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Constitutional Law—Civil Rights—State's Failure to Protect Child from Known Abuse Does Not Trigger Liability under Section 1983. DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989).

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NOTES

CONSTITUTIONAL LAW—CIVIL RIGHTS—STATE'S FAILURE TO PROTECT CHILD FROM KNOWN ABUSE DOES NOT TRIGGER LIABILITY UNDER SECTION 1983. *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989).

Joshua DeShaney was born in 1979 in Wyoming.[1] The next year his parents divorced. The court granted custody to his father, Randy DeShaney, who moved to a city in Winnebago County, Wisconsin, taking Joshua with him.[2] There Randy DeShaney soon remarried. Joshua's mother remained in Wyoming.[3]

In January 1982 when Randy DeShaney and his second wife divorced, the Winnebago County authorities first learned that Joshua might be a victim of child abuse. Randy's second wife reported to the police that Randy had previously "hit the boy causing marks and [was] a prime case for child abuse."[4] In an interview with the Winnebago County Department of Social Services (DSS), Joshua's father denied the accusations. The DSS did not pursue them further.[5]

In January 1983 Joshua was admitted to a local hospital with multiple bruises and abrasions.[6] Suspecting child abuse, the physician notified the DSS, which obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital.[7] Three days later, the county convened a "Child Protection Team" to consider Joshua's situation.[8] After deciding that there was insufficient evidence of child abuse to retain Joshua in the custody of the court, the Team recommended several measures[9] to protect Joshua. Randy

1. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1001 (1989).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* The team consisted "of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel . . . ." *Id.*
9. *Id.* These measures included "enrolling [Joshua] in a preschool program, providing his father with certain counselling services, and encouraging his father's girlfriend to move out of the home." *Id.*

DeShaney voluntarily promised to cooperate with the DSS in accomplishing these goals. The juvenile court dismissed the case and returned Joshua to the custody of his father.[10] A series of suspicious events followed.[11]

On March 8, 1984, Randy DeShaney beat Joshua so severely that he caused brain damage.[12] Emergency surgery revealed evidence of previous severe injury to the head.[13] The prognosis was that Joshua would need to spend the remainder of his life in an institution for the profoundly retarded.[14]

Joshua and his mother brought this action under title 42, section 1983 of the United States Code[15] against Winnebago County, its Department of Social Services, and various individual employees of the Department.[16] The complaint alleged that Joshua was deprived of his liberty without due process by the respondents.[17] The respondents prevailed on a motion for summary judgment.[18]

The Court of Appeals for the Seventh Circuit affirmed, stating two reasons for the failure of the petitioners to make an actionable section 1983 claim.[19] First, "the Due Process Clause of the Fourteenth Amendment does not require a state or local government entity to protect its citizens from 'private violence . . . .' "[20] Second, "the causal connection between respondents' conduct and Joshua's injuries was too attenuated to establish a deprivation of constitutional rights actionable under § 1983."[21]

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10. *Id.*

11. *Id.* A month later, the DSS caseworker handling Joshua's case received a call from the emergency room reporting that Joshua had once again been treated for suspicious injuries. During the next six months, the caseworker made monthly visits to the DeShaney home, noting suspicious injuries on Joshua's head and that Randy had not complied with the Team's recommendations. The caseworker also recorded her suspicions that someone in the household was physically abusing Joshua, but did nothing more. *Id.*

In November 1983 the emergency room notified DSS once again that they had treated Joshua for injuries related to child abuse. On the caseworker's next two visits to the DeShaney's home, Randy's girlfriend told her that Joshua was too sick to see her. Still, the DSS took no action. *Id.* at 1001-02.

12. *Id.* at 1002.

13. *Id.*

14. *Id.*

15. 42 U.S.C. § 1983 (1982). This statute imposes liability on the individual acting under color of state law when he "subjects . . . any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." *Id.*

16. 109 S. Ct. at 1002.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

The United States Supreme Court granted certiorari[22] and affirmed the decision. *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989).

