Washington Law Review

Volume 66 | Number 1

1-1-1991

Governmental Inaction as as Constitutional Tort: DeShaney and Its Aftermath

Thomas A. Eaton

Michael Wells

GOVERNMENTAL INACTION AS A CONSTITUTIONAL TORT: *DESHANEY* AND ITS AFTERMATH

Thomas A. Eaton* and Michael Wells**

Abstract: DeShaney v. Winnebago County Department of Social Services is the Supreme Court's first major effort to define the scope of state and local governments' affirmative obligations under the fourteenth amendment. The Court rejected liability against a county welfare agency and a caseworker for failing to prevent a father from severely beating his four-year-old son. The Court intimated that constitutional affirmative duties exist only where the plaintiff is in the state's custody. Scholarly commentary reads the case as announcing a sweeping prohibition against the imposition of affirmative duties in other contexts. Professors Eaton and Wells demonstrate that the *DeShaney* opinion is more ambiguous and less categorical than the preliminary scholarly consensus suggests. They argue that much of the Court's reasoning supports a more discriminating treatment of constitutional affirmative duties; one that acknowledges the various ways in which the state may play a part in making someone vulnerable to harm. Although in *DeShaney's* aftermath some lower courts embrace the "sweeping prohibition" view of the Supreme Court's opinion, many other courts examine the state's role in exposing the plaintiff to danger. Professors Eaton and Wells prefer the latter approach, arguing that it should be combined with an inquiry into the governmental defendant's state of mind, an issue the Court did not address in *DeShaney.*

Is the Constitution solely "a charter of negative liberties"[1] shielding us against intrusions by state officers upon our freedom? Or does it also encompass "positive rights" to governmental aid? If the Constitution sometimes does require government officials to help persons in distress, what circumstances trigger a duty to act? These questions were before the Supreme Court last Term in *DeShaney v. Winnebago County Department of Social Services.*[2]

Joshua DeShaney, a four-year-old child beaten repeatedly by his father, sued social workers assigned to his case for failing to do anything about the attacks. Joshua's lawyer charged that the social workers' inaction, in the face of strong evidence of abuse, amounted to a deprivation of Joshua's liberty in violation of the due process clause of the fourteenth amendment. Rejecting Joshua's claim, the Court asserted that the purpose of the due process clause was "to protect the

* Professor of Law, University of Georgia School of Law; B.A. 1972, University of Texas; J.D. 1975, University of Texas. The authors wish to thank Robert Brussack, Dan Coenen, and Joseph Singer for their helpful comments on a draft of this paper.

** Professor of Law, University of Georgia School of Law; B.A. 1972, University of Virginia; J.D. 1975, University of Virginia.

1. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); *see also* Harris v. McRae, 448 U.S. 297, 318 (1980).

2. 109 S. Ct. 998 (1989).

people from the State, not to ensure that the State protected them from each other."[3] The Court recognized that an affirmative duty may arise when the state has contributed to the plaintiff's need for assistance. In *DeShaney,* even though "the State may have been aware of the dangers that Joshua faced" in his father's home, it "played no part in their creation, nor did it . . . render him any more vulnerable to them."[4]

In one respect, *DeShaney* is only the most recent in a long line of cases struggling to define the boundary between tort claims governed by state law and those of constitutional dimension.[5] The distinctive aspect of *DeShaney* is its focus on affirmative duties. The distinguishing characteristic of affirmative duty cases is that the plaintiff seeks damages not from the actor who commits the harm but from a governmental official who somehow made the plaintiff more vulnerable to, or failed to prevent, the harm. The defendant may be a jailor who releases a dangerous inmate, or a social services worker who allows a child to remain in the custody of a parent who beats him, or a policeman who promises to defend the plaintiff against attacks and then reneges.

The affirmative duty problem has long fascinated courts and commentators, because it raises perplexing philosophical questions about liberty, utility, and moral responsibility.[6] Although constitutionally based affirmative duty claims raise profound issues that go to the heart of the relationship between the government and its citizens, these issues have received scant attention in the constitutional context.[7]

3. *Id.* at 1003.

4. *Id.* at 1006.

5. Prior decisions featuring this theme include Whitley v. Albers, 475 U.S. 312 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986); Martinez v. California, 444 U.S. 277 (1980); Baker v. McCollan, 443 U.S. 137 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); and Paul v. Davis, 424 U.S. 693 (1976). For our views on the issue, see Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts,* 18 GA. L. REV. 201 (1984).

6. *See, e.g.,* Soldano v. O'Daniels, 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901). Important scholarly works include M. SHAPO, THE DUTY TO ACT (1977); Ames, *Law and Morals,* 22 HARV. L. REV. 97, 110–13 (1908); Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151, 197–201 (1973); Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism,* 7 J. LEGAL STUD. 83 (1978); Weinrib, *The Case for a Duty to Rescue,* 90 YALE L.J. 247 (1980).

7. Academic commentary on the affirmative constitutional obligations includes Beermann, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. __; Bendich, *Privacy, Poverty, and the Constitution,* 54 CALIF. L. REV. 407 (1966); Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 WASH. U.L.Q. 695; Currie, *Positive and Negative Constitutional Rights,* 53 U. CHI. L. REV. 864 (1986); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7

While the Supreme Court has recognized an obligation of government to provide for the basic needs of prison inmates, mental patients, and others it confines,[8] *DeShaney* marks the first time the Court has addressed affirmative duty issues in a broader context.

Laurence Tribe, Aviam Soifer, and others have criticized *DeShaney* for its rigid distinction between "affirmative" and "negative" governmental duties. In an age in which government reaches virtually every aspect of daily life, they say, it is formalistic and naive to accord decisive weight to the difference between active and passive defaults by officials.[9] Our own focus, however, is far less abstract. The inescapable reality is that constitutional affirmative duty claims will continue to press for judicial recognition in the post-*DeShaney* world. Our goal is to point the way for courts and lawyers called on to deal with these cases. To this end, we seek to address the questions that remain to be decided in the wake of *DeShaney*. We explore the strengths and weaknesses of the Court's analysis in *DeShaney* in an effort to develop a practical framework for resolving future constitutional affirmative duty cases.

Framing this analytical structure entails three main steps. Initially, we examine the *DeShaney* opinion in order to identify the issues left open by the Court's disposition of the case. There are two shortcomings in the Court's treatment of the affirmative duty issue. First, in justifying its broad dicta rejecting affirmative duties in the absence of some state responsibility for the plaintiff's plight, the Court barely

---

(1969); Miller, *Toward a Concept of Constitutional Duty,* 1968 SUP. CT. REV. 199; Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence,* 99 HARV. L. REV. 330 (1985).

For an early effort to shed light on the intersection between constitutional tort and affirmative duty, see Wells & Eaton, *Affirmative Duty and Constitutional Tort,* 16 U. MICH. J.L. REFORM 1 (1982). We return to this question here because the Supreme Court has decided a number of cases bearing on the problem in one way or another in the years since our earlier article was published and the analysis we presented there has been somewhat superseded by the Court's more recent work.

8. *See* Revere v. Massachusetts Gen. Hosp., 463 U.S. 239 (1983); Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble, 429 U.S. 97 (1976).

9. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics,* 103 HARV. L. REV. 1, 8–14 (1989); Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney,* 57 GEO. WASH. L. REV. 1513 (1989); Strauss, *Due Process, Government Inaction, and Private Wrongs,* 1989 SUP. CT. REV. 53; *The Supreme Court, 1988 Term,* 103 HARV. L. REV. 40, 172–74 (1989); *see also* Whitman, *Government Responsibility for Constitutional Torts,* 85 MICH. L. REV. 225, 226, 253–54 (1986). Indeed, the distinction between acts and omissions often turns on how one poses the question. Assume, for example, a policeman impounds a car, arrests the driver, and leaves the children-passengers stranded on a busy highway. Are the children endangered by the officer's acts of impounding the car and arresting the driver, or by his failure to take them to a place of safety? *Cf.* White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

touches on the purposes of the fourteenth amendment and the teachings of its own precedents. Instead, the Court resorts to a highly selective citation to its prior cases and places more weight on the language of the due process clause than its own decisions show the clause can bear. Resolution of future affirmative duty cases will require reference not only to *DeShaney* but also to the full body of Supreme Court precedents on the meaning of the due process clause. Second, the Court's discussion in *DeShaney* of the level of state involvement needed to trigger imposition of an affirmative duty is itself ambivalent and unhelpful because it moves from one possible standard to another and then another without ever choosing among them. At one point the focus is on "involuntary confinement";[10] at another it is on whether the plaintiff's situation is "analogous to incarceration or institutionalization";[11] and at yet another it is on whether the victim is left in a "worse position than that in which he would have been had [the official] not acted at all."[12] This panoply of approaches reveals the substantial uncertainty that remains in this area of the law, and thus highlights the need for developing a coherent framework for analyzing affirmative duty cases.

Our second goal is to move beyond the language of the *DeShaney* opinion to identify the considerations that properly bear on the viability of constitutional tort suits for government inaction. The resolution of constitutional tort questions requires courts to address two areas of doctrine. Because tort liability is at issue, it is necessary to evaluate the considerations of tort policy that bear on whether recognition of an affirmative duty is appropriate. Specifically, the court must balance the importance of maintaining official discretion in the deployment of government resources against the benefits to persons in distress who will be helped if a duty is imposed. Of course, even if the benefits of a duty to aid outweigh the costs, it does not follow that such a duty may be imposed as a matter of constitutional law. Yet, reason and authority—including the *DeShaney* decision itself—suggest that a constitutional duty will arise if government conduct is sufficiently egregious. We contend that it is appropriate to recognize an affirmative constitutional duty only when government inaction can be characterized as an "abuse of power."

The third step in forging a practical framework for resolving affirmative duty claims is to formulate concrete guidelines for deciding cases.

10. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1005-06 (1989).
11. *Id.* at 1006 n.9.
12. *Id.* at 1006.

We submit that constitutional tort liability for government inaction must rest on two factors: the degree of state involvement in producing the plaintiff's plight and the defendant's state of mind. This approach builds on the Court's holding in *DeShaney* that there is no constitutional duty to act absent some state involvement with the plaintiff's need for assistance. In addition, it seeks to plug the gap created by *DeShaney*'s failure to specify the *type* of state involvement that will trigger an affirmative duty.

We argue that limiting affirmative duties to instances of involuntary confinement or analogues of confinement is arbitrary and unwise. Such tests do not reach the full range of cases in which the state may significantly contribute to the plaintiff's need for assistance. Rather, the familiar tort concept of "special relationships" can best identify the types of state involvement that should give rise to an affirmative duty.

The second criterion that courts must focus on is the defendant's state of mind, a factor the *DeShaney* majority neither needed to nor did consider. In determining whether a given failure to act is a constitutional violation, it is essential to determine how much the official knew about the plaintiff and his need for help. In keeping with both settled authority and widely accepted notions of justice, a standard of "deliberate indifference" is an appropriate measure of whether a particular instance of government inaction fairly may be characterized as abusive.

In the wake of *DeShaney* there is a pressing need to develop standards for distinguishing between proper and improper constitutional affirmative-duty claims. The thesis of this Article is that the best test is one focusing on whether the governmental official exhibits "deliberate indifference" toward the plaintiff's need for help after the government has created a special relationship between the plaintiff and itself.

I. *DESHANEY:* A CRITICAL ANALYSIS

Consider this case: Upon walking out of a nightclub into its parking lot late at night, a man is attacked by robbers. A policeman sits in his patrol car thirty yards away and watches, but does nothing to stop the attack. After the muggers have left, the policeman drives over and tells the victim's friends to take him away.[13] Has the policeman violated a constitutional duty? Should the policeman's motive for not helping make a difference? Suppose the officer is not liable on these facts. Would the result be different if the nightclub's owner had spe-

13. *See* Tucker v. Callahan, 867 F.2d 909 (6th Cir. 1989).

cifically requested police protection after a number of similar incidents, and had foregone private security arrangements in reliance on the police chief's promise that an officer would be present? Suppose the attackers have a long record of such behavior, and were recently released by parole officials despite strong evidence that they would again commit violent crimes. Might these officials be held liable for a constitutional tort? The Supreme Court began the process of untangling these knots with its decision in *DeShaney.*

A. The Facts of the Case

Joshua DeShaney was born in 1979.[14] A year later, his parents divorced and a Wyoming court awarded custody of Joshua to his father, Randy. Shortly thereafter, Randy and Joshua moved to Winnebago County, Wisconsin. Randy remarried, but this second marriage also was short lived. In January 1982, at the time of their divorce, Randy's second wife informed county authorities that Joshua might be a victim of child abuse. Randy denied the allegations when interviewed by Department of Social Service (DSS) officials, and no action was taken. A year later, Joshua was hospitalized with multiple cuts and bruises. The examining physician notified DSS of his suspicions of child abuse. DSS obtained a court order placing Joshua in the temporary custody of the hospital. A "Child Protection Team"[15] met and considered Joshua's situation. They determined there was insufficient evidence to remove Joshua permanently from the custody of his father. The team recommended that Randy secure counseling services, that Joshua be enrolled in a preschool program, and that Randy's current girlfriend be encouraged to move out of the house. Randy signed an agreement promising to accomplish these goals. Based on the recommendation of the Child Protective Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father.

Over the next fourteen months, Joshua's situation did not improve. In February 1983, emergency room personnel notified DSS that Joshua had again suffered injuries suggesting physical abuse. During the next six months, the caseworker handling Joshua's file observed a number of suspicious injuries. She also was aware that Randy had not complied with the voluntary agreement as Joshua was not enrolled in

14. Our account of the facts in *DeShaney* is taken from the Supreme Court's opinion, 109 S. Ct. at 1001–02, and the Seventh Circuit's opinion, 812 F.2d 298, 299–300 (7th Cir. 1987).

15. The team consisted of a pediatrician, a psychologist, a police detective, the county attorney, several DSS caseworkers, and various hospital personnel.

a preschool program and the girlfriend was still living in the house. In November 1983, the emergency room again notified DSS that Joshua had been treated for injuries they believed to be caused by child abuse. On the next two visits to the DeShaney home, the caseworker was told that Joshua was too ill to see her.

Despite this chronology of incidents, the caseworker did not initiate any action to remove Joshua from his father's custody. In March 1984, Randy beat Joshua so severely that he fell into a coma. Surgery revealed a series of hemorrhages caused by blows to the head inflicted over a long period of time. Joshua is expected to spend the rest of his life confined to an institution for the profoundly retarded.

B. In the Courts

Joshua and his mother filed an action under 42 U.S.C. § 1983 against the county, DSS, and various individual employees of DSS alleging that they deprived Joshua of his liberty without due process of law by failing to intervene to protect him from his father. The district court granted summary judgment to the defendants. The Seventh Circuit affirmed on two grounds. First, the court held that the defendants had no duty under the due process clause of the fourteenth amendment to protect Joshua from the violent acts of his father. Second, the causal connection between the defendants' conduct and Joshua's injuries was too attenuated to establish a deprivation of constitutional rights actionable under section 1983.[16]

In affirming the lower courts, the Supreme Court issued a sweeping condemnation of affirmative duties under the due process clause, stressing that "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."[17] The Court cited the language and history of the fourteenth amendment as well as prior decisions in support of its conclusion that the due process clause is not a source of affirmative obligations. The Court declared that no constitutional duty arises when the government has no connection with the plaintiff's need for assistance other than its ability to help.

The majority, however, recognized that Joshua was not a random victim of violence with whom the state had no prior relationship. Caseworkers, child protection teams, and courts had determined that Joshua would remain in the custody of his father. A social worker was assigned to keep an eye on the family. Joshua's attorney argued that

16. *DeShaney,* 812 F.2d at 301–02.
17. *DeShaney,* 109 S. Ct. at 1003.

these connections established a "special relationship," so that state agents had an affirmative obligation to protect him from the special danger of abuse at his father's hands.

In addressing this contention, the Court acknowledged that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."[18] Thus, *Estelle v. Gamble*[19] had found that such a duty arises under the eighth amendment to protect incarcerated prisoners, while *Revere v. Massachusetts General Hospital*[20] and *Youngberg v. Romeo*[21] had cited the due process clause of the fourteenth amendment in extending this affirmative duty to pretrial detainees and involuntarily committed mental patients. In *DeShaney,* however, the Court found that this line of cases was not controlling.

The Court emphasized three factors in concluding that Joshua did not have a special relationship with the state. First, the state did not create Joshua's need for protection. It was Randy DeShaney, a private individual, who was abusing his infant son. Second, this case differed from *Estelle, Revere* and *Youngberg,* in that the state did not confine Joshua, deprive him of means of self defense, or take other positive steps to render him powerless to protect himself. Third, the state's limited intervention in the situation did not render Joshua "more vulnerable" to the dangers or worsen his position.[22] He was endangered by his father before the DSS investigation and no action of the defendants *increased* that risk.

