POSITIVE RIGHTS IN CONSTITUTIONAL LAW: NO NEED TO GRAFT, BEST NOT TO PRUNE

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INTRODUCTION

The prevailing view in our courts and, to some degree, in legal scholarship is that "the Constitution is a charter of negative rather than positive liberties." With this absolute statement, judges have dismissed any claim that citizens have any positive rights to government services; that is, any claim that the federal government has an affirmative duty to ensure that its citizens can actually enjoy their constitutional liberties. The Supreme Court has denied claim after claim for government services, including the right to decent housing, public education, medical care, and welfare assistance. Finally, in DeShaney v. Winnebago County Department of Social Services, the Supreme Court held that a social service agency could not be liable for failing to remove a child from the custody of his father, despite substantial evidence of the father’s violent tendencies. The DeShaney opinion went even further, however, declaring that the Due Process Clause did not impose any affirmative obligations on state government. DeShaney thus became the latest—and perhaps the Court's

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2. Positive rights are defined as rights to government action. Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271, 2272 (1990). When a citizen enforces a positive right, she can compel the government to take action to provide certain services. By contrast, negative rights entail freedom from government action. Id. To enforce a negative right, a citizen merely insists that the government not act so as to impinge her freedom.
5. See Harris v. McRae, 448 U.S. 297, 318 (1980) (rejecting a claim for equal Medicaid funding for both childbirth and abortion by declaring that the government has no obligation to provide any medical funding at all).
7. 489 U.S. 189 (1989) (finding no liability under the Due Process Clause for a social service agency's decision to return a child to his father, a suspected child abuser, who inflicted severe injuries upon the child.)
8. Id.
9. See id. at 195 (denying that the Due Process Clause of the Fourteenth Amendment creates an affirmative right to protection).
strongest—statement sanctioning the negative rights theory as the official guiding principle by which demands for government action will be measured.

Whether the negative rights view prevails in our political culture or in society at large is a different question, one largely independent of the Court’s reasoning. Claims to positive rights can take various forms, ranging from broad social rights, such as the right to minimum subsistence, to those dependent on more narrowly defined governmental duties, like Joshua DeShaney’s claim to be protected from his father’s abuse. Additionally, what is a “positive” or a “negative” right depends on how one defines the issue at stake: While a majority on the Court framed Joshua’s claim for relief as relying on a (nonexistent) right to government protection, another reading of the facts would suggest that Joshua’s claim was that the government agency assigned to protect him should merely conduct its business in a non-negligent manner. However, there is a general understanding among Americans that the police and other state actors have a duty to protect private citizens from danger. Another telling indicator is the evolution of a duty to rescue in tort law, despite the long-standing common law rule that denies any liability for nonfeasance. Also, the fact that a community, a state, or the country as a whole has chosen (through its elected representatives) to provide certain social services gives strong normative support for an individual’s claim to receive those services. Apparently, the misfeasance/nonfeasance distinction that lawyers and judges take for granted does not match the average person’s moral intuitions.

Furthermore, as a theory of constitutional interpretation, the negative rights view is far from universally accepted. Legal scholar-

10 I will use the term “negative rights view” to describe the theory that the Constitution contains only guarantees of negative rights. The “positive rights view” interprets the Constitution as requiring the government to affirmatively act in some circumstances.
11 See generally Erwin Chemerinsky, Making the Case for a Constitutional Right to Minimum Entitlements, 44 MERCER L. REV. 525 (1993) (arguing that there is a constitutional right to basic subsistence).
12 See Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 DUKIE L.J. 507, 509 (1991) (arguing that the state has a duty under the Fourteenth Amendment to protect an abused child).
13 DeShaney, 489 U.S. at 195.
15 “Imagine, for example, the public reaction if a state decriminalized child and spouse abuse on the grounds that such abuse constitutes a private family matter.” Id. at 1087. Steven Heyman’s excellent, thoroughly researched article traces the historical pedigree of the government’s duty to protect. This duty has been a fundamental principle of our legal system and culture from the English common law, through the Revolution, the Civil War, and the Reconstruction. See Heyman, supra note 12.
16 For a more detailed discussion of affirmative duties in tort law, see infra Part II.
17 Beerman, supra note 14, at 1094.
ship reveals a wide diversity of opinions on this issue. Before DeShaney, many state courts and federal district courts had developed doctrines expanding the affirmative duties of government. The debate continues today in the scholarly literature as well as in federal and state courts around the country.

The thesis of this Comment is that interpretations of the Constitution that recognize some degree of positive rights are equally as plausible and legitimate as a strict negative rights view, if not more so. The dominant mainstream theories allow for positive rights claims, and explicitly endorse certain affirmative duties. The advocates of both the positive and negative rights views draw from overlapping theoretical sources, especially deontology and consequentialism, that lie at the heart of mainstream political thought. These theories are important to understanding legal development because they form the bedrock principles by which arguments and beliefs about the law are justified. As such, these theories are both indicators of and shaping forces within the social and legal culture. An examination of how these theories treat positive rights, as well as how other areas of law have evolved to incorporate positive rights, will show that positive rights have deep roots in our political and legal culture. At the same time, an examination of DeShaney’s effects on constitutional law makes clear that the negative rights regime has deformed the development of the law and has led judges to rely on formalistic logic games rather than real principles of justice.

Part I will describe the theoretical foundations of both the negative and positive rights views. Both sides can claim support from mainstream political thought, as well as from the text and history of the Constitution. A strict negative/positive rights distinction is a false reading of our system’s common law past that has remained in place even after the common law has begun to evolve away from such a hollow distinction.

Part II discusses how the lower courts have dealt with positive rights claims. Courts across the country have begun developing and expanding exceptions to the strict “no liability for nonfeasance” rule in the law of torts. These developments, plus the exceptions these courts have carved out of DeShaney, indicate that other courts view the conventional wisdom as an unduly harsh rule in need of qualification. Trial courts and local appeals courts deal with the people harmed by government neglect or inaction. These courts’ reactions to DeShaney, and their attempts to follow that case’s holding, indicate

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18 See discussion infra Part II.
19 See David Abraham, Liberty Without Equality: The Property-Rights Connection in a “Negative Citizenship” Regime, 21 L. & Soc. Inquiry 1, 3 (1996) (“[L]aw, being located at the intersection of civil society and the state, combines the persuasive norms of the former with the coercive power of the latter.”)
20 See infra notes 96-107 and accompanying text.
21 See infra notes 120-35 and accompanying text.
which theoretical and practical problems actually do arise in concrete cases. Some courts have developed exceptions to *DeShaney* that manage to realize our ideas of justice while still ostensibly staying within *DeShaney*'s rule;21 in contrast, cases denying relief under *DeShaney* illustrate the moral and logical distortion wrought by *DeShaney*'s broad negative rights holding.22 Outside of federal constitutional law, state courts' interpretations of positive rights guarantees found in state constitutions, plus other statutory guarantees of public or private assistance, indicate that there is indeed room within America's political culture for some claims of positive rights.

Part III summarizes the practical or policy-based arguments advanced by negative and positive rights proponents. The negative rights view is more a creation of expediency than of pure legal principles,23 thus, many of the most convincing claims made in favor of the negative rights theory are based on practical concerns.24 Any attempt to remove the negative rights roadblock will need to overcome the practical difficulties that arise from imposing affirmative duties on the government.25

I. THE THEORETICAL FOUNDATIONS OF THE POSITIVE AND NEGATIVE RIGHTS VIEWS

The primary moral and political theories that comprise our cultural set of beliefs provide a strong foundation for positive rights in the law. Conventional morality is a mixture of consequentialism and deontology;26 similarly, elements of both libertarian and communitarian political thought are present in American political culture, although they are mutually antagonistic.27 An examination of these four dominant theories in American political and legal culture shows that positive rights are a natural part of that culture.

A. Deontological or Rights-Based Theories

Deontology is defined by a belief "in the existence of constraints, which erect moral barriers to the promotion of the good."28 Those constraints are usually discussed as our rights as human beings; these

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21 See infra notes 139-53 and accompanying text.
22 See infra notes 154-64 and accompanying text.
23 See infra notes 182-86 and accompanying text.
24 See infra notes 181-96 and accompanying text.
25 See infra notes 190-96 and accompanying text.
26 See infra notes 181-96 and accompanying text.
28 See Sanford Levinson, *The Welfare State*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 553, 553-54 (Dennis Patterson ed. 1996) (observing that almost every Western government, including the United States, is some kind of welfare state; none are purely libertarian "night-watchman" states).
29 Kagan, supra note 27, at 73.
rights preserve each individual’s inherent dignity and worth as an “end in himself.”

Deontological rights take priority over the comparative goodness of the results of a given act; thus, unlike consequentialism, deontological theories do not allow rights to be compromised to achieve a quantitatively “better” result. Certain key features of deontological theory are prevalent in discussions of positive and negative rights, most notably: the affirmative act requirement, the moral significance of intent, and the distinction between obligatory and permissive moral acts.

