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INTIMATE INJURIES: ARE THERE CONSTITUTIONAL LAW PROTECTIONS FROM FAMILY VIOLENCE

J. RANDALL PATTERSON

I. INTRODUCTION

In a national upsurge of domestic violence, often occurring in the home of the victim and often committed by a member of the family, the courts across the United States have been forced to define the limits of government protection from this most intimate form of abuse. It is estimated that each year as many as sixteen

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million women are injured from some form of spousal violence, and in 1989 alone nearly two and one-half million reports of child abuse were filed. When can an individual rely on state or police protection from this significant private danger? This reoccurring question, opaquely shaded by Constitutional and tort law considerations, seems to be generally dependent upon the factual issues surrounding the incident of violence, and consistently its boundaries of protection are framed not by expectation of protection or even the actual need for protection, but rather by the relationship of the victim to the state.

II. DeShaney and Its Past

A. The DeShaney Facts

In 1989, the United States Supreme Court affirmed the Appellate and District Court findings in DeShaney v. Winnebago County Department of Social Services, as to the state's non-liability for inadequately providing protective services to a young child who was beaten so severely by his father that the child, with over half of his brain tissue destroyed, will remain comatose for the rest of his life.

The tragic events leading to Joshua DeShaney's severe injuries began in 1980, when a Wyoming state court, in a divorce proceeding, awarded custody of the child to his father, Randy DeShaney. In 1982, Christine DeShaney, Randy's second wife expressed concerns to the police that the child was being abused. Based on these accusations, the Winnebago County Department of Social Services questioned Randy DeShaney, who denied that any abuse had occurred. The Department of Social Services did not investigate further, and the matter was closed.

In January, 1983, the probability of Joshua being abused again surfaced when Randy DeShaney's live-in girlfriend, Marie, took Joshua to the hospital for emergency treatment. Marie told hospital authorities that Joshua's injuries, consisting of multiple bruises and abrasions, were the result of an attack on him by another child. In spite of this explanation, hospital emergency room per-

4. Id. at 2.
6. Id. at 192.
7. Id.
personnel suspected abuse and notified the Winnebago County Department of Social Services, who obtained an Order from a Wisconsin juvenile court, placing Joshua in the temporary custody of the hospital where he had been admitted. The Department of Social Services assembled a "Child Protection Team" consisting of a pediatrician, a psychologist, a police detective, a county attorney, several hospital personnel, and several Department of Social Services personnel, including Ann Kemmeter, the caseworker specifically assigned to Joshua's case. The team evaluated Joshua's case in light of Wisconsin Statutes Section 48.205(1)(a), which allowed the child to be retained under the protective custody of the court when "probable cause exists to believe that if the child is not held he or she will . . . be subject to injury by others." The team found no such probable cause or sufficient evidence of abuse and released Joshua back to his father's care and custody. In conjunction with Joshua's return home, the team recommended that the child be enrolled in the Headstart Program, that Randy DeShaney undergo anti-abuse counseling from the Department of Social Services, and that Marie, whom Randy suggested had abused Joshua, be required to move out. Randy DeShaney executed a document with the County Department of Social Services agreeing to these conditions. Approximately three weeks later, the court officially closed the child protection case brought in Joshua's behalf by the Winnebago County Department of Social Services.

Less than one month later, in February, Joshua was again returned to the hospital and treated for "suspicious injuries." Hospital personnel again notified the Department of Social Services through Ann Kemmeter. Ms. Kemmeter discussed the injuries and the situation with hospital social workers, and again concluded that there was insufficient evidence of child abuse to remove Joshua from the home. Joshua was again returned home to the care of his father.

Over the next year, Ann Kemmeter visited the DeShaney home approximately twelve times, notating in her files, during March, that "someone in the DeShaney household was physically abusing Joshua." In spite of Ms. Kemmeter's notes, neither she

8. Id.
11. Id.
12. Id. at 193.
nor the County Department of Social Services took any formal action to end the abuse or to protect the child. In May, during her in-home visit, Ms. Kemmeter noticed a lump on Joshua’s head but was told by Randy DeShaney and Marie that the bump had been caused when Joshua fell off his tricycle. When the caseworker next visited the DeShaneys in July, she noted that Randy had not complied with the January, 1983 agreement; Joshua had not been enrolled in Headstart and Marie had not moved out of the house. When Ms. Kemmeter next visited the DeShaney home in September, she did not see Joshua, but was told that the child had been taken to the hospital to be treated for a scratched cornea. During the October visit, Ms. Kemmeter again noted a suspicious bump on Joshua’s head. During her November visit, Ms. Kemmeter observed a scratch on Joshua’s chin that she later commented resembled a cigarette burn. Additionally, in late November Joshua was returned to the hospital requiring treatment for multiple injuries, including a cut forehead, bloody nose, swollen ear, and bruises on both shoulders. The hospital emergency room personnel, suspecting abuse due to the nature of the injuries, again contacted the Winnebago County Department of Social Services which took no action either to further investigate the cause of Joshua’s injuries or to protect him from subsequent abuse. During January and February of 1984, Ms. Kemmeter made two additional visits to the DeShaney home and on both occasions was told that Joshua was in bed and too ill to see her. In March, 1984, Ms. Kemmeter made another in-home visit to the DeShaneys “and was told that several days earlier Joshua had fainted in the bathroom for no apparent reason.” During that visit, Ms. Kemmeter made no request or effort to see Joshua, nor offered any reason for her failure to further investigate his condition.

