Land & Water Law Review

Volume 25
Issue 1 *Special Focus: NEPA at Twenty*

Article 15

1990

Constitutional Law - Governmental Child Abuse - Who Watches the Watchers - DeShaney v. Winnebago County Department of Social Services

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CONSTITUTIONAL LAW — Governmental Child Abuse - Who Watches the Watchers? *DeShaney v. Winnebago County Department of Social Services,* 109 S. Ct. 998 (1989).

"I just knew the phone would ring some day and Joshua would be dead." With these words, Joshua's caseworker informed his mother that her son was hospitalized and permanently brain damaged.[1]

The tragic sequence of events actually began some two years previously in January, 1982, when the police department notified the Winnebago County Department of Social Services (DSS) that Randy DeShaney was allegedly abusing his two-year-old son Joshua. DSS interviewed the father, did not see Joshua, and when the father denied the charges, DSS closed its file.[2]

A year later Joshua visited the emergency room for injuries related to suspected child abuse. This time, DSS had arranged for temporary legal custody of Joshua.[3] However, the assistant corporation counsel, designated by Wisconsin statute to commence any court action for child abuse, declined to bring the matter to court for any level of child protection.[4] DSS subsequently returned Joshua to his father.[5]

DSS then entered into a contract with Randy DeShaney calling for Randy to receive counseling, remove his girlfriend from the house, and enroll Joshua in the Head Start program. Randy DeShaney ignored the contract and DSS took no action to enforce it.[6] Joshua was treated in the hospital emergency room on several other occasions during the next year.[7] Although a DSS caseworker visited Joshua's home several

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

2. Brief for Petitioners at 4, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989) (No. 87154). Many of the facts cited in this casenote come from the petitioners' brief. Since the case was decided on a motion for summary judgment, the Court was required to look at the facts in the light most favorable to the petitioners. *DeShaney,* 812 F.2d at 299.

3. *DeShaney,* 812 F.2d at 299. An investigation was launched by a child protection team, made up of a pediatrician, a psychologist, a police detective, the DSS caseworker, a DSS supervisor, and the county's civil attorney. *Id.* at 300.

4. Brief for Respondents at 2, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989) (No. 87154). Insufficient evidence was the reason given for failure to take further action. Subsequently, DSS filed its report with the State of Wisconsin stating that the suspicion of child abuse was unfounded. *Id.*

5. Brief for Respondents at 2. The DSS internal report noted that abuse was strongly suspected and promised to closely monitor Joshua and bring him to the court for protection at the first additional indication of child abuse. Without a hearing and on its own initiative, Winnebago County officials returned Joshua to the custody of his father and his girlfriend (both of whom were suspected of abusing Joshua). Brief for Petitioners at 2.

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

7. Brief for Petitioners at 6. On November 30, 1983, emergency room personnel filed a written child abuse report and communicated it to the DSS caseworker. DSS took no action. *Id.*

times and documented Joshua's frequent injuries, the DSS took no action.[8]

On March 7, 1984, the DSS caseworker again visited Joshua's home and learned that he had been repeatedly falling down and on one occasion had lost consciousness.[9] The caseworker did not ask to see Joshua, and was never able to explain her reasons for not requesting to see him.[10] Joshua's father told her that he had not taken Joshua for medical treatment nor did he plan to do so unless it "kept up", although the condition had been persisting for some time.[11]

The next day, Joshua was again in the hospital emergency room in a deep coma. Emergency brain surgery was required to save his life.[12] The physicians found unequivocal evidence of brain damage and physical trauma to the head caused by injuries inflicted over a long period of time.[13] As a result, Joshua is now profoundly and permanently retarded and will spend the rest of his life in an institution.[14]

Joshua's mother[15] brought suit for damages in federal court[16] against the Winnebago County Department of Social Services under 42 U.S.C. § 1983, alleging violations of the due process clause of the United States Constitution.[17] The district court held the relationship between the DSS

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8. *DeShaney,* 812 F.2d at 300. She observed on one occasion what she described as cigarette burns on his face, and on a different visit she noticed a bump on his head. Another time, she was told that Joshua was not at home because he had been taken to the emergency room for treatment of a scratched cornea. *Id.* On several occasions she was not allowed to see Joshua, being told that he had a cold or that he was asleep. Brief for Petitioners at 7.

