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WAITING FOR THE JUSTICE LEAGUE: MOTIVATING CHILD WELFARE AGENCIES TO SAVE CHILDREN

*Kelli M. Mulder-Westrate**

INTRODUCTION

Three-year-old Eli Creekmore died at the hands of his father in spite of robust child welfare agency intervention in his home. Eli's tragic death so thoroughly captured the nation's attention that a documentary detailing his troubling story soon followed.[1] Daycare workers, a restaurant waitress, and Eli's grandmother all notified the state social welfare agency about the appalling physical abuse the toddler was enduring.[2] Even with these reports and his grandmother's attempts to rescue him, the child welfare agency kept Eli in his dangerous home where eventually his father beat him to death.[3] Bradley McGee's death was more of the same.[4] Although Bradley had previ-

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1 *See* State v. Creekmore, 783 P.2d 1068, 1072 (Wash. Ct. App. 1989); THE UNQUIET DEATH OF ELI CREEKMORE (KCTS/TV 1988) [hereinafter THE UNQUIET DEATH]. Eli's father kicked him in the stomach, rupturing the toddler's bowel, and then left Eli wedged in the toilet and covered in vomit. Although Eli's mom fished him out and put him to bed, it took the child several lonely hours to die. *Creekmore*, 783 P.2d at 1072.

2 *See* THE UNQUIET DEATH, *supra* note 1.

3 *See id.*

4 *See* Barber v. State, 592 So. 2d 330, 333 (Fla. Dist. Ct. App. 1992); Kim Barker, *Mom in Killing Gets Second Chance*, CHI. TRIB. (Nov. 19, 2001), http://articles.chicagotribune.com/2001-11-19/news/0111190246_1_illinois-child-welfare-agency-bradley-mcgee-sheryl-hardy; *Four Welfare Workers Accused of Failing To Report Child Abuse*, CHI. TRIB. (Sept. 1, 1989), http://articles.chicagotribune.com/1989-09-01/news/8901090518_1_report-child-abuse-child-welfare-bradley-mcgee.

ously been in foster care with parents who wanted to adopt him, state social workers returned Bradley home where his father killed him. Startlingly, *many* abused children die in their homes as Eli and Bradley did, even with forceful reporting laws and substantiated reports of abuse. These children die even when state welfare agencies are on notice that the kids are in grave danger.[5] Every six hours a child dies from abuse or neglect in the United States, and child welfare agencies are monitoring more than forty percent of these children.[6]

Joshua DeShaney is a child abuse victim whose claims gained Supreme Court review.[7] Although four-year-old Joshua survived multiple emergency room visits and repeated injuries, his father ultimately beat him so severely that Joshua ended up in a coma. As a result of this abuse, Joshua sustained permanent brain damage and remains profoundly retarded; he has spent the bulk of his life in a state institution. The Winnebago County Department of Social Services (DSS) file on Joshua commenced when he was just two years old. Joshua had been under the continuous monitoring of Ann Kemmeter, a DSS employee, for more than a year before that final beating. Joshua's mother brought a civil rights § 1983 claim[8] against DSS argu-

5 *See* ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, A NATION'S SHAME vii–xiii (1995) *available at* http://ican-ncfr.org/documents/Nations-Shame.pdf [hereinafter A NATION'S SHAME] (dedicating report to "the children on the following list and the thousands not named here, who have died at the hands of parents or caretakers"—which includes a six-page list of children's names, ages, and causes of death); Natalia Antelava, *America's Child Death Shame*, BBC NEWS (Oct. 17, 2011), http://www.bbc.co.uk/news/world-us-canada-15288865; *see also, e.g.*, Forrester v. Bass, 397 F.3d 1047, 1051 (8th Cir. 2005); Martirosyan v. Immigration and Naturalization Serv., 242 F.3d 905, 910 (10th Cir. 2001); People v. Santiago, 928 N.Y.S.2d 602, 603 (N.Y. App. Div. 2011); Associated Press, *Intoxicated Mother Held in Deaths of 2 Unfed Tots,* SAN DIEGO UNION-TRIB. (Nov. 17, 2004), http://www.signonsandiego.com/uniontrib/20041117/news_1n17deadkids.html; Erin Einhorn et. al., *Desperate Effort in Vain: School Worker Begged ACS to Save Abused Girl,* N.Y. DAILY NEWS (Jan. 13, 2006), http://www.nydailynews.com/news/ny_crime/2008/01/17/2008-01-17_desperate_effort_in_vain_school_worker_b-1.html; Kareem Fahim, *Mother Gets 43 Years in Death of Child*, N.Y. TIMES (Nov. 12, 2008), http://www.nytimes.com/2008/11/13/nyregion/12nixzmary.html; Carlin DeGuerin Miller, *Murdered 4-Year-Old Girl Had STD; Child Services Did Nothing, Crimesider*, CBS NEWS, Aug. 12, 2009, http://www.cbsnews.com/8301-504083_162-5234084-504083.html.

6 Antelava, *supra* note 5.

7 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

8 Title 42 U.S.C. § 1983 (2006) provides a cause of action for state actor infringement of well-established constitutional rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

ing that the conduct of the social worker—in disregarding obvious signs of repeated child abuse and in choosing not to save Joshua—had deprived him of his liberty interest in bodily integrity under the substantive component of the Fourteenth Amendment's Due Process Clause.[9] The Court held that even though DSS was on notice about the series of beatings and had frequently intervened in Joshua's family, the state agency had no *constitutional* duty to protect Joshua's life from the harm inflicted by his father, a private actor. According to Chief Justice Rehnquist's majority opinion, the Due Process Clause does not require the State to provide members of the general public with adequate protective services. Only in the case of a special relationship or a state-created danger would the state have a duty to protect an individual from private harm.

But can Joshua be fairly categorized as a member of the general public? The *DeShaney* opinion acknowledges that the "caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head . . . [and] dutifully recorded these incidents in her files, along with her continuing suspicion that someone in the DeShaney household was physically abusing Joshua, but *she did nothing more*."[10] Chief Justice Rehnquist further mentions several instances where emergency room personnel

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within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

Originally, this act was known as the Ku Klux Klan Act of 1871 and was intended to protect individual rights in the face of state actors who refused to enforce already existing laws. David Pruessner, *State-Created Danger Claims,* 20 REV. LITIG. 357, 376–379 (2001) (arguing that the legislative history of § 1983 supports ready recognition of certain state-duty claims notwithstanding the private actors involved); *see* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 684 (1978) ("This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.") (quoting Rep. Shellabarger's comments upon passage of the Ku Klux Klan Act of 1871).

Thus, to bring a viable § 1983 claim, a plaintiff must show that (1) the conduct was committed by a person acting under color of state law, (2) the state actor deprived the plaintiff of a recognized constitutional right with (3) the requisite state of mind. 42 U.S.C. § 1983; Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998); *see infra* discussion Part IV. and accompanying notes.

9 *DeShaney*, 489 U.S. at 193.

10 *Id.* at 192–93 (emphasis added).

called DSS about Joshua's injuries and notes that on the caseworker's final two visits to the DeShaney home she was told that Joshua was too ill to see her. "*Still, DSS took no action.*"[11] And yet, the majority opinion assigns no liability to DSS because the Court did not see Joshua's situation as one of state-created danger and did not find that the state's intervention gave rise to a special relationship with Joshua. Indeed, the Court says of the state actors in this case, "they stood by and *did nothing* when suspicious circumstances dictated a more active role for them,"[12] but this is not enough to establish a constitutional duty.

This Note will argue that although the *DeShaney* decision developed a workable legal framework, the Fourteenth Amendment has more to say about how states protect children from abuse and neglect. Abused children across the country should have the right to be reasonably protected by child welfare agencies that foreclose all other would-be rescuers.[13] The Court has before carved out very narrow, special constitutional rules to protect the interests of child abuse victims,[14] and it should do so again. Part I will suggest that the *DeShaney* decision did not fully analyze the particular context of child abuse. Part II will demonstrate that Congress has attempted to improve child safety via legislation, but that actual improvement has not happened. Furthermore, an economic analysis cuts in favor of a constitutional remedy. Part III will address the *DeShaney* framework by arguing that when a child welfare worker intervenes in a family, a special relationship *does* arise. Thus, when a welfare agency unreasonably keeps an abused child in his home, the home becomes a state-maintained and controlled environment and is—in effect—that child's prison. Part IV will distinguish substantive due process claims from those made in the procedural due process context, a distinction important both for determining the threshold state of mind required for culpability and for shaping the remedies discussion. This section will argue that deliberate indifference in the context of a state agency's special rela-

11 *Id.* at 193 (emphasis added).

12 *Id.* at 203 (emphasis added).

13 *DeShaney,* 489 U.S. at 208–09 (Brennan, J., dissenting). "It is a sad commentary upon American life and constitutional principles." *Id.* at 213 (Blackmun, J., dissenting).

14 *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (ruling that the Confrontation Clause guarantees a criminal defendant an opportunity for face-to-face confrontation of a witness against him, unless a victimized child witness would suffer "serious emotional distress such that [she could not] reasonably communicate" if required to testify face-to-face; such a child may testify via one-way closed-circuit television); *see also* Coy v. Iowa, 487 U.S. 1012, 1024–25 (1988) (O'Connor, J., concurring) (arguing that procedures sparing child abuse victims from testifying face-to-face might fall within an exception to the Confrontation Clause's general requirements).

tionship to children should trigger § 1983 liability. Part V will suggest and defend a narrow due process solution wherein abused children's rights to reasonable state protection match prisoners' rights to the same.

