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Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context

*Michele Miller**

I. INTRODUCTION

Hundreds of thousands of children fill this country's foster care system.¹ Statistics indicate that the incidence of child abuse in the United States has more than doubled since 1986.² The purpose of the foster care system, of course, is to provide a temporary safe haven for children who have been subjected to abuse or neglect by their primary caretakers.³ Unfortunately, in many cases the foster care arrangement does not provide this.⁴ Yearly, numerous child advocacy organizations and child guardians bring cases in federal court alleging that the state has failed children in foster care. Those bringing cases on behalf of children allege either violations of various federal statutes or violations of the Due Process Clause of the Fourteenth Amendment.⁵

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1. See Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 8 (1995) (noting that the best estimate of the number of children in legal custody of the state was approximately 400,000 and expected to skyrocket beyond 550,000 before the end of the year).

2. See Jean Peters-Baker, Note, *Punishing the Passive Parent: Ending A Cycle of Violence*, 65 UMKC L. REV. 1003, 1003 (1997).

3. See Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204 (1988). Social service agencies are expected to implement family services which will facilitate reunification of the biological family and, if this is not possible, work to terminate parental rights, freeing the child for adoption. See Megan O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key To Stopping the Pendulum of Termination v. Reunification*, 51 VAND. L. REV. 1427, 1432 (1998).

4. See generally DAVID FANSHIEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE (1978).

5. See SUSAN GLUCK MEZEY, CHILDREN IN COURT: PUBLIC POLICYMAKING AND FEDERAL COURT DECISIONS 109-10 (1996) [hereinafter GLUCK MEZEY].

Courts, legal scholars and the parties in these cases are confused as to whether a private right of action is available for children alleging substantive due process violations by state actors in the foster care context.⁶ The Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services* seemed to provide clarification.⁷ The Court held that children in legal custody of the state, but in physical custody of a natural parent, do not have a private right of action to sue the state for substantive due process violations.⁸

However, some courts have recently carved out an exception to *DeShaney*, providing a private right of action by adopting a state-created danger theory.⁹ Under such theory, the state might be liable for its failure to adequately assess and prevent incidents of severe child abuse. Most jurisdictions that permit the state-created danger theory exception do so when a foster child is returned to a natural parent despite clear signs that future abuse is likely to occur.¹⁰ The exception may be used when it is clear that the child was taken from a foster care placement and put into a more vulnerable situation with the natural parent. In cases where the exception was successfully used, the child ultimately suffered severe abuse by the natural parent after being returned.¹¹

This Note focuses on the application of a state-created danger theory and explores the benefits and problems of permitting a cause of action under such a theory. It is important that these children have an avenue of redress; the physical and psychological injuries that they suffer will surely affect them throughout their lives and may require future medical and psychological treatment as well as special education services. However, courts must recognize a delicate balance, which permits these actions while continuing to reunite families when it is possible to do so without further harm to the children.

I first provide a brief general introduction to the state-created danger theory. I follow with an overview of the foster care system in order to provide a context for analysis of substantive due process violations specifically in the foster care cases. Next, I analyze the United States Supreme Court's landmark *DeShaney* decision, focusing on its application by the lower courts. I then examine the recent adoption, by some jurisdictions, of the state-created danger theory in the foster care context.

Finally, I discuss problems that may accompany the adoption of the state-created danger theory in the foster care context. As one example, too

6. See Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 435 (1994).

7. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

8. See *id.* at 195-97.

9. See *Currier v. Doran*, 23 F. Supp. 2d 1277, 1280 (D. N.M. 1998); *Tazioly v. City of Philadelphia*, No. CIV.A.97-CV-1219, 1998 WL 633747, at *9 (E.D. Pa. Sept. 10, 1998).

10. See *Currier*, 23 F. Supp. 2d at 1280; *Tazioly*, 1998 WL 633747, at *9.

11. See *Currier*, 23 F. Supp. 2d at 1280; *Tazioly*, 1998 WL 633747, at *10.

much litigation aimed at child protective service workers who return children to their natural parents may ultimately hinder the already slow process of reuniting families. I present strategies to prevent this hindrance while still preserving the private right of action under a state-created danger theory.