Having concluded that Joshua was not deprived of liberty by state actors, the Court was able to avoid a number of other issues. For example, the Court did not address what state of mind is necessary to make out a substantive due process claim where a special relationship does exist, or whether the defendants in such a case might be entitled to a qualified immunity.[23] Furthermore, given the posture of the case, the Court found it unnecessary to determine whether Wisconsin child

18. *Id.* at 1004–05.

19. 429 U.S. 97, 105–06 (1976) ("deliberate indifference to a prisoner's serious illness" creates a cause of action under § 1983); *see also* Whitley v. Albers, 475 U.S. 312, 326–27 (1986) (suggesting "that a similar state of mind is required to make out a substantive due process claim in the prison setting," *quoted in DeShaney,* 109 S. Ct. at 1005 n.5).

20. 463 U.S. 239 (1983).

21. 457 U.S. 307 (1982).

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

23. *Id.* at 1007 n.10. *Compare* Wood v. Ostrander, 851 F.2d 1212 (1988), *modified,* 879 F.2d 583 (9th Cir. 1989) (no qualified immunity in an affirmative duty case), *cert. denied,* 59 U.S.L.W. 3325 (1990), *with* Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989) (social workers who failed to protect plaintiff-child from violence at the hands of a foster parent were entitled to qualified immunity), *cert. denied,* 110 S. Ct. 2631 (1990).

protection statutes created an "entitlement" to receive protective services.[24] The Court also noted that there was no allegation of discriminatory enforcement of child abuse laws.[25] Finally, the Court flatly suggested that the case might have been decided differently if it involved a modestly different set of relationships, namely, if the state had turned Joshua over to an abusive foster parent rather than returning him to his father.[26]

Justice Brennan, in dissent, did not disagree so much with the general framework of the majority opinion as with its application to the facts of the case. Conceding that the due process clause does not create a "general right to basic governmental services,"[27] he concluded that the extent of state involvement in Joshua's life warranted imposing an affirmative duty. Specifically, Justice Brennan found that the state did worsen Joshua's position by cutting off potential rescuers. "Through its child welfare program . . . the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS."[28] Inaction in this context "can be every bit as abusive of power as action."[29] Justice Blackmun, writing separately, posited that fourteenth amendment precedents could be read broadly or narrowly to suit the desired end. A "moral ambition," he declared, should have led the Court to recognize an affirmative duty toward Joshua.[30]

C. Evaluating the Court's Opinion

The opinion in *DeShaney* makes a halting start toward constructing sensible principles for resolving affirmative duty claims. The Court declares that "the Due Process Clause does not require the State to provide its citizens with particular protective services,"[31] but offers no persuasive justification for this ruling. As if to recognize the inade-

24. *DeShaney,* 109 S. Ct. at 1003 n.2; *see* Doe v. Milwaukee County, 712 F. Supp. 1370 (E.D. Wis. 1989) (holding that the Wisconsin statutes do not create an entitlement to protective services), *aff'd,* 903 F.2d 499 (7th Cir. 1990). For an extended discussion of this theory of recovery, see Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act,* 53 U. CHI. L. REV. 1048 (1986).

25. *DeShaney,* 109 S. Ct. at 1004 n.3; *see* Lowers v. City of Streator, 627 F. Supp. 244, 246 (N.D. Ill. 1985) (alleging sexually discriminatory enforcement of laws in domestic violence situations).

26. *DeShaney,* 109 U.S. at 1006 n.9.

27. *Id.* at 1007–08 (Brennan, J., dissenting).

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

29. *Id.* at 1012 (Brennan, J., dissenting).

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

31. *Id.* at 1004.

quacy of this broad prohibition, the Court proceeds to qualify it by acknowledging that the Constitution sometimes can be the source of affirmative duties. But the Court's effort to describe those circumstances and explain what factors count in identifying them produces more questions than answers.

1. Is the Constitution "A Charter of Negative Liberties"?

The most sweeping portions of the *DeShaney* opinion speak to the case in which government officers have played no part in exposing the plaintiff to danger. The Court unequivocally rejects the proposition that the due process clause obligates state officials to protect individuals from attacks by private persons.[32] In reaching this conclusion, the Court relies on the language, history, and prior judicial construction of the fourteenth amendment. The Court's analysis merits close scrutiny. None of these reasons, individually or collectively, provides an adequate explanation for the rejection of a constitutional affirmative duty. The Court's reliance on these tools of constitutional adjudication seems ill-advised, for language, history, and precedent yield only fragmentary and contradictory guidance to the resolution of inaction cases. They neither compel nor forbid the recognition of a constitutional duty to act.

a. Language

According to the Court, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[33] The Court's hidden assumption is that the word "deprive" denotes only positive acts. One accepted definition of this word, both today and in late eighteenth century usage, however, is "to keep [a person from] what he would otherwise have."[34] Under this usage, one may be "deprived" of valuable interests through inaction as well as action. Thus, one could readily conclude that the state's inaction deprived Joshua DeShaney of liberty without doing violence to the language of the due process clause.[35] It begs the question to say that the state did not deprive Joshua of liberty because it did not act.

32. *Id.* at 1003.

33. *Id.*

34. 4 THE OXFORD ENGLISH DICTIONARY 490 (2d ed. 1989); *see also* WEBSTER'S NEW WORLD DICTIONARY 380 (2d College ed. 1986).

35. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970) (state unconstitutionally "deprives" a person of welfare benefits when it withholds benefits to which he is legally entitled).

Such quibbling over the meaning of the word "deprive" points up a more general objection to relying exclusively on language to resolve fundamental constitutional questions. Constitutional language, standing alone, is a notoriously unreliable guide to the Court's construction of constitutional provisions, including the due process clause.[36] If the literal language of the Constitution were dispositive, then only Congress would be prohibited from abridging freedom of speech and religion.[37] The first amendment says nothing about the actions of judges, the President, or other government officials. Yet, it is abundantly clear that the first amendment restrains all branches of government.[38] In another vein, the Court has imposed constitutional limitations on state regulation of interstate commerce, even though the Constitution speaks only of Congress' authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[39] The so-called negative implications of the commerce clause cannot be fairly derived exclusively from constitutional language. It is a doctrine born more of policy than constitutional language.[40] Yet another example comes from the law of state sovereign immunity from suit in federal court. The eleventh amendment prevents federal courts from entertaining suits "prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[41] Neither the original Constitution nor the amendment says anything about suits brought against a state by a citizen of that state. Yet, the Court has long read them to immunize states from suit in federal courts even where the suit is brought on federal law grounds by one of the state's own citizens.[42]

---

36. We do not mean that one should interpret the Constitution as if it were "a poem." Laycock, *Constitutional Theory Matters,* 65 TEX. L. REV. 767, 774 (1987). Language and text do count. On some issues the Constitution speaks with such precision that there is no room or need for interpretation; for example, the age prerequisite for the presidency. We recognize, however, that many provisions of the Constitution are indeterminate. In giving content to open-ended constitutional commands such as the due process or privileges and immunity clauses, judges will necessarily make substantive choices. *See generally,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 12–15 (2d ed. 1988); L. TRIBE, CONSTITUTIONAL CHOICES (1985).

37. The amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

38. *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971) (executive branch); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (judicial branch).

39. U.S. CONST. art. I, § 8.

40. *See* Eule, *Laying the Dormant Commerce Clause to Rest,* 91 YALE L.J. 425, 429–35 (1982).

41. U.S. CONST. amend. XI.

42. Welch v. Texas Dep't of Highways & Public Transp., 483 U.S. 468 (1987); Hans v. Louisiana, 134 U.S. 1 (1890).

The Court's treatment of the due process clause itself belies the constraining force it ascribes to constitutional language. The first eight amendments to the Constitution restrain only the federal government. With the ratification of the fourteenth amendment in 1868 came the imposition of due process and equal protection restrictions on the exercise of state authority. It was not until much later, however, that some of the specific prohibitions contained in the Bill of Rights were deemed applicable to the states. In a series of cases decided mainly in the 1960's, the Court ruled that selective provisions of the Bill of Rights were incorporated into the fourteenth amendment through the due process clause.[43]

From the standpoint of linguistic precision, the due process clause is the one section of the fourteenth amendment that plainly does not incorporate part of the Bill of Rights. The due process clause of the fourteenth amendment is modeled, word for word, on a clause in the fifth amendment. The phrase "due process" in the fifth amendment does not address free speech, search and seizure, or other restrictions on governmental power found in other amendments. How then can the due process clause of the fourteenth amendment plausibly be deemed to stand for the provisions of the first, fourth, sixth, and eighth amendments, as well as other parts of the original fifth amendment? While the fourteenth amendment may properly impose upon the states some of the same limitations placed on the federal government by the Bill of Rights,[44] it is surely not because the language of the due process clause directs that result.

b. History

The Court's reliance on history to support its rejection of affirmative constitutional duties also lacks persuasive force. The gist of the Court's reasoning is that the fourteenth amendment was directed at abuses of governmental power. From this observation the Court concludes that the purpose of the due process clause "was to protect the people from the State, not to ensure that the State protected them

43. *E.g.*, Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

44. Many scholars suggest that the prohibitions on the exercise of federal power contained in the Bill of Rights apply equally against the state under the privileges and immunities clause of the fourteenth amendment. J. TEN BROEK, EQUAL UNDER LAW, 236–39 (1965); L. TRIBE, *supra* note 36, at 550. The Supreme Court greatly narrowed the reach of the privileges and immunities clause in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The privileges and immunities clause has been called "the almost forgotten . . . clause." Colgate v. Harvey, 296 U.S. 404, 443 (1935) (Stone, J., dissenting), *overruled on other grounds,* Madden v. Kentucky, 309 U.S. 83 (1940).

from each other."[45] Judge Posner made a similar historical argument in *Jackson v. City of Joliet.*[46] Pointing out that the fourteenth amendment was adopted in 1868, "at the height of laissez-faire thinking," he declared that the amendment "sought to protect Americans from oppression by state government, not to secure them basic governmental services."[47]

The historical record is not as unambiguous as Chief Justice Rehnquist and Judge Posner suggest. The framers of the fourteenth amendment and section 1983 were not so much captains of industry enamored by free market capitalism as idealistic abolitionists who had fought slavery for thirty years. The statute was originally known as the Ku Klux Klan Act, because it was inspired by Klan violence against blacks and their white supporters.[48] In order to justify creating a new federal remedy for constitutional wrongs, its supporters had to rebut the argument that it was an unnecessary incursion on state authority because local law enforcement officers could maintain law and order. Their response was to produce evidence of Klan terrorism that had elicited no response from local sheriffs.[49] Thus, the statute "was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages."[50]

Moreover, there is affirmative evidence that the fourteenth amendment was intended to recognize a state's obligation to protect its citizens from harm. The privileges and immunities clause of the fourteenth amendment provides that "[n]o State shall . . . abridge the privileges or immunities of citizens of the United States."[51] During the debates over the fourteenth amendment, proponents explained the meaning of this provision by quoting from Justice Bushrod Washington's 1823 opinion in *Corfield v. Coryell.*[52] In his *Corfield* opinion, Justice Washington explained the privileges and immunities clause of article IV, section 2 of the Constitution. That section provides that

45. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1003 (1989).

46. 715 F.2d 1200 (1983), *cert. denied,* 465 U.S. 1049 (1984).

47. *Id.* at 1203.

48. *See* Monroe v. Pape, 365 U.S. 167, 172–80 (1961), *overruled on other grounds,* Monell v. Department of Social Servs. of City of New York, 436 U.S. 658 (1978). *See generally* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965).

49. *See* Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules,* 19 CONN. L. REV. 53, 66 & n.90 (1986).

50. Note, *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1154 (1977); *see also* Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney,* 57 GEO. WASH. L. REV. 1513, 1524–25 (1989).

51. U.S. CONST. amend. XIV.

52. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

"[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,"[53] and inspired the fourteenth amendment's broader guarantee. The very first right identified by Justice Washington as a privilege of citizenship is the right to "[p]rotection by the government."[54] Senators Trumbull and Howard quoted this passage from *Corfield* with approval when explaining their understanding of the privileges and immunities clause of the fourteenth amendment.[55]

Does the favorable quotation of *Corfield* by two influential senators mean that the framers of the fourteenth amendment intended the Winnebago County Department of Social Services to protect Joshua DeShaney as a matter of constitutional right? Of course not. As William Nelson explains in his recent book, "supporters of the Fourteenth Amendment spent little time elaborating how it would apply to specific issues they faced."[56] They "understood constitutional politics as a rhetorical venture designed to persuade people to do good, rather than a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms."[57] Their task was perceived as a moral one of proclaiming vague principles of civic reformation. Consequently, it is futile to place too much reliance on the history of the adoption of the fourteenth amendment in an effort to resolve specific issues raised for the first time more than one hundred years after its ratification.[58]

Even if reliable information were available about the framers' intent, we should be skeptical of the Court's suggestion in *DeShaney* that it considers itself bound by such history. Longstanding practice casts doubt on the Court's fidelity to the framers' intent as the basic standard of constitutional interpretation. The Court's narrow construction of the privileges and immunities clause in the *Slaughter-House Cases,*[59] for example, was "flatly inconsistent with the history of its framing in Congress and its ratification by the state legislatures."[60]

53. U.S. CONST. art. IV, § 2.

54. *Corfield,* 6 F. Cas. at 551.

55. CONG. GLOBE, 39th Cong., 1st Sess. 475 (Jan. 29, 1866) (remarks of Sen. Trumbull); *id.* at 2765 (May 23, 1866) (remarks of Sen. Howard); *see* W. NELSON, THE FOURTEENTH AMENDMENT 81 (1988).

56. W. NELSON, *supra* note 55, at 9.

57. *Id.*

58. For a more complete discussion on the limitations of history as a basis of constitutional interpretation, see Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204 (1980); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?,* 73 CALIF. L. REV. 1482 (1985).

59. 83 U.S. (16 Wall.) 36 (1873).

60. W. NELSON, *supra* note 55, at 163; *see also* L. TRIBE, *supra* note 36, at 548–53.

There is also strong evidence that most of the framers of the fourteenth amendment intended no bar on segregated public schools,[61] yet the Supreme Court has held that racial segregation violates the equal protection clause.[62]

Opinions addressing the application of the Bill of Rights to the states also reflect the court's selective reliance on history. Some scholars argue that the framers of the fourteenth amendment meant to "incorporate" the Bill of Rights into it, so that the rights to speech, free exercise of religion, jury trial, and the rest, would apply against state governments.[63] Other historians dispute that thesis.[64] Each side marshalls historical evidence for its position.[65] No one argues that the framers meant to incorporate only selective portions of the Bill of Rights. The historical evidence[66] all goes to the broad issue whether the Bill of Rights should be applied, *en bloc,* to the states. Yet, the Court's approach has been profoundly ahistorical. It has rejected both sides of the historical debate in favor of "selective incorporation," picking and choosing among constitutional rights. The Court applies the first, fourth, sixth and eighth amendments against the states, while refusing to subject them to the grand jury clause of the fifth amendment or the right to jury trial in civil cases guaranteed by the seventh amendment. The Court's actual practice has no historical pedigree whatsoever.[67] These are but a few examples that support the belief that one cannot accept at face value the Court's assertion that the result in *DeShaney* follows from the history of the enactment of the fourteenth amendment.

c. Precedent

The Court in *DeShaney* noted that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to gov-

61. *See* R. BERGER, GOVERNMENT BY JUDICIARY 118–19 (1977); W. NELSON, *supra* note 55, at 133.

62. Brown v. Board of Educ., 347 U.S. 483 (1954).

63. The most prominent proponent of this view was Justice Hugo Black. *See, e.g.,* Adamson v. California, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting), *overruled on other grounds,* Malloy v. Hogan, 378 U.S. 1 (1964).

64. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding,* 2 STAN. L. REV. 5 (1949).

65. *See* G. GUNTHER, CONSTITUTIONAL LAW 424 n.2 (11th ed. 1985) ("Searches in the origins of the [fourteenth] [a]mendment have been inconclusive.").

66. Compare the Appendix to Justice Black's dissenting opinion in Adamson v. California, 322 U.S. at 92–123, with Professor Fairman's review of the history of the fourteenth amendment, *supra* note 64.

