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BLOWING THE LID OFF: EXPANDING THE DUE PROCESS CLAUSE TO DEFEND THE DEFENSELESS AGAINST HURRICANE KATRINA

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Five frogs are sitting on a log. Four decide to jump off.
How many are left?
Answer: five.
Why? Because there's a difference between deciding and doing.[1]

I. INTRODUCTION

Long before the storm made landfall in Louisiana on August 29, 2005,[2] Hurricane Katrina was already set to become the most horrific natural disaster in United States history. The hurricane—which obliterated an area covering almost 90,000 square miles along the Gulf

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1. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE, at v (Comm. Print 2006) *available at* http://www.katrina.house.gov/full_katrina_report.htm [hereinafter A FAILURE OF INITIATIVE] (quoting Mark L. Feldman & Michael F. Spratt, *Five Frogs on a Log*). It is more than appropriate that the House Report on the Hurricane Katrina Preparation and Response begins with a string of aphorisms concerning lack of initiative, blame, and responsibility. As discussed throughout this paper, the government's inadequate response to the impending Katrina hurricane reflects a systemic failure that impaired already vulnerable classes and compounded the effects of the storm.

2. Elisabeth Bumiller, *In New Orleans, Bush Speaks With Optimism But Sees Little of Ruin*, N.Y. TIMES, Jan. 13, 2006, at A12.

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Coast[3]—ultimately impacted 1.5 million people[4] and handily earned the title of the costliest natural disaster in United States history,[5] with insurable losses in excess of $100 billion.[6] More than 1,500 deaths have been attributed to the hurricane.[7] The powerful storm[8] left its mark on people throughout the Mississippi, Alabama, and Louisiana regions.[9] New Orleans took the brunt of the storm's violence.[10] Katrina ripped through the region, and in its wake left an already-dilapi-

3. S. REP. No. 109-322, at 2 (2006), *available at* http://hsgac.senate.gov/_files/katrina/fullreport.pdf. The storm impacted an area roughly the size of the United Kingdom. *Id.*

4. *FEMA's Manufactured Housing Program: Haste Makes Waste Before the Comm. On S. Homeland Sec. and Gov'tal Affairs*, 109th Congress (2006) (statement of Richard L. Skinner, Inspector General, U.S. Dept. of Homeland Sec.) [hereinafter FEMA's MANUFACTURED HOUSING]. The hardest hit areas lost all infrastructure such as electricity, water, sewer, roads, and communication systems. Howard Witt, *New Orleans Ravaged; 80 Percent of City Submerged After Levees Burst*, CHI. TRIB., Aug. 31, 2005, at C1. The flooding following the passage of Katrina was "catastrophic, resulting in the displacement of 250,000 people, a higher number than during the Dust Bowl years of the 1930's." AXEL GRAUMANN ET AL., HURRICANE KATRINA, A CLIMATOLOGICAL PERSPECTIVE 1 *available at* http://www.ncdc.noaa.gov/oa/reports/tech-report-200501z.pdf.

5. Kim Lanier, *Hurricane Scale Is Called Misleading; Some Say Size, Surge Should Be Factored In*, TIMES-PICAYUNE (New Orleans), June 7, 2006, at 9.

6. Carolyn A. Dehring, *The Value of Building Codes*, 29 REG. 10 (2006). Hurricane Katrina caused at least $125 billion in economic damage and could cost the insurance industry up to $60 billion in claims. *Katrina Damage Estimate Hits $125B*, USA TODAY, Sept. 9, 2005, *available at* http://www.usatoday.com/money/economy/2005-09-09-katrina-damage_x.htm. By comparison, Hurricane Andrew in 1992 caused nearly $21 billion in insured losses in today's dollars. *Id.*

7. *Another Katrina Victim Found, in Eastern N.O.: Woman Was in House, Buried Under Debris*, TIMES-PICAYUNE (New Orleans), May 22, 2006, at 3; *Deaths of Out-of-State Evacuees Raise Katrina Toll*, WASH. POST, May 20, 2006, at A2. The death toll includes deaths that are related to the storm or its aftermath. *Evacuee Deaths Increase Katrina's Louisiana Toll*, ORLANDO SENTINEL, May 20, 2006, A14. More than 1,000 people perished in Louisiana alone. Reports of Missing and Deceased (Aug. 2, 2006), http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248. As of August 1, 2006, 135 people remained on the official missing list from Hurricanes Katrina and Rita in Louisiana. *Id.*

8. Hurricane Katrina was a Category 3 hurricane when it made landfall in Louisiana. GRAUMANN ET AL., *supra* note 4, at 2; Bumiller, *supra* note 2. Howard Witt, *The Parish the Feds Left Behind*, CHI. TRIB., May 31, 2006, at C1. Just after 6 a.m. August 29, 2006, Katrina made landfall near Plaquemines Parish, which is just south of Buras, as a strong Category 3 storm. GRAUMANN ET AL., *supra* note 4, at 2. Wind speeds at landfall were approximately 127 miles per hour. *Id.* Katrina was extraordinarily powerful and was one of the deadliest hurricanes to ever strike the United States. RICHARD D. KNABB ET AL., TROPICAL CYCLONE REPORT—HURRICANE KATRINA 1 (2005), http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf. After it made initial landfall in Louisiana near Buras, it continued northward and made its final landfall near the mouth of the Pearl River at the Louisiana/Mississippi border, still as a Category 3 hurricane. *Id.* at 3.

9. *FEMA's Manufactured Housing Program, supra* note 4.

10. More than 1,000 people perished in Louisiana alone. *FEMA's Manufactured Housing Program, supra* note 4.

dated levee system vulnerable to attacks from the wind and the rain.[11] Once the Pontchartrain levee system notoriously breached, 80 percent of New Orleans was flooded.[12] Some areas were more than twenty feet underwater.[13]

But the real tragedy surrounding Hurricane Katrina had started days before the storm made landfall. Before the levees broke and long before the first winds arrived on shore, the residents of New Orleans had been stranded by their government officials. On the evening of August 27, 2005—less than 48 hours before the landfall—National Hurricane Center Director Max Mayfield made a personal telephone call to Louisiana Governor Kathleen Blanco and later talked to New Orleans Mayor Ray Nagin in an effort to emphasize the severity of the storm and express concern for the safety of the residents in its track.[14] The call was practically unprecedented.[15] Left alone, the mayor of the city in the midst of a soup-bowl[16] had not taken the essential step to convince residents to seek shelter else-

11. Iris Young, *Katrina: Too Much Blame, Not Enough Responsibility*, DISSENT, Winter 2006, 41, 43. "Since Katrina we have learned that the levees in New Orleans were poorly maintained for decades, and that a number of experts predicted several years ago that they were liable to breach with a bad hurricane." *Id.*

12. Peter Whoriskey & Sam Coates, *Looting, Fires and a Second Evacuation*, WASH. POST, Aug. 31, 2005, at A1; Witt, *supra* note 4. According to the 6,000-page report issued by the Army Corps of Engineers, the losses emanating from the levy failures are much more than physical: "'The flooding caused a breakdown in New Orleans' social structure, a loss of cultural heritage and dramatically altered the physical, economic, political, social and psychological character of the area," it said. "These impacts are unprecedented in their social consequence and unparalleled in the modern era of the United States."' Ralph Vartabedian, *Army Corps Admits Design Flaws in New Orleans Levees,* L.A. TIMES, June 2, 2006, at A1.

13. *See* NOAA's Nat'l Climatic Data Ctr., *News Highlights*, Fall 2005, at 1, *available at* http://www.ncdc.noaa.gov/oa/about/NOAA Newsletter4.pdf.

14. A FAILURE OF INITIATIVE, *supra* note 1, at 108; DOUGLAS BRINKLEY, THE GREAT DELUGE, 57 (2006). Mayfield said that he "wanted to do 'everything that I could do' to warn the country that the Gulf Coast—and New Orleans in particular—was in grave danger." *Id.* Mayfield telephoned Louisiana Governor Kathleen Blanco to reiterate the danger of the storm and explain his efforts to track down Mayor Nagin. *Id.* Governor Blanco agreed to call the mayor and put them in touch. *Id.*; Mark Schleifstein, *Hurricane Center Director Warns New Orleans: This Is Really Scary*, TIMES-PICAYUNE, Aug. 27, 2005, http://www.nola.com/katrina/updates/.

15. S. REP. No. 109-322, at 5. In more than three decades as director of the National Hurricane Center, Mayfield had only personally called the state officials once before to make a personal plea. *Id. See also* A FAILURE OF INITIATIVE, *supra* note 1, at 125 n.34.

