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Defining the Scope of the Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity

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DEFINING THE SCOPE OF THE DUE PROCESS RIGHT TO PROTECTION: THE FOURTH CIRCUIT CONSIDERS CHILD ABUSE AND GOOD FAITH IMMUNITY

INTRODUCTION

The United States Court of Appeals for the Fourth Circuit recently held in *Jensen v. Conrad*[1] that as of 1979 state and local officials could not be held liable under section 1983[2] for the deaths of abused children, even if the officials were aware of the children's plight. The court stated in dicta, however, that such children may now enjoy a federal due process right to be protected by the state from their abusers[3] and may vindicate that right by bringing suit under section 1983.[4] It held that because the deaths in question occurred before this right was "clearly established," the defendant-officials enjoyed good faith immunity from suit.[5]

This Note evaluates the *Jensen* decision and discusses the merits of a section 1983 claim based on the violation of a fourteenth amendment right to be protected by the state from harm inflicted by third parties. Part I reviews the *Jensen* decision and its discussion of the development of the fourteenth amendment right to protection.[6] Part II proposes a test designed to evaluate the merits of a claim that one's fourteenth amendment right to protection has been violated when, as in *Jensen*, the injured party was not in the state's custody.[7] Part III discusses the good faith immunity doctrine and argues that courts should not grant immunity to government officials who vio-

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1 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3669 (U.S. Mar. 19, 1985) (No. 84-1159).

2 42 U.S.C. § 1983 (1982) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3 This Note draws no distinction between abuse by parents and abuse by others within the family setting. *Jensen* considered two abused children, one of whom was abused by his mother's boyfriend. *See infra* text accompanying note 11. The other was abused by her mother and possibly her mother's boyfriend. *See infra* text accompanying notes 15-20.

4 747 F.2d at 194; *see infra* discussion in part II.

5 747 F.2d at 194-95; *see infra* discussion in part III.

6 *See infra* notes 10-70 and accompanying text.

7 *See infra* notes 71-136 and accompanying text.

late rights clearly established by state law even if those rights were not clearly established by federal law.[8] Part IV applies the principles suggested by this Note to the *Jensen* case.[9] It concludes that the court should not have immunized all of the defendants from suit, but should have reached the merits of one of the claims presented and dismissed it as a matter of law.

I
THE CASE

A. Background

The *Jensen* case is a consolidated appeal of two contemporaneous decisions from different divisions of the United States District Court of South Carolina. In one case, *Jensen, Administratrix of the Estate of Clark v. Conrad,*[10] a three-year old boy was beaten to death by his mother's live-in boyfriend four months after the county department of social services had received a report alleging abuse of the boy's older brother.[11] The plaintiff alleged that the department inadequately investigated the report, failed to locate the family, and wrongfully closed the case.[12] In the other case, *Jensen, Administratrix of the Estate of Brown v. Conrad,*[13] while a county hospital was treating a four-month-old girl for a fractured skull,[14] hospital officials observed the boyfriend of the child's mother handle the infant roughly[15] and reported her suspected abuse to the county child protection agency.[16] Agency caseworkers apparently contacted the mother,[17] who allegedly agreed to live with her daughter at the

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8 *See infra* notes 137-59 and accompanying text.

9 *See infra* notes 160-79 and accompanying text.

10 570 F. Supp. 114 (D.S.C. 1983) (Anderson Division) [hereinafter cited as *Clark*].

11 *Id.* at 119. The boyfriend was convicted of the boy's murder. *Jensen,* 747 F.2d at 188.

12 *Clark,* 570 F. Supp. at 120. Appellant blamed the State Department of Social Services for failing to properly train caseworkers and the County Department of Social Services for hiring inadequately trained personnel:

> Plaintiff specifically maintains that [decedent's] death was not prevented, as it could have been through proper protective service intervention, because caseworkers were not taught essential investigatory techniques necessary to locate the parents or guardians of children who are suspected to be victims of abuse.

Id.

13 570 F. Supp. 91 (D.S.C. 1983) (Columbia Division) [hereinafter cited as *Brown*].

14 *Jensen,* 747 F.2d at 187.

15 The boyfriend "held the child by the head and neck, and slapped [her] in a rough manner." *Id.*

16 *Id.*

17 It is unclear how much contact the agency had with the mother or her child. The court stated only that "after an initial review of the case" an agreement was reached with the mother. *Id.* The precise facts of the state's interaction with the family are important to an analysis of the child's rights. *See infra* note 178.

home of the child's grandmother, on pain of forfeiting custody of the infant.[18] The plaintiff alleged that the agency failed to adequately supervise the mother and to enforce the terms of the agreement despite knowledge that the child and her mother were not living at the grandmother's house.[19] Two and a half months after the initial hospital visit the girl suffered a brain hemorrhage and died.[20]

In both cases, the plaintiff brought suit under section 1983 against the Commissioner of the South Carolina Department of Social Services, state and county department board members, and state and county social workers. The plaintiff argued in both cases that the South Carolina Child Protection Act[21] created a "special relationship" between the state and the children by bringing them under the state's care.[22] The plaintiff asserted that this special relationship gave rise in the children to a substantive due process right under the fourteenth amendment to be protected by the state from their abusers.[23] The fourteenth amendment assertedly also imposed on the state a correlative duty to protect the children. Finally, the plaintiff claimed that the state breached this duty by its inaction and/or malfeasance.[24] Defendants in both cases moved to dismiss

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18 747 F.2d at 187-88.

19 *Id.* at 188.

20 *Id.* The child's mother "pleaded guilty to involuntary manslaughter." *Id.*

21 S.C. CODE ANN. §§ 20-7-480 to -780 (Law. Co-op. 1985). It is the purpose of the Act, *inter alia,* to "save [abused and neglected children] from injury and harm by establishing an effective reporting system and encouraging the reporting of the children in need of protection; [and] by establishing an effective system of services throughout the State to safeguard the well-being and development of endangered children." *Id.* at § 20-7-480.

22 *E.g., Clark,* 570 F. Supp. at 121-22.

23 747 F.2d at 189. The *Jensen* court did not characterize this right as "liberty" or "property." *Id.*; *see also infra* text accompanying note 29. Appellant claimed in *Brown* below that defendants had deprived the decedent child of her "right to life." 570 F. Supp. at 105. In the *Jensen* court's view, however, the right to protection arises in certain situations from the fourteenth amendment due process clause itself and not from one of the life, liberty, or property interests it protects. *See infra* text accompanying notes 33-63 (*Jensen* court's analysis of case law bearing on question of fourteenth amendment right to protection). Other courts have deemed the right to protection a subtantive due process right. *See, e.g.,* Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (involuntarily committed mental patient's right to safety is liberty interest under fourteenth amendment); Gann v. Delaware State Hosp., 543 F. Supp. 268, 273 & n.6 (D. Del. 1982) (state's failure to protect decedent hospital patient gave rise to substantive due process claim). A procedural due process claim might be made on the facts of *Clark,* but in such a claim the substantive right allegedly deprived without procedural due process is not the fourteenth amendment right to protection, but rather is a substantive right arising under state law. *See infra* note 179. The substantive right asserted in *Jensen* arises under the fourteenth amendment, but is triggered by a relationship between the holder of the right and the state, created by state law or, as this Note suggests, by state risk-creating action. *See infra* discussion in part II.

24 747 F.2d at 189.

the complaint.[25]

The *Brown* court dismissed the suit as to all defendants on the ground that an affirmative constitutional duty to protect arises only when the state assumes custody over the injured party.[26] The *Clark* court, however, determined that the State Child Protection Act put the victims under South Carolina's care and concluded that the relationship between child and state thus established by state statute could give rise to a federal constitutional duty to protect.[27] Finding, however, that such a duty had not been "clearly established" by state or federal law, the court extended good faith immunity to the state and county board members and granted summary judgment in their favor.[28] The appeals from *Clark* and *Brown* thus presented the

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25 *Brown,* 570 F. Supp. at 96; *Clark,* 570 F. Supp. at 119.

26 *Brown,* 570 F. Supp. at 110-11, 114; *see also* Bailey v. County of York, 580 F. Supp. 794, 794-97 (M.D. Pa. 1984) (on similar facts agreeing with *Brown* that custody or state's direct control or supervision of abusive actor is necessary to convert state's failure to act into constitutional violation).

The *Jensen* court misread *Brown* as holding that a duty to protect arises only when "legal custody *or direct supervisory control of the victim* l[ies] in the hands of the state." 747 F.2d at 189-90 (emphasis added). *Brown* actually held that legal custody of the victim "and/or direct supervisory control over or regulation of" the *abusive* party are necessary to finding state action violative of the fourteenth amendment. 570 F. Supp. at 110. The *Brown* court distinguished Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981) (on remand, trial court entered judgment n.o.v. for defendant after jury verdict for plaintiff), *rev'd,* 709 F.2d 782 (2d Cir.), *cert. denied,* 104 S.Ct. 195 (1983), in which the Second Circuit held that a foster child's fourteenth amendment rights could be violated by her state-regulated foster father, in part because the state's regulation of the foster father made it more logical to impute his action to the state. 570 F. Supp. at 109-11; *see infra* notes 42-43 and accompanying text. These factors were important to the *Brown* court because its analysis focused on whether state action could be found that deprived the decedent of her life. *See infra* note 103 and accompanying text. The proper view of *Doe,* according to the *Jensen* court and this Note, is that the state's assertion of legal custody over the child-plaintiff triggered a fourteenth amendment right to protection in the child, and it is that right, not the right to life, that was denied by the state's failure to protect the decedent in *Doe* from her abusive foster father. *See infra* notes 42-43 (discussion of *Doe*), 54 (discussion of Fox v. Custis, 712 F.2d 84 (4th Cir. 1983)), 86-89 (arguing that when state creates risk to individual by placing him in custody, state owes individual a right to protection), and accompanying text.

