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"Indifferent [towards] Indifference:" Post-DeShaney Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch

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“Indifferent [towards] Indifference:”¹ Post-*DeShaney* Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch

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I. INTRODUCTION

In 1998, the death of 5-year-old Terrell Peterson in Fulton County, Georgia gained national media attention.² Terrell was abused and neglected most of his short life, and then died at the hands of family members.³ The public outcry at his death centered not only around the fact that Terrell’s life and death were so brutal, but also on the failure of the state child protective services system to protect Terrell from this harm.⁴ The Department of Family and Children’s Services in Fulton County had received eight reports of abuse on Terrell’s family in the years before his death.⁵ Caseworkers investigated these allegations, and removed Terrell twice briefly from his home.⁶ Then, they placed him back with the abusive family.⁷ At one point, Terrell’s case was dismissed in Juvenile Court because the caseworker failed to show up.⁸ As a result of the state’s failure to protect Terrell, two lawsuits were filed against Georgia Department of Human Resources (“DHR”) and Division of Family and Children’s Services (“DFACS”), one in federal court

2. The Terrell Peterson story prompted a series of articles in the Atlanta Journal Constitution, a segment on CBS’ “60 Minutes,” a New York Times article, a Time Magazine Cover Story, and a segment on the Oprah Winfrey Show. See Joanna Soto Carabello & Lee Shearer, *Clarke Infant Deaths Targeted in GBI Probe*, ONLINEATHENS, Jan. 13, 2000, available at http://www.onlineathens.com/stories/011300/new_0113000002.shtml. See also *Tortured Children Follow-up; Terrell’s Story*, *The Oprah Show*, available at http://www.oprah.com/tows/pastshows/tows_2000/tows_past_20000504.jhtml; Timothy Roche, *The Crisis of Foster Care*, TIME MAGAZINE, Nov. 13, 2000, at 74+.

3. See Jane O. Hansen, *Suit Demands Child Welfare Reforms; Death of 5-year-old Prompts Legal Case*, ATLANTA J. CONST., Nov. 11, 1999, at E4. Terrell’s grandmother, aunt and aunt’s boyfriend faced criminal charges for the murder of Terrell. *Id.*

4. See Roche, *supra* note 2.

5. Hansen, *supra* note 3. See also Ron Martz, *Suit Over Boy’s Death Refiled; State had Custody of Child, it Claims*, ATLANTA J. CONST., Oct. 20, 2000, at 4D.

6. Martz, *supra* note 5 at 4D.

7. *Id.*

8. Jane O. Hansen, *Abuse Suit: State Under Fire in 5-year-old’s Death*, ATLANTA J. CONST., November 10, 1999, at A1.

and one in state court.⁹ One of these lawsuits listed 21 violations of policy and practice and alleged that DFACS had recklessly failed to prevent Terrell's death.¹⁰

Lawsuits like these have become an increasingly common phenomenon in both state and federal courts.¹¹ Across the country, there has been increased public outcry over the failures of child protective services,¹² as more outrageous cases of child abuse deaths come to public attention.¹³ Each year, an estimated 1,100 children die from abuse or neglect.¹⁴ Of these, 12.5% of the families of children who died had received services from child welfare during the five years prior to the death.¹⁵ These numbers represent children who the system has failed, children who have slipped through the cracks. In some instances, these horrific cases prompt lawsuits against the state child protective services agency.¹⁶ These lawsuits generally

9. *Id.*

10. *Id.*

11. The Atlanta Journal Constitution reported that "[n]ationwide, a growing number of child welfare agencies are being sued for failing to protect some of the children under their care." Hanson, *supra* note 3, at E4. Further, these suits have resulted in the courts ordering "about 20 child welfare systems to change the way they do business." *Id.*

12. State agencies are coming under fire for their failures in many ways: public outcry manifests in accusing headlines; lawsuits are filed against the state. See Hansen *supra* note 3. Additionally, many agencies are becoming targets of administrative reviews by both the state and federal governments. See, e.g., *Report outlines Areas for Improvement in State's Child Welfare Programs*, DHS Newsroom, Sept. 10, 2001 (discussing a federal review report of Minnesota's child welfare system), available at <http://www.dhs.state.mn.us/newsroom/news/CW.htm>.

13. See, e.g., Brian Farmer & Tania Cocksedge, *Social Workers Let Lauren Slip Through Safety Net*, PRESS ASS'N NEWS, Oct. 1, 2001 (discussing case where social workers had "clear opportunities to save," an abused girl, yet, because of serious mistakes, failed to save the child, who subsequently died); Nina Bernstein, *Girl's Death Underscores Complexity of Child Welfare*, N. Y. TIMES, May 21, 2000, at A37 (discussing a long history of complaints of abuse to child protective services before the death of a five-year-old girl); Editorial, *Protecting Children; Texas Needs a Joint Tracking System*, THE DALLAS MORNING NEWS, July 11, 2001, at 14A (discussing the death of a child who "might have been saved sooner," and noting that the child slipped through the cracks because her family moved); Jonathan D. Silver & John A. Pro, *Brights Had Trouble in Calif.; Allegations of Abuse Levelled in 1990s Against Parents of Murdered Girl*, PITTSBURGH POST-GAZETTE, Aug. 9, 2001, at A1 (discussing the murder of a child whose family had a history of involvement with children's service agencies); Roche, *supra* note 2, at 74+ (two-year-old boy was killed after social workers allowed him to remain in his parents home, despite an alleged beating that had left him in a body cast).

14. National Clearinghouse on Child Abuse and Neglect Information, *Highlights from Child Maltreatment 1999*, at <http://www.calib.com/nccanch/pubs/factsheets/canstats.cfm> (n.d.). This is at an approximate rate of 1.62 deaths per 100,000 children in the population. *Id.* 2.1% of these fatalities occurred in foster care, and 86.1% of the fatalities from abuse or neglect are of children younger than 6 years old. *Id.*

15. *Id.* Further, 2.7% of child fatalities were of children who had been returned to their home (from foster care) by social services during the five years prior to their death. *Id.*

16. See, e.g., William Cooper Jr., *Father of Slain Toddler Files Suit Against State*, THE PALM

allege that the department's failures to adequately investigate, to remove children from abusive situations or to provide other protective measures have lead to injury or death, and therefore violated the children's right to be free from harm.

Title 42 of the United States Code, section 1983¹⁷ (hereinafter section 1983) protects against state action, or action under the color of state law, that subjects citizens to the deprivation of any right or rights that are secured by the Constitution and laws of the United States.¹⁸ It provides a "private federal right of action for damages and injunctive relief" when these rights are violated.¹⁹ In order to maintain an action under section 1983, "a plaintiff must allege: 1) action by the state or governmental entity; 2) deprivation of a constitutional right; and 3) causation."²⁰ Section 1983 has become a tool for enforcing substantive rights, and has been used to prod government officials into performing certain affirmative duties.²¹ A cause of action under section 1983 can arise where an official has "fail[ed] to exercise an affirmative duty."²² Thus, in this context, if a defendant state official fails to act according to an affirmative duty to the child, and this failure to act results in the deprivation of a liberty interest protected by the Fourteenth Amendment, then a cause of action may arise under section 1983.

However, there is a severe limitation on the liability of state agencies under section 1983 because of a 1989 Supreme Court case, *DeShaney v.*

BEACH POST, Nov. 14, 2001, at 3B (father of a two-year-old who was beaten to death after calls to Florida's child abuse hot line filed suit alleging that the Department was negligent in failing to properly investigate the child abuse reports.); Daniel Wise, *NYC Settles Lisa Child Abuse Suit*, N. Y. LAW J., Oct. 1, 1999 (lawsuit against the city was based on its failure to take action to protect the child after receiving "clear warnings that she was in danger"), available at <http://www.rickross.com/reference/general/general129.html>; Natasha Ashe, *Lawsuit Filed in Death of 2-year-old*, SALISBURY POST, June 16, 1999 (two lawsuits were filed against a North Carolina county for failure to prevent the death of two children from abuse), available at <http://www.salisburypost.com/newscopy/061699lawsuit.htm>.

17. 42 U.S.C. § 1983 (West 2001). Section 1983 provides:

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

Id.

18. *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000); *Fox v. Custis*, 712 F.2d 84, 87 (4th Cir. 1983); *Thelma D. v. Bd. of Educ. of St. Louis*, 669 F. Supp. 947, 948 (E.D. Mo. 1987).

19. *Clift v. Fincannon*, 657 F. Supp. 1535, 1539, n.1 (E.D. Tx. 1987).

20. *Schieber v. City of Philadelphia*, 156 F. Supp. 2d 451, 452 (E.D. Pa. 1999).

21. *See L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (finding that certain duties are privately enforceable under 42 U.S.C. § 1983).

22. *Taylor v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987); *See also Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983); *Ware v. Reed*, 709 F.2d 345, 347-48 (5th Cir. 1983); *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972).

Winnebago County Dep't of Soc. Services.²³ Citing this case, the federal district court dismissed the Terrell Peterson lawsuit, finding that the State did not have custody or control over Terrell.²⁴ As cases like the Terrell Peterson case increasingly come to the public's attention, more and more child advocates are turning to lawsuits as a means for reforming the system;²⁵ however, in federal court, they are hitting the *DeShaney* roadblock.²⁶

This comment will analyze these lawsuits as a method of state accountability. Specifically, it will focus on the legal obligations that a child protective service agency has to children, and when a violation of these obligations will result in liability under section 1983. Federal lawsuits against child protective services agencies under section 1983 are currently reaching varying results. The success of some lawsuits has led to monetary damages and court-ordered changes in the child welfare system.²⁷ An estimated twenty child welfare systems have been ordered to "change the way they do business" as a result of these lawsuits.²⁸ Other lawsuits are dismissed based on the fact that the child was not in the custody or control of the State at the time of the death. This comment will discuss the different judicial approaches that the federal courts have taken to these lawsuits since *DeShaney* and evaluate what the legal duty of child protective services agencies should be.

23. 489 U.S. 189 (1989).

