IN SEARCH OF AFFIRMATIVE DUTIES TOWARD CHILDREN UNDER A POST-*DESHANEY* CONSTITUTION

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INTRODUCTION

As public awareness and concern about child abuse have increased in recent decades,¹ more and more resources have been directed toward efforts to protect children from dangerous home situations.² In the past thirty years, laws have been passed in all fifty states requiring certain professionals to report suspected child abuse and creating state and county agencies to receive and investigate such reports.³ Since 1960, the number of children reported to child welfare agencies as suspected victims of abuse or neglect has increased dramatically,⁴ as has the number of children in foster care.⁵ Although most professionals now agree that child abuse and neglect occur in all socioeconomic classes,⁶ the vast

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¹ Social concern about child abuse in the United States has waxed and waned over the past 300 years. For a summary of the history of child protection since the 17th century, including the recent resurgence of interest, see Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659, 665-69 (1990).

² While in 1963 the federal government spent only a few million dollars on child protective services, by 1980 that expenditure had risen to over \$325 million. See Besharov, *Right Versus Rights: The Dilemma of Child Protection*, 43 PUB. WELFARE 19, 20 (1985).

³ See Oren, *supra* note 1, at 668, 702.

⁴ The number of children reported has increased during this period at least tenfold. See Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning*, 20 FAM. L.Q. 213 (1986) (noting approximately 150,000 children reported in 1963 and 1,500,000 reported in 1984); see also U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 172 (1989) (Table 291) (counting over 1,900,000 children reported in 1985).

This dramatic statistical increase may actually reflect the effects of mandatory reporting laws, increased awareness among the public, and a broadening of the definition of child abuse over the past 30 years, rather than an actual increase in the incidence of child abuse. See Johnson, *Symbolic Salvation: The Changing Meanings of the Child Maltreatment Movement*, 6 STUD. SYMBOLIC INTERACTION 289 (1985).

⁵ The number of children placed in foster care due to allegations of abuse or neglect rose from approximately 75,000 in 1963 to over 300,000 in 1980. See Besharov, *supra* note 4, at 218.

⁶ See Stewart, Senger, Kallen, & Scheurer, *Family Violence in Stable Middle-Class*

majority of families reported to and investigated by child welfare agencies are poor.⁷

Thus, the child welfare agency has increasingly become a major presence in poor communities. Given the resources and legal authority they possess, such agencies have the power to be both a source of great help and a source of great harm to these communities. While their laudable mission is to save children, child protective social workers also have the capacity to cause serious harm to children. They must strike a delicate balance between the risk of injury to the child in the home and the risk of destroying desperately needed family bonds through overly intrusive intervention. An error in either direction can have catastrophic consequences for the child. Failure to remove, in the most extreme situations, can lead to serious injury or even death,⁸ but removing a child from her home will inevitably result in emotional injury that may be worse than that which the child might have suffered at home.⁹ Moreover, foster care itself does not always offer children

Homes, 32 SOC. WORK 529 (1987).

⁷ A national study conducted in 1986 found that children from families with incomes of less than \$15,000 were reported to child protective services and other agencies as maltreated at five times the rate of other children. See NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE OF CHILD ABUSE AND NEGLECT: 1988, at 5-41 (1988). Another study showed that in 1984 approximately 48% of all children reported to child protective services were from families receiving public assistance. See U.S. BUREAU OF THE CENSUS, *supra* note 4, at 172 (Table 291). Some studies suggest that children from poor and minority families are more likely to be labeled "abused" than middle and upper class children who are more likely to be assumed to be victims of accidents. See Hampton, *Race, Class and Child Maltreatment*, 18 J. COMP. FAM. STUD. 113, 114 (1987).

While middle and upper income families can afford to buy the social services they need during times of crisis, indigent families are dependent on public agencies. Many of the cases that come to an agency's attention as neglect cases stem directly from poverty. Thus, a mother may have difficulty caring for her children because of homelessness or inadequate living quarters, lack of day care, or because of the stresses caused by these conditions. See Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 257-58 (1986). It has also been suggested that since the poor, by virtue of their participation in welfare programs, are more likely to have their private lives scrutinized by state-employed social workers, they are more likely to be reported to child welfare agencies. See Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 629 n.21 (1976).

⁸ In 1987, over 1100 children died from abuse nationwide. See Shapiro & Shapiro, *Tomorrow: The Epidemic of Child Abuse Turns Deadly*, U.S. NEWS & WORLD REP., Apr. 11, 1988, at 35.

⁹ See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 9-25 (1979); Fein & Maluccio, *Children Leaving Foster Care: Outcomes of*

the safe haven from physical and emotional abuse that it is supposed to provide.¹⁰ Yet despite the importance of the judgments that we entrust them to make, and the devastating consequences of error, child protective social workers are generally poorly paid, inadequately trained, and overworked.¹¹ As a result, the judgments they make may too often be wrong.¹²

Attempts have been made to hold child welfare agencies accountable for the tragic effects of their most egregious mistakes through federal court actions under section 1983 of the Civil Rights Act of 1871¹³ alleging violations of the child-victim's constitutional rights.¹⁴ Yet, while wrongful removal of a child by an agency

Permanency Planning, 8 CHILD ABUSE & NEGLECT 425 (1984); Lowry, *supra* note 7, at 257; Wald, *supra* note 7, at 644-46. Foster children are often traumatized by being shuffled from home to home without any opportunity to develop bonds with any one set of foster parents. This only compounds the feelings of loss and abandonment that a child inevitably feels upon being removed from her natural family. See Mushlin, *Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 207-08 (1988).

¹⁰ Some studies show the rates of abuse and neglect in foster homes to be substantially higher than in the general population. See DEPARTMENT OF HEALTH & HUMAN SERVS., NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, at 10-11 (1978) (Table 2) (showing rates of substantiated abuse in foster care ranged as high as ten times greater than rates in the general population); Mushlin, *supra* note 9, at 206 nn.29-30 (finding the rate of substantiated abuse and neglect in foster family homes in New York City to be one-and-a-half times that in the general population (citing VERA INSTITUTE OF JUSTICE, FOSTER HOME CHILD PROTECTION 63-64 (1981))); see also Nunno & Motz, *The Development of an Effective Response to the Abuse of Children in Out-of-Home Care*, 12 CHILD ABUSE & NEGLECT 521-22 (1988) (discussing a study indicating that fatalities from abuse and neglect in foster homes may be two or three times that of the general population). But see M. WALD, J. CARLSMITH & P. LEIDERMAN, PROTECTING ABUSED AND NEGLECTED CHILDREN 183-87 (1988) (reporting a multi-year study showing that children may be better off in foster care than with their natural parents in some circumstances).

¹¹ See Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1, 13-15 (1973); Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633, 649 (1981).

¹² Studies in some states have indicated that 25% of all child fatalities attributed to abuse or neglect involved children who were previously reported to a child welfare agency. See Nunno & Motz, *supra* note 10, at 522.

¹³ Section 1983 provides, in relevant part:

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

42 U.S.C. § 1983 (1982).

¹⁴ See Lowry, *supra* note 7, at 264.

clearly involves state action in violation of the child's and her parents' rights under the fourteenth amendment, many of the other mistaken judgments committed by child welfare agencies and their social workers result not in a clearly definable *action* on the part of the agency, but rather in the agency's *failure to act*. Thus, a child who is seriously injured at the hands of her parents or foster parents may seek to hold the agency liable for its *failure* to take action to protect her.¹⁵ Similarly, a child in foster care who could return home safely if certain protective services were provided to her or her family may seek to hold the agency liable for its *failure* to provide those services.¹⁶

Imposing liability for a state's failure to act under the Constitution, however, poses very serious difficulties. Judge Posner observed that "the Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."¹⁷ This view from the Seventh Circuit is gaining wider acceptance among members of the federal bench. Last year in *DeShaney v. Winnebago County Department of Social Services*,¹⁸ the United States Supreme Court adopted this Posnerian stance in response to an attempt to hold a child welfare agency liable under the due process clause of the fourteenth amendment for its failure to protect four-year-old Joshua DeShaney from near fatal abuse by his father. Despite the fact that the agency had been supervising the family for over a year and was aware of the serious risk of abuse faced by the child, the Court held that the

¹⁵ See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1001 (1989); *Taylor v. Ledbetter*, 818 F.2d 791, 792-93 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989); *Estate of Bailey v. County of York*, 768 F.2d 503, 509 (3d Cir. 1985); *Jensen v. Conrad*, 747 F.2d 185, 187 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

¹⁶ See, e.g., *Lipscomb v. Simmons*, 884 F.2d 1242, 1250 (9th Cir. 1989), *reh'g granted*, 907 F.2d 114 (9th Cir. 1990) (en banc); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1006 (N.D. Ill. 1989), *leave to appeal granted*, No. 88-C-7919 (N.D. Ill. Oct. 3 1989) (LEXIS, Genfed library, Dist file); *Artist M. v. Johnson*, 726 F. Supp. 690, 695 (N.D. Ill. 1989); *Black v. Beame*, 419 F. Supp. 599, 602 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 815 (2d Cir. 1977).

¹⁷ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (citations omitted), *cert. denied*, 465 U.S. 1049 (1984). For an argument that the fourteenth amendment was originally intended to radically alter this negative-liberties orientation of the Constitution by imposing affirmative duties on government, see Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

¹⁸ 109 S. Ct. 998 (1989).

agency "had no constitutional duty to protect Joshua against his father's violence."¹⁹

This Comment examines the possibilities that remain after the *DeShaney* decision for imposing affirmative constitutional duties on child welfare agencies. Part I examines the *DeShaney* opinion itself and argues that most courts are reading the decision too broadly. A careful reading of the text indicates that the decision actually forecloses affirmative governmental duties in a smaller range of cases than most courts seem to have assumed. Part II discusses the implications of *DeShaney* with regard to actions seeking to impose liability on child welfare agencies for abuse and neglect of children in foster care and argues for an interpretation of the opinion that will foreclose such liability in fewer instances. Part III discusses a number of possible factual situations other than abuse and neglect in foster care, that might escape the *DeShaney* bar and support a finding of an affirmative duty to protect on the part of child welfare agencies. Part IV considers the potential scope of affirmative constitutional duties beyond a duty of protection that may be imposed on agencies, such as a duty to provide the substantive services necessary to reunite foster children with their natural parents. Finally, Part V briefly discusses the other constitutional arguments left untouched by *DeShaney* that may also be used to argue for the imposition of affirmative duties on child welfare agencies.

I. THE *DESHANEY* CASE

A. *The Facts*

On March 8, 1984, four-year-old Joshua DeShaney was beaten so severely by his father that half of his brain was destroyed.²⁰ As a result, Joshua is now permanently brain-damaged and profoundly retarded and is expected to remain institutionalized for the rest of his life.²¹ A medical examination indicated that this had not been the first time that Joshua had been seriously injured by his father's blows.²² Scars of varying ages were found all over his body and a

¹⁹ *Id.* at 1007.

²⁰ See Brief for Petitioners at 8, *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 988 (1989) (No. 87-154).

²¹ See *DeShaney*, 109 S. Ct. at 1002.

²² See *id.*

neurosurgeon's examination revealed evidence of previous traumatic head injury.²³

The preceding year, Joshua had been taken to the emergency room with suspicious injuries, and the Department of Social Services (DSS) had arranged for the hospital to hold him for several days while they investigated.²⁴ The result of that investigation was to release Joshua back to his father because of insufficient evidence, despite the fact that abuse was strongly suspected.²⁵ The case was subsequently dismissed from court without a hearing, but during the following year DSS continued to monitor the family.²⁶ Although there were repeated signs of abuse, including several more visits to the emergency room with suspicious injuries, the DSS social worker assigned to the case took no action except to visit the family sporadically—no more than once a month—and during two of these visits she did not actually see the child.²⁷ It was clear, however, that she believed Joshua to be at serious risk, since afterward she said to his mother, "I just knew the phone would ring someday and Joshua would be dead."²⁸

Joshua, through his guardian ad litem and his mother, brought suit under 42 U.S.C. § 1983 against the Winnebago County Department of Social Services, the caseworker assigned to the case, and her supervisor, alleging that their failure to take action to protect Joshua constituted a deprivation of his liberty without due process of law in violation of the fourteenth amendment.²⁹ The district court granted summary judgment in favor of the defendants, and that ruling was affirmed by the Seventh Circuit and then by the Supreme Court. The Supreme Court, in an opinion by Chief Justice Rehnquist, focused on the issue of duty, holding that the due process clause did not impose an affirmative duty on the state to protect Joshua from his father's violence.³⁰ "The Clause is

²³ See Brief for Petitioners, *supra* note 20, at 7-8.