The fourteenth amendment[23] is generally considered to be a limitation on the state's power, not a guarantee of protection by the state.[24] As stated by Judge Posner in *Jackson v. City of Joliet*,[25] "[t]he Fourteenth Amendment . . . sought to protect Americans from oppression by state government, not secure them basic governmental services."[26]

In 1871 Congress enacted section 1983 to implement the fourteenth amendment.[27] Congress designed section 1983 not only to prevent states from violating the amendment, but also to compensate individuals for deprivation of their federal rights.[28] Originally, this section, interpreted as applying to direct oppressive action by the state, was little-used.[29] In recent years, courts have expanded the meaning to include deprivation of constitutional rights caused by actions indirectly tied to the state.[30] This expansion has led to a sizeable increase in both the number of section 1983 cases and the types of state action that might lay the foundation for a section 1983 claim.[31]

A section 1983 action requires a two-fold analysis.[32] The first

22. DeShaney v. Winnebago County Dep't of Social Servs., 108 S. Ct. 1218 (1988).

23. U.S. CONST. amend. XIV, § 1. "No state shall deprive any person of life, liberty, or property, without due process of law . . . ."

24. *See* Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864 (1986) (discusses German decisions finding affirmative government duties based on provisions similar to those of the United States Constitution and how American courts might also find affirmative government duties); Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986) (criticizes the use of tort law in determining liability under § 1983).

25. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1983).

26. *Id.* at 1203.

27. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 (2d ed. 1986). Section 1983 began as section 1 of the Ku Klux Klan Act of April 20, 1871, which was entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." *Id.* at 4.

28. *Id.*

29. Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring). *See also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 (1980) (discusses the effect of the increase in section 1983 cases caused by allowing recovery for section 1983 claims even when there is also a remedy under state tort law).

30. *Parratt*, 451 U.S. at 554 n.13.

31. *Id.*

32. *Id.* at 535. In *Parratt* the Court held that the respondent was deprived of property (a $23.50 hobby package) by persons acting under color of state law (prison officials). *Id.* at 536-37. However, he had not established a section 1983 claim because the deprivation was a result of failure of the state officials to follow established state procedures. *Id.* at 543. The Court observed that the respondents would have a remedy under state tort law. *Id.*

inquiry is whether a person acting under color of state law committed the infraction.[33] Second, the court must decide whether that conduct deprived a person of rights protected by the Constitution.[34] Only after the court answers these questions affirmatively is the issue of whether the deprivation occurred without due process of law addressed.[35]

In recent years, courts have struggled with whether a person acting under color of state law caused the deprivation when the constitutional violation resulted indirectly from that person's action.[36] These cases often involve a failure by the state to protect or render aid to the complainant in a dangerous situation.[37]

In *Martinez v. California*[38] the United States Supreme Court held that deprivation of life by a dangerous parolee did not constitute a section 1983 claim.[39] The Court emphasized that the parole officers had no reason to believe that the victim was in special danger.[40] The fact that the murder occurred five months after the parolee's release was another important factor in the Court's decision.[41] Writing for a unanimous Court, Justice Stephens stated, "it is perfectly clear that not every injury in which a state official has played some part is actionable under [section 1983]."[42]

Federal courts generally do not impose section 1983 liability when the state only indirectly causes the deprivation by failing to provide protection or aid.[43] As stated in *Bowers v. DeVito*,[44] a Seventh

33. *Id.* at 535.

34. *Id.*

35. Martinez v. California, 444 U.S. 277, 284 (1979); Winchenbach, *Snake Pits and Slippery Slopes: DeShaney Revisited*, A.B.A. J., Sept. 1989, at 62.

36. Currie, *supra* note 24, at 866.

37. Martinez v. California, 444 U.S. 277 (1980) (paroled sex offender who was negligently released murdered Martinez's decedent); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (police officer failed to aid passengers in burning car); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) (state released dangerous schizophrenic who murdered Bowers).

38. 444 U.S. 277 (1980).

39. *Id.* at 285. A paroled sex offender murdered Martinez's decedent. *Id.* at 280. The parolee had been imprisoned with a recommendation of no parole. *Id.* at 279. Five years later, overlooking certain requisite formalities, the officials paroled him. *Id.* Less than six months later, the parolee murdered the decedent. *Id.* at 280. The court stated that the parolee was in no way a state agent, and the decedent's death was too remote a consequence of the parole officers' action to hold them responsible under federal civil rights law. *Id.* at 285. Therefore, the appellants had not stated a § 1983 claim. *Id.*

40. *Id.* at 285.