9. Brief for Petitioners at 21. Joshua's father and his girlfriend also told the caseworker that Joshua had been fainting, had complained of headaches, and that he had struck his head on a toilet. Apparently the same "head striking the toilet" excuse had been proffered before to explain other injuries and had been accepted without further inquiry although the caseworker noted skepticism. *Id.*

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

11. Brief for Petitioner at 21.

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

13. *Id.*

14. *DeShaney,* 812 F.2d at 300. The state successfully prosecuted Randy Deshaney for child abuse, and he was given a sentence of two to four years in prison. *Id.*

15. Melody DeShaney was a resident of Wyoming and Joshua was born in Wyoming. A Wyoming court, in a 1980 divorce decree, granted custody of Joshua to his father, Randy DeShaney. *DeShaney,* 812 F.2d at 299.

16. *Id.* at 300. Melody DeShaney sought relief on behalf of herself and Joshua. *Id.*

17. *DeShaney,* 109 S. Ct. at 1002. 42 U.S.C. § 1983 provides a civil cause of action for state deprivation of a constitutional right. It was originally section 1 of the Klu Klux Klan Act of 1871, part of a series of civil rights legislation passed by Congress in order to enforce the provisions of the fourteenth amendment. *Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1153 (1977) [hereinafter Section 1983]. The genesis of the modern § 1983 suit was Monroe v. Pape, 365 U.S. 167 (1961). Section 1983, *supra,* at 1137. 42 U.S.C. § 1983 (1982) provides:

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

and Joshua did not give rise to a constitutional right of protection under the fourteenth amendment due process clause.[18] The Seventh Circuit affirmed the district court's ruling.[19] The United States Supreme Court held that the state had no constitutional duty to protect Joshua after receiving reports of abuse.[20]

This casenote examines the approach of the Court in this case as well as alternative approaches which were available to the Court without significant expansion of existing precedent. In addition, it suggests possible ramifications of this decision.

BACKGROUND

DeShaney epitomizes the Supreme Court's struggle with the issue of whether the fourteenth amendment's due process clause guarantees individual affirmative rights enforceable in a suit for damages.[21] The Court has taken divergent and somewhat conflicting positions in several distinct lines of cases.

In two major cases, the Court has extended constitutional protection and sanctioned damage suits for individuals confined by the state. In *Estelle v. Gamble,* the Court upheld a prisoner's section 1983 complaint that his eighth amendment rights against cruel and unusual punishment were violated by the state.[22] He alleged that prison officials failed to provide adequate medical treatment for a back injury suffered while working at the prison. The *Estelle* court held that deliberate indifference to a prisoner's serious need for medical treatment constituted a cause of action under Section 1983.[23]

In 1982, the Supreme Court decided *Youngberg v. Romeo,* which challenged treatment in a state mental institution.[24] Romeo alleged the state had failed to provide appropriate treatment programs for mental retardation and in addition had failed to protect her son from injury.[25]

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18. *DeShaney,* 812 F.2d at 301.
19. *DeShaney,* 109 S. Ct. at 1002.
20. *Id.* at 998.
21. The fourteenth amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.
22. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
23. *Id.* at 104-05.
24. Youngberg v. Romeo, 457 U.S. 307, 310 (1982). The mother of a mentally retarded patient, who had been voluntarily committed to a Pennsylvania institution by his mother's petition, filed a complaint objecting to his treatment in the institution. *Id.*
25. *Id.* at 311. The complaint alleged that during the period complained of that the plaintiff "has suffered injuries on at least sixty-three occasions." Apparently some of the injuries were caused by his own violence and some by the reactions of the other residents toward him. *Id.* at 310.

The U. S. Supreme Court began its analysis by noting that generally a "[s]tate is under no constitutional duty to provide substantive services for those within its border."[26] But recognizing that due process liberty interests were at stake, the Court held that when a person is institutionalized, thus becoming wholly dependent upon the state, a duty to provide certain services does exist.[27] The Court stated that the constitution afforded Romeo a right to minimally adequate or reasonable training and a right to personal security while in confinement.[28] The Court labeled the right to personal security a "historic liberty interest" protected substantively by the due process clause.[29]

In another line of fourteenth amendment cases, the Court dispensed with the custodial requirement and held that the state does have affirmative obligations to certain individuals who are not in governmental custody. In *Boddie v. Connecticut* the Supreme Court held that the state had the obligation to subsidize the filing fee for an indigent seeking a divorce.[30] In *Little v. Streater,* the state was required to provide the cost of a blood test to an indigent man in a proceeding to determine paternity.[31] In a series of criminal cases, the Court has held that the state has affirmative duties to ensure an indigent access to the appellate process.[32]

In yet a another case, the Court reviewed constitutional due process claims using tort principles of duty and causation and refused to extend constitutional protection. In *Martinez v. California,* the Court considered whether the government had an affirmative duty under the fourteenth amendment to protect private citizens from actions of a parolee.[33] In *Martinez,* a parolee with a history of sex offenses and violent crime, who was also a former mental patient, murdered a fifteen-year-old girl.[34] Relying upon the notion of proximate cause, the Court declined to recognize a claim under section 1983 because Martinez' death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[35] The Court stated, however, that under different facts where causation could be proved, a fourteenth amendment claim might be upheld.[36]

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26. *Id.* at 317.