27 570 F. Supp. at 121-22. The *Clark* court noted the section of the act that provides, in part: " 'Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation. . . .' " *Id.* at 122 n.13 (quoting S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1985)). This Note contends that a state's creation of a statutory duty to come to the aid of some of its residents, without more, is insufficient to trigger a fourteenth amendment right to protection and its correlative duty to protect. *See infra* discussion in part II.

28 570 F. Supp. at 125-30. The court did not expressly include the State Commissioner in its grant of immunity, but it seems likely that the Commissioner, as a part of the Department of Social Services, would be immunized as well. The *Clark* court treated defendants' motions to dismiss as motions for summary judgment, *id.* at 119, but denied the motion as to the caseworkers involved. *Id.* at 127-28; *see infra* notes 167-70 and accompanying text. The *Jensen* court declined to rule on the *Clark* court's denial of summary judgment to the caseworkers because proceedings below as to the caseworkers were still pending at the time the appeal was filed. 747 F.2d at 187 n.1. Because the

Jensen court with two issues: "[First,] whether the fourteenth amendment affords the appellants a right to affirmative protection by the state, and [second,] if such a right presently exists, whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity. . . ."[29]

B. The Decision

In *Jensen* the Fourth Circuit reviewed the federal case law establishing a state's affirmative constitutional duty to protect an inhabitant from a third party. The *Jensen* court concluded that although initially the eighth amendment imposed such a duty only in prison settings, the fourteenth amendment may now impose a similar duty in other settings, including those presented by the *Jensen* appeals.[30] The court declined to decide this issue, however, and held instead that the defendants were entitled to good faith immunity from suit under *Harlow v. Fitzgerald*[31] because the children's fourteenth amendment right to protection was not "clearly established" at the time of the alleged deprivations in this case.[32]

The *Jensen* court traced the doctrine of a constitutional duty to protect and its correlative constitutional right to protection back to *Estelle v. Gamble*.[33] In *Estelle* the Supreme Court held that a state prison inmate had an eighth amendment right[34] to medical care which would be violated if prison officials acted with "deliberate indifference" to his medical needs.[35] The *Jensen* court noted the *Estelle* court's rationale: that the state rendered the inmate incapable of caring for himself by depriving him of his liberty and thus acquired an obligation to care for him.[36]

According to the *Jensen* court, the Supreme Court began expanding the *Estelle* doctrine beyond the prison setting in *Martinez v. California*.[37] In *Martinez* a sex offender, paroled after five years of his one to twenty year sentence, murdered a fifteen-year-old girl five

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Jensen court's decision granting immunity to all remaining defendants expressly disapproves the *Clark* court's reasons for denying immunity to the caseworkers, it is safe to conclude that the claim against them will be dismissed. This Note, however, contends that the *Clark* court's ruling on immunity was correct and that the court should have reached the merits of the claim against the caseworkers in that case. *See infra* discussion in part IV.

29 747 F.2d at 190.

30 *Id.* at 190-94. *See infra* notes 33-63 and accompanying text.

31 457 U.S. 800 (1982).

32 747 F.2d at 194-95. *See infra* notes 64-70 and accompanying text.

33 429 U.S. 97 (1976) (discussed in *Jensen*, 747 F.2d at 190-91).

34 The eighth amendment prohibits the infliction of "cruel and unusual punishment." U.S. CONST. amend. VIII.

35 429 U.S. at 104-05.

36 *Id* at 103-04; *Jensen*, 747 F.2d at 191.

37 444 U.S. 277 (1980) (discussed in *Jensen*, 747 F.2d at 191-92).

months after his release.[38] "[R]ather than addressing directly the issue of whether [the decedent] had a constitutional right to protection under the fourteenth amendment," the *Jensen* court explained, the Supreme Court held that the parolee's action was too attenuated from his release on parole to hold the state parole board liable for the harm.[39] Because the *Martinez* Court carefully limited its holding to "the particular circumstance of this parole decision,"[40] the *Jensen* court speculated that "in another setting the fourteenth amendment right asserted by Martinez might be upheld in a § 1983 suit."[41] The *Jensen* court thus read *Martinez* as laying the groundwork for the future expansion of the fourteenth amendment right to protection.

Since the *Martinez* decision, the *Jensen* court continued, three courts of appeals have extended the constitutional right to protection into nonprison settings, basing the right on the fourteenth amendment. The *Jensen* court first considered *Doe v. New York City Department of Social Services*.[42] In *Doe I* the Second Circuit held that the city's failure to protect foster children in its legal custody from abuse in their private, city-regulated foster home would violate the children's constitutionally protected liberty or property rights if the city's failure to act was due to deliberate indifference.[43] Next, the *Jensen* court discussed *Bowers v. DeVito*,[44] in which the Seventh Circuit held that a state mental hospital had not violated the constitutional rights of a woman murdered by a violent schizophrenic one year after his release from the hospital. The *Bowers* court ruled that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen."[45] As an exception to this rule, however, the *Bowers* court recognized that the state's failure to protect someone it has specifically endangered may violate due process.[46] Although *Bowers* discussed only eighth amendment prison cases as examples of this exception,[47] the *Jensen* court inter-

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38 *Id.* at 279-80.

39 747 F.2d at 191 (reciting facts of *Martinez*, 444 U.S. at 285).

40 444 U.S. at 285.

41 747 F.2d at 191; *see infra* notes 96-102 and accompanying text (discussing *Martinez* case as intimating that a fourteenth amendment right to protection might exist in custodial setting).

42 649 F.2d 134 (2d Cir. 1981) (discussed in *Jensen*, 747 F.2d at 192) (on remand, trial court entered judgment n.o.v. for defendant after jury verdict for plaintiff), *rev'd*, 709 F.2d 782 (2d Cir.), *cert. denied*, 104 S. Ct. 195 (1983)) [the decision announced in 649 F.2d hereinafter will be cited as *Doe I*.].

43 *Id.* at 141-42. The *Doe I* case "marked the first time that the eighth amendment analysis had been applied to a traditional fourteenth amendment claim." *Jensen*, 747 F.2d at 192.

44 686 F.2d 616 (7th Cir. 1982) (discussed in *Jensen*, 747 F.2d at 192-93).

45 *Id.* at 618.

46 *Id.*

47 *Id.* The *Bowers* court cited Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974),

preted this passage broadly to mean that a right to protection is triggered not by the "precise type of relationship" between state and victim, but by the state's endangerment of the victim.[48]

Finally, the *Jensen* court assessed its own decision, *Fox v. Custis*,[49] in which a state parolee set fire to a claimant's house and inflicted injuries upon two other claimants.[50] In denying the claimants relief, the *Fox* court first concluded that the causal link between the state's release of the parolee and the claimant's injuries was too weak to impute liability to the state.[51] As in *Martinez*, the claim failed for lack of causation.[52] More significant to the *Jensen* court, however, was the *Fox* court's adoption and expansion of the principles set forth in *Bowers*.[53]

The *Jensen* court emphasized two aspects of that expansion. First, the *Fox* opinion defined the scope of the fourteenth amendment right to protection by reference to eighth amendment considerations more expressly than did either *Bowers* or *Doe I*.[54] The *Jensen* court read *Fox* as requiring fourteenth amendment protection when, as in the eighth amendment cases, "the state has selected an individual from the public at large and placed him in a position of danger."[55] *Fox* thus recognized that state endangerment of the victim justifies a fourteenth amendment right to protection. Second, the *Jensen* court noted that "the *Fox* ruling . . . stated in terms more explicit than *Bowers* that a right to affirmative protection . . . could arise from a custodial *or other relationship*."[56] In *Fox*, however, the plaintiffs failed to allege any "special relationship"[57] with the state;

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however, in which the Seventh Circuit held that a state hospital patient had a fourteenth amendment right to protection from other patients.

48 747 F.2d at 193. The court stated:

> Significantly, the [*Bowers*] court did not draw a distinction between "custodial" and "other" relationships. In this sense, *Bowers* moved one step beyond *Doe*. Rather than implicitly limiting government liberty [sic] to custodial relationships the *Bowers* court chose to speak in broader terms; in the court's view, it was not the precise type of relationship that mattered, but whether the government had placed an individual in danger.

Id. (footnote omitted).

49 712 F.2d 84 (4th Cir. 1983).

50 *Id.* at 86.

51 *Id.* at 87.

52 *See supra* note 39 and accompanying text.

53 747 F.2d at 193 (discussing *Fox*, 712 F.2d at 88).

