

61. *Id.* at 164.

62. *Id.* at 166.

pediatric colleagues to a conference of the United States Children's Bureau in 1962, and his landmark article on "The Battered-Child Syndrome" later appeared in the prestigious *Journal of the American Medical Association*.<sup>63</sup> Public response, both professional and lay, was immediate, and by 1965 ninety percent of adults in a national survey had heard of the problem of child abuse.<sup>64</sup> The legislative response was similarly swift. The first models for mandatory child abuse reporting laws were issued in 1963 and 1965 and, through the work of the Children's Bureau and the American Humane Society, were taken up rapidly by state legislatures.<sup>65</sup> The last two decades have seen an enormous growth in the number of cases of child abuse reported. In 1963 150,000 children were the subject of reports of suspected abuse or neglect.<sup>66</sup> By 1972 an estimated 610,000 children were reported a year; and by 1979, 1.1 million.<sup>67</sup>

In the nearly three decades since the pediatric reawakening, the new information and the renewed legislative sensitivity to the problem of child abuse have produced a complex state system of child protection. The interjection of federal funding legislation, beginning with the 1974 Child Abuse Prevention and Treatment Act,<sup>68</sup> helped to spur the enormous expansion of programs to prevent child abuse and neglect.<sup>69</sup> The expansion initially meant a substantial rise in the

63. Kempe, Silverman, Steele, Droegemuller & Silver, *The Battered Child Syndrome*, 181 J. A.M.A. 17 (1962).

64. E. PLECK, *supra* note 45, at 167-68.

65. See Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 710-12 (1966).

66. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 FAM. L.Q. 151, 151, 154 (1983).

67. *Id.* at 154. It is difficult to evaluate this figure. Douglas Besharov, first director of the National Center on Child Abuse and Neglect, feels that there is both substantial underreporting of abuse, and, at the same time, overreporting of incidents which are later determined to be "unfounded." The figure, of course, includes reports of neglect as well as abuse. *Id.* at 161-63.

68. 42 U.S.C. §§ 5101-5115 (1982 & Supp. V 1987).

69. The federal statute established the National Center on Child Abuse and Neglect within the Children's Bureau. *Id.* § 5101. It provided federal assistance and grants to public and private organizations and to the states for the identification, prevention, and treatment of child abuse and neglect, and required states seeking funding to comply with various conditions, for example, the establishment of a confidential reporting system and the instigation of prompt investigation of reports. *Id.* §§ 5101-5106. Subsequent amendments extended the federal program to cover sexual abuse of children, and added other provisions. See Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205 (1978) (codified as amended at 42 U.S.C. §§ 5111-5113, 5115 (1982)). The Family Violence Prevention and Services program was first enacted in 1984. See Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749 (1984) (codified at 42 U.S.C. §§ 5101-5106, 5111-5113, 5115, 10401-10412) (1982 & Supp. V 1987)). The 1988 amendment for the first time included a provision of grants for the investigation and prosecution of child abuse cases. Child Abuse Prevention, Adoption, and Family Services Act of 1988, 102 Stat. 102 (1988) (codified at 42 U.S.C.A. § 5106(c) (West Supp. 1989)).

Between 1960 and 1980 federal funding for child protection services went up from a few million to \$325 million annually. Besharov, *Protecting Abused and Neglected Children: Can Law Help Social Work?*, in MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 31 (1984). Funding and staffing for child protection programs, however, have not kept pace with the ambitious state child protection structures erected in every state, or with the rising numbers of reported cases. See Besharov, *supra* note 66, at 163-64; see also Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1767-68 (1987) (discussing the relationship between insufficient resources and failures in child protective services); Horowitz, *Improving the Legal Bases in Child Protection Work—Let the Worker Beware*, in MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 25 (1984) (describing centers for reporting child abuse where therapy, not punishment, is the ultimate goal).

number of children placed in foster care. In recent years, however, there has been more emphasis on providing services while leaving the child in the home, in the wake of mounting criticism of the effects of the "limbo" of long-term foster care.<sup>70</sup>

The modern approach to child abuse is characterized by an effort to avoid criminal prosecution in favor of treatment for the family, preferably with the voluntary cooperation of the parents, including the abuser.<sup>71</sup> Douglas Besharov, an attorney who was the first director of the National Center on Child Abuse and Neglect, aptly describes the current approach:

As a society, we have adopted a predominantly therapeutic—or, in the vernacular, a "social work" response to the problems of child abuse and child neglect. Almost all reports of suspected child maltreatment are made to child protective agencies. Even in states where the law still permits reporting to the police, most reports are made to these specialized agencies. (If the police receive a report, they usually forward it to the child protective agency. In rare situations, they perform a parallel or joint investigation with the child protective agency.)<sup>72</sup>

At the same time, the therapeutic process works within a framework of the legal power to coerce parental cooperation.<sup>73</sup> We have developed an elaborate system of child protection over the last twenty-five years. All states have laws that funnel abuse reports to specialized social service agencies that have very specific mandatory duties of oversight and protection for children at risk. The philosophy behind the operation of this program is a therapeutic one that emphasizes family autonomy and integrity.<sup>74</sup> Parents are primarily responsible for the protection of their children.<sup>75</sup> Children at risk *because of parental behavior* are treated differently from other citizens in need of protection.<sup>76</sup> Their fate is not in the hands of the police; they are to be protected instead by specialized state agents in child welfare agencies. State intervention inevitably treads on politically sensitive ground because it raises issues about the appropriate relationship

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70. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 672 (1982 & Supp. IV 1986)), amended the Social Security Act and changed the structure of financial incentives in order "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. REP. NO. 96-336, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1448, 1450. As a result of this and other changes inspired by a new philosophy of minimum intervention, the number of children in foster care declined substantially between 1977 and 1982. Garrison, *supra* note 69, at 1760. The result is that more children at risk remained in their own homes instead of being placed in foster care. In the absence of sufficient alternative services, this may have increased the dangers for children who were not in the legal custody of the agency. *Id.* at 1760-61. The 1980 Act provided federal grants for foster care and required the development of a case review system for each child in the state's foster program. S. REP. NO. 96-336, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 1451-53; *see also* E. PLECK, *supra* note 45, at 178-79.

71. *See, e.g.*, D. BESHAROV, THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES 51 (1985).

72. *Id.* at 76.

73. *Id.* at 77. Child welfare work, however, has been criticized for not living up in practice to the therapeutic ideal of reuniting families. Garrison, *supra* note 69, at 1757.

74. *See supra* notes 70-73 and accompanying text.

75. D. BESHAROV, *supra* note 71, at 77.

76. *See infra* notes 354-62 and accompanying text.

of family and state, and about conflict within a family that may otherwise be viewed as a single unit.<sup>77</sup> The construction of the elaborate child protection structure out of state and federal law also necessarily provoked questions about the circumstances in which government officials will be held responsible for failing to perform the new protective duties.

*B. Estelle, Martinez, and Youngberg: The Basis of Federal Liability*

As the statutory child protection structure grew, state<sup>78</sup> and federal<sup>79</sup> courts grappled with liability questions that arose out of alleged state failures to perform the new duties. The doctrinal development that led to *DeShaney*, however, is based on something other than the common law of tort. Rather, the question is whether the duty to protect children created by the statutory scheme also implicates constitutional rights. How does the state's failure to act to protect a child deprive the infant of protected liberties and violate the Constitution of the United States? Before the recent *DeShaney* decision, the answer had been suggested by three Supreme Court cases that did not concern abused children directly, but upon which the lower federal courts had built their child protection rulings. In 1976 the Court held in *Estelle v. Gamble*<sup>80</sup> that an inmate's eighth amendment right to be free of cruel and unusual punishment could be violated by the state's failure to act when government agents were consciously indifferent to the serious medical needs of the prisoner.<sup>81</sup> In 1980 the Court seemed to acknowledge in dicta in *Martinez v. California*<sup>82</sup> that persons harmed by a released felon might be able to complain of the state's failure to warn or protect them if a special relationship could be shown between the victim and the government and the problems of proximate cause could be overcome.<sup>83</sup> Finally, *Youngberg v. Romeo*,<sup>84</sup> decided in 1982, recognized a constitutional claim by an involuntarily confined man with a mental age of an eighteen-month-old child to safety and protection from assaults by other mental patients.<sup>85</sup> These cases encouraged lower federal courts to conclude that the state's failure to protect children through inaction could violate constitutional guarantees;<sup>86</sup> ironically, they

77. See *infra* notes 403-14 & 455-56 and accompanying texts.

78. See, e.g., *Hanson v. Rowe*, 18 Ariz. App. 131, 133-35, 500 P.2d 916, 918-19 (1972); *Elton v. County of Orange*, 3 Cal. App. 3d 1053, 1056-59, 84 Cal. Rptr. 27, 29-31 (1970); *Florida First Nat'l Bank v. City of Jacksonville*, 310 So. 2d 19, 21, 25 (Fla. Dist. Ct. App. 1975); *Vonner v. State*, 273 So. 2d 252, 255-57 (La. 1973); *Koepf v. County of York*, 198 Neb. 67, 71-74, 251 N.W. 866, 870-71 (1977).

79. See, e.g., *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 506-07 (3d Cir. 1985); *Jensen v. Conrad*, 747 F.2d 185, 192-94 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 786-88 (2d Cir.) (*Doe II*), *cert. denied*, 464 U.S. 864 (1983); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141-46 (2d Cir. 1981) (*Doe I*).

80. 429 U.S. 97 (1976).

81. *Id.* at 106.

82. 444 U.S. 277 (1980).

83. See *id.* at 285.

84. 457 U.S. 307 (1982).

85. *Id.* at 309, 315-16.

86. See, e.g., *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981) (*Doe I*); *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 787-91 (2d Cir. 1983) (*Doe II*)

were also used by the Court in *DeShaney* to draw a bright line based on custody.<sup>87</sup>

Although there were earlier cases in which the state's failure to protect the plaintiff from the violence of others formed the basis for constitutional tort liability,<sup>88</sup> the child protection cases drew more directly on the rationale of the Supreme Court's 1976 decision in *Estelle*.<sup>89</sup> In that case, a Texas Department of Corrections inmate sued various prison officials, alleging that they had subjected him to cruel and unusual punishment in violation of the eighth (and fourteenth) amendments by failing to provide him with adequate medical care for injuries he sustained while performing a prison work assignment.<sup>90</sup> Although conceding that the primary concern of the drafters may have been to proscribe torture and other barbarous methods of punishment, the Court found that the scope of the eighth amendment was broad enough to prohibit other punishments that were incompatible with "the evolving standards of decency that mark the progress of a maturing society."<sup>91</sup> These evolving standards, the Court concluded, could be violated by omission as well as commission. As the common law and modern statutes have recognized, inmates who are deprived of their liberty cannot care for themselves and must rely on prison authorities who have an obligation to care for them.<sup>92</sup> The *Estelle* Court found that a failure to fulfill that affirmative obligation, through "deliberate indifference to serious medical needs of prisoners," constitutes the kind of "unnecessary and wanton infliction of pain" that is prohibited by the eighth amendment.<sup>93</sup> The constitutional violation was not simply medical malpractice committed against a victim who happened to be an inmate.<sup>94</sup> In order to state an eighth amendment claim, the prisoner had to allege omissions that were "sufficiently harmful to evidence deliberate indifference to serious medical needs."<sup>95</sup>

Following *Estelle*, dictum in another case further contributed to an emerg-

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(*Youngberg v. Romeo* does not change result in *Doe D*), cert. denied, 464 U.S. 864 (1983); *Jensen v. Conrad*, 747 F.2d 185, 192-94 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985); *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 509-10 (3d Cir. 1985) (relying in turn on *Doe I & Jensen*).

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

88. See, e.g., *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943) (deputy sheriff could be prosecuted under the civil rights statute for his failure to stop the detention and mistreatment of Jehovah's Witnesses by a mob); see *infra* notes 241-44 and accompanying text.

89. See *Jensen*, 747 F.2d at 190; *Doe I*, 649 F.2d at 141. For a discussion of the development of the special relationship doctrine, see *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 926-27 (8th Cir. 1987).

90. *Estelle v. Gamble*, 429 U.S. 97, 98, 101 (1976).

91. *Id.* at 102 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

92. *Id.* at 103-04.

93. *Id.* at 104.

94. *Id.* at 106.

95. *Id.* After *Estelle*, lower courts concluded that the eighth amendment proscription of cruel and unusual punishment applies when prison officials unreasonably fail to protect inmates from violence at the hands of other prisoners, or even from suicide by their own hand. E.g., *Stokes v. Delcambre*, 710 F.2d 1120, 1125 (5th Cir. 1983) (jail administration created risk of harm of assaults). The Supreme Court approved that eighth amendment development in *DeShaney*. See *DeShaney*, 109 S. Ct. at 1005 & n.5; Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 *DRAKE L. REV.* 101, 109-34 (1985-86); Note, *Defining the Scope of Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 *CORNELL L. REV.* 940, n.83 (1985); see also *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982)

ing doctrine of affirmative government duties to protect certain individuals under special circumstances. Plaintiffs in *Martinez* brought suit against California parole board officials who released a man with a violent criminal history, who had been committed to a state mental hospital as a mentally disordered sex offender not amenable to treatment, and who thereafter was sentenced to a term of imprisonment with a recommendation that he not be paroled.<sup>96</sup> Five months after release, the parolee tortured and killed a fifteen-year-old girl. The fourteenth amendment, the Court held, protected the victim's life only from "deprivation" by the state.<sup>97</sup> Even if the parole board had a duty to avoid harm to the victim, or if it could be shown that the parole decision proximately caused her death, the Court ruled that there was no state action involved.<sup>98</sup> Her life was taken by the parolee, some five months after the release, and he was not an agent of the parole board in any way. Moreover, the parole board was not aware that this particular girl, as distinguished from the public at large, faced any special danger.<sup>99</sup> In dictum that was to become important for the future development of the child protection cases, the Court went on to say that it was not deciding that a parole officer could never be held liable for a decision which resulted in loss of a life, but was concluding only that under these circumstances the victim's death was too remote a consequence of the parole officers' actions to trigger civil rights liability.<sup>100</sup>

In *Youngberg v. Romeo*<sup>101</sup> the Court addressed the substantive rights of involuntarily committed mentally retarded persons under the fourteenth amendment.<sup>102</sup> The profoundly retarded plaintiff was committed to Pennhurst State School and Hospital where he suffered many injuries, inflicted both by his own uncontrolled violence and by the actions of other inmates.<sup>103</sup> The Court unequivocally held that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."<sup>104</sup> In other words, the Court recognized Romeo's "historic liberty interest" in safety and personal security, which is protected substantively by the due process

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(rationale extended beyond the prison setting to hold that substantive due process requires the state to provide involuntarily committed mental patients protection from themselves and others).

96. *Martinez v. California*, 444 U.S. 277, 279 (1980).

97. *Id.* at 284-85.

98. *Id.* at 285.

99. *Id.*

100. *Id.* In its child protection case, the Fourth Circuit's gloss on *Martinez* was that the decision rested on the narrow grounds that the plaintiff had failed to establish proximate cause, but that it left open the issue of whether the murdered girl had a constitutional right to protection under the fourteenth amendment. *Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984) (abused children have fourteenth amendment right to protection by the state if a "special relationship" exists between them and the state).

*Martinez* also held that the sovereign immunity statute of the state of California, which denied all remedy to anyone injured by acts of the parole board, did not thereby deprive the plaintiffs of any liberty or property interest. *Martinez*, 444 U.S. at 283.

101. 457 U.S. 307 (1982).

102. *Id.* at 314.

103. *Id.* at 309-10.

104. *Id.* at 315-16.

clause.<sup>105</sup> In determining whether this right had been violated, however, the Court ruled that liability should not be based on the eighth amendment's deliberate indifference standard as articulated in *Estelle*.<sup>106</sup> Involuntary mental patients, the *Youngberg* Court held, "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."<sup>107</sup> The appropriate standard, however, must also balance the relevant state interests,<sup>108</sup> not unduly burden the operation of a state institution like Pennhurst, and show the proper deference to the judgment exercised by the qualified professionals in charge.<sup>109</sup> Consequently, the state should not have to show a compelling or substantial necessity to justify conditions of less than absolute safety. Rather, professional judgment enjoys presumptive validity, and liability follows only when the decision is such a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."<sup>110</sup>

### C. *The Child Protection Cases Before DeShaney*

*Estelle*, *Martinez*, and *Youngberg* suggested that under the right circumstances the state has an affirmative obligation to protect a child and that its failure to do so may deprive that child of a liberty interest in safety and personal security in violation of the fourteenth amendment. This theory was developed in two opinions of the United States Court of Appeals for the Second Circuit dealing with a foster child,<sup>111</sup> and in decisions of the United States Courts of Appeals for the Fourth and Third Circuits in cases concerning children not currently in state custody.<sup>112</sup>

The Second Circuit cases, both styled *Doe v. New York City Department of Social Services* (*Doe I*<sup>113</sup> and *Doe II*<sup>114</sup>), concerned Anna Doe, who was placed into foster care at the age of two along with her sister, in legal custody of the

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105. *Id.* at 315. Although the Court asserted that as a general matter a state has no constitutional duty to provide substantive services to persons within it and cautiously took no position on any general right to treatment, it did agree that Romeo had a protected interest in receiving enough training so that he could be kept safe and free from undue restraint. *Id.* at 318-19.

106. *Id.* at 312 n.11.

107. *Id.* at 321-22.

108. *Id.* at 321.

109. *Id.* at 322.

110. *Id.* at 323.

111. *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981) (*Doe I*); *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 786-77 (2d Cir.) (*Doe II*) (sustaining foster child's 1983 action against the agency that failed to supervise placement with a foster father who sexually abused her over a period of years), *cert. denied*, 464 U.S. 864 (1983).

112. *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985) (complaint that alleges agency returned abused child to mother without adequately investigating whether abusive boyfriend had gone from the home states a civil rights claim); *Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984) (state and county officials entitled to good faith immunity in suit by representatives of children who died after brutal beatings by their guardians because, at the time of the beatings, right to affirmative protection not yet clearly established).

113. *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981) (*Doe I*).

114. *Doe v. New York Dep't of Social Servs.*, 709 F.2d 782 (2d Cir.) (*Doe II*), *cert. denied*, 464 U.S. 864 (1983).

New York City Commissioner of Welfare and under the supervision of their agents, the Catholic Home Bureau.<sup>115</sup> She remained for more than thirteen years in the foster home, where from the age of about ten she was regularly and frequently beaten and sexually abused by her foster father.<sup>116</sup> Over the years the agency's supervisory visits fell off and they failed to discover the longstanding abuse. The foster father was allowed to resist agency supervision and the agency did not act on a number of warning signals.<sup>117</sup> Even after their own psychiatric expert reported a finding of sexual abuse, the only action the agency took was to require the doctor to delete those references from her report.<sup>118</sup> As further evidence of the abuse piled up, the agency continued to drag its feet, even omitting from required annual reports all information about the suspected problem.<sup>119</sup>

Drawing on *Estelle*, the *Doe I* court concluded that government officials might violate the Constitution by failing to do what was required of them as well as by engaging in overt unlawful and harmful activity.<sup>120</sup> *Estelle* demonstrated to the Second Circuit panel that government is "sometimes" charged by the Constitution with affirmative duties to those in its custody or under its care.<sup>121</sup> That conclusion answered the *constitutional* question, but the Second Circuit also addressed a causation issue that arose out of the *statutory* requirements of the Civil Rights Act, section 1983.<sup>122</sup> The civil rights statute itself does not create any substantive rights;<sup>123</sup> rather it provides a civil remedy for deprivations of federal rights that arise from the Constitution or from certain federal statutes.<sup>124</sup> In order to prevail, a plaintiff must satisfy both the elements of the

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115. *Doe I*, 649 F.2d at 137.

116. *Id.*

117. *Id.* at 138.

118. *Id.* at 139.

119. *Id.*

120. *Id.* at 141.

121. *Id.*

122. 42 U.S.C. § 1983 (1982).

123. *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *West v. Town of Bristol*, 712 F. Supp. 269, 274 (D.R.I. 1989).

124. Several child protection cases also raised the claim that various federal statutes, most notably the 1980 Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 672 (1982 & Supp. IV 1986)), or other amendments to the Social Security Act impose mandatory standards, such as case plan review for children in foster care, as a condition of federal aid, *see e.g.*, *L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 122-23 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 816 (1989).

If federal law creates a private right of action that Congress does not intend to be the exclusive remedy, these statutory rights may also be enforced through section 1983. *See Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423-24 (1987) (remedial devices in federal housing statute not sufficiently comprehensive to demonstrate congressional intent to preclude a section 1983 action); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981) (comprehensive enforcement mechanisms in federal environmental laws preclude enforcement directly under section 1983); *Pennhurst St. School & Hosp. v. Halderman*, 451 U.S. 1, 20 (1981) (remanded for consideration whether the Developmentally Disabled Assistance and Bill of Rights Act creates a private right of action enforceable through section 1983); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (violations of the Social Security Act are enforceable under the "and laws" provision of section 1983). A number of child protection cases raise federal statutory claims. *See, e.g., Massinga*, 838 F.2d at 120-22 (sustaining preliminary injunction and denial of immunity claim in class action suit by foster children in Baltimore's federally funded foster care program who were the victims of physical and sexual abuse and medical neglect); *see also Lynch v. King*, 550 F. Supp. 325, 342-43 (D. Mass. 1982) (injunctive relief under 1983 Social Security Act provisions requiring



underlying constitutional violation and the statutory elements of section 1983.<sup>125</sup> Those statutory elements include causation, proof that the particular defendant, such as the agency or the city in *Doe I*, has itself subjected or caused someone to be subjected to a deprivation of rights.<sup>126</sup> In deference to the causation requirement of section 1983, the *Doe I* court required that the inaction actually must have caused the denial of rights.<sup>127</sup> The omissions must be "a substantial factor leading to the denial of the constitutionally protected liberty or property interest."<sup>128</sup>

The *Doe I* court also concluded that in order to satisfy the statutory elements of a section 1983 action against a child welfare agency in its *supervisory* capacity, the agency's failure to act must be a result of a sufficiently culpable mental state, that is, "deliberate indifference."<sup>129</sup> Before *Doe I*, the Supreme Court generally held that the civil rights statute did not incorporate the doctrine of *respondeat superior* and did not impose any form of vicarious liability on ordi-

state welfare officials to provide children in foster care with service plans and periodic review of their cases). But see *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 928 (8th Cir. 1987) (Social Security Act does not create a private right of action for money damages or enforceable rights).

125. *Daniels*, 474 U.S. at 332; *West*, 712 F. Supp. at 274.

126. *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1975); see Kritchevsky, *Or Causes to Be Subjected: The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187 (1988).

127. The court relied on a general citation to *Rizzo*. In *Rizzo* the Court reversed a class action against Philadelphia's mayor, police commissioner, and others, alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in particular and Philadelphia residents in general, which resulted in a broad-ranging district court order governing police procedure for handling citizen complaints. *Rizzo*, 423 U.S. at 369-70.

Justice Rehnquist, writing for the majority in *Rizzo*, criticized the district court for, among other errors, mistaking the kind of causation required for civil rights liability, and consequently for any form of relief against the police department and the city itself. *Id.* at 370-71. Plaintiff class had shown that a number of individual police officers who were not named as parties to the action violated the constitutional rights of particular individuals. According to Justice Rehnquist, however, they had failed to establish any "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the mayor of Philadelphia, the police commissioner, and others]—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371. Instead, the "sole causal connection" found by the District Court was that unless the police disciplinary procedures changed, similar incidents were likely to recur affecting other members of the plaintiff classes. *Id.* at 371. Justice Rehnquist found this to be an insufficient basis to hold defendants responsible for any constitutional violations or to order them to change police procedure in order to avoid further infringements of the rights of citizens of Philadelphia. *Id.* at 373-77.

Justice Rehnquist also rejected the argument that mere official *failure to act* in the face of the statistical pattern is the equivalent of the active policy approving or authorizing misconduct found actionable in other cases. *Id.* at 376. Justice Rehnquist emphasized that the plain words of the statute impose liability and authorize relief only for a defendant's conduct which "subjects, or causes to be subjected" a plaintiff to a deprivation of a federal right. *Id.* at 370-71.

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

129. *Id.* This requirement is imposed as a matter of section 1983 law. By contrast, *Estelle* held that the eighth amendment was not violated unless prison officials displayed the mental state of deliberate indifference to known serious medical needs of the inmates. It is not surprising that the eighth amendment claim, which is posited on the constitutional prohibition of cruel and unusual punishment, would incorporate this requirement. The value protected by the eighth amendment proscription is the commitment of civilized societies to impose appropriate punishment for appropriate penal purposes only. "Unnecessary and wanton" infliction of pain for its own sake, however, does not meet the evolving penal standards of a civilized community. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Thus, the mental state, the purpose that animates prison officials' acts or refusals to act, lies at the heart of an eighth amendment claim.

nary agency principles.<sup>130</sup> Governmental entities were liable only for the execution of their own policies and could not be held vicariously liable for the acts of their employees;<sup>131</sup> supervisors were not individually liable for the misdeeds of those that they supervise if they were not personally responsible for the conduct in some way.<sup>132</sup> In order to establish the requisite direct responsibility, therefore, the Second Circuit applied a standard that held supervisors liable if they, or, in the case of an agency, its "top supervisory personnel"<sup>133</sup> exhibited deliberate indifference "to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution."<sup>134</sup>

Evidence of specific statutory duties imposed by New York law was highly relevant to the culpability of the agency's supervisory default.<sup>135</sup> The Second Circuit noted that the agency had a mandatory duty to report suspected child abuse.<sup>136</sup> Dereliction of this duty could be evidence of deliberate indifference on the part of the agency—indifference either to the statutory duty to report (assuming that a report would have triggered an investigation and ended the abuse), or as another instance of indifference to Anna's welfare in general.<sup>137</sup> The Second Circuit believed that the more specifically a statute or regulation clearly mandates a particular action, the greater its value as evidence of deliberate indifference. Whereas another failure to act may be fairly attributed to the exercise of judgment on how best to handle the situation, nonfeasance of a mandated duty cannot be explained in that way.<sup>138</sup>

The Second Circuit Court of Appeals remanded the *Doe I* case to be tried again using the approved jury charge on supervisory liability;<sup>139</sup> the result in

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130. *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 691 (1978); *Rizzo*, 423 U.S. at 371.

131. See *Monell*, 436 U.S. at 694-95; Oren, *supra* note 42, at 987-90 (describing the unfortunate results of this construction).

132. *Monell*, 436 U.S. at 694-95 (municipality); see also *Bigford v. Taylor*, 834 F.2d 1213, 1220 (5th Cir. 1988) (supervisor); *Reimer v. Smith*, 663 F.2d 1316, 1323 (5th Cir. 1981) (supervisor).