67. *See* Duncan v. Louisiana, 391 U.S. 145, 175–76, 180–81 (Harlan, J., dissenting).

ernmental aid."[68] In support of this proposition, the Court cited opinions proclaiming that there is no fundamental right to adequate housing,[69] and that the government has no constitutional obligation to fund abortions or other medical services.[70] These cases do indeed support the thesis that the Constitution is primarily a "charter of negative liberties."[71] The abortion funding cases in particular draw a sharp distinction between governmental prohibitions and the obligation of government to assist an individual in exercising rights secured by the Constitution.[72]

Other cases, however, find positive governmental obligations in various constitutional provisions, including the due process clause. Scholars have documented many instances in which the Supreme Court has found in negatively phrased provisions constitutional duties that can be described as positive in some sense.[73] Besides the line of cases from *Estelle* to *Youngberg* to *Revere* on duties owed to involuntarily confined persons, note the obligation to provide counsel to indigent criminal defendants,[74] the obligation to provide access to information,[75] the obligation to provide access to government facilities to engage in communicatative activity,[76] and other arguably affirmative duties constitutionally imposed on government.[77] To the extent these rulings require the state to act affirmatively they do so by reason of the same due process clause the Court describes in restrictive terms in *DeShaney.*

One decision that strongly suggests that "due process" may involve state protection is *Truax v. Corrigan.*[78] This 1921 opinion involved an employer's request for an injunction against picketing by striking workers. The Court ruled that, by withdrawing the injunctive remedy, the state had deprived the employer of property without due process of law. The Court, in effect, read the due process clause to require the state to protect the employer from acts of private parties. This, of course, closely parallels the theory rejected in *DeShaney.*

68. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1003 (1989).
69. Lindsey v. Normet, 405 U.S. 56 (1972).
70. Harris v. McRae, 448 U.S. 297 (1980); *see also* Maher v. Roe, 432 U.S. 464 (1977).
71. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
72. L. TRIBE, *supra* note 36, at 781–84.
73. Currie, *supra* note 7, at 872–86.
74. Gideon v. Wainwright, 372 U.S. 335 (1963).
75. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–76 (1980).
76. *See* Cass, *First Amendment Access to Government Facilities,* 65 VA. L. REV. 1287 (1979).
77. *See* Currie, *supra* note 7, at 872–86; *see also* Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873, 888–91 (1987).
78. 257 U.S. 312 (1921). *Cf.* Kaiser Aetna v. United States, 444 U.S. 164, 178–80 (1979) (suggesting that the government is obligated to enforce trespass laws against private intruders to avoid a "taking" of property).

Lawrence Tribe proposes *Boddie v. Connecticut*[79] as the progenitor of the state's duty to rescue Joshua DeShaney from his father's abuse.[80] *Boddie* was a challenge by an indigent couple to the state's filing fee for divorce. The Court invalidated the fee on the ground that due process "does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."[81] Essentially, *Boddie* requires the state to subsidize divorces of indigent persons because of the state's control over the mechanisms for obtaining a divorce. In *DeShaney* the Court might have focused on the parallel between Connecticut's monopoly on the means for obtaining divorce and Wisconsin's decision to channel complaints about child abuse to social services agencies. As a practical matter, the Winnebago County Department of Social Services exercised as much control over Joshua's exposure to a violent parent as the Connecticut courts had over divorce.[82]

Prior case law may not compel a different result in *DeShaney,* but neither does it preclude it. David Currie warns that "it would be dangerous to read too much, even at the theoretical level, into the generally valid principle that ours . . . is a Constitution of negative rather than positive liberties."[83] There are too many counter examples in which the Court has imposed a positive constitutional obligation. Justice Blackmun was correct when he noted that the question presented by Joshua's claim was "an open one."[84]

2. *How Much State Involvement Is Necessary?*

DeShaney squarely rejects liability in constitutional tort when the governmental defendant has no connection to the plaintiff other than its ability to render aid. The defendants in *DeShaney,* however, were not strangers to the events giving rise to Joshua's need for protection.

79. 401 U.S. 371 (1971).

80. *See* Tribe, *supra* note 9, at 11–12.

81. *Boddie,* 401 U.S. at 374.

82. *See* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1011 (1989) (Brennan, J., dissenting). In his dissent, Justice Brennan observed that:

> [A] private citizen or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. . . . [T]he State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap.

Id.

83. Currie, *supra* note 7, at 887. Currie also dismisses as "profoundly ahistorical" the notion that the Constitution offers a positive right to basic welfare services. *Id.* at 878.

84. 109 S. Ct. at 1012 (Blackmun, J., dissenting).

State officials had first taken custody of Joshua and then returned him to the care of his father. Caseworkers monitored the situation and determined whether Joshua should remain in the abusive environment. Reports of suspicious injuries were channeled to the defendants pursuant to state law. Joshua argued that these facts coupled with his need for protection were sufficient to create an affirmative duty in constitutional tort based on a special relationship between himself and the state.

The majority in *DeShaney* rejected this argument, but never adequately explained why. Rather, Justice Rehnquist's opinion meanders among three distinct alternatives, and appears not to recognize that the three approaches might produce different results in future cases. By not clearly differentiating among the three approaches, *DeShaney* sends an ambiguous message that has already produced considerable confusion in the lower courts.[85]

a. Involuntary Confinement

Justice Rehnquist began his consideration of state involvement by acknowledging that the Constitution sometimes "imposes upon the State affirmative duties of care and protection with respect to particular individuals."[86] For this proposition he cited *Estelle v. Gamble*[87] and *Youngberg v. Romeo.*[88] In *Estelle,* a prisoner claimed he received inadequate medical attention and the Court said that "deliberate indifference" to his needs would violate the eighth amendment's prohibition on cruel and unusual punishment.[89] *Youngberg* applied this principle under the doctrine of substantive due process to cover the basic needs of persons involuntarily confined in mental institutions.[90]

According to the Court these cases provided "no help" to Joshua,[91] because the plaintiffs in both *Estelle* and *Youngberg* were persons confined by the state against their will. The rationale of those cases was that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by

85. *See infra* notes 99–100 and accompanying text.
86. *DeShaney,* 109 S. Ct. at 1004–05.
87. 429 U.S. 97 (1976).
88. 457 U.S. 307 (1982).
89. 429 U.S. at 104.
90. 457 U.S. at 314–25.
91. *DeShaney,* 109 S. Ct. 998, 1005 (1989).

the Eighth Amendment and the Due Process Clause."[92] Had the Chief Justice stopped there, the opinion would stand for the broad principle that the state owes affirmative duties only to those it involuntarily confines. Some early commentary on *DeShaney* has, too hastily in our view, adopted this very expansive reading of the case.[93]

b. Analogies to Confinement

The Court, however, felt compelled to go further. Evidently unsatisfied with an involuntary confinement rule, Chief Justice Rehnquist added that the case might come out differently had the state not returned Joshua to his father but instead placed him in a foster home. On these facts, the Court explained, "we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[94] The Court's disposition of then-pending affirmative duty cases indicates that this suggestion must be taken seriously. In two cases, the Court followed its routine practice of vacating the lower court's judgments and remanding the cases for reconsideration in light of *DeShaney*.[95] A third case, *Taylor v. Ledbetter*,[96] presented the constitutional tort claim of a child beaten by his foster parent. The Eleventh Circuit had affirmed an award in favor of the child based on social workers' failure to protect him. The Court denied certiorari, thus allowing the circuit court's ruling to stand. The "sufficiently analogous" language in *DeShaney* and the denial of certiorari in *Ledbetter* suggest the Court may not mean to limit the protective scope of affirmative duties to involuntarily confined plaintiffs. Others whose circumstances are similar to confinement, in some as yet undefined way, may benefit from a constitutionally grounded affirmative duty of protection.[97]

92. *Id.* at 1005–06.

93. Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 570 n.219 (1989); Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659, 662–63 (1990); Soifer, *supra* note 9, at 1527; Strauss, *supra* note 9, at 55; Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C.L. REV. 1357, 1371 (1989).

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

95. Smith v. Stoneking, 856 F.2d 594 (2d Cir. 1989), *vacated*, 109 S. Ct. 1333 (1989); City of New Kensington v. Horton, 857 F.2d 1464 (3d Cir. 1988), *vacated*, 109 S. Ct. 1334 (1989).

96. 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989); *see also* K.H. v. Morgan, 914 F.2d 846 (1990) (state officials owe a constitutional duty to protect a child placed in a foster home).

97. The Supreme Court's message remains ambiguous. The Court recently denied certiorari to a Fourth Circuit case holding that government welfare officials were not to be held responsible for the abusive acts of a state approved foster parent with whom a child had been voluntarily placed. Milburn v. Anne Arundel Dep't. of Social Servs., 871 F.2d 474 (4th Cir.), *cert. denied*,

c. Special Relationships

The Court's discussion of circumstances that may give rise to a duty to act did not end with confinement and its analogues. The Court offered a third, and much narrower, ground for denying relief. It emphasized that the state "played no part" in creating the dangers Joshua faced, did nothing "to render him any more vulnerable to them," and left him "in no worse position than that in which he would have been had it not acted at all."[98] This suggests that if the state contributes in some way to a person's peril, or if its undertakings worsen the plaintiff's position, a constitutional duty to act might arise. The state may create danger or render a person more vulnerable without constraining him in any way. Familiar examples include the release of a criminal known to be dangerous without warning potential victims, or inducing someone to rely on state protection and then failing to provide it. The Court's third approach to justifying its denial of relief to Joshua DeShaney leaves ample room to recognize a constitutional duty in either such case.

The Court's failure to clearly identify what type of state involvement will give rise to an affirmative duty has already produced confusion. Since *DeShaney,* several lower courts have suggested that the state is constitutionally obligated to protect only those it involuntarily confines.[99] Other courts continue to recognize affirmative duties in

110 S. Ct. 148 (1989). The Fourth Circuit based its ruling on the alleged absence of state action. The court drew support from Supreme Court decisions finding that private action adversely affecting liberty or property interests is not subject to the demands of procedural due process, notwithstanding some involvement of the state. *E.g.,* Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). The Fourth Circuit reasoned that since the foster parent of a voluntarily placed infant was not a state actor, child welfare authorities were not legally responsible for preventing the abuse. *Milburn,* 871 F.2d at 479. The state action cases are only marginally relevant to the recognition of affirmative duty in constitutional tort. On a superficial level, both lines of cases often present questions of whether the state bears any responsibility for the conduct of a nominally private actor. On closer examination, however, the two lines of cases raise distinctly different issues. The affirmative duty cases raise the question of whether the state owes an obligation to protect the plaintiff from some peril—not whether the peril itself can be said to be that of the state.

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

99. *E.g.,* J.O. v. Alton Community Unit School Dist. No. 11, 909 F.2d 267 (7th Cir. 1990) (no duty to protect school children from sexually abusive teacher); *Milburn,* 871 F.2d at 478 n.2 (distinguishing between voluntary and involuntary foster home placements); Philadelphia Police & Fire Ass'n v. City of Philadelphia, 874 F.2d 156, 168 (3d Cir. 1989) (affirmative duties under *DeShaney* must be predicated upon the state's "act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint on personal liberty"); Dean v. D. Raucci, No. 87-C-7697 (N.D. Ill. Mar. 31, 1989) (LEXIS, Genfed library, Dist file) (no duty to protect complaining witness who voluntarily accompanies investigating officer into a suspect's apartment); McPeak v. City of Philadelphia, No. 88-6716

noncustodial settings.[100] The paramount affirmative duty issue facing both the Supreme Court and the lower courts in the aftermath of *DeShaney* is to determine what kinds of governmental contributions to the plaintiff's predicament will trigger the guarantees of the due process clause. To this issue we now turn.

II. FOUNDATIONS FOR A REVISED DOCTRINE

The gaps in the Court's *DeShaney* opinion stem from its failure to recognize the fundamental value choices raised by affirmative duty claims in constitutional tort. The Court's focus on constitutional language and its superficial citation to precedent reflect reluctance to address questions of constitutional principle and tort policy that must be resolved in reaching wise decisions in this field of law. In terms of tort policy, it is necessary to take account of conflicting demands for public resources and of the need to maintain leeway for officials to exercise their judgment. In addition, because these cases are of constitutional dimension, the Court also must consider the special features of constitutional rules. While due process clause does not provide a remedy for every injury caused by government, properly construed it should protect persons from abuses of governmental power.

A. Tort Policy and Affirmative Duty

The argument for recognizing a government's duty to aid its citizens is straightforward. The imposition of an affirmative duty subjects the passive official to potential tort liability. Exposure to liability provides

(E.D. Pa. Apr. 3, 1989) (LEXIS, Genfed library, Dist file) (no duty to protect criminal defendant who jumped out of courtroom window since he was on bail and not in defendant's custody); *see also* sources cited *supra* note 93.

100. *E.g.*, Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990) (duty to protect citizen from former policeman who was permitted to retain his gun despite being placed on the medical roll as mentally unfit for duty); Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) (police chief who refused to enforce a restraining order may be held liable in constitutional tort for injuries inflicted by the chief's friend); Horton v. Flenory, 889 F.2d 454 (3d Cir. 1989) (policy of relegating law enforcement in private clubs to proprietor may be the cause of the plaintiff's injury); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) (duty to protect town clerk from inmates assigned to community work squad implied when court reversed trial court's order granting state's motion for summary judgment, finding existence of duty a triable question), *cert. denied,* 110 S. Ct. 1784 (1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (duty to protect passenger left stranded by police in high crime area implied when court reversed trial court's order granting defendant's summary judgment motion), *cert. denied,* 59 U.S.L.W. 3325 (1990); G-69 v. Degnan, 745 F. Supp. 254 (D.N.J. 1990) (duty to protect undercover informant enrolled in government program); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) (duty owed to 15,000 children in the legal, but not physical, custody of the Illinois Department of Children and Family Services); Pagano v. Massapequa Pub. Schools, 714 F. Supp. 641 (E.D.N.Y. 1989) (duty to protect elementary school pupil).

an incentive to act. So long as the costs of protection are less than the potential liability, the rational official will act to protect the person in peril. Encouraging cost effective protective action would reduce the overall injury costs to society and eliminate some harms to some individuals.[101] The duty to act can also be defended in terms of reinforcing widely shared understandings of the proper role of government. Most people would think it "wrong" for a police officer to passively observe a citizen being robbed or beaten. Imposing an affirmative duty in such a case vindicates the plaintiff's expectations of protection and provides a means for redressing the wrong.[102]

Despite these considerations, courts remain cautious in recognizing common law tort affirmative duties for public officials.[103] The ensuing discussion identifies several policy considerations that counsel against imposing widespread affirmative duties.

1. Discretionary Allocation of Public Resources

Before the Supreme Court's ruling in *DeShaney,* several lower court opinions explained the judicial reluctance to recognize affirmative constitutional tort duties in terms of preserving legislative and executive discretion. Government is a complex enterprise in which hard choices must be made as to how best to deploy limited resources. Money spent on better police or fire protection may have to be taken away from the budget for schools or providing shelter for the homeless. Since "[t]his choice is one without a single right answer," it is "one for the political rather than the judicial branches."[104] In short, good government requires the exercise of legislative and executive discretion in deciding how to use limited resources. This rationale for rejecting affirmative duties is concerned with the distribution of power within government. It reflects a confidence that the legislative and executive branches can properly define the obligations of government and allocate resources to achieve public goals. Judicial intervention through

101. The deterrent function of tort law is elaborately explicated in the law and economics literature. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Landes & Posner, *The Positive Economic Theory of Tort Law,* 15 GA. L. REV. 851 (1981).

102. *See* Owen v. City of Independence, 445 U.S. 622, 653–55 (1980). Tort law traditionally defines legal rights, provides a means for vindicating those rights, and compensates those whose rights have been violated. *See generally* AM. BAR ASS'N, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW ch. 3–4 (1984); 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 11.5 (1986).

103. *See* Wells & Eaton, *supra* note 7, at 3–13.

104. Archie v. City of Racine, 847 F.2d 1211, 1221 (7th Cir. 1988), *cert. denied,* 109 S. Ct. 1338 (1989).

the imposition of constitutional tort liability would disrupt the balance of competing interests achieved through the democratic political process.

In evaluating this argument, it bears noting that there is nothing distinctly constitutional about a judicial policy favoring the preservation of executive and legislative discretion. Many decisions under state tort law have rejected the imposition of affirmative duties on governments for the same reason. The "public duty doctrine"[105] of state tort law is predicated upon the belief that the politically responsive branches of government should determine the mix of goals to pursue and how to spend public resources in pursuit of those goals. As explained in the classic case of *Riss v. City of New York:*

> For the courts to proclaim a new and general duty of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits.[106]

Judicial deference to the other branches of government also appears in affirmative duty cases brought against the United States under the Federal Tort Claims Act.[107] The discretionary function exception to the Act[108] is designed to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[109] The scope of discretion appropriately insulated from judicial second guessing is a matter of considerable controversy.[110] The discretionary function exception has been invoked to deny recovery in affirmative duty

105. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 1049 (5th ed. 1984).

106. 22 N.Y.2d 579, 240 N.E.2d 860, 860–61, 293 N.Y.S.2d 897 (1968). Linda Riss repeatedly asked the police to protect her from a rejected lover who threatened to injure her if she married another man. The threats were carried out by a hired thug who threw lye in her face. The court dismissed her tort suit, holding that the city had no duty to protect her from the attack.

107. 28 U.S.C. § 1346(b) (1988) (permitting tort suits against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

108. 28 U.S.C. § 2680(a) (excepting from the coverage of 28 U.S.C. § 1346(b) claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused").

