

**A CONSTITUTIONAL RIGHT TO POLICE PROTECTION
AND CLASSICAL LIBERAL THEORY: COMPLEMENT, NOT
CONFLICT**

*Laura Rae Dove**

I.	Introduction	38
II.	The Cases.....	41
	A. The Claims: Substantive Due Process and Procedural Due Process	41
	B. <i>DeShaney v. Winnebago County Dep’t of Social Services</i>	42
	C. <i>Town of Castle Rock v. Gonzales</i>	48
	D. Public Response to <i>DeShaney</i> and <i>Castle Rock</i>	54
III.	Rejected Doctrine	56
	A. The Special Relationship Test	57
	B. The “Special Danger” Test	58
	C. The State-Created Danger Test.....	59
	D. Existing Doctrine is Insufficient to Establish a Constitutional Right to Police Protection Against Private Violence for All Citizens.....	60
IV.	False Premises	61
	A. Abolishing the Myth of the Custody Doctrine.....	61
	B. Social Contract Theory	63
	C. Positive and Negative Rights.....	65
	D. The Court’s Logical Flaw	67
V.	Conclusion.....	68

Author’s Note: While this Article was undergoing revisions in preparation for publication, news reports emerged regarding three young women, Amanda Berry, Gina DeJesus, and Michelle Knight, who were

* J.D., West Virginia University College of Law, May 2012. Ms. Dove is an Adjunct Professor of Law in the Sorrell College of Business at Troy University in Troy, Alabama, and was previously a Superior Court Law Clerk in the Macon Judicial Circuit in Macon, Georgia. She is licensed to practice law in Georgia.

freed after being held captive for nearly ten years at a home in Cleveland, Ohio under shockingly inhumane conditions. Subsequent reports indicated that neighbors claimed to have made several calls to police over the years regarding suspicious activities at the property where the women were held by the perpetrator of the kidnappings. Not surprisingly, the adequacy of Cleveland police investigations into these reports has been called into question. This has raised speculation over whether the police can or should be held accountable in some way in the event that their response is found to be deficient. As my Article demonstrates, two U.S. Supreme Court cases involving tragically similar situations indicate that it is highly unlikely Cleveland police will ever face repercussions even if they are found to have ignored neighbors' reports or to have otherwise acted negligently. Although the cases analyzed in this Article were decided in 1989 and 2005, the horrific circumstances of the Cleveland kidnapping case demonstrate that, unfortunately, the issues discussed in this Article continue to be all too salient.

I. INTRODUCTION

James Madison famously wrote: "If men were angels, no government would be necessary."¹ The United States, like other countries, provides its citizens with many benefits such as public schools and roads in exchange for citizens' tax contributions. Madison's statement, however, reflects the belief that most of these benefits, while desirable, were not the impetus for the creation of government. Rather, governments are created when people determine that they are unable to effectively protect themselves and their rights individually.² After all, were there no government-provided police services, any security would have to be provided by individuals themselves or by hiring private security forces.³ Without the consistent and uniform law enforcement

1. JAMES MADISON, THE FEDERALIST NO.51 288 (Barnes & Noble Classics ed. 2006).

2. See discussion *infra* Part IV.

3. At the time the U.S. Constitution was ratified, no official police forces existed as Americans know them today, and the Constitution itself did not specifically address the creation of police forces. See Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 688-89 (2001). The concept of law enforcement to protect individual rights, however, was nonetheless clear to the Founding Fathers:

The Constitution contains no explicit provisions for criminal law enforcement. Nor did the constitutions of any of the several states contain such provisions at the time of the Founding. Early constitutions enunciated the intention that law enforcement was a universal duty that each person owed to the community, rather than a power of government. Founding-era constitutions addressed law enforcement from the standpoint of individual

standards of a government, the risk of a “might makes right” society emerges. Moreover, many would argue that fundamental fairness dictates that an individual’s safety should not be dependent solely on his or her ability to pay for it.⁴ By forming government and spreading the costs of police forces via taxation, the goals of personal safety and fairness are both reached.⁵ Even staunchly conservative critics of “big government” tend to agree with the proposition that protecting citizens’ rights is a legitimate function of government.⁶

Although the purpose of forming government may have been to ensure that citizens’ rights would be protected, the United States Supreme Court has decided two cases that have severely undermined this seemingly obvious point: *DeShaney v. Winnebago County Department of Social Services*⁷ and *Town of Castle Rock v. Gonzales*.⁸ Although the plaintiffs’ legal claims in the two cases differed, both involved citizens who begged for help from government officials when lives were at stake. In both cases, state officials effectively ignored the pleas. And, in both cases, the results were tragic. The plaintiffs in these cases sued state officials for their failure to enforce laws designed to protect people in the plaintiffs’ situations. The Supreme Court rejected

liberties and placed explicit barriers upon the state.

Id. In modern times, government-provided police services are integral to ensuring the security citizens expect.

4. For an alternative argument—that only private enterprise should be involved in the provision of personal security and that this would actually help the poor by leading to better, more efficient outcomes—see MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 241–248 (Collier Books 2002) (1973); Randy E. Barnett, *Pursuing Justice in a Free Society: Part One—Power vs. Liberty*, 4 CRIM. JUST. ETHICS 50 (1985) [hereinafter Barnett, *Part One*]; Randy E. Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, 5 CRIM. JUST. ETHICS 30 (1986) [hereinafter Barnett, *Part Two*].

5. The efficacy of the public provision of police forces has been disputed. See ROTHBARD, *supra* note 4; Barnett, *Part One*, *supra* note 4; Barnett, *Part Two*, *supra* note 4.

6. For example, the often controversial Glenn Beck invited on his Fox News television program, in his words, “[one] of the Constitution’s staunchest defenders . . . author and historian David Barton” to discuss the birth of the Constitution. *Glenn Beck: Restoring the Constitution* (Fox News television broadcast Dec. 21, 2010). Barton discussed Thomas Jefferson’s first inaugural address, in which Jefferson explained the purpose of the federal government. Barton stated, “[Jefferson] said [one purpose is] to restrain injury. Government exists to keep the bad guys under control. It’s not to regulate the good guys. It’s to keep bad guys from hurting somebody.” *Id.* See also Thomas Jefferson, First Inaugural Address (March 4, 1801), in 33 PAPERS OF THOMAS JEFFERSON 148, 148–52 (Barbara B. Oberg, ed., Princeton University Press 2006), available at <http://www.princeton.edu/~tjppapers/inaugural/infinal.html> (“[W]hat more is necessary to make us a happy and a prosperous people? Still one thing more, fellow citizens, a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement . . .”).

7. 489 U.S. 189 (1989).

8. 545 U.S. 748 (2005).

both plaintiffs' claims, purportedly applying classical liberal jurisprudence to analyze the claims. Taken together, the two cases hold that citizens have no constitutional right to police protection from criminal acts by other private citizens. Even though the State cannot deny police protection to certain citizens based on factors such as race, as long as there is no Equal Protection violation, the State has no obligation to enforce its own laws.⁹

This Article will first examine the Court's holdings in these two cases and the preexisting legal doctrines that the Court used in its analyses. The Court, and various legal scholars, believed that its holdings were firmly grounded in classical liberal or individualist principles.¹⁰ As will be seen, this seems accurate at first glance, but a deeper exploration of the classical liberal view of the purpose of government and the unique nature of police protection as a government-provided service shows that the Court was mistaken. In fact, what purports to be a sound application of classical liberal theory was a substantial deviation from what a classical liberal analysis of the issue would yield.

In addition, this Article will also discuss how the dissenting judges on the Court would have applied already-existing doctrine to each case to reach the opposite result. However, even if the dissenters had had their way, their holdings still would not have gone far enough. As will be shown, both dissenting opinions were narrowly tailored to the specific facts in each case. This Article contends more broadly that all citizens have a constitutional right to police protection from criminal acts by other private citizens.

Finally, this Article will discuss a few possible solutions proposed by legal scholars in the wake of *DeShaney* and *Castle Rock*. It will also explore whether existing legal doctrine could be applied in such a way as to achieve the right to police protection for all citizens. Ultimately, the Article will analyze these opinions from a classical liberal viewpoint and will find that this viewpoint is compatible with a constitutional right to police protection. It will be shown that the Court's contrary holdings in *DeShaney* and *Castle Rock* resulted from a significant logical flaw in the

9. See U.S. CONST. amend. XIV. This Article focuses on the reasoning supporting the U.S. Supreme Court's decisions in *DeShaney* and *Castle Rock*. The applicability of the Equal Protection Clause, though important, is beyond the scope of this Article.