16. Throughout the storm's approach, several media outlets reported that the city was a "bowl" and could be left submerged by the storm. S. REP. No. 109-322, at 5. As homeland security coordinator for Jefferson parish explained, New Orleans' unique geographic characteristics expose it to special threat of flooding. NOW with Bill Mayers, Transcript of *The City in a Bowl*, Sept. 20, 2002, http://www.pbs.org/now/transcript/transcript_neworleans.html. The city faces inherent vulnerability to flooding by virtue of its location on subsiding swampland on the delta of the Mississippi. *See* A FAILURE OF INITIATIVE, *supra* note 1, at 51. The city's average elevation is six feet below sea level. *Id.* "The greatest threat from hurricanes is not wind, but storm-surge, which accounts for most of the damage and deaths caused by hurricanes." *Id.*

where; he had not yet issued a mandatory evacuation.[17] Once the mandatory evacuation order was finally issued, the storm was expected to make landfall in only 15 hours.[18] Even worse, the eleventh-hour mandatory order was not accompanied by transportation needed to carry it out, despite the fact that two in ten households in the New Orleans disaster area had no working car.[19]

Such an oversight was only one of many examples of neglect that plagued the region in the days preceding the storm. According to some estimates, thousands of people would have been spared the worst of the storm's force if the local authorities had made provisions to help move those in the storm's path to safety.[20] Along with the debilitating power of nature, the victims of Katrina had to suffer through expansive systemic failures. The hurricane blew the lid off

17. BRINKLEY, *supra* note 14, at 58-9. "Throughout all nine of Louisiana's coastal parishes, only a mandatory evacuation drew the attention of storm-tested residents—anything less was inadequate." *Id.* at 5. In Mayor Nagin's defense, a mandatory evacuation order had never been issued in the history of New Orleans—287 years. *Id.* There are three levels of evacuation: voluntary, recommended, and mandatory. *Id.* at 20. "Only the [mandatory evacuation] carries real weight—and places the responsibility for evacuation on state and local government officials." *Id.*

18. BRINKLEY, *supra* note 14, at 626. Neither Louisiana Governor Blanco nor New Orleans Mayor Ray Nagin ordered a mandatory evacuation until Sunday morning. A FAILURE OF INITIATIVE, *supra* note 1, at 109. The mandatory evacuation order was issued at 11:00 a.m. Sunday, August 29, 2006. *See id.* The hurricane was due to come ashore in approximately 19 hours. *Id.* The storm actually made landfall near Buras, Louisiana at 6:10 a.m. Monday, August 29, 2006, about 20 hours after the mandatory order was issued. BRINKLEY, *supra* note 14, at 628. As the House Committee pointed out, the late evacuation order is particularly troubling because state and local officials received adequate warnings regarding the severity of the hurricane 56 hours before landfall. *See* A FAILURE OF INITIATIVE, *supra* note 1, at 2. Additionally, the consequences of a hurricane striking the New Orleans region were well known before the threat of Katrina. *Id.*

19. *Katrina's Victims Poorer than U.S. Average*, FOXNEWS.COM, Sept. 05, 2005, http://www.foxnews.com/story/0,2933,168500,00.html (hereinafter "Victims Poorer"). At the time the storm approached, more than 112,000 adult New Orleanians did not own cars. BRINKLEY, *supra* note 14, at 24; Gordon Russell, *Nagin Orders First-Ever Mandatory Evacuation of New Orleans*, TIMES-PICAYUNE (New Orleans), Aug. 28, 2005, at A1.

20. *See* A FAILURE OF INITIATIVE, *supra* note 1, at 111. The failure to implement meaningful evacuation procedures, namely, a timely mandatory order and the transportation needed to get citizens to safety led to incomplete evacuation and increased the threat of the storm. *See id.*

> [The decision] did not reflect the publicly stated recognition that Hurricane Katrina would "most likely topple [the] levee system" and result in "intense flooding" and "waters as high as 15 or 20 feet," rendering large portions of the city uninhabitable. As a result, more than 70,000 people remained in the city to be rescued after the storm. *Id.*

In contrast to the laissez-faire attitude about the impending storm that seemed to characterize New Orleans officials, the president of the Plaquemines Parish (another one of the nine coastal parishes) declared a mandatory "Phase I" evacuation on August 27, "that Saturday when there was still plenty of time to flee—parish employees fanned out on preappointed routes, picking up residents with special needs and busing them to state-run shelters in Shreevport, Alexandria, Houma, and Lafayette." BRINKLEY, *supra* note 14, at 5.

festering poverty, infrastructure failures, and government inadequacies. And as usual, the most vulnerable classes of people were hit hardest. Seventy percent of those who died in Hurricane Katrina were 61 years of age or older.[21] The dead from nursing homes account for about ten percent of Louisiana deaths from the storm.[22] People living in the path of Katrina's worst devastation were twice as likely as most Americans to be poor and without a car.[23] In addition, one-fourth of those in the hardest hit areas lived below the poverty level.[24] Seventeen percent of the residents lived in what is called "extreme poverty," in which a family of four is making approximately $9,000 a year.[25] Twelve percent of the victims of Hurricane Katrina were members of single-mother households[26]; thirty-eight percent of the children in New Orleans were living in households with incomes below the federal poverty threshold.[27] Despite the startling obstacles facing the residents, they were charged with self-help as the storm approached. Officials failed to complete evacuations to move people to safer, higher ground.[28] The maintenance of the levees that flooded after the storm fell through the cracks of bureaucratic red tape.[29]

21. Eric Lipton, *Committee Focuses on Failure to Aid New Orlean's Infirm*, N.Y. TIMES, Feb. 1, 2006, at A20.

22. Roma Khanna, *Katrina's Aftermath*, HOUS. CHRON., Nov. 27, 2005, at A1. Most of the dead did not lose their lives because of floodwater or immediate storm damage; instead, interviews revealed that most of the nursing home deaths occurred after days in brutal conditions. *Id.* "Their deaths and the effects on survivors represent the worst medical catastrophe for the elderly in recent U.S. history." *Id.*

23. *Victims Poorer*, *supra* note 19. An Associated Press analysis of Census data showed that two in ten households in the disaster area had no car, compared with one in ten nationwide. *Id.*

24. *Id.*

25. NAT'L CTR. FOR CHILDREN IN POVERTY, CHILD POVERTY IN STATES HIT BY HURRICANE KATRINA, *available at* http://www.nccp.org/pub_cpt05a.html (last visited Mar. 12, 2007). "New Orleans and the surrounding region have long been home to some of the poorest children in the country." *Id.* at 1.

26. *Victims Poorer*, *supra* note 19, at 1. This figure is almost twice the national average, in which seven percent of children live in single-mother households. *Id.* A child reared by a single mother faces special adversities and difficulties.

27. NAT'L CTR. FOR CHILDREN IN POVERTY, *supra* note 25, at 1. The federal poverty level is $16,090 a year for a family of three and $19,350 a year for a family of four. *Id.*

28. *See* A FAILURE OF INITIATIVE, *supra* note 1, at 2 ("The failure of complete evacuations led to preventable deaths, great suffering, and further delays in relief.").

29. BRINKLEY, *supra* note 14, at 194. "Over the years, improvements were made, patches introduced, and the need for repairs noted and sometimes neglected." *Id.* A few months before Hurricane Katrina, a $427,000 repair to a "crucial floodgate languished in excusable bureaucratic delay. . .." *Id.* At the same time, the Orleans Levee District Board directed its attention to building parks, overseeing docks, and investing in on-water gambling. *Id.* See also Ann Carrns, *Holes in the Dike: Long Before Flood, New Orleans System Was Prime for Leaks*, WALL ST. J., Nov. 25, 2005, at A1. The levees that failed under the weight of Katrina were built by the United States Army Corps of Engineers ("USACE"), and were a joint federal, state, and local effort with shared cost. A FAILURE OF INITIATIVE, *supra* note 1, at 89. Different parts of the Lake Pontchartrain project were turned over to four different local

Hurricane Katrina's crippling impact on the poor, elderly, and infirm highlights the need to reconsider the government's responsibility to help those who are unable to help themselves.

This paper advocates an expanded reading of the Due Process Clause of the Fourteenth Amendment to include affirmative obligations to act. Specifically, this paper considers the government's failure to act during the threat of Hurricane Katrina a valid cause of action under a Section 1983 Civil Rights suit. State officials, local officials, and local government must be held accountable for their monumental failures during the storm. The government's mistreatment of its most vulnerable citizens—the poor, the elderly, and the sick—may constitute a due process violation[30] under one of the exceptions to the no-duty rule generally imposed on the Due Process Clause of the Fourteenth Amendment.[31] A "more perfect Union"[32] must act on its duties—both negative and affirmative—to protect the powerless against harm.

Part II of this paper will provide a brief introduction to Section 1983 litigation, examining possible defendants and the type of relief available. Part III will discuss Fourteenth Amendment violations supported by two exceptions to the no-duty rule under *DeShaney*[33]: the state-

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sponsors. *Id.* at 91. "[S]eparate water and sewer districts are responsible for maintaining pumping stations." *Id.* According to the investigation conducted by the USACE, known officially as the Interagency Performance Evaluation Task Force, the corps had lost some of its expertise in building stronger levees in the 1980s, and shifted emphasis to managing projects. Vartabedian, *supra* note 12. The report also concluded that flooding in New Orleans would have occurred, but reduced substantially, had the levees not failed. *Id.* A computer simulation showed that if the levees had not failed, the flooding would have been about one-third of what occurred. *Id.*

30. Residents of Mississippi and Alabama, as well as Floridians who braced the storm in its Category 1 incarnation on August 25, 2006, all felt the effects of Hurricane Katrina. *See* FEMA'S MANUFACTURED HOUSING, *supra* note 4, at 1. However, this paper is limited to a discussion of government responsibility to the residents of New Orleans, Louisiana. The limit is prompted by the storm's catastrophic effects on the state and the preventable losses caused in large part by systemic human failures. *See supra* text accompanying notes 2, 7.

31. While the no-duty rule generally applies, the United States Supreme Court has recognized two exceptions. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195–202 (1989). The first is the state-created danger exception, in which the government is responsible for creating the danger; the second is the special relationship exception, in which the potential plaintiff is in government custody and the person is unable to protect himself or herself. *See id.*

32. U.S. CONST. pmbl. The preamble of the United States Constitution reads, in full:

> We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id.

