GOVERNMENT DUTY TO PROTECT: POST-DESHANEY DEVELOPMENTS

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Generally, when people are injured by the government, lawyers often want to turn it into a constitutional § 1983[2] claim. Moreover, lacking anything else in the Constitution, lawyers turn to the Due Process Clause.[3] When government inaction causes a potential plaintiff to be injured, lawyers again want to turn it into a constitutional claim, so they look to the Due Process Clause.[4] The United States Supreme Court, in *DeShaney v. Winnebago County Department of Social Services,* largely precluded such actions, but the majority left open a few exceptions.[5] It is interesting and noteworthy that in the thirteen years since *DeShaney*, the Supreme Court has largely avoided this set of issues, despite numerous petitions for *certiorari* that could have clarified the area.[6] To

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[2] 42 U.S.C § 1983 (2003).

[3] U.S. CONST. amend. XIV, § 1.

[4] *See, e.g.,* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

[5] *Id.* at 192-202. The Court mentioned two possible exceptions: 1) if the government is responsible for creating the danger, and 2) if someone is in government custody and the person is unable to protect himself. *Id.*

[6] *See, e.g.,* Davis v. Brady, 143 F.3d 1021 (6th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

make sense of the post-*DeShaney* developments, one must recognize that certain patterns have begun to emerge in lower court cases. Of course, no description can explain each and every one of these cases, but there are some common themes.

The place to begin is with *DeShaney* itself. Joshua DeShaney was a four-year-old boy who was severely beaten by his father and suffered irreversible brain damage.[7] Joshua's guardian sued the Department of Social Services, claiming its failure to respond to complaints of child abuse over a two year period resulted in Joshua losing his liberty interests without due process of law.[8] Chief Justice Rehnquist, writing for the majority, rejected this argument.[9] The Court said that the government had no duty to protect Joshua from his father.[10] It rejected the claim that there was a special relationship between the Department of Social Services and Joshua that would create such a duty.[11] According to

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[7] *DeShaney*, 489 U.S. at 193. As a result of the beating that Joshua sustained, he is expected to spend the rest of his life in an institution for the profoundly retarded. *Id.*

[8] *Id.* at 191. An argument that the Wisconsin child protection statute gave Joshua an "entitlement" to receive protective services was also advanced. *Id.* at 195. The argument was based on the Court's decision in Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972). *Id.* However, since this argument was made for the first time on appeal, the Court declined to address it. *Id.*

[9] *Id.*

[10] *Id.* at 196-97.

[11] *Id.* at 201-02.

the Court, generally, the government has no duty to safeguard people and protect them from privately inflicted harms.[12]

Chief Justice Rehnquist expressly invoked the distinction between negative liberties and affirmative duties in the Constitution.[13] The Court stated that the function of the Constitution is to impose prohibitions on the government.[14] The government cannot infringe upon the freedom of speech or the freedom to exercise one's religion. The government cannot impose cruel and unusual punishment or deny a person equal protection of the law.[15] These are considered negative liberties because they are prohibitions on government action.

Chief Justice Rehnquist wrote that the Constitution does not generally impose affirmative burdens on the government, and Joshua's case was no different.[16] The Court reasoned there might be certain limited circumstances in which the government has a duty to provide protection.[17] The Court specifically mentioned two: 1) if the government is responsible for creating the danger and

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[12] *DeShaney*, 489 U.S. at 196-97.
[13] *Id.* at 195-96.
[14] *Id.*
[15] *Id.* at 197-99.
[16] *Id.* at 196.
[17] *DeShaney*, 489 U.S. at 198-99.

2) if someone in government custody is unable to protect himself or herself.[18]

There were strong dissenting opinions in this case. The most famous was Justice Blackmun's. He lamented the fate of poor four-year-old Joshua who had no one to protect him other than the Department of Social Services, and it had failed to do so.[19] Justice Brennan, along with the other dissenters, questioned Rehnquist's bright-line distinction between negative liberties and affirmative duties.[20] The dissenters explained that the most significant difference between a negative and an affirmative duty is the phrasing.[21] More telling is that Joshua's claim could have been phrased as being about negative liberties; the government violated a prohibition on its acting in a way that endangered a child.[22] Justice Blackmun stated that the government should be required to provide protection in a circumstance like this.[23]

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[18] *Id.* at 198-202.

