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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** JOSHUA DESHANEY, A MINOR, BY HIS GUARDIAN AD  
LITEM, AND MELODY DESHANEY, Petitioners V.  
WINNEBAGO COUNTY DEPARTMENT OF SOCIAL  
SERVICES, ET AL.

**CASE NO:** 87-154

**PLACE:** WASHINGTON, D.C.

**DATE:** November 2, 1988

**PAGES:** 1 thru 59

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X  
3 JOSHUA DESHANEY, A MINOR, BY :  
4 HIS GUARDIAN AD LITEM, AND :  
5 MELODY DESHANEY, :  
6 Petitioners :  
7 v. : No. 87-154  
8 WINNEBAGO COUNTRY DEPARTMENT OF :  
9 SOCIAL SERVICES, et al. :

10 -----X  
11 Washington, D.C.

12 Wednesday, November 2, 1988

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 12:54 o'clock p.m.

16 APPEARANCES:

17 DONALD JAMES SULLIVAN, ESQ., Cheyenne, Wyoming; on behalf  
18 of the Petitioners.

19 MARK J. MINGO, ESQ., Milwaukee, Wisconsin; on behalf of  
20 the Respondents.

21 DONALD B. AYER, ESQ., Deputy Solicitor General,  
22 Department of Justice, Washington, D.C.; as  
23 amicus curiae supporting Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

DONALD JAMES SULLIVAN, ESQ.

On behalf of the Petitioners

3

MARK J. MINGO, ESQ.

On behalf of the Respondents

32

DONALD B. AYER, ESQ.

As amicus curiae supporting Respondents

49

REBUTTAL ARGUMENT OF

DONALD JAMES SULLIVAN, ESQ.

58

P R O C E E D I N G S

(12:54 p.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 87-154, Joshua DeShaney v. Winnebago County  
5 Department of Social Services.

6 Mr. Sullivan, you may proceed whenever you're  
7 ready.

8 ORAL ARGUMENT OF DONALD JAMES SULLIVAN

9 ON BEHALF OF PETITIONERS

10 MR. SULLIVAN: Mr. Chief Justice, and may it  
11 please the Court:

12 We are here contending today not for a broad  
13 constitutional mandate to the states to do all good  
14 things to all people, nor do we contend for a broad  
15 constitutional duty to prevent all harm or all sadness,  
16 nor do we contend for a broad constitutional duty to  
17 protect all children in all cases.

18 QUESTION: (Inaudible) narrow one (inaudible).

19 MR. SULLIVAN: None in those situations --

20 QUESTION: Oh.

21 MR. SULLIVAN: -- Justice White.

22 We do suggest that there is one and only one  
23 exquisitely narrow circumstance where there is an  
24 affirmative duty. I would suggest that there are two  
25 primary elements to the one and only one circumstance

1 for which we argue.

2 The first is the existence of a child/parent  
3 relationship. The other is what I term enmeshment,  
4 intricate intimacy, enmeshment of the agents of the  
5 state in a particular circumstance which would have  
6 three characteristics: the first, an extreme danger to  
7 a particular individual child; the second, abundant  
8 actual knowledge on the part of the agents of the state;  
9 and the third, an actual undertaking by the state to  
10 protect the child.

11 QUESTION: You derive all this from the  
12 language of the due process clause?

13 MR. SULLIVAN: Indeed, Your Honor. We think  
14 it arises from that and from the nature of the  
15 relationship and from the way the Court has -- has  
16 accorded the relationship. If I may -- if I may explain.

17 It is my view -- it is our view that the  
18 protector of the child, the raiser of the child, the  
19 person with the right and the power and the authority  
20 and the duty to educate the child, teach the child,  
21 provide medical care, all those parental things,  
22 including setting bedtime, is the parent and not the  
23 state.

24 The -- the other side of that coin is that  
25 there is one and only one circumstance where when the

1 family unit -- and I don't care whether it's a married  
2 family or a step-parent or whatever, but when the child  
3 is at home and the door is closed to the world, the  
4 people with whom that child is locked in, his natural  
5 and his inherent protectors, from those individuals  
6 alone, whether it's a father, a step-mother, a live-in  
7 girlfriend of what have you -- from those protectors  
8 alone he has no protection. And in that one and only  
9 one circumstance, I think that's appropriate.

10 And I would further respond to your question,  
11 Mr. Chief Justice, by saying this. It is only in that  
12 one circumstance, as I understand the cases -- it is  
13 only in that one circumstance that the Court has already  
14 interposed any aspect of the Constitution. And I don't  
15 want that changed. I don't ask that that be applied to  
16 a different circumstance.

17 What I'm saying is this. Take the situation  
18 where the child is locked behind the door with his  
19 protector and the protector becomes the predator, and a  
20 proceeding is brought at the extreme end of the child  
21 protection spectrum to terminate the parental rights.  
22 The Court has already said that the Constitution governs  
23 that relationship. The Court has already recognized it  
24 in the relationship between the adult and the child that  
25 the Constitution prevails and it prevails both

1 substantively and procedurally.

2           What I mean is this. We know that any parent  
3 has a constitutionally recognized right to the -- if I  
4 may simplify it, to the possession of the child, care,  
5 custody, companionship, all those -- all those kinds of  
6 things that go with being a parent. We also know that  
7 that right of parenthood cannot be terminated except by  
8 procedural due process protections. So, I'm saying to  
9 the Court that in that most intimate relationship, the  
10 Court has already recognized that the Constitution has  
11 application.

12           The Court additionally has recognized, I  
13 believe, that a child -- indeed, any of us -- has a  
14 constitutionally protected right to physical integrity,  
15 to bodily protection. What I'm suggesting --

16           QUESTION: A -- a right against the state.

17           MR. SULLIVAN: And a right that -- that arises  
18 out of the Constitution to remain alive, yes, sir.

19           QUESTION: Well, but -- but it's protected  
20 only against the state. It's not protected against  
21 private individuals.

22           MR. SULLIVAN: Well, I think that's part of  
23 what the Court is going to have to address in this case.

24           QUESTION: Well, why don't we start with the  
25 language of the Fourteenth Amendment which says that a

1 state shall not -- what does it state -- deprive any  
2 person of life, liberty or property without due process  
3 of law.

4 MR. SULLIVAN: Yes, sir.

5 QUESTION: Now, certainly we've held in many  
6 cases that the state may not deprive someone of life,  
7 but we've never held that that provision protects in the  
8 constitutional sense a private -- a private attack on  
9 another person.

10 MR. SULLIVAN: I agree with that, Mr. Chief  
11 Justice.

12 And I would further agree that in the -- in  
13 the context in which prior to today that question has  
14 been addressed by the Court, I agree that that's the  
15 correct holding. For example, if you were to hold  
16 otherwise, then the police department would have an  
17 obligation to prevent the mugging and a whole host of  
18 things that are simply unworkable and are not to be  
19 found in the Constitution.

20 What I -- what I'm suggesting to you is that,  
21 first of all, this is a question in the most intimate  
22 relationship. That has not been addressed, to my  
23 knowledge, by the Court before. And I think that it's  
24 consistent with the nature of the circumstance that  
25 we're dealing with, and I think it's consistent with the



1 other constitutional applications the Court has afforded  
2 to the child/parent relationship.

3 If you have -- if you have the parent and  
4 child in an intimate relationship and the Constitution  
5 properly lies in -- in that setting, and if the rights  
6 of the parent with all of his natural powers in addition  
7 -- if the rights of the parent are recognized, why  
8 should the rights of the child be less recognized? It  
9 -- it seems to me that it's simply a balancing in --

10 QUESTION: But -- but the rights of the parent  
11 are recognized to the extent that the state may not  
12 interfere with it.

13 MR. SULLIVAN: I think that's entirely true.  
14 And --

15 QUESTION: And the -- and the question here is  
16 the extent to which you impose a mandatory duty on the  
17 state to act affirmatively to protect the child.

18 MR. SULLIVAN: That's right, Justice --

19 QUESTION: And the fact that it's -- that  
20 other cases are not workable seems to me not the point.  
21 The question is where do you derive the duty.