33. *DeShaney*, 489 U.S. at 189. This case is considered the leading case on the prohibition against affirmative duties in the Constitution. It will be discussed in greater detail in Section III of this paper. *See infra* Part III.B.

created[34] danger rule and the special relationship exception. This part of the paper will also examine the government's failures leading up to the Katrina debacle in light of the two exceptions, arguing that either could be used to make the state and local officials liable under a due process claim. Finally, this paper will conclude with a look ahead at government's response to the constant threat of hurricanes and whether anything has been learned from the events surrounding Hurricane Katrina.

II. 42 U.S.C. § 1983

A. *History*

Commonly known as the Civil Rights Act, 42 U.S.C. § 1983 is the primary vehicle for obtaining damages and equitable relief against state and local officials who violate the Constitution or federal law.[35] The legislation was passed in 1871 as part of the Reconstruction Era Civil Rights Legislation aimed at protecting the rights of new black Americans.[36] The act reads:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[37]

Although passed shortly after Reconstruction, Section 1983 lay dormant for decades until the United States Supreme Court resuscitated

34. For the purposes of this paper, the term "state" is not limited to state officers, but to government entities including the state, cities, and local subdivisions.

35. *See* JOHN C. JEFFRIES JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 42 (2000). "Section 1983 is only a vehicle for substantive claims that have their base elsewhere. It is not an independent source of constitutional or statutory rights." SHELDON NAHMOD, ED., A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 47, quoting Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985).

36. *See* Wilson v. Garcia, 471 U.S. 261 (1985). The act was originally enacted after the American Civil War, and came into the books as § 1 of the Ku Klux Klan Act of April 20, 1871 with an intent to provide a remedy for abuses being committed in southern states, especially by the Ku Klux Klan. *See id.* at 276. The goal of the legislation was to "address the deprivations of civil rights and civil liberties in the post-Civil War South" and "give the victims a *federal* cause of action in *federal* court." MICHAEL KENT CURTIS ET AL., 1 CONSTITUTIONAL LAW IN CONTEXT 739 (2003).

37. 42 U.S.C. § 1983 (2000).

it through *Monroe v. Pape*.[38] The use of Section 1983 in *Monroe* ushered in a new era of civil rights litigation,[39] which has since burgeoned.[40] Even with the surge in civil rights cases recently, this breed of constitutional tort litigation is not without limits.

B. *Possible Defendants*

One such limit on Section 1983 litigation is the list of possible defendants who can be sued for civil rights violations. Courts have defined who and what constitutes a "person" subject to suit under Section 1983. First, Section 1983 does not create a valid cause of action against the federal government or federal officials.[41] The plain language of the statute limits it to a "person" acting under color of state law.[42] Also, courts have been unwilling to expand the legislation to puncture the sphere of sovereign immunity enjoyed by the federal government.[43] Thus, the federal government and federal officials are not "persons" for purposes of Section 1983 litigation.

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38. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978) (holding that the doctrine of *respondeat superior* does not apply to municipal liability for actions). In *Monroe*, the plaintiffs claimed that 13 Chicago police officers who broke into their home in the early morning, routed them from bed, made them stand naked in the living room and later took them to the police station on "open" charges without first going before a magistrate constituted a violation of their Constitutional rights. *Monroe*, 365 U.S. at 169–70. The plaintiff, Mr. Monroe, was arrested and detained without a warrant and without arraignment, which Mr. Monroe alleged violated his Fourth Amendment rights. *Id.* at 170. The city of Chicago moved to dismiss, but the Supreme Court held that Section 1983 provides a federal remedy when state officials fail to enforce state laws "by reason of prejudice, passion, neglect, intolerance or otherwise" and thereby deprive citizens of their rights protected by the fourteenth amendment. *Id.* at 180.

39. JEFFRIES ET AL., *supra* note 35, at 37. Monroe is particularly significant because it "overturn[ed] a longstanding assumption that § 1983 reached only misconduct either officially authorized or so widely tolerated as to amount to a 'custom or usage.'" *Id.* It effectively expanded the concept of "state action." *See id.*

40. *Id.* at 42. A "crude" measure of the impact of *Monroe v. Pape* is measurable through the activity in federal courts. *Id.* "In the year of the *Monroe* decision, fewer than 300 suits were brought in federal court under all the civil rights acts." *Id.* Within ten years, that figure had grown to 8,267. *Id.* In 1998, more than 43,000 suits were brought under the civil rights acts, primarily section 1983. *Id.*

41. *See* JEFFRIES ET AL., *supra* note 35, at 78. There are judicially created damage actions that run against federal officers who violate constitutional rights. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens*, the plaintiff claimed that federal narcotics agents entered his home and arrested him in front of his family, threatened his family with arrest, searched the apartment and was later subjected to a visual strip search. *Id.* at 389. The Court concluded that the allegations stated a cause of action, and that when federal rights are violated, federal courts have the power to supply a remedy. *Id.* at 395, 397. A *Bivens* action is directly analogous to the cause of action available against state and local officials under section 1983. *Id.* at 395.

42. 42 U.S.C. § 1983.

43. *See* JEFFRIES ET AL., *supra* note 35, at 78. Despite the existence of *Bivens* actions, there are some respects in which federal officers are treated specially. *Id.* For example, the President has absolute immunity from award damages for official misconduct. *See* Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). In addition, there is broad

States are also not "persons" for purposes of Section 1983 litigation.[44] The state also enjoys sovereign immunity for purposes of Section 1983 litigation.[45] The Eleventh Amendment makes clear the shield erected against litigants who would attempt to sue the state: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subject of any Foreign State."[46]

Notwithstanding the inability to sue the state under Section 1983, a cause of action for civil rights violations may be maintained against the state by way of the *Ex Parte Young* fiction.[47] Under *Ex Parte Young*, relief can be obtained that will effectively run against the state.[48] The prohibition against suing a state is not disturbed when a state official is sued in his or her official capacity for prospective injunctive relief.[49]

A Section 1983 suit may be maintained against a municipality or political subdivision.[50] Courts have consistently held that a municipal corporation is a "person" for purposes of Section 1983 litigation with regard to declaratory, injunctive, and monetary relief.[51] Furthermore,

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immunity for federal legislators and their aids for any official acts. *See* Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 503, 510 (1975).

44. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

45. JEFFRIES ET AL., *supra* note 35, at 43–44. "[T]he Eleventh Amendment "(or the principle of state sovereign immunity it is said to reflect) generally bars the award of money damages against states and state agencies. . .." *Id.* at 19.

46. US CONST. amend. XI. Though not as clear from the language of the text, the United States Supreme Court has adopted the position that the Eleventh Amendment reflects a wide-sweeping sovereign immunity shield that "protects states from virtually all suits in federal court." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 192 (2006). The Court has held that the Eleventh Amendment bars suits against state government by citizens of another state, citizens of a foreign country and Indian tribes. *Id.* at 194. The Court has also held that citizens are also prohibited from suing their *own* state in federal court. *Id.* at 194; *see also* Hans v. Louisiana, 134 U.S. 1 (1890).

47. *See Ex parte Young*, 209 U.S. 123 (1908) (enjoining the Attorney General of Minnesota to conform his future conduct of that office to the requirements laid down in the Fourteenth Amendment).

48. *See id.*

49. *See* JEFFRIES ET AL, *supra* note 35, at 11. "The official is 'stripped' of any 'official or representative character' if the enforcement of state law violates the federal Constitution, even though the official's conduct is still regarded as 'state action' under the Fourteenth Amendment (without which there would be no constitutional violation)." *Id.* The Supreme Curt also held that a successful plaintiff who obtains prospective injunctive relief from a state officer will also be entitled to an award of attorneys fees payable from the state treasury. MARY MASSARON ROSS, ED., SWORD & SHIELD REVISITED, A PRACTICAL APPROACH TO SECTION 1983 21 (1998).

50. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978).

51. *See id.* at 690. "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* As noted earlier, however, the *Monell* court rejected the strict application of the *respondeat superior* doctrine to municipal liability. *Id.* at 691, 695. A section 1983 action

the local subdivisions in New Orleans, parishes, have also been sued under Section 1983.[52] Finally, local officials can be sued as a "person" for Section 1983 litigation.[53]

C. *Equitable Relief*

While Section 1983 opens the door for damages to assist plaintiffs, the plain language of the law also provides the remedy of equitable relief.[54] As discussed earlier, equitable relief may be obtained against state officials (which essentially runs against the state itself) through the *Ex Parte Young* caselaw.[55] Most importantly, the prospective injunctive relief can still be upheld even when the expenditure of state funds is required.[56]

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may be maintained only when municipal policy or custom causes a constitutional deprivation. *Id.* at 694.

52. *See, e.g.*, Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984) (allowing a section 1983 case to proceed against the Lafayette Parish Police Jury in Louisiana for an alleged Fourth Amendment violation as incorporated into the Fourteenth Amendment).

