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NOTES

A SOCIAL CONTRACT ARGUMENT FOR THE STATE'S DUTY TO PROTECT FROM PRIVATE VIOLENCE

LILIYA ABRAMCHAYEV*

INTRODUCTION

Social contract theory originated with the works of prominent philosophers, notably, Jean-Jacques Rousseau and John Locke, as they explored the origins of a human society and its characteristics. Rousseau argued that in a state of nature, each man protects his person and property until his own force proves

* To Michael, my constant inspiration.

1 The theory of social contract does not purport to illustrate or document actual events that led to the formation of a civilized society, but rather is used metaphorically to describe a historic process of the development of a modern state. See Edward L. Rubin, Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw out that Baby, 87 CORNELL L. REV. 309, 356 (2002).
to be inadequate against the obstacles to self-preservation.\textsuperscript{2} At this point, it becomes apparent that the joined forces of mankind will provide greater protection from nature's perils.\textsuperscript{3} However, as people united into society for the purposes of greater safety, they became confronted with the question of preserving their liberties.\textsuperscript{4} Rousseau reasoned that the balance between safety and liberty is in the social contract—a universal pact between members of society to "put into the community his person and all his powers under the supreme direction of the general will,"\textsuperscript{5} where every member becomes "an invisible part of the whole."\textsuperscript{6} Consequently, the social contract governs the creation of society, providing for "the mutual protection of the people and their goods."\textsuperscript{7} As members reap the benefits of society and enjoy a greater degree of protection, they forgo certain freedoms and comply with the general will of the society, enforced via a formed government.\textsuperscript{8} The union thus formed "marks the transition from

\textsuperscript{2} See Edward Cheng, Note, A Discussion on Ethical Decisions, 21 J. LEGAL PROF. 89, 94 (1996-1997) (presenting Rousseau's theory on the origins of society); see also April L. Cherry, Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right, 75 OR. L. REV. 1037, 1048 (1996) (noting Rousseau's observation that various forms of inequality amongst individuals fostered the socialization process); Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. CAL. L. REV. 1307, 1331 (2001) (explaining Rousseau's position that the clash and conflict of individual interests in a state of nature must be balanced against the general will and common good when individuals enter into a democratic state).

\textsuperscript{3} See Cheng, supra note 2, at 93-94 (noting Rousseau's position that man, with the constant motive of greater protection, can only muster enough power to preserve his person and goods before finding the need to unite); see also Cherry, supra note 2, at 1048-49 (discussing Rousseau's belief that social relationships in a state of nature lead to conflicts that threaten safety and that individuals are forced to unite under a social contract in order to preserve the social order); Thomas M. Franck, Is Justice Relevant to the International Legal System?, 64 NOTRE DAME L. REV. 945, 949 (1989) (explaining Rousseau's belief that the social contract provides for organization, justice, defense of liberties, and an increase in value for each person involved).

\textsuperscript{4} See Cheng, supra note 2, at 94 (outlining Rousseau's theory that man submits his individual power to the general will); Cherry, supra note 2, at 1050-52 (explaining Rousseau's assertion that men must surrender some natural liberties in a trade off for the civil liberties he receives as a member of society).


\textsuperscript{6} Id. at 59.

\textsuperscript{7} Cheng, supra note 2, at 94.

\textsuperscript{8} See id. (noting that Rousseau's philosophy of the contract necessarily subordinates individual desires when they are in conflict with the general will); Franck, supra note 3, at 949 (asserting that Rousseau's concept of the social contract calls for an alienation of individual rights to the community); Rosenfeld, supra note 2, at 1332 (explaining that Rousseau conceived of a society in where the general will is produced from the opposition of individual interests).
The idea of social contract encompasses the notion that individuals forming it are free and equal, and when they subject themselves to its rule, they follow their own rules.

Locke agreed with Rousseau, arguing that the main reason people form societies and subject themselves to a government is for "preservation of their property" and safety. The government formed thus serves the purpose of protecting the individuals. In addition, Locke further emphasized that formation of the government, by the people joining into the contract, is governed by public good and with the consent of the individuals agreeing to be governed. Indeed, the doctrine postulates that since the individuals participate in the rule-making process, all its rules

9 THE SOCIAL CONTRACT FROM HOBBES TO RAWLS 37 (David Boucher & Paul Kelly eds., Routelidge 1994).
10 Id.
11 See Cheng, supra note 2, at 94. Cheng explains that Rousseau's theory of social contract posits that the individual must submit to the greater society to which he is a part. Id. This includes subordinating individual desires the law of the general will when the two come in conflict. Id. at 94. Rosenfeld, supra note 2, at 1332-33. In discussing Rousseau's social theory, Rosenfeld states "law is legitimate if it is an expression of the general will that emerges as a consequence of a dynamic process and accounts for all relevant interests." Id. at 1332. According to Rousseau, this is the foundation of legitimacy. Ingeborg Maus, Liberties and Popular Sovereignty: On Jurgen Habermas's Reconstruction of the System of Rights, 17 CARDOZO L. REV. 825, 827 (1996). Maus comments that Rousseau's commitment to a democratic system of law that provides for equal application, equal protection, and the elimination of preferential treatment. Id. at 827.

12 John Locke says:

Men being... by nature all free, equal, and independent, no one can be put out of his estate and subjected to the political power of another without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoinderment of their properties and a greater security against any that are not of it.

JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690); see Rosenfeld, supra note 2, at 1311. Locke and Rousseau are among the founders of social contract theory where the legitimacy of government is established by the consent of the governed. Id. at 1311. Frost, supra note 1, at 199. Frost identifies Locke and Rousseau as thinkers who propose that man's true nature can only be realized in some form of social organization. Id. Although differing in their details, both agree that the social group and government gain their legitimacy through the consent of everyone involved. Id.

