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## Failure to Protect Witnesses: Are Prosecutors Liable?

*The duty of everyone to aid in the enforcement of the law, which is as old as history, begets an answering duty on the part of government, under the circumstances of contemporary life, reasonably to protect those who have come to its assistance in this manner.<sup>1</sup>*

When third persons injure witnesses due to the witnesses' unfavorable testimony, the witnesses have a limited number of theories available to sue prosecutors who have unreasonably refused to provide them with police protection. Because there are no federal statutes imposing a duty upon prosecutors to offer protection to witnesses, and in the absence of a relevant state statute, plaintiffs must seek a judicial remedy under the fourteenth amendment of the United States Constitution. The general rule courts follow, however, is that prosecutors have no constitutional duty to provide police protection to witnesses threatened by outside forces regarding their testimony. Nonetheless, a court may find prosecutors liable under a narrow exception to the general rule, when a "special relationship" exists between the prosecutor and witness. Unfortunately, many courts, recognizing the delicate balance at issue between persons seeking redress for violations of their constitutional rights and ensuring that government employees are allowed to perform their duties unhindered by a profusion of lawsuits, have balanced their decisions heavily in favor of the government employees.<sup>2</sup> Although egregious fact patterns should arise where the court would strike the balance in favor of the injured witness, such a case has yet to emerge.<sup>3</sup>

In the context of the United States Constitution and federal statutory law, this Note traces the history of the "no constitutional duty" rule and "special relationship" doctrine to its present status. Part I explores the inception of the no-duty rule and the elements

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1 Schuster v. New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

2 Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C.L. REV. 337, 338 (1989).

3 The United States Court of Appeals for the Second Circuit recently considered arguably such a case. See *Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987). See also *infra* note 63 and accompanying text.

of a plaintiff's case under 42 U.S.C. § 1983. Part I addresses three main issues. First, has there been state action? Second, if there was state action, was there a constitutional deprivation? Finally, if there was as constitutional deprivation, what is the requisite scienter to hold a government official responsible? Although it would be convenient to treat the issues in this order, the courts have inextricably commingled these issues to a point that they are a single oversized inquiry. Part II examines the special relationship exception to the no-duty rule. Part III explores both economic and policy reasons for and against retaining the no-duty rule. Part IV analyzes the Supreme Court's position on special relationship doctrine. Finally, Part V concludes that constitutional claims brought against prosecutors for an unreasonable failure to provide endangered witnesses with police protection from third parties will continue to be unsuccessful.

#### I. GENERAL RULE: THE GOVERNMENT HAS NO AFFIRMATIVE DUTY TO PROTECT WITNESSES

Section 1983 of the Civil Rights Act of 1871<sup>4</sup> creates a federal cause of action against state officials who have deprived private citizens of either their constitutional or federal statutory rights. No federal statute, however, imposes either a duty on state prosecutors to provide endangered witnesses with proper protection from third persons or a basis for liability when a prosecutor negligently, recklessly, or intentionally fails to do so. Injured witnesses<sup>5</sup> bringing section 1983 claims are limited to alleging that a state prosecutor<sup>6</sup> 42 U.S.C. deprived them of their fourteenth

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4 42 U.S.C. § 1983 (1988). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

5 The term "injured witnesses" in this Note refers to witnesses, or witnesses represented by their estates, who have suffered bodily injury or mental distress.

6 In 1961, the United States Supreme Court ruled that individuals deprived of their constitutional rights by state officials may recover damages under § 1983. See *Monroe v. Pape*, 365 U.S. 167 (1961).

amendment rights.<sup>7</sup> When bringing a deprivation of rights claim under the fourteenth amendment, a plaintiff must first show that there was "state action."<sup>8</sup> The state action requirement has proven to be a formidable obstacle for plaintiffs alleging deprivation of their fourteenth amendment rights, especially when the claim rests on the basis of a state's inaction.<sup>9</sup>

#### A. *The State Action Issue*

In *Martinez v. California*,<sup>10</sup> the United States Supreme Court unanimously affirmed a California Court of Appeals judgment holding that state officials' decision to release a prisoner was action by the State, but the prisoner's commission of a violent crime five months later could not fairly be characterized as state action.<sup>11</sup> Focusing on the time span between the prisoner's release and the commission of the murder, the Court found the decedent's death "too remote a consequence of the parole officers' action to hold them responsible . . . ."<sup>12</sup>

Two years later, the United States Court of Appeals for the Seventh Circuit applied the *Martinez* decision in *Bowers v. DeVito*,<sup>13</sup> where an Indiana state mental hospital released a patient with a known history of criminal violence. One year after being released, the former patient murdered Marguerite Bowers. Bowers' estate filed a section 1983 claim against the hospital, alleging *reckless* deprivation of her fourteenth amendment rights.<sup>14</sup> The Seventh Circuit held that the government's failure to affirmatively protect Bowers did not constitute state action, but limited its holding to situations where the state had not taken an active role in placing an individual in a position of danger.<sup>15</sup> Specifically, the court noted:

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7 The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

8 The due process clause of the fourteenth amendment applies only where the state has "acted" in a manner sufficient to render it amenable to suit. *Id.*

9 See, e.g., Note, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986).

10 444 U.S. 277 (1980).

11 *Id.* at 284-85.

12 *Id.* at 285.

13 686 F.2d 616 (7th Cir. 1982).

14 *Id.* at 619.

15 *Id.* at 618.

We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.<sup>16</sup>

The issues framed by the Seventh Circuit proved to be prophetic of questions asked by courts treating similar claims: What is the line between action and inaction? When has the state placed a person in a position of danger? When must a state protect a person?