22 MR. SULLIVAN: Well, it occurs to me that you  
23 derive the duty first and foremost from the nature of  
24 the -- of the relationship that you're -- that you're  
25 analyzing in a -- in a constitutional setting, and

1 secondly, from the fact that the Constitution does  
2 admittedly apply in that relationship.

3 QUESTION: Well, the only -- the only cases in  
4 which the Court has found an affirmative duty on the  
5 part of the state to provide basic services is in a  
6 setting like a prison or a state institution where the  
7 state has already deprived the individual of the  
8 individual's liberty and institutionalized them.

9 MR. SULLIVAN: Justice O'Connor, I -- I  
10 generally --

11 QUESTION: This is certainly a step far beyond  
12 that that you're asking us to take.

13 MR. SULLIVAN: The only word I would -- I  
14 would differ with you is -- is the word "far." It  
15 occurs to me -- obviously, the prison cases are in an  
16 Eighth Amendment context, so they are not -- they are  
17 not the identical setting. The institutionalized,  
18 hospitalized settings like Youngberg is the other  
19 category to which -- to which I think you refer.

20 And I think that -- I think that's what the  
21 notion of enmeshment -- and that's not a phrase that I'm  
22 aware the Court has used. That's -- that's a -- that's  
23 a word that I use for my own understanding and the  
24 clarity -- I hope the clarity of my own thinking -- that  
25 I think that's what's described there is to what extent

1 has the state become involved in -- in the life of this  
2 person. If I may give an example.

3 QUESTION: If -- if your theory were to be  
4 accepted, it seems to me it would have a real deterrent  
5 effect on state child abuse programs. Why would a state  
6 want to undertake a child abuse program at all if they  
7 face liability if they guess wrong? I can't -- I think  
8 you're asking the Court to take a step that is perhaps  
9 quite unwarranted and quite dangerous.

10 MR. SULLIVAN: If -- if the circumstance were  
11 as you -- as you phrased it, Justice O'Connor, I would  
12 agree. If -- and the Seventh Circuit addressed that in  
13 its razor's edge argument. The Seventh Circuit said you  
14 would put child protection authorities in a damned if we  
15 do, damned if we don't situation.

16 But this Court relatively recently decided  
17 Daniels and decided Davidson, and I think solves that  
18 problem entirely because I understand under -- under  
19 those cases that even if we guess wrong, we are safe  
20 from liability. And that's -- that's vitally important  
21 here. I understand Daniels and Davidson -- again, to  
22 simplify in -- in paraphrasing -- to say even if you're  
23 negligent, it's okay in a 1983 setting. And the Court  
24 reserved for another occasion -- I think this may well  
25 be the occasion -- the -- the question of something more

1 aggravated than -- than negligence.

2 But what I'm saying is this. In the whole  
3 range of state action dealing with children, all conduct  
4 that is -- let's assume that we can recognize some  
5 standard. All conduct that is proper, obviously, is not  
6 actionable. All conduct that is negligent is not  
7 actionable.

8 And it has never been in contest that if we  
9 had the circumstance where the police officer or the  
10 child protection worker or someone else were inflicting  
11 a beating -- you know, that's not the kind of case we're  
12 talking about. And the next topic, obviously, that we  
13 have to address is the question of whether it's gross  
14 negligence, deliberate indifference or what have you.

15 So, I -- I respectfully and very strongly  
16 suggest that it's not a question of do we guess wrong at  
17 our peril. We -- under the existing holdings of this  
18 Court, which I do not ask the Court to change, we've  
19 already said to the child protection agency it's okay to  
20 guess wrong. It's okay if you make a mistake. And that  
21 has to be. I think government can't function without  
22 that --

23 QUESTION: Well, Mr. Sullivan, don't you have  
24 to persuade us that the child has an entitlement under  
25 Wisconsin law?

1 MR. SULLIVAN: Well, I -- I think first I have  
2 to persuade you that the child has an entitlement and  
3 the --

4 QUESTION: What -- what's your argument that  
5 he does?

6 MR. SULLIVAN: Well, there are two. The one  
7 -- the one I've addressed, which is the -- the  
8 substantive due process inherent in the relationship and  
9 inherent in the constitutional control of the  
10 child/patient -- parent relationship. The second one --

11 QUESTION: You mean from that arises an  
12 entitlement?

13 MR. SULLIVAN: I feel that from that arises an  
14 entitlement in the extreme and only in the extreme  
15 circumstance that I posit to the Court.

16 QUESTION: Has a Wisconsin court said that  
17 it --

18 MR. SULLIVAN: The Wisconsin standard is mere  
19 negligence. The Wisconsin state tort law standard is  
20 mere negligence, and this Court has already said that's  
21 not acceptable in a 1983 context.

22 Justice Brennan, your -- your question to me  
23 was -- was do I have to persuade you --

24 QUESTION: Yes.

25 MR. SULLIVAN: -- that the child has an

1 entitlement under Wisconsin law. That's addressed in  
2 the briefs. That would be basically the Roth approach  
3 to it, and that's a -- that's a separate approach which  
4 I'm happy to address at this juncture since you -- since  
5 you put the question.

6 QUESTION: Mr. Sullivan, let me put it another  
7 way. This child was severely injured.

8 MR. SULLIVAN: Yes, sir.

9 QUESTION: And the state placed him in a  
10 position of extreme danger, did it not?

11 MR. SULLIVAN: Eventually they did, yes, sir.  
12 And the reason for that --

13 QUESTION: Well, they put him in -- not  
14 eventually, but they put him in a position of extreme  
15 danger. It certainly turned out to be that way.

16 MR. SULLIVAN: When they -- when they  
17 unilaterally returned him to the abusive father, yes,  
18 sir.

19 QUESTION: Now, suppose the -- the state or  
20 the county, municipality knew that it was putting the  
21 child -- placing the child in a situation of extreme  
22 danger. Do you have any trouble in working out  
23 liability on that situation?

24 MR. SULLIVAN: No, Your Honor. I have no  
25 trouble. And I would further say that that's not a

1 supposition in this case.

2 QUESTION: Well, I wonder why you don't argue  
3 it.

4 MR. SULLIVAN: Well, I did --

5 QUESTION: I haven't heard you --

6 MR. SULLIVAN: I did in my pleadings, but I --  
7 I would -- I would remind the Court that one of the --  
8 and we addressed it three or four or five times in our  
9 brief. Not to rehash, but because I think it's so  
10 important, this case worker -- the evidence in the  
11 record before the Court demonstrates that she told  
12 witnesses -- and I think I'm quoting accurately -- "I  
13 always knew the phone would ring some day and Joshua  
14 would be dead."

15 QUESTION: That she knew --

16 MR. SULLIVAN: I understand it that way.

17 QUESTION: -- or should have known.

18 MR. SULLIVAN: I understand it that way, yes,  
19 sir. Now --

20 QUESTION: And in -- in effect admitted that  
21 she knew --

22 MR. SULLIVAN: Yes, sir.

23 QUESTION: -- or should have known.

24 MR. SULLIVAN: That was -- that's how I  
25 understand that -- that language.

1                   QUESTION: Well, that's the way I parse your  
2 case, and maybe it is a step ahead. But it doesn't  
3 shock me as much as it seemed to shock some of my  
4 brethren.

5                   MR. SULLIVAN: Yes.

6                   The -- the -- the hangup that -- that I think  
7 I've seen in reading the colloquy in our briefs on the  
8 notion of intent -- we do not argue -- we certainly do  
9 not argue that the case worker or the supervisor or the  
10 county wanted this child dead. That would be  
11 irresponsible, and we don't make that claim. But we do,  
12 based on the record that's in -- in front of you -- and  
13 I think the joint appendix at 109 to 160 is the -- is  
14 the DSS case file itself, and that I find shocking --  
15 quite candidly, I find shocking.

