9

Lynda G. Dodd*

DeShaney v. Winnebago County: Governmental Neglect and "The Blessings of Liberty"

I. Joshua DeShaney and the "Blessings of Liberty"

On March 8, 1984, almost two weeks before his fifth birthday, Joshua DeShaney fell into a coma after suffering a brutal beating at the hands of his father.[1] When brain surgery was performed to save Joshua's life, doctors discovered evidence of repeated head trauma and bruises all over his body. In the constitutional litigation that followed, the courts concluded that the state authorities should not be held liable for failing to protect Joshua from the abuse that ultimately left him partially paralyzed and profoundly brain damaged.[2]

* Thanks to Jessica Davidson for her research assistance, and to the editors of this volume for their helpful comments.

[1] Paul Reidinger, *Why Did No One Protect This Child?* A.B.A. JOURNAL 48 (Dec. 1, 1988).

[2] *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). The facts presented here and in the following paragraphs are derived from Chief Justice Rehnquist's opinion, Judge Posner's opinion for the Seventh Circuit, *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987); the unpublished opinion of the district court below, *DeShaney v. DeShaney*, No. 85–C–310, slip op. at 3–14 (E.D. Wis. June 20, 1986), reprinted in the Appendix to the Petition for Certiorari at 35–53, *DeShaney*, 489 U.S. 189 (No. 87–154); the Brief for Petitioner, *DeShaney*, 489 U.S. 189 (No. 87–154); the Brief for Respondent, *DeShaney*, 489 U.S. 189 (No. 87–154); and the Joint Appendix to the merits briefs, *DeShaney*, 489 U.S. 189 (No. 87–154). The lengthy Joint Appendix is a particularly important resource for background information on the *DeShaney* case. The Joint Appendix compiles a number of sources of factual details not mentioned in the legal briefs and court opinions, such as notes from DSS caseworker Ann Kemmeter's case files

The courts absolved the state authorities of all responsibility despite the fact that, for the fourteen-month period before that final beating, Joshua had been under the care and supervision of the Winnebago County Department of Social Services (DSS).[3] In fact, DSS received its first notification of suspected abuse more than two years before Joshua's final beating. This initial report came in January 1982, when the lawyer handling divorce proceedings for Joshua's stepmother, Christine DeShaney, called the Neenah, Wisconsin Police Department to inform them that Joshua's father, Randy DeShaney, was abusing his son. After a brief investigation, DSS decided against taking any action.[4]

One year later, in January 1983, Joshua had suffered such serious injuries that Randy DeShaney's new girlfriend—his former sister-in-law, Marie DeShaney—took Joshua to the local hospital, the Theda Clark Regional Medical Center, for treatment of multiple bruises and abrasions. Marie explained to the doctors that the bruises might have been caused by another toddler hitting Joshua in the forehead with a metal toy truck. His medical report, however, indicated there were bruises and abrasions on Joshua's forehead, cheek, scalp, spine, arms, buttocks, penis, upper thighs, ankles and heel.[5]

When the emergency room physician and hospital social worker notified DSS of suspected child abuse, the agency finally took action and obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital.[6] The county assigned a Child Protection Team—which included a pediatrician, psychologist, police officer, a Winnebago County assistant corporation counsel, and DSS caseworkers—to review Joshua's case.[7] After a three-day investigation, including interviews with Randy, Marie, and Christine DeShaney, the Child Protection Team concluded that the child abuse allegations were "unfounded."[8] However, before officially relinquishing custody of Joshua, they negotiated a voluntary contract with Randy, asking him to seek counseling, to move Marie out of his house (there was some suspicion that she had caused the injuries),[9] and to ensure that Joshua would be placed in a

and excerpts from over 3700 pages of depositions taken during the course of the *DeShaney* litigation.

[3] *DeShaney*, 489 U.S. at 192.

[4] Brief for Petitioner, *supra* note 2, at 8; Joint Appendix, *supra* note 2, at 159–60, 163–64.

[5] Joint Appendix, *supra* note 2, at 107–8, 111.

[6] *Id.* at 107–8.

[7] *Id.* at 45–46.

[8] *Id.* at 107–14.

[9] *Id.* at 59, 63.

Head Start preschool program, where presumably his well-being would be more closely monitored.[10] Randy DeShaney agreed to those requests and Joshua was returned to his custody.

In the internal report filed by DSS, Joshua's new caseworker, Ann Kemmeter, indicated in a notation that, while the allegations against the DeShaneys were dismissed, she would "refer it back into Court should there be any further injuries to this child of an unexplained origin."[11] Just a few weeks later, on March 15, 1983, Joshua was again sent to the emergency room for treatment. Although the hospital social worker filed another report to notify DSS that Joshua had suffered another blow to his head, Kemmeter concluded there was no basis for action.[12]

For the next year, Kemmeter conducted home visits to monitor Joshua's care. She kept detailed notes regarding suspicious injuries—including bruises and bumps on Joshua's forehead, a scratched cornea, and cigarette burns—but she did not attempt to investigate their cause.[13] When she learned that Marie had joined Randy and Joshua in a move to a new home in Oshkosh, Wisconsin, Kemmeter still did nothing to intervene, accepting without question their claims that their relationship had improved following the move.[14]

On November 30, 1983, Joshua was once again taken to the emergency room. Hospital officials at Mercy Medical Center in Oshkosh notified DSS of a head injury, a bloody nose, a swollen ear, and bruised shoulders.[15] After Randy DeShaney offered the explanation that Joshua had injured himself in the bathroom, Kemmeter again decided not to intervene.[16]

During this same period, a Head Start social worker, Ruth Davis, visited the DeShaney home and found that Joshua had been left alone and unsupervised. Davis tried repeatedly to contact DSS to inform Joshua's caseworkers of this incident, but received no immediate response from the agency.[17]

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[10] *Id.* at 112–14, 170–71.

[11] *Id.* at 170.

[12] *Id.* at 115, 120–21.

[13] *Id.* at 114–21; see also the lengthy summary of incidents and injuries at *id.* at 132–37.

[14] *Id.* at 114–15. From the time the DeShaneys moved to Oshkosh in June 1983 to January 1984, the police responded to at least five complaint calls reporting domestic disputes in the DeShaney household. *See id.* at 6–7, 151.

[15] *Id.* at 119–120.

[16] *Id.* at 121.

[17] Petition for Certiorari at 8, *DeShaney*, 489 U.S. 189 (No. 87-154); Joint Appendix, *supra* note 2, at 186–87. Kemmeter later asserted that she scolded the Head Start social

On each of her next two monthly visits to the DeShaney home, Kemmeter was told that Joshua was either sleeping or too ill to see her. She made no further inquiries, although her social services review report in January 1984 offers for the first time some evidence of her growing suspicions about Joshua's "accident-prone" behavior. She attached to her case notes the domestic violence reports from the Oshkosh Police Department, and she described her suspicion that Marie may be retaliating against Joshua out of frustration resulting from Randy's abusive behavior towards her.[18] Yet Kemmeter made no further attempts to investigate, even when she was told that Joshua was unable to see her during her visits to the DeShaney home in February and March.[19] Indeed, she had not seen Joshua in person since the previous November. The next time she would see Joshua, on March 8, 1984, his bruised body would be lying unconscious in a hospital bed.