10. Although the nuances of classical liberal theory are many and are subject to debate, Judge Richard A. Posner presents a thought-provoking case for the modern application of classical liberal theory in *Pragmatic Liberalism Versus Classic Liberalism*, 71 U. CHI. L. REV. 659 (2004). This Article does not endeavor to determine the extent to which modern libertarianism is informed by classical liberalist principles, though undoubtedly the two philosophies overlap.

Court's reasoning. An examination of this flaw will further serve to demonstrate the unique status of police protection as a substantive right for all citizens.

II. THE CASES

A. *The Claims: Substantive Due Process and Procedural Due Process*

Before discussing the cases in detail, it is important to distinguish the claims brought by the parties. The Due Process Clause of the Fourteenth Amendment provides that citizens have a right to be protected against State deprivation of life, liberty, or property without due process of law.¹¹ Joshua DeShaney's claim was that the State deprived him of his liberty interest in "free[dom] from . . . unjustified intrusions on personal security" because it failed to protect him from his father's abuse.¹² Joshua's claim was a substantive due process claim.¹³ Substantive due process considers whether the government had an adequate reason for its deprivation of life, liberty, or property.¹⁴ Not only must the procedures be appropriate to deprive a person of the right, the government must also be justified in taking the action itself.¹⁵ Joshua's substantive due process claim, as described by the Court in *DeShaney*, alleged that the State "was categorically obligated to protect him in these circumstances."¹⁶

Notably, the *DeShaney* Court stated in a footnote: "Petitioners also argue that [state law gave Joshua] an 'entitlement' to receive protective services . . . which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges v. Roth*."¹⁷ Evidently, though, this issue was first raised in the petitioners' brief to the Supreme Court; therefore, the Court declined to consider the issue.¹⁸ The Court did, however, have the opportunity to consider this issue in Jessica Gonzales's case.¹⁹ In *Castle Rock*, Jessica Gonzales

11. *Id.* at § 1.

12. *DeShaney*, 489 U.S. at 194–95.

13. *Id.*

14. *See, e.g.*, *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 142 (3rd Cir. 2000); *Madden v. City of Meriden*, 602 F.Supp. 1160, 1167–68 (D. Conn. 1985) (discussing the distinction between substantive due process and procedural due process).

15. *Id.*

16. 489 U.S. at 195.

17. *Id.* at 195 n.2 (citation omitted).

18. *Id.*

19. *Castle Rock*, 545 U.S. at 754.

brought a procedural due process claim.²⁰ Procedural due process claims essentially allege that the government has failed to provide adequate notice or hearing before taking action that might deprive the claimant of life, liberty, or property.²¹ In general, procedural due process claims require that the government has undertaken to provide a benefit (an “entitlement”) on which the claimant relies.²² Entitlements have been found in welfare benefits, disability benefits, public education, utility services, and government employment.²³ Although a person may not have a categorical right to any of these “entitlements,” the government may not deprive a person of them without proper procedural due process once it has undertaken to provide them in the first place.²⁴

With this background on the legal claims at issue before the Supreme Court in *DeShaney* and *Castle Rock*, the two cases can now be discussed in further detail.

B. *DeShaney v. Winnebago County Dep’t of Social Services*

1. Background: Joshua DeShaney Argues for a Right to Be Protected from his Father’s Abuse

As Chief Justice Rehnquist wrote near the beginning of his opinion in *DeShaney*, “[t]he facts of this case are undeniably tragic.”²⁵ Joshua DeShaney was only one year old when his parents divorced in 1980, and a Wyoming court awarded custody of him to his father.²⁶ Joshua’s father moved to Winnebago County, Wisconsin with Joshua.²⁷ His father remarried, and in January of 1982, his father’s second wife contacted police in Winnebago County to report that Joshua was being abused.²⁸ She told police that the father had “hit the boy causing marks and [was] a prime case for child abuse.”²⁹ In Wisconsin, all reports of child abuse were channeled to the Department of Social Services (“DSS”) for investigation; in fact, police were only to intervene if the

20. *Id.*

21. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545 (3d ed. 2006).

22. *See Castle Rock*, 545 U.S. at 789–90.

23. *Id.*

24. *Id.*

25. *DeShaney*, 489 U.S. at 191.

26. *Id.*

27. *Id.*

28. *Id.* at 192.

29. *Id.* (alteration in original).

person reporting abuse had concern for the child's immediate safety.³⁰ After receiving the report, DSS interviewed Joshua's father.³¹ When he denied abusing Joshua, DSS did nothing to follow up on the case.³²

About a year later, in January 1983, Joshua was admitted to a local hospital with injuries that made his doctor suspect child abuse and report the case to DSS.³³ DSS ordered that Joshua temporarily be kept in the custody of the hospital, and three days later assembled a team of "a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel" who determined that there was insufficient evidence to keep Joshua from his father's custody.³⁴ Pursuant to the team's recommendation, Joshua was released to his father based on several conditions his father promised to follow.³⁵ Just one month later, emergency room personnel contacted the DSS caseworker assigned to Joshua's case to report that, once again, he had been brought in with suspicious injuries.³⁶ The caseworker took no action other than to make monthly visits to Joshua's house.³⁷ During visits, the caseworker kept notes indicating that Joshua's father had not been complying with some of the conditions of his custody, including the requirement that he enroll Joshua in preschool.³⁸ The caseworker's notes also reflected continuing evidence of injuries to Joshua and her suspicion that Joshua was being abused by his father.³⁹ Nothing more than "dutifully record[ing]" these observations was done for Joshua.⁴⁰ In November 1983, the emergency room yet again contacted Joshua's caseworker about suspected child abuse.⁴¹ DSS took no action, even after Joshua's father told the caseworker on two subsequent home visits that Joshua was too "sick" to see her.⁴²

In March 1984, Randy DeShaney beat his four-year-old son into a life-threatening coma.⁴³ Joshua survived, but because of severe brain

30. *Id.* at 208 (Brennan, J., dissenting).

31. *Id.* at 192.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* These conditions included enrolling Joshua in preschool, receiving counseling, and "encouraging" his girlfriend to move out of the home. *Id.*

36. *Id.* at 192.

37. *DeShaney*, 489 U.S. at 192.

38. *Id.* at 193.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 193.

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

damage, doctors predicted he would spend the rest of his life institutionalized in a facility for people with severe mental disabilities.⁴⁴ Joshua and his mother sued Winnebago County, DSS, and several individual DSS employees under 42 U.S.C. § 1983⁴⁵ alleging that the defendants violated Joshua's rights under the Fourteenth Amendment to the U.S. Constitution.⁴⁶ In essence, Joshua and his mother claimed that DSS deprived Joshua of his liberty interest without due process of law when it failed to protect him from his father's abuse.⁴⁷

The district court granted summary judgment for DSS and the other defendants. The Seventh Circuit affirmed, holding that under the Fourteenth Amendment, the government is not required to protect its citizens from "private violence" and that there was an insufficient causal connection between DSS's conduct and Joshua's injuries.⁴⁸ With its holding, the Seventh Circuit rejected reasoning used by the Third Circuit in its opinion in *Estate of Bailey by Oare v. County of York*,⁴⁹ which held that a "special relationship" can arise between a state and a child if the state learns the child is in danger of abuse and takes on the obligation to protect the child.⁵⁰ The Supreme Court granted certiorari in *DeShaney* to resolve the apparent circuit split.⁵¹

2. Majority Opinion: Joshua DeShaney Had No Substantive Due Process Right to be Protected from His Father

After the description of the facts of the case and brief discussion of due process doctrine, the Court got right to the point: "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."⁵² The Court discussed the legislative history of the Fourteenth Amendment and characterized it, like the Fifth Amendment, as stemming from concerns about the arbitrary exercise of government power and a desire to protect people from the State.⁵³ Regarding the

44. *Id.*

45. This statute created a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

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

47. *Id.*

48. *Id.* at 193–94 (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 812 F.2d 298, 301 (7th Cir. 1987)).

49. 768 F.2d 503 (3rd Cir. 1985).

50. *Id.* at 510–511.

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

52. *Id.*

53. *Id.* at 195–96.