²⁴ See *DeShaney*, 109 S. Ct. at 1001.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.* at 1001-02.

²⁸ Brief for Petitioners, *supra* note 20, at 8.

²⁹ See *DeShaney*, 109 S. Ct. at 1002.

³⁰ See *id.* at 1007. For criticisms of the Supreme Court's opinion, see Gerhardt, *supra* note 17, at 409; Oren, *supra* note 1, at 683-717; Strossen, *Recent U.S. International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 873 (1990); Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 4 (1989); Note, *DeShaney v. Winnebago County: The Narrowing Scope of Constitutional Torts*, 49 MD. L.

phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."³¹

B. *Arguing for a Constitutional Duty: The Special Relationship Theory*

It is well-established that the Constitution generally does not impose duties on the State to provide care or protection to its citizens.³² The *DeShaney* plaintiffs, however, argued that this case involved a special circumstance in which the state did have a constitutional duty to act by virtue of the "special relationship" that existed between the state and Joshua. The defendants were specifically aware of the particular danger faced by Joshua: they "proclaimed, by word and by deed, [their] intention to protect him against that danger"³³ and actually undertook to so protect him. Moreover, the defendants were specifically charged under Wisconsin law with the responsibility of protecting children from abuse. For these reasons, the plaintiffs claimed, the defendants had a special relationship with Joshua, which imposed on them a special constitutional duty of protection toward him which they did not owe to the public at large.³⁴

At the time the case was argued, this special relationship theory had been endorsed by the Third and Fourth Circuits in cases similar to *DeShaney*. *Estate of Bailey v. County of York*³⁵ involved a five year

REV. 484 (1990).

³¹ *DeShaney*, 109 S. Ct. at 1003. Since the Court found no duty to act, it did not reach a number of other issues implicated by this case, including: the issue of causation, see *Martinez v. California*, 444 U.S. 277 (1980); the "state of mind" on the part of the defendant that is necessary to trigger the protections of the due process clause—i.e. negligence, gross negligence, recklessness, or deliberate indifference, see *Daniels v. Williams*, 474 U.S. 327 (1986); whether the injuries alleged were a result of a policy or custom of the Department, as required by *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) and its progeny; or whether the defendants were entitled to qualified immunity, see *Anderson v. Creighton*, 483 U.S. 635 (1987). Clearly, any § 1983 action against a child welfare agency for failure to act that escapes the limitations set by *DeShaney* and establishes a duty to act, will still have to face these hurdles as well as possible eleventh amendment immunity problems in instances in which the child welfare agency is state-run. These additional issues, however, are beyond the scope of this Comment.

³² See *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("As a general matter, a state is under no obligation to provide substantive services for those within its border." (citing *Harris v. McRae*, 448 U.S. 297, 317-318 (1980) (no duty to provide abortions); *Maier v. Roe*, 432 U.S. 464, 469 (1977) (no duty to provide medical services))).

³³ *DeShaney*, 109 S. Ct. at 1004.

³⁴ See Brief for Petitioners, *supra* note 20, at 18-20.

³⁵ 768 F.2d 503 (3d Cir. 1985).

old girl who was beaten to death by her mother or mother's paramour while the family was under the supervision of the county child welfare agency. The Third Circuit held that the facts alleged—that the agency was specifically aware of the child's plight and had previously temporarily removed the child from her mother's custody because of suspected abuse—were sufficient to establish a special relationship between the agency and the child, such that the agency could be found constitutionally liable for its failure to protect her. The Third Circuit relied heavily on a recent Fourth Circuit case, *Jenson v. Conrad*,³⁶ which had dismissed a similar claim on immunity grounds but suggested in dicta that a special relationship could exist under such facts.³⁷

This concept of a special relationship triggering an affirmative duty to act has been borrowed directly from common law tort doctrine, which shares with constitutional law a sharp distinction between action and inaction.³⁸ Tort law imposes liability on parties for their "misfeasance" or affirmative acts that cause injury to others, but not for their "nonfeasance" or failure to protect or help another person.³⁹ When, however, a "special relationship" between the parties exists, there is an exception to the rule of no liability for nonfeasance, and the defendant may be held liable for her failure to act in aid of another.⁴⁰

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

³⁷ Although this dicta in *Jenson* was called into question by the Supreme Court in *DeShaney*, a recent district court opinion from the Fourth Circuit indicates that the *Jenson* dicta regarding special relationship is still being afforded weight, at least in cases that are factually distinguishable from *DeShaney*. See *Swader v. Virginia*, No. 90-1111-N (E.D. Va. July 19, 1990) (LEXIS, Genfed library, Dist file); see also *infra* note 81.

The plaintiffs in *DeShaney* also relied on two cases from the Second and Eleventh Circuits that found a special-relationship duty of protection toward children in foster care. See Brief for Petitioners, *supra* note 20, at 13-14, 16-17 (relying on *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983), and *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989)). While both cases involved children in the custody of the state, both decisions indicated that custody is not essential to the existence of an affirmative state duty.

³⁸ Amici in *DeShaney* argued that this distinction between action and inaction is unworkable and "illusory." See Brief Amicus Curiae of the American Civil Liberties Union Children's Rights Project in Support of Petitioners at 46-52, *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 888 (1989) (No. 87-154) [hereinafter A.C.L.U. Amicus Brief].

³⁹ W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 56 (5th ed. 1984) [hereinafter PROSSER & KEETON].

⁴⁰ *Id.* § 56.

C. *The Relevance of Common Law Tort Doctrine*

Although Joshua DeShaney's claim could be described as a "constitutional tort,"⁴¹ it is clear that common law tort doctrine is not controlling in such a case.⁴² Just as negligently inflicted injury does not rise to the level of a constitutional deprivation under the Supreme Court's holding in *Daniels v. Williams*,⁴³ there is no reason to assume that all of the duties imposed by common law under the special relationship doctrine are also imposed on government officials by the Constitution. Because constitutional torts impose liability on government rather than private persons, the policy considerations involved are clearly different. Additionally, constitutional torts must be anchored in the Constitution, which generally is read to impose limits on government action rather than inaction.⁴⁴ In fact, the federal courts generally have been unwilling to expand constitutional liability for government officials' failure to act as far as the common law has expanded liability for nonfeasance under the "special relationship" doctrine.⁴⁵

⁴¹ See Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 323-24 (1965).

⁴² See, e.g., *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986) (stating that the fourteenth amendment does not constitutionalize every common-law duty owed by government officials); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (holding that every injury inflicted by a state official under "color of law" is not a violation of the fourteenth amendment); *Baker v. McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (stating that the due process clause is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states").

It is important to note that a § 1983 case like *DeShaney* involves two intellectually distinct levels at which a tort-like analysis might be employed. Thus the question of whether an official has subjected the plaintiff to a deprivation of rights secured by the Constitution under § 1983 is distinct from the question of whether the official has deprived the plaintiff of life, liberty or property under the due process clause. Tort law concepts may be imported into either one of these analyses. The *DeShaney* case and this Comment deal only with the due process clause inquiry. Thus the Supreme Court's statement in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds*, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), that "section [1983] should be read against the background of tort liability" is irrelevant for our purposes here.

⁴³ 474 U.S. 327, 330-31 (1986).

⁴⁴ See Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

⁴⁵ See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1223-24 (7th Cir. 1988) (en banc) (holding no constitutional liability for fire dispatcher's refusal to provide rescue services requested by plaintiff), *cert. denied*, 109 S. Ct. 1338 (1989); *Wideman v. Shallowford*, 826 F.2d 1030, 1035-37 (11th Cir. 1987) (holding that mother of a prematurely-delivered

Still, with an understanding that the common law is not controlling, it is helpful to look to the original common law definition of "special relationship" in analyzing the attempts that have been made to import this theory into constitutional law. Tort law enumerates four basic types of special relationships: 1) that which arises when the defendant acts affirmatively to cause the peril faced by the plaintiff, 2) that which arises when the defendant undertakes to rescue the plaintiff, 3) that dependent upon the status of the parties (e.g. parent-child, landlord-tenant), and 4) that which arises when there is a contract between the parties.⁴⁶

The plaintiffs in *DeShaney* argued that a special relationship of the second and/or third types made the defendants liable for their inaction.⁴⁷ Thus, the Department of Social Services had a special relationship with Joshua both because it had already undertaken to rescue him through its prior involvement with his family and because of its status as the child protective agency that was monitoring Joshua's situation.⁴⁸ While the Supreme Court clearly rejected these proffered definitions of a special relationship, it did not reject altogether a special relationship doctrine for constitutional torts. Indeed, the Court could not have done so without breaking with a well-established line of precedent imposing a constitutional duty on government officials to protect prisoners and the institutionalized mentally disabled.⁴⁹ I argue that the Supreme Court's analysis in *DeShaney* essentially limited the special relationship theory as applied to constitutional torts to type one above, in which the peril is caused by the defendant. Thus the Court's holding that the state was under no constitutional duty to protect Joshua was based on its finding that the state had not created the danger that he faced.

infant had no fourteenth amendment claim against county and county ambulance drivers for their refusal to drive her to the hospital of her choice); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-22 (1st Cir.) (concluding that prison officials and psychiatrist were not constitutionally liable for their failure to protect woman murdered by an inmate released on furlough), *cert. denied*, 479 U.S. 882 (1986).

⁴⁶ See PROSSER & KEETON, *supra* note 39, § 56.

⁴⁷ See Brief for Petitioners, *supra* note 20, at 18-20.

⁴⁸ See *id.*

⁴⁹ *DeShaney*, 109 S. Ct. at 1004-06.

D. *Precedent for a Special Relationship in Constitutional Torts*

1. The duty to those in state custody

Prior to *DeShaney*, the Supreme Court had already found government officials constitutionally liable for their failure to act in certain circumstances. In *Estelle v. Gamble*,⁵⁰ the Court held that prison officials' failure to provide medical treatment to prisoners could be a constitutional violation actionable under section 1983. Although this decision rested on the cruel and unusual punishment clause of the eighth amendment, the principle was later extended to institutional settings outside of the prison context under the due process clause of the fourteenth amendment. *Youngberg v. Romeo*⁵¹ established an affirmative duty on the part of state officials to provide mentally retarded persons who are involuntarily committed to state institutions with reasonable safety, freedom from unnecessary restraint, and training as is necessary to ensure such safety and freedom.⁵²

In the language of tort doctrine, these cases stand for the proposition that in certain circumstances a "special relationship" exists between the state and the individual such that the Constitution imposes on the state an affirmative duty to act to provide care and/or protection to the individual.⁵³ The plaintiffs in *DeShaney* relied heavily on *Estelle* and *Youngberg* in their argument, and the Court in ruling against them was forced to distinguish these cases. Most of the *DeShaney* opinion, in fact, is devoted to defining the boundaries of *Youngberg* and *Estelle* so as to clearly place *DeShaney* outside those boundaries. It is important to look closely at how the Court made this distinction in order to understand exactly where the contours of the special relationship theory now lie.

⁵⁰ 429 U.S. 97 (1976).

⁵¹ 457 U.S. 307 (1982).

⁵² See *id.* at 324.

⁵³ In the constitutional context the term "special relationship" has usually been used only in cases that extend an affirmative duty of protection beyond situations where the individual is in state custody. See, e.g., *Estate of Bailey v. County of York*, 768 F.2d 503, 510-11 (3rd Cir. 1985) (finding a special relationship between a child welfare agency and a child living at home under agency supervision). The term was not actually used by the Court in *Estelle* or *Youngberg*. In the interests of clarity and consistency, however, I use the term in this Comment to refer to any instance in which the due process clause imposes a duty to act on the state, including *Youngberg*-type cases in which the individual is in state custody.

While the Court in *DeShaney* clearly rejected the plaintiffs' argument that a special relationship was established by the state's undertaking to rescue Joshua (type two) or by the defendant's status as a child protection agency (type three),⁵⁴ a superficial reading of *DeShaney* suggests that the Court has set up another status-based test for special relationship, asking whether or not the plaintiff is in the custody of the state.⁵⁵ Under this reading, the Court simply found that the special relationship established in *Youngberg* and *Estelle* need not apply to *DeShaney*, since the plaintiffs in those cases were in state custody and Joshua DeShaney was not. This is in fact how most lower courts have been reading the decision.⁵⁶ I argue, however, that the opinion can be more accurately and usefully read as creating a definition of special relationship of type number one above.⁵⁷ Where the state has played some role in creating the peril faced by the plaintiff, then a special relationship exists such that the state has a duty to act. Situations where the state has taken an individual into custody fit within this definition but comprise only a subset of all possible special relationships.

