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DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)

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Due Process—CLAIMS OF ABUSED CHILDREN AGAINST STATE PROTECTIVE AGENCIES—THE STATE'S RESPONSIBILITY AFTER *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

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I. INTRODUCTION

ON July 27, 1989, Bradley McGee's stepfather and mother plunged the youngster headfirst into a toilet and hit him with pillows until he collapsed.[1] Bradley was being punished for soiling his diapers.[2] He died the next evening from extensive head injuries.[3] The death of this blond-haired, blue-eyed two-year-old from Lakeland, Florida, aroused the passions of Floridians statewide,[4] not just because of the brutality of his beatings, but also because of the failure of the Department of Health and Rehabilitative Services (HRS) to protect him.[5]

Twenty-five to fifty percent of the fatal child abuse cases in the United States each year occur in families that have previously been reported to child protection agencies.[6] In states around the country, child protection departments are being intensely scrutinized as children who are supposed to be in their care are allowed to die.[7] In the face of Bradley McGee, Florida has been confronted once again by the specter of child abuse and by the troubling issue of the extent of the state's responsibility to protect children from the beatings of adults.

The United States Supreme Court recently addressed this issue in *DeShaney v. Winnebago County Department of Social Services*.[8] This Note will discuss the policy implications of *DeShaney* and suggest a

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1. Tampa Tribune, July 30, 1989, at 1A, col. 3.
2. *Id.*
3. *Id.*
4. *See* Miami Herald, Sept. 14, 1989, at 1B, col. 2; Miami Herald, Aug. 20, 1989, at 5B, col. 4.
5. After more than a year of foster care, Bradley died only two months after being returned to his mother. Miami Herald, Sept. 1, 1989, at 1A, col. 5.
6. N.Y. Times, Nov. 9, 1987, at B1, col. 3.
7. Tampa Tribune, Oct. 23, 1989, at 1B, col. 4. *See also* Miami Herald, May 21, 1989, at 1B, col. 2.
8. 489 U.S. 189 (1989).

way to ensure that states cannot abdicate responsibility for abused children despite this ruling.

II. THE CASE

"I just knew that the phone would ring some day and Joshua would be dead," said a Wisconsin Department of Social Services case worker upon hearing that four-year-old Joshua DeShaney had been beaten so severely by his father that he fell into a coma.[9] The resultant brain damage is expected to relegate Joshua to confinement in an institution for the profoundly retarded for the rest of his life.[10]

This final, crippling beating took place more than two years after the state authorities were first informed of Joshua's dangerous situation.[11] During this time, emergency room personnel who treated Joshua made three separate reports of abuse, and a case worker from the state observed numerous suspicious injuries.[12] Despite these reports and the failure of Joshua's father to comply with his agreement with the Department to take various steps to ensure the boy's welfare,[13] the social worker took no action to help the child but merely "dutifully recorded these incidents in her files."[14]

Joshua and his mother subsequently filed suit under 42 U.S.C. § 1983,[15] alleging that the Department had deprived Joshua of his right to due process of law by failing to protect him when they knew, or should have known, that he was in danger.[16] The district court granted summary judgment for the defendants, which was affirmed by the Court of Appeals for the Seventh Circuit.[17] The Supreme Court granted certiorari[18] and also affirmed.[19]

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9. *Id.* at 209 (Brennan, J., dissenting).

10. *Id.* at 193.

11. *Id.*

12. The social worker assigned to the case visited the DeShaney home nearly twenty times. *Id.* at 209.

13. Mr. DeShaney promised to attend counseling sessions, to convince his girlfriend to move out of the DeShaney home, and to enroll Joshua in preschool. *Id.* at 192-93.

14. *Id.*

15. This statute provides in part:

> 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.

42 U.S.C. § 1983 (1982).

16. *DeShaney*, 489 U.S. at 193.

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

18. DeShaney v. Winnebago County Dep't of Social Servs., 485 U.S. 958 (1988).

19. *DeShaney*, 489 U.S. at 194.