II. THE STATE-CREATED DANGER THEORY GENERALLY

The state-created danger theory is often analogized to state actors placing private citizens into a "snake pit."¹² In a Seventh Circuit case alleging due process violations based on a state-created danger theory, the court noted,

[i]f 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.¹³

The foster care cases presented in this Note illustrate that, in some cases, state actors have indeed placed foster children into a "snake pit" situation.

The Third Circuit suggested a test for analyzing the state-created danger theory.¹⁴ According to this test, there are four common elements present in cases which adopt the state created-danger theory. They are:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) the state actor acted in willful disregard for the safety of the plaintiff;
- (3) there existed some relationship between the state and the plaintiff;
- (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.¹⁵

The court that announced this test ultimately did not permit a private right of action because the factors were not met. However, the four factors provide guidance for analyzing cases alleging violations under a state-created danger theory.

The Third Circuit also noted that the state-created danger theory should be limited to fact situations in which the state's action poses a foreseeable risk to a discrete party as opposed to the public at large.¹⁶ This limitation

12. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

13. *Id.*

14. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995).

15. *Id.*

16. *See id.* at 1152-53.

may become problematic because many suits brought on behalf of foster children alleging substantive due process violations by state actors are class action lawsuits.

The Third Circuit applied the state-created danger theory in *Kneipp v. Tedder*,¹⁷ decided in 1996. Though not a foster care situation, the facts of *Kneipp* illustrate one instance when the private right of action was permitted under the state-created danger theory. The plaintiffs alleged that their daughter Samantha's severe and permanent injuries resulted from substantive due process violations by police officers who placed her in a dangerous and more vulnerable situation.¹⁸

Samantha and her husband Joe were walking home from a bar on a very cold night when they were stopped and questioned by the police.¹⁹ The police gave Joe permission to leave the scene to relieve the couple's babysitter at home.²⁰ Joe testified that when he left, Samantha was visibly inebriated and leaning against the police car.²¹ He was under the impression that the police, knowing of Samantha's state, would not leave her alone upon completion of their questioning.²²

Though she was visibly intoxicated, had difficulty walking and smelled of alcohol and urine, the police left Samantha alone after questioning her.²³ Samantha sustained serious brain damage as a result of falling into an embankment and being exposed to the severe weather for two hours before anyone found her.²⁴ Applying the state-created danger theory, the *Kneipp* court determined that a triable issue of fact existed as to whether Samantha's injuries resulted from the officers allowing her to remain in a more vulnerable position than when they first encountered her.²⁵ Thus, a private right of action was permitted alleging substantive due process violations by the police officers who left Samantha alone out in the cold.²⁶

III. RECENT APPLICATION OF THE STATE-CREATED DANGER THEORY IN THE CONTEXT OF THE FOSTER CARE SYSTEM

A. OVERVIEW OF THE FOSTER CARE SYSTEM

A report of child abuse or neglect typically leads to intervention by a

17. *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996).

18. *See id.* at 1203.

19. *See id.* at 1201.

20. *See id.* at 1202.

21. *See id.*

22. *See id.*

23. *See id.* at 1201-02.

24. *See id.* at 1203.

25. *Id.* at 1208.

26. *See id.* at 1201.

social service agency.²⁷ An agency worker initiates an investigation, which usually includes a visit to the child's home where the alleged abuse took place and a telephone conversation with the individual who made the report.²⁸ At this point, the agency worker, and perhaps a supervisor, decides whether to file a petition in court, initiating judicial inquiry.²⁹ The judicial proceeding is generally divided into two phases, which are commonly referred to as "fact-finding" and "dispositional."³⁰

The purpose of the fact-finding phase is to present evidence to the court and question witnesses to determine whether the alleged abuse actually occurred.³¹ Assuming that a finding of abuse is made during the fact-finding stage, the court maintains jurisdiction over the child and must decide what action to take.³² This is done during the dispositional phase.³³ The action taken during the dispositional phase will depend on an assessment of how severe the abuse or neglect was and what course of action will be best for the child. In order to ensure that further abuse does not occur, the court may order placement for the child outside of the home, psychological counseling for the family, supervised visitation or any number of preventive service arrangements for the family.³⁴

