

POSITIVE RIGHTS IN CONSTITUTIONAL LAW:
NO NEED TO GRAFT, BEST NOT TO PRUNE

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INTRODUCTION

The prevailing view in our courts and, to some degree, in legal scholarship is that “the Constitution is a charter of negative rather than positive liberties.”¹ With this absolute statement, judges have dismissed any claim that citizens have any positive rights² to government services; that is, any claim that the federal government has an affirmative duty to ensure that its citizens can actually enjoy their constitutional liberties. The Supreme Court has denied claim after claim for government services, including the right to decent housing,³ public education,⁴ medical care,⁵ and welfare assistance.⁶ Finally, in *DeShaney v. Winnebago County Department of Social Services*,⁷ the Supreme Court held that a social service agency could not be liable for failing to remove a child from the custody of his father, despite substantial evidence of the father’s violent tendencies.⁸ The *DeShaney* opinion went even further, however, declaring that the Due Process Clause did not impose any affirmative obligations on state government.⁹ *DeShaney* thus became the latest—and perhaps the Court’s

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¹ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989) (Posner, J.).

² Positive rights are defined as rights to government action. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990). When a citizen enforces a positive right, she can compel the government to take action to provide certain services. By contrast, negative rights entail freedom from government action. *Id.* To enforce a negative right, a citizen merely insists that the government not act so as to impinge her freedom.

³ See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (denying a fundamental right to housing).

⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (denying a fundamental right to education).

⁵ See *Harris v. McRae*, 448 U.S. 297, 318 (1980) (rejecting a claim for equal Medicaid funding for both childbirth and abortion by declaring that the government has no obligation to provide any medical funding at all).

⁶ See *Dandridge v. Williams*, 397 U.S. 471, 478-83 (1970) (denying a fundamental right to minimal subsistence).

⁷ 489 U.S. 189 (1989) (finding no liability under the Due Process Clause for a social service agency’s decision to return a child to his father, a suspected child abuser, who inflicted severe injuries upon the child.)

⁸ *Id.*

⁹ See *id.* at 195 (denying that the Due Process Clause of the Fourteenth Amendment creates an affirmative right to protection).

strongest—statement sanctioning the negative rights theory¹⁰ as the official guiding principle by which demands for government action will be measured.

Whether the negative rights view prevails in our political culture or in society at large is a different question, one largely independent of the Court's reasoning. Claims to positive rights can take various forms, ranging from broad social rights, such as the right to minimum subsistence,¹¹ to those dependent on more narrowly defined governmental duties, like Joshua DeShaney's claim to be protected from his father's abuse.¹² Additionally, what is a "positive" or a "negative" right depends on how one defines the issue at stake: While a majority on the Court framed Joshua's claim for relief as relying on a (nonexistent) right to government protection,¹³ another reading of the facts would suggest that Joshua's claim was that the government agency assigned to protect him should merely conduct its business in a non-negligent manner.¹⁴ However, there is a general understanding among Americans that the police and other state actors have a duty to protect private citizens from danger.¹⁵ Another telling indicator is the evolution of a duty to rescue in tort law, despite the longstanding common law rule that denies any liability for nonfeasance.¹⁶ Also, the fact that a community, a state, or the country as a whole has chosen (through its elected representatives) to provide certain social services gives strong normative support for an individual's claim to receive those services.¹⁷ Apparently, the misfeasance/nonfeasance distinction that lawyers and judges take for granted does not match the average person's moral intuitions.

Furthermore, as a theory of constitutional interpretation, the negative rights view is far from universally accepted. Legal scholar-

¹⁰ I will use the term "negative rights view" to describe the theory that the Constitution contains only guarantees of negative rights. The "positive rights view" interprets the Constitution as requiring the government to affirmatively act in some circumstances.

¹¹ See generally Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993) (arguing that there is a constitutional right to basic subsistence).

¹² See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1991) (arguing that the state has a duty under the Fourteenth Amendment to protect an abused child).

¹³ *DeShaney*, 489 U.S. at 195.

¹⁴ "[T]he question [involved in *DeShaney*] does not turn on the imposition of a new duty. Rather, the case involved a state's failure to carry out promises it had already made to protect helpless victims." Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1096.

¹⁵ "Imagine, for example, the public reaction if a state decriminalized child and spouse abuse on the grounds that such abuse constitutes a private family matter." *Id.* at 1087. Steven Heyman's excellent, thoroughly researched article traces the historical pedigree of the government's duty to protect. This duty has been a fundamental principle of our legal system and culture from the English common law, through the Revolution, the Civil War, and the Reconstruction. See Heyman, *supra* note 12.

¹⁶ For a more detailed discussion of affirmative duties in tort law, see *infra* Part II.

¹⁷ Beerman, *supra* note 14, at 1094.

ship reveals a wide diversity of opinions on this issue. Before *DeShaney*, many state courts and federal district courts had developed doctrines expanding the affirmative duties of government.¹⁸ The debate continues today in the scholarly literature as well as in federal and state courts around the country.

The thesis of this Comment is that interpretations of the Constitution that recognize some degree of positive rights are equally as plausible and legitimate as a strict negative rights view, if not more so. The dominant mainstream theories allow for positive rights claims, and explicitly endorse certain affirmative duties. The advocates of both the positive and negative rights views draw from overlapping theoretical sources, especially deontology and consequentialism, that lie at the heart of mainstream political thought. These theories are important to understanding legal development because they form the bedrock principles by which arguments and beliefs about the law are justified.¹⁹ As such, these theories are both indicators of and shaping forces within the social and legal culture. An examination of how these theories treat positive rights, as well as how other areas of law have evolved to incorporate positive rights, will show that positive rights have deep roots in our political and legal culture. At the same time, an examination of *DeShaney*'s effects on constitutional law makes clear that the negative rights regime has deformed the development of the law and has led judges to rely on formalistic logic games rather than real principles of justice.

Part I will describe the theoretical foundations of both the negative and positive rights views. Both sides can claim support from mainstream political thought, as well as from the text and history of the Constitution. A strict negative/positive rights distinction is a false reading of our system's common law past that has remained in place even after the common law has begun to evolve away from such a hollow distinction.

Part II discusses how the lower courts have dealt with positive rights claims. Courts across the country have begun developing and expanding exceptions to the strict "no liability for nonfeasance" rule in the law of torts.²⁰ These developments, plus the exceptions these courts have carved out of *DeShaney*, indicate that other courts view the conventional wisdom as an unduly harsh rule in need of qualification.²¹ Trial courts and local appeals courts deal with the people harmed by government neglect or inaction. These courts' reactions to *DeShaney*, and their attempts to follow that case's holding, indicate

¹⁸ See discussion *infra* Part II.

¹⁹ See David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 L. & SOC. INQUIRY 1, 3 (1996) ("[L]aw, being located at the intersection of civil society and the state, combines the persuasive norms of the former with the coercive power of the latter.")

²⁰ See *infra* notes 96-107 and accompanying text.

²¹ See *infra* notes 120-35 and accompanying text.

which theoretical and practical problems actually do arise in concrete cases. Some courts have developed exceptions to *DeShaney* that manage to realize our ideas of justice while still ostensibly staying within *DeShaney*'s rule;²² in contrast, cases denying relief under *DeShaney* illustrate the moral and logical distortion wrought by *DeShaney*'s broad negative rights holding.²³ Outside of federal constitutional law, state courts' interpretations of positive rights guarantees found in state constitutions, plus other statutory guarantees of public or private assistance, indicate that there is indeed room within America's political culture for some claims of positive rights.

Part III summarizes the practical or policy-based arguments advanced by negative and positive rights proponents. The negative rights view is more a creation of expediency than of pure legal principles;²⁴ thus, many of the most convincing claims made in favor of the negative rights theory are based on practical concerns.²⁵ Any attempt to remove the negative rights roadblock will need to overcome the practical difficulties that arise from imposing affirmative duties on the government.²⁶

I. THE THEORETICAL FOUNDATIONS OF THE POSITIVE AND NEGATIVE RIGHTS VIEWS

The primary moral and political theories that comprise our cultural set of beliefs provide a strong foundation for positive rights in the law. Conventional morality is a mixture of consequentialism and deontology;²⁷ similarly, elements of both libertarian and communitarian political thought are present in American political culture, although they are mutually antagonistic.²⁸ An examination of these four dominant theories in American political and legal culture shows that positive rights are a natural part of that culture.

A. *Deontological or Rights-Based Theories*

Deontology is defined by a belief "in the existence of constraints, which erect moral barriers to the promotion of the good."²⁹ Those constraints are usually discussed as our rights as human beings; these

²² See *infra* notes 139-53 and accompanying text.

²³ See *infra* notes 154-64 and accompanying text.

²⁴ See *infra* notes 182-86 and accompanying text.

²⁵ See *infra* notes 181-96 and accompanying text.

²⁶ See *infra* notes 190-96 and accompanying text.

²⁷ See SHELLY KAGAN, *NORMATIVE ETHICS* 74-78 (1998) (arguing that conventional morality is not purely consequentialist, but includes a deontological component).

²⁸ See Sanford Levinson, *The Welfare State*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 553, 553-54 (Dennis Patterson ed. 1996) (observing that almost every Western government, including the United States, is some kind of welfare state; none are purely libertarian "night-watchman" states).

²⁹ KAGAN, *supra* note 27, at 73.

rights preserve each individual's inherent dignity and worth as an "end in himself."³⁰ Deontological rights take priority over the comparative goodness of the results of a given act; thus, unlike consequentialism, deontological theories do not allow rights to be compromised to achieve a quantitatively "better" result.³¹ Certain key features of deontological theory are prevalent in discussions of positive and negative rights, most notably: the affirmative act requirement, the moral significance of intent, and the distinction between obligatory and permissive moral acts.