27. *Id.* Justice Powell, writing for the majority, established a balancing test. The plaintiff's liberty interests were balanced against the relevant state interests. *Id.* at 321.

28. *Id.* at 324.

29. *Id.* at 315 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

30. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

31. Little v. Streater, 452 U.S. 1, 17 (1981).

32. Douglas v. California, 372 U.S. 353 (1963); Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

33. Martinez v. California, 444 U.S. 277 (1980).

34. *Id.* at 279. He had been committed as a "Mentally Disordered Sex Offender[,] not amenable to treatment . . . . " *Id.*

35. *Id.* at 285.

36. *Id.* The Court stated in the last paragraph of the opinion, "We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances . . . [Martinez'] death is too remote a consequence . . . ." *Id.*

Another pertinent group of Supreme Court decisions dealt with whether negligence by the state is enough to bring about a constitutional deprivation. In *Parratt v. Taylor,* the Supreme Court laid out two threshold questions, the affirmative answers to which are essential elements of a claim under 42 U.S.C. § 1983.[37] The Court looked at (1) whether the conduct complained of was committed by someone acting under state law, and (2) whether the conduct deprived the person of rights, privileges, or immunities secured by the Constitution.[38] The *Parratt* Court decided that while in the *Parratt* case these two questions could be answered affirmatively, the deprivation was not without due process because of the availability of remedies at state law.[39]

Several years later the Court reconsidered the first prong of the *Parratt* test in *Daniels v. Williams* and concluded that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."[40] The plaintiff in *Daniels,* a prison inmate, injured himself when he slipped on a pillow negligently left on some stairs by a deputy. He asserted that the deputy's negligence had deprived him of a due process liberty interest in freedom from bodily injury.[41] The Court held that in any section 1983 suit, the plaintiff had to prove "a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim."[42] Daniels was denied constitutional relief.[43]

The Court decided another pertinent case, *Davidson v. Cannon,* on the same day as *Daniels.*[44] A prison inmate alleged that prison authorities had failed to protect him and thus violated his constitutional rights under the eighth and fourteenth amendments.[45] Another inmate had threatened Davidson with bodily harm. Davidson informed the prison officials of the threat, but they took no action to protect him, and he received serious injuries.[46] The Supreme Court used the *Daniels* anal-

37. Parratt v. Taylor, 451 U.S. 527, 535 (1981). A Nebraska prison inmate had ordered a hobby kit through the mail and the prison officials negligently lost the kit after its delivery to the prison. *Id.* at 530.

38. *Id.* at 535.

39. *Id.* at 543.

40. Daniels v. Williams, 474 U.S. 327, 328 (1986).

41. *Id.* at 328.

42. *Id.* at 330. *Daniels* partially overruled *Parratt* to the extent that the earlier case recognized that mere lack of due care by a state official might, in the proper circumstances, violate the fourteenth amendment. *Id.* at 330-31.

43. *Id.* at 336.

44. Davidson v. Cannon, 474 U.S. 344, (1986).

45. *Id.* at 345-46.

46. *Id.* at 351. Davidson sent to the Assistant Superintendent of the prison a note reporting a threat to his person made by McMillian, another inmate. The Assistant Superintendent read the note and forwarded it to a Corrections Sergeant. The Corrections Sergeant received the note about 2:00 p.m. on December 19 and was informed of its contents by the messenger. However, he did not read it and attended to other matters which he stated were emergencies. By the time he left for the day, he apparently had forgotten about the note. Neither of these men who were aware of the situation was on duty on December 20 or 21, and the officials on duty did not know of the threat. *Id.* at 351-52. On December 21 McMillian attacked Davidson with a fork, causing a broken nose and other wounds in the area of the face, neck, and head. *Id.* at 346.

ysis to deny Davidson's claim, holding that mere negligence did not constitute deprivation of a constitutionally guaranteed liberty interest.[47]

For fourteenth amendment purposes, "deprivation" was now defined by the Court as being something beyond mere negligence. The Court perceived a growing problem for the federal courts — the transformation of traditional state tort claims into federal constitutional claims.[48] The Daniels Court stated that "our Constitution deals with the large concerns . . . of the governed, but it does not purport to supplant traditional tort law."[49]