54 712 F.2d at 88 (discussed in *Jensen*, 747 F.2d at 193-94).

55 747 F.2d at 194 (discussing *Fox*, 712 F.2d at 88).

56 *Id.* at 194 (emphasis in original).

57 *Id.* The term "special relationship," as used by the *Jensen* court, refers to relationships between the state and citizens giving rise to a fourteenth amendment right to protection. *Id.* The *Jensen* court drew the term from the *Fox* opinion, which stated that "[a] right [to protection] and corollary duty *may* arise out of special custodial or other relationships created or assumed by the state in respect of particular persons." *Fox*, 712 F.2d at 88 (emphasis in original). The adjective "special" applies to both "custodial"

hence, the court did not address what relationships will trigger a right to protection.[58]

The *Jensen* court did not discuss *Youngberg v. Romeo*,[59] an earlier case in which the Supreme Court explicitly recognized a fourteenth amendment right to protection in a custodial setting other than a prison. Given the *Jensen* court's concern with whether a right to protection could arise when the state does not have custody over the injured individual, the omission is not surprising. In *Youngberg* a patient in a state mental hospital was injured by his fellow patients.[60] The plaintiff asserted that he had a fourteenth amendment right to be protected from such harm and that his custodians violated this right by failing to ensure his safety.[61] The Supreme Court agreed, holding that patients in state mental hospitals have a fourteenth amendment right to "conditions of reasonable . . . safety,"[62] similar to the right to protection enjoyed by prisoners under the eighth amendment.[63]

Although the *Jensen* court acknowledged that a fourteenth amendment right to protection may exist under the present facts, the court held that the plaintiffs could not invoke such a right against the defendants. The court found that good faith immunity

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and "other" relationships. *See Jensen*, 747 F.2d at 194-95 n.11 (detailing some of factors includable in "special relationship" analysis). As discussed *infra*, custodial relationships are inherently "special," *see infra* notes 86-89 and accompanying text. The issue in this Note is which noncustodial relationships are "special." This Note uses the term "special relationship" to mean noncustodial relationships that give rise to a due process right to protection.

58 ". . . *Fox* left the inquiry nearly as open-ended as *Martinez*, for it did not purport to delimit the scope of the right." *Jensen*, 747 F.2d at 194. This statement inexplicably ignores *Fox*'s recognition that the fourteenth amendment right to protection should arise only when the state has affirmatively endangered an individual, a point the *Jensen* court itself considered an important expansion of the *Bowers* holding. *See supra* text accompanying notes 53-55. This Note suggests that such endangerment is essential to finding a fourteenth amendment right to protection and is, therefore, the primary criterion of a special relationship test. *See infra* discussion in part II.A.

59 457 U.S. 307 (1982). *Youngberg* preceded two of the cases—Fox v. Custis, 712 F.2d 84 (4th Cir. 1983), and Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982)—discussed by the *Jensen* court. *See supra* notes 44-48 and accompanying text (discussion of *Jenson* court's analysis of *Bowers*); notes 49-58 and accompanying text (discussion of *Jensen* court's analysis of *Fox*). As did *Jensen*, both *Bowers* and *Fox* ignored the *Youngberg* decision, perhaps because the *Youngberg* holding that state mental patients have a fourteenth amendment right to minimal training "to ensure safety and freedom from undue restraint" is the controversial aspect of the decision. 457 U.S. at 319; *see also, e.g.*, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 4, 77-86 (1982) (discussion of *Youngberg* entitled *Right to Training for the Mentally Retarded*).

60 Plaintiff-patient, himself prone to violence, allegedly suffered injury on 63 occasions in less than two and one half years. 457 U.S. at 310.

61 *Id.* at 309.

62 *Id.* at 324.

63 *Id.* at 315-16.

was available to all defendants under *Harlow v. Fitzgerald*.[64] The court construed *Harlow* as shielding government officials from liability for wrongdoing if the right allegedly violated was not "clearly established" at the time of the alleged wrongdoing.[65] The *Jensen* court held that a fourteenth amendment right to protection was not "clearly established" by federal law because the government inaction at issue occurred before the post-1980 expansion of the duty to protect in the *Martinez-Fox* line of cases.[66] The *Jensen* court therefore extended good faith immunity to all defendants.[67]

In addition, the court expressly rejected appellant's argument that good faith immunity should not be available because the state Child Protection Act clearly established an affirmative duty to protect.[68] The court insisted that the clear establishment of a right under state law[69] is irrelevant to the question of whether a court should grant immunity in a federal suit to vindicate that right as a federally-created substantive right. Without considering the policies behind the good faith immunity doctrine, the court asserted that in such a suit, the question controlling the application of immunity is simply whether federal law has clearly established the underlying right.[70]

II
THE SPECIAL RELATIONSHIP TEST

The *Jensen* court recognized that a "special relationship" between the state and the victim of a violent third party triggers a right to protection under the fourteenth amendment.[71] Thus, the question controlling the merits of the claims presented in *Jensen* is whether there was a "special relationship" between the state and the decedent children in the sense in which the *Fox* court used the

64 457 U.S. 800 (1982).

65 747 F.2d at 194, 195 & n.12.

66 *Id.* at 194. The court mistakenly reported that both decedents died in the spring of 1979, *id.*, when in fact the decedent in *Clark* died in June 1980. *Clark,* 570 F. Supp. at 120. Although the incidents in *Clark* post-dated *Martinez,* which was decided on January 15, 1980, they preceded the real expansion of the right to protection in *Doe, Bowers,* and *Fox.* The court's error is therefore insignificant.

67 747 F.2d at 195. The court concluded that defendants could not have anticipated *Fox. Id.* at 194. It added that even if they had foreseen the *Fox* "special relationship" basis of an affirmative duty to protect, "it is not clear that under the facts of this case the defendants could, or should, have foreseen that a 'special relationship' existed," because on the facts presented it was a "close" question. *Id.*

68 *Id.* at 195 n.12.

69 The *Jensen* court doubted that the South Carolina Child Protection Act clearly established the children's right to protection. *Id.*

70 *Id.* The validity of this view is discussed *infra,* part III.

71 747 F.2d at 194-95; *see supra* note 67.

term.[72] The *Fox* court did not define the term "special relationship,"[73] but the *Jensen* court suggested three relevant factors: (1) whether the state has or had custody of the victim or the attacker, (2) whether the state had committed itself to protecting the victim, and (3) whether the state knew of the danger to the victim.[74] The court summarily assessed the strength of these factors in this case, but it neither reached a conclusion on these facts nor assigned relative weights to the factors.[75] The court also left the analysis open to inclusion of other, unspecified factors.[76] The court did recognize, however, that the rationale for a fourteenth amendment right to protection lies in the state's endangerment of an individual.[77] But rather than formulate a test based on this threshold criterion, the court left the special relationship test a vagne requirement seemingly wholly fact-dependent.[78]

Courts need a more coherent view of what should trigger a fourteenth amendment right to protection in noncustodial contexts. The *Jensen* court intended the term "special relationship" to be a noncustodial analogne to a "custodial relationship" in which the person in custody enjoys a right to protection under the fourteenth amendment.[79] This analogy is logical because the cases finding such a custodial relationship support the extension of the fourteenth amendment right to protection to persons not in custody.[80] However, the facts that should trigger a right to protection when the victim is not in the state's custody may not describe a "relationship"

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72 For an argument that the state's failure to protect should be actionable under "constitutional common law" by imposing an affirmative duty to act if "constitutional values" require it, see Wells & Eaton, *Affirmative Duty and Constitutional Tort,* 16 U. MICH. J.L. REF. 1 (1982). After discussing cases in which custody triggered a government's constitutional duty to act, the article expressly rejects the "special relationship" approach to extending the duty to noncustodial situations:

> We will not pursue further the question of just how much and what kind of governmental involvement is necessary to justify a constitutional right to government action. Instead, we will argue that the plaintiff should recover whether or not there is a constitutional right to protection as a matter of constitutional common law right.

Id. at 16. In another article, the authors argue that substantive due process principles should define the scope of a constitutional tort. Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts,* 18 GA. L. REV. 201 (1982).

73 *See supra* text accompanying notes 57-58.

74 747 F.2d at 194 n.11.

75 *Id.*

76 The court introduced its three factors stating, "we note that these cases underscore *some* of the facts that should be included in a 'special relationship' analysis." *Id.* (emphasis added).

77 *See supra* text accompanying note 55.

78 *See supra* notes 74-76 and accompanying text.

79 *See supra* note 57.

80 *See supra* notes 33-36, 42-43, 59-63 and accompanying text; *see also infra* notes 86-89 and accompanying text.

in the ordinary sense of the word. The term "special relationship" is misleading because it invites inquiry into the nature of the relationship, if any, between state and victim.[81] Instead, courts should focus on the effect of government actions on an individual's safety to determine if a noncustodial victim enjoys a fourteenth amendment right to protection. Specifically, courts should find a special relationship[82] triggering a right to protection under the fourteenth amendment only if (1) the government has created a risk of harm to a particular person or persons, and (2) the risk is unreasonable. Government risk-creation triggers the right to protection; the reasonableness standard defines its scope. The requirement of government risk-creation and the reasonableness standard are consistent with the precedent and are supported by policy considerations.