1. The Action/Inaction Distinction

The negative rights view relies heavily on the deontological premise that only actions, not omissions, have moral worth. The requirement of an affirmative act—outside of certain carefully limited exceptions—is a basic requirement for liability under tort law and criminal law. This rule is present in almost every such case in the form of strict causation requirements: “If personal losses are attributable to third parties or natural events, it follows that the party who suffered the loss has no claim on the government. No causal linkage exists...”

Negative rights proponents apply this idea in interpreting the Constitution as containing only negative rights. The Constitution does not merely delineate the government’s political powers and limitations; it also declares the government’s ethical obligation not to interfere with its citizens’ rights. From a deontological standpoint, this duty extends only to government actions: Government inaction, even in the face of extreme injury or indifference by state actors, is not a morally culpable deprivation of liberty by the government.

Despite the negative rights view’s selective use of the action/inaction distinction, even deontological theories based on a

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51 See Ernest J. Weinrib, The Case for a Duty to Rescue, in PHILOSOPHY OF LAW 625, 638 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) (comparing utilitarianism and deontology); ROGER J. SULLIVAN, IMMANUEL KANT’S MORAL THEORY 50 (1989) (explaining Kant’s theory that moral obligations are absolute); KAGAN, supra note 27, at 73-74 (defining deontology and consequentialism).

52 See Bandes, supra note 2, at 2313 (quoting Judith Shklar, Giving Injustice Its Due, 98 YALE L.J. 1185, 1142 (1989)).


constraint against doing harm do place some (albeit lesser) moral weight on allowing harm. Additionally, most deontological theorists explicitly recognize some specific affirmative duties. For example, Kant discussed positive obligations such as the duty to develop one's talents or to love one's parents. Even in our legal system of predominantly negative rights, the state can still enforce a parent's duty to care for his children, and most people consider it both a moral failing and a legal crime when a parent refuses to fulfill this obligation.

2. Intent

Perhaps the strongest rebuttal of the negative rights view's reliance on the action/inaction distinction is the fact that only one strain of deontological theory attaches moral weight to results alone; more familiar is the school of thought that judges morality by the actor's intent. Liability (except for limited instances of strict liability) attaches to actions not solely based on their physical effects, but rather because an act is more completely understood to be an "external manifestation of the will," i.e., intent; otherwise, we could hold people criminally liable for innocently (non-negligently) causing accidents. Under this view, then, inaction can be just as wrongful as action if done with wrongful intent. When the government withholds the assistance needed to exercise a fundamental right, say in the case of Medicaid funding for abortion, the government makes a conscious decision not to protect that right from the vicissitudes of the market, thereby causally bringing about a prohibited goal through seemingly passive means.

3. The Distinction Between Obligatory and Supererogatory Duties

The negative rights view also rests upon the distinction between obligatory and supererogatory duties. Kant distinguished "narrow"
duties, which were primarily restraints on conduct, from "wide" duties that obligate a person to act affirmatively in some way.\textsuperscript{41} Narrow duties are required of every person regardless of circumstances, while wide or positive duties do not specify how or to what extent an individual must act to fulfill them; therefore, each individual must use his judgment in deciding how and to what extent to fulfill a positive duty.\textsuperscript{42} In a sense, the fact that positive duties are merely permissible makes them morally neutral—an individual or a government can be praised for carrying out such obligations, but neither can be faulted for neglecting to do so.\textsuperscript{43}

Translated into legal terms, this concept makes a sharp distinction between legal and imperfect obligations. Legal obligations, including rights, are enforceable by government, but imperfect obligations are more akin to charity—they do not require anyone, either the government or private citizens, to fulfill them, nor can needy persons claim a right to that assistance.\textsuperscript{44} Judge Posner’s Seventh Circuit opinion in \textit{DeShaney} takes this distinction for granted: “The men who framed the original Constitution and the Fourteenth Amendment were worried about government’s oppressing the citizenry rather than about its failing to provide adequate social services.”\textsuperscript{45}

Negative rights theorists recognize that many people will not be able to enjoy their constitutional rights, whether because their poverty makes such rights unaffordable,\textsuperscript{46} or because their youth or other circumstances render them vulnerable to private violence.\textsuperscript{47} However, this view argues that, because the government played no active part in creating these problems, it has no obligation to correct them. The consequentialist strain of the negative rights view does not necessarily foreclose legislative action to create social services, but these services are seen as privileges, not rights that citizens can enforce in court.\textsuperscript{48}

\textsuperscript{41} SULLIVAN, supra note 31, at 51-52.
\textsuperscript{42} Id. at 52.
\textsuperscript{43} Id. at 189.
\textsuperscript{44} See Epstein, supra note 33, at 204 (describing the distinction between legal and imperfect obligations as rooted in the common law).
\textsuperscript{45} \textit{DeShaney} v. Winnebago County Dep’t. of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987) (quoted in Aviam Soifer, \textit{Moral Ambition, Formalism, and the “Free World” of DeShaney}, 57 GEO. WASH. L. REV. 1512, 1521-22 (1989)).
\textsuperscript{46} See Harris v. McRae, 448 U.S. 297 (1980) (holding that the government has no obligation to fund medically necessary abortions).
\textsuperscript{47} See \textit{DeShaney} v. Winnebago County Dep’t. of Soc. Servs., 489 U.S. 189 (1989) (refusing to hold state child protection agency liable for mistakenly returning a child to an abusive home).
\textsuperscript{48} See \textit{DeShaney}, 489 U.S. at 196 ("[The Fourteenth Amendment’s] purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."). See also Currie, supra note 34, at 886-87 (arguing that, while explicit constitutional foundations for positive rights are lacking, the Constitution does not rule out legislative action that would create such rights).
To the extent that deontological theories contrast narrow (negative) duties to wide (positive) duties, the conclusion does not follow that, because positive duties are left to the individual's judgment, they are unnecessary. The fact that those duties leave their exact scope of fulfillment up to the individual actor does not mean that the actor may abandon them altogether. In fact, social or political consensus may very well specify a certain minimum extent to which those duties should be fulfilled—for example, the government requires that parents supply a minimum of care to their children. In the tort context, certain (judicially crafted) limitations on a duty to rescue—that such a duty exists only in an emergency situation, and only if the actor can perform the rescue with little harm to his own interests—can impose an objective standard rather than individual, subjective determinations of how to fulfill a positive duty, thereby eliminating the risks posed by an overly expansive affirmative duty.

B. Consequentialist Theories

Consequentialist theories maintain as their core value the maximization of happiness, welfare, or some other version of the general good. Modern consequentialist theories tend to follow a rule utilitarian strand, viewing rights as the result of a balancing of interests between private citizens or between citizens and the government. Judges and legislators may not re-weigh the balance whenever the occasion arises, however; "[r]ules result from a balance of interests, but, once in place, exert an independent claim to obedience."

The rule-of-law argument implicit in rule utilitarianism, as well as some consideration of state interests, are present in much of the negative-rights rhetoric. In favor of government interests, negative rights proponents claim that judicial recognition of positive rights would divert resources from other programs and subvert legislative discretion regarding spending priorities. Also, conservatives decry

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49 See Sullivan, supra note 31, at 316 n.16 (discussing various interpretations of supererogation).
50 See Weinrib, supra note 31, at 686-87 ("The relief of an emergency is . . . unlikely to induce reliance on the assistance of others in normal conditions.").
51 Utilitarians such as John Stuart Mill and Jeremy Bentham based their utilitarian theory on happiness as its core value. By contrast, "welfarists" distinguish "welfare" from "happiness" in that while the latter describes the satisfaction of desires, the former is a more comprehensive term, connoting the overall life satisfaction of an "informed and autonomous subject." L.W. Sumner, Welfare, Happiness, and Ethics 172 (1996).
52 See Fallon, supra note 30, at 947-48 (positing that individual rights are essentially limits on government power, or the result of a balancing between individual and government interests).
53 See Epstein, supra note 33, at 206-07 (arguing that treating welfare as a right would fail to take into account the limited resources available to satisfy this right).
54 See Eaton & Wells, supra note 39, at 198-99 (explaining the argument that legislatures, not the judiciary, should decide how to allocate resources and define the government's obligations).
judges' "invention" of new fundamental rights through creative interpretations of the law.  

An additional consequentialist feature present in the negative rights view is that both theories judge the rightness of actions by their effects or results, not by the actor's intent. The negative rights doctrine ignores the state's intent when it fails to act: As the Court held in *DeShaney*, the government can only be held liable when it makes a victim worse off, regardless of the state actor's intentions. Although the Court relied on several cases that included state-of-mind inquiries, such a requirement was conspicuously absent from the majority's opinion in this case. The Court's test was essentially results-oriented: Was the state's active conduct a proximate cause of Joshua's injuries? Once it had answered this question in the negative, the majority felt no need to consider whether the state actors had been negligent or "deliberately indifferent" to Joshua's safety.

Although the *DeShaney* Court relies on some consequentialist premises, such as the basic causation issue discussed above and the public policy concerns described in the next section, the bulk of consequentialist reasoning soundly repudiates the negative rights view. Consequentialism weighs the rightness of an action purely on its results, not on the actor's intent: "for the consequentialist . . . there is no intrinsic moral significance to the distinction between doing and allowing." A rule utilitarian analysis sees the action/inaction distinction as irrelevant in questions of rights: "what rights should be recognized at any particular time depends on an assessment of competing interests and likely empirical consequences . . . ." Also, any undesired consequences arising out of the recognition of positive rights can be mitigated by tailoring the rule to produce the best outcome, as Professor Weinrib demonstrates in proposing a tort law duty to rescue.