13 See Douglas G. Smith, A Lockean Analysis of Section One of the Fourteenth Amendment, 25 HARV. J.L. & PUB. POLY 1095, 1150 (2002).
are just and legitimate.\textsuperscript{15} The justness and legitimacy of the rules are secured by the relationship formed between the government and its citizens, which Locke characterized as one of trust. Trust gives rise to the fiduciary power "to be exercised solely for the good of the community."\textsuperscript{16} The fiduciary relationship creates a wide array of powers for the government,\textsuperscript{17} but it is subject to an obligation: protection of the rights of the individuals who had given the government the power to act.\textsuperscript{18} Locke further argued and proposed that when a government violates this agreement, i.e. enacts a rule that goes against "preservation of property" and "protection of safety," the citizens reserve the right to dissolve the government and create a new one that would protect their rights and guard their safety.\textsuperscript{19} Another influential philosopher, Charles Montesquieu, recognized yielding of individual rights at the formation of a government and therefore saw the protection of these rights as a governmental responsibility.\textsuperscript{20}

The writings of these Enlightenment philosophers were so influential that newly established governments used the political theory of the social contract as the basis for their governmental forms.\textsuperscript{21} The most profound influence was on the young American Republic as it declared its independence from Britain. Lockean concepts of rights and liberties are found throughout the Declaration of Independence and Bill of Rights, as the Framers

\begin{itemize}
\item \textsuperscript{15} THE SOCIAL CONTRACT FROM HOBBES TO RAWLS, \textit{supra} note 9, at 38.
\item \textsuperscript{16} THOMAS P. PEARDON, \textit{Introduction} to JOHN LOCKE, \textit{SECOND TREATISE OF GOVERNMENT} xv (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} See \textit{PEARDON, supra} note 16, at xvii.
\item \textsuperscript{19} See Cheng, \textit{supra} note 2, at 95.
\item As early as 1758, Montesquieu had argued that the state 'owed all citizens,' among other things, 'nourishment, suitable clothing, and the opportunity for a healthy life. The French Constitution of 1791 acknowledged such a duty by imposing an obligation on government to establish not only a system of free public education but also a system of public assistance 'to bring up abandoned children, relieve poor invalids, and furnish work to the able-bodied poor who cannot obtain it for themselves.'
\end{itemize}
searched for the assurance of the American freedom. In fact, such powerful proclamations as "We the People," "Life, liberty, and the pursuit of happiness," and "We hold these truths to be self-evident, that all men are created equal," which are so central to the American Constitution, are attributable to the works of John Locke. The social contract, the key element of Locke's work, laid the foundation for the newly created Constitution and the government it formed. By covenanitng to obey the laws of the society, the central feature of the social contract is that "one is entitled to preservation of his life, and property." The basis for such entitlement is that "these rights belong to all individuals because they are human beings." The function of preservation of life, and property goes to the government, as it limits and regulates people's freedoms for the general good, and the scope of governmental duty of preservation is limited to these "natural rights" of life, liberty and property, which are inalienable, i.e. not forfeited at the formation of the society. However, as individuals abide by the laws of society, the society restricts the ways individuals can enforce their rights, i.e., the individuals surrender to the state the authority to enforce their rights. For example, when an individual has been deprived of his life or property, neither he, nor his family can go after the perpetrator to enforce his deprived rights. His only recourse is that state laws allow for vindication and that the state will pursue the application of these laws to the perpetrator. Therefore, the individual's natural rights create a duty on the government to

23 See id. at 297-98. "Locke’s ideas influenced the creation and adoption of the Constitution in three specific ways: they inspired the founding fathers to undertake the creation of a new government; they formed the foundation of the document; and they encouraged public ratification of the Constitution."
24 See Anita L. Allen, Social Contract Theory in American Case Law, 51 FLA. L. REV. 1, 34 (1999) ("Formation of American government [was portrayed] as a social contract."); Wardle, supra note 22, at 302 (establishing that “the framers of the Constitution felt that a social contract is the basis of free government”).
25 Wardle, supra note 22, at 306.
27 See PEARDON, supra note 16, at xiii-xviii.
28 See Taylor, supra note 26, at 312.
The Framers understood that proposition as the core purpose of the new government and intended the Constitution to guarantee the protection of these rights. In fact, in the Declaration of Independence, after outlining the inalienable rights, the drafters defined the purpose of the legitimate government as "securing these [r]ights." Consequently, the Constitution is also a "manifestation of the social contract whose continued viability and authority ultimately depends on... [the] phenomenon like the inalienable rights of human beings" and governmental correlational obligation to secure these rights.

The Supreme Court endorsed the idea of the social contract and had stated that "[t]he people... erected their Constitutions, or forms of government... to protect their persons from violence. The purposes for which men enter into society will determine the nature and the terms of the social compact." On another occasion, the Court affirmed its position with respect to the state's purpose and duty to protect its citizens, noting that "[t]he obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as laying at the very foundation of the

29 See A. John Simmons, The Lockeian Theory of Rights 72-73 (Princeton University Press 1992) (illustrating the point via example: children have a right to be cared for, that right creates a duty on the parents to provide such care); see also Jennifer J. Dacey, Citizens Fourth Amendment Rights: Do They Extend Only to the Waters' Edge? United States v. Barona, 5 Geo. Mason L. Rev. 761, 764 (1997) (referring to the arrangement as one of "correlative rights and responsibilities").


33 See Dacey, supra note 29, at 764. 

social compact.” In more recent cases, the Court held that the social contract governed the interpretation of the Constitution’s Establishment Clause and the Ex Post Facto Laws Clause, among others.

The thrust of the social contract is concentrated in the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983, which allows private causes of action for governmental wrongs. Following the narrow interpretation of the Fourteenth Amendment in the Slaughter House Cases, the Supreme Court has defined the Constitution as a “charter of negative rights,” meaning that the Constitution requires the government to refrain from acting, as opposed to positive rights, which would entitle individuals to governmental protection. This interpretation of the Constitution is not only inconsistent with the theory of the social contract, but also with the history of the Fourteenth Amendment, resulting in such decisions as denial of funding of abortions to poor women, denial of protections to

35 City of Chicago v. Sturges, 222 U.S. 313, 322 (1911).
36 See Lee v. Weisman, 505 U.S. 577, 606 (1992). "The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty."
38 U.S. CONST. amend. XIV, § 1 (stating "...nor shall any State deprive any person of life, liberty, or property, without due process of law...").