A. Government Risk-Creation

Two lines of precedent exist for expanding the fourteenth amendment right to protection[83] to noncustodial situations: the

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81 For example, in Beck v. Kansas Univ. Psychiatry Found., 580 F. Supp. 527, 534 (D. Kan. 1984), the court held that state hospital officials had a "special relationship" with the allegedly foreseeable victims of a violent mental patient they had released, solely because state tort law imposed on them responsibility for harm to foreseeable victims. The case is wrongly decided because it bases a constitutional violation on the existence of a state tort. The Supreme Court is opposed to such "federalizing" of state tort claims through § 1983. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 700-01 (1976) (rejecting § 1983 claim on basis of police flyer identifying plaintiff as an "active shoplifter"; no property or liberty interest at stake).

Under this Note's proposed test, the plaintiff in *Beck* could have stated a constitutional claim because the hospital's release of the assailant constituted government risk-creation. The viability of the claim would turn on whether the decision to release the assailant was reasonable.

82 For reasons of continuity, this Note will continue to use the term "special relationship."

83 The *Jensen* court's history of the development of this right is largely complete. In addition to the cases the court discussed, the court cited Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (prison official may be held liable under § 1983 for failure to protect prisoners from harm inflicted by other inmates), *cert. denied*, 450 U.S. 929 (1981); Withers v. Levine, 615 F.2d 153, 163 (4th Cir. 1980) (prison officials have constitutional duty to protect inmates), *cert. denied*, 449 U.S. 849 (1980), and Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979) (prison guards' failure to protect inmate from attack and provide medical care for resulting injures is actionable under § 1983), as affirming the eighth amendment duty of care established in Estelle v. Gamble, 429 U.S. 97 (1976). 747 F.2d at 191. *See also* Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982) (inmates have a right to be protected from other inmates); Gullatte v. Potts, 654 F.2d 1007, 1012 (5th Cir. 1981) (prisoner has a right to be protected from constant threat of violence); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980) (same), *cert. denied*, 450 U.S. 1041 (1981).

The right of hospital patients to be protected from fellow patients is also well established. *See* Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (involuntarily committed mental patients have similar right to safety under fourteenth amendment as prisoners do under eighth amendment); Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974) (state hospital inmate had fourteenth amendment right to protection from fellow inmates);

"custody" cases[84] and the "causation" cases.[85] In each series of cases, state risk-creating action is essential to finding a right to protection. Thus, both lines of precedent support the inclusion of this factor in a special relationship test.

1. *The Custody Cases*

The custody cases, *Estelle, Doe,* and *Youngberg,* provide the sturdiest foundation for an extension of the fourteenth amendment right to protection to noncustodial settings.[86] These cases impose a constitutional duty on the state to protect an individual in custody because that person is dependent on the state for protection.[87] The custody cases stress the "dependence" of an individual in custody, rather than the risk or danger that custody presents. A prisoner or hospital patient, however, is dependent on his custodians largely because the state's assertion of custody has severely restricted his capacity and resources to care for and protect himself. By handicapping the individual, the state renders him more vulnerable than he was before being taken into custody. The state thus endangers the individual by subjecting him to a risk he did not previously face. Moreover, in prisons and hospitals government custodians directly endanger their wards by exposing them to others in custody

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Gann v. Delaware State Hosp., 543 F. Supp. 268, 272 (D. Del. 1982) (state hospital had constitutional duty to protect involuntarily committed patient from committing suicide; his death not "too remote" from hospital officials' failure to carefully monitor him).

84 Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble, 429 U.S. 97 (1976); Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981). *See supra* text accompanying notes 33-36, 42-43; *see also supra* note 83.

85 Martinez v. California, 444 U.S. 277 (1980); Fox v. Custis, 712 F.2d 86 (4th Cir. 1983); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). *See supra* text accompanying notes 37-41, 44-58.

86 Only the custody cases have acknowledged a constitutional right to protection. *See supra* notes 33-36, 42-43, 59-63 and accompanying text. The causation cases, *Martinez, Bowers,* and *Fox,* have denied relief; their discussions of the possibility of a successful claim on different facts are dicta. *See infra* notes 90-98 and accompanying text. Judge Murnaghan, concurring in *Jensen,* thought that because previous discussions were merely dicta, the majority should not have speculated about the existence of a special relationship that could trigger a constitutional right to protection. *Jensen,* 747 F.2d at 196 (Murnaghan, J., concurring).

87 *See, e.g., Doe I,* 649 F.2d at 141 ("When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the non-feasance of which may violate the constitution."). The *Estelle* Court stated in this regard, " '[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.' " 429 U.S. at 104 (quoting Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)). The Court also stated: "an inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Id.* at 103. The *Youngberg* Court stated that contrary to the general rule that "a State is under no constitutional duty to provide services for those within its border. . . . When a person is institutionalized—and wholly dependent on the State— . . . a duty to provide certain services and care does exist. . . ." 457 U.S. at 317 (citations omitted).

who may be violent or abusive.[88]

A noncustodial situation will not involve the exact type of government risk-creation found in custody cases. However, if government risk-creation justifies a constitutional right to protection for someone in custody,[89] it should also justify a fourteenth amendment right to protection for someone who is not in the state's custody but is put in jeopardy by the state's action. Thus, government risk-creation is an appropriate factor in the special relationship test.

2. *The Causation Cases*

The causation cases, *Martinez, Bowers,* and *Fox,* underscore the importance of government risk-creation in finding a fourteenth amendment right to protection in noncustodial situations.[90] These cases held that the government action was too remote from the ultimate injury to justify imposing liability.[91] Where the government cannot be deemed to have caused injury inflicted by a third party,[92] it is under no duty to protect the victims.[93] These cases clearly have

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88 *See, e.g., Youngberg,* 457 U.S. 307, 310 (plaintiff mental patient, himself prone to violence, suffered injuries on 63 occasions in two and one-half year period); Gullatte v. Potts, 654 F.2d 1007, 1010 (5th Cir. 1981) (plaintiff inmate, known as informant, murdered by other prisoners in new prison on day of transfer to that facility). Because of their relative weakness and the acceptability of disciplinary measures, children are more vulnerable than adults when placed in custody.

89 A right to protection and its correlative duty to protect may arise under the equal protection clause of the fourteenth amendment. *See, e.g.,* Smith v. Ross, 482 F.2d 33, 36-37 (6th Cir. 1973) (black residents have same right to police protection as white residents). However, "the utility of equal protection analysis in this area is severely limited by *Washington v. Davis*[, 426 U.S. 229, 240 (1976) (intent to discriminate necessary to success of equal protection claim)]," Wells & Eaton, *Affirmative Duty and Constitutional Tort, supra* note 72, at 15. This Note addresses only a right to protection stemming from the due process clause of the fourteenth amendment.

90 The *Bowers* court stated in this regard:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

686 F.2d at 618.

91 *Martinez, Bowers,* and *Fox* considered the liability of state parole boards or hospital officials for injury inflicted by individuals they released from custody. *See supra* text accompanying notes 37-41, 44-58.

92 "[W]e hold that . . . appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment." *Martinez,* 444 U.S. at 285. The fourteenth amendment may require a closer connection between action and injury to establish legal causation than does tort law for proximate causation. The Court's holding in *Martinez* was made "[r]egardless of whether, as a matter of state tort law, the parole board could be said either to have had a 'duty' to avoid harm to [the] victim or to have proximately caused her death." *Id.*

93 *See Bowers,* 686 F.2d at 619:

> A State may if it wants recognize positive duties of care and make the breach of those duties tortious. But the only duties of care that may be enforced in suits under section 1983 are duties founded on the Constitu-

implied, however, that courts might find a fourteenth amendment violation when the state action is factually closer to the injury.[94] The fourteenth amendment right so violated would be the right to protection,[95] and the causation cases therefore support the view that government risk-creation is necessary to trigger this fourteenth amendment right.

In *Martinez,* for example, the evidence showed that the victim's murder occurred five months after the parolee's release, the parolee was not an "agent of the parole board," and the defendant parole officers did not know that the victim faced any special danger "as distinguished from the public at large."[96] By limiting its holding to the particular circumstances of the case[97] and by refusing to decide "that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole,"[98] the *Martinez* court implied that a victim's claim might succeed on facts which more closely tie the official's action to the resulting injury.

The *Fox* court applied the *Martinez* factors to similar but more compelling facts. Unlike *Martinez* the defendant parole officers in *Fox* had supervisory responsibilities over the parolee, and the victim's injury occurred only one month after the parolee's release.[99] As in *Martinez,* however, the defendants had no knowledge that the particular victim faced danger.[100] The *Fox* court denied the claimant relief[101] but indicated that a special relationship between state and victim might justify relief.[102]

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tion or laws of the United States; and the duty to protect the public from dangerous madmen is not among them.

94 *See supra* text accompanying notes 41, 55-56.

95 *See infra* notes 103-04 and accompanying text.

96 444 U.S. at 285.

97 *Id.*

98 *Id.*

99 712 F.2d at 85-87.

