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# **DESHANEY: CUSTODY, CREATION OF DANGER, AND CULPABILITY**

*Karen M. Blum\**

## **I. INTRODUCTION**

In the five years since the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*,<sup>1</sup> a clear consensus has yet to emerge on the criteria for defining the circumstances that give rise to a constitutional duty of the state to provide protection to persons from acts of private violence. The *DeShaney* Court expressly rejected the argument

that once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a "special relationship" arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection.<sup>2</sup>

Although *DeShaney* may be narrowly read to limit any affirmative duty to protect to situations in which "the State takes a person into its custody and holds him there against his will,"<sup>3</sup> a number of lower federal

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1. 489 U.S. 189 (1989). Although most readers are probably familiar with the tragic facts of *DeShaney*, they bear repeating here. Four-year-old Joshua had been repeatedly beaten by his father. *Id.* at 192. The county child protection agency, which had been monitoring his case through social workers, failed to protect Joshua from his father's last beating, which left Joshua in a permanently brain-damaged state. *Id.* at 193. A majority of the Supreme Court held that nothing in the Due Process Clause of the Fourteenth Amendment creates an affirmative duty on the part of the state to "protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. The Court concluded that "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

2. *Id.* at 198 n.4.

3. *Id.* at 199-200; accord *Was v. Young*, 796 F. Supp. 1041, 1050 (E.D. Mich. 1992) (concluding that "[a]bsent some kind of custodial relationship between the state and either Plaintiffs or their attackers, no constitutional duty can be imposed on Defendants"); see, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) (finding substantive due process component of Fourteenth Amendment Due Process Clause imposes duty on state to provide for safety and medical needs of involuntarily committed mental patients); *Estelle v. Gamble*, 429 U.S. 97, 103

courts confronting the question have interpreted *DeShaney* to recognize a duty to protect outside the contexts of imprisonment and involuntary confinement in public institutions.

Plaintiffs who have successfully survived the *DeShaney* analysis have generally asserted substantive due process claims<sup>4</sup> based on a breach of the duty to protect in one of two contexts: (1) The plaintiff was in the state's "functional custody" when harmed; or (2) the plaintiff was in a "snake-pit"<sup>5</sup> situation where the state created or increased the danger to

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(1976) (recognizing state has constitutional duty to provide adequate medical care to incarcerated prisoners); *see also* *Nobles v. Brown*, 985 F.2d 235, 239 (6th Cir. 1992) (stating that "[t]he people of Michigan are free to create a system under which the state and its officials would be subjected to liability for failure to accord prison guards reasonable protection against harms inflicted by dangerous prisoners. This court, however, is not free to create such a system by turning the Due Process Clause into a Michigan Tort Claims Act"); *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) (en banc) (observing that "custody cases such as *DeShaney* and *Youngberg* stand for the proposition that the government has an affirmative obligation to facilitate the exercise of constitutional rights by those in its custody only when the circumstances of the custodial relationship directly prevent individual exercise of those rights"); *Salazar v. City of Chicago*, 940 F.2d 233, 237 (7th Cir. 1991) (holding that government has no constitutional duty to provide competent rescue services to people not in its custody); *Harris v. District of Columbia*, 932 F.2d 10, 14 (D.C. Cir. 1991) (indicating that plaintiff who died of drug overdose while in police custody was owed no constitutional duty by police to obtain medical assistance where plaintiff "had not been formally committed, either by conviction, involuntary commitment, or arrest, to the charge of the District"); *Hilliard v. City of Denver*, 930 F.2d 1516, 1520 (10th Cir.) (indicating reluctance to find constitutional right to personal security in absence of state-imposed confinement or custody), *cert. denied*, 112 S. Ct. 656 (1991); *Piechowicz v. United States*, 885 F.2d 1207, 1215 (4th Cir. 1989) (concluding that federal witnesses murdered by hired killer were owed no duty of protection under Fifth Amendment substantive Due Process Clause where witnesses were not "in custody" of United States); *de Jesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989) (holding affirmative duty to protect prisoner arises from state's restraint on individual's liberty and that state has no affirmative constitutional duty to protect prison guards from inmates' violence).

4. The Court has recognized three types of claims that may be asserted under the Fourteenth Amendment Due Process Clause. First, the Bill of Rights sets forth specific rights that are incorporated and made applicable to the states through the Fourteenth Amendment Due Process Clause. *Zinerman v. Burch*, 494 U.S. 113, 125 (1990). Second, rights exist to substantive due process and to be free from government action that is arbitrary, irrational, and wrongful, regardless of the procedure accompanying the conduct. *Id.* Third, a right to procedural fairness exists when the state acts to deprive a person of a constitutionally protected interest. *Id.* These actions are brought under 42 U.S.C. § 1983 (1988), which 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.

5. In *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), Judge Posner wrote that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit," *id.* at 618.

which the plaintiff was exposed.<sup>6</sup> Alternatively, plaintiffs unable to cast their cases in the relatively narrow substantive due process mold carved out by *DeShaney* have still succeeded by framing the case as a procedural due process<sup>7</sup> or an equal protection claim.<sup>8</sup>

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6. Chief Justice Rehnquist, writing for the majority in *DeShaney*, suggested that the case might have been decided differently if the state had helped create the dangers that Joshua faced or had rendered Joshua more vulnerable to these dangers. *DeShaney*, 489 U.S. at 201.

7. The Court in *DeShaney* did not address the petitioners' argument, raised for the first time in the Supreme Court, that an "entitlement" to protective services existed under state law, any deprivation of which was subject to Fourteenth Amendment procedural due process constraints. *Id.* at 195 n.2.

Some lower federal courts have recognized procedural due process claims based on the pleading of such entitlements. See, e.g., *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476-77 (6th Cir.) (determining that Kentucky state law provided children placed in state-regulated foster homes with "framework of entitlements," including "an entitlement to protective services of which they may not be deprived without due process of law"), *cert. denied*, 498 U.S. 867 (1990); *Coffman v. Wilson Police*, 739 F. Supp. 257 (E.D. Pa. 1990) (concluding that in domestic abuse case protective orders, issued by state court pursuant to authority under state law, created constitutionally protected property interest in police protection); see also *Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991) (finding protective order issued under state law created property right that created duty on part of government and failure to perform duty could constitute procedural due process violation); cf. *Losinski v. County of Trempealeau*, 946 F.2d 544, 551 (7th Cir. 1991) (holding no property right was created by state law "no contact" temporary restraining order or state law abuse policies).

In *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991), the plaintiff argued that Wisconsin state law created an entitlement to safe public housing "that the state could not take away without notice and an opportunity for a hearing," *id.* at 1286. Judge Easterbrook rejected the argument, stating that

[t]he Housing Authority's decision to set a particular target level of safety is not person-specific. It is a legislative rather than adjudicative decision, and the due process clause does not require individual hearings before a governmental body takes decisions that affect the interests of persons in the aggregate.

*Id.*

It is important to note in this entitlement/procedural due process context that procedural guidelines in and of themselves will not create a liberty or property interest. See, e.g., *Villanova v. Abrams*, 972 F.2d 792, 798 (7th Cir. 1992) (noting "persistent fallacy that procedural requirements create substantive entitlements"); *Kellas v. Lane*, 923 F.2d 492, 495 (7th Cir. 1991) (holding "a state creates a protected liberty interest only when it establishes 'specific substantive predicates' that limit the discretion of official decisionmakers and mandates a particular outcome to be reached if the relevant criteria have been met" (quoting Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-63 (1989))); see also *Bagley v. Rogerson*, Nos. 92-3245NI, 92-3343NI, 1993 WL 358543, at \*3 (8th Cir. Sept. 20, 1993) ("If a state law gives me the right to a certain outcome in the event of the occurrence of certain facts, I have a right, by virtue of the Fourteenth Amendment, to whatever process is due in connection with the determination of whether those facts exist. This is not at all the same thing as saying that the federal Constitution guarantees me all rights created or conferred upon me by state law."); *Coker v. Henry*, 813 F. Supp. 567, 570 (W.D. Mich. 1993) (finding Michigan Child Protection Law "not sufficiently explicit and mandatory" so as to create legitimate claim of entitlement); *Boston v. Lafayette County*, 743 F. Supp. 462, 472 (N.D. Miss. 1990) (concluding state statute, creating duty on part of sheriff to safely keep prisoners entrusted to his care, could not serve as source of constitutionally cognizable procedural due process claim).

The purpose of this Article is to examine post-*DeShaney* cases that have addressed the functional custody and snake-pit approaches to substantive due process claims. In a custody context the examination exposes problems created by any requirement that involuntariness serve as a threshold that must be satisfied before the state has an affirmative constitutional duty to protect citizens from harm caused by private actors.<sup>9</sup> Although the nature of the custody may be relevant in determining the level of culpability that will be required to establish a due process claim for failure to protect, this Article takes the position that the criterion of

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8. The Court noted in *DeShaney* that any selective denial of protected services to "certain disfavored minorities" would violate the Equal Protection Clause of the Fourteenth Amendment. *DeShaney*, 489 U.S. at 197 n.3. Many of the cases attempting to circumvent *DeShaney*'s restrictions on substantive due process claims, based on the breach of an affirmative duty to protect, involve domestic abuse situations. In these cases the plaintiffs typically allege that a policy of selective and impermissible discriminatory police protection led to a failure to protect. *See, e.g.*, *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701-02 (9th Cir. 1990) (holding that where allegations in plaintiff's complaint suggested "an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women," district court should not have dismissed complaint with prejudice, but should have allowed plaintiff opportunity to amend in order to properly plead equal protection claim); *Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988) (determining that to survive motion for summary judgment, "a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom"); *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988) (holding that plaintiff's evidence was sufficient to support jury determination "that the City and Police Department followed a policy or custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks [and] . . . that the City and Police Department acted with a discriminatory motive in pursuing this policy"); *Pinder v. Commissioners of Cambridge*, 821 F. Supp. 376, 386 (D. Md. 1993) (finding allegations of plaintiff's complaint "sufficient to make out a claim that Defendants maintain a policy that discriminated against victims of domestic violence"); *see also Mody v. City of Hoboken*, 959 F.2d 461, 467 (3d Cir. 1992) (rejecting plaintiff's claim when "evidence necessary to show constitutionally discriminatory police action in failing to provide cognizable minorities with protection from crime [was] absent"); *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1460-67 (E.D. Wis. 1993) (rejecting plaintiffs' argument that city had policy of denying equal housing inspection and code enforcement services based on race); *Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343, 1350 (E.D. Wis. 1992) (finding complaint "clearly states a claim that the actions of the officers and the policy of the City both are due to intentional discrimination on the 'basis of race, color, national origin, or sexual orientation'"); *cf. McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (finding complete failure of proof on issue of differential treatment of victims of domestic abuse and leaving undecided question of whether such differential treatment would constitute intentional, gender-based discrimination), *cert. denied*, 493 U.S. 1023 (1990); *Howell v. City of Catoosa*, 729 F. Supp. 1308, 1311-12 (N.D. Okla. 1990) (determining plaintiffs failed to show city had "governmental policy of indifference to victims of domestic violence or of discrimination against women because of their gender").

9. *See infra* part II.

involuntariness should not serve as a talisman for either the duty owed or the standard of culpability applied.<sup>10</sup>

Separately, the noncustodial snake-pit cases reveal the difficulties inherent in any theory of affirmative duty based on a distinction between action and inaction.<sup>11</sup> It is suggested in this context that a duty to protect should be recognized when the state, by affirmative acts or sins of omission, creates or enhances the risk of harm confronting an individual.<sup>12</sup> In the snake-pit context less emphasis should be placed on the affirmative nature of the state's acts, while rigorous scrutiny should be given to the factors of causation and culpability.<sup>13</sup> The latter factors better determine the ultimate finding of a breach of duty and the imposition of constitutional liability.

## II. THE FUNCTIONAL CUSTODY CASES

### A. Foster Care Context

Some plaintiffs have attempted to satisfy even the most uncompromising interpretation of *DeShaney*: that an affirmative duty to protect exists only in an involuntary custodial situation. These plaintiffs have urged the courts to expand the notion of what constitutes "custodial" beyond the strict confines of a prison or state-operated institution for the mentally ill.<sup>14</sup>

The most widely accepted scenario for extending the duty to protect beyond the prison or state hospital setting arises in the context of foster care. In *DeShaney*, the Court acknowledged that the situation in which the state removes a child from "free society" and places him or her in a foster home might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."<sup>15</sup> Indeed, the

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10. See *infra* part II.

11. Justice Brennan, dissenting in *DeShaney*, noted that "[i]n a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case." *DeShaney*, 489 U.S. at 204 (Brennan, J., dissenting). In the dissent's view, "inaction [could] be every bit as abusive of power as action . . ." *Id.* at 212 (Brennan, J., dissenting). The distinction drawn between affirmative acts and omissions has received extensive criticism elsewhere. See, e.g., Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and Its Aftermath*, 66 WASH. L. REV. 107, 109 n.9 (noting "the distinction between acts and omissions often turns on how one poses the question").

12. See *infra* part III.

13. See *infra* part III.

14. See *White v. Rockford*, 592 F.2d 381 (7th Cir. 1979).

15. *DeShaney*, 489 U.S. at 201 n.9. Prior to *DeShaney*, two circuit courts of appeals had recognized an affirmative duty under the Constitution to protect children placed by the state in foster care. See *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc) (holding

lower federal courts that have ruled on this issue since *DeShaney* have uniformly recognized a constitutional right to protection from unnecessary harm on the part of foster children involuntarily placed by the state in a foster care situation.<sup>16</sup> The facts of a recent Eighth Circuit case are illustrative. In *Norfleet v. Arkansas Department of Human Services*,<sup>17</sup> the plaintiff went on a two-day trip and left her two children with a neighbor.<sup>18</sup> The plaintiff's four-year-old son, who had a history of asthma problems, suffered an attack in his mother's absence.<sup>19</sup> A hospital treated him and gave him two different medications to take home.<sup>20</sup> Later, the caretaker neighbor was arrested, and the children were placed in the custody of a certified foster parent.<sup>21</sup> The foster parent failed to supervise or direct the taking of the medication, and the boy suffered another attack.<sup>22</sup> The foster parent ordered the child to bed, but several hours later called for emergency assistance.<sup>23</sup> Tragically, the child died

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affirmative duty under substantive Due Process Clause to provide protection and supervision was created by virtue of "special relationship" between state and child placed in foster home and that duty was breached only by showing of "deliberate indifference"), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981) (allowing claim against city for abuse of child placed in foster care), *cert. denied*, 464 U.S. 864 (1983).