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57 See *DeShaney* v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 201 (1989) ("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."). See also Bandes, *supra* note 2, at 2278 (criticizing the action/inaction distinction).

58 See *DeShaney*, 489 U.S. at 198 n.5 (citing *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976), that held prison officials liable for "deliberate indifference" to a prisoner's need for medical attention).

59 Id. at 201.

60 See Eaton & Wells, *supra* note 39, at 162 (describing a state-of-mind inquiry as essential to protect people from "abusive or oppressive behavior on the part of government officers").

61 Kagan, *supra* note 27, at 95. See *Weinrib, supra* note 31, at 635 ("Consequences are important; how they are reached is not.").


63 See *Weinrib, supra* note 31, at 636-38 (discussing two limitations on a duty to rescue: that the duty arise only in emergencies, and that the rescuer can assist the victim with little harm or inconvenience to himself).
Additionally, positive rights advocates point out that, in opinions like *DeShaney* and *Webster*, the Court has selected an inappropriate and unrealistic baseline for considering whether an individual is made worse off by government inaction. These cases compare instances of inadequate state action against a hypothetical state in which the government provides no services whatsoever. However, we live in a modern welfare state in which government wields so much power over access to resources that it can do harm by virtue of its inertia, by inaction or inadequate action, and by holding a monopoly on certain kinds of aid and displacing private sources of help. The state has also shaped the social structures that enable many constitutional torts to occur. In Joshua DeShaney's case, Wisconsin's family law gave custody of the boy to his father; this was just as much a form of positive state action as if the state had placed Joshua in an abusive foster home.

Furthermore, rights cannot be understood separately from the powers of government; a consequentialist theory of rights requires that the interests of individuals and the government be balanced against the interests of private citizens. At the very least, a utilitarian cost-benefit analysis mandates a duty to rescue if the benefits to the people involved are less than the costs to the government.

### C. Libertarianism

Libertarianism places overriding importance on individual autonomy. This ideology maintains that individual freedom and self-sufficiency must be respected in order to preserve human dignity and prevent state oppression. The government thus should remove only structural or artificial barriers that prevent people from exercising their rights. Further, to intervene in order to correct "natural" inequalities would degrade the people so helped because such action would deprive them of the virtues of self-help and treat them as less than autonomous, adult human beings. Additionally, most libertarians accept the presumption that inequalities are primarily the result of individual choice rather than of social factors outside an individual's control. Therefore, they believe that any claim of positive

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64 See Bandes, *supra* note 2, at 2283-85 (describing the ways in which governmental inaction can have the same negative effects as deliberate action).
65 Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1362 (1992) ("[L]ike property, custody is a legal concept, shaped and enforced by the state.").
67 See Soliter, *supra* note 45, at 1519-20 (criticizing the majority's reasoning in *DeShaney*: Because no government had locked up Joshua, he ought to have taken care of himself. That is what individuals, rugged or not, are expected to do in the free world.").
68 See Bandes, *supra* note 2, at 2316-17 (explaining the view that portrays the results of free competition as just, but government interference as degrading and intrusive on individual liberty).
liberty amounts to the government's attempting to remove self-imposed constraints on liberty, in effect paternalistically determining the substantive content of that liberty and overriding those individuals' decisions about their own best interests.69

The libertarian's disdain for social legislation in general generates antipathy toward any claims of positive rights to government services. Libertarians worry that positive rights would require massive—ultimately wasteful—public expenditures. In addition to helping people who are less at fault for their own condition, the government might be forced to take on the care of individuals whose self-destructive behavior is the main cause of their problems.70 They also express concern that a broad declaration of positive rights would force states to implement expensive outreach programs in order to meet judicially created standards.71 Furthermore, because libertarians do not consider social services to be part of the government's proper function, any state-run program that attempts to fulfill these imperfect obligations is guilty of stealing from the taxpayers to give to the poor: "It is a different matter when some people try to fund their gifts with cash taken from their neighbor's pockets."72

Despite their strong denouncements of government in general—and social programs in particular—even libertarians must admit that the state exists in part to protect individuals from each other.73 Some scholars have even reconciled certain redistributive goals with libertarian individualism: For instance, some commentators limit the right to amass resources when exclusion of others causes severe harm or death.74 Most modern libertarians include the provision of some public goods within the state's proper range of powers or responsibilities.75

Furthermore, critics of the negative rights view point out that this doctrine in effect frustrates the very rights that libertarians wish to protect. Even libertarians must recognize that individual rights are nonexistent if they cannot be exercised, or if the state does not enforce those rights that are necessary for a free and democratic government.76 Certain minimum levels of physical integrity are "a pre-

69 See id. at 2325 (explaining how the action/inaction distinction relates to ideas about positive versus negative liberty).
71 Id.
72 Epstein, supra note 33, at 203.
74 See id. at 664 ("[S]ome libertarians [concede] that, for example, one may not appropriate the only water hole in the desert to the life-threatening exclusion or the extortion of others.").
75 Levinson, supra note 28, at 553.
condition to the accomplishment of the purposes that [a person's] freedom gives him the power to set. Scholars on both sides of this debate recognize that, to a great extent, some minimal level of physical and material security is necessary for an individual to be free. This view argues that constitutional rights should not be dependent on a person's ability to pay for them, and therefore the government has an obligation to help needy citizens exercise those rights. Social rights should be enshrined in the Constitution because, as the founding charter of our nation and a repository for rights that are set beyond the reach of legislative majorities, the Constitution should contain all of the most important aspirations and principles of our society.

Moreover, some libertarian policy premises lack firm empirical support. Legal realists have long criticized the libertarian's sharp distinction between public and private activity as fictitious; in reality, the "private" sphere has been shaped and enabled by government action. The claim that inequality is entirely self-generated is belied by the existence of a hereditary, marginalized, socially immobilized underclass in this country, whose poverty and powerlessness are in part maintained by institutionalized inequalities in education and by racial discrimination. In addition, the libertarian's image of the "rugged individual" capable of fending for himself or herself certainly does not hold true in cases involving children in need of protection. This extremely atomistic picture of humanity has been criticized by some scholars—most notably communitarians—for inaccurately brushing aside the complex interactions and interdependencies between individuals and their societies, not to mention each individual's nature as a social being.

participation, as well as tolerance and compromise. Destitute, hungry people don't vote, and idle, hungry people have no patience for the slow, often tedious haggling among often sharply differing groups that democracy requires.

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77 See Weinrib, supra note 31, at 638.
78 See Abraham, supra note 19, at 32 ("[N]egative rights, 'liberties', provide people with possibilities that in our existing socioeconomic system they are unable to fulfill meaningfully"); id at 47-48 (discussing the notion of property, or a minimal level of material security, as the "guardian" of other rights).
79 See Mark Tushnet, Civil Rights and Social Rights: The Future of the Reconstruction Amendments, 25 LOY. L.A. L. Rev. 1207, 1214-16 (1992) (drawing a distinction between formal rights—rights that require only that the laws be in harmony with them—and rights that are more concerned with social realities or effects).
81 Levinson, supra note 28, at 556-57.
82 See Judges, supra note 73, at 662 ("Extreme poverty and deprivation of basic education ... harms ... because they disable any real participation in politics and plainly do ascribe social and political stigma.").
83 Soifer, supra note 45, at 1519-20.
84 See, e.g., id. at 1520 (criticizing the atomistic view of humanity): ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 32 (1996) (noting the disagreement between "liberal individualists" and
D. Communitarian Theories

One commentator described communitarianism as “the sane middle ground . . . between authoritarianism and libertarianism.” The basic characteristic of communitarian theories is that they envision individuals and their community as mutually interdependent rather than antagonistic. In contrast, the atomistic model of human rights embodied in libertarianism sees society or government as conflicting with the rights and interests of the individual. “Communitarians support basic civil liberties, but fear that our ability to confront societal problems effectively is compromised by the claims of ‘radical individualists’ who would subordinate the needs of the community to the absolute fulfillment of individual rights.”

Positive rights are a fundamental part of communitarian theory. These rights or obligations are necessary to fulfill the core values of communitarianism: freedom, equality, and well-being. Additionally, the inclusion of positive rights is essential for the communitarian’s conception of human beings as social rather than atomistic: “When rights are viewed solely as negative, in that their correlative duties require only noninterference with persons’ having the objects of their rights, the adversarial conception of the relation between rights and community is given ready entry.”

