

CASE NOTES

CIVIL RIGHTS & CIVIL RIGHTS ACTS—An Affirmative Duty To Protect Individuals Who Are Not in the State's Custody From Harm by Private Actors Is Not Imposed on the State by the Fourteenth Amendment's Due Process Clause; Therefore, a Social Services Agency That Failed To Protect a Child From Severe Beatings by His Father Despite Knowledge of Abuse Allegations and Continuing Agency Contact With the Family Did Not Violate the Child's Due Process Rights—*DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989).

In January 1982, the police notified the Winnebago County Department of Social Services ("DSS") that Randy DeShaney was possibly abusing his son, Joshua DeShaney.¹ The DSS interviewed the father and he denied the accusations.² The matter was then dropped by the DSS.³

One year later an examining physician notified the DSS that Joshua had been admitted to the hospital with multiple bruises and abrasions and that child abuse was suspected.⁴ The DSS arranged for the state to temporarily take Joshua into custody.⁵ Three days later a multidisciplinary "Child Protective Team," including the DSS caseworker handling Joshua's case, met and concluded the suspicion of child abuse was not supported by sufficient evidence, and Joshua was consequently returned to his father.⁶

One month after Joshua was returned to his father's custody, the DSS caseworker received a similar notice from hospital personnel that Joshua had been treated for suspicious injuries.⁷ The caseworker concluded there was no basis for action.⁸ During the caseworker's subsequent visits to the DeShaney home, she observed and documented repeated instances of suspi-

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1. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1001 (1989).
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*

cious injuries, including marks resembling cigarette burns, but she did nothing more.⁹

In November 1983, the DSS received another notice from hospital personnel that Joshua had been treated for injuries that they believed to be caused by child abuse, but the DSS took no action.¹⁰ On the caseworker's following two visits to the DeShaney home, she was told Joshua was too ill to see her.¹¹ In March 1984, Randy DeShaney beat four year old Joshua so severely that Joshua fell into a life threatening coma.¹² Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time.¹³ Although Joshua did not die, his brain was damaged so severely that he is expected to spend the remainder of his life confined to an institution for the profoundly retarded.¹⁴

Joshua and his mother brought suit against respondents, Winnebago County, the DSS, and individual employees of the DSS, in the United States District Court for the Eastern District of Wisconsin under 42 U.S.C. § 1983,¹⁵ alleging violations of Joshua's liberty within the meaning of the fourteenth amendment.¹⁶ The petitioners generally claimed that their injuries were caused by the failure of respondents to intervene to protect Joshua from his father's violent actions of which they knew or should have known.¹⁷ The district court granted summary judgment for respondents.¹⁸

The Court of Appeals for the Seventh Circuit affirmed, holding that the state is not required by the due process clause to protect its citizens from private violence not attributable to the conduct of its employees.¹⁹ In reaching this conclusion, the appellate court rejected the proposition set forth in *Estate of Bailey v. County of York*²⁰ and *Jensen v. Conrad*,²¹ that once the state learns a particular child is in danger of abuse and takes steps to protect the child from that danger, a "special relationship" arises placing an

9. Brief for Petitioners at 7, *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989) (No. 87-154).

10. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1001-02.

11. *Id.*

12. *Id.* at 1002.

13. *Id.*

14. *Id.*

15. 42 U.S.C. § 1983 (1982) (renders individuals acting "under color of any statute, ordinance, regulation, custom, or usage, of any state" liable when they deprive citizens of "any rights, privileges or immunities secured by the Constitution and laws").

16. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1002.

17. *Id.*

18. *Id.*

19. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987).

20. *Estate of Bailey v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985).

21. *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984) (tracing development of "special relationship" doctrine for state inaction liability), *cert. denied*, 470 U.S. 1052 (1985).

affirmative constitutional duty on the state to provide protection.²² Instead, the court of appeals relied on a previous Supreme Court decision, *Martinez v. California*,²³ and held that the causal connection between the respondents' conduct and Joshua's injuries was too remote to establish a violation of the fourteenth amendment.²⁴

The United States Supreme Court granted certiorari to resolve the inconsistent positions taken by lower courts as to whether the fourteenth amendment imposes a duty on the state to protect individuals, not in the state's custody, from harm by private individuals.²⁵ In a six to three decision²⁶ the Court *held*, affirmed.²⁷ The state has no constitutional duty to protect a child from beatings by the child's father despite knowledge of the abuse and continuing contact with the family.²⁸ Therefore, the state's failure to provide such protection does not constitute a violation of the due process clause. *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989).