16. *See, e.g.*, *Angela R. v. Clinton*, 999 F.2d 320, 323-24 (8th Cir. 1993) (observing "class members who are foster children in the State's custody have stronger constitutional claims than abused or neglected children who have not been placed in foster care"); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (recognizing "[c]ases from this and other circuits clearly demonstrate that imprisonment is not the only custodial relationship in which the state must safeguard an individual's civil rights"); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (denying qualified immunity to defendant officials as it was clearly established that "children in the custody of a state had a constitutional right to be reasonably safe from harm"); *K.H. v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990) (denying qualified immunity to extent complaint asserted "prima facie right not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child"); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir.) (holding "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes"), *cert. denied*, 498 U.S. 867 (1990); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir.) (en banc) (recognizing creation of "special relationship" requiring provision of constitutionally adequate care when state removes child from natural home and places under state supervision), *cert. denied*, 498 U.S. 1040 (1990); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 992-93 (D.D.C. 1991) (finding rights of children in foster care analogous to rights of those involuntarily committed), *aff'd*, 990 F.2d 1319 (D.C. Cir. 1993).

17. 989 F.2d 289 (8th Cir. 1993).

18. *Id.* at 290.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

in the early hours of the morning.<sup>24</sup> The plaintiff, who returned home on the evening before her son's death, learned the whereabouts of her children from a department caseworker, was assured that her son was fine, and was told that she would be reunited with both children the next morning.<sup>25</sup> Early the next morning she was informed of her son's death.<sup>26</sup>

The Court of Appeals for the Eighth Circuit affirmed the district court's denial of qualified immunity<sup>27</sup> to the Director of the Arkansas Department of Human Services and the Department caseworker who

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24. *Id.*

25. *Id.*

26. *Id.* at 293.

27. The Supreme Court has developed a doctrine of qualified immunity for state officials sued in their individual capacities under 42 U.S.C. § 1983 (1988). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.* at 818. *Harlow* was intended to objectify the qualified immunity inquiry and make it possible for a judge to decide the availability of immunity as a matter of law at an early stage in the litigation, generally on a motion for summary judgment. *Id.* at 819-20.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court made the specific facts surrounding the officer's conduct relevant to the qualified immunity analysis. Even if the law were found to be clearly established at the time of the alleged violation, the Court held that the lower court should have addressed the question of whether a reasonable officer could have believed his or her conduct to be lawful in light of the facts and information possessed by the officer at the time. *Id.* at 640-41.

In two recent cases, the Court has further elaborated on the qualified immunity defense. In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), the Court established that the first inquiry in the qualified immunity analysis should be whether the plaintiff has alleged the violation of a constitutional right under the law as currently interpreted, *id.* at 1793. In *Hunter v. Bryant*, 112 S. Ct. 534 (1991) (*per curiam*), the Court emphasized that the qualified immunity issue is a question of law that "ordinarily should be decided by the court long before trial," *id.* at 537.

A denial of qualified immunity, to the extent that it turns on a question of law, is immediately appealable as a collateral order. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

Problems associated with the qualified immunity doctrine have received extensive treatment elsewhere by this Author and others. See, e.g., Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993); Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions*, 38 EMORY L.J. 369 (1989); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989); Laura Oren, *Immunity and Accountability in Civil Rights Legislation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989); Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61 (1989); Henk J. Brands, Note, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 COLUM. L. REV. 1045 (1990); Mary A. McKenzie, Note, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 SUFFOLK U. L. REV. 673 (1991).

had been involved in the circumstances that resulted in the death of the plaintiff's child.<sup>28</sup> Relying on both pre- and post-*DeShaney* decisions in the circuit,<sup>29</sup> the court concluded that it was clearly established at the time of the devastating occurrence that the state had a duty to provide for the safety and medical needs of the plaintiff's child.<sup>30</sup>

The court in *Norfleet* explained that a child placed in foster care, like a prisoner, is deprived of "freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs."<sup>31</sup> Interestingly, however, the court proceeded to underscore that the reason the child was placed in foster care was precisely because the child was unable to care for himself without adult supervision and protection.<sup>32</sup> Thus, the state's act of removing the child from free society was not the cause of the child's inability to provide for his own needs and protection and, therefore, was not the source of the duty to protect.<sup>33</sup> Rather, the state owed a duty to the child because the state had assumed control of the child's environment and responsibility for the child's welfare, replacing whatever private source of protection the child may have had in the "free" world.<sup>34</sup>

Although the result in *Norfleet* is to be commended, the rationale of the decision may be construed so as to belie the reality of what criteria are important in the affirmative duty cases. Fixation on the concept of custody, with attempts to characterize situations so that they are analogous to incarceration or institutionalization, have led plaintiffs to plead—and some courts to insist upon—a showing of state *action* that has caused the *involuntary* restriction of the plaintiff's freedom. If custody is to be a threshold requirement in affirmative-duty cases, the notion of custody should not only be viewed in more expansive terms, encompassing all situations where the state assumes responsibility for and control over

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28. *Norfleet*, 989 F.2d at 290.

29. See, e.g., *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) (recognizing state's affirmative duty to protect citizens "in custodial and other settings in which the state has limited the individuals' ability to care for themselves"), *cert. denied*, 113 S. Ct. 1265 (1993); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (acknowledging "possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting"); *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988) (extending circuit's previously narrow view of affirmative duty beyond strict confines of prison-like setting), *cert. denied*, 489 U.S. 1012 (1989).

30. *Norfleet*, 989 F.2d at 293.

31. *Id.*

32. *Id.*

33. *Id.* at 292.

34. *Id.* at 293.

an individual's environment, but also should be uncoupled from the requirement that custody be of an involuntary nature.

If Taureen Norfleet, the young boy who died from an asthma attack, had been "voluntarily" placed with the state by his mother, a number of courts would hold that the state owed him no affirmative duty under the Due Process Clause, even assuming that subsequent to his placement the same events that led to his death unfolded.<sup>35</sup> One of the first courts to interpret *DeShaney* to require a finding of involuntary custody before an affirmative duty of protection could be imposed, did so in the context of foster care. In *Milburn v. Anne Arundel County Department of Social Services*,<sup>36</sup> the Court of Appeals for the Fourth Circuit held under *DeShaney* that when parents voluntarily place their child in the foster care system, the state has no constitutional duty to protect the child against private violence.<sup>37</sup>

Other courts have similarly focused on the involuntary nature of the plaintiff's relationship with the state as a predicate to the finding of a constitutional duty. In *Monahan v. Dorchester Counseling Center, Inc.*,<sup>38</sup> the plaintiff, a voluntarily committed mental health patient, sued several state officials who were charged with his care for serious injuries he sustained when he jumped out of a van while being transported between health facilities.<sup>39</sup> The First Circuit, relying on *DeShaney*, rejected the plaintiff's argument that his mental condition, "which may have made him functionally dependent on his caretakers,"<sup>40</sup> imposed upon the state a constitutional duty to provide for his safety and well-being.<sup>41</sup> As a voluntary patient, the plaintiff was not "in custody"; thus, the court concluded that "[b]ecause the state did not commit [the plaintiff] involuntarily, it did not take an 'affirmative act' of restraining his liberty, an act which may trigger a corresponding due process duty to assume a special responsibility for his protection."<sup>42</sup>

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35. See, e.g., *Wilson v. Formigoni*, No. 92C5063, 1993 WL 344322, at \*3 (N.D. Ill. Aug. 9, 1993) (noting that courts have interpreted *DeShaney*'s holding "to mean that involuntarily committed patients have due process rights to reasonable care and safety while voluntarily committed patients generally do not").

36. 871 F.2d 474 (4th Cir.), cert. denied, 493 U.S. 850 (1989). The facts and holding of *Milburn* received extensive treatment by Professor Laura Oren in her excellent article. See Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113, 133-47 (1990).

37. *Milburn*, 871 F.2d at 476-78.

38. 961 F.2d 987 (1st Cir. 1992).

39. *Id.* at 989.

40. *Id.* at 992.

41. *Id.*

42. *Id.* at 991; see also *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990) (holding state acquires affirmative duty under Fourteenth Amendment to

The problem with emphasizing custody is the baggage that the concept has come to encompass since *DeShaney*. The notion that one is not "in custody" unless the state has taken some affirmative steps to hold the person against his or her will makes any substantive due process duty to protect turn on the status of an individual as a prisoner, an involuntarily committed mental patient, or an involuntarily placed foster child. Custody, as a status rather than a situation, is an unsatisfactory indicator of when a constitutional duty is owed. An interpretation of *DeShaney* that would support treating two children in the same foster care situation differently under the Constitution because one child was voluntarily placed in the system is difficult to defend. Common sense and notions of basic fairness dictate that all children, whether placed voluntarily or involuntarily in the state's care, should be entitled to equal rights under the Constitution. The custody concept should be linked to the condition of being in an environment subject to the state's control and supervision, rather than to the process of how one got there.<sup>43</sup>

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provide safe conditions only where mentally retarded person is taken into custody without consent); *Rogers v. City of Port Huron*, No. 92-CV-75898-DT, 1993 WL 409729, at \*5 (E.D. Mich. Oct. 5, 1993) (observing that "if a person's attendance at an event or area is voluntary, and not in the state's compulsion, and that person was not physically placed there by the state, the person cannot be considered to be in 'functional custody'"); *Baby Neal v. Casey*, 821 F. Supp. 320, 334-35 (E.D. Pa. 1993) (noting that "[n]umerous courts have made this involuntary versus voluntary distinction," and concluding "that Plaintiffs who have been involuntarily placed in the custody of DHS may state a claim for violation of their substantive due process rights based upon their right to freedom from harm under the fourteenth amendment of the United States Constitution"); *Jordan v. Tennessee*, 738 F. Supp. 258, 259-60 (M.D. Tenn. 1990) (holding that mentally retarded child, *voluntarily* committed to state institution by parents, did not have substantive due process right to safe conditions).

43. See, e.g., *United States v. Pennsylvania*, No. CIV.A.93-2094, 1993 WL 370570, at \*3 (E.D. Pa. Aug. 31, 1993) (rejecting defendants' argument "that voluntarily confined patients are not entitled to the constitutional right to treatment and care by virtue of the 'voluntariness' of their initial confinement" and concluding that "the constitutional right to treatment or habilitation extends to both involuntarily and voluntarily confined residents alike"); *Halderman v. Pennhurst State Sch. & Hosp.*, No. CIV.A.74-1345, 1993 WL 342806, at \*3 (E.D. Pa. Aug. 25, 1993) (noting *DeShaney* supported finding that residents of [state hospital] were involuntarily confined where "the Commonwealth defendants had affirmatively acted in accepting the residents into [the state hospital], . . . and in depriving them of their constitutional right to minimally adequate habilitation"); *McNamara v. Dukakis*, No. CIV.A.90-12611-Z, 1990 WL 235439, at \*10 (D. Mass. Dec. 27, 1990) (refusing to consider outpatient recipients in "constructive custody," viewing those in community residences as comparable to state-placed foster children, and accepting expert testimony as to status of "unconditional voluntary patients" that suggested "little practical difference between voluntarily and involuntarily committed patients in terms of their ability to act on their own behalf").

### B. Public School Context

The compulsion to wed the concepts of custody and involuntariness, along with the emphasis upon restraint of freedom rather than assumption of control and responsibility by the state, have led the majority of courts to reject arguments that public schoolchildren should be viewed as in the "functional custody" of the state during school hours. Thus, these courts have held that the state does not owe a duty of protection from harm inflicted by fellow students or other private actors.<sup>44</sup> Three recent circuit court opinions, presenting very different factual contexts, underscore the difficulties inherent in an approach that concentrates on the elements of custody, involuntariness, and restraint of freedom, rather than control and culpability.

In *D.R. v. Middle Bucks Area Vocational Technical School*,<sup>45</sup> the Court of Appeals for the Third Circuit, sitting en banc, confronted a "classic case of constitutional line drawing in a most excruciating factual context."<sup>46</sup> The plaintiffs were two female students who attended a graphic arts occupation class at Middle Bucks School.<sup>47</sup> One of the plaintiffs, D.R., a hearing-impaired student with related communications problems, was sixteen at the time of the alleged conduct.<sup>48</sup> She asserted that over a five-month period she was sexually molested two to four times per week by several male students in a unisex bathroom and a darkroom, both of which were part of the graphic arts classroom in

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44. It is well settled that schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). The school cases in which *DeShaney* is implicated must be distinguished from those in which the alleged harm is attributed to a state actor, generally a teacher or other school official. See *Waechter v. School Dist. No. 14-030*, 773 F. Supp. 1005, 1009 & n.5 (W.D. Mich. 1991) (finding child to be in custodial relationship with teacher). Compare *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3d Cir. 1989) (opinion on remand) (recognizing difference from *DeShaney* because injury, sexual molestation of plaintiff, resulted from conduct of state employee, not private actor), *cert. denied*, 493 U.S. 1044 (1990) with *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1042 (10th Cir. 1993) (holding, in case of sexual assault of student by teacher, "no custom or policy of deliberate indifference to or tacit authorization of the unconstitutional conduct practiced by [the teacher] could be attributed to the school district") and *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 147 n.14 (5th Cir.) (noting that although "[t]he precise contours of a school official's duty, as it pertains to injuries inflicted by someone other than a school teacher" was not before it but concluding that "public school officials have a duty to police the misconduct of their subordinates and to protect schoolchildren from hazards of which the school officials know or should know"), *cert. denied*, 113 S. Ct. 1066, and *vacated*, 987 F.2d 231, and *reh'g en banc granted*, 987 F.2d 231 (5th Cir. 1992).

45. 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

46. *Id.* at 1365.

47. *Id.* at 1366.

48. *Id.* at 1366 n.5, 1370.

which she had an assigned class.<sup>49</sup> The other plaintiff, L.H., seventeen at the time in question, claimed to have been likewise molested two to three times per week over a similar period of time.<sup>50</sup> The molestation, which consisted of "offensive touching of their breasts and genitalia, sodomization and forced acts of fellatio,"<sup>51</sup> was claimed to have taken place during school hours, at a time when the student teacher "was or should have been in the classroom . . . and either heard or should have heard the incidents taking place."<sup>52</sup>

The plaintiffs sued the school defendants, asserting four different theories of constitutional liability.<sup>53</sup> The first theory claimed that a special relationship existed between the plaintiffs and the school defendants while the plaintiffs were in attendance at school, giving rise to an affirmative duty to protect the plaintiffs from the type of harm inflicted by the male students.<sup>54</sup> In an effort to meet a stringent reading of *DeShaney*, the plaintiffs argued that "Pennsylvania's scheme of compulsory attendance and the school defendants' exercise of *in loco parentis* authority over their pupils so restrain schoolchildren's liberty that plaintiffs can be considered to have been in state 'custody' during school hours for Fourteenth Amendment purposes."<sup>55</sup>

Grounding the argument for an affirmative duty in an analogy to involuntary institutionalization automatically excluded the plaintiff L.H. from the scope of any duty that might exist, since Pennsylvania's compulsory attendance law applied only until a child reached seventeen years of age.<sup>56</sup> As for the plaintiff D.R., the majority of the court rejected the analogy between compulsory school attendance and imprisonment or in-

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49. *Id.* at 1366.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1368-77.