109. United States v. S.A. Empresa De Viacao Aerea Rio Grandense Varig Airlines, 467 U.S. 797, 814 (1984).

110. *See* Fishback & Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz,* 25 IDAHO L. REV. 291 (1988–1989); James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity,* 10 U. FLA. L. REV. 184 (1957).

cases involving the protection of witnesses,[111] prison inmates,[112] jurors,[113] and property owners.[114]

DeShaney may be understood in terms of traditional tort doctrine that respects executive and legislative discretion in setting broad policy. By rejecting Joshua's constitutional tort claim, the Court deferred to the State of Wisconsin's judgment as to how best to respond to the delicate social problem of child abuse. Partisans of giving leeway to the executive and legislature do not assert that officials will always make wise choices. They maintain that bad decisions may be corrected through the political process or by common law rules subject to state legislative oversight.

The argument for policy-making discretion is not without force. The judicial process is hardly suited to the task of setting governmental policy, nor is it appropriate in a democracy to place so much power in the hands of politically unaccountable judges. Notice, however, that the strength of the argument varies from one context to another, depending on the particularity of the decision at issue. It is strongest when contemplating judicial interference in general decisions by the legislature or executive on how to allocate resources among the departments of government. It is weakest in situations where courts are asked to impose liability on executive officers faced with specific facts, like the policeman who watches from his patrol car as the plaintiff is beaten or the social services worker who *knows* a parent is abusing a child under her supervision. Judicial interference in this kind of decision will have only minor impact on the ability of legislative and executive officers to set governmental policy.

2. *Operational Discretion and Tough Choices*

Some decisions rejecting affirmative duties emphasize the need to preserve discretion on an operational level. The relationship between operational discretion and affirmative duty implicates the values of fairness to officials and efficiency in the day-to-day administration of government. One sympathizes with the police officer or social worker called upon to make difficult decisions under the excitement of the moment. In *DeShaney,* for example, the Court viewed county child

111. Piechowicz v. United States, 885 F.2d 1207 (4th Cir. 1989). *But see* Miller v. United States, 561 F. Supp. 1129 (E.D. Pa. 1983) (duty to protect an informant), *aff'd,* 729 F.2d 1148 (3d Cir. 1984).

112. United States v. Muniz, 374 U.S. 150, 163 (1963).

113. Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967).

114. Monarch Ins. Co. v. District of Columbia, 353 F. Supp. 1249, 1256–58 (D.D.C. 1973), *aff'd mem.,* 497 F.2d 684 (D.C. Cir.), *cert. denied,* 419 U.S. 1021 (1974).

welfare authorities as being trapped between the proverbial rock and a hard place. "[H]ad they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection."[115] The government officials must either act or not act, and either decision may subject them to liability.[116] The harshness of this choice may be unfair to the individual official.[117] This argument also has an instrumental dimension. Faced with the prospect of tort liability for their errors, officials may become too cautious. Hence, expanding the scope of constitutional duty may impede the efficient operation of government.[118]

While these concerns are legitimate, they do not justify the rejection of affirmative duties. In the first place, a court need not deny the existence of an affirmative duty to alleviate the dilemma facing the state official. Relief from liability is provided through the doctrine of qualified immunity. Officials cannot be held personally liable in constitutional tort unless their decisions violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[119] Thus, qualified immunity should protect all officials who are forced to make the truly hard choice. More importantly, the denial of affirmative duties skews the decision-making process by creating incentives for inaction. Before and after *DeShaney,* the decision to remove a child from a home could lead to liability, subject to the defense of qualified immunity.[120] After *DeShaney,* the decision to do nothing is beyond challenge in constitutional tort. *DeShaney* tells the social worker that it is safer from a standpoint of personal liability to

115. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1007 (1989).

116. *Cf.* K.H. v. Morgan, 914 F.2d 846, 853 (1990) ("[W]e do not want to place child welfare workers on a razor's edge—damned if they return the child to its family and damned if they retain custody of the child . . . ."); *see also* Walker v. Rowe, 791 F.2d 507, 512 (7th Cir.) (rejecting suit by prison guards against their superiors for inadequate protection from prisoners, partly because greater efforts to protect the guards may lead to suits by prisoners), *cert. denied,* 479 U.S. 994 (1986).

117. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

118. *See, e.g.,* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). For a detailed treatment of the problem of "overdeterrence" of government officials, see Cass, *Damage Suits Against Public Officers,* 129 U. PA. L. REV. 1110, 1133–74 (1981).

119. *Harlow,* 457 U.S. at 818; *see also* Anderson v. Creighton, 483 U.S. 635, 639–40 (1987). Furthermore, the denial of a defendant's motion for summary judgment on the basis of qualified immunity sometimes can be appealed immediately, so that the official may not even have to stand trial. Mitchell v. Forsyth, 472 U.S. 511 (1985). *See generally* Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions,* 23 GA. L. REV. 597 (1989).

120. *See, e.g.,* Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989), *cert. denied,* 110 S. Ct. 2631 (1990); Lux *ex rel.* Lux v. Hansen, 886 F.2d 1064, 1066–67 (8th Cir. 1989); Achterhof v.

leave an endangered child in the home than to attempt to remove him. The decision-making process would be more balanced if the risk of personal liability did not depend on the characterization of the decision as an act or omission. In short, the blanket rejection of affirmative duties is neither an essential nor a prudent way of preserving operational discretion.

3. Fear of the Slippery Slope

Some judges fear that any recognition of affirmative duties will inexorably lead to a dangerous expansion of the role of government in our lives. In *Jackson v. City of Joliet,*[121] the court held that a police officer who happens upon an automobile accident owes no duty to look for or rescue a person trapped in the car. In his opinion, Judge Posner explained that if this plaintiff were successful, "[t]he next case . . . will be one where the police and fire departments, maybe because of budget cuts, do not arrive at the scene of the accident at all." The ultimate logic of the plaintiff's argument, Judge Posner concludes, leads to a general constitutional "duty to provide basic services."[122] These passages reflect the concern that imposing any affirmative duty on state officials is the first step down the "slippery slope" towards the evils of big government.

One should approach slippery slope arguments with caution. Most statements of legal principle may be criticized on slippery slope grounds. Recognition of any duty under the fourteenth amendment, for example, creates a danger that courts will extend the scope of that duty to an inappropriate case. The risk of tumbling down such a slippery slope, however, does not justify judicial refusal to recognize any fourteenth amendment rights.

In addition, the implicit premise of the slippery slope is that there is nothing wrong in the "first step," other than it will lead to bad out-

Selvaggiuo, 886 F.2d 826, 829–30 (6th Cir. 1989); Doe v. Bobbitt, 881 F.2d 510 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 2560 (1990).

Other recent cases have held that decisions of child welfare workers whether or not to remove a child from the home are prosecutorial in nature, and hence social workers should receive absolute immunity when making these decisions. *See, e.g.,* Salyer v. Patrick, 874 F.2d 374, 377–78 (6th Cir. 1989); Babcock v. Tyler, 884 F.2d 497, 501–02 (9th Cir. 1989), *cert. denied,* 110 S. Ct. 1118 (1990); Vosburg v. Department of Social Servs., 884 F.2d 133, 135 (4th Cir. 1989); Coverdell v. Department of Social & Health Servs., 834 F.2d 758, 762–63 (9th Cir. 1987). If this view gained widespread support, children in Joshua's position would have no remedy *even if* governmental inaction states a constitutional violation.

121. 715 F.2d 1200 (7th Cir. 1983), *cert. denied,* 465 U.S. 1049 (1984).

122. *Id.* at 1204; *see also* Archie v. City of Racine, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc) (rejecting an affirmative duty claim and warning of the dangers of "increases in the role of government in society"), *cert. denied,* 109 S. Ct. 1338 (1989).

comes in future cases.[123] The slippery slope argument ultimately rests on a pessimistic view of the ability of judges and juries to make linguistic and conceptual distinctions.[124] Judge Posner declines to impose an obligation on the on-the-scene police officer to rescue the trapped automobile accident victim, not necessarily because liability would be inappropriate in this case, but because future judges and jurors might not be able to articulate and apply the distinctions necessary to avoid recognizing a general governmental duty to provide basic services.[125] He is willing to sacrifice the benefits that would accompany a requirement that government actors help persons in danger even when policy-making discretion is not at issue.

Finally, the slippery slope attack seems particularly inapposite to recognizing affirmative duties. There exists in the lower federal courts an increasingly well defined body of case law identifying the relevant considerations and distinctions bearing on constitutional liability for nonfeasance. This case law, discussed in detail below,[126] provides guideposts sufficiently determinate to avoid such horribles as the constitutionalizing of basic government services.

B. Constitutional Considerations

If the affirmative duty question were strictly a matter of tort policy, the problem would come down to ranking and accommodating two competing values. One is the need to give officials leeway in the deployment of scarce governmental resources. The other is the tort plaintiff's interest in recovering damages for the failure to help him, which in turn rests on the familiar tort policies of encouraging safety precautions and compensating victims of wrongdoing. These are issues for common law courts and state legislatures, with significant differences among states in the protection accorded the victim's interests.[127] Joshua DeShaney, and many other plaintiffs, seek to litigate these cases in a different forum. They assert that the state official's failure to help is not merely a state law tort but a violation of their constitutional rights. To deal with this theory of liability, courts must

123. Schauer, *Slippery Slopes,* 99 HARV. L. REV. 361, 368–69 (1985).

124. *Id.* at 370–71.

125. Professor Schauer distinguishes the slippery slope argument from "the argument against the instant case"—one in which the initial step itself is bad, even if no "slide" down the slope were to occur. *Id.* at 365. It may be that courts predicting bad outcomes of future cases if an affirmative duty is recognized in this case also feel the outcome in this case is bad standing alone. If so, the slippery slope argument adds nothing to the analysis. *City of Joliet* may be such an opinion.

126. *See infra* section III.A.

127. *See* Wells & Eaton, *supra* note 7, at 3–13.

look beyond tort policy and consider the special issues raised by the constitutional nature of the claimed wrong.

1. The Perceived Dangers of Constitutionalizing Tort Claims

Why should Joshua, or any other plaintiff with similar injuries, be permitted to proceed in federal court claiming a constitutional violation, when state tort remedies may be available?[128] One practical answer is that the state tort remedy may be unavailable or inadequate to compensate for the loss. In Joshua's case, for example, a Wisconsin Court might deny a tort claim by characterizing the caseworker's decision not to intervene as discretionary.[129] Even if the claim was not barred on this ground, a Wisconsin statute places a $50,000 ceiling on tort recovery against governmental subdivisions or agencies.[130] This limited recovery would not fully compensate the plaintiff for his loss.

Focusing on the adequacy of the state remedy, however, only sidesteps the more fundamental objection to authorizing constitutional tort suits like Joshua's. Why not let the state limit or deny recovery? In a representative democracy like our own, the legislature is primarily responsible for deciding the scope of legal rights and obligations. Why should some harms be accorded constitutional status so that the legislature loses its power to define their legal consequences?[131]

Any answer to this question must begin with the landmark decision *Monroe v. Pape.*[132] In *Monroe,* policemen broke into the plaintiffs' home, forced them to disrobe and stand naked, and then ransacked the house. These wrongs could be characterized as unreasonable searches and seizures, or described in terms of common law trespass, assault

128. *See, e.g.,* Ebarb v. Stanislaus Co., 246 Cal. Rptr. 845 (Cal. Ct. App.) *ordered not to be officially published,* 254 Cal. Rptr. 508, 765 P.2d 940 (Cal. 1988); Sorichetti v. City of New York, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985).

129. *See* WIS. STAT. ANN. § 893.80(4) (West 1983); C.L. v. Olson, 143 Wis. 2d 701, 422 N.W.2d 614 (1988) (decision to give paroled sex offender the use of a car was discretionary and therefore not actionable).

130. WIS. STAT. ANN. § 893.80(3) (West 1983).

131. *Cf.* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989). The *DeShaney* court stated:

> [If] the people of Wisconsin . . . prefer a system of liability which would place upon the State . . . the responsibility for failure to act in situations such as the present one . . . [t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause . . . .

Id. at 1007; Jackson v. City of Joliet, 715 F.2d 1200, 1205 (7th Cir. 1983) (no constitutional tort remedy needed because political accountability of local officials will provide sufficient incentives against incompetence in rescuing accident victims).

132. 365 U.S. 167 (1961), *overruled on other grounds,* Monell v. Department of Social Servs. of City of New York, 436 U.S. 658 (1978).

and battery, and false imprisonment. Relying on this fact, the defendants argued that the plaintiffs should be limited to their remedies under Illinois tort law. The Supreme Court disagreed. The Court concluded that any constitutional claim remediable under 42 U.S.C. § 1983 was supplementary to any remedy available under state law.[133] Since *Monroe,* plaintiffs commonly file their suits in federal court, pleading both a constitutional tort and a pendent state tort claim.[134] An overlap between state and constitutional tort is both anticipated and accepted.

Monroe, however, was only the first in a long line of Supreme Court opinions purporting to define the boundary separating constitutional from common law torts. Many of these decisions evidence the Court's determination to avoid transforming all government inflicted injuries into constitutional torts. In *Paul v. Davis,*[135] for example, the Court turned aside a claim that defamation by a state officer is a deprivation of a constitutionally protected liberty. The fourteenth amendment, the Court declared, is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[136] This theme reappeared in *Daniels v. Williams,*[137] where the Court rejected the constitutional tort claim of a prisoner who slipped and fell on a negligently misplaced pillow. The opinion emphasizes that the constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[138] Most recently, in *DeShaney,*, the Court reaffirmed that "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation."[139] The Court has reiterated this maxim, in

133. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

134. United Mine Workers v. Gibbs, 383 U.S. 715 (1966), permits plaintiffs with federal claims to assert a state law theory of recovery in their federal suits, provided the federal and state claims arise out of a common nucleus of operative facts. *See, e.g.,* Lux *ex rel.* Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989); Chonich v. Wayne County Community College, 874 F.2d 359, 362 (6th Cir. 1989); Murray v. Wal-Mart, Inc., 874 F.2d 555, 557–58 (8th Cir. 1989); *cf.* Rodriguez v. Comas, 875 F.2d 979, 983–85 (1st Cir. 1989) (pendent party jurisdiction), *withdrawn and republished at* 888 F.2d 899 (1st Cir. 1989).

135. 424 U.S. 693 (1976).

136. *Id.* at 701.

137. 474 U.S. 327 (1986).

138. *Id.* at 332.

139. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1007 (1989).

one formulation or another, on no fewer than eight occasions over the past thirteen years.[140]

Opinions like *Paul* and *DeShaney* reflect the Court's uneasiness with invoking the Constitution—especially the due process clause—as a source of tort recovery. The Court's concern stems partly from the difficulty in modifying constitutional tort rules through the political process. Because conflicting state laws must yield to controlling constitutional provisions, state courts and legislatures are powerless to alter constitutional tort rules or immunize governmental defendants. For example, Wisconsin's statutory damage cap would not limit Joshua's recovery in a section 1983 suit.[141] Constitutional tort rules thus provide plaintiffs with greater protection, but are less flexible than their common law counterparts.

The rigid character of constitutional rules may bolster the tort-based policy arguments identified in the preceding section as undercutting the recognition of affirmative duty claims. Had the Court in *DeShaney* recognized an affirmative constitutional tort duty to protect Joshua, county welfare officials could only turn to Congress for relief.[142] The same rule adopted as a matter of state tort law, in contrast, could be modified by state courts or the state legislature. Thus, the recognition of affirmative constitutional duties would exact a greater toll on state legislative and executive policy-making discretion than would the recognition of similar duties under state tort law. The rigidity of constitutional tort rules may also exacerbate the perceived dangers of the slippery slope. The fear that affirmative duty rules will lead to unlimited governmental obligations becomes more urgent when missteps cannot be readily corrected in the political arena.

When the constitutional tort claim rests on a specific provision of the Bill of Rights, the displacement of state tort law[143] necessarily is limited to the particular subjects addressed by that constitutional pro-

140. *See id.*; Daniels v. Williams, 474 at 665; Davidson v. Cannon, 474 U.S. 344, 347–48 (1986); Parratt v. Taylor, 451 U.S. 527, 543–44 (1981); Martinez v. California, 444 U.S. 277, 285 (1980); Baker v. McCollan, 443 U.S. 137, 146 (1979); Ingraham v. Wright, 430 U.S. 651, 672 (1977); *Paul*, 424 U.S. at 698–99.

141. *See Martinez*, 444 U.S. at 284 & n.8.

142. Whether Congress may deny a damages remedy to someone proving a violation of his constitutional rights remains an open issue. *Cf.* Wells, *The Past and the Future of Constitutional Torts*, 19 CONN. L. REV. 53, 76 n.132 (1986) (discussing Congress's power to repudiate judicially created causes of action for damages resulting from constitutional violations).