2. The Special Relationship Duty Outside the Custody Context

A state-created-danger theory of special relationship in constitutional torts is not new. An earlier line of lower federal court decisions, originating in the Seventh Circuit, has found a constitutional state duty to act in situations where the state created the danger:⁵⁸

If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say

⁵⁴ See *supra* text accompanying note 46.

⁵⁵ See *DeShaney*, 109 S. Ct. at 1005-06.

⁵⁶ See, e.g., *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 167 (3d Cir. 1989) (finding that, after *DeShaney*, "the state continues to owe an affirmative duty to protect those physically in its custody"); *Piechowicz v. United States*, 885 F.2d 1207, 1215 (4th Cir. 1989) ("The implications of *DeShaney* . . . are clear, and devastating. The United States did not trigger the due process clause because it never took [the plaintiffs] into its custody."); *Griffin v. Carlisle*, No. 89-0603 (E.D. Pa. Sept. 18, 1989) (LEXIS, Genfed library, Dist file) (finding food service worker at juvenile detention facility not constitutionally entitled to state protection against inmates because "the relationship between [the] plaintiff and the state [was] not one of custody, but merely one of employment"); see also *Oren, supra* note 1, at 683.

⁵⁷ See *supra* text accompanying note 46.

⁵⁸ See *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972).

that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.⁵⁹

In *Byrd v. Brishke*,⁶⁰ the Seventh Circuit held that police officers could be liable under section 1983 for their failure to protect a person beaten by other police officers in their presence. In *White v. Rochford*,⁶¹ the court held that police officers, who arrested the guardian of three children for drag racing and then left the children alone in an abandoned automobile along the side of a highway on a cold evening, could be found liable under section 1983 for their failure to protect the children. These decisions have been widely followed in other circuits.⁶² They were not mentioned by the Court in *DeShaney*⁶³ and apparently survive that decision, even though these cases effectively create a constitutional special-relationship duty in situations that do not involve a state custodial relationship.⁶⁴

E. *The Text of the Opinion*

A textual examination of the *DeShaney* opinion demonstrates that the Court's analysis actually rested on the state-created-danger definition of special-relationship, rather than a status-based custody test, even though there is language in the opinion which, taken alone, seems to point in the direction of a simple custody test.

⁵⁹ *Bowers*, 686 F.2d at 618.

⁶⁰ 466 F.2d 6 (7th Cir. 1972).

⁶¹ 592 F.2d 381 (7th Cir. 1979).

⁶² See First, "Poor Joshua!": *The State's Responsibility to Protect Children from Abuse*, 23 CLEARINGHOUSE REV. 525, 532 (1989).

⁶³ This is a conspicuous omission since the decisions were discussed in the Brief for Petitioners, *supra* note 20, at 12, 17, and in the Seventh Circuit *DeShaney* opinion, 812 F.2d at 303, as well as in virtually every other case involving the special relationship theory. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1222-23 (7th Cir. 1988) (addressing the failure to provide requested rescue squad), *cert. denied*, 109 S. Ct. 1338 (1989); *Estate of Bailey v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985) (addressing the failure to protect abused child); *Jensen v. Conrad*, 747 F.2d 185, 191-94 (4th Cir. 1984) (same), *cert. denied*, 470 U.S. 1052 (1985).

⁶⁴ Citing *DeShaney* in support of its holding, a recent Ninth Circuit decision clearly follows this line of cases in finding a special relationship in a non-custodial situation in which the state created the danger. See *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989) (holding that a police officer who arrested driver of car for drunk driving, impounded vehicle, and left female passenger stranded at night in high-crime area where she was raped by a stranger from whom she accepted a ride, had an affirmative duty to protect the passenger because he created the danger she faced); see also *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 355-57 (11th Cir. 1989) (finding that a special relationship existed between plaintiff and town because she was compelled by her position as town clerk to be exposed to inmate work squads); *infra* note 81.

Thus, after discussing *Estelle* and *Youngberg*, the Court stated that "[these cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."⁶⁵ However, in the following sentence the Court further refined its characterization of *Estelle* and *Youngberg*,⁶⁶ emphasizing not the custodial status of the state's relationship with the individual, but the action taken by the state which placed the individual in a dangerous situation.⁶⁷

The rationale for this principle is simple enough: when the State by the *affirmative exercise of its power* so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.⁶⁸

Chief Justice Rehnquist continued by stating, "[I]t is the state's *affirmative act* of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause"⁶⁹ Thus, according to Chief Justice Rehnquist, in *Youngberg* and *Estelle*, it was the state's act of taking the plaintiff into state custody that set the stage for the ensuing injury. The special relationship analysis in these cases turns not simply on whether the plaintiffs were in state custody, but also on whether the state's act in taking them into custody created the danger. In *DeShaney*, on the other hand, at least in Chief Justice Rehnquist's eyes, the state "played no part in [the] creation [of the

⁶⁵ *DeShaney*, 109 S. Ct. at 1005.

⁶⁶ For a discussion of these two cases, see *supra* notes 50-56 and accompanying text.

⁶⁷ It is possible to read *Youngberg* as defining a status-based special relationship. In finding a special relationship duty to exist, Justice Powell seemed to emphasize Romeo's status in relation to the state, more than the state's affirmative action in institutionalizing him. See *Youngberg*, 457 U.S. at 317 ("When a person is institutionalized—and wholly dependent on the State[—] . . . a duty to provide certain services and care does exist"). Chief Justice Rehnquist, however, as discussed above, cast the decision in a different light.

⁶⁸ *DeShaney*, 109 S. Ct. at 1005-06 (emphasis added). Similarly, while the Court observed that "the harms Joshua suffered did not occur while he was in the State's custody," the next sentence indicated that the Court's real concern was whether the state created the danger: "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." *Id.* at 1006 (emphasis added).

⁶⁹ *DeShaney*, 109 S. Ct. at 1006 (emphasis added).

dangers that Joshua faced],”⁷⁰ and thus there was no special relationship.

The state-created-danger test seems to turn, at least partly, on a causal analysis. In order to find an affirmative duty arising from a special relationship, we must be able to point to some affirmative action by the state that is a but-for cause of the injury.⁷¹ Thus, Nicholas Romeo would not have been injured but for the fact that the state committed him to Pennhurst,⁷² and a prisoner who was denied medical treatment would presumably have had that treatment but for the fact that she was incarcerated by the state.⁷³ The “snake pit” line of cases also follow this analysis.⁷⁴ Thus, in *White v. Rochford*,⁷⁵ the children would not have been left alone on the side of the highway but for the action of the police in arresting their custodian.⁷⁶

Moreover, it is clear that the state’s danger-creating act must involve some element of involuntary submission by the individual to the state’s power or authority.⁷⁷ The *DeShaney* opinion repeatedly emphasized the involuntary nature of the plaintiff’s confinement in both *Estelle* and *Youngberg* and the fact that the state had acted

⁷⁰ *Id.*

⁷¹ It is important to note that this causation inquiry occurs within the duty analysis and is distinct from the standard causation inquiry that ultimately determines tort liability (i.e., the causation element of the duty-breach-causation-damages analysis). The latter inquiry asks whether the defendant’s breach (here the failure to act) was a necessary antecedent condition to a reasonably foreseeable injury. In contrast, the duty-causation inquiry asks whether some previous, non-breaching act (i.e., imprisoning or institutionalizing the plaintiff), was a necessary antecedent condition to the plaintiff’s injury. Here the causal chain may be fairly attenuated; the foreseeability requirement is lessened, and intervening causes do not break the causal chain.

⁷² See *Youngberg*, 457 U.S. 307.

⁷³ See *Estelle*, 429 U.S. 97.

⁷⁴ See *supra* notes 58-64 and accompanying text.

⁷⁵ 592 F.2d 381 (7th Cir. 1979).

⁷⁶ In *DeShaney*, the majority found no state action that had even incrementally contributed to the cause of Joshua’s injuries. Instead, the state “placed him in no worse position than that in which he would have been had it not acted at all . . .” *DeShaney*, 109 S. Ct. at 1006.

⁷⁷ Without this additional criterion, the but-for causation test alone would produce absurd results. For example, it seems unlikely that Chief Justice Rehnquist meant to argue that since a state’s act in issuing an adoption decree is a but-for cause of an adopted child’s injuries at the hands of her adoptive parents, the state should owe a special-relationship duty of protection to every adopted child. This involuntariness requirement is not the only way the but-for test could have been effectively limited. Notions of proximate cause might have served the same purpose. See *infra* notes 134-53 and accompanying text (discussing the difficulty of applying the involuntariness requirement).

coercively in those cases, "restrain[ing] an individual's liberty,"⁷⁸ imposing "limitation . . . on his freedom to act on his own behalf,"⁷⁹ and "hold[ing] him [in custody] against his will."⁸⁰

Thus, the special relationship test that emerges from *DeShaney* is not simply whether the plaintiff is in state custody. The test asks whether some affirmative state action, taken without the plaintiff's consent, has sufficiently altered the plaintiff's situation such that it can be said to be a but-for cause of her injury.⁸¹ Certainly,

⁷⁸ *DeShaney*, 109 S. Ct. at 1005.

⁷⁹ *Id.* at 1006.

⁸⁰ *Id.* at 1005.

⁸¹ A few courts have interpreted *DeShaney* in this way to find a special relationship in non-custodial situations in which the state created the danger. In *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), a town clerk, who was abducted from the town hall, held hostage and terrorized for three days by prison inmates assigned to a community work squad, sought to hold the town and its officials liable under § 1983 for violation of her due process rights. The Court found that these allegations could support the existence of a special relationship under the standard set forth in *DeShaney*, because "the defendants did indeed create the dangerous situation of the inmates' presence in the community by establishing the work squad and assigning the inmates to work around the town hall." *Id.* at 356.

In a similar case, *Swader v. Virginia*, No. 90-1111-N (E.D. Va. July 19, 1990) (LEXIS, Gefed library, Dist file), the daughter of a prison employee, who was required as a condition of employment to live on the prison grounds, was brutally raped and murdered by an inmate who was negligently permitted outside the fenced-in area of the prison without the accompaniment of a guard. The court observed that "a central part to the [Supreme] Court's analysis [in *DeShaney* was] the fact that the State played no part in the creation of the dangers that harmed Joshua, nor did the state do anything to render him more vulnerable to those dangers." *Id.* at 17. Because in this case, "not only did the State play a part in making [the girl] more vulnerable to the dangers which led to her death, but . . . the State actually played a part in the creation of those dangers," the court found a special relationship duty of protection to exist. *Id.*; see also *Bryson v. City of Edmond*, 905 F.2d 1386, 1393 (10th Cir. 1990) (holding that because police did not create the danger that led to the victims' injuries, they did not owe a special relationship duty to the victims under *DeShaney*); *Ward v. City of San Jose*, 737 F. Supp. 1502, 1507 (N.D. Cal. 1990) (concluding that, under *DeShaney*, police officers can be held liable pursuant to the fourteenth amendment for their failure to protect plaintiff against a danger they created).

Another area in which the federal courts have been willing to impose affirmative constitutional duties on the states is in school desegregation. Although these cases involve equal protection claims, the analysis is similar to that used in due-process special relationship cases. Thus, the Constitution may impose an affirmative duty on states to desegregate public schools, but only in those instances in which some previous affirmative action by the state (in the form of de jure segregation) created the discriminatory situation. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 (1973) (stating that "where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute, the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system'. . . ." (citation omitted)); *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968) (stating that school boards that had operated

whenever the plaintiff is involuntarily in state custody, it is easy to show that a special relationship exists, but involuntary custody is not the litmus test. Such cases are only a subset of the special relationship cases that survive the *DeShaney* opinion, and there can also be non-custodial situations which fit within the special relationship doctrine.⁸²

*F. Majority Versus Dissent: What Constitutes a
"State-Created Danger?"*

Under this view of the special relationship standard, the dispute between the majority and dissent in *DeShaney* appears to be less a disagreement over which test to apply than over how to apply it. In his dissent, Justice Brennan also articulated a state-created-danger standard for special relationships. While Chief Justice Rehnquist, however, characterized the affirmative state action necessary to trigger a special relationship as "restraining the individual's freedom

separate black and white school districts were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

⁸² See *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); cases cited *supra* note 81; see also *infra* notes 154-58 and accompanying text. While in *DeShaney* the Supreme Court deemphasized the role of the state vis-à-vis Joshua's family situation in order to conclude that the state played no role in the creation of the dangers he faced, in another recent opinion involving child abuse but addressing an entirely different legal issue, the Court painted a strikingly different picture of the relationship between the state and a family under the supervision of a child welfare agency. In *Baltimore City Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 990 (1990), the Supreme Court, in an opinion by Justice O'Connor, held that a mother who retained custody of her child subject to the supervision of the Department of Social Services could not invoke the fifth amendment to avoid revealing her child's whereabouts to the Department of Social Services and the juvenile court.