Many scholars have recognized collective aspects to our Constitution’s supposedly individualistic, negative rights. Professor Tribe has observed that the positive rights expressly described in the Constitution do not fit the standard description of rights under our system. For example, the Sixth Amendment’s guarantees of a speedy trial, compulsory process for obtaining witnesses, and the right to counsel, and the requirement of Article IV, section 4 that the United States guarantee a republican form of government, impose affirmative requirements on the federal government. While the Bill of Rights typically describes rights that are individual, alienable, and negative, these other rights are just the opposite. First, they are positive, in that they require some affirmative act by the government to fulfill them. Second, they are inalienable, as no individual may permanently waive these rights. Third, they are held in common by all citi-
zens, and cannot be asserted by one individual (except, of course, the Sixth Amendment's rights protecting criminal defendants). Tribe observes that these rights "correspond to systemic norms—norms concerned with structuring power relationships to avoid the creation or perpetuation of hierarchy . . . " Thus, even rights that are commonly regarded as attaching to individuals derive their substance and meaning from an individual's membership in a group.

In addition, even the commonly accepted negative Constitutional rights define "spheres of membership" by singling out some people for protection based on characteristics shared in common with a group. For example, when a person invokes the Americans with Disability Act, she must prove that her claimed disability is of the type protected under the Act.

In a system of group-centered or relational rights, government can effect great harm by its inaction. When the state refuses to protect or assist an individual in exercising a positive right—for instance, by refusing to fund abortions for poor women—that refusal amounts to a forced alienation of that right. Also, the modern welfare state creates reliance on its services and displaces private sources of help.

The greater influence the government has on our society, the greater responsibility the government should take in alleviating social problems. Extensive government involvement in shaping our society makes the claim of nonfeasance less tenable—the government's conduct is active misfeasance when it has played a part in the creation or exacerbation of a social problem in the private sphere. Despite libertarian criticism of social services, they have become a fact of modern life: "Just as we no longer trust our economic welfare to the uncertainties of the unregulated marketplace, we no longer trust our personal welfare to the uncertainties of the weakened family structure . . . ."

Communitarian ideals are important because many legal reformers speak in the language of communal values and mutual support, as well as because communitarianism engages traditional liberal values in a constructive dialogue that will most likely continue to reshape

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92 Tribe, supra note 91, at 336 (discussing the abortion funding cases).
93 Beerman, supra note 14, at 1089-90 ("All institutions . . . structure themselves in response to the institutions that surround them. As government agencies become more pervasive and more powerful, the ethical argument in favor of a governmental responsibility to intervene becomes stronger. Other institutions develop around those agencies, and people rely on the agencies for the protective services they provide.").
the way we view the law.\textsuperscript{99} In addition, due to this theory's strong emphasis on mutual obligations, communitarianism is one major theoretical school that is effectively closed out of the law by the DeShaney Court's negative rights rule.

II. THE EVOLUTION AND AVOIDANCE OF POSITIVE RIGHTS: DEVELOPMENTS BEFORE AND AFTER DESHANEY

The artificial exclusion of positive rights from constitutional law has distorted the development of the law. This distortion is evident not only in the questionable logic of DeShaney itself,\textsuperscript{100} but also in the refusal of lower courts to apply the DeShaney exceptions, as well as the distortion of state constitutional law affected by the gravitational pull of federal constitutional doctrine. At the same time, however, some positive rights notions have developed and continue to evolve. These include the judicially crafted exceptions to DeShaney, notions of affirmative duties in private law, and the presence of explicit positive rights guarantees in state constitutional law.

On the one hand, some courts have developed exceptions to DeShaney that recognize some limited affirmative duties on behalf of government. By contrast, other courts have refused to apply those exceptions, extending DeShaney past its own terms to foreclose a victim's recovery even in cases where the state can be said to have an active causal role (in the traditional sense) in the ultimate harm. These cases highlight the distortion in the law caused by DeShaney.

Private law has shown an increasing acceptance of affirmative duties of private citizens toward other citizens. These developments show, first, that the negative rights view is not applied uniformly throughout all areas of the law. Second, they show that the moral foundations for some positive rights (or affirmative duties) are strong enough to have led courts and legislatures to craft exceptions to the general rule of "no liability for nonfeasance."\textsuperscript{101} Third, the particular types of rules that impose affirmative duties can serve as guideposts for expanding positive rights in constitutional law, as these rules already enjoy popular support.

State constitutional law contains even broader guarantees of positive rights, which shows that these rights are already an established part of our political culture. However, state courts have erroneously imitated the negative rights rule in federal constitutional law, which has distorted and weakened many state constitutional rights.\textsuperscript{102}

\textsuperscript{99} See Abraham, supra note 19, at 5-6 (discussing the dialogue between communitarian and liberal theories and the role of communitarian ideas in legal reform).
\textsuperscript{100} For a more detailed criticism of the DeShaney decision, see generally Bandes, supra note 2.
\textsuperscript{101} See RESTATEMENT (SECOND) OF TORTS § 314(A) cmt. c (1965).
A. Changing Views about Affirmative Duties

Positive rights are not foreign to this country's legal history; in fact, they have found expression in state law as well as in federal law. Through the Ninth and Tenth Amendments, the federal constitution originally left the protection of most civil rights, including positive rights, to the states. Additionally, the Fourteenth Amendment was adopted with the explicit intention of requiring the government to protect citizens' rights. In its interpretation of the Due Process Clause, the DeShaney Court confused the history of the Fourteenth Amendment with that of the Fifth. The Fifth Amendment was based in its framers' fear of tyranny by the federal government; this is the rhetoric that the DeShaney majority uses to describe the policies and intent behind the Fourteenth Amendment's Due Process Clause. However, the Fourteenth Amendment and its family of Reconstruction legislation arose out of a concern for deliberate state inaction. One of the major ills that plagued the post-war South was the rampant terrorism of the Ku Klux Klan, which was exacerbated or even facilitated by local officials' refusal to act to oppose it. Section 1983, passed pursuant to the Fourteenth Amendment, was meant to remedy this problem by creating a cause of action against this kind of abuse of official power.

Although the law does not enforce every moral requirement, most legal rules are based in a common understanding of morality. Popular sentiment about which moral duties are required, and which should be encapsulated within the law, indicates where the moral ground is fertile for the growth of law. The general consensus is that affirmative duties should be imposed, and victims should be given a positive-rights remedy in court, for certain common-law and constitutional torts.

The area of the law in which this view has most readily found legal expression is in the tort law. Although the common law of torts has traditionally maintained a strict separation between misfeasance and nonfeasance, the law has gradually evolved some exceptions to the no-duty default rule that are now widely accepted. The Second Restatement of Torts recognizes affirmative duties to others in the following circumstances: special relationships, a duty to prevent fur-

103 U.S. CONST. amend. IX & X.
104 See Eaton & Wells, supra note 39, at 118-21 (discussing the Supreme Court's interpretation of the Fourteenth Amendment in DeShaney); Soifer, supra note 45, at 1521-26 (comparing the intent behind the Fourteenth and Fifth Amendments.)
105 See id.
106 See Ackerman, supra note 85, at 661 (discussing the interrelation of law and morality).
107 See RESTATEMENT (SECOND) OF TORTS § 314(A) cmt. c (1965).
108 Id. § 314(A).
ther harm after causally contributing to an initial injury,\textsuperscript{109} a duty to warn or protect after one's actions create an unreasonable risk of harm,\textsuperscript{110} and the duty to follow through on an attempted rescue and to act with due care.\textsuperscript{111}

Additionally, state law reflects a growing recognition of a duty on behalf of private citizens to rescue another person in danger, or—at the very least—the law provides an incentive to rescue. Some states have passed statutes requiring an individual to assist someone in peril when the danger is great and the rescuer can complete the rescue with minimal danger or inconvenience to himself.\textsuperscript{112} Several more states have laws that punish those who fail to report serious crimes.\textsuperscript{113} Also noteworthy is the fact that all fifty states have "Good Samaritan" laws intended to encourage (rather than sway by threat of criminal sanction or lawsuit) people to attempt a rescue or to give medical aid.\textsuperscript{114} These laws absolve rescuers from legal or criminal liability except where the rescuer recklessly or intentionally harms the victim.

The exceptions within the tort law indicate that the law no longer refuses to impose affirmative obligations on citizens to look out for the welfare of others. These laws consciously amend the preexisting legal structure in favor of a more communitarian-influenced approach, which shows that people generally believed something was previously lacking from the traditional understanding of the law's role and values.

B. Lower Courts' Reactions to DeShaney

In the years following DeShaney, many lower courts interpreted the decision as a sweeping denial of almost all claims requiring affirmative government action.\textsuperscript{115} However, in the twelve years since that de-

\textsuperscript{109} Id. § 322.

\textsuperscript{110} Id. § 321.

\textsuperscript{111} Id. § 324.

\textsuperscript{112} 12 VT. STAT. ANN. tit. 12 § 519 (1973), MINN. STAT. ANN. § 604A.01 (West 2000); R.I. GEN. LAWS §§ 11-56-1 (1994); WIS. STAT. ANN. § 940.34(2) (West 1996). At least one court has held that a state duty-to-rescue law creates by analogy a cause of action against a state agency for its failure to follow through on an investigation of child abuse. Sabia v. State, 669 A.2d 1187, 1194-95 (Vt. 1995).