24. Ron Martz, *Judge Rules State not Liable in Death of Terrell Peterson*, ATLANTA J. CONST., Aug. 23, 2001, at F1 (noting that the U.S. District Judge ruled that the State did not "control his care or the actions of his guardian because he was never officially in its custody").

25. The Terrell Peterson lawsuit sought a court order "to ensure that the state implement protective procedures for other children like Terrell in the future." Mary Margaret Oliver, Editorial, *Child Protection Lawsuit Justified*, ATLANTA J. CONST., Sept. 24, 2001. Advocates, like Oliver, argue that lawsuits are needed when the political process does not move quickly enough to reform the system. *Id.* Oliver argues that "[l]awsuits are a valuable tool for democracy. They prod our elected officials to protect the most vulnerable and least politically powerful citizens." *Id.*

26. See Peter J. Schmiedel, Charles P. Golbert & Adrienne Giorgolo, *Rights of Abused and Neglected Children to Safe and Adequate Foster Care Under the Guarantees of the Fourteenth Amendment*, 20 CHILD. LEGAL RTS. J. 14, 16 (2000) (noting that "[t]he *DeShaney* opinion severely limits or forecloses any constitutional right to safety for children who, like Joshua [*DeShaney*], are injured while in the parents' (as opposed to the state's) custody, regardless of the state's actual or direct knowledge of the child's plight").

27. Hansen, *supra* note 3, at E4 (noting that "[l]awsuits elsewhere have resulted in a variety of reforms They often require smaller caseloads for child protective workers, more pay and better training. The court order covering the District of Columbia's child protection system covers all operations New Mexico's is narrower and deals with adoption while Kansas City's focuses on children in foster care."). See also Case Updates, Children's Rights, at http://www.childrensrights.org/case_updates/index.htm (discussing the results of lawsuits in ten states).

28. Hansen, *supra* note 3, at E4.

Based on the growing awareness of cases like Terrell Peterson's, accountability of child protective service workers and departments is of great public concern. This concern has led to an increase in lawsuits, the rise of legislation, and court mandates ordering changes in the system. Due to the fact that the lawsuits are receiving different treatment in different federal courts, there is no consistency as to where the federal courts will draw the line for holding social services agencies civilly liable.²⁹ Because there is currently conflict between the circuits, the Supreme Court needs to take up the issue of a child's constitutional right to be free from harm. The Court should take the opportunity to overrule *DeShaney* and promulgate a new rule that recognizes a right to safety outside of the strict state custody situations.

II. THE DEVELOPMENT OF A CONSTITUTIONAL RIGHT FOR CHILDREN TO BE FREE FROM HARM

A. The Source of the Right and of the Duty

1. The Duties and Responsibilities of Social Service Agencies

Generally, state social service agencies have a department or division that is responsible for providing protective services for children ("child protective services") and a department that is responsible for overseeing foster care ("foster care services"). Historically, foster care and child protective services developed out of efforts of religious and charitable groups to aid orphans and "rescue" children from abuse or neglect.³⁰ The Social Security Act of 1935 created a federally funded foster care system "as a last-resort attempt to protect children at risk of serious harm."³¹ Under the 1935 Act, states were obligated to remove children from homes where the parents were either unwilling or unable to care for them.³² The goals and duties of foster care services are generally to provide safe and stable foster care homes to the children who have been removed from their own homes.³³

29. See Jonathan Ringel, *Supremes to Review Child Abuse and Due Process*, THE RECORDER, Feb. 26, 2001, at 7 (noting that there are split decisions among circuits on liability of state agencies when a child is removed and then returned to the home, making this a possible issue for Supreme Court review).

30. Bazelon Center for Mental Health Law, *Making Child Welfare Work: Forging New Partnerships to Protect Children and Sustain Families*, at <http://www.bazelon.org/rc.html> (n.d.).

31. *Id.*

32. *Id.*

33. See *id.* It is argued that foster care services are failing horribly to meet these goals. See *id.*

The foster care system, however, is overburdened, with an estimated nearly half a million children in the custody of the State in the early 1990's.³⁴

The goal of child protective services is generally "to ensure the protection and safety of children who are victims of abuse and neglect."³⁵ This goal derives from the legal mandate of social services.³⁶ For example, the Georgia Social Services Manual states that "both state and Federal law mandate providing the protective services of the state, in situations of child maltreatment, to prevent further abuse, to protect and enhance the welfare of children and to preserve the family when possible."³⁷ To accomplish its responsibility of "safeguard[ing] the rights and protect[ing] the welfare of neglected, abused or exploited children through specialized social services," the department defines certain beliefs and values that are the basis of its "standards of good practice."³⁸ Among these are the belief that "children are entitled to protection, safety and permanency," and that "if parents are unable or unwilling to provide a protective, safe or permanent life for their children, or if the maltreatment is serious, intentional or cruel, the department must *aggressively intervene* to ensure the protection, safety and permanency of the children."³⁹

While this is a large issue, the rights of foster care children in a §1983 action are more clearly established, and this article is therefore focused on the children who are left in abusive homes rather than those who are removed and injured subsequently in foster care.

34. *Id.*

35. Georgia Social Services Manual, CHILD PROTECTIVE SERVICES, 2101.1 (Nov. 2000) [hereinafter SS MANUAL], available at <http://www.childwelfare.net/DHR/policies/CPS/2101.html> and on file with the author. See also Jim McCoy, *Reunification – Who Knows the Child's Best Interests?*, 53 J. MO. B. 40, 41 (1997) (noting that the purpose of Missouri's child protective services is "to prevent further abuse and to 'help preserve and stabilize the family wherever possible'"). This is a representative example of child protective services goals, but the actual phrasing will vary by state.

36. U.S. Department of Health and Human Services, National Clearinghouse on Child Abuse and Neglect Information, *Philosophy of Child Protective Services*, at <http://www.calib.com/nccanch/pubs/usermanuals/cpswork/philosophy.cfm> (last modified Apr. 6, 2001). "The basis for child protective services stems from a concern for the care of children, which is expressed through laws established in every State." *Id.*

37. SS MANUAL, *supra* note 35, at 2101.1. The manual lists several federal laws as mandating the State to provide protective services, including: the Social Security Act of 1935, 20 C.F.R. 200, the Child Abuse Prevention and Treatment Act of 1996, 45 C.F.R. 1340, the Adoption and Safe Families Act of 1997, P.L. 105-89, and the Child Abuse Prevention, Adoption, and Family Services Act of 1988, P.L. 100-294. *Id.* at 2101.2. The manual also lists state laws with similar mandates, including the Children and Youth Act, O.C.G.A. 49-5-1, and the Juvenile Court Code of Georgia, O.C.G.A. 15-11-1. *Id.*

38. *Id.* at 2101.3.

39. *Id.* (emphasis added). The manual further states that "parents have a right not to be unduly interfered with by the State, yet children have a right to be protected from neglect or abuse . . . [t]he safety and protection of children is always the primary goal of child protective services." *Id.*

Legally mandated child protective services agencies exist for the purpose of protecting children from abuse and neglect. The system is extremely overburdened,⁴⁰ and caseworkers have low salaries, overwhelming caseloads and massive responsibilities.⁴¹ As a result, it is impossible for the system to save every child from the abuse or neglect that he or she suffers. However, as social services manuals indicate, the system is obligated to “aggressively intervene” and to provide protective services when needed.⁴² The issue, then, becomes whether children can turn to the courts for remedy when social services agencies fail to meet this obligation.

2. The Constitutional Right to Safety for Prisoners and Mental Health Facility Patients

The courts’ recognition of any right to safety that abused and neglected children enjoy is based on analogy to the rights of prisoners and of mental health patients.⁴³ As one scholar has noted:

It is an interesting commentary on American Constitutional jurisprudence that the courts first recognized a right to safe conditions for prisoners, and only many years later did the courts recognize that the right should be extended to include mental health patients, and only after that did the courts finally extend the right to include abused and neglected children in foster care.⁴⁴

First, the Supreme Court recognized that prisoners had a right to safe prison conditions in *Estelle v. Gamble*.⁴⁵ The courts later recognized that mental health patients who are involuntarily confined also have a right to be

40. See Lauren D’Ambra, *Survey of Ombudsman Offices for Children in the United States*, at <http://www.child-advocate.state.ri.us/Ombudsman.htm> (last modified Sept. 2001). “Limited resources, high staff turnover, a lack of training and appropriate recruitment of experienced personnel, have added to the states’ inability to meet the needs of the burgeoning number of children requiring protection and care.” *Id.* See also American Federation of State, County, and Municipal Employees, *Caseloads and Workloads: Progress in The States*, at <http://www.afscme.org/publications/child/cww00101.htm> (Feb. 2000) (arguing that an overwhelming majority of child welfare caseworkers would say that the “biggest obstacle . . . to doing their jobs well [is] that they have been assigned too much casework to properly serve each child and family on their caseload”).

41. Jane O. Hansen, *Georgia’s Forgotten Children: State’s Child Caseworkers among lowest-paid in nation*, *ATLANTA J. Const.*, Feb. 6, 2001, at A1. Hansen notes that “[c]hild protective services workers often make critical decisions for children [T]hey are required to have a college degree but earn less than many workers who need only a high school diploma.” *Id.* Furthermore, turnover is often a big problem. *Id.*

42. See SS Manual, *supra* note 35.

43. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989).

44. Schmiedel, *supra* note 26, at 30 n.24.

45. 429 U.S. 97, 104-05 (1976).

safe or free from harm. The Supreme Court established this right in *Youngberg v. Romeo*.⁴⁶ The importance of these two cases is that they created a framework for a recognition of a constitutional right to safety. Under section 1983, this can be used to impose an affirmative duty on the state to ensure safety of those confined to state custody.