When the Mercy Medical Center phoned Kemmeter to notify her of Joshua's catastrophic head injury, she drove to the hospital and met first with Marie DeShaney, who told her that Joshua had fallen down four basement stairs and hit his head. Kemmeter later asserted that she then expressed concern about Joshua's numerous accidental injuries, but Marie insisted that was the true explanation.[20] In Kemmeter's case notes, she reports that she then encountered Randy DeShaney, who approached her crying, shaking violently, clearly upset, stating that if anything happened to Joshua he would have no reason to live. Kemmeter attempted to help calm Randy, and she arranged for him to receive a sedative from the hospital staff.[21]

Kemmeter then called the Oshkosh police department to report the incident. While waiting for the officers to arrive, she visited Joshua's room, and she reports in her notes that she observed that Joshua had bruises on his cheeks, as well as a "line type bruise" across his neck.[22] When the two Oshkosh police officers, Detective Novotny and Officer Kronenwetter, arrived, both Marie and Randy were sitting by Joshua's side. Still crying but sedated, Randy was stroking Joshua's hair when the

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worker for not calling the police if she truly believed that Joshua was in any danger that afternoon. When following up on the report, Kemmeter apparently accepted the explanations of Randy and Marie DeShaney, who claimed that they had just left Joshua alone for fifteen minutes while they went to the corner to use a pay phone. Brief for Respondent, *supra* note 2, at 11, n. 7; Joint Appendix, *supra* note 2, at 188–90.

[18] Joint Appendix, *supra* note 2; *Id.* at 120–21.

[19] *Id.* at 133–35.

[20] *Id.* at 122.

[21] *Id.* at 122–23.

[22] *Id.* at 124.

officers entered the room.[23] Randy repeatedly asked Kemmeter why it was necessary to speak to the police, and though he eventually cooperated with the request, Randy reminded her, "Ann, you know Joshua bruises easily."[24]

Kemmeter and the detectives then met with Joshua's surgeon, who told them that Joshua had a 25 percent chance of surviving the surgery that evening. Detective Novotny phoned the district attorney's office to inform them there was a likely homicide case.[25]

It was at this point that Kemmeter spoke with Joshua's mother, Melody DeShaney, for the first time. During all the months that Kemmeter had been monitoring the situation with Joshua, she knew that his mother still resided in Cheyenne, Wyoming, where Joshua was born and where his parents divorced.[26] Although she had never notified Melody about the abuse allegations, Kemmeter finally decided to notify Melody to tell her that her son would likely die.[27] Melody and her mother, Myrna Bridgewater, later claimed that Kemmeter had confided to them, soon after their arrival at Mercy Medical Center, "I just knew one day I would pick up the phone and learn that Joshua was dead."[28]

After the surgery, Kemmeter and the DeShaneys were told that a large portion of Joshua's skull had been removed in order to relieve pressure on his brain, and that he would remain in the intensive care unit indefinitely. His surgeon, Dr. Marc Letellier, predicted that it could be weeks before Joshua could wake up, if he ever did regain consciousness. The surgeon then met with the Oshkosh police detectives, Kemmeter, DSS supervisor Cheryl Stelse, and other Mercy staff members. He told the group that there was no indication of any stress fracture on Joshua's skull, which indicated to him that the explanation that Joshua fell down the stairs was false. Instead, there appeared to be several areas of older bruising, which were evident only after Joshua's head was shaved in preparation for surgery. During the surgery, Dr. Letellier discovered that a group of blood vessels had been detached from Joshua's

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[23] *Id.* at 124.

[24] *Id.* at 124.

[25] *Id.* at 125.

[26] When Joshua was fourteen months old, Melody DeShaney agreed to surrender custody to his father, but she continued to send monthly child support payments and apparently made numerous attempts to contact Randy to check on Joshua's care. *See id.* at 73–82.

[27] Petition for Certiorari, *supra* note 17, at 10–11. In her case notes, Kemmeter states that she first received Melody's phone number from Randy DeShaney after Joshua suffered his final beating. Joint Appendix, *supra* note 2, at 136.

[28] Petition for Certiorari, *supra* note 17, at 11; Joint Appendix, *supra* note 2, at 104–05.

skull, resulting in severe internal bleeding. According to the surgeon, this type of injury is consistent with injuries produced by severe, violent shaking.[29] Because these injuries required a physically strong perpetrator, the Oshkosh detectives began to focus their investigation on Randy DeShaney.[30]

Following this meeting, Joshua was again placed in the temporary custody of the hospital. The assistant corporation counsel for Winnebago County, John Bodnar, was notified of the new abuse allegations, and the Oshkosh Police Department began its own investigation. Detective Novotny first conducted a series of interviews with the staff of Mercy Medical Center. The treating pediatrician, Dr. B.F. Kayali, who initially examined Joshua after his arrival at Mercy on March 8, told Novotny that, in addition to older bruises covering most of Joshua's body, there were also fresh deep purple bruises, on his face, buttocks and upper thighs. Dr. Kayali estimated that the new bruises covered 50 to 75 percent of Joshua's lower body, and he would later testify during Randy DeShaney's criminal trial that he had never observed physical injuries as alarming as those suffered by Joshua DeShaney.[31]

The Oshkosh police detectives also interviewed associates and neighbors of the DeShaneys, and they were able to gather corroborating testimony describing the abuse of Joshua by both Randy and Marie DeShaney that had occurred over the past several months.[32] On May 30, Randy DeShaney was arrested and charged with two counts of child abuse, one count of conduct regardless of life, and five counts of misdemeanor battery against Marie (these last charges were later dropped after Marie refused to cooperate with the prosecutors).[33] In December of 1984, Randy entered an "Alford" plea, which allowed him to accept a plea bargain without admitting to being guilty of the two felony charges against him. At the February, 1985 sentencing hearing,

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[29] *Id.* at 127.

[30] LYNNE CURRY, THE DESHANEY CASE: CHILD ABUSE, FAMILY RIGHTS, AND THE DILEMMA OF STATE INTERVENTION 65 (2007) (discussing the criminal case against Randy DeShaney).

[31] CURRY, *supra* note 30, at 63.

[32] Joint Appendix, *supra* note 2, at 151–54.

[33] CURRY, *supra* note 30, at 66, 76. Wisconsin's criminal provision 940.201, " 'Abuse of Children,' defined 'child' as a person under sixteen years of age and defined the crime of abuse as a Class E felony, applicable to 'whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited to, severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm. . . .' " Those found guilty could be punished with a fine of $10,000 or a prison sentence of not more than two years, or both. *Id.* at 66. Detective Novotny later recalled recommending that his investigation had uncovered enough evidence to charge Randy DeShaney with attempted manslaughter, but the district attorney declined to pursue the charge. *Id.* at 76.

the judge sentenced him to the maximum penalty of two years for each count—four years in total. Randy entered the Dodge Correctional Institution in Waupun, Wisconsin the following week. He was paroled after two years and seven months, and served the remainder of his sentence in a local drug treatment facility.[34]