One day later, on March 3, 1984, Joshua DeShaney lapsed into a coma, his father having beaten him “so severely” that a major-

14. Id.
15. Id.
16. Id. This is critically important in that through Randy DeShaney’s second wife, Christine, the initial attention was drawn to Joshua’s abuse.
17. DeShaney, 812 F.2d at 300.
18. Id.
19. Id.
20. Id.
ity of Joshua's brain tissue had been destroyed. The doctors treating Joshua discovered, while performing emergency brain surgery, that the condition of the child's head evidenced previous injuries from earlier beatings. Additionally, Joshua's body was heavily bruised, solidly indicating long term abuse. The emergency treatment was sufficient to preserve the child's life, but nothing could be done to reverse the effects of the injury to Joshua's brain. Randy DeShaney was convicted of child abuse and was sentenced to a prison term of two to four years. He was later paroled before completing the second year of that sentence.

B. History and Background

The fourteenth amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the past there has been considerable disagreement between courts as to what actual duties section 1 of the fourteenth amendment imposes on state agencies, not only with regard to child abuse situations, but in general, in situations where the agency either knew or should have known of the impending injury.

The critical issue in any case concerning governmental liability resulting from the failure to perform an assumed duty lies in the relationship between the injured party and the government agency.

21. Id.
22. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 193 (1989). While conducting surgery on Joshua's brain, the doctors discovered "a series of hemorrhages" and determined them to be the direct result of long-term traumatic abuse. Id.
23. DeShaney, 812 F.2d at 300.
24. Id.
Where the streets are quiet, but people who could be saved are left to die of neglect or cold or hunger, or are crippled or killed by their living or working conditions, a different group of people may suffer, and other theorists may see their suffering as attributable to human agency, and so class it as part of man’s violence to man.  

To establish liability for state inaction, it is necessary to prove that the relationship which existed between the injured party and the government involved more than simple negligence, but rather that it developed from some affirmative act on the part of the state to assume a duty toward the individual. This overt act by the governmental agency has been found to range from a failure to act where danger is imminent to the actual negligent performance of an assumed rescue.

The ultimate dependency on a state agency, and the one most likely to mandate a duty of care and protection, is when the state brings into its custody an individual against his will. Estelle v. Gamble recognized this duty as between a state prison and an individual confined there. The Court stated, “It is but just that


31. See Martinez v. California, 444 U.S. 277 (1980) (no liability for state’s negligent supervision of parolee who later committed murder); Bradberry v. Pinella County, 789 F.2d 1513 (11th Cir. 1986) (finding no liability when swimmer drowned due to negligence of county employed lifeguard); Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986) (finding no liability for injury due to state’s failure to remedy an unsafe work place); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) (finding no liability for negligent post-release supervision of parolee); Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982) (finding no liability for train-vehicle collision which resulted from negligent maintenance of signals).

32. See United States v. Lawter, 219 F.2d 559 (5th Cir. 1955) (finding liability for negligently performed rescue operation); see also White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (finding liability for injury which occurred as a result of police intervention). Cf. Doe v. New York Dep’t of Social Servs., 649 F.2d 134 (2d Cir. 1981) (finding liability due to state “deliberate indifference” to a known danger).

33. Vonner v. State Dep’t of Public Welfare, 273 So. 2d 252 (La. 1973) (holding state liable when social services failed to conform to its own policies on child placement follow-up investigations, resulting in the death of a child in the foster home).

34. United States v. Lawter, 219 F.2d 559 (5th Cir. 1955) (holding government liable for individual’s death caused by unqualified personnel operating Coast Guard rescue equipment during rescue operations).


36. Id. at 104. See Daniels v. Williams, 474 U.S. 327 (1986); Withers v. Le-
the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." The case concerned the state’s duty to provide reasonable medical care to its prisoners so as not to violate the eighth amendment’s protection against “cruel and unusual punishments.” A case with a similar duty imposed, *Youngberg v. Romeo*, concerned a mentally retarded individual who was injured while confined to a state mental institution. His mother, as a result of the injuries, brought suit against the hospital alleging violations of the eighth and fourteenth amendments. The Court held that the institution owed an affirmative duty of protection to individuals confined therein. “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.” The application of these principles mandates a duty from the state proportionate to the amount of control that it exercises over its citizen.