I. No Duty to Protect Abused Children

A. DeShaney*'s Workable Framework*

In deciding *DeShaney*, the Court established a workable analytical framework.[15] Chief Justice Rehnquist explained that the state is not "require[d] to protect the life, liberty, and property of its citizens against invasion by private actors"[16] unless the case falls within two narrow exceptions: First, if the state has created the danger, then it may owe a duty of care to the victim; or second, if the state has a special relationship to the victim—as it does with prisoners and institutionalized mental patients—then the state must offer reasonable protection.[17] Thus, *DeShaney*'s holding embodies a general "no duty" principle, and the state has no duty to protect citizens like Joshua from private-party harm.[18]

DeShaney's framework is one viable way to analyze Joshua's claim. The Court was not convinced that state intervention in a familial child abuse situation established a special relationship and a corresponding state duty to complete a reasonable rescue. Consequently, Justice Rehnquist found no violation of Joshua's right to personal security, even though the right is a " 'historic liberty interest' protected substantively by the Due Process Clause."[19] The relative silence of the opinion suggests that the Court did not consider the amount of control the state was exerting in the DeShaney family. The state played a very active role in Joshua's family life, and the social worker had nearly exclusive power to determine Joshua's living situation. Such state

15 Although other frameworks can be imagined, such considerations are beyond the scope of this Note.

16 *DeShaney,* 489 U.S. at 195; U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

17 *DeShaney*, 489 U.S. at 198–99, 201 (noting that the Constitution imposes affirmative duties of care on the state arising out of the Eighth Amendment in the prison context and arising out of the Fourteenth Amendment Due Process Clause in the involuntarily-committed mental patient context) (citing Estelle v. Gamble, 429 U.S. 97 (1976) and Youngberg v. Romeo, 457 U.S. 307 (1982)); *see* Laura Oren, *Safari Into the Snake Pit: The State-Created Danger Doctrine*, Wm. & Mary Bill Rts. J. 1165, 1166–67 (2005).

18 *DeShaney*, 489 U.S. at 198–99.

19 Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

intervention in the family should trigger special relationship protections. *DeShaney* held that the Fourteenth Amendment has nothing to say about how states care for abused children. Child welfare agencies, no matter how negligently or recklessly they execute their tasks, are not liable for any consequent harms. Thus, when the inaction of child welfare agencies keeps abused children trapped in dangerous homes and those children are severely injured or killed, the Constitution offers no remedy.

B. The Larger Legal Context of Child Welfare

Perhaps the Court's decision in *DeShaney* was not unexpected.[20] Courts took a relatively long time to recognize the due process rights of children in juvenile delinquency proceedings, too, maintaining the fiction that the Fourteenth Amendment and the Bill of Rights were "for adults alone."[21] Judges have also been appropriately reluctant to impinge on parents' fundamental liberty interests in raising their children,[22] including the parental right to administer corporal disci-

20 "[*DeShaney*] is part of a line of decisions in which the [C]ourt has indicated significant hostility to legal protections for children." Editorial, "*Poor Joshua!": The Supreme Court Absolves States in Child-Abuse Cases*, TIME, Mar. 6, 1989, at 56 (quoting James Weill of the Children's Defense Fund) [hereinafter *Poor Joshua*].

21 Although the first juvenile court was established by the Illinois Juvenile Court Act of 1899, it was a "social welfare institution" and even minimal due process rights were not awarded until much later. J. ERIC SMITHBURN, CASES AND MATERIALS IN JUVENILE LAW xxv (2002); *see also In re* Gault, 387 U.S. 1, 4–5, 13, 28 (1967) (For a prank phone call and "as a result of his having been in the company of another boy who had stolen a wallet," the fifteen-year-old petitioner was held in custody and adjudicated as a delinquent until age 21, without notice or the ability to confront the witnesses against him, no right to appeal, and no legal representation. Because the "Due Process Clause has a role to play" and "the condition of being a boy does not justify a kangaroo court," the Court held that due process in a juvenile proceeding requires notice, the right to counsel, the right to confront witnesses via cross-examination, the right not to be a witness against oneself, the right to appellate review, and the right to a transcript of the proceedings); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that juveniles have no constitutional right to a jury trial in a delinquency proceeding.). As Justice Douglas has noted: "a mere child" is "an easy victim of the law." *In re* Gault, 387 U.S. at 45 (quoting Haley v. Ohio, 332 U.S. 596, 599–600 (1948)).

22 Troxel v. Granville, 530 U.S. 57, 57 (2000) (preventing the application of a visitation statute that may well have served the best interests of the children because the law "unconstitutionally infringes on parents' fundamental right to rear their children"); Santosky v. Kramer, 455 U.S. 745 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. . ."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that a parent's right to "the

pline.[23] Nevertheless, a parent's rights over her child are not absolute.[24] Moreover, *DeShaney*'s legacy is the unworkable state-cre-

companionship, care, custody, and management of his or her children . . . undeniably warrants deference, and absent a powerful countervailing interest, protection"); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) (emphasizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (defining due process liberty within the meaning of the Fourteenth Amendment to include "not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children").

23 *In re* Ethan H., 609 A.2d 1222, 1226 (N.H. 1992) (favorably citing the "well-recognized precept of Anglo-American jurisprudence that the parent of a minor child or one standing *in loco parentis* was justified in using a reasonable amount of force upon a child for the purpose of safe-guarding or promoting the child's welfare") (citations omitted); State v. Kaimimoku, 841 P.2d 1076 (Haw. Ct. App. 1992) (holding that a father who repeatedly slapped his seventeen-year-old daughter on the face and punched her could successfully raise a parental discipline justification defense to child abuse charges); Lang v. Starke Cnty. Office of Family and Children, 861 N.E.2d 366, 371 (Ind. Ct. App. 2007) ("[R]easonable corporal punishment is legal . . . .").

24 *See* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("And rights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . .); *see, e.g.*, *In re* Baby Boy N., 874 P.2d 680 (Kan. Ct. App. 1994) (holding that a state statute permitting termination of a father's rights for not financially supporting the mother for six months prior to the birth of the child and for lack of a developed parent-child relationship survived constitutional muster). "[T]he degree of protection afforded parental rights under the Due Process Clause depends upon the extent and nature of the parent-child relationship." *Id.* at 688; *In re* Tamara R., 764 A.2d 844 (Md. Ct. App. 2000) (holding that, notwithstanding *Troxel,* if a child has been removed from her home and is in state custody, her right to visit with her siblings can overcome the parent's objection); *In re* E.A.T., 989 P.2d 860, 864 (Mont. 1999) (holding that a mother who allowed her child to be sodomized forfeited her parental rights, for the policy of preservation of family unity should not come at "the expense of the child's best interest"). Furthermore, "[t]he right to maintain the family unit is not absolute and although the children's best interests and welfare generally are served by maintaining the family unit with custody retained by the natural parents, *the children's best interest and welfare, not that of the natural parent, is the paramount consideration.*" *Id.* (quoting *In re* C.G., 747 P.2d 1369, 1371 (Mont. 1988)); *In re T. H. L.*, 636 P.2d 330, 334 (Okla. 1981) ("The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental and must hence be shielded with equal vigor and solicitude." (citing Bellotti v. Baird, 443 U.S. 622, 633 (1979) (holding that a mature minor has the right to obtain an abortion without parental obstruction, and that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution . . . ."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school

ated danger doctrine and thoroughly muddled circuit tests.[25] In the twenty-three years since the decision, *DeShaney* has foreclosed § 1983 claims in many child abuse cases with robust state agency involvement.[26] And, child abuse deaths continue to rise in America.[27] Abused children continue to die daily under watchful state agency care. The public is always suitably outraged, and yet those agencies *statutorily* obligated to intervene are not liable when they fail.[28] Because of *DeShaney*, this system is unlikely to change. In 1989, "[g]overnment child welfare agencies expressed relief over the

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are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . .")); *see also Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1358 (1980) (stating that although it is "well established" post *In re Gault* that the Constitution protects children, how much protection the Constitution affords minors remains an open question).

Today, robust parental rights are the presumption, but the unique circumstances raised in child abuse situations militate recognition of the child's right to be reasonably protected by the state when the state agency has knowledge of abuse. *See Lang*, 861 N.E.2d at 371 (Ind. Ct. App. 2007) ("We do not terminate [parental] rights to punish a parent, but to protect a child.").

25 Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 26 (2007) ("One would think, given the large volume of litigation in this area and the splits among the circuits that the Supreme Court would have stepped in. . . . And I think it is a scenario where we do need the Supreme Court. It is about due process, an area where we need a national, uniform set of rules."); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (*stare decisis* analysis should query "whether the rule has proven to be intolerable simply in defying practical workability").

26 *See* J.R. v. Gloria, 593 F.3d 73, 79 (1st Cir. 2010); *see, e.g.*, Doe v. Dist. of Columbia., 93 F.3d 861, 868 (D.C. Cir. 1996) (citing *DeShaney* to summarily foreclose a similar substantive due process claim brought on behalf of a severely-burned two-year-old against social workers who failed to protect her notwithstanding multiple reports of abuse and neglect); Milburn v. Anne Arundel Cnty. Dep't of Soc. Servs., 871 F.2d 474, 475–76 (4th Cir. 1989) (denying recovery to a child severely abused in foster care with injuries including a broken tibia, a deep laceration over his eye, and severely burned and permanently disfigured hands and wrists; in spite of four hospital visits and hospital personnel reporting abuse in writing and via telephone to child welfare agents, the state agency that failed to investigate was not liable, because *DeShaney* "is dispositive"). *But see infra* note 49 and accompanying text.

27 In 1998 about three children per day died from abuse in the United States; in 2010, six children died from abuse every day. *National Child Abuse Statistics*, *Child Abuse in America* CHILDHELP.ORG, http://www.childhelp.org/pages/statistics; *see also* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NAT'L INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) 3–11 (2008) (showing the increase in child abuse fatalities from approximately 1100 in 1986 to about 1500 in 1993 to an estimated 2400 in 2006, as well as noting that this increase is statistically significant; of course, even preservation of the status quo would be problematic) [hereinafter NIS-4].