53. *See* Hafer v. Melo, 502 U.S. 21 (1991) (holding that individual employees of state government may be sued); *see also* City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (holding that individual employees of city government may be sued in their individual capacities). While the pursuit of damages against local governing bodies and local officials is beyond the scope of this article, it should be noted that possible obstacles are present for the litigant pursuing damages against either. First, the defense custom and policy may be present for a municipality against whom damages is sought. *See generally Monell*, 436 U.S. at 694. The custom and policy limits recovery from a municipality to acts that are the result of a policy statement or regulation promulgated by the entity's officers, or the result of the entity's custom. *See id.* at 690–94. Additionally, the defense of qualified immunity may also be available for local officials being sued for damages. *See* Wilson v. Layne, 526 U.S. 603 (1999); Harlow v. Fitzgerald, 457 U.S. 800 (1982). Under the qualified immunity defense, a successful plaintiff seeking damages from a local government official performing discretionary activities must show that the defendant violated statutory or constitutional rights that were clearly established at the time of the complained of incident. *Harlow*, 457 U.S. at 818. The qualified immunity defense may be raised if the conduct violated clearly established rights "of which a reasonable person would have known." *Id.* Absolute immunity is also an available defense in some instances for state and local legislators, judges and prosecutors when civil damages are sought. *See generally* Pierson v. Ray, 386 U.S. 547 (1967) (upholding immunity for judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (upholding immunity for state prosecuting attorney. For a more detailed discussion of qualified and absolute immunity defenses in the section 1983 arena, see Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993); John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

54. Section 1983 states that a plaintiff may be ". . .liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress. . .." 42 U.S.C. § 1983 (emphasis added). The pursuit of equitable relief also alters the analysis for purposes of immunity. ROSS, *supra* note 49, at 512. "There is a distinction from immunity from damages and immunity from injunctive relief." *Id.*

55. *See Ex parte Young*, 209 U.S. 123 (1908).

56. JEFFRIES ET AL., *supra* note 35, at 18–19. The general rule is that a suit by private parties "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663 (1974) (finding that the award of retroactive benefits was barred by the

One of the plainest examples of this paradigm is evident in *Miliken v. Bradley (II)*.[57] In *Miliken*, the Supreme Court upheld a school desegregation order requiring the expenditure of both state and local funds to implement a decree.[58] In its ruling for the plaintiff, the Court ordered wide-sweeping remedies as part of this equitable relief scheme.[59] The state had to pay for the Court's exhaustive remedy list, which included remedial reading programs, counseling, training, and testing.[60] Such precedent is significant if state and local officials will be forced to spend money to implement a transportation plan to protect its vulnerable residents.

In the proposed Section 1983 claim against local government, state officials, and local officials with relation to the Katrina victims, the successful plaintiff would need to obtain a declaratory judgment that a constitutional violation had occurred, and then obtain a structural affirmative injunction to prevent future violations. The injunctive relief could then be funded from the government treasury to realize the implementation of the evacuation plan. In plain terms: put some buses in place to move people to safety.

III. A FOURTEENTH AMENDMENT CLAIM

The Fourteenth Amendment has long been a favorite of the Section 1983 claimant.[61] Most useful has been the Due Process Clause, which

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Eleventh Amendment). However, the Supreme Court has permitted the expenditure of state and local funds to implement provisions under the prospective-compliance exception. JEFFRIES ET AL., *supra* note 35, at 18.

57. 433 U.S. 267 (1977).

58. *Id.* at 281.

59. *Id.* at 284-88.

60. *Id.* at 289. The Court sought to clarify the muddy waters of prospective/compensatory expenditures by focusing on the prospective benefits that would ensue from the implementation of the educational components. *Id.* at 290. It addressed the Eleventh Amendment objections in the following manner:

> The [*Edelman*] exception, which had its genesis in *Ex parte Young*, permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. . . .That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such *prospective* relief is not barred by the Eleventh Amendment.

Miliken, 433 U.S. at 290.

61. As one commentator recognizes, the right to "liberty" is the protected right most frequently the subject of section 1983 litigation. Roberta M. Saielli, Casenote, DeShaney v. Winnebago County Department of Social Services*: The Future of Section 1983 Actions for State Inaction*, 21 LOY. U. CHI. L. J. 169, 170 (1989). "The Court's treatment of cases under the Due Process Clause of the Fourteenth Amendment offers the best illustration of remedial concerns that seem to have affected the delineation of substantive rights." JEFFRIES ET AL., *supra* note 35, at 217. Moreover, the Supreme Court has repeatedly stressed that section 1983 is not a source of substantive rights; rather, the Court characterizes section 1983 as a means to vindicate federal rights elsewhere conferred. *See* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). "It should also be evident that the overriding theme of Section 1983 is the centrality of

has opened the door for claims arising under various deprivations of "life, liberty or property" interests.[62] The Fourteenth Amendment, enacted in 1868, reads in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[63]

The Fourteenth Amendment has generally been read to confer only negative rights; that is, it is seen as a restraint for government interference with certain constitutional guarantees.[64] Generally, the Fourteenth Amendment does not create positive rights, or imposes affirmative obligations on the government to protect those same constitutional guarantees.[65]

The typical Section 1983 claim based on a Fourteenth Amendment violation involves a government actor (state or local) who actively deprives a plaintiff of a protected liberty interest.[66] Efforts to expand the Due Process Clause to include affirmative obligations to act have been almost foreclosed by the United States Supreme Court in *DeShaney*.[67] Nevertheless, the Court did carve out two narrow exceptions to the general no-duty rule: the state-created danger exception and the special relationship exception.[68] Both exceptions may be used to create liability for local government, state officials, and local officials who failed to evacuate the poor, sick, and elderly during the threat of Hurricane Katrina. First, however, it is important to understand the background of the no-duty rule exceptions through the widely-discussed *DeShaney* case.

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the Fourteenth Amendment and its enforcement." Ross, *supra* note 49, at 13. Nonetheless, the Section 1983 claim is not limited to the vindication of 14th Amendment rights. *Id.* at 41. A Section 1983 suit may be brought to enforce the Dormant Commerce Clause, and the Privileges and Immunities Clause of Article IV, among others. *Id.*

62. JEFFRIES ET AL., *supra* note 35, at 217.

63. U.S. CONST. amend. XIV, § 1.

64. The Constitution does not require affirmative acts by the government to assist individuals. Michael Wells & Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REFORM 1, 1 (1982). It ordinarily places only negative restrictions on government. *Id.* The case law also reflects a "deeply entrenched" belief that the Constitution is a charter of negative liberties, or rights that restrain the government. CHEMERINSKY, *supra* note 46, at 552.

65. The Due Process Clause has been interpreted to confer no affirmative right to governmental aid, even to secure life, liberty or property interest the government itself may not deprive the individual. CHEMERINSKY, *supra* note 46, at 847.

66. *See e.g.*, Bd. of County Comm'rs v. Brown, 520 U.S. 397 (1997) (asserting a section 1983 claim against a county for its hiring of a police officer who plaintiff claimed used excessive force and violated her Constitutional rights in making an arrest).

67. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

68. *See id.* at 196–202.

A. *DeShaney v. Department of Winnebago Service*

The facts of *DeShaney* never fail to illicit sympathy and outrage, and for good reason.[69] The case involves a young boy who was suspected of being a victim of child abuse at the hands of his father.[70] Following a divorce in which the father was granted custody of the child,[71] little Joshua DeShaney was seen and treated for multiple injuries.[72] The father remarried and soon divorced his second wife, who told police that her ex-husband "was a prime case for child abuse."[73] Later, the father's new live-in girlfriend took Joshua to the hospital to be treated for bruises and abrasions.[74] Hospital officials reported that Joshua might be subject to child abuse.[75] Joshua was temporarily placed in the hospital's custody, but in short time returned to his father.[76] The suspicions of abuse continued to mount; reports of suspected abuse poured in to the caseworker for the Department of Social Services who was assigned to Joshua's case.[77] In fact, a caseworker visited the DeShaney home approximately thirteen times during a twelve month period,[78] yet no one instituted any proceedings to remove Joshua from the home. In March 1984, the father beat

69. The *DeShaney* opinion has been the subject of much academic discussion, much of it oppositional. *See, e.g.*, Jack M. Beermann, Essay, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078 (1990); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990).

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

71. *Id.* at 191. After being granted custody by a Wyoming court, the father shortly took his son to Neenah, a city located in Winnebago, Wisconsin. *Id.*

72. *Id.* at 192–93.

73. *Id.* at 191–92. The second wife complained that the father had previously "hit the boy causing marks and [was] a prime case for child abuse." *Id.* at 192. Social Services interviewed the father, who denied the accusations, and social services did not pursue the matter further. *Id.*

74. Saielli, *supra* note 61, at 177.

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

76. *Id.* Joshua spent three days in temporary state custody before he was returned to his father. *Id.* The return was primarily based on lack of sufficient evidence of child abuse and the father's promise to adhere to a voluntary agreement to protect Joshua. *Id.* The agreement included enrollment in a preschool program and counseling. *Id.*

77. *Id.* at 192–93.

78. Saielli, *supra* note 61, at 178. On two of the caseworker's visits to the DeShaney home, she was told Joshua was too ill to see her. *See* Jason L. Weisberg, DeShaney v. Winnebago County Department of Social Services*: The Special Relationship Doctrine Reconsidered*, 19 SW. U. L. REV. 1113, 1124 (1990). Nevertheless, Social Services did nothing. *DeShaney*, 489 U.S. at 193.