The Supreme Court finally has held unequivocally that a city's failure to train its police force adequately may give rise to a cause of action against the municipality itself for any constitutional violations that are caused by that default. The plaintiff must prove, however, that the omission is the product of the city's deliberate indifference to the need for police training. *City of Canton v. Harris*, 109 S. Ct. 1197, 1203-05 (1989).

133. *Doe I*, 649 F.2d at 145. This may no longer be good law. The Supreme Court recently held that high-level supervisors do not automatically constitute final decisionmakers who make policy for the municipality and whose actions, therefore, may bind the governmental entity. Plaintiffs must demonstrate that as a matter of state law those high-level officials possess final policymaking authority in the particular area which is the subject of the lawsuit. See *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 924-26 (1988). For a discussion of the development of municipal liability-final authority doctrine and of *Praprotnik*, see Oren, *supra* note 42, at 995-1000 & nn.245-65.

134. *Doe I*, 649 F.2d at 145. The *Doe I* court disapproved jury instructions that charged that agency supervisors were not liable unless they actually *knew* of Anna's mistreatment and *encouraged* or *condoned* it. *Id.* at 144.

135. *Id.*

136. *Id.* This is a feature displayed by all the modern child protection statutes. See *supra* note 5 and accompanying text.

137. *Doe I*, 649 F.2d at 146.

138. *Id.*

139. *Id.* at 144-46.

*Doe II* was a large verdict that the district court refused to enter in judgment.<sup>140</sup> On the second appeal, the argument subtly shifted ground. Instead of centering on the state of mind required to establish supervisory liability, the opinion addressed the separable issue of the state of mind required to prove the underlying constitutional violation.<sup>141</sup> In *Doe I* the Second Circuit required deliberate indifference in order to satisfy the statutory elements for supervisory liability, and did not give much consideration to the state of mind element that the Supreme Court imposed in *Estelle* as a matter of eighth amendment law.<sup>142</sup> In the interim between the two appeals, however, the Supreme Court decided *Youngberg v. Romeo*,<sup>143</sup> which the *Doe II* defendants claimed had altered the applicable constitutional law.<sup>144</sup>

In *Doe II* the Second Circuit denied that *Youngberg* changed the result.<sup>145</sup> It treated *Youngberg's* test of "a substantial departure from accepted professional judgment, practice or standards" as the equivalent of a gross negligence standard.<sup>146</sup> Conceding for the purposes of argument that the *Youngberg* test applied outside of the institutional setting, the court of appeals nonetheless reaffirmed the validity of the jury's verdict.<sup>147</sup> Because the Supreme Court apparently intended *Youngberg* to be a more generous standard than the deliberate indifference that must be shown to prove an eighth amendment violation, the *Doe II* jury instructions were, if anything, too strict.<sup>148</sup>

In large part, the *Doe* opinions framed the terms of subsequent analysis of constitutional liability for the failure to protect foster children that followed.<sup>149</sup>

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140. *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 783 (2d Cir.) (*Doe II*), cert. denied, 464 U.S. 864 (1983). On appeal for the second time, the Second Circuit again reversed and remanded the case for reinstatement of the \$225,000 jury verdict. *Id.* at 792.

141. The issues of the underlying constitutional cause of action and of statutory causation each involve an independent state of mind inquiry. See *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (although section 1983 contains no general state of mind requirement, the fourteenth amendment cannot be violated by merely negligent conduct).

142. In *Doe II* the Second Circuit said that the deliberate indifference standard stemmed from *Estelle*. *Doe II*, 709 F.2d at 790. In *Doe I*, however, the Second Circuit clearly relied instead on the line of cases that considered what kind of action or inaction by supervisory officials justified imposing individual liability upon them under the civil rights statute. See *Doe I*, 649 F.2d at 141-42 (citing *Turpin v. Maillet*, 619 F.2d 196 (2d Cir.) (*Turpin III*), cert. denied, 449 U.S. 1016 (1980); *Turpin v. Maillet*, 591 F.2d 426 (2d Cir. 1979) (*Turpin II*)).

143. 457 U.S. 307 (1982).

144. *Doe II*, 709 F.2d at 789-90. Defendants also claimed that *Parratt v. Taylor*, 451 U.S. 527 (1981), decided after *Doe I* in 1981, had altered the applicable law. See *Parratt*, 451 U.S. at 543-44 (existence of adequate state remedy for negligent loss of prisoner's hobby kit meant he had received all the process that was due and could not bring a section 1983 action). The *Doe II* court dismissed that argument by pointing out that *Parratt* dealt with only the negligent loss of a prisoner's property. *Doe II*, 709 F.2d at 790 n.8.

145. *Doe II*, 709 F.2d at 789-90.

146. *Id.* at 790.

147. *Id.*

148. *Id.*

149. There was an earlier district court opinion, *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979), that followed a somewhat different tack. A class of parents whose children allegedly had been abused and neglected while in New York state foster homes argued that children in the custody of the state had a constitutional right to at least humane custodial care. *Id.* at 795. In effect, they were seeking to establish a variant of the "right to treatment" litigated with respect to state treatment of institutionalized citizens.

In 1976 a federal court in Louisiana entered an elaborate order requiring appropriate treatment

After 1983 it seemed clear that children could complain that their fourteenth amendment rights were violated when the state failed to protect them from their foster parents and the official inaction met the standard of deliberate indifference. The more hotly litigated cases, however, concerned children who were not legally in state custody. This raised the additional issue suggested by *Martinez*: what kind of "special relationship" might justify extending fourteenth amendment protection to a noncustodial infringement of the liberty interest in safety?<sup>150</sup> *Jensen v. Conrad*<sup>151</sup> was one of the first of the noncustodial child protection cases. In *Jensen* the United States Court of Appeals for the Fourth Circuit confronted claims that the South Carolina Department of Social Services and others had failed to intervene and protect the lives of Sylvia Brown, a seven-month-old baby girl, and Michael Clark, a three-year-old toddler, two children who died at the hands of their guardians.<sup>152</sup>

The Brown baby first came to the attention of county social workers when she was admitted to the hospital at the age of four months with a fractured skull. A healing subdural hematoma was found by x-ray; hospital authorities actually witnessed Mrs. Brown's boyfriend slapping the infant during a visit to the hospital. The hospital reported the case to the County Department of Social Services and requested a child protection investigation.<sup>153</sup> As in all states, South Carolina made such reporting mandatory.<sup>154</sup> After their initial review of the case, the Department apparently reached an agreement with the mother that required her to live with the child at the grandmother's home, subject to "intensive follow-up and in-home supervision."<sup>155</sup> Mrs. Brown was warned that if she failed to comply with the terms of this agreement, the baby would be placed in the custody of the Department.<sup>156</sup> In other words, although the child was not technically in the legal custody of the Department, that was true only by virtue of the alternative plan for intensive supervision. The Department failed to super-

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for Louisiana mentally retarded, physically handicapped, and delinquent children who had been placed in out-of-state institutions (largely in Texas). *Gary W. v. State*, 437 F. Supp. 1209 (E.D. La. 1976). The district court ruled that civil commitment of any person—restraint of liberty in an institution—can only be justified by a *quid pro quo* of rehabilitative treatment. When rehabilitation is not possible, the district court required minimally adequate habilitation and care, beyond the subsistence-level custodial care that would be provided in prison. *Id.* at 1216. Perhaps because of the noninstitutional setting of most foster care, or because of the decision in *Youngberg* in 1982, this analysis did not become central to the child protection cases. *Cf. Youngberg v. Romeo*, 457 U.S. 307 (1982).

*Youngberg* involved two claims: an alleged right to safe conditions of confinement and a broader right to treatment. The Supreme Court had no difficulty with the first one, derived from *Estelle*, and found a right to safe conditions of confinement. *Id.* at 316. The Court was more reluctant, on the other hand, to recognize any broad ranging right to treatment. The Court held that the state was obligated to provide minimally adequate training that was sufficient to ensure Romeo's safety and freedom from undue restraint. *Id.* at 319. It would not go beyond that, however, claiming that the issue was not squarely presented by the case and its record. *Id.*

150. *See Martinez*, 444 U.S. at 285.

151. 747 F.2d 185 (4th Cir. 1984).

152. *Id.* at 187.

153. *Id.*

154. *See S.C. CODE ANN.* § 20-7-510 (Law. Co-op. 1985).

155. *Jensen*, 747 F.2d at 187-88.

156. *Id.* at 187.

wise the family and carry out the terms of this agreement, however.<sup>157</sup> On their only two visits to the house caseworkers found that the baby was living alone with her mother, in violation of the agreement, but the Department took no action. Within three months Sylvia was brought dead on arrival to the hospital. An autopsy revealed that brain hemorrhaging had occurred three times in the previous three weeks, the last only minutes before the child died.<sup>158</sup> The Fourth Circuit denied any recovery for the Department's failure to protect baby Sylvia, on the ground that the defendant officials enjoyed qualified immunity.<sup>159</sup>

The story of the life and death of Sylvia Brown contains many features typical of other child protection cases. It demonstrates that in child protection work the line between legal custody and noncustodial supervision by the agency can be very artificial. The Department's supervisory agreement with Mrs. Brown reflects prevailing policy in the treatment of child abuse and is typical of a predominantly therapeutic response that emphasizes treatment and the preservation of the family.<sup>160</sup> Use of such an agreement also is consonant with the trend to avoid foster care placement whenever possible.<sup>161</sup> The Brown facts also demonstrate the existence of the iron fist beneath the velvet glove. In the final analysis, the Department's authority to provide social work services is sanctioned by the coercive power of the state to remove the child.<sup>162</sup> Finally, the Brown case illustrates how assaults on children by their own families, unlike other crimes against the person, have been largely withdrawn from the criminal justice system. Mrs. Brown was not criminally charged for the earlier injuries to Sylvia. Criminal charges were brought against her only after the child died.<sup>163</sup>

The story of three-year-old Michael Clark, the other child denied a remedy in *Jensen*,<sup>164</sup> is typical of child abuse cases in its own way. It is a compelling

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157. *Id.* at 188.

158. *Id.*

159. *Id.* at 195. In section 1983 lawsuits individual defendants enjoy immunity from suit for money damages whenever the constitutional law they have violated was not clearly established at the time of their action. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Since the cases that the Fourth Circuit found established a possible right to protection were decided *after* the Brown and Clark children were injured in 1980, the defendants were immune. *Jensen*, 747 F.2d at 187. The Fourth Circuit further held that the law as it affected these defendants was not clearly established in 1980 because there still were no specific guidelines about what constitutes a "special relationship," and because of the "particularly 'close'" nature of the factual cases at issue. *Id.* at 195. The court did not decide whether the state had in fact created a special relationship with the children under the circumstances alleged in *Jensen*. *Id.*

160. See, e.g., S.C. CODE ANN. § 20-7-480 (Law. Co-op. 1985) (the purpose of the law is "to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate."); D. BESHAROV, *supra* note 71, at 76 (as a society we have adopted a predominantly therapeutic, or "social work" response to the problem of child abuse).

161. See, e.g., Besharov, *supra* note 66, at 160.

162. D. BESHAROV, *supra* note 71, at 77. The warning to Sylvia Brown's family that without a voluntary agreement the department would take the baby into custody was issued despite a statutory instruction that the protective agency should not threaten such action in order to coerce cooperation. The Department was authorized to petition the family court for intervention if necessary. *Jensen*, 747 F.2d at 189 & n.5; see S.C. CODE ANN. § 20-7-650(i) (Law. Co-op. 1985).

163. *Jensen*, 747 F.2d at 188; see *infra* notes 359-62, 391-402 and accompanying texts for discussion of the meaning of that withdrawal for the constitutional equal protection and due process analysis of child protection cases.

164. *Jensen*, 747 F.2d at 195.

example of how a young child can fall through the cracks of the state's protection system and become a victim of the bureaucracy. The DSS first learned of abuse in young Michael Clark's family through a report from his older brother's school.<sup>165</sup> An interview with the school-age boy convinced an investigator that a meeting with the mother was necessary, but after a number of unsuccessful attempts to make contact the Department gave up.<sup>166</sup> At the expiration of the sixty-day investigatory period allotted in the statute, the agency classified the Clark case as "unfounded" and officially closed the investigation.<sup>167</sup> Shortly thereafter, three-year-old Michael was beaten to death by his mother's boyfriend.<sup>168</sup> The Department's decision to close out the Clark case as "unfounded" even though it had reason to believe a child was at significant risk, is not unusual. Staffing and budget shortages and legislatively mandated deadlines for action lead to similar arbitrary action in other states too.<sup>169</sup> As in the Brown case, the Clark facts also illustrate the special danger to very young children, pre-school age, who are physically more vulnerable to abuse than older children, and cannot help themselves or ask for outside help because they cannot communicate the problem and are isolated in the privacy of their parents' home.<sup>170</sup>

Before 1980, when the Brown and Clark children were killed, the Fourth Circuit had followed *Estelle* and decided a number of cases that imposed an affirmative duty of care on government, but only in a prison setting where the eighth amendment pertained and only when officials had acted with deliberate indifference.<sup>171</sup> The *Jensen* court explained that the larger possibilities, which went beyond incarceration, opened up only with the Supreme Court's refusal in *Martinez* to rule out absolutely a cause of action grounded on a parole release.<sup>172</sup> The circuit courts developed a theory of "special relationships" based upon the 1980 *Martinez* dictum. The circuits agreed that as a general rule there was no affirmative duty on the part of government to protect people from criminals or the insane. Some courts, however, qualified that proposition: the United States Court of Appeals for the Seventh Circuit conceded that there might be a different result when the state actively placed victims in danger from private persons and then failed to protect them—when the government was "as much an active

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165. *Id.* at 188.

166. *Id.*

167. *Id.*

168. *Id.*

169. See, e.g., *Child Protective Services in Texas: Staff Report to the Senate Committee on Health and Human Services* 16 (Feb. 1989) (Texas Senate) (report on the system-wide problems in the State of Texas) [hereinafter *Texas Senate Committee Report*].

170. For the significance of the age of the child victim, see Brief of the Massachusetts Committee for Children and Youth at 9-10, *DeShaney* (No. 87-154) [hereinafter *Massachusetts Committee Brief*]. But see AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, TRENDS IN CHILD ABUSE AND NEGLECT: A NATIONAL PERSPECTIVE 14 (1984) [hereinafter *AAPC TRENDS*] (presents evidence that there is a reporting bias such that abuse of younger children is more likely to be reported). Between 1976 and 1982 the surveyors found that children 0-2 years old show the most neglect, the least sexual and emotional maltreatment, and an average amount of physical injury. *Id.* at 22-23.

171. *Jensen*, 747 F.2d at 191 (citing *Orpiano v. Johnson*, 632 F.2d 1096 (4th Cir. 1980)); *Withers v. Levine*, 615 F.2d 158, 162 (4th Cir.), cert. denied, 449 U.S. 849 (1980).

172. *Jensen*, 747 F.2d at 191-92.

tortfeasor as if it had thrown [the victim] into a snakepit."<sup>173</sup> The Fourth Circuit had gone even further and had recognized there could be a constitutional right to protection based on the fourteenth amendment *if* the claim arose out of "special custodial or other relationships created or assumed by the state in respect of particular persons."<sup>174</sup>

The *Jensen* court concluded from these appellate court cases that affirmative governmental duties existed outside of the prison walls, but only when a special relationship was invoked.<sup>175</sup> It suggested several factors that would be relevant to any special relationship analysis:

- 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 incident.<sup>176</sup>
- 2) Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals.<sup>177</sup>
- 3) Whether the State knew of the claimant's plight.<sup>178</sup>

The *Jensen* court's second and third factors address a concern that was characteristic of state law cases that involved the failure to protect children. In Anglo-American common law there was no private action available against otherwise suable (not immune) government officials unless they breached a duty owed to a particular party.<sup>179</sup> Although law enforcement personnel, for example, historically could be sued for a number of torts, at common law their duty to *protect* was owed only to the public at large and therefore could not form the basis for tort liability to any particular individual.<sup>180</sup> In the 1970s some state courts found that the new child protection statutes overcame this common-law problem because they imposed mandatory responsibilities to investigate and take action on child abuse reports, thus creating a special duty owed to the child victim.

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173. *Id.* at 192 (citing *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (murder victim had no civil rights claim against the state mental hospital which released her murderer)).

174. *Id.* at 193. The Fourth Circuit followed the *Bowers* rationale in *Fox v. Curtis*, 712 F.2d 86 (4th Cir. 1983), another case in which a dangerous parolee was released and injured a citizen. *Jensen*, 747 F.2d at 193 (citing *Fox*). In *Fox* the Fourth Circuit qualified the general rule. *Id.*

175. *Id.* at 194-95.

176. *Id.* at 194-95 n.11. The court opined that the agency defendants were unaware that these two children, as opposed to anyone else in the public at large, faced a special danger. The Fourth Circuit suggested that this fact, combined with the lack of a past or present custodial relationship between the state and the perpetrators, would weigh against finding that a special relationship existed if a court had to decide the issue squarely. *Id.*

177. *Id.* The court found that this factor did not clearly point in either direction in the *Brown* and *Clark* cases. On the one hand, it seemed unlikely that the state intended to "single out" these particular children and place them in its own care. *Id.* On the other hand, the preamble of the Child Protection Act, S.C. CODE ANN. § 20-7-480 (Law. Co-op. 1985), clearly expressed a desire to take affirmative steps to locate and protect potentially abused children. *Id.*

178. *Id.* The court felt that this factor was more probative of a *breach* of the special relationship than a *definition* of the relationship. It conceded, however, that this factor may illuminate the extent to which the State intended to protect or watch over the particular children involved. The State knew that these children were being beaten. This strengthened the argument that some sort of special relationship had been established. *Id.*

179. See T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 379 (1880). For a fuller discussion of the common-law background of public official liability and immunity, see Oren, *supra* note 42.

180. T. COOLEY, *supra* note 179, at 379.

When the statute created duties and public officials had reason to know of the danger to a particular child, some state courts recognized a cause of action for failure to protect.<sup>181</sup> The last two *Jensen* criteria for a special relationship in civil rights lawsuits merely reiterate this state tort law conclusion.

The first *Jensen* factor (whether the child was in the state's legal custody), however, was the one on which *DeShaney* ultimately turned in the Supreme Court, and is somewhat different in kind from the other two. It is more reminiscent of the concerns that animated *Estelle's* search for a constitutionally based duty. Unfortunately, the circuit courts never really developed a theory that went beyond the special relationship framework to explain just what makes a *specific* duty that a government agent owed to children a *constitutional* duty as well. This made it relatively easy for the Supreme Court in *DeShaney* to adhere rigidly to a formally drawn line based on custody. An early and thoroughgoing discussion of the custody test for affirmative government duties, in *Jensen* or other lower court cases, might have revealed the shortcomings of that approach before the Supreme Court decided *DeShaney*.<sup>182</sup>

The last significant child protection case decided by the courts of appeals before *DeShaney* was *Estate of Bailey ex rel. Oare v. County of York*.<sup>183</sup> In *Bailey* county child welfare officials investigated complaints by relatives that five-year-old Aleta Bailey was being abused by her mother's live-in boyfriend.<sup>184</sup> Hospital physicians confirmed the abuse and advised that the child should not be returned to her mother unless the boyfriend was denied access to her. The welfare agency returned Aleta to her home on these conditions, but made no effort thereafter to determine where or with whom she was living. Within a month the girl died from physical injuries inflicted by her mother and the boy-

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181. For instance, in *Florida First Nat'l Bank v. City of Jacksonville*, 310 So. 2d 19 (Fla. App. 1975), *cert. dismissed*, 339 So. 2d 632 (Fla. 1976), plaintiff children sued police for failing to protect them from their father who beat and abused them after their mother was incarcerated for passing bad checks. The court held that the Florida Supreme Court cases abrogating sovereign immunity imposed liability on the government under the same circumstances that the acts of an agent would trigger vicarious liability for a private employer, *provided* that the duty breached was a specific one different from that owed to any other member of the public. *Id.* at 21. The special duty was created here because the police, through the statute, undertook to aid the children, and the neighbors relied on that undertaking in reporting the abuse, but the police either negligently performed or failed to perform those duties, with the result that these specific children, as contrasted to the public in general, were hurt. *Id.* at 26.

Similar reasoning led an Arizona appellate court in 1983 to uphold a \$1 million wrongful death verdict against the state of Arizona and its Department of Economic Security. *Mammo v. State*, 138 Ariz. 528, 675 P.2d 1347 (Ariz. Ct. App. 1983). The court held that the specificity of the child protection statute and the duties it spelled out were clearly designed for the protection of threatened individuals, such that a special relationship existed between the state and the vulnerable child. *Id.* at 1351. *But see* *Nelson v. Freeman*, 537 F. Supp. 602, 610-11 (W.D. Mo. 1982) (federal district court, sitting in diversity, rejected a claim that Missouri law gave rise to a specific duty to 8-year-old girl who was so seriously sexually abused by a man to whom her mother "sold" her, that she was killed).

182. Later in this Article, I explain how viewing the due process question in the full context of child protection and state policy toward family violence provides a sounder basis for deriving constitutional rights than any theory that turns on the existence of custody. *See infra* notes 281-434 and accompanying text.

183. 768 F.2d 503 (3d Cir. 1985). The Third Circuit reinstated this case, which was based on the county's failure to protect a child who had been returned to her mother's custody. *Id.* at 511.

184. *Id.* at 505. Because the lawsuit was dismissed at an early stage, all allegations of the complaint must be taken as true. *Id.* at 506.



friend.<sup>185</sup> The federal district court that heard the *Bailey* case balked at extending the *Doe* framework to a child who was not in the legal custody of the state: it dismissed young Aleta's claim that the state's failure to protect her from abuse violated her constitutional rights.<sup>186</sup> Although the court of appeals reversed, its analysis also did not transcend the limits of special relationship thinking. It simply held that this particular case fell "on the other side of the line suggested in *Martinez*."<sup>187</sup>

The *Doe*, *Jensen*, and *Bailey* cases together introduced most of the strands of substantive due process analysis<sup>188</sup> that characterized the child protection cases by the time that *DeShaney* came before the Supreme Court.<sup>189</sup> Following *Estelle*, *Martinez*, and *Youngberg*, many of the lower courts accepted the prem-

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185. *Id.* at 505. The complaint also alleged that in disregard of the advice of the examining physician, the county agency treated the boyfriend as part of the family unit and failed to invoke the state's procedures for protective custody of abused children. *Id.* The *Bailey* case therefore suggests how far the withdrawal of child abuse from the criminal justice system can go. Apparently even the mother's boyfriend to some degree came under the umbrella of the therapeutic family treatment approach to child abuse. Criminal charges were brought against him and Aleta's mother only after the girl was dead. *Id.* at 505 n.1. This is another good example of how the line between custody and non-custody is often blurred by placements back in the natural family, subject to fulfilling certain conditions of safety for the child.

186. *Id.* at 509.

187. *Id.* at 511. Although the *Bailey* court did not go beyond special relationship thinking, it did cite two examples in which courts found governmental entities owed a duty of protection to persons who were not in custody, and these two cases ultimately are more helpful than the theory of special relationships for deriving a constitutional duty to safeguard children at risk. *Id.* at 510; see *White v. Rochford*, 592 F.2d 381, 383-84 (7th Cir. 1979) (children left alone in car on busy highway in inclement weather may bring civil rights suit against police who arrested the person who was driving the car, and then refused to protect the minors); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526-28 (D. Conn. 1984) (wife and son stated a civil rights cause of action against police department that failed to protect them from assault by husband and father because domestic violence was involved). See *infra* notes 383-90, 419-34 and accompanying text for a discussion of these cases and an alternative theory of substantive due process and child protection.

188. Procedural due process is the other significant constitutionally based claim in these cases. In *DeShaney* the Court declined to decide whether Wisconsin child protection statutes gave Joshua an entitlement to receive protective services in accordance with the statute, an entitlement that would enjoy due process protection against state deprivation under the Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972). *DeShaney*, 109 S. Ct. at 1003 n.2. The Eleventh Circuit found that the Georgia statutory foster care scheme created just such a legitimate claim of entitlement. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989).

189. Before *DeShaney*, lower courts disagreed whether a special relationship existed when the child was not in the legal custody of protective services, and sometimes were reluctant to find liability even when the child was in foster care. See, e.g., *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923 (8th Cir. 1987). In *Harpole* the department failed to protect an infant prone to breathing difficulties. It released the child back into his mother's care, even after she had demonstrated her inability to care for this child and for her other three children, two of whom died from Sudden Infant Death Syndrome. *Id.* at 924. The Eighth Circuit, however, denied liability, finding this case distinguishable from *Doe* because the child in *Doe* was in the legal custody of the state. *Id.* at 925. The court, moreover, questioned whether "special relationships" may ever exist outside of the prison context. *Id.* at 926-27.

For rejection of liability in a foster care setting, using atypical reasoning, see *Atchley v. County of Du Page*, 638 F. Supp. 1237 (N.D. Ill. 1986). Pursuant to a state court disposition adjudicating the child a minor in need of supervision, she was placed in a licensed foster home, where she was allegedly raped and made pregnant. The defendant county claimed that its only involvement with the plaintiff was to make payments for foster care ordered by the state under the Juvenile Court Act, and that in the absence of any custodial relationship, it had no duty to protect her. *Id.* at 1238. The district court relied on the Seventh Circuit's special relationship decisions, and found none here when the county lacked statutory duties for foster care placement or regulation. *Id.* at 1239.

ise that the right circumstances may create an affirmative governmental duty to protect children, which, in turn, triggers the protections of the due process clause.<sup>190</sup> In considering the claims of abused children, courts emphasized the mandatory responsibilities to report and investigate child abuse that were imposed by state law beginning in the 1960s and 1970s.<sup>191</sup> The state's creation of a comprehensive child protection system clearly influenced the courts' view of the constitutional issue. The lower court decisions also raised issues about the requisite state of mind and sometimes distinguished between custodial and noncustodial cases.<sup>192</sup> The pre-*DeShaney* opinions struggled with the contours of the "special relationship" between the state and the child it failed to protect from violence, that the courts assumed was necessary to establish a constitutional violation. The early decisions, however, failed to develop any alternate due process analysis that might have survived better the *DeShaney* Court's rejection of the special relationship doctrine.

### III. *DESHANEY* AND THE SUPREME COURT'S DUE PROCESS METHOD

The *DeShaney* majority<sup>193</sup> repudiated the special relationship line of cases.<sup>194</sup> Justice Rehnquist's opinion finessed the thorny questions of substantive due process methodology that so divided the Court in other rulings later in the 1988 term<sup>195</sup> by embracing an apparently bright line based on custody. The decision follows from an abstract and general constitutional due process theory and is not responsive to the specific context of child protection.<sup>196</sup>

190. *E.g.*, *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (deliberate indifference standard), *cert. denied*, 109 S. Ct. 1337 (1989).

191. *E.g.*, *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 145 (2d Cir. 1981) (*Doe I*), *cert. denied*, 464 U.S. 864 (1983).

192. *See id.* at 141.

193. Justices White, Stevens, O'Connor, Scalia, and Kennedy joined the opinion written by Chief Justice Rehnquist. *DeShaney*, 109 S. Ct. at 1000.

