
Title forty-two of the United States Code provides a civil remedy for any person who is deprived of any rights, privileges, or immunities secured by the Constitution. An action may be brought under Section 1983 of that Title against every person who, acting under color of state law, subjects another within the jurisdiction of the United States to such a deprivation.\(^1\) DeShaney v. Winnebago County Department of Social Services\(^2\) tested the reach of this statute in the context of a fourteenth amendment due process challenge.\(^3\) In an emotionally-charged decision,\(^4\) a divided United States Supreme Court\(^5\) refused to extend liability under Section 1983 to a municipality or its agents for failure to provide protective services to a victim upon suspicion of child abuse.\(^6\) “[N]othing in the due process clause itself, the Court concluded, requires the state to protect the life, liberty, and property of its citizens against invasion by private actors.”\(^7\)

This Note contains a brief synopsis of the facts of DeShaney and traces the background against which the case was decided. A summary of the

\(^1\) Originally enacted as part of the Civil Rights Act of 1871, the relevant text of the statute reads as follows:

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.


\(^2\) 489 U.S. 189 (1989)

\(^3\) The due process clause provides: “[N]othing in the due process clause itself, the Court concluded, requires the state to protect the life, liberty, and property of its citizens against invasion by private actors.”

\(^4\) See generally 489 U.S. at 203-13 (dissenting opinions).

\(^5\) Chief Justice Rehnquist delivered the opinion of the Court, joined by Justices White, Stevens, O'Connor, Scalia and Kennedy. Justices Brennan, Marshall and Blackmun dissented.

\(^6\) Although a state tort action may have been maintained against the department for breach of its duty of care, this case was brought under the fourteenth amendment in order to extend the parameters of “constitutional tort” liability and to avoid the $50,000.00 recovery ceiling imposed on claims against government agencies in Wisconsin. See Wis. STAT. § 893.80(3) (1983).

\(^7\) 489 U.S. 189 at 195.
majority and dissenting opinions is followed by an analysis of three alternative standards which the Court could have employed. The Note concludes with an assessment of the decision and a brief comment concerning its impact on due process law.

I. STATEMENT OF THE CASE

The petitioner brought this action on behalf of her son, Joshua DeShaney, who suffered severe brain damage and retardation as a result of continual abuse by his father.8 The complaint alleged that the Winnebago County Department of Social Services [hereinafter DSS] deprived Joshua of his liberty without due process of law by failing to adequately protect him.9

Born into a dysfunctional family, Joshua became an early victim of child abuse.10 In 1983, officials at DSS obtained a court order placing Joshua in the temporary custody of a local hospital, upon the information of a treating physician who suspected child abuse.11 A "child protection team"12 was assembled three days later. The team decided there was insuf-
ficient evidence to continue to hold Joshua in the protective custody of the state. After recommending several remedial measures, the juvenile court returned Joshua to his father’s custody and appointed a caseworker to monitor the family situation.

One month after the first accident, Joshua was readmitted to the emergency room with suspicious injuries. After release on the caseworker’s recommendation, Joshua returned home only to be readmitted six months later with similar injuries. No further action was taken to protect Joshua. Ann Kemmeter, the DSS caseworker, noted marks and visible bruises on Joshua’s head each time she visited. On March 7, 1984, she returned to the home and was informed without explanation that Joshua had fainted. The next day, Joshua was beaten so severely that he lapsed into a life-threatening coma. As a result of the beatings, Joshua will spend the rest of his life in an immediate care facility for the profoundly retarded.

The district court dismissed the case upon the defendant’s motion for summary judgment. On appeal, the Seventh Circuit affirmed, reasoning that the state had not proximately contributed to Joshua’s abuse and, therefore, did not deprive him of his right to bodily integrity. In addition, the appellate court rejected the notion that a special relationship arises between a state and a victim once the state is put on notice that abusive conditions may exist. The idea of special relationship had been embraced by the

13. *Id.* In order to continue detention, the team would have had to determine that there was probable cause to believe that if the child was not held, he or she would be subject to injury by others. Wis. Stat. § 48.205(1)(a) (1983).

14. Parental rights have been accorded constitutional status by the Supreme Court. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (burden of proof to terminate parental rights is the clear and convincing standard); Parham v. J.R., 442 U.S. 584 (1979) (state may voluntarily place child in an institution at the parent’s request with only minimal proceedings and without representation for the child in such proceedings); Wisconsin v. Yoder, 406 U.S. 205 (1972) (right of Amish parents to educate child at home after the eighth grade); Stanley v. Illinois, 405 U.S. 645 (1972) (all parents, including unwed fathers, have a right to due process before their child is removed from their custody).

15. These recommendations included enrolling Joshua in the Headstart program, providing his father with counseling, and encouraging his father’s new girlfriend to move out of the house. 812 F.2d at 300.

16. An informal disposition embodying the terms of these recommendations was entered into with the child’s father, as permitted by Wis. Stat. § 48.245 (1983). 812 F.2d at 300.

17. 489 U.S. at 192.

18. *Id.* at 192-93.

19. *Id.* at 193.

20. 812 F.2d at 300.


22. 489 U.S. at 193.

23. 812 F.2d at 303.