Joshua so severely he was left in a life-threatening coma.[79] Doctors said the child, only four years old at the time, would never recover.[80]

In the Section 1983 claim against the department, Joshua and his mother alleged that Winnebago County, the county Department of Social Services, the caseworker, and her supervisor had deprived Joshua of his liberty without due process of law in violation of the Fourteenth Amendment of the United States Constitution.[81] Specifically, the complaint asserted that Joshua had been deprived of his protected liberty because of the respondents' failure to intervene to protect Joshua from his father's violent actions of which they knew or should have known.[82] Had the officials been more diligent in investigating the abuse complaints, the mother argued, Joshua would not have been crippled by his father.[83]

The United States Supreme Court rejected the mother's argument. The bench found that while the facts of the story are heartbreaking,[84] there is no constitutional violation because the circumstances only gave rise to a failure-to-act case.[85] Writing for the majority, Chief Justice Rehnquist announced that the Constitution only serves as a restraint against government misconduct.[86] He reiterated that the government has no affirmative duty to act to protect citizens from

79. *Id.* "Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time." *Id.* Joshua is expected to spend the rest of his life confined to an institution for the profoundly retarded. *Id.*

80. *See id.* The father was eventually tried and convicted for child abuse. *Id.*

81. *Id.* The United States District Court for the Eastern District of Wisconsin granted summary judgment for the respondents. *Id.* The Court of Appeals for the Seventh Circuit affirmed. DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 304 (7th Cir. 1987).

82. *DeShaney*, 489 U.S. at 193; *see also* Marne Brom, *Case Note*, 39 DRAKE L. REV. 911, 912 (1990). "The caseworker was aware that Joshua had been hospitalized . . . , and "that he was never without a bump, scratch or burn during her inspections." Weisberg, *supra* note 78, at 1124.

83. *See* Erwin Chemerinsky, *Government Duty to Protect: Post-DeShaney Developments,* 19 TOURO L. REV. 679, 680 (2003).

84. For reasons to be discussed in greater detail, see *infra* text accompanying notes 90–92, the dissent's characterization of the case led to the "Poor Joshua" moniker often used to refer to the case. JEFFRIES ET AL., *supra* note 35, at 236 n.b. Justice Blackmun's begins the last paragraph of his dissent with: "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing. . . ." *DeShaney*, 489 U.S. at 214 (Blackmun, J., dissenting).

85. *DeShaney*, 489 U.S. at 203 (majority opinion). "The Court granted certiorari to resolve the inconsistent positions taken by lower courts as to whether the fourteenth Amendment imposes a duty on the state to protect individuals, not in the state's custody, from harm [inflicted] by private individuals." Brom, *supra* note 82, at 913.

86. *DeShaney*, 489 U.S. at 195–96.

wrongs committed by private parties.[87] "The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."[88]

While the dissent characterized the state conduct as an example of state action that fell below constitutional standards,[89] the majority view held fast to its characterization of the case as a prime example of a no-duty rule.[90] Because Joshua had been injured by his own father, a private person, there was no duty by the State to protect him; consequently, there could be no liability for the State's failure to protect the boy.[91] The majority seemed very concerned with expanding the Due Process Clause to impose affirmative obligations on the state.[92] The Court did, however, leave open the door for two exceptions to the no-duty rule.

B. *State-Created Danger Exception*

The state-created danger exception relies on state conduct that enhances the risk faced by the plaintiff.[93] This exception is grounded in the premise that a state actor who, by its actions, places citizens in a more vulnerable position may face Section 1983 liability.[94] This ex-

87. *Id.* at 195, 197. He explained that the Due Process Clause is intended to "protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Chief Justice Rehnquist wrote that the Framers planned to commit government obligation with regard to protection from others to the democratic political process. *Id.*

88. *Id.* at 203.

89. *See id.* (Brennan, J., dissenting). "This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications. In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under §1983 may effectively decide the case." *Id.* at 204. Further, Justice Brennan would find that the State's knowledge of the child's predicament and expressions of intent to provide help would rise to a "'limitation of his freedom to act on his own behalf' or to obtain help from others." Weisberg, *supra* note 78, at 1128.

90. *DeShaney*, 489 U.S. at 202 (majority opinion). ". . .the State had no constitutional duty to protect Joshua against his father's violence; its failure to do so – though calamitous in hindsight – simply does not constitute a violation of the Due Process Clause." *Id.*

91. *Id.* at 201. "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

92. *Id.* at 195; *see also* Chemerinsky, *supra* note 83, at 683 (". . .DeShaney is the touchstone for all subsequent discussions about the affirmative duty to provide protection under due process. The Court held that the government generally has not duty to protect people from privately inflicted harms.").

93. *DeShaney*, 489 U.S. at 198–202.

94. *Id.* at 201. The majority pointed out that when the state took custody of Joshua temporarily and then returned him to his father, it "placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.* Some lower courts have worked hard to expand the state-created danger exception, and with some success for plaintiffs. *See* MARTIN A. SCHWARTZ ET

ception also has been characterized as the "snake pit" model.[95] Some Section 1983 plaintiffs have relied on the state-crated danger scenario to effectively expand the Due Process Clause.[96]

Wood v. Ostrander, from the Ninth Circuit, is a compelling example in which the state-created danger exception was employed to support a Section 1983 claim.[97] In *Wood*, a Washington State Trooper pulled over a car at 2:30 in the morning because the driver had the high beams on.[98] Because the driver of the vehicle was intoxicated, the trooper arrested him, called a tow truck for his car to be impounded, and took the keys to the car.[99] The passenger of the vehicle, a woman, asked the trooper how she would get home.[100] The officer apologized and insisted that the woman exit the vehicle;[101] she was left to walk home by herself in fifty-degree weather.[102] As the woman started her five mile journey home on foot, she passed up offers from strangers in passing cars.[103] Eventually, the woman accepted a ride from a stranger, who took her to a secluded area and raped her.[104] She filed a Section 1983 claim against the officer based on a violation of her due process rights.[105] The District Court granted summary judgment dismissal as to the trooper, and the Ninth Circuit reversed.[106]

AL., SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, 3D ED. VOL. 1A, 158-60; *see also* Nicholas Seidule, *A Fly in the Soup Bowl: Using the State-Created Danger Doctrine to Find Liability Against the State of Louisiana for the Katrina Disaster*, 5-10 (unpublished manuscript, on file with NOVA LAW REVIEW).

95. Accurately characterized as dicta, the snake pit/state created danger exception "could be read as implying that the state action that enhances the risk of private harm may violate the due process clause." SCHWARTZ, *supra* note 94, at 158. The snake pit name is taken from Judge Posner's opinion in Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger . . . and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."). One example of the snake pit model involves a plaintiff who is attacked after police abandons her in a high-crime area. Julie Shapiro, *Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm*, 62 U. CIN. L. REV 883, 923 (1994).

96. The theory has been used with measured victory in the Ninth Circuit, Third Circuit and Tenth Circuit. *See* Wood v. Ostrander, 879 F.2d 583, 589–90, 596 (9th Cir. 1989); Kneipp v. Tedder, 95 F.3d 1199, 1201, 1211 (3d Cir. 1996); Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1262–64 (10th Cir. 1998).

97. *See Wood*, 879 F.2d at 583–90.

98. *Id.* at 586.

99. *Id.*

100. *Id.* "Ostrander [the trooper] left Wood near a military reservation in the Parkland area of Pierce County, which has the highest aggravated crime rate in the county outside the City of Tacoma." *Id.*

101. *Id.* The trooper admits to telling the woman that he was sorry, but she would have to get out of the car. *Id.* The two dispute whether the trooper offered to call for a ride. *Id.*

102. *Id.* At the time, the woman was wearing only jeans and a blouse. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 587.

106. *Id.* at 586.

In allowing the case to proceed, the Ninth Circuit relied implicitly on the state-created danger exception.[107] The court analyzed the viability of the plaintiff's Section 1983 claim by focusing on whether the trooper's conduct deprived the woman of a federal constitutional or statutory right.[108] *Kneipp v. Tedder*[109] articulates a helpful test to determine whether the state-created danger exception applies.[110] According to the Third Circuit, a state-created danger case requires: (1) foreseeable harm faced by the plaintiff, (2) willful disregard of that harm by the state actor, (3) a relationship between the state actor and the plaintiff, and (4) conduct by the defendant that enhances a risk or creates one that otherwise would not have existed but for the defendant's conduct.[111]

In applying the state-created danger theory to the proposed Section 1983 Katrina claim, an argument may be made that the state and local officials left the residents of New Orleans in a virtual "snake-pit" and effectively met the four criteria that outline the exception. First, the threat of an imminent, powerful hurricane was a foreseeable harm that would be faced by the plaintiff.[112] As early as 5 a.m. August 27, 2006, the threat of Hurricane Katrina loomed over the New Orleans region.[113] Unlike other natural disasters such as tornados or earthquakes, hurricanes arrive with a fair amount of warning. In addition, the National Hurricane Center had issued warnings that Katrina might make landfall as a Category 5 storm, and was barreling toward New Orleans.[114] Moreover, before making its way toward Louisiana, Katrina had already visited Florida, where it dumped 18 inches of rain

107. *See id.* at 589. The Ninth Circuit found that plaintiff had "raised a triable issue of fact as to whether [trooper's] conduct 'affirmatively placed the plaintiff in a position of danger.'" *Id.* at 589–90.

108. *Id.* at 587. The court acknowledged that the state played a role in creating the danger faced by the plaintiff. *Id.* at 590. However, the recognition of the "snake-pit" exception does not guarantee judgment for the plaintiff. Although the plaintiff survived a motion to dismiss, "[o]n remand [the trooper] was tried before a jury, and a verdict for defendants was returned." Shapiro, *supra* note 95, at 929, n.172.

109. Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996). *Kneipp*, which also involved a police stop, involved a Section 1983 claim brought on behalf of a woman who was injured after police sent her home on foot. *Id.* at 1202–03. The woman, who was visibly intoxicated at the time police sent her off, was injured in a fall down an embankment and suffered severe brain damage. *Id.* at 1203.