\textsuperscript{113} See R.I. GEN. LAWS §§ 11-373.1 (1994); WIS. STAT. ANN. § 940.34(2) (West 1996); FLA. STAT. ANN. § 794.027 (West 1992); COLO. REV. STAT. §§ 18-8-115 (1986); MASS. ANN. LAWS ch. 268, § 40 (Law. Co-op. 1992); OHIO REV. CODE ANN. § 2921.22(A) (Anderson 1999); WASH. REV. CODE ANN. §§ 9.69.100, 9.92.020 (West 1988). See also Ackerman, supra note 85, at 660 n.53 (discussing affirmative duties in state law).

\textsuperscript{114} See Willard v. City of Vicksburg, 571 So. 2d 972, 974 (Miss. 1990) (listing of relevant state laws).

\textsuperscript{115} See Eaton & Wells, supra note 39, at 166 (describing lower court cases shortly after DeShaney that treated the decision "as a blanket prohibition on constitutional tort liability for government inaction"). See generally Joseph M. Pellicciotti, Annotation, "State-Created Danger," or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.S. §§ 1983, 159 A.L.R. Fed. 37 (2000) (summarizing lower court cases that have denied recovery under a strict reading of DeShaney).
cision was handed down, many qualifications and exceptions have germinated in the case law. Often mirroring the special rules for affirmative duties in the tort law, the exceptions to the no-duty rule generally conform to the basic reasoning of DeShaney.

1. Special Relationships Creating a Duty to Aid

Before DeShaney, some lower courts had developed a rule allowing for affirmative duties when a special relationship was found to exist between the plaintiff and the state actor(s). Relying on Estelle v. Gamble and Youngberg v. Romeo, DeShaney specifically limited this exception to cases in which the victim is in the state's custody. Since DeShaney, some circuits have relaxed the special relationship rule to include situations analogous to custody, such as foster care arranged by the state or reckless placement of a child with an abusive parent. Foster care cases have declared the broadest assertions of positive rights for children over whose fates the government has chosen to assume control. In such cases, courts often speak in terms of a foster child's right to be placed in a safe environment.

Furthermore, some courts have held state agencies liable for placing children with their abusive natural parents. These cases typically require a high standard of misconduct as judged by a state-of-mind inquiry, namely a "deliberate indifference" or actual knowledge standard.

These cases contrast with DeShaney in light of that case's complete lack of any state-of-mind inquiry. The DeShaney Court focused ex-

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116 See Bandes, supra note 2, at 2278.
117 429 U.S. 97 (1982) (holding prison officials liable for failure to provide medical care to inmate).
118 457 U.S. 307 (1982) (requiring state to provide for the safety and basic needs of involuntarily committed mental patients).
120 See Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995) (holding that a foster child has a right to be placed with a family that will provide adequate supervision); Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990) (ruling that a state owes foster children a "rudimentary duty of safekeeping"). See also Norfleet v. Arkansas Dept. of Human Servs., 989 F.2d 289 (8th Cir. 1993) (finding the state liable for providing children in foster homes with adequate medical care); Lewis v. New Mexico Dept. of Human Servs., 959 F.2d 883 (10th Cir. 1992) (holding that minors in foster care have a constitutional right to be reasonably safe from harm).
121 See Jervis v. McMullen, 186 F.3d 1066 (8th Cir. 1999), reh'g en bane granted, judgment vacated, 1999 U.S. App. LEXIS 24361 (8th Cir. Sept. 30, 1999) (holding that the state created a danger by placing a child in the custody of the father who was a convicted pedophile); Ford v. Johnson, 899 F. Supp. 227, 233 (W.D. Pa. 1995) (holding that there is a prima facie case of state created danger when a state agency placed a child in the custody of an abusive father). But see Murphy v. Morgan, 914 F.2d 846, 852 (7th Cir. 1990) (noting in dicta that the state could not be held liable for placing a child with an abusive natural parent).
122 Ford, 899 F. Supp. at 233.
123 Jervis, 186 F.3d at 1067.
124 See Eaton & Wells, supra note 39, at 159 (noting that DeShaney is part of a line of Supreme Court precedents that avoid state-of-mind inquiries).
clusively on the degree of state involvement in Joshua DeShaney's life, seemingly indifferent to the question of whether the social workers involved had actual or constructive knowledge of his father's ongoing abuse. As Justice Brennan pointed out in his dissent, the Winnebago County Department of Social Services had amassed substantial evidence of abuse, and the social worker herself stated that "I just knew the phone would ring some day and Joshua would be dead." Despite compelling evidence of a guilty state of mind on the part of the state actors involved, the Court apparently considered the officials' state of mind to be irrelevant; instead, the Court simply declared a broad negative-rights rule and accordingly dismissed Joshua's claim.

In addition, some courts have expanded the types of special relationships between victims and state defendants to include situations in which a defendant made a promise of protection but failed to follow through. Before DeShaney, some cases had found liability where the state defendant undertook to help the plaintiff but then failed to complete the rescue, similar to the tort law concept of an imperfect rescue. The language of DeShaney flatly denies this argument: "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." Nonetheless, some courts have found that a government actor's failure to fulfill a promise of protection or confidentiality created a special relationship due to the victim's reliance on that promise. For instance, several circuits consider the state's relationship with police informants and whistle-blowers to be sufficiently close to hold the state actors liable for breaching a promise of confidentiality. Likewise, courts have found that promises of confidentiality to police officers, which induced the officers to rely on those promises, created a relationship that re-

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125 DeShaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 208-09 (Brennan, J., dissenting) (quoting DeShaney v. Winnebago County Dep't. of Soc. Servs., 812 F.2d 298, 300 (7th Cir. 1987)).
126 Id. at 203-04 (Brennan, J., dissenting) ("It may well be . . . that the Due Process Clause as construed by our prior cases creates no general right to basic governmental services. That, however, is not the question presented here . . . .").
127 See Eaton & Wells, supra note 39, at 155 (citing Balistreri v. Pacifica Police Dep't., 855 F.2d 1421 (9th Cir. 1988), superseded by 901 F.2d 696 (9th Cir. 1990)).
128 See RESTATEMENT (SECOND) OF TORTS § 324 cmt. c (1965) (describing an actor's conduct that furthered the victim's injury).
129 DeShaney, 489 U.S. at 201.
130 See Monfils v. Taylor, 165 F.3d 511 (7th Cir. 1998) (finding police liable when they promised anonymity to the victim, who called to report his coworker's workplace theft, but then released tape recordings of victim's call to the coworker, who later killed the whistle-blower); Dykema v. Skoumal, 1999 W.L. 417360 (N.D. Ill. 1999) (noting that a special relationship existed when the police persuaded reluctant informant to go to the home of a suspected drug dealer while the informant was intoxicated); G-69 v. Degnan, 745 F. Supp. 254 (D. N.J. 1990) (finding that a special relationship exists where the state promises protection and a new identity if informant's real identity were discovered induced victim to rely on those promises).
quired the state to withhold the confidential information.\textsuperscript{131}

While releasing confidential information may be characterized as an affirmative action that creates a danger,\textsuperscript{132} the line is hard to draw. At least one case, \textit{Dykema v. Skoumal},\textsuperscript{133} explicitly referred to the basis of liability as a "special relationship." Furthermore, in that case, the police had not, strictly speaking, created the danger to the informant, such as by revealing his identity. Rather, the police had persistently tried to persuade him to act as an informant after he expressed his desire to stop acting in that role, and had arranged for him to go to the home of a suspected drug dealer while the informant was intoxicated. Although the informant was technically free to refuse the assignment, the Illinois district court extended the special relationship rule based on the extent of police involvement in the informant's decision.

Similarly, courts have held state officials liable for failing to live up to promises to protect specific victims from their likely attackers. This is especially relevant in cases of domestic violence, where the police promise to hold an abusive spouse or boyfriend in custody, but then release him to commit more violence.\textsuperscript{134}

Other cases have found special relationships in situations seemingly not covered by DeShaney's narrow custody exception. For example, the Second Circuit found that police had entered into a special relationship with a woman when they undertook to instruct her on how to protect herself from her estranged husband's violence.\textsuperscript{135} Another case in the Eleventh Circuit held that a residential school for the deaf had a special relationship with its students such as to protect them from sexual assaults by other students.\textsuperscript{136} Some circuits have also held that compulsory school attendance laws create a situation analogous to custody, such that schools owe a duty of care to students.\textsuperscript{137}

\textsuperscript{131} See Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) (revealing officers' identities and personal information to defense counsel in a drug conspiracy case).

\textsuperscript{132} See Pellicciotti, supra note 115, at §11 (explaining that the Monifiis case did not impose a duty of protection, but rather required the state to avoid affirmatively creating a danger to the victim).

\textsuperscript{133} 1999 WL 417360 (N.D. Ill. 1999).

\textsuperscript{134} See, e.g., Simpson v. City of Miami, 700 So. 2d 87 (Fla. App. 1997) (relating on Florida statute requiring all arrested persons to be brought before a judge as imposing a duty on police not to release estranged husband who, after release, killed his wife). Contra Finder v. Johnson, 54 F.3d 1169, 1175 (5th Cir. 1997) (en banc) (holding that victim's reliance upon police officer's promise did not create a special relationship or an affirmative duty: "By requiring a custodial context as the condition for an affirmative duty, DeShaney rejected the idea that such a duty can arise solely from an official's awareness of a specific risk or from promises of aid.").