54. *Id.* at 1368. The second theory of liability was based on a snake-pit rationale, claiming that the defendants had created the danger that caused harm to the plaintiffs. *Id.* This theory is discussed *infra* part III. The third theory claimed the existence of an official policy, custom, or practice that caused the constitutional deprivations. *Id.* Finally, plaintiffs alleged a conspiracy by defendants to deprive plaintiffs of their constitutional rights. *Id.*

55. *Id.* at 1370. The district court had held that compulsory attendance laws created a custodial relationship between schoolchildren and the state, thereby mandating an affirmative constitutional duty to provide protection. *Id.* at 1367. The court concluded, however, that plaintiffs' allegations were insufficient to establish a breach of the duty through reckless indifference to plaintiffs' rights by the school defendants. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, Nos. CIV.A.90-3018, 90-3060, 1991 WL 14082, at \*11 (E.D. Pa. Feb. 1, 1991). A Third Circuit panel affirmed the decision but rejected the establishment of a special custodial relationship in the public school setting. *D.R. v. Middle Bucks Area Vocational Sch.*, Nos. 91-1136, 91-1137, 1991 WL 276292 (3d Cir. Dec. 31, 1991).

56. *D.R.*, 972 F.2d at 1370.

voluntary commitment, concluding that schoolchildren are not in the type of physical custody envisioned by *DeShaney*, in the sense of being subject to "full time severe and continuous state restriction of liberty."<sup>57</sup> The majority stressed that parents remain the primary caretakers responsible for meeting the basic needs of their children, and are free to remove their children from school if the welfare of their children is threatened.<sup>58</sup> This fact made the situation of schoolchildren unlike that of prisoners or involuntary mental patients.<sup>59</sup>

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57. *Id.* at 1371-72.

58. *Id.*

59. *Id.* at 1373. In so holding, the Third Circuit's opinion was in agreement with the only other court of appeals to address the issue at that time. *See* *J.O. v. Alton Community United Sch. Dist.*, 11, 909 F.2d 267, 272-73 (7th Cir. 1990) (rejecting argument that compulsory attendance laws made schoolchildren, like mental patients and prisoners, unable to provide for their own basic needs and are therefore owed affirmative duty of protection by state).

Other circuits have since adopted views consistent with those of the Third and Seventh Circuits. *See, e.g.,* *Dorothy J. v. Little Rock Sch. Dist.*, No. 92-2452, 1993 WL 406464, at \*2 (8th Cir. Oct. 13, 1993) (agreeing with Third, Seventh, and Tenth Circuits that "state-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates . . . or to the involuntarily institutionalized . . ."); *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992) (determining that "compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school"), *cert. denied*, 113 S. Ct. 1266 (1993); *see also* *B.M.H. v. School Bd.*, No. Civ.A.2:92CV1221, 1993 WL 383559, at \*3 (E.D. Va. Sept. 23, 1993) (rejecting argument that child attending public school because of "state mandatory attendance law and who makes her teachers aware of a threat to her safety is in such a relationship with those teachers and the school system as to create an affirmative duty upon them to protect her under the Fourteenth Amendment Due Process Clause"); *Doe v. Petaluma City Sch. Dist.*, No. C-93-0123-EFL, 1993 WL 359872, at \*21 (N.D. Cal. Aug. 30, 1993) (concluding "[c]ompulsory school attendance laws do not make schools the functional equivalent of prisons. The court holds that, in general, for purposes of section 1983 liability, no special relationship exists between school officials and students such that school officials have a constitutional duty to protect students from the acts of other students"); *Holman v. School Dist.*, No. CIV.A.92-6846, 1993 WL 197445, at \*3 (E.D. Pa. May 28, 1993) (determining relationship between socially and emotionally disturbed student and school district "was not sufficiently custodial to trigger an affirmative duty on the part of the school district to protect him from the private acts of third parties"); *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714, 720 (M.D. Pa. 1993) (concluding "[p]arents are and remain the primary caretakers of students even though state laws require the students' presence in school"); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992) (holding relationship of state with students of public schools is not same as relationship with prisoners and patients of mental institutions and that failure to prevent other students from abusing plaintiff did not give rise to liability under § 1983); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1583 (N.D. Ga.) (holding "[s]choolchildren are not like mental patients and prisoners such that a state has an affirmative duty to protect them"), *aff'd*, 981 F.2d 1263 (11th Cir. 1992); *Arroyo v. Pla.*, 748 F. Supp. 56, 61 (D.P.R. 1990) (deciding that although school official may have known of other violent incidents that had taken place on school premises, no constitutional duty existed to protect student from injury caused by another student).

Finally, in rejecting the custody basis for finding a duty of protection in these circumstances, the court distinguished the foster care context, concluding that any analogy to foster care was "not decisive."<sup>60</sup> The court explained that the relationship between the state and foster children exists by virtue of an affirmative act of the state in locating the children and placing them with foster families.<sup>61</sup> The state, through the foster family, assumes responsibility for the children's basic needs.<sup>62</sup> For the public school student, however, "required to spend only 180 six-hour days in the classroom per year[,] . . . parents or others remain a child's primary caretakers and decisionmakers."<sup>63</sup>

60. *D.R.*, 972 F.2d at 1372.

61. *Id.*

62. *Id.*

63. *Id.* In *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707 (3d Cir. 1993), the Third Circuit found *D.R.* controlling in a case that determined whether the superintendent of schools had a duty to protect six-, seven-, and eight-year-old girls from alleged sexual molestation by their school bus driver, *id.* at 714. The plaintiffs looked to the superintendent's liability under *DeShaney* as the bus driver was found not to be a state actor because he was employed by a private entity under contract with the school district. *Id.* at 709-11. Because the students were not compelled to ride the school bus and their parents were "free" to arrange for other modes of transportation, the court determined that "the plaintiffs here were less affected by state restraints at the time of their alleged injuries than was *D.R.*" and concluded that no affirmative duty of protection existed under the Constitution. *Id.* at 714. Judge Scirica, concurring in the opinion, expressed some reservation about the situation being governed by *D.R.* Finding the facts "more compelling" than *D.R.*, Judge Scirica made the following observation:

I recognize we must draw lines to refine the state action requirement and the special relationship of care developed in [*DeShaney*]. But applied here, these principles lead to a result that belies the gravity of the constitutional claims involved. Denying these § 1983 claims also ignores the practical realities of this case—the necessity for small school districts to contract out bus service, the reliance of families in rural areas upon school buses, and the defenselessness of young girls riding a school bus. When claims like these fall through the cracks, § 1983 seems less than the powerful tool to vindicate constitutional rights it was designed to be.

*Id.* at 715 (Scirica, J., concurring).

In *Holman*, 1993 WL 197445, the district court relied on both *D.R.* and *Black* in finding that the relationship between a socially and emotionally disturbed student and the school district "was not sufficiently custodial to trigger an affirmative duty on the part of the school district to protect him from the private acts of third parties," *id.* at \*3. The case involved a nine-year-old boy who was killed by a car as he exited a public transportation bus on his way to school. *Id.* at \*1. The boy's parents argued that the school district owed him a duty to provide bus transportation to and from school and that the failure to do so breached the boy's constitutional right to be free from injury to his person. *Id.*

For another example, see *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714 (M.D. Pa. 1993). In *Hunter*, a seventh-grade special education student was attacked and pursued by other students after a detention period at the end of the school day. The chase led to a stream where the boy drowned in his attempt to escape. *Id.* at 716-17. In addressing plaintiff's argument based on a theory of functional custody, the court concluded that

[i]n the present case the Defendants' authority over the Decedent during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney* and *D.R.* . . . especially when all channels

Chief Judge Sloviter, in a persuasive dissent, criticized the majority's unwillingness to recognize any situation in which schoolchildren might be entitled to a substantive due process duty of protection by the state.<sup>64</sup> The dissent underscored the disingenuousness of much of the rationale supporting the majority opinion. Giving a more expansive reading to *DeShaney's* reference to "restraint of personal liberty"<sup>65</sup> as a predicate to any substantive due process duty to protect, the dissent disparaged the majority's holding "that the duty to protect can be triggered only by involuntary, round-the-clock legal custody."<sup>66</sup>

In an attempt to satisfy *DeShaney's* emphasis on the involuntariness of the constraint imposed on the individual's freedom to provide for his or her own needs, the dissent objected to the majority's refusal to acknowledge the real force of compulsory education laws.<sup>67</sup> The majority's conclusion that parents may choose to send their children to private schools, educate them at home, or remove them from the public school for certain reasons,<sup>68</sup> reflects an incredible lack of connection with life in the "real" world.<sup>69</sup> As the dissent noted, "For the vast majority of children of school age, this is no choice at all."<sup>70</sup>

The dissent obviously felt obligated to make the case for compulsory attendance laws satisfying any involuntary restraint requirement imposed by *DeShaney*. However, it is clear that the duty to protect recognized by the dissent was grounded more in the nature of the relationship that the state had with children who were in attendance at school than in any state laws compelling them to be there. Chief Judge Sloviter, writing in dissent, would have held

that the state compulsion that students attend school, the status of most students as minors whose judgment is not fully mature,

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for communication to the outside were not totally closed. There is no evidence in the present case that the Decedent was forced or intimidated by the Defendants to report for detention. The Decedent could have decided not to report to detention for the day.

*Id.* at 720.

64. *D.R.*, 972 F.2d at 1377-84 (Sloviter, C.J., dissenting).

65. *DeShaney*, 489 U.S. at 200.

66. *D.R.*, 972 F.2d at 1379 (Sloviter, C.J., dissenting).

67. *Id.* at 1379-81 (Sloviter, C.J., dissenting).

68. *Id.* at 1371 (Sloviter, C.J., dissenting).

69. *Id.* (Sloviter, C.J., dissenting).

70. *Id.* at 1380 (Sloviter, C.J., dissenting). The dissent found the majority's reasoning analogous to an argument concerning "choice versus compulsion" rejected by the Supreme Court in *Lee v. Weisman*, in which the Court observed that "[l]aw reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.* at 1380 n.5 (Sloviter, C.J., dissenting) (quoting *Lee v. Weisman*, 112 S. Ct. 2649, 2659 (1992)).

the discretion extended by the state to schools to control student behavior, and the pervasive control exercised by the schools over their students during the period of time they are in school, combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody.<sup>71</sup>

The dissent appeared willing but unable to totally abandon the shackles of the involuntary restraint predicate to finding an affirmative duty. As Chief Judge Sloviter implied,<sup>72</sup> however, the technical, legal requirement of compulsory attendance makes little sense as the *sine qua non* for an affirmative duty owed to schoolchildren who are in fact, whether voluntarily or involuntarily, in the state's care and under the state's control while in attendance.<sup>73</sup> Any insistence that a legal compulsion to attend school be present before an affirmative duty to protect is recognized would result in the drawing of irrational and arbitrary classifications defining the circumstances and situations in which students are afforded constitutional protection.<sup>74</sup> The key to the duty owed should be the state's assumption of responsibility for the care and control of students while they are physically present in a state-created and controlled environment.<sup>75</sup>

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71. *Id.* at 1377 (Sloviter, C.J., dissenting). Judge Becker, expressing agreement with most of Chief Judge Sloviter's analysis, resisted the adoption of any "bright-line rule," but would have held on the facts of this case that the school had a constitutional duty to protect the plaintiffs from the harm to which they were exposed. *Id.* at 1384 (Becker, J., dissenting).

72. Chief Judge Sloviter observed that "[a]lthough L.H. at seventeen may not have been compelled to attend school, I see no reason to draw an age distinction between students who, in fact, are attending a state school." *Id.* at 1379 n.3 (Sloviter, C.J., dissenting).

73. *Id.* at 1379 (Sloviter, C.J., dissenting).

74. For example, a constitutional duty linked to compulsory attendance would totally exclude any situations encompassed by after-school, extracurricular activities. See, e.g., Fenstermaker v. Nesfedder, 802 F. Supp. 1258, 1265 (E.D. Pa. 1992) (concluding that "*DeShaney* cannot be the basis for a federal cause of action against a coach when a wrestler, who is not obliged in any way to participate in an extracurricular wrestling program, alleges that he was injured during a bout"); Reeves v. Besonen, 754 F. Supp. 1135, 1140 (E.D. Mich. 1991) (concluding school owes no constitutional duty of protection to students against assault by other students inflicted during ride on school bus in connection with wholly voluntary participation on school football team). Nor would the duty apply to conduct occurring during the type of optional, "extended day" programs that more and more public school systems are offering.

75. See Stephen F. Huefner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940, 1957 (1990) (arguing that, in school context, courts should look to "implications of custodial control, rather than only to control itself, because it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian").

Because the dissent concluded that the facts alleged were sufficient to establish that an affirmative duty of protection was owed, it also had to address the question of whether the facts, as they pertained to a breach of that duty, were adequate to withstand a motion to dismiss.<sup>76</sup> Given the allegations, which included assertions that the student teacher in charge of the classroom witnessed some of the offensive conduct and that other school officials knew about the problems in the graphic arts classroom, the dissent found that the complaint "sufficiently allege[d] deliberate and reckless indifference by school officials to the safety and physical well-being of the students while they were in the functional custody of the school."<sup>77</sup>

In *Maldonado v. Josey*,<sup>78</sup> the Court of Appeals for the Tenth Circuit joined the Third<sup>79</sup> and Seventh<sup>80</sup> Circuits in holding that "compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."<sup>81</sup> The facts of *Maldonado* were very different from the facts of *D.R.* Mark Maldonado, an eleven-year-old fifth grader, died of strangulation when he became caught on his bandanna in a cloakroom next to his classroom.<sup>82</sup>

This was not a case that required a decision based on arbitrary line drawing concerning the scope of any affirmative duty the state may have toward schoolchildren after *DeShaney*. It was not necessary to categorically reject a constitutional duty to protect schoolchildren to conclude

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76. *D.R.*, 972 F.2d at 1378 (Sloviter, C.J., dissenting).

77. *Id.* (Sloviter, C.J., dissenting).

78. 975 F.2d 727 (10th Cir. 1992).

79. *D.R.*, 972 F.2d at 1372 (holding "school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*").

80. *J.O. v. Alton Community United Sch. Dist. 11*, 909 F.2d 267, 272-73 (7th Cir. 1990) (concluding "[s]chool children are not like mental patients and prisoners such that the state has an affirmative duty to protect them").

81. *Maldonado*, 975 F.2d at 732 (footnote omitted). The court noted two district court decisions that had reached the same conclusion. *Id.* at 732 n.5; see *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405, 1415 (E.D. Ark. 1992) (rejecting view that school had constitutionally mandated duty to protect child from violence by other student where child was not in state custody or control "either directly or by virtue of school attendance laws, nor did the state remove him involuntarily from his home and place him in the [special] program"), *aff'd*, No. 92-2452, 1993 WL 406464, at \*2 (8th Cir. Oct. 13, 1993); *Doe v. Douglas County Sch. Dist. RE-1*, 770 F. Supp. 591, 593-94 (D. Colo. 1991) (concluding no special relationship existed between school district and student who had been sexually molested by school psychologist).