1. *The Action/Inaction Distinction*

The negative rights view relies heavily on the deontological premise that only actions, not omissions, have moral worth.³² The requirement of an affirmative act—outside of certain carefully limited exceptions—is a basic requirement for liability under tort law and criminal law. This rule is present in almost every such case in the form of strict causation requirements: "If personal losses are attributable to third parties or natural events, it follows that the party who suffered the loss has no claim on the government. No causal linkage exists"³³

Negative rights proponents apply this idea in interpreting the Constitution as containing only negative rights. The Constitution does not merely delineate the government's political powers and limitations; it also declares the government's ethical obligation not to interfere with its citizens' rights. From a deontological standpoint, this duty extends only to government actions: Government inaction, even in the face of extreme injury or indifference by state actors, is not a morally culpable deprivation of liberty by the government.³⁴

Despite the negative rights view's selective use of the action/inaction distinction, even deontological theories based on a

³⁰ See Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1251 & n.246 (1990) (discussing Kantian moral theory in basic constitutional values). But cf. Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 351 (1993) (noting that such metaphysical theories are useful in explaining why people should have rights, but are inadequate to specify exactly what the content of those rights should be).

³¹ See Ernest J. Weinrib, *The Case for a Duty to Rescue*, in PHILOSOPHY OF LAW 625, 638 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) (comparing utilitarianism and deontology); ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 50 (1989) (explaining Kant's theory that moral obligations are absolute); KAGAN, *supra* note 27, at 73-74 (defining deontology and consequentialism).

³² See Bandes, *supra* note 2, at 2313 (quoting Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1142 (1989)).

³³ Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 BYU L. REV. 201, 226 (1985).

³⁴ See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986) (pointing out that American jurisprudence generally recognizes no liability for government inaction).

constraint against doing harm do place some (albeit lesser) moral weight on allowing harm.³⁵ Additionally, most deontological theorists explicitly recognize some specific affirmative duties. For example, Kant discussed positive obligations such as the duty to develop one's talents or to love one's parents.³⁶ Even in our legal system of predominantly negative rights, the state can still enforce a parent's duty to care for his children, and most people consider it both a moral failing and a legal crime when a parent refuses to fulfill this obligation.

2. *Intent*

Perhaps the strongest rebuttal of the negative rights view's reliance on the action/inaction distinction is the fact that only one strain of deontological theory attaches moral weight to results alone; more familiar is the school of thought that judges morality by the actor's intent.³⁷ Liability (except for limited instances of strict liability) attaches to actions not solely based on their physical effects, but rather because an act is more completely understood to be an "external manifestation of the will,"³⁸ i.e., intent; otherwise, we could hold people criminally liable for innocently (non-negligently) causing accidents. Under this view, then, inaction can be just as wrongful as action if done with wrongful intent.³⁹ When the government withholds the assistance needed to exercise a fundamental right, say in the case of Medicaid funding for abortion, the government makes a conscious decision not to protect that right from the vicissitudes of the market, thereby causally bringing about a prohibited goal through seemingly passive means.⁴⁰

3. *The Distinction Between Obligatory and Supererogatory Duties*

The negative rights view also rests upon the distinction between obligatory and supererogatory duties. Kant distinguished "narrow"

³⁵ See KAGAN, *supra* note 27, at 95 ("The suggestion is not being made that the deontologist thinks it morally unimportant if, in a given case, you have allowed harm. If there is some harm that you could have prevented, and you fail to do it, then this weighs heavily against the moral permissibility of your act All other things being equal, your act is still forbidden.").

³⁶ SULLIVAN, *supra* note 31, at 52-53.

³⁷ E.g., KAGAN, *supra* note 27, at 102-05; SULLIVAN, *supra* note 31, at 66.

³⁸ See Weinrib, *supra* note 31, at 641 n.24 (defining the term "act" as it is used in the tort law).

³⁹ See Bandes, *supra* note 2, at 2280-81 (describing how a more complete legal definition of the word "act" includes an intent element); Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath*, 66 WASH. L. REV. 107, 162-63 (1991) (advocating a "deliberate indifference" standard for evaluating state actors' conduct).

⁴⁰ See Bandes, *supra* note 2, at 2299-301 (discussing how the penalty/subsidy distinction employed by the Court in *Harris*, *Maher*, and *Webster* diverts attention from the fact that the government's intent clearly was to burden the exercise of abortion rights).

duties, which were primarily restraints on conduct, from "wide" duties that obligate a person to act affirmatively in some way.⁴¹ Narrow duties are required of every person regardless of circumstances, while wide or positive duties do not specify how or to what extent an individual must act to fulfill them; therefore, each individual must use his judgment in deciding how and to what extent to fulfill a positive duty.⁴² In a sense, the fact that positive duties are merely permissible makes them morally neutral—an individual or a government can be praised for carrying out such obligations, but neither can be faulted for neglecting to do so.⁴³

Translated into legal terms, this concept makes a sharp distinction between legal and imperfect obligations. Legal obligations, including rights, are enforceable by government, but imperfect obligations are more akin to charity—they do not require anyone, either the government or private citizens, to fulfill them, nor can needy persons claim a right to that assistance.⁴⁴ Judge Posner's Seventh Circuit opinion in *DeShaney* takes this distinction for granted: "The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services."⁴⁵

Negative rights theorists recognize that many people will not be able to enjoy their constitutional rights, whether because their poverty makes such rights unaffordable,⁴⁶ or because their youth or other circumstances render them vulnerable to private violence.⁴⁷ However, this view argues that, because the government played no active part in creating these problems, it has no obligation to correct them. The consequentialist strain of the negative rights view does not necessarily foreclose legislative action to create social services, but these services are seen as privileges, not rights that citizens can enforce in court.⁴⁸

⁴¹ SULLIVAN, *supra* note 31, at 51-52.

⁴² *Id.* at 52.

⁴³ *Id.* at 189.

⁴⁴ See Epstein, *supra* note 33, at 204 (describing the distinction between legal and imperfect obligations as rooted in the common law).

⁴⁵ *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987) (quoted in Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 G&O. WASH. L. REV. 1512, 1521-22 (1989)).

⁴⁶ See *Harris v. McRae*, 448 U.S. 297 (1980) (holding that the government has no obligation to fund medically necessary abortions).

⁴⁷ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (refusing to hold state child protection agency liable for mistakenly returning a child to an abusive home).

⁴⁸ See *DeShaney*, 489 U.S. at 196 ("[The Fourteenth Amendment's] purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."). See also Currie, *supra* note 34, at 886-87 (arguing that, while explicit constitutional foundations for positive rights are lacking, the Constitution does not rule out legislative action that would create such rights).

To the extent that deontological theories contrast narrow (negative) duties to wide (positive) duties, the conclusion does not follow that, because positive duties are left to the individual's judgment, they are unnecessary.⁴⁹ The fact that those duties leave their exact scope of fulfillment up to the individual actor does not mean that the actor may abandon them altogether. In fact, social or political consensus may very well specify a certain minimum extent to which those duties should be fulfilled—for example, the government requires that parents supply a minimum of care to their children. In the tort context, certain (judicially crafted) limitations on a duty to rescue—that such a duty exists only in an emergency situation, and only if the actor can perform the rescue with little harm to his own interests—can impose an objective standard rather than individual, subjective determinations of how to fulfill a positive duty, thereby eliminating the risks posed by an overly expansive affirmative duty.⁵⁰

B. Consequentialist Theories

Consequentialist theories maintain as their core value the maximization of happiness, welfare⁵¹, or some other version of the general good. Modern consequentialist theories tend to follow a rule utilitarian strand, viewing rights as the result of a balancing of interests between private citizens or between citizens and the government.⁵² Judges and legislators may not re-weigh the balance whenever the occasion arises, however; “[r]ules result from a balance of interests, but, once in place, exert an independent claim to obedience.”⁵³

The rule-of-law argument implicit in rule utilitarianism, as well as some consideration of state interests, are present in much of the negative-rights rhetoric. In favor of government interests, negative rights proponents claim that judicial recognition of positive rights would divert resources from other programs⁵⁴ and subvert legislative discretion regarding spending priorities.⁵⁵ Also, conservatives decry

⁴⁹ See SULLIVAN, *supra* note 31, at 316 n.16 (discussing various interpretations of supererogation).

⁵⁰ See Weinrib, *supra* note 31, at 636-37 (“The relief of an emergency is . . . unlikely to induce reliance on the assistance of others in normal conditions.”).

⁵¹ Utilitarians such as John Stuart Mill and Jeremy Bentham based their utilitarian theory on happiness as its core value. By contrast, “welfarists” distinguish “welfare” from “happiness” in that while the latter describes the satisfaction of desires, the former is a more comprehensive term, connoting the overall life satisfaction of an “informed and autonomous subject.” L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 172 (1996).

⁵² See Fallon, *supra* note 30, at 347-48 (positing that individual rights are essentially limits on government power, or the result of a balancing between individual and government interests).

⁵³ *Id.* at 375.

⁵⁴ See Epstein, *supra* note 33, at 206-07 (arguing that treating welfare as a right would fail to take into account the limited resources available to satisfy this right).

⁵⁵ See Eaton & Wells, *supra* note 39, at 128-29 (explaining the argument that legislatures, not the judiciary, should decide how to allocate resources and define the government’s obligations).

judges' "invention" of new fundamental rights through creative interpretations of the law.⁵⁶

An additional consequentialist feature present in the negative rights view is that both theories judge the rightness of actions by their effects or results, not by the actor's intent. The negative rights doctrine ignores the state's intent when it fails to act: As the Court held in *DeShaney*, the government can only be held liable when it makes a victim worse off, regardless of the state actor's intentions.⁵⁷ Although the Court relied on several cases that included state-of-mind inquiries,⁵⁸ such a requirement was conspicuously absent from the majority's opinion in this case. The Court's test was essentially results-oriented: Was the state's active conduct a proximate cause of Joshua's injuries?⁵⁹ Once it had answered this question in the negative, the majority felt no need to consider whether the state actors had been negligent or "deliberately indifferent" to Joshua's safety.⁶⁰

Although the *DeShaney* Court relies on some consequentialist premises, such as the basic causation issue discussed above and the public policy concerns described in the next section, the bulk of consequentialist reasoning soundly repudiates the negative rights view. Consequentialism weighs the rightness of an action purely on its results, not on the actor's intent: "for the consequentialist . . . there is no intrinsic moral significance to the distinction between *doing* and *allowing*."⁶¹ A rule utilitarian analysis sees the action/inaction distinction as irrelevant in questions of rights: "what rights should be recognized at any particular time depends on an assessment of competing interests and likely empirical consequences . . ."⁶² Also, any undesired consequences arising out of the recognition of positive rights can be mitigated by tailoring the rule to produce the best outcome, as Professor Weinrib demonstrates in proposing a tort law duty to rescue.⁶³

⁵⁶ See Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038, 1046-47 and *passim* (1992) (describing the legal arguments used by the Supreme Court to recognize unenumerated rights as "tricks of the trade").