24. *Id.*
Third and Fourth Circuit Courts of Appeal.\textsuperscript{25} The Supreme Court granted certiorari\textsuperscript{26} in part to resolve this conflict and in part to define the scope of the state's duties in a social service setting.\textsuperscript{27}

II. **Section 1983, Due Process and the Establishment of the Special Relationship Doctrine**

A. **Section 1983**

1. Historical Development

Section 1983 was originally enacted as part of the Civil Rights Act of 1871\textsuperscript{28} to provide access to the federal courts for those deprived of constitutionally-protected rights by state actors.\textsuperscript{29} While a broad remedy may have been intended by the drafters,\textsuperscript{30} restrictive interpretations\textsuperscript{31} limited the scope of its effect.\textsuperscript{32} With the decision in *Monroe v.*
Pape, and the advent of the "constitutional tort," Section 1983 was given renewed viability. In Monroe, the Court held that state and federal remedies were available concurrently, expanded Section 1983's reach, abrogated the doctrine of absolute immunity, and imposed liability upon municipalities and their policy redress these grievances. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recovery of monetary damages allowed under the fourth amendment even in the absence of congressional directive).


34. Two competing conceptions of § 1983 have dominated its judicial interpretation. Historically, § 1983 may be seen as limited to the confines of racial discrimination, which it was intended to redress. Yet by its language, § 1983 may also be read as the general federal remedy for violations of all constitutional rights. See Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 CORNELL L. REV. 482, 484-87 (1982). The latter construction has been adhered to in recent years. The term "constitutional tort" is credited to Professor Marshall Shapo:

It thus appears that what is developing is a kind of "constitutional tort." It is not quite a private tort, yet contains tort elements; it is not "constitutional law," but employs a constitutional test. Because of this interesting amalgam, serious questions arise about the measurement of the substantive right. It may well be argued that given the broad language of Monroe construing the already broad language of the statute, every policeman's tort and every denial of a license by a state or local board will give rise to an action under Section 1983.


35. "One hardly can read about section 1983 without seeing a reference to the overwhelming number of section 1983 cases." Eisenberg, supra note 34, at 522.

36. Monroe opened the door to a wide variety of constitutional torts. The court found that a claim could be stated under § 1983 against government officials who violated a citizen's constitutional right even though they were not acting under the sanction of "color" of state law. 365 U.S. at 184. This expansion had been foreshadowed by the decisions in United States v. Classic, 313 U.S. 299 (1941) (misuse of power made possible by authority of the state is action under color of law) and Screws v. United States, 325 U.S. 91 (1945) (acts of officers who undertake to perform their official duties are included whether they adhere to the line of their authority or overstep it). More important, the Monroe court held that redress through the federal court system was "supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183.


38. See Monell, 436 U.S. at 690 (overruling Monroe insofar as it provided absolute immunity for municipalities). In Monell, employees were allowed to recover against a municipality for constitutional deprivations resulting from the exercise of a government policy or custom. Id. at 690-91. However, municipalities were not held vicariously liable for the acts of their agents under a doctrine of respondeat superior, where the municipality itself had not caused the violation. Id. at 690-91, 94.
2. Requirement of State Action

In order to assert a cause of action under Section 1983, plaintiffs must allege conduct committed under color of state law, which deprives the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States.40

Section 1983 claims, brought through the fourteenth amendment, are to be enforced against governmental entities and their agents,41 not against individuals acting in their private capacity.42 “Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”43 Unconstitutional state

39. While the issue of municipal liability still turns upon the issue of causation, the Court in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), held that “municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.” Id. at 480. But see Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (reaffirming the decision not to impose liability under the doctrine of respondeat superior and refusing to find the existence of a city policy based upon the isolated misconduct of a single police officer). See generally Note, Under the Civil Rights Act, Municipal Liability May Be Imposed For a Single Decision by Municipal Policymakers Under Appropriate Circumstances, 38 Drake L. Rev. 465 (1987).

Government actors may be sued generally under § 1983 in either their individual or official capacities. If sued individually, the Tuttle doctrine applies. See Kentucky v. Graham, 473 U.S. 159 (1985); Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985).


41. This is actually a strange result since direct suit against a state in federal court is barred by the eleventh amendment, unless the immunity is waived. See Grotta v. Rhode Island, 781 F.2d 343 (1st Cir. 1986). Cf. Spurrell v. Bloch, 40 Wash. App. 854, 701 P.2d 529 (1985) (Department of Social and Health Services not a “person” within the meaning of § 1983). Although municipalities traditionally were not considered “persons” for purposes of the Civil Rights Act, see City of Kenosha v. Bruno, 412 U.S. 507 (1973), a line of cases beginning with Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978), reversed this doctrine. See supra notes 38-40 and accompanying text.

The federal government may not be implicated by the statute, however, as its actions are governed by the Bivens doctrine. See Note supra note 32.