Meanwhile, the federal circuit courts were operating in the midst of this confusing Supreme Court precedent. No clear guideline existed relative to when and how the fourteenth amendment due process clause could be used to guarantee individual affirmative rights. Not unexpectedly, the circuit courts reached conflicting results. Several found that in appropriate circumstances, the state could be held liable in child abuse situations similar to *DeShaney.*

In a case of sustained sexual and physical abuse perpetrated on a girl by her foster father, the Second Circuit held that when individuals are placed in governmental custody, their "governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution."[50]

In *Jensen v. Conrad,* the Fourth Circuit looked at facts similar to, but less severe in terms of agency culpability than those in *DeShaney.*[51] The *Jensen* court found no liability on the facts before it but held that were the issue properly before the court on a stronger factual basis, nothing would preclude a ruling that there was a "special relationship"

47. *Id.* at 347.

48. *Daniels,* 474 U.S. at 327; *Davidson,* 474 U.S. at 344.

49. *Daniels,* 474 U.S. at 332.

50. Doe v. New York City Dept. of Social Services, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied,* 464 U.S. 864 (1983). The circuit court looked to *Estelle* in stating that government officials could be held liable under Section 1983 for failing to do what is required as well as for harmful or unlawful overt activity. *Id.* The facts of *Doe* reveal that the New York City Commissioner of Welfare, while retaining legal custody, arranged through the Catholic Home Bureau for placement of the plaintiff in a foster home. While in the foster home, plaintiff was abused both physically and sexually for a period of six years before the Bureau became aware of the extent of the abuse and acted to remove the plaintiff. This lack of knowledge was apparently due to declining frequency of home visits and the fact that such visits were almost always conducted in the presence of the foster father - thus impeding the ability of the plaintiff to make known to the social worker the true situation in the home. The Bureau finally became aware of the abuses when the foster mother filed for divorce and advised agency personnel what had been going on. *Id.* at 137-40.

51. Jensen v. Conrad, 747 F.2d 185, 187-88 (4th Cir. 1984). This action was brought on behalf of two children who had suffered beatings at the hands of their guardians. Sylvia Brown was a seven-month old child and Michael Clark was three years old. Both were abused by their mothers' boyfriends and Sylvia by her mother as well. The Social Services Departments of both counties were aware of the problems and acted in varying degrees to monitor the situations. Both children were eventually beaten to death, Sylvia by her mother and Michael by his mother's boyfriend. Both abusing adults were prosecuted for manslaughter or murder. *Id.*

between the agency and the child abuse victim.[52] The court further stated that the relationship need not be "custodial."[53]

The Third Circuit considered a similar question in *Estate of Bailey by Oare v. County of York* and held that when a state knows that a child has been beaten, the argument that a special relationship has been established is strengthened.[54]

The Eleventh Circuit reviewed similar issues in *Taylor v. Ledbetter,* another instance where the social services agency failed to act to protect a child from abuse in a foster home.[55] The court held that there was a liberty interest in the right to be free from infliction of unnecessary pain which was protected by the fifth and fourteenth amendments.[56] In its conclusion, the court stated that "[f]ailing to act may, under certain circumstances, be more detrimental than acting."[57]

While the Seventh Circuit had not considered a similar case, Judge Posner, a Seventh Circuit Judge, had previously made an interesting comment in dicta. In one of his earlier decisions in a 1982 wrongful

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52. *Id.* at 194-95.

53. *Id.* at 194. The court noted that this particular holding did not necessitate the comprehensive definition of a "special relationship" but went on to footnote factors which should be included. Those listed were: 1) whether the victim or the perpetrator was in legal custody at the time of the incident or had been in legal custody prior to the incident; 2) whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals; 3) whether the state knew of the victim's plight. *Id.* n.11. The court cited an earlier decision of the same court regarding the existence of such a "special relationship" that would establish an affirmative duty of protection and that such existence did not have to be custodial. *Id.* (citing Fox v. Curtis, 712 F.2d 86 (4th Cir. 1983)).

54. Estate of Bailey by Oare v. County of York, 768 F.2d 503, 510-11 (3d Cir. 1985). Five-year-old Aleta lived with her natural mother and her mother's paramour, Hake, who was apparently abusing the child. The social worker placed the child in temporary custody and told the mother she had twenty-four hours to make arrangements to have Hake leave the home and that Aleta would not be returned to her until arrangements had been made to deny him access to the child. That night the agency returned Aleta to her mother's custody after undertaking no independent investigation to determine that the conditions had been complied with. One month later Aleta was dead - a victim of abuse inflicted by her mother and Hake. *Id.* at 505.