41. *Id.*

42. *Id.*

43. Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986).

Circuit case similar to *Martinez*, there is "no constitutional right to be protected by the state against . . . criminals or madmen."[45]

There are exceptions to the rule that states do not have an affirmative duty to protect individuals from private action. In deciding whether a case falls within an exception to the rule, courts rely on tort principles.[46] Under tort law, courts usually impose liability for nonfeasance[47] only when they find a special relationship. Courts have found that this special relationship exists when the injured party is particularly dependent on the one failing to act, and the one failing to act has "considerable power" over the injured party's welfare.[48]

The Supreme Court has also determined that this special relationship exists between the state and a victim when the victim is in the state's custody.[49] In *Estelle v. Gamble*[50] the Court held that the state had a duty to render medical aid to those in prison.[51] The Court reasoned that by taking a prisoner into custody, the state had cut off his other sources of aid, making him completely dependent on the prison authorities.[52] This created the requisite special relationship necessary to establish the duty to protect.[53]

Similarly, in *Youngberg v. Romeo*[54] the Court stated that persons involuntarily committed to mental institutions possess constitution-

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44. 686 F.2d 616 (7th Cir. 1982).

45. *Id.* at 618. In *Bowers* a schizophrenic, with a history of making knife attacks, murdered Bowers by stabbing her to death. *Id.* at 617. Officials had released the killer from a mental institution a year before the murder took place. *Id.* Stating that the "Constitution . . . does not require . . . the state to provide services, even so elementary a service as maintaining law and order," the court affirmed the dismissal of the § 1983 complaint. *Id.* at 618-19.

46. Comment, *supra* note 43, at 1050.

47. Nonfeasance is a failure to take steps to protect one from harm. P. KEETON, D. DOBBS, R. KEETON AND D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 373 (5th ed. 1984).

48. *Id.* at 374.

49. Daniels v. Williams, 474 U.S. 327 (1986) (prison environment); Davidson v. Cannon, 474 U.S. 344 (1986) (Blackmun, J., dissenting) (prison environment); Youngberg v. Romeo, 457 U.S. 307 (1982) (state mental institution); Estelle v. Gamble, 429 U.S. 97 (1976) (prison environment).

50. 429 U.S. 97 (1976).

51. *Id.* at 103. In *Estelle* a prisoner brought a section 1983 case when prison officials failed to provide appropriate medical treatment for a back injury. *Id.* at 98. The prisoner contended that this constituted cruel and unusual punishment, violating the eighth amendment, which is applicable to the states through the fourteenth amendment. *Id.* at 101. The Court stated that "deliberate indifference" to prisoners' medical needs violates the eighth amendment. *Id.* at 104.

52. *Id.* at 103.

53. *Id.*

54. 457 U.S. 307 (1982).

ally protected interests[55] which the state has a duty to preserve.[56] The Court found that the custodial relationship formed the basis of a duty to provide services.[57]

Even when a custodial relationship is present and deprivation of a constitutionally protected right occurs as a result of a state agent's failure to act, a court does not automatically find a section 1983 claim.[58] Because Congress framed the fourteenth amendment to protect individuals from abuse of power by the state, the plaintiff must show that the state's inaction amounted to more than mere negligence.[59] As stated in *Daniels v. Williams*,[60] "[f]ar from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person."[61] This level of misconduct is not sufficient to establish a section 1983 claim. It "simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent."[62] To state a section 1983 claim, the plaintiff must establish that the actor exhibited "deliberate indifference" to his needs.[63]

The Supreme Court recognizes an affirmative duty on the part of the state to provide for the needs of those involuntarily incarcerated or committed by the state.[64] Breach of this duty rises to the level of a violation of an individual's rights when it is committed with deliberate indifference.[65] The Court has yet to specify what noncustodial relationships might create a duty on the part of the state to provide certain services.

Though not finding a special relationship to be present in *Martinez*, the Supreme Court did, for the first time, indicate that a special

55. *Id.* at 324. The Court listed these constitutionally protected rights as "interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Id.*

56. *Id.*

57. *Id.*

58. Comment, *supra* note 43. Even when courts find that the state has a duty to protect a certain individual, that individual must be able to show that the state actor exhibited "deliberate indifference" to his needs to establish a § 1983 claim. *Id.* at 1053. *See also* Winchenbach, *supra* note 35. Winchenbach notes that liability is imposed on the state for failure to provide a constitutionally required service if the "professional practices [were] so far below generally prevailing professional standards that deliberate indifference was indicated." *Id.* at 64.