Joshua's condition improved slightly in the weeks following the final incident, but he remained in the Pediatric Unit from late March until June 5, 1984. One of the brain scans performed during his stay at the Mercy Medical Center showed that he was brain dead on the right side of his brain, but after a second surgery to insert a metal plate in his head where a large portion of his skull had been removed in the first surgery, there was an immediate improvement in Joshua's condition. This second surgery produced some hope that, with extensive physical therapy, his cognitive and physical skills might improve significantly.[35] Upon his release from the hospital, Joshua was sent to the Central Wisconsin Center for the Developmentally Disabled, a state-supported institution in Madison, Wisconsin.[36] As his condition improved, the staff at Central Center recommended that he be transferred to the Gillette Rehabilitation Center in St. Paul, Minnesota, where his recovery proved to be slower than expected. In September of 1984, Joshua remained partially paralyzed and unable to speak or respond to verbal commands, but after months of physical therapy he was able to regain some use of his limbs on the right side of his body.[37] Joshua later left the Gillette Center, and had spent a number of years living in a series of foster homes when the Supreme Court heard his case in 1988.[38] Today, Joshua lives in a Wisconsin group home for severely disabled adults.[39]

Years later, looking back on these events, Ann Kemmeter told a reporter, "I am very sorry for Joshua, but the bottom line is, I'm not the one who abused him . . . given the information we had at the time as it was given to us, I don't think there was anything we could have done differently."[40]

II. Civil Rights Litigation and "Constitutional Torts"

In her recent book on the *DeShaney* case, historian Lynne Curry traces the development of child protective services bureaucracies, focus-

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[34] *Id.* at 79–81.

[35] Joint Appendix, *supra* note 2, at 139–40.

[36] *Id.* at 139.

[37] *Id.* at 140–41; CURRY, *supra* note 30, at 78.

[38] CURRY, *supra* note 30, at 82.

[39] Joint Appendix, *supra* note 2, at 144.

[40] Nat Hentoff, *No Comment from Joshua*, WASH. POST, Mar. 18, 1989, at A27.

ing especially on their assignment of dual roles to caseworkers, like Ann Kemmeter, who must simultaneously offer therapeutic services to families while also serving as the government's chief investigator.[41] It is certainly true that a careful review of Kemmeter's case files suggests that she had considerable difficulty shifting from the role of family advocate to skeptical investigator. Explaining why such failures to intervene remain so common today, however, requires more attention to the *legal* dimensions of these cases, especially the role of civil rights litigation in efforts to hold the government accountable for the injuries inflicted on children like Joshua.

When Joshua's mother, Melody DeShaney, sued the Winnebago County DSS in order to seek compensatory damages on behalf of her son, she, like thousands of other plaintiffs do every year, relied on 42 U.S.C. § 1983—the primary statutory vehicle individuals use to vindicate their constitutional rights against state and local government officials and municipalities. For civil rights advocates, constitutional tort litigation is an indispensable tool of civil rights enforcement in the modern administrative, welfare state.[42] Because the development of government programs designed to protect children from abuse[43] coincided with the growth of civil rights litigation, it is not surprising that, throughout the 1980s, an increasingly large category of § 1983 cases targeted governmental efforts to protect abused and neglected children.

In these lawsuits, plaintiffs sued child welfare and other governmental agencies for their "failure to protect" them from harm. For a number of doctrinal reasons,[44] these "failure to protect" claims were rarely successful. Under the existing two-step framework for § 1983 litigation, the first hurdle plaintiffs must pass over requires establishing the existence of a constitutional violation. The next step is showing the government entity or official defendant is liable for the injury. The problem with failure to protect cases is that the first hurdle is deemed insurmountable, because in most of these cases, the direct source of the injury or harm is typically a *private* actor, like Joshua DeShaney's

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[41] CURRY, *supra* note 30, at 8.

[42] For an overview of the law of § 1983, see SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (2006 ed.).

[43] *See* LELA B. COSTIN ET AL., THE POLITICS OF CHILD ABUSE IN AMERICA Ch. 4 (1996) (providing an overview of federal child abuse and neglect legislation).

[44] Whether due to concerns about docket pressures resulting from the dramatic growth of cases brought under § 1983 or fears about the consequences of expanding governmental liability, the law of § 1983 has been interpreted in a pervasively anti-plaintiff manner in recent years. For more on these developments, see LYNDA DODD, SECURING THE BLESSINGS OF LIBERTY: THE HISTORY AND POLITICS OF CONSTITUTIONAL TORTS LITIGATION Ch. 4 (2004) (unpublished Ph.D. dissertation, Princeton Univ.) (on file with author).

father. When there is no state actor serving as the direct cause of the harm, courts have concluded that the "state action requirement" for a Fourteenth Amendment violation cannot be satisfied. The inquiry generally ends at this point, and so all of the remaining questions related to the second step—the liability inquiry addressing such issues as individual officer immunity defenses or the municipal policy or custom requirement—are never even reached.[45]

This focus on the state action requirement is understandable. The protections of the Constitution have traditionally been understood to provide *constraints* on government—not affirmative duties with which the government must comply. Because the principal aim of liberal constitutionalism is to protect citizens from arbitrary abuses of government power, the conventional wisdom has long held that constitutional rights are meant to limit state action, and that the Constitution is thus properly deemed a "charter of negative liberties."[46] Constitutional rights discourse has largely consisted of charging the government with negative duties of non-interference, rather than positive, affirmative duties or guarantees, in order to establish a protected "realm" of private authority.

However, in a series of cases during the 1970s and 1980s, lower federal courts recognized exceptions to this general approach. This is a crucial issue because, if the government has an affirmative duty to protect, then *the failure to act* could satisfy the state action requirement under the Fourteenth Amendment. The key issue in these cases concerns what circumstances would trigger a governmental affirmative duty to protect individuals like Joshua DeShaney from private violence. In these affirmative duties cases, federal judges introduced two major doctrinal theories holding the government responsible for failures to act: (1) the custody limitation and (2) the state-created danger requirement.

A. "Special Relationships" and the Custody Limitation

The "custody doctrine" is based on the acknowledgment that the state's physical custody of individuals gives rise to governmental affirmative duties to protect individuals from harm. The rationale for this exception to the general rule against affirmative duties focuses on the

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[45] In *DeShaney*, as with other failure to protect cases, even if the first hurdle had been overcome, the individual defendants likely still would have won because Kemmeter and Stelse could claim a qualified immunity defense, on the grounds that the due process doctrine for failures to protect was not clearly established. It also would have been difficult to satisfy the post-*Monell* doctrinal tests for determining whether a "policy or custom" of the government agency caused the injury. *See* Brief for Respondent, *supra* note 2, at 57–64 (applying the qualifying immunity and "policy or custom" doctrines to the *DeShaney* case).

[46] Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982).

state's assumption of complete control over the individual.[47] In such circumstances, the state enters into a "special relationship" with the individual in custody, which in turn triggers the assignment of an affirmative duty upon the state to make certain that basic needs are met. The Supreme Court first acknowledged this special relationship in *Estelle v. Gamble*, a case involving the affirmative duty of prison officials to provide medical care to prisoners.[48] In *Youngberg v. Romeo*, the Court extended this custody-based affirmative duty doctrine to apply to patients committed to state mental health institutions.[49]

When applying this doctrine to cases involving abused children, the lower federal courts divided on the issue of the custody limitation's scope.[50] A few circuits—including the Fourth Circuit in *Jensen v. Conrad*[51] and the Third Circuit in *Estate of Bailey by Oare v. County of York*,[52]—held that child welfare agencies could be held responsible for failing to protect children under their supervision, even if they remained in the physical custody of their parents.