100 *Id.*

101 *Id.* at 87; *see also* Humann v. Wilson, 696 F.2d 783, 784 (10th Cir. 1983) (victim's claim failed on facts similar to *Martinez* except that time lapse between parolee's release and injury was two months).

102 712 F.2d at 88. The *Fox* court noted that both *Martinez* and *Bowers* recognized that the foreseeability of danger to a particular claimant would help tighten the causal relationship between government action and ultimate injury. *See Martinez,* 444 U.S. at 285 (parole officers were unaware that victim, "as distingnished from the public at large, faced any special danger"); *Bowers,* 686 F.2d at 618 (same). The *Fox* court thought that such foreseeability would also help establish a "special relationship." 712 F.2d at 88. It stated in this regard:

> That defendants' unawareness of the specific risk emerges as a critical factor under either a causation-focused or a rigbt/duty analysis simply bespeaks the inescapably "tort-like" nature of the § 1983 claim. . . . The question whether in negligence cases foreseeability relates more properly to defining duty or to assessing "legal cause" (or whether it

A successful *Martinez*-type claim might be viewed merely as presenting more compelling facts for a holding that state officials actually caused a victim's injuries. Accordingly, a claim relying on the *Martinez* language might allege, for example, that the acts of a parolee constituted state action that deprived the victim of his life in contravention of the fourteenth amendment.[103] In approving such a claim, however, a court would have to infer that state inaction violated the fourteenth amendment right to protection because the gravamen of a victim's claim in such a case is not that the state took the victim's life, but rather that the state failed to protect the victim from a third party.[104] Thus, the claim actually amounts to an allegation that the state violated the victim's fourteenth amendment right to protection.

In sum, the causation cases imply that a fourteenth amendment right to protection arises in noncustodial situations only when the government creates a risk of such magnitude that a court would find that the government action caused the injury. The legal standard by which the courts judge the government action defines the requisite magnitude of risk.[105]

3. *Policy Considerations*

Requiring the existence of government risk-creation before a right to protection is implied under the fourteenth amendment is

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> makes any difference) is of course one of the most profound and persistent ones in the evolution of that body of common law tort doctrine.

Id. at 88 n.3 (citation omitted). Under the test proposed by this Note, the foreseeability of harm to particular individuals is a factor in deciding whether the state's conduct was reasonable. *See infra* part IIB. In the context of violence by a released parolee, the release itself would provide the requisite risk-creating action.

103 Some courts have interpreted *Martinez* as requiring such an approach. *See, e.g., Brown,* 570 F. Supp. at 106-08 (applying Supreme Court's state action test from Blum v. Yaretsky, 457 U.S. 991 (1982), to appellant's claim, finding no state action in parent's killing of decedent child and dismissing claim for this reason, citing *Martinez*); Estate of Bailey v. York, 580 F. Supp. 794 (M.D. Pa. 1984) (following *Brown*'s state action analysis on similar facts).

104 The *Fox* court recognized that when an individual brings suit under § 1983 against a government official responsible for the release of a parolee who subsequently injures him,

> the claimant . . . assert[s] the right [under the fourteenth amendment] not to be injured in person or property by the irresponsible failure of the state to protect [him] against any risks of harm posed to [him] by a state parolee under the direct supervision of the state's agents. In sum, the right asserted is the *right to be protected by the state* from the possible depredations of a convicted criminal with known dangerous propensities who is under the direct supervision of the state's agents.

712 F.2d 84, 87-88 (4th Cir. 1983) (emphasis added).

105 The standard implied by the *Martinez* opinion is unclear. *See supra* text accompanying notes 96-98. A fourteenth amendment right to protection should be triggered by unreasonable government risk-creation. *See infra* part IIB.

consistent with the principle that constitutional rights are "negative" in nature. Constitutional rights prohibit government invasion of protected interests,[106] but rarely[107] do they require government action or aid.[108] The due process clause of the fourteenth amendment creates such a negative right. It strikes a balance between citizen and state by commanding that a "State [shall not] deprive any person of life, liberty, or property, without due process of law,"[109] although it does not grant the public a "right to be protected by the state against . . . criminals or madmen."[110] However, when a government affirmatively subjects a particular individual to a risk of harm, it upsets this balance by beginning the process by which life, liberty, or property may be deprived. In such a situation, the government action justifies the implication of a substantive right to protection, and the imposition of the state's duty to protect. Imposing a duty to protect when the state affirmatively endangers an individual does not undermine the principle that affirmative constitutional rights are disfavored.

B. The Reasonableness Standard

The special relationship test also should include the requirement that the risk posed to the plaintiff by government action be unreasonable; the plaintiff must show that those who acted exercised unreasonable judgment.[111] This reasonableness standard strikes the proper balance between the legitimate state and private interests identified by the Supreme Court in *Youngberg v.Romeo*.[112] Furthermore, the reasonableness standard follows *Youngberg* in rejecting the lesser duty of care embodied in the deliberate indifference standard which courts applied in the early cases considering

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106 *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 414 (2d ed. 1983) ("Almost all of the constitutional protections of individual rights . . . restrict . . . the actions of governmental entities.").

107 Some exceptions are the eighth and fourteenth amendment rights to protection while in government custody; fifth and fourteenth amendment equal protection rights, *see supra* note 89; affirmative rights attendant to the first amendment, *see* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); and procedural due process protection under the fourteenth amendment of substantive liberty and property rights, *see infra* note 179.

108 *See, e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (no constitutional right to funding for abortions); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no constitutional right to housing).

109 U.S. CONST. amend. XIV, § 1.

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

111 The inquiry into the requisite unreasonableness may focus on the conduct that produced the risk or the magnitude of the risk itself. *See* W. KEETON, PROSSER AND KEETON ON TORTS § 31, at 169-73 (5th ed. 1984).

112 457 U.S. 307 (1981).

the fourteenth amendment right to protection.[113] The reasonableness standard departs from the *Youngberg* holding, however, by rejecting the professional judgment standard because it would not adequately protect individuals' safety.

In *Youngberg* the Supreme Court held that a state mental hospital patient's fourteenth amendment right to safe conditions of confinement[114] is not violated when he suffers injury from other patients, if hospital officials have exercised "professional judgment" in providing "reasonable conditions of safety."[115] The *Youngberg* Court recognized an involuntarily committed patient's constitutional right to reasonable safety,[116] but it also recognized the need to help "often . . . overcrowded and understaffed [state institutions] to continue to function."[117] The Court concluded that the professional judgment standard represented the proper balance between these conflicting interests.[118] The *Youngberg* professional judgment standard properly determines the scope of the fourteenth amendment right to protection in a custodial context, but it inadequately protects a noncustodial victim's right to protection from a state-created risk. Nonetheless, the state and private interests the *Youngberg* Court identified and the principle from *Youngberg* that they must be balanced should determine the standard in the special relationship test.

The reasonableness standard properly balances a noncustodial individual's interest in safety against the state's interest in facilitating the operation of its institutions.[119] An individual's interest in

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113 *See, e.g., Doe I,* discussed *supra* text accompanying notes 42-43; *see also* Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir. 1980) (requiring deliberate indifference or gross negligence on part of police to support claim that officers violated plaintiff's fourteenth amendment rights through repeated unlawful arrests).

114 The harm to which plaintiff-patient was exposed was injury inflicted by other patients or by himself. 457 U.S. at 310. The patient's right to safe conditions of confinement means the right to be protected from such injury. *See supra* note 83.

115 457 U.S. at 321. The Court found that plaintiff-respondent had a "constitutionally protected liberty interest in safety," *id.* at 318, and referred to it variously as a right to "reasonable conditions of safety," *id.* at 321, "reasonable safety," *id.* at 324, and "conditions of reasonable . . . safety," *id.* This Note considers these characterizations of the right to be synonymous. The word "reasonable" in these formulations modifies the conditions of safety to be achieved, not the "professional judgment" exercised in achieving them. For an argument that *Youngberg* implicitly requires that judgment to be reasonable but allows a presumption of reasonableness from proof that the judgment was "professional," see *infra* note 119.

116 457 U.S. at 324. The Court also held that such patients have a right to be free from "unreasonable restraints," *id.* at 321, as well as a right to "such training as may be reasonable in light" of these interests, *id.* at 322.

117 *Id.* at 324. The Court stated, "By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operation of these institutions should be minimized." *Id.* at 322 (footnote omitted).

118 *Id.* at 321.