82. *Maldonado*, 975 F.2d at 728. The facts indicated that the boy had been in the cloakroom unsupervised for approximately 20 minutes, though no reason was provided for his having been sent there. See *id.*

that the plaintiffs had stated no constitutional claim upon which relief could be granted. Judge Seymour, in a concurring opinion, concluded that the court should recognize "some affirmative duty on the part of public school teachers to protect students who are in the total care of the school during the period of their compulsory attendance."<sup>83</sup>

Even though he acknowledged that a duty was owed, Judge Seymour would have affirmed the district court's grant of summary judgment on behalf of the defendant teacher based on the plaintiff's failure to raise a material fact with respect to the issue of breach of that duty since there were no facts alleged from which a jury could have found that the teacher had been deliberately indifferent to Mark Maldonado's exposure to potential danger.<sup>84</sup>

The concurrence in *Maldonado*, like the dissent in *D.R.*, appeared to be much more in tune with the reality of the situation confronting both schoolchildren and parents vis-à-vis their relationship with the state in the matter of public education.

Judge Seymour addressed the argument that a schoolchild—unlike a prisoner, involuntarily committed mental patient, or child involuntarily placed in the state's foster care system—is not in "custody" because the child's parents remain responsible for providing the child's basic needs. She commented:

Obviously, a parent does not lose all control over, nor all responsibility for, satisfying a child's basic needs simply as a result of school attendance laws. But younger children are incapable of providing for their own basic needs; they depend on parents or other caretakers to provide for them. Even older children may be forced by school disciplinary procedures and rules to rely on authority figures at school to protect them from harm. I cannot fathom who, other than a teacher or other school staff member, is capable of ensuring the "reasonable safety" of schoolchildren during the school day and class periods.<sup>85</sup>

The requirement adopted by the Third,<sup>86</sup> Seventh,<sup>87</sup> and Tenth<sup>88</sup> Circuits—that a child be involuntarily in the total and full-time physical

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83. *Id.* at 735 (Seymour, J., concurring).

84. *Id.* (Seymour, J., concurring). As Judge Seymour explained: "I do not believe the Constitution requires an elementary school teacher to protect her students from unknown and unforeseen harms, or to follow the minute-by-minute progress of her eleven-year-old charges." *Id.* (Seymour, J., concurring).

85. *Id.* at 734-35 (Seymour, J., concurring) (footnote omitted).

86. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1045 (1993).

custody of the state before the relationship gives rise to an affirmative duty to protect—serves as an arbitrary, unsatisfactory, and unnecessary screening device for substantive due process claims in the school context. To acknowledge that school teachers and officials are unquestionably the primary caretakers of children during school hours and school activities and to impose upon such caretakers a constitutional duty of protecting schoolchildren from known and foreseeable harms is not to open the floodgates of constitutional litigation.<sup>89</sup> As Chief Judge Sloviter noted, case law doctrines are in place that significantly limit the potential liability of state officials for substantive due process violations.<sup>90</sup>

In *Doe v. Taylor Independent School District*,<sup>91</sup> involving a factual context quite different from both *D.R.* and *Maldonado*, the Fifth Circuit became the first court of appeals since *DeShaney* to decide that schoolchildren are in the functional custody of school officials, who thus “have a duty to police the misconduct of their subordinates and to protect schoolchildren from hazards of which the school officials know or should know.”<sup>92</sup> *Doe* involved the sexual molestation of a fifteen-year-old high

87. *J.O. v. Alton Community United Sch. Dist.* 11, 909 F.2d 267 (7th Cir. 1990).

88. *Maldonado*, 975 F.2d 727.

89. In *Dorothy J. v. Little Rock School District*, 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, No. 92-2452, 1993 WL 406464, at \*2 (8th Cir. Oct. 13, 1993), the court, in rejecting a broad view of custody based on compulsory attendance laws, articulated the floodgate fear

that [this] view would expand constitutional duties of care and protection to millions of schoolchildren. School officials would be subject to section 1983 liability anytime a child skinned his knee on the playground or was beat-up by the school bully, so long as the requisite “state of mind” was shown. More seriously, with the epidemic of deadly violence on many school campuses today, teachers would be constitutionally obliged to assume roles similar to policemen or even prison guards in protecting students from other students. The precise contours of an affirmative duty to care and protect would be much more difficult to define in public schools.

*Id.* at 1414.

90. In her dissent in *D.R.*, Chief Judge Sloviter noted:

[A] state official’s potential liability for violations of substantive due process has already been circumscribed by decisions imposing high standards of culpability, limitations on the type of conduct for which state entities can be held responsible, and qualified immunity for individual defendants. These decisions make it unlikely that a holding that schools have a duty to protect schoolchildren while they are in the functional custody of the school will markedly expand the liability of the school districts.

*D.R.*, 972 F.2d at 1384 (Sloviter, C.J., dissenting) (citations omitted).

91. 975 F.2d 137 (5th Cir. 1992), *reh’g en banc granted*, 987 F.2d 231 (5th Cir. 1993).

92. *Id.* at 147. Some federal district courts recognize a duty owed to schoolchildren based on their being in the functional custody of the state by virtue of compulsory attendance laws. *See, e.g.*, *Lichtler v. County of Orange*, 813 F. Supp. 1054, 1056 (S.D.N.Y. 1993) (noting “[a] state imposing compulsory attendance upon schoolchildren must take reasonable steps to protect those required to attend from foreseeable risks of personal injury or death”); *Waechter v. School Dist. No. 14-030*, 773 F. Supp. 1005, 1009 & n.5 (W.D. Mich. 1991) (determining child was in custodial relationship with teacher); *Pagano by Pagano v. Massapequa Pub. Sch.*, 714 F. Supp. 641, 642-43 (E.D.N.Y. 1989) (holding elementary school students required to attend

school student by one of her teachers.<sup>93</sup> The Fifth Circuit, hearing an interlocutory appeal from the district court's denial of qualified immunity for the school district's superintendent and the school's principal,<sup>94</sup> addressed the question of whether these officials violated the plaintiff's constitutional rights by not protecting her from the misconduct of her teacher.<sup>95</sup>

The court explained that the matter of supervisory liability<sup>96</sup> could be approached from two perspectives.<sup>97</sup> First, the officials could be found liable for the injury inflicted by the teacher if they knew or should have known of the teacher's unconstitutional conduct and yet deliberately chose not to take any remedial action.<sup>98</sup> Alternatively, the court held that school officials could be liable for the constitutional wrongs perpetrated by their subordinates based on the breach of a duty to pro-

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school were owed some duty of care by defendants to prevent physical and verbal abuse by other students); *see also* *Walton v. City of Southfield*, 995 F.2d 1331, 1337 (6th Cir. 1993) (noting protected liberty interest of schoolchildren in personal security "may turn on the fact that public school students are compelled by state law to attend school and are not permitted to withdraw from situations posing the risk of personal injury").

93. *Doe*, 975 F.2d at 138.

94. *Id.* at 141.

95. The court first determined that sexual molestation by a teacher violated the plaintiff's clearly established right to bodily integrity under the Due Process Clause. *Id.* at 141-44.

96. As the court noted in *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987), "when supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates," *id.* at 1170.

As with a local government defendant, a supervisor cannot be held liable under § 1983 on a respondeat superior basis. *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 n.58 (1978).

97. *Doe*, 975 F.2d at 144-45.

98. *Id.*; *accord* *Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642, 645 (8th Cir. 1990) (holding school officials could be constitutionally liable when they are shown to have been deliberately indifferent to pattern of unconstitutional acts committed by subordinates); *Stonking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724-25 (3d Cir.) (stating school official could be liable for "maintain[ing] a practice, custom, or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers"), *cert. denied*, 493 U.S. 1044 (1990); *see also* *Howard v. Adkison*, 887 F.2d 134, 137-38 (8th Cir. 1989) (finding supervisors liable when inaction amounts to reckless disregard of, deliberate indifference to, or tacit authorization of constitutional violations); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989) (stating supervisor's conduct or inaction must be shown to amount to deliberate, reckless, or callous indifference to constitutional rights of others); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (holding "supervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act"); *Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986) (establishing supervisory liability required showing that "official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act").

tect the schoolchildren.<sup>99</sup> The court grounded the duty to protect in the state's compulsory attendance laws, which operate to separate children from the persons who would otherwise bear responsibility for their safety and well-being.<sup>100</sup> In justifying the imposition of the duty, the court noted that

[p]arents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily.<sup>101</sup>

Thus, *Doe* eliminates one of the fictions that has become entangled with the concept of custody in the school context. The notion that custody is an all-or-nothing proposition has prevented the recognition of the school officials' affirmative duty to protect. The Fifth Circuit does not require that custody be characterized by full-time and total assumption of physical control over a person.<sup>102</sup> While an individual in the full-time custody of the state when incarcerated, institutionalized, or in foster care is thereby dependent upon the state for all basic needs, schoolchildren are in the state's custody on a part-time basis. Thus, while in the school environment these children are entitled to rely upon school officials to provide some level of protection from known dangers.

Unfortunately, the Fifth Circuit anchored the affirmative duty in the condition that the state had mandated the child's presence in school through compulsory attendance laws.<sup>103</sup> Thus, the condition of custody

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99. *Doe*, 975 F.2d at 145. In a pre-*DeShaney* case, involving a school bus driver who was charged with constitutional liability for failing to break up a fight between schoolchildren on the bus, the Fifth Circuit held that the driver was "entrusted with the care of students attending school under Texas's compulsory education statute" and that he could be held liable for failing to protect or render aid to the schoolchild if such failure "rose to the level of callous indifference and was a cause of injury." *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987). The court also suggested that school officials could be held liable if it were shown that a widespread problem involving fights on school buses was met with no response on the part of the officials with respect to proper training of the bus drivers. *Id.* at 354.

100. *Doe*, 975 F.2d at 146-47.

101. *Id.* at 147.

102. *See id.* at 146-47.

103. *Id.* at 144 n.6, 147.

must be imposed involuntarily before the duty arises.<sup>104</sup> As already noted, this distinction between voluntary and involuntary custody makes little practical sense.<sup>105</sup> It is formalistic at best, arbitrary and irrational at worst.

*Doe* is significant, of course, not only for what the case holds, but for what it does not hold. The court clearly reserved any opinion on the "precise contours of a school official's duty, as it pertains to injuries inflicted by someone other than a school teacher (or other subordinate)."<sup>106</sup> The court was quick to clarify that its decision would not result in school officials' constitutional liability "in the ordinary course for injuries to students inflicted by fellow students."<sup>107</sup> Yet, the rationale of the court's opinion would arguably support an affirmative duty on school officials to refrain from deliberate indifference to known or foreseeable threats, from whatever source, to the safety and well-being of school children when the children are separated from their primary caretakers and the school has assumed that responsibility.<sup>108</sup>

104. *See id.* at 147.

105. *See supra* part II.B.

106. *Doe*, 975 F.2d at 147 n.14.

107. *Id.* at 147 (emphasis added).

108. To the extent that the Fifth Circuit's opinion leaves open the question of a school official's affirmative duty to protect schoolchildren from harm inflicted by persons other than state actors, the decision can be distinguished from that of the court in *C.M. v. Southeast Delco School District*, 828 F. Supp. 1179 (E.D. Pa. 1993). In *C.M.*, a middle school special education student alleged that he was sexually, physically, and verbally abused by one of his teachers. *Id.* at 1180-81. As the Fifth Circuit did in *Doe*, the district court discussed the matter of the school officials' liability for the injury inflicted upon the plaintiff under two different theories. *See id.* at 1184, 1186. First, the court held that

[i]n light of what defendants allegedly knew about [the teacher's] conduct, . . . a jury could reasonably conclude that the actions taken or not taken by defendants in response to reports of [the teacher's] conduct amounted to a custom, practice, or policy of deliberate indifference to [his] actions and to plaintiff's constitutional rights.

*Id.* at 1185. Second, the court addressed the issue of whether school officials had an affirmative duty to protect schoolchildren from constitutional violations committed by teachers or other school employees. *Id.* at 1188. Finding the identity of the alleged perpetrator as a state actor to be determinative, the court concluded that

the affirmative-duty line should be drawn at state action. That is, in light of *Stoneking* and *D.R., DeShaney* stands only for the proposition that states have no affirmative duty to protect people from private actors, rather than the broader proposition that states have no duty to protect people from actors who are the state's own.

*Id.* at 1189. In a related case, *K.L. v. Southeast Delco School District*, 828 F. Supp. 1192 (E.D. Pa. 1993), the court further refined its reasoning in *C.M.*, making clear that the case held only that "public school districts and school officials have an affirmative duty to protect students from state-employed teachers," *id.* at 1195. The court expressed no opinion

as to whether the state might have an affirmative duty to protect students from, for example, school janitors or cafeteria workers, or whether the state might have an affirmative duty to protect citizens from police officers, trash collectors, or any other state employees outside the public school system. The holding [of *C.M.*] is limited to teachers, whom the state has placed in sensitive positions involving close, daily con-

The emphasis in the school cases, no less so than in the incarceration and institutionalization cases, should be on the factors of culpability and causation. As schoolchildren are in the custody and care of school officials while attending school—whether or not that attendance is compelled—those officials should have an affirmative duty under the Constitution to provide an environment that is, at least, not deliberately indifferent to the safety and health needs of those children.

### C. Public Housing and Employment Contexts

Unlike the foster care and public school contexts, courts have not been receptive to an affirmative duty under the Due Process Clause to protect persons living in public housing or those employed by a public employer.

In *Dawson v. Milwaukee Housing Authority*,<sup>109</sup> the plaintiff, a resident of city public housing, was shot and seriously injured by another resident.<sup>110</sup> The plaintiff argued that his presence in publicly subsidized housing was the functional equivalent of being in custody, thereby creating a constitutional duty to protect him from harm at the hands of private actors.<sup>111</sup> In refusing to equate “subsidy with custody,” Judge Easterbrook relied on pre-*DeShaney* precedent from the Seventh Circuit that held that the Due Process Clause does not guarantee safety in the public workplace.<sup>112</sup> In *Collins v. City of Harker Heights*,<sup>113</sup> the Supreme Court unanimously affirmed that “the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace.”<sup>114</sup>

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tact with children, and over whom school administrators have direct supervisory authority.

*Id.* at 1196.

109. 930 F.2d 1283 (7th Cir. 1991).

110. *Id.* at 1283.

111. *Id.* at 1284.

112. *Id.* at 1285 (citing *Walker v. Rowe*, 791 F.2d 507, 510-11 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986)); *accord* *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986) (finding prison guard has no constitutional right to safe working environment); *McClary v. O'Hare*, 786 F.2d 83, 89 (2d Cir. 1986) (noting improper actions by employer are not tantamount to constitutional violations simply because employer is government official).

113. 112 S. Ct. 1061 (1992).

114. *Id.* at 1071. The plaintiff's husband was employed by the city in its sanitation and sewer department and was asphyxiated while clearing a sewer line. *Id.*; *see also* *Walls v. City of Detroit*, 993 F.2d 1548 (6th Cir. 1993) (finding plaintiff's attempt to distinguish *City of Harker Heights* “unavailing, because it misunderstands one of the central tenets of the Supreme Court's holding in that case: the Constitution does not guarantee police officers and other municipal employees a workplace free of unreasonable risks of harm”); *Searles v. Southeastern Pa. Transp. Auth.*, 990 F.2d 789, 792 (3d Cir. 1993) (rejecting plaintiff's argument

*DeShaney* and *Collins* no doubt negate any argument that there is a general substantive due process right to safety in public workplaces or housing based on some notion of functional custody. However, support exists for imposing constitutional liability on government defendants in noncustodial contexts, where persons claim to have been harmed by exposure to risks created or increased by government employees or officials.