194. *Id.* at 1004.

195. *E.g.*, *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) (biological father denied due process right to challenge California's irrebuttable presumption of a husband's paternity) (Scalia, J., announced judgment of the Court, and delivered an opinion joined by Rehnquist, C.J., and, in all but note 6, O'Connor and Kennedy, JJ.; Stevens, J., concurred in the judgment only; Brennan, J., dissented, in an opinion joined by Marshall and Blackmun, JJ.; White, J., dissented, in an opinion joined by Brennan, J.). The divisions in *Michael H.* concerned questions of due process methodology. *See id.* at 2343-44 & n.6 (Scalia, J.), 2346 (O'Connor, J., concurring in part), 2347 (Stevens, J., concurring in the judgment), 2349-51 (Brennan, J., dissenting), 2361 (White, J., dissenting); *see also, e.g., Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (Court drastically changed course on a woman's substantive due process right of privacy in abortion decision, but could not agree on a coherent rationale for doing so) (Rehnquist, C.J., delivered the opinion for a unanimous Court with respect to Part II-C, the opinion of the Court with respect to Parts I, II-A, and II-B, in which White, O'Connor, Scalia, and Kennedy, JJ., joined, and an opinion with respect to Parts II-D and III in which White and Kennedy, JJ., joined; O'Connor, J., and Scalia, J., filed opinions concurring in part and concurring in the judgment; Blackmun, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined; Stevens, J., filed an opinion concurring in part and dissenting in part.).

196. Certiorari was granted in *DeShaney*, according to the majority, in order to resolve the general question of "when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights." *DeShaney*, 109 S. Ct. at 1002 (emphasis added) (citing *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989)). In *Archie*, the Seventh Circuit held that there is no constitutional liability for failing to dispatch an ambulance and giving

### A. *Special Relationships and Custody*

In *DeShaney* the Court rejected the argument that certain "special relationships" created or assumed by the state with respect to particular individuals impose an affirmative constitutional duty on the states to protect citizens. The fallacious logic, according to Chief Justice Rehnquist, went like this:

[A] "special relationship" existed here because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Having actually undertaken to protect Joshua from this danger—which petitioners concede the State played no part in creating<sup>197</sup>—the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so "shocks the conscience" as to constitute a substantive due process violation.<sup>198</sup>

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improper medical advice to the family of a woman who died from a health emergency. *Id.* *Archie*, with opinions by conservative judges Easterbrook and Posner, and two dissents, is a good illustration of the equation of the *DeShaney* problem with the general one of a government's liability for failing to provide efficacious protective services. Although *Archie* was grounded on quite different facts and circumstances, concurring Judge Posner and dissenting Judges Cummings and Ripple nonetheless assumed that the forthcoming Supreme Court decision in *DeShaney* would provide general guidance on the *Archie* issues. *Archie*, 847 F.2d at 1226 (Posner, J., concurring); *id.* at 1227 (Cummings, J., dissenting); *id.* at 1227-28 (Ripple, J., dissenting).

The amici in *DeShaney* who supported the government defendants' position also assumed that what was at stake was a general rule of liability under any circumstances in which the government undertook to provide police, fire, or other rescue services, but did a bad job. Brief of the National Association of Counties, Council of State Governments, U.S. Conference of Mayors, National Conference of State Legislatures, National League of Cities, and International City Management Association as Amici Curiae in Support of Respondents at 8-10, *DeShaney* (No. 87-154) [hereinafter National Association of Counties Brief]; Brief of the States of New York, Connecticut, Maryland, Oregon, Pennsylvania and Wisconsin as Amici Curiae in Support of Respondents at 20, *DeShaney* (No. 87-154) [hereinafter States Brief]; Brief Amicus Curiae of the National School Boards Association in Support of Respondents at 3, *DeShaney* (No. 87-154) [hereinafter National School Boards Association Brief]. The Supreme Court's second asserted reason for taking this case was its importance to the administration of state and local governments. *DeShaney*, 109 S. Ct. at 1002.

For criticism of this approach, which wrenches due process jurisprudence out of the specific context that gives it meaning, see *infra* notes 258-64 and accompanying text.

197. Contrary to this assertion, amicus Massachusetts Committee for Children and Youth did argue that the state played a role in increasing the risk of harm to Joshua. They emphasized that Wisconsin's child protective services preempted any other aid that otherwise might have been extended to Joshua, and increased his isolation and the risk of harm to the child. Massachusetts Committee Brief, *supra* note 170, at 27-30.

198. *DeShaney*, 109 S. Ct. at 1004 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). Joshua and his mother argued that the special relationship created a protected liberty interest to receive appropriate protection when the public official charged with that responsibility has actual knowledge of the child and his plight and actually undertakes to protect him, and that this liberty interest was both procedurally and substantively protected by the due process clause. Petitioners' Brief, *supra* note 3, at 11. The procedural claim was not reviewed by the Court because it had not been raised at any earlier stage of the litigation. *DeShaney*, 109 S. Ct. at 1003 n.2.

The American Civil Liberties Union's amicus brief characterized the liberty interest at stake as a right to personal security when the state has undertaken a specific responsibility to assure a specific person's safety. Brief Amicus Curiae of the American Civil Liberties Union Children's Rights Project, the ACLU of Wisconsin, Legal Services for Children, the Juvenile Law Center, Bay Area Coalition Against Child Abuse, and the National Woman Abuse Prevention Project in Support of Petitioners at 9, *DeShaney* (No. 87-154) [hereinafter ACLU Brief]. The Massachusetts Committee for Children and Youth proposed what they considered a narrow version of the special relationship

Dictum in *Martinez* was the genesis of this mistaken notion.<sup>199</sup> The Chief Justice noted that several courts of appeals read the language of the *Martinez* Court that expressly reserved the question whether a parole officer could ever be deemed to deprive someone of life through a parole release decision as implying such a cause of action was possible.<sup>200</sup> Those courts therefore concluded that once the state learns that a third party poses a special danger to an identified victim and indicates a willingness to protect the victim against that danger, a special relationship arises, creating an affirmative duty, enforceable through the due process clause, to give adequate protection.<sup>201</sup>

Conceding that there were certain limited circumstances in which the Constitution imposed affirmative duties of care and protection with respect to particular individuals,<sup>202</sup> the Court found that those rulings were no help to Joshua.<sup>203</sup> Taken together, *Estelle* and *Youngberg* stood for a different proposition: "[W]hen the state takes a person into its custody and holds him there against his will, the Constitution imposes . . . a corresponding duty to assume some responsibility for his safety and general well-being."<sup>204</sup> It is only because the state first acts to restrain "an individual's liberty" and thus takes away his ability to care for himself that any failure to provide for basic human needs, including reasonable safety, "transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause";<sup>205</sup>

The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.<sup>206</sup>

The Supreme Court applied this gloss on *Estelle* and *Youngberg* to Joshua DeShaney, a four-year-old child who never had any freedom to act on his own behalf. Chief Justice Rehnquist found that the two cases were inapplicable here because Joshua suffered injury while in the custody of his natural father rather than the state.<sup>207</sup>

While the State may have been aware of the dangers that Joshua faced in the *free world*, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. 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

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test which would reach only children and other incompetents who are known to be at serious risk of physical harm. Massachusetts Committee Brief, *supra* note 170, at 33-36.

199. *DeShaney*, 109 S. Ct. at 1004 n.4 (citing *Martinez v. California*, 444 U.S. 277, 285 (1980)).

200. *Id.*

201. *Id.*

202. *Id.* at 1004-05.

203. *Id.* at 1005.

204. *Id.*

205. *Id.* at 1005-06.

206. *Id.* at 1006.

207. *Id.*

safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.<sup>208</sup>

Custody thus became the all-important factor. Without ruling on the issue, the Court conceded that there *might* be a different situation, more analogous to *Estelle* and *Youngberg*, if the state "by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home" run by state agents.<sup>209</sup> In the absence of the undefined condition of custody, typified by "incarceration, institutionalization, or other similar restraint[s] of personal liberty,"<sup>210</sup> however, any special relationship at best created a mere common-law tort duty, not a constitutional violation.<sup>211</sup>

Joshua's plight may elicit a natural sympathy from judges, but this Court did its best to resist yielding to the impulse,<sup>212</sup> finding that there simply was no abuse of government power associated with Joshua's predicament.<sup>213</sup> Instead the *DeShaney* Court characterized the state's actions as, at worst, doing nothing when suspicious circumstances dictated a more active role for them.<sup>214</sup> This inaction could be defended, moreover, in light of the risk of constitutional liability that state agents ran if they moved too *soon* to remove Joshua from his father's custody, interfering with the parent-child relationship.<sup>215</sup> Thus, the majority offered an apparently simple test of constitutional liability for state inaction. All that counts as a threshold issue is whether the state has first actively deprived the presumably otherwise capable free actor of liberty by placing that individual in its custody, however custody may be defined. Statutory responsibilities, knowledge of the danger, and special relationships were irrelevant to the Court's inquiry.

### B. Due Process and "Protective Services"<sup>216</sup>

Chief Justice Rehnquist's opinion disposed of Joshua's claim abstractly, as a matter of a general theory of the Constitution and the due process clause in particular. In its construction, the argument resembles a logical syllogism<sup>217</sup>—

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208. *Id.* (emphasis added).

209. *Id.* at 1006 n.9 (citing *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989)); *Doe I*, 649 F.2d 134 (2d Cir. 1981). After holding the certiorari petition in *Ledbetter* for an unusually long time, the Supreme Court denied certiorari right after issuing *DeShaney*. *Ledbetter v. Taylor*, 109 S. Ct. 1337 (1989).

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

211. *Id.* at 1006-07.

212. *Id.* at 1007.

213. *Id.* at 1003.

214. *Id.* at 1007.

215. *Id.* Judge Posner's Seventh Circuit opinion in this case advanced this argument as well. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989). Judge Posner called it the "razor's edge." *Id.*; see *infra* notes 435-57 and accompanying text (Part III B) for a critique of this view.

216. *DeShaney*, 109 S. Ct. at 1002-03.

217. Black's Law Dictionary defines a syllogism (in logic) as "the full logical form of a single argument. It consists of three propositions (two premises and the conclusion), and these contain three terms, of which the two occurring in the conclusion are brought together in the premises by being referred to a common class." BLACK'S LAW DICTIONARY 1299 (5th ed. 1979). Syllogism may also be defined as "a deductive scheme of a formal argument consisting of a major and a minor

albeit a faulty one. The major and minor premises and the deductive conclusion of the argument may be restated as follows: (1) due process liberties generally constitute negative limitations on the state's power to act rather than affirmative guarantees of minimal levels of safety and security from "private" violence;<sup>218</sup> (2) "governmental aid," even where such aid in the form of protective services may be necessary to secure life, liberty, or property, is an affirmative guarantee voluntarily provided by the state;<sup>219</sup> (3) therefore, the "State's failure to protect an individual [child] against private violence [by his father] simply does not constitute a violation of the Due Process Clause."<sup>220</sup> Examination of the Chief Justice's premises exposes some of the errors of his conclusion. In addition to its faulty logic, however, the *DeShaney* opinion's language and imagery suggest what was wrong with the Court's analysis. In *DeShaney* the Court embraced an abstraction that has very little relevance to abused children and to little Joshua's claim.

# 1. The Chief Justice's Major Premise: Due Process Liberties Are Negative and Do Not Include Affirmative Guarantees of Safety from Private Violence

Chief Justice Rehnquist's chief premise is that the due process clause of the fourteenth amendment "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."<sup>221</sup> While the fourteenth amendment forbids the state itself to deprive individuals of life, liberty, or property without due process of law, the Chief Justice contended that its *language* does not imply an affirmative obligation on the State to ensure that those interests do not come to harm through other means.<sup>222</sup>

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premise and a conclusion (as in 'every virtue is laudable; kindness is a virtue; therefore, kindness is laudable')." WEBSTER'S NEW COLLEGIATE DICTIONARY 1180 (1976).

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

219. *Id.* at 1003-04.

220. *Id.* at 1004.

221. *Id.* at 1003.

222. *Id.* Although the Chief Justice did not refer to the Seventh Circuit's opinion in this case, this notion owes much to Judge Posner's assertion that "the Constitution is a charter of negative rather than positive liberties." *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989); see *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting) (criticizes the majority for starting their analysis from this point, rather than focusing on the actions actually taken by the state with respect to Joshua).

Judge Posner first advanced the negative liberties argument in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), a special relationship case in which the court rejected a claim of constitutional liability for discharging a mental patient, who, having been committed to a state institution after being found innocent of an earlier homicide by reason of insanity, murdered a woman one year after his release. *Id.* at 617. Judge Posner ruled that there is no constitutional right to be protected by the state from criminals or the insane. However monstrous the state's failure to act may be, it simply does not meet the requirements of the constitutional charter of negative liberties that simply instructs government to leave people alone and does not require it to provide any level of services "even so elementary a service as maintaining law and order." *Id.* at 618.

The axiom came to be relied upon by the Seventh Circuit, as well as others, in their disposition of other special relationship claims after *Martinez*. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989) (no constitutional violation when city emergency dispatcher failed to send ambulance and rendered bad medical advice to caller who later died from the medical emergency); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983) (due process not implicated by negligent failure of city workers to save occupants from dying in

The Chief Justice argued, moreover, that *history* also does not support such an expansive reading of the "constitutional text."<sup>223</sup> According to Chief Justice

burning automobile), *cert. denied*, 465 U.S. 1049 (1984); see also *Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1034-37 (11th Cir. 1987) (no constitutional duty to transport pregnant woman to hospital of her choice which had facilities to safeguard health of baby born prematurely); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987) (no constitutional duty to protect child from injury by parents); *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987) (due process does not require the county to protect citizens from attack by an escaped inmate); *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986) (prison guard injured by prisoner); *Escamilla v. City of Santa Ana*, 796 F.2d 266, 269-70 (9th Cir. 1986) (undercover officer failed to prevent barroom shooting); *Bradberry v. Pinellas County*, 789 F.2d 1513, 1517-18 (11th Cir. 1986) (swimmer drowned because of inadequately trained lifeguard); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir.) (claim of woman murdered by furloughed inmate), *cert. denied*, 479 U.S. 882 (1986); *McClary v. O'Hare*, 786 F.2d 83, 88-89 (2d Cir. 1986) (wrongful death claim of county highway department employee killed when supervisor failed to follow safety rules).

For scholarly commentary on this idea, see C. MACKINNON, *FEMINISM UNMODIFIED* 207 & n.1 (1987) (a feminist critique of the negative liberties concept, considered by MacKinnon to be the cornerstone of the liberal state); Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON FREEDOM* 121-22 (1970); Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171 (1986); Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986).

Judge Posner has acknowledged in another context that the classical libertarian philosophies of Hobbes, Locke, and more recently, Nozick, paradoxically may lay the theoretical foundation for inferring a constitutional duty to provide services. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 24 (1987). If the social contract exchanges liberties enjoyed in the state of nature for the state's guarantees of internal and external security, what is the result if the state provides only ineffectual police services, as is so often the case today? Although he opposes the conclusion that there is a constitutional duty to provide minimal security, Posner seems aware in this discussion that the classical expression of negative liberties seems to support rather than to negate the state's duty to provide basic services. *Id.* I am indebted for this point to my research assistant, Jim Essig.

223. *DeShaney*, 109 S. Ct. at 1003. The Chief Justice emphasizes the negatively phrased language of the Constitution and makes assertions about *history* and the *intent of the framers*. *Id.* These methods are hallmarks of an interpretivist model of constitutional jurisprudence. This mode of reading the Constitution assumes that the framers of the Constitution made a binding choice of which fundamental values (rights and liberties) it protects. The sole legitimate role of the judiciary, therefore, is to *implement* in its decisions those choices that already have been made. This view was taken by Justice Black in his years on the Supreme Court, and has returned to favor in some academic and judicial circles. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703-06 (1975).

Proponents of pure interpretivism, such as the conservative jurist Robert H. Bork, believe that if the constitutional materials do not clearly specify the value to be preferred, there is no other "principled way to prefer any claimed human value to any other." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971). The chief argument in support of this position is a democratic one: the Constitution allows the will of the majority to be overruled by the Supreme Court. *Id.* at 3. The only legitimate basis for the exercise of this nondemocratic power, therefore, is if the Justices are not merely enacting their own will, but are instead faithfully adhering to constitutional values chosen in the original Madisonian compromise between majority rule and minority protection. *Id.*

Noninterpretivists criticize the assumptions of the intentionalist model on a variety of grounds. Professor Thomas Grey, for example, observes that courts routinely "resort to bad legislative history and strained reading of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text." Grey, *supra*, at 706. This is because there is some feeling that the noninterpretivist mode is somehow not legitimate. *Id.* In some of the most significant decisions of our history, however, courts also have appealed openly to values beyond those expressly stated in the constitutional text for the content of the substantive principles they were invoking to invalidate legislation. *Id.* at 709. The legitimacy of this view of constitutional adjudication rests on the notions either of natural law or of a living Constitution, adaptable to the evolving standards of our civilization. *Id.* Grey argues that many of our most cherished decisions involving fundamental rights would be inconceivable under

Rehnquist, the due process clause of the fourteenth amendment, one of the civil war amendments that reconstructed the federal-state relationship after the Civil War,<sup>224</sup> reflected the same framers' intent as the corresponding clause in the fifth amendment: the purpose was to protect the people from the state's affirmative abuse of power, and "not to ensure that the State protected them from each other."<sup>225</sup> The framers assertedly left that job to the democratic political processes.<sup>226</sup>

It is, of course, not accurate to say that the framers of the fourteenth amendment were unconcerned with the state's failure to protect its citizens from the violence of third-party private actors. In another recent opinion, the Supreme Court unanimously accepted as a matter of courtroom history that the paradigmatic claim under the Ku Klux Klan Act of 1871,<sup>227</sup> the predecessor statute to section 1983,<sup>228</sup> was that of a victim of private violence or harassment who sued state officials for failing to prevent the harm.<sup>229</sup> Prominent scholars and historians of the Reconstruction era also would agree that Congress and the courts were concerned about serious problems of private coercion, intimidation, and violence directed against citizens. In their well-respected book *Equal Jus-*

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any variant of the interpretivist model. *Id.* at 710-13. Other scholars have demonstrated that problems arise even if one agrees to focus on the *text* itself. What is the text? And what role does the reader have in actively creating rather than passively understanding the predetermined meaning of that text? See, e.g., Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 376-89 (1982) (discussing "weak" and "strong" textualists).

Clearly, I am critical of Chief Justice Rehnquist's tendency to "slipshod history," to borrow a phrase from Grey. Grey, *supra*, at 706. I do not believe, however, that the *DeShaney* opinion is a good example of interpretivist constitutional adjudication. It would be hard to argue that personal security is a value that was never intended to be addressed by the Constitution. Rather, *DeShaney* is an exercise in the application of abstract logic to an assumed first principle—that our Constitution is a negative charter and guarantees no minimal levels of government "services."

224. Historians disagree how thoroughgoing a revolution in federal-state relations the framers of the Reconstruction Amendments and statutes *intended* to enact. See, e.g., H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER THE LAW CONSTITUTIONAL DEVELOPMENT 1835-1875* 386-88 (1982); Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 47 (1987). It seems clear, however, that provisions inspired by the Civil War and by white Southern intransigence after the war, did not leave existing relationships untouched. See generally A. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971) (history of the Klan and federal response to outbreaks of private violence in Reconstruction era); W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880* (1935) (classic history demonstrating intention of white Southerners to deny black freed people basic civil rights). The contemporary resuscitation of Section 1983, originally the Ku Klux Klan Act of 1871, is founded on that premise. See *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (section 1983 passed to afford a federal right in federal courts because state officials were not enforcing their laws to protect the enjoyment of rights, privileges and immunities guaranteed by the fourteenth amendment), *overruled in part*, *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

225. *DeShaney*, 109 S. Ct. at 1003 (citing *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)); *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring in the result).

Constitutional scholars have criticized the Chief Justice's historicism, used in the service of his philosophy of state autonomy at all costs, as a "sham" because it ignores everything that happened after 1787, including, most importantly, the Civil War. See Fiss & Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, March 10, 1982, at 14, 20 (written before Justice Rehnquist was elevated to the Chief Justice position).

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

227. Civil Rights Act of 1871, ch. 99, § 1, 16 Stat. 433 (1871).

228. 42 U.S.C. § 1983 (1982).

229. *Owens v. Okure*, 109 S. Ct. 573, 581 n.11 (1989).



*tice Under the Law: Constitutional Development 1835-1875*,<sup>230</sup> legal historians Harold Hyman and William Wiecek explained that congressional sponsors initially intended or assumed that the thirteenth and fourteenth amendments would have a more expansive reach than the courts later gave them.<sup>231</sup> In 1866 Republican abolitionists in Congress asserted that the nation had to supply security for person, property, and society if the states did not. Sometime after the adoption of the amendments, however, some of the original framers themselves became unsure and oscillated between a broader view that the amendments reached both public and private conduct and a narrower position that the enactments encompassed only positive state acts.<sup>232</sup>

Historian Robert Kaczorowski studied the operation of federal courts in the South between 1866 and 1876.<sup>233</sup> He found that in those years many federal judges, particularly those exercising primary jurisdiction over criminal cases alleging conspiracies to deprive citizens of their civil rights, accepted a constitutional theory based on national citizenship rights that could be enforced against private parties.<sup>234</sup> The federal judiciary's willingness to take jurisdiction over cases that involved crimes committed by private parties, however, held sway for only a short time. Supreme Court decisions in 1873 and after, such as *Bylew v. United States*,<sup>235</sup> the *Slaughter-House Cases*,<sup>236</sup> and *United States v. Cruikshank*,<sup>237</sup> soon made that an untenable position.<sup>238</sup>

230. H. HYMAN & W. WIECEK, *supra* note 224.

231. *Id.* at 403-72.

232. See *id.* Professors Hyman and Wiecek convey the "nineteenth-century sense of 'civil rights'" through a pyramidal diagram. *Id.* at 395-96. By 1865 the substantive content of the rights that distinguished slaves from the now freed people was well-known "at least in terms of the responses needed to the limitations on freedmen the southern states were imposing in the Black Codes." *Id.* The very first stratum of rights after slavery, denominated "civil rights" in this diagram, included the rights of contract, property, marital/parental rights, juridical (party and witness) rights, locomotion, and state protection from private violence. *Id.* at 396. The sources of these civil rights are shown as the fourteenth amendment, section 1, with its guarantees of citizenship, privileges and immunities, due process, and equal protection; together with the state emancipation amendments; the thirteenth amendment; and the 1866 civil rights act. *Id.* Political rights and social rights occupied higher, less basic, and more controversial, strata in this pyramid. *Id.* at 397.

233. R.J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985).

234. *Id.* at 8-9.

235. 80 U.S. (13 Wall.) 581 (1872). In *Bylew* the Supreme Court decided that the federal district court did not have jurisdiction over a murder case in which a white man killed a black woman, all the witnesses were black, and the state (Kentucky) did not permit black witnesses to testify against white defendants. *Id.* at 595. It arrived at this result through a technical interpretation of the language granting jurisdiction over causes "affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the 1st section of [the 1866 Civil Rights Act]." *Id.* at 591.

236. 83 U.S. (16 Wall.) 36 (1873). *Slaughter-House* drastically narrowed the scope of the fourteenth amendment privileges and immunities clause to only a few selected rights of national citizenship. *Id.* at 79-80. According to Robert Kaczorowski, this case "undermined the constitutional theory that permitted federal legal officers to interpret their powers so broadly," and many judges thereafter limited their jurisdiction to cases involving state action. R.J. KACZOROWSKI, *supra* note 233, at 192.

237. 92 U.S. 542 (1876). In *Cruikshank* the Court dismissed criminal indictments that grew out of a mini-civil war in Louisiana during which a Ku Klux Klan army representing a rival governor stormed the parish courthouse occupied by armed Republicans on behalf of their candidate. *Id.* at 559. The indictment was held to be faulty for attempting to punish the defendants for infringing rights that the national government could not directly protect, and because it failed to charge that

I do not offer the conclusions of professional historians in order to reopen the "state action" debate or to promote a counter-history<sup>239</sup> that will prove something about the intent of the framers and therefore about the scope of the due process clause today. Rather, this scholarship demonstrates the inadequacy of the Chief Justice's major premise, which relies on the categorical and historically suspect statement that the framers never intended there to be any such right to state protection against private violence.<sup>240</sup>

Closer to our time, courts have recognized civil rights claims against state agents who did not protect citizens from private actors, such as a deputy sheriff who failed to protect Jehovah's Witnesses from mob violence,<sup>241</sup> officials who did not protect victims from racial violence,<sup>242</sup> police officers who did not protect a white middle-class family from private harassers who were related to a member of the police force,<sup>243</sup> and an entire police department that failed to protect a woman and her son from the violence of her estranged husband.<sup>244</sup> Concededly, these cases all allege intentional discrimination in violation of the equal protection rather than the due process clause.<sup>245</sup> Reckless or deliberately indifferent conduct, however, can be viewed as equivalent to the kind of intentional behavior that was alleged in these equal protection cases.<sup>246</sup> I will argue

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the offenses had been committed with the intent to deprive victims of their rights because of their race, color, or previous condition of servitude. *Id.* at 555; see R.J. KACZOROWSKI, *supra* note 233, at 183.

238. See R.J. KACZOROWSKI, *supra* note 233, at 138-92 (discusses the Supreme Court's dismantling of effective civil rights enforcement). The immediate result of the retreat from enforcement was renewed white violence in 1874. *Id.* at 188-90.

239. See Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 783 (1987) (analysis of what the author views as an equally plausible "counter-history" to the official version used by the Court in determining immunity issues in section 1983 litigation).

240. The Chief Justice did not even attempt to look at historical sources. Instead, he simply cited recent cases that are themselves equally innocent of professional history, but that reflect a concern of his—the need to *limit* the number of section 1983 lawsuits. See *DeShaney*, 109 S. Ct. at 1003 (citing *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring in the result)).

241. *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943).

242. *Huey v. Barloga*, 277 F. Supp. 864, 870 (N.D. Ill. 1967) (relying on legislative history of the Civil Rights Act which reveals that Congress was concerned with the inaction of state and local governments in the face of whippings, robbery, and murder to find cause of action on behalf of black man beaten by racists). But see *Smith v. Ross*, 482 F.2d 33, 35-36 (6th Cir. 1973) (per curiam) (law enforcement officer not liable, because he acted in good faith in attempting to persuade interracial band to leave town; he felt unable to protect them from racial violence of townspeople and his actions played no role in their ultimate decision to leave).

243. *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972).

244. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

245. The *DeShaney* Court specifically reserved any equal protection claim. *DeShaney*, 109 S. Ct. at 1004 n.3.

246. This may be particularly true when the recklessness involves an omission to act to protect a child. In the Texas Penal Code, for example, a person commits a felony of the first (intentionally or knowingly) or third (recklessly) degree if she "intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger . . . serious bodily injury; serious physical or mental deficiency or impairment; disfigurement or deformity." TEX. PENAL CODE ANN. § 22.04 (Vernon 1987). This offense concerning children is one of the few under the Texas code that criminalizes an omission to act and also criminalizes some form of negligence. Other provisions generally require at least a reckless culpable mental state. *Id.* § 22.04 *Practice Commentary*.

later, moreover, that there is an element of equal protection in the due process claims of child-victims of family violence who, unique among other assaulted citizens, are consigned by law to the mercies of child welfare agencies.<sup>247</sup>

## 2. The Chief Justice's Minor Premise: "Governmental Aid" in the Form of Protective Services is an Affirmative Guarantee That the State is Not Obligated to Provide

The Chief Justice's secondary premise is that generally there is no constitutionally protected affirmative right to governmental aid, even when such assistance may be necessary to secure life, liberty, or property interests.<sup>248</sup> For this proposition, he relied on *Harris v. McRae*,<sup>249</sup> in which the Court upheld the Hyde Amendment's<sup>250</sup> restriction on the use of federal Medicaid funds for any abortion except those meeting certain narrow qualifications.<sup>251</sup> Even though freedom to make the abortion decision clearly was protected from government interference by the due process clause,<sup>252</sup> the *Harris* Court found that this did not entitle indigent women to federal subsidies in order to take advantage of that freedom.<sup>253</sup> Congress could decide freely which medical services it wished to fund without violating the due process clause.<sup>254</sup> The government could make that decision because it was not responsible for creating the poverty that burdened a woman's constitutionally protected reproductive choice. The government's refusal to fund abortions left a poor woman in no worse a position than she would have occupied if Congress had chosen not to subsidize health care costs at all.<sup>255</sup> The Court insisted that any other ruling would impose an affirmative funding obligation on Congress, which would constitute a drastic change in our understanding of the Constitution.<sup>256</sup> The *Harris* majority in effect treated

247. See *infra* notes 391-402 and accompanying text.

248. *DeShaney*, 109 S. Ct. at 1003 (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (federal government has no obligation to fund abortions or other medical services under due process clause of fifth amendment); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (due process clause of fourteenth amendment does not confer obligation to provide adequate housing)).

249. 448 U.S. 297 (1980).

250. Pub. L. No. 95-205, § 101, 91 Stat. 1460 (Dec. 9, 1977).

251. *Harris*, 448 U.S. at 302-03.

252. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Although this liberty interest remains in place for the time being, in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), a divided court called into question the framework established by *Roe* and made it clear that many significant state regulations of abortion that once might have been considered invalid as burdening the basic right will now pass muster. In *Webster* this included a Missouri prohibition on the use of any public facilities or personnel for abortions, and a requirement of viability testing at 20 weeks. *Id.* at 3047.

253. *Harris*, 448 U.S. at 317-18.

254. *Id.* at 318.

255. *Id.* at 317.

256. *Id.* at 317-18. Constitutional scholar Laurence Tribe has argued in criticism of *Harris* that even though rights in our system tend to be individual, alienable, and negative, sometimes the Constitution gives rise to affirmative governmental duties to facilitate the exercise of certain kinds of rights at public expense. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331-33 (1985). Although the government is ordinarily free to leave the provision of most goods and services to the vagaries of the private market, he argues that abortion funding is not one of them. *Id.* at 338. Because the abortion right is relational, that is, it implicates a woman's subordinate relationship in this society and her ability to exercise basic power over her own reproductive role and life, and inalienable, the state may

the specific political, religious, and moral context of abortion funding as irrelevant to the constitutional analysis.<sup>257</sup>

By similarly portraying protective services for children as part of a larger class of governmental aid, the Court situated *DeShaney* in a line of cases that considered and rejected potentially broad claims of social justice for the poor.<sup>258</sup> In *San Antonio v. Rodriguez*,<sup>259</sup> for example, the Court upheld Texas' method of financing public schools even though the system created gross disparities in levels of education based upon wealth.<sup>260</sup> The *DeShaney* Court's statement that there is no general right to government aid reflects the *Rodriguez* doctrine and is part of a dispute over what has been defined as welfare rights.<sup>261</sup> The political context is the war on poverty in the 1960s and the federal funding retrenchment that followed by the early 1980s,<sup>262</sup> and the general legal issue is whether a

not withhold funds from a woman who medically needs an abortion but is too poor to purchase it in the private market place. *Id.* at 335-36. Tribe contends that government may not use its legal rules to exploit the special vulnerability of women—their capacity for pregnancy—in a way that reinforces their subservience to men and their lack of fully autonomous and equal roles in social and political life. *Id.* at 338.

The issue of parental child abuse can also be said to be relational. It implicates the child's legally enforced subordinate relationship to her parents in this society.

257. See *Harris*, 448 U.S. at 316. This seems like an exercise in wishful thinking. Abortion is an extremely political issue, with enormous religious and moral significance. More recently, we have witnessed the Court squabbling about whether they can insulate themselves from the politics of abortion, and whether the view that life begins at conception is religious in nature. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).

258. See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *James v. Valtierra*, 402 U.S. 137 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

259. 411 U.S. 1 (1973).

260. *Id.* at 54-55.

261. See Michelman, *The Supreme Court 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (although equal protection may not require an attack on economic inequality per se, it may mandate intervention to protect against certain hazards endemic in an unequal society). In an article written before the decision in *Rodriguez*, Professor Michelman elaborated his theory of social justice, minimum protection against economic hazard, and argued that certain kinds of "goods" cannot be distributed solely as the market dictates, and that decisions of the Supreme Court on voting and poll tax, or a criminal defendant's right to representation or to a trial transcript should be understood in that context. *Id.* at 24-26.

For an example of a conservative attack on later developments in Professor Michelman's "welfare rights" constitutional thinking, see Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (reply to Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659). More recently, Professor Peter Edelman has considered anew the more radical proposition of the existence of a constitutional right to some form of minimum income. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). Professor Edelman acknowledged that the present Supreme Court has essentially rejected the views he expressed. *Id.* at 3.

The contextual argument developed in Part III of this Article does not directly address economic power in our society. This does not mean, however, that I reject its significance for constitutional law. Inequalities of wealth, after all, also form the social context of our legal system. There is an association between poverty and reported child abuse. See AAPC TRENDS, *supra* note 170, at 24. There is also an association between poverty and the placement of neglected and abused children in foster care. Garrison, *supra* note 69, at 1752.

262. See AAPC TRENDS, *supra* note 170, at 40 (discussing the decline in federal funding in the early 1980s and its impact on state child welfare agencies); Besharov, *supra* note 66, at 169-71 (growth and retrenchment of federal funding for child abuse programs). See generally R. FISHER, LET THE PEOPLE DECIDE: NEIGHBORHOOD ORGANIZING IN AMERICA 121-52 (1984) (discussion of increased corporate conservatism in response to economic difficulties of the 1970s); F.F. PIVEN &

minimum of some good or service is ever required by the Constitution.<sup>263</sup> Far from being the product of immutable constitutional principle, the position taken in *DeShaney* (and perhaps in *Rodriguez* before it) is the result of the changes that produced a more conservative Court after the Warren years.<sup>264</sup> Because it placed child protection in the general class of governmental aid, the *DeShaney* Court could use law that is well settled, although not universally accepted. This in turn made little Joshua's case easier to dismiss out of hand.

### 3. The Chief Justice's Conclusion: The State's Failure to Protect an Individual [Child] Against Private Violence [by his Father] Does Not Violate the Due Process Clause

In *DeShaney* Chief Justice Rehnquist concluded that because the due process clause does not require the state to provide its citizens with government aid in the form of protective services, it therefore cannot be held liable under that clause for any injury that could have been averted had it chosen to provide them: "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."<sup>265</sup>

Even granting the truth of the original premises, however, as does Justice Brennan's dissent,<sup>266</sup> the conclusion does not follow necessarily. If the majority has begun its argument from the wrong starting point, and if child abuse statutes do not really belong in the general category of governmental aid or in the even narrower class of protective services,<sup>267</sup> the syllogism fails.<sup>268</sup> Justice Brennan conceded that the due process clause as construed by the Court's prior cases creates no general right to basic governmental services.<sup>269</sup> He also noted that no participant in the *DeShaney* case asked the Court to announce as a general rule

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R.A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971) (analysis of the War on Poverty of the 1960s as another example of expansion of welfare programs in order better to control the poor during times of increased protest and disorder); F.F. PIVEN & R.A. CLOWARD, *THE NEW CLASS WAR: REAGAN'S ATTACK ON THE WELFARE STATE AND ITS CONSEQUENCES* (1982) (political analysis of the war on poverty and the attack on welfare programs mounted by the Reagan administration in 1980).

263. Professor Tribe describes the Burger Court's reshaping of Warren Court decisions which suggested that equal access to justice was required, into a philosophy of *minimal* access. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-51 to 16-59 (2d ed. 1988). According to Professor Tribe, the change was marked by an increased Supreme Court reluctance to tell the states how to spend their scarce resources, and by more willingness to tolerate pejorative characterizations of the poor. *Id.* § 16-58.

264. *Id.*

265. *DeShaney*, 109 S. Ct. at 1004.

266. *Id.* at 1007-08 (Brennan, J., dissenting).

267. The class of protective services presumably includes the law enforcement, fire, and emergency medical services at issue in many of the earlier special relationship cases. See cases listed in *Archie v. City of Racine*, 847 F.2d 1211, 1220-23 & n.10 (7th Cir. 1988) (en banc) (cited in *DeShaney*, 109 S. Ct. at 1002).

268. Justice Brennan considered the majority's starting premises irrelevant to the inquiry. They served no function except perhaps to preordain a certain result. *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting).

269. *Id.* at 1007-08 (Brennan, J., dissenting).

that the Constitution safeguards positive as well as negative liberties.<sup>270</sup> Neither proposition, however, seemed to Justice Brennan to be the relevant starting point.

Justice Brennan would not begin by focusing on the state's *inaction*, seen in relation to the state's unquestioned right to refrain from offering any protective services in the first place.<sup>271</sup> Rather, his dissent emphasized the *action* that the state *had* taken with respect to Joshua and children like him, a method he believed was followed in both *Estelle* and *Youngberg*.<sup>272</sup> As a result, Justice Brennan's opinion offered a different and less "stingy" reading of those cases than that advanced by the *DeShaney* majority.<sup>273</sup> The relevant state *action*, he found, was not simply the restraint of liberty imposed on the prisoner or on the institutionalized mentally retarded man, but that the state had cut off private sources of aid, and then refused to render help itself.<sup>274</sup>

Justice Brennan thus found it highly relevant to his constitutional analysis that Wisconsin had established a child welfare system that channeled all reports of abuse to a single agency.<sup>275</sup> State law required private citizens and other governmental entities alike to depend on the specialized child protective services. Indeed, that is exactly what happened in Joshua DeShaney's case.<sup>276</sup> The state cut Joshua off from any other public or private assistance, "effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him," and thereby may have endangered the boy further.<sup>277</sup> Having actively put the child in an isolated position and knowing of the specific danger that he faced, the state should not then escape all constitutional accountability.<sup>278</sup> Justice Brennan concluded that this kind of *inaction* was "every bit as abusive of power as action. . . . [O]ppression can result when a State undertakes a vital duty and then ignores it."<sup>279</sup> The Chief Justice's deduction, therefore, was an answer to the wrong question. Instead, the appropriate conclusion was that the due process clause prohibits a state from displacing private sources of protection and then turning its back at a crucial juncture on the harm that it has promised to prevent.<sup>280</sup>

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270. *Id.* at 1008 (Brennan, J., dissenting).

271. *Id.* (Brennan, J., dissenting).

272. *Id.* at 1008-09 (Brennan, J., dissenting).

273. *Id.* at 1009 (Brennan, J., dissenting).

274. *Id.* (Brennan, J., dissenting).

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

276. *Id.* (Brennan, J., dissenting).

277. *Id.* at 1011 (Brennan, J., dissenting).

278. *Id.* (Brennan, J., dissenting). In the posture of this case, dismissed on a motion for summary judgment, it was impossible to determine the cause of the state's default.

279. *Id.* at 1012 (Brennan, J., dissenting). My colleague Irene Rosenberg points out that one of the traditionally limited situations that create *criminal* liability for omissions involves a defendant who "has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid." *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962).

280. *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting). The Court had heard an argument that the state's *actions* precluded help from other sources. Amicus Massachusetts Committee for Children and Youth contended that the structure of child abuse statutes meant that child welfare laws "preempted" any other form of protection for children, who are vulnerable, isolated, and unable to protect themselves. Massachusetts Committee Brief, *supra* note 170, at 35.

### C. DeShaney's Embrace of An Abstraction

The *DeShaney* majority claimed that despite the natural sympathy they felt as human beings, the constitutional text and formal logic compelled them to reach a harsh conclusion in their judicial capacity.<sup>281</sup> We have seen, however, that neither text, history, nor logic constrained them.<sup>282</sup> In a separate and very emotional dissent, Justice Blackmun criticized the Court for pretending to be a dispassionate oracle of the law, unmoved by natural sympathy, thus "re-treat[ing] into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts."<sup>283</sup> Justice Blackmun likened the *DeShaney* majority and its assumed helplessness before the law to the antebellum judges studied in Robert Cover's *Justice Accused*,<sup>284</sup> who denied relief to fugitive slaves on the grounds that existing legal doctrine compelled their decisions.<sup>285</sup>

The *DeShaney* Court was not helpless before the law. The majority chose to ignore the child protection context of Joshua's claim; it willfully embraced an abstract formal argument about "governmental services" instead. The majority opinion is filled with talk about "individual's" rights in society,<sup>286</sup> individuals who live in "free society" as free men able to protect themselves from the violence of "private actors" unless the state restrains their "liberty" and prevents them from helping themselves.<sup>287</sup> The "individual" in question, however, disappeared from view in this opinion. Four-year-old Joshua DeShaney, who was entrusted to his father's custody by a state court; who was isolated in his father's home;<sup>288</sup> who had no physical ability to defend himself from his father's violence; whose father had the legal right to inflict physical discipline on him as a parental prerogative enforced by the state;<sup>289</sup> who was in danger; who was supposed to be protected by an elaborate state legislative scheme that purported to

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

282. See *supra* notes 216-80 and accompanying text; see also, Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 19 GEO. WASH. L. REV. 1513-32 (1989).

283. *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting).

284. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

285. *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting). The expression "helplessness before the law" is from Cover's discussion of judicial rhetoric in slave and fugitive slave cases. This stance provided justification for judges who took a position contrary to their own morality, but in adherence to the law. R. COVER, *supra* note 284, at 121. Similarly, this position may make it easier for the majority Justices of *DeShaney* to discount its compelling facts.

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

287. *Id.* at 1005-06.

288. The child protective agency implicitly acknowledged the importance of isolation in abuse cases. One of the conditions imposed by the Wisconsin agency when it returned Joshua to his father's custody was that he be enrolled in a Head Start program that would take him out of the complete isolation a preschooler experiences and provide some kind of public oversight. Massachusetts Committee Brief, *supra* note 170, at 25. The father never fulfilled this part of the agreement, and the state did nothing about it, even after a Head Start investigator visited the DeShaney home to find out where the child was and reported to the agency that he found the four-year-old left all alone. *Id.* at 24-25.

289. See *infra* notes 363-67. Wisconsin abolished parent/child tort immunity in *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Parental conduct that is "reasonable discipline" of a child is privileged and cannot be criminally prosecuted. *State v. Teynor*, 141 Wis. 2d 187, 200, 414 N.W.2d 76, 80 (Wis. Ct. App. 1987).

concentrate all aid to abused children within one agency; and who did not even get the kind of judicial protection that someone assaulted by an actor other than his parent would get,<sup>290</sup> is virtually absent from the majority's discussion.

The majority's use of language that is redolent of classical liberalism and the laissez-faire ethic<sup>291</sup> is truly a "malversation of terminology"<sup>292</sup> in the *DeShaney* context. The Court has misappropriated words and images in the service of something other than the just resolution of this case. Even laissez-faire individualism ideologues, however, have long recognized that dependent children (and, at one time, women) do not fit the model of free agents acting in a free market or free society.<sup>293</sup> Indeed, the Supreme Court has justified modify-

290. See *infra* notes 358-62 and accompanying text.

291. The classical expression of economic laissez-faire individualism may be found in A. SMITH, *AN INQUIRY INTO THE NATURE AND COURSES OF THE WEALTH OF NATIONS* (1776); a more contemporary restatement of these principles appears in M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962). In general the theory posits a free and autonomous market. Individuals should be equal in their relationship to the state. "The domination and subordination that accompany economic and social inequality in civil society," however, are deemed to be natural, private matters only, which are beyond the proper scope of state action. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502 & n.19 (1983); see also C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263-77 (1962) (on the continued use in modern liberal-democratic theory of assumptions of "possessive individualism" derived from seventeenth-century political foundations even though structure of contemporary market society no longer provides necessary conditions for deducing a valid theory of political obligation from those assumptions); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551, 561-62 (1986) (on the individualist liberalism of Locke and Madison).

292. This term was suggested by Professor John Snyder of the University of Houston/Clear Lake.

293. Protective labor legislation for children and women was justified on the basis that they were weaker, dependent, and quite different from men, who needed no such protection from the marketplace. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding, during the heyday of *Lochner*, a 10-hour limit for women's hours because absolute liberty of contract may be limited for women, who were thought weaker and more dependent than men). For a discussion of *Muller*, see Olsen, *supra* note 291, at 1556-57. The Court invalidated a federal attempt to limit children's hours through regulating the sale of the products of child labor on different grounds—the extent of the commerce clause. The Court seems to have assumed, however, that state regulation would have been fine. *Hammer v. Dagenhart* (The Child Labor Case), 247 U.S. 251, 276 (1918).

In England, the home of Adam Smith, the campaign for the regulation of labor came earlier in the nineteenth century, in the 1830s and 1840s. The parliamentary debates over the regulation first of children's, and then of women's, hours in the factories were based on their exceptionality in a free market society. There is evidence, however, that the working-class shorttime committees that organized outside of Parliament intended to accomplish the effective regulation of *men's* hours, too, by taking the children and women who made up most of the workforce out of the factories after 10 hours. Oren, "Woman's Place, in the Factory or in the Home: Women and the English Factory Reform Movement 1802-1855" (work in progress); see O.J. DUNLOP & R.D. DENMAN, *ENGLISH APPRENTICESHIP AND CHILD LABOUR: A HISTORY* 294-95 (1912) (English workingmen manipulated public sentiment on behalf of children for their own ends, and when that did not change their own conditions, hid behind the women's petticoats in the movement on behalf of female workers); M.W. THOMAS, *THE EARLY FACTORY LEGISLATION: A STUDY IN LEGISLATIVE AND ADMINISTRATIVE EVOLUTION* 37 (1948) (given the predominance of laissez-faire economic theories, the factory operatives knew it was futile to talk about regulating their own hours and therefore talked about children and young persons).

On rising in Parliament to move the second reading of his bill to regulate the labor of children in factories, Sadler emphasized that children were "not . . . free agents." Hansard's Parliamentary Debates, March 16, 1832, s. 3, v. 11, 340-46. David Brook, a clothdresser and witness before the Sadler Committee, however, admitted that he had read Mr. Marshall's *The System of Social Economy*, which taught that wages would go up proportionately if children's hours were limited, and that, although his first hopes were to benefit the children, he also hoped that the legislation would



ing procedural protections that otherwise would be due adults under the due process clause because of the inherent difference between a free adult and a child who is always legally in someone's custody.<sup>294</sup> The use of abstractions about "individuals," "free society," and "private actors," however, permitted the Court to obscure the fact that this case is not about individuals and governmental services in general, but is about the state's failure to protect a *child* from abuse by his father, after the state had good reason to know of extreme danger to the little boy and had committed itself to help him. The words sound good because they reverberate with all the positive associations of freedom that we have with such terms<sup>295</sup> and with the drawing of a line between private and public spheres<sup>296</sup> that is bounded by certain negative constitutional liberties that prevent the state from breaking into our homes or beating us up.

The Court's use of the language of individualism and its embrace of an abstract rather than a contextual mode of decisionmaking, moreover, can be seen as an example of the differences between "male" and "female" thinking.<sup>297</sup> In 1982 Carol Gilligan wrote *In a Different Voice*,<sup>298</sup> a pathbreaking critique of Lawrence Kohlberg's widely-accepted model of moral development.<sup>299</sup> She found that a hierarchy of moral decisionmaking that progressed from a more specific, relational, and contextual choice to a higher justice governed by abstract principle failed to account for moral development in girls and women.

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benefit himself. Brook testified that adult men, too, were not really "free agents" and might require legislation to protect their labor. REPORT FROM THE SELECT COMMITTEE ON THE "BILL TO REGULATE THE LABOUR OF THE CHILDREN IN THE MILLS AND FACTORIES OF THE UNITED KINGDOM," WITH THE MINUTES OF EVIDENCE, APPENDIX, AND INDEX, SESSION 6, DECEMBER 1831-16 AUGUST 1832, 1831-32 XV 59 (1968) ("Sadler Committee" report) (Irish University Press Series of British Parliamentary Papers, Industrial Revolution, Children's Employment 2).

294. *Schall v. Martin*, 467 U.S. 253, 265 (1984) (authorizing preventive detention of juveniles because, unlike adults, they are always in some kind of custody).

295. See, e.g., Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 16-25 (1988) (discussing the power of "naming").

296. For the nineteenth-century separation of the public from the private sphere, see M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 3-30 (1985); Olsen, *supra* note 291, at 1501-07.

In a speech on pornography and the first amendment, Catherine MacKinnon criticized what she identifies as the liberal view of negative liberties, that is, that the Constitution only begins where law or the public order begins, and prohibits state action only. She argues that women, however, are "oppressed socially, prior to law, without express state acts, often in intimate contexts. For women this structure means that those domains in which women are distinctively subordinated are assumed by the Constitution to be the domain of freedom." C. MACKINNON, *supra* note 222, at 207. In other words, "freedom" depends on where you stand.

297. To assert that there are differences between male and female thinking is not to say that these differences are biologically determined, or that all men share one mode of thought and all women the other. See C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY OF WOMEN'S DEVELOPMENT* 2 (1982); Sherry, *supra* note 291, at 579 (1986); see also Gilligan & Attanucci, *Two Moral Orientations*, in *MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION* 82-83 (1988) (both men and women in study reflected concerns with both justice and care in thinking about moral dilemmas, although there was a significant association by gender).

298. C. GILLIGAN, *supra* note 297. Carol Gilligan is a Professor of Education at the Harvard Graduate School of Education where she is associated with the Center for the Study of Gender, Education, and Human Development.

299. See L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981); Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* 347-480 (1969).

They spoke in a different voice in which there were fewer absolute and abstract answers because more depended on the context.<sup>300</sup> This insight has influenced scholars in many fields, including law, and is useful here.<sup>301</sup> The answers to *DeShaney's* thorny substantive due process questions depend on the context of family violence and state regulation of the family, and on lessons about the political and social significance of child abuse gleaned from the battered woman's movement and historians who write about women, children, and the family.<sup>302</sup>

Rather than illuminating the context of Joshua's claim, the linguistic malversations in *DeShaney* obscure the significance of child protection in the modern state. They create a false equivalency between people, predicaments, and liberties that are not truly alike. Catherine MacKinnon has criticized just such a fallacy in *Feminism Unmodified*.<sup>303</sup> She argues that liberals who speak of sex discrimination only in terms of removing differences commit this error.<sup>304</sup> The argument is that men and women are both persons, and therefore all that is necessary is to ensure that the law treats all persons alike. MacKinnon argues, however, that women are not similarly situated with men in our society. Instead they live in a *relation* of social, economic, and political subordination to men.

300. C. GILLIGAN, *supra* note 297, at 18-23, 38. The newest collection of essays published by the Center for the Study of Gender, Education, and Human Development reports three studies undertaken in response to those critics of Gilligan whose recent research on whether men and women score differently in Kohlberg's scale of justice reasoning yielded contradictory findings. Gilligan & Attanucci, *supra* note 297, at 73. Professor Gilligan and her associate Attanucci observed that the critics have confused moral stages within the Kohlberg justice framework with moral orientation, the distinction between "justice" and "care" perspectives. *Id.* Focusing on moral orientation in evidence drawn from people's discussions of actual moral conflicts, they reconfirmed that there is a statistically significant difference between the sexes in responding to moral dilemmas using either an abstract "justice" or a relational and contextual "care" ethic. *Id.* at 73-86.

301. See, e.g., Bender, *supra* note 295, at 18-19; Sherry, *supra* note 291, at 578-91. For other disciplines, see BELENSKY, CLINCHY, GOLDBERGER & TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* 7-9 (1986).

302. Contextual analysis should not be confused with insisting on a deceptive level of particularity and detail, as Justice Scalia did in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989). Justice Scalia would only recognize as fundamental those liberties that are deeply rooted in history and tradition, in the very specific form that is asserted. *Id.* at 2342. So, for example, since history and tradition considered the "unitary family," typically the marital family, sacrosanct, a liberty interest arose for that kind of relationship only, and did not extend to a biological father who stepped forward to claim paternity and challenge a marital family. *Id.* at 2342 n.3. The *Michael H.* opinion actually operates on a very high level of abstraction: it is based on a universal abstraction that due process liberties may only be defined by canvassing views that have prevailed throughout Anglo-American history. As dissenting Justice Brennan noted, Justice Scalia garnered only two votes (his own and Chief Justice Rehnquist's) for the full scope of this position. *Id.* at 2349 (Brennan, J., dissenting); see *id.* at 2344 n.6. There is no context in Justice Scalia's insistence on particularity, only a bald abstract preference for majority beliefs.

303. C. MACKINNON, *supra* note 222, at 32-45; see also *id.* at 164-65 (liberal jurisprudence, which accepts "neutrality" as a principle of constitutional adjudication, mistakenly "equates substantive powerlessness with substantive power and calls treating these the same 'equality'").

304. *Id.* at 34-39. Catherine MacKinnon also argues that the liberal "sameness" approach is only one face of a general fallacy of "differences" theories of sex inequality. *Id.* at 34. MacKinnon admits an affection for Carol Gilligan's "in a different voice" version of special benefits analysis. *Id.* at 39. She rejects, however, any valuation of women's differences that does not recognize the raw realities of power that produce such distinctiveness. She says flatly that women think in relational terms today only "because our existence is defined in relation to men." *Id.* This Article, however, draws on both Gilligan and MacKinnon. The context of young Joshua's constitutional claim to protection is one of power in the family, as sanctioned or overridden by the state. See *infra* notes 378-80 & 403-16.

Even-handed treatment, therefore, does nothing to address the real problem—oppression and subordination.<sup>305</sup> The language used facilitates this and obscures the reality of the differences.