28 State tort law claims are inadequate for various reasons. *See infra* Parts IV–V.

[*DeShaney*] decision" because "'[a] contrary ruling would have seriously affected programs and budgetary priorities.'"[29] Certainly, a contrary decision would have necessitated reform. In 1990, child abuse was declared a "national emergency" and "a moral disaster" because the rise in reported cases was "astronomical"[30] even then.[31] Today the trend continues.[32] If constitutional rights were protected and liability were appropriately assigned, necessary policy change would likely follow.[33] Now is the time for the Court to exercise "reasoned judgment" to rework how such claims are treated.[34]

II. The Current Child Welfare Regime

The facts of the *DeShaney* case and so many child abuse cases raise the question: Why do child protection workers choose not to inter-

29 "*Poor Joshua!*", *supra* note 20, at 54 (quoting Benna Ruth Solomon of the State and Local Legal Center in Washington).

30 *See* Marlene Cimons, *Panel Calls Child Abuse a National Emergency,* L.A. Times (June 27, 1990), http://articles.latimes.com/1990-06-27/news/mn-679_1_child-abuse-cases ("The U.S. Advisory Board on Child Abuse and Neglect, using unusually strong language, condemned the current system in the United States as failing to protect the nation's children.").

31 U.S. Advisory Bd. on Child Abuse & Neglect, U.S. Dep't of Heath & Human Servs., Abuse and Neglect xiii, 1 (1990) ("Within each State, not only the integrity of CPS, but that of the entire system of services to children and families has been threatened by the enormous increase in the number of reports without a commensurate increase in resources.") [hereinafter Abuse and Neglect]. "Not only are child abuse and neglect wrong, but the nation's lack of an effective response to them is also wrong. Neither can be tolerated. Together, they constitute a moral disaster. . . . All Americans should be outraged by child maltreatment." *Id.* at viii.

32 *See supra* notes 5, 27.

33 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212–14 (1989) (Blackmun, J., dissenting) (criticizing the "sterile formalism" of the majority and lamenting "Poor Joshua! Victim of repeated attacks . . . and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . 'dutifully record[ ] these incidents in [their] files'" (quoting *id.* at 193 (majority opinion)).

34 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.'"); Rochin v. California, 342 U.S. 165, 171–172 (1952) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."). "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command." Lawrence v. Texas, 539 U.S. 558, 577 (2003).

vene in situations like Joshua's? Although arguably DSS did establish a special relationship in *DeShaney*, the prior issue is the social worker's choosing to keep Joshua in his dangerous home in spite of chronicling abuse "in detail that seems almost eerie in light of her failure to act upon it."[35] As it turns out, abused children are at the mercy of a unique interplay among statutory law, longstanding child welfare policies, and routine state-agency practices. By relieving states of liability, the *DeShaney* decision only adds to a pre-existing problem, and the Court's unwillingness to assign economic liability to these state agencies sustains the ill-functioning child welfare regime. Today, federal law requires that these agencies act in the best interests of the child.[36] When states fail to act reasonably on this federal mandate, liability should follow.

A. Preserving Abusive Families Disregards the Fundamental Rights of Children

The Adoption Assistance and Child Welfare Act (AACWA) of 1980[37] required state agencies to make "reasonable efforts" to "prevent or eliminate the [removal of the child from his home], and to make it possible for the child to . . . return to [his] home."[38] Although requiring "reasonable efforts" at family preservation seems an appropriate mandate on its face, as applied, AACWA resulted in family preservation at all costs—even at the cost of a child's life. In Joshua's case, the goal of preserving his family gave primary animation to the social worker's actions. Similarly, in Eli Creekmore's case, the Homebuilders program—"Intensive Family Preservation Service and Intensive Family Reunification Services"—was trying to keep Eli's family together in spite of the many reports of abuse made by emergency room personnel, daycare providers, and family members. Ultimately, family preservation meant that Eli died in his home.[39]

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35 *Deshaney*, 489 U.S. at 209 (Brennan, J., dissenting).

36 *See infra* Part II.B and accompanying notes.

37 Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.). The definition of "reasonable" was left to the individual states; DSS worker Ann Kemmeter's extensive notes in Joshua DeShaney's case reflect the federal reporting requirements. LYNNE CURRY, THE DESHANEY CASE 57 (2007).

38 42 U.S.C. § 671 (a)(15)(B) (2006).

39 *See supra* note 1; *see also Programs for Intensive Family Preservation and Family Reunification*, INST. FOR FAMILY DEV., http://www.institutefamily.org/programs_IFPS.asp (last visited Oct. 11, 2012) (describing the Homebuilders mission: "Homebuilders provides intensive, in-home crisis intervention, counseling, and life-skills education for families who have children at imminent risk of placement in state-funded care"). The website refers to children in "imminent danger of being placed in foster, group,

Under the AACWA family preservation model, "caseworkers served as intermediaries between their clients and the network of social services provided by the states. Significantly . . . caseworkers undertook responsibility for all members of the household rather than the children exclusively."[40] In this regime, the so-called "child welfare workers" were actually family welfare workers who played a dual role: first, the primary "healer" of the family who needed to gain the trust of the parents; and second, the state authority figure responsible for protecting children and removing abused and neglected children from their dangerous homes.[41] Not only were these two roles in basic conflict with one another, these conflicted caseworkers were the very persons responsible for initiating child protection actions—all reports of suspected abuse "were routed to the child protective worker assigned to the family involved."[42] Additionally, if the social worker rescued a child from an abusive home, the child's respite was generally temporary, as the social worker would then focus all efforts on family reunification.[43]

In Joshua's case, the social worker, Ann Kemmeter, developed a "family plan" pursuant to the statute—not a "Joshua safety plan." Kemmeter tried to help Joshua's abusive dad, Randy DeShaney, find a job, she counseled Randy's wife on how to care for children, and she recommended that Joshua go to Head Start.[44] Even when the family did not uphold their end of the voluntary social service agreement with DSS—Randy was still out of work, injuries continued to appear on Joshua's body, and Joshua was not enrolled in Head Start—the social worker merely noted that Joshua seemed unusually accident-prone.[45] Kemmeter acted under AACWA to save Joshua's family, but in the process gravely endangered him. As *DeShaney* illustrates, some families are emphatically not worth saving, and AACWA's family preservation regime needed to change.

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or institutional care" but does not recognize the "imminent danger" of permanent injury and death many of these children face, stating: "The goal of the program is to remove the risk of harm to the child instead of removing the child." *See* Antelava, *supra* note 5 (noting that Texas brags that it has the highest family preservation record in the United States, but misses the point that it has the highest rate of child abuse deaths in the United States).

40 Curry, *supra* note 37, at 7 (discussing the conflict inherent in abruptly changing from a therapeutic role as family guidance counselor to an enforcer of state law and child protector).

41 *Id.*

42 *Id.*

43 Richard J. Gelles, The Book of David 125–43 (1996).

44 Curry, *supra* note 37, at 23.

45 *Id.* at 26–27.

B. Congress's Passage of the Adoption and Safe Families Act Has Not Made Children Safer

In part because of highly publicized cases like Eli Creekmore's,[46] Adam Mann's,[47] and Joshua DeShaney's, Congress passed the Adoption and Safe Families Act (ASFA) in 1997.[48] This new law sought to clarify the reasonable efforts requirement of AACWA to emphasize that "in making such reasonable efforts, *the child's health and safety shall be the paramount concern.*"[49] Although child welfare is now statutorily

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46 *See supra* notes 1–2. "Eli Creekmore was killed by his father in 1986, and Child Protective Services (CPS) involvement in the case is a major reason it made headlines. CPS had removed Eli from his home three times in two years, but returned him each time despite evidence his father continued to abuse him. [CPS] concluded Eli's caseworkers made no major errors in handling his case. Instead, [CPS] officials said the 'system' failed Eli, and recommended changes in law and policy." Linda Shaw, *Settlement Reached in Suit Over Eli Creekmore Death,* SEATTLE TIMES (Oct. 10, 1990), http://community. seattletimes.nwsource.com/archive/?date=19901010&slug=1097503.

47 A NATION'S SHAME, *supra* note 5, at xxiu ("In 1991, a riveting PBS documentary told the story of the brutal death of malnourished 5-year-old Adam Mann, beaten to death . . . by his stepfather . . . with participation by his mother . . . . Many professionals had missed a series of red flags that Adam was in serious danger. The autopsy of Adam revealed over 100 injuries on his body. Following the autopsy, the cause of death was listed as a broken skull, broken ribs, and a split liver. At one time or another, nearly every bone in his body had been broken. In addition, there was no food in his stomach.") (citations omitted).

48 Pub. L. No. 105-89, 111 Stat. 2116. (1997) (amending 42 U.S.C. § 671(a)(15)).

49 *Id.* (emphasis added). "The new legislation marks a fundamental shift in child-welfare philosophy, away from a presumption that everything should be done to reunite children with their birth parents, even if the parents have been abusive. The legislation would instead give more weight to the child's health and safety." Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), http://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html; *see* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., A REPORT TO CONGRESS ON ADOPTION AND OTHER PERMANENCY OUTCOMES FOR CHILDREN IN FOSTER CARE 13–14 (2005), *available at* http://www.acf.hhs.gov/programs/cb/pubs/congress_adopt/congress_adopt.pdf (discussing key legislation including AACWA and ASFA).

Although the foster care system is beyond the scope of this Note, states are generally exposed to greater liability when they put children in foster care, which may give rise to a special relationship or a state-created danger claim. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) ("[W]hen the state takes a person into its custody . . . the Constitution imposes . . . a corresponding duty to assume some responsibility for his safety and general well-being."). "After *DeShaney*, many of our sister Courts of Appeals held that foster children have a substantive due process right to be free from harm at the hands of state-regulated foster parents." Nicini v. Morra, 212 F.3d 798, 807 (3d Cir. 2000) (holding that foster care custody falls within the special relationship exception to *DeShaney*, but that the state actor did not act with the requisite culpability to be held liable under § 1983 (citing *e.g.,* Lintz

required to be the supreme consideration, child abuse and neglect deaths continue to rise and family preservation and reunification efforts often persist in the face of abuse.[50] ASFA, a federal statute which attempts to prevent the sort of abuse that Joshua experienced, has *not* achieved reform. In spite of ASFA and its state counterparts,[51] more than a decade after the passage of ASFA, the on-the-ground approach of social workers likely has not changed much.[52]

Not only is it the child welfare worker's job to initiate intervention, but also the "buck effectively stop[s] with the [d]epartment."[53]

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v. Skipski, 25 F.3d 304, 305 (6th Cir. 1994); Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289, 293 (8th Cir. 1993); Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883, 891–93 (10th Cir. 1992); K.H. v. Morgan, 914 F.2d 846, 848–49 (7th Cir. 1990))). In any event, *DeShaney* incentivizes social workers to leave children in dangerous homes where liability does not attach; thus, a fear of liability may be animating child welfare agencies' reluctance to place abused kids in foster care, as well as a concern about liability for infringing parental due process rights. *See supra* note 22; GELLES, *supra* note 43, at 150.