⁵⁷ See *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). See also Bandes, *supra* note 2, at 2278 (criticizing the action/inaction distinction).

⁵⁸ See *DeShaney*, 489 U.S. at 198 n.5 (citing *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976), that held prison officials liable for "deliberate indifference" to a prisoner's need for medical attention).

⁵⁹ *Id.* at 201.

⁶⁰ See Eaton & Wells, *supra* note 39, at 162 (describing a state-of-mind inquiry as essential to protect people from "abusive or oppressive behavior on the part of government officers").

⁶¹ KAGAN, *supra* note 27, at 95. See Weinrib, *supra* note 31, at 635 ("Consequences are important; how they are reached is not.").

⁶² Fallon, *supra* note 30, at 378-79.

⁶³ See Weinrib, *supra* note 31, at 636-38 (discussing two limitations on a duty to rescue: that the duty arise only in emergencies, and that the rescuer can assist the victim with little harm or inconvenience to himself).

Additionally, positive rights advocates point out that, in opinions like *DeShaney* and *Webster*, the Court has selected an inappropriate and unrealistic baseline for considering whether an individual is made worse off by government inaction. These cases compare instances of inadequate state action against a hypothetical state in which the government provides no services whatsoever. However, we live in a modern welfare state in which government wields so much power over access to resources that it can do harm by virtue of its inertia, by inaction or inadequate action, and by holding a monopoly on certain kinds of aid and displacing private sources of help.⁶⁴ The state has also shaped the social structures that enable many constitutional torts to occur. In Joshua DeShaney's case, Wisconsin's family law gave custody of the boy to his father; this was just as much a form of positive state action as if the state had placed Joshua in an abusive foster home.⁶⁵

Furthermore, rights cannot be understood separately from the powers of government; a consequentialist theory of rights requires that the interests of individuals and the government be balanced against the interests of private citizens.⁶⁶ At the very least, a utilitarian cost-benefit analysis mandates a duty to rescue if the benefits to the people involved are less than the costs to the government.

C. Libertarianism

Libertarianism places overriding importance on individual autonomy. This ideology maintains that individual freedom and self-sufficiency must be respected in order to preserve human dignity and prevent state oppression.⁶⁷ The government thus should remove only structural or artificial barriers that prevent people from exercising their rights. Further, to intervene in order to correct "natural" inequalities would degrade the people so helped because such action would deprive them of the virtues of self-help and treat them as less than autonomous, adult human beings.⁶⁸ Additionally, most libertarians accept the presumption that inequalities are primarily the result of individual choice rather than of social factors outside an individual's control. Therefore, they believe that any claim of positive

⁶⁴ See Bandes, *supra* note 2, at 2283-85 (describing the ways in which governmental inaction can have the same negative effects as deliberate action).

⁶⁵ Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1362 (1992) ("[L]ike property, custody is a legal concept, shaped and enforced by the state.").

⁶⁶ See Fallon, *supra* note 30, at 360 and *passim*.

⁶⁷ See Soifer, *supra* note 45, at 1519-20 (criticizing the majority's reasoning in *DeShaney*: "Because no government had locked up Joshua, he ought to have taken care of himself. That is what individuals, rugged or not, are expected to do in the free world.").

⁶⁸ See Bandes, *supra* note 2, at 2316-17 (explaining the view that portrays the results of free competition as just, but government interference as degrading and intrusive on individual liberty).

liberty amounts to the government's attempting to remove self-imposed constraints on liberty, in effect paternalistically determining the substantive content of that liberty and overriding those individuals' decisions about their own best interests.⁶⁹

The libertarian's disdain for social legislation in general generates antipathy toward any claims of positive rights to government services. Libertarians worry that positive rights would require massive—ultimately wasteful—public expenditures. In addition to helping people who are less at fault for their own condition, the government might be forced to take on the care of individuals whose self-destructive behavior is the main cause of their problems.⁷⁰ They also express concern that a broad declaration of positive rights would force states to implement expensive outreach programs in order to meet judicially created standards.⁷¹ Furthermore, because libertarians do not consider social services to be part of the government's proper function, any state-run program that attempts to fulfill these imperfect obligations is guilty of stealing from the taxpayers to give to the poor: "It is a different matter when some people try to fund their gifts with cash taken from their neighbor's pockets."⁷²

Despite their strong denunciations of government in general—and social programs in particular—even libertarians must admit that the state exists in part to protect individuals from each other.⁷³ Some scholars have even reconciled certain redistributive goals with libertarian individualism: For instance, some commentators limit the right to amass resources when exclusion of others causes severe harm or death.⁷⁴ Most modern libertarians include the provision of some public goods within the state's proper range of powers or responsibilities.⁷⁵

Furthermore, critics of the negative rights view point out that this doctrine in effect frustrates the very rights that libertarians wish to protect. Even libertarians must recognize that individual rights are nonexistent if they cannot be exercised, or if the state does not enforce those rights that are necessary for a free and democratic government.⁷⁶ Certain minimum levels of physical integrity are "a pre-

⁶⁹ See *id.* at 2325 (explaining how the action/inaction distinction relates to ideas about positive versus negative liberty).

⁷⁰ See Dennis D. Dorin, *Utopian Dangers: Cherminisky's "Right to Minimum Subsistence"*, 44 MERCER L. REV. 553, 560 (1993) (questioning the manageability of positive rights).

⁷¹ *Id.*

⁷² Epstein, *supra* note 33, at 203.

⁷³ See Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 663-64 (1992) (discussing libertarian theory in the context of a right to minimal subsistence).

⁷⁴ See *id.* at 664 ("[S]ome libertarians [concede] that, for example, one may not appropriate the only water hole in the desert to the life-threatening exclusion or the extortion of others.").

⁷⁵ Levinson, *supra* note 28, at 553.

⁷⁶ See Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?* 10 AM. U. J. INT'L L. & POL'Y 1233, 1243 (1995) ("[G]enuine representative democracy involves widespread

condition to the accomplishment of the purposes that [a person's] freedom gives him the power to set."⁷⁷ Scholars on both sides of this debate recognize that, to a great extent, some minimal level of physical and material security is necessary for an individual to be free.⁷⁸ This view argues that constitutional rights should not be dependent on a person's ability to pay for them, and therefore the government has an obligation to help needy citizens exercise those rights.⁷⁹ Social rights should be enshrined in the Constitution because, as the founding charter of our nation and a repository for rights that are set beyond the reach of legislative majorities, the Constitution should contain all of the most important aspirations and principles of our society.⁸⁰

Moreover, some libertarian policy premises lack firm empirical support. Legal realists have long criticized the libertarian's sharp distinction between public and private activity as fictitious; in reality, the "private" sphere has been shaped and enabled by government action.⁸¹ The claim that inequality is entirely self-generated is belied by the existence of a hereditary, marginalized, socially immobilized underclass in this country, whose poverty and powerlessness are in part maintained by institutionalized inequalities in education and by racial discrimination.⁸² In addition, the libertarian's image of the "rugged individual" capable of fending for himself or herself certainly does not hold true in cases involving children in need of protection.⁸³ This extremely atomistic picture of humanity has been criticized by some scholars—most notably communitarians—for inaccurately brushing aside the complex interactions and interdependencies between individuals and their societies, not to mention each individual's nature as a social being.⁸⁴

participation, as well as tolerance and compromise. Destitute, hungry people don't vote, and idle, hungry people have no patience for the slow, often tedious haggling among often sharply differing groups that democracy requires.").

⁷⁷ See Weinrib, *supra* note 31, at 638.

⁷⁸ See Abraham, *supra* note 19, at 32 ("[N]egative rights, 'liberties', provide people with possibilities that in our existing socioeconomic system they are unable to fulfill meaningfully"); *id.* at 47-48 (discussing the notion of property, or a minimal level of material security, as the "guardian" of other rights).

⁷⁹ See Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1214-16 (1992) (drawing a distinction between formal rights—rights that require only that the laws be in harmony with them—and rights that are more concerned with social realities or effects).

⁸⁰ See *id.* at 1210 (describing the unique status of constitutional rights in political culture); Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1429 (1999) [hereinafter Hershkoff, *Welfare Devolution*].

⁸¹ Levinson, *supra* note 28, at 556-57.

⁸² See Judges, *supra* note 73, at 662 ("Extreme poverty and deprivation of basic education inflict . . . harms . . . because they disable any real participation in politics and plainly do ascribe social and political stigma.").

⁸³ Soifer, *supra* note 45, at 1519-20.

⁸⁴ See, e.g., *id.* at 1520 (criticizing the atomistic view of humanity); ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 32 (1996) (noting the disagreement between "liberal individualists" and

D. Communitarian Theories

One commentator described communitarianism as "the sane middle ground . . . between authoritarianism and libertarianism."⁸⁵ The basic characteristic of communitarian theories is that they envision individuals and their community as mutually interdependent rather than antagonistic.⁸⁶ In contrast, the atomistic model of human rights embodied in libertarianism sees society or government as conflicting with the rights and interests of the individual.⁸⁷ "Communitarians support basic civil liberties, but fear that our ability to confront societal problems effectively is compromised by the claims of 'radical individualists' who would subordinate the needs of the community to the absolute fulfillment of individual rights."⁸⁸

Positive rights are a fundamental part of communitarian theory. These rights or obligations are necessary to fulfill the core values of communitarianism: freedom, equality, and well-being.⁸⁹ Additionally, the inclusion of positive rights is essential for the communitarian's conception of human beings as social rather than atomistic: "When rights are viewed solely as negative, in that their correlative duties require only noninterference with persons' having the objects of their rights, the adversarial conception of the relation between rights and community is given ready entry."⁹⁰

Many scholars have recognized collective aspects to our Constitution's supposedly individualistic, negative rights. Professor Tribe has observed that the positive rights expressly described in the Constitution do not fit the standard description of rights under our system.⁹¹ For example, the Sixth Amendment's guarantees of a speedy trial, compulsory process for obtaining witnesses, and the right to counsel, and the requirement of Article IV, section 4 that the United States guarantee a republican form of government, impose affirmative requirements on the federal government. While the Bill of Rights typically describes rights that are individual, alienable, and negative, these other rights are just the opposite. First, they are positive, in that they require some affirmative act by the government to fulfill them. Second, they are inalienable, as no individual may permanently waive these rights. Third, they are held in common by all citi-

communitarians).