The majority held that because the due process clause is phrased as a limitation on state action, the clause's intent is to prohibit certain state actions rather than mandate affirmative duties on the state.²⁹ Consistent with this principle, previous Supreme Court decisions³⁰ have recognized that the due process clause generally confers no affirmative right to governmental aid even if such aid may be necessary to secure life, liberty, or property interests.³¹ Therefore, the clause does not establish positive duties on the state to ensure its citizens' protection from each other.³² Thus, as a general proposition, a state cannot be held liable under the clause for failing to provide protective services even if injuries could have been avoided had the state chosen to provide the services.³³

Although the due process clause was not interpreted by the majority as

22. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d at 303-04.

23. *Martinez v. California*, 444 U.S. 277 (1980).

24. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d at 302-03.

25. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1002.

26. *Id.* at 1000. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, Stevens, O'Connor, Scalia, and Kennedy joined. *Id.* Justice Brennan filed a dissenting opinion joined by Justices Marshall and Blackmun. *Id.* at 1007 (Brennan, J., dissenting).

27. *Id.*

28. *Id.* at 1006.

29. *Id.* at 1003.

30. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (no obligation of the state to fund abortions or other medical services); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no obligation of the state to provide adequate housing); see also *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (generally a state is under no constitutional duty to provide substantive services for those within its border).

31. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1003.

32. *Id.*

33. *Id.* at 1004.

creating an affirmative right to basic governmental aid, the petitioners in *DeShaney* did not ask the Court for a broad duty. Rather, the petitioners' claim focused on the narrowly defined circumstances of when a state "by word and by deed" has announced its intention to provide protection to a child abuse victim. When this intent is coupled with a statutory duty to provide such protection, the Constitution should impose upon the state an affirmative duty of protection.³⁴

The majority rejected the petitioners' argument determining that an "affirmative duty to protect [does not arise] from the state's knowledge of the individual's predicament or from its expressions . . . to help him."³⁵ While the state may acquire a duty under state tort law to provide a citizen protective services, the affirmative duties of care and protection of the due process clause are triggered only when an affirmative act of the state restrains "the individual's freedom to act on his own behalf—through incarceration, institutionalization, or similar restraint of personal liberty."³⁶

Applying the majority's rationale to the facts of *DeShaney*, no violation of the due process clause would result because the state's action did not rise to the Court's requisite level of a custodial relationship. The majority indicated that if the state had affirmatively exercised its power by placing Joshua in a foster home operated by state agents, the situation may have been sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.³⁷ The fact that the state once took temporary custody of Joshua did not alter the majority's position. According to the majority, when the state returned Joshua to his father's custody, the state placed him in no greater danger than if the state had not acted at all.³⁸ At most, all that could be said was the state simply stood by and failed to act.³⁹

The majority's rationale came as a "surprise" to the dissenting justices.⁴⁰ In light of previous Supreme Court decisions, the dissent argued the focus should be on the actions the state had taken with respect to Joshua, rather than the actions the state had failed to take, and actual physical custody is not the only state action that is relevant.⁴¹

For example, in *Youngberg v. Romeo*,⁴² the Court considered the substantive rights of an involuntarily committed mentally retarded person under the fourteenth amendment.⁴³ The Court explicitly observed that the

34. *Id.* at 1008 (Brennan, J., dissenting).

35. *Id.* at 1006.

36. *Id.*

37. *Id.* at 1006 n.9.

38. *Id.* at 1006.

39. *Id.* at 1007.

40. *Id.* at 1009 (Brennan, J., dissenting).

41. *Id.* at 1008-09 (Brennan, J., dissenting).

42. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

43. *Id.* at 314.

patient did not challenge his commitment but instead argued that he had a "constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that [the state] infringed these rights by failing to provide constitutionality required conditions of confinement."⁴⁴ As the dissent in *DeShaney* points out, the due process clause was not triggered by the state's affirmative act of restraining the patient in *Youngberg*, but rather the cause of action arose when the state failed to take steps to protect the patient from himself and others.⁴⁵ Although the *DeShaney* majority suggested the state's affirmative act of restraint in *Youngberg* rendered the patient unable to care for himself, the patient had been unable to do so long before the state stepped into his life.⁴⁶ Thus, the affirmative act of institutionalization in *Youngberg* was critical not because it rendered the patient unable to care for himself, but because it separated the patient from other sources of aid that the Court in *Youngberg* obligated the state to replace.⁴⁷

A similar rationale was employed by the Court in *Estelle v. Gamble*,⁴⁸ in which the restraint imposed by the state was incarceration.⁴⁹ The Court noted that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."⁵⁰ Again, the state's act of restraining the individual did not give rise to the inmate's cause of action under section 1983, but rather the state's failure to act after separating the individual from other sources of aid created the claim.⁵¹

The *DeShaney* majority, however, interpreted *Youngberg* and *Estelle* as standing for the proposition that the Constitution imposes a duty upon the state to assume responsibility for an individual's safety and well being only when the state takes a person into custody and holds him against his will.⁵² In comparison, the *DeShaney* dissent interpreted *Youngberg* and *Estelle* as not limiting affirmative state action solely to the direct physical control of a custodial relationship.⁵³ The dissent would recognize an affirmative state act of restraint to include situations in which the state knows of an individual's plight and expresses an intent to help, because this action separates the individual from other sources of aid.⁵⁴ Accordingly, if the state then refuses to render the promised aid, "it cannot wash its hands of the

44. *Id.* at 315 (emphasis added).

45. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1009 (Brennan, J., dissenting).

46. *Id.* (Brennan, J., dissenting) (discussing *Youngberg v. Romeo*, 457 U.S. at 309).

47. *Id.* (Brennan, J., dissenting).

48. *Estelle v. Gamble*, 429 U.S. 97 (1976).

49. *Id.* at 98.

50. *Id.* at 103.

51. *Id.* at 103-05.

52. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1005.

53. *Id.* at 1009 (Brennan, J., dissenting).

54. *Id.* (Brennan, J., dissenting).

harm that results from inaction."⁵⁵

The dissent explained how the application of the Wisconsin child protection laws to Joshua's situation effectively separated Joshua from other sources of aid.⁵⁶ Under Wisconsin law, anyone can report child abuse, although certain people such as doctors, teachers, or police are required by state law to report any suspicion of abuse.⁵⁷ These reports are channeled and handled exclusively by the social service agency⁵⁸ unless the reporter believes the child is in immediate danger.⁵⁹ In accordance with state law, therefore, each and every suspected occasion of abuse in *DeShaney* was exclusively channeled to the DSS, dutifully recorded by the DSS caseworker, and placed in the department's files.⁶⁰ Because of this exclusivity, the state "invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as the [DSS] to protect children from abuse."⁶¹

After receiving a report of suspected child abuse, a statutory duty is imposed upon the DSS to initiate a diligent investigation.⁶² The investigation must include observation of the child or an interview with the child, and a visit to the child's home if possible.⁶³ After the initial contact, the DSS may generally supervise the family or require the family to receive certain services.⁶⁴ Through the Wisconsin child welfare system, the state in effect has relieved ordinary citizens and government entities other than the DSS of any sense of obligation to do anything more than report suspicions of child abuse.⁶⁵ After contacting the DSS, the citizen or government official most likely assumes a child's safety will be monitored through the department's investigations. "If DSS ignores or dismisses these suspicions, no one will step in to fill the gap."⁶⁶

Most importantly, the decision to intervene and protect a particular child is controlled by the DSS.⁶⁷ During the investigation the state temporarily took custody of Joshua.⁶⁸ At this point, the child was wholly dependent on the state and on the state's disposition of his case. The DSS made the

55. *Id.* (Brennan, J., dissenting).

56. *Id.* at 1010-11 (Brennan, J., dissenting).

57. WIS. STAT. ANN. § 48.981(2) (West 1987).

58. WIS. STAT. ANN. § 48.981(3) (West 1987).

59. WIS. STAT. ANN. § 48.981(3)(b)(1) (West 1987).

60. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

61. *Id.* (Brennan, J., dissenting).

62. WIS. STAT. ANN. § 48.981(3)(c)(1) (West 1987).

63. *Id.*

64. WIS. STAT. ANN. § 48.981(3)(c)(1)-(3) (West 1987).

65. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1011 (Brennan, J., dissenting).

66. *Id.* (Brennan, J., dissenting).

67. *Id.* at 1010-11 (Brennan, J., dissenting).

68. *Id.* at 1001.

decision to return Joshua to his father's custody, subject to limitations contained in a written agreement: Randy was required to enroll Joshua in a preschool program, receive counseling from the DSS, and have his girlfriend move out of the DeShaney home.⁶⁹ A caseworker was required to visit the home regularly to check on the child's welfare.⁷⁰ During these visits the caseworker noted that Randy's girlfriend was still living in the home and that Joshua had not been enrolled in a preschool.⁷¹ The caseworker repeatedly documented her continuing suspicions that Joshua was in danger and her disbelief of the excuses proffered by Randy and his girlfriend for the frequent injuries to Joshua, but she did nothing more.⁷²

On the caseworker's final visit to the DeShaney home the day before Joshua fell into a life threatening coma, Randy and his girlfriend told the caseworker Joshua had been fainting as a result of hitting his head on the toilet stool, but Joshua had not received medical attention.⁷³ Despite this comment, the caseworker did not see Joshua nor explain why she failed to do so.⁷⁴ This same "head striking the toilet" excuse had been offered by Randy and his girlfriend to the hospital personnel during the November 30, 1983 visit, which was reported to the DSS, but was not investigated.⁷⁵