Private action may be attributed to the state only when the private ends were accomplished with the overt and significant assistance of state officials. See Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 486, (1988); United States v. Price, 383 U.S. 787, 794 (1966) (state liable where private individual was a willful participant in a joint activity with the state or its agents); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (where symbiotic relationship exists between individual and the state, the state may be liable for the individual’s actions).

action is not equivalent, however, to tortious conduct under state law.\textsuperscript{44} As the Court in \textit{Snowden v. Hughes}\textsuperscript{45} counsels, "state action, even though illegal under state law, can be no more and no less constitutional under the fourteenth amendment than if it were sanctioned by the state legislature."\textsuperscript{46} Therefore, the mere violation of a state statute by a government agency does not infringe upon the Constitution.\textsuperscript{47}


Despite the general consensus that requisite state action may not be established by the simple violation of state statutes, courts continue to struggle over which, if any, state-of-mind is required to impose liability under Section 1983.\textsuperscript{48} Clearly, intentional acts of deprivation are sufficient to invoke the principles of liability.\textsuperscript{49} Police misconduct provides the most common example of this form of constitutional violation.\textsuperscript{50} On the other side of the spectrum, mere negligence is insufficient to support a constitutional tort claim.\textsuperscript{51} The murky area of culpability that lies between these parameters

\textsuperscript{44} See \textit{Hebert v. Louisiana}, 272 U.S. 312, 316 (1926); \textit{Barney v. City of New York}, 193 U.S. 430, 439 (1904).

\textsuperscript{45} 321 U.S. 1 (1944).

\textsuperscript{46} \textit{Id.} at 11.


\textsuperscript{48} "Neither the statutory language nor the legislative history of section 1983 contain any indication that a defendant must act with a particular state of mind before being subject to liability under the Act." \textit{Note}, supra note 31, at 584.

\textsuperscript{49} Early cases even \textit{required} intentional conduct. \textit{See}, e.g., \textit{Cobb v. City of Malden}, 202 F.2d 701 (1st Cir. 1953) (liability would only exist when defendants subjectively realized conduct would result in depriving the plaintiff of a secured right). Today, intentional conduct is sufficient but not necessary. \textit{See \textit{Personnel Adm'r of Mass. v. Feeney}}, 442 U.S. 256, 278-80 (1979); \textit{DeWitt v. Pail}, 366 F.2d 682, 685-86 (9th Cir. 1966) (not necessary to allege a purpose to deprive plaintiff of any federal rights to state a due process claim under § 1983).

\textsuperscript{50} \textit{See \textit{Bell v. City of Milwaukee}}, 746 F.2d 1205 (7th Cir. 1984) (racially-motivated homicide by police officer); \textit{Bishop v. Tice}, 622 F.2d 349 (8th Cir. 1980) (police officer may be personally liable for damages under § 1983); \textit{Johnson v. Glick}, 481 F.2d 1028 (2d Cir.) (unjustified attack on suspect by police), \textit{cert. denied}, 414 U.S. 1033 (1973); \textit{Stringer v. Dilger}, 313 F.2d 536 (10th Cir. 1963) (police subject to liability for actual deprivations of liberty); \textit{Lewis v. Brautigam}, 227 F.2d 124 (5th Cir. 1955) (police exacting of confessions by use of force).

has been the subject of much debate and criticism in Section 1983 jurisprudence.\textsuperscript{52}

In \textit{Parratt v. Taylor},\textsuperscript{53} the Supreme Court announced that "[s]ection 1983, unlike its criminal counterpart . . . has never been found by this Court to contain a state-of-mind requirement."\textsuperscript{54} Despite this clarification, the federal courts continued to reach different conclusions, distinguishing \textit{Parratt} as limited to property interests\textsuperscript{55} or applicable only to procedural due process claims.\textsuperscript{56} In response, the Supreme Court addressed the issue a second time in \textit{Daniels v. Williams},\textsuperscript{57} ruling that mere negligence could not support a due process violation.\textsuperscript{58} The requirement now appears to be somewhat greater than gross negligence,\textsuperscript{59} but somewhat less than intent,\textsuperscript{60} a standard sometimes articulated as "conscious,"\textsuperscript{61} "reckless"\textsuperscript{62} or "deliberate"\textsuperscript{63} indifference.

\textsuperscript{52} See Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988). "A line that cannot be policed is not a line worth drawing in constitutional law." \textit{Id.} at 1219. Love v. King, 784 F.2d 708, 713 (5th Cir. 1986) (terms applicable to common law torts can be misleading in defining constitutional abuse of power). \textit{See also} Comment, \textit{Section 1983 and the Due Process Clause: Crossing the Constitutional Line}, 10 Cardozo L. Rev. 789 (1989).

\textsuperscript{53} 451 U.S. 527 (1981).

\textsuperscript{54} \textit{Id.} at 534. \textit{Monroe} had also purported to reach this conclusion: "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187.

\textsuperscript{55} See, e.g., Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985).


\textsuperscript{57} 474 U.S. 327 (1986).

\textsuperscript{58} See supra note 51.

\textsuperscript{59} See Archie, 847 F.2d at 1219-20. "The distinction between negligence and gross negligence does not respond to the functions of the due process clause." \textit{Id.} at 1220.

\textsuperscript{60} See supra note 49.

\textsuperscript{61} Estate of Conners by Meredith v. O'Connor, 846 F.2d 1205, 1208 (9th Cir. 1988) (applicable \textit{Youngberg} standard is equivalent to that required for a finding of conscious indifference).

\textsuperscript{62} Nishiyama v. Dickson County, Tenn., 814 F.2d 277, 283 (6th Cir. 1987) (reckless indifference to risk posed by allowing inmate to drive sheriff's car while unsupervised sufficient to establish a violation of substantive due process under § 1983).