⁸⁵ Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 650 (1995).

⁸⁶ GEWIRTH, *supra* note 84, at 2.

⁸⁷ *Id.*

⁸⁸ Ackerman, *supra* note 85, at 650 (internal citations omitted).

⁸⁹ Gewirth, *supra* note 84, at 31.

⁹⁰ *Id.*

⁹¹ Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 332-33 (1985).

zens, and cannot be asserted by one individual (except, of course, the Sixth Amendment's rights protecting criminal defendants). Tribe observes that these rights "correspond to systemic norms—norms concerned with structuring power relationships to avoid the creation or perpetuation of hierarchy"⁹² Thus, even rights that are commonly regarded as attaching to individuals derive their substance and meaning from an individual's membership in a group.

In addition, even the commonly accepted negative Constitutional rights define "spheres of membership" by singling out some people for protection based on characteristics shared in common with a group.⁹³ For example, when a person invokes the Americans with Disability Act, she must prove that her claimed disability is of the type protected under the Act.⁹⁴

In a system of group-centered or relational rights, government can effect great harm by its inaction. When the state refuses to protect or assist an individual in exercising a positive right—for instance, by refusing to fund abortions for poor women—that refusal amounts to a forced alienation of that right.⁹⁵ Also, the modern welfare state creates reliance on its services and displaces private sources of help.⁹⁶ The greater influence the government has on our society, the greater responsibility the government should take in alleviating social problems.⁹⁷ Extensive government involvement in shaping our society makes the claim of nonfeasance less tenable—the government's conduct is active misfeasance when it has played a part in the creation or exacerbation of a social problem in the private sphere. Despite libertarian criticism of social services, they have become a fact of modern life: "Just as we no longer trust our economic welfare to the uncertainties of the unregulated marketplace, we no longer trust our personal welfare to the uncertainties of the weakened family structure"⁹⁸

Communitarian ideals are important because many legal reformers speak in the language of communal values and mutual support, as well as because communitarianism engages traditional liberal values in a constructive dialogue that will most likely continue to reshape

⁹² *Id.*

⁹³ See Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 WAKE FOREST L. REV. 409, 434 (1999) (discussing how, when an individual asserts a right, he must prove that his circumstances are substantially similar to those of the group described by that right).

⁹⁴ *Id.*

⁹⁵ See Tribe, *supra* note 91, at 336 (discussing the abortion funding cases).

⁹⁶ See Beerman, *supra* note 14, at 1089-90 ("All institutions . . . structure themselves in response to the institutions that surround them. As government agencies become more pervasive and more powerful, the ethical argument in favor of a governmental responsibility to intervene becomes stronger: Other institutions develop around those agencies, and people rely on the agencies for the protective services they provide.").

⁹⁷ *Id.* at 1092.

⁹⁸ *Id.* at 1093.

the way we view the law.⁹⁹ In addition, due to this theory's strong emphasis on mutual obligations, communitarianism is one major theoretical school that is effectively closed out of the law by the *DeShaney* Court's negative rights rule.

II. THE EVOLUTION AND AVOIDANCE OF POSITIVE RIGHTS: DEVELOPMENTS BEFORE AND AFTER *DESHANEY*

The artificial exclusion of positive rights from constitutional law has distorted the development of the law. This distortion is evident not only in the questionable logic of *DeShaney* itself,¹⁰⁰ but also in the refusal of lower courts to apply the *DeShaney* exceptions, as well as the distortion of state constitutional law affected by the gravitational pull of federal constitutional doctrine. At the same time, however, some positive rights notions have developed and continue to evolve. These include the judicially crafted exceptions to *DeShaney*, notions of affirmative duties in private law, and the presence of explicit positive rights guarantees in state constitutional law.

On the one hand, some courts have developed exceptions to *DeShaney* that recognize some limited affirmative duties on behalf of government. By contrast, other courts have refused to apply those exceptions, extending *DeShaney* past its own terms to foreclose a victim's recovery even in cases where the state can be said to have an active causal role (in the traditional sense) in the ultimate harm. These cases highlight the distortion in the law caused by *DeShaney*.

Private law has shown an increasing acceptance of affirmative duties of private citizens toward other citizens. These developments show, first, that the negative rights view is not applied uniformly throughout all areas of the law. Second, they show that the moral foundations for some positive rights (or affirmative duties) are strong enough to have led courts and legislatures to craft exceptions to the general rule of "no liability for nonfeasance."¹⁰¹ Third, the particular types of rules that impose affirmative duties can serve as guideposts for expanding positive rights in constitutional law, as these rules already enjoy popular support.

State constitutional law contains even broader guarantees of positive rights, which shows that these rights are already an established part of our political culture. However, state courts have erroneously imitated the negative rights rule in federal constitutional law, which has distorted and weakened many state constitutional rights.¹⁰²

⁹⁹ See Abraham, *supra* note 19, at 5-6 (discussing the dialogue between communitarian and liberal theories and the role of communitarian ideas in legal reform).

¹⁰⁰ For a more detailed criticism of the *DeShaney* decision, see generally Bandes, *supra* note 2.

¹⁰¹ See RESTATEMENT (SECOND) OF TORTS § 314(A) cmt. c (1965).

¹⁰² See generally, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1153-69 (1999) [hereinafter Hershkoff, *Positive Rights*].

A. Changing Views about Affirmative Duties

Positive rights are not foreign to this country's legal history; in fact, they have found expression in state law as well as in federal law. Through the Ninth and Tenth Amendments, the federal constitution originally left the protection of most civil rights, including positive rights, to the states.¹⁰³ Additionally, the Fourteenth Amendment was adopted with the explicit intention of requiring the government to protect citizens' rights. In its interpretation of the Due Process Clause, the *DeShaney* Court confused the history of the Fourteenth Amendment with that of the Fifth. The Fifth Amendment was based in its framers' fear of tyranny by the federal government; this is the rhetoric that the *DeShaney* majority uses to describe the policies and intent behind the Fourteenth Amendment's Due Process Clause.¹⁰⁴ However, the Fourteenth Amendment and its family of Reconstruction legislation arose out of a concern for deliberate state inaction. One of the major ills that plagued the post-war South was the rampant terrorism of the Ku Klux Klan, which was exacerbated or even facilitated by local officials' refusal to act to oppose it. Section 1983, passed pursuant to the Fourteenth Amendment, was meant to remedy this problem by creating a cause of action against this kind of abuse of official power.¹⁰⁵

Although the law does not enforce every moral requirement, most legal rules are based in a common understanding of morality.¹⁰⁶ Popular sentiment about which moral duties are required, and which should be encapsulated within the law, indicates where the moral ground is fertile for the growth of law. The general consensus is that affirmative duties should be imposed, and victims should be given a positive-rights remedy in court, for certain common-law and constitutional torts.

The area of the law in which this view has most readily found legal expression is in the tort law. Although the common law of torts has traditionally maintained a strict separation between misfeasance and nonfeasance,¹⁰⁷ the law has gradually evolved some exceptions to the no-duty default rule that are now widely accepted. The Second Restatement of Torts recognizes affirmative duties to others in the following circumstances: special relationships,¹⁰⁸ a duty to prevent fur-

¹⁰³ U.S. CONST. amend. IX & X.

¹⁰⁴ See Eaton & Wells, *supra* note 39, at 118-21 (discussing the Supreme Court's interpretation of the Fourteenth Amendment in *DeShaney*); Soifer, *supra* note 45, at 1521-26 (comparing the intent behind the Fourteenth and Fifth Amendments.)

¹⁰⁵ See *id.*

¹⁰⁶ See Ackerman, *supra* note 85, at 661 (discussing the interrelation of law and morality).

¹⁰⁷ See RESTATEMENT (SECOND) OF TORTS § 314(A) cmt. c (1965).

¹⁰⁸ *Id.* § 314(A).

ther harm after causally contributing to an initial injury,¹⁰⁹ a duty to warn or protect after one's actions create an unreasonable risk of harm,¹¹⁰ and the duty to follow through on an attempted rescue and to act with due care.¹¹¹

Additionally, state law reflects a growing recognition of a duty on behalf of private citizens to rescue another person in danger, or—at the very least—the law provides an incentive to rescue. Some states have passed statutes requiring an individual to assist someone in peril when the danger is great and the rescuer can complete the rescue with minimal danger or inconvenience to himself.¹¹² Several more states have laws that punish those who fail to report serious crimes.¹¹³ Also noteworthy is the fact that all fifty states have “Good Samaritan” laws intended to encourage (rather than sway by threat of criminal sanction or lawsuit) people to attempt a rescue or to give medical aid.¹¹⁴ These laws absolve rescuers from legal or criminal liability except where the rescuer recklessly or intentionally harms the victim.

The exceptions within the tort law indicate that the law no longer refuses to impose affirmative obligations on citizens to look out for the welfare of others. These laws consciously amend the preexisting legal structure in favor of a more communitarian-influenced approach, which shows that people generally believed something was previously lacking from the traditional understanding of the law's role and values.

B. Lower Courts' Reactions to *DeShaney*

In the years following *DeShaney*, many lower courts interpreted the decision as a sweeping denial of almost all claims requiring affirmative government action.¹¹⁵ However, in the twelve years since that de-

¹⁰⁹ *Id.* § 322.

¹¹⁰ *Id.* § 321.

¹¹¹ *Id.* § 324.

¹¹² 12 VT. STAT. ANN. tit. 12 § 519 (1973), MINN. STAT. ANN. § 604A.01 (West 2000); R.I. GEN. LAWS § 11-56-1 (1994); WIS. STAT. ANN. § 940.34(2) (West 1996). At least one court has held that a state duty-to-rescue law creates by analogy a cause of action against a state agency for its failure to follow through on an investigation of child abuse. *Sabia v. State*, 669 A.2d 1187, 1194-95 (Vt. 1995).