In *Jensen v. Conrad*, the Fourth Circuit asserted in dicta that "a right to affirmative protection need not be limited to a determination that there was a 'custodial relationship.' "[53] Because the court disposed of the case on qualified immunity grounds, it did not take the opportunity to offer a full assessment of the circumstances that might trigger an affirmative duty to protect, but the opinion did offer a list of additional factors it considered relevant to the inquiry, including whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals, and whether the state knew of a victim's plight.[54]

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47 Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (holding that a duty is triggered when the person is "wholly dependent on the State").

48 429 U.S. 97, 106 (1976) (limiting liability under the Eighth Amendment to cases involving "deliberate indifference to serious medical needs").

49 457 U.S. 307 (1982). *Youngberg* is also significant because the Court acknowledged that the affirmative duty to protect doctrine encompassed not only Eighth Amendment violations but also claims relying on the substantive due process clause.

50 The Second and Eleventh Circuits extended the custody analogy to the foster care system, holding that the government has an affirmative duty to protect children placed in the care of foster parents. *See* Doe v. N.Y. City Dep't of Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1981) ("Doe I"); Doe v. N.Y. City Dep't of Soc. Servs., 709 F. 2d 782 (2d Cir. 1983) ("Doe II"); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987).

51 747 F. 2d 185 (4th Cir. 1984).

52 768 F.2d 503 (3d Cir. 1985).

53 747 F. 2d at 194 (citing Fox v. Custis, 712 F. 2d 84 (4th Cir. 1983)).

54 *Id.* at 195, n.11.

In the *Estate of Bailey* case, child protection workers were accused of failing to protect a five-year-old girl, Aleta Bailey, from abuse by her mother and her mother's boyfriend. Despite receiving reports from relatives and physicians about the abuse, the child's social workers released her to the custody of her mother and then failed to ensure that the mother's boyfriend moved out of the residence. According to the complaint, the agency never followed up with an additional investigation of Aleta's welfare, and just one month later she died from injuries caused by her mother and the boyfriend.[55] The Third Circuit applied the *Jensen* factors to Aleta's case—focusing in particular on the agency's awareness of a special danger to Aleta—and vacated the district court's dismissal of the complaint.[56]

B. State-Created Danger Theory

As developed in a series of Seventh Circuit opinions, the "state-created danger" doctrine focuses on the state's involvement in placing the individual in a position of danger.[57] No analogies to custodial relationships are required and the state-created danger need not involve any formal relationship between the government and the victim. Under this approach, even if it is a private actor that later causes an injury, so long as the state *created* the danger, it can be held liable for failing to protect the individual. In Judge Richard Posner's view, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him in a snake pit."[58]

The doctrine was significantly limited in subsequent Seventh Circuit opinions to emphasize that the danger must be *imposed* by the state and that if individuals encouraged the creation of the danger, they voluntarily assumed the risk of any ensuing injuries. As Judge Frank Easterbrook pithily concluded in *Walker v. Rowe*, "[t]he state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten."[59]

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[55] 768 F.2d at 505.

[56] *Id.* at 510–11.

[57] An early example of this approach can be found in *White v. Rochford*, where the Seventh Circuit applied a state-created danger theory to a case involving police officers who arrested the driver of a car containing three child passengers. When the police took the driver into custody and abandoned the children, they became liable for subjecting the children to a "health-endangering situation." White v. Rochford, 592 F. 2d 381, 382 (7th Cir. 1979).

[58] Bowers v. Devito, 686 F.2d 616, 618 (7th Cir. 1982).

[59] Walker v. Rowe, 791 F.2d 507, 511 (7th Cir. 1986).

The state-created danger theory is vague enough that it remains susceptible to varying applications. Consider the facts at issue in *Jackson v. City of Joliet*,[60] a case involving a car accident that resulted in the car bursting into flames. A Joliet police officer came upon the scene, where, after calling the fire department, he began directing traffic away from the area. He never attempted to check the status of the car's passengers, nor did he call an ambulance. It is possible to describe the police officer's actions in directing possible sources of help away from the scene as a state-created danger, but Judge Posner offered a different analysis. He conceded that botched rescue efforts may make victims worse off, but he distinguished *White v. Rochford* and other state-created danger cases on the grounds that here, in the *Joliet* case, the victims were already in grave danger before the police officer arrived on the scene. Because the state played no role in the initial car crash, it should not be held liable for the events that followed.[61] From these initial cases, it appeared that the Seventh Circuit was eager to prevent the state-created danger doctrine from becoming a fruitful legal theory for plaintiffs seeking to hold the government accountable for its failures to protect.

III. Lower Court Proceedings

Given these Seventh Circuit opinions, the prospects for DeShaney's lawsuit appeared dim. But Melody DeShaney was determined to find a way to provide for Joshua's care and to ensure that nothing similar ever happened to another child in Winnebago County.[62] After she returned from her visit to Oshkosh, she contacted a local personal injury lawyer, Donald J. Sullivan, and met with him to discuss Joshua's situation. He told her that, compared to a tort claim in state court, her prospects for winning a federal civil rights lawsuit were much lower, but the ability to sue for full compensatory as well as punitive damages could make a federal lawsuit worth attempting.[63] Because the case was filed in the Federal District Court for the Eastern District of Wisconsin, Sullivan

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[60] Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983).

[61] 715 F.2d at 1204; *see also* Archie v. City of Racine, 847 F.2d 1211, 1215 (7th Cir. 1988).

[62] William Glaberson, *Determined to Be Heard: Four Americans and Their Journey to the Supreme Court*, N.Y. TIMES MAG., Oct. 2, 1988, at 34. A state law tort claim was thought to be a much less attractive option, because, at the time when Joshua DeShaney was injured, the damages cap for claims against the state of Wisconsin was set at $50,000. The *annual* costs of Joshua's medical care would far exceed the cap on total damages imposed by the state.

[63] CURRY, *supra* note 30, at 84. *See also* Joint Appendix, *supra* note 2, at 17–18 (reproducing the *DeShaney* complaint, which requests $50 million in compensatory damages and $50 million in punitive damages).

arranged for local co-counsel, Curry First, the litigation director for the Legal Aid Society of Milwaukee, Wisconsin, to join the case.[64]

Their legal strategy centered on the recent opinions in *Jensen*[65] and *Estate of Bailey*,[66] both of which had endorsed an expansion of the custody limitation by assigning to the government an affirmative duty to protect children under the care of their child protective services agencies. These opinions had emphasized that sufficient awareness by the government of the dangers faced by the child could trigger an affirmative duty to protect. So, in order to show that the Winnebago County DSS had sufficient knowledge of the serious dangers Joshua faced, Sullivan and First early on realized the importance of discovery: they decided to conduct extensive depositions, and to gather extensive exhibits, including photographs and videotapes of Joshua, medical evidence such as x-rays and CAT scans, and other illustrations and diagrams to explain the extent of Joshua's injuries.[67] Their greatest hope was for a favorable ruling in the district court that would pave the way for serious settlement negotiations.[68]

These hopes were soon defeated. Judge John W. Reynolds (former governor of Wisconsin and now chief judge of the United States District Court for the Eastern District of Wisconsin) was assigned to the *DeShaney* case. In January of 1986, Mark Mingo and Wayne Yankala, the lawyers representing the Winnebago County DSS, Kemmeter, and her supervisor, Cheryl Stelse, filed a motion to dismiss.[69] In their motion, they argued that no special relationship existed between Joshua and the Winnebago County DSS. They emphasized that the social services agreement between DSS and Randy DeShaney was a purely voluntary one, and that neither DSS nor Kemmeter had retained any control or responsibility for the events that occurred during the period they offered services to the DeShaney family. They also argued that Kemmeter and Stelse enjoyed a qualified immunity defense from the lawsuit, because the law regarding the duty to protect was not clearly established at the time the injuries occurred.[70]

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[64] CURRY, *supra* note 30, at 89–90.