110. *See id.* at 1208.

111. *Id.*; *see also* Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995).

112. One factor that the court considered in *Wood*, for instance, was the fact that the area where the defendant trooper left the plaintiff was a known high crime area. 879 F.2d at 590. The court noted that the state trooper had been in the area for years and that he may be chargeable with knowledge of the crime rate in the area. *Id.* "Moreover, the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense." *Id.*

113. BRINKLEY, *supra* note 14, at 1-3.

114. *Id.* at 1.

and left half-a-million people without power.[115] Because the state and local government officials had ample time to prepare for and appreciate the severity of the threat presented by Katrina, the hurricane could accurately be described as a foreseeable harm.

The next factor to be explored in the state-created danger exception is the defendant's willful disregard of the foreseeable risk faced by the plaintiff.[116] State and local officials who did not evacuate the poor, sick, and elderly may also satisfy this element. The poverty and correlative immobility that impairs the residents of New Orleans is no secret, and certainly should not have been news to the elected officials.[117] Knowing about such a scarcity of resources, the state's failure to evacuate people in the storm's worst path could be seen as willful disregard for their safety.[118]

A relationship between the state actor and the plaintiff must also be found to support a claim for a due process violation based on the state-created danger exception.[119] Courts generally have required a relationship that sets the plaintiff apart from the general public.[120] In *Wood*, for example, the state trooper knew of the special threat facing the plaintiff, which was enough to find that a relationship between the two existed.[121] In the Katrina case, the relationship factor may be satisfied by virtue of the evacuee status of the victims. On Sunday, August 28, 2006, New Orleans Mayor Ray Nagin ordered a mandatory evacuation.[122] It was the first time a mandatory order had been issued for the residents in the region.[123] It may also be enough to create a special status of the residents and satisfy the relationship prong of the state-created danger test.

The last element of the exception is the defendant's conduct. Courts willing to utilize the state-created danger exception demand

115. *Id.* at 3. "Driving winds had torn door off houses, bent trailers like horseshoes, sent sloops surfing onto front lawns, and chewed up industrial parks, coughing out plywood and shards." *Id.* There were seven reported storm-related deaths. *Id.* The number eventually grew to 14 deaths in Florida as being directly, indirectly or possibly related to Hurricane Katrina. Ctr. For Disease Control, *Mortality Associated with Hurricane Katrina – Florida and Alabama*, MMWR WEEKLY, Mar. 10, 2006, at 239, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5509a5.htm.

116. Awareness of the risk alone is not enough to impose an affirmative duty to act and support a claim. ROSS, *supra* note 49, at 190.

117. See *supra* notes 23–27 and accompanying text.

118. Former Secretary of State Colin Powell shared his disappointments on the government's response to Hurricane Katrina and voiced his frustration with the lack of resources available for Katrina victims in a televised interview not long after the storm. *Colin Powell on Iraq, Race, and Hurricane Relief,* ABC NEWS (Sept. 8, 2005) http//abcnews.go.com/2020/Politics/story?id=1105979&page=1 (interview by Barbara Walters with Colin Powell, former Secretary of State on "20/20").

119. *See* Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996); Seidule, *supra* note 94, at 8.

120. *Id.*

121. Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir, 1989).

122. *See* A FAILURE OF INITIATIVE, *supra* note 1, at 111.

123. Russell, *supra* note 19.

that the defendant's conduct create a risk that otherwise would not have existed for the plaintiff, or one that enhances the risk faced by the plaintiff.[124] With regard to the Katrina victims, the court must only examine the government's response to the victims once the threat of the hurricane bore down. One argument is that the government's conduct created a risk that would not have otherwise existed because evacuees relied on the government to help get them to safety.[125] Evacuation is a critical component of hurricane preparedness, and detailed evacuation, planning, and implementation is a responsibility of potentially affected areas.[126] Indeed, New Orleans city officials were responsible for executing an evacuation plan and were vested with the authority to commandeer resources to assist in the evacuation.[127] Nevertheless, more than 50,000 people were not evacuated before the storm hit.[128] Furthermore, the decision to issue the mandatory evacuation order only 15 hours before the storm was scheduled to hit exacerbated an already dangerous situation.[129] Residents waited on the mandatory evacuation before seeking refuge,[130] and justifiably so. It is unreasonable for local officials to attempt to

124. "To the *Wood* majority, the realities of the time and place where the plaintiff was stranded enhanced the risk that she would be harmed." SHWARTZ, *supra* note 94, at 160.

125. Evacuation failures led to "catastrophic circumstances" when Katrina made landfall in New Orleans. A FAILURE OF INITIATIVE, *supra* note 1, at 103. After the levy failures, floodwaters ran through low-lying areas and thousands of people were trapped. *Id.* at 103–104. *See also* ANDERSON COOPER, DISPATCHES FROM THE EDGE 124–30 (2006).

126. A FAILURE OF INITIATIVE, *supra* note 1, at 103.

127. *Id.*

> [T]he New Orleans Plan provides that "[t]ransportation will be provided to those persons requiring public transportation from the area," placing the Regional Transit Authority as the lead agency for transportation, supported by multiple federal, state, and local agencies, including the Orleans Parish School Board, New Orleans Equipment Maintenance Division, Louisiana Department of Transportation, Louisiana National Guard, Port of New Orleans, U.S. Coast Guard, New Orleans Public Belt Railroad, and Amtrack. The tasks allotted to the RTA include: "plac[ing] special vehicles on alert to be utilized if needed[,] [p]osition[ing] supervisors and dispatch[ing] evacuation buses [and i]f warranted by scope of evacuation, implement[ing] additional service."

Id. at 113.

128. *Cf. id.* at 115. Despite their authority to requisition resources to implement the evacuation plan, New Orleans city officials failed to utilize the resources needed to move 70,000 people out of storm's path. *Id.* at 103. "Those who did not evacuate included many who did not have their own means of transportation."

129. *See supra* note 17.

130. BRINKLEY, *supra* note 14, at 5. Some residents, even after receiving the mandatory evacuation, did not heed the warnings and attempt to relocate to safer ground. *See* A FAILURE OF INITIATIVE, supra note 1, at 114. These stubborn residents do not excuse the acts of the local officials with regard to those who were ready, willing but unable to evacuate as the storm closed in. It is estimated that between 10 and 25 percent of residents play "hurricane roulette" and will not heed a mandatory evacuation order. *Id.*

escape liability by pointing to general hurricane warnings; because residents know that an imminent threat should trigger a mandatory evacuation, they reasonably relied on the local officials in this regard. Furthermore, local officials made a bad situation worse by failing to take basic steps needed to assist their special-needs residents.[131] Specifically, "hundreds of city buses and school buses that could have been used for evacuation sat useless . . . ."[132] The failure to issue a timely evacuation order, coupled with the failure to help residents without transportation get to higher ground, satisfies the last element of the state-created danger test; these stark acts by officials are no different than casting an evacuee in a proverbial "snake-pit."[133]

C. *Special Relationship Exception*

In addition to the state-created danger exception to the no-duty rule advanced in *DeShaney*, the United States Supreme Court also recognized a narrow exception known as the special relationship exception.[134] Under the special relationship exception, an affirmative duty to act may be triggered by a special relationship between the state actor and the plaintiff.[135] The special relationship has typically been held to apply in instances involving prisoners,[136] mental patients who have been involuntarily institutionalized,[137] and those who have been involuntarily placed at foster homes.[138] An analysis of lower courts wrestling to apply this exception has generally revealed the following traits: the state's assumption of control over the plaintiff's envi-

131. BRINKLEY, *supra* note 14, at 64–65 (addressing the reluctance of New Orleans nursing homes to leave absent a mandatory evacuation order from the mayor or governor). In addition, the failure of the levee system could also be properly characterized as a dangerous example of state and local enhancement of risk. The levees were an "incomplete patchwork of protection riddled by design flaws and poor maintenance. The hurricane protection system in New Orleans and Southeast Louisiana was a system in name only." John Schwartz, *Army Builders Accept Blame Over Flooding*, N.Y. TIMES, June 2, 2006, at A1.

132. A FAILURE OF INITIATIVE, *supra* note 1, at 119.

133. Testimonials support the theory that a more timely evacuation would have saved lives. For instance, "[t]he President of the Louisiana Nursing Home Association told Select Committee staff that at least one nursing home had been unable to evacuate its patents prelandfall because it could not find bus drivers by the time the mandatory evacuation order was issued." *Id.* at 115.

134. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198–201 (1989). The special relationship exception has also been referred to as the custodial relationship exception.

135. *See* SCHWARTZ, *supra* note 94, at 161.

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

137. *See* Youngberg v. Romeo, 457 U.S. 307 (1982).