[19] *Id.* at 213 (Blackmun, J., dissenting).

[20] *Id.* at 204-06 (Brennan, J., dissenting). Justice Brennan stated that he would have begun the analysis at the opposite direction, focusing on the action that the Department of Social Services engaged in, rather than the inaction. *Id.* at 205.

[21] *Id.* at 212 ("My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it.").

[22] *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting) ("From this perspective, the DeShaneys' claim is first and foremost about inaction . . . the failure, here, of respondents to take steps to protect Joshua . . . and only tangentially about action . . . the establishment of a state program specifically designed to help children like Joshua.").

[23] *Id.* at 212.

There are many parts of the Constitution that are about affirmative duties. The Fourth Amendment creates an affirmative duty on the part of the government to get warrants before searches or arrests.[24] The Fifth Amendment places an affirmative duty on the police with regard to the privilege against self-incrimination.[25] The Sixth Amendment is all about affirmative duties.[26] Nonetheless, *DeShaney* is the touchstone for all subsequent discussions about the affirmative duty to provide protection under due process. The Court held that the government generally has no duty to protect people from privately inflicted harms.[27]

Pinder v. Johnson[28] is a paradigm post-*DeShaney* case. One way in which it is typical is that almost all post-*DeShaney* cases have truly tragic facts. They usually involve deaths,[29] rapes,[30]

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[24] U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[25] U.S. CONST. amend. V provides in pertinent part: "no person . . . shall be compelled in any criminal case to be a witness against himself."

[26] U.S. CONST. amend. VI provides, "[i]n all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defense."

[27] *DeShaney*, 489 U.S. at 196-97.

[28] 54 F.3d at 1169.

[29] *See, e.g., Pinder*, 54 F.3d at 1169.

[30] *See, e.g., Wood*, 879 F.2d at 583.

or horrible injuries.[31] In *Pinder*, a woman who was harassed by her ex-boyfriend called the police because she was scared for her life and the lives of her children.[32] She asked the police officer whether the ex-boyfriend was going to be kept in custody. She informed the officer that she was not going back to work if the police were just going to take him to the station and release him. The police assured her that she had nothing to be concerned about because the ex-boyfriend was going to stay in custody. She did go back to work. The officers took the ex-boyfriend to the station and quickly released him. After his release, he immediately went back to her house and burned it down, killing her three children.[33] She sued, claiming that the police had enhanced and created the danger.[34] She argued that she relied to her detriment on what the officer said, but the United States Court of Appeals for the Fourth Circuit rejected that claim.[35] The Fourth Circuit held that the government's duty to provide protection was only imposed when

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[31] *See, e.g., Davis,* 143 F.3d at 1021.
[32] 54 F.3d at 1172.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1178-79.

someone is physically in government custody.[36] This is one of the most restrictive interpretations of *DeShaney*. The court stated the police had no obligation to protect her or her children, and their representations did not change anything.[37]

Next, I would like to focus on the exceptions to *DeShaney*. There are many ways of characterizing these exceptions. I would divide them into two categories based on the two exceptions that the Court recognized in *DeShaney*. The first exception is when the government enhances the danger; the second is where a person is literally in government custody.[38]

The first of these exceptions is where the government enhances or creates the danger. The most authoritative and frequently cited case is *Wood v. Ostrander*[39] out of the Ninth Circuit. In *Wood*, the police stopped a motorist who was exhibiting signs of driving while intoxicated. The police administered a field sobriety test, and it was clear that the driver was drunk. They arrested the driver and took him to the station. There was a female passenger who was not taken to the station.

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[36] *Id.* at 1175.
[37] *Pinder*, 54 F.3d at 1175.
[38] *DeShaney*, 489 U.S. at 198-202.
[39] 879 F.2d at 583.