[65] 747 F.2d 185 (4th Cir. 1984).

[66] 768 F.2d 503 (3d Cir. 1985).

[67] CURRY, *supra* note 30, at 94.

[68] *Id.* at 101. Both lawyers realized they had little chance of winning on appeal, because the Seventh Circuit was filled with appellate judges known to be hostile to their arguments.

[69] The Wisconsin Attorney General represented the other public defendants—the State of Wisconsin, the Wisconsin Department of Health and Social Services, and its Secretary, Linda Rivetz. The claims against these defendants were soon dismissed on Eleventh Amendment state sovereign immunity grounds.

[70] CURRY, *supra* note 30, at 96.

After receiving the motion to dismiss, Judge Reynolds informed the parties that he intended to convert the filing into a motion for summary judgment. This procedural step allowed Reynolds to consider additional materials, and he gave the parties thirty days to submit any other briefs, affidavits, and depositions they had prepared. The DeShaneys' lawyers were dismayed by these developments. They believed that the legal questions in the case—centering on whether a special relationship existed—depended on the full development of a factual record.[71]

On June 20, 1986, Judge Reynolds granted the defendants' motion for summary judgment, finding that there was no special relationship established between the Winnebago County DSS and Joshua Deshaney.[72] He agreed that an affirmative duty to protect may be triggered by a custodial relationship or a state-created danger, but he concluded that neither existed in this case.[73] Reynolds also specifically declined to accept the plaintiffs' proposal to expand the definition of a special relationship in the manner of the Third Circuit's *Estate of Bailey* opinion, which had focused in particular on the state's knowledge of the danger Aleta Bailey faced.[74] Describing the *Bailey* approach as "unsound," Reynolds emphasized the slippery slope problem he considered to be inherent in the *Bailey* expansion of the special relationship doctrine—the result that every social welfare program would become "a charter of constitutionally sanctioned social and economic 'rights'. . . ."[75]

First and Sullivan filed their appellate briefs in the Court of Appeals for the Seventh Circuit in September, 1986, and the *DeShaney* oral argument was scheduled for January 13, 1987. The three-judge panel assigned to the case included Judges Richard Posner, John Coffey, and Robert Grant, sitting by designation from the Northern District of Indiana.

The Seventh Circuit panel issued its opinion on February 12, 1987. Judge Posner wrote the opinion rejecting Joshua DeShaney's claims, citing the "well established" case law in the Seventh Circuit holding that the state's failure to protect individuals from private violence is not a

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[71] *Id.* at 98.

[72] *DeShaney v. DeShaney*, No. 85–C–310, slip op. at 3–14 (E.D. Wis. June 20, 1986), reprinted in the Appendix to the Petition for Certiorari, *supra* note 2, at 35–53.

[73] Appendix to the Petition for Certiorari, *supra* note 2, at 46.

[74] *Id.* at 46–47.

[75] *Id.* at 48.

deprivation of a constitutional right.[76] According to Posner, in order to establish a due process violation, the plaintiff needed to show a state actor "deprived" him of his liberty. The social workers employed by the Winnebago DSS certainly did not *directly* cause Joshua's injuries. Nor, according to Posner, were they indirectly responsible. Because "deprivation implies causation," the plaintiffs needed to establish that DSS in some way "increased the probability of Joshua's injuries."[77] In assessing such an argument, Posner posed a hypothetical, asking whether Joshua would still have sustained his injuries if DSS had never existed. Posner surmised that he would have: "It is unlikely that Ann Kemmeter's well intentioned but ineffectual intervention did Joshua any good at all, but it is most unlikely that it did him any harm. She merely failed to protect him from his bestial father."[78]

Posner acknowledged that Kemmeter acted recklessly when she failed to act on the growing evidence of abuse, but he also stressed that, by that point, Joshua was in the lawful custody of his father.[79] At this later stage, when the abuse recommenced, the state itself did not *create* the danger. It "merely" failed to protect him from an abusive family environment the state had no responsibility for creating.[80] Thus, in Posner's view, what occurred to Joshua was "botched rescue," not a deprivation by the state.

In his discussion of the "botched rescue" argument, Posner emphasized that the traditional common law tort theory of detrimental reliance—focusing on the idea that the rescuer's botched or negligent attempt made it less likely other potential rescuers would make an attempt—should not be applied in a *constitutional* tort claim:

> "Constitutional tort law, ... which ties a defendant's liability to *depriving* the plaintiff of some right, cannot follow this path of expansion.... [A] constitutional tort requires deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others."[81]

Just as he had done previously in his *Jackson v. City of Joliet* opinion,[82] Posner distinguished situations involving a "botched rescue" from those resulting from a state-created danger, cases where "the state

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[76] DeShaney v. Winnebago County, 812 F.2d 298, 301 (7th Cir. 1987).

[77] *Id.* at 302.

[78] *Id.*

[79] *Id.* at 303.

[80] *Id.*

[81] *Id.* at 302.

[82] Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983).

places the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becomes the cause of the harm."[83] Posner rejected the argument that, by returning Joshua to his father's custody in January 1983, DSS had recklessly placed him in a position of great danger. At that point, Posner emphasized, the state was weighing the evidence available to it, as it was required to do under Wisconsin law, and taking into account as well that Randy DeShaney might well have sued DSS for violating his parental rights.[84]

Finally, Posner offered an assessment of the arguments in the Third Circuit's *Bailey* opinion,[85] which held that a special relationship and an affirmative duty to protect arose whenever a state becomes aware of the danger that a particular child may be abused and took steps to intervene. Rejecting the *Bailey* expansion of the special relationship category, Posner distinguished physical custody cases like *Estelle*[86] and *Youngberg*[87] on the grounds that, in those cases, the state had deprived individuals of their liberty and prevented them from exercising self-help, and so once having done so "cannot shrug off all responsibility when the danger materializes and injury results."[88] The key difference between the custody situation and a case like DeShaney's was that, according to Posner, the state had not entirely removed Joshua's ability to protect himself.

IV. The Supreme Court

On July 17, 1987, Sullivan and First filed a petition for a writ of certiorari, which the Supreme Court granted on March 21, 1988. Throughout the spring and summer, there was much speculation about the impact of Justice Anthony Kennedy's arrival on the Court. The press coverage of the Court focused in particular on the fact that the 1988–1989 Supreme Court Term would be the first in over forty years in which conservative justices held a majority on the Court.[89] The Court's

[83] 812 F.2d at 303 (citing White v. Rochford, 592 F.2d 381 (7th Cir. 1979)).

[84] 812 F.2d at 303; *see also id.* ("To place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principle.").

[85] *Id.*

[86] 429 U.S. 97 (1976).

[87] 457 U.S. 307 (1982).

[88] 812 F.2d at 303.