119 Arguably, the *Youngberg* Court actually endorsed the reasonableness standard. In

safety is not absolute; it must be balanced against " 'the demands of an organized society.' "[120] The standard imposed by the special relationship test will determine not only the scope of an individual's safety, but also the degree to which government officials are restricted in their decisions which pose risks to society. As a matter of policy, government officials should be expected to act in an objectively reasonable manner,[121] and the reasonableness standard is therefore appropriate. A higher standard of care, requiring that government officials' risk-creating actions be based on "compelling" or "substantial" necessity,[122] would unduly restrict officials' ability to perform their duties; often their duties involve risk-assessment which is unsuited to such findings.[123] On the other hand, a

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recognizing a right to minimally adequate training, the Court stated that the Constitution requires "such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is 'reasonable' . . . we emphasize that courts must show deference to the judgment exercised by a qualified professional." 457 U.S. at 322. Thus, the Court seemed to require that a professional's choice of a patient's training program, which determines the extent of his safety and freedom, must be reasonable. However, anxious to minimize the intrusion of federal courts into the management of state institutions, *see id.* at 322-23 ("there certainly is no reason to think judges or juries are better qualified than appropriate professionals to prescribe conditions within state hospitals), the *Youngberg* Court ruled that a court should find a constitutional violation only if a professional's decision was "such a substantial departure from accepted professional judgment . . . as to demonstrate that [it was not] such a judgment," *id.* at 323. In effect, the Court established a conclusive presumption of reasonableness once a defendant shows that a challenged decision was based on professional judgment. The Court could have retained reasonableness as the ultimate standard of proof but declared that a showing that a professional judgment was made triggers a presumption that the judgment was reasonable, which the claimant could then rebut. By flatly denying liability when it finds that a judgment was "professional," the Court set a more lenient standard than reasonableness. *See infra* notes 131-36 and accompanying text.

120 *Youngberg*, 457 U.S. at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

121 This principle is the foundation of the qualified immunity doctrine. *See infra* text accompanying notes 75-78.

122 These tests were rejected by the *Youngberg* Court because they "would place an undue burden on the administration of [state institutions] and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents." 457 U.S. at 322. The same argument applies to the latitude of decisionmaking available to other officials such as parole officers or child abuse workers.

123 The *Clark* court recognized this point and used it to help explain the result in *Martinez*:

> In *Martinez*, the Parole Board was performing a discretionary risk-assessing function. A strong argument can be made that in order to provide the members of the Parole Board with the necessary flexibility of judgment to properly perform such a function, they must be given significant protection from suit.

570 F. Supp. at 132 n.12. Furthermore, when government officials pose a danger to an individual, they seek to achieve a substantive goal in spite of the danger created. *See, e.g.*, G. GIARDINI, THE PAROLE PROCESS 5 (1959) (purpose of parole is to "restor[e] the offender to normal social functioning"); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 5 (1979) (social workers should always attempt to keep

lower duty of care, as reflected in standards such as gross negligence or deliberate indifference, would subject individuals to unanticipated dangers. The principle of tort law that individuals are entitled to expect non-negligent behavior from those who perform acts that might affect them[124] supports the reasonableness standard as a matter of policy.

The reasonableness standard is consistent with *Youngberg* in rejecting the deliberate indifference standard. The Supreme Court adopted the "deliberate indifference" standard[125] in *Estelle v. Gamble,*[126] holding that prison officials' intentional and deliberate indifference to prisoners' serious medical needs would constitute "unnecessary and wanton infliction of pain" in violation of the eighth amendment.[127] The Court ruled that mere negligence in diagnosing or treating a prisoner's medical needs would not support such a claim.[128]

The *Youngberg* Court unanimously rejected the deliberate indifference standard,[129] reasoning that those who have been "involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[130] Under *Youngberg*'s reasoning, unsuspecting citizens in the community deserve greater consideration for their safety than do prisoners. Thus, *Youngberg* demonstrates that the deliberate indifference standard does not require a sufficiently high duty of care to adequately protect noncustodial victims of state-created harm.

Nonetheless, the reasonableness standard rejects the *Youngberg* professional judgment standard because it also inadequately protects private interests. Under *Youngberg*'s standard, a hospital pro-

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abused child in own family, because "his paramount interest lies in the preservation of his family"). A standard of care more stringent than reasonableness would interfere with the accomplishment of these goals. A higher standard would also deter social workers from returning abused children to potentially abusive families and would, therefore, conflict with the rights of parents to maintain custody of their children. For a thorough discussion of the possible infringement of parents' family rights by state child abuse and neglect statutes, see Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes,* 79 COLUM. L. REV. 719 (1979).

124 *See, e.g.,* W. KEETON, *supra* note 111, § 53, at 358-59.

125 *See Youngberg,* 457 U.S. at 312 n.11.

126 429 U.S. 97 (1976).

127 *Id.* at 104.

128 *Id.* at 106; *see also Doe I,* 649 F.2d at 143-44 (simple negligence probably does not establish deliberate indifference, although gross negligence may create a "strong presumption of deliberate indifference").

129 Chief Justice Burger, who concurred only in the judgment, joined the majority and other concurring Justices on this point. 457 U.S. at 331.

130 *Id.* at 321-22. Arguably, prisoners are also entitled to greater protection under the eighth amendment than the deliberate indifference standard affords. Analysis of this question is beyond the scope of this Note.

fessional[131] is liable for violating a patient's fourteenth amendment right to reasonable safety only if her decision in prescribing the patient's conditions of confinement was "such a substantial departure from accepted professional judgment . . . as to demonstrate that [she] did not base the decision on such a judgment."[132] This standard apparently[133] requires a showing of mere rationality and allows decisions to pass constitutional muster as long as they are not professionally irrational or baseless.[134] Such decisions could be less than reasonable and yet still be professionally rational because a decisionmaker may have a rational basis for a decision that falls short of what a reasonable decisionmaker in his position would have done.[135] The professional judgment standard is thus less rigorous than the reasonableness standard. Because noncustodial individuals should not be subjected to unreasonable risks of harm,[136] the professional judgment standard provides inadequate protection. Like *Estelle*'s deliberate indifference test, *Youngberg*'s professional judgment standard is too low for the special relationship test.

C. Summary

The special relationship test should consider two factors. If a plaintiff shows first, that the state created a risk of harm to him, and second, that the risk was unreasonable, courts should find that the plaintiff has a right to protection under the fourteenth amendment.

III
GOOD FAITH IMMUNITY

The good faith, or qualified, immunity doctrine[137] shields gov-

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131 The Court defined a " 'professional' decisionmaker" as "a person competent, whether by education, training or experience, to make the particular decision at issue." *Id.* at 323 n.30.

132 *Id.* at 323.

133 *See, e.g., The Supreme Court, 1981 Term, supra* note 59, at 80 (*Youngberg* court "fail[ed] to specify the standard by which courts should review psychiatric decisionmaking").

134 This view interprets the test's language, *see supra* text accompanying note 132, to mean that only the decisions that are so clearly not based on accepted professional standards that they may be deemed arbitrary or irrational would fail. Therefore, any rational professional judgment would pass the test.

135 *See* W. KEETON, *supra* note 72, § 32, at 173-79 (describing "reasonable person" concept).

136 *See supra* notes 119-24 and accompanying text.

137 Qualified immunity is a judge-made immunity granted to some officials who are defendants in § 1983 actions. Arguably, Congress did not intend any common law immunity defenses to apply to claims brought under § 1983. *See* Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 579-81 (1983). Its scope is narrower than that of absolute immunity, which affords a complete defense to liability to public officers such as state and local legislators, judges, and prosecutors, for their official actions. Courts have

ernment officials from liability for their violations of federal rights if they act in good faith.[138] The Supreme Court set forth its most recent formulation of the good faith immunity test in *Harlow v. Fitzgerald*.[139] The *Harlow* Court ruled that government officials should be immunized if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[140]

In construing the *Harlow* test, the *Jensen* court had to decide whether immunity should be available to officials who violate federal rights that were not clearly established by federal law at the time of the violation if the same rights were clearly established by state law.[141] The policies underlying the good faith immunity doctrine

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applied the common law doctrine of absolute immunity to § 1983 suits. *Id.* at 580-81. None of the defendants in *Jensen* claimed absolute immmunity, nor could they successfully have asserted it. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 242-44 (1974) (state governor and other top executive officials do not enjoy absolute immunity).

138 Qualified immunity was first granted in Pierson v. Ray, 386 U.S. 547 (1967), in which the Court held that police officers were entitled to immunity for an arrest made under an unconstitutional statute because they acted in good faith and on probable cause. In Wood v. Strickland, 420 U.S. 308, 322 (1975), the Supreme Court established a two-part test for good faith immunity, including both objective and subjective components: immunity would not be granted to an official (1) "if he knew or reasonably should have known" that his action would violate the claimant's clearly established constitutional rights or (2) if he acted with the malicious intention to cause a deprivation of constitutional rights or other injury to the claimant.

139 457 U.S. 800 (1982). The Court interpreted this test more recently in Davis v. Scherer, 104 S. Ct. 3012 (1984). *See infra* notes 142-46 and accompanying text.

140 *Id.* at 818. The *Harlow* Court thus dropped the subjective element of the *Wood* two-part test. *See supra* note 101. However, this change is irrelevant to the good faith immunity issue in *Jensen* which concerns only the objective aspect of the test. *See infra* text accompanying note 141.

The *Harlow* court's inclusion of "statutory rights" in the good faith immunity test does not include state statutory rights in the scope of the test. Rather it refers to federal statutory rights and reflects the fact that two of the three federal claims in that case were statutory. 457 U.S. at 805 (petitioner brought two claims as "implied" by federal statutes and one claim directly under the Constitution); *see also id.* at 818 n.30 (although no § 1983 claim was presented, the court noted that its ruling on good faith immunity should apply in § 1983 suits). The *Clark* court stated that this language in the *Harlow* test requires that clearly established state statutory rights bar good faith immunity in a suit alleging the violation of those same rights under federal law. 570 F. Supp. at 127 n.26. Such a view iguores the nature of the claims asserted in *Harlow*.