In reaching this holding, the Court emphasized the role of the state in creating the custodial relationship between Ms. Bouknight and her son. As in *DeShaney*, Ms. Bouknight's son had been temporarily removed from her custody because of suspected abuse and then returned to her custody under the supervision of the Department of Social Services. Yet, instead of portraying Ms. Bouknight as an autonomous private actor whose custodial relationship with her son was preexistent and not subject to state responsibility or control, which would seem most consistent with the *DeShaney* opinion's depiction of Joshua and Randy DeShaney's relationship to the State, this time, the Court viewed Ms. Bouknight's custody of her son as conferred by the state.

Although the facts suggest an incrementally higher degree of state involvement here than in *DeShaney*, in that the child was initially held in foster care for several months rather than several days and was subsequently adjudicated to be a child in need of supervision by the juvenile court and therefore subject to court-ordered supervision, the Court's portrayal of the situation suggests a radically different vision of the relationship between the State and families that are subject to supervision by child welfare agencies.

to act on his own behalf,"⁸³ Justice Brennan recognized that such a standard is meaningless in this situation, in which Joshua, a four year-old child, never had the ability to act on his own behalf at all. This standard is equally inadequate to explain *Youngberg*:

[T]he Court's exclusive attention to State-imposed restraints of "the individual's freedom to act on his own behalf" . . . suggests that it was the State that rendered Romeo unable to care for himself, whereas in fact—with an I.Q. of between 8 and 10, and the mental capacity of an 18-month-old child . . . [—] he had been quite incapable of taking care of himself long before the State stepped into his life. Thus, the fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the State was obligated to replace.⁸⁴

The dissent agreed with the majority that a special relationship exists when the state affirmatively acts without the individual's consent, thereby rendering her more vulnerable and creating the danger she faces. In *Youngberg* and *DeShaney*, however, cases in which the individual was never capable of acting on his own behalf, the question whether the state had restrained the individual's freedom to act on his own behalf should have been translated into the question whether the state had cut off other private sources of aid to the individual.⁸⁵ The dissent further argued that, on the facts of this case, the defendant's actions did actively cut off other sources of aid to Joshua.⁸⁶ By establishing the Department of Social Services as the sole agency to which all reports of child abuse are made (by private and public persons), and by according the agency the responsibility to investigate reports and take action to protect children, the state "relieved ordinary citizens and government bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap."⁸⁷

While the majority clearly held that the state did not create the dangers faced by Joshua, such a holding may either have been based on a specific factual conclusion that the state did not, in this

⁸³ *DeShaney*, 109 S. Ct. at 1006.

⁸⁴ *Id.* at 1009 (Brennan, J., dissenting).

⁸⁵ *See id.* (Brennan, J., dissenting).

⁸⁶ *See id.* at 1010-11 (Brennan, J., dissenting).

⁸⁷ *Id.* at 1011 (Brennan, J., dissenting).

instance, cut off any other sources of aid to Joshua, or it may have been based on a broader legal holding that cutting off other sources of aid does not, in any instance, constitute an act sufficiently harmful to meet the state-created-danger standard. Chief Justice Rehnquist's repeated insistence that the state did not "do *anything* to render [Joshua] *any* more vulnerable to [the danger],"⁸⁸ and that "it placed him in *no worse position* than that in which he would have been had it not acted at all"⁸⁹ points toward a factual holding that, in this particular situation, the state did not cut off other sources of aid. Such an interpretation leaves open the possibility that the dissent's argument could be adopted in a later case.⁹⁰

It is apparent that the special relationship theory endorsed by the Supreme Court in *DeShaney* does not turn on the question whether the plaintiff is in state custody at the time of her injury. Instead, after *DeShaney*, a special relationship exists whenever the state acts to create the danger faced by the plaintiff, and the plaintiff is involuntarily subjected to such danger. While the Court in *DeShaney* rejected the argument that the state's action in cutting off other sources of aid to Joshua established a special relationship with him, that holding may be read as limited to the specific facts of the case. Thus, the opinion does not foreclose the possibility that "cutting off other sources of aid" might establish a special relationship under a different set of facts.

II. THE IMPLICATIONS OF *DESHANEY* FOR CHILDREN ABUSED IN FOSTER CARE

How would the special relationship analysis have differed if Joshua had been beaten while in foster care rather than in the custody of his natural father? The Supreme Court left this question open in the *DeShaney* opinion.⁹¹ Eleven days after *DeShaney* was

⁸⁸ *Id.* at 1006 (emphasis added).

⁸⁹ *Id.* (emphasis added).

⁹⁰ While the petitioners did make the argument adopted by the dissent—that the state cut off private sources of aid—they made this argument in the context of a procedural due process claim that the Court explicitly declined to consider. See Brief for Petitioners, *supra* note 20, at 27; see also *DeShaney*, 109 S. Ct. at 1003 n.2. They did not explicitly argue that the defendant's act in cutting off other sources of aid constituted a state-created danger triggering a special-relationship duty. This argument, however, was extensively argued in the A.C.L.U. Amicus Brief, *supra* note 38, at 28-34.

⁹¹ It explained:

Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might

decided, the Court again declined to consider this question by denying certiorari in *Taylor v. Ledbetter*.⁹² The Eleventh Circuit in *Taylor* held that the state did owe a special-relationship duty, under the due process clause, to a child abused in foster care.

At the time that *DeShaney* and *Taylor* reached the Supreme Court, only a handful of courts had considered the question whether a special relationship exists between the state and foster children.⁹³ In 1976, two decisions of the Southern District of New York⁹⁴ rejected the analogy of foster care to incarceration and found no special relationship duty to exist. "[T]he state's action in taking the child plaintiffs into foster care, whether with an institution or foster parent, is not a deprivation of liberty. The state has merely provided a home for them in substitution for the one the parents failed to provide."⁹⁵ Subsequent cases, however, have found a substantive due process duty to protect children in foster care.⁹⁶ In 1979, the Southern District of New York held that "[a] child who is in the custody of the state and placed in foster care has

have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.

DeShaney, 109 S. Ct. at 1006 n.9.

⁹² 791 F.2d 881 (11th Cir. 1986), *aff'd in part, rev'd in part on reh'g*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989). The Eleventh Circuit found the liberty interest of the foster child analogous to the liberty interest in *Youngberg*:

The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. The state's failure to meet that obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment.

Taylor, 818 F.2d at 795.

⁹³ See *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *Rubacha v. Coler*, 607 F. Supp. 477 (N.D. Ill. 1985); *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979); *Black v. Beame*, 419 F. Supp. 599 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 815 (2d Cir. 1977); *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976).

⁹⁴ See *Black*, 419 F. Supp. 599; *Child*, 412 F. Supp. 593.

⁹⁵ *Child*, 412 F. Supp. at 608. *Child* challenged the failure to provide adoptive homes to foster children, and *Black* challenged the failure to provide housing and welfare benefits necessary to reunite foster children with their family. These cases therefore are arguably distinguishable from cases alleging a right to physical safety in foster care. See *infra* notes 178-82 and accompanying text.

⁹⁶ See *Doe*, 649 F.2d at 141; *Rubacha*, 607 F. Supp. at 479; *Brooks*, 478 F. Supp. at 795.

a constitutional right to at least humane custodial care."⁹⁷ In 1981, the Second Circuit held that the foster care situation was controlled by *Estelle*, and that the child welfare agency therefore had an affirmative duty to protect the plaintiff from sexual abuse in foster care.⁹⁸ Finally, in 1985, the Northern District of Illinois held that under *Youngberg*, the state had a duty to protect a foster child from attacks by other foster children.⁹⁹

The *DeShaney* opinion leaves the foster child plaintiff with two major problems. First, courts are interpreting *DeShaney* to create a simple custody test for special relationship.¹⁰⁰ This test not only derives from an imprecise reading of the *DeShaney* opinion,¹⁰¹ but it is also unworkable in practice since it leaves unresolved the ambiguity inherent in the term "custody." Such a test allows the state to argue in virtually all cases that the child is not in its actual custody because the foster parent is a private party over whom the

⁹⁷ *Brooks*, 478 F. Supp. at 795.

⁹⁸ See *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

⁹⁹ See *Rubacha v. Coler*, 607 F. Supp. 477, 479 (N.D. Ill. 1985); *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979). These cases, however, did not resolve the special relationship question in the foster care context. A number of courts have held, for purposes of qualified immunity, that a foster child's right to protection from the state was *not* clearly established as late as 1984. See, e.g., *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1989) (finding no clearly established right in 1984), *cert. denied*, 110 S. Ct. 2560 (1990); *Eugene D. v. Karman*, 889 F.2d 701, 707-10 (6th Cir. 1989) (finding no clearly established right from 1974 through 1982), *cert. denied*, 110 S. Ct. 2631 (1990). But see *K.H. v. Morgan*, No. 89-3158 (7th Cir. Sept. 24, 1990) (LEXIS, Genfed library, USApp file) ("It should have been obvious from the day *Youngberg* was decided that a state could not avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility [for foster children] to irresponsible private persons."); *Zemola v. Johnson*, No. 89 C 0798 (N.D. Ill. Sept. 20, 1989) (LEXIS, Genfed library, Dist file) (concluding that foster child's right to protection *was* clearly established by 1982).

¹⁰⁰ See *supra* note 56. In most foster-care protection cases decided since *DeShaney*, the courts have found that a special-relationship duty toward foster children *does* exist under the custody test. See, e.g., *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Lipscomb v. Simmons*, 884 F.2d 1242, 1247 (9th Cir. 1989), *reh'g granted*, 907 F.2d 114 (9th Cir. 1990); *Campbell v. City of Philadelphia*, No. 88-6976 (E.D. Pa. July 18, 1990) (LEXIS, Genfed library, Dist file); *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989). But see *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 476 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 148 (1989) (finding no special relationship because foster child was found not to be in state custody). A recent Seventh Circuit opinion by Judge Posner, however, applied a state-created-danger test for special relationship to conclude that the state owes a duty to children involuntarily placed in foster care. See *K.H. v. Morgan*, No. 89-3158 (7th Cir. Sept. 24, 1990) (LEXIS, Genfed library, USApp file).

¹⁰¹ See *supra* notes 65-82 and accompanying text.

state has limited control.¹⁰² Secondly, *DeShaney* appears to require the plaintiff to be involuntarily subjected to state action in order for a special relationship to be established.¹⁰³ The lower courts have interpreted this requirement to mean that when a child's foster-care placement is initially authorized by a "voluntary placement agreement" signed by the parent (as is most often the case¹⁰⁴), this involuntariness requirement is not met, and there is no special relationship.¹⁰⁵

A. Problems Presented by the Custody Test

The meaning of the word "custody" varies significantly depending upon the context in which it is used. Asking whether someone is in "custody" in a *Miranda* case is entirely different from asking whether a child is in "custody" in the context of a domestic relations dispute. "Custody" does not in and of itself clearly designate a specific set of parameters for purposes of a special-relationship test.

The word's meaning is especially ambiguous in the foster care context, in which the rights and responsibilities attendant to custody may be shared among a number of different entities and individuals.¹⁰⁶ State child welfare agencies retain "legal custody" of foster children in that the court order permitting the placement of the child in foster care normally designates the agency as the custodian.¹⁰⁷ The state agency makes the initial decision to petition the court for placement of the child, along with the subsequent decision

¹⁰² This argument may gain additional force when (as is often the case) the state contracts out the provision of foster care to private agencies, which in turn contract with individual foster parents.

¹⁰³ See *supra* notes 77-80 and accompanying text.

¹⁰⁴ Estimates of the proportion of all placements that are "voluntary" vary from 50 to 90 percent. See Mushlin, *supra* note 9, at 238 n.207.

¹⁰⁵ See, e.g., *Milburn*, 871 F.2d at 476 (finding that plaintiff was voluntarily placed in foster care by his parents); *Black v. Beame*, 419 F. Supp. 599, 602 (S.D.N.Y. 1976) (also focusing on voluntary placement of child by parents), *aff'd*, 550 F.2d 815 (2d Cir. 1977); see also *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989) (distinguishing factual circumstances of the case because children involved were not voluntarily placed in foster care as in *Black*).

¹⁰⁶ The Supreme Court has held that foster children are *not* in state "custody" for purposes of habeas corpus relief. See *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502 (1982). For a discussion of why the concept of custody creates an artificial line with little or no relation to who bears actual responsibility for the child, see Oren, *supra* note 1, at 704.