State protecting citizens from each other, the Court stated that “[t]he Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.”⁵⁴

The Court then described its due process jurisprudence by citing cases that held that the Due Process Clauses “generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual.”⁵⁵ “Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.”⁵⁶

After finding that, generally, a State’s failure to protect a citizen from private violence does not violate the Due Process Clause, the Court addressed and rejected the “special relationship” exception adopted by the Third Circuit.⁵⁷ The Court noted that in some situations, when the State itself deprives a person of the ability to care for himself, affirmative duties to protect the citizen may be imposed.⁵⁸ These “custody-based” cases hold that when a state exercises *affirmative* power to restrain an individual, substantive due process is violated if the State fails to provide for the basic human needs the individual cannot provide for himself.⁵⁹ This doctrine has been applied to require states to provide medical care to prisoners,⁶⁰ services to ensure the “reasonable safety” of involuntarily committed mental patients,⁶¹ and medical care to suspects in police custody who were injured while being apprehended.⁶² In these cases, the State’s initial deprivation of liberty triggered the Due Process Clause; in Joshua’s case, the harms he suffered did not occur while he was in State custody.⁶³ From here, the Court’s argument emphasizes that Joshua’s father, not the State, beat Joshua and that the State’s

54. *Id.* at 196. It is unclear whether the “Framers” referred to here are the framers of the Fifth Amendment or Fourteenth Amendment because the Court discusses both amendments before concluding with the sentence quoted in the text. Regardless, the Court cites no support for this proposition and, as this Article will attempt to show, the Court’s assertion is dubious at best. *Id.*

55. *Id.*

56. *Id.* at 196 (quoting *Harris v. McRae*, 448 U.S. 297, 317–18 (1980)) (alteration in original).

57. *DeShaney*, 489 U.S. at 196–98.

58. *Id.* at 198.

59. *Id.* at 200.

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

61. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982).

62. See *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

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

actions did not actively worsen Joshua's circumstances.⁶⁴ The Court summed up its opinion by suggesting that perhaps state tort law could provide a remedy for Joshua and by restating that, although the Court might feel sympathetic toward the parties in the case, "the harm was inflicted not by the State of Wisconsin, but by Joshua's father."⁶⁵

3. Dissenting Opinions: The Majority's Focus on the State's Inaction Ignores the Acts the State *Did* Take

Justice Brennan filed a dissent with which two other justices joined.⁶⁶ The dissent criticized the majority primarily for focusing on DSS's *inaction* and for failing to consider the affirmative acts the State took with regard to Joshua's situation.⁶⁷ The dissenting judges agreed with the majority that "the Due Process Clause . . . creates no general right to basic government services[,]" but believed this was not the issue to be decided in the case.⁶⁸ "No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties."⁶⁹ These statements, echoing the majority's reliance on negative and positive rights, demonstrate that the justices on both sides of the opinion took the majority's characterization of police protection as merely a type of governmental "aid" for granted. In *Castle Rock*, the Court elaborated on this theme.⁷⁰ These assumptions—and the classical liberal foundations they purportedly rest on—may be subject to some debate.⁷¹

The dissenting judges would have focused on Wisconsin's statutory child-welfare framework, which required all reports of child abuse to be channeled to DSS and which imposed a duty on DSS to investigate them.⁷² The law "invite[d]—indeed, direct[ed]—citizens and other governmental entities to depend on [DSS] to protect children from

64. *See id.* at 201.

65. *Id.* at 201-203.

66. *Id.* at 203. The two other justices were Justice Marshall and Justice Blackmun. *Id.*

67. "'The most that can be said of the state functionaries in this case,' the Court today concludes, 'is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.'" *Id.*

68. *Id.* at 203-04.

69. *Id.* at 204. The dissent further stated, "The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights." *Id.*

70. *See infra*, Section II.C.2.

71. *See infra*, Section IV.

72. *DeShaney*, 489 U.S. at 208.

abuse.”⁷³ Through the State’s affirmative act creating its system of child protection, the State intervened in Joshua’s life and effectively confined him to his father’s home because DSS alone was in charge of handling Joshua’s case.⁷⁴ Because “[u]nfortunately for Joshua . . . the buck effectively stopped with [DSS,]” the dissenting judges believed the case should have been analyzed under the Court’s custody-based precedent, wherein positive duties may be imposed upon the State.⁷⁵ The dissent compared Joshua’s case with *Youngberg v. Romeo*,⁷⁶ a case in which the Court held that the State had a duty to provide minimum safety levels when confining an individual to a psychiatric hospital.⁷⁷ The majority in *DeShaney* believed that the holding in *Romeo* resulted because the State’s institutionalization of Romeo restricted his freedom to act on his own behalf.⁷⁸ In contrast, the dissenting judges in *DeShaney* believed that the holding in *Romeo* resulted because Romeo’s institutionalization separated him from other sources of help.⁷⁹ The dissent made the point that the majority’s restatement of the holding was highly questionable considering that Romeo had *never* been capable of acting on his own behalf—even as an adult, he had the mental capacity of an eighteen-month-old child.⁸⁰

Applying this interpretation of *Romeo* in *DeShaney*, the dissent would have held that, because Wisconsin law cut off all other avenues of assistance for Joshua, the State would have owed him a duty to protect him from abuse once it became aware that the abuse was occurring.⁸¹ “Today’s opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent.”⁸² The point the Court made here is critical and reflects an insight into the unique status of police protection that has been alluded to throughout this Article. The question is whether only specific statutory schemes displace private protection or whether the public provision of law enforcement does that by its very nature.

Justice Blackmun filed a separate dissent, which, although perhaps

73. *Id.*

74. *Id.* at 210.

75. *See id.* at 209.

76. 457 U.S. 307 (1982).

77. *DeShaney*, 489 U.S. at 205-206.

78. *Id.* at 205-206.

79. *Id.* at 206.

80. *Id.*

81. *Id.* at 210.

82. *Id.* at 212.

not as thoroughly reasoned as the other two opinions, was a more natural reaction to the facts of this case.⁸³ Justice Blackmun denounced the majority's "formalistic reasoning" of the Fourteenth Amendment: "Poor Joshua! . . . abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing . . ." ⁸⁴ Justice Blackmun's strikingly emotional reaction should be thoughtfully considered. The majority took great pains to avoid "yielding to the impulse" of "natural sympathy" for Joshua and his mother.⁸⁵ Some commentators have seized upon this unfortunate language in the majority opinion to criticize the individualist or classical liberal theory for too strongly embracing the formalism denounced by Justice Blackmun.⁸⁶ As will be discussed, however, the natural sympathies expressed by Justice Blackmun and felt by most who know of Joshua DeShaney's case need not be ignored.

C. *Town of Castle Rock v. Gonzales*

1. Background: Jessica Gonzales Sues Police for Violating Her Due Process Rights by Failing to Enforce a Restraining Order Against Her Husband

In *Town of Castle Rock v. Gonzales*, the Supreme Court tackled the issue it had declined to address in *DeShaney*: whether the Fourteenth Amendment's guarantee of *procedural* due process made law enforcement a protected property right.⁸⁷ Jessica Gonzales, the plaintiff in the original case (respondent on appeal to the Supreme Court), had obtained a state-law restraining order.⁸⁸ She alleged that having the police enforce that order was a constitutionally protected property interest.⁸⁹

Justice Scalia, writing for the majority, began the Court's opinion like Justice Rehnquist did in *DeShaney* by acknowledging that the facts in the case were "horrible."⁹⁰ During the process of her divorce, a state

83. *DeShaney*, 489 U.S. at 212.

84. *Id.* at 213.

85. *Id.* at 202–03.

86. See, e.g., Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 698 (1990).

87. *Castle Rock*, 545 U.S. at 750–51. The Court specifically stated that, although *DeShaney* resolved the issue of whether substantive due process requires a state to protect the life, liberty, and property of its citizens, the issue of procedural due process was left unanswered. See *id.* at 755.

88. *Id.*

89. *Id.*

90. *Id.* at 751.

trial court granted Mrs. Gonzales a temporary restraining order against her husband.⁹¹ The order required her husband to stay one hundred yards from the family home at all times and to refrain from “molest[ing] or disturb[ing] the peace of [Mrs. Gonzales] or of any child.”⁹² The order was later modified and made permanent by the trial court, though it allowed Mr. Gonzales limited visitation rights with his children as long as arrangements were made with Mrs. Gonzales.⁹³

On June 22, 1999, without making the required advance arrangements, Mr. Gonzales took the couple’s three daughters from the front yard of the family home.⁹⁴ When Mrs. Gonzales discovered her children were missing, she immediately suspected her husband and called the Castle Rock Police Department (“Police”) at 7:30 p.m.⁹⁵ Although two officers were dispatched and Mrs. Gonzales showed them her restraining order, the officers merely told her to call the Police again if her daughters weren’t home by 10:00 p.m.⁹⁶ At 8:30 p.m., Mrs. Gonzales reached her husband on his cell phone, and he claimed he had taken the children to an amusement park.⁹⁷ Mrs. Gonzales reported this to the Police, but she was again told to wait until 10:00 p.m.⁹⁸

At 10:10 p.m., Mr. Gonzales and the children were still missing.⁹⁹ Mrs. Gonzales called the Police and this time was told to wait until midnight.¹⁰⁰ She then went to see if anyone was at her husband’s apartment and found it empty.¹⁰¹ She called the Police from his apartment at 12:10 a.m. and was told an officer would be sent over.¹⁰² No one came.¹⁰³ At 12:50 a.m., Mrs. Gonzales went to the police station and filed a report.¹⁰⁴ Instead of taking steps to enforce the restraining order or to search for the missing children, the officer with whom Mrs. Gonzales spoke went to dinner.¹⁰⁵

Mr. Gonzales showed up at the police station at 3:20 a.m. with a

91. *Id.*

92. *Id.* at 751.