16                   We know that there were -- and Justice  
17 Brennan, you alluded to this. There are black and white  
18 absolute mandates in the state statute that -- that say  
19 when you receive a report from a doctor or from a nurse  
20 or from an outside social worker or from a police agency  
21 suggestive of child abuse, you shall investigate. It  
22 doesn't go into you got to do it this way or that way,  
23 but you got to make a real investigation. You got to do  
24 it in a timely manner.

25                   On the first occasion in January of 1982 that



1 the police reported suspected child abuse, they made an  
2 investigation which was cursory but I can't fault them  
3 at that point. They complied with the statute.

4 In January of 1983, they had a doctor report  
5 from a hospital -- they -- saying I am finding an abused  
6 child here. They take custody of the -- of the child.  
7 Three days later they send the child back to the abusive  
8 home.

9 QUESTION: Did they at that point commit a  
10 constitutional violation? That is the time when they  
11 placed the child in extreme danger, as I understand  
12 Justice Blackmun's question, is it not?

13 MR. SULLIVAN: I think that's right.

14 QUESTION: And why -- why was that a  
15 constitutional violation to return the child at that  
16 time?

17 MR. SULLIVAN: I'm not prepared to say that  
18 that was, but I am prepared to say that the next  
19 incident was. And the difference was that they were  
20 informed by --

21 QUESTION: But they didn't -- the child had  
22 already been placed by then.

23 MR. SULLIVAN: They took the child out and  
24 placed the child in the technical custody of the  
25 hospital during his period of hospital confinement.

1 That's right.

2 QUESTION: That's January of 1983.

3 MR. SULLIVAN: Yes, sir, which is the --

4 QUESTION: All right. And you say that was  
5 not a constitutional violation to return the child then.

6 When did the constitutional violation occur  
7 and what was it?

8 MR. SULLIVAN: I think it was the very next  
9 contact they had with the child and each succeeding  
10 contact --

11 QUESTION: Well, in the very next one then you  
12 say it did occur. And what was the constitutional  
13 violation?

14 MR. SULLIVAN: At that point -- and by way of  
15 background information so that we're clear on this, if I  
16 may, Justice Stevens -- the -- when the case worker made  
17 the decision to return the child -- and this is in the  
18 record at 159 and 160 -- she dismissed the protective  
19 proceeding that they had started, and --

20 QUESTION: Was that a constitutional violation?

21 MR. SULLIVAN: I don't think so. What she  
22 said, though, in --

23 QUESTION: I want to get to the constitutional  
24 violation and when it occurred.

25 MR. SULLIVAN: All right. What I -- I need

1 you to understand that she made a written promise to the  
2 child and to the family court that the very next time  
3 there was a suspicious lesion on this child, she would  
4 bring the matter back to the court for the child to be  
5 protected. She made that -- that promise to the -- now,  
6 the child was a toddler, so I don't mean to say that  
7 child understood that. But she made that guarantee and  
8 it was on that premise that the child I think  
9 erroneously was returned.

10 The very next time she was in the house all of  
11 the things that she had insisted on, all of the things  
12 that had been guaranteed by the birth father, all of the  
13 things that were necessary for the child's protection  
14 had been absolutely thrown out the window.

15 For example, the father told the county that  
16 it was the girlfriend who had abused him on this  
17 occasion. And that's probably credible because he was  
18 out of town on a fishing trip. So, he -- he probably  
19 was not the physical abuser in that case.

20 QUESTION: But just summarizing, what you're  
21 saying is it's -- she got sufficient information on that  
22 occasion that she had a constitutional duty to remove  
23 the child. And that was the -- that was the  
24 constitutional violation.

25 MR. SULLIVAN: On the -- on the ensuing

1 occasion?

2 QUESTION: Yes. Isn't that your theory?

3 MR. SULLIVAN: Yes, yes.

4 QUESTION: So, your theory is not that the  
5 state placed the child in a position of extreme danger,  
6 but rather that the state failed to remove the child  
7 from a position that they should have known was  
8 extremely dangerous.

9 MR. SULLIVAN: Subsequently. I think -- I  
10 think that that placing the child back is the ultimate  
11 act --

12 QUESTION: Would your case be any different if  
13 you had none of this history but a very stupid social  
14 worker who went in and saw lots of evidence of child  
15 abuse and failed to remove the child from the home  
16 immediately?

17 MR. SULLIVAN: It's a -- it's a question of  
18 the level of -- of -- and that's why I'm using the word  
19 "enmeshment."

20 QUESTION: Well, I know. The word  
21 "enmeshment" is not one that really helps me very much.

22 MR. SULLIVAN: Okay. I -- I think that --

23 QUESTION: My question is if you just have  
24 those stark facts, a social worker visits a home, sees  
25 the child that a reasonable social worker should have

1 known was in extreme danger --

2 MR. SULLIVAN: Yes.

3 QUESTION: -- and fails to remove the child,  
4 has the state committed a constitutional violation?

5 MR. SULLIVAN: In an appropriate fact setting,  
6 yes, I believe so.

7 QUESTION: Well, I've given you the facts.  
8 The answer is yes.

9 MR. SULLIVAN: If we -- to -- to -- to  
10 illustrate what I think your question is, if on the very  
11 first occasion --

12 QUESTION: That's right.

13 MR. SULLIVAN: -- maybe even by accident,  
14 stopping to use the phone, no official business, and the  
15 -- and a case worker finds the -- the parent holding a  
16 knife to the throat of a toddler, I would say that  
17 obligation arises at that point. Yes, sir.

18 Now, that's not the factual setting that we  
19 have here.

20 QUESTION: Now, how do you -- how do you place  
21 within the words of the Fourteenth Amendment again? How  
22 is the state depriving -- depriving the child of --

23 MR. SULLIVAN: It is the state alone --

24 QUESTION: You see I can -- I can understand  
25 it's depriving the child of something when the child is

1 safe with the state and the state turns it back, which  
2 happened here. But you -- you acknowledged that when  
3 that happened, it was all right. The state had no  
4 inadequate reason to believe that -- that the parent was  
5 abusive.

6 MR. SULLIVAN: Well --

7 QUESTION: But I don't understand how the  
8 state is depriving the child of anything when -- when  
9 the child is already in the home and all the state has  
10 done is failed to take the child out of the home.

11 MR. SULLIVAN: Well, that's the -- that's the  
12 final argument in the Seventh Circuit's opinion that all  
13 we did was not stop it. And what I'm saying is in this  
14 one and only one circumstance, the child has no one  
15 else. The -- the only protector he has in the world is  
16 now the predator.

17 QUESTION: That's -- that's not -- well, I --  
18 I could think of a lot of cases.

19 QUESTION: Well, that's true in every child  
20 abuse situation. Sure.

21 Wasn't that always true in a child abuse  
22 situation? When a social worker visits a home, has very  
23 good reason to believe an abuse is going on, you're  
24 saying there's an immediate constitutional duty arise to  
25 remove the child if it's close enough to the knife at

1 the throat example.

2 MR. SULLIVAN: Right.

3 QUESTION: But there is, of course, all shades  
4 of evidence. This is not quite a knife at the throat  
5 example.

6 MR. SULLIVAN: That's correct.

7 QUESTION: It's pretty serious, but you say  
8 the evidence is clear enough so that the constitutional  
9 duty arose to remove the child.

10 MR. SULLIVAN: I think the evidence -- and,  
11 yes, I do. And I want to -- I want to mention as well  
12 that the evidence, of course, is cumulative so that even  
13 if the second or third or fourth instance, if you feel  
14 that's not enough, the 14th or 15th or 20th instance  
15 certainly is.

16 You know, I -- I lose track of how many  
17 different doctor reports of abuse there were and how  
18 many different nurse abusive reports there were --  
19 reports of abuse there were and how many direct  
20 observations on separate occasions by the case worker.  
21 But I suggest to you that after two years,  
22 approximately, of this, when the case worker goes to the  
23 home and sees cigarette burns on the face of the child,  
24 I suggest that's knowledge.