¹¹³ See R.I. GEN. LAWS § 11-373.1 (1994); WIS. STAT. ANN. § 940.34(2) (West 1996); FLA. STAT. ANN. § 794.027 (West 1992); COLO. REV. STAT. § 18-8-115 (1986); MASS. ANN. LAWS ch. 268, § 40 (Law. Co-op. 1992); OHIO REV. CODE ANN. § 2921.22(A) (Anderson 1999); WASH. REV. CODE ANN. § 9.69.100, 9.92.020 (West 1988). See also Ackerman, *supra* note 85, at 660 n.53 (discussing affirmative duties in state law).

¹¹⁴ See *Willard v. City of Vicksburg*, 571 So. 2d 972, 974 (Miss. 1990) (listing of relevant state laws).

¹¹⁵ See Eaton & Wells, *supra* note 39, at 166 (describing lower court cases shortly after *DeShaney* that treated the decision “as a blanket prohibition on constitutional tort liability for government inaction”). See generally Joseph M. Pellicciotti, Annotation, “State-Created Danger,” or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.S. s 1983, 159 A.L.R. Fed. 37 (2000) (summarizing lower court cases that have denied recovery under a strict reading of *DeShaney*).

cision was handed down, many qualifications and exceptions have germinated in the case law. Often mirroring the special rules for affirmative duties in the tort law, the exceptions to the no-duty rule generally conform to the basic reasoning of *DeShaney*.

1. *Special Relationships Creating a Duty to Aid*

Before *DeShaney*, some lower courts had developed a rule allowing for affirmative duties when a special relationship was found to exist between the plaintiff and the state actor(s).¹¹⁶ Relying on *Estelle v. Gamble*¹¹⁷ and *Youngberg v. Romeo*,¹¹⁸ *DeShaney* specifically limited this exception to cases in which the victim is in the state's custody.¹¹⁹ Since *DeShaney*, some circuits have relaxed the special relationship rule to include situations analogous to custody, such as foster care arranged by the state or reckless placement of a child with an abusive parent. Foster care cases have declared the broadest assertions of positive rights for children over whose fates the government has chosen to assume control. In such cases, courts often speak in terms of a foster child's right to be placed in a safe environment.¹²⁰

Furthermore, some courts have held state agencies liable for placing children with their abusive natural parents.¹²¹ These cases typically require a high standard of misconduct as judged by a state-of-mind inquiry, namely a "deliberate indifference"¹²² or actual knowledge¹²³ standard.

These cases contrast with *DeShaney* in light of that case's complete lack of any state-of-mind inquiry.¹²⁴ The *DeShaney* Court focused ex-

¹¹⁶ See Bandes, *supra* note 2, at 2278.

¹¹⁷ 429 U.S. 97 (1982) (holding prison officials liable for failure to provide medical care to inmate).

¹¹⁸ 457 U.S. 307 (1982) (requiring state to provide for the safety and basic needs of involuntarily committed mental patients).

¹¹⁹ *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 193-99 (1989).

¹²⁰ See *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995) (holding that a foster child has a right to be placed with a family that will provide adequate supervision); *Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (ruling that a state owes foster children a "rudimentary duty of safekeeping"). See also *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993) (finding the state liable for providing children in foster homes with adequate medical care); *Lewis v. New Mexico Dept. of Human Servs.*, 959 F.2d 883 (10th Cir. 1992) (holding that minors in foster care have a constitutional right to be reasonably safe from harm).

¹²¹ See *Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999), *reh'g en banc granted, judgment vacated*, 1999 U.S. App. LEXIS 24361 (8th Cir. Sept. 30, 1999) (holding that the state created a danger by placing a child in the custody of the father who was a convicted pedophile); *Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) (holding that there is a prima facie case of state created danger when a state agency placed a child in the custody of an abusive father). But see *Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (noting in dicta that the state could not be held liable for placing a child with an abusive natural parent).

¹²² *Ford*, 899 F. Supp. at 233.

¹²³ *Jervis*, 186 F.3d at 1067.

¹²⁴ See *Eaton & Wells*, *supra* note 39, at 159 (noting that *DeShaney* is part of a line of Supreme Court precedents that avoid state-of-mind inquiries).

clusively on the degree of state involvement in Joshua DeShaney's life, seemingly indifferent to the question of whether the social workers involved had actual or constructive knowledge of his father's ongoing abuse. As Justice Brennan pointed out in his dissent, the Winnebago County Department of Social Services had amassed substantial evidence of abuse, and the social worker herself stated that "I just knew the phone would ring some day and Joshua would be dead."¹²⁵ Despite compelling evidence of a guilty state of mind on the part of the state actors involved, the Court apparently considered the officials' state of mind to be irrelevant; instead, the Court simply declared a broad negative-rights rule and accordingly dismissed Joshua's claim.¹²⁶

In addition, some courts have expanded the types of special relationships between victims and state defendants to include situations in which a defendant made a promise of protection but failed to follow through. Before *DeShaney*, some cases had found liability where the state defendant undertook to help the plaintiff but then failed to complete the rescue,¹²⁷ similar to the tort law concept of an imperfect rescue.¹²⁸ The language of *DeShaney* flatly denies this argument: "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter."¹²⁹ Nonetheless, some courts have found that a government actor's failure to fulfill a promise of protection or confidentiality created a special relationship due to the victim's reliance on that promise. For instance, several circuits consider the state's relationship with police informants and whistleblowers to be sufficiently close to hold the state actors liable for breaching a promise of confidentiality.¹³⁰ Likewise, courts have found that promises of confidentiality to police officers, which induced the officers to rely on those promises, created a relationship that re-

¹²⁵ *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 208-09 (Brennan, J., dissenting) (quoting *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 812 F.2d 298, 300 (7th Cir. 1987)).

¹²⁶ *Id.* at 203-04 (Brennan, J., dissenting) ("It may well be . . . that the Due Process Clause as construed by our prior cases creates no general right to basic governmental services. That, however, is not the question presented here . . .").

¹²⁷ See *Eaton & Wells*, *supra* note 39, at 155 (citing *Balistreri v. Pacifica Police Dep't.*, 855 F.2d 1421 (9th Cir. 1988), *superseded by* 901 F.2d 696 (9th Cir. 1990)).

¹²⁸ See RESTATEMENT (SECOND) OF TORTS § 324 cmt. c (1965) (describing an actor's conduct that furthered the victim's injury).

¹²⁹ *DeShaney*, 489 U.S. at 201.

¹³⁰ See *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998) (finding police liable when they promised anonymity to the victim, who called to report his coworker's workplace theft, but then released tape recordings of victim's call to the coworker, who later killed the whistle-blower); *Dykema v. Skoumal*, 1999 W.L. 417360 (N.D. Ill. 1999) (noting that a special relationship existed when the police persuaded reluctant informant to go to the home of a suspected drug dealer while the informant was intoxicated); *G-69 v. Degnan*, 745 F. Supp. 254 (D. N.J. 1990) (finding that a special relationship exists where the state promises protection and a new identity if informant's real identity were discovered induced victim to rely on those promises).

quired the state to withhold the confidential information.¹⁵¹

While releasing confidential information may be characterized as an affirmative action that creates a danger,¹⁵² the line is hard to draw. At least one case, *Dykema v. Skoumal*,¹⁵³ explicitly referred to the basis of liability as a "special relationship." Furthermore, in that case, the police had not, strictly speaking, created the danger to the informant, such as by revealing his identity. Rather, the police had persistently tried to persuade him to act as an informant after he expressed his desire to stop acting in that role, and had arranged for him to go to the home of a suspected drug dealer while the informant was intoxicated. Although the informant was technically free to refuse the assignment, the Illinois district court extended the special relationship rule based on the extent of police involvement in the informant's decision.

Similarly, courts have held state officials liable for failing to live up to promises to protect specific victims from their likely attackers. This is especially relevant in cases of domestic violence, where the police promise to hold an abusive spouse or boyfriend in custody, but then release him to commit more violence.¹⁵⁴

Other cases have found special relationships in situations seemingly not covered by DeShaney's narrow custody exception. For example, the Second Circuit found that police had entered into a special relationship with a woman when they undertook to instruct her on how to protect herself from her estranged husband's violence.¹⁵⁵ Another case in the Eleventh Circuit held that a residential school for the deaf had a special relationship with its students such as to protect them from sexual assaults by other students.¹⁵⁶ Some circuits have also held that compulsory school attendance laws create a situation analogous to custody, such that schools owe a duty of care to students.¹⁵⁷

¹⁵¹ See *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) (revealing officers' identities and personal information to defense counsel in a drug conspiracy case).

¹⁵² See Pellicciotti, *supra* note 115, at §11 (explaining that the *Monfils* case did not impose a duty of protection, but rather required the state to avoid affirmatively creating a danger to the victim).

¹⁵³ 1999 WL 417360 (N.D. Ill. 1999).

¹⁵⁴ See, e.g., *Simpson v. City of Miami*, 700 So. 2d 87 (Fla. App. 1997) (relying on Florida statute requiring all arrested persons to be brought before a judge as imposing a duty on police not to release estranged husband who, after release, killed his wife). *Contra Pinder v. Johnson*, 54 F.3d 1169, 1175 (5th Cir. 1997) (en banc) (holding that victim's reliance upon police officer's promise did not create a special relationship or an affirmative duty: "By requiring a custodial context as the condition for an affirmative duty, *DeShaney* rejected the idea that such a duty can arise solely from an official's awareness of a specific risk or from promises of aid.").

¹⁵⁵ *Rauci v. Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990).

¹⁵⁶ *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994).

¹⁵⁷ See, e.g., *Pagano by Pagano v. Massapequa Pub. Schs.*, 714 F. Supp. 641 (E.D.N.Y. 1989) (justifying student's request for school to protect him from classmate attacks); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989). *Contra Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (supporting student's rights to bodily integrity while finding that a

2. *The State-Created Danger Theory*

State actors may be held liable when, through their affirmative acts, they causally contribute to the danger that injures the plaintiff. In such a situation, a duty arises when state actors "create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger."¹³⁸ This rule, even in its minimalist version, accepts state responsibility for the wrongful acts of private individuals if the state actor placed the victim in danger:

[I]f a 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 is merely passive; it is as much an active tort-feasor as if it had thrown him into a snake pit.¹³⁹

Building on similar language in *DeShaney*,¹⁴⁰ several circuits have held state actors responsible even when the state's causal link to the danger must be defined in mixed terms of both negative duties to refrain from causing harm, and positive duties to prevent harm.