*United States v. Lawter* typifies a different, but complete state assumption of duty for the protection or rescue of an individual against a private danger. In this case the commander of a Coast Guard helicopter allowed an untrained crew member to operate the helicopter’s air-sea rescue equipment resulting in the

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39. U.S. CONST. amend. VIII. The amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
40. Id.
42. *Youngberg*, 457 U.S. at 310.
43. U.S. CONST. amend. VIII.
44. U.S. CONST. amend. XIV.
45. *Youngberg*, 457 U.S. at 316.
46. Id. at 315.
48. 219 F.2d 559 (5th Cir. 1955).
49. Id. at 562.
death of the person being rescued. The Fifth Circuit found liability, holding that "the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he has undertaken." The court in *Lawter* further considered as a basis for finding liability that the government agency "affirmatively took over the rescue mission, excluding others therefrom . . . ." By applying this analysis, the court's rationale was that negligent performance of the rescue would increase the likelihood of injury and thus impose liability. Additionally, in *White v. Rochford*, a Seventh Circuit court found liability when a police officer allowed the children of an arrested driver to remain unsupervised on the roadside. The court in *Jackson v. City of Joliet*, however, found no state liability when, in addition to failing personally to rescue, a police officer negligently directed other potential rescuers away from the scene of an accident where two individuals were trapped in their car and eventually burned to death. The court in *Jackson* found that no "special relationship" existed between the trapped individuals and the police officer sufficient to predicate an obligation to act in a reasonable manner. The court held that the "car ran off the road and burst into flames for reasons unrelated to the actions of the police officer [and that] the state officers did not

50. Id. at 561.
51. Id. at 562.
52. Id.
53. Id.
54. 592 F.2d 381 (7th Cir. 1979).
55. But see *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (holding passenger of impounded vehicle who was assaulted and raped after being abandoned by police in high crime area was held to have viable § 1983 claim), *cert. denied*, 111 S. Ct. 341 (1990).
57. Id. at 1202.
create but merely failed to avert danger." The Jackson court further speculated that other potential rescuers would not have risked their safety to effectuate a rescue, thus relieving the state of the possibility of having contributed to the injury. The court in Jackson distinguished its holding from that in White by concluding that in the latter the state actually created the danger whereas in Jackson the "decedents were in great danger before the defendant appeared."

In cases more factually related to DeShaney, courts have shown a myriad of holdings. Vonner v. State involved a situation where a county department of social services failed to conform to its own policies regarding the follow-up investigations of children placed in foster homes. The court in Vonner found a "causal relationship between a child's death and the agency's breach of its rules . . . ." This court further considered the child to be continually in the state's custody while in the foster home and established a "special relationship" based on that custody sufficient, when coupled with the county's negligence, to find liability. This idea of the causal link between the child's "special relationship" with the state, the act of negligence, and the subsequent injury is expanded in Jensen v. Conrad, a suit combining the claims on behalf of

59. Jackson, 715 F.2d at 1205.
60. Id.
61. But see Ross v. United States, 910 F.2d 1422 (7th Cir. 1990) (holding that deputy sheriff's interference with a private rescue of a drowning boy was actionable).
62. White, 592 F.2d at 382.
63. Jackson, 715 F.2d at 1204.
64. Martinez v. California, 444 U.S. 277 (1980) (holding that state nonfeasance was inadequate to prove a violation of the fourteenth amendment); Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923 (8th Cir. 1987) (holding that release of an abused child from hospital into his parents' custody and subsequent death of the child did not create a civil rights cause of action for the child's grandmother); Koepl v. County of York, 251 N.W.2d 866 (Neb. 1977) (rejecting liability for negligent placement of child with foster parents); Vonner v. State Dep't of Public Welfare, 273 So. 2d 252 (La. 1973) (finding liability against state for failure to investigate child placed in a foster home); Commonwealth v. Coyle, 28 A. 634 (Pa. 1894) (holding county liable for negligent placement of a child into a situation which resulted in child's death).
65. 273 So. 2d 252 (La. 1973).
66. Id. at 254.
67. Sohnel, supra note 28, at 1217.
68. Vonner, 273 So. 2d at 256.
several battered children. Although the court failed to find liability due to the state’s claim of “good faith immunity,” it clearly acknowledged that absent the immunity, liability could attach as a result of a “special relationship” between the state and an individual. The court in Jensen further stated three considerations in finding a “special relationship” for liability purposes:

(a) whether the victim was in the legal custody at the time of the incident or had been in legal custody prior to the incident; (b) whether the state had expressed a desire to provide affirmative protection to a particular class or specific individual; (c) whether the state was aware of the victim’s plight.

Much of the rationale of the Jensen court derived from the holding of Doe v. New York City Department of Social Services, which in remanding the case for retrial found that the evidence was sufficient to have allowed liability. The court held that the state could “be held liable under 1983 if they . . . exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff’s deprivation of rights under the Constitution.” The court further stated this proposition as a two-prong test that required “that the omissions must have been a substantial factor leading to the denial of a constitutionally protected liberty and property interest [and] that the officials in charge of the agency being sued must have displayed a mental state of ‘deliberate indifference’ in order to meaningfully be termed culpable.” The court, acknowledging the difficulty of proving a state of mind, provided “that gross negligent conduct creates a strong presumption of deliberate indifference.” On retrial, the court held that there was sufficient evidence to establish a duty and allowed recovery.