In *Estelle v. Gamble*, a Texas inmate sued the state alleging that his constitutional right to be free from cruel and unusual punishment was violated.⁴⁷ The plaintiff prisoner suffered a back injury while on a work assignment, and he argued that the state's treatment of him after this injury violated his rights.⁴⁸ The court found that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment."⁴⁹ The court concluded that a plaintiff could base a cause of action under section 1983 on "deliberate indifference to a prisoner's serious illness or injury . . ."⁵⁰

In *Youngberg v. Romeo*, a lawsuit was brought on behalf of a mentally retarded man who was involuntarily committed to a state institution.⁵¹ The lawsuit alleged that the state of Pennsylvania had violated the patient's constitutional rights to safe conditions of confinement.⁵² The patient in this case had injured himself and had been injured by others in the facility, and the suit alleged that the state officials had done nothing to protect him from these injuries.⁵³ The court held that the plaintiff mental health patient had a constitutionally protected right under the Fourteenth Amendment's Due Process Clause to reasonably safe conditions of confinement.⁵⁴ The Court reasoned that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed - who may not be punished at all - in unsafe conditions."⁵⁵

46. 457 U.S. 307, 315-16 (1982).

47. 429 U.S. at 101.

48. *Id.* at 98-99.

49. *Id.* at 104.

50. *Id.* at 105.

51. 457 U.S. at 307, 309.

52. *Id.*

53. *Id.* at 309-11.

54. *Id.* at 315-16.

55. *Id.*

3. Pre-*DeShaney* Cases – Applying the Right to Children

In several cases prior to 1989, courts found that government agencies could be liable under section 1983 if they breached an affirmative duty to protect children from abuse.⁵⁶ In these cases, courts were applying the reasoning and rules recognized in *Youngberg* and *Estelle* to situations involving children. That is, the courts were extending the constitutional protection recognized for prisoners and involuntary mental patients to cover children as well.⁵⁷ These cases involved situations where the child victim was in the state's custody, as well as situations where the child victim was not in state custody. The framework for liability of the state for injuries or fatalities of abused and neglected children was established.

In *Doe v. New York City Dept. of Social Services*, the Second Circuit Court of Appeals found that there was sufficient evidence to establish deliberate indifference on the part of the social services agency.⁵⁸ The court held that where there is sufficient evidence of deliberate indifference to a known risk, there can be liability for injuries to a foster child.⁵⁹ The court noted that the agency had a "specific" and "unequivocal" duty to protect the child, arising out of statutory obligations.⁶⁰ Therefore, the court reasoned, liability could be based on the failure to perform a duty, or alternatively, could be based on a pattern of failures or omissions.⁶¹

In *Taylor v. Ledbetter*, the Eleventh Circuit Court of Appeals found a sufficient relationship between the state and the foster child such that the child could maintain a section 1983 cause of action.⁶² This case recognized that "[f]ailing to act may, under certain circumstances, be more detrimental than acting."⁶³ Therefore, if the state agency exhibits deliberate indifference and its failure to act is the proximate cause of the injury, then the state may

56. See, e.g., *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (finding liability when defendants had reason to know of the risk to foster children); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (holding that the state agency was liable for injuries sustained by a foster child if the officials had been deliberately indifferent to the child's welfare); *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985) (finding that an affirmative duty to protect the child was created by specific awareness of the danger to the child, and that this duty existed even though the child was not in the custody of the state at the time of the child's death); *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984) (stating that a child was entitled to affirmative protection under the Fourteenth Amendment, even if that child was not in state custody); *Doe v. N.Y. City Dep't of Soc. Servs.*, 709 F.2d 782, 787 (2d Cir. 1983) (stating that liability could be found based on evidence of "deliberate indifference to a known injury, a known risk, or a specific duty").

57. See Schmiedel, *supra* note 26 at 20. See also Hansen, *supra* note 41, and accompanying text.

58. *Doe v. N.Y. City Dep't. of Soc. Servs.*, 709 F.2d at 791-92.

59. *Id.*

60. *Id.* at 791.

61. *Id.*

62. *Taylor*, 818 F.2d at 791.

63. *Id.* at 800.

be liable.⁶⁴ The court found that the child was entitled to the “state’s protection from harm” based on the duties and responsibilities mandated for the agency by state law.⁶⁵ The court based its holding on the reasoning of *Youngberg* and *Estelle*, noting that “it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.”⁶⁶

Most importantly, before the *DeShaney* decision, a duty to children who were not in the state’s custody was recognized in at least one circuit. In *Estate of Bailey v. County of York*, the Third Circuit Court of Appeals recognized that the duty to protect a child from abuse was not limited to situations where the child was in state custody.⁶⁷ The court based its finding that a special relationship existed on the fact that the agency was aware of the suspected abuse and potential danger.⁶⁸ The court found that when the agency knows that a child is being abused, then there may be “some sort of special relationship” giving rise to liability.⁶⁹ Also, in *Jensen v. Conrad* the Fourth Circuit Court of Appeals recognized a constitutional right to be free from harm that was not limited to children in foster care.⁷⁰ Although the state actors were not held liable because of the qualified immunity doctrine,⁷¹ the court noted that the right to protection could be extended to include such children not in state custody, in certain circumstances.⁷²

What is important in these cases is the fact that courts were willing to recognize that a failure to act could violate a child’s right to be free from

64. *Id.* at 799.

65. *Id.* at 800.

66. *Id.* at 797.

67. *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985).

68. *Id.* (The court noted that the agency had taken temporary custody, and that the child had been examined by a physician who confirmed abuse. However, the agency had returned the child to the mother’s custody prior to the time of the child’s death. Even though the child was no longer in the custody of the state, there was a duty to protect the child created by the agency’s awareness of the abuse.)

69. *Id.* at 511. “When the agency knows that a child has been beaten, ‘[t]his strengthens the argument that some sort of special relationship had been established.’” *Id.* at 510-11 (quoting *Jensen v. Conrad*, 747 F.2d 185, 195 n.11 (4th Cir. 1984)).

70. *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984).

71. The court holds that “[a]ll of the defendants were entitled to a good faith immunity defense against liability under § 1983,” because the law was not clearly established such that the defendants “could reasonably have been expected to know that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their Fourteenth Amendment rights.” *Id.* at 195.

72. *Id.* at 193. The court applied the reasoning of *Estelle* and its progeny and found that a right to protection for children may exist given the proper factual situation. *Id.* Because the court decided on grounds of immunity, it did not need to reach this issue. *Id.* at 195.

harm.⁷³ State agencies were found liable because they had an affirmative duty to protect the child from harm.⁷⁴ This duty was created by factors such as specific awareness of potential harm, custody of the child, or statutory mandates. However, the lack of custody did not automatically mean that the state would not be liable for the child's injuries or death.⁷⁵

B. The Supreme Court's Limitation on Children's Right to Safety: DeShaney v. Winnebago County Department of Social Services

From the time that Joshua DeShaney was two-years-old, he suffered continual abuse at the hands of his father, who was his custodial parent.⁷⁶ Social Services received repeated reports of the abuse.⁷⁷ First, in January of 1982, Joshua's step-mother reported abuse, and as a result, the Department of Social Services ("DSS") interviewed Joshua's father, who denied the allegations.⁷⁸ Second, a year later, Joshua was admitted to the hospital with abrasions and bruises; the doctor contacted DSS, who put together an emergency team.⁷⁹ The team determined that there was insufficient evidence, and Joshua was again placed in his father's custody.⁸⁰ Third, a month after this incident, Joshua was again admitted to the hospital with suspicious injuries,⁸¹ but the caseworker determined that there was not a basis for action.⁸² Fourth, for six months, the caseworker herself visited the family and observed suspicious bruising and noted her own suspicion of abuse; no action was taken.⁸³ Fifth, Joshua was again admitted to the hospital, but again no action was taken.⁸⁴ Finally, over two years after the first report of abuse to DSS, Joshua DeShaney's father beat him until he was in a coma.⁸⁵ As a result, Joshua suffered permanent and severe mental retardation.⁸⁶

Joshua's father faced criminal charges for child abuse.⁸⁷ Joshua and his mother filed a lawsuit in federal court, under section 1983, alleging that DSS

73. *Taylor v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987).

74. *See id.* at 799.

75. *See Estate of Bailey v. County of York*, 768 F.2d 503, 504 (3d Cir. 1985).

76. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 191-92 (1989).

77. *Id.* at 192.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 192-93.

84. *Id.* at 193.

85. *Id.*

86. *Id.*

87. *Id.*

deprived Joshua of his liberty “by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known.”⁸⁸ The district court granted summary judgment for defendants, and the Seventh Circuit affirmed on appeal, holding that the state had no duty under the Fourteenth Amendment to protect citizens from private violence.⁸⁹

In an opinion written by Chief Justice Rehnquist, the Supreme Court affirmed the summary judgment.⁹⁰ The Court stated that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”⁹¹ Because there was no constitutional requirement that the government provide such protection, the Court reasoned the state could not be liable for injuries that resulted when protective services were not provided.⁹² Further, the Court rejected plaintiffs’ argument that the “special relationship doctrine” applied in this case to create a duty where one generally did not exist.⁹³ The Court found that the department’s alleged knowledge of the abuse of Joshua DeShaney was not sufficient to create a “special relationship.”⁹⁴ The Court held that the special relationship doctrine would only apply where the individual was under the custody and control of the state.⁹⁵ The Court further found that the fact that Joshua had been temporarily in state custody was not sufficient because he was not in state custody at the time of the incident that caused the injury.⁹⁶ The Court

88. *Id.*

89. *Id.* at 193-94.

90. *Id.* at 191. Chief Justice Rehnquist was joined by Justices White, Stevens, O’Connor, Scalia and Kennedy. *Id.* at 190. Justices Brennan, Marshall, and Blackmun dissented. *Id.*

91. *Id.* at 195. The Court further stated that the Due Process Clause is not a guarantee of a minimal level of safety and security. *Id.*

92. *Id.* at 196.

93. *Id.* at 197-98. Plaintiffs argued that even though there was no affirmative duty to provide protective services to the public, a duty to do so could arise if a “special relationship” was created with respect to particular individuals, and that in this case, such a special relationship was created. *Id.* at 197.

94. *Id.* at 198. The Court noted that in some limited circumstances, the relationship between the state and the individual could be such that a duty was created. *Id.* However, the Court found that the cases where this was allowed, including those involving prisoners and involuntarily committed mental health patients, involved individuals who were deprived of their liberty to move and unable to care for themselves. *Id.*

95. *Id.* at 199.