59. Davidson v. Cannon, 474 U.S. 344, 348 (1986); Daniels v. Williams, 474 U.S. 327, 332 (1986); Estelle v. Gamble, 429 U.S. 97, 106 (1976).

60. 474 U.S. 327 (1986).

61. *Id.* at 332.

62. *Davidson*, 474 U.S. at 347-48.

63. *Estelle*, 429 U.S. at 104.

64. *Id.* at 103.

65. *Id.* at 104.

relationship may be found outside the custodial environment.[66] The Court, however, failed to give further guidelines on how to recognize this "special relationship." The failure to define which relationships give rise to an affirmative duty to protect has led to differences of opinion on when this relationship is present.[67]

In determining whether a special relationship exists between the state and the complainant, a court may look at several factors.[68] In *Balistreri v. Pacifica Police Department*[69] the court stated that while "mere knowledge" of an individual's danger does not establish a special relationship, such a relationship may be found in noncustodial situations.[70] Because the state had issued a restraining order to keep Balistreri's estranged husband away from her and had been notified on several occasions of her plight, the court found that a special relationship existed.[71] This imposed an affirmative duty on the state to protect Balistreri from her attacker.[72] The court based its decision on the fact that the state had affirmatively committed itself to the protection of the plaintiff and exhibited reckless indifference to her safety.[73]

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66. Martinez v. California, 444 U.S. 277, 285 (1979).

67. *Compare* Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988) (finding a special relationship establishing a duty to protect Balistreri from her former husband) with Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986) (finding no special relationship when the state released an inmate on furlough knowing that he was threatening to kill the specific victim that he did kill).

68. *Balistreri*, 855 F.2d at 1425. The factors to be considered are:

> (1) whether the state created or assumed a custodial relationship toward the plaintiff; (2) whether the state was aware of a specific risk of harm to the plaintiff; (3) whether the state affirmatively placed the plaintiff in a position of danger; or (4) whether the state affirmatively committed itself to the protection of the plaintiff.

Id.

69. 855 F.2d 1421 (9th Cir. 1988).

70. *Id.* at 1426.

71. *Id.*

72. *Id.*

73. *Id.* at 1423. On February 13, 1982, Balistreri was beaten by her husband. Police responding to her call removed her husband from the house, but refused to arrest him. The police did not offer medical assistance, though Balistreri needed treatment for injuries to her nose, mouth, eyes, teeth, and abdomen. Throughout 1982, Balistreri continually notified the police that she was the victim of vandalism and harassing phone calls which she believed were being committed by her husband whom she was now divorcing. In November 1982 Balistreri obtained a restraining order enjoining her ex-husband from having any contact with her. Subsequent to the restraining order, her ex-husband drove his car into her garage door. Balistreri called the police, who came to her house, but refused to arrest her ex-husband or investigate the incident. When a firebomb was thrown through one of Balistreri's windows in March of 1983, the police took 45 minutes to respond to her "911" call. After asking Balistreri's ex-husband a few questions, the police determined he was not responsible for the act. Balistreri was harassed and vandalized throughout 1983-85, during which time the police rendered little or no aid. As a result, she suffered physical injuries, a bleeding ulcer, and emotional distress. *Id.*

Not every circuit agrees that a special relationship exists in a situation in which the state has committed itself to the protection of an individual. In *Estate of Gilmore v. Buckley*[74] the state had imprisoned an individual found guilty of making threats on Gilmore's life.[75] The prisoner, released on furlough, kidnapped and murdered Gilmore.[76] Citing *Martinez*[77] as opening the door to new situations establishing an affirmative duty to act, the court found that no such situation existed when the state merely had knowledge that this specific victim was in special danger.[78] The court relied on the fact that the parolee was not a state actor.[79] The court did not address the issue of whether the act of imprisoning the parolee was an undertaking to protect Gilmore, thereby creating a special relationship.[80]