143. For a discussion of the "costs" of federal displacement of state tort law, see Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 30–40 (1980). *But cf.* Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277, 326 (1988) (arguing that "[t]he fear that the fourteenth amendment might displace state tort law is groundless").

vision. Thus, *Monroe* opened the door to constitutionalizing tort claims only to the extent the defendants' conduct could be characterized as an unreasonable search and seizure. When, as in *DeShaney*, the claim rests solely on the open-ended language of the due process clause, the potential for displacement of state law increases significantly because any harm in which the government plays a role might be called a deprivation of life, liberty, or property.

A related point is that the constitutional basis for affirmative duty tort claims is somewhat controversial. Although the Court continues to recognize substantive due process as a viable constitutional theory of relief, critics point out that the due process clause by its terms supports only procedural, not substantive, restrictions on the exercise of governmental power.[144] The inherently nebulous character of substantive due process "invests judges with an uncanalized discretion to invalidate federal and state legislation."[145] For these reasons, critics may assert that constitutional tort claims grounded in substantive due process are potentially more offensive to federalism and separation of power concerns than claims based on more textually explicit provisions of the Bill of Rights.[146]

2. *Due Process and Constitutional Tort*

Given the longstanding concern with substantive due process in general, and the troublesome relationship between substantive due process and state tort law in particular, one might expect the Court to eschew substantive due process doctrine altogether, at least in the context of constitutional tort. Significantly, the Court has not done so. It has never issued a blanket prohibition against treating substantive deprivations of life, liberty or property as constitutional torts. Rather, its opinions establish only that the circumstances of particular cases do not amount to unconstitutional deprivations of life, liberty, or property. The governmental conduct may be "too remote" to the loss of life,[147] or the defendant may lack a sufficiently culpable state of mind[148] to support liability. More recently, the Court has sought out alternative constitutional bases for claims previously analyzed in terms of substantive due process. For example, suits alleging use of excessive

144. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 14–21 (1980).

145. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 465 (7th Cir. 1988).

146. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986); Griswold v. Connecticut, 381 U.S. 479, 511–13 (1965) (Black, J., dissenting).

147. Martinez v. California, 444 U.S. 277, 285 (1980).

148. Daniels v. Williams, 474 U.S. 327, 332–33 (1986); Davidson v. Cannon, 474 U.S. 344, 347–48 (1986).

force are now evaluated in terms of the more specific provisions of the eighth and fourth amendments rather than the more general due process clause.[149]

Notwithstanding these efforts to restrict the scope of the due process clause as a source of constitutional tort duties, the Court remains faithful to the proposition that the clause does embody substantive limitations on egregious government conduct. The Court has declared unequivocally that unjustified physical injury affronts the "liberty" protected by the due process clause.[150] It has also held, and reaffirmed in *DeShaney,* that the mistreatment of institutionalized persons through inaction may violate substantive due process.[151] In a similar vein, the Court in *Daniels v. Williams*[152] ruled that negligently inflicted physical injury did not amount to the kind of "abuse of power" at which the due process clause was directed.[153] The Court expressly left open the issue of "whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of the Due Process Clause."[154] This locution acknowledges that some forms of official misconduct resulting in personal injury are violations of due process, including at least "intentional misconduct", and perhaps even "recklessness" or "gross negligence" as well. *Daniels* explains that "by barring certain government actions regardless of the fairness of the procedures used to implement them . . . [substantive due process] serves to prevent governmental power from being 'used for purposes of oppression.' "[155]

Why would the Court continue to embrace, albeit reluctantly, a doctrine as controversial as substantive due process? The answer lies in basic elements of constitutional theory. Many governmental decisions designed to meet utilitarian ends hurt individuals in one way or

149. Brower v. County of Inyo, 109 S. Ct. 1378, 1380–81 (1989); Graham v. Connor, 109 S. Ct. 1865, 1870–71 (1989); Tennessee v. Garner, 471 U.S. 1, 7–8 (1985); Reed v. Hoy, 891 F.2d 1421, 1426 (9th Cir. 1989).

150. Ingraham v. Wright, 430 U.S. 651, 672–74 (1977).

151. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1004–05 (1989) (citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239 (1983), and Youngberg v. Romeo, 457 U.S. 307 (1982)); *see also* West v. Atkins, 108 S. Ct. 2250, 2260 (1988) (Scalia, J., concurring) (preferring to analyze claim against a prison doctor under the rubric of substantive due process). The Court recently expressed "no doubt" that prison inmates possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Washington v. Harper, 110 S. Ct. 1028, 1036 (1990). The state's policy at issue was found to satisfy substantive due process requirements. *Id.* at 1039–40.

152. 474 U.S. 327, 332–33 (1986).

153. *Id.* at 332–33.

154. *Id.* at 334 n.3.

155. *Id.* at 331.

another. For most of these harms no redress is available in the courts. We accept that individual interests must often give way to the good of the group, and leave the choice of collective goals and the means of implementing them to the legislature and other officials accountable at the ballot box.

Even so, political constraints are not the only limitation on the power of government officials. Constitutional liberties are predicated on the proposition that some individual rights are too vital to be left to political checks alone. One theme of the Court's substantive due process jurisprudence is that, quite apart from the specifics of the first eight amendments, people have the right to be free from the arbitrary exercise of governmental powers, and that this right embraces more than the procedures to be followed before punishing or otherwise inflicting harm on someone.

The Court has never set forth a definitive statement of this right. Its opinions speak in terms of "fundamental rights" and "fundamental fairness." Commentators characterize the cases as recognizing a right of "personhood" or "autonomy"[156] or "concern and respect."[157] Whatever the appropriate terminology, the Court in a variety of contexts has, under the rubric of due process, established boundaries on permissible government action.

Thus, it lies beyond the legitimate authority of government to prohibit the teaching of foreign languages,[158] to prohibit parents from sending their children to private schools,[159] to involuntarily sterilize convicted felons,[160] and to prohibit a grandmother from living in the same residence with her son and two grandchildren.[161] Nor may the state infringe on an individual's procreative liberty by banning the sale of contraceptives[162] or prohibiting first trimester abortions.[163] Nor may it revoke someone's probation because she is too poor to pay a fine,[164] or refuse to permit her to obtain a divorce because she cannot afford the filing fee.[165]

156. *See* L. TRIBE, *supra* note 36, at 1304.

157. R. DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977); *see* Wells & Eaton, *supra* note 5, at 230.

158. Meyer v. Nebraska, 262 U.S. 390 (1923).

159. Pierce v. Society of Sisters, 268 U.S. 310 (1925).

160. Skinner v. Oklahoma, 316 U.S. 535 (1942).

161. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

162. Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

163. Roe v. Wade, 410 U.S. 113 (1973).

164. Bearden v. Georgia, 461 U.S. 660 (1983).

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

The relevance of the substantive strain of due process doctrine to personal injuries brought about by government abuse is also firmly established. In *Rochin v. California*[166] the forced stomach pumping of a criminal suspect was found to deny due process, because the practice "shocks the conscience"[167] and "offends those canons of decency and fairness which express the notions of justice of English speaking peoples."[168] *Youngberg v. Romeo*[169] declares that due process requires the state to protect and care for involuntarily-committed mental patients,[170] and *Revere v. Massachusetts General Hospital*[171] obliges states to provide medical care for pretrial detainees.[172] *Daniels v. Williams,* in explaining why negligence is not enough to make out a constitutional case, points out that the aim of the due process clause is "to secure the individual from the arbitrary exercise of the powers of government."[173]

The theme connecting these various evocations of substantive due process is the insistence that government officials show respect for persons. In our political system, government is not an entity separate from and above the people subject to its authority, like the Roman emperors or the Bourbon kings of France. Rather, the function of government in a liberal democracy is to serve the welfare of the citizenry.[174] Government must recognize the worth of the human beings in its charge and show some modicum of concern for their well-being.

It follows that the apparent convergence between common law torts and constitutional torts is deceptive. The critical difference between the two does not lie in the nature of the plaintiff's injury, but in the abuse of government power. Moreover, what is abusive hinges on the government official's state of mind. Suppose that two plaintiffs each suffer bruises. One is involved in a collision with a negligently driven state car, the other a high school student paddled by the school principal. Suppose further that the spanking was motivated by malice rather than a need to maintain discipline, or was grossly disproportionate to any legitimate justification for it. The plaintiff states a good

166. 342 U.S. 165 (1952).

167. *Id.* at 172.

168. *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 416–17 (1945)).

169. 457 U.S. 307 (1982).

170. *Id.* at 324.

171. 463 U.S. 239 (1983).

172. *Id.* at 244.

173. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884) quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

174. *See* J. LOCKE, *Of Civil Government* §§ 95, 123, 131, in TWO TREATISES OF GOVERNMENT 330–31, 350, 353 (Cambridge Univ. Press student ed. 1988).

constitutional tort claim in the latter case but not the former. The beating is an instance of arbitrary, oppressive, or abusive conduct in violation of the plaintiff's right to respect from government officials.[175] The automobile accident is not.[176]

Viewed against this background of constitutional principles and precedents, *DeShaney* is yet another in the line of substantive due process cases from *Rochin* through *Daniels.* In all these cases the injured plaintiff claimed that the government deprived him of life, liberty, or property without due process of law, and the Court was called upon to decide what kinds of governmental conduct were sufficiently egregious to raise constitutional concerns. The distinctive issue raised by *DeShaney* is whether suits requesting recovery for governmental *inaction* can *ever* state cognizable constitutional claims.

III. TWO CRITERIA FOR RESOLVING AFFIRMATIVE DUTY ISSUES

DeShaney's gravest weakness is neither its peremptory dismissal of the due process clause as a source of affirmative obligations of government, nor its confusion over the level of state involvement sufficient to trigger affirmative obligations. It is, instead, the Court's insensitivity to the constitutional values underlying the victim's claim for relief. Nowhere does the Court reaffirm the teaching of its precedents, that the due process clause is implicated by egregious governmental decisions resulting in harm to the person.

Indeed, Justice Rehnquist's opinion manages to deny relief to Joshua without even taking account of the knowledge possessed by the defendants, and the bearing their knowledge may have on the constitutional claim. So far as the majority's reasoning is concerned, Joshua would lose even if the social worker stood by and watched as his father beat him.[177] The challenge of the affirmative duty cases is to devise

175. *See* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). *See generally* Wells & Eaton, *supra* note 5, at 254–55.

176. *See* Daniels v. Williams, 474 U.S. 327, 331–33 (1986).

177. *Cf.* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1011 (1989) (Brennan, J., dissenting) (under the majority's reasoning, officials presumably would not be liable if they "decided not to help Joshua because his name began with a 'j', or because he was born in the spring").

The hypothetical suggested in the text is not wholly implausible. Sometimes state officers really do stand by and do nothing to help persons in distress. *See* Tucker v. Callahan, 867 F.2d 909 (6th Cir. 1989) (policeman allegedly watched from his parked patrol car as plaintiff was assaulted thirty yards away; qualified immunity defense upheld); Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986) (plaintiff injured in barroom brawl; undercover policemen stood by and did nothing to help; relief denied for failure to state a constitutional claim); Beard v. O'Neal,

rules that give due regard not only to the state's interest in allocating scarce resources as it sees fit and the precept that the clause is violated only by abuses of governmental power, but also to the plaintiff's interest in recovering damages where the government's failure to act sufficiently "shocks the conscience."

Lower federal courts have grappled with this problem for many years in a wide variety of factual settings. This Part of the Article draws on the teaching of these cases to propose a decisional framework that rests on two criteria: state involvement and the defendant's state of mind. Conditioning an affirmative duty on some threshold level of state involvement affords government the leeway to preserve its discretion in allocating resources, while still rendering it accountable for abusive inaction. The state of mind requirement helps separate abusive governmental inaction of a constitutional dimension from indifference that should remain wholly within the realm of state tort law.

Section A discusses state involvement. This Article considers the various standards suggested in *DeShaney* and concludes that the language of "special relationships" best captures the variety of state involvement that supports an affirmative duty. Section B then addresses the essential role of the defendant's state of mind in evaluating whether governmental inaction can be classified as abusive.

A. State Involvement

One clear principle emerges from the *DeShaney* opinion: affirmative duty claims will fail unless the plaintiff demonstrates some state contribution to the circumstances giving rise to his claim. While the Court's reliance on constitutional language, history, and precedent are somewhat shaky underpinnings for this rule, it may be justified in terms of tort and constitutional policies. The problem of discretion in allocating resources increases as the field of potential claimants grows larger. Limiting the scope of constitutional duty to situations where the government has played some part in generating the danger faced by the plaintiff substantially diminishes the intrusion on governmental decisionmaking. In addition, the due process precedents do strongly suggest that only "abuses" of governmental power are actionable. Arguably, inaction is less abusive when the passive governmental actor bears no responsibility for the plaintiff's need for help. In any event, such a strong majority of the Justices seems to subscribe to this posi-

728 F.2d 894, 899 (7th Cir.) (FBI informant watched as aggressor murdered plaintiff; no constitutional duty to help), *cert. denied*, 469 U.S. 825 (1984).

tion[178] that this Article takes it as a given throughout the course of its analysis.

State involvement may take many forms. If some governmental involvement is necessary to liability for inaction, then the question is what kind of governmental action will be sufficient. On this issue, the *DeShaney* opinion is not helpful. As we have seen, *DeShaney* discusses three standards for determining whether state involvement is sufficient to support an affirmative duty in constitutional tort—involuntary confinement, analogies to involuntary confinement, and special relationships.[179] These standards represent something of a continuum, with involuntary confinement being the most restrictive test for affirmative duties and the special relationship approach being the most generous. This Article now examines each approach in more detail and explains why the umbrella of special relationship is the preferred standard.

1. Involuntary Confinement

One alternative set forth in *DeShaney* is to limit the state's liability for failure to act to situations where the plaintiff is confined against his will to a state prison or mental hospital. While such a rule has undeniable advantages of clarity and convenience, its defects render it an undesirable solution to a vexing problem. Persons held in state facilities certainly make a strong case for an affirmative duty. As the Court pointed out in *DeShaney,* the state in such a case has "so restrain[ed] an individual's liberty that it renders him unable to care for himself."[180] The state breaches a constitutional duty if it then "fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety."[181]

By excluding a large number of potential constitutional claims, an involuntary confinement rule would avoid the slippery slope of constitutionalizing the right to basic governmental services. Because it would relieve government officers of liability for failure to act in all cases except those arising in jails, prisons, and mental institutions, the rule would provide ample protection to state officers deciding how to use the state's resources without judicial interference.

178. The dissenters do not contest this point, but they do not altogether concede it either. Justice Brennan begins by accepting it for purposes of argument. *DeShaney,* 109 S. Ct. at 1008–09 (Brennan, J., dissenting). He and Justice Blackmun insist that the state *did* contribute to Joshua's vulnerability. *See infra* text accompanying notes 242–44.

179. *See supra* text accompanying notes 86–98.

180. *DeShaney,* 109 S. Ct. at 1005.

181. *Id.* at 1005–06.

An involuntary confinement test also has the advantage of "ruleness." It identifies two sets of cases and directs that they be treated differently, without the need for any further inquiry by the decisionmaker into the wisdom of a decision.[182] Under this regime, many cases could be dismissed without a trial to determine the facts and without detailed weighing of the pros and cons of imposing liability in the circumstances of a given case. Avoiding legal standards that turn on factual nuances—and therefore often cannot be applied without a trial—is a major theme in the current Court's development of constitutional tort doctrine.[183] The Court might well find an involuntary confinement rule attractive for this reason alone.

Although these arguments are not without force, the considerations counseling against an involuntary confinement rule are more compelling. One important test of a liability rule is whether it reaches the full range of cases in which recovery is appropriate, or at least an acceptably large portion of them. The involuntary confinement rule fails on this score, for it falls short of embracing all instances of official misconduct impinging a plaintiff's constitutionally protected right to respectful treatment by government officers. Consider the Seventh Circuit's widely cited opinion upholding liability in *White v. Rochford.*[184] In that case, the police stopped a car on a busy expressway, arrested the driver for drag racing, and took him away. Despite his request that the officers at least call for help, the police left his child passengers alone in the car to fend for themselves. One of the children, an asthmatic, was subsequently hospitalized for a week.

The children were not confined; indeed, the police took no action against them at all. Nonetheless, the difference between placing a person in custody and using state authority to leave him stranded in a dangerous place seems too insubstantial to support a rule that would permit liability in the former case but not the latter.[185] Even judges

182. *See* Schauer, *Formalism,* 97 YALE L. J. 509, 535, 537–38 (1988).

183. *See* Graham v. Connor, 109 S. Ct. 1865 (1989) (liability of police officers for excessive force in arrest turns on objective reasonableness and not the officers' subjective motivations); Anderson v. Creighton, 483 U.S. 635 (1987) (official's subjective beliefs are immaterial to official immunity defense); Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of motion for summary judgment based on qualified immunity is immediately appealable).