The *Bailey* court looked at the *Jensen* court's reasoning and reaffirmed the relevant factors in determining the existence of a "special relationship." *Id.* at 510-11. It also reiterated, by citing a Seventh Circuit case, that a duty of protection can be found owing by the state to persons not in custody. *Id.* at 510 (citing White v. Rochford, 592 F.2d 381 (7th Cir. 1979)). In *White* the court reversed the dismissal of a complaint alleging that police who had arrested the driver of a car in turn subjected the three children who had been passengers to a "health-endangering situation" when they abandoned the children on the highway in cold weather. *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979).

55. Taylor v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987), *cert. denied,* 109 S. Ct. 1337 (1989). The *Ledbetter* court discussed two requirements which must be satisfied for a Section 1983 action to arise when an official is charged with failing to exercise an affirmative duty. The first requirement is that the failure to act must have been a substantial factor in the violation of a constitutionally protected liberty or property interest. The next requirement is that the official having the responsibility to act must display deliberate indifference. *Id.* at 794.

56. *Id.* at 794.

57. *Id.* at 800.

death case, he stated that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."[58]

To clarify the uncertainty created by the various circuit court decisions, the Supreme Court granted certiorari after the Seventh Circuit held that Joshua DeShaney had not established an actionable claim under Section 1983.

PRINCIPAL CASE

The Seventh Circuit found that the DeShaneys had not proved an actionable Section 1983 claim for two different reasons.[59] The circuit court held that the due process clause does not force upon the state a duty to protect people from "private violence".[60] Also, the court rejected the idea of a "special relationship" outside of total confinement by the state.[61] The circuit court went on to "assume without having to decide" that DSS' failure to protect Joshua surpassed the mere negligence hurdle raised by *Daniels* and *Davidson.*[62] Judge Posner, writing for the court, reasoned that the court did not have to decide that issue because even if the defendants were blameworthy, they did not cause Joshua's injuries. They therefore could not be held to have deprived him of a liberty interest because "deprivation implies causation."[63]

The Supreme Court in *DeShaney* relied heavily on the historical interpretation that the due process clause is meant to protect individual citizens from state action, not from actions by other actors.[64] "The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[65] The Court stated that it had consistently held that the due process clause conferred no affirmative right to governmental aid. This was true, according to the Court, even in situations where such aid was necessary to secure a protected liberty.[66]

The Court specifically rejected the argument that a "special relationship" existed because the state knew of the danger that Joshua was in, had proclaimed its intention to protect him from that danger, and then had failed to do so.[67] The Court denied that *Youngberg* and *Estelle* had any applicability to the instant case. It reasoned that these cases were distinguishable because they both dealt with plaintiffs who were in the physical custody of the state when the deprivation

58. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
59. *DeShaney,* 109 S. Ct. at 1002.
60. *DeShaney,* 812 F.2d at 301.
61. *Id.* at 303. The court specifically renounced the Third Circuit's holding in *Bailey* and the Fourth Circuit's dicta in *Jensen. Id.* at 303-04.
62. *Id.* at 302.
63. *Id.*
64. *DeShaney,* 109 S. Ct. at 1003.
65. *Id.*
66. *Id.*
67. *Id.* at 1004.

occurred.[68] The Court stated that when the state has, through its affirmative power, restrained an individual's liberty and rendered him unable to care for himself, while at the same time failing to provide for basic human needs, then the state has breached the substantive limits set by the eighth amendment and the due process clause. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[69] The Court looked to incarceration as the distinguishing point.

The Court concluded by suggesting that the state may have had a duty under state tort law to provide Joshua with adequate protection under the circumstances and suggested that a state forum would be a preferable alternative to this constitutional challenge in the federal courts. If no such duty existed under Wisconsin statutes and case law, then the Court suggested that the people of Wisconsin could legislatively create such liability in the future if they chose to do so rather than having it thrust upon them by a broad expansion of the fourteenth amendment.[70]

Justice Brennan wrote a vigorous dissent with Justice Blackmun and Justice Marshall joining,[71] and Justice Blackmun dissented separately.[72] The dissents concurred that the Court had not analyzed the case properly. Justice Blackmun stated that the Court should not focus on what the state failed to do but rather on how the state's intervention in Joshua DeShaney's life triggered a constitutional duty to assist him. He likened the majority to "antebellum judges who denied relief to fugitive slaves" and lamented the majority's reluctance to adopt a "sympathetic" reading of the fourteenth amendment.[73]

Justice Brennan stated that the majority began their analysis from the wrong direction. He indicated that no one had asked the Court to "proclaim that, as a general matter the Constitution safeguards positive as well as negative liberties."[74] He argued that the majority, by beginning their analysis with that proposition, had no alternative but to end up where they did. He proposed that the Court should have first focused on the action that Wisconsin did take with respect to Joshua, not on the actions the state failed to take.[75]

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68. *Id.* at 1005 (quoting *Youngberg,* 457 U.S. at 317).