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
40 83 U.S. 36, 78 (1872).
41 See Michael J. Gerhardt, The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution, 43 VAND. L. REV. 409, 410 (1990) (arguing that reluctance to enforce fundamental rights against state and private action reinforces a view that the Constitution primarily provides negative rights); see also Bryan R. Berry, Crime of Dispassion: Eighth Circuit (Mis)Applies DeShaney in Failing to Hold State Employees Accountable to the Children They Protect: S.S. ex rel. Jervis v. McMullen, 66 Mo. L. REV. 881, 886-87 (2001) (describing Supreme Court approaches to Fourteenth Amendment cases under the "charter of negative liberties" theory).
42 See discussion of the Fourteenth Amendment infra notes 38-46 (delineating the history of the Fourteenth Amendment).
43 See Harris v. McRae, 448 U.S. 297, 316-17 (1980).
state government workers from hazardous work conditions,\textsuperscript{44} and denial of protection to individuals from violent acts of others.\textsuperscript{45} The defining case in the area of substantive due process violation and § 1983 liability is \textit{DeShaney v. Winnebago County Department of Social Services}.\textsuperscript{46}

\textbf{I. \textit{DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES}}\textsuperscript{47}

In 1980 a Wyoming court granted custody over one-year old Joshua DeShaney to his father, Randy DeShaney, after a divorce between his parents.\textsuperscript{48} Joshua and his father then moved to Wisconsin, where in 1982, Randy DeShaney’s former second wife informed the police that Joshua might be a victim of child abuse, stating Joshua’s father “hit the boy causing marks and [was] a prime case for child abuse.”\textsuperscript{49} The Winnebago County Department of Social Services (DSS) interviewed Randy DeShaney, but he denied all accusations. DSS did not investigate further and closed the file. One year later, in 1983, Joshua was treated in a hospital for multiple bruises and abrasions. The examining doctor notified DSS, which in turn obtained an order from a juvenile court to place Joshua in the temporary custody of the hospital.\textsuperscript{50} In a couple of days, the County assembled a “Child Protection Team” consisting of professionals from various fields, including a pediatrician, a psychologist, a police detective, lawyers, and social workers.\textsuperscript{51} Assessing Joshua’s situation, the Team concluded there was insufficient evidence of child abuse and decided to return custody of Joshua to his father.\textsuperscript{52} However, the Team recommended that DSS take some protective measures, including enrollment of Joshua in a preschool program, providing his father with

\textsuperscript{45} See \textit{DeShaney v. Winnebago County Dep’t of Soc. Servs.}, 812 F.2d 298 (1987), affm’d, 489 U.S. 189, 195 (1989) (stating that the Due Process Clause is a limitation on state action and does not guarantee minimal levels of safety and security).
\textsuperscript{46} \textit{DeShaney}, 489 U.S. at 195.
\textsuperscript{47} Id. at 189.
\textsuperscript{48} Id. at 191.
\textsuperscript{49} Id. at 192 (quoting Appellate Brief 152-53).
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
counseling services, and moving his father’s girlfriend out of the house.\textsuperscript{53} Randy DeShaney voluntarily agreed to cooperate with DSS in accomplishing these goals\textsuperscript{54} and signed a written document outlining his responsibilities.\textsuperscript{55} Based on the Team’s finding of insufficient evidence of child abuse and the agreement to protect Joshua, the juvenile court returned the child to the custody of his father.\textsuperscript{56} A month later, emergency room personnel notified DSS that Joshua once again was treated for suspicious injuries.\textsuperscript{57} The social worker handling the case concluded that there was no basis for DSS to take action.\textsuperscript{58} Following this incident, for the next six months, the social worker made monthly visits to the DeShaney home, during which she observed several suspicious injuries, including some on Joshua’s head.\textsuperscript{59} She also noticed that Joshua was not enrolled in school and that the father’s girlfriend had not moved out.\textsuperscript{60} The caseworker diligently recorded her observations in the file, along with her suspicions that Joshua was indeed physically abused,\textsuperscript{61} but did nothing else.\textsuperscript{62} In November of 1983, the hospital staff once more treated Joshua for injuries believed to be caused by child abuse.\textsuperscript{63} DSS was again notified.\textsuperscript{64} On her next two visits to the DeShaney’s home, the social worker was not allowed to see Joshua.\textsuperscript{65} Even after these events, DSS did not take measures to protect the child.\textsuperscript{66} In March 1984, severe beatings put Joshua in a life-threatening coma.\textsuperscript{67} Emergency brain surgery revealed series of hemorrhages caused by consistent injuries to his head.\textsuperscript{68} Joshua lost almost half of the tissue in his brain.\textsuperscript{69} However,
Joshua did not die. Instead, he will spend the rest of his life in the institution for the profoundly retarded as a result of the severe brain damage caused by systematic abuse.

Joshua and his mother brought suit under 42 U.S.C. § 1983 against the Winnebago County Department of Social Services, alleging a deprivation of liberty without due process of law under the Fourteenth Amendment. The complaint alleged that DSS knew or should have known of the risk of violence to Joshua and violated Joshua's rights by failing to intervene to protect him from such violence. The District Court granted summary judgment for the defendants and Judge Posner of Seventh Circuit affirmed. Upon grant of certiorari, the Supreme Court observed "the importance of the issue to the administration of state and local governments," and in doing so, affirmed the Seventh Circuit decision.