25 QUESTION: What is magical about the fact that

1 the citizen, here the child, is in threat from -- from  
2 his father rather than from someone else? Suppose a  
3 case worker goes in and finds an elderly person  
4 starving. Why wouldn't there be a similar obligation on  
5 the part of the state? Why wouldn't you -- you find the  
6 state liable for depriving this person of life if the  
7 person dies because the state did not provide food? Why  
8 wouldn't that --

9 MR. SULLIVAN: To the -- to the best of my  
10 knowledge, in the first place the Constitution does not  
11 intrude into each individual life in the sense of an  
12 obligation to provide food, shelter, clothing. That's a  
13 political issue.

14 The Constitution is interposed in the  
15 relationship between the child and its -- and its  
16 parent. And that's the only place in that -- in that  
17 child's life where the -- where the Constitution --

18 QUESTION: How -- how is the Constitution  
19 interposed there? I don't -- I don't see how it's  
20 interposed. It's interposed when the state moves in and  
21 takes the child away and then gives it back.

22 MR. SULLIVAN: It's interposed, more  
23 precisely, when the -- when the state says we suspect  
24 there might be a problem for this child. We're going to  
25 terminate your rights. At that point there's no



1 question but what the parent's constitutional rights in  
2 the relationship are recognized, both his substantive  
3 rights to his possession of his child and his procedural  
4 rights to have witnesses and hearings and burdens of  
5 proof and all those kinds of things. And if we have one  
6 -- one equation -- and the Constitution is in here for  
7 the parent and we know the Constitution recognizes the  
8 child has at least the right to be alive and more or  
9 less healthy --

10 QUESTION: But that's a -- that's a limitation  
11 on the state -- those cases. They say the state can't  
12 do certain things. You're trying to turn that around  
13 and say that arising out of that same relationship is a  
14 duty on the state.

15 MR. SULLIVAN: I -- I think that the  
16 procedural things, Mr. Chief Justice, clearly are -- are  
17 limitations on -- on the mechanics by which you can  
18 effect a termination.

19 QUESTION: Well, no doubt. And what I'm  
20 saying is I don't see how you turn that around and say  
21 from these limitations on the state, we also derive a  
22 duty on the state.

23 MR. SULLIVAN: Well, if we've recognized --  
24 and -- and manifestly --

25 QUESTION: Can you answer that question?

1 MR. SULLIVAN: Well, I -- I hope so. I hope  
2 so, Mr. --

3 QUESTION: Why don't you try?

4 MR. SULLIVAN: Okay. The -- the situation of  
5 the child, his place in the world, when the door is  
6 closed, there -- there literally is no one else. And if  
7 the child has --

8 QUESTION: That has nothing to do with the  
9 limitations on the state's authority to take the child  
10 away from the parent.

11 MR. SULLIVAN: No. And I don't -- I don't  
12 propose that for that --

13 QUESTION: I thought -- but I thought that was  
14 the basis of your argument.

15 MR. SULLIVAN: Well, what I'm saying is that  
16 we recognize that the Constitution has a legitimate  
17 place in the relationship between the parent and the  
18 child. If it does, I -- I suggest that it should fairly  
19 apply both ways. It doesn't make sense to me that the  
20 -- the Constitution applies between the parent and the  
21 child only for the benefit of the parent. And I think  
22 that's the -- that's the result.

23 QUESTION: (Inaudible).

24 QUESTION: Well, it applies in Justice  
25 Scalia's hypothetical too if the state can't take away

1 the person's food, but that doesn't mean the state has  
2 to give the person food. And you're -- you're in the  
3 same box either way it seems to me.

4 MR. SULLIVAN: Well, I agree that there's no  
5 obligation to -- to provide food to somebody. In fact,  
6 I would say there's not a constitutional obligation to  
7 provide food to a child. That's not what I'm -- that's  
8 not what I'm suggesting.

9 QUESTION: But there is a constitutional  
10 obligation I would assume not to arbitrarily take it  
11 away.

12 MR. SULLIVAN: Yes.

13 QUESTION: All right. So, there's a --

14 MR. SULLIVAN: That's a --

15 QUESTION: So, the Constitution is in the  
16 house with the elderly woman just as it's in the house  
17 -- just in the same sense that it's in the house with  
18 the parent and the child.

19 MR. SULLIVAN: I -- I'm not sure I follow your  
20 question or -- or I'm seeing it very differently.  
21 Clearly you can't send the agent of the state in to  
22 empty out the old person's refrigerator, you know,  
23 without -- that's -- no one is going to fight about  
24 that. That's different from saying that you have to  
25 create a responsibility where you have to bring food to

1 the -- to the elderly person.

2 QUESTION: Do you think it makes any  
3 difference what agent of the state finds out that this  
4 child is in danger from his father? Suppose it's just a  
5 -- suppose it's a trash collector that goes around and  
6 finds out that it's official -- and he just knows that  
7 that child is in real danger.

8 MR. SULLIVAN: Yes. I do think it makes -- it  
9 makes a difference. In contemporary society, we have --  
10 in all the states, we have child protection agencies.  
11 And certainly I would think they would be within the  
12 scope of the --

13 QUESTION: So, it has to be a certain kind of  
14 a -- of a state agent who has a duty under state law or  
15 not?

16 MR. SULLIVAN: I think that would be correct.  
17 Certainly someone with the power under state law.

18 QUESTION: Well, isn't it a state law -- isn't  
19 it a state law issue here then as to -- do you -- do you  
20 suggest that this social worker was violating state law  
21 when she --

22 MR. SULLIVAN: In addition, yes -- yes, sir,  
23 we do because of --

24 QUESTION: Is there any -- do you have some  
25 Wyoming cases for that?

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QUESTION: Wisconsin.

QUESTION: Wisconsin cases. Sorry.

MR. SULLIVAN: I'm -- I'm a citizen of Wyoming.

QUESTION: I know you're from Cheyenne, aren't you?

MR. SULLIVAN: Yes, sir. Yes, sir.

The --

QUESTION: Well, Mr. Sullivan, aren't there any Wisconsin tort remedies assuming you're right --

MR. SULLIVAN: There clearly are.

QUESTION: Hmm?

MR. SULLIVAN: There clearly are state tort remedies.

QUESTION: Well, what are they?

MR. SULLIVAN: A negligence --

QUESTION: If they're -- if they're adequate, isn't that the end of your claim?

MR. SULLIVAN: I think it would be as to the property interest claim. What I -- what I have to say on that is this. I believe that the child's entitlement -- and this is the Roth analysis. Now, I believe the child's entitlement is to the procedural protections of the investigation and the intervention.

QUESTION: Did you argue that in the lower courts? I looked through Judge Reynolds' opinion.

1 MR. SULLIVAN: No, it wasn't addressed, Mr.  
2 Chief Justice, at --

3 QUESTION: You -- you didn't argue the Roth  
4 entitlement in the lower courts.

5 MR. SULLIVAN: No. We raised -- we raised the  
6 statutory claim in the -- in the complaint. It was not  
7 a factor in either Judge Reynolds' or Judge Posner's  
8 decision. That's correct.

9 QUESTION: Now, is -- there's a limitation of  
10 some amount, isn't there, on a --

11 MR. SULLIVAN: There is --

12 QUESTION: -- State tort remedy?

13 MR. SULLIVAN: There is --

14 QUESTION: Fifty thousand dollars?

15 MR. SULLIVAN: Yes. Yes, Justice Brennan.

16 I am not here arguing that the dollar amount  
17 makes that remedy insufficient. I am not arguing that  
18 at all.

19 What I am saying is that under the state  
20 system, the objective, the stated objective of it, is  
21 the wellbeing of the child, the safety of the child, and  
22 I suggest that no after-the-fact damage action can  
23 address that question. The only --

24 QUESTION: How can we be confident that this  
25 social worker violated state law?

1 MR. SULLIVAN: Well, you have the record  
2 before you which reflects that on countless occasions --

3 QUESTION: I know. But where -- where do you  
4 find the duty on a social worker to do anything more  
5 than the social worker did?