### B. *Government Officials' Requisite Scierter*

The issue of whether state officials should be held liable for their failure to affirmatively act in order to prevent the deprivation of a certain individual's constitutional rights has been fervently percolating in the circuit courts.<sup>17</sup> One main consideration of the circuit courts has been the requisite scierter necessary to hold a state official responsible for an unconstitutional deprivation of an individual's fourteenth amendment rights.<sup>18</sup> In *Parratt v. Taylor*,<sup>19</sup> the Supreme Court of the United States that section 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.<sup>20</sup> In *Daniels v. Williams*,<sup>21</sup> the Court reaffirmed this conclusion and noted that the plaintiff would still have to allege a

16 *Id.* The Seventh Circuit later acknowledged that § 1983 liability will not lie where an individual voluntarily assumes a position of danger. According to the court, "[t]he state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten." *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986). Although no court has considered whether a witness volunteering testimony has assumed a position of danger, Congress has made findings of its own. *See infra* note 76 and accompanying text.

17 *See infra* note 18.

18 *See, e.g., Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988)(en banc) (gross negligence is not a sufficient basis for liability), *cert. denied*, 109 S. Ct. 1338 (1989); *Metzger v. Osheck*, 841 F.2d 518, 520 n.1 (3d Cir. 1988) (gross negligence is a sufficient basis for liability); *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (recklessness is not a sufficient basis for liability); *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986) (recklessness is a sufficient basis for liability); *Jackson v. Procunier*, 789 F.2d 307, 312 (5th Cir. 1986) (reserving the issue).

19 451 U.S. 527 (1981).

20 *Id.* at 534-35.

21 474 U.S. 327 (1986).

state-of-mind sufficient to state a claim that the defendant violated the underlying constitutional right.<sup>22</sup> The Court in *Daniels* concluded that a state official can not be held liable for negligently failing to prevent unconstitutional deprivations under the fourteenth amendment's due process clause.<sup>23</sup> The Court recognized that the Constitution forbids intentional, unauthorized deprivations, but the Court left open the issue of whether gross negligence or recklessness would be sufficient to create a cause of action under section 1983.<sup>24</sup> For this reason, plaintiffs must be sensitive to the manner in which they frame their complaints, as the circuit courts differ in their analysis of the scienter issue.<sup>25</sup>

### C. *The Unconstitutional Deprivation Issue*

In addition to the issues of state action and scienter, circuit courts have inconsistently determined when the failure of a state official to provide an individual with protective services violates that individual's substantive due process rights.<sup>26</sup> Thus, the Supreme Court granted certiorari in *DeShaney v. Winnebago County Department of Social Services*.<sup>27</sup> In *DeShaney*, a case best described as one of state "inaction," a mother brought suit on behalf of her minor son under section 1983 against the Winnebago County Department of Social Services ("DSS") alleging that DSS employees failed to protect the child from his father after receiving extensive evidence indicating that his father was physically abusing him.<sup>28</sup>

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22 *Id.* at 330.

23 *Id.* at 336. *See also* Davidson v. Cannon, 474 U.S. 344, 347 (1986).

24 *Daniels*, 474 U.S. at 334 n.3. *See also* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1004 (1989).

25 *See supra* note 18.

26 *See* Archie v. City of Racine, 847 F.2d 1211, 1219-23 & n.10 (7th Cir. 1988) (en banc) (collecting cases), *cert. denied*, 109 S. Ct. 1338 (1989).

27 109 S. Ct. 998, 1002 (1989).

28 The DSS first learned of Joshua DeShaney in January 1982, when Joshua's father's second wife complained that he had hit the three-year-old boy causing marks. A year later, Joshua was admitted to a local hospital with multiple bruises and abrasions. Again, the DSS was notified. A Wisconsin juvenile court placed Joshua in the custody of the hospital, where he was thoroughly examined and released back to the DeShaneys three days later under an agreement that the father was to enter a counseling program. About a month later, the hospital again treated Joshua for "suspicious" injuries. Over the next six months, a DSS caseworker made monthly visits to Joshua's home, during which the worker observed a number of "suspicious" injuries on his head. The caseworker only recorded these incidents in her files. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that appeared to be caused by child abuse. Still, the DSS took no action. In March 1984, Randy DeShaney beat four-

The complaint alleged that DSS employees had deprived her child of liberty without due process of law in violation of his fourteenth amendment rights.<sup>29</sup> The Supreme Court rejected the claim, holding:

Nothing in the language of the due process clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation . . . [forbidding] the State itself from depriving individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.<sup>30</sup>

The Court arguably could have stopped its analysis here because the fourteenth amendment requires state action. According to the Court, the state's temporary custody of Joshua did not render it a "permanent guarantor" of Joshua's safety.<sup>31</sup> Once the DSS released Joshua, the Court concluded, the state placed him in a position no worse than he would have been had the state not acted at all. Thus, the DSS's subsequent failure to continue to protect the child could not be constitutionally redressable.<sup>32</sup> Since the plaintiff did not show that there was state action after the DSS released Joshua, the Court should have dismissed the case under *Martinez*.

Nonetheless, the Court did not dismiss the case and instead examined the scienter issue. Noting that the claim invoked the substantive rather than procedural component of the due process clause, the Court concluded that a state's negligent failure to protect an individual against private violence simply does not constitute a violation of that clause.<sup>33</sup> The Court seemed to imply that a state official's state-of-mind is irrelevant in a substantive due process analysis absent some type of "special relationship."<sup>34</sup>

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year-old Joshua so severely that he subsequently suffered brain damage such that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. *Id.* at 1001.

29 *Id.* at 1002.

30 *Id.* at 1003.

31 *Id.* at 1006.

32 *Id.*

33 *Id.* at 1004.