50 *National Child Abuse Statistics*, *Child Abuse in America,* CHILDHELP.ORG, http://www.childhelp.org/pages/statistics#gen-stats (last visited Oct. 17, 2012).

51 *See, e.g.*, N.Y. FAMILY COURT ACT § 1039-b (McKinney 2009); N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2009) ("The legislature recognizes that the health and safety of children is of paramount importance. To the extent it is consistent with the health and safety of the child, the legislature further hereby finds that . . . the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home . . . ."). Thus, the New York ASFA statute retains a conflict: children's health is of "paramount importance," but the state's "first obligation" is to preserve the family.

52 *See* Antelava, *supra* note 5 (noting that "America has the worst child abuse record in the industrialised world," and that "Unicef research from 2001 places the US equal bottom with Mexico on child deaths from maltreatment"); *see also* Terri Langford, *Mom Goes to Trial in 4-Year-Old's Death in Harris County,* HOUS. CHRON. (June 28, 2010), http://www.chron.com/news/houston-texas/article/Mom-goes-to-trial-in-4-year-old-s-death-in-Harris-1695835.php (In Emma's case, a visit to the emergency room with a super-glued head and a subsequent case of genital herpes were not enough to warrant removing her from her abusive home. "Emma—a sexually abused child found with 80 bruises, a severed pancreas and fractured skull—died on June 27, 2009 . . . . Three weeks before Emma died, her pediatrician notified Texas Child Protective Services that she had tested positive for genital herpes, a sexually transmitted disease."); Randy Burton, *CPS Under Fire in Death of Emma Thompson,* HOUS. CHRON. (August 15, 2009), http://www.chron.com/opinion/outlook/article/CPS-under-fire-in-death-of-Emma-Thompson-1746858.php (describing the Texas Health and Human Services Inspector General's report, which found that CPS only removed children from abusive homes twenty-seven percent of the time).

53 *DeShaney*, 489 U.S. at 209 (Brennan, J., dissenting); *see* GELLES, *supra* note 43, at 9 (The [child welfare] system . . . [is] just as responsible . . . as the actual perpetrator.").

As was undoubtedly true in Joshua's case,[54] reporting abuse is generally not the weakest link; rather, the system still fails—post-ASFA—when social workers view a family's compliance with a misguided family preservation plan as an indication that the home environment can become safe, all the while actively keeping children in their dangerous homes.[55] Up to 40% of abused children die under the care of a child welfare agency,[56] and the legal regime is such that only "specialized state agents in child welfare agencies" have the power to protect abused children.[57]

C. Economic Considerations Support Reform

Congress indicated that it agreed that the priority is the health and safety of children with its passage of ASFA, and when child welfare agencies do not reasonably carry out Congress's stated statutory purpose, assigning liability makes sense. But assigning liability also makes *cents*. That is, economic arguments actually cut in favor of imposing liability on child welfare agencies. Problematically, "*DeShaney* together with DSS's statutory immunity has effectively eliminated any liability considerations that might have encouraged the State to allocate its resources more efficiently." After all, the "financial penalty" of paying for Joshua's care in a state-run institution actually continues to be assessed to a *state* agency—just not to DSS.[58] At the very least, efficiency is lacking here.

Furthermore, society at large pays a steep price for turning a blind eye toward victimized children.[59] The indirect costs of child abuse include increased societal spending due to the resulting long-

54 *DeShaney*, 489 U.S. at 209 (Brennan, J., dissenting) (discussing reports made by Randy DeShaney's second wife, police, three separate emergency room personnel reports, neighbors, and the social worker, whose careful records of the reports "seems almost eerie in light of her failure to act upon it").

55 *See* GELLES, *supra* note 43, at 9–10, 86, 88 (1996).

56 Antelava, *supra* note 5.

57 *See* CURRY, *supra* note 37, at 87.

58 Garrett M. Smith, Note, DeShaney v. Winnebago County: *The Narrowing Scope of Constitutional Torts*, 49 MD. L. REV. 484, 506–07 & n.142 (1990) ("State[s] would have much to gain if [they] instituted a more effective prevention program because the program's benefits would outweigh both the economic costs of funding and the likely social costs of ignoring child abuse. . . . [L]iability could increase the efficiency of inefficient state programs." (citations omitted)). A cost-benefit analysis of state liability in child abuse situations would likely lead to better allocation of state resources among agencies and yield "financial and social benefits." *Id.*

59 DAVID S. ZIELINSKI, LONG-TERM SOCIOECONOMIC IMPACT OF CHILD ABUSE AND NEGLECT: IMPLICATIONS FOR POLICY 2005), *available at* http://familyimpactseminars.org/s_nmfis02c03.pdf.

term problems, including impaired physical and mental health, substance abuse, criminality, incarceration, and teenage pregnancy.[60] Child abuse victims require additional educational support and medical intervention and as adults are more than twice as likely to fall below the federal poverty line; moreover, since child abuse victims are generally less economically productive, they more often must rely on Medicaid and state unemployment insurance.[61] Society is already paying for child abuse but is doing so in a dramatically inefficient fashion and at great cost to children.[62] In fact, the annual *indirect* costs of child abuse in America amount to at least $70.7 billion.[63] Thus, exposing child welfare agencies to liability is not only the statute-sanctioned choice, but it is the economically beneficial choice, too.

At least one scholar disagrees. In her analysis of *DeShaney*, Barbara Armacost[64] argued that *DeShaney* was rightly decided because of both economic and separation-of-powers concerns.[65] Armacost asserted that "[t]he level of protection that the government plausibly can provide is determined, in large part, by the amount of resources the legislature has allocated to particular services. Permitting individuals to bring failure-to-protect claims would require the courts to review resource-allocation decisions and permit judges to mandate a level of protection different from the level determined by the political branches."[66] Separation-of-powers concerns might have been a thorny issue when *DeShaney* was decided because AACWA demanded family preservation even above the best interests of the child. Thus, the Supreme Court would have been somewhat hard-pressed to assign liability to an agency that was at least arguably complying with the

60 *Id.* at 19; *see* CHING-TUNG WANG & JOHN HOLTON, TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES (2007), *available at* http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf.

61 ZIELINSKI, *supra* note 59, at 18–20.

62 WANG & HOLTON, *supra* note 60, at 2 "[I]t is impossible to calculate the impact of the pain, suffering, and reduced quality of life that victims of child abuse and neglect experience. These 'intangible losses', though difficult to quantify in monetary terms, are real and should not be overlooked. Intangible losses, in fact, may represent the largest cost component of violence against children . . . ." (citations omitted)).

63 *Id.* at 5 (cost calculated in 2007 dollars).

64 Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983 (1996).

65 *Id.* at 1002 ("[T]he primary driving force behind *DeShaney* . . . may not be constitutional text or history but . . . permitting liability for inadequate protection would make the courts the arbiters of decisions about how to allocate finite public resources and manpower that are best left to the political branches.").

66 *Id.* at 1002–03.

congressional mandate, albeit unreasonably. But today, ASFA demands that state agencies protect the child's best interests *first.* If agencies are demonstrably not doing so, judicial intervention is appropriate. Furthermore, notwithstanding the argument that states establish special relationships with children in child welfare cases, Armacost's economic argument disregards the fundamental nature of the rights at stake and the importance—even economically—of preventing and deterring child abuse. Although it is undeniably true that "[p]ublic outrage at child abusers [is] not accompanied by an equally enthusiastic opening of its pocketbooks to adequately staff and maintain quality alternative living arrangements for . . . young victims,"[67] this sort of argument unacceptably justifies states in routinely and dramatically underfunding child welfare agencies.[68] Finally, economic interests are better served by assigning liability appropriately, thereby preventing the cascade of costs that follows from permitting unreasonable state agency conduct to continue unchecked.

III. AN ABUSED CHILD'S HOME IS LIKE A PRISON TO HER[69]

A. Wronging the Rights in the Circuits

DeShaney did highlight two narrow exceptions to the general no-duty rule: the state-created danger exception and the special relationship exception. Neither exception applied in Joshua's case.[70] Years before Joshua's case reached Supreme Court review, however, the Court in *Martinez v. California*[71] had flagged the possibility that a special relationship between the state and a plaintiff might create a right to state protection under the Fourteenth Amendment.[72] As a result,

67 CURRY, *supra* note 37, at 59.

68 Many § 1983 cases grant that the child's constitutional rights have been infringed but decide the case on qualified immunity grounds. *See* Lawrence G. Albrecht, *Human Rights Paradigms for Remedying Governmental Child Abuse,* 40 WASHBURN L.J. 447 (2001) (writing persuasively on the human rights issues these cases present); *see also supra* note 24 and Shaw, *supra* note 46 In the aftermath of the Creekmore case, the investigation into CPS determined that changes in law and policy were necessary).

69 Professor J. Eric Smithburn first suggested this method of analysis to me. *See also* Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery,* 105 HARV. L. REV. 1359, 1361–62 (1992) (quoting Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) (DSS "by the affirmative exercise of its power" restrained Joshua's liberty and failed to meet his "basic human need" for safety).

70 *DeShaney,* 489 U.S. at 199–201.

71 444 U.S. 277 (1980).