96. *Id.* at 201. The Court noted that the fact that Joshua had temporarily been in state custody did not change the analysis, and that returning Joshua to his father was “plac[ing] him in no worse position than that in which he would have been had it not acted at all” *Id.*

reasoned that “the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter.”⁹⁷

Justice Brennan wrote a dissenting opinion, in which Justices Blackmun and Marshall joined.⁹⁸ Justice Brennan argued that the focus of the analysis should be on the actions taken by the state with respect to Joshua and other abused children.⁹⁹ From this focal point, Brennan argued, Joshua’s case comes within the protection established by *Youngberg* and *Estelle*.¹⁰⁰ The department had control over Joshua’s situation; it determined what steps to take and “whether to disturb the family’s current arrangements.”¹⁰¹ Further, because the structure of the department relieved other individuals of “any sense of obligation to do anything more than report their suspicions,” the department’s failure to remove Joshua “effectively confined [him] within the walls of Randy DeShaney’s violent home.”¹⁰² Brennan concluded by condemning the majority opinion for its “failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it.”¹⁰³

1. Post-DeShaney and the Establishment of the Right to Adequate and Safe Foster Care

Because *DeShaney* limited the right of children to safety to those children who were in state custody and control,¹⁰⁴ many subsequent cases

97. *Id.*

98. *Id.* at 203 (Brennan, J., dissenting). A separate dissent was written by Justice Blackmun as well. *Id.* at 212-13 (Blackmun, J., dissenting). Blackmun accused the Court of applying “sterile formalism,” and ignoring the fact that the case involved active state intervention, not mere passivity. *Id.* at 212. He compared the Court in this opinion to “antebellum judges who denied relief to fugitive slaves.” *Id.* Compassion, he argued, “need not be exiled from the province of judging.” *Id.* at 213. He ended with a passionate lament:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles – so full of late of patriotic fervor and proud proclamations about “liberty and justice for all” – that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve – but now are denied by this Court – the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.

Id. at 213.

99. *Id.* at 205.

100. *Id.* at 208.

101. *Id.* at 209.

102. *Id.* at 210.

103. *Id.* at 212. Further, he charged that the “opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent.” *Id.*

104. *Id.* at 201.

have dealt with when the right arises for children who are in fact in the state's custody.¹⁰⁵ These cases have clearly defined a right of foster children to safe and adequate care.¹⁰⁶ For example, in *K.H. through Murphy v. Morgan*, the Seventh Circuit Court of Appeals held that under the reasoning of *Youngberg*, a foster child has a constitutional right to safety in the foster home.¹⁰⁷ The case involved a foster child who was sexually abused by one of the foster parents.¹⁰⁸ The court found that under *DeShaney*, the defendants would not have been liable if they had left the child in the home of her abusive parents.¹⁰⁹ However, since the defendants had removed the child, "the state assumed at least a minimal responsibility for her safety."¹¹⁰

Post-*DeShaney* cases have clearly established and defined the right of children in state custody to safety while in foster care.¹¹¹ The courts' general willingness to find that this right exists, and willingness to hold state agencies liable for violations of this right when children are abused in foster homes, is an important acknowledgement of the constitutional rights of children to be free from harm. However, while this right as it exists for foster children is defined, the rights of children who are not in the state's custody are still uncertain.¹¹²

105. See, e.g., *K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883 (10th Cir. 1992).

106. Schmiedel, *supra* note 26, at 107-08 (noting that "without exception, every post-*DeShaney* Circuit Court opinion that has decided this question has ruled in favor of the foster children plaintiffs.").

107. *K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990).

108. *Id.*

109. *Id.* at 848-49.

110. *Id.* at 849.

111. See Schmiedel, *supra* note 26, at 107-08 (stating that "since *DeShaney* was decided, the right has become firmly established, being recognized by every Circuit Court that has ruled on the question").

112. See *id.* at 16 (noting that "a number of courts have expanded the class of children who enjoy liberty rights to safe conditions to include certain children who are not, strictly speaking, in the custody of the state").

III. ISSUES AFFECTING THE LIABILITY OF THE STATE FOR HARM TO CHILDREN

A. Inherent and Valid Limits on Liability

1. Deliberate Indifference is the Standard

The standard for liability of a state agency under section 1983 is deliberate indifference.¹¹³ In *Estelle v. Gamble*, the Court articulated that the standard of liability for a prisoner's claim of a constitutional violation was deliberate indifference to the well-being of the prisoner.¹¹⁴ Mere negligence will not suffice; the plaintiff must show that there was knowledge or notice of the danger and a deliberate failure to act to protect the plaintiff.¹¹⁵ Thus, for example, in *Nicini v. Morra*, the Third Circuit Court of Appeals affirmed summary judgment for defendants because the conduct of the Department of Youth and Family Services did not meet the deliberate indifference standard.¹¹⁶ The court found that defendant's conduct in investigating the foster parent's background amounted only to negligence, if it amounted to anything at all.¹¹⁷ Similarly, in *White v. Chambliss*, the Fourth Circuit Court of Appeals held that the plaintiffs were unable to meet the burden of establishing deliberate indifference because there was no evidence that defendants had any knowledge or awareness of any abuse in the foster home.¹¹⁸

The deliberate indifference standard acts as a limit on the liability of state agencies and ensures that they will not be forced to pay damages for

113. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (stating that "in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs"); *Thelma D. v. Bd. of Educ. of St. Louis*, 669 F. Supp. 947, 949 (E.D. Mo. 1987) (stating that the "plaintiff must demonstrate 'deliberate indifference or tacit authorization [by officials] of the offensive acts by [failure] to take remedial steps following notice of a pattern of such acts by . . . subordinates'") (quoting *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986)); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (holding that the deliberate indifference standard applies to actions under § 1983 alleging violation of foster children's rights).

114. *Estelle*, 429 U.S. at 106.

115. *Thelma D.*, 669 F. Supp. at 949. *See also* *Darby v. California*, 2001 U.S. App. Lexis 481 (9th Cir. 2001) (holding that where there is insufficient evidence of a policy or custom that amounted to deliberate indifference, defendants would not be held liable).

116. *Nicini v. Morra*, 212 F.3d 798, 814-15 (3d Cir. 2000).

117. *Id.* at 815.

118. *White v. Chambliss*, 112 F.3d 731, 736 (4th Cir. 1997). The court noted that there was no evidence that the social services workers knew or suspected abuse in this foster home, that the foster parents were licensed and approved, and that there was no evidence of any previous allegation of abuse being made. *Id.* The court further stated that "a claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice." *Id.* at 737.

mere negligent actions or inactions. Given that the system is overburdened, it is important to eliminate the possibility of liability for mere negligence.¹¹⁹ Social workers are only human and are almost always doing their very best to protect children. Mistakes will happen, and to hold the state agent liable for mere negligence may do more harm than good by causing a further hindrance on the ability of the agency to be effective. As Justice Brennan noted in his dissent in *DeShaney*, “that the Due Process Clause is not violated by merely negligent conduct . . . means that a social worker who simply makes a mistake of judgment under what are admittedly complex and difficult conditions will not find herself liable in damages under section 1983.”¹²⁰ Given that this limitation is already present, the *DeShaney* limitation is unnecessarily stringent.¹²¹

2. The Immunity Defense – Another Limit on Liability

Qualified immunity exists for government actors as a defense to claims under section 1983 for damages resulting from violations of constitutional rights. Qualified immunity derives directly from the Eleventh Amendment¹²² and exists both when the claim is against the state itself and when the claim is against officials acting in their official capacity.¹²³ Qualified immunity acts as a shield to liability for individual government actors if certain criteria are met.¹²⁴ For the qualified immunity defense to apply, it must be shown that the law was unclear as to whether there was a right which was being violated.¹²⁵ In order for the plaintiff to defeat the defendant’s defense of qualified immunity, “the plaintiff must show that the law was clearly established when the alleged violation occurred and must

119. Child welfare is an overwhelmed and overburdened system. See *supra* notes 37-38, and accompanying text.

120. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 211 (1989). Brennan also notes that under the *Youngberg* rule, a caseworker would not be liable for a mistake that was made in exercise of sound professional judgment. *Id.*

121. See *id.*

122. The Eleventh Amendment provides: “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

123. See *Sophamysay v. City of Sergeant Bluff, Iowa*, 126 F.2d 1180, 1187-88 (3d Cir. 2000).

124. R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 4 (1998).

125. *Id.* “Defendants will not be personally liable in damages if their conduct did not violate relevant federal constitutional or statutory rights of the plaintiff that were clearly established at the time of the defendant’s act and of which a reasonable person or a reasonable official would have known.” *Id.*

come forward with sufficient facts to show the official violated that clearly established law.”¹²⁶ This means that if the state can show there was no clarity as to the child’s right to be free from harm, then immunity will likely apply.

In *L.J. v. Massinga*, the court found that the defendants could not establish qualified immunity because at the time, it was clear that the state had a duty to protect children in foster care.¹²⁷ Defendants argued, however, that the current state of the law was unclear as to whether they could be held liable if they placed a child into an unsuitable home.¹²⁸ Therefore, defendants argued, their inactions and failures could not lead to liability.¹²⁹ The court rejected this argument and agreed with the lower court’s finding that “defendant’s statutory duty was clear and certain.”¹³⁰ The court based this finding on the fact that within the statute that created the foster care program, there was a clear duty to “assure that a child in foster care receive[d] proper care.”¹³¹ The court evaluated the statutory provisions that governed the child protective services agency and determined that the scheme “spell[ed] out a standard of conduct” and created “corollary rights in plaintiffs.”¹³²

Qualified immunity is important because it acts as a valid limit on liability where the actor could not have known that the law would hold him or her liable for the violation. Qualified immunity serves the purpose of protecting “mistaken but not plainly incompetent judgments or knowing violations of the law.”¹³³ The Supreme Court has recognized the importance of protecting public officials from “undue interference with their duties and from potentially disabling threats of liability.”¹³⁴ Particularly in areas like child welfare where workers are faced daily with difficult judgment calls, qualified immunity is legitimate and necessary. Government actors may be deterred from properly doing their jobs “by fear of legal liability, [and] also by the various costs of having to defend their conduct in lengthy litigation.”¹³⁵

However, while valid, qualified immunity is difficult to apply. This is particularly true of areas like child welfare.¹³⁶ First, child welfare issues

126. *Foote v. Spiegel*, 118 F.3d 1416, 1424 (10th Cir. 1997).