The police took the keys to the car and left her alone on the side of the road in what the lower court described as "a high crime area." She accepted a ride from another motorist and she was raped. She then sued the police.[40] The Ninth Circuit ruled in favor of the woman, holding the police created the danger, and this case thus fit into the exception carved out in *DeShaney*.[41] The court expressly used the language of "deliberate indifference," stating that the police, by leaving her alone on the side of the road with no means of transportation, were "deliberately indifferent" to her safety.[42]

Another case with similar facts which is also widely cited is *Davis v. Brady*.[43] In this case, the police arrested Davis for public intoxication and disorderly conduct. He was then taken to the county jail facility, but it was full. The officer was ordered to "release Davis at the county jail if he was not so drunk that he would be a hazard to himself."[44] The officer drove Davis to an area outside the city, kicked him out of the car, and told him to find his own ride home. As the drunken man staggered along the road, he was hit by a car and rendered a quadriplegic. He then brought a lawsuit against the police.[45] The Sixth Circuit, like the Ninth

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[40] *Id.* at 586.
[41] *Id.* at 588, 590, 596.
[42] *Id.* at 588.
[43] 143 F.3d at 1021.
[44] *Id.* at 1023.
[45] *Id.*

Circuit in *Wood*, concluded that the government could be held liable and articulated a test that has been frequently relied on by other courts.[46] The court stated that in order to have a claim after *DeShaney*, two requirements have to be met. First, the government has to have a duty to the individual, and such a duty is not easily inferred.[47] That is the lesson of *DeShaney*. In this case, the court stated that there is such a duty because the police had put the person at risk.[48] Second, the Sixth Circuit held the government has to be "deliberately indifferent;" mere negligence is not enough.[49]

In two 1986 cases, *Daniels v. Williams*[50] and *Davidson v. Cannon*,[51] the Supreme Court held that negligence is not enough for a due process violation. The Court reasoned that a due process violation generally requires an intentional, or at least a reckless, government act, the latter seemingly synonymous with deliberate

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[46] *Id.* at 1027.

[47] *Id.* at 1025. The court reasoned that although in *DeShaney* the state neither created nor worsened the danger, "duty to protect can arise in a non-custodial setting if the state does anything to render an individual more vulnerable to danger." *Id.* (quoting Gazette v. City of Pontiac, 41 F.3d 1061, 1065 (6th Cir. 1994)).

[48] *Davis*, 143 F.3d at 1026 (explaining that the fact that Davis' injuries occurred after his release was not dispositive because "[w]hat is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries.").

[49] *Id.* at 1026 (where a government official is merely negligent in causing injury to an inmate, there is no due process violation).

[50] 474 U.S. 327, 335-36 (1986).

[51] 474 U.S. 344, 348 (1986).

indifference.[52] In *Davis*, the Sixth Circuit found there was both a duty and deliberate indifference.[53]

The third case frequently cited is *Munger v. Glasgow Police Department*.[54] Once again, this is a case that has tragic facts. In this instance, a person was being rowdy in a bar and the owner called the police. The police escorted the rowdy individual outside the bar and took his car keys away. They would not allow him back into the bar and would not allow him to get in his car. It was clear to the police he was intoxicated, yet the police did nothing to protect him. He was left outside overnight in the cold and died of hypothermia.[55] A lawsuit was brought, and the Ninth Circuit ruled that after *DeShaney*, there could still be liability.[56] The court phrased the test as, "whether [the government] 'affirmatively placed the plaintiff in a position of danger.'"[57] It held that the government has the duty to not put a person in harm or to not make the person worse off than he or she was before. The Ninth Circuit further stated that was exactly what the government did in this instance, and thus there was a basis for liability.[58]

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[52] *Id.*
[53] 143 F.3d at 1027.
[54] 227 F.3d 1082 (9th Cir. 2000).
[55] *Id.* at 1084-85.
[56] *Id.* at 1089-90.
[57] *Id.* at 1086 (quoting *Wood*, 879 F.2d at 589).
[58] *Id.* at 1087.