The cases finding no liability when an injury occurs as the re-

70. Id. at 187.
71. Id. at 195.
72. Id. at 194.
73. Id. at 194 n.11. See also Duggan, supra note 27, at 519.
74. 649 F.2d 134 (2d Cir. 1981).
75. Id. at 149.
76. Id. at 145.
77. Id. at 141.
78. Id. at 143.
result of the state’s nonfeasance do so for a variety of reasons. The court in *Jackson v. City of Joliet* distinguishes between positive and negative constitutional liberties. With regard to the fourteenth amendment, the court provides “that the liberties secured by the clause include not only the traditional negative liberties — the right to be let alone, in its various forms — but also certain positive liberties, including the right to receive the elementary protective services . . .” *Jackson* further held that “the men who wrote the Bill of Rights were not concerned that government might do too little for the people but rather that it might do too much to them, [that] the Constitution is a charter of negative rather than positive liberties.” The court in *Jensen* expounded further on this perceived framer intent of “a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.” The concept that the state owes no basic protective duty to its citizens against private violence is further addressed in *Balistreri v. Pacifica Police Department* in which the court found no liability for the state’s failure to respond to repeated calls for assistance. In this case, the plaintiff was forced to endure repeated attacks and harassment by her estranged husband that she alleges could have been prevented had the police provided the protection that she requested. The court determined that to attach liability in such a situation, a “special relationship” should be found to exist between the individual and the state.

To determine whether a “special relationship” exists, a court may look to a number of factors, which include (1) whether the state created or assumed a custodial relationship toward the plaintiff;

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81. *Id.* at 1203.
82. *Id.*
83. *Jensen*, 747 F.2d at 192 (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).
84. 901 F.2d 696 (9th Cir. 1988).
86. *Balistreri*, 901 F.2d at 699.
87. *Id.* at 700.
(2) whether the state was aware of a specific risk of harm to the plaintiff; (3) whether the state affirmatively placed the plaintiff in a position of danger; or (4) whether the state affirmatively committed itself to the protection of the plaintiff.\textsuperscript{88}

The court further determined that because the state "had not created or assumed a custodial relationship over her, nor [had] the state actors . . . affirmatively placed her in danger,"\textsuperscript{89} the relationship between the plaintiff and the police was insufficient to attach a positive duty. The court held that the "state's awareness of the plaintiff's plight goes more to the breach of the 'special relationship' than a definition of [that] relationship."\textsuperscript{90}

The court in \textit{Ellsworth v. City of Racine}\textsuperscript{91} applied a similar rationale and held the Constitution provides no right of protection, that such a duty must arise from a "special relationship" created from a particular circumstance.\textsuperscript{92} This court also made an important distinction between constitutional and tort causes of action.\textsuperscript{93}

Although the City did not have a constitutional duty to provide this service, the City was required to carry out the duty it had assumed in a non-negligent manner. However, even assuming for the sake of argument that the City was negligent, 1983 "imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under the traditional tort-law principles."\textsuperscript{94}

The court further stated, however, that a constitutional right to protection could attach by means of a unique or "special relationship" between the citizen and the state.\textsuperscript{95} The application of this rationale would preclude recovery against the state for virtually any type of government nonfeasance, absent the existence of a "special relationship."

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} 774 F.2d 182 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986).
\textsuperscript{92} Id. at 185.
\textsuperscript{93} Id. at 186. \textit{See also} Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (holding firefighters had no liability for death of two children which occurred in a fire during firefighters' strike).
\textsuperscript{95} \textit{Ellsworth}, 774 F.2d at 185.
C. The DeShaney Analysis

DeShaney v. Winnebago County Department of Social Services\textsuperscript{96} presented several important considerations for the Supreme Court's resolution concerning state liability in child abuse cases.\textsuperscript{97} "The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known."\textsuperscript{98} The Court considered various critical issues including the intent of the fourteenth amendment,\textsuperscript{99} the effect of private violence on state duty,\textsuperscript{100} and the necessary relationship between the child and the state agency to invoke any state assumption of duty at all.\textsuperscript{101}

DeShaney recognized the existence of such a constitutional duty to protect an individual once the mandated relationship is established\textsuperscript{102} but required that the child be in the custody of the state at the time of injury\textsuperscript{103} or that the state's negligence or inaction substantially increase the child's risk of injury in order to create that relationship.\textsuperscript{104} The Court distinguished the custodial relationship required to invoke governmental protection from the failure to protect a child returned to his natural home.\textsuperscript{105} "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."\textsuperscript{106} The Court further held:

That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that which he would have been had it not acted at all; the State does not become the

\textsuperscript{96} DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989).
\textsuperscript{97} Id. at 189-90.
\textsuperscript{98} Id. at 194.
\textsuperscript{99} Id. at 195.
\textsuperscript{100} Id. at 196.
\textsuperscript{101} Id. at 198.
\textsuperscript{102} Id. at 197.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 201.
\textsuperscript{105} DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 303 (7th Cir. 1987), aff'd, 489 U.S. 189 (1989).
\textsuperscript{106} DeShaney, 489 U.S. at 197.
permanent guarantor of an individual's safety by having once offered shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.\(^{107}\)

The Court determined that although the Department of Social Services had intervened in his behalf, it had not assumed any continuing or long-term duty to protect Joshua\(^{108}\) since the cessation of that aid did not increase the child's risk of harm.\(^{109}\)

This somewhat limited perception of the state's duty to aid an endangered individual is founded in the Court's analysis regarding the scope of the fourteenth amendment.\(^{110}\) The Court stated:

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[\text{N}othing 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 on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law"...][T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression.\(^{111}\)
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By applying this exclusion of "positive liberties"\(^{112}\) and by determining that the state had not increased Joshua's risk by returning him to his father's care,\(^{113}\) the Court held that there was, at the time of Joshua's final injury, no duty to remove or further protect him from danger.\(^{114}\) Since Joshua's relationship with the Department of Social Services was not, by the Court, considered adequate to impose a duty on the agency to protect the child from nongovernmental injury, and since his father's abuse was private violence, the Court held that no viable cause of action could be maintained against the Winnebago County Department of Social Services or Ann Kemmeter.\(^{115}\)

Although the lower court holding in DeShaney superficially

\(^{107}\) Id. at 201.
\(^{108}\) Id.
\(^{109}\) DeShaney, 812 F.2d at 303.
\(^{110}\) DeShaney, 489 U.S. at 201.
\(^{111}\) Id. (quoting Davidson v. Cannon, 747 U.S. 327, 348 (1986)).
\(^{113}\) DeShaney, 489 U.S. at 197.
\(^{114}\) Id. at 198.
\(^{115}\) Id.
rejected the notion of a "special relationship" existing under any circumstances: "[W]e can find no basis in the language of the due process clauses or the principals of constitutional law for a general doctrine of 'special relationships.'" The court, by its recognition of certain limited circumstances in which, due to custody or increased risk of injury, the state assumes an affirmative duty in the protection of an individual against private violence, implicitly propagates such a doctrine of "special relationships."

*DeShaney* may be distinguished from cases such as *White* in that, like *Jackson*, the state played no role in increasing or creating Joshua's risk of injury. Since Joshua was already a member of the DeShaney household and subject to injury before the state had notice of his abuse, the Court held that there was no basis for establishing a "special relationship" or creating an affirmative duty on the part of the state. As such, Joshua was not in state custody, nor had the State increased his risk. The Court stated "that the harms Joshua suffered did not occur while he was in the State's custody... [I]t played no part in their creation, nor did it do anything to render him any more vulnerable to them."

Justice Brennan, in his dissent, opposed this rationale, concluding that Joshua was in state custody at the time of his injuries and that the state through its nonfeasance increased Joshua's risk of harm. Brennan's argument provided that, due to the nature and purpose of the Winnebago Department of Social Services and their role in the removal of abused children, potential rescuers, even law enforcement officers, would refer child abuse cases to them for action. When the Department of Social Services failed

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117. *Id.*
118. *DeShaney*, 489 U.S. at 201.
119. *Id.* at 196.
120. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (finding liability where police officer created a danger by leaving children of an arrested driver unsupervised on a highway at night).
121. *Jackson*, 715 F.2d 1200 (finding that police officer who directed potential rescuers away from an accident did not create the danger or injury).
122. *DeShaney*, 489 U.S. at 196.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 199-200 (Brennan, J., dissenting).
128. *Id.* at 200.
to respond, this nonfeasance "effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him." Additionally, potential rescuers, having notified the Winnebago County Department of Social Services of suspected child abuse, were less likely to be further concerned with Joshua's safety. This effectively placed Joshua at a greater risk than that which he had originally faced. The Brennan argument aligns DeShaney with decisions such as Doe v. New York City Department of Social Services and Estate of Bailey v. County of York where the courts found a basis for liability. Brennan's view additionally satisfied the "special relationship" tests created by Jensen. That test further required, in addition to Joshua being in state custody and at a greater risk, that the state be aware of Joshua's danger and express an intention to assist him. By its initial investigations and visitations, the Department of Social Services satisfied the awareness and intent prongs of the Jensen Test.

The facts leading to Joshua's injuries strongly suggest that the state did assume a role for his protection. The critical issue in keying a continuation of that duty is the relationship between Joshua and the Winnebago County Department of Social Services. The Court stated:

In 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 liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
By applying Brennan's rationale to this standard, Joshua would have been in state custody and due protection based on his inability to be removed from danger by anyone other than the Winnebago County Department of Social Services.\textsuperscript{141}

The Court only briefly commented on the effect of this decision on tort assumption of duty cases.\textsuperscript{142} "It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the state acquired a duty under state tort law to provide him with adequate protection against that danger."\textsuperscript{143} Although the Court never commented on the impact of its holding on tort assumption of duty, the "special relationship" so critical to establish a "constitutional tort"\textsuperscript{144} violation, will surely be felt.

The harsh decision by the Supreme Court in \textit{DeShaney v. Winnebago County Department of Social Services} reflects a strict interpretation of state action under the due process clause.\textsuperscript{145} The pivotal issue in this decision, the "special relationship" between the state and the individual, is one that must be determined objectively by the bench, relying primarily on the facts of that individual case. The weakness in the \textit{DeShaney} holding, as stated by Justice Brennan in his dissent, is that it allows the state, in situations of questionable custody, to act or not to act at its leisure. "Today's opinion construes the Due Process Clause to permit a state to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try and prevent."\textsuperscript{146} By allowing the state to assume a protective role and then to withdraw without warning creates a justified reliance on the state that will certainly increase the individual's potential for harm, and that should mandate a "special relationship" sufficient to impose liability against the state for any resulting injuries.\textsuperscript{147}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 210.
\item Id. at 201-202.
\item Id.
\item Id.
\item U.S. CONST. amend. XIV.
\item DeShaney, 489 U.S. at 212 (Brennan, J., dissenting).
\item The sting of the \textit{DeShaney} holding was most recently felt in D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1045 (1993), when the Third Circuit Court of Appeals affirmed a dismissal of the plaintiffs constitutional law claims. In that lawsuit, the plaintiffs, a group of minor school children were sexually assaulted by other students.
\end{enumerate}
\end{footnotesize}
III. DUE PROCESS

Within the fact-law pattern of a domestic violence case, there is a basis for several claims well grounded in constitutional law. Deprivation of substantive due process, the most commonly asserted such claim, arises from the fifth and fourteenth amendments to the United States Constitution, and concerns the victims deprivation of certain fundamental rights.