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

70. *Id.* at 1007. The Court also indicated that it would not consider the petitioners argument that the Wisconsin child protection statutes gave Joshua an entitlement to such protective services. The argument was not made during consideration by any of the lower courts and was not pleaded in the complaint. *Id.* at 1003 n.2.

71. *Id.* at 1007 (Brennan, J., dissenting).

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

73. *Id.*

74. *Id.* at 1008 (Brennan, J., dissenting). A negative liberty has been defined as the right to be left alone by the state while a positive liberty is being assisted by the state. Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983), *cert. denied,* 465 U.S. 1049 (1984).

75. *DeShaney,* 109 S. Ct. at 1008 (Brennan, J., dissenting).

ANALYSIS

Justice Brennan's logic appeals to the human urge for justice. Looking at what the state *did* rather than what the state failed to do changes the analysis. The state actively intervened in Joshua's life — first by taking him into temporary custody and studying his situation, and then by purposely returning him to his father's custody.[76] The state (through the DSS) repeatedly failed to assist him the many times he was abused. Numerous complaints from emergency room personnel and the Head Start worker were all funneled to DSS, which had a statutory duty to act upon the complaints. DSS was the recipient of all other individuals' concerns for Joshua's welfare and the agency of last resort. DSS effectively isolated Joshua from nongovernmental assistance. Any individual concerned with Joshua's welfare would feel her job had been done when she reported her suspicions to DSS.[77] Then when DSS failed to act, there was no one else to step in and fill in the gap. As Justice Brennan said so eloquently in his dissent, "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hand of the harm that results from its inaction."[78]

The Court could have held the state liable with only a minor expansion of the *Estelle* and *Youngberg* holdings. The state separated Joshua from other sources of assistance, even though he was not in the physical custody of the state. In his dissent, Justice Brennan disputed the majority's analysis of *Youngberg,* saying that it was not the state's affirmative confinement and restraint of freedom that made the difference. He suggested that while not irrelevant, the incarceration in *Youngberg* would have led to no injury "and consequently no state action under Section 1983, unless the State then had failed to take steps to protect Romeo from himself and from others."[79] Romeo's confinement by the state did not render him incapable of taking care of himself. An I.Q. of between eight and ten, coupled with the mental capacity of an eighteen-month-old child, meant Romeo was never able to care for himself.[80]

Joshua, like Justice Brennan's characterization of the plaintiff in *Youngberg,* was never in a position to help himself because he was only four years old. Therefore, the Court's analysis should not hinge on

76. *DeShaney,* 812 F.2d at 300. DSS entered into a contract with Randy DeShaney when they returned Joshua to his custody. The contract called for the father to receive counseling, enroll Joshua in a Head Start program (a way to provide additional and independent monitoring of Joshua), and to remove his girlfriend from the home. The conditions of this contract were substantially ignored and DSS took no enforcement action. Previously, when the decision was made to return Joshua to his father's custody, the caseworker promised that the court would be notified if any further, unexplained injuries to Joshua occurred. This promise was never carried out. Brief for Petitioners at 4-5.

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

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

79. *Id.*

80. *Id.* (citing *Youngberg,* 457 U.S. at 309).

whether or not the state imposed restraints on his freedom to help himself, but rather on whether the state effectively cut him off from other sources of aid.

Justice Blackmun's dissent in *Davidson* (in which Justices Brennan and Marshall join) illustrates the same logic. While these three Justices concurred with the result in *Daniels,*[81] they did not join the majority in *Davidson* because of the difference in the factual situations.[82] Justice Blackmun pointed out that when the state incarcerated Daniels, it "left intact his own faculties for avoiding a slip and a fall."[83] However, in *Davidson* the state prevented the plaintiff from protecting himself and effectively cut off any outside sources of aid as well.[84] These circumstances are much different from those where a person is in custody but still maintains the physical ability to escape the harm—in the *Daniels* case the ability to step over a pillow and avoid falling down the stairs.