6 MR. SULLIVAN: The statute says by its terms  
7 when you get notice of evidence of child abuse, you  
8 shall make a fresh, de novo investigation --

9 QUESTION: All right.

10 MR. SULLIVAN: -- promptly and you shall  
11 intervene as appropriate. On time after time after  
12 time, there was notice of --

13 QUESTION: Do you have some -- do you have  
14 some case in -- in Wisconsin that --

15 MR. SULLIVAN: This is the only circumstance  
16 we've been able to find in Wisconsin where this has  
17 occurred. We're not trying to pick on Wisconsin.

18 QUESTION: (Inaudible).

19 MR. SULLIVAN: But the fact is that if -- if  
20 the -- if the rule says that when the members of the  
21 court come in, I have to stand up, it's a simple matter  
22 of whether I stood up or not. And that's the -- that's  
23 the situation that we have. They simply in the face of  
24 doctors' warnings, nurses' warnings, their own  
25 observations of profound abuse --

1 QUESTION: Well, do you think it was  
2 intentional?

3 MR. SULLIVAN: In the sense that the --

4 QUESTION: Or was it just negligent?

5 MR. SULLIVAN: No. I think -- I think that it  
6 was not malicious. I think it was intentional in the  
7 sense of knowing and understanding the significance of  
8 the action and nonetheless choosing not to act to do the  
9 things the statute says you must do.

10 QUESTION: Was that -- was that just a  
11 negligent omission or what?

12 MR. SULLIVAN: No. I think it was a very  
13 conscious, a deliberative, a thought-through decision.  
14 And I think that's part of -- and --

15 QUESTION: Wasn't it just a failure to realize  
16 that -- that a breach of duty was involved, a negligent  
17 failure to know -- know her duty?

18 MR. SULLIVAN: If we didn't have the factual  
19 setting in the record of -- of the lady saying to people  
20 she believes on a current basis the child is being  
21 abused and saying later I believed the child was going  
22 to die, that might be the case. But I think given the  
23 facts that exist, I don't think that's the situation.

24 I have only two minutes left. Obviously, I'll  
25 answer your questions. I would like to reserve what



1 little time there may be, if that's acceptable.

2 QUESTION: Very well, Mr. Sullivan.

3 MR. SULLIVAN: Thank you.

4 QUESTION: Mr. Mingo, we'll hear now from you.

5 ORAL ARGUMENT OF MARK J. MINGO

6 ON BEHALF OF THE RESPONDENTS

7 MR. MINGO: Thank you, Mr. Chief Justice. May  
8 it please the Court:

9 We believe this case involves an attempt by  
10 the Petitioners to transform the private wrongdoing of a  
11 natural father into state action for purposes of  
12 invoking the Fourteenth Amendment. The primary issue  
13 presented is whether a county's failure to prevent the  
14 infliction of harm by a third party upon a person at  
15 liberty constitutes a due process violation of the  
16 Fourteenth Amendment.

17 We believe that there was no state deprivation  
18 of a constitutionally protected right for three main  
19 reasons. First, the Fourteenth Amendment's concept of  
20 liberty does not include a right to basic protective  
21 services from the state. Secondly, there is no state  
22 action in a constitutional sense which caused a  
23 deprivation in this case. Third, we believe that the  
24 actions of the social worker did not evince the state of  
25 mind necessary to invoke the Fourteenth Amendment.

1           In addition, we believe that there are two  
2 independent reasons for urging affirmance of the Seventh  
3 Circuit's decision. First, with respect to the  
4 municipal Respondents, there was no policy or custom  
5 which led to a deprivation and with respect to the  
6 individual Respondents, we believe they are clearly  
7 entitled to the defense of qualified immunity.

8           QUESTION: The lower courts didn't reach any  
9 of those issues, did they, because they found there was  
10 no constitutional duty?

11           MR. MINGO: That's correct, Mr. Chief Justice.

12           It seems to us that what Petitioners are  
13 attempting to do is use Section 1983, on one hand, and  
14 the Fourteenth Amendment on the other hand to  
15 affirmatively compel the states to act to protect. Yet,  
16 in analyzing the -- the legislative history and intent  
17 of Section 1983, it's quite clear that the statute was  
18 not designed for those purposes.

19           Section 1983 is remedial in nature.  
20 Therefore, we must look to the -- the constitutional  
21 right that the Petitioners seek to invoke by way of use  
22 of Section 1983, which brings us precisely to the  
23 Fourteenth Amendment.

24           The Fourteenth Amendment has been viewed by  
25 this Court as imposing no constitutional duty upon the

1 states to provide substantive services to its citizens.  
2 The Court also has held that if the state chooses to  
3 provide some form of protective services, the Fourteenth  
4 Amendment does not tell the state how far they must go  
5 in providing those services.

6 QUESTION: Mr. Mingo, if this child had been  
7 in foster care placed by the state or the county, would  
8 there be potential liability?

9 MR. MINGO: Justice O'Connor, in that  
10 instance, we believe there may well be potential  
11 liability because in that case we have, at least  
12 arguably, state action in the sense that the state took  
13 a child out of his natural surroundings, arguably put  
14 him in state-controlled surroundings and thereby  
15 increased the risk of harm to that child. In that  
16 instance, I believe we may well have a case somewhat  
17 analogous to the prison setting and perhaps more  
18 analogous to the mental institution setting that was  
19 present in Youngberg v. Romeo.

20 QUESTION: What -- I -- I'm sure Justice  
21 Stevens is going to ask the same question. So, go on.  
22 You take it, John.

23 (Laughter.)

24 QUESTION: Why wasn't that what happened in  
25 January of 1983 when they returned the child? Is that

1 what you were going to ask?

2 (Laughter.)

3 MR. MINGO: In January of 1983 --

4 QUESTION: Because they had custody of the  
5 child for a few days.

6 MR. MINGO: -- the hospital had custody of the  
7 child because of the fact that the juvenile court -- not  
8 the social workers, not the Department of Social  
9 Services, but Wisconsin juvenile court -- through its  
10 intake worker placed the child in the temporary custody  
11 of a hospital.

12 QUESTION: All right. And assume, having done  
13 that, the hospital now learns if we return the child to  
14 his father, the father has the knife and is about to  
15 abuse the child, do you say the state can go ahead and  
16 return the child?

17 MR. MINGO: Although that is certainly not the  
18 case before this Court, in that instance, I believe from  
19 a constitutional standpoint only a county or a  
20 department of social services could return the child  
21 without facing constitutional liability.

22 QUESTION: Even with knowledge that there's --  
23 even with knowledge of extreme danger and almost certain  
24 serious abuse of this kind?

25 MR. MINGO: Even with that knowledge, Your

1 Honor.

2 QUESTION: Well, why is that different then  
3 from the foster home case that Justice O'Connor asked  
4 you about?

5 MR. MINGO: In the foster home setting, we  
6 have the state taking a child away from his natural  
7 surroundings, putting him in another set of  
8 surroundings, which are state controlled, state  
9 operated --

10 QUESTION: That's exactly what happened here.

11 MR. MINGO: No, that's quite different from  
12 what happened here. Here we have a child being taken  
13 out of his home for three days by the juvenile court and  
14 then, because no petition was filed by the Corporation  
15 Council which was -- had nothing to do with the decision  
16 of the social worker, but the Corporation Council failed  
17 to file a petition. Therefore, the --

18 QUESTION: No, but during those three days,  
19 the child was in the custody of the state, wasn't it?

20 MR. MINGO: No. The child was in the custody  
21 of the hospital.

22 QUESTION: Who owned -- who operated the  
23 hospital?

24 MR. MINGO: As far as I know, it was a public  
25 hospital. The child was placed there for purposes of

1 examination only.

2 QUESTION: But -- but who had custody? You --  
3 you don't think the state or this agency had custody of  
4 the child during that period?

5 MR. MINGO: The agency I believe definitely  
6 did not have custody of the child. I also don't believe  
7 this was a state-run institution. The reason that the  
8 child was placed in this hospital was for -- primarily  
9 for -- for observation and secondly because his father  
10 could not be located.