34 *See id.* at 1006. According to the Court, "[t]he affirmative duty to protect arises not from the State's *knowledge* of the individual's predicament or from *its expressions of*

## II. THE SPECIAL RELATIONSHIP EXCEPTION

Courts uniformly agree that an exception to the no affirmative duty rule applies where a "special relationship" exists between the State and a specific individual.<sup>35</sup> The special relationship concept often employed in section 1983 cases is derived directly from the common law of torts. Just as tort law does not recognize a general affirmative duty to aid others unless a special relationship exists, courts applying section 1983 do not recognize a general government duty to provide protective services absent a special relationship.<sup>36</sup> Yet, courts have been reluctant to find special relationships in section 1983 cases involving constitutional claims.<sup>37</sup>

### A. *Influence of the Restatement (Second) of Torts*

Perhaps one reason courts have hesitated to engage in a special relationship analysis derives from the Restatement (Second) of Torts approach to special relationships.<sup>38</sup> The Restatement provides: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other."<sup>39</sup> The Restatement principle of special relationships revolves around custodial relationships between the parties. Although courts generally have recognized that the Restatement approach is not intended to be exclusive,<sup>40</sup> they

*intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id. (emphasis added).*

35 30 PROOF OF FACTS 2D *Governmental Entity's Liability for Failure to Prevent Crime* § 4 (1982).

36 *See, e.g., Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

37 *See infra* note 105 and accompanying text.

38 RESTATEMENT (SECOND) OF TORTS § 314A(4)(1965).

39 *Id.* The institute expresses no opinion as to whether there may be other relations that impose a similar duty. *See infra* note 40 and accompanying text. *See also* RESTATEMENT (SECOND) OF TORTS § 323 (1965), which discusses when an individual who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion. This duty, commonly known as the "Good Samaritan Rule" is beyond the scope of this Note, as it would necessarily involve a prosecutor undertaking an initial affirmative attempt to protect the witness.

40 *See, e.g., Miller v. United States*, 561 F. Supp. 1129, 1134 (E.D. Pa. 1983) ("Comment b states, 'the duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found.'" (quoting RESTATEMENT (SECOND) OF TORTS § 314(A) comment b (1965)).



have nevertheless declined to expand upon the Restatement principle that a special relationship exists where there is a custodial relationship.<sup>41</sup> In other words, absent a custodial relationship, courts generally decline to apply special relationship doctrine. Federal courts, including the Supreme Court of the United States, have not promulgated guidelines to follow in section 1983 special relationship cases.<sup>42</sup>

### B. *The Custodial Relationship Issue*

In *Bowers v. DeVito*, the Seventh Circuit was willing to find a special relationship in a case not involving a custodial relationship, as long as the government had actively placed the individual in a position of danger.<sup>43</sup> Nonetheless, the notion that a custodial relationship should serve as a prerequisite to finding a special relationship has proven a more deeply imbued idea than supposed by the *Bowers* court.<sup>44</sup>

The concept that a custodial relationship is a necessary prerequisite to the finding of a special relationship may have derived from cases where the court found that the state has an affirmative duty of care and protection with respect to incarcerated prisoners. The eighth amendment's prohibition against cruel and unusual punishment, applicable to the states by incorporation through the fourteenth amendment due process clause, may require a state to take affirmative steps to provide protection to a specific individual.<sup>45</sup> Cases seem to turn on whether states have deprived individ-

41 See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1006-07 (1989).

42 Cf. Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 39-40 (1926-27):

It is not open to doubt that notwithstanding the denial by many courts that the maxim, "the king can do no wrong," has any application in the United States, it has nevertheless furnished the real explanation why exemption of the government, state and federal, from liability in tort has become an apparent axiom of American law.

Although Borchard was addressing the issue of sovereign immunity, his observation may arguably overlap into the area of special relationships. Perhaps courts fear that a "tidal wave" of litigation would result from expansion of special relationship doctrine in the area of government employees vis-a-vis private individuals. See *infra* text accompanying note 84.

43 See *supra* note 16 and accompanying text.

44 See *infra* text accompanying note 58.

45 See, e.g., *Stokes v. Delcambre*, 712 F.2d 1120 (5th Cir. 1983)(jailers owe constitutional duty to protect prisoners against harm from other prisoners). See also *Estelle v. Gamble*, 429 U.S. 97 (1976), where the Supreme Court held that prison officials could be held liable in a section 1983 action for displaying "deliberate indifference" to the

uals of their liberty so that they are no longer in a position to care for themselves.<sup>46</sup> The courts have effectively interpreted this deprivation to mean incarceration.<sup>47</sup>

### C. *Special Relationships Other Than Custodial Relationships*

One court has found that a constitutional right to protection based on the fourteenth amendment “and corollary duty *may* arise out of special custodial or *other relationships created* or assumed by the state in respect of particular persons.”<sup>48</sup> The problem is that courts have avoided delineating what factors comprise those “other relationships” that would give rise to a constitutional right of protection. Courts have escaped the issue in several ways. First, complainants may fail to allege in their claim that a special relationship existed, and thus the court finds it unnecessary to define the type of “special relationship required to give rise to a right . . . to affirmative protection . . . .”<sup>49</sup>

Second, along with the courts’ recognition that a special relationship between a state and an individual may exist in certain undefined circumstances, they have even more readily recognized that the issue may be avoided by finding that the law at the time of the alleged deprivation was not “clearly established.” For example, in *Jensen v. Conrad*<sup>50</sup> the Richland County Department of Social Services was sued for failure to take action in two potential child abuse cases. The United States Court of Appeals for the Fourth Circuit avoided the alleged special relationship issue by noting that under *Harlow v. Fitzgerald*<sup>51</sup> government officials cannot be held liable if the law<sup>52</sup> at the time of the alleged wrong-

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serious medical needs of prisoners in violation of the eighth amendment’s prohibition against cruel and unusual punishment. Mere negligent or inadvertent failure to provide adequate care is not sufficient to state a claim. *Id.* at 104-05.

46 See, e.g., *Estelle*, 429 U.S. at 103-04 (“it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself”) (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

47 *DeShaney v. Winnebago County Dep’t of Social Servs.*, 109 S. Ct. 998, 1005 (1989).

48 *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (emphasis added).

49 *Id.* at 88. The decedent’s estate failed to claim that a special relationship existed between the state and her.

50 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). See also *Barbera v. Smith*, 836 F.2d 96, 101-02 (2d Cir. 1987).

51 457 U.S. 800 (1982).