¹⁰⁷ See Dobbs, *Foster Care and Family Law: A Look at Smith v. Offer and the Constitutional Rights of Foster Children and Their Families*, 17 J. FAM. L. 1, 5 (1978).

as to where to place the child.¹⁰⁸ The agency also retains control over decisions pertaining to moving the child from one foster home to another, visiting arrangements with parents, and returning the child to her natural parents.¹⁰⁹

In many instances, the state agency contracts with a private foster care agency, which in turn contracts with the foster parents.¹¹⁰ The private agency decides which foster family will receive the child. The private agency usually employs a social worker who has regular contact with the foster family and exercises some supervisory authority over day-to-day decisions. Her role may overlap substantially with that of the state agency social worker, and the manner in which responsibility is divided between the two agencies may vary significantly from case to case. One or both social workers might be involved in dealing with the child's school, arranging psychological testing and/or treatment, and organizing visits with the natural parents, in addition to a range of other issues relating to the care of the child. Although private agencies are not formally parties to dependency proceedings, their social workers are frequently included in case plan meetings and pre-trial negotiations and may exert substantial influence over decisions made by the state agency and the court as to parental visitation and the ultimate return of the child.

The foster parent, of course, has physical custody and exercises authority over most of the day-to-day details of the child's life. The natural parents, however, retain substantial rights over their children placed in foster care, including at a minimum the right to make major medical decisions, the right to be consulted before the child is moved, and the right to regular visitation.¹¹¹

Thus, responsibility and decisionmaking authority with regard to a foster child may frequently be shared among three or four different parties.¹¹² The word "custody" or "custodian," without

¹⁰⁸ See Wald, *supra* note 7, at 631.

¹⁰⁹ While these decisions are subject to court approval, many courts with overcrowded dockets frequently rubber-stamp the agency's recommendation.

¹¹⁰ See, e.g., 55 PA. CODE §§ 3700.1-73 (1990) (setting guidelines for approval and supervision of individual foster homes by foster family care agencies).

¹¹¹ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because . . . they have lost temporary custody of their child to the State."); see also 55 PA. CODE § 3130.68 (1990) (regarding rights of parents to visitation and to be informed before the child is moved); *id.* § 3130.91 (requiring parent's authorization for nonroutine medical treatment).

¹¹² The situation may also be complicated when a hospital takes temporary custody

a more specific definition, is of little value in determining the rights and duties of the various parties exercising control over a foster child.

Two recent Third Circuit opinions, interpreting *DeShaney's* "custody" test, demonstrate how malleable the term really is. In *Stoneking v. Bradford Area School District*,¹¹³ the court noted that students required by state law to attend public school could be viewed as being in the "functional custody" of the state while at school, such that a special relationship could be held to exist consistent with *DeShaney*.¹¹⁴ The *Stoneking* court, perhaps anticipating that this finding of functional custody might be regarded by the Supreme Court as too strained a reading of *DeShaney*, ultimately based its finding of liability on alternative grounds.¹¹⁵ In *Horton v. Flenory*,¹¹⁶ the plaintiff was beaten to death by a private club owner who was purportedly questioning the plaintiff about a crime. Since the beating occurred with the knowledge and acquiescence of the police, the court held that the plaintiff was in constructive state custody.¹¹⁷

While in these cases the meaning of the word "custody" was broadly interpreted to the benefit of the plaintiffs, the term may just as easily be narrowly construed to the detriment of plaintiffs seeking

of a child pending an investigation, as happened in *DeShaney*. See *supra* notes 24-25 and accompanying text.

¹¹³ 882 F.2d 720, 723-24 (3d Cir. 1989), *on remand from* 109 S. Ct. 1333 (1989) (remanding in light of *DeShaney*), *aff'd on other grounds* 856 F.2d 594 (3d Cir. 1988).

¹¹⁴ See *id.* at 723-24; see also *Tilson v. School Dist. of Philadelphia*, No. 89-1923 (E.D. Pa. July 13, 1990) (LEXIS, Genfed library, Dist file) (noting in dicta that even though participation of children in a state-run day care program is voluntary, "the tender years of preschool children and their inability to defend themselves against adult mistreatment favor imposing the same constitutional duty to provide for their reasonable safety as for institutionalized or incarcerated individuals"); *Pagano v. Massapequa Pub. Schools*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (holding that there exists a special relationship between the state and school children, which is not barred by *DeShaney*). But see *I.O. v. Alton Community Unit School Dist.*, 909 F.2d 267, 272-73 (7th Cir. 1990) (holding that no special relationship exists between state and school children subject to compulsory school attendance).

¹¹⁵ See *Stoneking*, 882 F.2d at 724 (holding the school district liable for the child-plaintiff's injuries from sexual abuse at the hands of a school-employed band director on the basis of the school district's maintenance of "a practice, custom, or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers" (relying on *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978))).

¹¹⁶ 889 F.2d 454 (3d Cir. 1989), *on remand from* *City of New Kensington v. Horton*, 109 S. Ct. 1334 (1989) (remanding in light of *DeShaney*), *aff'd In re City of Kensington*, 857 F.2d 1463 (3d Cir. 1988).

¹¹⁷ See *id.* at 458.

the protection of the state. In *Milburn v. Anne Arundel County Department of Social Services*,¹¹⁸ the Fourth Circuit dismissed a claim by a child abused in foster care on the grounds that the foster parent was not a state actor.¹¹⁹ This line of reasoning assumes that "custody," for purposes of special relationship analysis, refers only to the type of physical custody exercised by the foster parent. Assuming that only the foster parents could be said to have "custody" of the child, the court went on to require that the foster parents be state actors in order to be subject to the fourteenth amendment.¹²⁰

Milburn involved a child who allegedly suffered repeated serious physical abuse by his foster parents over a period of two years. During that time, the Maryland Department of Social Services, which had placed the child in the foster home, took no action to remove him from the home despite reports of suspected abuse from the hospital. The child sued the foster parents, the two hospitals, the county, the county Department of Social Services, and employees thereof under section 1983, alleging deprivation of his rights under the first, fourth, fifth, ninth, and fourteenth amendments.¹²¹

In upholding the dismissal of the complaint, the Fourth Circuit said that the Supreme Court's decision in *DeShaney* was dispositive and that the facts of *DeShaney* were virtually "indistinguishable" from this case.¹²² In the court's view, the child was not in the custody of the state when the injuries occurred, but in the custody of the foster parents, who were private parties in the same sense that Joshua DeShaney's father was a private party. Therefore, just as the state had no obligation to protect Joshua when he was in the custody of his father, it had no duty to protect a child in the custody of private citizens who happened to be foster parents.¹²³

¹¹⁸ 871 F.2d 474 (4th Cir. 1989).

¹¹⁹ See *id.* at 476-79. The court also based its holding that there was no special relationship on the fact that the child was voluntarily placed in foster care. The court summarily resolved the involuntariness issue by observing that the child "was voluntarily placed in the foster home by his natural parents," without any discussion of whether such consent on the part of the parents could fairly be attributed to the child. *Id.* at 476. This same approach has been taken by every court considering a right to protection claim by a foster child since *DeShaney* and is discussed in section IIB. See *infra* notes 134-53 and accompanying text.

¹²⁰ See *Milburn*, 871 F.2d at 476.

¹²¹ See *id.* at 475.

¹²² See *id.* at 476.

¹²³ See *id.*

Rather than looking to *Youngberg* and *Estelle* to determine what constitutes state custody for purposes of a special relationship (or to determine what constitutes a state-created danger), the court erroneously equated the question of whether the plaintiff was in state custody for purposes of special relationship analysis with the question of whether the custodian (foster parent) was a state actor and thus subject to the fourteenth amendment under *Burton v. Wilmington Parking Authority*¹²⁴ and *Jackson v. Metropolitan Edison Co.*¹²⁵

These state action cases, discussed at length by the *Milburn* court, address an issue that is clearly distinct from the issue of a special-relationship duty with which *DeShaney* deals. The state action cases ask whether the actions of the defendant can be fairly attributed to the state such that the defendant can be held to have violated the fourteenth amendment, which binds only the conduct of states, not private parties.¹²⁶ *DeShaney*, on the other hand, asked whether the defendant child welfare agency, which was clearly an arm of the state, could be held to have deprived someone of life, liberty or property by its failure to protect that person from the acts of a private party.¹²⁷ The two inquiries are similar in that they both ask when the state should be held responsible for the actions of a private party, but they are doctrinally distinct. In the language of the due process clause, the special-relationship inquiry asks: has the state *deprived* a person of life, liberty, or property? The state action inquiry asks: was it the *state* that deprived a person of life, liberty, or property?¹²⁸

¹²⁴ 365 U.S. 715 (1961).

¹²⁵ 419 U.S. 345 (1974).

¹²⁶ See *id.* at 349-50; *Burton*, 365 U.S. at 721-22.

¹²⁷ See *DeShaney*, 109 S. Ct. at 1002-03.

¹²⁸ The Fourth Circuit launched into its state action analysis from a vague reference in the *DeShaney* opinion to the fact that Joshua was "in the custody of his natural father, who was in no sense a state actor." *Milburn*, 871 F.2d at 476 (quoting *DeShaney*, 109 S. Ct. at 1006) (emphasis added). Yet this sentence in and of itself hardly indicates that the Court's opinion turns on whether Joshua's father was a state actor in the sense of *Burton* and *Jackson*. It is hard to imagine that the *DeShaney* Court would, in such a cursory manner, import into the special-relationship theory all of the complexity and uncertainty of the state action requirement.

This kind of mistake in legal reasoning has long been recognized:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

The Fourth Circuit's discussion of whether the foster parents were state actors was relevant to the plaintiff's claims against the foster parents themselves.¹²⁹ Such a state-action inquiry could also be relevant to claims against a county and its department of social services, but only insofar as such claims were made under *Monell v. Department of Social Services*,¹³⁰ alleging that a policy or custom of the county caused the foster parents to violate the child's rights.¹³¹ To the extent, however, that the plaintiff was proceeding under a *DeShaney*-type special-relationship theory, to hold the Department of Social Services or its social workers liable for their failure to protect the child from abuse by his foster parents, the question whether the foster parents were state actors was irrelevant.¹³² Just as the other patients who attacked plaintiff Nicholas Romeo were clearly not state actors in *Youngberg*,¹³³ those who inflicted injury on Charles Milburn need not have been state actors in order for the state to have been held liable for his injury under a special-relationship theory.

Thus, the ambiguity inherent in the term "custody" raises significant problems when attempting to apply such a test to a specific fact situation. Analyzing the state's duty toward foster children through a state-created-danger test for special relationship raises less ambiguity as to meaning and would result in more consistent treatment of foster care cases. Under a state-created-danger test, the analogy to *Youngberg* and *Estelle* is fairly straightforward. Just as

Hancock, *Fallacy of the Transplanted Category*, 37 CANADIAN B. REV. 535, 575 (1959) (quoting COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159 (1942)).

¹²⁹ A claim against the foster parents does not involve a *DeShaney*-type special relationship inquiry because the foster parents are not being sued for their failure to act, but their *acts* of abuse. Such a claim does, however, involve a state action inquiry since it can be argued that the foster parents are private actors. This issue did not come up in *DeShaney* because the defendants, the County Department of Social Services, and employees thereof, were all clearly state actors. Joshua's father could not be named as a defendant under § 1983 precisely because he was so clearly *not* a state actor.

¹³⁰ 436 U.S. 658, 690 (1978).

¹³¹ No such claim was made in *Milburn*.

¹³² Thus, it is important to note that there are two possible theories under which a child abused in foster care could attempt to hold a municipality or county liable for her injuries. The first alleges that the county had a duty to act to protect the child from her foster parents by virtue of the special relationship that was formed when the county placed the child in foster care. This theory relies on *Youngberg*, *Estelle* and footnote nine in *DeShaney*. The second theory alleges that the foster parents are state actors and that because their actions in abusing the child resulted from some county policy or custom, the county is liable for the child's injuries under *Monell*.

¹³³ See *Youngberg v. Romeo*, 457 U.S. 307, 310 (1982).

inmate Gamble would not have been unable to obtain medical care but for the state having incarcerated him, and patient Romeo would not have been injured by other patients at Pennhurst but for the state having committed him, a foster child who suffers abuse by her foster parents clearly would not have suffered such abuse but for the state's affirmative act of placing her in the foster home. The second prong of the *DeShaney* special relationship test, however, that the plaintiff have been involuntarily subjected to state action, raises an additional set of problems for the foster child-plaintiff, which are discussed in the next section.