93. *Id.*

94. *Id.* at 753.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 753.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 753–54.

105. *Id.* at 754.

semiautomatic handgun he had purchased earlier in the evening.¹⁰⁶ When he opened fire on the police station, police officers shot back and killed him.¹⁰⁷ Mr. Gonzales had already murdered his children, and their bodies were found in the trunk of his car.¹⁰⁸

Mrs. Gonzales brought an action against the Town of Castle Rock, alleging that it had violated the Due Process Clause because the police department had an official policy of failing to enforce restraining orders.¹⁰⁹ On appeal, the Tenth Circuit held that Mrs. Gonzales did not have a cognizable substantive due process claim but found that she *had* stated a claim for violation of procedural due process.¹¹⁰

2. Majority Opinion: Enforcement of a Restraining Order is Not a Constitutionally Protected Property Interest

The Supreme Court determined that it would decide the “ultimate issue” of whether Mrs. Gonzales’ restraining order constituted a property interest under the Fourteenth Amendment.¹¹¹ First, the Court noted that not all benefits rise to the level of property interests.¹¹² A person must have a “legitimate claim of entitlement” to the benefit and not merely “an abstract need or desire” or “a unilateral expectation” of it.¹¹³ The Constitution itself does not create these entitlements; they are created and defined by “existing rules or understandings that stem from an independent source such as state law.”¹¹⁴ Benefits may not be protected entitlements if they may be granted or denied at the government’s discretion.¹¹⁵ The Tenth Circuit had held that the language of the restraining order mandated enforcement by police in the event that police had probable cause to believe the order had been violated.¹¹⁶ This

106. *Id.*

107. *Id.* at 754.

108. *Id.*

109. *Id.* The Court noted that three police officers were also named as defendants, but the Court of Appeals decided that they were entitled to qualified immunity. *Id.* Mrs. Gonzales did not appeal this ruling. *Id.*

110. *Id.* (citing *Gonzales v. City of Castle Rock*, 307 F.3d 1258 (10th Cir. 2002)).

111. *Id.* at 756. Because state law, and not the Constitution, creates the property rights that the Fourteenth Amendment protects, Mrs. Gonzales urged the Court to defer to the Tenth Circuit’s holding. *Id.* The Court noted that it has applied a presumption of deference to the views of federal courts on state law within the federal courts’ jurisdiction but that this presumption may be overcome. *Id.* at 757.

112. *Id.* at 756.

113. *Id.* (citing *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972)).

114. *Id.* at 756 (citing *Paul v. Davis*, 424 U.S. 693, 709 (1976)).

115. *Id.* (citing *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 462–63 (1976)).

116. *Id.*

was based on a preprinted notice describing the duties of the police under the statute stating that an officer “shall use every reasonable means to enforce a restraining order” and that upon probable cause that the order has been violated, an officer “shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant [for arrest.]”¹¹⁷

Despite the ostensibly mandatory language of the order, the Court held that because of the “deep-rooted nature of law-enforcement discretion[,]” the provisions of Colorado law did not make enforcement mandatory.¹¹⁸ The Court went on to note that most mandatory arrest statutes (usually in the context of domestic violence complaints) had been held to be impossible to follow in situations where the offender was not on the scene.¹¹⁹ Because Mr. Gonzales’ whereabouts were unknown, he could not be arrested.¹²⁰ Therefore, any mandatory duty imposed would be a duty to investigate, which would be so open-ended as to scope and duration as to be totally impractical.¹²¹ According to the Court, because Mrs. Gonzales did not precisely state the means of enforcement she believed she was entitled to, the benefit she claimed could not rise to the level of an entitlement.¹²² The Court went on to state that, even if the statute did require mandatory enforcement, this would not necessarily be the equivalent of an entitlement conferred on a specific class of people.¹²³ Criminal law generally serves public, not private, ends.¹²⁴ Overall, on this issue, the Court stated, “We conclude that Colorado has not created such an entitlement.”¹²⁵

Next, the Court questioned whether enforcement could be an entitlement even if it were deemed mandatory.¹²⁶ Notably, the Court stated, “Perhaps most radically, the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed—to wit, arresting people who they have probable cause to believe have committed a criminal offense.”¹²⁷ Moreover, enforcement

117. *Id.* at 759.

118. *Id.* at 761.

119. *Id.* at 763.

120. *See id.* at 762–63.

121. *Id.* at 762.

122. *Id.* at 763.

123. *Id.* at 764–65.

124. *Id.* at 764–65. The Court added that, under Colorado law, district attorneys can prosecute domestic assault even if the victim does not wish to press charges. *Id.* *But see* ROTHBARD, *supra* note 4, at 55–66.

125. *Castle Rock*, 545 U.S. at 766.

126. *See id.* at 766.

127. *Id.* at 766–767.

of the restraining order did not have monetary value, as “implicitly required” in the Court’s prior holdings.¹²⁸ Finally, the Court emphasized that the nature of the benefit was simply too “indirect” to constitute an entitlement.¹²⁹

The Court concluded its opinion by summing up the state of the law after its present holding and its holding in *DeShaney*: “[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its “substantive” manifestations.”¹³⁰ The Court expressed “reluctance to treat the Fourteenth Amendment as ‘a font of tort law,’” and, like Justice Rehnquist did in *DeShaney*, noted that liability could be imposed under state law.¹³¹

3. Concurring Opinion: Collapsing the Distinction Between Property Protected and the Process that Protects It

Justice Souter, joined by Justice Breyer, filed a concurrence in which he primarily argued that prior precedent indicated that process cannot be an end in itself rising to the level of a property interest.¹³² In these justices’ view, the property interest claimed was in itself a variety of procedures—police investigation and arrest—so Mrs. Gonzales therefore had not articulated a claim for the deprivation of a recognized property right.¹³³ Interestingly, the concurring judges argued that Mrs. Gonzales’ claim “collaps[ed] the distinction between property protected and the process that protects it”¹³⁴

The distinction that these justices considered the proper foundation for a holding against Mrs. Gonzales is more properly viewed as reasoning supporting a finding in her favor. By combining these justices’ insight that a right and the provision of that right should be analyzed separately with the *DeShaney* Court’s focus on negative and positive rights, a framework for analysis emerges that provides a constitutional right to police protection from the violence of private actors. Moreover, classical liberal theory underlies and justifies this right.

128. *Id.* (citing Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000)).

129. *See id.* at 767.

130. *Id.* at 768.

131. *Id.* (citing *Parratt v. Taylor*, 451 U.S. 527, 544 (1981)).

132. *Id.* at 771.

133. *Id.* at 771–72.

134. *Id.* at 772.

4. Dissenting Opinion: The Functional Equivalent of a Contractual Relationship between Mrs. Gonzales and the State May Create a Property Interest

Two justices, Justice Stevens and Justice Ginsburg, dissented in *Castle Rock*. The dissenting justices agreed with the majority and with the prior holding in *DeShaney* that “[i]t is perfectly clear . . . that neither the Federal Constitution itself, nor any federal statute, granted respondent or her children any individual entitlement to police protection.”¹³⁵ However, the justices went on to argue that, had Mrs. Gonzales entered into a contract with a private security firm, the family’s interest in the contract would “unquestionably constitute ‘property’ within the meaning of the Due Process Clause.”¹³⁶ Interestingly, the majority opinion also went out of its way to distinguish contracts: “[Mrs. Gonzales’] alleged interest stems only from a State’s *statutory* scheme She does not assert that she has any common-law or contractual entitlement to enforcement.”¹³⁷ The dissenting justices held that, if Mrs. Gonzales could show that the Colorado statute created the “functional equivalent” of a contractual relationship, enforcement of the restraining order could qualify as property.¹³⁸ The dissent criticized the majority for focusing on the “precise means of enforcement” and not on whether the police had discretion to enforce to begin with.¹³⁹ And, as far as the majority’s opinion that mandatory arrest provisions are inapplicable when the offender is not on the scene, the dissenters objected, concluding that this is also an issue of scope.¹⁴⁰ Furthermore, cases where the offender has left the scene are significantly different than this one, where Mr. Gonzales had absconded with the children and was thus in continuous violation of the order.¹⁴¹

Finally, the dissenting justices rejected the majority’s assertion that to be a property interest a benefit must be defined specifically.¹⁴² This explained why property interests had been found in welfare benefits,

135. *Id.* at 773.