52 The term “law” as used here refers to the issue of special relationships.

doing was not "clearly established."<sup>53</sup> Since the children died in 1979 and 1980, and the issue of whether the state owed specific individuals an affirmative duty of protection under the fourteenth amendment did not arise until after 1980,<sup>54</sup> the defendants could not possibly have foreseen that a special relationship existed. For this reason, the court in *Jensen* concluded that even if a special relationship did exist under current law, all defendants were entitled to "a good faith immunity defense under section 1983."<sup>55</sup> The "clearly established" principle set forth in *Harlow* and followed in *Jensen* may well have set the trend for cases involving potential special relationships.<sup>56</sup>

Although several courts have suggested factors that may indicate the existence of a special relationship, there stands only a nebulous framework upon which to build. Some suggested factors include: foreseeability of harm to the claimant; the perpetrator's status as an agent of the state; the state's declared intention to protect a certain class of individuals; and reliance by an individual on implied or express promises of protection by the state.<sup>57</sup> Even though the *Jensen* court did not address the proposed special relationship argument, it did set forth three factors it would deem helpful when deciding a case.<sup>58</sup> Not surprisingly, the first

53 *Jensen*, 747 F.2d at 194.

54 *Id.*

55 *Id.* at 194-95. According to the court,

Given the absence of specific guidelines to determine precisely what constitutes a "special relationship" and the particularly "close" nature of the factual cases before us, we would be hard pressed to conclude that the law as it affected the defendants was "clearly established." We conclude, therefore, that we need not decide whether, under the circumstances of this case, the State had created or assumed a "special relationship" with the Clark and Brown families. All of the defendants were entitled to a good faith immunity defense against liability under section 1983.

*Id.*

56 See *infra* text accompanying note 68.

57 See Note, *supra* note 9, at 1051.

58 *Jensen*, 747 F.2d at 194 n.11. The Fourth Circuit found

no need to provide a comprehensive definition of "special relationship" given the facts of these cases, we note that these cases underscore some of the factors that should be included in a "special relationship" analysis. These factors—which would make these cases particularly close ones were we to decide them—include: 1) Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident . . . . 2) Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals . . . . 3) Whether the State knew of the claimants' plight.

factor the court articulated was whether a custodial relationship existed between the state and the victim or between the state and the perpetrator.

*D. Special Relationship Doctrine and the Bivens Action*

Since Section 1983 applies to state officials who have infringed upon an individual's constitutional rights, plaintiffs with a similar cause of action against a federal official must bring a corollary cause of action pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>59</sup> In *Bivens*, the Supreme Court ruled that absent a statutory provision providing a course of redress, individuals whose constitutional rights are infringed upon by a federal employee could sue directly under the Constitution.<sup>60</sup> This means that the aggrieved party must be a victim of some constitutional deprivation. Because no federal statute provides for a cause of action when a federal prosecutor refuses to provide protection to a witness,<sup>61</sup> injured witnesses are forced to file their claims in the form of a *Bivens* constitutional tort.<sup>62</sup>

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*Id.*

59 403 U.S. 388 (1971). For a thorough discussion of the *Bivens* corollary cause of action to § 1983, see Rosen, *supra* note 2.

60 *Bivens*, 403 U.S. at 397.

61 The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1500-15 (1988)) provides no independent private right of action against the federal government; nor does Chapter 224, Protection of Witnesses, Pub. L. No. 98-473, 98 Stat. 2153, 2154 (1984) (codified as amended at 18 U.S.C. §§ 3521-28 (1988)), specifically § 3521(a)(3), which provides: "The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter." *Id.*

62 An action brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80 (1988), may overlap with the principles that underlie a *Bivens* action. Nonetheless, actions under the FTCA are limited to those in which the United States government has consented to being sued. *Id.* § 2674; see also *id.* § 2680(a), which provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Consequently, the decision to place someone in the Witness Protection Program is a policy decision shielded by the discretionary function exception. *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1974).

A federal witness may bring a suit under the FTCA, § 1346(b), alleging that the government negligently failed to provide adequate protection if the government had undertaken to protect the individual and has done so negligently or if a duty to protect exists under state law. *Leonard v. United States*, 633 F.2d 599, 623 n.35. (2d Cir.), *cert.*

Federal courts deciding cases after *Bivens* have echoed the reasoning applied by courts deciding section 1983 cases. For example, in *Barbera v. Smith*<sup>63</sup> the United States Attorney's Office for the Southern District of New York was investigating the bankruptcy of Candor Diamond Corporation (Candor) for possible fraud committed by it, by its president, Irwin Margolies, and by its employees. The investigation was led by Assistant United States Attorney Stephen Schlessinger. The government eventually secured the cooperation of Lena Margaret Barbera, an accountant who served as Candor's comptroller and was believed to have knowledge of the company's suspected fraudulent acts. In exchange for her cooperation, Barbera was permitted to plead guilty to a single-count information charging her with fraud without recommendation with respect to her sentence. Barbera, fearing that her cooperation would place her life in danger, asked Schlessinger to provide her police protection. Schlessinger refused. In a later conversation with Margolies' attorney, Henry Oestericher, Schlessinger allegedly mentioned that Barbera and another woman, also employed by Candor, were cooperating with the government. Oestericher allegedly passed this information on to Margolies, who hired Donald Nash, a contract killer, to murder Barbera and the other employee, presumably Jenny Soo Chin. Shortly thereafter, Chin, a former Candor employee and a close friend of Barbera, disappeared. Although her body was never found, Nash apparently displayed a photograph of Chin's dead body to Margolies as proof that he had carried out part of their agreement. Soon after Chin's disappearance, Barbera again requested police protection. Again, Schlessinger denied the request. On April 12, 1982, Barbera was abducted from the rooftop parking area at Pier 92 in Manhattan and was later shot to death. Three employees of CBS Inc. were also killed when they attempted to come to her aid. Margolies and Nash were eventually convicted for Barbera's murder in a New York state court.<sup>64</sup>

The Second Circuit found that the Barbera estate's complaint alleging that the AUSA negligently deprived her of her right to life in violation of the due process clause of the fifth amendment failed to state a constitutional claim.<sup>65</sup> Noting that the govern-

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*denied*, 451 U.S. 908 (1982).