Joshua's mother moved to another state when Randy was awarded custody of Joshua after their divorce in 1980.⁷⁶ Throughout the entire time the caseworker was handling Joshua's case, the caseworker knew the location of Joshua's mother.⁷⁷ Nevertheless, the first and only time she contacted the mother was when it appeared that Joshua would die.⁷⁸ Thus, similar to *Youngberg* and *Estelle*, the affirmative act of restraint in *DeShaney* did not render Joshua unable to care for himself, but rather, the actions taken by the state separated him from other sources of aid.⁷⁹ Who other than the state would monitor Joshua's safety and enforce the agreement when the state, in effect, promised its citizens continuing vigilance and in doing so preempted the ability of other persons who could have intervened on Joshua's behalf? As stated by the court in *Bowers v. DeVito*,⁸⁰ if the state places a person "in a position of danger from private persons" and then fails

69. *Id.*

70. *Id.*

71. *Id.*

72. Brief for Petitioner at 6, *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989) (No. 87-154).

73. *Id.* at 21.

74. *Id.*

75. *Id.*

76. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1001 (1989).

77. Brief for Petitioner at 8, *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (No. 87-154).

78. *Id.*

79. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1011 (Brennan, J., dissenting).

80. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982).

to protect that person, the state's role is not merely passive: "[the state] is as much an active tortfeasor as if it had thrown him into the snake pit."⁸¹

Under the dissent's approach, the circumstances surrounding the state's prior action determine the constitutional significance of the state's inaction.⁸² Contrary to the majority's position, the dissent's approach does not require a new or expanded interpretation of the due process clause. The Court in previous decisions has determined a fundamental distinction exists between a state's obligation to provide benefits in the first place, and a state's obligation to administer those benefits fairly once the state provides the benefits. The Court has acknowledged that nothing in the Constitution imposes the first obligation on the state.⁸³ The Court has also recognized, however, the due process clause imposes the second obligation on the state when the state assumes such an obligation and then fails to fulfill the obligation in order to protect an individual from the arbitrary exercise of governmental power.⁸⁴ Thus, a prior state action that effectively cuts off private sources of aid, coupled with a state's arbitrary refusal to render the promised aid, is sufficient to trigger the protections of the due process clause.⁸⁵

The majority, however, pretends that the lines between action and inaction, and between inflicting and failing to prevent the infliction of harm, are perfectly clear. By immediately determining that the Constitution does not impose affirmative duties on the state to provide its citizens with protective services, the majority "foreshadows—perhaps even preordains—its conclusion that no duty existed."⁸⁶ In doing so, the majority completely ignored⁸⁷ the rule that "[a] State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause, because the argument was not advanced."⁸⁸ The dissent did not suggest that the state's failure to protect Joshua was the result of invidious

81. *Id.* at 618 (emphasis added).

82. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

83. *Id.* (Brennan, J., dissenting) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970)). In *Rodriguez*, the Court rejected the claim that the plaintiffs had a constitutional right to education. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 35-36. The Court in *Dandridge* impliedly rejected the idea that welfare is a fundamental right. *Dandridge v. Williams*, 397 U.S. at 484.

84. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1010 (Brennan, J., dissenting) (citing *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)). The Court in *Lopez* determined that a statutory entitlement to public education may not be withdrawn absent fundamentally fair procedures. *Goss v. Lopez*, 419 U.S. at 574. In *Goldberg*, the Court held that welfare recipients are entitled to evidentiary hearings before a state may terminate their benefits. *Goldberg v. Kelly*, 397 U.S. at 263-64.

85. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1011-12 (Brennan, J., dissenting).

86. *Id.* at 1008 (Brennan, J., dissenting).

87. *Id.* at 1011 (Brennan, J., dissenting).

88. *Id.* at 1004 n.3.

discrimination. The dissent stated, however, that because of the majority's posture, "we do not know whether [the actions were the product of irrational discrimination] or not."⁸⁹

Likewise, due to the majority's baseline view of the absence of positive rights in the Constitution, the majority completely ignored due process limitations on the withdrawal of promised entitlements. If the majority had recognized such an approach, the Court's analysis would have changed significantly. Analyzing a claim in this manner will not render a state liable for every instance of inaction.⁹⁰ But when the state has effectively displaced private sources of aid and then by inaction has broken its own promise to render such aid, the state may not escape liability by hiding behind an artificial distinction between action and inaction. As the facts of this case illustrate, inaction can be as equally abusive as the power of action.⁹¹

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89. *Id.* at 1011 (Brennan, J., dissenting).

90. *Id.* at 1012 (Brennan, J., dissenting).

91. *Id.* at 1011 (Brennan, J., dissenting).