In analyzing Joshua's claim alleging DSS' violation of Due Process under the Fourteenth Amendment, the Court held 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." Writing for the majority, Chief Justice Rehnquist interpreted the Clause as a constitutional limitation on the state's power to take action, "not as a guarantee of certain minimal levels of safety and security." In doing so, the Court acknowledged that the Clause carries the dual purposes of safeguarding procedural and substantive due process and that Joshua's claim involved a substantive component. The Court equated the Due Process Clause of the Fourteenth Amendment to that of the Fifth Amendment, and held that both of them were intended "to prevent government

70 Id.
71 Id.
72 Id.
73 Id.
75 DeShaney, 489 U.S. at 194.
76 Id. at 201. "The State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua."
77 Id. at 195.
78 Id.
79 Id.
from abusing [its] power, or employing it as an instrument of oppression."80 The Chief Justice found support for such reading of the Fourteenth Amendment in that "[t]he Framers were content to leave the extent of governmental obligation [of the protection of its citizens] to the democratic political processes."81 Laying such a foundation, the Court then proceeded to hold that the Constitution, and particularly the Fourteenth Amendment, does not require the states to provide any protective services to its citizens. Consequently, the state cannot be liable for failing to provide that protection,82 even if it had been completely within its ability and authority to do so.

Joshua and his mother further argued that since DSS knew of the grave danger Joshua was in and had already undertaken action to protect Joshua from it, the state had acquired an affirmative duty to shield him from such danger.83 Failure to carry out this duty "was an abuse of governmental power that so shocks the conscience."84 In analyzing this argument, the Court focused its attention on two prior cases:85 *Estelle v. Gamble*86 and *Youngberg v. Romeo.*87 In both of these cases a constitutionally required state's duty of care of protection was recognized.88 *Estelle* involved a prisoner's claim to adequate medical care to which he was held entitled after a showing of deliberate indifference on the part of prison officials.89 The Court "reasoned

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80 Id. at 196 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). The Due Process Clause of the 5th Amendment reads: no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V, §1, cl. 3. The Due Process Clause of the Fourteenth Amendment reads: "...nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3.
81 DeShaney, 489 U.S. at 196.
82 See id. at 196-97; Kay P. Kindred, Of Child Welfare and Welfare Reform: The Implications For Children When Contradictory Policies Collide, 9 WM. & MARY J. OF WOMEN & L. 413, 469 (2003) ("Indeed, the state could choose not to provide any child protection services at all.").
83 DeShaney, 489 U.S. at 197; Susan Vivian Mangold, Reforming Child Protection In Response to the Catholic Church Child Sexual Abuse Scandal, 14 J. LAW. & PUB. POL'Y 155, 171 (2003) (insisting that there is a balance of responsibility in instances of child abuse between the State, the parent, and the child).
84 DeShaney, 489 U.S. at 197.
85 Id. at 198-99.
86 429 U.S. 97 (1982).
88 DeShaney, 489 U.S. at 198; 429 U.S. at 103-04; 457 U.S. at 314-25.
89 See DeShaney, 489 U.S. at 199 n.5 (noting that "the mere negligent or inadvertent failure to provide adequate care is not enough."); 429 U.S. at 105-06 (stating "[r]egardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.").
that because the prisoner is unable by reason of the deprivation of his liberty to care for himself, it is only just that the State be required to care for him." Similarly, in Youngberg, an involuntarily admitted mental patient was entitled to "reasonably safe" conditions provided by the state. Considering the holdings in these cases, the Court derived a "proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." In further advancing its position, the Court explained:

The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs...—it transgresses the substantive limits on state action set by the [Constitution].

In applying this principle to the facts of DeShaney, the Court noted that since the state did not restrain Joshua's liberty, and did not place him in a position of danger, it "had no constitutional duty to protect Joshua." For the majority, the disposition of the case turned on this state's "inaction."

Justice Brennan, in his dissenting opinion, which was joined by Justices Blackmun and Marshall, criticized the Court's view of the state's role as "inactive." He argued that attention should have been focused on what the State has done. Looking at the record from that perspective, it becomes apparent that Wisconsin created a Department of Social Services for the very reason of providing protection to children like Joshua. Protection includes investigation of cases of suspected child abuse, prevention, and action to protect the children. Moreover, the Department had

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90 DeShaney, 489 U.S. at 199 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).
91 Id. at 200; Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (ruling that the State has "the unquestioned duty to provide reasonable safety for all residents and personnel within the institution.").
92 DeShaney, 489 U.S. at 199.
93 Id. at 200.
94 Id. at 201.
95 Id. at 203.
96 Id. at 205.
97 Id. at 209.
the exclusive authority to provide protection to these children by successfully cutting off other sources of help by requiring cases of child abuse to be referred to the Department for ultimate decision.\textsuperscript{98} For Justice Brennan, "[i]t simply belies reality...to contend that the State stood by and did nothing with respect to Joshua."

Furthermore, Justice Brennan challenged the Court's characterization of custody as physical for the purposes of establishing duty, suggesting that the State itself must render the individual unable to care for himself.\textsuperscript{100} Yet, in Romeo, the plaintiff, a mental patient, had an IQ of between 8 and 10 and was functioning at the level of an 18-month old child.\textsuperscript{101} It was certainly not the state that rendered him unable to care for himself, yet the state was found to owe him a duty to provide reasonable safety.\textsuperscript{102} For Justice Brennan, "the State's knowledge of an individual's predicament and its expressions of intent to help him can amount to a limitation on his freedom to act on his own behalf or to obtain help from others,"\textsuperscript{103} and therefore trigger the recognition of a duty.