In *DeShaney,* the Supreme Court refused to expand the "special relationship" doctrine to noncustodial circumstances, but a look at how other courts have utilized such an expanded doctrine shows that the facts of *DeShaney* would lend themselves nicely to such analysis. The Fourth Circuit in *Jensen* enumerated these relevant questions. First, whether or not the victim or the perpetrator was in legal custody at the time of the incident or had been in legal custody prior to the incident; second, whether the state has expressed a desire to affirmatively protect this particular class; and third, whether the state knew of the victim's plight.[85] All three of these questions would have been answered affirmatively in Joshua DeShaney's case and would have provided a useful framework for determining whether the State had a "duty" to protect Joshua from his father. Requiring the presence of all three of these factors would serve to narrowly define the circumstances where such a duty could be found to exist.

The majority, however, wanted no part of this type of analysis. Justice Rehnquist defended the state officials by saying that had they acted too soon to remove Joshua from his father's custody they would likely be in court defending due process charges that they had improperly interfered with a parent-child relationship.[86] This assumed, however, that the only two options available to DSS were to leave Joshua alone and unaided in his father's custody or to remove him from his father's custody.

There were many other alternatives available to DSS before action to permanently strip the father of custody. Any one of them might have

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81. Daniels v. Williams, 474 U.S. 327 (1986).
82. *Davidson,* 474 U.S. at 349 (Blackmun, J., dissenting).
83. *Id.* at 350. In that case the plaintiff slipped on a pillow negligently left on the prison stairs by a state official. *Daniels,* 474 U.S. at 328.
84. *Davidson,* 474 U.S. at 350 (Blackmun, J., dissenting).
85. *Jensen,* 747 F.2d at 194 n.11.
86. *DeShaney,* 109 S. Ct. at 1007.

saved Joshua. DSS should have acted to enforce the contract it had made with Randy DeShaney. As the caseworker had promised, DSS should have notified the court when Joshua suffered from so many more "unexplained" injuries. The caseworker should have insisted she be allowed to see Joshua personally each time she visited. She should have insisted that Joshua receive medical care when she was told that he had been inexplicably passing out. Any sort of affirmative action might have been enough to prevent Joshua's eventual fate and to keep the state's conduct from exceeding the mere negligence standard set forth in *Daniels* and *Davidson.* This was not an all-or-nothing situation. There was a middle ground within which any action by the state might have been enough to preclude state liability.[87]

Underlying the Court's "hard-line" analysis appeared to be a concern for the impact of recognizing an affirmative state duty. The amicus briefs in this case talked of "enormous economic consequences"[88] if an affirmative right is held to exist and projected that the financial consequences of liability could impair or destroy foster care in many states.[89] As early as 1981 in *Parratt* the Court was worried about whether a small crack in the dam of governmental liability might inundate the federal courts in litigation. Justice Rehnquist, writing for the majority in *Parratt,* reasoned that if the state's conduct in that case violated the constitution, then there would be no logical stopping point. He stated, "[p]resumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983."[90]

These concerns suggest an extremely broad interpretation of affirmative state obligations. The Supreme Court has already narrowed the field with its "more than mere negligence" requirements set forth in *Daniels* and *Davidson,* and could narrow the field further with the recognition of specific requirements for the establishment of a special relationship. Criteria such as those laid out by the *Jensen* court would limit the establishment of a duty in the typical tort analysis of duty, breach of duty, causation and injury. The Court could determine how restrictive it wanted the duty to be by the strictness of the criteria. Then, if the element of duty was established by the facts in the particular case, the *Davidson-Daniels* standards of "more than mere negligence" would still have be to met. These standards require that to prove a "breach of duty" the plaintiff would have to prove reckless or grossly

87. As noted, the Supreme Court did not analyze the standards set out in *Daniels* and *Davidson,* which held that mere negligence was not enough for a deprivation under the fourteenth amendment. *Id.* at 1002. Plaintiffs in *DeShaney* argued, and the Seventh Circuit assumed "without having to decide" that the facts of this case illustrate a sufficiently aggravated form of negligence to take it beyond the bar of *Daniels* and *Davidson. DeShaney,* 812 F.2d at 302.

88. Brief for the United States as Amicus Curiae Supporting Respondents at 13 n.4, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989).

89. Brief of the National Ass'n of Counties, et al., at 19, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 988 (1989).

90. *Parratt,* 451 U.S. at 544.

negligent behavior. Causation and injury would still have to be found before an individual could be held deprived of a liberty interest by state action or inaction. These criteria would limit actionable fourteenth amendment claims to those where prior state involvement justified the liability imposed and where reckless or grossly negligent behavior by the state had occurred. Letting in some claims through this tiny hole would not endanger the entire dam.