From the plaintiff's perspective, perhaps the best phrasing of the test post-*DeShaney* is in *Currier v. Doran,*[59] yet another case with tragic facts. In this case, a social worker transferred a child from his mother to his father who then killed the child. There was reason for the social worker to know that the father was potentially abusive, even dangerously so.[60] The Tenth Circuit held that post-*DeShaney,* the government could still be held liable.[61] It used a "but-for" causation analysis. The court stated, but-for the act of the social worker, the child would not have been in danger or suffered these harms.[62] Normally, but-for causation is easy to find in virtually any of these cases. Even in *DeShaney,* there was but-for causation; but-for the inattention of the Department of Social Services, Joshua DeShaney likely would not have suffered the harms he did. Of course, in *Currier v. Doran*, it was not just but-for causation; the Tenth Circuit also emphasized that the harm was foreseeable and the Department of Social Services had been deliberately indifferent.[63]

I think from a plaintiff's perspective, this Tenth Circuit case is useful, but many other courts have rejected but-for

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[59] 242 F.3d 905 (10th Cir. 2001), *cert. denied*, 534 U.S. 1019 (2001).
[60] *Id.* at 909-10.
[61] *Id.* at 919.
[62] *Id.* at 918.
[63] *Id.* at 922.

causation as insufficient. *Terry B. v. Gilkey*[64] is an example of one such case. In this instance, there was a transfer of a child from foster care to an aunt and uncle. The child was abused, and a lawsuit was brought. The court concluded that the government could not be held liable because it could not be shown that the harms were foreseeable, nor could it be shown that there was deliberate indifference.[65] There are hundreds of cases in which the courts have articulated the test for state-enhanced danger in varying ways.[66] Moreover, the Seventh Circuit said that state-created dangers are really about whether the government put the person, in essence, in a "snake pit." If the government puts a person in a "snake pit," then the government is responsible.[67]

More generally, in order for a plaintiff to succeed, three requirements must be met.[68] First, there must be some government

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[64] 229 F.3d 680 (8th Cir. 2000).

[65] *Id.* at 682, 684.

[66] *See, e.g., Wood,* 879 F.2d at 588 (phrasing the test in terms of "deliberate indifference"); *Davis,* 143 F.3d at 1021, 1024 (phrasing the test in terms of having dual requirements: 1) there must be a duty and 2) the government must have been deliberately indifferent); *Munger,* 227 F.3d at 1086 (phrasing the test as whether the government did something affirmative to enhance the danger); *Currier;* 242 F.3d at 918-19 (phrasing the test as a but-for causation); *Terry B.*, 229 F.3d at 684 (phrasing the test in terms of whether the state action shocks the conscience).

[67] *See, e.g.,* Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to 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.").

[68] *Wood,* 879 F.2d at 586; *Davis,* 143 F.3d at 1021; *Munger,* 227 F.3d at 1082; *Currier,* 242 F.3d at 905.

action. Normally these are cases where the government action is leaving a person on the side of the road or transferring the custody of a child.[69] Second, it must be proven that the risk to the person was actually foreseeable in light of the government action.[70] It has to be a situation where there is a foreseeable increase in danger as a result of the government's action. Third, there has to be deliberate indifference on the part of the government.[71] Again, I emphasize that pure negligence is not enough.[72] These are hard requirements to meet, but I think that the vast majority of state-created danger cases can be explained by focusing on these three factors. If the plaintiff can meet these requirements, then the plaintiff can win. If the plaintiff fails to meet any one of them, then the defendant will prevail.

The other exception that is recognized in the *DeShaney* line of cases is where somebody is in government custody. As I mentioned, Chief Justice Rehnquist spoke of this exception in

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[69] *See, e.g., Wood,* 879 F.2d at 586 (police left plaintiff by side of the road); *Davis,* 143 F.3d at 1023 (police left plaintiff by side of the road); *Munger,* 227 F.3d at 1084-85 (police left plaintiff outside of bar); *Currier,* 242 F.3d at 905 (defendant transferred custody of child to father who had allegedly previously neglected children).

[70] *See, e.g., Terry B,* 229 F.3d at 684.

[71] *See, e.g., Wood,* 879 F.2d at 583; *Davis,* 143 F.3d at 1021.

[72] *See, e.g., Daniels,* 474 U.S. at 335-36; *Davidson,* 474 U.S. at 348.