<sup>63</sup> 836 F.2d 96 (2d Cir. 1987).

<sup>64</sup> *Id.* at 98.

<sup>65</sup> *Id.* at 102. The Second Circuit left open the question whether grossly negligent or reckless conduct would be sufficient to allege a constitutional violation. *Id.* at 99. As

ment owes a duty to protect a person from harm where a special relationship exists between that person and the state,<sup>66</sup> the court found the “contours of what constitutes a ‘special relationship’ . . . hazy and indistinct.”<sup>67</sup> Instead of trying to carve out such contours, the Second Circuit sidestepped the issue by concluding that the limited case law in 1981-82, when Barbera was cooperating with the government, did not clearly establish that a special relationship had arisen between the government and Barbera.<sup>68</sup>

The circuit courts appear to expect a snowball effect. As more cases involving special relationships are decided, case law will expand and the parameters as to when a special relationship exists will become clearer. Each case will either add an additional factor necessary in establishing a special relationship or hold that a particular factor is not relevant. But because courts have repeatedly avoided the issue, the snowball rests on dry ground.

What better set of facts than *Barbera* could a court require to begin to construct a pliable framework for special relationship cases? If courts are willing to entertain special relationship arguments, then they should grant special relationship doctrine the recognition it deserves and rework some of the logic previously employed to gloss over the issue.

### *E. Factors for Establishing a Special Relationship*

To begin with, courts should not inquire into whether special relationship doctrine was “clearly established” at the time an individual began to have intimate relations with the government. The words “clearly established” connote a thing that is securely set and easily recognizable.<sup>69</sup> One logical conclusion is that if no

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a result, plaintiffs today should allege recklessness and gross negligence when framing their complaints.

66 *Id.* at 101.

67 *Id.* at 102 (quoting *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986)). Other courts have had similar problems. *See, e.g.*, *Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir.) (The Supreme Court of the United States in *Martinez v. California*, 444 U.S. 277 (1980) “gave only vague hints as to what circumstances, if any, might create such a special relationship and render the state liable . . .”), *cert. denied*, 479 U.S. 882 (1986).

68 *Barbera*, 836 F.2d at 102.

69 The American Heritage Dictionary defines “clear” as “free from anything that dims or obscures; easily perceptible, distinct; free from doubt or confusion . . . .” THE AMERICAN HERITAGE DICTIONARY 130 (2d Coll. ed. 1983). It defines “establish” as “to set securely in a position; to cause to be recognized or accepted . . . .” *Id.* at 241. Thus,

court is willing to begin setting forth precedent on a case-by-case basis the law will never become clearly established. Each court would simply look into a void left by the previous court and find that the state of the law was a seed without soil.

Another problem with the clearly established principle is that it allows prosecutors, who are assumed to know the state of the law, to act within the limited bounds of the law even when doing so is professionally unreasonable. The logic of this is plain. A government employee can only be required to act within the requirements of the law and, when the requirements of the law are minimal, the employee has no legal incentive to exercise more than that minimum degree of care.<sup>70</sup> Thus, a minimum degree of care is exactly what is exercised.<sup>71</sup>

In the context of a prosecutor-witness relationship under the current state of the law, a federal prosecutor is under no duty to exercise any minimum degree of care to protect a witness with whom the prosecutor may have developed a special relationship.<sup>72</sup> Should witnesses be forced to cooperate with prosecutors who have no incentive, other than personal integrity, to provide protection for their well-being?

On October 12, 1982,<sup>73</sup> Congress expressly addressed the issue when it enacted the Victim and Witness Protection Act of 1982<sup>74</sup> for the specific purpose "to enhance and protect the necessary role of . . . witnesses in the criminal justice process . . . [and] to ensure that the Federal Government does all that is possible within limits of available resources to assist . . . witnesses of crime . . . ."<sup>75</sup> Congress realized that defendants charged with

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something that is clearly established can be defined as something securely set and easily recognizable.

70 The missing premise is that people generally do only as much as they are required to by law, if even that much.

71 See, e.g., *Barbera v. Smith*, 836 F.2d 96, 98\* (2d Cir. 1987) and *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1001-02 (1989).

72 See *supra* notes 61-62. Furthermore, as discussed in this Note, § 1983 creates no cause of action against a federal employee.

A *Bivens* action alleging reckless or grossly negligent deprivation of a plaintiff's fourteenth amendment rights under the due process clause may be sufficient to find liability against a federal prosecutor, but courts have not decided the issue. See *supra* note 65 and accompanying text.

73 Interestingly enough, Congress enacted the Victim and Witness Protection Act of 1982 just six months after Lena Margaret Barbera's murder.

74 The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1500-15 (1988)).

75 *Id.* at 1249.

committing a crime receive more help and protection than do victims and witnesses of the same crime.<sup>76</sup> Yet, ironically, Congress did not provide for a cause of action when a federal prosecutor unreasonably refuses to provide police protection to a witness who has agreed to cooperate with the government.<sup>77</sup> Hence, witnesses who experience harm related to their roles as witnesses are forced to return to the only available cause of action under section 1983 or *Bivens*.

Either legislatures or courts need to develop special relationship doctrine so that prosecutors may be subject to personal liability if they fail to exercise a minimum degree of care in protecting vulnerable witnesses.<sup>78</sup> The absence of liability and lack of guidelines afford prosecutors indiscriminate latitude to whom they should grant protection.

Second, as is often the case in a prosecutor-witness relationship,<sup>79</sup> a witness may be at the mercy of the prosecutor. In

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76 *Id.* at 1248. Section 2 of the Act provides:

The Congress finds and declares that: (1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders. (2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim. (3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an *important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system.* (4) Under current law, law enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated. (5) While the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed.