136. *Id.*

137. *Id.* at 765.

138. *Id.* at 773.

139. *Id.* at 784. Before their analysis of the majority opinion, the dissenting justices expressed their opinion that the Court should have deferred to the Tenth Circuit’s reading of the Colorado statute or certified the question to the Colorado Supreme Court. *Id.* at 778–85. The dissenting justices also emphasized the unique nature of domestic violence statutes as evidence that the Colorado legislature intended enforcement of the restraining orders to be mandatory. *Id.*

140. *Id.* at 793.

141. *Id.*

142. *Id.* at 789.

disability benefits, public education, utility services, and government employment.¹⁴³ As in *Board of Regents of State Colleges v. Roth*,¹⁴⁴ the law in this case guaranteed a service to a specific class of individuals, and Mrs. Gonzales reasonably relied on that guarantee.¹⁴⁵ The dissenting justices would have held that enforcement of the restraining order was indeed a protected property interest and would have found that the police deprived Mrs. Gonzales of that property interest without due process of law.

D. *Public Response to DeShaney and Castle Rock*

1. “Poor Joshua!” Indeed

DeShaney and *Castle Rock* were not popular opinions. Public opinion was generally unfavorable. One newspaper columnist in 1995, writing about the recent tragic death of a young girl at the hands of her abusive mother in New York City, compared the story to Joshua DeShaney’s case.¹⁴⁶ On the issue of whether the child’s caseworkers, who had behaved similarly to those in Joshua’s case, could be held liable, the author wrote: “Is there no redress for the city’s negligence? The answer, for good or ill, is none at all.”¹⁴⁷ The article concluded:

There’s a difference between law and justice. Justice is what we deserve; law is what we get. Contrary to popular impression, the court’s function is not to dispense justice, but to interpret law. As a matter of constitutional law, Rehnquist was clearly right. As a matter of justice, poor Joshua! And poor Elisa too.¹⁴⁸

According to this author, we have evidently come rather far from when James Madison wrote: “Justice is the end of government. It is the end of civil society.”¹⁴⁹ In a March 1989 newspaper article, a reader replied that she had read the story of Joshua DeShaney “with a mixture of sorrow, anger, and disgust.”¹⁵⁰ Her sorrow was for Joshua; her anger was for the social workers; and her disgust was for the U.S. Supreme

143. *Id.* at 789–90.

144. 408 U.S. 564.

145. *Castle Rock*, 545 U.S. at 790.

146. James J. Kilpatrick, *Poor Joshua! Poor Elisa!*, POINT PLEASANT REGISTER, Dec. 18, 1995, at 2.

147. *Id.*

148. *Id.*

149. MADISON, *supra* note 1, at 291.

150. Frieda Levine, *Life of Joshua hurt others*, THE MILWAUKEE JOURNAL, March 10, 1989, at 6A.

Court.¹⁵¹

Resounding criticism also followed the *Castle Rock* case. One columnist called the decision “infuriating” and called for new laws “to set right what the court got wrong.”¹⁵² The author bluntly stated, “Battered women across America have one more reason to cringe.”¹⁵³

2. The Legal Community

Legal scholars have advanced various criticisms of the *DeShaney* and *Castle Rock* cases. One author, Professor Laura Oren, traced the history of child welfare laws in the United States to attempt to show that “[c]hildren at risk because of parental behavior are treated differently [under the law] from other citizens in need of protection.”¹⁵⁴ Professor Oren argued that the Court’s opinion in *DeShaney* “follow[ed] from an abstract and general constitutional due process theory and [was] not responsive to the specific context of child protection.”¹⁵⁵ The Court’s focus on state custody of an individual (i.e., whether the State has deprived an individual of his or her ability to care for himself or herself) cannot reasonably be applied to children, who are *always* unable to care for themselves.¹⁵⁶ Professor Oren also sharply criticized the majority’s reliance on what she characterized as “classical liberalism and the laissez-faire ethic” as “creat[ing] a false equivalency between people, predicaments, and liberties that are not truly alike.”¹⁵⁷ Professor Oren would build on the “special relationship” test by “placing Joshua DeShaney’s claim back in the full child protection setting from which it was abstracted by the Court”¹⁵⁸

Just before *Castle Rock* was decided, one author, Julie Hilden, offered some comments on the upcoming case and discussed it in the context of *DeShaney*.¹⁵⁹ Although she believed the Court would rule against Mrs. Gonzales, she argued that *DeShaney* could be narrowly

151. *Id.*

152. Errol Louis, Editorial, *Disorder in the Court*, NEW YORK DAILY NEWS, June 28, 2005, available at 2005 WLNR 25296126.

153. *Id.*

154. Oren, *supra* note 86, at 668.

155. *Id.* at 683.

156. *Id.* at 687.

157. *Id.* at 697–699.

158. *Id.* at 701.

159. Julie Hilden, *Must the Government Protect Its Citizens If It Learns They Are in Danger? The Supreme Court Considers How Far Responsibility Reaches*, FINDLAW (Mar. 29, 2005), <http://writ.corporate.findlaw.com/hilden/20050329.html>.

overruled only as it applied to children.¹⁶⁰ She cited concerns similar to Professor Oren's concerns: "*DeShaney's* libertarian logic—suggesting that private persons can usually take care of themselves, so the government isn't responsible when they get hurt—doesn't make sense when applied to minors."¹⁶¹

Many scholars responded similarly to *Castle Rock*.¹⁶² One author argued that the Supreme Court "has elevated the liberty of police officers to ignore their duties to enforce court ordered restraining orders over the safety and security of the victims of domestic violence."¹⁶³ Just as many legal scholars in the wake of *DeShaney* focused specifically on the duty to protect in the context of child abuse, many scholars following *Castle Rock* focused on the duty to protect in the limited context of domestic violence.¹⁶⁴

III. REJECTED DOCTRINE

In *DeShaney*, the Court focused on a custody-based test for determining when a state has an affirmative duty to act to protect its citizens' life, liberty, and property.¹⁶⁵ Only the affirmative act of confining an individual can trigger affirmative duties in the State.¹⁶⁶ In *Castle Rock*, the Court ruled that even providing a restraining order does

160. *Id.*

161. *Id.* For another analysis of *DeShaney* focused primarily on finding an affirmative duty of care in the context of child abuse, see Amy Sinden, *In Search of Affirmative Duties Toward Children Under a Post-DeShaney Constitution*, 139 U. PA. L. REV. 227 (1990).

162. See, e.g., Lynn A. Combs, Note, *Between a Rock and a Hard Place: The Legacy of Castle Rock v. Gonzales*, 58 HASTINGS L. J. 387, 405-08 (2006) (arguing that state legislatures must act to ensure the protection of domestic violence victims because courts have failed to do so); Sara Metusalem, Note, *Should There Be a Public Duty to Respond to Private Violence? The Effect of Town of Castle Rock v. Gonzales on Restraining Orders*, 38 U. TOL. L. REV. 1037, 1057-61 (2007) (advocating state legislation explicitly mandating the enforcement of restraining orders); Sara B. Poster, *An Unreasonable Constitutional Restraint: Why the Supreme Court's Ruling in Town of Castle Rock v. Gonzales Rests on Untenable Rationales*, 17 TEMP. POL. & CIV. RTS. L. REV. 129, 135-44 (2007) (criticizing, among other things, the Court's focus on the monetary value of a claimed property interest and the Court's application of its own precedent, and urging the Court to overrule its holding).

163. Christopher J. Roederer, *Another Case in Lochner's Legacy, The Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order is a "Sham," "Nullity," and "Cruel Deception,"* 54 DRAKE L. REV. 321, 331 (2006).

164. See, e.g., Kathleen K. Curtis, Comment, *The Supreme Court's Attack on Domestic Violence Legislation—Discretion, Entitlement, and Due Process in Town of Castle Rock v. Gonzales*, 32 WM. MITCHELL L. REV. 1181 (2006); G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L. J. 111 (2005).

165. *DeShaney*, 489 U.S. at 199–201.