The many types of state conduct that can lead to liability under the state-created danger theory can be grouped into the following categories: abandoning a victim to a dangerous situation; bringing a victim into close proximity with a person the state knew was violent; cutting off private sources of aid without providing a meaningful alternative; or conspiring with private actors to permit or assist in the commission of a wrongful act.¹⁴¹

These cases generally share four requirements: reasonably foreseeable harm; culpable state of mind; a causal nexus between the state actor's omission and the injury; and, in some circuits, that the victim be a known or foreseeable individual.¹⁴² However, some cases in which the state actors' omissions facilitate the crime, and in which the results were sufficiently egregious, courts have held the state responsible despite the fact that the victim or the type of harm were not directly foreseeable.¹⁴³

The Third Circuit's state-created danger test is illustrative. The test articulates the exception to *DeShaney* further than the earlier cases to include a state-of-mind inquiry:

school official's liability arises only when official exhibits indifference to student's rights).

¹³⁸ Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993).

¹³⁹ Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.).

¹⁴⁰ See *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

¹⁴¹ See Pellicciotti, *supra* note 115, at 50 (grouping successful state-created danger claims into categories based on the facts involved).

¹⁴² See *Eaton & Wells*, *supra* note 39, at 152-53 (citing *Martinez v. California*, 444 U.S. 277 (1980)); *id.* at 152 n.224 (discussing circuit split on the issue of foreseeable victims).

¹⁴³ See *id.* at 154 (citing *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)); *id.* at 153 (citing *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987)).

[C]ases predicated constitutional liability on a state-created danger theory have four common elements:

(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.¹⁴⁴

It is worth noting that the "prior relationship" means only that the individual was a "foreseeable victim," not that the state took him into custody.¹⁴⁵

The Tenth Circuit set forward a similar test in *Uhlrig v. Harder*.¹⁴⁶

Plaintiff must demonstrate that (1) [he] was a member of a limited and specifically definable group; (2) defendants' conduct put [him] . . . at substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.¹⁴⁷

The Tenth Circuit later added a sixth requirement, that "the charged state entity . . . created the danger or increased the plaintiff's vulnerability to the danger in some way."¹⁴⁸

Some state-created danger cases have recognized the special helplessness of certain victims, despite the Court's implied reasoning in *DeShaney* that individuals in the "free world" should be left to fend for themselves.¹⁴⁹ Analogous to the rule in *Youngberg* and *Estelle*, cases involving involuntary confinement by the state, lower courts have recognized that the government may cut off self-help or outside assistance even when there is no involuntary confinement or custody.¹⁵⁰ This rule parallels the tort doctrine that holds individuals liable for interfering with a rescue.¹⁵¹

3. Harm Directly Caused by a State Actor

Cases in which a state agency has been found liable for injuries caused by another state actor contain elements of both misfeasance

¹⁴⁴ See *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996) (citing *Mark v. Borough of Harbor*, 51 F.3d 1137, 1152 (3d Cir. 1995)).

¹⁴⁵ *Id.* at 1209.

¹⁴⁶ 64 F.3d 567, 574 (10th Cir. 1995).

¹⁴⁷ *Id.* at 572.

¹⁴⁸ *Chavez v. Wagon Mound Public Schs.*, 159 F.3d 1253, 1263 (10th Cir. 1998).

¹⁴⁹ See *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation . . ."); Soifer, *supra* note 45, at 1519-20 ("Because no government had locked up Joshua, he ought to have taken care of himself. That is what individuals, rugged or not, are expected to do in the free world.").

¹⁵⁰ See *Eaton & Wells*, *supra* note 39, at 147-49 (discussing cases arising within a few years after *DeShaney* in which the state restricts private assistance).

¹⁵¹ RESTATEMENT (SECOND) OF TORTS §§ 326, 327 (1965).

and nonfeasance. State agencies have been held responsible for constitutional rights violations resulting from such arguably non-active conduct as improper training, supervision, or lack of needed departmental policy-making.¹⁵² In addition, state employees such as police officers and prison officials have been held liable for failing to protect a victim from the wrongdoing of a fellow officer.¹⁵³

4. *Cases Denying Liability: DeShaney's Legacy*

Equally instructive are the cases that seem to fit within the state-created danger theory or other exceptions, but where the state actors in question are nonetheless held not liable as a result of *DeShaney* and similar precedents. Cases denying a state-created danger theory or other liability for abusive inaction strike the reader as more anomalous and stilted in their reasoning than the opinions that attempt to carve an exception out of *DeShaney's* broad language. Such cases occur just as often, if not more often, than cases that are held to fall under an exception to *DeShaney*.

One notable example is *Pinder v. Johnson*.¹⁵⁴ In that case, Carol Pinder's abusive ex-boyfriend, Don Pittman, broke into her house and began attacking and threatening her and her children.¹⁵⁵ Ms. Pinder relied on a police officer's promise that Pittman would be held at least overnight, and that it would be safe for her to return to work that night. However, the police later released Pittman, who returned to the Pinder home and set it on fire, killing Ms. Pinder's three children.¹⁵⁶

The first time this case came before the Fourth Circuit, the court found that Officer Johnson's promise had created a "special relationship" sufficient to expose him to liability under the state-created danger exception.¹⁵⁷ However, on en banc review, the Fourth Circuit reversed itself to hold that Officer Johnson had no duty to follow through on his promises.¹⁵⁸

The court's rationale for its en banc decision is even more stilted than the reasoning of *DeShaney*:

There was no custodial relationship with the plaintiffs in this case. Neither Johnson nor any other state official had restrained Pinder's freedom to act on her own behalf. Pinder was never incarcerated, arrested, or otherwise restricted in any way. Without any such limitation imposed on her liberty, *DeShaney* indicates Pinder was due no affirmative constitu-

¹⁵² Eaton & Wells, *supra* note 39, at 150-52.

¹⁵³ See *id.* at 151-52 (noting that such holding is not based on vicarious liability, but on the premise that inaction can violate someone's constitutional rights).

¹⁵⁴ 33 F.3d 368 (4th Cir. 1994), *rev'd* 54 F.3d 1169 (4th Cir. 1995) (en banc).

¹⁵⁵ *Pinder*, 54 F.3d at 1172.

¹⁵⁶ *Id.*

¹⁵⁷ *Pinder*, 33 F.3d at 371.

¹⁵⁸ *Pinder*, 54 F.3d at 1169.

tional duty of protection from the state, and Johnson would not be charged with liability for the criminal acts of a third party.¹⁵⁹

Under any reasonable reading of the facts, this case should fit nicely within any test for state-created danger: the harm was reasonably foreseeable (Pittman had threatened Pinder and had previously been arrested for attempted arson against her home); the victims were easily foreseeable; Officer Johnson acted with reckless disregard for the safety of Pinder and her children; and the act would likely not have occurred had Ms. Pinder not relied upon Johnson's representations. However, the Fourth Circuit seems to have chosen a mechanical application of *DeShaney*'s broad negative rights rule rather than to have sought to do justice in *Pinder*. This decision poignantly illustrates the injustice worked by the sweeping negative rights rule of *DeShaney*.

Another case similarly emphasized the fact that the victim was not confined by the state when she was attacked as a result of a government actor's negligence or indifference. In *Liebson v. New Mexico Corrections Department*,¹⁶⁰ a librarian was kidnapped, held hostage, and sexually assaulted by a prison inmate. Although previously a corrections officer had been posted in the library, five days before the attack the guard's schedule was changed, so there was no guard on duty in the library at the time of the attack. The Tenth Circuit read *DeShaney* broadly and the exceptions to *DeShaney* narrowly to preclude liability under either the special relationship exception or the state-created danger exception.¹⁶¹ In that court's reasoning, because Ms. Liebson was free to leave her job and was not otherwise confined by the state, the prison could not be held liable for its negligence.¹⁶² The court seemed to go out of its way to avoid declaring a duty on the part of the prison to ensure safe working conditions for Ms. Liebson—who, incidentally, was not a prison employee, but was employed by a local community college and was assigned to the prison library temporarily.¹⁶³ Instead of requiring the prison to simply provide safe working conditions for its employees, the Tenth Circuit framed the discussion, in effect, as if Ms. Liebson had assumed the risk of inmate attacks when she did not quit her job.¹⁶⁴ This type of reasoning, which sounds absurd to anyone who has ever worked for a living, is only made necessary by sweeping negative-rights rulings such as *DeShaney*; no inherent logic or principles of law require it.

¹⁵⁹ *Id.* at 1175.

¹⁶⁰ 73 F.3d 274 (10th Cir. 1996).

¹⁶¹ *Id.* at 276 (internal citations omitted).

¹⁶² *Id.* at 278.

¹⁶³ *Id.* at 275.

¹⁶⁴ *Liebson*, 73 F.3d at 276.

C. Positive Rights in State Constitutions

To some extent, the negative rights view continues to influence state constitutional law. Eighteen state constitutions explicitly mandate government assistance for the poor,¹⁶⁵ and all fifty state constitutions contain at least the positive right to education.¹⁶⁶ However, some state courts have followed the federal negative-rights model effectively ignoring or eviscerating their states' positive rights guarantees. Other state courts have given these positive rights varying degrees of force. State courts that fail to give full effect to positive rights in state constitutions rely on federal norms and precedents that some commentators consider inappropriate, given the unique history and nature of state constitutions.¹⁶⁷ Relying on a separation of powers rationale, the highest courts of New York, Idaho, and Colorado have maintained almost complete deference to the state legislatures' discretion on how to enact certain positive rights guarantees.¹⁶⁸ Other state courts—especially Illinois, Kansas, and Montana—have applied a deferential approach in particular cases without closing the door altogether to some rights to government assistance under the states' constitutions.¹⁶⁹

Many of the justifications for limiting positive rights in federal constitutional law rely on uniquely federal concerns that should not be carried over into state constitutional law, such as federalism, separation of powers, and restraint of the Supreme Court's power.¹⁷⁰ For instance, as Professor Hershkoff has described, many states' review of welfare legislation mirrors federal rational basis review.¹⁷¹ However, the main policy considerations behind the federal courts' deference to Congress and state legislatures do not hold true when dealing with state constitutional rights. For example, separation of powers concerns—especially a perceived need to restrain the power of the courts and to prevent them from making policy judgments—are a key motive behind judicial deference.¹⁷² Unlike federal courts, however,

¹⁶⁵ See Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1076 & n.100 (1993) (listing the relevant sections from state constitutions).