11 The child was examined. After the three days  
12 in the hospital, it was the concurrence by the hospital  
13 personnel and by the Corporation Council that evidence  
14 of abuse could not be substantiated. That automatically  
15 triggered Wisconsin's statute coming into play which  
16 required that the child automatically be returned to the  
17 parent in the event a petition was not filed --

18 QUESTION: And the statute required whom to --  
19 to return the child?

20 MR. MINGO: Pardon me?

21 QUESTION: Who was it that had the duty to  
22 return the child?

23 MR. MINGO: Wisconsin's statutes say that the  
24 juvenile court -- not the social worker, but that the  
25 juvenile court must return the child to the home in the

1 event a petition is not filed within 72 hours.

2 QUESTION: All right. Supposing the juvenile  
3 court is given evidence that if you return the child to  
4 the home, the child will be seriously abused forthwith?  
5 (Inaudible). Would the state be liable if it went ahead  
6 and returned the child?

7 MR. MINGO: Even though we may have the  
8 requisite state of mind, Your Honor, present in that  
9 case, I do not believe --

10 QUESTION: (Inaudible) state action too.

11 MR. MINGO: I don't believe in that instance  
12 we would have state action because we have not done  
13 anything to increase the risk of harm to that child,  
14 whereas in Justice O'Connor's example, we certainly can  
15 be said to have increased the risk of harm to the child  
16 because we took that child away from his or her natural  
17 surroundings and put that child into an arguably more  
18 dangerous set of surroundings. And we believe that's  
19 what triggers state action.

20 QUESTION: What if you don't give it back to  
21 the father, but you give it back to -- to the wrong  
22 person? You give it back to some -- some --

23 QUESTION: Some trial --

24 QUESTION: -- right -- some -- some mad  
25 criminal who has just been released from a mental

1 institution knowing or you ought to know that this is  
2 not the -- not the father. Would the state have any  
3 liability in those circumstances?

4 MR. MINGO: Justice Scalia, I believe in that  
5 set of circumstances there well may be liable --  
6 liability because we have state action --

7 QUESTION: So, what you're saying is what  
8 makes a difference is whether you're just returning him  
9 to the status he was in before you took over the  
10 temporary custody. Is that -- is that the difference?

11 MR. MINGO: I believe that the important  
12 factor to be looked at is whether or not the state  
13 action can fairly be said to have increased the risk of  
14 harm to that child. If the answer to that threshold  
15 question is yes, then I believe we have state action in  
16 a constitutional sense.

17 QUESTION: Increased it from what? From what  
18 it was before the state took custody or from what it was  
19 when the state had custody?

20 MR. MINGO: From what it was before the state  
21 interjected and took custody.

22 QUESTION: Well, you were just returning it to  
23 the person who had the legal right to custody.

24 MR. MINGO: That's correct.

25 When an individual such as the --



1 QUESTION: Which is more important than the  
2 abuse to poor Joshua?

3 MR. MINGO: We're not saying it's more  
4 important, but the parents certainly have a  
5 constitutionally protected right which must be observed  
6 by the social worker.

7 QUESTION: Poor Joshua.

8 QUESTION: It's the -- I -- I guess the -- the  
9 malfeasance was by the person who didn't file the  
10 petition to change custody.

11 MR. MINGO: If there was any malfeasance, that  
12 certainly would be an argument. The record is quite  
13 clear, though, that all of the professionals in this  
14 case, the pediatrician, the child psychologist, the  
15 police officer who investigated the case -- they all  
16 believed that abuse could not be substantiated. Every  
17 one of the professionals involved concurred, and the  
18 record is absolutely clear in that regard. They all  
19 concurred that there was no evidence to substantiate a  
20 claim for child abuse.

21 QUESTION: Well, except the social worker.

22 MR. MINGO: I'm now talking about the January  
23 22 incident where the state arguably took custody or  
24 custody was placed with -- with the hospital. At that  
25 time there was an initial suspicion of child abuse which

1 after the three-day stay in the hospital, all  
2 professionals agreed could not be confirmed.

3 In looking at this Court's decisions, it  
4 appears to us that state action has been found primarily  
5 in two settings: first, and most obviously, where the  
6 state goes out and directly inflicts harm upon an  
7 individual; secondly, state action has been found in a  
8 custodial setting where the state by its intentional act  
9 deprives a person of liberty, and by depriving that  
10 person of liberty, assumes a degree of control over that  
11 individual such that they have a reasonable means of  
12 protecting that individual, such as in a prison setting,  
13 and where they assume some responsibility for that  
14 individual's welfare.

15 QUESTION: Well, Mr. -- Mr. Mingo, I wonder if  
16 you wouldn't be better advised to use the term  
17 "constitutional duty" rather than state action. There's  
18 no doubt that the social worker was a state actor. She  
19 was a -- she was a public employee doing this, and her  
20 acts were those of the state. Your point really is that  
21 she was not under a constitutional duty to do certain  
22 things that your opponent says she was under a duty to  
23 do.

24 MR. MINGO: Yes, Your Honor, you're quite  
25 correct. State action can be quite misleading, and when

1 I use the term "state action," I'm trying to use it in a  
2 constitutional sense which necessarily implies a  
3 deprivation of a constitutionally protected right.

4 QUESTION: And under your theory, I take it if  
5 two policemen see a rape and watch it just for their own  
6 amusement, no violation of the Constitution.

7 MR. MINGO: We would concede that there is no  
8 constitutional violation in that particular case.

9 QUESTION: You're not -- you're arguing it as  
10 well as conceding it.

11 (Laughter.)

12 MR. MINGO: That's correct.

13 In this case it is undisputed by both sides  
14 that there was no direct deprivation or direct  
15 infliction of harm upon the Petitioners nor was the  
16 Petitioner in the custody of the state at the time of  
17 the alleged wrongdoing.

18 In order to circumvent the -- the state action  
19 or constitutional deprivation requirement, counsel has  
20 proposed in their brief a special relationship theory  
21 which today they appear to call an enmeshment theory.  
22 No matter what it is, this theory would hold states  
23 liable wherever they have expressed a desire to afford  
24 protection to an individual and where they have some  
25 generalized knowledge of the victim's plight. We submit

1 that such a theory has no support in the language of the  
2 Fourteenth Amendment, no support in Section 1983, nor  
3 does it have any support in any prior decision of this  
4 Court.

5 What their theory would do is open up local  
6 governments to massive new areas of exposure precisely  
7 because of the fact that the states, if we were to  
8 accept Petitioners' theory, become liable for the acts  
9 of private wrongdoers. There are numerous governmental  
10 agencies other than social services departments which  
11 seek to afford some degree of protection to the public.

12 Certainly police departments, fire  
13 departments, emergency ambulance services fall into that  
14 very same category. It seems to us that if Petitioners  
15 are to prevail in these types of cases, the effect will  
16 be to greatly expand the financial drain on local  
17 governments thereby making the very services that  
18 Petitioners claim they wish to encourage less available  
19 to the public as a whole.

20 QUESTION: Mr. Mingo, under Wisconsin law,  
21 does Joshua have a cause of action against his father?

22 MR. MINGO: He certainly would have a cause of  
23 action against his father. In fact, his --

24 QUESTION: No -- no barrier between  
25 child/parent relationship?

1 MR. MINGO: That -- that immunity was done  
2 away in Wisconsin some 10 or 15 years ago. And, in  
3 fact, I might note that Randy DeShaney, the father, was  
4 in fact a party defendant to this action when it was  
5 first -- when the complaint was first filed. He was  
6 subsequently dismissed on a voluntary basis by counsel.  
7 So, he was in fact a party defendant, and there was no  
8 objection on the basis of immunity.

9 Again, we wish to emphasize that the problem  
10 with this special relationship or enmeshment theory is  
11 that it fails to distinguish between privately inflicted  
12 harm and state action. On the other hand, we believe  
13 that the Court's adherence to the traditional state  
14 action or constitutional deprivation requirement  
15 provides a bright line standard which would separate  
16 actions of private wrongdoing from actions which can  
17 fairly or truly be attributed to the states.