138. *See* Angela R. v. Clinton, 999 F.2d 320 (8th Cir. 1993). In fact, the majority in *DeShaney* said that if Joshua DeShaney had been in foster home, the analysis would have differed significantly. 489 U.S. at 202 n.9. "Had the State by affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id.*

ronment—which results in the plaintiff's lack of choice in assistance—and the state's failure to provide a meaningful alternative.[139] A classic example is the welfare of a prisoner being held in police custody who is suffering from a medical condition.[140] Although the state has no general duty to provide medical care for its citizens, it does have an affirmative duty to provide medical care for the prisoners in its care.[141] There are two guiding factors for such a duty: first, the state has assumed control of the prisoner's environment and welfare by virtue of the incarceration, and second, the prisoner has been deprived of private sources of aid through his or her confinement.[142]

The 1992 case of *Sinthasomphone v. City of Milwaukee*[143] serves as an unsettling example of the special relationship exception. In *Sinthasomphone*, police responded to a 911 emergency call to help a person in need of assistance.[144] When the police arrived shortly before 2 a.m. on May 27, 1991, they found Konerak Sinthasomphone, a Laoatian 14-year-old boy, wandering the streets naked and bleeding.[145] The two black women who had called police were present and trying to steer the young man to safety.[146] "However, the police officers ordered the women to leave the young man alone."[147] When a white man from a nearby apartment appeared and claimed that the boy was with him,[148] the black women vigorously objected.[149] Nevertheless, the police delivered the boy to the man, who killed him almost as soon as the police left the scene.[150] The man was serial killer Jef-

139. Ross, *supra* note 49, at 170.

140. *See Estelle*, 429 U.S. at 104–05 (holding that prison officials who failed to provide adequate medical care for an inmate violated the Constitutional ban on cruel and unusual punishment).

141. *See id.*

142. *See* Saielli, *supra* note 61, at 174. In prison settings, "the government's breach of an affirmative duty constitutes a constitutional deprivation under section 1983." *Id.*

143. Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343 (E.D. Wis. 1992).

144. *Id.* at 1345.

145. *Id.* at 1345–46.

146. *Id.* at 1346.

147. *Id.*

148. Estate of Sinthasomphone v. City of Milwaukee, 838 F. Supp. 1320, 1323 (E.D. Wis. 1993). The man had met Konerak at the mall, and taken him home with a promise to pay him to pose for pictures. *Id.* at 1322. After getting Konerak to his apartment, the man offered him a drink laced with Halcion, and when Konerak fell asleep, he drilled a small hole into the child's head. *Id.* The man then poured diluted hydrochloric acid into the hole so Konerak would be in a "zombie-like" state. *Id.*

149. *See Sinthasomphone*, 785 F. Supp. at 1346–47. The complaint also alleged that the women told police that the child had been drugged and that the white man claiming custody of Konerak had referred to him by different name. *Id.* at 1345–46. The police officers threatened them with arrest if they continued to intervene or provide information. *Id.* at 1346.

150. *Id.* at 1345–46. The police concluded that Konerak and Dahmer were adult homosexual partners who, at the time, were staying together. *Id.* at 1346–47.

frey Dahmer, who eventually confessed to killing 17 young men between the ages of 14 and 28.[151]

In its Section 1983 claim against the responding police officers and the City of Milwaukee Police Department, the parents of the slain boy argued that their Fourteenth Amendment rights had been violated by the officers' failure to protect their son from danger.[152] More significantly, the *Sinthasomphone* plaintiffs argued that the officers prevented private citizens from helping their child and delivered him into Dahmer's custody.[153] The city moved to dismiss the complaint based on the argument that the death resulted from the wrongs of a third party, and there could be no city liability for a failure to protect from the acts of an intervening actor.[154] The Eastern District of Wisconsin rejected the city's argument.[155] The court reasoned that the facts of the case were best characterized—not as a failure to act—but one in which the police officers took affirmative steps to create the danger.[156] Also, the court found that even under a failure to act characterization, it could not "at the motion to dismiss stage . . . say that no special relationship existed between Konerak and the three police officers."[157] Where the state assumed control of the child's environment and cut off private sources of aid without providing a meaningful alternative, the plaintiff stated a cause of action under Section 1983 and the Due Process Clause.[158]

This same analysis applied to the circumstances in *Ross v. United States*.[159] In *Ross*, a police officer arrived on the scene at the time a

151. *Id.* at 1345. At the time, Dahmer was on probation for a 1988 conviction for sexual abuse of a male child. *Id.* at 1346. Dahmer pled guilty to 15 of his 16 Milwaukee homicides, which were committed between January 1988 and July 1991. *Id.* at 1345. In February 1992, Dahmer was sentenced in Wisconsin to life in prison. *The Dahmer Timeline*, USA TODAY, Nov. 29, 1994, at 3A. In November 1994, Dahmer was attacked in prison and killed. *Id.*

152. *See Sinthasomphone*, 785 F. Supp. at 1347.

153. *Id.*

154. *Id.* at 1346. The city moved to dismiss the cases under 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. *Id.* The plaintiff also raised the custom and policy argument, which was found by the court to state a claim. *Id.* at 1350–51. The court found that a "*de facto* custom or policy exists, giving rise to section 1983 liability." *Id.* at 1351.

155. *See id.* at 1350–51. The parents of the subsequent victims killed by Dahmer also attempted to bring suit but were summarily rejected. *Id.* at 1351. The court deemed the subsequent deaths "too remote" under law to establish a claim. *Id.*

156. *Id.* at 1349. "In other words, the allegations are not just of police inaction, but of police action, action which violated Konerak Sinthasomphone's substantive due process rights." *Id.*

157. *Id.* at 1350.

158. *See* Estate of Sinthasomphone v. City of Milwaukee, 838 F. Supp. 1320 (E.D. Wis. 1993). Though successful in surviving a motion to dismiss, the plaintiff's due process claim could not survive a motion for summary judgment. *See id.* The court found that the officers were entitled to qualified immunity on the due process claim against them and allowed the equal protection claims against them to remain. *Id.* at 1328.

159. Ross v. United States, 910 F.2d 1422 (7th Cir. 1990).

12-year-old boy was drowning and refused to allow other would-be rescuers to intervene on the boy's behalf.[160] The child had walked out onto a breakwater, slipped, and fell into the waters of Lake Michigan.[161] A friend quickly summoned help, and within ten minutes, seven people arrived to come to help the child.[162] Incredibly, the officer was enforcing an intergovernmental agreement and elected to wait for the arrival of the county rescuers to save the boy; the officer also prevented anyone else present from assisting the drowning child.[163] He even threatened the others on the scene with arrest if they attempted to help.[164] After another twenty minutes of struggling in the water, the preferred workers rescued the boy, but he eventually died as a result of his injuries.[165] The Seventh Circuit found that allegation stated a Section 1983 cause of action against the county defendants.[166]

The special-relationship exception to the no-duty rule, which requires both the state's assumption of control of the environment and its failure to provide a meaningful alternative, can be applied to the local and state government response to Katrina victims in support of a Section 1983 claim for a due process violation. First and foremost, it is paramount that the plaintiffs trace the narrative of Katrina to emphasize conditions of the plaintiffs, rather than the circumstances that led

160. *Id.* at 1424–25.

161. *Id.* at 1424.

162. *Id.* A nearby festival was occurring, and several emergency response personnel were nearby. *Id.* Among the group of people who had come to offer assistance within ten minutes: two lifeguards, two firefighters, one police officer, and two civilian scuba divers with a boat and equipment. *Id.*

163. *Id.* at 1424–25.

> The city of Waukegan and Lake County had previously entered into an intergovernmental agreement that required the county to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Under its authority to police the lake, the county and its sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the city of Waukegan Fire Department could carry out such a rescue.

Id.

164. *Id.* at 1425.

165. *Id.*

166. *Id.* at 1434. The plaintiff also attempted to make a claim under the Federal Torts Claims Acts against the city for its role in the agreement and the United States based on the United States' status as owner of the breakwater. *Id.* at 1426. The court ruled that the harm was not foreseeable and dismissed the United States from the suit. *Id.* at 1434. After winding its way through the court system (five different courts in eight years), the case against the city was dismissed and the county was urged to "exhaustively explore" the county's "duty, if any, to provide the police and safety services at issue" before the court would entertain any more motions to dismiss. *See* Ross v. County of Lake, 764 F. Supp. 1308, 1309–11 (N.D. Ill. 1991); Ross v. City of Waukegan, 5 F.3d 1084, 1086 (7th Cir. 1993).

them there.[167] Namely, the state and local officials shared a special relationship with the evacuees by virtue of the evacuees' status. The state assumed control of the environment and responsibility by issuing a contraflow order and deeming the area a mandatory evacuation zone. At 4 p.m. Saturday, August 27, 2006, a little more than 38 hours before the storm made landfall, the governor issued a contraflow traffic order that impacted almost 80 percent of the region.[168] The contraflow order redirected traffic on affected roads to move only out of the city.[169]

While the contraflow order has been credited with saving lives,[170] it still must be evaluated through the massive restriction it placed on potential outside sources of aid.[171] The analysis of the contraflow order becomes even more troubling when considered with the state's shamefully inadequate fulfillment of its evacuation obligations. Significantly, the issuance of a mandatory evacuation order triggered a duty by the state to adhere to its own guidelines, which called for commandeering resources to help those in need. Still, thousands were left behind.[172] The failure of the officials to provide transportation out of the storm's path all but guaranteed that no meaningful alternative would be available to those in Katrina's path.[173] Moreover, the crowds that ended up in the shelter were also facing hardship.

167. *See generally* Shapiro, *supra* note 95. "A broader reading of the special relationship doctrine would offer greater protection of an individual's right to be free from the arbitrary government conduct that due process claims were meant to guard against." Weisberg, *supra* note 78, at 1130.

168. BRINKLEY, *supra* note 14, at 54, 108. The Louisiana State Police turned over all lanes to outward traffic on four New Orleans interstate highways. *Id.* Two toll roads, the Crescent City connection and the Lake Ponchartrain Causeway were all free. *Id.* The contraflow run through Sunday, August 28, 2006, at 6 p.m. *Id.* at 64. The contraflow efforts were coordinated with the states of Mississippi and Texas. *Id.*

169. *Id.*; *see also* Mary Swerczek, *Police meet to iron out evacuation glitches; Contraflow Basically Worked Well, Chief Says*, TIMES-PICAYUNE (New Orleans), May 10, 2006, at 1B (noting that the contraflow plan worked well, but that residents could benefit from education about the routes and an automated call system).