### III. THE SNAKE-PIT CASES

In concluding that the state had not deprived Joshua *DeShaney* of any constitutionally protected rights, the Supreme Court suggested that the result might have been different if the state had played a role in creating the dangers to which Joshua was exposed or had increased his vulnerability to these dangers.<sup>115</sup> This Article now turns to an examination of cases in which courts have found an affirmative duty to protect, in situations admittedly noncustodial, based on a state-created-danger or enhancement-of-risk theory—cases that shall collectively be referred to as snake-pit cases.<sup>116</sup>

#### A. State-Created-Danger Cases

*DeShaney* makes clear that the state's mere awareness of a risk of harm to an individual will not suffice to impose an affirmative duty to provide protection.<sup>117</sup> If the state creates the danger confronting the individual, however, it may then have a corresponding duty to protect. The state-created-danger theory for imposing an affirmative duty has been raised in a number of the school cases. As one federal district court has noted:

The relationship between a state and its students does not constitute the special custodial relationship referred to in *DeShaney*. The absence of an affirmative constitutional duty to protect its students does not, however, mean that a state may create a dangerous situation and place students in harm's way

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"that the Constitution imposes a duty on a municipal transit authority to provide its passengers with minimal levels of safety and security during transportation").

115. *DeShaney*, 489 U.S. 189, 201 (1989).

116. No clear line separates the state-created danger cases from the enhancement-of-risk cases, and most snake-pit situations may fairly be characterized as containing elements of both. This Article treats these cases as categorically distinct only for purposes of organization and discussion.

117. *DeShaney*, 489 U.S. at 200 ("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 . . .").

without acquiring a corresponding duty to protect those students from resulting violations of their constitutional rights.<sup>118</sup>

In addition to their functional custody argument,<sup>119</sup> the plaintiffs in *D.R. v. Middle Bucks Area Vocational Technical School*<sup>120</sup> raised the state-created-danger theory. They alleged that the school officials created an environment in which the plaintiffs were subject to repeated sexual and physical abuse by other students.<sup>121</sup> The court first noted that "the state-created danger theory is predicated upon the state's affirmative acts which work to plaintiffs' detriments in terms of exposure to danger."<sup>122</sup> The Third Circuit then distinguished the plaintiffs' principal cases for imposing liability by observing that in each of those cases, the state acted affirmatively to create the danger encountered.<sup>123</sup>

The court's conclusion that no duty to protect existed in *D.R.*, however, appeared to rest not on the lack of the defendants' affirmative acts, but rather on the perceived unrelatedness between the defendants' acts

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118. *Robbins v. Maine Sch. Admin.* Dist. No. 56, 807 F. Supp. 11, 13 (D. Me. 1992).

119. See *supra* notes 45-77 and accompanying text.

120. 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

121. *Id.* at 1373. Specifically, the plaintiffs claimed that the defendants created or increased their risk of harm by

(1) failing to report to the parents or other authorities the misconduct resulting in abuse to plaintiffs; (2) placing the class under the control of an inadequately trained and unsupervised student teacher; (3) failing to demand proper conduct of the student defendants; and (4) failing to investigate and put a stop to the physical and sexual misconduct.

*Id.*

122. *Id.* at 1374.

123. *Id.* The plaintiffs relied heavily on three post-*DeShaney* cases recognizing the state-created-danger theory as a basis for § 1983 liability outside the custodial context. See *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989) (concluding defendants owed plaintiff duty of protection where they had created risk of harm to plaintiff by exposing her to inmates who were inadequately supervised), *cert. denied*, 494 U.S. 1066 (1990); *Wood v. Ostrander*, 879 F.2d 583, 595-96 (9th Cir. 1989) (finding duty to provide protection where police officer put plaintiff in harm's way when he arrested driver of car in which plaintiff was passenger, impounded vehicle, and left plaintiff stranded in high-crime area), *cert. denied*, 498 U.S. 938 (1990); *Swader v. Virginia*, 743 F. Supp. 434, 435, 444 (E.D. Va. 1990) (finding affirmative duty where defendants created risk of harm by permitting inmate serving life sentence for rape to work unsupervised on prison property where prison employees and their families were required to live).

In a recent case, the Court of Appeals for the Third Circuit found that *DeShaney* was not controlling where a high-speed police pursuit resulted in the deaths of innocent third parties who collided with the vehicle being pursued. The court noted that "[t]his type of case is different from *DeShaney*, where state actors failed to intervene in a situation that they knew or should have known was dangerous but that they played no part in creating. Here . . . the police actively created the danger that resulted in the plaintiffs' injuries." *Fagan v. City of Vineland*, Nos. 92-5481, 92-5482, 92-5551, 92-5594, 1993 WL 290386, at \*28 n.5 (3d Cir. Aug. 5, 1993) (citation omitted), *vacated and reh'g en banc granted*, Nos. 92-5481, 92-5482, 92-5551, 92-5594, 1993 WL 335390 (3d Cir. Sept. 2, 1993).

and the plaintiffs' harm. The court opined that although the defendants' conduct "may have created a recognizable risk that plaintiffs would receive little education in that class, and perhaps, physical injury due to the roughhousing[,] [p]laintiffs did not suffer harm . . . from that kind of foreseeable risk."<sup>124</sup> Thus, although the court underscored the action/inaction line as the constitutionally significant distinction between *D.R.* and the other state-created-danger cases, the opinion's language belies a greater concern with the element of causation.

The Court of Appeals for the Eighth Circuit expressed a similar concern in *Dorothy J. v. Little Rock School District*.<sup>125</sup> This case involved the sexual assault of a mentally handicapped student by a fellow student who was in legal custody of the State of Arkansas.<sup>126</sup> After rejecting an argument that the State owed a duty to provide protection based on some notion of functional custody,<sup>127</sup> the court turned to the state-created-danger theory of liability.<sup>128</sup> The plaintiff argued that the state defendants' act of placing a youth with known violent propensities in the same program with the plaintiff created the risk of harm to which the plaintiff was exposed.<sup>129</sup>

The court refused to hold that the defendants' acts put the plaintiff in harm's way and thus gave rise to a duty to protect, where the attack took place at least two years after the violent youth had been placed in the program.<sup>130</sup> The court observed that "[i]n most every circuit court decision imposing § 1983 liability because the State affirmatively created or enhanced a danger, 'the immediate threat of harm has a limited range and duration,' unlike the indefinite risk created by enrolling Louis C. in

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124. *D.R.*, 972 F.2d at 1374. The dissent in *D.R.* disagreed with the majority's conclusion "that harm from sexual assault was not a foreseeable risk." *Id.* at 1378 (Sloviter, C.J., dissenting).

125. No. 92-2452, 1993 WL 406464 (8th Cir. Oct. 13, 1993).

126. *Id.* at \*1. The youth who committed the assault and rape was a ward of the Arkansas Department of Human Services. *Id.*

127. *Id.* at \*2. The court concluded that "public schools are simply not analogous to prisons and mental institutions." *Id.*

128. *Id.* at \*2-3.

129. *Id.* at \*3. A similar argument was made in *Hunter v. Carbondale Area School District*, 829 F. Supp. 714 (M.D. Pa. 1993). Plaintiffs argued that defendant school officials created the danger to which decedent was exposed when they placed the decedent, a seventh-grade special education student, in detention with older students who harbored animosity toward the boy. *Id.* at 720. The older students chased and assaulted the decedent after the detention period, pursuing him to a stream where he drowned. *Id.* at 716-17. Noting that the state-created-danger theory "is viable in limited circumstances," the court found "nothing in the record . . . that suggest[ed] that either Defendant encouraged, facilitated or authorized the students to engage in the conduct which took place." *Id.* at 720-21.

130. *Dorothy*, 1993 WL 406464, at \*3.

public school.”<sup>131</sup> Concluding that the consequence was too remote from the challenged conduct, the court refused to translate what it viewed as a traditional tort claim into a due process deprivation.<sup>132</sup>

The Supreme Court's decision in *Collins v. City of Harker Heights*<sup>133</sup> does not preclude the imposition of constitutional liability on state officials who deliberately place public employees in a dangerous situation without adequate protection. For example, in *L.W. v. Grubbs*,<sup>134</sup> the plaintiff, a registered nurse at a medium security prison for young male offenders, was kidnapped and raped by an inmate who had been assigned to work with her.<sup>135</sup> The plaintiff named as defendants her supervisors at the institution and alleged that, contrary to assurances that had been made, they selected a known violent sex offender to work alone with her in the clinic, thus “intentionally placing her in a position of known danger.”<sup>136</sup> The district court granted the defendants' motion to dismiss for lack of a custodial context giving rise to a duty to protect and the plaintiff appealed.<sup>137</sup>

In reversing the dismissal, the Ninth Circuit stated that it was a mistake to read *DeShaney* as making “victim custody” a prerequisite to a due process claim for failure to protect.<sup>138</sup> The court noted two distinct exceptions to the general rule that the state has no affirmative duty to protect persons from violence inflicted by private actors: (1) the “special relationship” exception, stemming from a custodial relationship between the state and the victim; and (2) the “danger creation” exception, stemming from “affirmative conduct on the part of the state in placing the plaintiff in danger.”<sup>139</sup>

The state-created-danger theory had been recognized by the Ninth Circuit in *Wood v. Ostrander*,<sup>140</sup> in which a third party had raped a woman after a police officer arrested the driver of the car in which she was a passenger, impounded the car, and left her alone in a high-crime area in the early hours of the morning.<sup>141</sup> Finding that the officer's actions had affirmatively placed her in danger, the court found her allegations suffi-

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131. *Id.* at \*4 n.4 (quoting *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993)).

132. *Id.* at \*3.

133. 112 S. Ct. 1061 (1992).

134. 974 F.2d 119 (9th Cir.), *cert. denied*, 113 S. Ct. 2442 (1992).

135. *Id.* at 120.

136. *Id.*

137. *Id.*

138. *Id.* at 121.

139. *Id.*

140. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

141. *Id.* at 586.

cient to withstand scrutiny under *DeShaney*.<sup>142</sup> As in *Wood*, the court in *L.W.* concluded that the defendants' conduct "created the danger to which L.W. fell victim,"<sup>143</sup> a danger "that would not otherwise have existed."<sup>144</sup> The plaintiff's allegations that the defendants created the danger to which she was exposed, "and did so with a sufficiently culpable mental state," were sufficient to state a substantive due process claim under § 1983.<sup>145</sup>

The defendants in *L.W.* argued that the Supreme Court's decision in *Collins* precluded a public employee from asserting a substantive due process claim against her supervisors for failure to protect.<sup>146</sup> The Ninth Circuit distinguished *Collins*, however, as a case in which the plaintiff asserted no affirmative culpable acts by the defendant city.<sup>147</sup> In holding that the city had no affirmative duty under the Due Process Clause to provide a safe work environment, the Supreme Court observed that the plaintiff in *Collins* had not claimed that "his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured."<sup>148</sup> The *L.W.* plaintiff, unlike *Collins*, asserted that her supervisors knowingly put her in a position of danger and thus owed her a duty to provide protection.<sup>149</sup>

In *Gregory v. City of Rogers*,<sup>150</sup> the Court of Appeals for the Eighth Circuit, sitting en banc, was closely divided. The majority held that officers who arrested a designated driver owed no constitutional duty to protect the driver's intoxicated passengers from the dangerous situation created when the driver left the passengers in the vehicle, with the keys and unattended, outside the police station.<sup>151</sup> When one of the passengers attempted to drive home, the vehicle became involved in a single-car

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142. *Id.* at 589-90.

143. *L.W.*, 974 F.2d at 121.

144. *Id.*

145. *Id.* at 123.

146. *Id.* at 122.

147. *L.W.*, 974 F.2d at 122.

148. *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1069 (1992).

149. *Id.* Other courts have recognized the viability of substantive due process claims asserted by public employees who have been subjected to known dangers by state officials. *See, e.g., Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989) (recognizing substantive due process claim where plaintiff, town clerk, was abducted and held hostage by work squad inmates who were assigned to work in town hall without adequate supervision), *cert. denied*, 110 S. Ct. 1784 (1990); *Swader v. Virginia*, 743 F. Supp. 434, 444 (E.D. Va. 1990) (holding prison employee whose daughter was raped and killed by prisoner could state substantive due process claim against officials who allowed prisoner serving life sentence for rape to work unsupervised on prison property where plaintiff was required to live with her family).

150. 974 F.2d 1006 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1265 (1993).

151. *Id.* at 1011-12.

accident in which one passenger was killed and the other was injured.<sup>152</sup> The court concluded that even if the officers were aware of the intoxicated state of the passengers, there was no affirmative act on the part of the defendants that placed the passengers in a position of danger.<sup>153</sup> Rather, it was the act of the designated driver in leaving them in an unattended car with keys that exposed the passengers to the danger encountered.<sup>154</sup>

The majority opinion disposed of the case on the grounds that the defendants owed no duty in a noncustodial situation in which they had not affirmatively created or enhanced the risk encountered by the victims.<sup>155</sup> The situation would have been different had the officers arrested the designated driver and left the passengers they knew to be intoxicated in the vehicle at the place of arrest.<sup>156</sup> This suggestion arguably makes the opinion turn more on elements of causation and culpability than on any distinction between acts of omission and commission.

In *Reed v. Gardner*,<sup>157</sup> the Court of Appeals for the Seventh Circuit applied the state-created-danger theory in reversing the dismissal of a case on the pleadings.<sup>158</sup> The complaint alleged that police officers violated the plaintiff's constitutional rights when they arrested the driver of a car and left the vehicle with an intoxicated passenger who shortly thereafter collided head-on with the plaintiff's vehicle, killing and injuring members of the plaintiff's family.<sup>159</sup> Assuming the truth of the well-pleaded factual allegations in the motion to dismiss, the court held that liability could be imposed on police officers who arrested a sober driver and left a passenger they knew or should have known was intoxicated to drive the vehicle, thereby creating the specific danger that the plaintiff and his family encountered.<sup>160</sup>

The court was quick to note that the defendants had a duty to protect only to the extent that their affirmative acts created or enhanced the

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152. *Id.* at 1008.

153. *Id.* at 1011.

154. *Id.* at 1012.

155. *See id.* at 1010-11.

156. *Id.* at 1011.

157. 986 F.2d 1122 (7th Cir. 1993).

158. *See id.* at 1125.

159. *Id.* at 1123.