*Id.* (emphasis added).

77 Congress did specify that "[a] victim or witness should routinely receive information on steps that law enforcement officers and attorneys for the Government can take to protect victims and witnesses from intimidation." 18 U.S.C. note (a)(2) prec. § 1513 (1988). This "note" is of little comfort considering the negligible number of witnesses who actually realize they qualify for police protection.

78 See *infra* text preceding note 82.

79 Using co-conspirators to testify against their partners in crime enables prosecutors to gather sufficient evidence to present a case when government-produced evidence is lacking. Such testimony is so essential to our criminal justice system, federal statutes



*Barbera*, the Assistant United States Attorney (AUSA) secured Barbera's testimony against her former employer by permitting her to plead guilty to a single-count information charging her with fraud. The AUSA's office promised to make no recommendation regarding her sentence.<sup>80</sup> Barbera requested that the AUSA provide her with police protection on at least two occasions.<sup>81</sup> The second request came after another employee of the company mysteriously disappeared, but, again, the AUSA refused Barbera's request.<sup>82</sup> Barbera was forcibly lodged between a rock and the AUSA. The choice to testify was certain to place her life in danger. Barbera's refusal to testify would likely result in the AUSA bringing more severe charges against her. Her fatal choice was to testify, and the AUSA remained free of responsibility for his failure to grant her protection.

Third, because special relationship doctrine is necessarily fact specific, rarely would a case involving a special relationship clearly rest within the holding of a previous case. Each case, presenting its own original fact pattern should be analyzed in its individual context. Thus, no single factor should carry the day. Rather, the court should attempt to generate a pliable standard that would encompass a wide reaching variety of fact patterns.

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allow prosecutors to grant witnesses immunity for their testimony that may otherwise have been protected under the fifth amendment. See 18 U.S.C. § 6003 (1988). Nonetheless, this only protects witnesses from prosecution in our court system as a result of their statements. It provides no protection from forces outside the courtroom. Thus, witnesses may still be forced to choose between being prosecuted themselves or testifying and endangering their lives. This type of situation is where a prosecutor should be held to the standard proposed *infra* at text preceding note 83.

For examples where the witness seems to be at the mercy of the prosecutor, see *Roberts v. United States*, 445 U.S. 552, 553-62 (1980) (holding that the district court properly considered, as one factor in imposing sentence, the petitioner's refusal to cooperate with officials investigating a criminal conspiracy in which he was a confessed participant). See generally *United States v. Vargas*, 925 F.2d 1260 (10th Cir. 1991) (government could make a motion to reduce defendant's sentence, if, in its sole and absolute discretion, it determined that the defendant provided substantial assistance); *United States v. Jefferson*, Nos. 90-8028, 90-8030 (10th Cir. 1991) (LEXIS, Genfed library, Courts file); *United States v. Magana-Olvera*, 917 F.2d 401 (9th Cir. 1990) (prosecutor told defendant that in exchange for his cooperation in identifying his drug supplier, defendant "might" receive lenient treatment on both the pending state robbery charges and upcoming federal drug charges); *Barbera v. Smith*, 836 F.2d 96, 98 (2d Cir. 1987).

80 *Barbera*, 836 F.2d at 98.

81 See *supra* text accompanying note 63.

82 *Barbera*, 836 F.2d at 98.

### F. A Proposed Standard

One possible standard involves a two-prong analysis. The first inquiry would be whether a reasonable person in the government employee's position would know or should have known that he or she was assuming a "special relationship" with an individual that would give rise to a special duty of care. A "special relationship" would be defined as a logical association between a government agent or agency and one or more known private individuals that surpasses any common or usual association experienced between an agent and those known private individuals in the ordinary course and scope of that agent's employment. If the objective answer is positive, then the second inquiry would be whether the government agents were grossly negligent or reckless in performing any duty the special relationship reasonably bestowed upon them.<sup>83</sup>

Gross negligence should be the basis for liability rather than negligence. Mere negligence would not afford government employees sufficient leeway to perform their everyday tasks. Gross negligence implies a greater state of mind than mere negligence, a great blunder as opposed to a mere mistake or oversight. For example, a gross mistake is a mistake or duty that should be noticed with even less than reasonable care. Such a distinction seems necessary to allow the government to operate without too many resources spent on guarding against small errors. Further, the lower standard of gross negligence would not raise as great a concern of opening the floodgates of litigation as would mere

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83 *Barbera* provides a scenario where courts could apply this standard. The first inquiry would be whether a reasonable person in Schlessinger's position should have known that he was assuming a special relationship with Barbera. The court would have to determine whether Schlessinger's relationship with Barbera surpassed the usual association between a prosecutor and witness within the ordinary course and scope of Schlessinger's position. Because Schlessinger actively sought out and eventually secured Barbera's cooperation in exchange for a lesser sentence, he had surpassed the usual association between a prosecutor and a witness. Barbera's requests for police protection exacerbated their relationship, especially after the unexplained disappearance of her close colleague, Chin.

To determine whether Schlessinger was grossly negligent in failing to provide police protection to Barbera, or whether providing such protection was a duty reasonably bestowed upon him by the relationship, a court would have to discover his reasons for denying her requests, which were not specified in the case. See *Barbera*, 836 F.2d at 98. The point is that courts should begin to develop special relationship doctrine by applying a viable standard and fitting fact patterns to that standard.

negligence.