127. *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988).

128. *Id.* at 121.

129. *Id.*

130. *Id.* at 122.

131. *Id.* at 123 (internal quotation marks omitted).

132. *Id.*

133. *Wright*, *supra* note 124, at 4.

134. *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)).

135. *Wright*, *supra* note 124, at 4-5.

136. *See id.*

inherently involve a “balancing test,” which can complicate the analysis of qualified immunity.¹³⁷ Because child protective services workers’ decisions must be made while carefully balancing the interests of the child, the parents, and the public, the outcome is difficult to predict, and the defendant can use this fact to argue that the plaintiff’s rights were not clearly established.¹³⁸ For example, in *Manzano v. South Dakota Dep’t of Soc. Servs.*, the court stated that “[t]he need to continually subject the assertion of this abstract substantive due process right to a balancing test which weighs the interest of the parent against the interests of the child and the state makes the qualified immunity defense difficult to overcome.”¹³⁹ Second, the rights of children to be free from harm can be characterized as emerging rights. Generally, qualified immunity is “biased against the real enforceability of emerging, newly recognized, or controversial constitutional and other federal rights.”¹⁴⁰ Currently, it is uncertain whether children not in state custody have any substantive right to protection at all. Given the current uncertainty of when a duty to protect a child arises,¹⁴¹ the qualified immunity defense is likely to prevail in these lawsuits against state agencies. This defense is another way that liability can be severely limited.¹⁴² Until the Court clearly defines the existence and boundaries of children’s substantive due process rights, plaintiffs will likely be unsuccessful in bringing about section 1983 actions in the area of child abuse investigations. While qualified immunity is a legitimate and important part of section 1983 law, its harshness, combined with the uncertainty of the law in this area, may prevent recognition of children’s constitutional rights.

B. Current Approaches and Rules: When does Liability Arise?

1. Special Relationship Doctrine: Custody or Control

The special relationship doctrine is an exception to the general rule that the state does not have an affirmative duty to protect an individual from

137. *See id.* at 8.

138. *Id.* Wright uses child abuse cases as an example of the “systematic bias of balancing tests against plaintiffs, given the nature of the test for qualified immunity.” *Id.*

139. *Manzano v. South Dakota Dep’t of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1991).

140. Wright, *supra* note 124, at 9.

141. *See* discussion *infra* Section I.

142. Scholars argue that the severity of the qualified immunity defense creates injustice to litigating parties. Wright, *supra* note 124, at 3.

harm by a private actor.¹⁴³ There may be a special relationship between the government and the individual that gives rise to an affirmative duty to protect the individual.¹⁴⁴ “When a special relationship exists between a person and the state, however, the state must affirmatively protect the individual against the violation of his or her constitutional rights by the private actions of a third party.”¹⁴⁵

The special relationship doctrine will apply if the state restrains or limits the freedom of the individual to act.¹⁴⁶ “Total and exclusive custody, not mere restraint, is at the heart of a due process claim relying upon a special relationship.”¹⁴⁷ In the area of child welfare agency liability, the special relationship rule was defined and limited in *DeShaney v. Winnebago County Dept. of Soc. Servs.*¹⁴⁸ In *DeShaney*, the Supreme Court held that the state would not be liable for failing to protect a child from abuse where the harm did not occur while the child was in the custody of the state.¹⁴⁹ Subsequently, a “special relationship” exists between the government and the child when the child is in the state’s custody or control.¹⁵⁰ For example, in interpreting the *DeShaney* rule, the court in *Pierce v. Delta County* found that the special relationship doctrine applies only if the child is actually in the state’s physical and legal custody.¹⁵¹ Other circuits have interpreted the rule similarly.¹⁵²

2. State Created Danger Doctrine: Majority Approach

The state created danger doctrine also allows for state liability when harm is caused by the actions of a private individual.¹⁵³ This doctrine applies when the state takes some action that creates or increases the danger that results in the injury to the victim.¹⁵⁴ Usually, the court will require an

143. *Maxwell v. School District of Philadelphia*, 53 F. Supp. 2d 787, 790-91 (E.D. Pa. 1999).

144. *See id.* at 791.

145. *Id.* at 790-91.

146. *Id.* *See also* *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

147. *Maxwell*, 53 F. Supp. 2d at 791.

148. *DeShaney*, 489 U.S. at 200-02.

149. *Id.* at 201.

150. *See id.* at 199-200.

151. *Pierce v. Delta County*, 119 F. Supp. 2d 1139, 1150 (D. Colo. 2000).

152. *See, e.g., Sayles v. Pennsylvania*, 24 F. Supp. 2d 393 (M.D. Pa. 1997) (holding that the state had no duty to the child because the state had not taken custody of the child). In *Sayles*, the district court interpreted the doctrine extremely narrowly, finding that there was no special relationship even though the child was in foster care at the time. *Id.* at 397. The court distinguished this case from other foster care cases where liability was imposed because here the parents had voluntarily placed the child in foster care, so the state did not actually take custody. *Id.*

153. *Schieber v. City of Philadelphia*, 156 F. Supp. 2d 451 (E.D. Pa. 2001).

154. *See id.*

affirmative act on the part of the state which is responsible for bringing the danger into existence.

In *Pierce v. Delta County*, the court further held that the state created danger doctrine did not apply because the defendants did not undertake “any affirmative acts which created or increased the risk of harm to [the] plaintiffs.”¹⁵⁵ The court applied a five-part analysis to determine the state created danger issue.¹⁵⁶ The court stated,

[T]he danger to [plaintiff child] and her brothers existed prior to any nonfeasance on the part of the defendants. In situations such as this one where state actors did not disturb the status quo by removing the children and then placing them in an abusive environment, or removing the children and then returning them to that environment, but, rather, simply failed to remove the children from the abuser in the first place, courts have been reluctant to accept the danger-creation theory as a means of circumventing *DeShaney*.¹⁵⁷

A more difficult area under the state created danger doctrine occurs when the state temporarily removes a child and then returns him or her to the abusive home. *Pierce* left open the possibility of this situation leading to liability.¹⁵⁸ However, in *S.S. v. McMullen*, the Eighth Circuit Court of Appeals held that there was no liability for the state where the social services agency placed the child back into an abusive home.¹⁵⁹ The court reasoned

155. *Pierce*, 119 F. Supp. 2d at 1151.

156. *Id.* at 1150. The five part rule is:

(1) plaintiffs were members of a limited and specifically definable group; (2) defendants' conduct put plaintiffs at substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, “shocks the conscience of federal judges.”)

Id.

157. *Id.* at 1152.

158. *Id.* In finding that the state-created danger doctrine did not apply, the court in *Pierce* specifically noted that this was not a situation where the state actors had removed the children and then returned them to that abusive environment. *Id.* This indicates that such a case would be distinguishable from *Pierce* and other cases where the status quo was not disturbed, and therefore there may be liability in those cases.

159. *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000), *cert. denied* 532 U.S. 904 (2001). It was believed by some scholars that *S.S.* would be the case that the Supreme Court took up to re-evaluate the issue of children's right to safety. See Jonathan Ringel, *Supremes to Review Child Abuse and Due Process*, *American Lawyer Media*, THE RECORDER, Feb. 26, 2001, at 7. Ringel noted that if the Supreme Court granted review in *S.S.* it would have the opportunity to determine whether *DeShaney* prevented liability in a situation where the child was removed and then returned to the abusive home. *Id.* *S.S.* was thought to be a possible candidate for Supreme Court review because of the split

that by returning the child to an abusive home, social services was merely returning the child to a dangerous situation, not increasing the danger or creating a new danger.¹⁶⁰ The court recognized that “drawing a distinction between exposing a child to a dangerous environment and returning her to an equally dangerous one may seem to some to be gratuitous,” but found that this distinction was necessary under *DeShaney*.¹⁶¹

3. The Tenth Circuit Rule: *Currier v. Doran*

In the recently decided case *Currier v. Doran*, the Tenth Circuit Court of Appeals held that *DeShaney* did not prevent liability for a social worker and supervisor for child abuse injuries that occurred after the child was removed by social services from one parent’s home and placed in the home of the other parent.¹⁶² The case involved two young children who were removed from their mother’s home after social services confirmed neglect.¹⁶³ Social services recommended to the court that the children be placed in the physical custody of their father, and the court complied with this recommendation.¹⁶⁴ Subsequently, the father also gained legal custody of the children.¹⁶⁵ Social services received repeated reports of abuse, and one social worker, Doran, observed some bruising.¹⁶⁶ At one point, the social worker observed bruising that indicated bite marks on both children, and was informed that the father had bitten one of them.¹⁶⁷ The children were removed temporarily from the father’s custody, but when the social worker “failed to strongly advocate [in court] against return of the children to [their father],” he regained custody.¹⁶⁸ Subsequent to this, another social worker, Medina, and a supervisor, Gonzales, observed bruising on the children and were told that the children received spankings with a belt. The caseworker and the supervisor were then warned of the danger of the

opinions in the circuits on this issue. *Id.* The Supreme Court, however, denied certiorari on March 5, 2001. *S.S.*, 532 U.S. 904.

160. *Id.*

161. *Id.* at 963.

162. *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 543 (2001).

163. *Id.* at 909.

164. *Id.* Based on social worker Medina’s recommendation, the court granted custody to the father. *Id.*

165. *Id.* Plaintiffs argued that the father was able to get physical custody of the children either because of the social worker’s failure to investigate allegations that the father was abusive, or because of the social worker’s affirmative recommendation to the court to grant the father custody. *Id.*

166. *Id.* The children’s mother told the guardian ad litem that the children were abused by their father and his girlfriend; this was reported to social services. *Id.* Additionally, the social worker noticed bruises on Anthony’s face on more than one occasion and on Latasha’s back on at least one occasion. *Id.* at 909-10.

167. *Id.* at 910.