When the child is permitted to reside with the biological parent, the state may still have "legal custody" while the parent maintains "physical custody."³⁵ This allows the state to monitor the family and possibly provide necessary services.³⁶ When the level of abuse or neglect is not severe, this plan allows the child to maintain attachment to his/her family. Children's attachment to family members is important and should be supported when possible.³⁷ A child's removal from the home is "a drastic step which may have serious negative effects on the child."³⁸ It is difficult for a child to adjust when unnecessarily separated from the primary caretaker.³⁹

Alternatively, when the abuse or neglect is more severe, the child is

27. See Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973), reprinted in ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE 454 (1995).

28. See *id.* at 456.

29. See *id.*

30. *Id.* at 456-57.

31. See *id.* at 456.

32. See *id.*

33. See *id.* at 456-57.

34. See *id.* at 457.

35. *Id.*

36. See *id.*

37. See Anita Weinberg and Linda Katz, *Law and Social Work in Partnership for Permanency: The Adoption and Safe Families Act and the Role of Concurrent Planning*, 18 CHILDREN'S LEGAL RTS. J. 2, 14 (1998).

38. Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children From the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 453 (1997).

39. See *id.*

placed in an out-of-home foster care placement allowing the state to maintain both legal and physical custody.⁴⁰ The goal is usually to reunite the child with his/her natural parent(s), provided that the parent(s) cooperate with the foster care agency.⁴¹ Cooperating with the agency may entail attending parenting skills classes, psychological counseling, a drug treatment program or whatever is deemed to be necessary by social services workers.⁴²

Though the foster care arrangement is meant to provide a situation that protects children from abuse, administration of the system has been widely criticized in recent years.⁴³ Abuse occurs in some foster care placements by foster parents and/or foster siblings.⁴⁴ Sometimes this abuse is far worse than the child experienced at home.⁴⁵ Moreover, caseworkers allegedly remove children from their biological homes when it is not warranted.

B. 42 U.S.C. § 1983 AND SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment of the United States Constitution provides individuals with rights against the state and federal branches of the government and protects against deprivations of life, liberty or property.⁴⁶ 42 U.S.C. § 1983 states that a person acting under color of state law may be liable when he or she acts to deprive an individual of rights, privileges or immunities secured by the United States Constitution.⁴⁷ 42 U.S.C. § 1983 provides a private right of action against an individual who, under color of state law, acts to deprive another of rights secured by the law or the Constitution.⁴⁸

Claims brought on behalf of foster children under 42 U.S.C. § 1983 have alleged that the state has deprived them of rights created by the Fourteenth Amendment, the Adoption Assistance and Child Welfare Act, the Child Abuse Prevention Act, the Americans with Disabilities Act and other federal statutes.⁴⁹ These actions are filed either as class action lawsuits, or on behalf of individual children, depending on the circumstances.

Marisol A. v. Giuliani, a recent class action lawsuit brought in New

40. See O'Laughlin, *supra* note 3, at 1431-32.

41. See *id.* at 1432.

42. See *id.* at 1431, 1432 n.31.

43. See *id.* at 1428.

44. See Mushlin, *supra* note 3, at 204.

45. See, e.g., Andy Newman, *Mother and Daughter Sentenced in Death of a Young Foster Child*, N.Y. TIMES, March 10, 1999, at B7.

46. See U.S. CONST. amend. XIV, § 1; see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

47. 42 U.S.C. § 1983 (1994).

48. See *Evans v. Avery*, 100 F.3d 1033, 1036 (1st Cir. 1996).

49. This Note will focus only on substantive due process claims. Discussion of actions brought under the other federal statutes are beyond the scope of this paper and are not relevant to an analysis of the state-created danger theory.