Even Justice Rehnquist's approach of jumping directly into the positive versus negative rights analysis could have led the Court to find an affirmative duty on the part of the state. Cases such as *Boddie* and *Streater* illustrate that the Court has not effectively defined a bright line separating affirmative and negative rights in the Constitution.[91] Although the Court in *DeShaney* claimed that the due process clause could not be appropriately extended to impose an affirmative obligation on the state,[92] *Boddie* and *Streater* show that it has been done. The *Boddie* Court looked at the basic position of marriage in our society and the state monopolization of the means of terminating a marriage. It concluded that due process mandated an affirmative obligation on the part of the state to make sure the indigent had access to the courts, even if the state had to pay the fees.[93] The facts of *DeShaney* are even more compelling, considering our basic societal values of protecting and promoting the welfare of young children[94] and Wisconsin's monopolization of all avenues of protection for a battered child.[95]

The *Streater* Court held that the state's cost requirement for blood tests to determine parentage violated due process because it foreclosed an indigent's opportunity to be heard.[96] Is the state's obligation to provide a means of determining paternity any more sacred in the constitution than the expectation of a child to be protected from life threatening physical abuse which the state knows is likely to be inflicted? In fact, the Wisconsin child-welfare system was set up especially to assist children like Joshua and Wisconsin law required DSS to investigate and respond to reports of child abuse.[97]

What will be the ramifications of *DeShaney* in the months and years to come? Will the Court refuse any further expansion of substantive due process or will it find opportunities to impose affirmative fourteenth amendment duties on the states in noncustodial situations, such as it did in *Boddie* and *Streater?* The Court will be hard-pressed to find a set of facts more heart-wrenching and appealing for such an expansion than those in *DeShaney.* Therefore, the present Court is unlikely to expand the reach of the fourteenth amendment in this way.

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91. See *supra* notes 30-31 and accompanying text.
92. *DeShaney,* 109 S. Ct. at 1003.
93. *Boddie,* 401 U.S. at 379.
94. Santosky v. Kramer, 455 U.S. 745, 766 (1982). That case recognizes the "parens patriae" interest in promoting the welfare of children. *Id.*
95. *DeShaney,* 109 S. Ct. at 1010-11 (Brennan, J., dissenting).
96. *Streater,* 452 U.S. at 16.
97. *DeShaney,* 109 S. Ct. at 1010 (Brennan, J., dissenting).

The effects of *DeShaney* have already extended far beyond the arena of child protection.[98] Just a few months after *DeShaney,* the Fifth Circuit relied heavily on the decision in finding no state liability in a domestic violence case.[99] After discussing *DeShaney* for two pages the court asserted, "[t]his is the lesson of *DeShaney:* that law enforcement officers have authority to act does not imply that they have any constitutional duty to act."[100]

DeShaney is not the right answer. In *DeShaney's* wake float vital, unanswered questions. Is it appropriate to give state officials wide discretionary powers in the modern welfare state without providing any real means of checking that discretion? As the demand for governmental services increases, will we as a nation demand governmental liability not only for harmful actions taken by a state but for actions the state should have taken? Or will we respond as the Court did in this case when it stated, "[t]he facts of this case are undeniably tragic,"[101] but "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[102]

CONCLUSION

The United States Supreme Court held that the state had no constitutional duty to protect a child from his father's abuse even though the state was fully aware of many instances of abuse and "dutifully" reported the abuse in its files. The Court refused to recognize the existence of affirmative constitution rights in the noncustodial circumstances of this case. However, noncustodial cases such as *Boddie* and *Streater,* where affirmative rights were acknowledged by the Court in less compelling circumstances than *DeShaney,* illustrate the Court's inconsistent approach to the issue of affirmative versus negative constitutional rights.

The Court refused to recognize any sort of "special relationship" like that found by several of the circuit courts in similar child abuse cases. Such a "special relationship" should have been established. The Court could have restrictively defined such relationship to limit application to only those compelling cases where the state's inaction was grossly negligent or reckless and where the state had substantial

98. Notably, *DeShaney* was cited by Justice Rehnquist in the Court's opinion in the controversial abortion decision handed down later the same year. Webster v. Reproductive Health Servs, 109 S. Ct. 3040, 3051 (1989).

99. McKee v. City of Rockwall, 877 F.2d 409, 413-14 (5th Cir. 1989). A woman brought a § 1983 claim against the city and certain police officers, alleging she was physically injured as a result of the police officers' failure to make an arrest after a domestic violence call. *Id.* at 412.

100. *Id.* at 414.

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

102. *Id.* at 1003.

involvement and knowledge. Wisconsin, by funneling all child-abuse complaints from any source to DSS and by authorizing only DSS to investigate the suspicions of abuse, effectively separated Joshua from any other sources of aid or protection and then refused to protect him itself. Surely Joshua was thrust into Judge Posner's "snake pit."

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