18 We also believe that the Petitioners cannot  
19 prevail upon their Fourteenth Amendment claim because  
20 the social workers in this case did not evince the state  
21 of mind necessary to support a Fourteenth Amendment  
22 action. This Court has recently told us in Daniels and  
23 Davidson that negligence certainly is not enough. And  
24 the Court also indicated to us that traditionally the  
25 due process clause has been applied to deliberate

1 decisions by government officials to deprive a person of  
2 life, liberty or property.

3 This case we believe is even less  
4 constitutionally compelling than Daniels and Davidson  
5 because we are not dealing with a custodial setting, and  
6 we are faced with claims of inaction versus action. In  
7 such circumstances, we have proposed that the requisite  
8 state of mind must be that of deliberate indifference or  
9 a failure to act.

10 And the reason we propose this heightened  
11 state of mind requirement is twofold. First, we believe  
12 it avoids trivializing the Constitution by allowing  
13 individuals to bring ordinary tort claims in the name of  
14 the Fourteenth Amendment. And we also believe that this  
15 heightened state of mind requirement recognizes the  
16 real-life dilemma which front-line social workers and  
17 many other governmental workers face on a daily basis.

18 As the Seventh Circuit indicated below, social  
19 workers truly do operate on a razor's edge. First, a  
20 social worker must respect the constitutional rights of  
21 a parent to the care, custody and management of their  
22 children. Secondly, where a social worker's involvement  
23 is on a purely voluntary basis, such as it was in this  
24 particular case, she must walk a fine line to avoid  
25 having the door slammed in her face thereby preventing

1 any future involvement of the department. This --

2 QUESTION: You -- I take it you don't agree  
3 with your colleague on the other side that the social  
4 worker was -- was disregarding her duty under state law?

5 MR. MINGO: We certainly do not agree with  
6 that position, and we believe the record is quite  
7 clear. The only duty she had under state law was to  
8 investigate when she received a report of abuse. The  
9 only report of abuse which the department ever received  
10 in this case was the initial report of suspected abuse.  
11 Immediately following that report, there was an  
12 investigation. The child was placed in the hospital for  
13 three days and then, since there was no filing of a  
14 petition at the end of three days, the child was  
15 automatically returned to the home.

16 After that first incident, there was  
17 absolutely no further reports of abuse.

18 QUESTION: Yes, but there was further  
19 information received by the social worker, wasn't there?

20 MR. MINGO: There was information in the sense  
21 that the social worker suspected that there might be  
22 abuse.

23 QUESTION: And the -- wasn't there visits  
24 after that?

25 MR. MINGO: By the social worker? In fact,

1 there were 12 visits on a voluntary basis.

2 QUESTION: Well, that's better -- that's  
3 better than having a written report I suppose.

4 MR. MINGO: In fact, those were tantamount to  
5 informal investigations. But there was only one formal  
6 investigation, and that was triggered by the initial  
7 report of abuse.

8 QUESTION: Well, but the submission -- the  
9 submission is that the social worker knew enough that  
10 under state law it was her duty to take the child out of  
11 the house or do something to -- to remove the child from  
12 that position of danger. And you disagree with that I  
13 take it.

14 MR. MINGO: We do disagree with that. Under  
15 state law, it's quite clear that the only duty that the  
16 social worker had was to investigate. And she only had  
17 a duty to investigate when she received formal reports  
18 of abuse.

19 QUESTION: Well, what -- what was the purpose  
20 of investigating? Wasn't there -- didn't the law --  
21 doesn't the law say, well, and if you find out certain  
22 things, you must do certain things?

23 MR. MINGO: The law doesn't say that, but I  
24 believe the law probably presupposes that if there is an  
25 investigation and that investigation reveals probable



1 cause to believe that there was child abuse, that that  
2 information will be relayed to, in this instance, the  
3 Corporation Council who will then file a petition in  
4 juvenile court.

5 QUESTION: In Wisconsin --

6 QUESTION: So, you're relying --

7 QUESTION: -- what's the difference between a  
8 formal and an informal investigation? You keep saying  
9 that this wasn't a formal one. What's the difference?

10 MR. MINGO: The only formal investigation --

11 QUESTION: Well, what is the difference?

12 MR. MINGO: A formal investigation is an  
13 investigation triggered by the statute. And the statute  
14 only triggers a duty to investigate when the social  
15 worker receives a report of abuse.

16 QUESTION: Well, what's the difference in what  
17 the social worker does?

18 MR. MINGO: Again, the -- a formal  
19 investigation is any investigation triggered by the  
20 statute, 48 -- Section 48.981.

21 QUESTION: So, there's no difference between a  
22 formal and an informal one. Is that right?

23 MR. MINGO: I don't believe that is correct.

24 QUESTION: Well, what is the difference? This  
25 is my last time I'm going to ask you.

1 MR. MINGO: The only way I can answer that  
2 question, Justice Marshall, is to tell you that a formal  
3 investigation is one that's triggered by a statute. An  
4 informal investigation is one voluntarily undertaken by  
5 the social worker. The net effect may be the same, but  
6 the triggering process is different.

7 QUESTION: So, you really are drawing the  
8 distinction between a formal report and an informal  
9 investigation. No matter how much she uncovers, if no  
10 -- there is no resulting formal report, no possible  
11 liability.

12 MR. MINGO: That's not the basis of our -- our  
13 -- our position is.

14 QUESTION: I thought that's just what you've  
15 been arguing.

16 MR. MINGO: What I've been attempting to argue  
17 is that a formal report is required to trigger an  
18 investigation. If she receives a formal report, then  
19 she does have some affirmative duties imposed upon her  
20 by the statute. The statute says she shall investigate.

21 QUESTION: Thank you, Mr. Mingo.

22 Mr. Ayer, we'll hear now from you.

23 ORAL ARGUMENT OF DONALD B. AYER

24 AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

25 MR. AYER: Mr. Chief Justice, and may it

1 please the Court:

2 I want to address the -- the due process --  
3 the deprivation of due process analysis briefly if I  
4 could, but before I do, I'd like to say a few words  
5 about the relationship between federal and state  
6 government and the role of the federal Constitution  
7 because I think it is reasonably clear that the area of  
8 child protection is not one that is crying out for  
9 federal constitutional oversight.

10 First of all, it is not an area where there is  
11 any sort of history of hostility between the state and  
12 the interests that we're talking about trying to  
13 protect. Quite the contrary. There being no  
14 constitutional right to this protection in the first  
15 place, it's clear I think that the state programs that  
16 have been set up have all been set up as a matter of  
17 state and local government initiative born of exactly  
18 the same sentiments and concerns that everyone feels  
19 toward children who are exposed to the kinds of abuse  
20 and hazards that we're sadly reviewing in this case.

21 So, we don't have -- we don't have a -- a  
22 state actor who there is a need to step in front of and  
23 stop in any sort of habitual way. Quite the contrary.  
24 The state is actively intervening to do all that it  
25 reasonably can do.

1                   Second of all, I think there's no reason to  
2 think that federal oversight, federal constitutional  
3 oversight, is going to add very much to the handling of  
4 these sensitive and difficult problems. There is I  
5 think little reason to think that federal courts have  
6 any special expertise in the reviewing of what is at  
7 least in some sense a balance between interests of  
8 parents, respect for the interest of parents in  
9 controlling their children, as opposed to the priority  
10 of intervening when you -- when you need to and must in  
11 order to protect the child.

12                   It's the kind of a sensitive situation that  
13 requires close, on-the-scene involvement, the exercise  
14 of discretion and the exercise of a great deal of care  
15 and concern. It's an area of -- of traditional state  
16 law involvement and local government handling. And the  
17 idea that at a federal court review engrafted on top of  
18 what is already in place, machinery that has been put in  
19 place by the state and local governments -- the idea  
20 that that is going to help rather than hurt I think is  
21 -- is really a misguided one.

22                   We're talking about a number of things. We're  
23 talking about, number one, creating another layer of  
24 judicial action, judicial review, which itself will  
25 result in delay. It will divert resources from the --

1 the real everyday problems and the handling of these  
2 personal situations.