This insight also suggests what is wrong with the *DeShaney* opinion and inspires an alternative constitutional analysis. Children in our society are not similarly situated with respect to other potential claimants of so-called governmental aid or even of protective services. They are subject to family violence, which contemporary scholars and commentators believe reflects patriarchal family norms that traditionally have been enforced by law and to some extent still are.<sup>306</sup> Resolving little Joshua's claim on a general basis of governmental services, therefore, conceals what is at stake and, as a result, deforms the constitutional analysis of liberty and due process.

### III. DUE PROCESS IN CONTEXT

#### A. *The State and the Family: Domestic Violence and Child Protection*

This Article is not an attempt to expose a counter-history of the fourteenth amendment,<sup>307</sup> to read a counter-text into it, or to develop an over-arching counter-methodology of substantive due process, although respectable arguments may be made for all those efforts. Rather, it explains why Joshua *DeShaney's* claim unquestionably implicates values that are of constitutional dimension. This Article, however, does not seek to revive the tort-law doctrine of special relationships that was rejected by the *DeShaney* Court as an inadequate basis for resolving the question of constitutional duty.<sup>308</sup> The special rela-

305. *Id.* at 32-45. In her classic book on wifebeating, Del Martin provides another example of how false equivalencies work. She criticized a decision by San Jose Superior Court Judge Eugene Premo who ruled in 1975 that he could not enforce old California laws that specifically applied to "wife-beating" because the statutes denied equal protection to *men*, who were not the subject of any such special solicitude. D. MARTIN, *BATTERED WIVES* 100-01 (1983). Martin contended that this was an example of male bias within the criminal justice system because the judge refused to recognize that the law was created to correct an existing imbalance.

306. *See, e.g.*, D. GIL, *VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES* 10-11, 14 (1970) (use of violence against children is widespread and culturally sanctioned); E. PLECK, *supra* note 45, at 8-10; L. WALKER, *THE BATTERED WOMAN* 149 (1979); Olsen, *supra* note 291, at 1505-06 (state ratifies father's control of the children, and parental rights of physical discipline); *see also* P. CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 234, 517-18 n.13 (1987) (male domestic violence judicially unpunished under patriarchal law). For ongoing research on the possible interrelationships between child homicides and the status of women in a state, *see* K. STOUT, *CHILD HOMICIDES IN MISSOURI 3* (unpublished report prepared for the staff of the Missouri Division of Family Services) (on file with the *North Carolina Law Review*) [hereinafter *CHILD HOMICIDES*]. My thanks to colleague Karen Stout of the University of Houston Graduate School of Social Work for sharing her research results and her expertise in the study of domestic violence with me.

307. *See, e.g.*, Matasar, *supra* note 239, at 782-83 (history and counter-history of the fourteenth amendment).

308. *DeShaney*, 109 S. Ct. at 1006-07. The Court reiterated that "[t]he Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 1007 (citing, among others, *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981)). The sentiment that the Constitution should not become a "font of tort law," *Parratt*, 451 U.S. at 544, is understandable. It has, however, become a talismanic recitation whenever the Court wishes to limit § 1983 litigation. It reflects the Burger and Rehnquist Courts' desire to control a federal remedy that is *supplementary* to any common-law relief that might apply under state law, *see* *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled*

tionship theory developed in state courts to overcome common-law difficulties.<sup>309</sup> Insofar as it requires some knowledge on the part of protective services of danger to the child, the doctrine also is useful for making determinations of causation. Abuse of government power,<sup>310</sup> another way of stating the idea of constitutional duty, however, may be found best by placing Joshua DeShaney's claim back in the full child protection setting from which it was abstracted by the Court, including but not limited to the special relationships created by child welfare statutes.

It is striking that the brief submitted by amicus Massachusetts Committee for Children and Youth (MCCY) alone began with a discussion of the pattern of child abuse and the nature of the child protection system, rather than with general constitutional theory of the fourteenth amendment.<sup>311</sup> The MCCY explained its interest as a nonprofit organization<sup>312</sup> that for thirty years has

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in part, *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), and that they perceive to be flooding the federal courts with frivolous litigation, see, e.g., *Parratt*, 451 U.S. at 554 n.13 (Powell, J., concurring in the result). For an empirical evaluation of the flood fears, see Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987). See also Oren, *supra* note 42, at 987-90 (discussion of the Court's attempts to limit the remedy through official immunity doctrine).

In its eagerness to draw lines and shrink federal dockets, the Court, however, may overlook crucial distinctions. As Justice Blackmun pointed out in his dissent to *Davidson v. Cannon*, 474 U.S. 344 (1986), there is a vast difference between cases involving a "commonplace slip and fall," such as *Daniels v. Williams*, 474 U.S. 227 (1986), or "the loss of a \$23.50 hobby kit" such as in *Parratt v. Taylor*, 451 U.S. 527 (1981), and one involving the failure to prevent anticipated inmate violence resulting in injury. *Davidson*, 474 U.S. at 350 (Blackmun, J., dissenting). The challenge lies in determining the appropriate reach of the United States Constitution, not in invoking abstract principles that have the effect of truncating any contextual inquiry.

309. Historically Anglo-American law held government officials individually liable for their torts, unless they fell into a select category of immune "discretionary" officers. Oren, *supra* note 42, at 948-49. In order to be liable they had to owe a specific private duty to the individual harmed, rather than a duty merely to the public at large. *Id.* at 948 n.53. Because discretionary officials such as judges and legislators owed their duties to the state and not to individuals, they could not be liable. *Id.* Even low-level "ministerial" officials such as police officers, who were otherwise liable for their misconduct, were not accountable in tort for the exercise of duties, such as the duty to protect, which they owed to the public at large, rather than to a particular individual. *Id.*; see, e.g., *Mammo v. State*, 138 Ariz. 528, 531-32, 675 P.2d 1347, 1350-51 (Ariz. Ct. App. 1983) (child protection statute created private duty); *Turner v. District of Columbia*, 532 A.2d 662, 666-67 (D.C. App. 1987) (cannot sue the government for failure to provide services absent a special duty); *Florida First Nat'l Bank v. City of Jacksonville*, 310 So. 2d 19, 21 (Fla. App. 1975) (government employee liable in tort only if violates a private duty, not just a duty owed to public at large); *Coleman v. Cooper*, 89 N.C. App. 188, 196-97, 366 S.E.2d 2, 7-9 (1988) (violation of statutory duties to investigate, remove, and protect children can give rise to action for negligence against county and social worker).

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

311. Massachusetts Committee Brief, *supra* note 170, at 8-14; cf. Petitioners' Brief, *supra* note 3, at 11-15 (beginning with the special relationship cases, *Estelle*, *Martinez*, and *Youngberg*); ACLU Brief, *supra* note 198, at 9-14 (beginning with the right to personal security in *Youngberg*); Brief for Respondents at 11-14, *DeShaney* (No. 87-154) (beginning with argument that there is no general constitutional right to protection from private violence); National Association of Counties Brief, *supra* note 196, at 6-8 (beginning with assertion that there is no government duty to provide protective services in general); States Brief, *supra* note 196, at 6-11 (beginning with argument for quasi-judicial absolute immunity); National School Boards Association Brief, *supra* note 196, at 4-9 (beginning with argument that due process concerns abuse of government power and not negligence by state employees); Brief for the United States as Amicus Curiae Supporting Respondents at 8-19, *DeShaney* (No. 87-154) (beginning with argument that the Constitution is not a font of tort law and that the state did not affirmatively inflict the injury).

312. The MCCY is headquartered in Boston, which was also the home of the Massachusetts

worked on behalf of abused, neglected, and other vulnerable children.<sup>313</sup> The organization is headed by Dr. Eli Newberger, chief of the clinic at Boston's Children's Hospital, which is responsible for treatment of cases of abused and neglected children.<sup>314</sup> Board members come from the field of child welfare, and the organization has itself issued studies of child abuse prevention.<sup>315</sup> The Committee's motion to intervene in support of the plaintiffs rested on the broad implications of the Court's decision for *children*,<sup>316</sup> rather than on the generalized concerns about liability for inadequate governmental services that persuaded the National Association of Counties, for example, to intervene on behalf of the defendants.<sup>317</sup> Listening to the voice of the MCCY, therefore, can tell us much about the relevant context of the *DeShaney* case.

The MCCY explains how vulnerable children are to abuse.<sup>318</sup> The helplessness of the abused child is magnified by her isolation.<sup>319</sup> Even older children who are verbal are often intimidated by the abuser from alerting anyone to their plight, and toddlers like Joshua are in worse shape. They rarely have contact with anyone outside their family, unless their parents permit it;<sup>320</sup> they cannot protect themselves; and they cannot escape.<sup>321</sup> Eventually, children become conditioned to the abuse and accept it as their due.<sup>322</sup> In response to the problems of child abuse, every state, the District of Columbia, and all the United States territories have established child protection systems.<sup>323</sup> In all of these systems, child abuse reports trigger investigation by social workers and then intervention if necessary.<sup>324</sup> There is a great deal of uniformity, partially because federal law, beginning with the Child Abuse Prevention and Treatment Act of 1974,<sup>325</sup> required certain programs as a condition of federal aid.<sup>326</sup>

The MCCY told the Court that the Wisconsin child abuse reporting law

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Society for the Prevention of Cruelty to Children, the pioneer children's welfare society that has been studied by Linda Gordon. See L. GORDON, *supra* note 45, at 12.

313. Massachusetts Committee Brief, *supra* note 170, at iii.

314. *Id.* at 2.

315. *Id.* at 3.

316. *Id.* at iii.

317. National Association of Counties Brief, *supra* note 196, at 5, 8, 13-19.

318. Massachusetts Committee Brief, *supra* note 170, at 9.

319. *Id.* at 9-10; see also Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259, 1306 (1971) (vulnerability of preschool age children).

320. Joshua DeShaney shared this dangerous isolation. See *supra* note 288.

321. Massachusetts Committee Brief, *supra* note 170, at 10. Although experts now question whether child abuse occurs more frequently among very young children, see *supra* note 170, this point about their greater helplessness has been made by other observers. See Redden, *The Federal and State Response to the Problem of Child Maltreatment in America: A Survey of Reporting Statistics*, 2 NOVA L.J. 13, 23 & n.72 (1978). Abuse of very young children also may have more serious consequences. For example, between 1980 and 1982 children age one and two were the most frequent victims of child homicides in Missouri. CHILD HOMICIDES, *supra* note 306, at 10-11. This is also true nationally: 64% of child homicide victims were age one or two and only 20% of the victims were over age five. *Id.*

322. Massachusetts Committee Brief, *supra* note 170, at 11.

323. *Id.* at 11-12.

324. *Id.* at 12.

325. Pub. L. 93-247, 88 Stat. 5 (1974) (codified at 42 U.S.C. §§ 5105-5106 (1982 & Supp. V 1987)).

326. Besharov, *supra* note 66, at 157-59.

follows the pattern of the federal act.<sup>327</sup> It requires DSS to respond to reports of child abuse with an immediate investigation when there is reason to suspect that a child's health or safety is in immediate danger.<sup>328</sup> Investigation must begin within twenty-four hours of the report; if services are needed they must be provided.<sup>329</sup> The MCCY also asserted that it was both practical and feasible for a court to review social work practice in child abuse cases.<sup>330</sup> Standards in the field are sufficiently clear to allow anyone familiar with abusing families and their children to determine that the agency's actions grossly deviated from those principles.<sup>331</sup> Point by point, the MCCY brief went through the culpable defaults of the agency that was supposed to be protecting Joshua.<sup>332</sup> For example, the social worker failed to act<sup>333</sup> even though she saw a series of unexplained injuries to Joshua, a classic indicator of child abuse, and observed cigarette burns on him, another common sign that is easy to confirm with medical diagnosis.<sup>334</sup>

The MCCY explained how the structure of the state's child protective system interacts with the etiology of child abuse. The universally adopted model "preempt[s] society's response to the abusive family";<sup>335</sup> in law and in practice, the child protection agency becomes the sole source of services to the abused child and the family, displacing other institutions in society. Police, hospitals, other social service agencies, the child's school, and her church "are all inhibited from acting, because all believe that the social service agency is in charge."<sup>336</sup> The result can be serious for the abused child, because this preemption exaggerates the isolation that makes her so vulnerable, thereby *increasing* the danger to the child if agency intervention is carried out indifferently.<sup>337</sup> The MCCY believed that this may have happened to Joshua, citing the hospital's reliance on their report to the protective agency to satisfy fully their responsibilities to him.<sup>338</sup> Seriously flawed intervention also can increase the danger to the child

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327. Massachusetts Committee Brief, *supra* note 170, at 13.

328. *Id.*

329. *Id.* at 13-14.

330. *Id.* at 14.

331. *Id.*

332. *Id.* at 14-26.

333. The MCCY claimed that the social worker had several options but exercised none of them. She did not obtain medical confirmation of the injuries to use as evidence to remove Joshua from the home; she did not take the boy into emergency custody; nor did she take the case back to court. She did not even see to it that the contracted-for services were provided to the family, including counseling for the father and his girlfriend, more frequent visits from a social workers, and daily visits from a parent aide or protective day care. *Id.* at 25-26.

334. *Id.* at 20.

335. *Id.* at 27.

336. *Id.*

337. *Id.* at 27-28. Isolation is dangerous even for adult women who are victims of wifebeating. The abuser often systematically isolates the woman and forces her to cut ties with friends and family. Training on family violence for the Houston Police Department now includes "isolation" on lists of "Warning Signs" and of reasons "Why Women Stay." J. Meanix-Garcia, Family Violence (April 18, 1989) (unpublished materials distributed at Houston Police Department training seminar) (copy on file at North Carolina Law Review). My thanks to the Houston Police Department for permitting me to attend this excellent training seminar. Although isolation can become a problem for adult women, it is inherently characteristic of the condition of young children.

338. Massachusetts Committee Brief, *supra* note 170, at 28.

in other ways.<sup>339</sup> The MCCY noted that it is known in the profession that the initial intervention, without adequate follow-up and treatment, may simply "raise the abuser's sense of anxiety and intensify his feelings of inadequacy, the same feelings that fuel the urge to attack the child."<sup>340</sup>

The MCCY argued that the special relationship criteria should be limited to "those who are in genuine need of special protection, such as children and other incompetents who are known to be at serious risk of physical harm."<sup>341</sup> The relevant factors would include danger to the victim, helplessness of the victim, knowledge by the state of the threat to the victim, and the assumption of the role of protector by the state.<sup>342</sup>

Legal custody, on the other hand, should not be dispositive. The amicus brief properly pointed out that legal custody of a child is often a matter of "happenstance, with little relation to the risk to the child."<sup>343</sup> The state may assume legal custody of a child whom they place in relative safety with grandparents, or, it may not have legal custody of a child at great risk like Joshua, for whom they have nonetheless assumed life-and-death responsibility.<sup>344</sup> The MCCY's point is well taken. Common practices in the child welfare field make the assumption of custody an artificial line: the therapeutic and rehabilitative goal is to obtain voluntary cooperation of parents, including the abuser, and to hold in reserve the coercive power of the state whenever possible.<sup>345</sup> There are also practical reasons why this is the preferred course of action,<sup>346</sup> even when the child is in danger.

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339. *Id.* at 28-29.

340. *Id.* at 29-30. For another acknowledgement that ineffective intervention makes the child's situation worse, see *Texas Senate Committee Report*, *supra* note 169, at 16-17.

Despite the posture of this case, dismissal on a motion for summary judgment before complete factual development, Judge Posner inappropriately felt free to assume that "it is unlikely that [the social worker's] well intentioned but ineffectual intervention did Joshua any good at all, but it is most unlikely that it did him any harm. She merely failed to protect him from his bestial father." *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 302 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989). Similarly, the Supreme Court implicitly assumed that fact. *DeShaney*, 109 S. Ct. at 1007. The Court took the position that so long as Joshua was injured while in his father's legal custody, the state played no role in creating the danger to him or in making him more vulnerable to it. *Id.* at 1006.

341. Massachusetts Committee Brief, *supra* note 170, at 35.

342. *Id.* at 35.

343. *Id.* at 35-36. For examples of children whose situations illustrate this point, see *supra* text accompanying notes 155-57 (the Brown baby in the *Jensen* case) and *supra* notes 184-85 and accompanying text (Aleta Bailey).

344. Massachusetts Committee Brief, *supra* note 170, at 36.

345. See, e.g., Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 207-12 (1987). Douglas Besharov, former director of the National Center on Child Abuse and Neglect, noted that nationally, less than 20% of the cases of "substantiated" child abuse result in removal from the home to foster care. Instead, the general policy is to seek "home supervision," unless the parents refuse to cooperate. Besharov, *supra* note 66, at 160 & n.41. Conversely, foster care placements, which are overwhelmingly "voluntary" in form may not really be so voluntary. Parents may agree because of the threat of coercive action if they do not. See Garrison, *supra* note 69, at 1748 n.6; Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 237-242 (1988).

346. For example, there may be no place to put a child taken into agency custody because of a shortage of foster homes. See *Texas Senate Committee Report*, *supra* note 169, at 66, 79, 85. Officials may lack the investigatory legal tools that are needed to deal with noncooperation by the parents (for instance, to insist on physical examination of the child or entry into the home). See Hardin,

The MCCY argued that the nature of the state's intervention in Joshua's life, the risks that intervention caused, and the state's assumption of the role of protector of Joshua's welfare all required the state to bear fourteenth amendment responsibility for his life and bodily integrity.<sup>347</sup> The state intervened, took responsibility for Joshua, and preempted any other institution that might have protected him;<sup>348</sup> inept government action heightened the dangers facing the isolated child.<sup>349</sup> The MCCY concluded that the state's indifference to the welfare of a totally helpless child for whom it has assumed the role of protector is offensive to the fundamental values of our culture and violates the due process clause.<sup>350</sup> This due process argument, with its refined version of the special relationship test can be called, as the MCCY characterized it, "narrow,"<sup>351</sup> but it is also specific and contextual.

Instead of picturing the MCCY argument as a smaller slice of the special relationship pie, it is more useful to *extend* the exploration of context even further, in order to comprehend the constitutional values implicated. In a number of ways, for reasons arguably good and bad, the state has used its power to treat violence against children by their parents (or other family members) differently from other so-called "private" assaults on bodily integrity and safety. Historically, some child savers relied on criminal prosecution to remedy parental abuse and neglect of children.<sup>352</sup> Today, there is some renewed call for this approach.<sup>353</sup> By the end of the Progressive Era around 1920, however, the prevail-

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*Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 497 (1988).

347. Massachusetts Committee Brief, *supra* note 170, at 30.

348. *Id.* at 27.

349. *Id.* at 28.

350. *Id.* at 32.

351. *Id.* at 35 (limiting constitutional special relationships to those who are in genuine need of special protection, such as children and other incompetents who are known to be at serious risk of physical harm).

352. The children's anticruelty societies established in the 1870s used criminal as well as civil law to punish abusers and remove abused and neglected children from parental custody. E. PLECK, *supra* note 45, at 69. The two oldest of these organizations differed on their approach. The New York Society for the Prevention of Cruelty to Children (SPCC), which had closer ties to the Society for the Prevention of Cruelty to Animals (SPCA), favored prosecution of the parents. The Boston SPCC, however, which drew support from both the male SPCA organizers and women active in social reform, emphasized instead charity and casework help to children and families. L. GORDON, *supra* note 45, at 34. In the late nineteenth century there was also a law-and-order movement, headed by mostly Republican male lawyers, judges, district attorneys, and other law enforcement officials to punish wife beaters with the whipping post. It had limited legislative success. E. PLECK, *supra* note 45, at 109. Sometimes, child molestation was included in the program. One goal of this whipping-post campaign was to stifle even louder demands for cruel punishment of lawbreakers. The leadership was worried about vigilante action, which began in the 1870s by the Ku Klux Klan in the South and White Caps in the Midwest. The vigilantes mostly targeted independent-minded ex-slaves, but they also whipped child abusers, drunken men, adulterers, prostitutes, and mothers of illegitimate children. Some judges believed that if legal institutions did not take the lead, the vigilantes would prevail. *Id.* at 109-10. There was a strong racist and social control overtone to this movement. *Id.* at 109, 116.

353. See, e.g., Peters, Dinsmore & Toth, *Child Abuse Is a Criminal Offense*, in CHILDREN AND THE LAW 161 (1988). The authors, who are associated with the National Center for the Prosecution of Child Abuse, claim that "no conflict has caused greater dissension [sic] among professionals working on behalf of abused children than the use of criminal prosecution as a response to child abuse." *Id.* The National Center opposes both decriminalization and separate standards for intrafamilial sexual abuse: "there is absolutely no legal or moral justification for ignoring cases where the acts of



ing model clearly had become preventive rather than punitive.<sup>354</sup> Starting around 1900 specialized juvenile courts or other separate family law tribunals were established to handle certain categories of people rather than to punish criminal offenses: "The basic goal of these courts was to preserve the family, act in the best interests of the child, and offer a curative rather than punitive approach to family problems."<sup>355</sup> Beginning in 1910 courts of domestic relations

physical or sexual abuse are committed by a family member, while strangers are treated as criminals for committing similar acts." *Id.* Especially focusing on sexual abuse, the authors noted that a number of community interests are served by criminal prosecution: it establishes that the child is the innocent victim and the perpetrator is the one who did wrong; it "validates the victims' and society's sense of fairness" that the older person has no right to violate or exploit the weakness of children; it educates the community that child abuse is wrong and so may serve as a deterrent; the court has the power to order offenders into a treatment program to modify deviant sexual or other abusive behavior, thus reducing the likelihood of recidivism; criminal prosecution produces a criminal record which, unlike social service records, will follow the offender from state to state. *Id.* at 165. Although the Center recognizes that prosecution is not a panacea, they contend that it recognizes that the offenders are accountable for their misdeeds and that children are as entitled to protection under the law as adults. *Id.* For a discussion of the increased public cries for tougher abuse laws and of the substantial increase from 1980 to 1984 in the number of criminal cases involving abuse of children in Los Angeles County, see Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, the Right to Competent Counsel and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 302 (1987). Patton believes that criminal prosecution for child abuse (including sexual abuse) in Los Angeles County "is no longer a remote possibility, it is probable." *Id.* at 305.

Some of the recent campaigns for recriminalization uncannily resemble the SPCCs of the 1870s. For example, Justice for Children (JFC), a child advocacy citizens group established by a former assistant district attorney in Houston, Texas, is developing a court-watch policy in order to influence prosecutors and judges in favor of criminal prosecution of child abusers. A member of the group saw some parents who were sending their three-year-old into heavy traffic to solicit money and reported it to authorities. JFC continued to play an active role in ensuring that the parents were prosecuted under a provision of the Texas Penal Code that creates a misdemeanor for abandoning or endangering a child, and were asked by the criminal court judge whether or not the proposed plea bargain in the case was acceptable to the organization. JFC NEWSLETTER, July 1989. This intervention by JFC seems quite similar to the even more comprehensive role played by the SPCCs in initiating prosecutions. The most influential figures in child welfare work, however, continue to oppose calls for recriminalization of child abuse. See, e.g., Besharov, *supra* note 66, at 164-65.

It is not clear what to make of the *political* meaning of the voices speaking up for recriminalization of child abuse. Feminists have yet to develop an analysis of child abuse. But see LAHEY, *Research on Child Abuse in Liberal Patriarchy*, in TAKING SEX INTO ACCOUNT: THE POLICY CONSEQUENCES OF SEXIST RESEARCH (1984) (Canadian feminist discussion of research on child abuse). Peters, Dinsmore, and Toth implicitly accept the feminist-derived conclusion that Freud was wrong about childish sexual fantasy and that widespread serious sexual exploitation of children exists. See Peters, Dinsmore & Toth, *supra*; F. RUSH, THE BEST KEPT SECRET: THE SEXUAL ABUSE OF CHILDREN (1980). In general, however, this movement seems to be a relatively conservative one, related to more general victims' rights and crime control concerns. In the 1980s the chief political preoccupations seem to be crime and drug control. For the role of victims' rights ideology in Burger Court criminal decisions, see O'Neill, *The Good, the Bad, the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 369-71 (1984). Even efforts to reform child protective services sound the theme of crime control: the dedication of the Staff Report on Child Protective Services in Texas to the Texas Senate Committee on Health and Human Services, which calls for reforms in social services rather than for recriminalization, states: "The children we fail to protect today will possibly be the adults we protect ourselves from tomorrow." *Texas Senate Committee Report*, *supra* note 169, at i, 20.

354. L. GORDON, *supra* note 45, at 60-61; E. PLECK, *supra* note 45, at 126.

355. E. PLECK, *supra* note 45, at 126. The first juvenile court was established in 1899 in Chicago; within 20 years all but 3 states had them. *Id.* at 126. There was also a general decrease in emphasis on child abuse and child "cruelty" itself. *Id.*

On the juvenile courts, see A. PLATT, *supra* note 45, and Fox, *supra* note 45. For a critique of recent changes in the juvenile court system that criminalize its internal structure and therefore ensure that juveniles get the *worst* of all possible worlds (adult criminal treatment without adult crimi-

with legal authority over family crimes such as domestic assault and nonpayment of child support, emerged as the adult extension of the already-established juvenile courts.<sup>356</sup> Historian Elizabeth Pleck found that "family court judges believed they were helping to decriminalize family violence."<sup>357</sup>

This decriminalization of family violence also characterized the modern reawakening of interest in child abuse that began in the 1960s and led to the nationwide establishment of child protection social service agencies in the 1970s, including the Wisconsin system at issue in *DeShaney*.<sup>358</sup> Looking back in 1982, Douglas Besharov, the first director of the National Center on Child Abuse and Neglect, noted that the experts who called for the establishment of specialized child protection agencies had a commitment to nonpunitive, therapeutic responses to child mistreatment.<sup>359</sup> The system that became universal and that channels child abuse complaints to such agencies rarely seeks criminal prosecution. Nationwide, in 1978 less than five percent of substantiated cases of child abuse resulted in criminal prosecution.<sup>360</sup> Officials undertook criminal prosecu-

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nal court procedural protections), see Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 272-76 (1984).

356. E. PLECK, *supra* note 45, at 136.

357. *Id.* at 126, 137; see also L. GORDON, *supra* note 45, at 69-72 (noting the reinterpretation of cruelty and adoption of prevention as watchword of social work after WWI).

358. See, e.g., Paulsen, *supra* note 65, at 692 (discusses the "shortcomings in the application of the criminal law to cases of child abuse"). Criminal prosecution destroys any hope for a continuing family life and is appropriate only in severe cases, "cases which indicate that further harm may be done to others, cases which call for vengeance (if that call should ever be heeded), or cases which so disturb the community's sense of security that the events cannot go unremarked." *Id.* (emphasis added). Even if it was not possible because of the danger to leave the child in the home, Paulsen recommended that the removal not be accomplished by criminal means:

The publicity of the case is likely to damage the reputations of both parent and child. A conviction carries with it no social services. Merely beginning a prosecution is likely to mean the end of the chance to improve a child's home situation. Parents are nearly always resentful of the proceeding, and the hostility thus engendered makes casework with the child's family all but impossible. Moreover, a criminal prosecution is a clumsy affair. The defendant must be proved guilty beyond a reasonable doubt, and a criminal trial is subject to a great many rules of evidence that are grounded in policies other than the pursuit of truth and the punishment of crime when crime is found. For example, the rules adopted as part of the effort to deter police misconduct or protect the privacy of communication between husband and wife will naturally impede the successful prosecution of abusive parents. An act of child abuse is not likely to take place openly, and when it does, neighbors are often unwilling to testify.