DeShaney. The Court said that this is the only exception to *DeShaney*.[73] Of course, if a person is in custody, then he or she is limited in the ability to protect himself or herself. The government then has responsibility. The initial cases concerning the government's duty to those in custody normally involved prisoners. In *Estelle v. Gamble,*[74] the Court held that the prison has a duty to provide medical care to inmates and that deliberate indifference is a basis for liability under the Eighth Amendment.[75]

The most important and famous prisoner case is *Farmer v. Brennan*.[76] A prisoner had begun to undergo a sex-change procedure before going into a federal penitentiary. The prison officials did nothing to protect him from other inmates, and he was repeatedly raped and sodomized.[77]

The Supreme Court stated that prison officials are liable if they are deliberately indifferent; however, the Court reasoned that in the prisoner context, deliberate indifference is a subjective test

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[73] *DeShaney,* 489 U.S. at 198-200 (reasoning that *DeShaney* never actually stated the "state created danger theory" as an exception to the inaction rule).

[74] 429 U.S. 97 (1976).

[75] *Id.* at 104-05 (reasoning that when a person is in custody, the state, at the very least, must provide basic medical needs).

[76] 511 U.S. 825 (1994).

[77] *Id.* at 829-30.

that looks to the state of mind of the prison officials.[78] Usually, in other contexts, when courts talk about deliberate indifference, the standard is usually an objective test.[79] In this context, I see deliberate indifference as being an objective test. I was just speaking of deliberate indifference in the post-*DeShaney* cases and how I view it as being objective in nature. However, custody cases are different. In these cases dealing with prisoners' rights, deliberate indifference is viewed as subjective in nature.[80] The objective test looks to the reasonable officer under the circumstances. The subjective test looks to the state of mind of these officers.

I have identified three areas where the Court has dealt with custody. Certainly, this does not account for all of the custody cases, but probably picks up the vast majority of them. The first area is the foster care cases, and there are a great many of them.[81] In my opinion, the foster care cases seem to come down to the following: If the government places a child in foster care, then the

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[78] *Id.* at 837.

[79] *See, e.g.*, City of Canton v. Harris, 489 U.S. 378 (1989).

[80] *See, e.g.*. Farmer v. Brennan, 511 U.S. 825 (1994).

[81] *See, e.g.*, Nicini v. Morra, 212 F.3d 798 (3d Cir. 2000); White v. Chambliss, 112 F.3d 731 (4th Cir. 1997); Milburn v. Anne Arundel County Dep't of Soc. Servs., 871 F.2d 474 (4th Cir. 1989).

government owes a duty to that child.[82] However, if the child is privately placed in foster care by his or her parents, then the government does not have a duty to that child.[83]

One such case is the Third Circuit case, *Niccini v. Morra*,[84] from a couple of years ago. In this case, the state took a child away from its parents and placed the child in foster care.[85] Here, the Third Circuit expressly analogized this to the state putting a person in prison or institutionalizing the individual. The Court reasoned that when the state takes such action, it creates a duty on the part of the state and distinguishes the situation from *DeShaney*.[86] However, as we all learned in first year Torts class, duty is not enough; in order to have liability, there must be a breach of that duty.

White v. Chambliss,[87] from the Fourth Circuit, gives us some sense of what the standard is for breach of duty.[88] *White* involved the government placing a child in foster care, and the question was under what circumstances the government was

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[82] *See, e.g., Niccini*, 212 F.3d at 807.
[83] *See, e.g., Milburn*, 871 F.2d at 476.
[84] 212 F.3d at 798.
[85] *Id.* at 801. The child was then sexually abused by the foster care custodians. *Id.* at 804. As it turns out, the foster care provider had been convicted of sexual abuse of a minor in the past, which should have been discovered. *Id.* at 804 n.5.
[86] *Id.* at 807, 808-09.
[87] 112 F.3d at 731.
[88] *Id.* at 737 (reasoning that the duty is breached only if the state officials "were plainly placed on notice of a danger and chose to ignore the danger").

liable.[89] The Fourth Circuit stated that a plaintiff has to prove "deliberate indifference" on the part of the government; it is not enough that the child was placed in foster care and there was harm to the child. This means that a potential plaintiff must prove that the government was "deliberate[ly] indifferent" with regard to foreseeable harms.[90] There are a large number of cases involving private placement of children into foster care that consistently reject government liability.[91] The *Milburn*[92] case is typical of this. Also, in situations involving private placement, the Fourth Circuit flat out rejects any duty of the government to provide protection under those circumstances.[93] The Fourth Circuit basically relied on *DeShaney*.