Perhaps the clearest case of a special relationship, other than custodial, is when the state places an individual in a position of danger.[81] *Doe v. New York City Department of Social Services*,[82] which involved the placement of children in a foster home, illustrates this concept.[83] Comparing this case to the custodial cases and citing *Estelle v. Gamble*, the court found the state liable for "deliberate indifference" to the child's plight.[84]

The Eleventh Circuit did not reach the same result in *Taylor v. Ledbetter*.[85] The court refused to address whether it would extend the rationale of *Estelle* outside of the prison environment and into the foster home.[86] The court reasoned that the state exercised less control over foster homes, so it would not find "deliberate indifference" as easily as in a prison environment.[87]

Courts have been hesitant to extend the "special relationship" doctrine to situations involving the protection of children from their

74. 787 F.2d 714 (1st Cir. 1986).
75. *Id.* at 717.
76. *Id.* at 718.
77. Martinez v. California, 444 U.S. 277 (1980).
78. 787 F.2d at 721-22.
79. *Id.*
80. *Id.*
81. Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id.* at 618.
82. 649 F.2d 134 (2d Cir. 1981).
83. *Id.* at 137. The city negligently failed to protect children who were repeatedly sexually abused by their foster father.
84. *Id.* at 141, 145.
85. 791 F.2d 881 (11th Cir. 1986).
86. *Id.* at 883.
87. *Id.*

parents.[88] This reluctance probably arises out of a respect for family autonomy and a fear of unnecessary state interference in parent-child relationships.[89]

Courts that have addressed the issue of whether the state has an affirmative duty to protect a child frequently use a *Martinez* type approach. These courts point out that *Martinez* was the first Supreme Court case to suggest that an affirmative duty to protect could arise out of a noncustodial relationship.[90] The question that has remained unanswered by *Martinez*,[91] which has led to diverse decisions, is what exactly constitutes that type of special relationship.[92]

The Third Circuit concluded in *Estate of Bailey v. County of York*[93] that a special relationship may exist where the county becomes involved in protecting a child from her mother and her mother's live-in boyfriend, and then fails to do so adequately.[94] In vacating the lower court's dismissal of the case, the court stated that this situation differed from the one in *Martinez*.[95] Here the victim was distinguishable from the public at large.[96] The court also cited a Fourth Circuit case, *Jensen v. Conrad*,[97] that suggested a special relationship could exist.[98] The court noted that, on remand, the plaintiffs

88. Harpole v. Arkansas Dep't of Human Servs., 829 F.2d 923, 927 (8th Cir. 1987).

89. *See* Lehr v. Robertson, 463 U.S. 248 (1983) (involving rights of natural father of child born out of wedlock); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (ordinance making it illegal for grandson to live with his grandmother was declared unconstitutional); Wisconsin v. Yoder, 406 U.S. 205 (1972) (recognized parents' fundamental interest in guiding their children's future).

90. Estate of Bailey v. County of York, 768 F.2d 503, 510 (3rd Cir. 1985); Jensen v. Conrad, 747 F.2d 185, 191 (4th Cir. 1984).

91. 444 U.S. 277 (1980).

92. Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923, 927 (8th Cir. 1987).

93. 768 F.2d 503 (3rd Cir. 1985).

94. *Id.* In this case Aleta Bailey's relatives notified the county workers that Aleta was being abused. *Id.* at 505. A county worker took Aleta to the hospital where a physician informed her that Aleta should be taken from her mother in order to prevent further abuse from the mother's boyfriend. A county worker placed the child in her aunt's custody for 24 hours so that her mother could make living arrangements that would deny the boyfriend access to Aleta. The next day Aleta was returned to her mother. The county failed to investigate the living arrangements of Aleta, her mother, and her mother's boyfriend, and all continued to live together. One month later, Aleta died from abuse inflicted by her mother and her mother's boyfriend. *Id.*

95. *Id.* at 511.

96. *Id.* at 510.