B. *The Involuntariness Requirement as Applied to Children*

Whether we read *DeShaney* to establish a custody test or a state-created-danger test, the case appears to require that there be some element of involuntary submission by the individual to state power or authority in order to establish a special relationship. *Youngberg* also included this notion. Justice Powell repeatedly noted throughout that opinion that Romeo had been "involuntarily" committed to the institution,¹³⁴ although there was no discussion as to what the concept of "involuntary" might mean in reference to someone who is severely mentally retarded. Similarly, the "snake-pit" line of cases, establishing a special relationship based on state-created danger, all involve coercive action by the state.¹³⁵

Determining whether a young child or an infant has consented voluntarily to some action by the state is clearly problematic. Children who are pre-verbal obviously cannot express their consent or nonconsent. Even decisions to place older children are not usually based on the child's opinion.¹³⁶ Most courts construing the special relationship theory in the context of foster care translate this question into whether or not the child was "voluntarily placed" in foster care, meaning whether or not the parents signed an agreement consenting to the placement. Parents do act as proxy for their children in making most decisions about their welfare. Arguably we

¹³⁴ See *id.* at 310, 313, 315, 316, 318, 321-22.

¹³⁵ See, e.g., *White v. Rochford*, 592 F.2d 381, 382 (7th Cir. 1979) (finding that police officer created the danger by arresting plaintiff-children's uncle and leaving children on busy eight-lane highway).

¹³⁶ One study found that 27% of children voluntarily placed in foster care were opposed to the decision and that nearly half of all foster children were too young to understand the reasons why they had been placed in foster care. See A. GRUBER, *CHILDREN IN FOSTER CARE: DESTITUTE, NEGLECTED, . . . BETRAYED* 141 (1978).

should therefore view the voluntary placement of a child as a situation in which the state's action has been consented to by both the parent *and* the child. For several reasons, however, this is a flawed analysis.¹³⁷

First, the *Youngberg* case itself, which serves as our central model of a special relationship created by involuntary institutionalization, involved a mother who essentially "voluntarily placed" her child in state care. Romeo's mother petitioned the court asking that he be admitted to a state institution for the mentally retarded because she was unable to care for him or control his violence.¹³⁸ Romeo, at age thirty-three, had the mental capacity of an eighteen-month old child and was incapable of consenting on his own behalf.¹³⁹ Therefore, pursuant to state law, a commitment hearing was held, and he was "involuntarily committed" to Pennhurst State Hospital.¹⁴⁰ Thus, *Youngberg*, on its facts, supports the idea that a placement consented to by a parent can establish a special relationship.¹⁴¹

Second, parents cannot generally act as a proxy for their children in making decisions that affect the children's constitutional rights, such as the fundamental right to an abortion,¹⁴² the right to procedural due process,¹⁴³ or, in certain circumstances, the right to counsel.¹⁴⁴ It would be inconsistent with this principle

¹³⁷ See Mushlin, *supra* note 9, at 237-42.

¹³⁸ See *Youngberg*, 457 U.S. at 309.

¹³⁹ See *id.* at 309-10.

¹⁴⁰ See *id.* at 310.

¹⁴¹ In fact, *Youngberg* has been interpreted as supporting a right to safety for voluntarily committed patients as well. See *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245 (2d Cir. 1984) ("We need not decide whether [plaintiffs] are at [the institution] 'voluntarily' or 'involuntarily' because in either case they are entitled to safe conditions and freedom from undue restraint."); *Wilder v. City of New York*, 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983) (applying *Youngberg* to voluntarily committed, emotionally disturbed adult); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 470, 485 (D.N.D. 1982) ("An individual's liberty is no less worthy of protection merely because he has consented to be placed in a situation of confinement."). *DeShaney*, however, has already caused at least one district court to reject this interpretation. See *Jordan v. Tennessee*, 738 F. Supp. 258, 260 (M.D. Tenn. 1990) (holding that voluntary resident of state facility for severely mentally retarded individuals had no due process right to a safe environment).

¹⁴² See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) (holding unconstitutional statute requiring parental consent for minor's abortion where mother's life not threatened).

¹⁴³ See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (holding that a child's right to procedural due process before being committed to a mental hospital is not waived simply because parent consents to commitment).

¹⁴⁴ A number of state courts have held that a minor's right to counsel in

to hold that in this instance a parent's consent on behalf of her child causes the child to lose constitutional rights she would otherwise possess.

Finally, even if consent to placement by the parent were sufficient to vitiate a special relationship, it is not at all clear that a parent's signature on a voluntary placement agreement reliably indicates that the placement was in fact voluntary. Because middle- and upper-class parents have the resources to arrange other alternatives for the care of their children in the face of crisis, those who place their children in state-run foster care are usually poor, uneducated, and without the benefit of legal counsel when they sign such agreements.¹⁴⁵ The extent to which such a parent at a time of crisis may be subtly coerced or intimidated by a social worker who, with the authority of the state behind her, confidently pronounces placement to be "in the best interests of the child" is impossible to measure.

Coercion may often take even more overt forms. The social worker may threaten the parent with a longer placement or even permanent removal of the child through court intervention if she does not "cooperate" by signing the agreement.¹⁴⁶ Even if the social worker is more honest in explaining to the parent that she will be given a chance to convince a judge that she should be able to keep her child, many parents may consider their chances of winning a court case against a government agency to be slim at best and will try to cut their losses by adopting a conciliatory stance toward the agency.¹⁴⁷ Thus, even putting aside the question of

delinquency and dependency hearings cannot be waived by the parent where the interests of parent and child are found to be adverse. See *In re Manuel R.*, 207 Conn. 725, 733, 543 A.2d 719, 726 (1988); *McBurrough v. Department of Human Resources*, 150 Ga. App. 130, 131, 257 S.E.2d 35, 36 (1979); *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. 371, 393, 324 A.2d 562, 573 (1974); see also MODEL JUVENILE COURT ACT § 26(a) (1968) ("If the interests of 2 or more parties conflict separate counsel shall be provided . . .").

¹⁴⁵ See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 833-34 (1977); *Musewicz*, *supra* note 11, at 639; see also *In re David R.*, 101 Misc. 2d 41, 42-43, 420 N.Y.S.2d 675, 677 (Fam. Ct. 1979) (regarding woman, fluent only in Spanish who, without the aid of an interpreter, signed a voluntary placement agreement in English relinquishing custody of her grandchild).

¹⁴⁶ See *Mushlin*, *supra* note 9, at 240; see also *In re Burns*, 519 A.2d 638, 640-41 (Del. 1986) (finding that 17-year old mother signed voluntary placement agreement on the understanding that if she did sign, her child would stay with her and that if she did not sign, the court would take him away).

¹⁴⁷ See Mnookin, *Foster Care-In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 601 (1973).

the consent of the child, "voluntary" foster care placement may in fact constitute coercive state action against the parent.

Moreover, voluntary placement agreements are typically valid for only thirty days.¹⁴⁸ In order to keep a child in foster care beyond this initial period, the agency must obtain judicial approval of the agreement.¹⁴⁹ At this point the placement is clearly authorized by the coercive power of the state. Once such an order is entered, the parent may no longer regain custody of her child merely by revoking her consent to placement. Further, while the court orders are frequently entered with the "agreement" of the parents, such an agreement is often the result of a Hobson's choice. It is analogous to a criminal defendant's voluntary plea of guilty. The plea is "a bargain with the [state] for what is seen as the 'least bad' option."¹⁵⁰ Certainly, a prisoner who enters state custody by such a plea is not considered to be voluntarily incarcerated and therefore entitled to fewer constitutional protections.

While most of the courts that have considered the issue so far have found a special relationship to exist between the state and foster children,¹⁵¹ those holdings are on shaky ground. First, given the dominant reading of *DeShaney* as creating a custody test for a special relationship, many courts will be particularly prone to use an erroneous analysis, similar to that of the Fourth Circuit in *Milburn*. Second, given the significance accorded to voluntary placement agreements by the courts, relief under this theory is, in practical terms, unavailable to most foster children. A careful analysis of the *DeShaney* holding, as well as informed consideration of the special situation of children and how voluntary placements really work in practice, however, should lead courts to expand the special relationship doctrine to all children in foster care.

Regarding the first prong of the special relationship test, courts should recognize that simply asking whether or not the plaintiff is in state custody will not yield any clear answers in the foster care context, and additionally that such is not the appropriate test under

¹⁴⁸ See Mushlin, *supra* note 9, at 238 n.209 (citing *Joyner v. Dumpson*, 712 F.2d 770, 773 (2d Cir. 1983)).

¹⁴⁹ See *id.*

¹⁵⁰ *Id.* at 238 n.210 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31-39 (1970)).

¹⁵¹ The only post-*DeShaney* decision so far to find no special relationship has been *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474 (4th Cir. 1989). See *supra* notes 118-33 and accompanying text. For a discussion of pre-*DeShaney* foster care cases, see *supra* notes 93-99 and accompanying text.

DeShaney anyway.¹⁵² Asking instead whether the state created the danger faced by the foster child by its affirmative act of placing her in foster care, in the same sense that the state created the danger faced by the plaintiffs in *Estelle* and *Youngberg* by placing them in institutions, leads to a clearer analysis and follows more accurately the Supreme Court's analysis in *DeShaney*.

Regarding the second prong of the special relationship test—whether the state acted without the plaintiff's consent—courts should consider that the signing of a voluntary placement agreement may not in practice actually signify the consent of the child or the parent. Even if a voluntary placement is in fact voluntary on the part of the parent, *Youngberg* teaches us that such action by the parent is not enough to vitiate the state's special relationship with the child.¹⁵³

Thus, children abused in foster care should in virtually all cases meet the requirements for a special relationship with the state. They have been placed in foster care by the state, almost always without their consent, and but for this placement, injury at the hands of their foster parents would not have occurred.

III. EXTENDING THE RIGHT TO SAFETY BEYOND FOSTER CARE

After *DeShaney*, it appears that agency supervision in the form of monthly visits by a social worker to the parents' home is not sufficient to create an affirmative duty of protection toward a child, while placing and maintaining a child in foster care may create such a duty. This simple formula does not, however, address the many other situations that may arise in the child-welfare context that fall somewhere in between these two extremes. Agency intervention takes many forms, some of which are more intensive than monthly home visits by a social worker but not as extreme as the removal of the child for placement in foster care.¹⁵⁴ Simply because the minimal intervention in *DeShaney* was held not to create a special relationship, it does not necessarily follow that other forms of agency intervention, short of placement in foster care, will not rise to the level necessary to create a special relationship.

¹⁵² See *supra* notes 65-82 and accompanying text.

¹⁵³ See *supra* notes 138-41 and accompanying text.

¹⁵⁴ See Oren, *supra* note 1, at 678 (stating that "in child protection work the line between legal custody and noncustodial supervision by the agency can be very artificial").

The following are all fact patterns that may arise in this gray area between supervision and foster care, and thus present potential due process claims that are not necessarily foreclosed by *DeShaney*:

* The agency allows a parent to visit her child at the foster home. During one of these visits, the parent severely abuses the child.

* A child in foster care is sent home for an overnight visit with her parents, during which they severely abuse her.

* After a child has been in foster care for two years, the agency decides it is safe to send her home to her parents. Shortly after being returned home, she is severely abused.¹⁵⁵

* After a child has been in foster care for two years, the agency sends her home but retains legal custody. After being returned home, she is severely abused.

* The agency removes a child from her home and places her temporarily with relatives during which time the agency retains court-authorized supervision (or legal custody) over the child. The child is subsequently severely abused in the relative's home.¹⁵⁶

¹⁵⁵ See *Lord v. Murphy*, 561 A.2d 1013, 1018 (Me. 1989) (Clifford, J., concurring) (suggesting that the state's special-relationship duty under due process extends to a child who after one-and-a-half years in foster care placement was returned to his mother who then abused him).

¹⁵⁶ See *Hampton v. Motley*, 911 F.2d 722 (4th Cir. 1990) (holding that children who were removed from their mother's custody and placed with their paternal grandparents and who then suffered abuse at the hands of their grandparents and their father, had a substantive due process claim against the state based on a special relationship). But see *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 392 (4th Cir. 1990) (finding no special relationship that would render the state liable for injuries sustained by a child while in the custody of his grandmother or mother with whom the child was placed after being removed from the custody of his father).