A second area where *DeShaney's* custody principle is applied is in the school context.[94] These cases usually involve a student who was terribly injured while at school, and the parents brought a claim arguing that, as a result of the state's requirement

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[89] *Id.* at 734-35.
[90] *Id.* at 737.
[91] *See, e.g., Milburn*, 871 F.2d at 474; Mentavlos v. Anderson, 249 F.3d 301 (4th Cir. 2001); Edwards v. Johnston County Health Dep't, 885 F.2d 1215 (4th Cir. 1989); Pfoltzer v. County of Fairfax, 775 F. Supp. 874 (E.D. Va. 1991).
[92] 871 F.2d at 474.
[93] *Id.* at 476.
[94] *See, e.g.*, Martin v. Shawano-Gresham Sch. Dist., 295 F.3d at 701 (7th Cir. 2002); Shrum v. Kluck, 249 F.3d 773 (8th Cir. 2001); Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999), Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412 (5th Cir. 1997).

that the child be in school, the state has a duty to protect the child.[95] The reality is that the parents and the children lose in the vast majority of these cases. Overwhelmingly, courts have refused to find a duty on the part of the school to provide protection.[96]

I have listed several of these cases which are typical representative cases. *Doe v. Hillsboro Independent School District*[97] is one of the most frequently cited cases. It involved a student who was raped by a custodian. The parents argued that because the State of Texas requires students to be in school seven hours a day, there exists a duty to protect students. They alleged that when a parent sends a child to school, the parent has a reasonable expectation that the school will protect the child. However, the court held there is no duty on the part of the school to provide protection to the student, and the school has no liability with regard to this rape.[98]

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[95] *Doe*, 113 F.3d at 1412.

[96] *See, e.g., Doe*, 113 F.3d at 1416 (finding that the recognition of "a potential for § 1983 liability based on egregious hiring decisions does not entail endorsement of the view that defendants such as the Hillsboro Independent School District have a duty to protect students from threats from other sorts of third parties."); *Martin*, 295 F.3d at 712 (stating that the plaintiff "did not attempt suicide during school hours or on school premises. Thus, the plaintiffs can only succeed if they establish that the school had a duty to protect [decedent] from suicide *after* the school day ended."); *Shrum*, 249 F.3d at 781 (finding that "public schools do not have a duty to protect schoolchildren from private violence").

[97] 113 F.3d at 1412.

[98] *Id.* at 1414-15.

Moreover, the Seventh Circuit, in *Martin v. Shawano-Gresham School District,*[99] provided another example of this. This case involved a student who was suspended from school. The school had reason to believe that the student was depressed. The school did nothing to help the student, but instead she was suspended and sent home. She then committed suicide.[100] The argument was that the state created the danger and had an affirmative duty to protect the student. It was then argued that the "state created danger" theory is enough to create a duty on the part of the school to provide protection. The Seventh Circuit rejected that argument, stating that there was no duty on the part of the school in such circumstances. It explicitly applied authority from its jurisdiction.[101]

There are many cases that involve students being injured by other students.[102] The question under those circumstances is whether the government has a duty to provide protection. I refer to *Shrum v. Kluck*[103] as a representative case where the court held there is no duty on the part of the school to protect the student from

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[99] 295 F.3d at 701.
[100] *Id.* at 704-05.
[101] *Id.* at 708 n.6.
[102] *See, e.g., Shrum*, 249 F.3d at 773; Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993); D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992).
[103] 249 F.3d at 781.

private acts of violence. Similarly, in *DeShaney*, the Court held there was no duty on the part of the government to protect Joshua DeShaney from violence at the hands of his father.[104]

It could be argued that when it comes to special education students, there might be a special duty, even if no such duty exists for other students. However, in *Soper v. Hoben,*[105] the Sixth Circuit held that even in the context of special education students, there is no duty. Generally, the plaintiffs in these school cases lose the vast majority of times, but there are certainly some instances where courts have been willing to provide protection for students.[106] There is a First Circuit case, *Hasenfus v. LaJeunesse*,[107] which states that if the school's conduct "shocks the conscience," meaning the school's behavior is "outrageous," then there might be a basis for liability. However, it is a difficult standard for a plaintiff to prevail under.