York District Court, alleged, among other things, 42 U.S.C. § 1983 violations.⁵⁰ *Marisol A.* serves as a good example of the type of fact situation which gives rise to lawsuits alleging failure of the state to adequately protect children in foster care.⁵¹ The plaintiffs were all children who suffered, and in some cases continued to be at risk of suffering, severe abuse and neglect.⁵² The factual allegations in the case “portray a child welfare program in crisis and collectively suggest systemic deficiencies of gross proportions.”⁵³ Eleven children who endured a wide range of abuse and neglect represented the class.⁵⁴

Marisol’s situation is a tragic example of the types of problems these children faced and continue to face in the foster care system. *Marisol* was a five-year old who was born two days after her mother was arrested for selling drugs.⁵⁵ Child protective service workers placed the child in a foster home during and subsequent to the biological mother’s incarceration.⁵⁶ However, *Marisol* was returned to her mother’s custody despite a criminal history and reports that she was abusing *Marisol* during visitation.⁵⁷ Caseworkers failed to properly assess the appropriateness of placing her with her mother and took no steps to monitor the home.⁵⁸

Upon regaining custody, *Marisol*’s mother confined her to a closet for several months, deprived her of food resulting in her eating her own feces and plastic garbage bags to survive and physically and sexually abused her to the point of injury.⁵⁹ During this period numerous reports were made to child protective services to no avail.⁶⁰ Ultimately, a housing inspector noticed the situation by chance and made a report to the police department.⁶¹ At the time *Marisol A. v. Giuliani* was filed in court, no action had yet been taken to terminate the mother’s parental rights; moreover, no counseling or support services were implemented by social services workers assigned to *Marisol*’s case.⁶²

C. THE LANDMARK *DESHANEY* CASE

Under the United States Supreme Court’s landmark *DeShaney* decision, state liability for substantive due process violations in the foster

50. *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) (alleging, among other things, substantive due process violations by state actors).

51. *Id.*

52. *See id.* at 669.

53. *Id.*

54. *See id.* at 669-70.

55. *See id.* at 670.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *Id.*

care context seems to turn on whether the child is in physical custody of the state.⁶³

In *DeShaney*, Social Services workers temporarily placed a minor child, Joshua, in the custody of a hospital after signs of physical abuse were found on his body.⁶⁴ A team of professionals released Joshua to his father's care after finding insufficient evidence of abuse to prevent the return of Joshua to his father.⁶⁵ Within the next six months, social services workers duly noted suspected abuse in Joshua's case file but took no action to remove the child from his father's home.⁶⁶ Ultimately, severe beatings by the father rendered Joshua irreversibly and profoundly retarded.⁶⁷ The majority in *DeShaney* did not permit a private right of action, noting that the due process clause is not meant to protect individuals from harm imposed by private citizens.⁶⁸ Since Joshua's father was a private citizen and he inflicted the injuries, the Court imposed no duty upon state social services workers to protect Joshua.⁶⁹

DeShaney appeared to bar a private right of action for substantive due process violations unless the child is outside of the parents' physical custody.⁷⁰ A special relationship triggering a heightened duty of care exists only when abuse occurs while the child is physically in the state's custody.⁷¹

It is worth noting that Justice Blackmun wrote a passionate dissent in which he characterized the majority as retreating into a "sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts."⁷² He ended his dissent with a paragraph for which *DeShaney* has become known:

Poor Joshua! Victim of repeated and irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . 'dutifully recorded these incidents in [their] files.' It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all'—that this child, Joshua DeShaney, now is assigned to live out the

63. *DeShaney*, 489 U.S. at 200.

64. *Id.* at 192.

65. *See id.*

66. *See id.* at 192-93.

67. *See id.* at 198.

68. *Id.* at 196.

69. *See id.*

70. *Id.* at 201.

71. *See id.* at 197.

72. *Id.* at 213 (Blackmun, J., dissenting).

remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C Section 1983 is meant to provide.⁷³

Unfortunately, the majority did not agree with Justice Blackmun, adhering instead to strict formalism.⁷⁴

After the *DeShaney* decision, it appeared as though a private right of action did not exist in the foster care context unless the child alleging failure by social services workers was physically in state custody. Most courts now apply a strict *DeShaney* analysis, denying all substantive due process claims where the child is in physical custody of his parent even when the state has retained legal custody.⁷⁵

The *DeShaney* Court cited several of its prior decisions, noting, “when the State takes a person into its own 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.”⁷⁶ Courts regularly permit cases brought on the behalf of foster children who are placed outside of the home, when plaintiffs allege substantive due process violations by state actors for not protecting them.⁷⁷ They allow these cases under the theory that by removing the child from the natural parent’s home and placing the child in a state-approved foster home, the state assumes at least a limited responsibility for his or her safety.⁷⁸