These first five hypothetical cases could present the plaintiff with the possibility of avoiding the special relationship issue altogether by arguing that the agency's action (in arranging the visit, returning the child, or placing the child with the relative) directly caused the child's injury. The existence of an intervening cause, in the form of the private party who actually delivered the blows, clearly poses a serious problem to this argument, but the Supreme Court's opinion in *Martinez v. California*, 444 U.S. 277, 285 (1980), suggests that it might not be insurmountable, given the right facts. The plaintiff would also have to be able to assert that the action itself constituted a breach of duty, probably at the level of deliberate indifference, see *supra* note 31, which would require at a minimum that the agency had substantial reason to suspect the danger of abuse

* As an alternative to placing the children of a mother and father who are mentally retarded in foster care, the agency engages in a program of intensive supervision. Social workers are at the home forty hours per week helping the parents with parenting and homemaking skills. After a year of such supervision, the children are found to have been severely abused.¹⁵⁷

Applying the state-created-danger test to these fact patterns means asking whether the injury would have occurred but for the state's intervention. In the first example, one might be tempted to conclude that if the parent beat the child during the visit, she probably would have done the same had the child been left at home. But what if the parent had never beaten the child before? What if the child was taken away not because of parental abuse but because the parent was homeless and unable to care for the child? What if the parent beat the child because the stress and frustration of not being able to find a home, and being told by judges and social workers that she could not care for her own child, had pushed her to the breaking point? What if she beat the child out of fear and frustration at seeing her own child not respond to her nor obey her and hearing her call a stranger "mommy?"¹⁵⁸ If these are the causes of the parent's dysfunction, it becomes much more difficult to view the state's intrusion into the family as completely unrelated to the injury. At some point along this continuum, the state's

before returning the child or arranging the visit.

Even if this direct causation argument is not available, the fact that the chain of causation from agency action to child's injury is shorter in these cases than in *DeShaney* makes more convincing the plaintiff's argument that the state, by its action, created the danger that the plaintiff faced and thus established a special relationship duty. (Under this line of reasoning, the subsequent inquiries under standard tort analysis then become: first, whether the agency's failure to act was a breach of duty, and second, whether that breach caused the child's injury. See *supra* note 71.)

¹⁵⁷ For a discussion by the Supreme Court of the relationship between the state and a family subject to agency supervision that portrays such a family as being much more actively shaped by state involvement than was the *DeShaney* family as portrayed by the Court, see *Baltimore City Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 990 (1990), discussed *supra* at note 82.

Clearly, in addition to establishing a duty in each of these hypothetical cases, a plaintiff would also have to show a breach of that duty, presumably by showing at a minimum that the agency had reason to suspect that abuse would occur. See *supra* note 71. Here the focus is only on duty, as it is throughout this Comment.

¹⁵⁸ For discussions of the emotional reactions of parents whose children are placed in foster care, see Carbino, *Group Work with Natural Parents in Permanency Planning*, SOC. WORK WITH GROUPS, Winter 1982, at 7, 12; McAdams, *The Parent in the Shadows*, 51 CHILD WELFARE 51 (1972).

intervention becomes so substantial that it is no longer possible to simply subtract the state from the equation and honestly say what would have happened without it.

By bringing these "gray area" right-to-protection lawsuits, in which the effect of the agency's intervention on the child's situation is more pronounced than it was in *DeShaney*, advocates may encourage the courts to consider the continuum that exists between supervision and foster care, and thus prevent the doctrine in this area from evolving into a simplistic bright-line rule that foster care creates a special relationship and supervision does not.

IV. AFFIRMATIVE DUTIES BEYOND ENSURING PHYSICAL SAFETY

When there is a special relationship, do child welfare agencies have any affirmative duties beyond ensuring physical safety? A number of courts have found that the substantive due process cause of action for failure to protect against physical injury extends to emotional injury as well.¹⁵⁹ Perhaps more significantly, however, two courts have recently been willing to extend the special-relationship duty of the state beyond protection to an affirmative duty to assist children in foster care in exercising fundamental constitutional rights such as their right to family integrity and association.¹⁶⁰

A. *The Duty to Assist in the Exercise of Constitutional Rights*

In *Lipscomb v. Simmons*,¹⁶¹ three foster children challenged the state of Oregon's foster care funding scheme by which financial assistance was provided only to children who were placed with foster parents who were not related to them.¹⁶² Under this scheme, two of the plaintiffs lived with strangers because their relatives, though willing to care for them, were financially unable to

¹⁵⁹ See, e.g., *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (holding that aspects of emotional well-being are protected by the due process clause of the fourteenth amendment); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) ("[A] child who is in the state's custody has a substantive due process right to be free from unreasonable and unnecessary intrusions on both its physical and emotional well-being."); *Doe v. New York City Dep't of Social Servs.*, 670 F. Supp. 1145, 1184 (S.D.N.Y. 1987) (holding unconstitutional inadequate shelter and treatment of foster children).

¹⁶⁰ See *Lipscomb v. Simmons*, 884 F.2d 1242, 1248-50 (9th Cir. 1989), *reh'g granted*, 907 F.2d 114 (9th Cir. 1990) (en banc); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009-10 (N.D. Ill. 1989), *leave to appeal granted*, No. 88 C 7919 (N.D. Ill. Oct. 3, 1990) (LEXIS, Genfed library, Dist file).

¹⁶¹ 884 F.2d 1242 (9th Cir. 1989).

¹⁶² See *id.* at 1243.

meet the children's needs.¹⁶³ The third was in danger of having to leave her aunt and uncle's home because they could not receive foster care payments and thus were unable to provide for her.¹⁶⁴ The Ninth Circuit held that the state had a special-relationship duty toward children in foster care and that this duty encompassed not only an obligation to ensure their safety but also to "assist the children to exercise their constitutional rights."¹⁶⁵ In this instance, therefore, the state was required to fund foster care placements with relatives so as to enable the children to exercise their "constitutionally protected liberty interest in choosing to live with family members."¹⁶⁶

The court relied primarily on prison cases which held that prison officials have an affirmative duty to assist prisoners in the exercise of their right to abortion,¹⁶⁷ the observance of religious dietary laws,¹⁶⁸ and access to the courts.¹⁶⁹ It concluded that "[t]he State's obligation to ensure that children in its custody are able to exercise their constitutional rights is even greater than its responsibility toward prisoners" since foster children are in the state's custody not because of their own misdeeds but "solely because they were the victims of abuse by others."¹⁷⁰

In *Aristotle v. Johnson*,¹⁷¹ Judge Williams of the Northern District of Illinois reached a similar conclusion, holding that under the due process clause, the state has an affirmative duty to assist

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ *Id.* at 1246.

¹⁶⁶ *Id.* at 1244. Citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"), *Quillin v. Walcott*, 434 U.S. 246, 255 (1978) (stating that "the relationship between parent and child is constitutionally protected"), *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (noting that "freedom of personal choice, in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"), and *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) (declaring that constitutional protection extends beyond the nuclear family), the court found this right to associate with relatives in the due process clause of the fourteenth amendment. See *Lipscomb*, 884 F.2d at 1244.

¹⁶⁷ See *Lipscomb*, 884 F.2d at 1246 (citing *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988)).

¹⁶⁸ See *id.* at 1246-47 (citing *McElyea v. Babbitt*, 833 F.2d 196 (9th Cir. 1987); *Schlesinger v. Carlson*, 489 F. Supp. 612 (M.D. Pa. 1980)).

¹⁶⁹ See *id.* at 1248 (citing *Bounds v. Smith*, 430 U.S. 817 (1977)).

¹⁷⁰ *Id.* at 1247.

¹⁷¹ 721 F. Supp. 1002 (N.D. Ill. 1989).

foster children in exercising their right to family association by providing visits with siblings who are separately placed.

While these two cases effected fairly narrow and specific changes in the respective state child welfare systems, the principle articulated, if followed, could lead to much broader claims for services on behalf of foster children and their families. If the state must fund placements with relatives and provide visitation with siblings, it logically follows that its duty to assist foster children in exercising this constitutional right to family association also embraces an obligation to ensure the provision of substantive services (such as housing, daycare, or drug treatment) that are necessary to reunite foster children with their parents.

Three months prior to *Lipscomb* and *Aristotle*, such a claim brought by foster children seeking reunification services was rejected by the Northern District of Illinois in *B.H. v. Johnson*.¹⁷² Several months after *Lipscomb* and *Aristotle*, however, another Northern District of Illinois court held that the state's special-relationship duty toward foster children *does* require the state to do more than ensure the physical safety of foster children. In this case, *Artist M. v. Johnson*,¹⁷³ the court found a due process obligation on the part of the state to ensure that case workers were promptly assigned to children in foster care.

Such claims for reunification services mirror the mandate of the Adoption Assistance and Child Welfare Act of 1980,¹⁷⁴ which requires states receiving federal money under the Act to make

¹⁷² 715 F. Supp. 1387 (N.D. Ill. 1989). In this case, a class of foster children challenged virtually all aspects of the child welfare system: from abuse and neglect in foster care and the failure to provide services to reunite families, to high caseloads and the agency's failure to react quickly to reports of abuse and neglect. In addition to the substantive due process claim, plaintiffs also made procedural due process claims and federal statutory claims under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-629, 670-679 (1982 & Supp. V 1987). Judge Grady did find a special relationship to exist, such that foster children have a substantive due process right to be "free from unreasonable and unnecessary intrusions upon their physical and emotional well-being . . . and to be provided by the state with adequate food, shelter, clothing and medical care and minimally adequate training to secure these basic constitutional rights," *Artist M.*, 715 F. Supp. at 1396, but was unwilling to extend this right to parental and sibling visitation and reunification services, *see id.* at 1396-97.

¹⁷³ 726 F. Supp. 690 (N.D. Ill. 1989). While holding that a special-relationship duty did exist, the court nonetheless dismissed the plaintiffs' substantive due process claim, holding that the state's conduct did not rise to the level of "complete indifference to a known significant risk" necessary to trigger the protection of the due process clause. *See id.* at 700. The court did, however, uphold the plaintiffs' claim under the Adoption Assistance and Child Welfare Act of 1980. *See id.* at 697.

¹⁷⁴ 42 U.S.C. §§ 620-629, 670-679 (1982 & Supp. V 1987).

"reasonable efforts" to reunite foster children with their parents by providing appropriate services.¹⁷⁵ Claiming a right to such services directly under the Act may, however, be problematic. A number of courts have held that the Act creates a cause of action only to enforce its procedural aspects (such as the requirement that case plans be written for each foster child and periodically reviewed).¹⁷⁶ Other courts have also held that damages are not available under the Act.¹⁷⁷ Thus, the substantive due process theory endorsed in *Lipscomb*, *Aristotle*, and *Artist M.* may provide a useful alternative method to force child welfare agencies to comply with their mandate to provide the substantive services necessary to reunite foster children with their families.

B. *The Duty to Provide Care and Services Distinguished from the Duty to Protect from Private Violence*

A state's duty to protect individuals from private violence can be distinguished from its duty to provide care and services. *DeShaney* clearly involved the former as do the foster care abuse cases.¹⁷⁸

¹⁷⁵ The Act provides, in relevant part:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . .

42 U.S.C. § 671(a)(15) (1982).

¹⁷⁶ See, e.g., *B.H.*, 715 F. Supp. at 1401. *But see* *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990) (holding that the Act's "reasonable efforts" requirement that substantive services be provided to families is enforceable); *Artist M.*, 726 F. Supp. at 695 (stating that "if private plaintiffs have the right . . . to enforce their statutory entitlements to case plans and case reviews, the rights of the plaintiff class here to obtain preventive and reunification services must enjoy the same standing").

¹⁷⁷ See *Scrivner v. Andrews*, 816 F.2d 261, 264 (6th Cir. 1987) ("[D]amages are not available in a § 1983 action alleging a violation of the Adoption Assistance Act."); *Leshner v. Lavrich*, 784 F.2d 193, 197-98 (6th Cir. 1986) (stating that "whatever rights the Adoption Assistance Act might confer on parents, relief nullifying a prior state court judgment of child neglect or dependency, or awarding damages in connection therewith, would not be available"); *In re Scott County Master Docket*, 672 F. Supp. 1152, 1203 (D. Minn. 1987) (holding that "the failure of defendants to comply with the statutory requirements pertaining to foster care is not actionable in a damages action under 42 U.S.C. § 1983 in the context of home removals resulting from suspected child sexual abuse"). *But see* *L.J. v. Massinga*, 838 F.2d 118, 122 (4th Cir. 1988) (holding that the Adoption Assistance Act provides a private remedy for damages as well as prospective equitable relief), *cert. denied*, 488 U.S. 1018 (1989); *Joseph A. v. New Mexico Dep't of Human Servs.*, 575 F. Supp. 346, 354 (D.N.M. 1983) (same).