97. 747 F.2d 185 (4th Cir. 1984). This case involved two different § 1983 claims with facts similar to those in *Estate of Bailey*. *Id.* at 187. In both cases county workers were aware of the child's dangerous situation. *Id.* at 187, 188. In each case the worker undertook to protect the child, then did so with blatant disregard for his safety. *Id.* Both children died from abuse. *Id.*

98. *Id.* at 194. The court found that in light of the post-*Martinez* cases, the facts of this

would have to prove "deliberate indifference" to the child's needs.[99]

The Eighth Circuit chose not to follow the approach taken by the Third Circuit in *Bailey*.[100] In *Harpole v. Arkansas Department of Human Services*,[101] a case involving suspected neglect of a child, the court of appeals affirmed the lower court's dismissal of a section 1983 action.[102] The court concluded that the Department of Human Services did not create a special relationship by investigating the situation and returning the child to his mother.[103] The Eighth Circuit thus refused to extend the "special relationship" beyond the prison environment.[104]

The Supreme Court addressed the issue of whether a state has an affirmative duty to protect a known child abuse victim for the first time in *DeShaney v. Winnebago County Department of Social Services*.[105] Chief Justice Rehnquist, writing for the majority, began his analysis by noting that the due process clause is a limitation on the state's power to act.[106] The purpose of the clause is to protect people from the state, not to ensure that the state protects people from each other.[107] The due process clause does not bestow on the public an affirmative right to aid from the state.[108] The majority summarized the general rule by stating that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them."[109]

Citing *Estelle v. Gamble* and *Youngberg v. Romeo*, the petitioners contended that the state had assumed a special relationship with Joshua,[110] giving rise to an affirmative duty to protect him.[111] The

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case could give rise to an affirmative duty to protect. *Id.* However, the court affirmed the dismissal on the basis of good faith immunity. *Id.* at 195. The incidents had occurred one year prior to the *Martinez* decision. *Id.* at 194.

99. *Estate of Bailey*, 768 F.2d at 508.

100. 768 F.2d 503 (3rd Cir. 1985).

101. 820 F.2d 923 (8th Cir. 1987).

102. *Id.* at 928.

103. *Id.* at 927.

104. *Id.*

105. 109 S. Ct. 998 (1989).

106. *Id.* at 1003.

107. *Id.*

108. *Id.*

109. *Id.* at 1004.

110. *Id.* The petitioners argued that such a relationship existed because the state knew that Joshua faced a special danger and had proclaimed, by word and deed, an intention to protect him.

Court rejected this argument, pointing out that these cases stand only for the principle that an affirmative duty to protect arises when the state takes an individual into custody against his will, thereby restricting his ability to protect himself.[112] In Chief Justice Rehnquist's view, such protection is required because to do otherwise would transgress the substantive limits set forth by the eighth amendment and the due process clause.[113] He concluded that the "*Estelle-Youngberg* analysis simply has no applicability in the present case."[114]

Chief Justice Rehnquist conceded that the state may have acquired a duty to protect Joshua under state tort law, but its failure to do so was not automatically transformed under the fourteenth amendment into a constitutional violation.[115] Neither mere knowledge that a particular person was in danger nor the fact that the state once offered him shelter gave rise to a "special relationship" triggering an affirmative duty to protect.[116] Furthermore, the state risks incurring a charge of intrusion into the parent-child relationship if it acts too quickly.[117]

The Court held that there was no deprivation of constitutional rights actionable under section 1983 because a state actor did not inflict the injury on Joshua and there was no "special relationship" creating an affirmative duty to act.[118] Finally, Chief Justice Rehnquist noted that the people of Wisconsin may change their tort law to impose liability on the state and its actors for failure to act in a situation such as this.[119] However, this should not be forced upon them by the Court expanding the fourteenth amendment.[120]

Justice Brennan, joined by Justice Marshall and Justice Blackmun, dissented. He argued that the Court erred in beginning its analysis with the idea that the Constitution does not impose an affirmative duty on states to take care of their citizens.[121] On the contrary, the analysis should begin by focusing on the action that Wisconsin had

111. *Id.* *See* Estelle v. Gamble, 429 U.S. 97 (1976). *See supra* notes 50-53 and accompanying text.

112. 109 S. Ct. at 1005. *See* Youngberg v. Romeo, 457 U.S. 307 (1982). *See supra* notes 54-57 and accompanying text.

113. 109 S. Ct. at 1006.

114. *Id.*

115. *Id.* at 1007.

116. *Id.* at 1006.