[89] On the significance of the 1988 Term, see Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); DAVID G.

docket soon filled with an unusually large number of potentially landmark constitutional and other civil rights cases.[90] In the midst of all this media attention, the *DeShaney* case received extensive coverage from both television and print journalists.

In their brief, the DeShaneys' lawyers appeared mindful of concerns that their argument would lead to a slippery slope of unmanageable liability for public agencies. Even so, the brief argued once again in favor of returning to the broader definition of "special relationship" endorsed in the Third Circuit's *Bailey* opinion[91] and rejected by Judge Posner in the Seventh Circuit *DeShaney* opinion.[92] They argued that a special relationship could arise in contexts other than involuntary custody in state institutions, but at the same time they attempted to avoid implying that state agencies would enter a "special relationship" every time they undertook to help vulnerable citizens. DSS "knew of" his peril *and* initiated a relationship, and that is enough to establish a special relationship.[93]

Because the Supreme Court had recently introduced a heightened state-of-mind requirement for due process claims,[94] Sullivan and First focused on the argument that "more than mere negligence" was involved in the government's failure to protect Joshua from the abuse.[95] In order to satisfy a "deliberate indifference" standard, for example, plaintiffs typically must show there was knowledge or notice of the danger, and a deliberate failure to respond to protect the plaintiff. The DeShaneys' lawyers argued that the deliberate indifference standard was easily met. Indeed, they argued that Kemmeter's failure to act was such a reckless failure of care that it approached an "intentional deprivation of liberty."[96]

SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT Ch. 8 (1993); EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

[90] *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Michael H. v. Gerald D., 491 U.S. 110 (1989); Texas v. Johnson, 491 U.S. 397 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989); Stanford v. Kentucky, 492 U.S. 361 (1989); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

[91] 768 F.2d 503 (3d Cir. 1985).

[92] 812 F.2d 298 (7th Cir. 1987).

[93] Brief for Petitioner, *supra* note 2.

[94] *See* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986).

[95] Brief for Petitioner, *supra* note 2.

[96] Brief for Petitioner, *supra* note 2.

The lawyers for the defendants, Mark Mingo and Wayne Yankala, sought the assistance of a well-regarded Washington, D.C. appellate firm, Onek, Klein, and Farr, to assist with their brief and to help prepare for the oral argument. Their brief underscored the voluntary nature of the services provided by DSS to the DeShaney family and claimed that the record of Kemmeter's voluntary assistance could not be characterized as deliberate indifference or recklessness. Emphasizing that Kemmeter and her employers were in no way responsible for Joshua's plight, the brief concluded that the petitioners' argument "stretches the Due Process Clause well beyond the breaking point."[97]

If one measure of the importance of a Supreme Court case is the willingness of interest groups to spend the time and resources preparing amicus briefs, *DeShaney* was an important case, drawing a number of amicus briefs filed by prestigious legal groups.[98] Many of these amicus briefs presented legal arguments that largely tracked the positions of the parties in their merits briefs. Others, such as the amicus brief filed by a coalition of state and local government organizations, addressed the potential impact of liability for failures to protect, relying on policy arguments that were not emphasized in the merits briefs.[99]

The American Civil Liberties Union's Children's Rights Project, which focused its work on class actions to protect children in foster care systems, had followed the *DeShaney* litigation through the federal courts, and was preparing an amicus brief in support of the petitioners.[100]

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97 Brief for Respondent, *supra* note 2.

98 *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Amicus Curiae Before the Supreme Court: Who Participates, When, and How Much?* 52 J. OF POL. 782 (1990); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 897 (2004). For the *DeShaney* case, six amicus briefs were filed by various coalitions of organizations. The overall number of briefs filed in *DeShaney* was not extraordinary, especially when compared with other cases during the Supreme Court's 1988 Term. In *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), for example, a record seventy-eight briefs, sponsored by over 400 organizations, were filed. *See* Susan Behuniak-Long, *Friendly-Fire: Amici Curiae and* Webster v. Reproductive Health Services, 74 JUDICATURE 261 (1991).

99 Brief of Amici Curiae The National Association of Counties, Council of State Governments, U.S. Conference of Mayors, National Conference of State Legislatures, National League of Cities, and International City Management Association at 21–29, *DeShaney*, 489 U.S. 189 (1989) (No. 87-154). The other amicus briefs on behalf of the respondents were filed by the solicitor general, a coalition of state attorneys general, and the National School Boards Association.

100 Eventually, a coalition of advocacy groups signed on to the ACLU brief. *See* Brief of Amici Curiae The American Civil Liberties Union Children's Rights Project, The ACLU of Wisconsin, Legal Services for Children, The Juvenile Law Center, Bay Area Coalition Against Child Abuse, and The National Woman Abuse Prevention Project, *DeShaney*, 489

Impressed by their work on the amicus brief, Curry First proposed to Donald Sullivan that the ACLU, with their more experienced appellate litigators, should take over as the DeShaneys' counsel and argue the case before the Supreme Court.[101] Sullivan, however, insisted on remaining lead counsel and arguing before the Supreme Court.[102]

Sullivan's insistence on this matter resulted in considerable dissension within the *DeShaney* team. In June of 1988, after the Supreme Court had already granted certiorari in *DeShaney*, Sullivan announced his candidacy for a seat in the Wyoming state legislature. After succeeding in the August primary, he began campaigning for the general election, which was to take place on November 8, just six days after the oral arguments in the *DeShaney* case. Melody DeShaney, who was then living in Phoenix, Arizona, became concerned about the amount of time Sullivan was spending campaigning, and she was frustrated that he was not returning her calls seeking assistance for travel to Washington, D.C. for the Supreme Court oral arguments. She even mailed a handwritten letter to Chief Justice Rehnquist to express her dissatisfaction with her attorneys, and to inform the Court that she wanted to have them replaced. Although they were able to resolve their issues through a conference call just four days before the oral arguments, First later described this period as "the lowest point in my life as a lawyer."[103]

First also recalled the concerns he felt on November 1, the day before the oral arguments, when he met with Sullivan to practice and became alarmed when Sullivan appeared unprepared and nervous.[104] And he was right to worry: the following afternoon, at the oral argument in the *DeShaney* case, Sullivan's presentation to the Court was not impressive, and some of his statements during oral argument appear nowhere in the petitioners' merits briefs.[105] He apparently wanted to emphasize that the proposed affirmative duty to protect could be limited to the child welfare context: the petitioners, he asserted, were not arguing for affirmative duties to protect the public, nor were they assigning to the state the duty to protect all children, only those under the care and supervision of child welfare agencies. He repeatedly referred to the

U.S. 189 (1989) (No. 87-154). The Massachusetts Committee for Children and Youth filed a separate amicus brief on behalf of the petitioners.

[101] CURRY, *supra* note 30, at 110.

[102] *Id.* at 111.

[103] *Id.* at 112–13.

[104] *Id.* at 117.

[105] The audio recording of the *DeShaney* oral argument is available at the Oyez website, http://www.oyez.org/media/item?type=audio & id=argument & parent=cases/19801989/1988/1988_87_154.