D. APPLICATION OF THE STATE CREATED DANGER THEORY IN THE FOSTER CARE CONTEXT

Some jurisdictions have recently recognized a narrow exception to *DeShaney*. This exception—the state-created danger theory—applies when a child, though in legal custody of the state, resides with a natural parent and suffers injury due to abuse.⁷⁹ This is because the Due Process Clause is intended to protect a person’s life and health from egregious misconduct by government officials.⁸⁰

73. *Id.*

74. *See id.*

75. *See Bank of Ill. v. Over*, 65 F.3d 76, 77 (7th Cir. 1995) (finding no private right of action under the Constitution when child in legal custody of the state was beaten by her father because state social workers were under no duty to protect people from private violence); *Blalock v. Tellus*, 22 F. Supp. 2d 1217 (D. Kan. 1998) (finding no private right of action when state has legal custody but mother has physical custody because mother had power to protect child from abuse).

76. *DeShaney*, 489 U.S. at 199.

77. *See Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990).

78. *See id.*

79. *See Currier*, 23 F. Supp. 2d at 1280; *Tazioly*, 1998 WL 633747, at *9-10.

80. *See Thomas A. Eaton & Michael Wells, Governmental Inaction as a Constitutional*

Some lower courts conclude that the misconduct in many of the foster care cases would fail to satisfy the strict *DeShaney* rule because the child is not in physical custody of the state.⁸¹ However, the circumstances in some of these fact situations are so egregious that a private right of action is permitted under the state-created danger theory.⁸² Here, the mere fact that these children suffer injuries after being placed back into a home with their biological parents does not summarily deny a private right of action.

The action (or inaction) of state officials in cases applying the state-created danger theory in the foster care context is particularly egregious. Typically, the child is placed in a relatively safe foster care setting and then removed, and placed back with a natural parent who poses a known risk to the child's safety.⁸³

In *Currier v. Doran*, the plaintiff-child was removed from his mother's home and placed with his father, who did not have original custody.⁸⁴ While the child was living with his father, the natural mother became aware of abuse by the father and made a report. Consequently, the state removed the child from the father's care.⁸⁵ Three days later the child was again returned to his father's physical custody.⁸⁶ Soon thereafter, the child sustained fatal burns when the father poured boiling water on him.⁸⁷ The *Currier* court fixed liability on the state.⁸⁸ The court distinguished *DeShaney* on the grounds that, in *Currier*, the state officials created the danger of mistreatment and rendered the child more vulnerable to attack by placing him back in the physical custody of his natural father.⁸⁹ Applying *DeShaney* strictly would focus the analysis on the fact that the biological father, and not the state, had physical custody, thereby not permitting the private right of action against the state.

The state-created danger theory was also applied in *Tazioly v. City of Philadelphia*.⁹⁰ The plaintiffs acted pursuant to 42 U.S.C. § 1983, alleging, among other things, substantive due process violations by the state.⁹¹ Michael, the child, suffered severe injuries inflicted by his biological mother.⁹² Michael was born ten weeks premature and addicted to cocaine.⁹³ His mother tested positive for cocaine at the hospital where

Tort: DeShaney and Its Aftermath, 66 WASH. L. REV. 107, 166 (1991).

81. See, e.g., *Marisol A.*, 929 F. Supp. 662.

82. 23 F. Supp. 2d 1277 (D. N.M. 1998).

83. See *id.* at 1281.

84. *Id.* at 1279.

85. See *id.*

86. See *id.*

87. See *id.*

88. *Id.* at 1281.

89. *Id.*

90. *Tazioly*, 1998 WL 633747, at *2.