In contrast, the Supreme Court has recognized a duty for schools in a particular area, specifically with regard to sexual harassment claims under Title IX.[108] Educational institutions that receive federal funds are covered by Title IX. In this context, Title

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[104] 489 U.S. at 195.

[105] 195 F.3d 845, 852-53 (6th Cir. 1999).

[106] *See, e.g., Doe*, 113 F.3d at 1412; *Martin,* 295 F.3d at 701; *Shrum*, 249 F.3d at 773; *Soper*, 195 F.3d at 845.

[107] 175 F.3d 68, 72 (1st Cir. 1999).

[108] *See, e.g.,* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998).

IX states that institutions that receive federal funds cannot discriminate on the basis of gender.[109] In *Gebser v. Lago Vista School District*,[110] the Supreme Court held that a school district could be held liable under Title IX for sexual harassment by a teacher of a student when there is proof of "deliberate indifference."

In *Davis v. Monroe County Board of Education*,[111] the Supreme Court considered a school's duty with regard to peer sexual harassment. The Court stated that the school could be held liable under Title IX for peer sexual harassment. It said that a plaintiff must prove that the peer sexual "harassment . . . is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[112] Furthermore, a plaintiff must also prove there was "deliberate indifference" on the part of the school official. This means that the school officials actually knew and did not take appropriate action in light of that knowledge.[113] From a plaintiff's perspective, it is a difficult test to prove, but it certainly opens the door more than the usual due process claims against the schools.

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[109] 20 U.S.C. § 1681(a) (1) (2003).
[110] 524 U.S. at 284.
[111] 526 U.S. 629, 633 (1999).
[112] *Id.* at 633.
[113] *Id.*

The third and final area of custody cases is where a police officer witnesses other officers abusing an individual.[114] A clear example of this is the 1991 videotape of Rodney King being beaten by Los Angeles police officers while the other officers simply stood there and watched. The focus is on whether a police officer watching excessive force by another officer is under a duty to do something about it. The cases in this area hold that the officer watching the excessive force is under a duty to act.[115]

In *Anderson v. Branen*,[116] the Second Circuit stated that, "[i]t 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." Similarly, in *Hale v. Townley*,[117] the court reiterated the principle that "an officer who is present at the scene and does not take reasonable steps to protect a suspect from another officer's use of excessive force may be held liable under Section 1983." However, in *Cunningham v. Gates*,[118] the Ninth Circuit clarified when police officers have such a duty. In this

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[114] *See, e.g.*, Cunningham v. Gates, 229 F.3d 1271 (9th Cir. 2000), Hale v. Townley, 45 F.3d 914 (5th Cir. 1995), Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994).

[115] *Id.*

[116] 17 F.3d at 557.

[117] 45 F.3d at 919.

[118] 229 F.3d at 1289.

case, the court stated that police officers watching other officers using excessive force can be held liable only if they have a realistic opportunity to intercede and prevent the harm. However, no such opportunity existed in this case, and as such, no liability could be imposed.[119]

The final area I would like to discuss is the ability to use equal protection as an alternative to due process in failure to protect cases. Many clever lawyers realized that *DeShaney* closed the door on due process claims, so they turned to the Equal Protection Clause. The area where this is most frequently seen is in the domestic violence context where there is a long and tragic history of police not providing adequate protection to victims of domestic violence.[120] The argument is that police discriminate against victims of domestic violence as compared to victims of other kinds of violence. Victims of domestic violence are overwhelmingly women, so the argument is framed as gender discrimination in violation of the Equal Protection Clause.[121]

What is interesting in this area is that many lower courts have recognized, in theory, that such a claim is available.[122] Those

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[119] *Id.*

[120] *See, e.g.*, Shipp v. McMahon, 234 F.3d 907 (5th Cir. 2000); Ricketts v. City of Columbia, 36 F.3d 775 (8th Cir. 1994).

[121] *Shipp*, 234 F.3d at 911.