III. THE SECTION 1983 CLAIM

In *Martinez v. California*,[20] the Supreme Court considered the question of the liability of state officials under the due process clause for the murder of a private citizen by a parolee. Rather than directly address the issue, the Court decided the case on the narrow ground that the causal connection between the action of the state in releasing the murderer and the death of the citizen was too attenuated to establish a deprivation of rights under section 1983.[21] In dicta, however, the Court stated "[w]e need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole."[22]

Several courts of appeals interpreted this language to mean that if the state is aware of a danger to a victim and indicates a willingness to protect that victim, a "special relationship"[23] arises, requiring the state to provide adequate protection. For example, in *Estate of Bailey v. County of York*,[24] the Court held that a special relationship between the state and a child arose when the state took the child into custody and later returned her to her mother, aware that the child had been abused.[25] Therefore, the state had a duty to protect her.[26]

The Supreme Court rejected this interpretation of *Martinez* in *DeShaney*, stating that a special relationship giving rise to a duty to protect occurs only when the state has an individual in its custody when the harm takes place.[27] Joshua's presence in state custody and subsequent return to his father did not influence the Court.[28] The Court

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20. 444 U.S. 277 (1980).

21. *Id.* at 284-85.

22. *Id.* at 285 (footnote omitted).

23. The court must find a "special relationship" in this situation in order to sustain a section 1983 action, for there is, in general, no constitutional duty imposed on state officials to protect members of the public at large from crime. Wright v. City of Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983) ("the due process clause . . . does not protect a member of the public at large . . . , at least in the absence of a special relationship between the victim and the criminal or between the victim and the state."); *see also Martinez*, 444 U.S. at 284-85.

24. 768 F.2d 503 (3d Cir. 1985).

25. *Id.* at 510-11. *See also* Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425 (9th Cir. 1988) (listing factors to be considered in determining the existence of a special relationship); Jenson v. Conrad, 747 F.2d 185, 190-94 (4th Cir. 1984) (tracing the evolution of the special relationship concept).

26. 768 F.2d at 510-11.

27. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199 (1989). *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982) (involuntarily committed mental patients constitutionally entitled to services); Estelle v. Gamble, 429 U.S. 97 (1976) (incarcerated prisoners must be protected).

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

> If the state puts a man in a position of danger from private persons and then fails to

stated that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the due process clause, not its failure to act to protect his liberty interests against harms inflicted by other means."[29]

Chief Justice Rehnquist, writing for a 6-3 majority, stated that the due process clause of the fourteenth amendment, on which section 1983 actions are based, is a limitation on a state's power to act, not an imposition of an affirmative obligation on the part of a state to provide services.[30] The Court reasoned that because the due process clause does not require the state to provide protective services, the state bears no liability for injuries that could have been prevented had it chosen to furnish them.[31] Therefore, the state was not liable for its failure to provide protective services to Joshua.[32] In so holding, the Court drew a rigid line between an action of a state which deprives an individual of rights and a failure of a state to act which has the same result.[33]

IV. POLICY IMPLICATIONS OF *DESHANEY*

The Court's refusal to hold the state responsible when its child care workers are negligent[34] strikes a blow to the recent legal developments intended to stop the ever-increasing problem of child abuse in this country. Laws against child abuse affirmatively recognize that parental rights are not absolute and that the state should intervene into pri-

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protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. at 618.

29. *DeShaney*, 489 U.S. at 200 (footnote omitted). One wonders how Joshua, a four-year-old, could have "acted on his own behalf" once he was turned over to his father by the state.

See also id. at 207 (Brennan, J., dissenting) (reading *Youngberg* and *Estelle* to stand for the proposition that "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."); Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) (imposing a duty on a state to protect when it cuts off private aid—a "monopoly exception" to general rule of no duty). *But see generally* Note, *Snake Pits, Lion's Dens and Section 1983: When Does Inaction Equal Action—DeShaney v. Winnebago County Department of Social Services*, 24 WAKE FOREST L. REV. 781, 794-821 (1989) (discussing special relationship doctrine and praising the result in *DeShaney*).

30. *DeShaney*, 489 U.S. at 195.

31. *Id.* at 196-97.