3 We are talking possibly not only about  
4 awarding damages and creating a -- a chill and a  
5 discouraging factor which Justice O'Connor alluded to  
6 being involved at all, also a day-to-day possible, I  
7 suppose, injunctive role for the federal courts coming  
8 involved not only after the fact when something has  
9 happened to award damages, but becoming involved as  
10 these cases evolve. You go to the local court. You go  
11 to your local social service agency. You go to the  
12 local court, and then you go to federal court.

13 The idea that that is somehow going to help  
14 the resolution of these problems seems to be -- seems to  
15 be misguided, and I think there is a good reason to fear  
16 that it may well just primarily discourage the  
17 involvement of local agencies for fear that they're  
18 going to be facing an unmanageable and very expensive  
19 situation.

20 All of that is basically irrelevant unless it  
21 is wholly consistent with the law and what the  
22 Constitution requires. And very briefly I'd like to say  
23 that I think it's quite clear that when you take to  
24 heart the Court's statements that the due process clause  
25 is not to be a font of tort policy which will evolve as

1 tort policy does in response to various economic and  
2 distributive concerns and theories and -- and sort of  
3 comes and goes with -- with social concerns and the  
4 social situation, it's clear that we can't create the  
5 liability which is requested by the Petitioner here  
6 without really creating an open-ended possibility --

7 QUESTION: What if a police officer responding  
8 to a complaint of a neighbor goes into a house and sees  
9 a father beating up his son and the officer just says,  
10 well, I guess the son deserves it and just watches as  
11 the beating goes on? Would there be any liability on  
12 the -- on the officer himself and --

13 MR. AYER: I don't --

14 QUESTION: -- (inaudible) on the state?

15 MR. AYER: I don't think that there is going  
16 to -- I think the answer is probably no. It might  
17 change depending on the particular facts you're talking  
18 about, but I -- I think it has got to turn on whether  
19 what happens can be described as an abuse of government  
20 power which is a moving force behind the harm that is  
21 taking place.

22 QUESTION: But protection is never one of the  
23 -- one of the things that the Constitution would require  
24 the state to furnish.

25 MR. AYER: I don't -- I don't think it is. I

1 don't think that the state is obligated to provide a  
2 particular service as desirable as that may be and as  
3 concerned as most everyone probably is that that not go  
4 on.

5 QUESTION: And even if the -- even if the  
6 state law put -- put the affirmative duty on the officer  
7 or the social worker to remove the child or stop the  
8 abuse if it occurs in their very presence.

9 MR. AYER: Well, it might be possible to write  
10 a statute in a way that created a procedural due process  
11 interest. I don't know quite how you'd do that, but  
12 you'd have to link -- the words would have to be fairly  
13 mandatory and would have to link rather closely to the  
14 harm that you're talking about now occurring. And if  
15 that happened, the question would then be about the  
16 adequacy of the remedy that was provided for -- for the  
17 harm when it did in fact occur.

18 QUESTION: We're just talking here about  
19 whether there's a federal cause of action. I -- I  
20 presume --

21 MR. AYER: Absolutely.

22 QUESTION: I presume that there would be a  
23 state cause of action against the officer in those  
24 circumstances if he had a duty to act and didn't.

25 MR. AYER: Well, in most cases, I would think

1 there would be. And, of course, the point I guess I was  
2 making earlier in summary is that there is no reason why  
3 we can't rely on the mechanisms of state and local  
4 government to create the remedies that are appropriate  
5 in these circumstances.

6 QUESTION: Well, my only purpose of asking the  
7 question is that I -- I take it that -- that you had to  
8 answer that way and -- but also it makes irrelevant how  
9 much the social worker knew.

10 MR. AYER: Well, I -- I think that's right  
11 unless you -- unless you are --

12 QUESTION: Yes, and if -- but if we -- if we  
13 decide -- if we -- if we decide for the state, it -- it  
14 really does mean that it's irrelevant how -- how much  
15 the social worker knew or --

16 MR. AYER: That's correct.

17 QUESTION: -- how much of a duty she had under  
18 state law or anything else.

19 MR. AYER: That's correct unless you are  
20 thinking of going down the -- the Roth line of argument  
21 which I think is -- is --

22 QUESTION: Well --

23 QUESTION: But your --

24 QUESTION: -- that's never been argued around  
25 here.



1 QUESTION: But your basic position is there's  
2 no affirmative duty on the part of the government to --  
3 to provide the protection of the law to a particular  
4 citizen --

5 MR. AYER: Well, there -- there's a duty --

6 QUESTION: -- even though there is a duty to  
7 provide equal protection of the law.

8 MR. AYER: That's right. That's right. And  
9 -- and I think -- I think the way that one -- what one  
10 would have to do to violate equal protection of the law  
11 is -- is useful in thinking about how to think about a  
12 violation of due process in the sense that there the  
13 denial of equal protection which could, in fact, be  
14 other than an affirmative act or -- or the government  
15 being a moving force behind the harm, nonetheless it  
16 must be intentional. It must be an act which intends  
17 the result -- the denial of the protection that they  
18 otherwise would be entitled to.

19 And I would suggest that that concept of  
20 intent -- whereas it's -- it probably is not the best  
21 way to decide this case, I would suggest that an intent  
22 to take an action which does deprive one of liberty,  
23 such as by putting -- putting them in jail, putting them  
24 into a mental facility or something like that, that  
25 that's the kind of intent that you ought to have to

1 have. That's an issue, of course, the Court did not  
2 reach in Davidson and Daniels as to whether that degree  
3 of intent is required. We would suggest that it is.

4 QUESTION: What about giving him back to his  
5 father? What -- what -- what -- what's the government's  
6 position on that?

7 MR. AYER: (Inaudible) the case?

8 QUESTION: If the state had -- well, let's  
9 assume the state had a lot of knowledge at the time the  
10 child was returned to his father. Would you consider  
11 that to be enough affirmative state action to --

12 MR. AYER: Well, I -- I -- I would think not  
13 and the reason would be that the removal in this case  
14 was a temporary removal for specific purposes. The  
15 father remained the legal custodian of the child. No  
16 affirmative action had been taken to determine that the  
17 -- the father was unfit and that the expiration of this  
18 temporary period, absent further action, the child was  
19 going to go back to -- to the parent. And the fact that  
20 it did not take that affirmative action, but rather let  
21 the status quo continue, I think is not the kind of  
22 affirmative action that you've got to have in order to  
23 have the state be the moving force -- its abuse of power  
24 be the moving force behind the injury that occurred.

25 Thank you very much.

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QUESTION: Thank you, Mr. Ayer.

Mr. Sullivan, you have one minute remaining.

REBUTTAL ARGUMENT OF DONALD JAMES SULLIVAN

MR. SULLIVAN: Thank you, Mr. Chief Justice.

QUESTION: Mr. Sullivan, do you rely on due process or equal protection?

MR. SULLIVAN: Due process, Your Honor.

QUESTION: Due process?

MR. SULLIVAN: We -- we posed this case in terms of --

QUESTION: All right. Well, spell it out. Just what due process point --

MR. SULLIVAN: I'm sorry. I didn't hear.

QUESTION: What denial of due process is it that you deny -- that you object to?

MR. SULLIVAN: We feel there -- there are two: one, the -- what we see to be a -- a substantive due process right inherent in the balancing of the constitutional involvement in the child/parent relationship.

QUESTION: Well, what facts do you object to? Facts.

MR. SULLIVAN: We object to the fact that the -- the county agency and its personnel knowing and believing that the child was probably going to die or at

1 least be seriously, as he turned out to be, profoundly  
2 injured and knowing that he was in immediate need of  
3 medical care for lifesaving purposes, nonetheless,  
4 despite its power, its exclusive power, refused to help  
5 the child. It is that that we believe is the abuse of  
6 power. And we agree with Mr. Ayer's comment that abuse  
7 of power is the -- is the -- is the key here.

8 I see my time is up. Thank you very much.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Sullivan.

11 The case is submitted.

12 (Whereupon, at 2:00 o'clock p.m., the case in  
13 the above-entitled matter was submitted.)  
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-154 - JOSHUA DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, AND MELODY

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DESHANEY, Petitioners V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

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