166. *Id.*

not create a property right in police enforcement of the order.¹⁶⁷ “In light of today’s decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor its ‘substantive’ manifestations.”¹⁶⁸ These holdings declined to adopt any exceptions other than the custody rule. There were, however, other doctrines that had been applied by lower federal courts.¹⁶⁹

A. *The Special Relationship Test*

In *DeShaney*, the petitioners urged that, even if the Court were to reject the notion that the Due Process Clause imposed a duty on the State to ensure adequate protection for citizens generally, it should nonetheless adopt a “special relationship” test.¹⁷⁰ The Third Circuit had adopted this test in *Estate of Bailey v. County of York*.¹⁷¹ The facts in *Estate of Bailey* were startlingly similar to *DeShaney*: child protective services investigated and found evidence of abuse of a five-year-old girl, Aleta Bailey.¹⁷² Child protective services removed Aleta from the home shared by Aleta’s mother and her mother’s boyfriend, instructing her mother that Aleta could come home only if the boyfriend would be denied access to her.¹⁷³ Aleta was returned to her home, but child protective services made no efforts to determine whether or not the boyfriend was still living there.¹⁷⁴ A month later, Aleta died from injuries inflicted by her mother and her mother’s boyfriend.¹⁷⁵

The Third Circuit cited a Fourth Circuit opinion¹⁷⁶ and two Seventh Circuit opinions¹⁷⁷ to support its conclusion that, even in the absence of state custody, certain circumstances could warrant the imposition of affirmative duties on the State.¹⁷⁸ The Third Circuit also cited language

167. *Castle Rock*, 545 U.S. at 768.

168. *Id.*

169. *See, e.g.*, *Estate of Bailey v. Cnty. of York*, 768 F.2d 503 (3rd Cir. 1985); *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989), *superseded by Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992); *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996).

170. *DeShaney*, 489 U.S. at 197.

171. *Estate of Bailey*, 768 F.2d at 510–11.

172. *Id.* at 505.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Jensen v. Conrad*, 747 F.2d 185, 194–96 (4th Cir. 1984).

177. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979).

178. *Estate of Bailey*, 768 F.2d at 510.

in *Martinez v. California*,¹⁷⁹ a U.S. Supreme Court case, which affirmed the dismissal of a case seeking damages from a parole board after a woman was tortured and killed by a parolee five months after his release.¹⁸⁰ The case was dismissed on proximate cause grounds, but the Supreme Court in dicta left open the possibility that a special relationship may exist which imposes affirmative duties on the State in some cases:

[T]he parole board was not aware that appellants' decedent, *as distinguished from the public at large*, faced any special danger. We 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.¹⁸¹

In *DeShaney*, the Supreme Court discussed the Third Circuit's opinion in *Estate of Bailey* and explained that, under the special relationship test, when a state undertakes to protect a citizen from a particular danger, a duty arises to act in a "reasonably competent fashion."¹⁸² Essentially, although not every citizen has a right to police protection, that right may arise once the State steps in and offers protection. The Supreme Court, however, explicitly rejected the special relationship test.¹⁸³ "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."¹⁸⁴

B. The "Special Danger" Test

In *Cornelius v. Town of Highland Lake*,¹⁸⁵ the Eleventh Circuit construed *DeShaney* to indicate that the government may incur an affirmative duty to protect its citizens if the government itself created the danger or rendered an individual more vulnerable to harm than he or she

179. 444 U.S. 277 (1980).

180. *Estate of Bailey*, 768 F.2d at 510.

181. *Id.* (quoting *Martinez v. California*, 444 U.S. 277, 285 (1980) (emphasis added)).

182. *DeShaney*, 489 U.S. at 197.

183. *Id.* at 198.

184. *Id.* at 200 ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—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.").

185. 880 F.2d 348 (11th Cir. 1989).

would have been without state intervention.¹⁸⁶ The Eleventh Circuit reasoned that “[t]he [*DeShaney*] Court also found in denying liability, that despite the state’s awareness of the child’s dangerous predicament, the state ‘played no part in [its] creation, nor did it do anything to render him any more vulnerable to [it].’”¹⁸⁷ In another opinion, the Eleventh Circuit had held that a special danger may exist if a person can show that he or she faced a possibility of harm distinguishable from the public at large.¹⁸⁸ The Eleventh Circuit cited other appellate court opinions adopting the special danger test.¹⁸⁹ However, the Eleventh Circuit later held that a 1992 Supreme Court case, *Collins v. City of Harker Heights*,¹⁹⁰ abrogated the special danger test by holding that only government conduct “that can properly be characterized as arbitrary, or conscience shocking” can trigger due process claims in the absence of state custody.¹⁹¹

C. *The State-Created Danger Test*

The Third Circuit has adopted a “state-created danger” test that incorporates both the special relationship test and special danger test.¹⁹² It requires (1) that the harm was foreseeable and direct, (2) that the state actors acted with “willful disregard” for a person’s safety, (3) the existence of a relationship between the state and the injured person, and (4) that the state actors used their authority to create the possibility of a crime occurring against the injured person.¹⁹³

The state-created danger test imputes a form of accountability onto the State by imposing a duty to protect a citizen in certain situations if the State has created the dangerous situation at issue or has otherwise increased that citizen’s vulnerability to danger.¹⁹⁴ From this perspective, if the State has acted in a manner that puts a citizen in danger and fails to protect that citizen from harm, then the State cannot claim a “merely

186. *Id.* at 356.

187. *Id.* (quoting *DeShaney*, 489 U.S. at 201).

188. *Jones v. Phyfer*, 761 F.2d 642, 644-645 (11th Cir. 1985).

189. *See, e.g.*, *Wells v. Walker*, 852 F.2d 368, 370-371 (8th Cir. 1988); *Bowers v. DeVito*, 686 F.2d 616, 618-619 (7th Cir. 1982).

190. 503 U.S. 115 (1992).

191. *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999) (quoting *Collins*, 503 U.S. at 128).

192. *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3rd Cir. 1996).

193. *Id.* at 1208.

194. *See* Justin M. Rindos, Note, *Fallen on Deaf Ears: DeShaney Revisited*, 21 QUINNIPIAC PROB. L.J. 321, 332-33 (2008).

passive” role in the citizen’s injury.¹⁹⁵ The Third Circuit’s state-created danger paradigm has been constructed to be somewhat demanding on the plaintiff in order to avoid encroaching onto the State’s discretionary authority in enforcement.¹⁹⁶ The state-created danger test could be seen as a more narrow or particularized test than the special relationship or special danger tests taken by themselves. Nonetheless, the state-created danger test still offers a viable option in the more egregious cases, such as *DeShaney* and *Castle Rock*, involving the State’s outright dereliction of responsibility.

D. Existing Doctrine is Insufficient to Establish a Constitutional Right to Police Protection Against Private Violence for All Citizens

In searching for a way to overturn *DeShaney* and *Castle Rock*, it is tempting simply to advocate for the resurrection of the special relationship test, the special danger test, or to combine both, as the Third Circuit did. Some scholarly works criticizing *DeShaney* and *Castle Rock* have done just that. Some critics, for example, have argued that the special relationship test provides an adequate remedy to persuade the government to enforce its laws.¹⁹⁷

Both *DeShaney* and *Castle Rock* could have been resolved differently under either the special danger or special relationship test. In *DeShaney*, the State created a special relationship with Joshua by creating a child protective services scheme that was exclusively charged with protecting children and by undertaking to protect him specifically by first removing him from and then returning him to his father’s custody. And, although the Court in *DeShaney* argued that the State did not place Joshua in a more dangerous position than he would have been without State intervention, it still could have found for Joshua under the special danger test. When the State placed Joshua back in the custody of his father, it was aware of a special danger that Joshua faced and placed him in a more dangerous position than he was in when he was in State custody.

In *Castle Rock*, had the Court applied the special relationship test, it

195. *Id.* at 333 (quoting *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982)).

196. *Id.* at 334. *See also* Chris W. Perhson, *Bright v. Westmoreland Cnty.: Putting the Kibosh on State-Created Danger Claims Alleging State Actor Inaction*, 52 VILL. L. REV. 1046, 1063-64 (2007) (discussing the “significant burden on litigants” to satisfy the elements of the Third Circuit’s state-created danger test).

197. *See, e.g.*, Lisa Snead, Note, *Domestic Violence Litigation in the Wake of DeShaney and Castle Rock*, 18 TEX. J. WOMEN & L. 305, 317 (2009). State courts may be free to adopt their own common law causes of action that embrace the special relationship test or special danger test. *Id.*

could have found that by granting Mrs. Gonzales a restraining order the State entered into a special relationship with her and undertook the affirmative duty to protect her. Moreover, because it had issued a restraining order, the State was aware of a special danger that Mrs. Gonzales faced that was distinguishable from the public at large. The Court, therefore, could have found in her favor under the special danger test.

Resurrecting either or both of these doctrines could provide a workable solution that would hold state officials accountable for egregious behavior like that which occurred in the *DeShaney* and *Castle Rock* cases and may satisfy the public and legal scholars who expressed outrage over the opinions. But it is not sufficient to simply resurrect old doctrine. Similarly, adding another exception to current doctrine might lead to better outcomes than would result under current doctrine alone, but engrafting this “quick fix” would only serve to perpetuate the Court’s fundamentally flawed reasoning in *DeShaney* and *Castle Rock* about the nature of law enforcement and rights, the purpose of government, and the classical liberal underpinnings of this country. Most significantly, it is important to debunk the custody exception, which rests on false premises and logical inconsistencies, to explain why current doctrine is inadequate. Once this is accomplished, the right of citizens to police protection becomes the presumption rather than the exception.