¹⁷⁸ See, e.g., *Taylor v. Ledbetter*, 791 F.2d 881 (11th Cir. 1986), *aff'd in part, rev'd in part on reh'g*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337

Estelle, however, which established a duty to provide medical care, falls in the latter category, as do *Lipscomb* and *Aristotle*. *Youngberg* involved both protection (from the violence of other inmates) and care (adequate food, clothing, and training). Should these two duties be treated the same for purposes of special relationship analysis?

When an individual requests state protection, the harm from which she seeks protection comes from a clearly identifiable source other than the state. The source of Joshua's injuries, for example, was his father.¹⁷⁹ When an individual requests care or services from the state, however, the source of the harm those services will alleviate is more abstract; it may be disease or poverty. To protect the first individual from actions of a third party, the state must inevitably restrain the liberty of the third party in some way. Protecting Joshua DeShaney, for instance, would have required interfering with his father's liberty interest in raising his child. Since such direct and active governmental interference with liberty is exactly what the due process clause most clearly proscribes, courts have reason to be particularly hesitant in imposing such a duty to protect.

Chief Justice Rehnquist expressed this hesitation in *DeShaney*:

[I]t must also be said that had [the state] moved too soon to take custody of the son away from the father, [it] would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.¹⁸⁰

Thus, the duty of protection potentially sets two constitutional imperatives against each other: the liberty interest of the child to be free from harm and the liberty interest of the third party to be free from governmental interference.

A duty to provide care or services does not present this problem of conflicting constitutional mandates since there is no identifiable

(1989); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *Rubacha v. Coler*, 607 F. Supp. 477 (N.D. Ill. 1985); *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979).

¹⁷⁹ See *DeShaney*, 109 S. Ct. at 1001-02.

¹⁸⁰ *Id.* at 1007. The social worker's dilemma is perhaps exaggerated here by Chief Justice Rehnquist. The standard of care creates a sizable zone of safety, in that an error in either direction that does not rise at least to the level of gross negligence, or perhaps deliberate indifference, will not result in liability. See *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

source of harm. Provision of medical care to a prisoner or reunification services to a foster child does not require the state to impose restraints on a third party's liberty. This observation suggests that we should be more willing to impose a duty of care on the state than a duty of protection,¹⁸¹ and that perhaps the special-relationship test should be different in the two instances. Under this analysis, *DeShaney* is only binding precedent as to the duty of protection, and advocates asserting a duty to provide care or services are free to argue for a broader definition of a special relationship.¹⁸²

V. OTHER CONSTITUTIONAL ARGUMENTS LEFT OPEN BY *DESHANEY*

Other than the alternative of suing under state tort law,¹⁸³ which Chief Justice Rehnquist suggested would have been the most appropriate recourse for the plaintiffs in *DeShaney*, the opinion leaves open several other constitutional claims for plaintiffs seeking to impose affirmative duties on child welfare agencies. Depending on the facts involved, children injured as a result of agency inaction may be able to allege violations of their equal protection or procedural due process rights.

First, as the Court pointed out, a plaintiff who is a member of a disfavored minority can make a claim under the equal protection clause that she was selectively denied protective services because of her disfavored status.¹⁸⁴ Additionally, even plaintiffs who are not

¹⁸¹ But see Currie, *supra* note 44, at 875 (observing that the contract clause of the Constitution requires some governmental protection against third parties but not against poverty or disease).

¹⁸² Lower courts so far have not made this distinction, but instead have applied *DeShaney* with full force to substantive due process claims asserting a duty to provide services. See, e.g., Alessi v. Commonwealth of Pa., 893 F.2d 1444, 1448 (3d Cir. 1990) (finding no duty to provide residential treatment services to mentally retarded individuals); Edwards v. Johnston County Health Dep't, 885 F.2d 1215, 1219 (4th Cir. 1989) (finding no duty to ensure safe and sanitary housing); Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia, 874 F.2d 156, 166-68 (3d Cir. 1989) (finding no duty to continue providing services to mentally retarded individuals who live at home).

¹⁸³ Depending on state law, such suits may be barred by sovereign immunity, or the amount of damages may be limited. In Wisconsin, for example, where the *DeShaney* case arose, damages in state tort suits are limited to \$50,000. See WIS. STAT. § 893.80(3) (1983).

¹⁸⁴ See *DeShaney*, 109 S. Ct. at 1004 n.3. This type of claim has been brought against police departments by adult women who have been victims of domestic violence and allege that the police department's failure to respond to domestic violence calls as quickly as to reports of other types of assaults violates equal protection. See, e.g.,

members of a suspect class may in some instances be able to argue that they have been subject to arbitrary and capricious governmental action in violation of the equal protection clause. It is well established that governmental action that arbitrarily singles out individuals and treats them less favorably than others similarly situated violates the equal protection clause under the minimum scrutiny of the rational basis standard.¹⁸⁵

It is possible that this kind of equal protection argument could be made in a *DeShaney*-type situation. Admittedly, in most child protection cases such minimum scrutiny would be easy for the state to overcome; if the agency could make any reasonable assertion that the decision to ignore or give less attention to a case was based on a social worker's judgment, the claim would fail. The best factual situation for the assertion of such a claim, therefore, would be one in which the plaintiff's case "fell through the cracks" and was ignored purely because of administrative error, rather than one that received consideration by a social worker. Where it is possible to demonstrate that other similarly situated children have received greater protection and that the source of the disparate treatment is entirely arbitrary, this type of equal protection claim may lie even in the absence of invidious discrimination.

In *Logan v. Zimmerman Brush Co.*,¹⁸⁶ the Supreme Court indicated that this kind of arbitrary administrative action taken pursuant to a facially neutral law could constitute an equal protection violation. That case involved a plaintiff who filed a complaint before the Illinois Fair Employment Practices Commission. Under the state statute, the Commission had 120 days after the filing of the complaint to convene a fact-finding conference. Because the Commission, through inadvertence, failed to schedule the conference within the specified time limit, the plaintiff's claim was dropped. The Supreme Court ruled in favor of the plaintiff on procedural due process grounds, but a majority of the Court also

Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). But see *McKee v. City of Rockwell*, 877 F.2d 409, 413 (5th Cir. 1989) (rejecting plaintiff's claim that the police department's failure to respond to domestic violence calls violated equal protection on the grounds that plaintiffs cannot circumvent *DeShaney* by converting a due process claim into an equal protection claim), cert. denied, 110 S. Ct. 727 (1990).

¹⁸⁵ See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972) (holding that the double bond prerequisite for appealing an action under the Oregon Forcible Entry and Detainer Statute violated the equal protection clause under the minimum rationality standard because it granted appeals to some litigants while "arbitrarily" and "capriciously" denying them to others).

¹⁸⁶ 455 U.S. 422 (1982).

indicated in dicta that the state's action violated the equal protection clause. Although the statute on its face did not make explicit classifications,¹⁸⁷ in effect it operated to divide claimants into two categories: those whose claims were processed within 120 days and those whose claims were not. The Court majority found that this distinction did not bear a rational relationship to any legitimate governmental objective. Even though there was no creation of a suspect class that would have triggered strict scrutiny, this arbitrary division of claimants violated equal protection even under the minimum scrutiny, rational-basis standard.¹⁸⁸

Another argument made by the plaintiffs but not considered by the Court¹⁸⁹ was that the Wisconsin child protection statutes gave Joshua an entitlement to child protective services subject to procedural due process protections.¹⁹⁰ Under *Board of Regents v. Roth*,¹⁹¹ benefits conferred by state statute may, depending on the statutory language, constitute an individual entitlement, which is considered to be a property interest and thus not subject to restriction by the state without due process of law.¹⁹² In order for a statutorily conferred benefit to be treated as a property interest, the statute must condition receipt of the benefit on the existence of certain facts which are ascertainable at a due process hearing.¹⁹³ Where a statute leaves the issuance of benefits to the discretion of state officials, however, no property interest is created.

In *Taylor v. Ledbetter*,¹⁹⁴ the plaintiffs successfully brought such

¹⁸⁷ While Justice Blackmun noted that this made the equal protection claim "an unconventional one," *id.* at 438, the idea that a facially neutral law may violate equal protection because of unequal administration of that law is not new. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁸⁸ The plaintiffs in *DeShaney* did cite *Logan* in their brief to the Supreme Court, but it is not clear whether they were citing it as a due process or equal protection case. Their assertion was that "Joshua had a protected liberty interest in his equal access to the services which the state and county undertook to provide for all endangered children, on a basis which did not arbitrarily single him out for grossly negligent and deliberately indifferent 'protection.'" Brief for Petitioners, *supra* note 20, at 23. The Court did not address this argument in the *DeShaney* opinion.

¹⁸⁹ See *DeShaney*, 109 S. Ct. at 1003 n.2.

¹⁹⁰ See Brief for Petitioners, *supra* note 20, at 24-29.

¹⁹¹ 408 U.S. 564 (1972).

¹⁹² See *id.* at 578. A plaintiff claiming entitlement to protection (like Joshua DeShaney) might also claim a liberty interest subject to due process protection. See *id.* at 572 (discussing broad due process protection afforded liberty interests); see also *Vitek v. Jones*, 445 U.S. 480, 481 (1980) ("[T]he involuntary transfer of [a prisoner] to a mental hospital implicates a liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment.").

¹⁹³ See *Roth*, 408 U.S. at 578-79.

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

a claim, arguing that state statutes and regulations governing foster care in Georgia required child welfare officials to follow specific guidelines to ensure the well-being and safety of children in foster care. The Eleventh Circuit held that the statutory scheme in Georgia created an entitlement to the state's protection from harm.¹⁹⁵ Thus, the state's withholding of such protection without procedural due process violated the fourteenth amendment.¹⁹⁶ Similar procedural due process claims have been rejected, however, in two recent suits brought by foster children in the Northern District of Illinois,¹⁹⁷ and in a recent Seventh Circuit decision in a case with facts similar to those in *DeShaney*.¹⁹⁸ Since these holdings are rooted in the state law of Illinois, however, these cases do not preclude procedural due process claims in other jurisdictions.¹⁹⁹

CONCLUSION

Lawsuits seeking to hold child protective agencies liable in damages for their most egregious mistakes are an important tool for ensuring a minimally adequate level of competence among those whom we charge with the immeasurably important task of protecting our children. The *DeShaney* case has significantly reduced the possibility of bringing many such actions in federal court. If advocates and judges pay close attention to what was actually stated

(Certiorari was denied only 11 days after the Court decided *DeShaney*).

¹⁹⁵ See *id.* at 800.

¹⁹⁶ See *id.*

¹⁹⁷ See *B.H. v. Johnson*, 715 F.Supp. 1387 (N.D. Ill. 1989); *K.H. v. Morgan*, No. 87 C 9833 (N.D. Ill. Sept. 6, 1989) (LEXIS, Genfed library, Dist file) (dismissing a procedural due process claim because plaintiff did not have a "legitimate claim of entitlement" to the requested benefits), *aff'd in part, remanded in part*, 914 F.2d 848 (1990).

¹⁹⁸ See *Doe v. Milwaukee County*, 903 F.2d 499, 502-03 (7th Cir. 1990) (holding that Wisconsin law did not create a property interest in having the child welfare agency conduct an investigation of a report of suspected child abuse because the statute only specified a set of procedures that the agency had to follow, and procedures in and of themselves are not benefits subject to due process protection).

¹⁹⁹ Also of potential interest to the child welfare plaintiff is a recent decision in a wife-abuse case from the Eastern District of Pennsylvania. In *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264 (E.D. Pa. 1990), the court held that though the Pennsylvania Protection from Abuse Act itself did not create a property interest in police protection for battered women, a protective order issued by a court pursuant to the Act did create such a property interest. A parallel argument might be made by a child abused while in the custody of her parents but subject to a court order directing the child welfare agency to supervise the child.

by the Supreme Court in *DeShaney*, however, that opinion need not foreclose relief under the due process clause in as many instances as some have assumed.

A number of decisions since *DeShaney* have already found a special-relationship duty under the due process clause to protect foster children in some circumstances. Under a careful reading of *DeShaney*, with sensitivity to the special considerations surrounding children and the practical realities of foster care placement, the principle of these cases can be construed to cover all children in foster care. *DeShaney* may also leave room for this duty to be applied in other situations in which an agency's intrusion into a family is substantial. Furthermore, there may still be an opportunity to construe this duty as one to provide care and services to children and their families in addition to physical protection. Finally, there are other claims under the due process and equal protection clauses of the fourteenth amendment that were left untouched by *DeShaney* and that remain available to plaintiffs seeking to impose liability on child welfare agencies for their failure to act.