In addition, Justice Brennan raised an issue of arbitrary discrimination or indifference on the part of the DSS that resulted in failure to come to aid to Joshua.\textsuperscript{104} Such arbitrariness amounts to an abuse of power and is violative of the Due Process Clause.\textsuperscript{105}

Justice Blackmun's dissent focused on majority's formalistic approach and its detachment from any sense of justice.\textsuperscript{106} He argued that the true guide for deciding the case should be moral ambition,\textsuperscript{107} justice, and compassion.\textsuperscript{108}

\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 206.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 207.
\textsuperscript{104} Id. at 210.
\textsuperscript{105} Id. at 211; see Daniels v. Williams, 474 U.S. 327, 331 (1986) (stating that purpose of Due Process Clause is to protect individuals from arbitrary government actions).
\textsuperscript{106} DeShaney, 489 U.S. at 213 (Blackmun, J., dissenting) (criticizing the majority's view of Fourteenth Amendment as too rigid; "Faced with the choice, I would adopt a sympathetic reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.").
\textsuperscript{107} Id. (quoting A. STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984)) (recognizing that mistakes in judgment may be made but that "moral ambition" requires them to act
II. ANALYSIS

A. The Social Contract

"The very end and function of government [is] to preserve an individual's natural rights."109 This statement is the core of the social contract doctrine, which is in turn the foundation for our Constitution.110 Applying the social contract doctrine to the context of DeShaney, it becomes apparent that DSS not only owed Joshua a duty of protection from abuse DSS knew Joshua was suffering, but also that DSS impermissibly breached it. The legislature of Wisconsin, elected by the majority of people, decided to implement DSS,111 whose function would be to investigate cases of child abuse and protect children from it. By doing so, the state acknowledged its duty toward its citizens, especially toward the vulnerable class: the children. Indeed, creation of DSS was a recognition of children's entitlements to such protection, and this entitlement called for such state action.112

When DSS received evidence of Joshua's plight, it was under affirmative obligation to take steps necessary to ensure his safety.113 In failing to do so, DSS undoubtedly breached that

where it is apparently needed); see William Jefferson Clinton, Tribute: The Steady Hand of Justice Blackmun, 104 YALE. L. J. 1, 2 (1994) (marking this definition of Fourteenth Amendment requiring "moral ambition" as part of legacy of Justice Blackmun).

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


110 See id.


112 See West, supra note 111, at 1908:

Rights could be defined as the individual entitlements that follow from what states are morally required to do and what liberal states are morally prohibited from doing. . . . [E]very individual must be accorded equal dignity, equal concern, and equal respect. To accord all individuals dignity, concern, and respect, sometimes requires the state to refrain from acting, and sometimes requires it to act.

Id. WIS. STAT. § 48.981(3). This statute outlines the specific duties of DSS. DeShaney, 489 U.S. at 208 (Brennan, J., dissenting). The Court in DeShaney also reviewed some of these duties and policy reasons for them.

113 See WIS. STAT. § 48.981(3); DeShaney, 489 U.S. 189, at 203-12 (Brennan, J., dissenting).
obligation. The Court characterized this as mere "inaction" amounting to common law tort, not rising to the level of constitutional violation. But it was the Court itself that reduced this constitutional claim to a common law tort by employing the state inaction analysis, giving rise to a duty only when the state "affirmatively" exercises its power. The distinction between action and inaction often is blurred, and in fact, there is no such thing as state inaction. To begin with, the state facilitates the creation of family and places an affirmative duty of care on the parents to nurture their children. By exercising its powers, the state placed Joshua in the custody of his father. Furthermore, the state created DSS and gave it the exclusive power to interfere with children's lives. These are specific examples of the notion that state action is everywhere, contributing to the conditions individuals find themselves. State action is pervasive and its traces can be found in the background of any situation.

By employing the state inaction analysis, the Court carves out an exception where a state acquires a duty of protection once it restrains an individual's liberty as to render him unable to care for himself. This principle was partly based on Youngberg case, but as Justice Brennan correctly points out, the plaintiff there, a mental patient, had not been able to care for himself long before the state assumed custody over him. Similarly here, it is

114 DeShaney, 489 U.S. at 201–02.

115 See DeShaney, 489 U.S. at 201–02 (holding that there was no constitutional violation and that the state's inaction merely amounted to common law tort); David A. Strauss, Due Process, Government Inaction, and Private Wrongs, 1989 SUP. CT. REV. 53, 54 (1989) (noting that aside from misfeasance, under common law, a duty may arise from a status of the individual placed in the position of offering help); G. Kristian Miccio, Notes from the Underground: Battered Women, the State, and Conceptions of Accountability, 23 HARV. WOMEN'S L.J. 133, 143 (2000) ("Status of the individual, coupled with professional expertise forms a predicate for responsibility." Therefore, at common law, a person with status, i.e. a state official owes a duty toward the citizens arising out of his or her "public calling or office.").

116 See Wis. STAT. § 48.981(3) (2003).


118 I do not mean to suggest that any private action is equal to state action, but merely suggest that any private action is performed and shaped by the state action in the background. See Strauss, supra note 115, at 67. This can also be seen in private actions for spousal abuse, as actions are not just private but have a public face too. Id.

apparent that Joshua, as well as children in general, are unable to provide for their needs and protect themselves, and the states acknowledge this by requiring parents to do so. But by refusing to come to Joshua's aid, DSS abused its power; moreover, it did it in an arbitrary way. To frame it within the Court's analysis, abuse of power can also be state action, triggering liability.

In addition, the Court overlooked the point that Joshua's restraint was unnecessary for finding a duty: the state had already placed him in the custody of an abusive father. Concededly, the state did not know of the father's abusive tendencies the first time it granted custody, but it certainly had enough information to alert itself the second time when the state made an informed decision to place a child in the hands of an abusive parent. In doing so, the state "put Joshua in a position of danger from a private person... and cut off his sources of private aid." Following the logic of the "exception," "the state owed Joshua a duty of care against private violence from his father." Moreover, in citing the Gamble case for its support of the custody exception, the Court stated, "it is only just that the State be required to care for him." Would it not also be just for Joshua to receive protection from the state that returned him to the custody of the abusive father, especially since the state agency, DSS, had the exclusive power to offer such protection?

In justifying this holding, Chief Justice Rehnquist expressed concern as to governmental intrusion into the parent-child

120 In fact, the state not only prosecutes the perpetrators who abuse children, but those who failed to protect them, like the witnessing mothers who are unable to shield their children from violent fathers. See Miccio, supra note 115, at 133.