91. See *id.* at *1.

92. See *id.*

93. See *id.* at *3.

Michael was born and appeared to be “hostile, abusive and paranoid” when she visited Michael at the hospital.⁹⁴ Social services filed a petition in court attempting to gain jurisdiction over the child.⁹⁵ Ultimately, the court granted legal custody of Michael to the state, while physical custody was granted to his maternal grandmother.⁹⁶

Notations were made in Michael’s file that, during visits, his mother was disruptive and verbally abusive to him.⁹⁷ She held the child outside of a second-story window on one occasion, threatening to drop him.⁹⁸ Further notations were made in the case file describing the mother’s appearance at a family court hearing as “bizarre and hostile.”⁹⁹

When Michael was almost two years old, the social services department was under great pressure to discharge children from the foster care system.¹⁰⁰ Consequently, despite mounting evidence that the mother posed great danger to Michael, the court entrusted him to his mother’s care.¹⁰¹ The caseworker, obviously aware of the dangerous situation that Michael was being placed in, made a notation in his case file reading:

no psychological [evaluation]
no risk assessment
no drug test
why return home?¹⁰²

Approximately six months later, social services received a report that Michael was covered with bruises. Despite this, his mother maintained physical custody. The stated reason was that the reported abuse could not be substantiated.¹⁰³ Within six months of this, when Michael was approximately three years old, emergency room doctors treated him for a “spiral” fracture of his femur, an indication that his leg had been deliberately twisted.¹⁰⁴ Again, social services instructed the hospital to return Michael to his mother, despite the fact that his injuries required him to be placed in a cast from his waist to the bottom of his legs.¹⁰⁵

Neighbors also made reports to Social Services to no avail.¹⁰⁶ Finally, approximately one month after his hospitalization, neighbors making a

94. *Id.*

95. *See id.*

96. *See id.* at *4.

97. *See id.*

98. *See id.*

99. *Id.*

100. *See id.* at *4-5.

101. *See id.* at *5.

102. *Id.*

103. *See id.*

104. *Id.*

105. *See id.*

106. *See id.* at *5.

report of abuse were told by social services, "if you're really that concerned, call the police."¹⁰⁷ They did just that.¹⁰⁸ The child was found in a dark corner, naked, tied to a chair, covered with bruises and cigarette burns.¹⁰⁹

The court concluded that under a state-created danger theory, the state could be held liable under 42 U.S.C. § 1983 because the state should not have terminated foster care.¹¹⁰ Michael was placed in the custody of his biological mother, who had known propensities for violent and bizarre behavior, thereby increasing the foreseeable risk of harm to the child.

In support of their decisions to apply a danger creation theory in the foster care context, courts distinguish from *DeShaney*, in which the Court reasoned, "while the State may have been aware of the dangers that Joshua faced . . . it played no part in their creation, nor did it do anything to render him any more vulnerable to them."¹¹¹ Indeed, this language provides a loophole which lower courts have utilized in particularly egregious situations.

E. ASSESSING WHETHER A PRIVATE RIGHT OF ACTION SHOULD BE PERMITTED.

1. Avenue of Redress When A Child's Rights Have Been Severely Violated

The quality and quantity of child welfare services offered vary from jurisdiction to jurisdiction.¹¹² There are federal standards which are supposed to be met by each state, but unfortunately the child welfare systems in many jurisdictions seem to be in utter disarray.¹¹³ For many children, foster care is one traumatic episode in a series of difficult life struggles.¹¹⁴ The circumstances which lead to foster care placement often include, among other things, severe poverty, drug abusing parents, lack of housing, domestic violence and violent communities.

The child welfare system is meant to protect children exposed to numerous risk factors.¹¹⁵ When the system actually takes steps to place these children in a more vulnerable position, the children must be afforded an opportunity to challenge this in a court of law. 42 U.S.C. § 1983 is meant to (and does) provide redress for such unacceptable action by state

107. *Id.* at *5-6.

108. *See id.* at *6.

109. *See id.*

110. *See id.* at *7.

111. *DeShaney*, 489 U.S. at 201.

112. *See* GLUCK MEZEY, *supra* note 5, at 95.

113. *See id.*

114. *See* Jennifer R. Gavin, *Child Welfare Law Curricula in Legal Education: Massachusetts' Untried Opportunity*, 7 B.U. PUB. INT. L.J. 9, 12 (1998).

115. *See id.*

actors. The fact that a severe injury occurs after a child has been carelessly, and in many cases recklessly, returned to a natural parent should not prevent the case from going forward. A jury should hear the facts of the case and make the ultimate decision.