72 *Id.* at 284–85 (The state released a parolee who five months later tortured and killed the plaintiff. Although the plaintiff lost on proximate causation grounds, the

in pre-*DeShaney* decisions the Third, Fourth, and Seventh Circuits explicitly acknowledged that a substantive due process right to reasonable protection was a living thing.[73] In *Estate of Bailey v. County of York*,[74] for example, the child welfare agency had custody of an abused five-year-old, Aleta, and returned her to her mother and her mother's boyfriend, against doctor's advice, agency procedures, and without adequate investigation. The court ruled that Aleta had a viable § 1983 claim[75] reasoning: "When the agency knows that a child has been beaten, '[t]his strengthens the argument that some sort of special relationship had been established.'"[76] Since the *DeShaney* Court failed to recognize a special relationship in Joshua's case and upset[77] child welfare progress within the circuits, § 1983 plaintiffs looked instead to the state-created danger exception.

Court left the possibility open that the state may owe a duty to plaintiffs with whom it has a special relationship).

73 *See* Estate of Bailey v. Cnty. of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185, 194–96 (4th Cir. 1984) (dismissing the § 1983 actions of two minor children—a seven-month-old and a three-year-old beaten to death by their guardians—against a state child protection agency based on qualified immunity; in doing so the court explicitly recognized a Fourteenth Amendment right to protection from the state: "for [*Martinez v. California* and *Fox v. Custis*] firmly established that a right of affirmative protection could arise under the [F]ourteenth [A]mendment. . . ."); Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) (holding that a right to state protection could "arise out of special custodial or other relationships"); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (observing that although "there is no constitutional right to be protected by the state against being murdered by criminals or madmen," and "[t]he Constitution is a charter of negative liberties," the state still can be liable for the actions of private tortfeasors when the state places a person in known danger and fails to protect him); White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (police officers who arrested the driver of a car and abandoned the three minor children to the dangers of traffic and cold weather exhibited gross negligence giving rise to viable § 1983 claims under the Fourteenth Amendment).

74 768 F.2d 503 (3d Cir. 1985).

75 *Id.*

76 *Id.* at 510–511 (quoting *Jensen*, 747 F.2d at 195 n.11).

77 The Court noted that *Martinez v. California* has led "[s]everal of the Courts of Appeals" to rule that "once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a 'special relationship' arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 n.4 (citing *Estate of Bailey*, 768 F.2d at 510–11 and *Jensen*, 747 F.2d at 190–94 & n.11).

B. The State-Created Danger Exception Closes the Due Process Door[78]

Post-*DeShaney*, plaintiffs have been fruitlessly chasing the state-created danger exception to the no-duty rule.[79] Under this exception, only if the state had created the danger, would it have a corresponding duty to protect the citizen from harm.[80] A *DeShaney* footnote further suggests that if the state affirmatively exercises its power to place an individual in a dangerous situation, "we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[81] Since this exception is merely implied in dicta, much inter- and intra-circuit court variation exists in the acknowledgement and application of this doctrine.[82] In short, no

78 THE SOUND OF MUSIC Rogers & Hammerstein 1965) Fraulein Maria: "When the Lord closes a door, *somewhere* he opens a window").

79 *DeShaney,* 489 U.S. at 201. *See* Oren, *supra* note 17, at 1166–67.

80 Oren, *supra* note 17, at 1166–67. This exception did not apply in Joshua's case: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney,* 489 U.S. at 201.

81 *DeShaney*, 489 U.S. at 201 n.9.

82 Circuit confusion closes the window: Of the circuits that apply the doctrine, each frames the analysis distinctly. Oren, *supra* note 17 at 1184. The Second Circuit applies a two-part test and requires that the liberty deprivation by a state actor "shock[ ] the conscious." Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 431 (2d Cir. 2009). The Third Circuit has adopted a four-part test and requires a plaintiff to prove "willful disregard" on the part of the state actor. Kneipp v. Tedder, 95 F.3d 1199, 1208–09 (3d Cir. 1996). The Sixth Circuit has a three-prong test. Jones v. Reynolds, 438 F.3d 685, 690 (6th Cir. 2006). The Seventh Circuit has its own three-element analysis. Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) (The state action must be at least "reckless"). The Eighth and Ninth Circuits have explicitly found cognizable state-created danger claims. Freeman v. Ferguson, 911 F.2d 52, 54–55 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989). The Tenth Circuit has established a rigorous six-part analysis including the requirement that state conduct "shocks the conscience." Robbins v. Oklahoma, 519 F.3d 1242, 1251 (10th Cir. 2008).

In stark contrast, the First and Fourth Circuits still do not recognize the doctrine. J.R. v. Gloria, 593 F.3d 73, 79–81 (1st Cir. 2010) (emphatically reinforcing *DeShaney*'s no-duty rule); Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 80 (1st Cir. 2005) ("'This court has . . . discussed the state created danger theory but never found it actionable . . . .'" (quoting Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005))); Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) ("This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause."). *But see supra* notes 73, 77 (the Fourth Circuit pre-*DeShaney* recognized the state's duty to protect in special relationship cases). The Fifth Circuit also has resisted recognition of the doctrine. *See* Hernandez ex rel. Hernandez v. Texas Dep't of Protective and Regulatory Servs., No. 3:99-CV-1654-P, 2002 U.S. Dist. LEXIS 22707, at *7 (N.D. Texas 2002), *rev'd* 380 F.3d 872, 880 n.1 (5th Cir. 2004) ("We note that the district court also alluded to the plaintiffs' stating a theory

two circuits employ the same test, and even if plaintiffs get past the substantial hurdle of filing a well-pleaded complaint, these claims have been overwhelmingly unsuccessful. "At first, [the state-created danger doctrine] seemed a hopeful development" but "the situation looks far bleaker today. The more recent cases in the courts of appeals rarely survive dismissal, much less summary judgment."[83] In fact, "no series of cases . . . are more consistently depressing than the state-created danger decisions."[84] It is true that outside of the child abuse context, *DeShaney*'s state-created danger theory has—on rare occasions—been legally cognizable.[85] Yet, "[i]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect."[86] Ultimately, "the fate of state-created danger cases has been disheartening."[87]

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of liability based on a state-created danger claim. We emphasize that our court has not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.) (internal quotation marks omitted)). The Eleventh Circuit seems to have overruled itself and now repudiates the doctrine. White v. Lemacks, 183 F.3d 1253, 1258–59 (11th Cir. 1999) ("[W]hen someone not in custody is harmed because too few resources were devoted to their safety and protection, that harm will seldom, if ever, be cognizable under the Due Process Clause.") (explicitly overruling Cornelius v. Town of Highland Lake, 880 F.2d 348, 354–55 (11th Cir. 1989)). *See also* Chemerinsky, *supra* note 25, at 3 ("Notably, some circuits, like the Fourth and Fifth Circuits, tend to combine the two exceptions in *DeShaney*."); Christopher R. Burge, *Texas Advance Directives Act Versus "State-Created Danger" Theory: A Prima Facie Analysis*, 32 Am. J. Trial Advoc. 557, 559–60 (2009) ("[T]he precise requirements for a state-created danger action are still somewhat hazy. The elements for a prima facie claim vary among the majority of the federal circuits, and the First, Fourth, and Ninth Circuits have exceptionally limited interpretations for personal injury claims against government officials following the *DeShaney* decision." (footnotes omitted)).

83 Laura Oren, *Some Thoughts on the State-Created Danger Doctrine,* DeShaney *is Still Wrong and* Castle Rock *is More of the Same,* 16 Temp. Pol. & Civ. Rts. L. Rev. 47, 48–49 & n.11–12 (2006) ("[In recent cases] only two out of twenty-one appellate cases survived the state-created danger screening.").

84 Chemerinsky, *supra* note 25, at 1.

85 *See* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (holding that police officers could be liable for creating danger when they impounded a woman's vehicle and abandoned her in a high-crime area and the woman was subsequently raped); Freeman v. Ferguson, 911 F.2d 52, 53–54 (8th Cir. 1990) (Police officers could be liable for their failure to "take seriously" a woman's demands for enforcement of a restraining order; moreover, the officers took "affirmative action" increasing the "vulnerability of [the] decedents.").

86 *Ferguson*, 911 F.2d at 55.

87 Oren, *supra* note 83, at 57.

C. *The Special Relationship Doctrine Should Open a Window*

The struggle in the circuits highlights that *DeShaney*'s state-created danger exception remains elusive. Moreover, the doctrine does not squarely fit the child abuse context, and the Supreme Court has recently refused to elucidate further.[88] In stark contrast, the special relationship doctrine has long been legally cognizable and has already been logically extended to cover the foster care context.[89] The *DeShaney* Court allowed: "[W]hen the State takes a person into its custody and holds him there against his will, *the Constitution imposes upon it a corresponding duty* to assume some responsibility for his safety and general well-being."[90] Although *DeShaney* itself looks to foreclose the special relationship argument outside of actual custody situations, the *DeShaney* opinion did not really analyze the specific context of child abuse and the amount of state action occurring within families like Joshua's. According to *DeShaney*, the state's knowledge of the "individual's predicament" and "expressions of intent to help" are never enough to give rise to the state's affirmative duty to protect.[91] Applying this principle, the Court held that even though the state had Joshua in custody at one point, by returning him to his father, "it placed him in no worse position than that in which he would have been had [the State] not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter."[92]

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88 *See, e.g.*, Petition for Writ of Certiorari, Breen v. Southerland, 2007 WL 2155535 (5th Cir. July 23, 2007), *cert. denied*, 552 U.S. 948 (2007).

89 Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (recognizing that the Eighth Amendment establishes "the government's obligation to provide medical care for those whom it is punishing by incarceration."); *see infra* note 100.

90 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) (emphasis added) (citing Youngberg v. Romeo, 457 U.S. 307, 317 (1982)).

91 *Id.* at 200.