IV. FALSE PREMISES

The current doctrine regarding the right of citizens to police protection is fundamentally flawed in several respects. This section will first address the problem with the custody exception, currently the only situation in which affirmative duties are imposed upon the State. Then, other aspects of the Court’s reasoning in *DeShaney* and *Castle Rock* will be questioned, including dicta in *Castle Rock* distinguishing Mrs. Gonzales’ claim from claims founded in contract and the Court’s reasoning in both opinions relying on the distinction between positive and negative rights. The final part of this section will discuss the implications of the Court’s flawed assumptions.

A. *Abolishing the Myth of the Custody Doctrine*

Despite the Third Circuit’s creation of the state-created danger test, under Supreme Court precedent only custody can impose affirmative duties on a state to protect its citizens. The custody exception rests on

the distinction between state action and inaction that the majority in *DeShaney* drew and that the dissent strongly disputed.¹⁹⁸ According to the Supreme Court's rule, only when the State acts by taking a person into its custody can positive duties of care be imposed on the State.¹⁹⁹ Otherwise, as Judge Posner famously stated, "the Constitution is a charter of negative rather than positive liberties."²⁰⁰

The idea that there are any citizens who are *not* in state custody in the context of police protection is almost farcical. The custody doctrine revolves around the idea that the State has undertaken the responsibility of caring for citizens when it takes them into custody because citizens can no longer care for themselves. In terms of police protection, in many instances citizens may not care for themselves; in fact, if they do, they could face punishment from the State. Although some states have "citizen's arrest" provisions, many are strictly limited.²⁰¹ Otherwise, citizens who attempt to use force or detain criminal suspects are often considered vigilantes.²⁰² Even private security forces, such as security guards, bodyguards, and bail bondsmen, are typically not granted the same allowances of force that government police officers are entitled to use.²⁰³ In practical matters, too, police protection is not as easily compared to other government benefits as the Court tried to do in both *DeShaney* and *Castle Rock*. As discussed above, citizens have extremely limited options when it comes to ensuring their own protection because laws specifically militate against the private use of force in many instances. Thus, the public's reliance on government

198. 489 U.S. at 203, 207.

199. See *Youngberg*, 457 U.S. at 317, 324.

200. *Jackson v. City of Joilet*, 715 F.2d 1200,1203 (7th Cir. 1983).

201. See, e.g., D.C. CODE § 23-582(b) (2001) (requiring that private citizens witness the commission of a crime in order to be able to make an arrest); TEX. CODE CRIM. PROC. ANN. art. 14.01 (West, Westlaw through 2013 Reg. Sess.) (providing that citizens may arrest only for felony offenses committed in the citizen's presence); CONN. GEN. STAT. § 53a-22(e) (West, Westlaw through 2013 Reg. Sess.) (effective July 1, 2010) (providing that a private person may use reasonable physical force to effect an arrest but is not justified in using deadly force unless in self-defense). But see IDAHO CODE ANN. § 19-604 (West, Westlaw through 2013) (providing that a private person may arrest another for a felony even if not committed in his or her presence); S.C. CODE ANN. § 17-13-10 (2013) (allowing citizen's arrest for felonies upon "certain information that a felony has been committed").

202. Criminal charges are not the only consequence, either. Civil penalties may exist for taking the law "into one's own hands." See Alvin Stauber, *Citizen's Arrest: Rights and Responsibilities*, 18 MIDWEST L. REV. 31, 34-35 (2002) (discussing the risk of a false arrest or false imprisonment claim a retailer takes on when making a citizen's arrest of a suspected shoplifter).

203. Private security forces are generally governed by citizen's arrest statutes. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1183-84 (1999). Professor Sklansky, however, argues that the distinction between private and public police forces has become blurred. See *id.*

police forces is even more heightened than public reliance on government “entitlements” such as education, welfare, or disability benefits. Even though the government frequently regulates the *nature* of private provision of education and assistance to those in financial need, the government does not *prohibit outright* the private provision of education or assistance.

Aside from these practical considerations, State-provided police protection holds a unique position in terms of rights because of the ultimate foundation of our government. Both the majority and dissenting opinions in *Castle Rock* noted that, had Jessica Gonzales been able to show a contractual relationship ensuring her protection, the analysis would have been quite different. What the Court failed to consider²⁰⁴ is that our government was founded on the basis of contract theory. The *DeShaney* and *Castle Rock* Courts’ analyses of police protection in the context of positive and negative rights were flawed and are actually contrary to the classical liberal foundations of our country. Furthermore, critics of *DeShaney* and of *Castle Rock* who attributed the holdings in these cases to a reliance on libertarian or “individualist” principles were also mistaken.

B. *Social Contract Theory*

The U.S. Supreme Court has stated, “[t]he most basic function of any government is to provide for the security of the individual and of his property.”²⁰⁵ As one author noted, protection of citizens is “the first duty of government.”²⁰⁶ In fact, it is not only government’s first duty; it is government’s first purpose. John Locke, whose writings largely influenced the Founding Fathers of our country, explained why people are willing to form societies even though it may entail ceding certain rights:

If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest,

204. Although, in fairness, Mrs. Gonzales did not raise the issue.

205. *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 312 (1972) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)). Justice White’s dissent continued, “These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.” *Miranda*, 284 U.S. at 539.

206. Steven Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L. J. 507, 508 (1991) (arguing that the Fourteenth Amendment was actually intended to explicitly grant citizens the right to police protection).

and subject to nobody, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and control of any other power? To which 'tis obvious to answer, *that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others.* For all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. . . . [Man] is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name, property. . . . The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.²⁰⁷

The Founding Fathers would likely have viewed the proposition that the primary purpose of government is to ensure its citizens rights as a statement of the obvious. The Declaration of Independence described government as a contract between the people and the government which could be nullified in the event of breach; the Declaration detailed the way in which the Crown had wronged those living in the colonies and the ways in which the colonies had attempted to abide by the contract in the past.²⁰⁸ The Declaration also claimed the natural rights of the people and declared “[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”²⁰⁹ After asserting the right to abolish the government when it no longer meets these ends, the right of the people was claimed to institute a new government that would “seem most likely to effect their Safety and Happiness.”²¹⁰

Other statements by the Founding Fathers echo similar sentiments. “A free government with arbitrary means to administer it is a contradiction; a free government without adequate provision for personal security is an absurdity”²¹¹ “Government is instituted for the common good; for the protection . . . of the people”²¹² “Why has government been instituted at all? Because the passions of men will not

207. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Ch. IX, § 123 (C.B. McPherson ed., Hackett Publishing Co. 1980) (1690) (emphasis added).

208. THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

209. *Id.*

210. *Id.*

211. THE QUOTABLE FOUNDING FATHERS 148 (Buckner F. Melton, Jr. ed., 2004) (quoting Daniel Webster).

212. *Id.* (quoting John Adams).

conform to the dictates of reason and justice, without restraint.”²¹³ “The best frame of government is that which is most likely to prevent the greatest sum of evil.”²¹⁴ “Government, in my humble opinion, should be formed to secure and enlarge the exercise of natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”²¹⁵

Contrary to the beliefs of commentators who blamed classical liberal thought for the *DeShaney* and *Castle Rock* Courts’ decisions,²¹⁶ classical liberalism does not support the Courts’ holdings. According to one explanation of libertarian thought on rights, “[r]ights are what individuals bring to politics, not what they take out. When political society works properly, *what individuals derive from politics is security for rights*, but their previously justified rights are what they enter into political arrangements to secure.”²¹⁷ Robert Nozick, another prominent libertarian scholar, characterized the ideal State this way: “a minimal state, limited to the narrow functions of protection against force, theft, [and] fraud, enforcement of contracts, and so on, is justified; [and] that any more extensive state will violate persons’ rights not to be forced to do certain things.”²¹⁸ In both *DeShaney* and *Castle Rock*, the Court disregarded these underlying classical liberal ideals and instead based its holding on what it believed was strict adherence to the positive/negative rights dichotomy. This flawed reasoning led to the untenable comparison of the right to government protection of citizens and, for example, the right of a citizen to be provided with welfare.

C. *Positive and Negative Rights*

Negative rights “are rights that require others to refrain from certain kinds of actions.”²¹⁹ These rights include the right to one’s mind and body, including the right to physical security, and traditionally include the right to freedom of speech, freedom of religion, and privacy.²²⁰ Essentially, negative rights describe the right to be left alone. Positive rights, on the other hand, “require others to perform certain actions.”²²¹

213. *Id.* at 141 (quoting Alexander Hamilton).