170. "Up to 1.2 million Louisiana residents followed the evacuation orders [and used the contraflow pattern to leave] in their private vehicles." A FAILURE OF INITIATIVE, *supra* note 1, at 64.

171. Despite the contraflow plan, it soon became apparent that thousands in New Orleans did not (or could not) leave. Even those who heeded the call had some trouble. "A last minute evacuation of America's thirty-fifth largest city was fraught with problems, with or without the relief of contraflow. Those on the highways were the modern day equivalent of the Joads, the Dust Bowlers who escaped Oklahoma in an old touring car during the Great Depression." BRINKLEY, *supra* note 14, at 101. In addition, anyone with relatives or friends in neighboring states would be hard-pressed during the contraflow efforts to drive in to the city to offer aid.

172. *See* A FAILURE OF INITIATIVE, *supra* note 1, at 103. Of the 70,000 individuals who did not leave, many did not have their own means of transportation. *Id.* "Despite the declaration of a mandatory evacuation on Sunday before landfall, New Orleans officials still did not completely evacuate the population. Instead, they opened the Superdome as a 'shelter of last resort' for those individuals." *Id.*

173. *See supra* notes 128-30 and accompanying text. Fortunately, not everyone left behind perished in the storm. "The U.S. Coast Guard alone reported that it rescued

The shelters in New Orleans were "woefully inadequate."[174] Basic emergency planners prefer evacuation over sheltering because those sheltered must face the most intense dangers of the storm.[175] The so-called "shelter of last resort"—the Superdome—was ill-equipped to deal with the masses who sought refuge there.[176] Even if the state had no obligation to provide transportation or shelter to evacuees, once it assumed the duties, it did have a duty to act within Constitutional guidelines.[177] Essentially, controlling the flow of traffic into the city without providing a way out cuts off private sources of aid without providing a meaningful alternative—the *sine qua non* of a special relationship exception.[178]

IV. CONCLUSION

What has been learned from Katrina? For now, it seems, not much. One year after the storm ravaged the Gulf Coast, reports indicate that the government is still unable to meet the needs of its citizens.[179] In

more than 33,000 [people]." A FAILURE OF INITIATIVE, *supra* note 1, at 116. There were also rescues completed by the Louisiana National Guard, local police, the Department of Wildlife and Fisheries, Federal rescue personnel and several law enforcement and private volunteers. *Id.*

174. *See id.* at 113.

175. *Id.*

176. Shortly after Katrina hit, the Superdome devolved into the "epicenter of human misery." BRINKLEY, *supra* note 14, at 192. There was a hole in the roof, the building lost power, the artificial turf was soaked, toilets backed up and grown men were defacating in front of little children. *Id. But see* A FAILURE OF INITIATIVE, *supra* note 1, at 117 (stating that while the situation was bad, "there was never a shortage of food and water"). The Convention Center, which was never designated a shelter, was sanctioned by the city and was worse. *Id.* at 118. The Convention Center had no power, no functioning toilets, no food and no water. *Id.* New Orleans Mayor Ray Nagin announced at the start of the 2006 hurricane season that "based on the bitter experiences of Katrina, the city had no plans to open a massive shelter in a hurricane." James Varney, *Nagin to Set Forth Storm Plan*, TIMES-PICAYUNE (New Orleans), May 2, 2006, at 1A.

177. "The Court has held that once a state undertakes to provide a service, it must perform that service in accordance with constitutional principles." Sarah C. Kellogg, *The Due Process Right to a Safe and Humane Environment for Patients in State Custody: The Voluntary/Involuntary Distinction*, 23 AM. J.L. & MED. 339, 355–56 (1997).

178. Admittedly, courts have been very reluctant to expand the special relationship exception beyond those involuntarily held. *See, e.g.,* Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994) (holding that the state had no constitutional duty of protection to a voluntary summer school student killed after leaving a school session). However, the traits of involuntary classification—loss of control over one's choices and few options to provide for one's welfare—should, by analogy, lend support to the special relationship characterization of the relationship that exists between hurricane evacuees and the state and local officials over their charge.

179. *See* Christopher Lee & Anushka Asthana, *As Katrina Suffering Persists, Many Doubt Government Can Handle Next Big Storm*, S. FLA. SUN-SENTINEL, Aug. 22, 2006, at A1; Leslie Williams, *Red Cross: N.O.'s Shelters Unsafe*, TIMES-PICAYUNE (New Orleans), June 13, 2006, at 1B. While the new plan calls for Amtrak trains and about 100 buses to be available to move "special needs" residents out of harms way and will make 65,000 shelter beds available for those who can't make other arrange-

fact, some government officials seem even more determined to push the responsibility for preparedness on the shoulders of its citizens,[180] despite the obvious lack of resources available.[181] And the systemic failures that plagued the region are not unique to New Orleans or hurricane preparedness.[182]

It is therefore critical to maintain a dialogue about government responsibility[183] and the recognition of affirmative duties in the Constitution.[184] It is even more important to pursue creative measures to compel government to realize the expansive difference between *deciding* and *doing*.[185] Civil Rights case law developed through lower courts in the post-*DeShaney* world still offers some means to meet the challenges through an expanded reading of the Due Process Clause. First, an argument may be made that the local failures concerning the late-issued mandatory-evacuation order, in light of the obvious immobility of the predominantly poor residents in the storm's worst path, supports a state-created danger model for liability. Next, there is the argument that the evacuee status, contraflow orders, and appallingly deficient "shelters" give rise to a special-relationship exception. Hattie Johns, a 74-year-old Katrina evacuee, expressed the frustration many of her neighbors shared: "I know they are saying 'get out of town,' but I don't have any way to get out. If you don't have no money, you can't go."[186]

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ments, protocol for evacuee trailer parks such as Renaissance Village is still unsettled. Jan Moller & Gwen Filosa, *Hurricane Evacuation Drill Highlights Plans, Problems; Communications Snag Cancels Part of Exercise*, TIMES-PICAYUNE (New Orleans), May 24, 2006, at 1B.

180. *Leave Early if Storm on Way, Officials Urge*, TIMES-PICAYUNE (New Orleans), July 23, 2006, at 28; Graham Brink, *You're on Your Own. Ready?*, ST. PETERSBURG TIMES ONLINE, June 1, 2006, http://www.sptimes.com/2006/06/01/news_pf/State?You_re_on_your_own_Re_shtml (quoting a county emergency management director in Florida as saying "We're telling them the first 72 [hours] are on you. The laggards needs to wake up and be ready to take care of themselves.").

181. *See, e.g.*, Bill Hirschman, *S. Florida Poverty Level Rises 50,000, Census Says*, S. FLA. SUN-SENTINEL, Aug.31, 2006, at 1B (citing the increase in poverty throughout the state of Florida).

182. Sadly, system failures with infrastructure are becoming pervasive around the country. Infrastructure elements including transportation, dams, retaining walls, hazardous waste handling and treatment facilities throughout the nation are plagued with problems and have not been properly maintained for decades. *See* Young, *supra* note 11, at 43. Each of these deficiencies poses a serious threat to public safety. *Id.*

183. Pointing out that "Americans have a very, very short attention span," American filmmaker Spike Lee recently turned his lens to the Katrina catastrophe. *See* WHEN THE LEVEES BROKE: A REQUIEM IN FOUR ACTS, (HBO televised broadcast Aug. 29, 2006). The four-hour documentary chronicles the government failures in response to the storm. "I think when we look back on this many years from now, I'm confident that people are gonna see what happened in New Orleans as a defining moment in American history."

184. *See* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982 (1996).

185. *See supra* note 1 and accompanying text.

186. CNN Reports: Katrina State of Emergency 16 (2005).

Whether the story is cast with an emphasis on the steps taken or the steps missed by the government, the same Constitutional values are assaulted and destroyed. Indeed, to the Katrina victims, it is a distinction without merit. It certainly meant nothing to the 1,500-plus Katrina victims who paid with their lives.[187]

The debilitating effects of poverty that paralyzed the poor, sick, and elderly evacuees in New Orleans should have pushed the government to follow its own procedures to ensure a safe evacuation out of the storm's path. Instead, the government failed its citizens. "Katrina was an act of nature," said one commentator.[188] "But almost everything that happened both before and after was an act of neglect."[189] To ensure that such neglect—with its ensuing fatalities and immeasurable losses—never happens again, the state and local officials must be held liable under the law.

Section 1983 stands for "the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful."[190] Coupled with an expanded reading of the Due Process Clause, Section 1983 can be used as a powerful tool to promote government initiative.[191] It is one more weapon against the threat of disasters, natural and unnatural.[192]

187. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972).

188. Gary Younge, *New Orleans Forsaken*, NATION, Sept. 18, 2006, *available at* http://www.thenation.com/doc/20060918/younge.

189. *Id.*

190. NAHMOD, *supra* note 35, at 50.

191. *See* Mark R. Brown, *Accountability in Government and Section 1983*, 25 U. MICH. J.L. REFORM 53, 57 (1991) ("Section 1983 is perhaps the most potent civil weapon available for securing accountability in government.").

192. "There is plenty of blame to go around. What began as a natural disaster has become a man-made one." COOPER, *supra* note 125, at 160.