92 *Id.* at 201. The Court blatantly ignores the elephant in the room: tort law regarding rescue. Tort law imposes no duty to rescue, but once a rescue is undertaken it may not be negligently or recklessly carried out: "One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action,* 70 NOTRE DAME L. REV. 95, 103 (1994) (quoting RESTATEMENT (SECOND) OF TORTS § 324 (1965)). Blumoff further demonstrates that comment g to this section explains 324(b)'s "worse position" this way: "If the actor has succeeded in removing the other from a position of danger to one of safety, he cannot change his position for the worse by unreasonably putting him back into the same peril, or into a new one. Thus,

Nevertheless, the state agency exercised great power over Joshua's environment—the very environment that facilitated Joshua's grave injuries. The Court nods to the tort law of nonfeasance, but if the Court were to appropriately compare the *DeShaney* facts to the tort law regime, it would acknowledge that this is not a *failure* to rescue case; this is a *botched* rescue case. DSS began the process of rescuing Joshua, but failed to complete the rescue in a reasonable manner. Thus, because DSS executed AACWA's demands so unreasonably, Joshua should have had a viable special relationship claim. Today, under the ASFA regime, which gives primacy to the best interests of the child, abused children should certainly have a viable special relationship claim when state agencies initiate rescue and then fail to do so reasonably—in contravention to Congress's statutory mandate.

Further, child welfare agencies are statutorily required to respond to reports of abuse;[93] when the agency substantiates an abuse report and intervenes in a family, the agency is controlling the living arrangements of the abused child, and such state intervention in the sacred realm of the family[94] should trigger the special relationship due process protections. Just as foster home placement must be reasonable and safe and gives rise to a special relationship, the decision *not to place a child in a foster home* must likewise be reasonable and safe.[95] That is, "if [the state] choose[s] not to decide, [it] still [has] made a choice."[96] In *DeShaney,* Justice Rehnquist stated that it is "the State's affirmative act of restraining the individual's freedom" that "trigger[s] the protections of the Due Process Clause. . . ."[97] Here the

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while A, who has taken B from a trench filled with poisonous gas, does not here obligate himself to pay for B's treatment in a hospital, he cannot throw him back into the same trench, or leave him lying in the street where he may be run over." *Id.* at 104 (quoting RESTATEMENT (SECOND) OF TORTS § 324 cmt. g (1965)). According to Blumoff, the *DeShaney* opinion "miss[es] the point." *Id.* The Court's use of "worse position" is error because the Restatement indicates that the "no worse position" mandate "must mean . . . 'no worse than the best position the rescuer achieved after the recuse effort began.'" *Id.* Thus, the state actors in *DeShaney* indeed put Joshua in a worse position because "[t]he [DSS] 'threw Joshua back into the trench.'" *Id.* at 105.

93 *See, e.g.*, N.Y. SOC. SERV. LAW § 415 (McKinney 2009).

94 *See supra* note 23 and accompanying text.

95 *See, e.g.*, Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883 (10th Cir. 1992) (the Tenth Circuit recognized a clearly established constitutional right to a reasonably secure foster home placement).

96 RUSH, "*Freewill*," *on* PERMANENT WAVES (lyrics by Neil Peart 1980).

97 *DeShaney*, 489 U.S. at 200 (discussing Youngberg v. Romeo, 457 U.S. 307 (1982) (holding the state has an affirmative duty to protect involuntarily committed mental patients) and Estelle v. Gamble, 429 U.S. 97 (1976) (holding the state has an affirmative duty to treat an inmate's medical needs)). *Id.* at 201 (asserting "[t]he *Estelle-Youngberg* analysis simply has no applicability in [Joshua's] case").

DeShaney opinion does not recognize the prison-like, involuntary-custody context of the state-monitored child abuse situation. Both statutory law and agency practices contribute to a contextual prison every bit as restraining and real to the child as a physical prison would be. Because the Court fixated on the notion of a physical, four-walled custody situation, it avoided finding a special relationship in Joshua's case.

The Court should have queried exactly how an abused child could ever voluntarily escape his abuser. Even others who want to rescue the child—like grandparents, teachers, or doctors—must content themselves with reporting abuse to the state agency. Unlike adult victims of violence, a child cannot obtain a restraining order or leave the premises to escape abuse. Since the social worker in Joshua's case was doing all possible to keep Joshua's family together, Joshua's house was certainly more like a prison than the "free world" invoked by Justice Rehnquist. And the state actively maintained Joshua in that abuse-prison, depriving him of his fundamental liberty interest to be "free of physical and emotional violence at the hands of his . . . most trusted caretaker."[98]

Ironically, Joshua has more due process rights now—in a state institution for the profoundly retarded—than he ever had as a healthy child.[99] Since the state was actively involved in monitoring Joshua's situation, the Court should have recognized a special relationship that gave rise to the state's constitutional duty to protect.[100] "Having set the trap, through its monopolization of child protection in the hands of a social service agency . . . the state may not be excused from constitutional accountability on the pretext that the abusive parent formally retained custody and therefore sprung the trap by himself."[101] When

98 Kingsley v. Kingsley, 623 So. 2d 780, 785 (Fla. Dist. Ct. App. 1993) (citing Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991) (the Florida Supreme Court recognizes the fundamental liberty interest of a child to be free from physical and emotional violence) and Santosky v. Kramer, 455 U.S. 745, 754 n.7 (1982) (recognizing the "liberty interests of the child")); *See* Lang v. Starke Cnty. Office of Families and Children, 861 N.E.2d 366, 371 (Ind. Ct. App. 2007).

99 *Youngberg*, 457 U.S. at 316.

100 *Estelle*, 429 U.S. at 104–05 (establishing that by virtue of the special relationship between the state and a prisoner, the Eighth Amendment requires the state provide adequate medical treatment); *Youngberg*, 457 U.S. at 315–16 ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."). This reasoning by Justice Powell applies squarely to the situation of abused children.

101 Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659, 731 (1990); *see, e.g.*, CONN. GEN. STAT. ANN.

the state welfare agency enters into the family and substantiates a report of abuse, a constitutional duty to protect should be triggered.

Children in the child welfare system are particularly voiceless.[102] Even more so than mental patients and prisoners, the child's life and bodily integrity are so restrained that the child victim does not know that something has gone wrong and the state agency is the only rescuer with access.[103] "[C]hild welfare agencies bear almost the complete responsibility for investigating child abuse,"[104] and in the *DeShaney* case it did not help that police officers, doctors, nurses, and neighbors continued to dutifully report abuse, because all reports stopped with DSS. As in the prison context, the state "blocked all avenues of escape" and forced Joshua "to rely solely on its own agents for protection."[105] When the state agency—to the exclusion of law enforcement, teachers, doctors, and extended family—assumes responsibility for a child's physical security and then ignores that child's voiceless call for help, as in the prison context, "the State cannot claim that it did not know a subsequent injury was likely to occur."[106] Again, the Court referenced the "free world"[107] in *DeShaney*, but "the freedom our society has to offer Joshua is question-

§ 17a-101g (c), (d) (West 1998); 23 PA. CONS. STAT. ANN. § 6362(a) (West 2000); N.Y. SOC. SERV. LAW §§ 417(1)(a), 423 (McKinney 2009).

102 Susan Leviton, the founder of Advocates for Children and Youth and a professor at the University of Maryland Law School, commented on "voicelessness" regarding Maurice M., the missing infant at the center of *Baltimore Dep't of Soc. Servs. v. Bouknight,* 493 U.S. 549 (1990) (finding the mother of a missing child could not plead her Fifth Amendment right not to be a witness against herself in response to a court order requiring her to produce her abused infant Maurice M. and affirming the consequent contempt order and imprisonment for failing to produce the child), *quoted in* Kate Shatzkin, *Obscured by Fuss of Bouknight Case Little Boy Lost: The Legal Questions in the Case of Jacqueline Bouknight Threaten to Obscure the Small Boy Whose Whereabouts She Has Refused to Reveal for Seven Years*, BALT. SUN (Oct. 31, 1995), http://articles.baltimoresun.com/1995-10-31/news/1995304049_1_bouknight-maurice-voicelessness.

103 Antelava, *supra* note 5.

104 GELLES, *supra* note 43, at 53.

105 Analogizing to the prison context in Davidson v. Cannon, 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting); GELLES, *supra* note 43, at 9, 53; *see, e.g.*, N.Y. SOC. SERV. LAW §§ 417(1)(a), 423 (McKinney 2009); CONN. GEN. STAT. ANN. § 17a-101g (c), (d) (West 1998); *see also* 23 PA. CONS. STAT. ANN. § 6362(a) (West 2000) ("General rule. –The county agency shall be the sole civil agency responsible for receiving and investigating all reports of child abuse . . . .").

106 Analogizing to *Davidson*, 474 U.S. at 354 (Blackmun, J., dissenting).

107 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

able at best."[108] Joshua and children like him are not free agents and are rendered even more vulnerable by the "structure of the law" itself.[109]

IV. APPLES AND ORANGES: PROCEDURAL DUE PROCESS ANALYSIS IS NO PROXY FOR SUBSTANTIVE DUE PROCESS ANALYSIS

Any Fourteenth Amendment claim begins with an analysis of whether the particular interest at issue is "encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'"[110] However, procedural and substantive due process claims must be distinguished. This distinction matters for two reasons: First, it may influence the threshold state of mind required to assign liability to state actors under § 1983, and second, it is relevant to the availability of a federal remedy. In cases like *DeShaney*, it is critical to emphasize the substantive nature of the claim because only then is a federal § 1983 remedy justified for the reckless behavior of a state agent.

Substantive due process § 1983 claims must identify the core liberty—such as the right to procreate,[111] the right to privacy,[112] consensual sexual activity with another adult,[113] or the right to bear children or not[114]—violated by a state actor. In the case of abused children, the liberty at stake is the right to life and bodily integrity. Procedural due process claims, on the other hand, are "fundamentally different."[115] In such cases the deprivation "may be entirely legitimate . . . but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards."[116] Unlike the substantive due process claim, in the procedural due process context, the

108 Blumoff, *supra* note 92, at 110.

109 CURRY, *supra* note 37, at 139.

110 *Davidson*, 474 U.S. at 353 (Blackmun, J., dissenting) (quoting Ingraham v. Wright, 430 U.S. 651, 672 (1977)).

111 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

112 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating a state law barring the use of contraceptives and contraception devices between married individuals).