"enmeshment" of DSS and the DeShaney household, a choice of terminology that appeared to both confuse and annoy Chief Justice Rehnquist. Justice O'Connor attempted to draw his attention to the question of the special relationship doctrine and the arguments in favor of expanding it beyond the custody context. But Sullivan was unfocused. In his oral argument notes, under the section for Donald Sullivan, Justice Blackmun wrote, simply, "hostile questions."[106]

Mark Mingo then presented the arguments for the respondents, focusing in particular on (1) the need to uphold the custody limitation on affirmative duties to protect and, (2) the lack of evidence in the record to support finding that Kemmeter acted recklessly or with deliberate indifference. Justice O'Connor asked whether his position would be different if Joshua had been placed in foster care, and suffered abuse at the hands of his foster family. Mingo conceded that the foster care context presents a much closer question, and could fall within either the custody limitation or the state-created danger doctrine. But he also sought to highlight the differences between Joshua and other children placed in foster homes. Mingo suggested that Kemmeter and DSS had done nothing to increase the danger Joshua faced from Randy DeShaney, because the state had merely returned Joshua to his original status when it transferred him back to the custody of his father. He also emphasized that parental custody is itself protected by the Constitution. At this point, Justice Blackmun interjected: "Which is more important than the abuse to poor Joshua?" "Poor Joshua!"[107]

In December, the justices began exchanging opinion drafts and memos for the *DeShaney* case. Chief Justice Rehnquist's initial draft of the majority opinion was circulated, and he incorporated minor suggestions for revisions in subsequent drafts until Justices Stevens, O'Connor,

[106] Oral Argument Notes, *DeShaney v. Winnebago County* (No. 87-154), November 2, 1988 (Library of Congress, Harry Blackmun Papers, Supreme Court File, Box 514, Folder 3: *DeShaney v. Winnebago County*, 1989). Neither side earned high marks on Blackmun's eight-point grading scale for oral arguments: Donald Sullivan and Mark Mingo were each assigned a four out of eight (only thirty-eight percent of the lawyers appearing before the Court earned scores of four or lower from Justice Blackmun). *See* Timothy R. Johnson, et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 Am. Pol. Sci. Rev. 99, 105, tbl.7 (2006).

[107] This dramatic interruption in the presentation was incorporated in Justice Blackmun's dissenting opinion, and his evident concern for Joshua's plight would become, by the time of his retirement in 1994, a much remarked upon episode in Blackmun's long tenure on the Court. In a post-retirement interview with Dean Harold Koh, Justice Blackmun explained that he had become frustrated listening to the *DeShaney* oral argument: "Sometimes we overlook the individual's concern, the fact that these are live human beings that are so deeply and terribly affected by our decision." Transcript, The Justice Harry A. Blackmun Oral History Project, Library of Congress, at 397, http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901 & SERIESID=D09.

White, Kennedy, and Scalia joined the final version.[108] The constitutional claims made on Joshua DeShaney's behalf were apparently so weak, it took Rehnquist a mere nine pages to dismiss them entirely.[109]

In the first part of his opinion, Rehnquist focused on the state action requirement.[110] Rehnquist asserted that this causal prerequisite was not satisfied in Joshua's case because Randy DeShaney, not the state, inflicted the injuries. According to Rehnquist, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasions by private actors."[111] Using an analysis nearly identical to that developed by Judge Posner, Rehnquist focused particular attention on the due process clause's reliance on the word "deprive" and emphasized that this choice of words requires that *action by the state* cause the injury in order to claim a constitutional violation.[112]

In the second part of his opinion, Rehnquist examined the leading theories of affirmative duties to protect—the custody requirement and the state-created danger doctrine—and he concluded that neither theory applied to the facts of this case.[113] The state would have been obligated to ensure that Joshua's basic needs were met only after he had been placed in the physical custody of DSS, but Joshua never had been permanently removed from his home.[114] Rehnquist emphasized that the state's role in returning Joshua to his father's custody was not enough to establish a special relationship: "[T]he State does not become the permanent guarantor of an individual's safety by having once offered him shelter."[115]

With respect to the state-created danger theory, Rehnquist concluded that, because the state did not itself *create* the abusive environment nor did it make Joshua's situation worse, it could not be liable for failing to protect him from the abuse.[116] According to Rehnquist, "[w]hile the State may have been aware of the dangers that Joshua faced in the free

[108] See Library of Congress, Harry Blackmun Papers, Supreme Court File, Box 514, Folder 2: Draft Opinions, *DeShaney v. Winnebago County*, 1989.

[109] 489 U.S. at 194–203.

[110] *Id.* at 194–95.

[111] *Id.* at 195.

[112] *Id.*

[113] *Id.* at 197–202.

[114] *Id.* at 199–201.

[115] *Id.* at 201.

[116] *Id.*

world, it played no part in their creation, nor did it do anything to render him more vulnerable to them."[117]

Rehnquist's majority opinion centered on his characterization of the government's behavior as state inaction rather than action.[118] This assessment of the facts was subjected to much criticism.[119] Justice Brennan, for example, argued in his dissenting opinion that any choice to characterize the facts as involving state action or inaction is subject to manipulation, depending upon how far back in the chain of events one chooses to go.[120] It is just as easy, and just as valid, Brennan argued, to portray the *DeShaney* case as one involving governmental action. By instituting a set of child protective services, Winnebago County displaced alternative sources of private assistance. The resulting monopoly on the provision of sources was an "act" which could render Joshua more vulnerable if the county subsequently "failed to act" or acted incompetently.[121]

In Brennan's view, Kemmeter interacted often enough with the DeShaneys that it was fair to characterize her behavior as recklessly disregarding apparent dangers to Joshua's safety. By the time Joshua suffered his final beating at the hands of Randy DeShaney, DSS had been monitoring his case for well over a year. After Joshua had been taken into temporary custody at the Theda Clark Medical Center in January 1983, DSS decided to return Joshua to his father's custody, but only after negotiating a set of conditions with Randy DeShaney. Despite learning that none of these conditions had been met—after hearing numerous far-fetched explanations for Joshua's injuries and "accidents," receiving reports from hospital social workers, and obtaining notice of a series of domestic violence reports—Kemmeter did little more than include this information in her case files.[122]

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[117] *Id.*

[118] *Id.* at 203 ("The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.").

[119] *See, e.g.,* David A. Strauss, *Due Process, Government Inaction, and Private Wrongs,* 1989 SUP. CT. REV. 53, 61–63; Aviam Soifer, *Moral Ambition, Formalism, and the 'Free World' of* DeShaney, 57 GEO. WASH. LAW. REV. 1513, 1518–19 (1989).

[120] 489 U.S. at 205–06 (Brennan, J., dissenting).

[121] 489 U.S. at 207–08 ("Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse."); *see also* Soifer, *supra* note 120, at 1518 ("[Rehnquist] ignores the powerful preemptive quality of the state's initial protective decision, thereby ousting other institutions that might provide such services.").

[122] 489 U.S. at 208–09.