### III. WHY THE NO-DUTY RULE REMAINS

Scholars have advanced various arguments for retention of the no-duty rule. Probably the mainstay argument is that erosion of the no duty-rule will open "the floodgates of litigation"<sup>84</sup> and result in "staggering potential liability."<sup>85</sup> Economics and efficiency lie at the heart of these concerns. While some commentators argue that courts may experience a rise in litigation, causing greater congestion and a slower judicial process, other commentators suggest that such worries are extremely exaggerated or even groundless.<sup>86</sup>

Some writers consider the fear of court congestion as a reason to retain the no-duty rule "[as] not [an] answer, nor [an] affirmative argument for not changing the law. [It is] simply avoid[ing] the argument on the merits."<sup>87</sup> On the other hand, proponents of abolishing the no-duty rule argue that the financial burden imposed upon victimized individuals should be spread throughout society.<sup>88</sup> This argument unfolds into three distinct categories: loss-bearing, loss-spreading, and loss-avoidance.<sup>89</sup> Loss-bearing involves a wholly economic analysis of which party in a lawsuit can better afford to bear the cost, or put otherwise, has the deeper pocket. Almost offensive to one's perception of objective justice, loss-bearing usually rears its head under the guise of loss-spreading, as the better loss-bearer is usually the better loss-spreader.

Loss-spreading analysis examines which party in a lawsuit possesses a wider base upon which financial loss can best be distributed.<sup>90</sup> Loss-spreading argues that financial losses by injured wit-

84 See Note, *Municipal Tort Liability for Failure to Provide Adequate Police Protection in New York State*, 39 ALB. L. REV. 599, 602 (1975).

85 See *Massengill v. Yuma County*, 104 Ariz. 581, 523, 456 P.2d 376, 381 (1969) (en banc).

86 See Note, *supra* note 84, at 602.

87 *Id.* at 602 n.28. (quoting Samore, *Codling v. Paglia: Comparative Negligence*, 38 ALB. L. REV. 18, 19 (1973)).

88 Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 834 (1981).

89 Loss-bearing, loss-spreading, and loss-avoidance are complex economic concepts. This Note only briefly discusses the concepts because other authors have addressed them more extensively. See *id.* at 833-34.

90 See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 657 n.39 (1980), *reh'g denied*, 446 U.S. 993 (1980). The Court stated:

nesses impose a societal cost that should not be borne solely by the unfortunate few upon whom the injuries fall.<sup>91</sup> Loss-spreading must be analyzed in light of each case. For example, if a prosecutor is being sued in an individual capacity, the prosecutor has no better loss spreading capacity than the injured witness. On the other hand, a municipality being sued possesses a superior base upon which to spread the financial effects of a lawsuit.<sup>92</sup> Proponents of the loss-spreading analysis often argue that an entity could purchase insurance to protect itself and its employees against such liabilities and spread the cost of the insurance over its customer base.<sup>93</sup> Yet this argument is difficult to justify in the prosecutor-witness context. Simply stating that "between the two parties, the one who has acted unreasonably ought to pay" is not sufficient.<sup>94</sup> For when the law defines unreasonable, and the prosecutor has not acted unreasonably under that definition, an innocent witness may still suffer an objectively unreasonable injury. Nevertheless, by definition, no party has acted unreasonably, other than the perpetrator, and the innocent witness goes uncompensated.

The soundest economic principle advocating abolition of the no-duty rule is loss-avoidance.<sup>95</sup> When a witness reasonably requests police protection from a prosecutor, the prosecutor has the ability to arrange for such protection. Although prosecutors cannot be expected to ride "shotgun" with witnesses to the court-

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[W]hen it is the local government itself that is responsible for the constitutional deprivation, it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

*Id.* at 657.

91 See Note, *supra* note 88, at 834.

92 States, government agents, and municipalities all may be defendants under § 1983. Nonetheless, a state itself cannot be liable for damages under § 1983 due to the eleventh amendment. U.S. CONST. amend. XI.

93 See Note, *supra* note 88, at 833.

94 See *id.* at 834.

95 See generally G. CALABRESI, *THE COSTS OF ACCIDENTS* 69-73 (1970). See also Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 558 (1985) (criticizing tort law and accident avoidance principles as a deterrent for undesirable conduct). Sugarman expresses the deterrence model as, "[w]here avoidance hurts less than the sting, [a person] can rationally elect another course of conduct." *Id.* at 564. Sugarman also contends that "[p]eople are led to behave properly before they have any personal encounter with the law." *Id.*

house, they are generally in a better position to prevent injury to the witness.<sup>96</sup> This is not an unreasonably burdensome task for prosecutors to perform. To begin with, prosecutors should only be required to reasonably assess whether they have entered into a special relationship with a witness that may require them to provide affirmative protection.<sup>97</sup> Second, prosecutors who have dealt with witnesses to the extent that a "special relationship" exists are inevitably aware of the facts surrounding the witness's predicament.<sup>98</sup> Third, when determining prosecutorial liability, courts should scrutinize a prosecutor's decision whether to provide police protection under a gross negligence or reckless standard.<sup>99</sup> Finally, in exchange for this minimal effort, both the prosecutor and society at large receive the witness's effort and cooperation in fighting crime. Hence, adhering to a loss-avoidance principle is not only a way to minimize potential harm to specific witnesses, but also a method to secure witness cooperation.

Another significant policy consideration in favor of retaining the no-duty rule is that legislatures should mandate any changes in this area of law, not the courts.<sup>100</sup> To truly assess the validity of this argument, one must look at the underlying societal values and our government structure. On one hand, Americans generally share a libertarian disposition—that is, more or less, "don't tread on me and I won't tread on you."<sup>101</sup> On the other hand, any democracy contains an inherent utilitarian ingredient—the greatest good for the greatest number. The traditional function of the judiciary is to vindicate the rights of the individual as each case is brought before the court. The framers of the United States Constitution believed that the rights of the few, the minority, would best be served by a countermajoritarian unit that was not under political influence.<sup>102</sup> This unit, the federal judi-

96 See *supra* text accompanying note 63.

97 See *supra* text preceding note 81 and text accompanying note 83.

98 This Note's suggested standard, *supra* at text preceding note 83, caters to the special position of a prosecutor by requiring a relationship that "surpasses any common or usual association between [a prosecutor] and [a witness]."