113 Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) ("[O]ur laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

114 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

115 Daniels v. Williams, 474 U.S. 327, 338 (1986) (Stevens, J., concurring).

116 *Id.*

deprivation itself may not be an "abuse" of state power, but rather the deprivation without proper procedure is the violation.[117] Thus, a procedural due process claim must contain a "colorable objection" to the validity of state procedures.[118] Ultimately, a procedural due process analysis should not be seen as a one-size-fits-all box for substantive due process claims.

A. A Culpable State of Mind

In *Daniels v. Williams*[119] and *Davidson v. Cannon*,[120] two procedural due process cases cited in *DeShaney*,[121] the Court held that a state actor's negligence was not a deprivation of liberty because "due process has never been understood to mean that the State must guarantee due care on the part of its officials."[122] Justice Blackmun disagreed asserting, "[i]n some cases, by any reasonable standard, governmental negligence is an abuse of power."[123] The Court also "expressly left open the question [in *Daniels* of] 'whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.'"[124] *Daniels* and *Davidson* specifically address procedural due process claims. In a substantive due process context the minimum degree of state actor culpability that would trigger § 1983 liability remains an open question.

Assuming that a special relationship exists between an abused child and the child welfare agency making monitoring and placement decisions, a state actor's deliberate indifference should render him liable under § 1983 for violating a child's substantive due process rights. *County of Sacramento v. Lewis*,[125] a substantive due process case, held that a state actor's conduct must shock the conscience—at least

117 *Id.* at 338–39.

118 *Id.*

119 474 U.S. 327 (1986).

120 474 U.S. 344 (1986) (rejecting prisoner's § 1983 claim even after he was injured in an attack by another inmate and proved at trial that state officials were negligent in preventing the assault).

121 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

122 *Davidson*, 474 U.S. at 348.

123 *Id.* at 353.

124 Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989) (quoting *Daniels*, 474 U.S. at 334 n.3); *see also* Gonzales v. Castle Rock, 545 U.S. 748, 766–68 (2005) (The Court's most recent iteration of procedural due process doctrine avoids reaching the culpability issue by holding that the plaintiff did not have a property interest in the enforcement of a restraining order—even though police non-enforcement led to the murder of plaintiff's three children.).

125 523 U.S. 833 (1998).

in an emergency situation—to trigger § 1983 liability.[126] Circumstances are crucial in this analysis, and in foster care situations some courts have found that deliberate indifference on the part of a state actor does indeed "shock the conscience."[127] Likewise, in the child welfare context, a state actor's deliberate indifference to the child's welfare should trigger liability. Deliberate indifference is akin to criminal recklessness and is appropriately difficult to prove.[128] For the agency to be liable, a child welfare worker would need to proceed with *complete disregard* for the probable harmful consequences of her actions.[129]

Although deliberate indifference on the part of the social welfare agency should certainly trigger agency liability, even agency negligence could arguably be enough, for the Fourteenth Amendment is not "'trivialize[d]'[130] by recognizing that in some situations negligence can lead to a deprivation of liberty."[131] Rather, "excusing the State's failure to provide reasonable protection" to *known children* against *known family violence* when they are under the purview of the child welfare system "demeans both the Fourteenth Amendment and individual dignity."[132]

Even if agency negligence were categorically insufficient to trigger liability, the more-difficult-to-prove deliberate indifference standard likely would have implicated the social worker in Joshua's case.

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126 *Id.* at 848. The "exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." Miller v. City of Phila., 174 F.3d 368, 375 (3d Cir. 1999); Chemerinsky, *supra* note 25, at 12–15 (suggesting that threshold culpability triggering liability may be lower in non-emergency situations: "[N]egligence and gross negligence are not enough for due process claims, but deliberate indifference and recklessness are sufficient"). In his discussion of state-actor culpability, Chemerinsky conflates procedural due process analysis (as seen in *Daniels* and *Davidson*) with substantive due process analysis (as seen in *Lewis*), which is problematic. *Compare id.* at 11, *with supra* Part IV discussion. *See generally* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test,* 13 CHAP. L. REV. 307, 325–27 (2010) (arguing the culpability standard should not be so harsh as to defeat nearly all conceivable § 1983 claims: "[A]ppellate courts have ratcheted up the . . . standard to impose an almost impenetrable obstacle.").

127 *Miller,* 174 F.3d at 375; Nicini v. Morra, 212 F.3d 798, 810 (3d Cir. 2000) ("Indeed, in the foster care context, most of the courts of appeals have applied the deliberate indifference standard, although they have defined that standard in slightly different ways."); Chemerinsky, *supra* note 25, at 13.

128 Albrecht, *supra* note 68, at 459–60.

129 *Id.*

130 Daniels v. Williams, 474 U.S. 327, 332 (1986).

131 Davidson v. Cannon, 474 U.S. 344, 356 (1986) (Blackmun, J., dissenting) (citations omitted).

132 *Id.*

The social worker's "deliberate decision not to protect" Joshua from "a known threat" resulted in his grave injuries.[133]

B. In the World of Substantive Due Process, State Tort Remedies Are Beside the Point

As in the context of state actor culpability, substantive due process claims must be distinguished from procedural due process claims in the context of remedies, too. In *DeShaney*, the majority opinion pointed to the existence of state remedies to bolster the holding foreclosing constitutional remedies. In the substantive due process context, however, the existence of state remedies is not particularly relevant to the analysis: "the existence of state remedies has relevance with regard to some procedural due process claims, but not substantive due process claims."[134] That is, procedural due process claims are simply different in nature from substantive due process claims. "Substantive due process . . . does not focus on the state's failure to provide sufficient process. Rather, it is the raw abuse of power that violates the Constitution, and such abuse is *unaffected* by the existence of state remedies."[135] So even though state tort remedies are theoretically available to child abuse victims, such remedies do not redress the constitutional violation at issue. Only a *constitutional* remedy can do so. Finally, "[a]s the Supreme Court has recognized, Congress intended § 1983 to be 'liberally and beneficently construed' so that it might effectively 'protect human liberty and human rights.'"[136] A "beneficently construed" § 1983 remedy is necessary in the child welfare context.

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133 Analogizing to *Davidson*, 474 U.S. at 355–56 (Blackmun, J., dissenting).

134 Levinson, *supra* note 126, at 350.

135 *Id.* at 324 (emphasis added). If the claim is a violation of substantive due process, "a plaintiff may . . . invoke § 1983 regardless of the availability of a state remedy." *Daniels,* 474 U.S. at 338 (Stevens, J., concurring); Levinson, *supra* note 126, at 324.

136 *Recent Cases*, 116 HARV. L. REV. 1912, 1917 (2003) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 684 (1978)); Monroe v. Pape, 365 U.S. 167, 176 (1961). "Until or unless § 1983 is repealed or amended, it should not be interpreted contrary to its historic purpose . . . liability for the arbitrary abuse of power by executive branch officials should not be relegated to the vagaries of state tort law." Levinson, *supra* note 126, at 344 & n.212 (noting the "illogic and danger of limiting the substantive scope of constitutional rights based on the existence of state torts.").

V. THE DUE PROCESS SOLUTION

A. A Special Relationship Can Be Established in the Child Welfare Context

DeShaney's failure to recognize a special relationship in the child welfare context creates perverse incentives for child welfare agencies, incentives that persist today in spite of ASFA. First, the state has an incentive to avoid taking abused children into custody, for by doing so they give rise to liability that they would never have merely monitoring children in their own abusive homes. Second, states have no real incentive to fix their overburdened child welfare agencies because their workers can conduct cases negligently or even recklessly[137] without fear of legal penalties; for although state tort law remedies might exist in theory, immunity statutes and limits on damages render abused children without a state remedy in fact.[138] Moreover, even where criminal charges have been brought against child welfare workers, such workers were generally relieved of liability—either in the initial trial or on appeal.[139] In short, *DeShaney* has created a regime in which child welfare agencies are allowed to remain both overburdened and immune. This must change on a national scale, and "[t]hreaten[ing] states with the specter of litigation" will inspire reform.[140]

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137 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 301 7th Cir. 1987), *aff'd.,* 489 U.S. 189 (1989); Elena Kagan, Certiorari Memo written for Thurgood Marshall (Sept. 3, 1987).

138 This was the case with Joshua. CURRY, *supra* note 37, at 84 (pointing out that state tort law capped damages at $50,000—not even enough money to cover one year of his care). The state continues to pay the price for Joshua's abuse, but prevention would have been better for Joshua and more economically efficient for the state long-term. *See supra* notes 58–63 and accompanying text. Although immunity issues will persist with any § 1983 claim, this Note is limited to arguing that the fundamental nature of the right at issue warrants a constitutional cause of action. Immunity issues are beyond the scope of the argument.

139 *See supra* note 4.

140 Mark Levine, *The Need for the Special Relationship Doctrine in the Child Protection Context,* 56 BROOK. L. REV. 329, 374 (1990). Bringing *criminal* charges against individual caseworkers as in the cases of Nixzmary Brown and Bradley McGee does much to deter able persons from entering this field of work, but very little for agency reform, as the worker alone takes the fall, allowing the agency to continue business as usual. *See* Cara Buckley & Mosi Secret, *Case Workers Dispirited Over Charges in Girl's Death,* N.Y. TIMES (March 24, 2011), http://www.nytimes.com/2011/03/25/nyregion/25acs.html (noting also: "The mayor's proposed budget includes across-the-board cuts, and should it pass, the child protective services arm of the agency would lose $19 million, forcing staff cuts and burdening individual caseworkers with more work."). Assigning *civil* liability to deliberately indifferent social workers, on the other hand, increases

Furthermore, state agencies preclude private rescuers from intervening in the lives of abused children.[141] Local laws encourage citizens to rely on social services agencies and prevent other would-be rescuers from intervening on the child's behalf: "[A] private citizen, or even a person working in a government agency other than [a child welfare agency] would feel that her job was done as soon as she had reported her suspicions of child abuse . . . ."[142] Again, reporting is not where the breakdown occurs. In spite of reporting, nearly seventy percent of claims go uninvestigated.[143] Since "[the government] has required or encouraged reliance on its own regulatory structure in numerous areas, including . . . supervision of child welfare . . . it has stripped citizens of self-help remedies in numerous areas."[144] Thus, "even if [child welfare agencies] do not explicitly *approve or encourage*

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the likelihood that the agency will see some liability and implement reforms. *See, e.g.*, Barber v. State of Florida, 592 So. 2d 330 (Fla. Dist. Ct. App. 1992). Bradley McGee's caseworker, who failed to report that his mother forced him to eat feces as punishment for soiling his diaper, was originally convicted of abuse and failure to report abuse. On appeal, the court noted "[T]he facts here presented a very close case to the jury" and sustained only the lesser charge for failure to report. *Id.* at 335. The social worker's punishment was merely probation. In part, the court seems to accept an overburdened agency and too-busy caseworkers as valid excuses for deaths like Bradley's. Furthermore, the confidentiality laws that protect the privacy of those investigated by child welfare agencies "are also used to hide the work of caseworkers who ignore the basic tenets of child protection." Levine, *supra* at 374. Isolated instances of individual criminal liability will not lead to widespread child welfare reform.