\textsuperscript{135} Raucci v. Town of Rotterdam, 902 F.2d 1050 (2d Cir. 1990).

\textsuperscript{136} Spivey v. Elliott, 29 F.3d 1522 (11th Cir. 1994).

2. The State-Created Danger Theory

State actors may be held liable when, through their affirmative acts, they causally contribute to the danger that injures the plaintiff. In such a situation, a duty arises when state actors "create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger." This rule, even in its minimalist version, accepts state responsibility for the wrongful acts of private individuals if the state actor placed the victim in danger:

[I]f a state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role is merely passive; it is as much an active tort-feasor as if it had thrown him into a snake pit.

Building on similar language in DeShaney, several circuits have held state actors responsible even when the state's causal link to the danger must be defined in mixed terms of both negative duties to refrain from causing harm, and positive duties to prevent harm.

The many types of state conduct that can lead to liability under the state-created danger theory can be grouped into the following categories: abandoning a victim to a dangerous situation; bringing a victim into close proximity with a person the state knew was violent; cutting off private sources of aid without providing a meaningful alternative; or conspiring with private actors to permit or assist in the commission of a wrongful act.

These cases generally share four requirements: reasonably foreseeable harm; culpable state of mind; a causal nexus between the state actor's omission and the injury; and, in some circuits, that the victim be a known or foreseeable individual. However, some cases in which the state actors' omissions facilitate the crime, and in which the results were sufficiently egregious, courts have held the state responsible despite the fact that the victim or the type of harm were not directly foreseeable.

The Third Circuit's state-created danger test is illustrative. The test articulates the exception to DeShaney further than the earlier cases to include a state-of-mind inquiry:

\[\text{school official's liability arises only when official exhibits indifference to student's rights).}\]

\[\text{Reed v. Gardner, 986 F.2d 1129, 1127 (7th Cir. 1993).}\]

\[\text{Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.)}.\]

\[\text{See DeShaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").}\]

\[\text{See Pellicciotti, supra note 115, at 50 (grouping successful state-created danger claims into categories based on the facts involved).}\]

\[\text{See Eaton & Wells, supra note 39, at 152-53 (citing Martinez v. California, 444 U.S. 277 (1980)); id. at 152 n.224 (discussing circuit split on the issue of foreseeable victims).}\]

\[\text{See id. at 154 (citing White v. Rochford, 592 F.2d 381 (7th Cir. 1979)); id. at 153 (citing Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987))).}\]
[C]ases predicating constitutional liability on a state-created danger theory have four common elements:

(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.144

It is worth noting that the "prior relationship" means only that the individual was a "foreseeable victim," not that the state took him into custody.145

The Tenth Circuit set forward a similar test in *Uhrig v. Harder*:146

Plaintiff must demonstrate that (1) [he] was a member of a limited and specifically definable group; (2) defendants' conduct put [him] ... at substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.147

The Tenth Circuit later added a sixth requirement, that "the charged state entity ... created the danger or increased the plaintiff's vulnerability to the danger in some way."148

Some state-created danger cases have recognized the special helplessness of certain victims, despite the Court's implied reasoning in DeShaney that individuals in the "free world" should be left to fend for themselves.149 Analogous to the rule in Youngberg and Estelle, cases involving involuntary confinement by the state, lower courts have recognized that the government may cut off self-help or outside assistance even when there is no involuntary confinement or custody.150 This rule parallels the tort doctrine that holds individuals liable for interfering with a rescue.151

3. Harm Directly Caused by a State Actor

Cases in which a state agency has been found liable for injuries caused by another state actor contain elements of both misfeasance

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144 See Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (citing Mark v. Borough of Hatboro, 51 F.3d 1187, 1192 (3d Cir. 1995)).
145 Id. at 1209.
146 64 F.3d 567, 574 (10th Cir. 1995).
147 64 F.3d 572.
148 Chavez v. Wagon Mound Public Schs., 159 F.3d 1293, 1263 (10th Cir. 1998).
149 See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation ... "); Solfer, supra note 45, at 1519-20 ("Because no government had locked up Joshua, he ought to have taken care of himself. That is what individuals, rugged or not, are expected to do in the free world.").
150 See Eaton & Wells, supra note 39, at 147-49 (discussing cases arising within a few years after DeShaney in which the state restricts private assistance).
151 RESTATEMENT (SECOND) OF TORTS §§ 326, 327 (1965).
and nonfeasance. State agencies have been held responsible for constitutional rights violations resulting from such arguably non-active conduct as improper training, supervision, or lack of needed departmental policy-making. In addition, state employees such as police officers and prison officials have been held liable for failing to protect a victim from the wrongdoing of a fellow officer.

4. Cases Denying Liability: DeShaney's Legacy

Equally instructive are the cases that seem to fit within the state-created danger theory or other exceptions, but where the state actors in question are nonetheless held not liable as a result of *DeShaney* and similar precedents. Cases denying a state-created danger theory or other liability for abusive inaction strike the reader as more anomalous and stilted in their reasoning than the opinions that attempt to carve an exception out of *DeShaney*'s broad language. Such cases occur just as often, if not more often, than cases that are held to fall under an exception to *DeShaney*.

One notable example is *Pinder v. Johnson*. In that case, Carol Pinder's abusive ex-boyfriend, Don Pittman, broke into her house and began attacking and threatening her and her children. Ms. Pinder relied on a police officer's promise that Pittman would be held at least overnight, and that it would be safe for her to return to work that night. However, the police later released Pittman, who returned to the Pinder home and set it on fire, killing Ms. Pinder's three children.

The first time this case came before the Fourth Circuit, the court found that Officer Johnson's promise had created a "special relationship" sufficient to expose him to liability under the state-created danger exception. However, on en banc review, the Fourth Circuit reversed itself to hold that Officer Johnson had no duty to follow through on his promises.

The court's rationale for its en banc decision is even more stilted than the reasoning of *DeShaney*.

There was no custodial relationship with the plaintiffs in this case. Neither Johnson nor any other state official had restrained Pinder's freedom to act on her own behalf. Pinder was never incarcerated, arrested, or otherwise restricted in any way. Without any such limitation imposed on her liberty, *DeShaney* indicates Pinder was due no affirmative constitu-

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153 See id. at 151-52 (noting that such holding is not based on vicarious liability, but on the premise that inaction can violate someone's constitutional rights).
154 33 F.3d 368 (4th Cir. 1994), rev'd 54 F.3d 1169 (4th Cir. 1995) (en banc).
155 *Pinder*, 54 F.3d at 1172.
156 Id.
157 *Pinder*, 33 F.3d at 371.
158 *Pinder*, 54 F.3d at 1169.
tional duty of protection from the state, and Johnson would not be charged with liability for the criminal acts of a third party.159

Under any reasonable reading of the facts, this case should fit nicely within any test for state-created danger: the harm was reasonably foreseeable (Pittman had threatened Pinder and had previously been arrested for attempted arson against her home); the victims were easily foreseeable; Officer Johnson acted with reckless disregard for the safety of Pinder and her children; and the act would likely not have occurred had Ms. Pinder not relied upon Johnson’s representations. However, the Fourth Circuit seems to have chosen a mechanical application of DeShaney’s broad negative rights rule rather than to have sought to do justice in Pinder. This decision poignantly illustrates the injustice worked by the sweeping negative rights rule of DeShaney.

Another case similarly emphasized the fact that the victim was not confined by the state when she was attacked as a result of a government actor’s negligence or indifference. In Liebson v. New Mexico Corrections Department, a librarian was kidnapped, held hostage, and sexually assaulted by a prison inmate. Although previously a corrections officer had been posted in the library, five days before the attack the guard’s schedule was changed, so there was no guard on duty in the library at the time of the attack. The Tenth Circuit read DeShaney broadly and the exceptions to DeShaney narrowly to preclude liability under either the special relationship exception or the state-created danger exception.161 In that court’s reasoning, because Ms. Liebson was free to leave her job and was not otherwise confined by the state, the prison could not be held liable for its negligence.162 The court seemed to go out of its way to avoid declaring a duty on the part of the prison to ensure safe working conditions for Ms. Liebson—who, incidentally, was not a prison employee, but was employed by a local community college and was assigned to the prison library temporarily.163 Instead of requiring the prison to simply provide safe working conditions for its employees, the Tenth Circuit framed the discussion, in effect, as if Ms. Liebson had assumed the risk of inmate attacks when she did not quit her job.164 This type of reasoning, which sounds absurd to anyone who has ever worked for a living, is only made necessary by sweeping negative-rights rulings such as DeShaney; no inherent logic or principles of law require it.

159 Id. at 1175.
160 73 F.3d 274 (10th Cir. 1996).
161 Id. at 276 (internal citations omitted).
162 Id. at 278.
163 Id. at 275.
164 Liebson, 73 F.3d at 276.
To some extent, the negative rights view continues to influence state constitutional law. Eighteen state constitutions explicitly mandate government assistance for the poor, and all fifty state constitutions contain at least the positive right to education. However, some state courts have followed the federal negative-rights model effectively ignoring or eviscerating their states' positive rights guarantees. Other state courts have given these positive rights varying degrees of force. State courts that fail to give full effect to positive rights in state constitutions rely on federal norms and precedents that some commentators consider inappropriate, given the unique history and nature of state constitutions. Relying on a separation of powers rationale, the highest courts of New York, Idaho, and Colorado have maintained almost complete deference to the state legislatures' discretion on how to enact certain positive rights guarantees. Other state courts—especially Illinois, Kansas, and Montana—have applied a deferential approach in particular cases without closing the door altogether to some rights to government assistance under the states' constitutions.