32. *Id.*

33. *See id.* at 204-05 (Brennan, J., dissenting) (questioning the drawing of this line and the failure of the majority to focus on the *actions* taken by the state to aid Joshua). *See generally* Note, *Negligent Failure to Rescue; Liability under 42 U.S.C. Section 1983: DeShaney v. Winnebago County Dep't of Social Serv.*, 12 HAMLINE L. REV. 421 (1989) (criticizing the Court's narrow reading of section 1983).

34. *See infra* notes 52-54 and accompanying text.

vate family matters to protect endangered children. This doctrine of *parens patriae* long ago replaced the view of ancient civilizations that parents should have the ultimate responsibility concerning all decisions relating to their children, including the decision to kill them.[35]

The ever-increasing intervention of the state has displaced the role of private actors in providing such basic necessities as the teaching and nurturing of children,[36] a development which is probably inevitable in an industrial society.[37] With this added responsibility must come accountability, yet the Court in *DeShaney* has sent the message that states will not be held accountable for their actions. Under the doctrine of *parens patriae*, the state clearly has the authority to pursue the overwhelming societal interest in protecting children from abuse.[38] Having exercised this authority by installing a child welfare system, the state must at least assume the responsibility for seeing that it is competently administered. The child welfare system is meaningless if the state bears no liability for failing to fulfill this responsibility.

In *In re Gault*,[39] the Supreme Court stated that the Constitution does not apply only to adults, but protects children as well.[40] According to the majority in *DeShaney*, however, the Constitution turns its back on children when they are being brutally beaten by their own parents, even though the state, by acting with due care, could have prevented that harm. No duty is owed, said the Court, because abused children are no worse off than they would have been had the state taken no action on their behalf.[41]

The Court's assertion would be more palatable if the state had not displaced all former sources of help for the child. By establishing a system to receive and act on abuse complaints, the state created a reliance interest in the public. With this system in place, neighbors, rela-

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35. *See* Herman, *A Statutory Proposal to Prohibit the Infliction of Violence upon Children*, 19 FAM. L.Q. 1, 5 (1985). *See generally* Radbill, *A History of Child Abuse and Infanticide*, in VIOLENCE IN THE FAMILY 173 (S. Steinmetz & M. Straus eds. 1974); Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspective*, 50 N.C.L. REV. 293 (1972) (giving a comprehensive history of child abuse).

36. *See* L. HOULGATE, FAMILY AND STATE 31 (1988); Caplow, *The Loco Parent: Federal Policy and Family Life*, 1976 B.Y.U. L. REV. 709-14.

37. *See* W. GOODSELL, A HISTORY OF THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION 461-64 (1915); *Cf.* S. KNOX, THE FAMILY AND THE LAW 111-39 (1941) (the Great Depression created a societal need for security which provided the necessary impetus for modern welfare legislation to protect both children and adults).

38. *See* Prince v. Massachusetts, 321 U.S. 158, 165-67 (1944).

39. 387 U.S. 1 (1967).

40. *Id.* at 13.

41. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989). *But see* Doe v. Milwaukee County, 712 F. Supp. 1370, 1376 (E.D. Wis. 1989) (stating that "[t]he majority's reasoning on this point may have been less than compelling").

tives, teachers, and health care professionals feel they have "done their duty" by reporting suspected abuse to the appropriate authorities, not realizing that those officials can stand by and do nothing with absolutely no accountability. It seems self-evident that if this system did not exist, concerned adults would more readily take the initiative to speak to the abuser, call the police, or even personally rescue the child.[42] As in any situation where the state interferes in what was formerly a private domain, this interference ultimately replaces the position of private actors.[43]

Given the recent legislative enactments designed to protect children,[44] it is ironic that the Supreme Court, the traditional guardian of the helpless, would be the one to turn its back on the victims of child abuse. As Justice Blackmun recognized, the Court justifiably could have "gone either way" in *DeShaney* by reading its previous section 1983 decisions narrowly or broadly.[45] Indeed, one would be hard pressed to assert that Justice Brennan's approach to section 1983[46] is unsound.

The Court has previously insisted upon adequate protection of children, recognizing that children's safety and well-being take precedence over such Constitutional cornerstones as free speech[47] and the free exercise of religion.[48] In *DeShaney*, the Court took a step backward into the ancient time of parental control over the life, and death, of their child by allowing the state to abdicate its role of *parens patriae* when that role could result in legal liability.