In a substantive due process claim, we are concerned with those rights which the state may not take away. Substantive due process rights are rights such as those listed in the Bill of Rights and those rights held to be so fundamental that a state may not take them away. Among the fundamental rights not listed in the Bill of Rights or incorporated through the fourteenth amendment are such rights as abortion [citations omitted]; privacy [citations omitted]; marriage [citations omitted]; and safety and physical movement [citations omitted].

While such fundamental rights are protected by the Constitution, that protection is directed against the state itself rather than against private actors. The courts in their analysis of substantive due process claims, in which the deprivation of a right was caused by a private citizen, have consistently required the state’s nonvoluntary physical custody of the victim at the time of injury, or a showing of some form of a “special relationship” between the victim’s injury and the state before any constitutional duty to defend the threatened right attaches. While the circumstance of physical custody is rarely an issue in domestic violence cases, the factors which establish the existence of a “special rela-

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148. U.S. CONST. amend. V.
149. U.S. CONST. amend. XIV.
151. See note 34, supra.
152. See note 56, supra.
tionship” have been widely considered. In *Freeman v. Ferguson*, a case arising from the murder of a woman and her daughter by her estranged husband, the Eighth Circuit acknowledged “that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual’s danger or vulnerability to such violence beyond the level it would have been absent state action.”

While the *DeShaney* opinion is clearly the leading precedent on the application of the “special relationship” to the domestic violence context, its holding declined to address the factual setting of children in foster care. This imposition of foster care by the state seems a certain catalyst in the creation of the crucial “special relationship” as addressed in *LaShawn A. v. Dixon*. In that case, the court found a “special relationship” between an injured class of children, all in state licensed foster care, and the District of Columbia. The court reasoned “the rights of children in foster care to be analogous to the rights of the involuntarily committed.”

The logic of the *LaShawn* Court in aligning the state’s duty to protect with involuntary custody, clearly squares with the earlier holding in *Youngberg*, and at a minimum, does not run afoul of the harsh holding in *DeShaney*.

153. *Id.*

154. 911 F.2d 52 (8th Cir. 1990).

155. *Id.* at 55.


158. *Id.* at 998. See also Laura Oren, *DeShaney’s Unfinished Business: The Foster Child’s Due Process Right to Safety*, 69 N.C.L. REV. 113 (1990).


The LaShawn Court expressly distinguished that case from DeShaney on two grounds, the obvious fact that the plaintiff children were in foster care, rather than in the care of a natural parent, and that the District of Columbia had clearly violated its own statutes and policies with regard to the administration of the foster care program. The court’s logic was that these laws created “constitutionally protected liberty and property interests.” The state’s failure to adhere to its own laws and policies indirectly caused the injury of the plaintiff children while in state licensed foster care through the deprivation of those recognized liberty and property interests. As such, the court held that the rights under the fifth amendment due process clause were violated.

In Milburn v. Anne Arundel County Department of Social Services, a case with a similar fact-law pattern to LaShawn, the Fourth Circuit reached a completely opposite result. In Milburn a four year old child’s hands were permanently deformed as a result of abuse by his foster parents. The court, in apparent disregard of DeShaney’s declination to address the foster care issue, applied DeShaney to the facts and determined that no custodial or “special relationship” existed with regard to the child because the child had been voluntarily placed in foster care by his natural parents. The court, in Doe v. Milwaukee County, affirmed the dismissal of an action against a county department of social services for their failure to investigate reported child abuse in a timely manner. In Doe, the children were living with their natural mother and her
boyfriend. The children's natural father and his parents, after observing abnormal genital irritation and after being told by the children's baby-sitter that she feared the children were being abused by the boyfriend, contacted the Milwaukee County Department of Social Services and filed a report of suspected abuse. The department declined to investigate the report. After a second report a week later and after the children endured an additional week of abuse, the department initiated protective action. The constitutional claim asserted in this case was premised on the fact that the Department of Social Services failed to investigate the initial report within twenty-four hours, as mandated by statute, thus depriving the child of a constitutionally protected interest. "In the case before us, the DSS made no effort at all to intervene on the Doe children's behalf. Under Deshaney's clear pronouncement, the DSS's failure to initiate an investigation, while possibly mis-

170. Id. at 501.
171. Id.
(c) Duties of county departments. 1. Within 24 hours after receiving a report under sub. (3)(a), the county department shall . . . initiate a diligent investigation to determine if the child is in need of protection or services. The investigation shall be conducted in accordance with standards established by the department for conducting child abuse and neglect investigations and shall include observation of or an interview with the child, or both, and, if possible, a visit to the child's home or usual living quarters and an interview with the child's parents, guardian or legal custodian . . . .