168. *Id.*

situation again by the guardian ad litem.¹⁶⁹ Still, no action was taken by social services to protect the children.¹⁷⁰ Finally, the father poured boiling hot water over the young boy, causing severe burns that covered most of his body.¹⁷¹

After this happened, social services regained custody of the children, and the mother filed suit against the department under section 1983.¹⁷² The lawsuit alleged that the two children's constitutional rights had been violated.¹⁷³ Defendants filed a motion for summary judgment, arguing that *DeShaney* prevented the court from finding them liable.¹⁷⁴ The district court denied summary judgment, holding that *DeShaney* did not preclude plaintiff's claims because the state played a role in creating the danger.¹⁷⁵

On appeal, the Tenth Circuit found that although under *DeShaney* there was no constitutional duty to protect citizens from private acts of violence, there was an exception to this general rule.¹⁷⁶ This exception exists when the state has created a situation that puts a child at risk of danger by a private individual.¹⁷⁷ To determine if the state created danger doctrine exists, the court applied the following six-factor test:

[A] plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known;

169. *Id.* On each occasion that bruising was observed, the social workers concluded that it was a result of something other than abuse. *Id.* at 909-10. After these repeated allegations of abuse and observations of bruising, the social workers told the children's mother to stop making allegations because it was causing trauma to the children. *Id.* at 910.

170. *Id.*

171. *Id.* at 910. "Doctors at the emergency room indicated that Anthony was bruised everywhere he was not burned." *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 910-11. See also *Currier v. Doran*, 23 F. Supp. 2d 1277 (D.N.M. 1998). The district court relied on the holding of *Ford v. Johnson*, where the court in Pennsylvania held that the state was liable for the death of Shawntee Ford even though she was in her father's custody when her father killed her. *Id.* See also *Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995). In *Ford*, the court reasoned that the state played a role in creating the danger for Shawntee because it granted custody to the father despite a prior order, which under state law should have precluded him from gaining custody. *Id.* at 232.

176. *Currier*, 242 F.3d at 918.

177. *Id.*

(5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.¹⁷⁸

In applying this test to the social worker, the court found that he had created a danger by failing to investigate the numerous allegations of abuse.¹⁷⁹ The court further found that the other factors were met and held that the social worker could be held liable under the state created danger doctrine.¹⁸⁰

IV. POLICY CONSIDERATIONS

A. Other Means of Holding the State Agency Accountable

1. Independent Oversight Offices

Some states are reacting to the public outcry about their failure to protect abused and neglected children by establishing ombudsman offices charged with oversight of the social services system.¹⁸¹ These offices are created and designed “to protect the legal rights of children in state care and to monitor programs, placements, and departments responsible for providing children’s services.”¹⁸² Rhode Island was one of the first states to establish such an office.¹⁸³ In addition to investigatory and advocacy duties, the

178. *Id.* at 918 (quoting *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998)).

179. *Id.* at 919-20. Social worker Doran engaged in conduct that placed the children at “obvious risk of serious, immediate, and proximate harm, a harm that Doran recklessly and consciously disregarded.” *Id.* at 920. Further, Doran’s actions could be found conscious shocking. *Id.*

180. *Id.* As to Gonzales, the court also found that there could be liability under this exception. *Id.* at 923. However, as to Sentell and Medina, there could be no liability. *Id.* at 921-22.

181. See D’Ambra, *supra* note 40.

In recent years, a growing number of states have developed ombudsman offices for the protection of children in need of state care and intervention. This national trend is directly related to public concern regarding the inadequacy of child welfare systems to protect and care for children who are victims of physical abuse, sexual abuse, and neglect.

Id. The establishment of ombudsman offices as a means of accountability for state agencies has been strongly encouraged by the American Bar Association Center on Children and the Law. *Id.* (citing Howard A. Davidson et al., *Establishing Ombudsman Programs for Children and Youth: How Government’s Responsiveness to its Young Citizens can be Improved*, A.B.A. Center on Children & Law (1993)).

182. *Id.*

183. *Id.* Rhode Island’s Office of the Child Advocate is charged with “address[ing] complaints related to government services for children and youth; [providing] a ‘system accountability’ mechanism; and [protecting] the interests and legal rights of children and their families who are parties in the child welfare and juvenile justice arenas.” *Id.* Rhode Island’s Office of the Child Advocate has been used as a model ombudsman office on which many states have based their own

Rhode Island Office of the Child Advocate has the power to file suit against the state.¹⁸⁴ Partly in response to the horrific Terrell Peterson case, the state of Georgia created the Office of the Child Advocate (“OCA”) in 2000.¹⁸⁵ In establishing the OCA, the Georgia legislature recognized that “the needs of children must be attended to in a timely manner and that more aggressive action should be taken to protect children from abuse and neglect”¹⁸⁶ The OCA has the responsibility of “provid[ing] children with an avenue through which to seek relief when their rights are violated by state officials and agents entrusted with their protection and care.”¹⁸⁷ The OCA’s primary function under its legal mandate is to investigate complaints regarding the failure of state agencies to provide adequate and appropriate protective services for children.¹⁸⁸

Because ombudsman offices generally have the duty and authority to investigate the failures of state agencies charged with providing child protective services, they provide a governmental check on its own actions.¹⁸⁹ As cases like the Terrell Peterson case come to the public’s attention, states are finding that they have to respond, and ombudsman offices are therefore used as a method of providing accountability. The close scrutiny of the system that these offices engage in is bringing about reform and accountability.¹⁹⁰

oversight offices. *See id.*

184. *Id.* See also Jane O. Hansen, *Georgia’s Forgotten Children; Is bill strong enough to save lives?*, ATLANTA J. CONST., Mar 5, 2000, at C1. Comparing Rhode Island’s ombudsman office to others around the country, the ability to sue is an important factor, which may be responsible for the success of the office. *Id.* In the eleven years since Rhode Island opened its ombudsman office, Child Advocate Laureen D’Ambra has won every lawsuit she has brought. *Id.*

185. See Georgia Child Advocate for the Protection of Children Act, GA. CODE ANN. § 15-11-170 (2000). See also Georgia Office of the Child Advocate, *Mission Statement*, at <http://www.gachildadvocate/mission.org> (last visited Aug. 19, 2002); Richard Whitt, *Overseer of Fulton DFACS is named Watchdog will review all cases handled by troubled county agency*, ATLANTA J. CONST., Feb. 16, 2000, at E1 (“Citing Terrell’s death, Gov. Roy Barnes . . . called for approval of legislation creating an Office of Child Advocate to serve as a watchdog over DFACS.”).

186. Georgia Child Advocate for the Protection of Children Act, GA. CODE ANN. § 15-11-170 (2000).

187. *Id.* The OCA has the authority to “provide independent oversight of persons, organizations, and agencies responsible for providing services to or caring for children who are victims of child abuse and neglect, or whose domestic situation requires intervention by the state.” *Id.*

188. GA. CODE ANN. § 15-11-173 (2000). To accomplish this, the OCA has access to all files and records, has the authority to inspect all facilities and residences where a child is placed, and has the ability to request a writ of mandamus from the Governor to require the agency to take action. GA. CODE ANN. § 15-11-174 (2000).

189. See D’Ambra, *supra* note 40.

190. *See id.*

2. State law tort claims

While in federal court, plaintiffs claiming a violation of their right to be free from harm will run into the *DeShaney* roadblock, and those children harmed by their own parents will likely not have a claim.¹⁹¹ However, this will not preclude the plaintiffs from suing under state tort law.¹⁹² This has been recognized in federal court opinions, as an apparent consolation when holding that the plaintiffs cannot establish a claim.¹⁹³ For example, in California, state law allows for liability in tort when an injury is caused by a public entity's failure to discharge a mandatory duty.¹⁹⁴ In South Carolina, there may be liability when a government entity is negligent in not properly performing its duty.¹⁹⁵ However, in some states, claims will still face the hurdle of sovereign immunity.¹⁹⁶

B. Policy Ramifications

1. Tensions on the Overburdened System

There is some merit to the argument that any rule that allows for increased liability will inevitably prevent caseworkers from effectively doing their job because their concern will be focused on defending lawsuits. Furthermore, child protective services already face tremendous turnover of caseworkers,¹⁹⁷ which may be increased when caseworkers are faced with

191. See *infra* Section II, B, and accompanying notes.

192. In the Terrell Peterson case, for example, attorney Don Keenan filed in both state and federal court. See Hansen, *supra* note 8. When the federal suit was dismissed, the state court suit was still pending. See *id.* In Indiana, the Social Services Administration, a caseworker, and county commissioners were sued in state court after a three-year-old girl died from abuse. Sandra Wiley, *Mom Says DFC didn't do its job*, HERALD-PRESS ONLINE, Oct. 1, 2001, at <http://www.hponline.com/archives/Oct2001/100101/mom.htm>. The lawsuit alleged that the state and county officials were negligent in their investigation of the alleged abuse. *Id.* In this case, state law placed a limit on the amount of money that could be sought in such a lawsuit (\$300,000). *Id.*

193. See, e.g., Jensen v. Conrad, 747 F.2d 185, 196 (4th Cir. 1984) (noting that “[a]lthough our decision today leaves the appellants without a remedy in federal court, the victim’s estates still have several causes of action available to them in state court”).

194. See Creason v. Dep’t of Health Servs., 957 P.2d 1323, 1327 (Cal. 1998).

195. Gardner v. Biggart, 417 S.E.2d 858, 859 (S.C. 1992). The South Carolina Tort Claims Act was enacted for the purpose of abrogating sovereign immunity. *Id.* at 860. See also South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10, et seq.

196. See, e.g., Marshall v. Montgomery County Children Servs. Bd., 750 N.E. 2d 549 (Ohio 2001).

197. BARTON CHILD LAW AND POLICY CLINIC, EMORY UNIV. SCH. OF LAW, WORKPLACE SUPPORTS TO IMPROVE GEORGIA’S CHILD PROTECTIVE SERVICES (2002), available at <http://childwelfare.net/activities/legislative2002/workingpaper/> [hereinafter “Barton Paper”] (noting that in Georgia, 44% of caseworkers left their jobs in 2000, and in at least one Georgia county, the turnover rate in 1999 reached 70%).

increased possibility of liability.¹⁹⁸ The child welfare system is definitely overburdened, and resources are scarce. Problems include low pay, inadequate training, heavy workloads, and high turnover rates.¹⁹⁹ The argument can be made that there are better and more effective uses for the already scarce resources than defending lawsuits.²⁰⁰ While lawsuits can be a valuable tool for reform, they may inevitably impair the efficient working of the system.²⁰¹ This argument is a reminder that any new rule which recognizes a right of children to be free from harm, and therefore increases liability, results in costs; costs to the child welfare workers, cost to the system and the state, and inevitably, costs to the community and the taxpayers. These costs must always be considered when developing any new method of liability.