[122] *See, e.g., Shipp*, 234 F.3d at 912-13; *Ricketts*, 36 F.3d at 779.

courts reason that equal protection is not covered by the *DeShaney* rules. In reality, however, it is very hard to find instances where plaintiffs succeed under this equal protection theory. I think the reason is that aspects of equal protection law make it hard to succeed in these circumstances. First, there has to be a showing of purposeful discrimination. In *Washington v. Davis*,[123] the Supreme Court held discriminatory impact is not enough to show an equal protection violation; there has to be a showing of purposeful discrimination. The Supreme Court extended its holding to cover gender discrimination in *Personnel Administrator v. Feeney*.[124] In *Feeney*, the Court considered the Massachusetts statute that gave preference in hiring for state jobs to veterans. A substantial proportion of employable men of the state were veterans, but less than one percent of employable women were veterans. There was a foreseeable discriminatory impact against women. The Supreme Court held that discriminatory impact alone is not enough.[125] There has to be proof that the government did the act with the desire to bring about that consequence.[126] It is hard to show purposeful discrimination in the context of equal protection *DeShaney* type claims.

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[123] 426 U.S. 229, 239 (1976).
[124] 442 U.S. 256 (1979).
[125] *Id.* at 279.
[126] *Id.* at 260 (citing *Davis*, 442 U.S. at 260).

The other obstacle for potential plaintiffs is the difficulty of proving gender discrimination in light of some Supreme Court decisions. What I am referring to is the Supreme Court's decision in *Geduldig v. Aiello*.[127] In *Geduldig*, California had a statute that provided coverage in its disability plan for almost every imaginable medical condition, but excluded pregnancy. The plaintiff argued that excluding pregnancy was gender discrimination in violation of equal protection.[128] Justice Potter Stewart, writing for the majority, specifically rejected that argument.[129] Justice Stewart wrote that there are two categories of individuals, pregnant persons and non-pregnant persons. He reasoned that although the category of pregnant persons is only women, the category of non-pregnant persons includes both women and men.[130] Justice Stewart stated that since there are women in both categories, it cannot be gender discrimination.[131]

In addition, the Supreme Court has invoked this argument in the context of domestic violence, and it becomes very difficult to have an equal protection violation. If a potential plaintiff argues that the government is treating domestic violence differently than

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[127] 417 U.S. 484 (1974).
[128] *Id.* at 486.
[129] *Id.* at 494-95.
[130] *Id.* at 497 n.20.
[131] *Id.*

other kinds of violence, a court would likely conclude that women are in both categories. Therefore, no equal protection violation could occur. Lower courts have rejected equal protection claims with regard to both of these theories. *Ricketts v. City of Columbia*[132] is a representative decision. In this case, the Eighth Circuit held that in order to prove an equal protection violation in the gender context, there must be proof of intentional discrimination based on gender, and it must be shown that the discrimination was the proximate cause of the plaintiff's harm.[133]

Similarly, in *Hayden v. Grayson*,[134] the First Circuit specifically rejected the equal protection challenge based on discriminatory enforcement. The court reasoned that the plaintiff failed to prove the police intended to treat all domestic crimes differently from non-domestic crimes, all crimes against children differently from crimes against adults, and all sexual abuse crimes differently from nonsexual crimes.[135] Moreover, another recent representative case is *Jones v. Union County*[136] from the Sixth Circuit. The court also rejected an equal protection challenge for the failure of the police to provide protection in the domestic

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[132] 36 F.3d at 775.
[133] *Id.* at 781.
[134] 134 F.3d 449, 456 (1st Cir. 1998).
[135] *Id.* at 454.
[136] 296 F.3d 417 (6th Cir. 2002).

violence context. While there is certainly the possibility of an equal protection violation, provided the above requirements are met, lower courts have generally found that the requirements were not met.[137]

In sum, it is very difficult to show liability on the part of the government for failure to protect. In order to do so, the requirements mentioned above must all be met. First, it must be shown that the government had a duty, either because the government created the danger or the person is in custody. Second, the harm suffered by the plaintiff must have been foreseeable. Third, it must be shown that the government acted in a deliberately indifferent manner. Only if all of these requirements are met can there be liability imposed.

[137] *Id.* at 421.

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