Brennan forcefully argued that it was state action that made Kemmeter's inaction so consequential. Once the state "acted" by establishing a child protective services system that left Kemmeter with the sole authority to initiate investigations and refer cases to the juvenile court, the result was that all of her subsequent "failures to act" had far more pernicious consequences than they might otherwise have had, if other observers—the nurses, doctors, neighbors, and police officers—who were concerned for Joshua's safety had the authority to intervene. The failures of DSS in all likelihood left Joshua more vulnerable to his father's violence than if the agency had never existed. Brennan ended by chiding the majority for failing to see that government "oppression can result when a State undertakes a vital duty and then ignores it."[123]

Justice Blackmun wrote a brief but passionate separate dissenting opinion, criticizing the Court's "sterile" formalistic approach and arguing in favor of a "compassionate" jurisprudence that does not shy away from the moral ambition that the pursuit of justice requires. He lamented the result of this case, concluding that it was "a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all'—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded."[124]

Neither of these dissenting opinions endorsed the Third Circuit's approach to expanding the duty to protect in the *Estate of Bailey* case. Instead, Brennan's analysis can be likened to a more generous version of the state-created danger theory.[125] In contrast to Rehnquist's majority opinion,[126] the dissenters' approach would accept that botched rescues can sometimes constitute state-created dangers. Whenever the state establishes a monopoly of some type of protective service—by intervening to help and excluding or discouraging others from assisting—it creates a "danger" of sorts by inducing reliance on the government. In such situations, if the state botches a rescue, then there may be a deprivation of due process.[127] For example, battered women seeking

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[123] 489 U.S. at 212.

[124] *Id.* at 213.

[125] Brennan suggested that his analysis relied on the framework of *Estelle* and *Youngberg*, but his argument clearly sweeps far beyond the custody context. *See id.* at 207 (suggesting that these cases "stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses to aid, it cannot wash its hands of the harm that results from its inaction").

[126] Rehnquist's analysis followed Judge Posner's distinction between botched rescues and state-created dangers.

[127] Even if the dissenters' constitutional analyses were accepted, both the qualified immunity and the "policy or custom" doctrines would remain powerful obstacles for § 1983 plaintiffs.

orders of protection from the state would likely have a claim if the police failed to enforce their protection order. Likewise, public school students would be able to sue school officials who failed to protect them from bullying or harassment by their fellow students.

V. *DeShaney*'s Legacy

The Court's ruling in *DeShaney* prevented such claims from going forward. Cases involving failures to enforce protection orders for battered women have been dismissed on the grounds that *DeShaney* limited the establishment of special relationships to the custody context.[128] In the public school cases, federal appellate judges have generally rejected the use of a custody analogy to support claims that schools have an affirmative duty to protect students from harm inflicted by one another.[129] Although courts have extended the custody analogy to cases involving governmental failures to protect children placed in the foster system,[130] they have continued to apply *DeShaney* to reject claims involving the failure to protect children who have been injured or killed while in their parents' custody.[131]

DeShaney has imposed enormous burdens on civil rights plaintiffs attempting to hold the government liable for its failures to protect. Given these broad-ranging effects, no analysis of *DeShaney* should ignore the real-world consequences of the Court's ruling. The paradoxical result of Rehnquist's *DeShaney* reasoning deserves special emphasis: his enthusiastic endorsement of the "charter of negative liberties" view of the Constitution ultimately serves to advance the interests of the state,[132] by eliminating its exposure to liability in almost all cases involving failures to protect. Civil rights plaintiffs like Joshua, meanwhile, are left without any means of obtaining full compensation for their injuries.

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[128] *See* Balistreri v. Pacifica Police Dept., 855 F.2d 1421 (9th Cir. 1988), *rev'd in light of DeShaney*, 901 F.2d 696 (9th Cir. 1988); *see also* Pinder v. Johnson, 54 F. 3d 1169 (4th Cir. 1995) (rejecting special relationship analysis in case involving a verbal promise by police rather than court-issued order of protection).

[129] *See, e.g.*, Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 529 (5th Cir. 1994); Graham v. Independent Sch. Dist. No. I–89, 22 F.3d 991 (10th Cir. 1994); D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

[130] *See, e.g.*, Norfleet v. Arkansas Dep't of Soc. Servs., 989 F.2d 289 (8th Cir. 1993); K.H. through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987).

[131] *See, e.g.*, S.S. v. McMullen, 225 F.3d 960 (8th Cir. 2000).

[132] *See* Chemerinsky, *supra* note 90, at 58 (observing that "in forty-seven non-unanimous decisions in constitutional cases during the 1988–1989 Term, Chief Justice Rehnquist voted against the government only twice").

In the years following *DeShaney*, social services agencies continued to face criticism for their failures to protect vulnerable children. Some of these children's names are well known, due to widespread media coverage following their deaths: six-year-old Elisa Izquierdo of New York City, abused and beaten to death by her mother in 1995;[133] twenty-three-month-old toddler Brianna Blackmond of Washington D.C., killed by her mother's roommate in 2000;[134] and seven-year-old Nixzmary Brown of Brooklyn, abused by her mother and murdered by her stepfather in 2006.[135]

When such horrific cases of abuse become front-page news stories, the resulting public outrage typically produces a flurry of reform proposals to improve the child welfare system. These efforts have produced mixed results. Both the causes of these agencies' failures and the reforms required to improve the child welfare system are extraordinarily complex subjects, and they remain today the focus of intense debates among children's rights advocates and public policy experts.

For these reasons, one must be careful not to overstate the impact of *DeShaney*. The ability to bring failure to protect claims under § 1983 would not generate perfect outcomes in every child abuse case. At the same time, the additional deterrent effect produced by claims for damages under § 1983 should not be underestimated.[136] These private lawsuits could have provided a unique type of check on the performance of social services agencies.

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[133] Lizette Alvarez, *A Mother's Tale: Drugs Despair and Violence*, N.Y. TIMES, Nov. 27, 1995, at B1; Nina Bernstein and Frank Bruni, *Seven Warnings: She Suffered in Plain Sight But Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at A1.

[134] Sari Horwitz, *'Failure After Failure'; Foster System Betrayed Brianna*, WASH. POST, FEB. 21, 2000, at A1; Scott Higham and Sari Horwitz, *Brianna, Buried in System's Mistakes*, WASH. POST, Dec. 16, 2000, at A1.

[135] Leslie Kauffman, *Signs of Trouble at Agency Assigned to Protect Children,* N.Y. TIMES, Jan. 13, 2006, at B5; Leslie Kauffman and Jim Rutenberg, *Agency Suspends Supervisors After Girl's Death,* N.Y. TIMES, Jan. 19, 2006, at A1.

Only a few of these children receive such extensive media attention. The National Child Abuse and Neglect Data System ("NCANDS") reported an estimated 1490 child fatalities in 2004 alone, although it is important to note that only 12.4% of these cases involved children had been placed under the supervision of a child protective services agency at some point during the five years prior to their deaths. *Of these fatalities, 78.9% were the product of parental abuse or neglect. Maltreatment 2004* (U.S. Dep't of Health and Human Servs., 2006), http://www.acf.hhs.gov/programs/cb/pubs/cm04/index.htm.

[136] For examples of empirical work examining the deterrent effect of civil rights litigation under § 1983, *see* Charles Epp, Do Rights Matter? Exploring The Impact of Legal Liability on Administrative Policies, Presented at the Annual Meeting of the American Political Science Association (2001); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

The Court's refusal in *DeShaney* to assign any constitutional duties to child welfare agencies instead closed the federal courthouse doors to all plaintiffs seeking to use § 1983 litigation to hold these agencies accountable for their failures to protect them from abuse by their parents. Joshua, and all other children abused by their parents and let down by the government, are left without any constitutional rights to enforce. For these children, the notion that *DeShaney*'s vision of the Constitution helps promote "the blessings of liberty" surely offers little solace.