2. Is the Current Rule an Incentive to Ignore Abuse?

Does the rule under *DeShaney v. Winnebago County* create an incentive for children to be left in the home? If the child is removed from the abusive situation (which in an ideal system is what should be happening), then the caseworker is opening herself and her agency to liability for what happens to the child in foster care.²⁰² If, however, the child is left in the abusive home, and left to be continually abused (which would mean that the caseworker is not doing his or her job), then there is no liability.²⁰³ While we do not want child protective services to be overly zealous in removing the child,²⁰⁴ we

198. See Editorial, *Revenge No Answer*, ATLANTA J. CONST., Aug. 24, 2001 [hereinafter "Revenge"]. The editorial's author argued that "[e]xpecting social workers and state welfare officials - or anyone else - to wrestle with the terrifyingly complex issues of possibly abusive home situations without ever making a mistake, on pain of punishment by a court, is absurd Telling them they will face court suits if they ever guess wrongly is pretty much the same as telling them that, if they have any sense, they'd better get into another line of work." *Id.*

199. Child Protective Services Task Force, Georgia Department of Human Resources, *Child Protective Services Task Force Report* (2000), available at <http://www2.state.ga.us/cpstaskforce/index.html>. See also Barton Paper, *supra* note 198; *supra* notes 38-39 and accompanying text.

200. See Nina Bernstein, *Foster-Child Advocates Gain Allies in Injury Lawyers*, N.Y. TIMES, Oct. 27, 2000, at A18 (noting that some officials argue that "litigation unfairly detracts from continuing efforts to improve child welfare, diverting resources that legislatures, not courts, should control.").

201. See *Revenge*, *supra* note 198. This editorial argued that suing the child protective services agency was not the answer to the Terrell Peterson case. *Id.* The editors argued that the lawsuit would actually create a greater risk for other children. *Id.*

202. Once the child is placed in foster care, then the state, and the caseworkers involved, may be liable if harm befalls the child there. See Schmiedel, *supra* note 26.

203. Under the current rule, a caseworker is not liable, no matter how gross her indifference, if the child is left in the abusive home. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201-03 (1989).

204. Under some circumstances, an agency's overzealousness in investigating abuse may result in

do, as a society, want to encourage the worker to remove the child or to take other appropriate protective steps when the child is in danger in the home.²⁰⁵ Administratively, it would be equally as important to effectively hold the state agency or the caseworker accountable for a failure to remove the child from abuse than for placing them in unsuitable foster homes. However, legally, liability under section 1983 is limited in its applicability by the *DeShaney* holding. Section 1983 is important in a policy sense because it has been used to prod officials into enforcing constitutional rights. It is not good policy to limit liability so that state actors are safer by *not* taking steps to enforce rights.

V. IN THE AFTERMATH OF *DESHANEY*: IS THE CONSTITUTION TRULY "INDIFFERENT [TOWARDS] INDIFFERENCE?"

A. *The Problem with DeShaney*

Justice Brennan disagrees with the majority in *DeShaney* because he does not believe that the Constitution is "indifferent to such indifference."²⁰⁶ Judging from the criticism of the *DeShaney* decision by scholars, many agreed with this argument.²⁰⁷ For example, one commentator on the *DeShaney* case noted that "now and again . . . an egregious case comes along epitomizing the Court's usual indifference so dramatically that one's blood boils anew. Such a case is that of Joshua DeShaney."²⁰⁸ The facts of the

allegations of deprivation of the parent's constitutional rights. See, e.g., *Perry v. Wake County Dep't of Soc. Servs.*, No. 5:94-CV-815-BR-2, 1995 U.S. Dist. LEXIS 14586 (E.D.N.C. Sept. 8, 1995) (parents claimed that social services investigation violated constitutional rights to due process, family integrity, and free speech); *In the Matter of Stumbo*, 547 S.E.2d 451 (N.C. Ct. App. 2001) (parents claimed that social services investigation violated their Fourth Amendment rights.).

205. See SS Manual, *supra* note 35.

206. *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting).

207. See, e.g., Peter Edelman, *Boy Abused by Father Becomes Another Victim of High Court's Callousness*, MANHATTAN LAWYER, Mar. 28, 1989, at 14 ("[O]ur current constitutional jurisprudence is callous toward some of the more powerless in the United States."); Charles D. Gill, *Children Need a Bill of Rights of their Own*, Nat'l L.J. 12 (1990) (arguing that children need constitutional rights, "including the right to be protected from physical assaults and perhaps to live in a safe environment"). See also Benjamin Zipursky, Note, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990); Aviam Soifer, *Moral Ambition, Formalism and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989).

208. Edelman, *supra* note 207, at 14. Edelman went on to state:

Joshua DeShaney's case is so outrageous because he is an individual casualty. Failure to protect his liberty had concrete, tragic effect. It is of course true that his brain cannot be restored no matter how much money someone pays now, but a constitutional doctrine that holds the state responsible might get help for the next Joshua before the ultimate damage is done. And, just as important, it might be a much more appropriate statement of where we stand as a society if our constitutional doctrine were to say that what happened here is unacceptable and will not be tolerated.

Id.

DeShaney case were a horrendous example of what can happen when the system fails a child. Despite the shocking indifference of the social service workers and the cruelty of the life-altering damage to Joshua, the court failed to recognize liability, in effect finding that such deliberate indifference to the safety of the child was not unacceptable. Joshua DeShaney was failed by his father, by the system designed to protect him and then by the Court.

B. Arguments for a New Rule

A better rule may be found in a readjustment of the state-created danger analysis. The state should be held liable whenever the state agency, with deliberate indifference to the child's welfare, places the child into a dangerous situation, and that placement directly results in injury. This should not be limited to placements where the state maintains custody; the state should be equally liable for placing a child into an abusive parent's custody as for placing a child into an unsuitable foster home.²⁰⁹ If the state places an abused child back into the home of the abuser, or removes a child from one parent's home and places him or her into another abusive parent's home, then the state has created a danger for that child.²¹⁰ Although danger existed before, this danger had been eliminated by the state's removal (albeit temporary) of the child from the home.²¹¹ Therefore, when the state moves the child from the assumingly safe environment of a foster home back into the abusive situation, the state is creating a danger.²¹² The determination to move the child is made by the state agency. Should the fact that the movement in one situation is to a parent's home and in the other to a foster home change the analysis? Arguably, it should not, if in both instances the state was aware of the danger into which it was placing the child.

209. In an amicus curiae brief for the petitioners in the *DeShaney* case, the ACLU Children's Rights Project, et al. argued that "the existence of that right [to personal security] does not and should not depend on whether Joshua was in the formal legal custody of the state or in the state's institutional care." Brief of Amici Curiae American Civil Liberties Union Children's Rights Project et al. at 154, *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 1987 U.S. Briefs 154 (1988) (No. 87-154). See also *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2000).

210. See *S.S. v. McMullen*, 225 F.3d 960, 967-68 (8th Cir. 2000) (Gibson, J., dissenting). See also Schmiedel, *supra* note 26, at 18 (arguing that "abused children returned to abusive parents" also need Fourteenth Amendment rights to safety).

211. See *id.*

212. See *id.* at 968. Judge Gibson argues that where the agency does not merely fail to protect the child, but affirmatively acts to place the child in a dangerous situation, regardless of whether that situation is with a parent or with a foster parent, the state should be liable. *Id.*

Support for this position is found in the recent Tenth Circuit holding in *Currier v. Doran*.²¹³ *Currier* holds that by removing the child from the home of one natural parent and placing her in the home of another, the state may be liable for the harm that occurs to her there.²¹⁴ *Currier* did not make a distinction between natural parents and foster parents.²¹⁵ The fact that the state had acted to place the child in the dangerous situation was sufficient to create liability.²¹⁶

Judge Gibson of the Eighth Circuit made an important argument in his dissent in *S.S. v. McMullen*.²¹⁷ He argued that knowingly placing a child in a dangerous situation is action, regardless of whether it is a placement to a foster parent or a natural parent.²¹⁸ He noted that the state had removed the child in this case from the custody of her parents, and it could not then “place her in a position of danger, deliberately and without justification, without thereby violating her rights.”²¹⁹ He further stated:

These distinctions, between new dangers and old and between foster parents and natural parents, are arbitrary. I believe the proper distinction is whether the state actors have so intervened in the child’s situation that they can be said to have rescued the child from danger. At that point, the child’s fate is in the state’s hands, whether it decides to entrust him to stranger or kin, to new dangers or old. “Once the state acts to disturb the current custodial situation and assumes control over a child’s life, the state may not create a dangerous condition for the child by knowingly or recklessly

213. See *Currier v. Doran*, 242 F.3d 905, 918-19 (10th Cir. 2001) (holding that where a social worker created the danger by recommending placement with the abusive father and failing to investigate allegations of abuse, there may be state liability). See also discussion, *infra* Section II(B)(3).

214. *Id.* at 909-10. The children in this case were removed from their mother’s home because of neglect. *Id.* The social workers failed to adequately investigate repeated allegations of abuse by the father, and recommended placement with the father. *Id.*

215. *Id.* at 919. Further, *Currier* did not find that because the children were in the custody of their father, and not of the state, there was no liability. *Id.*

216. *Id.* Although the holding that the state could be liable for deliberate indifference to known harm to the children while in the custody of their father seems to be contrary to the *DeShaney* holding, or at least to other circuits’ interpretation of *DeShaney*, which states that there can be no liability without custody or control, the Supreme Court has denied certiorari on this case. 122 S. Ct. 543 (November 13, 2001).