*Id.*

In 1978, 29 of the states that had already enacted mandatory reporting legislation specifically proclaimed the nonpunitive intent and desire to preserve the family of these child abuse statutes. Redden, *supra* note 321, at 34.

359. Besharov, *supra* note 66, at 156; see also Hardin, *supra* note 346, at 593-94 (purpose of a civil child protection proceeding is not to punish the parents but to safeguard the child; parental rights may be preserved even when there has been "reprehensible" conduct toward the child).

The Texas Court of Criminal Appeals recently decided that social workers must also give Miranda-type warnings when they are acting as law enforcement officers. *Cates v. State*, 776 S.W.2d 170, 174 (Tex. Crim. App. 1989). Randy Burton, founder of the Houston-based Justice for Children, has criticized Texas' Child Protective Services for deciding that workers should not give the warnings, but instead should eschew any law enforcement role. *Prosecution of Child Abusers Being Jeopardized*, Houston Chronicle, Aug. 16, 1989, at B11, col. 1.

360. Besharov, *supra* note 66, at 159-60 (citing U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING (1978) 36, Table 28 (1979)). But see Patton, *supra* note 353, at 302 n.19 (238% increase in criminal cases involving abuse of children in Los Angeles County from 1980 to 1984).

tions only in cases of severe brutality such as homicide, serious assault, torture, sexual psychopathology, or forced starvation.<sup>361</sup>

By decriminalizing child abuse, the state in a sense creates an unusual defense to the crime of child abuse, at least for the majority of cases, which are unprosecuted. In our legal system as well as in others, an adult person cannot "consent" to a criminal assault against herself; consent does not constitute a defense to the criminal charge.<sup>362</sup> The state, however, withdraws certain kinds of criminal assaults by parents against their children from the criminal justice system in order to realize the rehabilitative goals of the child protective system and to preserve the integrity of the child's family. One could say that the state "consents" to the assault when it acts *in loco parentis* and, it is hoped, in the best interests of the child who needs protection, decriminalizes the abuse, and preserves the family unit. At the least, the state in effect consents to a defense or waives prosecution for the otherwise criminal offense. In diverting most child abuse away from the criminal justice system and into child protection agencies, therefore, the state has used its power affirmatively to put children in a very different position from any other victim of assault.

The diversion of child abuse from the criminal justice system, moreover, is but one example of the ways in which state law treats children differently from other victims of violence. At one time husbands and fathers were privileged to discipline their wives and their children physically.<sup>363</sup> Interfamilial tort immunities, moreover, protected parents from civil suits by their children whom they had injured negligently or intentionally.<sup>364</sup> The tort immunities are rapidly disappearing today.<sup>365</sup> Although the law no longer *explicitly* authorizes husbands to "chastise" their wives, the parental prerogative to inflict physical punishment on their children remains.<sup>366</sup> Indeed, the United States Supreme Court has

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361. Besharov, *supra* note 66, at 160.

362. Cf. Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U.L. REV. 955 (1988) (discusses the Jewish law ban on self-incrimination as part of a larger philosophy that one's life is not one's own to give away through confession to crime, a kind of suicidal consent). Anglo-American law had a related doctrine that a person could not consent to a criminal act against herself. *Id.* at 1037. Consent to an assault on one's person is also not a defense in Jewish law. *Id.* at 1037 n.298.

363. 1 W. BLACKSTONE, COMMENTARIES \*432-33; see *State v. Jones*, 95 N.C. 488, 489-90 (1886) (traditional view that there is no criminal liability for parents who administer disciplinary beatings of their children); see also Olsen, *supra* note 291, at 1506 n.31 (noting that modern courts apply different standards in torts of physical harm when defendant is victim's parent).

364. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 904-10 (5th ed. 1984); Thomas, *Child Abuse and Neglect: Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C.L. REV. 293, 339 (1972) (in 1972 most states still clung to old common-law rule of parent/child tort immunity).

365. RESTATEMENT (SECOND) OF TORTS § 895G comment j (1979) (notes that the move of the Wisconsin Supreme Court to abrogate parent/child immunity, *Goller v. White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963), has been followed by a "substantial minority" of other jurisdictions). The Reporters approved of this "clear and accelerating trend." *Id.*

366. Professor Frances Olsen points out that although a modern court might allow tort recovery for serious physical injury caused by a parental discipline, courts nevertheless apply a different standard because the defendant is a parent. Olsen, *supra* note 291, at 1506 n.31; see also MODEL PENAL CODE § 3.08 (1)(a) (1980) (sanctioning use of force by parent against a child for the purpose of safeguarding or promoting the welfare of the minor); RESTATEMENT (SECOND) OF TORTS § 147 & comment d (1975) (parental privilege of discipline broader than that of others).

placed its stamp of approval on the practice of schools using corporal punishment on children *in loco parentis*.<sup>367</sup> In 1977, well after the pediatric reawakening and the nascence of federal and state laws to prevent abuse, the Court decided in *Ingraham v. Wright*<sup>368</sup> that although children have an historic liberty interest in avoiding corporal punishment, that interest is also "subject to historical limitations."<sup>369</sup> The *Ingraham* Court noted that "reasonable" corporal punishment traditionally was considered justified, and that the laws of most states continued to take that view.<sup>370</sup> As a result, the Court concluded that "under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege."<sup>371</sup>

Formally and informally the legal system (police, prosecutors, judges, and legislators) regards victims of intimate violence, children and also women,<sup>372</sup> in a different light than victims of stranger violence. With respect to wifebeating, the battered woman's movement challenged that differential treatment. The classic book of the movement in the United States, first issued in 1976, was *Battered Wives*.<sup>373</sup> In it, Del Martin spoke of the nationwide pattern of police refusal to respond to the battered woman's call for help.<sup>374</sup> At every level, women met delay and diversion in their effort to seek recourse from the legal system. For example, in 1962 the New York legislature transferred wife abuse cases from the jurisdiction of the criminal courts to the family courts, where civil procedures apply. The harsher penalties of the criminal law were replaced by civil procedures and protective orders.<sup>375</sup> Justice Joseph B. Williams, administrative judge of New York City's Family Court explained the purpose of the change: "The

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367. *Ingraham v. Wright*, 430 U.S. 651, 675 (1977); L. WALKER, *supra* note 306, at 149; D. GIL, *supra* note 306, at 10 (notes that violence against children was still in 1970 "a widely sanctioned phenomenon in American society"). Gil used corporal punishment in schools as an example, and found it interesting that several state legislatures enacted laws *permitting* teachers to use corporal punishment at the same legislative session at which they enacted a law mandating the reporting of physical abuse of children. *Id.* at 10 n.6; see Cohen, *Freedom from Abuse: One of the Human Rights of Children*, 11 U. DAYTON L. REV. 601, 606, 612 (1986). Attorney Cohen, a United Nations Representative and Consultant, noted that the use of corporal punishment in schools is not universally accepted internationally. It is largely confined to "a handful of countries which were once occupied by England or were part of the United Kingdom." *Id.* at 612.

368. 430 U.S. 651 (1977).

369. *Id.* at 675.

370. *Id.* at 676.

371. *Id.* The Court went on to decide that the child had a significant interest in adequate procedural safeguards to minimize the risks of wrongful or excessive corporal punishment, but that such an interest was satisfied by the existence of postdeprivation state tort law remedies in Florida. *Id.* at 676-682.

372. For some evidence of a factual link between wifebeating and child abuse, see P. CHESLER, *supra* note 306, at 55; D. MARTIN, *supra* note 305, at 23; L. WALKER, *supra* note 306, at 27-28.

373. D. MARTIN, *supra* note 305. Martin attributes the beginning of the movement to the work of Erin Pizzey in England. *Cf.* E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1974). Pizzey is an activist who started the first advice center in London in 1971, which later developed into the influential Chiswick Women's Aid. D. MARTIN, *supra* note 305, at 6. In 1979 Lenore Walker issued her classic study of the psychology of battered women and the coercive techniques batterers use in their relationships with women. See L. WALKER, *supra* note 306.

374. D. MARTIN, *supra* note 305, at 96; see also L. WALKER, *supra* note 306, at 26-27 (battered women do not believe that the police are effective in checking the violence).

375. *Id.* at 104.

Family Court Act is not geared with punishment as a primary objective . . . . We're trying to stabilize the family."<sup>376</sup> Martin and the battered woman's movement she represented, however, questioned this goal. She was scathing in her criticism of a system that forces a woman seeking protection or trying to escape from her violent husband to rely on a system intent upon "stabilizing" her family.<sup>377</sup> We have learned from the battered women's movement that wifebeating is about power.<sup>378</sup> The veil of privacy and autonomy drawn over the family, moreover, has been "invoked to remove some individuals," such as battered women, "from the public guarantees of these liberties."<sup>379</sup> "[O]ne must ask: whose privacy? whose liberties?"<sup>380</sup> The late nineteenth-century growth in state protective intervention in families chronicled by Gordon reflected that "one man's loss in privacy was often another's (frequently a woman's) gain in rights."<sup>381</sup>

After 1976, contemporary women's movement activists resorted to the courts and state legislatures to demand an end to official reluctance to intervene in family violence.<sup>382</sup> *Thurman v. City of Torrington*<sup>383</sup> was the most successful of the lawsuits challenging differential police treatment of domestic violence.<sup>384</sup> Tracey Thurman and her son alleged that the Torrington, Connecticut police department violated their right to equal protection of the laws when they ignored or rejected Tracey's many attempts to file complaints against her estranged husband, who was threatening them with death and maiming. Charles Thurman was under a court order to stay away from his wife and child.<sup>385</sup> The police department, however, refused to take seriously Tracey Thurman's complaints about her husband because this was not violence between strangers, but

376. *Id.* at 105.

377. *Id.*

378. *Id.* at 26-44; see also L. GORDON, *supra* note 45, at 3, 292 (family violence emerged from power struggles in which family members were contending for often scarce material resources). For the coercive techniques (physical, sexual, economic, familial, and social) used by batterers, see L. WALKER, *supra* note 306, at 72-184.

379. L. GORDON, *supra* note 45, at 294.

380. *Id.*

381. *Id.*

382. The public rediscovery of wifebeating began in 1974 through efforts of activists such as Laurie Woods and Majory Fields, who developed a critique of the police refusal to respond to domestic violence calls. They began to bring class action suits. E. PLECK, *supra* note 45, at 185-87. The establishment of women's shelters legitimized the issue of wifebeating, and the radical feminist influence waned and was replaced by the growth of a bureaucracy. *Id.* at 190. By 1976, some states began to pass new laws on spouse abuse, such as funding for shelters, improved reporting, repeal of interspousal immunity for torts, or more effective criminal court procedures. *Id.* at 192. By 1980 most states had followed. *Id.*

383. 595 F. Supp. 1521 (D. Conn. 1984).

384. *Thurman* is also one of the cases cited by the Third Circuit in support of an affirmative duty of protection in its child protection case. *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985).

In addition to a substantial judgment for the plaintiff, *Thurman* is no doubt also responsible for a significant change in Connecticut state law, the passage of the Family Violence Prevention and Response Act. See Family Violence Prevention and Response Act, Pub. Act No. 86-337, 1986 Conn. Acts 775 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. ANN. § 46b-15 (West 1986 & Supp. 1989)); cf. The Women's Advocate: Newsletter of the National Center on Women and Family Law, January 1987, at 1, 6-7.

385. *Thurman*, 595 F. Supp. at 1525.

rather "domestic" violence, all in the family.<sup>386</sup> In the end, police default permitted Charles Thurman to attack and seriously injure his wife.<sup>387</sup> The district court held that the affirmative duty of police officers to preserve law and order and to protect the personal safety of persons in the community applied equally to women threatened by those with whom they have had a domestic relationship, as well as to other members of the public.<sup>388</sup> If the police were on notice of the threat to Tracey Thurman and her son, then they had an affirmative duty to protect them too, and police inaction deprived Tracey and her child of their constitutional rights.<sup>389</sup> The *Thurman* case exposes the context of family violence policy. It closely resembles paradigmatic civil rights cases in which a victim of violence or harassment sued state officials for failing to prevent the harm.<sup>390</sup>

This Article does not raise the context of the differential treatment afforded children who are victims of domestic violence or discuss the *Thurman* case in order to argue that *DeShaney* should have been grounded on equal protection instead of due process. The *DeShaney* Court easily conceded that the state may not selectively deny its protective services to certain disfavored minorities, but observed that no such argument was made by the parties.<sup>391</sup> There may be rational, arguably even compelling,<sup>392</sup> reasons for treating children assaulted by their parents differently from other classes of victims of violence. Family privacy is a real concern. It can be important to preserve family integrity in the face of state officials who may be too eager to exert social control over families that are different in class, ethnicity, and racial background from their controllers.<sup>393</sup> Studies have demonstrated that serious legal intervention in the form of an arrest can reduce recidivism in wife-battering.<sup>394</sup> When the legal system

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386. *Id.* at 1526-27. The complaint alleged that the Torrington police consistently afforded less protection when the victim was either a woman abused or assaulted by a spouse or boyfriend or a child abused by a father or stepfather. *Id.* at 1527.

387. *Id.* at 1526.

388. *Id.* at 1527. The court noted that the defendants made no effort to defend their differential treatment of women who were the victims of domestic violence. *Id.* at 1528. It commented, however, on some justifications that might have been offered. At one time English common law did sanction such disparate treatment. A husband had legal authority to physically discipline his wife within certain limits—the so-called rule of thumb. This male marital prerogative, however, no longer merited legal support. *Id.*

389. *Id.* at 1527.

390. See *supra* notes 241-43 and accompanying text.

391. *DeShaney*, 109 S. Ct. at 1004 n.3.

392. Modern equal protection analysis in effect recognizes three standards of review of legislative classifications. The Court will give deferential review to ordinary social and economic legislation that affects neither a suspect class nor a fundamental right, upholding any classification that is rationally related to a legitimate state purpose and that is not wholly arbitrary and irrational. If, however, a fundamental interest or suspect class triggers strict scrutiny, the state must offer a compelling reason for the classification. These are rarely found. Some of the cases involving illegitimacy and gender have been reviewed more closely, according to an intermediate standard that requires a showing of a closer fit with a more substantial state interest. See generally L. TRIBE, *supra* note 263, §§ 16-1 to 16-59 (discussing model of equal protection and levels of review).

393. See L. GORDON, *supra* note 45, at 28-29; Areen, *Intervention between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888 (1975); Burt, *supra* note 319, at 1305-06. But see L. GORDON, *supra* note 45, at 291-99 (criticizing simple model of social control).

394. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215-16 & n.16

takes the battering seriously, it undermines the batterer's belief that his assaults on his wife are his own private business, tacitly condoned by the society at large.<sup>395</sup> No comparable studies or analyses exist for child abuse, and the dynamic may be somewhat different.<sup>396</sup> There are also practical difficulties of proof that make it easier and therefore perhaps more desirable to proceed civilly in child abuse cases rather than criminally.<sup>397</sup> Finally, children are always in someone's custody,<sup>398</sup> and it seems reasonable to prefer the custody of a rehabilitated family to state custody through foster care and an incarcerated parent.<sup>399</sup>

The differential treatment of child abuse and its equal protection resonance, however, fortifies the due process conclusion. Children have a special status, which means that they get both *less*<sup>400</sup> and also *more*<sup>401</sup> than adults receive

(1988) (studies in Minneapolis, Minnesota; Newport News, Virginia; and Hartford, Connecticut). The social scientists who authored the Minneapolis study have been criticized for prematurely publicizing their results. They have recently been defended in an article that notes the powerful impact release of the study has had on police department practice. Sherman & Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC'Y REV. 117, 141 (1989). My thanks to my colleague Joe Sanders for drawing this debate to my attention.

395. See Recent Development, *Judging Domestic Violence*, 10 HARV. WOMEN'S L.J. 275, 277, 281 (1987).

396. Studies of police behavior with respect to child abuse are just beginning to be done. See Willis & Wells, *The Police and Child Abuse: An Analysis of Police Decisions to Report Illegal Behavior*, 26 CRIMINOLOGY 695 (1988).

397. See Hardin, *supra* note 346, at 520, 530, 534; Parker, *Dissolving Family Relations: Termination of Parent-Child Relations—An Overview*, 11 U. DAYTON L. REV. 555, 560-61 (1986); Paulsen, *supra* note 65, at 692.

398. Schall v. Martin, 467 U.S. 253, 265 (1984).

399. After a period of enormous growth in removals of abused children from their homes, there was a reassessment of this policy, in part prompted by federal legislation in 1980. Adoption Assistance and Child Welfare Reform Act of 1980, Pub. L. No. 96-272, § 103, 94 Stat. 500 (codified at 42 U.S.C. § 627 (1982)); see Garrison, *supra* note 69, at 1760.

Experience showed that children themselves were strangely resistant to removal from even a "bad" home. Parker, *supra* note 397, at 572-73 (quoting Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Terminations of Parental Rights*, 28 STAN. L. REV. 623, 644-46 (1976)). Foster care also was very expensive for the state. Garrison, *supra* note 69, at 1754. Influential critics such as Joseph Goldstein, of Yale Law School, Albert J. Solnit, Professor of Pediatrics at Yale University, and Anna Freud, the Director of the Hampstead Child Therapy Clinic in London, called for a policy of minimal intervention. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 9-10, 135-37 (1979).

400. Child abuse is largely decriminalized; parents are privileged to discipline their children physically; and public institutions—schools—may inflict reasonable corporal punishment. See *supra* notes 358-67 and accompanying text.

The Court has held "in a variety of contexts that 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" Carey v. Population Servs., 431 U.S. 678, 692 (1976) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)); see also Bellotti v. Baird, 443 U.S. 622, 634 (1979) (three reasons the constitutional rights of children cannot be equated with those of adults are: "the peculiar vulnerability of children; their inability to make critical decisions in an informed mature manner; and the importance of the parental role in child rearing"). For example, juveniles, because they are already always in someone's custody, are uniquely subject to preventive detention. See Schall, 467 U.S. at 265. In the juvenile courts, they are not entitled to the same right to trial by jury that adults enjoy. McKeiver v. Pennsylvania, 403 U.S. 528, 543-50 (1978).

401. Children are the object of legislative and judicial solicitude that has created protective structures of one kind or another. Michael Grossberg has traced the nineteenth-century development of the "best interest of the child" standard by which judges asserted their right to intervene in that most private of spheres when it was necessary to protect the child. M. GROSSBERG, *supra* note 296, at 234-307. The reforms of the Progressive Era implemented a number of protective ideas—from child labor legislation to compulsory schooling to the establishment of the juvenile court sys-

from our legal system. In a sense, it is a *quid pro quo*:<sup>402</sup> the chief justification for the other-than-equal approach to child abuse is that it represents a better way to protect *children* than the alternatives that are available to all victims of violence alike. Although it may be justified and there may be no equal protection violation when the state decriminalizes child abuse in the name of family rehabilitation, surely that exercise of great state power means that there is a liberty interest at stake when the state defaults on the alternative. The state's constitutional duty to protect Joshua, therefore, arose from more than the special relationship that it had with him. It also derived from the state's affirmative use of power that imposed a special legal status on him, increased his isolation and vulnerability to abuse by his father, and left him only one avenue of protection—the protective services agency. If that agency so departed from its function as to arbitrarily and irrationally fail to protect Joshua, then it violated the due process clause of the Constitution.

The 1980 political reaction of right-wing conservatives to the success of domestic violence activists in gaining access to federal funds further suggests that the context of *power* in the family is a salient one. The interposition of the state between violent family members and their victims aroused opposition in the name of family integrity and autonomy. Wifebeating became an issue of the women's movement in the early 1970s. By 1976 the first state laws on wife abuse, including funding for shelters, improved reporting, and repeal of interspousal immunity from torts were passed.<sup>403</sup> In the late 1970s activists began to lobby for repeal of the marital rape exemption.<sup>404</sup> In 1978 the United States Civil Rights Commission held hearings on battered women<sup>405</sup> and in 1979 President Carter established an Office of Domestic Violence.<sup>406</sup> The political reaction followed swiftly: conservative Senators Orrin Hatch of Utah and S.I.

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tem. Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 8-9 (1986). Most pertinent, all 50 states have created elaborate social service structures, supported by the coercive powers of the law, whose sole function is to protect children from abuse and neglect. See *supra* notes 61-77 and accompanying text.

The Court has recognized some constitutional rights that children may exercise autonomously, most significantly in the area of contraception and abortion. See, e.g., *Carey*, 431 U.S. at 693. The Court, however, rarely has afforded children *greater* autonomous constitutional protection than adults. Justice Brennan unsuccessfully argued in *Parham v. J.R.*, 442 U.S. 584 (1979), that children should receive greater procedural protection in a mental commitment because the consequences of a mistake at this stage of their lives were so serious. *Id.* at 627-28 (Brennan, concurring in part and dissenting in part). But see *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (undocumented alien school-aged children in Texas may not be denied a free public education; although education is not a fundamental right and undocumented aliens do not constitute a suspect class, the law must be reviewed more closely because it "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status").

402. The juvenile procedural cases implicitly rest on this principle. The presumed benefit to the child from the informality and flexibility of the juvenile justice system justifies the loss of formal criminal procedural rights. See, e.g., *McKeiver*, 403 U.S. at 545. Critics, however, have observed that sometimes the juvenile gets the worst of all worlds: she loses the procedural protection but gains very little from the juvenile justice system. E.g., Feld, *supra* note 355, at 142; see *Kent v. United States*, 383 U.S. 541, 556 (1966).

403. E. PLECK, *supra* note 45, at 192.

404. *Id.*

405. *Id.* at 195.

406. *Id.* at 196.



Hayakawa of California led congressional opposition in 1980 to increased funding for domestic violence, condemning the intrusion of the federal social service bureaucracy into family matters that properly were more local concerns.<sup>407</sup> A New Right coalition campaigned against the legislation as part of their general attack on feminism and other changes that were breaking up the family.<sup>408</sup> Lobbyists warned that the pending legislation would prevent parents from spanking their children<sup>409</sup> and that giving federal aid to battered women's shelters would promote divorce and intrude on the privacy of the family.<sup>410</sup>

In 1979 Senator Laxalt of Nevada introduced the so-called Family Protection Act,<sup>411</sup> drafted by Karl Moor, executive director of the Moral Majority.<sup>412</sup> Although the bill never had a serious chance to pass, its provisions are instructive. It sought to eliminate federal expenditures designated for child abuse prevention; to amend the definition of child abuse to exclude corporal punishment by a parent or parental designate; and to stipulate that no federal law, grant, program or directive could broaden or supersede existing state laws relating to spousal abuse.<sup>413</sup> Finally, after he took office in 1981, President Reagan closed the Office of Domestic Violence.<sup>414</sup>

Child abuse and wifebeating are not identical problems. Clearly, however, there is a significant linkage, as illustrated by the conservative political defense of the family. There are significant factual connections as well. In the *DeShaney* case itself, one of the signs that should have made the agency suspect continuing abuse of Joshua was his father's beating of Marie, the girlfriend who lived with him.<sup>415</sup> Power, the legally sanctioned relations of dominant and subordinate within the family, makes the government's protective default particularly susceptible to a due process analysis. The function of the Bill of Rights is to redress imbalance and protect the weak (political minorities) against the tyranny of the strong (majorities).<sup>416</sup> Children have no political means to redress the legally

407. E. PLECK, *supra* note 45, at 196; J. Zeitlin, *Domestic Violence: Perspectives from Washington*, in *WOMEN IN WASHINGTON: ADVOCATES FOR PUBLIC POLICY* 263-75 (1983).

408. E. PLECK, *supra* note 45, at 197.

409. 38 CONG. Q. 2719 (Sept. 13, 1980).

410. E. PLECK, *supra* note 45, at 197; *Domestic Violence Conference Bill to Go to Senate for Final Vote. Right Wing Targets Legislation for Defeat*, SANENEWS: A NATIONAL NEWSLETTER ON BATTERED WOMEN, Oct. 1980, at 1.

411. S. REP. NO. 1808, 96th Cong., 1st Sess. (1979).

412. E. PLECK, *supra* note 45, at 197-98.

413. S. REP. NO. 1808, 96th Cong., 1st Sess. (1979).

414. E. PLECK, *supra* note 45, at 198.

415. Massachusetts Committee Brief, *supra* note 170, at 23-24. In their recommendations for improving the disastrous condition of Texas' child protective services, the staff of the Texas Senate Committee on Health and Human Services acknowledged the interrelationship between child abuse and wifebeating. They were critical that there is no statewide policy in Texas recognizing that the presence of abuse of the mother is a high risk indicator for child abuse, and noted that the National Woman Abuse Prevention Project (a national task force of family violence experts funded by the Office of Victims of Crime in the United States Department of Justice) recently developed a protocol for child protective service workers to intervene more effectively in cases in which there is both child abuse and abuse of the child's mother. *Texas Senate Committee Report*, *supra* note 169, at 60-61.

416. In the famous footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), the post-*Lochner* Court conceded that special circumstances may justify closer and more solicitous judicial review. When there is prejudice against a discrete and insular minority and the

and culturally sanctioned power relationships that can put their very lives in the balance.

The Court need not engage in radical innovation in order to recognize that a due process right was at stake in the *DeShaney* case. The bright line of affirmative versus negative duties, assuming one exists in the Constitution, had already long since been breached by other decisions of the Court, such as *Estelle*. It is unsurprising, in view of cases like *Stanley v. Illinois*,<sup>417</sup> to find liberty interests implicated in family relationships. The context of domestic violence and state child protection policy, moreover, provides a specific and solid basis for an understanding of the due process nature of the claim.

Moreover, the Court already has recognized that there is a protected liberty interest in bodily integrity and personal security.<sup>418</sup> Because of this, the Seventh Circuit, in *White v. Rochford*,<sup>419</sup> a 1979 opinion that was not overruled even by the conservative panels that followed in the 1980s,<sup>420</sup> had no difficulty deciding that police officers who arrested an uncle on the Chicago Skyway, and then left the three minor children who were with him in the abandoned car on the side of the highway, violated the due process clause.<sup>421</sup> Unlike the Supreme Court in *DeShaney*, the court of appeals was not deterred by "the tenuous metaphysical construct which differentiates sins of omission and commission."<sup>422</sup>

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political processes cannot be relied upon to protect its members, a more searching judicial inquiry is appropriate. In another recent substantive due process case, Justice Blackmun reminded the Court:

[T]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property . . . may not be submitted to vote; they depend on the outcome of no election.

*Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3077 n.11 (1989) (Blackmun, J., concurring in part and dissenting in part) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

417. 405 U.S. 645 (1972) (unmarried father cannot be deprived of custody of his children without due process of law).

418. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977) (although school children have a liberty interest in personal security protected by due process, existing state remedies for excessive corporal punishment in schools is the only process that is due); see also *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (institutionalized retarded man with the mind of an 18-month-old child has a liberty interest in personal security protected by the fourteenth amendment).

419. 592 F.2d 381 (7th Cir. 1979).

420. See *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (distinguishing *White*); *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987) (distinguishing *White*), *aff'd*, 109 S. Ct. 998 (1989).

421. *White*, 592 F.2d at 382 (7th Cir. 1979). While driving along the Chicago Skyway, a busy, limited-access highway, with three minor children in the car, an uncle was stopped and arrested by the police for drag racing. Although the uncle pleaded with the officers to take the children with them to the police station or to a phone booth so that they could contact their parents, defendants refused. Instead, they left all three children in an abandoned car on the side of the highway. The children were finally driven out of the car by the cold, and crossed eight lanes of traffic, wandering the freeway at night until they found a telephone to call their mother. Their mother, who had no car to retrieve them, called the Chicago Police Department, which again refused to help. By the time the children were rescued by a neighbor, they had suffered mental pain and anguish and the five-year-old had experienced an asthmatic attack that resulted in a one-week hospitalization. *Id.* at 382.

422. *Id.* at 384. If the police intentionally discharged children under their care on the Chicago Skyway in inclement weather without any rational justification, the court argued, that surely would have intruded on the minors' right to personal security and implicated due process. Police indifference to the fate of the children in *White*, constituting gross negligence or reckless disregard of their

The Seventh Circuit utilized a due process standard in *White* that first was expressed by the Supreme Court in *Rochin v. California*<sup>423</sup> in 1952. The due process clause prohibits state conduct that "shock[s] the conscience."<sup>424</sup> The Court held in *Rochin* that pumping a suspect's stomach to acquire evidence violated the due process clause.<sup>425</sup> Today the fourth amendment presumably would apply to this kind of abusive police investigation, perhaps supplanting other constitutional analysis.<sup>426</sup> The *White* court, however, was correct in recognizing that *Rochin*'s substantive due process framework retains contemporary vitality.<sup>427</sup> This method for identifying state actions that are fundamentally unfair or that shock the conscience no doubt would garner little support from Judge Posner, author of the 1987 *DeShaney* opinion in the Seventh Circuit,<sup>428</sup> or those Justices of the Supreme Court today who seem to be embracing a straightened formalism<sup>429</sup> in constitutional thinking.<sup>430</sup> It would be premature at best,

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safety, and leading to injury, seemed to the 1979 panel of the Seventh Circuit no different in kind. *Id.* at 384-85.

423. 342 U.S. 165 (1952).

424. *White*, 592 F.2d at 383.

425. *Rochin*, 342 U.S. at 174.

426. In *Graham v. O'Connor*, 109 S. Ct. 1865 (1989), the Court held that claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other seizure of a person are properly analyzed under the fourth amendment's objective reasonableness standard. *Id.* at 1867. The Court, however, did not decide whether the fourth amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins. A substantive due process analysis may be applicable to that situation. *Id.* at 1871 n.10.

*Rochin* was decided before the Court ruled that the guarantees of the fourth amendment were made applicable to the states through the due process clause of the fourteenth amendment. See *Ker v. California*, 374 U.S. 23, 30-31 (1963) (identical standards to be applied to fourth amendment claims against federal or state governments); *Mapp v. Ohio*, 367 U.S. 643, 665 (1961) (exclusionary rule applicable to fourth amendment claims made applicable to the states through the fourteenth amendment); *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (fourteenth amendment incorporates the fourth amendment).

427. *White*, 592 F.2d at 385; see Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 204 n.10 (1984). The authors concede that the legitimacy and contours of substantive due process are very controversial, but note that the Supreme Court nonetheless continues to rely on the doctrine. *Id.*

428. Judge Posner held 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 interests. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989). Although the state may have failed in its attempt to rescue Joshua, it was not complicit in the beatings administered by the boy's father. *Id.* at 302. Judge Posner therefore found *DeShaney* distinguishable from *White*, in which the state arrested the uncle and therefore caused the injury. *Id.* at 303.

429. *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting).

430. For example, in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989), which upheld application of California's irrebuttable presumption of paternity of the husband to defeat the biological father's efforts to establish paternity, Justice Scalia expressed his view of the sole permissible method for deriving fundamental liberties protected by the due process clause. He would recognize only liberties that are deeply rooted in history and tradition, in the very specific form that is asserted. *Id.* at 2341-42 (Scalia, J., announcing the judgment of the Court and delivering an opinion, in which Rehnquist, C.J., and in all but note 6 of which O'Connor, J., and Kennedy, J., joined). So, for example, because history and tradition considered the "unitary family," typically the marital family, sacrosanct, a liberty interest arose for that kind of relationship only, and did not extend to this biological father who had stepped forward and was called "Daddy" by the little girl. *Id.* at 2342 n.3 (Scalia, J., announcing the judgment of the Court and delivering an opinion, in which Rehnquist, C.J., and in

however, to say *Rochin's* vision of due process,<sup>431</sup> with its room for evolving standards of justice,<sup>432</sup> is now entirely irrelevant.<sup>433</sup> The *context* of child protection, moreover, ensures that judges are not left "at large"<sup>434</sup> to fill the contours of the due process clause with concerns more redolent of tort liability than constitutional duty.

### B. *The Razor's Edge*

The *DeShaney* majority offered a defense for the otherwise indefensible indifference of the Wisconsin child protection agency, and perhaps also for its own refusal to recognize a constitutional interest. The Court noted that if the DSS had moved too soon to take custody of the son away from the father, they could have been charged with improperly intruding into the parent-child relationship,

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all but note 6 of which O'Connor, J., and Kennedy, J., joined). The method is a highly formal one that relies on a simple canvass of what the prevailing view has been in the distant past.

Interestingly, only Chief Justice Rehnquist went the full mile with Justice Scalia's plurality opinion. Justice Scalia lost conservative Justices O'Connor and Kennedy on his most doctrinaire statement in footnote 6 about substantive due process methodology. *Id.* at 2344 n. 6 (Scalia, J., announcing the judgment of the Court and delivering an opinion, in which Rehnquist, C.J., and in all but note 6 of which O'Connor, J., and Kennedy, J., joined). He insisted that the key to principled constitutional decisionmaking was to inquire very specifically whether the right of an adulterous natural father received traditional protection, rather than the more generic relationship of parentage. *Id.* General traditions, he argued, merely "permit judges to dictate rather than discern the society's views. . . . [A] rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all." *Id.* Justices O'Connor and Kennedy, however, withheld their approval from footnote 6. They refused to "foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id.* at 2347 (O'Connor, J., concurring in part). Although Justice Stevens concurred in the result in *Michael H.*, he did not accept Justice Scalia's analysis at all. *Id.* at 2347 (Stevens, J., concurring in the judgment). Justice Brennan's dissenting opinion, which also garnered the votes of Justices Marshall and Blackmun, explicitly rejected Justice Scalia's due process methodology and indeed centered its attack on the exclusively historical approach. *See id.* at 2349-51 (Brennan, J., dissenting). Finally, Justice White's separate dissenting opinion also did not accept the constitutional straightjacket, but relied on prior cases recognizing a liberty interest of a father in his relationship with his child to resolve this case. *Id.* at 2360 (White, J., dissenting). Thus, Justice Brennan is correct in his observation that only two members of the Court fully endorsed the new methodology. *Id.* at 2349 (Brennan, J., dissenting).

431. In his *Rochin* majority opinion, Justice Frankfurter spoke about certain standards of justice that are either "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)), or are "implicit in the concept of ordered liberty." *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). He denied that the absence of "formal exactitude, or want of fixity of meaning," when dealing "not with the machinery of government but with human rights," left courts without any guidelines. *Id.* The words were symbols that were fleshed out by the gloss given by history or by the process of judgment, as it falls "differently at different times and differently at the same time through different judges." *Id.* at 170. Judges were not left "at large" by the "vague contours" of the due process clause to appeal to natural law. *Id.* at 170-171. Rather, there were limits derived from the nature of the judicial process. That process is characterized by:

disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

*Id.* at 172. For a competing view of due process as incorporating only those rights explicitly named in the Bill of Rights, see *Rochin*, 342 U.S. at 175-77 (Black, J., concurring).

432. *Rochin*, 342 U.S. at 170-72. The appeal to the perspective of time is not unique in constitutional jurisprudence. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (evolving standards of decency make deliberate indifference to inmate's serious medical needs a violation of the eighth amendment).

433. *See Wells & Eaton, supra* note 427, at 204 n.10.

434. *Rochin*, 342 U.S. at 170-71.

"charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection."<sup>435</sup> This is the "razor's edge" that Judge Posner warned about in his opinion in this case for the Seventh Circuit:

To place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a section 1983 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 principle.<sup>436</sup>

The Supreme Court's decision in *DeShaney* does not center on the razor's edge policy issue. Instead, Chief Justice Rehnquist formally stated a syllogism about negative liberties, affirmative duties, and general governmental services and draws a bright line based on custody.<sup>437</sup> Nonetheless, the concern with the razor's edge, that is, the balance between the concededly constitutionally protected interest in family privacy and integrity and the state's duty to intervene in an abusive family, must be dealt with in any *contextual* analysis. The razor's edge predicament is also relevant to a question that the *DeShaney* Court never reached:<sup>438</sup> What state of mind is necessary to make out a due process violation?<sup>439</sup>

The parent-child relationship unquestionably is safeguarded by the due process clause of the United States Constitution. In 1972 the Supreme Court ruled that a father who had lived with his three children for eighteen years, but never married their mother, had a substantial liberty interest in retaining custody of his offspring.<sup>440</sup> After the mother's death, the state could not presume him unfit and could not deprive him of custody without first affording him a hearing.<sup>441</sup>

A number of other cases have established the constitutional importance not only of a parent's right to retain custody, but also of the parental prerogative to make decisions on behalf of their children without state intrusion into the family's privacy and autonomy.<sup>442</sup> Even when the child's individual rights may ap-

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

436. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).

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

438. *Id.* at 1007 n.10.

439. This question also was left unresolved by *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986), and its companion case, *Davidson v. Cannon*, 474 U.S. 344, 347 (1986), in which the Court determined that ordinary negligence is insufficient to state a fourteenth amendment due process violation, but left open what other standard, such as gross negligence or deliberate indifference, might suffice.

440. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

441. *Id.* at 656-58.

442. *Parham v. J.R.*, 442 U.S. 584, 613 (1979) (parents may commit children to mental institutions without an adversarial hearing as long as some neutral decisionmaker, such as a physician, reviews the commitment); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (state may not require Amish children to attend school beyond the eighth grade in contravention of their parents' sincere religious beliefs about how best to raise their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (statute requiring all Oregon children to attend public schools exclusively unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (state may not make it a crime to teach children a foreign language); *see also Santosky v. Kramer*, 455 U.S. 745, 749 (1982) (higher burden of proof of clear and convincing evidence required before state may terminate par-

pear to conflict with parental authority, the Court often gives a wide latitude to the integrity of the traditional family structure. In *Parham v. J.R.*,<sup>443</sup> for example, the Court acknowledged that children have a significant liberty interest at stake when their parents decide to commit them to mental institutions.<sup>444</sup> Because of balancing considerations, however, this liberty interest did not entitle the children to an adversarial hearing before commitment.<sup>445</sup> "Western civilization" holds a concept of "the family as a unit with broad parental authority over minor children."<sup>446</sup> Parents generally have the right to make difficult decisions for their children. The Court was willing to assume that parents generally do act in their child's best interests.<sup>447</sup> It was unwilling to accept the "statist" notion that governmental power should supersede parental authority in all cases just because some parents might abuse that authority.<sup>448</sup> Thus, although some medical decisionmaker was required to review the commitment, a formal proceeding was not necessary, in part because it would intrude too much on the parent-child relationship.<sup>449</sup> Justice Stewart emphasized in his concurring opinion that "it has been a canon of common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the

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ent/child relationship based on allegations of neglect). *But see* *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 31 (1981) (appointment of counsel for parents not required in *every* termination of parental rights suit).

The tension between parental rights of guardianship and control over their children and children's *individual* rights, as asserted by minors who are mature enough to make reproductive decisions on their own, was drawn sharply in the contraception and abortion cases. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), for example, the Court invalidated a Missouri statute that required parental consent for a minor's abortion, unless it was necessary to save the young woman's life. *Id.* at 74. The Court rejected the argument that the veto power would strengthen the family unit, which they found was already fractured by the disagreement over the decision. *Id.* at 75. In *Bellotti v. Baird*, 443 U.S. 622, 643 (1979), the Court decided that when the state does seek parental consent for the abortion of an unmarried minor, it must also provide an alternative procedure whereby authorization may be obtained. Although the constitutional rights of children generally cannot be equated with those of adults, abortion choices require a special sensitivity to the minor's right to make decisions. *Id.* at 642. In *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983), however, the Supreme Court upheld a Missouri statute requiring parental consent, but which did provide an alternative judicial bypass procedure. In *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court upheld a Utah statute that required parental *notification*, when feasible, as applied to an unemancipated girl living at home, on the grounds that it served important considerations of family integrity by providing parents with the opportunity to counsel their children. *Id.* at 411. By contrast, Justice Marshall observed in dissent that the ideal of the supportive family may not be fulfilled in reality and therefore is not enough to override the pregnant minor's fundamental individual right to privacy. *Id.* at 437 (Marshall, J., dissenting). With the Supreme Court's recent decision in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), any balance that arguably was reached in these cases involving minors in particular certainly will be upset by the Court's invitation to the states to impose additional regulation on the abortion decision generally. *See id.* at 3056-58. The Supreme Court heard oral argument on November 29, 1989, in two cases involving notification of parents of minors seeking abortions. *Ohio v. Akron Center for Reproductive Health*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 3239 (1989); *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 3240.

443. 442 U.S. 584 (1979).

444. *Id.* at 600.

445. *Id.* at 606-13.

446. *Id.* at 602.

447. *Id.* at 602-03.

448. *Id.*

449. *Id.* at 610.

Constitution itself may compel a State to respect it."<sup>450</sup>

The concern for family privacy reflected in these cases has a valid basis. Especially in view of the historical linkage between poverty and state regulation of the family,<sup>451</sup> it is all too tempting for state bureaucrats and legislators to impose their own (white middle-class) norms on the varieties of human experience in this most intimate and important relationship. It is troubling that after a swing in the other direction,<sup>452</sup> the Court again seems willing in recent years to countenance majoritarian regulation of nonconventional intimacies.<sup>453</sup> Influential commentators Anna Freud, Joseph Goldstein, and Albert Solnit have argued that outside intervention in family autonomy can do psychological harm to children who see their parents' authority undermined.<sup>454</sup>

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450. *Id.* at 621 (Stewart, J., concurring in judgment).

451. In *Wyman v. James*, 400 U.S. 309 (1971), for example, the Court demonstrated its greater willingness to condone intrusions on the privacy and autonomy of financially dependent families. For discussions of that linkage, see R. O'NEIL, *THE PRICE OF DEPENDENCY* 223-91 (1970); Reich, *The New Property*, 73 YALE L.J. 733, 756-60 (1964). In *Wyman*, the Supreme Court approved warrantless home visits by caseworkers as a condition of continued receipt of AFDC funds for poor families, refusing to characterize these visits as fourth amendment searches and finding them "reasonable" in any case. *Wyman*, 400 U.S. at 318. The Court justified these visits, which were both rehabilitative and investigative in character, in part on the grounds that they were necessary to protect the dependent children receiving assistance. *Id.* at 317-18. Justice Douglas' dissent condemned this warrantless invasion of the home of a poor person dependent on government largess. *Id.* at 331-32 (Douglas, J., dissenting). He questioned whether the same standards would be applied to an affluent cotton farmer receiving benefit payments for not growing crops, and denounced the obvious class bias involved. *Id.* at 332-33 (Douglas, J., dissenting).

For an extended critique of *Wyman* and a contrast between it and *In re Gault*, 387 U.S. 1 (1967), in which the Court recognized some formal procedural protections in juvenile delinquency programs, see Burt, *supra* note 319. Professor Burt points out that although the Court was willing to look behind the ideals to the realities of the juvenile justice system, it simply assumed, without examination, that the beneficent purposes of the welfare home visit, including protection of the child, were likely to be accomplished. *Id.* at 1262-65.

The state's greater willingness to regulate the intimate lives of the poor can also be seen in efforts on behalf of abused children. The earliest child protection laws, which provided for apprenticeship of children, were designed to lessen public expenditure on poor relief and to exert social control. Areen, *supra* note 393, at 894-96. The first lawsuits seeking to hold public officials responsible for failing to protect children were criminal indictments against local law officials who apprenticed children to cruel masters and ignored the dangers about which they knew or should have known. See, e.g., *Commonwealth v. Coyle*, 160 Pa. 36, 45, 28 A. 634, 636 (1894) (upholding conviction for neglect of their duty against three directors of the poor who apprenticed a seven-year-old to a cruel master who killed him with maltreatment).

Linda Gordon has shown how the Massachusetts SPCC was established as an upperclass effort to exercise social control of Catholic working-class immigrants. L. GORDON, *supra* note 45, at 28-29. For example, one of the campaigns that concerned the Boston SPCC in its early years was the desire to get beggar children or children apprenticed to organ-grinders off the streets so that family life would conform more closely to the middle-class ideal. *Id.* at 37-42.

Twentieth-century removals of children from their homes on the grounds of abuse or neglect and "voluntary" foster placements of children also reflect an apparent skewing in favor of poor families. See Areen, *supra* note 393, at 888-89 n.7, 911; Garrison, *supra* note 69, at 1752; Parker, *supra* note 397, at 565 (30,000 children removed each year, mostly from poor families).

452. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (invalidating city zoning that prevented grandmother from living with her grandson); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating ban on distributing contraceptives to unmarried).

453. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding Georgia law criminalizing consensual homosexual sodomy); *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2344 (1989) (upholding state's irrebuttable presumption of the husband's paternity, and refusing to recognize liberty interest of biological father in relationship with his child, who was the product of his adulterous relationship with a married woman).

454. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 399, at 9-10. Although they oppose

Family privacy, however, can also be an instrument of oppression to those trapped within it. Gordon has shown that the weaker members of late nineteenth-century working-class families, chiefly the women, *wanted* and sought out the SPCC's intervention.<sup>455</sup> Thus, the enthusiasm for state regulation of neglectful or abusive families was not strictly a middle-class maneuver, "nor was it on balance disadvantageous to poor women."<sup>456</sup> In other words, state intervention in the family to protect children is a two-edged sword. The state's role also has been two-fold: on the one hand, the power of the state has been used to enforce existing patriarchal power relationships by upholding parental prerogatives such as physical punishment and by promoting family privacy and integrity through the decriminalization of family violence. On the other hand, however, the state has intruded into family privacy and autonomy in order to establish a child protection agency with significant powers of investigation and removal.

This does not mean, however, that the state sits on a razor's edge, narrowly balanced between the accepted constitutional rights to family privacy and the due process right to protection that Joshua DeShaney unsuccessfully sought to establish. I am not sure that it would matter even if the balance were really so precarious. The mere clash of rights surely is no reason to refuse arbitrarily to recognize one of them at all.<sup>457</sup> In any case, the razor's edge metaphor is misleading because the state has a broad band of discretion to act or refuse to act, which permits the judiciary to arrive at a principled balance of rights.

### C. *Getting Off the Razor's Edge: State of Mind*

The answer to the razor's edge dilemma lies in a state-of-mind requirement for the constitutional violation. In *Daniels v. Williams*,<sup>458</sup> a case concerning an inmate's slip and fall on prison stairs, the Supreme Court ruled that the state cannot deprive a person of due process of law through acts or omissions that are

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intervention in most cases of neglect, the authors would intervene strongly in cases of serious abuse, terminating parental rights and quickly reconstituting a new permanent family for the child. *Id.* at 71-75. For criticisms of this theory, see Garrison, *supra* note 69, at 1763-65; Parker, *supra* note 397, at 567.

455. L. GORDON, *supra* note 45, at 296.

456. *Id.* at 297. Gordon is therefore critical of some feminists who find little to choose between the older private patriarchy, which put women under the control of an individual man, and the new "state patriarchy" of the welfare state, which transfers that control to the state. *Id.* at 371 n.4. She uses the term "patriarchy" in its historical sense, "referring to a family form in which fathers had control over all other family members—children, women, and servants." *Id.* at 55-56.

Gordon does not accept the liberal view developed by E.A. Ross in 1901, and Talcott Parsons and his followers in the 1940s and 1950s, which viewed social regulation by the state as a sign of progress, and the replacement of family functions such as socialization by professionals, as beneficent. But she also questions the contrasting pessimistic view, advanced since the 1930s by both Marxists and conservatives, which condemns professional intervention in the family. These interpretations are lacking because they fail to bring a gender or generational analysis to bear on the problem. *Id.* at 293.

457. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (rejecting prior censorship when sixth and first amendment rights clashed). In *Stuart* a judge had imposed a gag rule on publicity to make it possible to impanel a fair jury in a small town that was the scene of the murders. My thanks to colleague David Dow for suggesting this line of cases.

458. 474 U.S. 327 (1986).



merely negligent.<sup>459</sup> Since then it has been clear that all fourteenth amendment due process claims will require a state of mind more culpable than negligence, but, unlike other constitutional provisions,<sup>460</sup> the Court has not yet established the requisite standard.<sup>461</sup>

The *DeShaney* plaintiffs claimed that the misconduct of the Wisconsin DSS, however designated, went far beyond negligence and was sufficiently aggravated to establish section 1983 liability.<sup>462</sup> They argued that using this extreme measure of misbehavior would ensure the exclusion of the host of routine mistakes of judgment by government officials, but preserve a cause of action for a genuine abuse of the power of the office itself.<sup>463</sup> This would allay the concerns expressed in *Daniels* and in its companion case, *Davidson v. Cannon*,<sup>464</sup> about trivializing the due process clause by applying its guarantees to *unintended* loss of life, liberty, or property rather than to oppressive abuse of government power.<sup>465</sup>

The plaintiffs believed that the Seventh Circuit's fear about the razor's edge was misplaced. First, the protective agency had many options short of a too-hasty and perhaps unconstitutional termination of parental rights, none of which

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459. *Daniels*, 474 U.S. at 328. In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court resolved a question that it had evaded several times before: based on its legislative history in the 42nd Congress, the Court concluded that section 1983, unlike its criminal counterpart, did not impose any *statutory* state-of-mind requirement. *Id.* at 534. The Civil Rights Act afforded relief whenever states violated federal rights, whether by reason of "prejudice, passion, neglect, intolerance, or otherwise," that is, regardless of state of mind. *Id.* (emphasis added). Concurring Justice Powell warned that this ruling would open the pathway to many more such lawsuits than the Court contemplated or thought desirable, *id.* at 551, and he sought a constitutionally based decision that would limit this effect. *Id.* at 548 (Powell, J., concurring in the result).

A few years later, the Court concluded that Justice Powell had been right. In *Daniels v. Williams*, 474 U.S. 327 (1987), the Court reaffirmed its holding about the section 1983 statutory language and intent, but it reconsidered the issue of the content of the fourteenth amendment. *Id.* at 330-33. The Court held that the due process clause, which prohibits states from *depriving* any citizen of life, liberty, or property without due process of law, incorporates its own state of mind requirement: "We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Id.* at 328. Justice Rehnquist's majority opinion noted that historically the due process guarantee applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. He found this consonant with the "traditional and common-sense notion" that the famous clause was a shield against oppressive abuse of government power. *Id.* at 331. Lack of due care, for example, by the prison official whose carelessness caused inmate Williams to slip and fall, on the other hand, is something else again. Justice Rehnquist found this conduct is no more than a failure to measure up to the conduct of a reasonable person and that to equate such conduct to a "deprivation" would be to trivialize the principle of due process of law. *Id.*

The *Daniels* Court declined the invitation to specify whether something more than simple negligence, but less than intentional conduct, such as recklessness or gross negligence, would be sufficient to trigger the protections of the due process clause. *Id.* at 334 n.3. In a companion case, *Davidson v. Cannon*, 474 U.S. 344 (1986), the Court applied the same principles to a claim that prison officials failed to protect an inmate from an anticipated assault. *Davidson*, 474 U.S. at 347-48.

460. An eighth amendment claim, for example, requires proof of deliberate indifference to an inmate's serious illness or injury. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). For a claim of racial discrimination under the equal protection clause, proof of invidious discriminatory purpose is required. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

461. *DeShaney*, 109 S. Ct. at 1007 n.10; *Daniels*, 474 U.S. at 334 n.3.

462. Petitioners' Brief, *supra* note 3, at 29-34.

463. *Id.* at 30.

464. 474 U.S. 344 (1986).

465. Petitioners' Brief, *supra* note 3, at 30.

it chose to exercise.<sup>466</sup> The plaintiffs asserted that most child protection work, on the other hand, is either competent or merely poor or negligent, and therefore would not be actionable under the extreme misconduct standard.<sup>467</sup> Thus only a tiny fraction of agency decisions would be subject to potential liability—those that are “utterly beyond the Pale”; only when a “deliberate refusal to act, in a sphere specifically entrusted to them, is so profound that it violates the community’s sense of outrage and would be generally perceived as fundamentally wrong or unfair.”<sup>468</sup>

State of mind standards, like bright lines based on custody, generally are not the proper foundation for distinguishing due process violations from ordinary torts.<sup>469</sup> The analysis of constitutional duty in *the child protection and family violence context* provides a sounder basis. A state of mind requirement, however, may be a means to balance the constitutional concerns at stake: on the one hand, there is a constitutionally protected interest in family integrity and privacy, but on the other hand, the child victim within the family also has an interest of constitutional dimension in her safety. A standard that requires a substantial deviation from the appropriate exercise of judgment in child welfare work ensures that protective agencies have a broad band of discretion for their sensitive work. At the same time, however, such a standard does not ignore, as the *DeShaney* decision did, the due process values at stake when government fashions a comprehensive decriminalized child protection system, but fails to protect a child it knows to be in mortal danger. With a rigorous standard of culpability, the dreaded razor’s edge is merely chimerical.<sup>470</sup>

The *DeShaney* litigants offered varying formulations of the more-than-negligence standard: plaintiffs were sure that the conduct at issue met either a gross

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466. *Id.* at 32. For example, the agency could have taken the child to a doctor for a medical exam; it could have sought a court order requiring the family to cooperate; it could have sought foster home placement; it could have enforced the contract they made with Randy DeShaney; it could have insisted that the enrollment in Head Start go forward as planned; it could have notified Joshua’s mother about what was going on. *Id.*

467. *Id.* at 32-33.

468. *Id.* at 33-34.