214. *Id.* at 145 (quoting James Madison).

215. *Id.* at 146 (quoting James Wilson).

216. *See, e.g.*, Oren, *supra* note 86.

217. THE LIBERTARIAN READER 422 (David Boaz ed., 1997).

218. *Id.* at 181.

219. DANIEL SHAPIRO, IS THE WELFARE STATE JUSTIFIED? 25 (2007).

220. *Id.* at 25-26.

221. *Id.*

The general classical liberal view is that positive rights “arise from a special relationship between the parties, such as contractual rights . . . whereas negative rights are usually general or universal rights, rights that all persons have.”²²² Because rights necessarily impose obligations to respect those rights, libertarians typically agree that positive obligations can only arise from consent of the parties.²²³

Under this view, the *Castle Rock* opinion’s reasoning is invalid based on the contractual relationship that exists between individuals and the State.²²⁴ There are, however, a few problems with this argument. First, the concept of the “social contract” is admittedly abstract and would likely be impossible to conform to existing contract doctrine.²²⁵ For example, how does the social contract fit into the traditional offer-and-acceptance paradigm?

Citizens’ relationship with the government differs from a contractual one in another fundamental way, although this may be more of an argument in favor of citizens’ right to protection: a citizen cannot breach the social contract by deciding to forego government benefits in order to avoid paying taxes.²²⁶ This is one of the major reasons the idea of “consent” as a justification for government has been questioned.²²⁷ Although it is beyond the scope of this Article to fully analyze the nature of the “consent of the governed,” it does seem fair to presume the existence of consent because consent was used as the justification for the creation of our government.²²⁸

Alternatively, given the Court’s heavy emphasis on reliance in its entitlement jurisprudence,²²⁹ a promissory estoppel-based theory could

222. *Id.*

223. THE LIBERTARIAN READER, *supra* note 219, at 437.

224. *DeShaney* should also be rendered invalid under this analysis. By basing the right of police protection on the consent of the governed, police protection could be viewed as a substantive or procedural due process right. Categorically, it could not be denied because it is the foundation of the government’s grant of power from the people. That being said, it certainly could not be abridged without due process of law under the procedural prong of the Due Process Clause.

225. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 11–31 (2004) (exploring the idea of the consent of the governed through several traditional justifications and ultimately rejecting “actual” consent).

226. “[A]nyone who persists in thinking of taxation as in some sense a ‘voluntary’ payment can see what happens if he chooses not to pay.” ROTHBARD, *supra* note 4, at 62.

227. See BARNETT, *supra* note 225.

228. See THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776); U.S. CONST. pmb1. (“*We the People* of the United States . . .” (emphasis added)). Other alternatives have been proposed as justifications for continuing governance aside from actual consent. See BARNETT, *supra* note 225.

229. See, e.g., *Youngberg v. Romeo*, 457 U.S. at 317-319; *Roth*, 408 U.S. at 577 (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire [and] more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to

also provide a framework for analysis. Citizens are not only induced to rely on police protection for their safety, they are *required* to because of the monopoly the State has on police protection. This analysis still results in a contract in law, if not in fact.

Under a contracts-based analysis, the purpose of forming government was to ensure the protection of our negative rights, primarily our right to safety. Although not recognized in either case discussed in this Article, the social contract itself provided the justification for the right of citizens to be provided with protection. Although a positive right, through the creation of government, citizens implicitly consented to the provision of this right to one another, and the government agreed to provide it.

D. *The Court's Logical Flaw*

If consent, even in an abstract form, is all it really takes to justify positive rights as rights guaranteed by the Constitution, isn't the entire entitlement doctrine that *Castle Rock* outlined eviscerated?²³⁰ And does a State's inaction, as described in *DeShaney*, constitute a violation of due process in all circumstances?²³¹ Does this mean that the Constitution *does* guarantee positive, as well as negative rights?

By analyzing police protection under the same framework as it analyzed welfare rights, the Court certainly seemed to imply that this would be the case if the framework under discussion here were adopted. The Court, however, failed to make a fundamental distinction: recognizing the difference between a *right itself* and the *provision* of that right.²³² Similarly, in *DeShaney's* substantive due process analysis, the

it.”).

230. Demonstrating an entitlement requires meeting several elements. For example, there must be more than a unilateral expectation, and the benefit must be conferred on a specific class. See discussion *supra* Section II.A. Under the “contract” analysis of the Constitution, are these elements no longer needed?

231. For example, the dissenting justices in *DeShaney* noted that, although children had an entitlement to public education that was created under state law, there was no fundamental right to education. 489 U.S. at 207–08. The entitlement arose because the State had undertaken to provide the service. *Id.*

232. In his concurring opinion in *Castle Rock*, Justice Souter discussed the Court's misconstrued view of the distinction, or in the Court's opinion, the lack thereof, between the right and the process of enforcement, saying:

There is no articulable distinction between the object of Gonzales's asserted entitlement and the process she desires in order to protect her entitlement; both amount to certain steps to be taken by the police to protect her family and herself. Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that

Court failed to make the same distinction.

Both Courts collapsed the right itself—here, a liberty or property interest—with the provision of the right, i.e. police protection. The right of personal security itself, whether characterized as a property or liberty interest, is a negative right.²³³ Having the government provide it is a positive right. This is drastically different than the other cases the Courts cited. The right to *receive* welfare benefits is a positive right; the right to *be provided* with welfare is also a positive right. The right to *receive* an education is a positive right; the right to *be provided* with education is also positive right. The same goes for disability benefits, public utilities, and government employment. Because most “rights” the Court has wrestled with in developing its due process jurisprudence have been positive right/positive provision, it is easy to see why the Court failed to recognize the unique status of police protection.

V. CONCLUSION

With the nature of police protection distinguished as being both the motivation for the creation of government in the first place and as having a unique status apart from other rights, the intuitive belief of many people that *DeShaney* and *Castle Rock* do not comport with justice or common understanding of government’s purpose is explained. Not only does this framework provide a justification for overruling these cases confined to their specific fact patterns, but it also justifies the right to government protection of citizens’ security generally. Furthermore, the justification is derived from the classical liberal principles on which this country was founded. The extension of this right to all citizens should not open the floodgates to all manner of entitlement claims because of the unique nature of personal safety as a negative right ensured by a positive right, and not a positive right ensured by a positive provision as so many other recognized rights are.

For this doctrine to apply in practice, there would certainly need to be significant constraints imposed. After all, practically, police cannot be everywhere at once and are not mind-readers. Some police discretion must remain in place. But in egregious cases like those examined in this article, there is justification for the imposition of liability for failure to

protects it

Castle Rock, 545 U.S. at 772. The distinction Justice Souter is referring to is different than the right-provision distinction. His argument was that the entitlement Mrs. Gonzales claimed *was itself* a process, not, as this Article claims, that the right and the provision of the right by the State were the same thing.

233. SHAPIRO, *supra* note 217.

ensure citizens' safety.

With a right to police protection to citizens generally established, the special relationship and special danger tests have a new context. Seen in this light, they can be viewed as *constraints* on individuals' right to police protection, not as *extensions* of the right. By applying these tests in this new context, excessive claims can be weeded out to prevent a rush to the courts for suits over any injury that police failed to prevent. Under the special relationship test, liability would not arise unless and until police undertake to assist an individual. From that point, police would be liable not for legitimate judgment calls in the line of duty but for the types of dereliction of duty that occurred in *DeShaney* and *Castle Rock*. An ideal solution would also incorporate the special danger test. When government officials are notified of a danger to an individual, such as when Mrs. Gonzales called police to report her children missing, the officials would be obligated to investigate the situation. Discretion in terms of how the investigation is carried out is necessary and valuable, but officials would be held liable for totally failing to act. A foreseeability and directness requirement, like the Third Circuit has adopted with its state-created danger test, would also be desirable. Hyperbolic assertions aside, acknowledging this right would not open the doors of the courts to endless litigation or stretch law enforcement offices to a breaking point. Incorporating the special relationship test, the special danger test, and a foreseeability (or proximate cause) requirement would greatly reduce frivolous claims.

Protection is not a government-provided luxury or favor. It is deeper even than a constitutional right; it is a right derived from the ultimate purpose of creating a government. It is little wonder that the Court's jurisprudence on the right to police protection has struck so many citizens as inherently wrong. The Court's first premise is wrong. In fact, it is completely backward. The Court begins with the presumption that the right to protection does not exist. Only when this fallacy is corrected can the Court begin to build a fair and logical doctrine to displace the *DeShaney* and *Castle Rock* mistake.