217. 225 F.3d 960, 967-68 (8th Cir. 2000) (Gibson, J., dissenting).

218. *Id.*

219. *Id.* at 967 (“[S]tate actors who rescue children and then injure them may not defend on the ground that they had no duty to rescue the children in the first place.”).

turning control of the child over to an abusive person, *even if that person is a parent or other family member.*²²⁰

Under this rule, in a situation like the Terrell Peterson case, the state would be liable because it was aware of the danger to Terrell in the home (the state had received numerous reports, had confirmed the abuse, had temporarily removed the child, and then had placed the child back into the parent's home).

There is still an issue as to whether the state could be liable under the state-created danger doctrine if it never took custody of a child at all. This situation would be characterized as a failure to act, which occurs when the agency receives reports of abuse, and either substantiates abuse and does nothing to protect the child, or does not investigate the allegations properly. Advocates argue that the state's duty to a child arises before the child is taken into custody.²²¹ Caseworkers "have a responsibility to ensure to the best of their ability that the environment that they left the child in or placed the child in is the best environment for that child's safety and well-being."²²² The issue is whether the state agency's knowledge of potential abuse of a specific individual child can give rise to a duty to protect the child. Prior to *DeShaney*, the answer to this issue in some courts was yes.²²³ However, *DeShaney* and its progeny have held that there is no such duty.

Under the state-created danger doctrine, an argument could be made that when the state agency fails to act out of deliberate indifference to a known harm, it is still creating a danger to the child. This is analogous to a situation where a police officer fails to respond properly to an emergency call. In *Schieber v. City of Philadelphia*, a lawsuit was brought under section 1983 alleging that the city police failed to properly respond to a "Priority 1" emergency call, and that this failure resulted in the death of Shannon Schieber.²²⁴ Shannon Schieber was attacked in her apartment, and when her neighbor heard her screams for help, he called the police for assistance.²²⁵ When officers received no answer at the door, they left with no further

220. *Id.* at 968 (quoting *Currier v. Doran*, 23 F. Supp. 2d 1277, 1281 (D.N.M. 1998) (alteration in original)).

221. See Martz, *supra* note 24 (stating that "state Child Advocate Dee Simms . . . said she believes workers with the Division of Family and Children Services have a responsibility to children on which there is an open case, regardless of whether they are in state custody").

222. *Id.* (quoting Child Advocate Dee Simms).

223. See *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985).

224. *Schieber v. City of Philadelphia*, No. 98-5648, 1999 U.S. Dist. LEXIS 10368 (E.D. Pa. July 9, 1999).

225. *Id.* at *2.

inquiry.²²⁶ Shannon was found dead in her apartment the next day.²²⁷ The court applied the state created danger theory to the section 1983 claim, stating that “while governmental actors are not normally liable for injuries caused by private actors, they may be held liable for creating the danger.”²²⁸ The court held that in this case, the police officers’ failure to act had created the danger for Shannon.²²⁹ The court found that “it was foreseeable that the officers’ failure to intervene created additional danger for Shannon Schieber from the increased risk of harm or delay in medical attention.”²³⁰ Also, the court pointed out that “[h]ad the officers not exercised their authority as they did, neighbors would have intervened, and whatever danger there was would have been terminated not enhanced.”²³¹ The court concluded that because the officers’ failure to properly respond may be found to have “shock[ed] the conscience,” plaintiffs’ claims under section 1983 against the police officers could not be dismissed.²³²

Likewise, the state’s decision to leave the child in the home, or the state’s refusal to investigate an allegation, has created or significantly increased the risk of harm to the child. Further, the six-factor test of *Currier* should be applied to determine liability.²³³ Under this test, if the agency had knowledge of the abuse yet did nothing, it may meet the first prong because it may be shown that this has increased the child’s vulnerability to the harm.²³⁴ As Justice Brennan argued in his dissent in *DeShaney*, the very nature of child protective services’ existence may cause others to feel that they do not need to step in to protect the child, which may effectively confine the child to the dangerous or violent situation.²³⁵ Therefore, if child

226. *Id.*

227. *Id.* at *3.

228. *Id.* at *8. The court phrased the rule for state created danger as: “there must be: 1) foreseeable and fairly direct harm; 2) wilful [sic] disregard of the harm to the plaintiff by the government actor; 3) a relationship between plaintiff and defendants; and 4) use of defendants’ authority to create a danger that otherwise would not have existed.” *Id.* at *9 (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996)).

229. *Id.*

230. *Id.*

231. *Id.* at *9-*10.

232. *Id.* at *24-*25. The court further held that the police officers were not entitled to qualified immunity because “[r]easonable officers acting as they did should have known that the conduct did not conform to constitutional standards.” *Id.* at *16. Furthermore, the plaintiff’s claims against the City were not dismissed because the court found that a “municipal body may violate the Constitution if its policies demonstrate deliberate indifference towards the constitutional rights of those with whom its agents have contact.” *Id.* at *18 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

233. *See infra* Section III.

234. The first part of the test is that the plaintiff must show that “the charged state entity and the charged individual actors created the danger or *increased plaintiff’s vulnerability to the danger in some way . . .*” *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001) (emphasis added).

235. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 210 (1989) (Brennan, J., dissenting). Brennan argues that the department had control because it maintained the authority

protective services is repeatedly made aware of a dangerous situation and does nothing to protect the child, chances are no one else will do anything either.²³⁶ The agency has prevented the child from being rescued at all.²³⁷ Arguably, child protective services' deliberate choice to ignore the abuse creates a further dangerous situation for the child. Such indifference to known risks should not be tolerated under constitutional standards.

The special relationship doctrine is where the courts found successful arguments for a state's duty to protect a child not in its custody before *DeShaney*.²³⁸ However, *DeShaney* specifically defined special relationship as being under the state's custody or control.²³⁹ The better rule would be that under certain factual situations, a special relationship could exist without custody. This would require the Court to overrule its holding in *DeShaney*. This finding of a special relationship should be based on two factors. First, the very nature of the agency and its purpose creates a duty to children. Second, awareness of specific harm or danger creates a duty. These two factors must be taken together. That is, an ordinary citizen does not have a duty to protect a child from abuse, even if she is aware of it. But the agency holds itself out as protecting the welfare of children.²⁴⁰ The purpose of child protective services is to investigate abuse and to determine when a child should be removed.²⁴¹ But, the agency will not be responsible for all children it does not remove. The deliberate indifference standard, and its requirement of knowledge or notice of the abusive environment, will prevent liability where it should be prevented. There must be substantial knowledge of the risk such that the agency's failure to remove the child or the decision to place the child with an abusive parent shows "deliberate

to make the decision on whether or not to remove Joshua. *Id.* at 209. Further, he argued that Joshua was confined in the dangerous situation, with no other means of escape because "if DSS ignores or dismisses [the] suspicions [of child abuse], no one will step in to fill the gap." *Id.* at 210.

236. *See id.* This is the same as the situation in the *Schieber* case, where the police response made neighbors less likely to interfere. *See Schieber v. City of Philadelphia*, No. 98-5648, 1999 U.S. Dist. LEXIS 10368 (E.D. Pa. July 9, 1999).

237. *See* Brief of Amici Curiae American Civil Liberties Union Children's Rights Project et al. at 154, *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 1987 U.S. Briefs 154 (1988) (No. 87-154) (arguing that "the critical question is whether, as here, the state voluntarily and affirmatively assumed responsibility for the protection of a specific individual when (1) that individual was unable to protect himself and (2) the state's assumption of responsibility effectively precluded others from protecting him") (emphasis added).

238. *See Estate of Bailey v. County of York*, 768 F.2d 503, 509 (3d Cir. 1985).

239. *See DeShaney*, 489 U.S. at 197.

240. *See* SS Manual, *supra* note 35.

241. *Id.*

indifference” to the welfare of the child.²⁴² As noted above, a caseworker’s mere negligence will not result in liability.²⁴³ While it is true that a change in the rules will create increased liability, creating the right level of accountability for agencies with the duty to protect children can be accomplished through the deliberate indifference standard.

VI. CONCLUSION

As Justice Blackmun lamented in the case of “Poor Joshua,”²⁴⁴ so must we as a nation lament over the plight of our most vulnerable citizens: abused and neglected children. They often suffer at the hands of those who should protect them. First, their parents or caretakers become their abusers, thus failing them horribly and often brutally. Next, the system, designed to protect them, to remove them from harms way, fails to step in. Then, after the unthinkable happens, the court fails them as well by failing to recognize that they have a constitutional right to be safe from physical harm.

If reform of the system is to happen, deliberate indifference to child abuse cannot be tolerated among those whose job it is to prevent further abuse. The Court should recognize that such deliberate indifference is a violation of the child’s rights, no matter if the child is in state or parental custody. Given the current disagreement among federal courts, the Court should review these issues and decide under what circumstances children have a right to personal safety. In such a review, the Supreme Court should hold that the *DeShaney* ruling applies only to the special relationship doctrine, and therefore, liability for failure to protect children not in state custody is allowed under the state created danger doctrine. Alternatively, the Court should overrule *DeShaney*’s harsh limitation on liability, and therefore allow for liability under either doctrine regardless of whether a child is in state custody, so long as the deliberate indifference standard is met.

Terrell Peterson’s story is a tragedy. He, and hundreds of other children like him, have died brutal and violent deaths at the hands of those who were supposed to take care of them. The Court’s failure to recognize that children like Terrell, and like Joshua DeShaney, have the constitutional right, the basic human right, to safety, is a tragedy as terrifying as the cruelty of child abuse itself. Holding the state agency responsible for this will not bring Terrell back; nor will it undo the injuries that other children have suffered.

242. See *S.S. v. McMullen*, 225 F.3d 960, 968 (2000) (Gibson, J., dissenting) ([n]oting that “unlike negligence, ‘deliberate indifference’ requires the actor’s knowledge that a substantial risk of serious harm accompanies his course of action”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

243. See *infra* Section III(A) and accompanying notes.

244. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

But these children have suffered wrongs both at the hands of their abusers and because of the indifference of social service agencies. They deserve for these wrongs to be recognized and remedied by the law.

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