Perhaps the Court feared opening a floodgate of litigation involving the removal of children from their homes.[49] Indeed, the literature on

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42. While the merit of self help is undoubtedly questionable in these situations, surely it is no more questionable than the merit of a child protection service that is not held accountable for protecting children drawn to its attention.

43. *See DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) ("Through its child-welfare program, . . . the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS.").

44. *See infra* notes 55-58 and accompanying text.

45. *DeShaney*, 489 U.S. at 212-13 (Blackmun, J., dissenting).

46. *Id.* at 203-12 (Brennan, J., dissenting).

47. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

48. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

49. *See DeShaney*, 489 U.S. at 203. *See also* Vosburg v. Department of Social Servs., 884 F.2d 133 (4th Cir. 1989) (granting absolute immunity to child protection workers); Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539 (1985) (asserting that child protection workers are so afraid of letting children die that they intervene far too frequently, and advocating absolute immunity for their decisions).

this issue is often conflicting and uncertain.[50] While the specter of a jury second-guessing every case worker's decision with the benefit of hindsight is indeed frightening, this fear does not justify denying Joshua DeShaney, and the potential thousands like him, his day in court.

Joshua DeShaney may have been unsuccessful before a jury. The state would have had little difficulty establishing the substantial degree of uncertainty surrounding the unenviable decision to remove Joshua from his biological family. Perhaps the jury would have rewarded Joshua not because of the responsibility of the state, but out of pity. Again, however, this is no reason to take away Joshua's day in court. Pity is an element in many cases—an element the law deals with not by taking away the right to sue, but through careful instructions to the jury, through rules of evidence disallowing overly prejudicial items,[51] and through careful supervision by trial judges and appellate courts.

In addition, the high standard of fault required in a section 1983 action mitigates against the possibility of a "pity award." While the *DeShaney* Court did not reach the issue of the requisite degree of fault in actions such as this,[52] proof of mere negligence almost certainly would not have sufficed. Mere negligence will not support a substantive due process claim,[53] although the Supreme Court has not addressed whether something less than intentional conduct, such as gross negligence or recklessness, is actionable.[54]

While mandatory reporting laws,[55] immunity from liability for reporting abuse,[56] modifications of the rules of evidence,[57] and passive

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50. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979); Besharov, *supra* note 49; Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983); Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

51. *See, e.g.*, FLA. STAT. § 90.403 (1989).

52. *DeShaney*, 489 U.S. at 202 n.10.

53. Daniels v. Williams, 474 U.S. 327, 329-34 (1986).

54. *Id.* at 333-35. *See generally* Note, *Government Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity*, 27 B.C.L. REV. 949, 958-60 (1986). The lower courts are divided on the exact standard of liability. *Compare* Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986) (not even recklessness is sufficient) *with* Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir. 1988) (adopting a gross negligence standard).

55. *See, e.g.*, FLA. STAT. § 415.504 (Supp. 1990). *See also* Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 272-74 (1982).

56. *See, e.g.*, FLA. STAT. § 415.511 (Supp. 1990). *See also* Note, *Reporting Child Abuse:*

partner liability[58] are undoubtedly helpful in combating the problem of child abuse, these steps are all for naught if, in the end, the state can step back from the failure of its own system and wash its hands of the responsibility. Unless these laws and policies are enforced by a competent system, they will almost certainly be ineffective.

By failing to hold states responsible for their own ineptitude, the Supreme Court has sent the message that it will not use its power to force the state to perform competently the tasks it undertakes to protect children, thereby weakening the protections enumerated above. For example, special trial rules will be meaningless because abusers will never be brought to trial without competent investigators—until, of course, it is too late, as in the cases of Joshua DeShaney and Bradley McGee. Mandatory reporting will be similarly meaningless if the reports are merely "dutifully recorded"[59] but never acted upon.