160. *Id.* at 1125. On the face of the pleadings, there was no allegation that the driver was arrested by the defendants because she was intoxicated, although this fact was made known to the court by one of the defendants. *Id.* at 1124. It appears that had the district court judge converted the motion for a judgment on the pleadings into a summary judgment motion, this fact outside the pleadings would have been legitimately considered and summary judgment for the defendants would have been affirmed on the theory that removing a drunk driver and

danger faced by the victims.<sup>161</sup> Had the officers arrested one drunk driver and left the vehicle in the custody of another drunk driver or had they observed and not interfered with the operation of a vehicle by a driver they knew to be intoxicated, no constitutional liability would have attached.<sup>162</sup> In either of these situations, the police would have done nothing to "place individuals in a position of danger that otherwise they would not have faced."<sup>163</sup> The court's reasoning in *Reed* underscores the confusion engendered by any theory that turns "on the tenuous metaphysical construct which differentiates sins of omission and commission."<sup>164</sup> From a common sense viewpoint, it is difficult to fathom why officers who knowingly allow an intoxicated person to drive off in a vehicle should be in constitutionally different positions depending upon whether they arrested a sober driver, leaving the drunk driver in control of the vehicle; arrested a drunk driver, leaving another drunk driver in control of the vehicle; or simply stood by and watched while someone they knew was intoxicated took control of the vehicle. Rather than focusing upon the affirmative nature of the conduct involved, the courts should ask whether the defendant's acts *or* omissions were the *cause* of the plaintiff's injuries and, if so, whether such acts or omissions reflect the requisite level of culpability to constitute a constitutional violation.

### B. *Enhancement-of-Risk Cases*

In *Sinthasomphone v. City of Milwaukee*,<sup>165</sup> three police officers responded to a call for help from two women who observed a young, naked, bleeding male wandering in the street.<sup>166</sup> The officers took control of the situation, declined assistance from others who were willing and able to provide it, and released the young man into the custody of a Mr. Jeffrey Dahmer who shortly thereafter added the fourteen-year-old Lao-

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failing to prevent her replacement with another intoxicated individual did not create or enhance the risk faced by the individuals involved. *Id.* at 1124, 1127.

Judge Posner would not have addressed "the difficult constitutional question" of whether a due process claim could be stated if the driver arrested by the defendants had been sober. *Id.* at 1128 (Posner, J., dissenting in part and concurring in part). He would have remanded to allow the district court to conduct a summary judgment proceeding, which in light of the facts introduced, would have put an end to the case without the need to resolve the constitutional issue. *Id.* at 1128-29 (Posner, J., dissenting in part and concurring in part).

161. *Id.* at 1126.

162. *Id.* at 1125.

163. *Id.*

164. *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979).

165. 785 F. Supp. 1343 (E.D. Wis. 1992).

166. *Id.* at 1346.

tian boy's name to the long list of his other unfortunate victims.<sup>167</sup> The plaintiffs and the estate and family of the victim brought a § 1983 action against the officers and the City of Milwaukee, asserting that the defendants' failure to protect him violated the victim's constitutional rights.<sup>168</sup>

The court noted both the legal difficulties posed by this case, as well as the "genius" of the complaint in trying to avoid those difficulties.<sup>169</sup> In denying the defendants' motion to dismiss, the court concluded that a key distinction between this case and *DeShaney* rested in the line between action and inaction. "[P]laintiffs have not merely alleged that the police officers failed to protect [the boy] . . . . Rather, they allege[d] . . . that the officers actively prevented private citizens from helping [him] . . . . [T]he allegations are not just of police inaction, but of police action . . . ." <sup>170</sup> Thus, although the officers did not create the danger that befell Sinthasomphone, their interference with aid that would otherwise have been forthcoming significantly increased the risk of harm to which he was subjected.<sup>171</sup>

In *Pinder v. Commissioners of Cambridge*,<sup>172</sup> the plaintiff's boyfriend had been taken into custody after physically attacking and threatening to kill the plaintiff and her children.<sup>173</sup> The plaintiff informed the

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167. *Id.* at 1345-46. For a popular-media account of this tragedy, see, for example, *Police May Have Left Boy with Slaying Suspect*, L.A. TIMES, July 27, 1991, at A2.

168. *Sinthasomphone*, 785 F.Supp. at 1346-46.

169. *Id.* at 1347.

170. *Id.* at 1349. *Sinthasomphone* is a good example of a case in which the plaintiffs relied on a number of different theories in an attempt to slip through the "cracks" in the surface of *DeShaney*. Although the action/inaction distinction would have been sufficient to sustain the complaint at the motion-to-dismiss stage, the court noted other allegations in the complaint that served to differentiate the case from *DeShaney*. *Id.* The allegations supported a claim that the boy was taken into "brief police custody," and released to an unrelated adult with no legal right to custody. *Id.* In addition, the court found that the complaint clearly stated a claim that the officers' conduct and the policy of the city operated to deny Sinthasomphone equal protection under the law. *Id.* at 1350. Plaintiffs alleged that it was the policy of the city to differentiate in the provision of protective services on the "basis of race, color, national origin, or sexual orientation." *Id.*

171. See also *Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (allowing claim stated under § 1983 where plaintiff alleged that her son's death was due to county's policy of preventing private assistance to drowning victims and failing to provide effective replacement protection), distinguished in *Andrews v. Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991) (noting, whereas deputy in *Ross* used his authority as state actor to intrude into purely private rescue effort, police in *Andrews* enlisted private assistance as part of ongoing police rescue effort); cf. *Rogers v. City of Port Huron*, No. 92-CV-75898-DT, 1993 WL 409729, at \*6-8 (E.D. Mich. Oct. 5, 1993) (deciding "plaintiffs cannot establish that Officers . . . violated a clear constitutional right in preventing private citizens from rescuing Decedent in light of conflicting opinions within the circuits addressing this issue").

172. 821 F. Supp. 376 (D. Md. 1993).

173. *Id.*

arresting officer that the boyfriend was on probation for a previous arson conviction relating to the plaintiff's home and expressed concern about returning to work and leaving her children at home.<sup>174</sup> The plaintiff returned to work when she was assured that the boyfriend would be kept in custody.<sup>175</sup> The boyfriend was released on his own recognizance after spending only one hour in custody.<sup>176</sup> He went directly to plaintiff's home and set a fire that killed her three children.<sup>177</sup>

The plaintiff sued individually and on behalf of her minor children, claiming that the arresting officer and the City of Cambridge had violated her constitutional rights by not providing protection in these tragic circumstances.<sup>178</sup> The court made the following observation:

The *DeShaney* Court . . . left two issues unresolved. First, whether, after *DeShaney*, there are any noncustodial circumstances in which the state's enhancement of the risk of injury to a plaintiff violates the Due Process Clause. Second, assuming that such circumstances exist, how large a role the state must play in the creation or enhancement of the danger before it assumes a corresponding constitutional duty to protect.<sup>179</sup>

The court first concluded that *DeShaney* did not confine the substantive due process right to protection to the custodial context<sup>180</sup> stating

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 388.

180. *Id.* The court noted Fourth Circuit pre-*DeShaney* precedent that had recognized an affirmative duty to protect in noncustodial situations, see *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), as well as the many post-*DeShaney* decisions that recognize an affirmative duty in a noncustodial setting, see *Pinder*, 821 F. Supp. at 388-90. See also *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993) (determining "plaintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that [sic] they otherwise would have been"); *Dwares v. City of N.Y.*, 985 F.2d 94, 99 (2d Cir. 1993) (finding *DeShaney* not controlling where plaintiff alleged defendant officers conspired to make demonstrators more vulnerable to assaults by skinheads); *L.W. v. Grubbs*, 974 F.2d 119, 120-21 (9th Cir. 1992) (holding plaintiff stated constitutional claim against defendant correctional officers where defendants intentionally assigned known violent sex offender to work alone with plaintiff in clinic), *cert. denied*, 113 S. Ct. 2442 (1993); *Losinski v. County of Trempealeau*, 946 F.2d 544, 551 (7th Cir. 1991) (recognizing "[t]he essence of the Court's exception in *DeShaney* is state creation of dangers faced or involuntary subjection to known risks"); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (*DeShaney* analysis "establishes the possibility 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 of, or vulnerability to, such violence beyond the level it would have been at absent state action"); *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990)

that "while the custodial circumstances of a plaintiff are important, they are not dispositive."<sup>181</sup> Addressing the problem of the "slippery slope,"<sup>182</sup> the court pointed to three specific standards that operate to limit liability and make a "mechanical application of substantive due process to custodial settings" unnecessary.<sup>183</sup>

First, government is under no duty to provide citizens with any services at all.<sup>184</sup> The substantive due process right to protection in a noncustodial context should not impact upon the discretion that would otherwise operate in public resource allocation.<sup>185</sup> Second, the court noted that the plaintiff's burden to prove a high level of culpability and to demonstrate that the state's conduct was the proximate cause of her injury<sup>186</sup> would protect government officials from unwarranted liability.<sup>187</sup> Finally, the court suggested that even if a plaintiff successfully satisfied the rigorous culpability and causation demands imposed in the substantive due process context, a difficult barrier might still exist if the

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(concluding *DeShaney* not controlling when city alleged to have played part in both creating danger and rendering public more vulnerable to danger); *Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (holding plaintiff stated cognizable claim under § 1983 when she alleged that her son was deprived of life due to county policy prohibiting private rescue efforts to aid drowning victims without effective replacement protection); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989) (concluding defendants owed plaintiff duty of protection when they placed her in unique position of danger by exposing her to inmates who were inadequately supervised), *cert. denied*, 494 U.S. 1066 (1990); *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (finding police had affirmative duty to protect plaintiff after arresting driver of car in which plaintiff was passenger, impounding vehicle, and leaving plaintiff stranded in high-crime area), *cert. denied*, 498 U.S. 938 (1990); *Was v. Young*, 796 F. Supp. 1041, 1048 (E.D. Mich. 1992) (noting "some lower federal courts have held the state accountable for a victim's injuries even though the victim was not in state custody, where the state has created a danger to the victim"); *G-69 v. Degnan*, 745 F. Supp. 254, 265 (D.N.J. 1990) (finding affirmative duty to protect informant to whom state had made guarantees of personal safety); *Swader v. Virginia*, 743 F. Supp. 434, 444 (E.D. Va. 1990) (finding affirmative duty where defendants required prison employees and their families to live on prison property where inmates were allowed to work). *But see Ying Jing Gan v. City of N.Y.*, 996 F.2d 522, 534-35 (2d Cir. 1993) (finding complainant who agreed to identify suspects was owed no duty of protection by city).

181. *Pinder*, 821 F. Supp. at 390.

182. Professors Eaton and Wells aptly criticize slippery-slope arguments in the context of recognizing affirmative duties, pointing out that a "well defined body of case law" in this area "provides guideposts sufficiently determinate to avoid such horrors as the constitutionalizing of basic government services." Eaton & Wells, *supra* note 11, at 132-33.

183. *Pinder*, 821 F. Supp. at 391.

184. *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980), and finding no obligation to fund abortions or other medical services).

185. *Id.*

186. *Id.* at 392 (citing *Martinez v. California*, 444 U.S. 277, 285 (1980), and finding nexus between plaintiff's injury and state's conduct too attenuated to state constitutional claim).

187. *Id.*

defendant raised a qualified immunity defense.<sup>188</sup> Plaintiff would have to show that the "contours" of the substantive due process right to protection claimed in the case were clearly established at the time of the challenged action.<sup>189</sup> Thus, the court outlined the safeguards that were already in place to restrict the scope of liability for any breach of a substantive due process duty to provide protection in a noncustodial context.

Next, the court tackled the tougher question of whether the behavior by the state created a duty "such that the corresponding failure to act [was] arbitrary."<sup>190</sup> The court then drew from the common-law distinction between "misfeasance" and "nonfeasance" to "clarify the amount of governmental intervention necessary to create an affirmative duty for governmental action."<sup>191</sup> The state thus assumes an affirmative duty to

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188. *Id.* While a qualified immunity defense is available to government officials sued in their individual capacities, the Supreme Court has held that a local government entity has no qualified immunity from compensatory damages liability under § 1983. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Therefore, in cases where governmental and individual liability are asserted, summary judgment for the individual defendant on qualified immunity grounds will not necessarily dispose of the claim against the government entity. *See, e.g., Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir.) (noting municipality is not immune from liability simply because officer was entitled to qualified immunity), *cert. denied*, 113 S. Ct. 187 (1992); *Munz v. Ryan*, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (concluding it was not inconsistent to find official entitled to qualified immunity while holding municipality liable for his constitutional violations if caused by final policy maker).

Although local governments are not entitled to qualified immunity under § 1983, the court, in *Watson v. Sexton*, 755 F. Supp. 583 (S.D.N.Y. 1991), dismissed the plaintiff's claim against the City Department of Sanitation for failure to train its employees in proper administration of a substance abuse policy, when individual defendants had prevailed on qualified immunity grounds, *id.* at 592. The court held that

[t]o be "deliberately indifferent" to rights requires that those rights be clearly established. Therefore, even if plaintiff could prove that her Fourth Amendment rights were violated by current standards because the City inadequately trained its employees, plaintiff cannot show that the City was deliberately indifferent to rights that were not clearly established [at the time the challenged actions were taken].

*Id.* at 588; *see also Hinton v. City of Elwood*, 997 F.2d 774, 783 (10th Cir. 1993) (observing that when finding of qualified immunity is based on determination that individual officer's conduct did not violate law, such finding may preclude imposition of municipal liability); *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992) (holding "where no constitutional violation exists for failure to take special precautions, none exists for failure to promulgate policies and to better train personnel to detect and deter jail suicides"); *Williamson v. City of Va. Beach*, 786 F. Supp. 1238, 1264-65 (E.D. Va. 1992) ("Assuming that the constitutional rights alleged by plaintiff did exist, the conclusion that they were not clearly established negates the proposition that the city acted with deliberate indifference."), *aff'd*, 991 F.2d 793 (4th Cir. 1993).

189. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (holding "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right").

190. *Pinder*, 821 F. Supp. at 394.

191. *Id.* at 394-95.

protect in a noncustodial setting only when it creates or enhances the danger encountered by the plaintiff.<sup>192</sup>

In assessing the facts pleaded by the plaintiff, the court found that the alleged assurances that the defendants gave to the plaintiff that the danger had been removed “turned their nonliable nonfeasance into liable misfeasance.”<sup>193</sup> In reliance on the officer’s assurances, Ms. Pinder returned to work, making her children more vulnerable to the harm caused by her former boyfriend.<sup>194</sup> The court concluded that the officer’s conduct increased the risk confronted by the plaintiff and deprived her and her children of help that would otherwise have been available.<sup>195</sup>

It is interesting to compare *Pinder* with *Losinski v. County of Trempealeau*.<sup>196</sup> *Losinski*, like *Pinder*, was a case of domestic violence. Julie Losinski and her three children fled their trailer home after a particularly violent domestic dispute with her husband.<sup>197</sup> Ms. Losinski successfully obtained a “no contact” temporary restraining order and shortly thereafter commenced divorce proceedings.<sup>198</sup> She was granted permission to return to the trailer to retrieve some personal belongings.<sup>199</sup> Given her husband’s violent nature and the presence of guns in the home, Ms. Losinski sought and was granted police protection for this purpose.<sup>200</sup> Ms. Losinski, accompanied by her mother, brother-in-law, and Deputy Hovell, proceeded to the trailer home where her husband confronted them and expressed his desire to speak with her alone.<sup>201</sup> She apparently consented to this wish and was allowed to enter the home with her husband.<sup>202</sup> When it became clear that an argument had erupted inside the

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192. *Id.* at 395.