¹⁶⁶ *Id.* at 1076.

¹⁶⁷ See Hershkoff, *Welfare Devolution*, *supra* note 80, at 67 (discussing the influence of federal welfare law); Feldman, *supra* note 165, at 1062-63 (discussing the influence of federal separation of powers doctrine); Hershkoff, *Positive Rights*, *supra* note 102, at 1153-69 (discussing the influence of federal rational basis review).

¹⁶⁸ See Feldman, *supra* note 165, at 1078-83 (discussing leading cases in those states).

¹⁶⁹ Sarah Ramsey & Daan Braveman, *Let Them Starve: Government's Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1626-28 (1995). After the Montana Supreme Court used a state constitutional provision guaranteeing economic and social assistance to strike down a welfare funding scheme, the state legislature amended the constitution so that the "right" is now phrased as a discretionary function. *Id.* at 1627-28.

¹⁷⁰ Hershkoff, *Positive Rights*, *supra* note 102, at 1154.

¹⁷¹ *Id.* at 1153.

¹⁷² See *id.* at 1153-55 (discussing federal rationality review).

many state courts are popularly controlled, or at the very least, the local or state political system allows for greater control and accountability.¹⁷³ Also, state court decisions do not have the finality of United States Supreme Court decisions.¹⁷⁴ Additionally, state courts are not strictly separated from the other branches of government; instead, they work interdependently with state governments and are often involved in political issues.¹⁷⁵ In fact, positive rights guarantees in state constitutions give state courts the unique task of interpreting and enforcing those substantive commands and making sure that state laws uphold the meaning of those rights.¹⁷⁶

Despite the influence of the negative rights view, many state courts have actively enforced positive state constitutional rights and have even generated unique bodies of law pertaining to those rights.¹⁷⁷ One basic development is that state courts engage in "consequential" review: Unlike federal heightened scrutiny review, which evaluates how a law burdens a constitutional right, consequential review asks whether a state law helps or hinders a constitutionally mandated right.¹⁷⁸

Examining state constitutional decisions yields two results. First, these decisions demonstrate the need to end the hegemony of the negative rights theory. The pervasiveness of the negative rights view, even in the face of contradictory constitutional mandates, shows that this theory has overstepped its boundaries and has crippled state constitutional doctrine. Second, the cases in which state courts have upheld claims for positive rights are enlightening as to the effects and enforceability of those decisions. The rights themselves are usually phrased as goals, instructing the state legislature to use its discretion and its power to achieve those goals.¹⁷⁹ Contrary to the worries of negative-rights advocates, state courts have been successful in enforcing claims for positive state action.¹⁸⁰

III. POLICY ARGUMENTS

In addition to widening the gap between law and ethics and interfering with the natural evolution of the law, the negative rights view

¹⁷³ See *id.* at 1170 (distinguishing state courts from federal courts and noting that state judges are often popularly elected).

¹⁷⁴ See *id.* at 1162 (discussing how state legislatures can overrule state court decisions much more easily than Congress can overrule the Supreme Court).

¹⁷⁵ See *id.* at 1156-57 ("State courts settle contests over public offices, pass on the propriety of proposed public expenditures and even of proposed constitutional amendments, often at the suit of mere 'taxpayers.'") (quoting former Justice Hans Linde of the Oregon Supreme Court).

¹⁷⁶ *Id.* at 1154, 1169-70.

¹⁷⁷ Hershkoff, *Positive Rights*, *supra* note 102, at 1183.

¹⁷⁸ *Id.* at 1184.

¹⁷⁹ Hershkoff, *Welfare Devolution*, *supra* note 80, at 1413-15.

¹⁸⁰ *Id.*

claims to advance some policy objectives at the cost of other, more important goals. Policy arguments make up the bulk of the literature supporting the negative rights view and, in many cases, are more convincing than any moral or legal arguments. A critical examination of these policy concerns sheds light on the weakness of their predictions, highlights the benefits of including positive rights in the law, and instructs judges and legislators on how to most effectively structure a plan for realizing positive rights.

A. Policy Arguments from the Negative Rights View

Supporters of the negative rights view usually conjure up images of judicial chaos or government overreaching in order to dismiss even modest claims for positive rights. Their policy arguments and predictions fall into three general groups: difficulties of enforcement; negative economic or incentivizing effects; and structural or slippery slope problems. At the outset, it is important to note that these policy arguments only affect the practical feasibility affirmative duties and how they should be elaborated and implemented; they do not address the question whether such a right exists at all.¹⁸¹

1. Judicial competence, difficulties of enforcement

The negative rights view claims that positive rights are not suited to our system of adjudication. For one thing, it would be difficult to establish causation in a failure-to-act case.¹⁸² Also, the question of responsibility is complicated by the lack of reciprocity in affirmative duties: While negative rights imply obvious reciprocal duties, i.e., for each person not to harm the other, positive rights do not generate these clear reciprocal obligations: No one identifiable individual (or, by extension, government actor) is required to fulfill a person's needs.¹⁸³

There is also the fear that recognizing positive rights, especially those as broad as a general right to subsistence, would overwhelm the courts with disruptive cases. The problems arise because such a right may be inchoate, lack a firm textual basis, not indicate clear standards for decision-making, and may take an uncertain course of development.¹⁸⁴

Finally, because many positive rights are legally imprecise, they require legislative and executive definition before they can be effectively protected.¹⁸⁵ However, judges are ill-equipped to "create" and

¹⁸¹ Tribe, *supra* note 91, at 342.

¹⁸² Bandes, *supra* note 2, at 2335-36.

¹⁸³ *Id.* at 2337-38; Epstein, *supra* note 33, at 210.

¹⁸⁴ Dorin, *supra* note 70, at 556-60.

¹⁸⁵ See Currie, *supra* note 34, at 889 (discussing other countries' effectuation of positive con-

define the scope of positive rights. When judges attempt to define those rights, they must decide between two sets of equally convincing theoretical arguments; without guidance from precedent or text, judges would be unable to make these decisions except by deciding according to their own subjective beliefs.¹⁸⁶

2. *Economic efficiency and perverse incentives*

Several law-and-economics type arguments claim that recognizing positive rights would skew people's incentives toward socially or economically undesirable behavior. For example, in the context of duty-to-rescue or duty-to-report laws, some commentators have expressed concern that such laws might actually discourage the reporting of crimes in some instances. Eugene Volokh described how such laws disincentivize "delayed Samaritans" (who initially do not report a crime, but later change their minds) and "passive Samaritans" (who do not report the crime until the police come to them) from reporting crimes. Because these individuals would be subject to civil or criminal liability for their initial delay, they may choose not to cooperate at all instead of offering their (albeit limited) cooperation.¹⁸⁷ Analogously, when government is deemed to owe a positive duty toward its citizens and can be sued for doing a bad job, those agencies or officers who provide the services at issue will avoid those responsibilities altogether.

Those who oppose claims for positive rights observe that negative rights can be enforced fairly cheaply: "In principle, all persons can comply with the commands of the law, wholly without regard to their initial wealth or natural endowments."¹⁸⁸ In contrast, positive rights can generate high enforcement costs because they require positive action plus enforcement of a duty to act when it is not always clear when that duty has been breached.¹⁸⁹

3. *Slippery slope and structural concerns*

Critics of positive rights claims assert that, once we recognize affirmative governmental duties in some cases, we will be forced to extend them to others, creating havoc for lawmakers and administrators and depleting the state treasury. This argument claims that even a narrowly tailored positive right—say, the right to state protection to a known individual when an appropriate state agency is already in

stitutional rights).

¹⁸⁶ See Robert H. Bork, Commentary, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 700 (1979).

¹⁸⁷ Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105 (1999).

¹⁸⁸ Epstein, *supra* note 33, at 208.

¹⁸⁹ *Id.* at 208-09.

place—could be expanded in later cases, eventually leading the courts to require the creation of new agencies to provide other services.¹⁹⁰

Furthermore, critics assert that judicial enforcement would upset the balance of powers between the branches of government. This argument starts from the premise that our government is structured such that the legislative and executive branches formulate general policies, and the courts fill in the gaps in those policies.¹⁹¹ Negative rights advocates fear that courts will intrude on legislative discretion regarding spending priorities, or that they may order legislatures to create new services to fulfill positive rights.¹⁹² Such action would ignore the fact that the government has only limited resources with which to satisfy numerous claims and interests.¹⁹³ Furthermore, because such judicial management would require reordering fundamental interests and priorities, positive rights would lead to conflict and controversy.¹⁹⁴

The negative rights view is also attractive to those concerned about the effect of positive rights claims on federalism. According to this argument, once a federal court declares any positive rights, it would assume the power to force states to fulfill those rights. The courts would become too involved in managing state governments, telling the states which agencies or systems would be responsible for carrying out which obligations.¹⁹⁵

Likewise, judicial enforcement would encroach on agency discretion, perhaps to the detriment of the individuals served by those agencies. When cases implicating positive rights to agency action arise, the courts will have to examine the actions of administrators and state employees, as well as the allocation of funds within the agency, to determine whether a breach of duty occurred.¹⁹⁶ At some point, this scrutiny of agency actions would amount to judicial management of those agencies.

C. Policy Arguments from the Positive Rights View

The policy concerns posed by the advocates of the negative rights view are merely hypothetical; because the federal judiciary has not

¹⁹⁰ See *id.* at 230-32 (summarizing slippery slope arguments from various sources).

¹⁹¹ See Dorin, *supra* note 70, at 556 (arguing that judicial policymaking amounts to judicial legislation).

¹⁹² See Schwartz, *supra* note 76, at 1237-38; Eaton & Wells, *supra* note 39, at 128-29 (discussing government discretion principles).

¹⁹³ See Epstein, *supra* note 33, at 207 ("No legal or political theory of rights is acceptable if it fails to generate rights and duties consistent with the limited resources that must be generated to satisfy them.").