Subsection (3)(a) in turn provides that:
[a] person required to report under sub. (2) shall immediately inform . . . the county [social services] department or the sheriff or city police department . . . of the facts and circumstances contributing to a suspicion of child abuse or neglect or to a belief that abuse or neglect will occur. The sheriff or police department shall within 12 hours, exclusive of Saturdays, Sundays or legal holidays, refer to the county department . . . all cases reported to it. . . .

Persons "required to report under subsection 2" are medical and mental health professionals, social workers, counselors and public assistance workers, school teachers and day care providers and law enforcement officers "having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect of the child will occur. . . ." Subsection 2 also authorizes, but does not require, "any other person . . . having reason to suspect that a child has been abused or neglected or reason to believe that a child has been threatened with abuse or neglect and that abuse or neglect of the child will occur" to make a report of child abuse.
Even though the court clearly acknowledged that the statutes were in place and that the statutes were violated by the department's nonfeasance, its broad application of DeShaney eliminated any basis for a constitutional claim. 174

The Third Circuit applied DeShaney with equally harsh results in Brown v. Grabowski. 175 In Brown, Deborah Evans repeatedly sought police protection from her estranged lover who, after escaping from a drug rehabilitation program, took her hostage and repeatedly sexually assaulted and beat her over a period of several days. 176 After escaping, Evans returned to the police department for protection and to file charges against her attacker. At the conclusion of her interview, however, the officers instructed her to return after the weekend to file the complaint. On her way to the police station, as per their instructions on the following Monday, Evans was again abducted by the same man. 177 Her frozen body was discovered almost a month later "in the trunk of her car, which was parked outside of a motel where McKenzie [her attacker] had overdosed on drugs." 178 The Third Circuit, applying DeShaney, affirmed the district court's summary judgment against the plaintiff on the substantive due process claim, holding that Evans was not in state custody at the time of her death, and the facts of the case did not support the recognition of a "special relationship" between Evans and the police. 179 In Losinski v. County of Trempealeau, 180 Julie Losinski in fear of her husband, requested police protection and had a deputy sheriff accompany her to her trailer to remove personal belongings. 181 While there, her husband became abusive and eventually shot Julie in the head while the

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174. Id. at 505.
175. 922 F.2d 1097 (3d Cir. 1990).
176. Id. at 1102.
177. Id.
178. Id.
179. Id. at 1114. See Hynson v. City of Chester, 731 F. Supp. 1236 (E.D. Pa. 1990) (applying DeShaney and found no "special relationship" between murder victim and state, even though victim had sought police protection from the threats of her boyfriends); Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1988) (court of appeals affirming district court's finding of no state duty of protection toward victim of domestic abuse even though victim had actively sought protection).
180. 946 F.2d 544 (7th Cir. 1991).
181. Id. at 547.
deputy looked on.\textsuperscript{182} In a due process claim filed by her children, the court invoked the armor of DeShaney and in denying liability stated, "[a]lthough the state walked with Julie as she approached the ‘lions den’, it did not force her to proceed. It did not encourage her to continue."\textsuperscript{183} This blind application of the DeShaney doctrine to preclude the due process claim failed to consider the victims’ reliance on the state's protection as she reached the “lions den.” In this context, it seems apparent that the very presence of the state increased the risk of harm, by providing as it did to Joshua DeShaney, a false sensation of personal security.

IV. EQUAL PROTECTION

A novel theory of recovery being asserted in more domestic abuse cases is that of state violation of equal protection as guaranteed by the fifth\textsuperscript{184} and fourteenth\textsuperscript{185} amendments and enforced by Section 1983 of United States Code.\textsuperscript{186} The crux of this argument is that often police or social services authorities take domestic abuse reports less seriously, and fail to act on them as quickly as they would have, had the attacker been a stranger to the victim,\textsuperscript{187} thus by their inaction directly discriminating against women, the most common victim in a domestic attack. This classification of

\begin{itemize}
  \item \textsuperscript{182} Id. at 548.
  \item \textsuperscript{183} Id. at 550.
  \item \textsuperscript{184} U.S. CONST. amend. V.
  \item \textsuperscript{185} U.S. CONST. amend. XIV.
  \item \textsuperscript{186} 42 U.S.C. § 1983 (1993) 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.
\end{itemize}
domestic abuse victims as minorities, and a showing that they were injured as a result of state nonfeasance because of that classification, clearly presents a cause of action under the equal protection guarantees, and may well be the avenue around the DeShaney abyss.