2. State Actor Accountability

It is widely accepted that the child welfare system in this country is failing miserably.¹¹⁶ The impact of this failure is severely effecting the children. Those who are directly responsible must be held accountable and should not be permitted to avoid 42 U.S.C. § 1983 liability when their actions place a child in a 'snake pit' solely because the person who inflicted the abuse was a natural parent.

First of all, holding actors accountable will ultimately improve the delivery of services to children who suffer from the failures in the system. Holding these authorities accountable by imposing Constitutional liability will do much more to improve the foster care system than a mere slap on the wrist or the occasional sting of bad exposure in the local media.

Social service agencies charged with protecting children from abuse and neglect may improve delivery of services by hiring only qualified caseworkers, providing ongoing training and supervision to the workers and decreasing the caseloads assigned to an individual caseworker. Caseworkers assigned to cases which involve severe abuse should be highly qualified to do so.¹¹⁷ It may be acceptable to have less experienced workers handle cases which are not as severe. However, severe cases should be handled only by individuals holding a masters degree in psychology or social work and with a certain level of experience handling these types of case. Also, workers assigned to severe cases should have a lighter caseload so that more intense services may be provided to the families which they serve. Jurisdictions which choose to cut corners in this area must be held liable for constitutional violations when children are returned to parents who severely abuse them.

3. Respecting Family Privacy and Preserving Family Integrity

The jurisprudence in the area of family law values the integrity of the family and highly respects the value of family privacy.¹¹⁸ The United

116. See generally Gavin, *supra* note 114; Levesque, *supra* note 1; O'Laughlin, *supra* note 3; Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113; Elizabeth A. Sammann, *The Reality of Family Preservation Under Norman v. Johnson*, 42 DEPAUL L. REV. 675 (1992).

117. Caseloads of child welfare workers have grown beyond the ability of workers to provide necessary services to families. Workers are overburdened, poorly paid and too often not trained for the work they are required to perform. See Levesque, *supra* note 1, at 11.

118. See generally Judith G. McMullen, *Privacy, Family Autonomy and the Maltreated Child*, 75 MARQ. L. REV. 569 (1992).

States Supreme Court has "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."¹¹⁹ This high value for family is based on the assumptions that "privacy strengthens families" and "parents will act in the best interests of their children."¹²⁰ Though cultural differences may account for different parenting styles, most parents attempt to act in the best interests of their children.¹²¹ Nonetheless, privacy interests of families must be compromised to some extent in order to protect children from parents who act contrary to the best interests of their children.

4. Continuing to Encourage Reunification

The primary goal of the foster care system is to permit children to remain with their families if it is possible and, if the child must be removed, to work with the families as rapidly as possible so that they can be reunited.¹²² Unfortunately, there has been criticism of the system for removing children too often and allowing them to languish in foster homes for far too long.¹²³ If social services workers are fearful of litigation for abuse imposed after returning foster children to their natural parents, this already serious problem may be exacerbated. Therefore, courts should only allow a private right of action under the state-created danger theory in particularly egregious cases. By doing this, caseworkers will still be able to do their jobs but will be held accountable when their acts are particularly egregious.

IV. CONCLUSION

The private right of action alleging substantive due process violations in the foster care context should be permitted. However, in order to serve the interests of the children and the social services agencies involved, limitations must be placed on it. The four-part test set out by the Third Circuit serves as a solid guide for determining whether a private right of action should be permitted. An additional safeguard, which should be imposed, is to limit the cause of action only to discrete parties as opposed to the public at large.

Allowing the private right of action only when these requirements are met will provide an avenue of redress for children who unquestionably deserve it. At the same time, the important task of reuniting families when possible will not be thwarted because social services workers will not be in

119. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974).

120. McMullen, *supra* note 118, at 569.

121. See generally Robert Halpern, *Poverty and Early Childhood Parenting: Toward a Framework of Intervention*, AM. J. OF ORTHOPSYCHIATRY, Jan. 1990, at 6-18.

122. See GLUCK MEZEY, *supra* note 5, at 97.

123. See *id.*

constant fear of frivolous litigation in federal court.