¹⁹⁴ Schwartz, *supra* note 76, at 1237.

¹⁹⁵ See Dorin, *supra* note 70, at 557 (criticizing the impact of court-declared positive rights on federalism).

¹⁹⁶ See Bandes, *supra* note 2, at 2327 (discussing the arguments against positive rights).

opened the door to significant positive rights claims, none of these predicted problems have been observed. To the contrary, the experiences of state courts and of foreign countries in enforcing constitutional positive rights guarantees have shown that reasonable, effective standards for dealing with these claims are possible.¹⁹⁷ In addition, advocates of positive rights generally claim three types of benefits to including this conception of rights in constitutional law: the judiciary's role in shaping the law through its interactions with legislatures; controlling and preventing administrative failures; and providing a remedy to the victims of callous government neglect.

1. *Judicial dialogue with legislatures as an impetus for legal evolution*

Positive rights advocates point out, first, that positive rights have been proven judicially enforceable. American courts can already mandate the public expenditure of funds or the supervision of agency policies and have done so with considerable success—for instance, by implementing school desegregation.¹⁹⁸ State courts have also successfully enforced explicit guarantees of positive rights contained in state constitutions.¹⁹⁹

Secondly, even if courts are incapable of enforcing a particular right, the fact that they are willing to recognize that right is important in establishing that the right exists, so the legislature should take it into consideration when balancing other obligations and priorities.²⁰⁰ Although some positive social rights may not be strictly enforceable, they are no different in this respect than many accepted civil rights. Some rights are purely formal; that is, they require only recognition by the government and an attempt to effectuate them, but they do not require that such efforts be completely successful.²⁰¹ Rather than a win-or-lose model of enforcement, as we now have with negative rights, formal positive rights' success can be measured by each individual helped. For example, although America may never have won the "war on poverty," Johnson's "Great Society" programs were very effective at improving the lives of poor people; therefore, they effectively (albeit imperfectly) fulfilled a duty to help the poor.²⁰²

¹⁹⁷ See Hershkoff, *Positive Rights*, *supra* note 102, at 1153-69 (discussing state constitutions); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992) (discussing guarantees of social rights in other countries' constitutions).

¹⁹⁸ Schwartz, *supra* note 76, at 1238.

¹⁹⁹ Hershkoff, *Welfare Devolution*, *supra* note 80, at 1410-15.

²⁰⁰ Schwartz, *supra* note 76, at 1240.

²⁰¹ Tushnet, *supra* note 79, at 1214-15.

²⁰² Chemerinsky, *supra* note 11, at 530. The rhetoric of a "war on poverty" may have contributed to the fall in popularity of social programs after the 1960's. *Id.* A "war" requires a winner and a loser, anything less than complete victory is seen as a loss. *Id.* However, from the perspective of the individuals helped by the Great Society programs, this country's efforts to ameliorate the hardships of poverty were to a great degree successful. *Id.*

While generally held values and ethics inform the law, likewise the law can serve to influence social norms. Some opponents of positive rights claim that active judicial enforcement of those rights, in overriding the democratic process, would generate hostility toward positive rights among the public.²⁰³ However, it is more likely that judicial or legislative recognition of positive rights will in turn strengthen the public's appreciation of those rights.²⁰⁴

2. *Correcting administrative failures*

Under the negative rights rule, state agencies have a stronger incentive not to act, and thus avoid liability, than to take action and risk liability for malfeasance.²⁰⁵ When judicial supervision of an agency is activated as a result of a positive rights claim, the potential exists to increase accountability within agencies. As Professor Beerman points out, information gaps between politicians and the electorate, as well as misplaced incentives within agency structures, can lead agencies to pursue policies that do not reflect the majority's preferences.²⁰⁶ Judicial intervention would increase accountability between administrators and politicians, and between politicians and the electorate.²⁰⁷ Moreover, even though the deterrent effect of damages awards on state actors is uncertain,²⁰⁸ direct judicial enforcement of a positive right through injunctive relief is always available to correct administrative failures.

3. *Providing a remedy against abusive government inaction*

The most important policy goal of recognizing positive rights in

²⁰³ Maggs, *supra* note 56, at 1045.

²⁰⁴ See Ackerman, *supra* note 85, at 662 ("The tendency on the part of the public to equate law with morality, to assume that if something is not illegal then it is not immoral, may suggest the practical need for a rule requiring rescue in situations in which the potential rescuer is not in peril.").

²⁰⁵ See Bandes, *supra* note 2, at 2284, 2284 n.65 (citing PETER SCHUCK, *SUING GOVERNMENT* 59-87 (1983)).

²⁰⁶ See Beerman, *supra* note 14, at 1104-1108 (discussing gaps in the chain of responsibility between agencies, politicians, and the electorate).

²⁰⁷ *Id.* at 1106-08. Beerman demonstrates that judicial remedies could increase accountability in a number of ways. For example, incumbents often set goals for a social program in order to gain publicity, but because the electorate does not hear about funding decisions, these agencies end up inadequately funded. Courts could provide a remedy to those injured by this neglect, thus forcing politicians to either live up to their promises or suffer the costs on election day. *Id.* at 1107. In cases involving agencies that fail to pursue the policies set by statutes or political leadership, the fear of lawsuits could create incentives for administrators to perform their jobs properly, and lawsuits would alert the people and their representatives to problems within the agencies. *Id.*

²⁰⁸ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) (discussing the uncertain incentivizing effects of constitutional damage awards).

the Constitution is, quite simply, justice.²⁰⁹ The courts must abandon the negative rights rhetoric in order to provide a remedy to victims of administrative malfeasance or neglect. As Justice Brennan stated in his dissenting opinion in *DeShaney*, "inaction can be every bit as abusive of power as action . . . oppression can result when a State undertakes a vital duty and then ignores it."²¹⁰ The *DeShaney* decision ignores the need for compassion in adjudication: "[a] crucial lesson of our bleak century, and of the Holocaust in particular, is that it can be morally reprehensible to do nothing in the face of evil."²¹¹ Soifer points out that the Justices had an opportunity, with the *DeShaney* case, to correct the injustice of administrative neglect, but instead they retreated into formalistic rationalizing and line-drawing, ignoring the real human problems at hand.²¹² That is why, on a basic, visceral level, the *DeShaney* decision offends so many people's sense of basic fairness and justice.

CONCLUSION

The strict negative rights view is a type of legal fiction: It is an artificial structure, only loosely based on ethical and historical traditions, set up purely for the sake of convenience. This fiction, however, has done more harm than good. It contradicts this country's legal and political culture, it has warped the evolution of the law, and it has led to formalistic decisions like *Pinder* that make a mockery of our ideals of justice. The distortions caused by this doctrine are serious: Not only may the state stand idly by and refuse to fulfill its promises of help to its citizens, as the Department of Human Services did in *DeShaney*, but it may actually burden or discriminate against fundamental rights by refusing to fund or protect those rights, as in the abortion funding cases. A semantic flick of the wrist transforms government neglect of civil rights into "blameless" inaction.²¹³ Moreover, the Court's "greater includes the lesser" reasoning used in *DeShaney* and other cases²¹⁴ seems to defy the principles of equal protection as well as common sense: "the Equal Protection clause could theoretically be satisfied by denying education to all children or by

²⁰⁹ See generally JOHN RAWLS, A THEORY OF JUSTICE (1999) (stating that justice is the first virtue of any public institution).

²¹⁰ *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 211 (1989) (Brennan, J., dissenting).

²¹¹ Soifer, *supra* note 45, at 1531.

²¹² *Id.* at 1531-32.

²¹³ See Bandes, *supra* note 2, *passim* (explaining how the Court relies on several tricky semantic differences that hold little meaning on their own: private/public, action/inaction, penalty/subsidy, etc.).

²¹⁴ See Soifer, *supra* note 45, at 1521 (discussing this argument in *DeShaney*); see also *id.* at 1518 (noting that the Court's logic presupposes as fact that there are no positive rights contained in the Constitution; it cannot serve to prove that very fact).

allocating to each student equal shares of substandard schooling."²¹⁵

In addition, the negative rights view has corrupted the law's evolution in the states and in federal constitutional law. Even though most states' constitutions explicitly require the government to fulfill some positive rights, the negative rights view imported from federal constitutional law has corrupted those states' jurisprudence. In addition, lower federal courts have been forced to either find ways around *DeShaney*—which indicate a general dissatisfaction with that case's broad holding—or else to abandon considerations of justice and rightness in favor of a twisted form of logic that inevitably erases the government from the picture, no matter how deep its real involvement in a situation.²¹⁶

Nevertheless, hidden beneath the negative rights view's "ideological barrier"²¹⁷ is a philosophical and cultural landscape that is ripe for the growth of various positive constitutional rights. The *DeShaney* majority's definition of rights, and which rights belong in the Constitution, is far from absolute. Professor Tushnet had aptly demonstrated that the concepts of civil versus social rights, as well as the definitions of those rights, change over time.²¹⁸ The experience of state courts, as well as the exceptions to the *DeShaney* rule, indicate that positive rights are indeed enforceable without unduly disrupting legislative discretion or separation of powers. Where the public interest outweighs the practical difficulties, allowing positive rights claims can bring jurisprudence back into line with people's ethical expectations of their government. Such a change would redirect constitutional jurisprudence toward a more intellectually rich and ethically just path.

Cases like Joshua DeShaney's are all too common in an age of budget cuts and welfare reform. The negative rights theory encourages administrative neglect by relieving state actors of responsibility for their actions and by suppressing open judicial consideration of various legitimate theories. Some courts have already shown that they are not content to toe the line *DeShaney* has drawn. These exceptions, as well as the development of a duty to rescue in tort law, reflect our culture's evolving moral standards. Judges and legislators would be wise to consider the benefits of accepting positive rights as an important part of our Constitution. Only then will our basic constitutional freedoms have any real meaning to innocent victims like Joshua.

²¹⁵ Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 574 n.147 (1992).

²¹⁶ See *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 208-10 (1989) (Brennan, J., dissenting) (discussing how the *DeShaney* majority downplays the extent of the state's prior involvement in Joshua's life in order to bolster its claim of inaction); Soifer, *supra* note 45, at 1517.

²¹⁷ Tushnet, *supra* note 79, at 1392.

²¹⁸ *Id.*