193. *Id.* at 396.

194. *Id.*

195. *Id.* A neighbor of Ms. Pinder had been restraining the boyfriend until the officer arrived on the scene. *Id.* at 397. The court was of the opinion that had Ms. Pinder known that her attacker would not remain in custody, she would have enlisted further assistance from the neighbor or stayed at home herself. *Id.*

The court also noted that “if [the officer’s] decision to charge [the plaintiff’s boyfriend] with relatively minor offenses was influenced by a personal relationship, this claim may be actionable as well.” *Id.*; see also *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (holding substantive due process claim stated when, due to chief of police’s personal relationship with abusive husband, police protection that would otherwise have been forthcoming was withheld, resulting in murder of plaintiff and her daughter).

196. 946 F.2d 544 (7th Cir. 1991).

197. *Id.* at 547.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

trailer, the others entered the trailer.<sup>203</sup> There was no attempt on the part of Deputy Hovell to end the dispute or separate Ms. Losinski from her husband.<sup>204</sup> The argument continued in the bedroom and, as Deputy Hovell and the others stood in an adjacent hallway, the husband shot Ms. Losinski in the head and neck.<sup>205</sup> She died three days later.<sup>206</sup>

Ms. Losinski's three children and her estate brought an action against the county, the sheriff, Deputy Hovell, and their insurers, asserting both constitutional and state-law claims.<sup>207</sup> The complaint alleged that, by agreeing to provide protection to Ms. Losinski, the defendants created a special relationship that survived *DeShaney* analysis and that the failure to protect in this situation violated Ms. Losinski's rights under the Due Process Clause.<sup>208</sup>

In addressing the plaintiffs' due process claim, the court first rejected an argument that Ms. Losinski was owed an affirmative duty because she was in the "protective custody" of the state when harm befell her.<sup>209</sup> Adhering to a notion of custody characterized by restraint and involuntariness, the court quickly concluded that Ms. Losinski had been under no coercion to accept the state's protection.<sup>210</sup> With no coercion or restraint, the fact that the state had assumed some responsibility for her safety was insufficient to satisfy the "in custody" requirement of *DeShaney*.<sup>211</sup>

The court found the plaintiffs' other argument more plausible: By offering protection to Ms. Losinski and assuming some responsibility for her welfare, the defendants created or increased the risk of harm to which she was exposed, and thus owed her an affirmative duty to render assistance.<sup>212</sup> Ultimately, however, the court rejected the constitutional claim as precluded by *DeShaney*, concluding that "[w]hile the issue [was] very close, . . . the essence . . . of *DeShaney* is state creation of dangers

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203. *Id.* at 547-48.

204. *Id.* at 548.

205. *Id.*

206. *Id.* at 547-48.

207. *Id.* at 548.

208. *Id.*

209. *Id.* at 550.

210. *Id.*

211. The court did make the following observation:

The *DeShaney* vision of the substantive component of the due process clause has been debated from many perspectives. The vision of the state as wholly distinct from the individual, assuming indubitable obligations only when the state goes so far as to take the citizen into some form of custody is difficult to relate to the complex web of dependencies that characterize the modern state.

*Id.* at 551.

212. *Id.* at 550.

faced or involuntary subjection to known risks."<sup>213</sup> The court held neither element was satisfied in *Losinski*.<sup>214</sup> The defendants had not created or enhanced the risk facing Ms. Losinski, nor did they subject her involuntarily to a known existing danger.<sup>215</sup> While recognizing that Ms. Losinski may not have gone to the trailer home had she not been accompanied by Deputy Hovell, the court explained that "[a]lthough the state walked with Julie as she approached the 'lion's den,' it did not force her to proceed."<sup>216</sup>

The lower courts are obviously struggling to formulate a coherent theory for applying the "in custody" and "state-created danger" exceptions to *DeShaney's* no-affirmative-duty rule. A review of recent cases reveals the fine lines and distinctions courts are drawing. The comparison of *Gregory* and *Reed*, along with the examination of *Pinder* and *Losinski*, forces one to ask whether constitutional doctrine should be built on such parsing of facts. Characterizations about the custodial or non-custodial context of the case and, if noncustodial, whether defendants have committed sins of omission or commission, may determine not only whether a duty to protect exists at all, but also what level of culpability will be required in order to state a claim under the Due Process Clause.

#### IV. THE CULPABILITY FACTOR

The Supreme Court has not definitively established the level of culpability that is required to make out a substantive due process claim based on a failure to protect, but has held that something more than "mere negligence" must be shown.<sup>217</sup> Indeed, in *Collins v. City of Harker Heights*<sup>218</sup> the Court implied that allegations of deliberate conduct that "shocks the conscience"<sup>219</sup> might be required to state a substantive due process claim.<sup>220</sup> Multiple standards, including gross

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213. *Id.* at 550-51.

214. *Id.* at 550.

215. *Id.*

216. *Id.* at 550-51.

217. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Daniels v. Williams*, 474 U.S. 327, 333 (1986). In *City of Canton v. Harris*, 498 U.S. 378 (1989), the Supreme Court held that the plaintiff could make out a claim under § 1983 for injuries resulting from a municipality's failure to train police officers "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact," *id.* at 388 (footnote omitted).

218. 112 S. Ct. 1061 (1992).

219. *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding substantive due process claim stated where pumping of criminal defendant's stomach to obtain evidence was determined to be "conduct that shocks the conscience").

220. *Collins*, 112 S. Ct. at 1071 (refusing to find city's alleged deliberate indifference to worker's safety was "arbitrary Government action that must 'shock the conscience' of federal judges"). In *Searles v. Southeastern Pennsylvania Transportation Authority*, 990 F.2d 789 (3d

negligence,<sup>221</sup> recklessness,<sup>222</sup> deliberate indifference,<sup>223</sup> and conscience-shocking conduct,<sup>224</sup> have been articulated by the lower federal courts.<sup>225</sup>

In *Fagan v. City of Vineland*,<sup>226</sup> the Court of Appeals for the Third Circuit addressed the issue of the level of culpability required to state a substantive due process claim in the context of a high-speed police pursuit that resulted in the deaths of three innocent bystanders.<sup>227</sup> The incident that initially gave rise to the chase was the protrusion of a passenger waving his arms through a car's open rooftop.<sup>228</sup> When the driver of the vehicle failed to stop in response to an officer's activated overhead lights, a chase began and continued through residential neighborhoods.<sup>229</sup> Other police vehicles became involved in the pursuit, which ended tragi-

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Cir. 1993), the court noted that the concepts of deliberate indifference and deliberate harm are quite distinct, the latter requiring an "intent to injure," *id.* at 793.

221. *See, e.g., Simescu v. Emmet County Dep't of Social Servs.*, 942 F.2d 372, 375 (6th Cir. 1991) (holding gross negligence sufficient for substantive due process claim, where gross negligence is described as defendant "intentionally do[ing] something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow" (quoting *Nishiyama v. Dickson County*, 814 F.2d 277, 282 (6th Cir. 1987)). As the Third Circuit has pointed out, this concept of gross negligence "closely resembles reckless indifference." *Fagan v. City of Vineland*, 1993 WL 290386, at \*12 (3d Cir. Aug. 5, 1993), *vacated*, Nos. 92-5481, 92-5482, 92-5551, 92-5594, 1993 WL 335370 (3d Cir. Sept. 2, 1993) (en banc); *accord Dell Fargo v. City of San Juan Bautista*, 857 F.2d 638, 640 n.3 (9th Cir. 1988) (finding gross negligence or recklessness sufficient to state due process claim).

222. *See, e.g., Fagan*, 1993 WL 290386, at \*1 (holding standard of liability under Due Process Clause in police chase case is "whether the defendant police officers acted with reckless indifference to public safety"); *Germany v. Vance*, 868 F.2d 9, 18 (1st Cir. 1989) (stating reckless or callous indifference is required for substantive due process violation).

223. *See, e.g., Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (holding deliberate indifference is level of culpability that pretrial detainees must establish for violation of their personal security interests under Fourteenth Amendment), *cert. denied*, 112 S. Ct. 972 (1992); *Salazar v. City of Chicago*, 940 F.2d 233, 238-39 (7th Cir. 1991) (holding deliberate indifference proper standard for substantive due process claim but also noting that it is synonymous with intentional or criminally reckless conduct).

224. *See, e.g., Frohmader v. Wayne*, 958 F.2d 1024, 1027 (10th Cir. 1992) (noting that in excessive force case "[t]he due process standard is more onerous than the Fourth Amendment reasonableness standard since the former requires, in addition to undue force, personal malice amounting to an abuse of official power sufficient to shock the conscience"); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720-21 (4th Cir. 1991) (adopting shocks-the-conscience standard for substantive due process claims arising out of police pursuit), *cert. denied*, 112 S. Ct. 1172 (1992).

225. *See Barbara Kritchevsky, Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417 (1992), where the author observes that "there appears to be no discernible difference between indifference, recklessness, wantonness, and willfulness," *id.* at 470 n.279.

226. *Fagan*, 1993 WL 290386, at \*1.

227. *Id.* at \*1.

228. *Id.* at \*2.

229. *Id.*

cally when the pursued vehicle ran a red light and collided with a pickup truck, killing both occupants of the truck as well as one of the passengers in the fleeing vehicle.<sup>230</sup>

The plaintiffs, the accident survivors, and the estates and relatives of those killed, brought actions under § 1983 against the officers and the city. They alleged that their substantive due process rights were violated by the officers' recklessness and by the city's failure to train the officers properly regarding high-speed pursuits.<sup>231</sup> The district court granted summary judgment in favor of all defendants on the constitutional claims, holding that the alleged conduct of the officers could not be found to satisfy the applicable standard in this context.<sup>232</sup> A jury could not find that the actions of the officers constituted "[b]ehavior that shocks the conscience, . . . outrageous behavior, or behavior that offends a sense of justice."<sup>233</sup>

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230. *Id.* at \*2-3.

231. *Id.* at \*1.

232. *Id.* at \*8.

233. *Fagan v. City of Vineland*, 804 F. Supp. 591, 603 (D.N.J. 1992) (footnote omitted), *rev'd*, 1993 WL 290386, at \*14-17 (3d Cir. Aug. 5, 1993), *vacated*, Nos. 92-5481, 92-5482, 92-5551, 92-5594, 1993 WL 335370 (3d Cir. Sept. 2, 1993) (en banc). Having found no underlying constitutional violation, the court concluded there could be no liability on the part of the City for failure to train. *Id.* at 606 (citing *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986)). The Third Circuit held, however, that the city could be found independently liable for the violation of plaintiffs' constitutional rights even if the individual officers were found not liable because they lacked the requisite mental state to be constitutionally accountable. *Fagan*, 1993 WL 290386, at \*14-17; *accord* *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) (recognizing "[a] public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable"); *Simmons v. City of Phila.*, 947 F.2d 1042, 1058-65 (3d Cir. 1991) (no inconsistency in jury's determination that police officer's actions did not amount to constitutional violation, while city was found liable under § 1983 on theory of policy of deliberate indifference to serious medical needs of intoxicated and potentially suicidal detainees and failure to train officers to detect and meet such needs), *cert. denied*, 112 S. Ct. 1671 (1992); *Rivas v. Freeman*, 940 F.2d 1491, 1495-96 (11th Cir. 1991) (finding sheriff liable in official capacity for failure to train officers regarding identification techniques and failure to properly account for incarcerated suspects, while deputies' actions which flowed from lack of procedures were deemed mere negligence); *Gibson v. City of Chicago*, 910 F.2d 1510, 1519-20 (7th Cir. 1990) (determining that dismissal of claim against officer on grounds that he did not act under color of state law was not dispositive of claim against city where allegations of municipal policy of allowing mentally unfit officers to retain service revolvers); *Fulkerson v. City of Lancaster*, 801 F. Supp. 1476, 1485 (E.D. Pa. 1992) (acknowledging in high-speed pursuit context that "[i]n this case, as in *Simmons*, the individual police officer named as a defendant could be a causal conduit for the constitutional violation, without committing such a violation himself"), *aff'd*, 993 F.2d 876 (3d Cir. 1993).

For an extensive and fascinating analysis of the problems caused by lower courts' reliance on *Heller* to justify bifurcation in cases alleging both individual and municipal liability, see Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993).

In reversing the part of the district court's decision that held that a shocks-the-conscience standard was applicable to the due process claim asserted, the majority of the circuit panel held that "the standard of liability under section 1983 for a substantive due process violation in a police pursuit case is whether a pursuing police officer acted with a reckless indifference to public safety."<sup>234</sup> The court made clear that its holding did not rest on the premise that a special relationship existed between the officers involved in the pursuit and the innocent bystanders: The officers did not have an affirmative duty to protect those bystanders from injury at the hands of private actors.<sup>235</sup> Although no special relationship theory could serve as the basis for implying an affirmative duty to protect, the court observed that the case was different from *DeShaney* because "the police actively created the danger that resulted in the plaintiffs' injuries."<sup>236</sup> Thus, where the officers had affirmatively placed the victims in harm's way, a duty to protect existed. The issue was then the standard of culpability that would be applied to decide whether the duty had been breached.

The majority in *Fagan* focused on the affirmative acts of the officers not only for the purpose of finding a duty owed to the victims, but also for the purpose of deciding what level of culpability would be required to establish a breach.<sup>237</sup> The court distinguished the police pursuit context from those noncustodial situations where persons were injured because of the failure of the state to take action to rectify or eliminate a known risk.<sup>238</sup> It concluded that the standard of liability applied in custody

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234. *Fagan*, 1993 WL 290386, at \*12. The court went on to explain that [t]his standard does not require that the defendant intended to cause harm. Instead, the defendant acts with reckless indifference if he was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow, and he proceeded in conscious and unreasonable disregard of the consequences.

*Id.*

235. *Id.* at \*28 n.5.

236. *Id.*

237. *Id.* at \*11.