117. *Id.* at 1007.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1008. (Brennan, J., dissenting).

taken with respect to Joshua.[122] In his view, *Estelle* and *Youngberg* both stand for the principle that the state has a duty to protect people who are unable to help themselves due to state action.[123] Using this principle, Justice Brennan would extend the duty beyond the custodial environment.[124] He pointed out that the Court failed to recognize that *Estelle* and *Youngberg* stand for the proposition that in some situations the Constitution does establish positive duties,[125] citing several cases from different constitutional contexts for support.[126]

Justice Brennan would thus read *Estelle* and *Youngberg* as standing for the principle that once the state has cut off an individual's private sources of aid, it has a positive duty to care for the individual.[127] By this analysis Joshua would win. According to Wisconsin law, private citizens, as well as government officials working in an agency other than DSS, are to report suspected child abuse to DSS and let DSS handle the situation.[128] After suspected child abuse has been reported, Wisconsin's child protection program makes the child entirely dependent on DSS for help.[129] Because the State actively intervened, thereby cutting off Joshua's other sources of aid,[130] the dissent considered that there was a duty similar to that in *Youngberg* and *Estelle* on DSS's part to protect him.[131]

Having established that the state had a duty to protect Joshua, Justice Brennan would have allowed the plaintiff an opportunity to show that failure to help arose "from the kind of arbitrariness that we have in the past condemned."[132] He noted that inaction can be as abusive of power as action.[133]

Justice Blackmun, in a separate dissent, argued that this case is not about inaction, but about active intervention in Joshua's life that

122. *Id.*
123. *Id.* at 1009.
124. *Id.*
125. *Id.* at 1008.
126. *Id.* at 1009 (citing Boddie v. Connecticut, 401 U.S. 371 (1971) (striking down filing fees as applied to divorce cases brought by indigents); Shelley v. Kraemer, 334 U.S. 1 (1948) (striking down racially discriminative restrictive covenants); Schneider v. State, 308 U.S. 147 (1939) (deciding that a local government could not entirely foreclose the opportunity to speak in a public forum)).
127. *Id.*
128. *Id.* at 1010.
129. *Id.* at 1011.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1012.

triggered a fundamental duty to protect.[134] According to Justice Blackmun, rigid lines between action and inaction have no place in interpreting the fourteenth amendment.[135] The Court was wrong in considering this a closed case based on legal precedent. Rather, this question was an open one.[136] The Court erred by not reading precedent more broadly to establish a positive duty.[137]

DeShaney effectively closes the door left open by *Martinez*. While the Court suggested in *Martinez* that an affirmative duty to protect may arise in situations that are not custodial and do not involve the eighth amendment,[138] *DeShaney* clearly indicates that the Court is now unwilling to extend that duty into noncustodial cases.[139]

However, the Court left open the question of whether a state statute that requires an agency to protect victims from known abuse may create an entitlement to aid.[140] Applying a *Goldberg v. Kelly*[141] analysis in this situation may lead to the conclusion that state laws establishing agencies to protect children from abuse create an entitlement to that protection. By failing to provide that protection, the state deprives the child of a constitutionally protected interest.[142]

Adhering strictly to *Estelle* and *Youngberg*, Arkansas has refused to extend the affirmative duty to protect beyond the custodial environment.[143] At this point *DeShaney* seems to reinforce the law in Arkansas, rather than to indicate a move toward the state having a constitutional duty to protect once it has developed a protective relationship with an individual.

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134. *Id.* at 1012.

135. *Id.*

136. *Id.*

137. *Id.*

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

139. *DeShaney*, 109 S. Ct. 998.

140. *Id.* at 1003 n.2. The Court refused to address this issue because the petitioners failed to raise it in the lower courts. *Id.*

141. Goldberg v. Kelly, 397 U.S. 254 (1970). In *Goldberg* the Court held that state statutes providing for welfare benefits for qualified applicants created an entitlement interest. Taking welfare benefits away from beneficiaries without due process violated a constitutional right to these benefits. The constitutional right was solely created by statute. *Id. See also* Board of Regents v. Roth, 408 U.S. 564 (1972).

142. *See* WIS. STAT. ANN. § 48.13 (West 1982) (provides for state protection of abused children). Under *Goldberg* this could create an entitlement interest that could not be taken away without due process.

143. Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923 (8th Cir. 1987).