121 See DeShaney, 489 U.S. at 206, (noting it is difficult to characterize DSS' conduct otherwise; Carolina D. Watts, Indifferent [Towards] Indifference: Post-DeShaney Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch, 30 PEPP. L. REV. 125, 153 (2002) (asserting victim child in DeShaney was failed by his father, child welfare system, and the court).

122 DeShaney, 489 U.S. at 210, (Brennan, J. (dissenting)); Strauss, supra note 115, at 79 (maintaining that "government officials can abuse their power by wrongfully withholding government services or protection").

123 See Strauss, supra note 115, at 68 ("All members of society- not just state prisoners, involuntarily committed patients, and foster children- owe their position in some measure to the actions of the government.").

124 It can be argued in accord with the Court's analysis, that this very act was the state action, triggering the obligation to provide protection.

125 Strauss, supra note 115, at 65 (internal symbols omitted).

126 Id.

127 DeShaney, 489 U.S. at 199 (internal quotations omitted).
relationship if the state moves too quickly to remove the child from the family. Effectively, the DeShaney holding, by removing liability from the state conduct, gives the state officials "too little incentive to provide adequate protection." The appropriate solution seems to lie in a carefully designed system of immunities and giving proper deference to the professional judgment. However, in no way should state officials be allowed "to [stand] by and [do] nothing when suspicious circumstances dictate a more active role for them."

There is also a danger of a so-called "parade of horribles" that might overwhelm the courts if the state is held liable for failing to prevent some harm. But the liability should be limited to cases where the state officials know of the danger, have means to protect from it, but fail to do so. In fact, in the cases like DeShaney, it is hard not to find liability. The opinion has been criticized for its failure to impose a liability on the basis of erroneous interpretation of the Constitution, "intellectual and historical dishonesty," and mechanistic approach to a paramount social problem.

B. The Fourteenth Amendment

The foundation for the majority's holding was the proposition that the Due Process Clause of the Fourteenth Amendment does not impose on a state any affirmative duties to protect individuals. The Clause reads: "...nor shall any State deprive any person of life, liberty, or property without due process of law." There are many ways to read the word "deprive," and the Court suggests that "deprivation" must be an affirmative

128 Id. at 203; see Strauss, supra note 115, at 80 n.63.
129 Strauss, supra note 115, at 80 n.63.
130 See id.
131 DeShaney, 489 U.S. at 203.
132 See Deichert, supra note 34, at 1069-70.
133 See id.
134 Miccio, supra note 115, at 125.
135 Id. at 168 (referring to decision as "dreadful public policy"); see Susan Bandes, The Negative Constitution: A Critique, 88 MICH. L. REV. 2271, 2287 (1990) (proclaiming DeShaney opinion to be "classic example of conventional, conceptualist approach").
136 DeShaney, 489 U.S. at 195. See, e.g., Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that while Due Process Clause imposes limitations on government actors, it does not mandate affirmative obligation to provide necessary services to its citizens).
137 U.S. CONST. amend. XIV, § 1.
action; however, it is not unreasonable to attach other meanings to it. If the government cannot deprive, then must it provide? Stay neutral? Analysis of this sort must be in conjunction with consideration of the purpose of government. If we pause and think about what is the purpose of government, the ubiquitous answers come to mind: to ensure and provide for order, stability, and prosperity. The state is actively engaged in achieving and maintaining these objectives. Meeting these objectives necessarily implies a duty to offer protection, and in large part, the government has been able to offer protection, as manifested in creating such entities as police. It is difficult to imagine that a police officer would be relieved of liability if he had witnessed a crime, had the ability to prevent it, yet "stood by" and did nothing in the same fashion as DSS. For example, in Anderson v. Branen, the court held that it "is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." However, since this duty to offer protection is implied in the very purpose of the government, it tends to escape enforcement, and failure to carry out the duty is viewed as "state inaction," not a due process violation. A quick look at history clarifies the picture to the point where the state's duty to protect is unambiguously rooted in the Constitution.

The Fourteenth Amendment was enacted in light of clear governmental inaction of the states that refused to offer protection to the newly freed black citizens, who were often the victims of violence. The clear intent of the federal government was to compel the southern states to enforce the natural rights.

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139 See Steven J. Heyman, Constitutional Perspectives: Article: The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 1991 DUKE L.J. 507, 562 (1991); Miccio, supra note 115, at 166 (suggesting that historical background of Due Process clause supports conclusion that "deprive" can be read to mean "fail to protect").

140 17 F.3d 552, 557 (2d Cir. 1994).

141 Id. at 557.

142 See Heyman, supra note 139, at 509.

143 Later these rights came to be known as "civil rights." See Allen, supra note 24, at 35-36.
of black individuals. The role of the state was not to merely recognize negative rights but positively protect them, and it was viewed as "the most fundamental obligation the government owed to its citizens." In furthering its goal, the federal government drafted the Fourteenth Amendment and used the Due Process Clause as a tool of ensuring its applicability to the states, obliging them to protect the rights appearing in the Clause. Although the Drafters borrowed some language of the Clause from the Fifth Amendment, their clear intent was not to place limitations on the government's ability to act, but rather to expand states' obligations to offer protection to their citizens. Therefore, it follows that "a central purpose of the Fourteenth Amendment ... was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons..." including protection from private violence.