238. *Id.* at \*10. The court explained that "[i]n both *Collins* and *Searles*, the government did not directly cause harm to the plaintiffs but instead failed to take action to eliminate dangerous conditions." *Id.* In *Searles v. Southeastern Pennsylvania Transportation Authority*, 990 F.2d 789 (3d Cir. 1993), the plaintiff's husband was killed when a motor fell from a moving railcar and hit a switch, causing the car decedent was riding in to derail and strike a pillar, *id.* at 790. The Third Circuit, in rejecting plaintiff's due process claims, found the case to be analogous to *Collins* and concluded that "the alleged conduct of defendants in [*Searles*] is no more shocking than the conduct alleged in *Collins*." *Id.* at 792-93.

cases involving substantive due process claims, that of reckless indifference, should likewise apply in police pursuit cases.<sup>239</sup>

Chief Judge Sloviter, in dissent, took the position that the Supreme Court's opinion in *Collins* mandated a reexamination of the "routine invocation" of the reckless indifference standard in substantive due process cases. She concluded that only conduct so abusive of official power that it shocks the conscience can violate the Due Process Clause.<sup>240</sup> Citing numerous cases in support of her position that the shocks-the-conscience standard has been applied to affirmative acts of government, Chief Judge Sloviter rejected the majority's limitation of the standard to situations where government officials' liability is based on a failure to act.<sup>241</sup>

Under the dissent's approach, while the substantive due process analysis would entail a uniform, although "amorphous and imprecise inquiry,"<sup>242</sup> as to whether the alleged conduct shocks the conscience, the answer would depend on several factors: the defendant's state of mind, the "responsibilities of a particular official[,] . . . his power to take certain actions,"<sup>243</sup> and "the nature and types of discretion which different government officials must be allowed to exercise if they are to have the freedom to carry out their duties without undue interference."<sup>244</sup> Thus, what shocks the conscience will be a function of both the context in which the conduct occurs and the responsibilities of the officials charged with violating the Constitution.

The shocks-the-conscience test would be satisfied by a government actor's recklessness or deliberate indifference to the basic needs of those who are in the state's custody.<sup>245</sup> Furthermore, where a governmental entity is shown to have failed to train its officers in exercising the power vested in them, and such failure is deliberately indifferent to the constitutional rights of persons with whom those officers come into contact, the failure to train may shock the conscience.<sup>246</sup> In noncustodial contexts

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239. *Fagan*, 1993 WL 290386, at \*12-13. The majority of the panel expressly disagreed that someone in the custody of the state should be entitled to a more deferential standard of liability than someone who is the innocent victim of a high-speed pursuit. *Id.* at \*13.

240. *Id.* at \*21 (Sloviter, C.J., concurring in part and dissenting in part).

241. *Id.* at \*23 (Sloviter, C.J., concurring in part and dissenting in part) (citing cases).

242. *Id.* at \*26 (Sloviter, C.J., concurring in part and dissenting in part).

243. *Id.* at \*25 (Sloviter, C.J., concurring in part and dissenting in part).

244. *Id.* (Sloviter, C.J., concurring in part and dissenting in part).

245. *Id.* at \*28 (Sloviter, C.J., concurring in part and dissenting in part).

246. *Id.* (Sloviter, C.J., concurring in part and dissenting in part). Thus, given the facts in *Fagan*, Chief Judge Sloviter found the conduct of the individual officers not so egregious as to shock the conscience of the court, yet would entertain a substantive due process claim against the city based on a failure to train in proper police pursuit procedures, where such failure was likely to result in constitutional violations. *Id.* at \*26-27. The deliberate indifference of the

involving individual state actors' liability, however, it would take more than reckless or deliberate indifference to shock the conscience, whether the conduct was characterized as an affirmative act or an omission.<sup>247</sup>

There is certainly precedent for applying different standards of culpability to the same constitutional provision. This depends upon the context in which the alleged offense occurs and the nature of the claim being asserted. In the Eighth Amendment context, for example, prison conditions cases and medical needs cases are governed by a "deliberate indifference" standard,<sup>248</sup> while excessive force claims must satisfy a "malicious and sadistic" standard of culpability.<sup>249</sup> The ultimate ques-

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city to the great likelihood that constitutional rights would be violated would "necessarily" shock the conscience. *Id.* at \*28. In defending the notion that different standards of culpability should apply to the liability of a governmental entity and its employees, Chief Judge Sloviter reasoned that:

[a] governmental entity that places its employees in positions of authority where they act under color of state law, i.e. with uniforms, badges, firearms, and marked police cars, necessarily has the correlative obligation to take all reasonable steps to assure that those employees are appropriately trained so that the individual officers will not misuse their state-given power.

*Id.*

247. The dissent implies that allegations of a deliberate, willful violation of one's constitutional rights by the defendants would suffice to state a due process claim. *Id.* at \*28 n.5 (noting significance in *Fagan*, as in *Collins*, that "plaintiffs have not alleged deliberate action").

The allegations set forth by plaintiffs in *Boyle v. City of Liberty*, No. 92-087-CV-W-6, 1993 WL 398870 (W.D. Mo. Oct. 6, 1993), might reflect the heightened level of culpability that Chief Judge Sloviter would demand in a high-speed pursuit situation. Plaintiffs in *Boyle* alleged that police officers set up a roadblock during morning "rush hour," causing a mile-long line of traffic in both lanes. The officers did this deliberately to effect the seizure of a minor child and an adult companion who had stolen a car and were being pursued by other officers at speeds exceeding 100 miles per hour. As a result, "[t]he stolen car drove between the two lines of traffic . . . and collided with various cars, killing one civilian, causing substantial property damage and personal injury to others." *Id.* at \*1. Based on plaintiffs' allegations that the defendants "intentionally placed [plaintiffs] in a position where personal injury was not merely possible but inevitable," the court concluded that plaintiffs had adequately pled both a duty to protect and a breach of that duty. *Id.* at \*11. The scope of the duty and the reasonableness of the conduct would remain to be resolved by summary judgment or trial. *Id.*

248. See, e.g., *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993) (recognizing claim under Eighth Amendment based on prison officials' deliberate indifference to exposure of prisoner to levels of environmental tobacco smoke "that pose an unreasonable risk of serious damage to his future health"); *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991) (making deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97 (1976), applicable to all complaints about conditions of confinement); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (holding Eighth Amendment violated by deliberate indifference to prisoners' serious medical needs).

249. *Hudson v. McMillian*, 112 S. Ct. 995, 998-99 (1992) (adopting standard established in *Whitley v. Albers*, 475 U.S. 312 (1986), where force was used in context of prison riot, and making *Whitley* standard applicable "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, [making] the core judicial inquiry . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm").

tion in both contexts is whether the alleged conduct or condition constitutes cruel and unusual punishment.<sup>250</sup>

Likewise, in the substantive due process context, there is precedent for applying different standards of culpability depending upon the nature of the claim, the setting in which it arose, and the responsibilities of the state actors involved. In *Youngberg v. Romeo*,<sup>251</sup> a case involving the treatment of involuntarily committed, mentally retarded patients, the Supreme Court held that liability could be imposed "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."<sup>252</sup>

In *Shaw v. Strackhouse*,<sup>253</sup> a profoundly retarded resident of a state mental institution brought a § 1983 action against state employees, asserting a failure to protect him from abuse and sexual assault.<sup>254</sup> On appeal from a grant of summary judgment in favor of the defendants, the Third Circuit addressed the standard of care that state officials owe to those in their custody, and determined that the standard might vary depending upon the nature of the physical custody involved.<sup>255</sup>

The court concluded that while a deliberate indifference standard governed the liability of the nonprofessional employee-defendants, "the *Youngberg* professional judgment standard should have been applied to the primary care professionals, supervisors and administrators named as defendants."<sup>256</sup> In the court's opinion, professional judgment is a relatively deferential standard that, like recklessness and gross negligence, would fall "somewhere between simple negligence and intentional misconduct."<sup>257</sup> The plaintiff's burden is somewhat greater "when trying to establish deliberate indifference than when trying to establish a failure to exercise professional judgment."<sup>258</sup>

A number of courts have applied the professional judgment standard to substantive due process claims raised by involuntarily placed foster children. In *Yvonne L. v. New Mexico Department of Human Services*,<sup>259</sup> the Court of Appeals for the Tenth Circuit expressed some

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250. *Id.* at 1000.

251. 457 U.S. 307 (1982).

252. *Id.* at 323.

253. 920 F.2d 1135 (3d Cir. 1990).

254. *Id.* at 1138-39.

255. *Id.* at 1144.

256. *Id.* at 1139.

257. *Id.* at 1146.

258. *Id.* at 1150.

259. 959 F.2d 883 (10th Cir. 1992).

doubt about any significant difference between the two standards in the context of foster care, yet adopted the professional judgment standard rather than deliberate indifference.<sup>260</sup> The court explained:

The compelling appeal of the argument for the professional judgment standard is that foster children, like involuntarily committed patients, are "entitled to more considerate treatment and conditions" than criminals. These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. "The officials who place the children are acting in place of the parents."<sup>261</sup>

The District Court for the District of Columbia has also held that it would be "inappropriate" to require children in foster care to demonstrate deliberate indifference on the part of their caretakers in order to make out a constitutional claim for relief under the Due Process Clause.<sup>262</sup> The court concluded that it would "judge the defendants' liability based on whether they have exercised competent professional judgment in the administration of the District's child welfare system."<sup>263</sup>

## V. CONCLUSION

Given the variety and range of situations that may be covered by an affirmative duty theory under the Due Process Clause, it is not surprising that the lower court opinions in this area reflect a sense of confusion and a need for guidelines and principles beyond the foundation poured in

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260. *Id.* at 894. In adopting the professional judgment standard in the foster care situation, the Tenth Circuit expressed agreement with the approach of the Seventh Circuit in *K.H. v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990) (holding "[o]nly if without justification based either on financial constraints or on considerations of professional judgment [state welfare workers and their supervisors] place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages"). See also *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883, 893-94 (10th Cir. 1992); *Baby Neal v. Casey*, 821 F. Supp. 320, 340 (E.D. Pa. 1993) (determining proper standard to be applied to substantive due process claims of involuntarily committed foster children is professional judgment standard). But see *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc) (holding child in foster care may prevail under § 1983 "only where it is alleged and the proof shows that the state officials were deliberately indifferent to the welfare of the child"), *cert. denied*, 489 U.S. 1065 (1989).

261. *Yvonne L.*, 959 F.2d at 894 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)).

262. See *La Shawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991).

263. *Id.* In a footnote, the court stated that it was persuaded to adopt the professional judgment standard since the plaintiffs were seeking only injunctive relief. *Id.* at 996 n.29. The suggestion was made that deliberate indifference may be a more appropriate standard in cases seeking damages, where there is greater concern about "the chilling effect that an unfavorable judgment may have on municipal policymakers." *Id.*

*DeShaney*. The two major questions are clear: (1) In what contexts beyond imprisonment and involuntary commitment is an affirmative duty of protection owed?; and (2) What level of culpability will the plaintiff be required to demonstrate to establish a breach of the duty in a given context?

This Article suggests that the concept of custody set out in *DeShaney* should be interpreted expansively to include not only prisoners and involuntarily committed mental patients, but also (1) "voluntarily" committed mental patients; (2) foster children who are either voluntarily or involuntarily placed in the state's child welfare system; and (3) school-children who are in an environment controlled by the state and who rely on state actors to provide for their basic needs, safety, and welfare while they are in that environment.

Within the context of custody, as in the noncustodial setting, the test for a breach of the duty could be, as Chief Judge Sloviter has suggested, the shocks-the-conscience standard. Different levels of culpability would satisfy the standard depending upon the nature of the custody. Distinctions should not be based on the voluntary or involuntary aspect of the custodial arrangement, but rather on (1) the responsibilities assumed by the particular state actors involved; (2) the need for state actors to have more or less unfettered discretion in a particular area; (3) the degree of control actually exercised by the state in a given situation; and (4) the extent of reliance and the degree of vulnerability attributed to the person in the state's care.

Given these considerations, it would not be unreasonable to apply a professional judgment standard to those state actors who are trained and employed as professionals in state mental institutions, the state's child welfare system, and the public schools. The test should be: (1) whether the individual actor's behavior constituted a substantial departure from accepted professional judgment, practice, or standards; (2) whether such departure was virtually certain to be detrimental to the safety, health, or welfare of those persons within the professional's care; and (3) whether the constitutional injury complained of was in fact caused by the failure to adhere to accepted professional judgment. Conduct by professionals that represents a significant departure from accepted professional practice and that causes constitutional injury to those entrusted in their care should meet the shocks-the-conscience standard of the court.<sup>264</sup>

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264. The professional judgment standard, unlike the deliberate indifference standard, would entail a purely objective test, analogous to the "objective reasonableness" standard employed in Fourth Amendment excessive force cases. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989). Thus, it would not be relevant to the test whether the professional actually knew that

For nonprofessional state employees in these settings, liability should depend upon the plaintiff's ability to show that the constitutional injury was caused by the defendants' deliberate indifference to the safety, health, or well-being of those in their care. Deliberate indifference would be established by showing that a defendant consciously acted or chose not to act with knowledge of the obvious consequences of this conduct.<sup>265</sup> Likewise, government entity liability for a failure to protect—based on a failure to train, supervise, or discipline—would necessitate proof of deliberate indifference as required by the Court in *City of Canton v. Harris*.<sup>266</sup>

In noncustodial contexts, there are two different points at which the question of culpability plays a role. In assessing the threshold question of whether an affirmative duty to protect from harm inflicted by third persons should be recognized in noncustodial contexts, the test should be whether a state actor deliberately chose a course of conduct or failed to act, knowing that the act or omission was substantially certain to create an unreasonable risk of harm to the plaintiff or arbitrarily enhance the danger to which the plaintiff would be exposed. If the factfinder answers this question affirmatively, then the second question should be whether the state actor who knowingly exposed the plaintiff to danger by the act or omission was deliberately indifferent to the need to ameliorate or provide protection from the situation created. Government liability for constitutional injuries caused by a failure to train would, as in the custodial context, be based on *City of Canton's* deliberate indifference standard.

The search for criteria to define the circumstances that should give rise to an affirmative duty to protect under the substantive Due Process Clause has been misguided by the view that *DeShaney* recognizes such a duty only in involuntary custodial situations, as well as the assumption that a uniform standard of culpability will apply to all such claims. This Article has demonstrated that restricting the affirmative duty to contexts of imprisonment, involuntary institutionalization, and involuntary placement in a state's foster care system is an arbitrary, unfair, and unneces-

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her conduct violated accepted professional practice or whether she intended a substantial deviation from accepted professional standards.

265. Being charged with knowledge of the obvious or very likely consequences of one's conduct does not mean that the individual defendant must have intended or actually been aware that such consequences would violate the victim's constitutional rights.

266. 489 U.S. 378, 388 (1989); *see supra* note 219 and accompanying text. For an extensive discussion of *City of Canton's* deliberate indifference standard as applied to a school district's decision to transfer, rather than remove, a teacher who had been accused of sexually molesting a student, see *Gonzalez v. Ysleta Independent School District*, 996 F.2d 745, 755 (5th Cir. 1993).

sary means of containing the expansion of substantive due process claims. The complexity and variety of situations in which the affirmative duty should be recognized dictate that careful attention be paid to the level of culpability required in order to establish a breach of the duty, and close scrutiny be given to the causal connection between the challenged behavior and the resulting harm.

If the constitutional backdrop for affirmative duty cases is a shocks-the-conscience standard, the degree of fault or level of culpability that will satisfy this test should vary depending on the nature of the custodial arrangement in the custody cases. In noncustodial creation-of-danger or enhancement-of-risk cases, liability of state actors should depend upon their knowingly putting the individual in a position of unreasonable risk of harm and then being deliberately indifferent to the protective needs of that individual.