99 See *supra* text preceding note 83.

100 See Note, *supra* note 84, at 603.

101 Frank Michelman contends that "[a]fter all, the justification of the republic is freedom, to be found in the process of self-government—not the freedom of rulers as a class apart (and certainly not that of the Laws) but the freedom of each person as ruling and being ruled." Michelman, *Traces of Self-Government, Foreword to The Supreme Court: 1985 Term*, 100 HARV. L. REV. 4, 42 (1986) (on civic humanism and the libertarian strand of American conservatism).

102 The President appoints all article III federal court judges, including Supreme

ciary, conserves the libertarian rights of the citizens.

Opposite this countermajoritarian branch of government, the framers designed a legislature that is sensitive to the majority's needs, through the election process, and best suited to define the greatest good for the greatest number. The question becomes: Which branch is best suited to determine the propriety of the no-duty rule?

Some commentators argue that since "tort law 'traditionally has been a matter for judicial rather than legislative growth,' any '[r]ecourse to the legislature . . . [can be] condemned as a needless abdication of judicial responsibility."<sup>103</sup> Although "tradition" is not enough to justify the judicial branch's development of the no-duty rule or special relationship doctrine, this viewpoint correctly reflects the notion that the judiciary is best suited to vindicate the rights of individuals, and that the legislature may intervene if necessary. This is not to say that the judiciary should be legislating or promulgating new law, but, as Judge Keating observed, the no-duty rule is "judge made and can be judicially modified."<sup>104</sup>

Yet federal courts apparently feel that the legislature is best fit to either abolish the no-duty rule or to expand special relationship doctrine because the courts have failed to attempt either.<sup>105</sup> Congress, on the other hand, has either decided that the greatest good for the greatest number is presently being achieved under the current law or that the judiciary is best suited to promulgate

Court Justices, for lifetime tenure conditioned only on their "good behavior." They can be removed only by impeachment or resignation. U.S. CONST. art. III, § 1.

103 See Note, *supra* note 84, at 603-04 (quoting Comment, *Torts - Illegitimacy - Bastard Has Cause of Action Against State for Negligently Permitting Her Mother's Rape, Causing Plaintiff's Illegitimacy*, 41 N.Y.U. L. REV. 212 (1966) and Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 146 (1966)).

104 *Riss v. City of New York*, 22 N.Y.2d 579, 592, 240 N.E.2d 860, 867, 293 N.Y.S.2d 897, 907 (1968) (Keating, J., dissenting).

105 See, e.g., *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988). According to the United States Court of Appeals for the Seventh Circuit:

[i]mplication of a "positive" right (to have the government do something) out of the constitutional "negative" right (to be let alone) often depends on arguments about policy rather than on the text, structure, or history of the document it may depend on seeing things from the perspective of collective benefits rather than the autonomy of the individual, a perspective that potentially increases the role of government in society, contrary to the plan of the Bill of Rights. Such a step therefore must be unusual and exceptionally well-justified.

*Id.* at 1213.

any new doctrine.<sup>106</sup> Thus, the no-duty rule generally remains unchallenged, and the special relationship doctrine remains stagnant.

#### IV. THE SUPREME COURT ON SPECIAL RELATIONSHIPS

As much as *DeShaney* narrows the situations in which a plaintiff may bring a cause of action for failure of a government agent to act, it further narrows the scope of special relationships. The Supreme Court recognized that in certain limited circumstances the due process clause of the fourteenth amendment imposes a duty upon the state to take affirmative action to protect certain individuals.<sup>107</sup> Nonetheless, the Court rejected *DeShaney's* contention that a special relationship could exist between an individual and the State absent some type of custodial relationship.<sup>108</sup> Yet the Court may have created a loophole when it noted that "[w]hile 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 more vulnerable to them."<sup>109</sup>

The Court may have intended to leave open the issue of liability where the government played a part in creating the danger to a known individual but where no custodial relationship existed.<sup>110</sup> The Court also left open the issue whether a grossly negligent or reckless unconstitutional deprivation would be sufficient to establish a redressable constitutional claim where a state did not place the individual in a position of danger. Regardless, absent any state statute or tort law creating a cause of action for an injured witness due to a state prosecutor's failure to provide police protection, the "loophole" may be the only avenue available for legal redress.

106 See *supra* notes 61, 62, and 76.

107 *DeShaney*, 109 S. Ct. at 1004-05.

108 *Id.* at 1005. According to the Court,

[i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

*Id.* at 1006.

109 *Id.* at 1006.

110 *DeShaney* does not answer this question because the state did not create the danger Joshua suffered from. It would be interesting to see how *Barbera* would be decided by exploiting this "loophole."

## V. CONCLUSION

The Supreme Court is aware that constitutional tort cases must strike a balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."<sup>111</sup> But even an arm's length analysis of state "inaction" claims or of a situation where a prosecutor has failed to provide police protection to a needy witness reveals that neither courts nor legislatures have struck the balance.<sup>112</sup> Outside of relevant state statutory law, courts in general refuse to find that state or federal officials owe a duty to provide protection to specific individuals.<sup>113</sup> Due to this restrained view of the state-citizen relationship and the duty of the State to provide affirmative protection to its citizens under the fourteenth amendment, such actions have generally been unsuccessful.<sup>114</sup> The two-prong standard articulated in this Note<sup>115</sup> would impose liability on government agents if they were grossly negligent in performing reasonable duties to a known individual if reasonable agents would have known that they were assuming a special relationship with that person. Such a standard imposes a duty of reasonable protection to qualified witnesses while affording sufficient deference to prosecutorial discretion and decisionmaking.

*Daniel J. Glivar*

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111 *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (addressing the issue of sovereign immunity).

112 *Cf. Rosen*, *supra* note 2, at 338, 377 (concluding that courts need to balance the interests between vindication of citizens' constitutional rights and allowing public officials to effectively perform their duties).

113 30 *Proof of Facts*, *supra* note 35, at § 2.

114 S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION*, § 3.10 (2d ed. 1986 and Supp. 1989) (citing cases at n.171).

115 *See supra* text preceding note 83.