141 *See supra* text accompanying notes 68-70. All of the *Jensen* defendants claimed immunity from suit in federal court under the eleventh amendment, which bars federal court from hearing suits for monetary damages against state officials in their official capacities. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 48, at 291 (4th ed. 1983); P. SCHUCK, SUING GOVERNMENT 203-09 (1983). County officials, however, are not protected by the eleventh amendment. C. WRIGHT, *supra*, § 46, at 274. In *Brown* the court granted eleventh amendment immunity to the State Commissioner, state board members, and a state employee who were sued in their official capacities. 570 F. Supp. at 98. The court "reserved for later decision" the question of whether county board members are also entitled to immunity. *Id.* at 99 n.1. The court held that the defendants, sued in their individual capacities, were not shielded by eleventh amendment immunity but might be protected by good faith immunity, and it proceeded to consider this issue. *Id.*

indicate that courts should not grant immunity in such a situation, although recent case law requires the opposite conclusion.

In *Davis v. Scherer*[142] the Supreme Court held that state officials who violate federal constitutitonal rights not clearly established at the time of the violation enjoy immunity from suit even though by the same action they violate rights clearly established by state regulations.[143] In *Davis* officials fired a state policeman for failing to quit his job outside the police force when ordered to. The officials did not conduct a formal pre-termination or a prompt post-termination hearing.[144] The district court held that this omission violated the policeman's fourteenth amendment right to procedural due process and that the defendant officials could not be immunized from suit because they violated a departmental regulation that clearly commanded them to investigate the policeman's alleged wrongdoing and elicit his statement.[145] After affirmance by the Fifth Circuit, the Supreme Court reversed, holding that even if a state official violates the clear command of a state regulation he does not forfeit his immunity from suit for deprivation of a constitutional right not clearly established at the time of his action.[146]

The *Davis* result was presaged by the Court's opinion in *Procunier v. Navarette*.[147] In *Procunier,* the Supreme Court iguored the fact that prison officials' actions that allegedly violated the prisoner-plaintiff's constitutional rights also violated state prison regulations.[148] The Court granted immunity to the officials because federal constitutional law had not yet clearly established the rights.[149] In dissent, Justice Stevens argued[150] that because the rights allegedly violated were clearly established by state prison regulations, the officials could not be said to have acted in good faith. Thus,

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at 100 & n.2. Eleventh amendment immunity was not raised as an issue on appeal in *Jensen*. Full discussion of its reach is beyond the scope of this Note.

142 104 S. Ct. 3012 (1984).

143 *Id.* at 3019-21.

144 *Id.* at 3016.

145 *Id.* at 3016-17. Initially the court denied the defendants immunity because it found that the policeman's due process right to a pre-termination or a prompt post-termination hearing was clearly established when he was fired in 1977. *Id.* at 3016. On reconsideration, in light of a Fifth Circuit opinion to the contrary, the court rescinded this finding and substituted the reasoning cited in the text. *Id.*

146 *Id.* at 3019-21. Although this holding addresses squarely the question the *Jensen* court faced, and the *Davis* opinion preceded *Jensen* by over three months, the *Jensen* court did not cite *Davis*.

147 434 U.S. 555 (1978).

148 The Supreme Court mentioned the regulations only as background. *Id.* at 557.

149 *Id.* at 565.

150 The appellant in *Jensen* also made this argument, *see supra* text accompanying notes 68-70, as did the appellee in *Davis,* 104 S.Ct. at 3019. This Note attributes the approach to Justice Stevens.

Stevens contended, they should not be immunized from suit.[151] Although the *Procunier* majority did not expressly reject this approach, the *Davis* Court did.[152]

The conflicting policies underlying the good faith immunity doctrine call for the adoption of Stevens's approach. Those policies include providing a damages remedy to protect the rights of citizens on the one hand, and encouraging " 'the vigorous exercise of official authority' " on the other.[153] The Stevens rule, which would deny immunity when state law clearly establishes an allegedly violated right, advances the policy of providing a remedy for violations of citizens' rights. The rule would preclude granting the good faith immunity defense on summary judgment and terminating the suit.[154] Instead, a plaintiff could proceed to trial on the merits of his claim.[155] The Stevens rule would thus provide plaintiffs an opportunity to seek a remedy for violations of federal rights which good faith immunity might otherwise block.

In the Court's view, providing remedies for violations of individuals' rights conflicts with the policy of promoting the exercise of official discretion because the threat of suit might deter government officials from acting.[156] The Court has resolved this conflict by ruling that if an official acts in an objectively reasonable manner, he will not be liable for his actions.[157] The Stevens rule is entirely con-

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151 434 U.S. at 572 (Stevens, J., dissenting).

152 *See supra* text accompanying notes 145-46.

153 *Harlow*, 457 U.S. at 807 (quoting Butz v. Economou, 438 U.S. 478, 504-06 (1978)).

154 A major objective of the doctrine of good faith immunity has been the termination of "[i]nsubstantial lawsuits" at the summary judgment stage. Butz v. Economou, 438 U.S. 478, 507-08 (1978). This goal justified the *Harlow* Court's rejection of the subjective element of the test. 457 U.S. at 815-18. Adoption of the Stevens approach would not thwart this policy because the court could still grant immunity on summary judgment if federal or state law did not clearly establish the rights allegedly violated. Furthermore, claims which have no basis as a matter of federal law may still be dismissed by summary judgment on the merits.

155 To prevail in a § 1983 claim a plaintiff must prove a violation of a federal right. *See supra* note 2. A showing that official conduct violated clearly established state rights would serve only to negate immunity to the federal claim. It would not convert a state tort into a federal claim by way of § 1983. Paul v. Davis, 424 U.S. 693, 699-701 (1976).

156 In Wood v. Strickland, 420 U.S. 308, 319-20 (1975), for example, the Court stated: "[t]he imposition of the monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious . . . decisionmaker from exercising his judgment independently . . . . The most capable candidates for [official] positions might be deterred from seeking office."

157 "[T]he immunity must be such that . . . officials understand that action taken in good-faith fulfillment of their responsibilities and *within the bounds of reason under all the circumstances* will not be punished and that they need not exercise their discretion with undue timidity." *Id.* at 321 (emphasis added). The *Harlow* Court viewed its test as "[r]ely[ing] on the *objective reasonableness of an official's conduct*, as measured by reference to clearly established law." 457 U.S. at 818 (emphasis added). The Court concluded that this standard was fair, because

sistent with this principle. If a state official violates rights that are clearly established by state law, his conduct is not objectively reasonable. Therefore, "he should be made to hesitate"[158] and should not enjoy immunity from suit. In such a case, immunity does not further the policy of protecting the reasonable exercise of official power. The situation is analogous to granting immunity to an official who violates rights clearly established by federal law. In each case the inquiry is whether the official acted in an objectively reasonable manner. In each case the answer is no, because his acts conflict with the "law governing his conduct."[159]

The Stevens approach does not hinder the policy of protecting the reasonable exercise of official authority. Rather, it logically extends the policy by examining relevant state laws to determine the reasonableness of the official's conduct. In addition, the Stevens approach furthers the policy of providing a remedy for constitutional violations. Thus, this approach furthers both of the policies underlying the good faith immunity doctrine. Courts should deny a good faith immunity defense to an official sued for allegedly violating a plaintiff's federal right when state law clearly establishes an equivalent right.

> a reasonably competent public official should know the law governing his conduct . . . .
>
> . . . The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate . . . .

Id. at 819.

158 457 U.S. at 819. The *Clark* court recognized that because "holding [an] official liable in such a case [will not] place undesirable restraints on his flexibility," good faith immunity should not apply. 570 F. Supp. at 127. *See also supra* text accompanying note 151.

159 *Harlow*, 457 U.S. at 819.

Although it recognized that the objective reasonableness of officials' action is the test for good faith immunity, the *Davis* Court rejected the Stevens approach because it would over-deter public officials from acting. 104 S. Ct. at 3019-21. In the Court's view, officials would not be able to "reasonably . . . anticipate" the scope of their liability and carry out their official duties with confidence if they could be held liable for violating federal rights nonexistent at the time of the violation "*merely* because their official conduct also violated some [state] statute or regulation." *Id.* at 3020 (emphasis added). This view presumes that the deterrence such a rule would effect is undesirable, and it therefore contradicts the policy established in *Harlow* that government officials should be expected to act in an objectively reasonable manner. If an official violates a clear statute or regulation governing his conduct, his action is hardly reasonable. *See supra* note 157 and accompanying text. Furthermore, it would shield from federal liability a government official who chooses to violate a clear state statute or regulation and thereby incur liability only under state law, knowing that the federal right is not clearly established. Such official action is patently unreasonable, however, and should not be encouraged.

IV
APPLICATION TO *JENSEN*

Had it properly applied the good faith immunity doctrine, the *Jensen* court would have faced only appellant's claim against the *Clark* caseworkers. The court should have dismissed that claim as a matter of law because the facts do not indicate that the government created a risk.