Many of the justifications for limiting positive rights in federal constitutional law rely on uniquely federal concerns that should not be carried over into state constitutional law, such as federalism, separation of powers, and restraint of the Supreme Court's power. For instance, as Professor Hershkoff has described, many states' review of welfare legislation mirrors federal rational basis review. However, the main policy considerations behind the federal courts' deference to Congress and state legislatures do not hold true when dealing with state constitutional rights. For example, separation of powers concerns—especially a perceived need to restrain the power of the courts and to prevent them from making policy judgments—are a key motive behind judicial deference. Unlike federal courts, however,

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166 Id. at 1076.

167 See Hershkoff, *Welfare Devolution*, supra note 80, at 67 (discussing the influence of federal welfare law); Feldman, *supra* note 165, at 1062-63 (discussing the influence of federal separation of powers doctrine); Hershkoff, *Positive Rights*, supra note 102, at 1153-69 (discussing the influence of federal rational basis review).

168 See Feldman, supra note 165, at 1078-83 (discussing leading cases in those states).

169 Sarah Ramsey & Daan Braveman, *Let Them Starve: Government's Obligation to Children in Poverty*, 68 Temp. L. Rev. 1607, 1626-28 (1995). After the Montana Supreme Court used a state constitutional provision guaranteeing economic and social assistance to strike down a welfare funding scheme, the state legislature amended the constitution so that the "right" is now phrased as a discretionary function. Id. at 1627-28.


171 Id. at 1153.

172 See id. at 1153-55 (discussing federal rationality review).
many state courts are popularly controlled, or at the very least, the local or state political system allows for greater control and accountability. Additionally, state court decisions do not have the finality of United States Supreme Court decisions. Additionally, state courts are not strictly separated from the other branches of government; instead, they work interdependently with state governments and are often involved in political issues. In fact, positive rights guarantees in state constitutions give state courts the unique task of interpreting and enforcing those substantive commands and making sure that state laws uphold the meaning of those rights.

Despite the influence of the negative rights view, many state courts have actively enforced positive state constitutional rights and have even generated unique bodies of law pertaining to those rights. One basic development is that state courts engage in “consequential” review: Unlike federal heightened scrutiny review, which evaluates how a law burdens a constitutional right, consequential review asks whether a state law helps or hinders a constitutionally mandated right.

Examining state constitutional decisions yields two results. First, these decisions demonstrate the need to end the hegemony of the negative rights theory. The pervasiveness of the negative rights view, even in the face of contradictory constitutional mandates, shows that this theory has overstepped its boundaries and has crippled state constitutional doctrine. Second, the cases in which state courts have upheld claims for positive rights are enlightening as to the effects and enforceability of those decisions. The rights themselves are usually phrased as goals, instructing the state legislature to use its discretion and its power to achieve those goals. Contrary to the worries of negative-rights advocates, state courts have been successful in enforcing claims for positive state action.

III. POLICY ARGUMENTS

In addition to widening the gap between law and ethics and interfering with the natural evolution of the law, the negative rights view

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173 See id. at 1170 (distinguishing state courts from federal courts and noting that state judges are often popularly elected).
174 See id. at 1162 (discussing how state legislatures can overrule state court decisions much more easily than Congress can overrule the Supreme Court).
175 See id. at 1156-57 ("State courts settle contests over public offices, pass on the propriety of proposed public expenditures and even of proposed constitutional amendments, often at the suit of mere 'taxpayers.'") (quoting former Justice Hans Linde of the Oregon Supreme Court).
176 Id. at 1154, 1169-70.
177 Hershkoff, Positive Rights, supra note 102, at 1183.
178 Id. at 1184.
179 Id. at 1143-15.
180 Id.
claims to advance some policy objectives at the cost of other, more important goals. Policy arguments make up the bulk of the literature supporting the negative rights view and, in many cases, are more convincing than any moral or legal arguments. A critical examination of these policy concerns sheds light on the weakness of their predictions, highlights the benefits of including positive rights in the law, and instructs judges and legislators on how to most effectively structure a plan for realizing positive rights.

A. Policy Arguments from the Negative Rights View

Supporters of the negative rights view usually conjure up images of judicial chaos or government overreaching in order to dismiss even modest claims for positive rights. Their policy arguments and predictions fall into three general groups: difficulties of enforcement; negative economic or incentivizing effects; and structural or slippery slope problems. At the outset, it is important to note that these policy arguments only affect the practical feasibility affirmative duties and how they should be elaborated and implemented; they do not address the question whether such a right exists at all.181

1. Judicial competence, difficulties of enforcement

The negative rights view claims that positive rights are not suited to our system of adjudication. For one thing, it would be difficult to establish causation in a failure-to-act case.182 Also, the question of responsibility is complicated by the lack of reciprocity in affirmative duties: While negative rights imply obvious reciprocal duties, i.e., for each person not to harm the other, positive rights do not generate these clear reciprocal obligations: No one identifiable individual (or, by extension, government actor) is required to fulfill a person’s needs.183

There is also the fear that recognizing positive rights, especially those as broad as a general right to subsistence, would overwhelm the courts with disruptive cases. The problems arise because such a right may be inchoate, lack a firm textual basis, not indicate clear standards for decision-making, and may take an uncertain course of development.184

Finally, because many positive rights are legally imprecise, they require legislative and executive definition before they can be effectively protected.185 However, judges are ill-equipped to “create” and

181 Tribe, supra note 91, at 342.
182 Bandes, supra note 2, at 2335-36.
183 Id. at 2337-38; Epstein, supra note 33, at 210.
184 Dorin, supra note 70, at 556-60.
185 See Currie, supra note 34, at 889 (discussing other countries’ effectuation of positive con-
define the scope of positive rights. When judges attempt to define those rights, they must decide between two sets of equally convincing theoretical arguments; without guidance from precedent or text, judges would be unable to make these decisions except by deciding according to their own subjective beliefs.166

2. Economic efficiency and perverse incentives

Several law-and-economics type arguments claim that recognizing positive rights would skew people’s incentives toward socially or economically undesirable behavior. For example, in the context of duty-to-rescue or duty-to-report laws, some commentators have expressed concern that such laws might actually discourage the reporting of crimes in some instances. Eugene Volokh described how such laws disincentivize “delayed Samaritans” (who initially do not report a crime, but later change their minds) and “passive Samaritans” (who do not report the crime until the police come to them) from reporting crimes. Because these individuals would be subject to civil or criminal liability for their initial delay, they may choose not to cooperate at all instead of offering their (albeit limited) cooperation.167 Analogously, when government is deemed to owe a positive duty toward its citizens and can be sued for doing a bad job, those agencies or officers who provide the services at issue will avoid those responsibilities altogether.

Those who oppose claims for positive rights observe that negative rights can be enforced fairly cheaply: “In principle, all persons can comply with the commands of the law, wholly without regard to their initial wealth or natural endowments.”168 In contrast, positive rights can generate high enforcement costs because they require positive action plus enforcement of a duty to act when it is not always clear when that duty has been breached.169

3. Slippery slope and structural concerns

Critics of positive rights claims assert that, once we recognize affirmative governmental duties in some cases, we will be forced to extend them to others, creating havoc for lawmakers and administrators and depleting the state treasury. This argument claims that even a narrowly tailored positive right—say, the right to state protection to a known individual when an appropriate state agency is already in

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168 Epstein, supra note 33, at 208.
169 Id. at 208-09.
place—could be expanded in later cases, eventually leading the courts to require the creation of new agencies to provide other services.\textsuperscript{190}

Furthermore, critics assert that judicial enforcement would upset the balance of powers between the branches of government. This argument starts from the premise that our government is structured such that the legislative and executive branches formulate general policies, and the courts fill in the gaps in those policies.\textsuperscript{191} Negative rights advocates fear that courts will intrude on legislative discretion regarding spending priorities, or that they may order legislatures to create new services to fulfill positive rights.\textsuperscript{192} Such action would ignore the fact that the government has only limited resources with which to satisfy numerous claims and interests.\textsuperscript{193} Furthermore, because such judicial management would require reordering fundamental interests and priorities, positive rights would lead to conflict and controversy.\textsuperscript{194}

The negative rights view is also attractive to those concerned about the effect of positive rights claims on federalism. According to this argument, once a federal court declares any positive rights, it would assume the power to force states to fulfill those rights. The courts would become too involved in managing state governments, telling the states which agencies or systems would be responsible for carrying out which obligations.\textsuperscript{195}

Likewise, judicial enforcement would encroach on agency discretion, perhaps to the detriment of the individuals served by those agencies. When cases implicating positive rights to agency action arise, the courts will have to examine the actions of administrators and state employees, as well as the allocation of funds within the agency, to determine whether a breach of duty occurred.\textsuperscript{196} At some point, this scrutiny of agency actions would amount to judicial management of those agencies.