469. Justice Blackmun also makes this point in his dissent to *Davidson*. Although he joined in *Daniels*, because a commonplace slip and fall does not rise to the level of a constitutional violation, *Daniels v. Williams*, 474 U.S. 327, 336 (1987) (Blackmun, J., concurring), he contended that negligence, if it “permits anticipated inmate violence resulting in injury, or perhaps leads to the execution of the wrong prisoner,” does implicate the due process clause. *Davidson*, 474 U.S. at 350 (Blackmun, J., dissenting).

470. There is a certain irony in Judge Posner’s dire warnings in the appellate decision in *DeShaney*. Judge Posner was concerned about the Scylla of constitutional liability for moving too soon to terminate parental rights, and the Charybdis of civil rights accountability for moving too late in the *DeShaney* case. In an earlier case, *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir.), cert. denied sub nom. *Ellis v. Judge of Putnam Circuit Court*, 459 U.S. 1069 (1982), however, he experienced no difficulty in controlling liability for overeager state intervention in family relationships. Judge Posner held that adoption into a new family without notice to the grandparents, who had ably cared for the children and who were cut off from visitation as a result, was not a violation of due process so long as there were some state remedies that the grandparents could have exercised along the way. *Id.* at 514-15. This is an unusual application of the doctrine of *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (although inmate had been “deprived” of his “property” by prison officials who lost his hobby kit, the existence of post-deprivation state tort remedies for this random and unauthorized action meant that the deprivation was not without “due process of law”), to a deprivation of a liberty interest in family relationships.

negligence, deliberate indifference, or willful and wanton standard; government defendants urged that if *any* basis was found to hold them accountable for failing to protect children like Joshua, an extremely stiff version of "deliberate indifference" should be required.<sup>471</sup> Lower courts also have embraced deliberate indifference, modelled on *Estelle's* eighth amendment criterion, or something similar, in child protection cases.<sup>472</sup>

The facts alleged in *DeShaney* should be sufficient to establish deliberate indifference: the social worker actually *knew* and documented "in detail that

471. Brief For Respondents, *supra* note 311, at 31. State officials viewed this test as requiring conduct that "deliberately and purposefully disregarded the constitutionally protected rights of another," and as identical to the eighth amendment standard adopted in *Estelle*. Only in this way, the defendants argued, could the Court ensure that a proper distinction was made between the decision not to devote limited resources to a particular task, on the one hand, and a decision to oppress particular individuals, on the other. In their view, only the latter constituted the abuse of government power encompassed within the due process clause. *Id.*

The *DeShaney* defendants referred to the *Daniels* language about the due process clause having been historically applied to "deliberate decisions of government officials to deprive a person of life, liberty or property." *Id.* at 30 (citing *Daniels*, 474 U.S. at 331). They further concluded that "government simply cannot attempt to oppress without an intent to do so," *id.* at 31, a formulation that would seem to go rather beyond both *Daniels* and *Estelle*. See *id.* at 32 (describing purposeful or deliberate government action as the touchstone of *Daniels* and *Davidson*). They also described the conduct at issue in their case as clearly less culpable than that found insufficient to establish liability in *Davidson* for the failure to protect the inmate from assault: in the *Davidson* case, "[f]ar from abusing governmental power, or employing it as an instrument of oppression, Respondent Cannon mistakenly believed that the situation was not particularly serious and Respondent James simply forgot about the note." Certainly nothing worse can be said of Respondents' intentions in this case." *Id.* at 34 (quoting *Davidson*, 474 U.S. at 348).

472. See *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989). The Eleventh Circuit sitting en banc reinstated a claim by a foster child that alleged that the state agency was deliberately indifferent or grossly negligent in its failure to protect the child. *Id.* at 793.

For a case decided before *Daniels* and *Davidson*, see *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 783 (2d Cir.) (*Doe II*) (Second Circuit upheld a verdict against the foster care agency based on jury instructions requiring "deliberate indifference."), *cert. denied*, 464 U.S. 864 (1983). Even if a case that intervened between the two *Doe* appellate decisions, *Youngberg v. Romeo*, 457 U.S. 307 (1982), established a new test of "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment," *id.* at 323, the jury instructions were adequate. According to the *Doe II* court, the *Youngberg* formulation, if applicable at all, constituted a gross negligence test that would be easier than deliberate indifference to meet. *Doe II*, 709 F.2d at 790; see also *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 508 (3d Cir. 1985) (child not in state custody states claim against agency based on conduct rising to level of "deliberate indifference, reckless disregard, or gross negligence"). The *Bailey* court stated:

We stress that an error in judgment, an unforeseeable tragic event, a good faith but misinformed professional decision, or mere negligence will not suffice to impose liability . . . [T]o the extent that plaintiffs rely on the professional practices of the [child protection agency] to prove gross negligence, they will, of course, have to sustain the burden of showing that these practices are so far below the minimum accepted and generally prevailing professional standards as to permit the fact finder to infer deliberate or reckless indifference or unconcern or callous disregard for Aleta's safety.

*Id.* at 508.

*Cf. Sowers v. Bradford Area School Dist.*, 694 F. Supp. 125, 126 (W.D. Pa. 1988) (high school student who went to teacher's house on school business and was assaulted by him states a claim based on the school's reckless indifference to its responsibility to protect her), *aff'd*, 869 F.2d 591 (3d Cir.), *vacated sub nom. Smith v. Sowers*, 109 S. Ct. 1634 (1989); *Riddle ex rel. Brewster v. Innskeep*, 675 F. Supp. 1153, 1162 (N.D. Ind. 1987) (correct standard is gross negligence or deliberate indifference in noneighth amendment failure to protect claim by juvenile who was released from custody but was still attending county habilitation school where he was stabbed by an inmate of the center).

seems almost eerie in light of her failure to act upon it"<sup>473</sup> that an unreasonable or pervasive risk to Joshua's safety existed.<sup>474</sup> The agency and the social worker, moreover, had the sole authority, the means,<sup>475</sup> and the statutory mandate<sup>476</sup> to do something about that danger. Their substantial departures from accepted<sup>477</sup> social work practice in intervening in abusive families placed the dependent four-year-old Joshua at greater risk. Joshua was not injured by one sudden and hard-to-predict outburst. Appropriate intervention at several junctures could have rescued Joshua before the cumulative effects of ongoing abuse caused severe brain damage.<sup>478</sup>

In the posture of the *DeShaney* case, we do not know *why* the social worker, who seemed to care about the child, did not act to protect him, but instead only documented Joshua's danger in eerie<sup>479</sup> detail. If the reason was related to faults in the Winnebago County child protective system as a whole, surely there is a good reason to impose constitutional liability on the government that employed and constrained her. In many states, child protection agencies have serious structural<sup>480</sup> problems that amount to a virtual scandal.<sup>481</sup> Despite statutory mandates to investigate child abuse reports within a specific time, the

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473. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

474. *Id.* (Brennan, J., dissenting).

475. See *supra* note 333 for the possible actions by the agency, and its failure to exercise any of those options.

476. Statutory mandates can play an evidentiary role in establishing the requisite state of mind. The *Doe I* court suggested that dereliction of *mandatory* duties, such as reporting suspected abuse, demonstrated deliberate indifference. The more specifically the statute mandated the particular action, the greater its value as proof of deliberate indifference. Whereas another failure to act may be fairly attributed to the exercise of judgment on how best to handle the situation, nonfeasance of a mandated duty cannot be explained in that way. *Doe I*, 649 F.2d 134, 145-46 (2d Cir. 1981).

477. The amicus Massachusetts Committee for Children and Youth contended that social work standards are well established, particularly when specific statutory duties are involved. Massachusetts Committee Brief, *supra* note 170, at 14-15. Vincent DeFrancis, an attorney and Director Emeritus of the Children's Division of the American Humane Association, notes that the professional standards in the field of child abuse and neglect that have been promulgated by organizations such as the American Humane Association, the Child Welfare League of America, and more recently, the National Center on Child Abuse and Neglect, are widely accepted. DeFrancis, *Liability for Inadequate Services*, in *MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 2* (Holder & Hayes eds. 1984).

478. Petitioners' Brief, *supra* note 3, at 7-8.

479. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

480. Cf. Robertson, *supra* note 95, at 120-22. In prison assault cases in the lower courts, the primary model accepted is one of "structural" reasonableness. The duty of prison officials to protect inmates is satisfied if there is evidence of systematic compliance with certain structural attributes of prison security, such as the posting of an adequate number of trained guards.

481. The Texas system may be a good example. See *Texas Senate Committee Report*, *supra* note 169. The Senate Committee's findings included: (1) there is widespread dissatisfaction and turnover among employees of the system because the agency is top heavy with administrative employees, leaving front-line staff with no promotional opportunities, and apparently excessive caseloads and unnecessary paperwork, *id.* at 5-10; (2) the agency is afraid to get rid of bad employees, *id.* at 10; (3) decisions "not to remove a child from a dangerous environment may be based on the lack of a suitable alternative placement, such as a foster home," *id.* at 11; (4) the same relatively small proportion of children have been removed from abusive homes in the last few years, even though there is evidence that the agency is dealing with an increasing number of cases with more severe abuse, *id.* at 5; (5) the agency leaves bad foster homes open because there are not enough homes available and it cannot afford to close them, *id.* at 13; and (6) the high incidence of repeat offenders reported to the system may partly result from practices that close out cases prematurely, doing no good but arousing

agency may never investigate.<sup>482</sup> A recent report in Texas found that forty-nine percent of all *confirmed* cases of child abuse were closed shortly after the investigation, due to "staff shortages."<sup>483</sup> Closure may be based on inappropriate factors such as the unwillingness of the family to cooperate with the service plan or the unavailability of services or foster home placements.<sup>484</sup> Systemic deficiencies may exist due to underfunding, understaffing, or failure to train properly, even in the face of the agency's knowledge of the dangerous results for the children in their care. Courts have granted injunctive relief to classes of foster children subject to the same kinds of deficiencies in protecting them as children not in legal custody.<sup>485</sup> In other words, the governmental agency may be responsible for structural problems that irrationally expose arbitrarily selected children to mortal danger. The reasoning of the *DeShaney* majority, however, excludes these children, too, from constitutional protection.

The appropriate state of mind requirement and the evidence needed to satisfy it should be developed in the specific child protection context. It may be

the ire and scorn of parents, who see that nothing happened and therefore conclude that officials are powerless to intervene, *id.* at 16.

See also Mushlin, *supra* note 345, at 209 (discussing the acute and widespread problems in foster care systems—an integral part of the overall child protective services—which threaten the safety of children in foster care). A report by Marian Wright Edelman, distinguished president of the Children's Defense Fund, concluded in 1979 that the foster care system was a "national disgrace." *Id.* at 212.

482. See, e.g., *Texas Senate Committee Report*, *supra* note 169, at 5. Many of the cases never are investigated at all, with sometimes fatal results.

483. *Id.* at 4. The Department's Regional Information and Performance Report for Fiscal Year 1988 showed that the agency left the child in the home in 70% of confirmed abuse cases, when ongoing services and supervision would be required; only half of those cases, however, received the necessary services. *Id.*

The Committee reported one instance in which a baby boy in El Paso died as result of cerebral tissue softening. There had been an earlier abuse report on the child that reflected a fractured skull and head and facial bruises. The agency confirmed the abuse, but a supervisor administratively closed the case due to staff shortages. El Paso County Attorney Joe Lucas requested that the Texas Attorney General's office investigate this and other mishandled cases. *Id.* at 2-3. Testimony before the Senate Committee showed: "Every day confirmed cases of child abuse are being closed leaving children in potentially dangerous homes without any further monitoring and without providing any services which could possibly alleviate the abusive or neglectful situation." *Id.* at 4. The Committee concluded that

there are children whose abuse was reported as required by law, whose abuse was confirmed by an investigation, and whose situation indicated a need for further monitoring and assistance. No caseworker was assigned, no one monitored the child, no services were provided to attempt to help the family, and nothing was done to address the resulting psychological damage to the child.

*Id.* at 5.

484. *Id.* at 11.

485. See *L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 121 (4th Cir. 1988) (upholding preliminary injunction to redress deficiencies in Maryland's federally funded foster care program that placed children at substantial risk of severe harm from abuse), *cert. denied*, 109 S. Ct. 816 (1989). Cf. *Lynch v. King*, 550 F. Supp. 325, 326 (D. Mass. 1982) (preliminary injunction granted to bring Massachusetts Department of Social Services into compliance with federal Social Security Act requirements for foster care system concerning service plans and periodic review, in order to prevent irreparable harm to children from abuse and neglect), *aff'd sub nom. Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983).

Due to the philosophy and problems of the child protective system, it is often fortuitous whether a child is taken into formal legal custody by protective services. See *supra* notes 343-46 and accompanying text.

useful, however, to consider what deliberate indifference, for example, has come to mean in another context—cases alleging that prison or jail officials failed to protect inmates or detainees from assault by other inmates or from their own suicidal impulses. By the close of the 1960s the federal judiciary could no longer reconcile their previous “hands-off” policy with what they were learning about the shocking conditions of prison life, including overcrowding, disease, arbitrary discipline, and violence by staff and by other prisoners.<sup>486</sup> In order to establish deliberate indifference as a constitutional violation, the lower federal courts<sup>487</sup> developed a two-part inquiry that required proof that a pervasive risk of harm existed and that the officials failed to exercise reasonable care to prevent prisoners from intentionally harming others.<sup>488</sup> Courts sustained actions based on a pervasive risk of harm when inmate violence was commonplace in general, or affected an identifiable subgroup of inmates, or when prison officials had prior knowledge of an isolated assault.<sup>489</sup> Some, but not all, lower courts have concluded that the Supreme Court’s recent cases, *Davidson v. Cannon*<sup>490</sup> and *Whitley v. Albers*,<sup>491</sup> now require a more rigorous proof of lack of reasonable care to avert the harm.<sup>492</sup> Nonetheless, federal judges have continued since 1986 to deny summary judgment motions and to uphold jury verdicts, especially when officials departed from such fundamental basics of prison administration as proper investigation and classification of the inmate population.<sup>493</sup> Prison assaults raise different issues than child abuse. Prisons house many violent offenders confined in close quarters for penal purposes. *Whitley* clearly demonstrated that official decisions about protecting inmates merited much greater deference when made in the press of quelling a prison riot.<sup>494</sup> Official responsi-

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486. Robertson, *supra* note 95, at 103.

487. The Supreme Court has approved the principle that the state has an affirmative duty to protect those individuals it involuntarily incarcerates. *DeShaney*, 109 S. Ct. at 1005-06.

488. Robertson, *supra* note 95, at 113.

489. *Id.* at 113-19.

490. 474 U.S. 344 (1986) (negligent failure to prevent anticipated assault on inmate not a deprivation of due process).

491. 475 U.S. 312 (1986) (in the context of a prison riot, more than deliberate indifference must be shown in an eighth amendment prison security and safety claim; “obduracy and wantonness” characterize an eighth amendment claim). Three Justices of the Court dissented from denial of certiorari to a similar case involving prison unrest that was short of a riot. *Dudley v. Stubbs*, 109 S. Ct. 1095 (1989) (O’Connor, J., dissenting from the denial of certiorari). They wanted to apply the heightened *Whitley* standard, which they characterized as acting “maliciously and sadistically,” to this situation as well. *Id.* at 1097.

492. See *Roland v. Johnson*, 856 F.2d 764, 769 (6th Cir. 1988) (after *Whitley*, when eighth amendment violation occurs in context of an assault on an inmate, defendant’s conduct must be “obdurate” or “wanton”); *Harris v. Maynard*, 843 F.2d 414, 415-16 (10th Cir. 1988) (wanton and obdurate misconduct of prison officials). But see *Walsh v. Mellas*, 837 F.2d 789, 801 (7th Cir.) (deliberate indifference), *cert. denied*, 108 S. Ct. 2832 (1988); *Morgan v. District of Columbia (Two Cases)*, 824 F.2d 1049, 1057 (D.C. Cir. 1987) (*Whitley* standard inapplicable to this case, involving a fight in an overcrowded jail, but not a riot).

493. See, e.g., *Roland*, 856 F.2d at 765 (homosexual rape; perpetrators who were members of homosexual pressure gang allowed to be trustees and to roam freely); *Walsh*, 837 F.2d at 792 (defendants did not screen inmate before assigning cell, and put dangerous gang member with gang tattoo on him in same cell with target of gang violence); *Morgan*, 824 F.2d at 1050 (dangerous psychotic allowed to roam at large in prison population instead of going into special, although overcrowded unit for those with mental problems).

494. *Whitley*, 475 U.S. at 320.

bility for inmate safety, moreover, is a necessary corollary of the deprivation of liberty, but it is not the primary function of prisons.

Child protective services, on the other hand, exercise less *direct* control over the conditions of (parental) custody, but their sole purpose is to protect children. Rather than the need to maintain control over volatile offenders that characterizes the inmate assault cases, the countervailing concern in child protection is the interest in preserving the child's family. It remains to be seen what specific kinds of misconduct tip the balance in favor of liability in abused children's cases. The lower federal courts have only just begun to hear the kind of shocking evidence of endemic problems that mobilized them to respond to prison violence. The Supreme Court, however, has cut off future case-by-case development of a meaningful standard of deliberate indifference in the child protection context, with its impenetrable custody line.<sup>495</sup> The *DeShaney* facts and the many substantial departures from child welfare practice alleged certainly raise the likelihood of deliberate indifference. As the social worker in *DeShaney* said, "I just knew the phone would ring some day and Joshua would be dead."<sup>496</sup>

#### V. CONCLUSION: POLICY CONCERNS

Child protective services is a system under enormous pressure. Caseworkers, who are typically poorly paid women, have to go out each day to do a very hard job, often without the resources to do it right. I have been told that it feels the same as if the police were expected to do their jobs without guns. Child protection professionals are extremely frustrated, their morale is low, job turnover is high,<sup>497</sup> and they feel increasingly vulnerable to legal action.<sup>498</sup>

Increased liability for child protection workers, therefore, raises serious policy concerns. Douglas Besharov, the former director of the National Center on Child Abuse and Neglect, has warned that even as things stand now it is hard to recruit and retain people into this poorly paid field and that fear of legal liability can immobilize decisionmakers.<sup>499</sup> He also believes that social worker liability is unfair.<sup>500</sup> Social workers can be blamed for whatever they do:

They can be blamed if they report suspected child abuse, and they can

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495. It has left open the possibility that such a standard may be developed for children in foster care. *DeShaney*, 109 S. Ct. at 1006, n.9.

496. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

497. See, e.g., *Texas Senate Committee Report*, *supra* note 169, at 6-7.

498. Douglas Besharov, former director of the National Center on Child Abuse and Neglect, has written a book, *THE VULNERABLE SOCIAL WORKER*, *supra* note 71, which reports on what he sees as an alarming and growing trend to increased social worker liability of all kinds. Although still infrequent, criminal prosecutions are more common. *Id.* at 1-2. He noted that the indictment of a child protective worker in Queens, New York, created a "riptide of concern among social work professionals." *Id.* at 14. Malpractice claims against child welfare workers are rising, *id.* at 3, and more state and federal lawsuits are being brought. *Id.* at 3, 14-15. Besharov concedes, however, that it "is all too easy to spin horror stories" and to exaggerate the legal vulnerability of social workers. The cases he describes in his book are the "exception" and he believes that, at most, only 1-2% of active social workers ever get sued. *Id.* at 14.

499. *Id.* at 137.

500. *Id.* at 15.

be blamed if they don't. They can be blamed if they remove a child from parental custody, and they can be blamed if they don't. They can be blamed if they return a child to the home; and they can be blamed if they don't.<sup>501</sup>

Blaming social workers, however, is the wrong social policy.<sup>502</sup> It may be hard to predict which child will be killed or seriously injured.<sup>503</sup> Besharov emphasizes that blaming the worker is particularly unfair when "many child protective tragedies are the inevitable result of inadequate funding," aggravated by recent federal budget cuts.<sup>504</sup> Poorly trained social workers with too many cases feel pressure to clear cases and do not stop to discover the facts.<sup>505</sup>

It would be far better to "blame" the system rather than the social workers<sup>506</sup> and to impose liability for due process violations on the government that makes child protection policy and exercises control over its employees.<sup>507</sup> That will be difficult to accomplish, however, under current Supreme Court doctrine of section 1983 municipal (government) liability. Federal and state governments may not be sued for money damages at all,<sup>508</sup> and municipalities may be found liable only if the execution of their custom or policy can be proven to have caused the deprivation of federal rights.<sup>509</sup> In recent years, the Court has inter-

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501. *Id.* at 17.

502. *Id.* at 130. Besharov concedes, however, that the fear of liability has some favorable impact on professional behavior, and that social workers should be held accountable for misconduct. *Id.* at 132-33.

503. *Id.* at 133.

504. *Id.* at 134.

505. *Id.*

506. Besharov favors good-faith immunity for the individual child protective workers. *Id.* at 152-55. Defendants sued under section 1983, however, already enjoy so-called good-faith immunity pursuant to a standard that offers them almost the same benefits conveyed by absolute immunity. *See Oren, supra* note 42, at nn.170-97 and accompanying text. I argued that the clearly established law standard of good faith immunity adopted in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982), is tantamount to absolute immunity because it abolishes the traditional procedural distinction between the two doctrines. Under the new rule, defendants may be granted summary judgment at an early stage of the litigation whenever they can show the judge that at the time of the incidents in question, there was no controlling legal precedent based on facts that *closely* resembled the alleged misconduct. After 1982, qualified good faith immunity and absolute immunity in civil rights law share a single purpose: both are designed to abort *litigation* at the earliest possible moment, with virtually no factual development.

507. Many commentators with substantial practical expertise in the child protection field would prefer to see agencies rather than workers held liable for inadequate and harmful services. *E.g.*, D. BESHAROV, *supra* note 71, at 156; *see* P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 98 (1983); DeFrancis, *Guest Editorial*, 8 NAT'L CHILD PROTECTION SERVICES NEWSL. 2 (1979). Douglas Besharov, however, opposes agency liability, too, as deflecting public attention from the real issues of inadequate financial and political support for child protection. D. BESHAROV, *supra* note 71, at 159.

508. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (state may not be sued for money damages in federal court under section 1983); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989) (states are not "persons" suable for money damages in state court under section 1983). By its terms, the statute refers only to actions taken under color of state law. The Supreme Court has created a damages remedy analogous to section 1983 that is available against federal officials. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Congress, however, has not amended the Federal Tort Claims Act to permit constitutional tort suits against the federal government itself. *See Oren, supra* note 42, 1000 & n.268.

509. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Recent decisions of the Supreme Court make municipal liability an increasingly tough standard to meet. *See Oren, supra* note 42, at 995-1000 & nn.245-65.



preted the civil rights law in a way that further restricts *both* individual and governmental liability, rather than reallocating responsibility from the former to the latter.<sup>510</sup>

Recently, in *City of Canton v. Harris*,<sup>511</sup> the Court finally conceded that a city's failure to train its police force to constitutional standards is actionable under section 1983. *Canton* required proof of "deliberate indifference" for this statutory<sup>512</sup> element of causation. The *Canton* standard promises to be difficult to satisfy.<sup>513</sup> It is not yet clear how lower courts will interpret the new requirements with respect to police training, and it is even less clear how the courts could translate these requirements in the child protection area. Nonetheless, some of the structural problems in child protection services discussed in this Article,<sup>514</sup> such as a policy or custom of arbitrarily closing cases due to staff shortages, should provide a basis for establishing municipal liability when the system subjects a child to a pervasive and substantial risk of harm and injury results.<sup>515</sup>

State child protection agencies are grievously defaulting on their responsibilities and are not protecting children from serious harm.<sup>516</sup> There may be ways to attack the problem other than imposing constitutional tort liability, such as criminal indictments, newspaper scandals, state tort law, or political shake-ups. Change often seems to come, however, from an interplay of many pres-

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510. See Oren, *supra* note 42, at 995-1000 & nn.245-65.

511. 109 S. Ct. 1197 (1989).

512. The degree of fault necessary to prove the underlying constitutional violation may or may not be the same as that required to prove the section 1983 statutory element of municipal causation. *City of Canton v. Harris*, 109 S. Ct. 1197, 1204 n.8 (1989). In *Canton* the Court observed that it had never ruled upon the requisite state of mind for a denial of medical care to a detainee in violation of the due process clause of the fourteenth amendment. *Id.*

513. The Court offered an uncomfortably narrow example: if the city knows "to a moral certainty" that police officers will have to arrest fleeing felons and arms them with guns to accomplish this, but then fails to train them at all on the constitutional limitations on the use of deadly force, this need is so obvious that the failure can be characterized as deliberate indifference to constitutional rights. *City of Canton*, 109 S. Ct. at 1205 n.10.

Three Justices believed that the evidence adduced in *Canton* could not meet the standard, and they would have dismissed the case without a remand. *Id.* at 1207 (O'Connor, J., concurring in part and dissenting in part). Their gloss on the *Canton* ruling is that when municipal liability is predicated upon a failure to act, deliberate indifference means the "functional equivalent of a decision by the city itself to violate the Constitution." *Id.* at 1208. They also emphasized the necessary close causal relation. *Id.* In other words, they reiterated the importance of the difference between action and inaction in statutory municipal liability doctrine, in much the same way that *DeShaney* sharply distinguished acts and omissions for purposes of the underlying constitutional violation. These members of the Court have for some time attempted to establish a nearly absolute line between municipal policies that were unconstitutional in and of themselves, and policies, such as inadequate training, which were not unconstitutional but led to constitutional violations. See, e.g., *City of Springfield v. Kibbe*, 480 U.S. 257, 270-72 (1987) (O'Connor, J., dissenting from dismissal of writ of certiorari).

514. See *supra* notes 480-85 and accompanying text.

515. Compare the endemic problems in child protection to the prison assault and medical treatment cases, which involved systemic faults. See, e.g., *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985). In *Anderson* the United States Court of Appeals for the Eleventh Circuit upheld a jury verdict for a pretrial detainee who died after ingesting drugs. *Id.* at 685-86. He was alone in a cell in a coma for some time after jailers became aware of a potential problem. The jury cleared the individual defendants but found that the municipality was responsible, apparently because of its policy of understaffing the jail. *Id.*

516. See D. BESHAROV, *supra* note 71, at 51-75.

tures.<sup>517</sup> The issue, moreover, is not which is the best *legislative* policy in the child protection field. Rather, faithfulness to the constitutional system is required. Most of all, the answer to the policy concern lies in the nature of the constitutional right at stake—due process in the context of family violence and child protection. Having set the trap, through its monopolization of child protection in the hands of a social service agency and through its toleration and even endorsement of the physical power parents may exercise over their children, the state may not be excused from constitutional accountability on the pretext that the abusive parent formally retained custody and therefore sprung the trap by himself. At stake are the child's most precious constitutional rights—her personal security, her liberty, and even her life.

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517. Even infamous state prison systems show signs of healthy change since the 1960s and the end of the "hands-off" policy of the federal courts. Robertson, *supra* note 95, at 150-55.