\textsuperscript{63} See Whitley v. Albers, 475 U.S. 312, 319-21 (1986) (deliberate indifference standard not appropriate in prison context where other considerations required balancing test between infliction of pain and good faith efforts to maintain and restore discipline). Deliberate indifference standard is appropriate in determining questions of prisoner well-being. \textit{Id.} at 320 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

Since the decision in \textit{DeShaney v. Winnebago County Dep't of Social Servs.}, 489 U.S. 189 (1989), the court decided \textit{City of Canton v. Harris}, 489 U.S. 378 (1989). The principle issue for decision in that case was whether a municipality may be liable under U.S.C. § 1983 for constitutional violations resulting from its failure to \textit{train} municipal employees. Resolving this issue, the court held that the inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to \textit{deliberate indifference} to the rights of persons with whom the police come into contact. \textit{Id.} at 1204. Similarly, in \textit{Dorman v. District of Columbia}, 888 F.2d
4. Deprivation of Rights Requirement

Finally, Section 1983 requires that the plaintiff be deprived of some constitutionally-protected interest. These interests are generally shielded from intrusive state action through the fourteenth amendment. The due process clause has been the most useful vehicle for enforcing both substantive and procedural guaranties. Courts have differed, however, as to what constitutes a "deprivation" within the meaning of the statute. Actionable claims have been brought where the state actively interfered with the exercise of a right, or unfairly withheld the privilege to which an individual was entitled. Claims have been disallowed where there existed a mere expectation of state action or where the state had no duty to act.

159 (D.C. Cir. 1989), the court found that in order to impose liability upon municipalities under § 1983, the plaintiff must prove deliberate indifference in municipal policy as well as a close causal nexus with the injury. Id. at 164-65.

64. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913) (abuse of governmental power is the central inquiry under the fourteenth amendment).

65. The due process, equal protection, and privileges and immunities clauses serve to ensure a degree of fundamental fairness throughout the fifty states.

66. Three types of constitutional protection are encompassed by the due process clause: (1) functional due process, which selectively incorporates the protections of the Bill of Rights as against the states; (2) substantive due process, which protects nontextual but nonetheless fundamental rights; and (3) procedural due process, which ensures fairness in the implementation of government policy. See Daniels, 474 U.S. at 337 (Stevens, J., concurring).

67. "A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss. The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations." Parratt, 451 U.S. at 548 (Powell, J., concurring). Compare DiMarzo v. Cahill, 575 F.2d 15 (1st Cir.), cert. denied, 439 U.S. 927 (1978). "[T]he Civil Rights Acts of 1871 were intended to safeguard constitutional rights which state authorities might deny by neglecting to enforce state statutes as well as by more affirmative action. Failure to act where there is a duty to act can give rise to an actionable claim under section 1983." Id. at 18 n.3 (citation omitted) (containing a much clearer statement on actionable inaction).

68. "When the state puts a person in danger, the Due Process Clause requires the state to protect him . . . . When a state cuts off sources of private aid, it must provide replacement protection." Archie, 847 F.2d at 1223. See also Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (if government hurls a person into a snake pit, it may not disclaim responsibility).

69. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 467 (1981) (mere expectancy based on high probability of state action not enough to create an entitlement); Board of Regents v. Roth, 408 U.S. 564 (1972) (an abstract need or desire does not create a property interest).

70. See, e.g., Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir.), cert. denied, 479 U.S. 882 (1986). "Nothing in the fourteenth amendment or its history . . . suggests that it was written to provide an expansive guarantee of state protective services." Id. at 720.
B. Due Process

1. Generally

The due process clauses protect an individual's life, liberty, and property interests from the arbitrary exercise of power by the state. Substantive due process protects those interests which the Court has deemed "fundamental," although they are not explicitly enumerated in the text of the Constitution. When these interests are created by an independent source, such as state law, they are protected by procedural due process concerns, as long as there is a legitimate claim of entitlement to their benefit. Procedural due process guarantees individuals pre-deprivation notice and a hearing when the state seeks to infringe upon their rights. However, resort may also be limited to post-deprivation remedies provided under state law.

2. Substantive Due Process

The Bill of Rights is essentially a charter of negative liberties. Where the Constitution recognizes no duty on the part of the state to act, the government's failure to so act cannot support a substantive due process claim. Furthermore, not all privileges granted by the government are

71. See Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989).


73. Examples of such created interests are found in: Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Whalen v. Roe, 429 U.S. 589 (1977) (right of privacy); Ingraham v. Wright, 430 U.S. 651 (1977) (bodily integrity).


75. Once state law entitlements have been identified, the Court does not enforce the state law giving rise to those entitlements, but rather tests against the Federal Constitution the procedures by which the state deprives a person of those entitlements. See Archie, 847 F.2d at 1217; see also Olim v. Wakinekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1983).

76. See Parratt, 451 U.S. at 538. This is particularly true when the deprivation is not a result of some established state procedure and the state cannot adequately predict when the loss will occur. Id. at 541.

77. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

78. Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984).