\textbf{C. Policy Arguments from the Positive Rights View}

The policy concerns posed by the advocates of the negative rights view are merely hypothetical; because the federal judiciary has not
opened the door to significant positive rights claims, none of these predicted problems have been observed. To the contrary, the experiences of state courts and of foreign countries in enforcing constitutional positive rights guarantees have shown that reasonable, effective standards for dealing with these claims are possible. In addition, advocates of positive rights generally claim three types of benefits to including this conception of rights in constitutional law: the judiciary's role in shaping the law through its interactions with legislatures; controlling and preventing administrative failures; and providing a remedy to the victims of callous government neglect.

1. Judicial dialogue with legislatures as an impetus for legal evolution

Positive rights advocates point out, first, that positive rights have been proven judicially enforceable. American courts can already mandate the public expenditure of funds or the supervision of agency policies and have done so with considerable success—for instance, by implementing school desegregation. State courts have also successfully enforced explicit guarantees of positive rights contained in state constitutions.

Secondly, even if courts are incapable of enforcing a particular right, the fact that they are willing to recognize that right is important in establishing that the right exists, so the legislature should take it into consideration when balancing other obligations and priorities. Although some positive social rights may not be strictly enforceable, they are no different in this respect than many accepted civil rights. Some rights are purely formal; that is, they require only recognition by the government and an attempt to effectuate them, but they do not require that such efforts be completely successful. Rather than a win-or-lose model of enforcement, as we now have with negative rights, formal positive rights’ success can be measured by each individual helped. For example, although America may never have won the “war on poverty,” Johnson’s “Great Society” programs were very effective at improving the lives of poor people; therefore, they effectively (albeit imperfectly) fulfilled a duty to help the poor.

198 Schwartz, supra note 76, at 1238.
200 Schwartz, supra note 76, at 1240.
201 Tushnet, supra note 79, at 1214-15.
202 Chemerinsky, supra note 11, at 530. The rhetoric of a “war on poverty” may have contributed to the fall in popularity of social programs after the 1960’s. Id. A “war” requires a winner and a loser, anything less than complete victory is seen as a loss. Id. However, from the perspective of the individuals helped by the Great Society programs, this country’s efforts to ameliorate the hardships of poverty were to a great degree successful. Id.
While generally held values and ethics inform the law, likewise the law can serve to influence social norms. Some opponents of positive rights claim that active judicial enforcement of those rights, in overriding the democratic process, would generate hostility toward positive rights among the public. However, it is more likely that judicial or legislative recognition of positive rights will in turn strengthen the public’s appreciation of those rights.

2. Correcting administrative failures

Under the negative rights rule, state agencies have a stronger incentive not to act, and thus avoid liability, than to take action and risk liability for malfeasance. When judicial supervision of an agency is activated as a result of a positive rights claim, the potential exists to increase accountability within agencies. As Professor Beerman points out, information gaps between politicians and the electorate, as well as misplaced incentives within agency structures, can lead agencies to pursue policies that do not reflect the majority’s preferences. Judicial intervention would increase accountability between administrators and politicians, and between politicians and the electorate. Moreover, even though the deterrent effect of damages awards on state actors is uncertain, direct judicial enforcement of a positive right through injunctive relief is always available to correct administrative failures.

3. Providing a remedy against abusive government inaction

The most important policy goal of recognizing positive rights in

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201 Maggs, supra note 56, at 1045.
202 See Ackerman, supra note 85, at 662 ("The tendency on the part of the public to equate law with morality, to assume that if something is not illegal then it is not immoral, may suggest the practical need for a rule requiring rescue in situations in which the potential rescuer is not in peril.").
203 See Bandes, supra note 2, at 2284, 2284 n.65 (citing Peter Schuck, Suing Government 59-87 (1983)).
204 See Beerman, supra note 14, at 1104-1108 (discussing gaps in the chain of responsibility between agencies, politicians, and the electorate).
205 Id. at 1106-08. Beerman demonstrates that judicial remedies could increase accountability in a number of ways. For example, incumbents often set goals for a social program in order to gain publicity, but because the electorate does not hear about funding decisions, these agencies end up inadequately funded. Courts could provide a remedy to those injured by this neglect, thus forcing politicians to either live up to their promises or suffer the costs on election day. Id. at 1107. In cases involving agencies that fail to pursue the policies set by statutes or political leadership, the fear of lawsuits could create incentives for administrators to perform their jobs properly, and lawsuits would alert the people and their representatives to problems within the agencies. Id.
The courts must abandon the negative rights rhetoric in order to provide a remedy to victims of administrative malfeasance or neglect. As Justice Brennan stated in his dissenting opinion in DeShaney, "inaction can be every bit as abusive of power as action... oppression can result when a State undertakes a vital duty and then ignores it." The DeShaney decision ignores the need for compassion in adjudication: "[a] crucial lesson of our bleak century, and of the Holocaust in particular, is that it can be morally reprehensible to do nothing in the face of evil." Soifer points out that the Justices had an opportunity, with the DeShaney case, to correct the injustice of administrative neglect, but instead they retreated into formalistic rationalizing and line-drawing, ignoring the real human problems at hand. That is why, on a basic, visceral level, the DeShaney decision offends so many people’s sense of basic fairness and justice.

CONCLUSION

The strict negative rights view is a type of legal fiction: It is an artificial structure, only loosely based on ethical and historical traditions, set up purely for the sake of convenience. This fiction, however, has done more harm than good. It contradicts this country’s legal and political culture, it has warped the evolution of the law, and it has led to formalistic decisions like Pinder that make a mockery of our ideals of justice. The distortions caused by this doctrine are serious: Not only may the state stand idly by and refuse to fulfill its promises of help to its citizens, as the Department of Human Services did in DeShaney, but it may actually burden or discriminate against fundamental rights by refusing to fund or protect those rights, as in the abortion funding cases. A semantic flick of the wrist transforms government neglect of civil rights into “blameless” inaction. Moreover, the Court’s “greater includes the lesser” reasoning used in DeShaney and other cases seems to defy the principles of equal protection as well as common sense: “the Equal Protection clause could theoretically be satisfied by denying education to all children or by

See generally JOHN RAWLS, A THEORY OF JUSTICE (1999) (stating that justice is the first virtue of any public institution).
Soifer, supra note 45, at 1531.
Id. at 1531-32.
See Bandes, supra note 2, passim (explaining how the Court relies on several tricky semantic differences that hold little meaning on their own: private/public, action/inaction, penalty/subsidy, etc.).
See Soifer, supra note 45, at 1521 (discussing this argument in DeShaney); see also id. at 1518 (noting that the Court’s logic presupposes as fact that there are no positive rights contained in the Constitution; it cannot serve to prove that very fact).
allocating to each student equal shares of substandard schooling.\textsuperscript{215}

In addition, the negative rights view has corrupted the law's evolution in the states and in federal constitutional law. Even though most states' constitutions explicitly require the government to fulfill some positive rights, the negative rights view imported from federal constitutional law has corrupted those states' jurisprudence. In addition, lower federal courts have been forced to either find ways around \textit{DeShaney}—which indicate a general dissatisfaction with that case's broad holding—or else to abandon considerations of justice and rightness in favor of a twisted form of logic that inevitably erases the government from the picture, no matter how deep its real involvement in a situation.\textsuperscript{216}

Nevertheless, hidden beneath the negative rights view's "ideological barrier"\textsuperscript{217} is a philosophical and cultural landscape that is ripe for the growth of various positive constitutional rights. The \textit{DeShaney} majority's definition of rights, and which rights belong in the Constitution, is far from absolute. Professor Tushnet had aptly demonstrated that the concepts of civil versus social rights, as well as the definitions of those rights, change over time.\textsuperscript{218} The experience of state courts, as well as the exceptions to the \textit{DeShaney} rule, indicate that positive rights are indeed enforceable without unduly disrupting legislative discretion or separation of powers. Where the public interest outweighs the practical difficulties, allowing positive rights claims can bring jurisprudence back into line with people's ethical expectations of their government. Such a change would redirect constitutional jurisprudence toward a more intellectually rich and ethically just path.

Cases like Joshua \textit{DeShaney}'s are all too common in an age of budget cuts and welfare reform. The negative rights theory encourages administrative neglect by relieving state actors of responsibility for their actions and by suppressing open judicial consideration of various legitimate theories. Some courts have already shown that they are not content to toe the line \textit{DeShaney} has drawn. These exceptions, as well as the development of a duty to rescue in tort law, reflect our culture's evolving moral standards. Judges and legislators would be wise to consider the benefits of accepting positive rights as an important part of our Constitution. Only then will our basic constitutional freedoms have any real meaning to innocent victims like Joshua.


\textsuperscript{216} See \textit{DeShaney} v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 208-10 (1989) (Brennan, J., dissenting) (discussing how the \textit{DeShaney} majority downplays the extent of the state's prior involvement in Joshua's life in order to bolster its claim of inaction); Soifer, supra note 45, at 1517.

\textsuperscript{217} Tushnet, supra note 79, at 1992.

\textsuperscript{218} \textit{Id.}