To successfully assert this constitutional claim through the mechanism of section 1983, the plaintiff must present evidence of discriminatory intent in the provision and availability of police protection. 188 “It is not necessary to demonstrate that the challenged action was taken solely for discriminatory purposes, it is necessary only to prove that a discriminatory purpose was a motivating factor.” 189 In Watson v. Kansas City, 190 the plaintiff repeatedly sought police protection from the abusive treatment of her husband, who coincidentally happened to be a police officer. Although the police took her reports, they effected no protective services, and eventually Ms. Watson was raped, beaten, and stabbed by her husband. 191 The plaintiff in this case effectively utilized statistical evidence of police arrests in assault cases to show a discriminatory practice by the police in domestic violence investigations, and thereby overcame a district court defense summary judgment. 192 An earlier case, Thurman v. City of Torrington involved a fact-law pattern very similar to Watson. In Thurman, the plaintiff, Tracey Thurman, requested police protection after repeated death threats by her estranged husband. Even after the issuance of a restraining order, the threats continued until she was ultimately attacked and repeatedly stabbed in the throat by her ex-husband. 193 The court in addressing the equal protection claim opined:

A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and

188. Watson v. Kansas City, 857 F.2d 690 (10th Cir. 1988).
189. Id. at 694.
190. 857 F.2d 690 (10th Cir. 1988).
191. Id. at 692-693.
192. Ms. Watson presented evidence that during a relevant period of time, in the same city in which her attacks occurred, that arrests were 15% less likely to occur in domestic assault cases than in those outside of the domestic context. Id. at 695-96.
193. Watson, 857 F.2d at 695.
195. Id. at 1525.
may not "automatically decline to make an arrest simply because the assaulter and his victim are married to each other. . ." [citation omitted.] Such inaction on the part of the officer is a denial of the equal protection of the laws.\footnote{196}

While some courts may apply *DeShaney* to summarily defeat any section 1983 claim arising from a domestic abuse fact pattern, *McKee v. City of Rockwall*\footnote{197} poses a hypothetical that reduces the momentum of *DeShaney* with regard to equal protection claims. The court initially observes, "*DeShaney* specifically does not address claims based upon illegitimate distribution of public services in contravention of the Equal Protection Clause."\footnote{198} The court then suggests:

Imagine that in *DeShaney*, Winnebago County had an intentional policy to intervene only in family abuse cases when the family is white, not to intervene when the family is black, that Joshua *DeShaney* was black and died because of the County's failure to intervene. The majority would have us believe that no equal protection violation exists because "[f]ootnote three [of *DeShaney*] does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised discretion to act in one incident but not in another."\footnote{199}

In that context, by simply interjecting color as a factor, what some courts have held inactionable under *DeShaney*, clearly becomes a significant constitutional law violation.\footnote{200} Further, the text of "footnote three"\footnote{201} is considerably more benign than some courts have implied, and should in many domestic abuse cases illuminate the means to a constitutional law recovery through the equal process clause.\footnote{202}

In the above hypothetical, Joshua, now disfavored and neglected, because of his color and injured because of a police policy

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196. *Id.* at 1528 (quoting Bruno v. Codd, 396 N.Y.S.2d 974, 976 (N.Y. 1977)).
198. *Id.* at 417-418.
199. *Id.* at 418.
201. *DeShaney*, 489 U.S. at 197 n.3. ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.").
}
not to respond to the emergency calls of blacks, has little burden in the assertion of his equal protection claim. Once the discrimination is proven, since race is a suspect classification, the state must undergo a strict scrutiny standard of review and articulate a substantial governmental interest in the enforcement of their policy, which of course is impossible in a de jure racial discrimination fact pattern. Under this hypothetical, the injured Joshua has a means of recovery against the state.

Consider next the same hypothetical substituting the disability of sex instead of color. Now Joshualina, a disfavored female, is injured due to a police policy of not promptly responding to a call for help from females. The policy is blatantly discriminatory and will have an expected discriminatory effect on all females in the community. This classification, though not as suspect as race, still requires the state to prove an important government interest in the enforcement of their policy. In this gender tainted context, Joshualina probably will still recover.

Advancing the hypothetical more toward reality, consider the result if a victim of a domestic attack alleged that a police policy advocated responding less than promptly to calls associated with domestic violence. The effect of this policy is to create a condition of de jure discrimination against domestic abuse victims, traditionally women and children and a de facto discrimination against women and children traditionally domestic abuse victims. What would be the appropriate standard by which to judge the government's interest? While the quasi-suspect sex classification is clearly entitled to a substantial governmental interest level of review, should the same class of abuse victims created by the de facto discrimination not receive the same standard of review? If, as in Watson, a prima facie case of discrimination can be proven, and the state is required to pass constitutional muster through at least a substantial governmental interest standard of review, the victims of domestic abuse may have a viable means of recovery and, through the Equal Protection Clause, may be able to avoid the judicial violence of DeShaney.

V. Conclusion

The DeShaney holding, the harpy of constitutional protections, is invoked regularly to summarily eliminate federal claims arising from domestic abuse. While most such substantive due process claims may well be disposed of through the DeShaney doctrine, others may be won by a showing that the victim was in some form of state custody at the time of injury, or that the state, through its negligence or nonfeasance contributed to the victims plight.

The Equal Protection Clause provides an additional route through DeShaney. In that domestic abuse victims, by their very nature are a unique class, a showing of discriminatory policy by the state in their response to reports of domestic violence, may be adequate to assert a successful equal protection claim. Although DeShaney is recognized as the guiding doctrine in domestic abuse cases, its bite is dulled in the equal protection context, thus providing the victims of domestic violence a viable means to assert claims against the state. As a result of state liability in such cases, legislators and administrators may be forced to descend the ivory tower and effect workable government protections from domestic abuse, the most intimate injury.