184. 592 F.2d 381 (7th Cir. 1979); *see also* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), *cert. denied,* 59 U.S.L.W. 3325 (1990). In *Wood,* a woman was left stranded when the police arrested her companion and impounded his car at 2:00 a.m. She accepted a ride from a stranger, who raped her. The Ninth Circuit reversed a grant of summary judgment to the defendant policemen.

185. *See White,* 592 F.2d at 384 (noting that "it seems incongruous to suggest that liability should turn on the tenuous metaphysical construct which differentiates sins of omission and commission").

who are generally hostile to the expansion of affirmative duties now agree that the plaintiffs in *White* stated a good constitutional tort case.[186] The involuntary confinement rule suggested by *DeShaney* should be rejected as it fails to reach a substantial range of such cases in which official inaction is properly labeled abusive.[187]

2. *Analogies to Involuntary Confinement*

Even before *DeShaney,* some courts sought to avoid a rigid involuntary confinement rule while still closely restricting the scope of affirmative duty. They did so by asking whether the relationship between the state and the plaintiff so resembled confinement in its effects on the plaintiff as to justify recognition of an affirmative duty by analogy to the confinement principle. In view of the Court's footnote hinting that it might find this an acceptable resolution of the affirmative duty problem, the popularity of "analogies to confinement" will likely increase.

Wideman v. Shallowford Community Hospital[188] is illustrative. The plaintiff was a pregnant woman who lost her baby when a city ambulance took her to the wrong hospital. Upholding summary judgment against her, a panel of the Eleventh Circuit said that liability is appropriate only when the state "effectively strip[s] a person of her ability to defend herself, or cut[s] off potential sources of private aid."[189] According to the *Wideman* court, "[t]he key concept is the exercise of dominion, or restraint by the state."[190] The standard had not been met, because "[t]he County did not force or otherwise coerce her into its ambulance; it merely made the ambulance available to her and she entered it voluntarily."[191] As an example of a case that would meet

186. We have in mind Judge Easterbrook, *see* Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988), *cert. denied,* 109 S. Ct. 1338 (1989), and Judge Posner, *see* Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983), *cert. denied,* 465 U.S. 1049 (1984).

187. A striking example of the defects of an involuntary confinement rule is the case of someone voluntarily admitted to a mental institution. If involuntary confinement is the key to liability, then the voluntarily admitted patient stands on a different footing from someone sent there against his will. Yet he is quite helpless to look out for his own interests and his relatives may have no viable option for his care. It is difficult to see why the circumstances of the patient's commitment entitle him to less attention from directors and employees of the institution than an involuntary patient receives. *See* Flowers v. Webb, 575 F. Supp. 1450 (E.D.N.Y. 1983). *But cf.* Milburn v. Anne Arundel County Dep't of Social Serv., 871 F.2d 474 (4th Cir.) (no affirmative duty to protect voluntarily placed foster child, distinguishing cases involving involuntary placements), *cert. denied,* 110 S. Ct. 148 (1989).

188. 826 F.2d 1030 (11th Cir. 1987).

189. *Id.* at 1035.

190. *Id.* at 1035–36.

191. *Id.* at 1036. Apparently, the plaintiff did not allege that the driver knew she had requested she be brought to a different hospital until the case reached the appellate court. *Id.* at 1036 n.8.

this test, *Wideman* cited *Taylor v. Ledbetter,*[192] where the court upheld a complaint brought against a social services agency by a child involuntarily placed in a foster home.[193] In *DeShaney,* the Supreme Court also cited *Taylor* to suggest that some plaintiffs might be able to show that their situations were "analogous to incarceration or institutionalization."[194]

Insisting on a relationship with the state that can be analogized to involuntary confinement may seem to be a plausible compromise between limiting affirmative duties to confinement cases and liability based on some other, vaguer standard. Closer scrutiny, however, reveals that an "analogous to incarceration" rule is no more satisfactory than the confinement rule. A fundamental problem with the former approach lies in the difficulty of drawing a coherent analogy between involuntary confinement and the foster care case, or *White,*, or any other case where the plaintiff is not literally confined. The Court's rationale for the involuntary confinement rule is that the state "by the exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic needs."[195] The foster care case is analogous only if leaving a child in the care of dangerous persons is viewed as equivalent to restraining his liberty so that he cannot care for himself. The key to liability is the helplessness of the victim who is exposed to danger by the state's action.

If this is the relevant analogy, however, then it appears difficult to distinguish the foster care case from *DeShaney* itself, for returning the child to the care of a dangerous parent is no different in this respect from placing him in a dangerous foster home. But this cannot be what the Court meant. Chief Justice Rehnquist took pains to point out that mere helplessness is *not* equivalent to confinement. Rather, what counts is "the State's affirmative act of restraining the individual's freedom to act on his own behalf."[196] In the foster care case, no less so than in *DeShaney,* this standard is not met.

In fact, it is difficult to see how anything less than arrest or incarceration could meet this standard. The foster child is not so much restrained by the state from acting "on his own behalf," as by his own

192. 818 F.2d 791 (11th Cir. 1987), *cert. denied,* 109 S. Ct. 1337 (1989).

193. *Id.* at 800.

194. 109 S. Ct. 998, 1006 n.9 (1989).

195. *Id.* at 1005.

196. *Id.* at 1006.

immaturity.[197] A sufficiently old and courageous child can make his feelings known to the authorities and be removed from a home he does not like. The same could be said for the child plaintiffs in *White,* who, as far as the state was concerned, were free to go anywhere they pleased, and were limited only by their own lack of ability to drive.[198]

3. *Special Relationships*

The *DeShaney* Court discussed basing claims of breach of affirmative duty on the state's involvement in creating dangers to the individual or increasing her exposure to preexisting risk. At common law this concept is captured in the term "special relationship." The term is, of course, not self-defining; rather, to say that the state has a "special relationship" to the plaintiff is simply to signify that the court deems the relationship between the defendant and the plaintiff's need for assistance sufficiently close to warrant imposing an affirmative duty. In tort law there exist identifiable categories of cases in which "special relationships" are said to arise. Tracking this body of tort law, *DeShaney* itself mentioned three ways in which a special relationship might be established: (1) by way of a positive act that inhibits self-help or private rescue; (2) by way of a state's positive act that exposes the plaintiff to danger; and (3) by way of an undertaking that worsens the plaintiff's position. Each of these patterns of state involvement will be addressed in order.

a. State Imposed Limitations on Self-Help or Private Rescue

DeShaney recognized that persons involuntarily placed in the custody of the state are entitled to protection and care by the state. The Court explains that the imposition of a constitutional affirmative duty in these circumstances is necessary because of the state imposed limitation "on the individual's freedom to act on his own behalf."[199] This

197. *See* Eugene D. v. Karman, 889 F.2d 701, 711 (6th Cir. 1989) (differences between incarceration and foster care "raise serious questions as to whether foster care placement is sufficiently analogous to institutionalization"), *cert. denied,* 110 S. Ct. 2631 (1990), *cf.* Doe v. Bobbitt, 881 F.2d 510, 512 (7th Cir. 1989) (referring to the "novel analogy between incarceration and placement in a foster home"), *cert. denied,* 110 S. Ct. 2560 (1990).

198. *See also* J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) (rejecting the analogy between imprisonment and compulsory school attendance); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 723–24 (3d Cir. 1989) (in dicta, court said children compelled to attend school are "arguably" analogous to involuntarily confined inmates), *cert. denied,* 110 S. Ct. 840 (1990); Pagano v. Massapequa Pub. Schools, 714 F. Supp. 641 (E.D.N.Y. 1989) (school children found to be analogous to inmates); Flowers v. Webb, 575 F. Supp. 1450 (E.D.N.Y. 1983) (permitting a *voluntarily* committed mental patient to raise constitutional claims).

199. 109 S. Ct. 998, 1006 (1989).

rationale underlies the unanimous view of lower courts that correctional officials are constitutionally obligated to protect inmates from physical assaults by other inmates[200] and, in some cases, from self-inflicted injuries.[201] While many of these cases are grounded in the eighth amendment, others explicitly rest upon substantive due process.[202]

As lower federal courts have recognized, state imposed limitations on self-help and private rescue are not limited to instances of involuntary confinement. A recent Seventh Circuit case is illustrative. In *Ross v. United States,*[203] the complaint alleged that a twelve-year-old boy fell off a breakwater into Lake Michigan. Although two nearby scuba diving private citizens offered to help save him, a deputy sheriff, acting pursuant to county policy, ordered them to stop their rescue efforts, threatened to arrest them if they persisted, "and even positioned his boat so as to prevent their dive."[204] Twenty minutes after the initial rescuers arrived, the officially authorized divers recovered the boy's body. Upholding the complaint, the court stressed that this plaintiff asserts "a much different type of constitutional wrong"[205] from the imposition of a duty to provide services that was rejected in *DeShaney.* If the allegations of the complaint are true, "the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative."[206] If *Ross* is correctly decided,[207] the rationale underlying *Estelle* and *Youngberg* is not limited to instances of involuntary confinement, but extends to any situation in

200. *E.g.,* Stubbs v. Dudley, 849 F.2d 83 (2d Cir. 1988), *cert. denied,* 109 S. Ct. 1095 (1989); Berg v. Kincheloe, 794 F.2d 457 (9th Cir. 1986); Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984).

201. *E.g.,* Greason v. Kemp, 891 F.2d 829, 835–36 (11th Cir. 1990); Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988), *cert. denied,* 109 S. Ct. 1338 (1989); Partridge v. Two Unknown Police Officers of Houston, 791 F.2d 1182, 1187 (5th Cir. 1986); Roberts v. City of Troy, 773 F.2d 720, 724–25 (6th Cir. 1985); *cf.* Hudson v. Palmer, 468 U.S. 517, 526–27 (1984) (prison officials are entitled to search prisoners, in part, to prevent prison violence and suicides).

202. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) (detainee's right to medical care under the due process clause is at least as great as a prisoner's eighth amendment rights); *Colburn,* 838 F.2d at 668 (affirmative constitutional duty to protect pretrial detainee from suicide); *Partridge,* 791 F.2d at 1187 (affirmative constitutional duty to protect pretrial detainee from suicide). Because the eighth amendment does not extend to pretrial detainees, *City of Revere,* 463 U.S. at 244, these cases were decided in terms of substantive due process.

203. 910 F.2d 1422 (7th Cir. 1990).

204. *Id.* at 1425.

205. *Id.* at 1431.

206. *Id.*

207. While *Ross* correctly concluded that state interference with private rescue is sufficient state involvement to trigger an affirmative duty, the opinion is more problematic with regard to the defendants' state of mind. As argued in subpart B *infra,* the defendants' conduct must rise to the level of deliberate indifference in order to support constitutional tort liability.

which the state by its positive acts isolates someone and restricts private efforts to provide aid.[208]

b. Endangerment by Positive Acts of the State

DeShaney also justified its holding by noting that the state "played no part" in the creation of the danger faced by Joshua.[209] The negative implication of this reasoning is that the state might have an affirmative duty to protect persons from dangers the state does create. The imposition of liability in this type of case rests on simple fairness. As explained by Judge Posner, "[i]f a state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role is merely passive; it is as much an active tort-feasor as if it had thrown him into a snake pit."[210]

Positive endangerment presents an even stronger case for imposing an affirmative duty than interference with self-help or private rescue. This is so because in the positive endangerment cases, the state is at least partially responsible for exposing the plaintiff to danger in the first place. Thus, unlike the interference with private rescue or self-help cases, the state itself is the source of the threat to the plaintiff's well-being. Yet, the cases reveal that not all state contributions to the plaintiff's danger are sufficient to give rise to an affirmative duty to help. Courts distinguish between situations where the endangering force is another state actor and those in which it comes from some other source.

---

208. The holding in *Ross* was foreshadowed by dicta in two earlier Seventh Circuit cases. In Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) the court held that a city has no constitutional obligation to provide firefighting services, or even to allow striking firemen access to city equipment necessary to put out a blaze. But the court recognized that state interference with private rescuers, as by "block[ing] the path of the [striking] fire fighters as they endeavored to reach the apartment," could constitute a substantive due process violation. *Id.* at 1448. Similarly, in Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), a policeman at the scene of an accident directed traffic away from the burning vehicle but failed to check the car to see if anyone was inside. The court found that the officer's behavior manifested only negligence or gross negligence, and refused to impose liability on the ground that constitutional tort requires a more culpable state of mind. Significantly, the court's analysis appears premised on the notion that directing potential rescuers away from the victims may be a constitutional tort if it is accompanied by the requisite culpability. *Id.* at 1202. The *Ross* court relied on the reasoning of *Byrne* and *City of Joliet* to deny a qualified immunity defense to the deputy sheriff, ruling that, in view of those cases, he "should have known that he could not use [his] authority to prevent private rescue efforts." *Ross*, 910 F.2d at 1433.

209. 109 S. Ct. 998, 1006 (1989).

210. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

(1) Endangerment by Another State Actor

In some circumstances the standard rules governing supervisory and governmental liability for the acts of subordinates will suffice to provide the victim of official misconduct with an effective remedy against a state defendant other than the aggressor himself. Consider *Stoneking v. Bradford Area School District.*[211] Kathleen Stoneking was a student subjected to sexual abuse and harassment by the band director of Bradford High School. She asserted that the principal and school board officials were aware of the band director's conduct, but took no action to protect her. Relying on these allegations, she sued both the officials and the school district. In denying the defendants' motion for summary judgment, the Third Circuit ruled that Ms. Stoneking's constitutional injury resulted from the defendants' "own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers."[212]

Stoneking's casting of the affirmative duty issue in terms of inadequate supervision allows for some claimants to seek redress from either the aggressor's supervisors or his governmental employer. It is well established that governmental entities may be sued for constitutional torts caused by their "official policies,"[213] and that inadequate training is such a policy, providing it is so bad as to amount to "deliberate indifference" to the constitutional rights of persons subjected to state authority.[214] With regard to governmental liability, *Stoneking*'s only innovation was to extend this rule from inadequate training to inadequate supervision, a step that the Supreme Court may well find appropriate.

The *Stoneking* court also permitted suit against the school officials with supervisory authority over the abusive band director. This theory may succeed even if the school district itself cannot, because of the

211. 882 F.2d 720 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 840 (1990).

212. *Id.* at 724–25. *But cf.* J.O. v. Alton Community Unity School Dist. 11, 909 F.2d 267 (7th Cir. 1990) (no duty to protect child from sexual harassment; rejecting the analogy between imprisonment and compulsory school attendance); D.T. v. Independent School Dist. No. 16, 894 F.2d 1176 (10th Cir. 1990) (court rejected school district liability for teacher's sexual molestation of students on ground that the evidence was insufficient to establish that the school district's policy of investigating, hiring, and supervising teachers constituted deliberate indifference or reckless disregard for plaintiff's constitutional rights); Spann v. Tyler Indep. School Dist., 876 F.2d 437 (5th Cir. 1989) (school district not liable under § 1983 for principal's failure to properly investigate reports of student sexual abuse because student's injuries not caused by school district's policy granting principal complete discretion regarding investigation of such charges), *cert. denied,* 110 S. Ct. 847 (1990).

213. Monell v. Department of Social Servs., 436 U.S. 658 (1978).

214. City of Canton v. Harris, 109 S. Ct. 1197 (1989).

absence of an "official policy," be held responsible for the acts of its supervisors.[215] Although the Supreme Court has not yet addressed the issue, lower courts generally hold supervisory officials liable for the acts of their underlings if the supervisors' conduct manifests "deliberate indifference" to the plaintiff's constitutional rights.[216]

These avenues of redress are appealing because they avoid the language of affirmative duty and may consequently prove more acceptable to the Supreme Court. Their reach is limited, however, to circumstances where the endangering state agent is a subordinate of the passive supervisor, or where the governmental employer itself may be deemed responsible for the inadequacy of supervision. *Stoneking*'s approach would not reach cases where the passive state agent is a mere co-worker or subordinate of the aggressor. Yet, courts have uniformly imposed constitutional tort liability on policemen and prison guards for their failure to protect the plaintiff from the misconduct of another officer.[217]

An illustrative case is *O'Neill v. Krzeminski.*[218] Officer Conners sat passively as Officer Krzeminski and Sergeant Fiorillo beat a handcuffed prisoner with a night stick. Conners was held liable, not on the basis of vicarious liability for the acts of other officers, but because his own inaction violated O'Neill's constitutional rights. What is most notable about cases like *O'Neill* is their failure to identify any constitutional theory for imposing liability. The courts invariably fail to identify the constitutional basis of the passive officer's personal liability, and instead offer bare declarations that the passive policeman is constitutionally obligated to protect the plaintiff from a beating at the hands of another officer.[219]

In the wake of *Graham v. Connor,*[220] the liability of the officer inflicting the beating may be grounded in the fourth amendment's pro-

215. *Cf.* Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 567 (1st Cir. 1989) (distinguishing between the criteria for recovery in suits against municipalities and the criteria applicable to suits against supervisors); *see* Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990) (discussing supervisory and municipal liability).