141 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 205 (1989) (Brennan, J., dissenting) (noting that a state's action can "render[ ] . . . people helpless to . . . seek help from persons unconnected to the government"). Brennan argues: "While other governmental bodies and private persons are largely responsible for reporting of possible cases of child abuse . . . [e]ven when it is the sheriff's office or police department that receives a report of suspected child abuse, that report is referred to local social services departments for action." *Id.* at 208.

142 *Id.* at 209–10; *see also* THE UNQUIET DEATH, *supra* note 1. In spite of the maternal grandmother's attempts to intervene and rescue Eli, she was constrained by the social services agency; the more she reported abuse, the more the agency dismissed her claims as frivolous.

143 NIS-4, *supra* note 27, at 8-3–8-4. "Similar to previous NIS findings, the NIS-4 again determined that the majority of maltreated children do not receive CPS investigation." *Id* at 9-3; GELLES, *supra* note 43, at 88, 154–55 (arguing that the reporting of abuse is generally not the problem; rather, the rub lies with investigation and action).

144 Milena Shtelmakher, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations*, 43 LOY. L.A. L. REV. 1533, 1556 n.190 (2010) (quoting Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2321–22 (1990)). This move was motivated by a desire to keep the ballooning and flawed foster care system in check. It did so, but at a cost to child welfare.

private violence, their repeated, sustained inaction can communicate that they *will not interfere* in the violence."[145] And abusers are likely aware of understaffed and inadequate child protective services.

The policy fear animating the *DeShaney* opinion is a concern that the Fourteenth Amendment is at risk of becoming a "font of tort law."[146] But, recognizing that state-monitored child abuse victims are in a special relationship with child welfare workers would not result in the sort of font of tort law[147] problems with which the *DeShaney* court was concerned. Unlike the state-created danger exception—the world of plaintiffs here is limited to child abuse victims, for this special relationship regime would not extend to adult domestic violence victims who can leave, take shelter physically, and gain the legal shelter of a restraining order. Moreover, requiring plaintiffs to prove the "deliberate indifference" of the child welfare worker makes these claims very difficult to win and gives the state actor "a distinct courtroom advantage."[148]

Congressional action and Justice Rehnquist's ersatz state-tort-law remedy have *not* solved the *DeShaney* problem, and children's due process rights are too important to leave to the whims of state legislators. "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[149] The very purpose of § 1983 was "to provide a federal remedy where the state remedy . . . was not available in practice."[150] Thus, the right way to motivate state child welfare agencies to act reasonably is to impose liability for failures.

Finally, substantive due process "serves a nationalizing function" because "[w]hen the Court recognizes substantive due process rights,

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145 This is an analogy to Shtelmakher's argument regarding police officers. *See* Shtelmakher, *supra* note 144, at 1554 (emphasis added).

146 *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 863–64 (1998) (citing Daniels v. Williams, 474 U.S. 332 (1986)). "[T]he concern cited by the Court to justify a more stringent standard . . .—fear of converting § 1983 substantive due process claims into a 'font of tort law'—is unfounded and exaggerated." *Id.* at 846–48; Levinson, *supra* note 126, at 308.

147 Parratt v. Taylor, 451 U.S. 527, 544 (1981).

148 Smith, *supra* note 58, at 507.

149 Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). "The overlap with state tort remedies should not determine the fate of federal constitutional violations." Levinson, *supra* note 126, at 343. It is no answer that the state has a law which if enforced would give relief.

150 *Monroe*, 365 U.S. at 174.

they are national rights that every state and locality must honor."[151] Supreme Court recognition of an abused child's substantive due process right to be reasonably rescued by the state's child welfare agency would lead to national reform. Under the current no-duty regime, states vary widely in their efforts and policies, and abused children fare better in some states than in others.[152]

B. Fashioning a Narrow Due Process Remedy

The abused child's right to be reasonably rescued by the child welfare agency involved is viable only in this narrow context of state agency supervision. Although some scholars and judges cite a constitution of "negative rather than positive liberties,"[153] many others recognize that the *DeShaney* Court's line-drawing between state action and inaction is not sustainable.[154] The state's intervention in the family, the particular voicelessness of these victims, and the fundamental, core rights at issue—the child's basic rights to life and liberty—require that a corresponding state agency duty be recognized.

The elements of an abused child's claim should include (1) a substantiated report of child abuse, (2) child welfare agency intervention in the family, (3) a welfare worker keeping that child in or returning

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151 Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 94 (2006).

152 Antelava, *supra* note 5.

153 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 301 7th Cir. 1987), *aff'd.,* 489 U.S. 189 (1989).

154 Bandes, *supra* note 144, at 2279–85; Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent 'State-Created Danger' Analysis for Establishing Constitutional Violations Under Section 1983,* 37 VAL. U. L. REV. 177, 229–30 (2002) ("[I]ntentional inaction by a state can be just as abusive and oppressive. . . . [T]he action-inaction distinction is a classic example of a distinction without a difference."); Chemerinsky, *supra* note 25, at 25–26; Oren, *supra* note 83, at 53 ("[T]he line between action and inaction can often be in the eyes of the beholder . . . ."); Shtelmakher, *supra* note 144, at 1538 ("[T]he standard . . . should not focus on the distinction between an action and an omission."). *But see* Jeremy Daniel Kernodle, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 187–89 (2001) (outlining a three-element analysis for satisfying the "affirmative action requirement" because "inaction simply does not state a valid claim"). *See generally* W. KEETON, PROSSER & KEETON ON TORTS § 56, at 374 (5th ed.1984) ("Failure to blow a whistle or to shut off steam, although in itself inaction, is readily treated as negligent operation of a train, which is affirmative misconduct; an omission to repair a gas pipe is regarded as negligent distribution of gas; and failure to supply heat for a building can easily become mismanagement of a boiler."); Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath,* 66 WASH. L. REV. 107 (1991) (critiquing the sustainability of the action/inaction distinction).

her to the abusive home, and (4) the child's serious, permanent injury or death from abuse. If these elements are met, the child should have a *prima facie* § 1983 claim that her Fourteenth Amendment due process right to be reasonably rescued was violated. Of course to win a § 1983 claim in court, the child would further need to prove the at least the deliberate indifference of the state actor and overcome the state agency's robust sovereign and qualified immunity protections.[155]

Although recognizing a constitutional right may seem radical, it is precisely what several circuits did in pre-*DeShaney* forays into this area of law.[156] And, the *DeShaney* framework with its special relationship exception is well-suited to this task. Certainly, these rights remain highly contested.[157] However, even recognizing the controversial nature of establishing a constitutional right in the child welfare context, radical does not mean bad or unwarranted. In fact, radical may well mean necessary and appropriate. The Court has before carved out special constitutional rules to protect the interests of child abuse victims.[158] It should do so again. As Justice Blackmun notes in his *DeShaney* dissent, "Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary . . . our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. . . . [A]nd I would adopt a . . . reading . . . which comports with the dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."[159]

CONCLUSION

Before *DeShaney*, circuit courts were starting to provide a constitutional remedy for abused children under state care. Congress, too, sought to provide a statutory remedy for child abuse victims. *DeShaney* halted such progress.[160] Long ago, a congressional committee report

155 *See supra* note 8 & Part IV discussion.

156 *See supra* note 73 & Part III discussion.

157 Conkle, *supra* note 151, at 64 ("Nothing in constitutional law is more controversial than substantive due process.").

158 *See supra note* 14.

159 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212–13 (1989) (Blackmun, J., dissenting).

160 As now Supreme Court Justice Elena Kagan warned so long ago: "This issue is important, and there is a circuit split. I only worry that a majority of this Court will agree with Judge Posner that 'the Constitution is a charter of negative rather than positive liberties' and will thereby preclude the approach taken by the [Third] and [Fourth Circuits]." Elena Kagan, Certiorari Memo written for Thurgood Marshall

asserted that "[a]ll Americans share an ethical duty to ensure the safety of children"[161] and that the "[p]rotection of children from harm is not just an ethical duty—it is a matter of national survival."[162] Thus, the Fourteenth Amendment has *much* to say about the way child welfare agencies deal with children, prompting a capacious view of liberty and reasonable rescue for children under state agency care.

(Sept. 3, 1987); Linda Greenhouse, *A Second Chance for Joshua,* N.Y. TIMES (June 17, 2010), http://opinionator.blogs.nytimes.com/2010/06/17/a-second-chance-for-joshua/ ("Elena Kagan [is] the youngest justice, with a long prospective tenure. She saw around one corner in her initial encounter with the *DeShaney* case. She will inevitably have other chances in the coming decades and maybe, with her help . . . the court will get it right.").

161 ABUSE AND NEGLECT, *supra* note 31, at 4 ("The nation recognizes and enforces children's dependency upon adults. In such a context, Americans should ensure, *at a minimum*, that children are protected from harm." (emphasis added)).

162 *Id.*