While none of the above legislative steps have eliminated the problem of child abuse, lessening the effectiveness of these measures surely is not going to help the situation. Incompetent child protection workers seem to be a big part of the problem, and relieving them of the responsibility for their actions—or inactions—certainly is not the answer.[60]

V. A WAY AROUND *DESHANEY*

The petitioners in *DeShaney* also argued that the Wisconsin child protection statute gave abused children an "entitlement" to receive protective services in accordance with the terms of the statute.[61] Under *Board of Regents v. Roth*,[62] this entitlement would enjoy due process

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When Moral Obligations Fail, 15 PAC. L.J. 189 (1983) (advocating tort liability for failure to report abuse).

57. *See, e.g.*, Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1 (1984); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

58. *See* Note, *The Broadening Scope of Liability in Child Abuse Cases*, 27 J. FAM. L. 697 (1988-89).

59. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 192-93 (1989).

60. The Supreme Court recognized that liability could be found in abuse cases under state tort law. *DeShaney*, 489 U.S. at 201-03. While the relative merits of tort liability are beyond the scope of this discussion, this Note contends that section 1983 claims are not yet completely barred, *see infra* notes 61-82 and accompanying text, and that these claims should be allowed to ensure a remedy exists in those states refusing to impose tort liability in this context. *See, e.g.*, Nelson v. Freeman, 537 F. Supp. 602 (W.D. Mo. 1982), *aff'd sub. nom.*, Nelson v. Missouri Div. of Family Servs., 706 F.2d 276 (8th Cir. 1983) (finding no individual duty to abused child under Missouri Child Abuse Statute); *but see, e.g.*, Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987); Mammo v. State, 138 Ariz. 528, 675 P.2d 1347 (Ariz. Ct. App. 1983).

61. 489 U.S. at 195 n.2.

62. 408 U.S. 564 (1972).

protection against state deprivation.[63] Therefore, the child would have a section 1983 claim if the protections enumerated in the state's child protection statute were not competently rendered. The Court declined to rule on this issue because it was raised for the first time in the petitioners' brief to the Court.[64]

In *Goldberg v. Kelly*,[65] the Supreme Court held that welfare recipients are entitled to hearings before a state may terminate their benefits.[66] The Court stated that although the Constitution does not impose a requirement that the state provide welfare benefits, once the state undertakes to provide them, the due process clause imposes an obligation to do so fairly.[67] Property, for the purposes of due process protection, does not consist merely of the traditional concepts of land and personal possessions,[68] but is defined in light of the expectation created by state law.[69] Therefore, protective services could be regarded as a property right if the state's child protection statute is drafted in a way that creates an entitlement to those services.

By refusing to address the entitlement issue, the Court has left open a loophole that could serve to impose liability on states when child protective services are performed incompetently. This loophole could serve to eradicate the undesirable policy of allowing a state to escape responsibility for children's deaths as long as its negligence is a result of inaction rather than action.[70] At the same time, the existence of this loophole would allow states to limit their liability by carefully drafting their child protection statutes to avoid creating an entitlement to child protective services. Such a statute would also put the public on notice that no legal recourse would be available for the harm caused by incompetent provision of services, thereby reducing the public's reliance on state child protection agencies.[71] In addition, because an entitlement claim would be based on state statute, liability could be imposed

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63. *DeShaney*, 489 U.S. at 195 n.2.

64. *Id. See* Old Jordan Mining & Milling Co. v. Societe Anonyme des Mines, 164 U.S. 261, 264-65 (1896).

65. 397 U.S. 254 (1970).

66. *Id.* at 261.

67. *Id.*

68. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573 (1975) (public education is a property interest under due process clause).

69. Bishop v. Wood, 426 U.S. 341, 344 n.7 (1976). An abstract need or desire does not create an entitlement. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

70. *See supra* note 33 and accompanying text.

71. The importance of reducing the public's reliance on state agencies in those situations where the state will not be held responsible for its incompetence cannot be overestimated. *See supra* notes 42-43 and accompanying text.

without construing the due process clause to place positive obligations on states, a construction the Court obviously wants to avoid.[72]

The future of this "loophole" is unclear. The District Court for the Eastern District of Wisconsin specifically addressed the entitlement issue in *Doe v. Milwaukee County*.[73] The court reluctantly held that the Wisconsin child abuse statute[74] did not create a legitimate claim of entitlement to an investigation by the Department.[75] However, the decision was made on the narrow ground that the specific statutory scheme did not create an entitlement in the particular circumstances of the case before the court.[76] This very narrow holding is a positive sign that the entitlement argument will be well-received by courts.