216. *See, e.g.,* Greason v. Kemp, 891 F.2d 829, 836–37 (11th Cir. 1990); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); Bolin v. Black, 875 F.2d 1343, 1348–49 (8th Cir.), *cert. denied,* 110 S. Ct. 542 (1989); Thompkins v. Belt, 828 F.2d 298, 304–05 (5th Cir. 1987); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), *cert. denied,* 450 U.S. 929 (1981).

217. O'Neill v. Krzeminski, 839 F.2d 9 (2d Cir. 1988); Rascon v. Hardiman, 803 F.2d 269, 276 (7th Cir. 1986); Byrd v. Clark, 783 F.2d 1002 (11th Cir. 1986); Webb v. Hiykel, 713 F.2d 405 (8th Cir. 1983); Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982), *cert. denied,* 459 U.S. 1171 (1983); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).

218. 839 F.2d 9 (2d Cir. 1988).

219. *See* cases cited at *supra* note 217.

220. 109 S. Ct. 1865 (1989).

hibition against unreasonable seizures. That rationale could not support the personal liability of the passive officer as he has neither seized the plaintiff, nor acted in concert with the officer who did. In reality these cases are best understood in terms of the framework suggested in this Article. The endangerment of the plaintiff by the positive acts of one state actor is sufficient state involvement to place an affirmative duty on the other officer who stands idly by.

(2) Endangerment by a Private Actor or External Circumstances

While endangerment by a state actor generally results in the imposition of an affirmative duty upon other officials to rescue the victim, another group of cases presents more difficult problems for the plaintiff. These cases concern situations in which the immediate menace comes from a private actor, yet the state has in some way increased the plaintiff's vulnerability to the danger. Government action that contributes to a general increase in danger is almost always insufficient to trigger a duty to protect. Courts routinely disallow claims brought by those suffering at the hands of inmates released by parole,[221] furlough,[222] or escape.[223] The positive act of state officials in releasing the dangerous person clearly increases the general level of risk to society. It is not, however, a risk peculiar to the individual plaintiff.[224] The moral responsibility of the state for the subsequent act of the released inmate is viewed as too attenuated to justify imposing liability.

In *Martinez v. California*[225] for example, the parole board released a man convicted of attempted rape. Five months later he tortured and killed a fifteen-year-old girl. Her family sued the parole board members in constitutional tort, charging that their decision deprived the victim of her life without due process of law. The Supreme Court denied relief, explaining that the murderer's act "cannot fairly be char-

221. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980); Janan v. Trammell, 785 F.2d 557 (6th Cir. 1986); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); Doe v. United Social & Mental Health Servs., 670 F. Supp. 1121 (D. Conn. 1987); *cf.* Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983) (attacker had been moved from jail to a community corrections facility where he could roam about the town); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) (released mental patient).

222. Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986), *cert. denied*, 479 U.S. 882 (1986).

223. Ketchum v. Alameda Co., 811 F.2d 1243 (9th Cir. 1987); Commonwealth Bank & Trust Co. v. Russell, 825 F.2d 12 (3d Cir. 1987).

224. Where the risk is directed at particular individuals who are identified before the release, courts are divided. *Compare Estate of Gilmore*, 787 F.2d 714 (no constitutional duty) *with* Beck v. Kansas Univ. Psychiatry Found., 580 F. Supp. 527 (D. Kan. 1984) (recognizing a constitutional duty).

225. 444 U.S. 277 (1980).

acterized as state action," and that "the parole board was not aware" of any "special danger" toward this victim, "as distinguished from the public at large."[226] Hence, the crime was "too remote a consequence of the parole officer's action to hold them responsible" for a constitutional tort.[227] *Martinez* clearly curbs the ability of courts to impose constitutional tort liability on officials whose decisions facilitate private wrongs.

It would be a mistake, however, to treat *Martinez* as a blanket rejection of all constitutional claims arising from fact patterns where a private actor is the immediate source of danger. The Court itself cautioned against such a broad reading of the case,[228] and lower federal courts sometimes have encountered circumstances warranting the imposition of liability. The crucial factor distinguishing these cases from *Martinez* is the extent of the state's contribution to the plaintiff's peril.

Nishiyama v. Dickson County[229] features an especially compelling constellation of facts. The county sheriff routinely allowed a trusty inmate to have unsupervised use of a fully marked and equipped patrol car. On the day in question, he left the car in the inmate's hands, and took no action for ten hours after receiving reports that the trusty was using the patrol car to stop and harass passing motorists. During this time the trusty stopped and murdered the plaintiff's daughter. The Sixth Circuit ruled that failure to respond to reports that the trusty was endangering motorists constituted an "arbitrary use of government power."[230]

The court distinguished other dangerous release cases in which no duty to protect was found on the basis of additional state involvement. In *Martinez,* "the only action of the state officers was their decision to release from custody the person who subsequently committed the murder."[231] Here, in contrast, "state officers by their acts facilitate[d] the crime by providing the criminal with the necessary means and the specific opportunity to commit his crime."[232] The principal difference

226. *Id.* at 285.

227. *Id.*

228. *Id.* ("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.") (footnote omitted)).

229. 814 F.2d 277 (6th Cir. 1987).

230. *Id.* at 282.

231. *Id.* at 281.

232. *Id.* at 280–81. *Nishiyama*'s reasoning survives *DeShaney.* In the recent case of Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 1784 (1990), a town clerk was abducted and terrorized by prison inmates assigned to a community

between *Martinez* and *Nishiyama* is one of degree, for in both cases the state-actor defendant "facilitate[d] the crime." The key point is that, in sufficiently egregious circumstances, inaction following such facilitation becomes an "abuse of power" justifying recovery by the victim.

White v. Rochford[233] illustrates the operation of the same critical principle in a somewhat different context. The complaint alleged that the police arrested a driver for drag racing on an expressway. Despite his pleas, they left his passengers, three children too young to drive, stranded in the abandoned car beside a busy, eight lane, limited access highway. Ruling on a motion to dismiss, the court began its analysis by noting that the due process clause protects the right "to be free from, and to obtain judicial relief for unjustified intrusions on personal security."[234] If the allegations of the complaint were true, then the police "left helpless minor children subject to inclement weather and great physical danger without any apparent justification."[235] Accordingly, the court held that this set of facts would make out a due process violation.

It did not matter that the police left the children stranded by depriving them of a driver rather than by discharging them from a police car. In either event, state authority would remove the children's protector. The defendants knew that their actions left the children in a vulnerable position. Under these circumstances it would be "incongruous to suggest that liability should turn on the tenuous metaphysical construct which differentiates sins of omission and commission."[236]

Neither *White* nor *Nishiyama* seems at odds with *DeShaney.* The *DeShaney* Court carefully qualified its opinion by noting that the defendant child welfare workers were not responsible for Joshua's need for protection. In the wake of *DeShaney,*, lower federal courts have continued to impose constitutional tort liability in cases involving harm inflicted by a private person when official defendants played a

work squad program. The inmates were assigned to work near the town hall under direct supervision of state agents. Government officials dictated which inmates were to be released under the program and the degree of supervision they were to receive. As town clerk, the plaintiff was forced by operation of law to work alongside the inmates. The court viewed the plaintiff's claim as being more analogous to *Nishiyama* than *DeShaney* because the defendants in *Cornelius* "did indeed create the dangerous situation." *Id.* at 356; *see also* Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990) (city helped create danger by allowing mentally ill police officer to retain weapon after being declared unfit for duty).

233. 592 F.2d 381 (7th Cir. 1979).

234. *Id.* at 383 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

235. *Id.* at 384.

236. *Id.*

large role in exposing the plaintiff to the hazard.[237] Moreover, the results in these cases are wholly consonant with the tort and constitutional principles delineated in Part II. The use of state power to place the plaintiff in a position of danger provides a powerful equitable basis for imposing a duty of protection. The state's contribution to the danger and its ability to help are narrowly confined by the facts, so that imposition of a duty to prevent the harm is far removed from a constitutional duty to provide general services. The greater the government's involvement in producing the dangerous situation, the more heavily implicated is the due process clause as a bulwark against abuse of governmental power.

c. Undertakings that Worsen the Plaintiff's Position

Before the Supreme Court's opinion in *DeShaney,* lower federal courts recognized that governmental defendants may owe affirmative duties even where they have neither restrained self-help nor themselves endangered the plaintiff. The requisite state involvement may take the form of an undertaking to help and an ensuing failure to follow through on the promise. An illustrative case is *Balistreri v. Pacifica Police Department.*[238] The plaintiff was repeatedly beaten by her husband. She eventually secured a restraining order enjoining her husband from having any contact with her. Despite the restraining order and the police department's knowledge that the husband was continuing to commit acts of violence, the police refused to arrest Mr. Balistreri before he had gravely injured his wife. The Ninth Circuit originally concluded that a special relationship arose between Mrs. Balistreri and the police based upon the state's undertaking to protect her embodied in the restraining order. "[T]he restraining order together with the defendants' repeated notice of Balistreri's plight . . . are sufficient to state a claim that the defendants owed Balistreri a duty to take reasonable measures to protect Balistreri from her estranged husband."[239]

Joshua DeShaney's case, however, suggests the limits of the undertakings approach. The Winnebago County Department of Social

237. *See, e.g.,* K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990); Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 1784 (1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), *cert. denied,* 59 U.S.L.W. 3325 (1990); Germany v. Vance, 868 F.2d 9 (1st Cir. 1989).

238. 855 F.2d 1421 (9th Cir. 1988), *superceded* 901 F.2d 696 (9th Cir. 1990).

239. *Id.* at 1426. The court also allowed the plaintiff to pursue an equal protection claim based on the defendants' allegedly sexually discriminatory response to domestic violence complaints.

Services had undertaken to help Joshua by securing temporary custody of him and then assigning a caseworker to keep an eye on the family. Why was this state involvement insufficient to impose an affirmative duty? The answer is unclear. Parts of the opinion suggest that a mere undertaking to help will never be enough to support liability. At one point Justice Rehnquist seems to reject all affirmative obligations, except where the state "so restrains an individual's liberty that it renders him unable to care for himself."[240] Later in the opinion, the objection to granting relief appears to be less categorical, for the Court stresses that the state left Joshua "in no worse position than that in which he would have been had it not acted at all."[241] Presumably a plaintiff who can show that state intervention did leave him worse off, as by inducing him to lower his guard or by deterring other potential rescuers, would overcome the barrier to affirmative duty.

Why was Joshua unable to meet the Court's standard? According to Chief Justice Rehnquist, the state's involvement went no further than taking Joshua from his father's home and then returning him there. The Court's account of the state's role, however, was far too narrow. As Justice Brennan pointed out in his dissent, the state established "a child welfare system specifically designed to help children like Joshua," and "channels all . . . reports [of abuse] to the local departments . . . for evaluation and . . . further action."[242] The department of social services then decides whether to take action to protect a particular child from abuse. This administrative structure will likely lead anyone who might have helped Joshua to "feel that her job was done as soon as she had reported her suspicions . . . to DSS."[243] In its absence, individuals or other government officials may have taken further steps instead of relying on the department of social services. Accordingly, it is plausible that "children like Joshua are made worse off by the existence of this program."[244]

Admittedly, there is a hypothetical quality to the potential alternative rescue. Plaintiffs may be unable to identify specific individuals who were deterred from action by reason of the state undertaking. But the problem of proof is significantly due to the state's preemption of the field. The *DeShaney* majority appears oblivious to the subtle and pervasive ways by which the state affects relationships and individual behavior. Its treatment of Joshua's case reflects a conception of

240. 109 S. Ct. 998, 1005 (1989).
241. *Id.* at 1006.
242. *Id.* at 1010 (Brennan, J., dissenting).
243. *Id.* at 1011 (Brennan, J., dissenting).
244. *Id.*

the state "as a thing" separate from the "natural world, in which the abuse of children is an unfortunate, yet external, ante-legal, and pre-political fact of our society."[245] Because it started from this premise, the Court did not inquire whether "the hand of the state may have altered an already political landscape in a way that encouraged such child-beating to go uncorrected."[246] Such an inquiry might lead one to conclude that the state's promise of protection to a specific individual ought to give rise to an affirmative duty without strict proof of detrimental reliance. From this perspective, the government's failure to keep its promise to the vulnerable individual may be sufficiently abusive to trigger the substantive protections of the due process clause.

As a practical matter, however, *DeShaney* will likely foreclose affirmative duty claims based on undertakings unless the plaintiff can offer specific evidence of detrimental reliance. Mrs. Balistreri, for example, did not allege that the restraining order induced her to forego other measures to protect herself. Nor did she plead that the restraining order deterred others from protecting her. Indeed, after *DeShaney* was decided, the Ninth Circuit reconsidered its decision in *Balistreri.* Finding no material distinction between the nonenforcement of the restraining order and government's undertakings in *DeShaney,* the court rejected Mrs. Balistreri's due process claim.[247]

Occasionally, however, a plaintiff may be able to prove detrimental reliance on the government's promise of protection. In *G-69 v. Degnan,*[248] for example, an undercover informant sought the protection of the government when his identity was discovered by persons from his past. The government promised to protect the plaintiff-informant and provide him with a new identity should his position be uncovered. The district court found a "special relationship" grounded on the informant's reliance on the government's promise of protection. "It is difficult to imagine that a person would enlist for such a dangerous position absent some guarantee of personal safety. Having made such a guarantee, when there is so clear a risk to an individual's life and liberty, the state may not, consistent with the Constitution, walk

245. Tribe, *supra* note 9, at 10.

246. *Id.*

247. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 700 (9th Cir. 1990). *But see* Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) (recognizing a section 1983 claim against a chief of police who refused to enforce a restraining order because the husband was a friend. The court characterized the defendant's conduct as creating a danger that increased the plaintiff's vulnerability); *see also* Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction,* 30 B.C.L. REV. 1357, 1380 (1989).

248. 745 F. Supp. 254 (D.N.J. 1990).

away from its bargain."[249] Perhaps governmental undertakings and promises will give rise to special relationships in other contexts as well.[250]

4. Summary

DeShaney forecloses the argument that there is a general constitutional right to protection. The opinion affirms, however, that a constitutional duty to protect may arise if there is sufficient state connection with the plaintiff's need for help. The Court's opinion provides little guidance on how much state involvement is necessary. We have shown in the preceding section that an affirmative duty rule limited to instances of involuntary confinement would not reach all instances where governmental inaction should be seen as unconstitutional. Analogies to confinement are ultimately artificial and intellectually unsatisfying; foster children simply are not denied means of self-help or private rescue in the same manner as are prison inmates. The common law tort concept of special relationship offers the proper balance between structure and flexibility necessary to grapple with claims based on governmental inaction. Hoping to avoid the tyranny of labels, we have described the three principal types of state involvement that ought to trigger a constitutional duty to help.

Our suggested framework incorporates the current case law but is not intended to be exhaustive. No doubt at some point a new fact pattern will emerge in which a duty to act is appropriate.[251] The cen-

249. *Id.* at 265. The court held that the defendants were entitled to summary judgment on the claims for money damages on the basis of qualified immunity. The court based this ruling on its conclusion that a constitutional right to protection had not been clearly established at the time of the events in question. The court denied the defendants' motion for summary judgment on the plaintiff's request for prospective injunctive relief. The court reasoned that an award of prospective injunctive relief is not precluded by qualified immunity, and the factual record could support a jury finding that the defendant's failure to protect the plaintiff constituted a due process violation; *see also* Piechowicz v. United States, 885 F.2d 1207 (4th Cir. 1989) (no duty to protect witness in drug prosecution absent an express agreement to do so).

250. Assume, for example, that the police promise to protect a witness and his family and suddenly withdraw their protection without notice. The witness may be able to prove that he was deterred from taking alternative safety measures in reliance on the defendants' undertaking to protect. *Cf.* Ellsworth v. City of Racine, 774 F.2d 182, 183–84 (7th Cir. 1985) (here the plaintiff asked the bodyguards to leave). A tavern owner may forego hiring private security in reliance on the police department's promise to increase its patrol of the parking lot. *Cf.* Tucker v. Callahan, 867 F.2d 909, 914 (6th Cir. 1989) (ruling that "the alleged agreement between the city and the Harbour Inn management with regard to the Harbour Inn parking lot created no 'special relationship' between the city and the [assault victim]").

251. Note, too, that the three identified categories of state involvement are not mutually exclusive. For example, the state's constitutional duty to protect inmates may be justified both in terms of restrictions on self-protection as well as placing the inmate in a position of danger.

tral premise is that state involvement may take many forms. Courts cannot, and in any event should not, avoid fact sensitive inquiries as to state involvement in individual cases.

State involvement, however, is only one of the two factors that a court must consider in assessing a claim of affirmative duty. This Article now turns to the second, and perhaps more important consideration—the defendant's state of mind.