A. Good Faith Immunity

Courts should deny good faith immunity to state officials who violate rights clearly established by state law even if federal law did not clearly establish those rights at the time of the violation.[160] Therefore, the *Jensen* court should have considered whether the rights allegedly violated in *Clark* and *Brown* were clearly established by the South Carolina Child Protection Act.[161] The *Brown* court made no findings on this question; therefore, the *Jensen* court should not have granted immunity to the *Brown* defendants. The court should have remanded the case for consideration of whether state law clearly established a right to intervention and protection which state and county officials allegedly violated.[162]

The *Clark* court, however, considered the effect of state law and found that the state and county board members were entitled to good faith immunity, but the caseworkers were not.[163] The court found that state law imposed upon the state and county board members only "a general, vaguely defined duty to 'conduct training programs.' "[164] Because the meaning of this imperative was not "clearly established," the court reasoned that the board members were entitled to immunity.[165] The court noted, however, that the caseworkers did "not stand on the same legal footing"[166] as the board members. It found that state law "specifically defined" the

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160 *See supra* part III.

161 S.C. CODE ANN. §§ 20-7-480 to -490 (Law. Co-op. 1985). *See supra* note 21.

162 The *Jensen* court noted that such a right may not be clearly established: "The [State] Act does not create an express duty of intervention but rather provides only that the State 'may' intervene." 747 F.2d at 195 n.12.

163 570 F. Supp. at 127.

164 *Id.* at 125 (quoting S.C. CODE ANN. § 20-7-660(A) (Law. Co-op. 1985)). Other sections of the Soutb Carolina Child Protection Act impose additional duties on the state and county boards. *See, e.g.*, S.C. CODE ANN. § 20-7-660(B) (Law. Co-op. 1985) (duty to publicize problems of child abuse), § 20-7-640(C) (duty to review services offered throughout the state, assist in diagnosis of abuse, coordinate referrals). The appellant predicated the board members' liability on their failure to adequately train the caseworkers primarily responsible for the decedent's case, 570 F. Supp. at 120; therefore, tbe court identified this section as the most relevant.

165 570 F. Supp. at 127.

166 *Id.* at 125.

caseworkers' obligations,[167] including the duty to " 'commence an appropriate and *thorough* investigation' " within twenty-four hours of a report of abuse.[168] The court reasoned that because this duty was "clearly established," the caseworkers who allegedly violated it[169] could not be deemed "to have acted in 'good faith' " and, therefore, were not entitled to immunity.[170] In light of these findings, the *Jensen* court should have granted immunity to the state and county board members in *Clark* and then considered the merits of appellant's claim against the caseworkers.

B. The Merits

To prove the existence of a fourteenth amendment right to protection, a claimant must show that the government created an unreasonable risk of harm.[171] The *Jensen* court should have dismissed appellant's claim against the *Clark* caseworkers on its merits because no affirmative government action created a risk of harm to the decedent child.

The plaintiff in *Clark* claimed only that state social workers failed to investigate a report of child abuse[172] as required by state law[173] and that the child died as a result of this failure.[174] The third party, who ultimately killed the boy, however, had access to him before the state became aware of the boy's plight. State action in no way enhanced the threat to the child.[175] The caseworkers did not actually create a new risk; they merely, but tragically, failed to help a child who was already endangered.[176] Because appellant's claim did not allege government risk-creation, it fails the first prong of the special relationship test.[177] The claim is therefore insufficient as a matter of law to establish a right to protection under the fourteenth amendment[178] and must be dismissed.[179]

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167 *Id.* at 127.

168 *Id.* at 126 (quoting S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1985)) (emphasis added by *Clark* court).

169 The appellant in *Clark* alleged that the caseworkers failed to conduct a thorough investigation. *See supra* note 12.

170 570 F. Supp. at 1276.

171 *See supra* discussion in part IIA.

172 *See supra* note 12 and accompanying text.

173 *See supra* text accompanying notes 167-68.

174 *See supra* notes 10-12 and accompanying text.

175 The caseworkers never even located the child or his family. 747 F.2d at 188.

176 As the *Jensen* court noted, this failure might be actionable in a state tort suit. *Id.* at 196.

177 *See supra* text accompanying note 82.

178 The facts of *Brown*, however, present a much closer question. In that case, the state's child protection agency allegedly arranged a change in the living arrangements of the decedent child and her mother, apparently in an effort to protect the child. *See supra* text accompanying notes 14-20. Whether these facts support a finding that the state

CONCLUSION

In *Jensen v. Conrad,* the Fourth Circuit considered the constitu-

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subjected the child to a new risk is the first inquiry under the special relationship test. The *Jensen* court stated that "[a]fter an initial review of the case, the [agency] allegedly reached an agreement with Mrs. Brown requiring her to reside with Sylvia at the home of Sylvia's grandmother." 747 F.2d at 187. If the state had taken emergency custody of the child before reaching an agreement to release the child to its abusive mother, *see supra* note 20, then the state clearly created a risk that the child did not face while she was in the state's custody. Under the special relationship test, the court would then review the decision to release the child to determine if it was reasonable. However, if the state did not intervene and never removed the decedent child from her mother's custody, it would be difficult on these facts to find that by its action, the state created a risk of harm to the child that he did not previously face. The claim would fail the first prong of the test. The court would not reach the question of whether the agency behaved reasonably, at least in the context of a claim that the decedent's fourteenth amendment right was violated. The question would undoubtedly be relevant in a state tort action.

179 Claimant could have pursued an alternative theory of recovery, based on a violation of procedural due process, which is actionable under § 1983. Carey v. Piphus, 435 U.S. 247 (1978). Instead of attempting to establish a substantive right to protection under the fourteenth amendment, the *Clark* appellant could have asserted that the decedent had a substantive right to an investigation, created by state law and procedurally protected by the fourteenth amendment; the state's failure to adequately investigate his plight deprived him of that right without due process of law.

Substantive liberty and property rights may arise under state law. Hewitt v. Helms, 459 U.S. 460, 471-72 (1983) (protected liberty interest is created if state law, using "language of an unmistakably mandatory character" places "substantive predicates" on official's discretion to deprive individual of benefit granted by state law); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (property interest created if state law grants "legitimate claim of entitlement" to property). The right of an abused child to an investigation would best be characterized as a liberty interest because it is related to the child's bodily security, a "historic liberty interest," Ingraham v. Wright, 430 U.S. 651, 673-74 (1977), but the line between liberty and property is far from clear. *See generally* Bell v. Burson, 402 U.S. 535, 539 (1971) (avoiding liberty or property label, Court deemed state driver's license protected because it is "important" interest); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977). Under *Hewitt,* 459 U.S. at 471-72, the language of the statute controls.

Under the South Carolina Children's Code, a local child protection agency "shall commence an appropriate and thorough investigation" within 24 hours of receiving a report of abuse. S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1985). It is directed to classify the report within 60 days and to determine whether the report should be dismissed or pursued by reference to the specific standard of whether "abuse or neglect is more likely than not to have occurred." S.C. CODE ANN. § 20-7-650(D) (Law. Co-op. 1985). Under the *Hewitt* test for state-created liberty interests, 459 U.S. at 471, the statute arguably creates a substantive liberty interest in an investigation and determination of the merits of a report of suspected abuse because it uses mandatory language to grant an investigation and places substantive restrictions on agency discretion to withdraw it. *But see* S.C. CODE ANN. § 20-7-650(E)(3) (Law. Co-op. 1985) ("If no finding has beed made . . . after sixty days . . . [the report of suspected abuse] shall be classified 'Unfounded for want of an investigation.' ").

The next inquiry is what process the fourteenth amendment due process clause requires and whether the actual procedures satisifed that requirement. *See, e.g., Hewitt,* 459 U.S. at 472. Procedural due process requirements are flexible and vary depending on the factual context and the weights of the private and state interests involved. Mathews v. Eldridge, 424 U.S. 319 (1976). A complete analysis of due process requirements

tional tort liability of state officials who allegedly caused harm to abused children by failing to protect them from their abusers. The court determined that if the state has received a report alleging the abuse of a child, that child may have a fourteenth amendment right to protection due to his "special relationship" with the state. The state's failure to protect the child may therefore give rise to a claim under section 1983. The *Jensen* court held, however, that because the fourteenth amendment right to protection was not "clearly established" when the events in these cases occurred, the officials were entitled to good faith immunity.

The court's "special relationship" approach to finding a fourteenth amendment right to protection is unsatisfactorily vague. Both precedent and policy suggest that a court should not imply a right to protection under the fourteenth amendment unless the state has created an unreasonable risk of harm. Furthermore, state officials should not enjoy good faith immunity in federal suits if their actions violate rights clearly established by state law, even if those rights are not clearly established by federal law.

Instead of granting immunity to all of the defendants in *Jensen,* the Fourth Circuit should have reached the merits of one of the claims presented. The court should have dismissed that claim because it failed to establish a fourteenth amendment right to protection as a matter of law.

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under *Mathews* in this situation is beyond the scope of this Note; suffice it to say, a properly alleged procedural due process claim may have survived a motion to dismiss.