79. See Youngberg v. Romeo, 457 U.S. 307 (1982) (no duty to provide substantive services to those within its border); Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986) (state not required to provide safe working conditions or protect employees from murderers); Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985) (city had no duty to provide body guards to endangered wife of police detective); Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (no duty to provide firefighters); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) (no duty of police to rescue burning victim).
guaranteed by the Constitution. The contemporary Court views each new claim to a substantive due process right with caution. Yet, although scholars disagree over their propriety, the Court has sketched the contours of several of these "fundamental interests."

From Joshua's perspective, the freedom from unjustified intrusion on personal security, as recognized in Ingraham v. Wright, is one of the most significant of these historic liberties. Accordingly, due process violations may occur when officials withhold medical assistance from someone within their custody, or when they abandon minors after having placed them in a position of peril. There need not be a violent action to allege a deprivation of rights.

3. Procedural Due Process

Liberty and property interests may attain constitutional status by virtue of their recognition and protection by state law. Due process does not ensure, however, that state officials must comply with state-established procedures. Nor does the existence of a fundamental right guarantee a citizen the ability to exercise that right. Yet, once state law entitles its citizens to certain interests, it may not deprive those individuals of their benefits without meeting a certain minimum standard of due process.

82. Youngberg, 457 U.S. at 314-21 (institutionalized individuals have a substantive due process right to humane medical treatment); Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference to inmate's medical needs was cruel and unusual punishment within the meaning of the eighth and fourteenth amendments).
83. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc) (state created liberty interest in child when it placed the child in a dangerous foster home); White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (police abandoned child on expressway after arresting the driver of the car).
84. Duncan v. Nelson, 466 F.2d 939 (7th Cir.), cert. denied, 409 U.S. 894 (1972) (no reason in logic or experience to require physical violence as a prerequisite to § 1983 suit in involuntary confession case).
state law deems these benefits discretionary, however, there is no legitimate entitlement, and a state need not provide procedural protections.91

In Mathews v. Eldridge,92 the Court identified four factors to be balanced in determining whether a legitimate deprivation has taken place: (1) the private interest affected; (2) the risk of an erroneous deprivation; (3) the value and burden of additional procedural safeguards; and (4) the nature of the governmental interest involved.93 Finally, if the state has provided a sufficient post-deprivation remedy, due process is served by its application when pre-deprivation procedures are impracticable.94

C. The Doctrine of Special Relationship

The notion of special relationship evolved as a response to the general immunity that state actors could claim under the public duty doctrine. Briefly stated, the public duty doctrine provides that a failure of a public officer to perform a public duty can constitute an individual wrong only when a separate and identifiable private duty was owed to the aggrieved party by the state actor. If no such private duty exists, the injury must be redressed, if at all, in some form of public prosecution.95 Many state courts have adopted some form of special relationship theory.96 Generally, this theory requires a statutory mandate, coupled with conduct creating reliance upon government assistance by an individual in a dangerous or disadvantageous situation. Liability may arise when the state delivers such aid without due care.97

93. Id. at 335.
97. The Minnesota Supreme Court has outlined the following elements to be considered when determining the existence of a special relationship between the state and a private citizen: (1) actual knowledge of the dangerous condition; (2) reasonable reliance by the plaintiff on the municipality’s specific representation and conduct which caused the plaintiff to forego alternative conduct for his protection; (3) a statute which creates mandatory acts on the part of the municipality which are clearly for the protection of a specific class of persons, rather than for the public in
Relying on language in *Martinez v. California*, various circuit courts have sought to apply the special relationship doctrine in the context of Section 1983 actions. Most of these cases stand for the proposition that if a state takes a person into custody or otherwise assumes responsibility for that person's welfare, the fourteenth amendment imposes upon the state a special duty of care. A few cases have strayed outside these parameters, seeking to impose a more general obligation upon the state to offer protective services in noncustodial settings.

### III. DISPOSITION OF THE CASE

#### A. The Majority Decision

Chief Justice Rehnquist, writing for the majority in *DeShaney v. Winnebago County Department of Social Services*, noted that petitioner's claim invoked a substantive due process right to be free from intrusions on personal security under the fourteenth amendment. Rehnquist laid the groundwork for his analysis by pointing out that the purpose of the due process clause was to protect individuals from unwarranted governmental...
intrusions, not to safeguard individuals from interpersonal conflict. A state could not be held constitutionally liable for the failure to provide adequate protection to its citizens. Therefore, he concluded, the clause upon which the petitioner relies confers no affirmative right to aid from the state in the instance of domestic abuse.

Citing the Estelle-Youngberg line of cases, the Court held that a state has a duty to assume responsibility for an individual's liberty. It is the state's restraint of personal liberties that triggers due process protection, not its failure to act to protect those liberties. Thus, the lack of an established custodial relationship between Joshua and the state at the time he sustained his injuries served to place him outside the protection offered by the fourteenth amendment.

The majority then considered the actions the state had taken to protect Joshua. The Court summarily disposed of the notion that the state had a duty to guarantee Joshua's safety once it had intervened and taken him into temporary custody. Since the state had returned Joshua to his father's custody, arguably a position no worse than if it had not acted at all, the government could not be constitutionally liable for injuries it did not cause. While the majority noted that the DSS might incur liability under state law for negligent provision of services, the Court reaffirmed the principle that the due process clause does not transform every breach of state law into a constitutional infringement.