Florida is likely to be one of the states that accepts the entitlement argument. The Florida courts have been receptive to arguments that the state owes a duty to protect individuals in certain situations. For example, in *Department of Health & Rehabilitative Services v. Yamuni*,[77] the Florida Supreme Court held that HRS had a "statutory duty of care to prevent further harm to children when reports of child abuse are received."[78]

Furthermore, the Florida child abuse statute[79] specifically compels the department to perform an on-site child protection evaluation for each report it receives[80] and gives specific guidelines regarding the factors to be considered and the intervention which must take place.[81] These specific requirements should be sufficient to create an entitle-

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72. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-97 (1989). This Note does not contend that the due process clause requires a state to adopt measures to protect abused children, but rather it supports the position that when the state does adopt such measures, it must be held accountable for its failure. For the view that the Constitution does impose a duty to protect, see Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199.

73. 712 F. Supp. 1370, 1376-78 (E.D. Wis. 1989).

74. WIS. STAT. ANN. § 48.981 (West 1987 & Supp. 1989).

75. 712 F. Supp. at 1377.

76. *Id.* The Wisconsin statute requires the social service department to conduct an investigation when a report is received under subsection 3(a)—that is, when the report comes from one of the persons required to report under section 48.981(2). Nothing in the statute compels an investigation when the report is made by someone not required to do so under section 48.981(2). *Id.* The abuse report in the *Doe* case was made by the children's relatives, none of whom were obligated to report under the statute. *Id.* Therefore, the children "[a]lmost, but not quite" had an entitlement under the statute. *Id.*

77. 529 So. 2d 258 (Fla. 1988).

78. *Id.* at 261. This holding subjected HRS to tort liability. *See supra* note 60. *See also* Florida First Nat'l Bank v. City of Jacksonville, 310 So. 2d 19 (Fla. 1st DCA 1975) (police regulations gave rise to special duty once victims were clearly and specifically identified).

79. FLA. STAT. § 415.505 (Supp. 1990).

80. Unlike the Wisconsin statute at issue in *Doe*, discussed *supra* note 76, there appear to be no technical requirements as to which reports must be investigated under the Florida statute.

81. *See* FLA. STAT. § 415.505 (Supp. 1990).

ment for abused children who have been reported to HRS.[82] Holding the state accountable when its employees fail to follow their own procedures would be an important step toward a "system" which effectively protects children.

VI. CONCLUSION

Four HRS employees knew that Bradley McGee was being physically abused and subjected to bizarre punishments, including being forced to eat his own feces.[83] These officials failed to even report their knowledge to the abuse registry,[84] and one worker recommended to the juvenile judge that the child be returned permanently to his parents, failing to inform the judge about a report critical of their parenting skills.[85] As the law now stands, no federal avenues are available to hold these officials accountable to children like Bradley McGee.

The Court in *DeShaney* allowed the state to escape liability for its own mistakes, which will ultimately lessen the effectiveness of current legislative attempts to combat child abuse. While money damages under a section 1983 action would not restore Bradley McGee's life nor Joshua DeShaney's vitality, it would be, at least, a step in the right direction. The message would then be clear that the state cannot wash its hands of its responsibilities.

The entitlement claim left open by the Court would be an effective way to hold states accountable for their mistakes, while still ensuring that legislatures have some control over state liability. The Florida courts should be receptive to this type of claim.

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82. *See generally* Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986) (advocating an entitlement approach to state inaction claims under section 1983).

83. *Supra* note 5, at 18A, col. 1.

84. *Id.*

85. Orlando Sentinel, June 16, 1990, at A1, col. 1. This worker was convicted of a felony child abuse charge and a misdemeanor count of failing to report suspected abuse. *Id.*

Donn Dughi

God help me to see
beyond the tear
that needs drying
also the cause of the crying.

—GOVERNOR LEROY COLLINS
1909-1991