Despite such clear manifestation of the purpose of the amendment and the Due Process Clause, Chief Justice Rehnquist reads it as "a limitation on the state's power to act, not as guarantee of certain minimal levels of protection and security." Such an interpretation not only defeats the whole notion that a basic purpose of the government is to protect its citizens, as evidenced in the adoption of the social contract as the basis for the Constitution, but also damages the specific objective of the Fourteenth Amendment. The Chief Justice purported to follow

144 Heyman, supra note 139, at 509. "Unrestrained violence against the Blacks and states' failure to protect them prompted the federal government to provide "federal guarantees of protection...through constitutional amendment." Id. at 550.
145 Heyman, supra note 139, at 511-12.
146 See Gerhardt, supra note 41, at 427 (stating dual purposes of Fourteenth Amendment, including constitutional, as opposed to state, protection of rights of all American citizens); Heyman, supra note 139, at 532-34 (describing recognition of substantive rights as component of "protection"); Miccio, supra note 115, at 166 (arguing that Fourteenth Amendment reconfigured state's duty from merely restricting states from invading constitutional rights to positive protection of those rights from invasion by private actors).
147 Heyman, supra note 139, at 562: The contemporary understanding of the due process clause was not limited to direct governmental takings of life, liberty, and property. Instead, that clause was understood in the antebellum legal tradition to guarantee these rights the protection of the laws. [T]his understanding was shared by the Framers of the Fourteenth Amendment.
148 Heyman, supra note 139, at 546.
149 Id.
150 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195.
the intent of the Drafters when he stated, "Framers were content to leave the extent of governmental obligation... to the democratic political processes."151 However, not only is the Chief Justice mistaken about the goals of the Drafters, but he also endorses the views of their critics.152 Nevertheless, DeShaney remains the controlling case in the area of governmental inaction and has had an enormous effect on subsequent litigation.153

III. POST-DESHANEY JURISPRUDENCE

Just as the state's presence is immersed in every individual's situation, so is state action as it permeates every level of society. The government, in discharge of its duties mandated by the social contract, has created various institutions for the benefits of its citizens, the most apparent being schools and police. Since these institutions are governmental entities, the DeShaney holding has been applied to them in the various situations where individual's well-being depends on how the government uses its power, and when the government misuses its power, the DeShaney holding shields it from liability.154 The following provides an overview of the cases where courts analyze the DeShaney holding in the public school, domestic violence, and police settings.

In Stevens v. Umsted,155 a disabled student in a state residential school brought a § 1983 action alleging that school officials failed to protect him from sexual abuse by other students even after the school officials gained actual knowledge of the assaults on the student.156 Following DeShaney, the court found no constitutional violation because the plaintiff voluntarily

151 Id. at 196.
152 See Gerhardt, supra note 41, at 422-38 (criticizing Chief Justice Rehnquist's and Judge Posner's approach for their inconsistency with the history and purpose of Fourteenth Amendment and for their endorsement of opponents' of amendment's views); see also Jack M. Beermann, Administrative Failure and Local Democracy: The Politics of DeShaney, 1990 DUKE L.J. 1078, 1088-90 (1990) (critiquing DeShaney's Court's characterization of the Framers' intent).
153 See generally Beermann, supra note 152, at 1087-1112.
154 See, e.g., Lewis v. Anderson, 308 F.3d 768, 770-76 (7th Cir. 2002) (holding that state officials did not violate duty to foster children when they were abused by foster parents).
155 131 F.3d 697 (7th Cir. 1997).
156 Id. at 699.
attended the school. The Seventh Circuit based its holding on *DeShaney*'s language that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." The Seventh Circuit overlooked the fact that the Supreme Court derived this proposition only after reviewing its holdings in *Estelle* and *Youngberg*; therefore, the Seventh Circuit was free to find functional custody in the fact that the student was disabled, lived in the school, and was completely dependent on its officials for his protection. Instead, the court emphasized that the plaintiff attended the school voluntarily and could have requested a discharge at any time without taking into account state compulsory education laws, the student's disability, and the uniqueness of a residential school to meet disabled students' educational demands.

In *D.R. ex rel. v. Middle Bucks Area Vocational Technical School*, the complaint involved allegations of repeated physical and sexual abuse of a disabled student by other students in a public school. The abusive conduct took place in the art room in the locking unisex bathroom and a darkroom. The class teacher allegedly was or should have been present in the classroom and admitted to being unable to control the class. The plaintiff was subsequently subject to a variety of misconduct by the students, including offensive touching. The plaintiff also stated that the school officials knew of the repeated abuse and did nothing. In its analysis, the court employed the usual arguments that parents and students were free to choose another school and that parents were involved in the student's special education.

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157 *Id.* at 702.
158 *DeShaney* v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199-200.
159 See generally *Lewis*, 308 F.3d at 775-76. The facts bring this case closer to the facts of *Youngberg*, where a duty was found; however, the court focused its attention on voluntary aspect of attending a school.
160 See *Spivey v. Elliot*, 29 F.3d 1522 (11th Cir. 1994) (discussing similar facts with an opposite holding).
161 972 F.2d 1364 (3d Cir. 1992).
162 *Id.* at 1366.
163 *Id.*
164 *Id.*
165 *Id.*
educational program;\textsuperscript{166} and consistent with \textit{DeShaney}, the court did not impose liability on the school officials, absent some affirmative action on their behalf, despite their exercise of the state's conferred \textit{in loco parentis} authority.\textsuperscript{167}

In \textit{Pinder v. Johnson},\textsuperscript{168} a mother brought a § 1983 action seeking to impose liability on a police officer who failed to prevent the death of the plaintiff's three children.\textsuperscript{169} When the plaintiff's ex-boyfriend was released from prison after serving a sentence for arson, he came to her house. A scene of violent abuse developed with the boyfriend threatening to murder the plaintiff and her children. A neighbor helped the plaintiff to subdue the boyfriend until police arrived and arrested him. The plaintiff expressed her fears to the police, informed the officer of the threats, said that her ex-boyfriend had threatened her and the children before, and even attempted to burn them, for which he received the arson conviction.\textsuperscript{170} The officer assured the plaintiff that her ex-boyfriend would be under arrest for the whole night and that her children would be safe when she went to work that evening. The plaintiff did go to work, but the officer only charged the perpetrator with trespass and destruction of property, for which a commissioner released him with a warning not to go near the plaintiff's house.\textsuperscript{171} Undeterred by the warning, the perpetrator returned to the plaintiff's house and set it on fire, which led to the children's death from smoke inhalation.\textsuperscript{172} In analyzing the plaintiff's claim, the court stayed within \textit{DeShaney}'s reasoning, finding no state action\textsuperscript{173} and no custody that would give rise to the duty.\textsuperscript{174} The Court overlooked the officer's assurances to the plaintiff that it would be \textit{safe} for her to go to work and leave her children. Granted, civil liability may seem too much of a punishment for an assertion in an uncertain situation, the officer was acting under the color of law and should be held to a higher duty with carefully designed

\textsuperscript{166} \textit{Id.} at 1372.
\textsuperscript{167} \textit{Id.} at 1373.
\textsuperscript{168} \textit{Id.} at 1171-72.
\textsuperscript{169} \textit{Id.} at 1172.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} at 1175.
\textsuperscript{174} \textit{Id.}
immunities to shield from liability. Immunities should be based on a reasonable professional judgment.