In its concluding remarks, the majority reemphasized that, although sympathetic to Joshua's plight, it could not hold the state responsible for the infliction of harm by another. It noted the delicate predicament of social workers who may be held constitutionally liable for breach of the parent/child relationship. Drawing upon principles of federalism, the Court concluded that any remedy which Joshua may have must be derived from state, and not constitutional, tort law.

103. Id.
104. Id. at 196-97.
105. Id. at 197.
108. Id. at 200.
109. Id. at 201.
110. Id.
111. Id. at 202.
112. Id. at 202-03.
113. Id. at 203.
114. Id. at 202.
B. The Dissenting Opinions

In the principal dissent, Justice Brennan criticized the majority's focus on state inaction. Brennan believed the Court predetermined its conclusion by initially rejecting the contention that the Constitution imposes an affirmative duty on the states to care for their citizens.\(^{115}\) While granting the plausibility of the majority's initial proposition, he argued that it was more appropriate to examine the actions the state did take, rather than those it failed to pursue.\(^{116}\)

Noting that actual physical restraint is not the only way a state actor may deprive one of due process,\(^{117}\) Justice Brennan argued that the state's knowledge of Joshua's plight, coupled with its expressions of intent to aid him, amounted to an equally significant limitation on his freedom.\(^{118}\) Since Joshua was unable to care for himself, the state's monopoly of a particular type of care will implicate the state even when it is not the principal tortfeasor.\(^{119}\)

Justice Brennan proceeded to examine the extent to which Wisconsin had monopolized the caretaker function in cases of child abuse. Although providing general reporting provisions, the state funnelled all decision-making power into the DSS.\(^{120}\) As a result, private parties relied on the state to act; when it did not do so, the dissent reasoned, the state effectively confined Joshua.\(^{121}\) Having established significant procedures for preventing child abuse, the state vested Joshua with a right to their reasonable application.\(^{122}\) Brennan concluded that while negligent conduct cannot violate due process, the failure to take appropriate action in this case evidenced the very type of governmental indifference which the Constitution seeks to prevent.\(^{123}\)

In a separate dissent, Justice Blackmun counselled that the dictates of fundamental justice compel a compassionate and broad reading of the fourteenth amendment.\(^{124}\) Agreeing that the majority's reliance on the action/

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115. *Id.* at 204 (Brennan, J. with Marshall and Blackmun, J.J., dissenting).
116. *Id.* at 204-05.
117. *Id.* (citing White v. Rochford, 592 F.2d 381 (7th Cir. 1979)).
118. *Id.* at 206.
119. *Id.* at 206-07.
120. *Id.* at 208-09.
121. *Id.* at 210.
122. *Id.* at 211.
123. *Id.* at 211-12.
124. *Id.* at 212-13 (Blackmun, J., dissenting).
inaction distinction was inappropriate, he sadly concluded that overly formal legal reasoning had left Joshua abandoned by all, protected by none.125

IV. ANALYSIS

By virtue of our carefully conceived "system of ordered liberty,"126 the citizenry's right to be free from unwarranted governmental intrusions is paramount to an individual's interest in securing the government's protection, particularly when such protection may require intrusive action. This is the foundation that supports the Supreme Court's decision in DeShaney v. Winnebago County Department of Social Services.127 Yet the development of this nation's welfare systems, coupled with the substantial provision of community services by local governments, challenges the Court's operative principle. Following a long line of cases, DeShaney failed to take advantage of the opportunity to clarify the law of constitutional tort, address our society's increasing concern for children and the aged, or expand the scope of the state's role in the provision of social services.

The Court was correct in stating that "nothing in the language of the Due Process Clause itself requires the State to protect . . . its citizens against invasion by private actors."128 But examining the development of fundamental rights theory under substantive due process, and entitlement theory under procedural due process, the rule behind this assertion becomes less than an absolute truth. For example, a right to be free from "inactive" abuse has been established in the custodial setting,129 and where municipalities have adopted a pattern of activity or policy indicating gross indifference to an individual recipient's needs.130 Moreover, even after DeShaney, it is unclear whether substantive due process includes a guarantee of freedom from arbitrary and capricious state action,131 or whether procedural due process insures a certain standard of conduct when the government undertakes the provision of substantial community services.132

The Court did manage to reenforce a patchwork analysis of governmental liability, requiring courts to weigh policy against conduct and action against inaction in custodial versus non-custodial settings, all against a variety of potentially damning states-of-mind. This confusing approach re-

125. Id.
128. Id. at 195 (emphasis added).
sulted in a narrow conclusion in *DeShaney* and fails to provide lower courts with any real guidance when confronted by a factually distinct scenario encompassing a different level of individual-to-state relation. An illustration may be found in the foster care setting. The circuits are divided over whether to impose liability under Section 1983 when child abuse occurs in a foster home. Similarly, courts are unclear as to whether a "special relationship" may provide a constitutionally cognizable basis for liability under Section 1983.