B. The Defendant's State of Mind

Constitutional affirmative duties, whose doctrinal foundation is the due process clause, must ultimately rest on a judgment that the contested governmental action is egregious or abusive. In determining which failures to act amount to constitutional violations and which must be left to state law, it is essential to ascertain how much the official knew about the plaintiff's predicament and why he did nothing to help. The Court in *DeShaney* did not consider the state-of-mind issue; it did not have to, because it found insufficient state involvement to trigger a duty to protect.[252]

While *DeShaney* is the Court's most recent opinion to avoid the state of mind issue, it is by no means the only one. This section examines the Court's practice of evading the state of mind issue and the reasons for it. The section then explains why it is necessary to face this question squarely in adjudicating affirmative duty as well as other substantive due process cases. This Article proposes that officials be liable in special relationship cases for failures to act that, in view of the official's knowledge of the circumstances, amount to deliberate indifference to the victim's need for help.

1. The Supreme Court's Aversion to State of Mind Inquiries

In *Daniels v. Williams,*[253] the Court held that negligently inflicted personal injury was not the kind of abuse of power forbidden by the due process clause. The central point of *Daniels* is that the defendant's state of mind is a critical inquiry in any substantive due process case to recover for personal injury.[254] Because the function of the due process clause is to protect persons against arbitrary, oppressive, or abusive

252. 109 S. Ct. 998, 1007 n.10 (1989).

253. 474 U.S. 327 (1986). The Court had previously skirted the issue of the state of mind necessary to support constitutional tort liability. *See* Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978). In Parratt v. Taylor, 451 U.S. 527 (1981), the Court stated that one could be "deprived" of property through negligence. *Daniels* overruled this aspect of *Parratt. Daniels,* 474 U.S. at 330–31.

254. *See also* Wells & Eaton, *supra* note 5, at 221–34.

behavior by government officials, it is necessary to know an official's motivation in order to make out a good case. The school principal's swat with a paddle might be a routine part of his job or an abuse of power, depending on whether he did it to maintain discipline or summarily to punish a student whose hair length annoyed him.

Daniels is atypical in emphasizing state of mind. A persistent theme in the Court's constitutional tort jurisprudence is an effort to devise rules for resolving cases without the need to inquire into the defendant's knowledge or motives. *DeShaney* grasps for limits on liability based on the kind of state participation at issue in the case. *Graham v. Connor,*[255] another case decided last term, ruled that claims against policemen for excessive force in an arrest should be adjudicated solely under a fourth amendment "objective reasonableness" standard, and not a substantive due process test that would consider the motivations behind the officers' conduct.[256] After *Graham,* it is apparently impossible to recover from a police officer if the circumstances of the arrest were such that a reasonable officer could have acted as he did, even if a plaintiff can show that this officer in fact acted out of pure malice.[257]

This effort to limit state of mind investigations extends to other constitutional tort issues. *Martinez v. California*[258] employed the rhetoric of proximate cause to avoid an inquiry into state of mind. The defendant officials paroled a dangerous sex offender, who five months later murdered a young girl. Although the complaint characterized the release as "reckless, willful, wanton and malicious,"[259] the Court upheld dismissal of the complaint. Mr. Justice Stevens explained that the victim's death "is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law,"[260] thereby avoiding a trial on whether the officials really did act recklessly or maliciously in releasing the man.

The most prominent illustration of the Court's aversion to state of mind inquiries is its treatment of the law of official immunity. Under prior law, officials who violated constitutional rights could escape liability only by meeting both a subjective and an objective test. The official had to show not only that he acted "sincerely and with a belief

255. 109 S. Ct. 1865 (1989).
256. *Id.* at 1870–71.
257. *See, e.g.,* Reed v. Hoy, 891 F.2d 1421, 1423–24 (9th Cir. 1989).
258. 444 U.S. 277 (1980).
259. *Id.* at 280.
260. *Id.* at 285.

that he [was] doing right," but also that the constitutional rule he breached was not settled law at the time he acted.[261]

In *Harlow v. Fitzgerald*[262] and *Anderson v. Creighton*,[263] the Court abandoned the subjective part of this test. *Harlow* held that officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known,"[264] and *Anderson* made it explicit that the defendant's "subjective beliefs . . . are irrelevant."[265] As a result, the policeman who conducts an illegal search and seizure, believing it to be illegal and intending to harass someone for the sake of his own sadistic pleasure may avoid liability. He need only show that the law was sufficiently unsettled that "a reasonable officer *could have believed*" the search to be lawful.[266]

Why does the Court strive to minimize examination of the defendant's state of mind? *Harlow* suggests that the need for cases to go to trial in order to resolve subjective inquiries is an important reason to avoid them.[267] The burden of a trial is one that officials should be spared if possible.[268] In addition, "[j]udicial inquiry into subjective motivation[s] . . . may entail broad-ranging discovery and the deposing of . . . an official's professional colleagues," inquiries that are "peculiarly disruptive of effective government."[269]

This argument rests on two unarticulated empirical premises. The first is that government officers rarely abuse their authority or act with a motive to injure someone. The second is that state of mind inquiries unduly disrupt the operation of efficient government. If one questions either of these premises,[270] lawsuits entailing inquiry into officials' motives would be justified.

---

261. *See* Wood v. Strickland, 420 U.S. 308 (1975).

262. 457 U.S. 800 (1982).

263. 107 S. Ct. 3034 (1987).

264. 457 U.S. at 818.

265. 107 S. Ct. at 3040–42.

266. *Id.* at 3040; *see, e.g.*, Schertz v. Waupaca County, 875 F.2d 578, 582–84 (7th Cir. 1989). Some commentators assert that the government official who knowingly violates the law will not be shielded by qualified immunity even if the underlying constitutional right was not clearly established at the time of the conduct. *See* Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 616–18 (1989).

267. 457 U.S. at 816.

268. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985) (allowing interlocutory appeals of summary judgment denials based on the official immunity defense).

269. *Harlow*, 457 U.S. at 817.

270. One may question the extent of the burden constitutional tort litigation places on the operation of government. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Turner, *When Prisoners Sue: A Study of Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 637 (1979).

2. Why the State of Mind Issue Cannot Be Evaded

In order to put this group of cases in perspective, it is important to recall that limiting liability so as to avoid state of mind inquiries is not without cost. The price is paid by the victims of abusive or oppressive behavior on the part of government officers. In the official immunity context, *Harlow* and *Creighton* removed one of the two pre-existing means of defeating a qualified immunity defense. *Graham,* by rejecting any subjective inquiry, eliminated a pre-existing theory of recovery for excessive force by the police. While much uncertainty remains, *DeShaney* suggests that the Court may endeavor to limit liability in affirmative duty cases by distinguishing among various kinds of state involvement without any reference to state of mind. The tenor of the opinion, if not its narrow holding, reflects too much concern for the cost of state of mind inquiries in terms of the burden they place on the affected officials, and underestimates the frequency in which officers' actions and omissions are badly motivated.

The importance of state of mind to claims based on government inaction is evident when one considers the cases in which the Supreme Court has already recognized affirmative constitutional duties. In *Estelle v. Gamble,*[271] the Court distinguished between the state tort of medical malpractice and the constitutional tort of cruel and unusual punishment by reference to the defendant's knowledge and motives. A prison official who inadvertently denies an inmate needed medical care has not transgressed the constitutional standard of care. Only the prison official who evidences "deliberate indifference" to the inmate's "serious medical need"[272] is subject to constitutional tort liability.

Significantly, the degree of state involvement is exactly the same in the case of negligent, and of deliberate, medical inattention. In each instance, and to the same extent, the state "so restrains an individual's liberty that it renders him unable to care for himself."[273] Similarly, the extent of the injury resulting from the denial of medical care may be identical in the two cases. The single factor that allows one but not the other claim to proceed in constitutional tort is the defendant's state of mind.

3. Selecting an Appropriate Liability Rule

If the Court is to give constitutional values the protection they deserve, it will have to specify the sort of official attitude that exceeds

271. 429 U.S. 97 (1976).
272. *Id.* at 105–06.
273. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1005 (1989).

constitutionally permissible bounds. *Daniels* took the first step in addressing this problem by holding that negligence does not constitute a due process violation. The task that remains for the Court is to select a liability standard from among the remaining alternatives, ranging from intentional misconduct, to recklessness, to gross negligence.[274]

Deciding precisely where to draw the constitutional line requires a delicate balancing of state and individual interests. While fundamental constitutional principles call for a rule that some level of official insensitivity violates the Constitution, it is difficult to decide among these alternatives other than on the basis of raw value judgments. The interests of persons harmed as a result of the state's lack of concern would be best served by a gross negligence test, the most liberal choice available and one that is sometimes characterized as just another shade of negligence.[275] Conversely, the state's interest in freedom from constitutional restraints on its conduct would fare best under a rule that officials cannot be liable in the absence of intentional misconduct. Under such a test a defendant might know of the victim's peril, fail to act out of callous lack of concern, and yet escape liability because he did not actually intend the harm.

It would be better for the Court to reject both extremes in favor of the "deliberate indifference" rule it already uses to resolve failure to act issues in the eighth amendment context,[276] and that it recently adopted as the standard for determining whether a municipality should be liable for inadequate training of an employee who commits a constitutional tort.[277] Under this approach it is not necessary to show that the officer intended harm, but neither does carelessness suffice. The standard is akin to the tort law test focusing on reckless disregard of a high probability that harm will occur unless action is taken.

Allowing plaintiffs to prevail on a showing of less than intentional misconduct again raises the problem of the slippery slope. Aggressive and clever lawyers are bound to pursue any opportunity to convert ordinary negligence cases into constitutional torts. In the common law of torts, it has proven notoriously difficult to cabin liability rules requiring a higher state of mind than negligence. Courts treat gross

274. *See* Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986).

275. *See, e.g.*, Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989).

276. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

277. *See* City of Canton v. Harris, 109 S. Ct. 1197, 1204 & n.8 (1989). For an illustration of the application of this standard, see Merritt v. County of Los Angeles, 875 F.2d 765, 769–71 (9th Cir. 1989).

negligence as a form of negligence, conflate gross negligence with recklessness, and wind up giving juries broad discretion to characterize as reckless conduct that is fairly described as merely negligent.[278]

Lower federal courts, however, have managed quite well to apply the deliberate indifference standard so as to avoid the slippery slope. In resolving inmate complaints concerning the adequacy of medical care, lower courts have been able to distinguish between simple malpractice and deliberate indifference. Through the traditional process of case-by-case determination, general principles have emerged. To establish a constitutional claim an inmate must allege and prove that the defendant deliberately failed to respond to the inmate's serious medical needs of which he was aware.[279] Thus, refusing to provide prescribed treatment[280] or denying the inmate's access to medical personnel qualified to evaluate his condition[281] can be considered deliberate indifference. On the other hand, disagreements as to diagnosis and treatment do not rise to the level of a constitutional claim.[282]

To be sure, the line separating simple negligence from deliberate indifference is fine, and the resolution of particular claims will necessarily turn on the facts of each case. Requiring an inmate to wait two and one-half days to be examined by the regularly scheduled physician does not violate constitutional standards when the inmate does not manifest outward signs of serious injury.[283] By contrast, a defendant who delays a few hours in providing care to an inmate he knows is stabbed or shot may be properly labeled as deliberately indifferent.[284]

278. *See* W. PROSSER & W. KEETON, *supra* note 105, at 210–14.

279. *E.g.*, Miltier v. Beorn, 896 F.2d 848, 852–53 (4th Cir. 1990); Mandel v. Doe, 888 F.2d 783, 787–90 (11th Cir. 1989).

280. *E.g.*, Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989) (failure to provide clean catheter for paraplegic inmate), *cert. denied*, 110 S. Ct. 2173 (1990); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to provide inmate with solution defendants knew would relieve inmate's pain).

281. *E.g.*, Mandel v. Doe, 888 F.2d 783 (11th Cir. 1989) (refusal of county's physician's assistant to refer inmate to physician for examination despite inmate complaints and visible loss of use of leg over a three month period); Carswell v. Bay County, 854 F.2d 454 (11th Cir. 1988) (refusal to refer inmate to physician despite knowledge of skin rash, constipation and significant weight loss).

282. Estelle v. Gamble, 429 U.S. 97, 107 (1976) (disagreement whether X-ray was needed); Sanchez v. Vild, 891 F.2d 240 (9th Cir. 1989) (disagreement over efficacy of treatment of boils with antibiotics); *cf.* Neitzke v. Williams, 109 S. Ct. 1827 (1989) (alleged disagreement by two prison doctors over proper treatment fails to state a claim for relief under section 1983).

283. Maxwell v. Conn, 893 F.2d 1335 (6th Cir. 1990).

284. Reed v. Dunham, 893 F.2d 285 (10th Cir. 1990) (two hour delay in treating inmate with a serious stab wound); Cooper v. Dyke, 814 F.2d 941, 943–46 (4th Cir. 1987) (two hour delay in treating an inmate with a gun shot wound).

To say that the distinction between constitutional and common law claims turns on the facts of particular cases does not mean that every case must be resolved by a jury. Courts have demonstrated ample ability to summarily dispose of eighth amendment claims that fail to allege or substantiate deliberate indifference.[285] These same courts are equally capable of distinguishing between deliberately indifferent and merely careless governmental inaction.

4. Summary

The Supreme Court is misguided in attempting to resolve affirmative duty claims by reference only to the degree of state involvement with the plaintiff's need for help. Even when a government official is clearly obligated to protect a plaintiff, inaction does not violate the Constitution unless accompanied by the requisite state of mind. A jailer's liability in constitutional tort for failing to prevent an inmate's suicide does not hinge on the degree of state involvement. Rather constitutional tort liability turns on the jailer's awareness of the risk, and the adequacy of any protective measures taken.[286] Even *DeShaney* concedes the jailer is duty bound by the Constitution to protect the inmate from self-inflicted injury.[287]

Governmental indifference to an individual's plight should be considered sufficiently abusive to trigger constitutional protection when it is the product of a conscious decision. The Supreme Court must, therefore, consider a government official's state of mind in order to develop a coherent framework for analyzing affirmative duty cases. We submit that the standard of deliberate indifference reasonably balances the individual's interest in securing governmental concern and respect with the state's interest in maintaining discretion in allocating its resources. This standard, adopted in other constitutional tort contexts, has proven a workable basis for distinguishing complaints of constitutional magnitude from those that properly remain the exclusive province of state law.

---

285. *E.g.*, Neitzke v. Williams, 109 S. Ct. 1827 (1989); Sanchez v. Vild, 891 F.2d 240 (9th Cir. 1989); Hayes v. Sweat, 889 F.2d 1087 (6th Cir. 1989).

286. *Compare* State Bank of St. Charles v. Camic, 712 F.2d 1140 (7th Cir.) (summary judgment for defendants who neither knew nor should have known of decedent's suicidal tendencies), *cert. denied*, 464 U.S. 995 (1983) *with* Partridge v. Two Unknown Police Officers, 792 F.2d 1182 (5th Cir. 1986) (defendants may be held liable in constitutional tort when they had notice of decedent's suicidal tendencies).

287. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1004–05 (1989).

III. CONCLUSION

Some commentators and some lower courts treat *DeShaney* as a blanket prohibition on constitutional tort liability for government inaction, applicable to all cases except those where the victim is involuntarily confined. These courts and commentators read the decision far more broadly than its ambiguous and fragmentary directives warrant. The only firm rule laid down in *DeShaney* is that officials owe no duty to help a person unless the state played at least some part in creating a peril or in rendering the victim more vulnerable to it. It would appear that the policeman who stands by as a child is beaten and robbed need not fear a constitutional tort suit. Hopefully, the Court will someday reconsider this rule in light of considerations of justice and the pervasive role of government in modern life. For now, it seems set in stone.

This Article has focused on another set of cases—those in which the state is somehow implicated in the victim's predicament, yet not solely responsible for it. In these cases, the question of whether and when state inaction violates the due process clause remains open. Here *DeShaney* is confused and contradictory. The opinion at one point seems to indicate that involuntary confinement will be required, at another that anyone placed by the state in a "worse position than that in which he would have been had it not acted at all"[288] can sue for an official's failure to help him. The Court's uncertainty with respect to this issue suggests that *DeShaney* is only the first step in the construction of constitutional tort doctrine for government inaction.

The best approach to such cases is to begin from the premise, abundantly supported in the Court's precedents, that the due process clause protects a person's life and health against egregious misconduct by government officers. Any state involvement that significantly imperils someone, in any of the ways discussed in Part III, should be enough to escape the barrier erected in *DeShaney* against liability for the uninvolved official. Once this threshold is overcome, the key consideration should be the official's state of mind. If the evidence regarding his knowledge and motives warrants characterizing his attitude toward the victim's plight as "deliberate indifference," then the plaintiff makes out a good claim.

This approach is consistent with the Supreme Court's work in other areas of constitutional tort, and it is well supported in lower court case law on liability for government inaction. Most important, it responds

288. *Id.* at 1006.

to the sense that government officials sworn to uphold a Constitution centrally concerned with individual rights should, in fact, treat persons with the barest modicum of humanity and respect.