In *Gonzales v. City of Castle Rock*, the plaintiff, a mother of three children, retained custody over them and obtained a restraining order against their suicidal father. After the restraining order was issued, the father abducted the three children. The mother notified the police immediately and requested enforcement of the order. The police refused and told her to wait for her ex-husband to return. Upon contacting her ex-husband, the plaintiff learned of his whereabouts and again asked the police to enforce the order. She was told to wait for a police officer, but no help arrived. In a couple of hours her husband was killed after he opened fire near the police station. The police discovered that earlier he had murdered his children. Consistent with the *DeShaney* holding, the court found no substantive due process violation in the officers' refusal to enforce the restraining order and follow up on the lead provided by the plaintiff, which would have possibly prevented the deaths of three young children. These cases demonstrate how permeating the *DeShaney* holding is, as well as how easy it is for the courts to lose sight of "the first duty of government": the protection of its citizens.

IV. THE FUTURE

In light of the pervasiveness of the *DeShaney* doctrine and the scope of its applicability, the future seems rather bleak for the victims of governmental inaction. Since it does not appear likely that the Court will overrule its holding, the only avenue of protection may lie in a Congressional action, which is similar to those taken to protect the rights of Black people. To intervene in discrimination based on race, Congress enacted 42 U.S.C. §

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175 307 F.3d 1258 (11th Cir. 2002).
176 Id. at 1261.
177 Id.
178 Id. at 1262.
179 Id. at 1263. Although there was no constitutional violation of due process, the court found a violation of procedural due process based on a state statute. Id. at 1264. The statute required officers to "use... reasonable means to enforce a restraining order" and since the officers did not use reasonable means in enforcing restraining order, liability was found. Id.
180 Heyman, *supra* note 139, at 507.
1981,¹⁸¹ § 1982¹⁸² and § 1985¹⁸³ which ensure equal rights and equal protection of the laws to all citizens, black and white. These laws were aimed at the discriminatory conduct of private

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
individuals and were enacted under the Enabling Clause of the Thirteenth Amendment. The enactment was triggered by the recognition that Blacks were members of the vulnerable class and the usual methods of securing protection were not enough. The statutes enacted under the Thirteenth Amendment were initially aimed at equating racially diverse groups. However, their remedial purpose - recognition of a vulnerable class - can be transposed to the areas where certain categories of people may be in need of that extra assurance of this protection. The Fourteenth Amendment contains a similar Clause, allowing it to enforce the Amendment's provisions against the states. If Congress can regulate conduct of the private individuals, it should be able to proscribe egregious conduct by the states.

In contemporary America, children are certainly a vulnerable class deserving and requiring the highest level of protection. In light of the DeShaney holding, it would be quite appropriate for Congress to take action and enact legislation geared toward the protection of the generations destined to lead this country into the future. 42 U.S.C. § 1983 purports to shield individuals from deprivation of their rights by the state, but by judicial interpretation, it has not done so in DeShaney and subsequent cases. Perhaps a more effective approach would be to provide incentives for the states to take the responsibility to protect their

184 U.S. CONST. amend. XIII, § 2 Power to enforce the amendment.
185 See Amar, supra note 117, at 1359 (commenting on the 'peculiar institution' of southern chattel slavery, with its auction blocks and iron chains, and stating that said amendment's sweeping vision prohibited forced labor and still applies today); Adrieene D. Davis, The Case for U.S. Reparations to African Americans, 7 HUM. RTS. BR. 3, 3-4 (2000) (discussing political assaults and human rights deprivations that enslaved people suffered, including denial of suffrage, denial of literacy, denial of serving on juries, and denial of being able to testify against whites); David P. Tedhams, The Reincarnation of "Jim Crow:" A Thirteenth Amendment Analysis of Colorado's Amendment 2, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 137 (1994) (announcing that amendment XIII's framers wanted to ban slavery as legally enforceable personal servitude, as well as denial of rights and opportunities to newly free slaves).
186 U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
187 Id.
188 See DeShaney, 489 U.S. at 213 (Blackmun, J., dissenting) "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." Aileen M. Bigelow, Comment, In the Ghetto: The State's Duty to Protect Inner-City Children from Violence, 7 NOTRE DAME J. L. ETHICS & PUB. POL'y 533, 560 (1993) (quoting from SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS, "the ultimate test of a moral society is the kind of world it leaves to its children.")
citizens by providing them with conditional aid. These conditions could be the existence or creation of educational and counseling services for families, intervention, and prevention programs. To do that, the state's duty of care and protection has to be reinserted into the core of public policy. If the legislature, both federal and state, crafts "public policy and statutes that build in a state duty of care, courts will be forced to confront issues" of state accountability.

CONCLUSION

The Constitution guarantees our liberties and the purpose and obligation of the states is to protect these liberties. In a situation of a governmental failure to carry out its obligation, the courts have a unique power to secure the Constitutional guarantees and require the states to protect them. As Alexis de Tocqueville declared:

The strength of the Courts of law has always been the greatest security that can be offered to personal independence; but this is more especially in democratic ages. Private rights and interests are in constant danger if the judicial power does not grow more extensive and stronger to keep pace with equality of conditions.190

189 Miccio, supra note 115, at 168.