Several commentators have offered methods to clarify these issues. Professors Wells and Eaton suggest that substantive due process analysis is properly applied to constitutional tort claims "because the harm suffered . . . may be unconstitutional regardless of whether the appropriate procedures were followed." They propose four standards to determine when a constitutional tort should be available: (1) when the defendant acts with an impermissible motive or ill-will toward the plaintiff; (2) when an intrusion on the plaintiff is unreasonably disproportionate to the legitimate goal that the intrusion serves; (3) when the defendant's recklessness causes injury to a plaintiff under substantial control by the state; or (4) when a defendant recklessly harms a plaintiff not under state supervision. An application of the Wells-Eaton standards would probably reach the same result as the Court in *DeShaney*. Their fourth proposition, however, leaves open the possibility that a state may be liable when it acts recklessly in failing to provide services to an individual plaintiff.

In this way, if the DSS would have taken one less step and failed to assign a caseworker to Joshua, it could have been found liable even though

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133. *DeShaney* may be said to stand for the narrow proposition that a municipality which provides a social service may not be held liable when one of its agents, not evidencing a municipal policy, fails to take action or acts with gross indifference toward an individual service recipient in a non-custodial setting who is harmed by a third party.

134. *Compare* Milburn v. Anne Arundel County Dep't of Social Servs., 871 F.2d 474 (4th Cir. 1989), and Doe v. Bobbitt, 881 F.2d 510 (7th Cir. 1989), *with* Lipscomb *ex rel.* DeFehr, 884 F.2d 1242 (9th Cir. 1989), *and* Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989) (decided on qualified immunity grounds).

135. *Compare* Edwards v. Johnston County Health Dep't., 885 F.2d 1215 (4th Cir. 1989), and Piechowicz v. United States, 885 F.2d 1207 (4th Cir. 1989), *with* Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *and* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989). A recent variant of this problem has arisen with regard to drug-addicted newborns. A "professional conduct" standard coupled with a "substantial likelihood of harm" test may help to clarify when the state may intervene as well as the intrusiveness of that intervention. For an innovative discussion of this issue, see Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745 (1990) (arguing against automatic removal).


a private actor directly caused his injuries. This result is consistent with one of the more important purposes of the due process clause: the prevention of arbitrary exercise of government power. It would also have been a just result, especially since a quasi-state entity had exercised temporary control over Joshua in the past. If society chooses to allocate resources for a particular purpose, the Constitution dictates that they be provided to all who need them in a fundamentally fair manner.

Another commentator suggests that a procedural due process analysis is more appropriate in state "inaction" cases. Under both entitlement and inaction analyses, the government has withheld the promised benefit after encouraging reliance upon its provision. Indeed, it might even be argued that Joshua was entitled to protection from child abuse by state law. The Wisconsin Children's Code phrases the DSS's duty to intervene in an affirmative, non-discretionary manner. Although Joshua's case was deliberated at the time he was taken into temporary custody, the DSS has a duty to investigate each report of abuse and it must offer its services if appropriate. However, the right to petition the court for custody is discretionary, and an entitlement theory may fail here.

Nonetheless, in applying the analogy suggested, it would be fair to conclude that Joshua, as a member of a select class, was relying upon the state's services. The state's failure to adequately protect him may be said to have deprived Joshua of his "property interest" in that protection. How-

140. Id. at 1066.
141. "If the county department determines that a child . . . is in need of services, the county department shall offer to provide appropriate services or to make arrangements for the provision of services." Wis. Stat. § 48.981(3)(c)3 (1983).

Every state in the United States, the District of Columbia and all United States territories have child protective service systems. Thompson, Civil Suit: An Abused Child's Only Protection, 6 PROB. L.J. 85, 86 (1984). In all state systems, child abuse reports are followed by investigation by social workers and intervention, if appropriate.

142. See Palmore v. Sidati, 466 U.S. 429 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." Id. at 433 (dictum)). See also Eugene D., supra note 134, at 713-14 (Merritt, J., dissenting).

143. However, the Constitution establishes only minimum procedures. If state law creates additional procedural entitlements, these are not themselves property and will not be enforced.
ever, under this analysis, the existence of an appropriate post-deprivation tort remedy would preclude recovery in federal court.\textsuperscript{144}

Finally, although the Court rejected the \textit{Youngberg} standard as inappropriate, the interpretation it was given in \textit{Estate of Conners by Meredith v. O'Connor}\textsuperscript{145} would have yielded a more profitable analysis. Instead of the confusing focus on culpability requirements, \textit{O'Connor} employed a reasonableness test,\textsuperscript{146} imposing liability only when it could be demonstrated that defendants did not employ professional judgment. The court explained: "Under \textit{Youngberg}'s balancing test . . . '[l]iability may be imposed on a professional state officer only when his or her decision is so objectively unreasonable as to demonstrate that he or she actually did not base the challenged decision upon professional judgment.' "\textsuperscript{147}

In a similar qualified immunity case, \textit{Feagley v. Waddill},\textsuperscript{148} the Fifth Circuit reasserted this standard of liability while dismissing a state defendant's motion for summary judgment. The \textit{Feagley} court cited Justice Brennan's dissent in \textit{DeShaney}\textsuperscript{149} for the assertion that mere negligent conduct is insufficient to state a cause of action, while it sustained a complaint alleging "a substantial departure from accepted professional judgment" against an attack on the pleadings.\textsuperscript{150}

This type of standard is analogous to that employed in determining ineffective assistance of counsel under the sixth amendment.\textsuperscript{151} As the effective

under the rubric of a substantive constitutional right. Archie v. City of Racine, 847 F.2d 1211, 1217 (7th Cir. 1988) (citing Olim v. Wakinekona, 461 U.S. 238, 248-51 (1983)).

144. Parratt v. Taylor, 451 U.S. 527, 538 (1981). \textit{See} McClary v. O'Hare, 786 F.2d 83, 86 n.3 (2d Cir. 1986) (\textit{Parratt} post-deprivation ruling limited to procedural due process issues). \textit{See also} Weimer, 870 F.2d at 1406 (denying substantive due process claim where state offers adequate post-deprivation remedies). \textit{But see} McKee v. City of Rockwall, 877 F.2d 409, 413 (5th Cir. 1989) (equal protection claims based on state inaction not barred by \textit{DeShaney} because the state may not selectively deny protective services to certain disfavored minorities).

145. 846 F.2d 1205 (9th Cir. 1988).

146. "[T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." \textit{Id.} at 1207 (quoting \textit{Youngberg} v. Romeo, 457 U.S. 307, 323 (1982)).

147. 846 F.2d at 1208.

148. 868 F.2d 1437 (5th Cir. 1989).

149. \textit{DeShaney}, 489 U.S. at 207 (Brennan, J., dissenting) (Brennan suggests that "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.")

150. \textit{Feagley}, 868 F.2d at 1441.

151. \textit{See} Strickland v. Washington, 466 U.S. 668 (1984) ("[W]hether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." \textit{Id.} at 686). Generally, the plaintiff must show that a different outcome would have been obtained but for the attorney's ineffectiveness. \textit{Id.}
assistance cases demonstrate, recovery would not be easily gained. While preserving the integrity of social workers and limiting recovery to only the most egregious cases, the Court in DeShaney could have returned to its original holding in Monroe and Parratt and eliminated the state-of-mind inquiry altogether.

In fact, one commentator has argued that the Court has tentatively moved from a state-of-mind based approach to a constitutional duty based approach and, in doing so, has developed a new brand of constitutionalism. This shift is a healthy one, at long last recognizing the separation of “duties” from their “rights” counterparts. As one scholar recently concluded, “[o]nly through a duty theory can the Court coherently distinguish those losses of life, liberty, or property that are subject to due process constraints from those losses that state tort law should remedy.”

This suggestion, the characterization of constitutional duties apart from constitutional rights, leads us closer to the resolution of the dilemma imposed by all such choices: which “fundamental” values should be chosen over others. The point is that a “choice” need not be made by a constitutional court. Rather, the court need only insure that once a choice by the legislature or by an executive agency has been made, it is applied in a fundamentally fair manner. This is a matter of process, not a matter of substance. And that is what a claim under the due process clause should be about. The question becomes not whether Joshua was deprived of his right to life, but whether it was taken from him by a state actor without due process of law.

Are states constitutionally required to provide social services such as the ones Joshua received? Arguably they are not. However, it is the province of the legislature to provide them. Once an extensive system of care is developed, the state cannot ignore the requests of the underprivileged who seek its help. If one refuses the care the state provides, the state cannot be held liable for not providing it. But Joshua had no voice to refuse, and his parents at least acquiesced to the provision of care. When society enacts such a legislative measure, it endorses the government to at least preempt, and possibly occupy the field of, private providers. Once the state is authorized to intervene, and such intervention is expected, the services must be

provided fairly and competently to all if the very intrusive burdens which the Constitution seeks to shield are to be avoided.

Thus arises the "constitutional duty." Imagine a fire department responding to a call and attempting to put out the blaze with buckets, or a police officer collaborating in a robbery, or a judge convicting an accused without a hearing. Are these not all deprivations of due process to some extent? While the standard we articulate must necessarily be imprecise, the Constitution guarantees that the state must not act in such a way that, given the existence of a law establishing systems of service, it deprives the people of their life, liberty or property, once preservable by other means. Perhaps the dissenters were correct and the decision in DeShaney was foul, but in deciding the case on a fundamental rights theme, the majority never articulated a standard by which we could decide.

V. CONCLUSION

The Court's reasoned opinion hedged close to the constitutional line, recognizing there could be no deprivation of liberty where the state had no duty to act and inflicted no injury. The case curtailed but did not foreclose the development of the special relationship doctrine in constitutional tort law. Yet it confirmed the conservative direction of the Court by declining to find any affirmative duty on the part of the state to provide social services. DeShaney's impact will be felt not so much as a radical turning from contemporary jurisprudence, but as a bulwark against the further erosion of sovereign immunity in the realm of constitutional tort. Perhaps the Court will clarify its position on governmental liability under the special relationship doctrine and articulate a more workable standard for constitutional tort analysis if it grants certiorari in a foster care case. However, until a clarification is made, plaintiffs will have to continue to rely on the limits of state tort law to recover for injuries connected with the provision of government services, for the Court has determined that the Constitution provides no such remedy.

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156. See, e.g., Everson v. Board of Educ., 330 U.S. 1 (1947) (Rutledge, J., dissenting) ("Certainly the fire department must not stand idly by while the church [burns]." Id. at 61.).

157. The DeShaney opinion seems to endorse the idea of a special relationship in those cases where the state is in a custodial relationship with the plaintiff, but not in non-custodial settings. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200-01 nn.8-9 (1989).