WHEREFORE ART THOU *ROMEO*: REVITALIZING *YOUNGBERG*'S PROTECTION OF LIBERTY FOR THE CIVILLY COMMITTED

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Abstract: Thirty years ago, in *Youngberg v. Romeo*, the U.S. Supreme Court recognized that those who are involuntarily committed in a state institution enjoy a constitutionally protected liberty interest, which protects the right to reasonably safe conditions of confinement, freedom from unreasonable restraint, and minimally adequate training sufficient to ensure these liberty interests. In a unanimous decision, the Court held that when government officials make decisions that constitute a substantial departure from professional judgment, causing injury to these liberty interests, the officials violate the substantive due process guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution. Despite the Supreme Court's admonition that those who are civilly committed in state institutions do not lose their core liberty interests and that they enjoy greater protection than convicted criminals, many lower courts have seriously eroded the substantive due process protection recognized in *Youngberg*. Two Supreme Court decisions, *DeShaney v. Winnebago County Department of Social Services* and *County of Sacramento v. Lewis*, have fueled this erosion. This Article seeks to revitalize *Youngberg*'s protection of liberty for the civilly committed by explaining why neither *DeShaney* nor *Lewis* should be interpreted to limit the fundamental liberty interests recognized in *Youngberg*.

Introduction

In 1982, in *Youngberg v. Romeo*, the U.S. Supreme Court recognized that those who are involuntarily committed in a state institution enjoy a constitutionally protected liberty interest, which protects the right to reasonably safe conditions of confinement, freedom from unreasonable restraint, and minimally adequate training sufficient to ensure

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these liberty interests.[1] In a unanimous decision, the Court held that when government officials make decisions that constitute a substantial departure from professional judgment, causing injury to these liberty interests, the officials violate the substantive due process guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution.[2] The Court rejected the state's argument that the rigorous Eighth Amendment subjective deliberate indifference or criminal recklessness standard should govern the due process rights of those who are civilly, as opposed to criminally, committed in state institutions.[3]

Despite the Supreme Court's admonition that those who are civilly committed in state institutions do not lose their core liberty interests and enjoy greater protection than convicted criminals,[4] many lower courts have seriously eroded the substantive due process protection recognized in *Youngberg*.[5] Two Supreme Court decisions have fueled this erosion. One addressed the level of involvement the state must have with the injured party to trigger a constitutional duty of care under substantive due process.[6] The second focused on the state of mind and degree of culpability required to establish that the state's abuse of power reached constitutional dimensions.[7] Together, these cases have been interpreted to deny *Youngberg*'s protection of liberty to the civilly committed.[8]

Seven years after *Youngberg*, the Supreme Court, in *DeShaney v. Winnebago County Department of Social Services*, rejected a substantive due process claim brought against county welfare department employees for failing to intervene to protect a young child from abuse by his father.[9] Joshua DeShaney was not in the custody of the state,[10] and a

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[1] Youngberg v. Romeo, 457 U.S. 307, 315–19 (1982).

[2] *Id.* at 324. The Constitution forbids governmental deprivation "of life, liberty, or property, without due process of law." *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1. Substantive due process ensures the right to be free of arbitrary government actions "regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986).

[3] *Youngberg*, 457 U.S. at 321–22, 325; *see infra* notes 183–185 and accompanying text (explaining that the Eighth Amendment subjective indifference standard requires that a government actor know that a person faced a substantial risk of serious harm but acted with deliberate indifference to the risk).

[4] *Id.* at 321–22.

[5] *See infra* notes 144–293 and accompanying text.

[6] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989); *see infra* notes 91–143 and accompanying text.

[7] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 836 (1998); *see infra* notes 16–21 and accompanying text.

[8] *See infra* notes 77–78, 186–240 and accompanying text.

[9] *DeShaney*, 489 U.S. at 191.

third party, not a state actor, inflicted his injury.[11] But the Court broadly asserted that unless government officials, by an affirmative exercise of power, restrain an individual's liberty, rendering that individual unable to protect him or herself, there is no cause of action under the Due Process Clause.[12] Although *Youngberg* involved an involuntarily committed individual, decisions both before and in the years immediately after *Youngberg* did not view the nature of the commitment proceeding as critical.[13] Many courts recognized that even commitments formally labeled as "voluntary" cause a de facto deprivation of liberty.[14] After *DeShaney*, however, most appellate courts have held that, in the absence of a formal involuntary commitment, individuals in state institutions due to an intellectual disability or mental incapacity do not enjoy the liberty interests recognized in *Youngberg*.[15]

Nine years after *DeShaney*, the Supreme Court further endangered the substantive due process protection afforded the civilly committed by holding, in *County of Sacramento v. Lewis*, that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[16] Thus, to establish a substantive due process violation, plaintiffs must prove that the abuse of power "shocks the conscience."[17] Although the Supreme Court did not overturn *Youngberg*, and in fact cited it as valid authority,[18] many federal courts have ruled that (1) the shocks-the-conscience test supersedes the *Youngberg* standard, and that (2) this test requires that the civilly committed satisfy the rigorous Eighth Amendment standard, which *Youngberg* specifically rejected.[19] Other courts have reasoned that the *Youngberg* standard is the same as

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[10] *Id.* at 201.

[11] *Id.* at 203.

[12] *Id.* at 199–200.

[13] *See infra* notes 45–49 and accompanying text.

[14] *See infra* notes 71–76 and accompanying text.

[15] *See infra* notes 77–78 and accompanying text.

[16] *Lewis*, 523 U.S. at 846 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

[17] *Id.* (citing Rochin v. California, 342 U.S. 165, 172–73 (1952)).

[18] *Id.* at 852 n.12.

[19] *See* Strutton v. Meade, 668 F.3d 549, 557–58 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 124 (2012); Sain v. Wood, 512 F.3d 886, 894 (7th Cir. 2008); Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006); Moore *ex rel.* Moore v. Briggs, 381 F.3d 771, 773–74 (8th Cir. 2004); *infra* notes 191–202 and accompanying text.

the shocks-the-conscience standard,[20] thus heightening the plaintiff's burden of proof.[21]

This Article seeks to revitalize *Youngberg*'s protection of liberty for the civilly committed by explaining why neither *DeShaney* nor *Lewis* should be interpreted to limit the fundamental liberty interests recognized in *Youngberg*. Part I discusses *Youngberg* and the importance of the rights that it guaranteed to the mentally incapacitated who find themselves in state institutions.[22] Part II discusses *DeShaney* and the federal appellate courts' overly broad interpretation of its holding to restrict *Youngberg*'s protection to those who have been *involuntarily* committed to state institutions.[23] Part II further explains why this broad interpretation of *DeShaney* is unwarranted and how it can be circumvented.[24] Part III discusses *Youngberg's* professional judgment standard before examining *Lewis* and the confusion it has generated among the circuits regarding the appropriate culpability and "state-of-mind" standards to govern substantive due process challenges brought by the civilly committed.[25] Part IV argues that government officials who make decisions that constitute a substantial departure from professional judgment, thereby violating the *Youngberg* standard, have engaged in conscience-shocking behavior that gives rise to a substantive due process claim.[26] Finally, Part IV concludes that an objective deliberate indifference test should be used to judge the misconduct of nonprofessionals—not the Eighth Amendment's subjective criminal recklessness standard.[27]

I. *Youngberg*'s Recognition of Romeo's Right to Liberty

Nicholas Romeo was an adult male with a profound intellectual disability and the mental capacity of an eighteen-month-old child.[28] Until Romeo was twenty-six years old, he lived with his parents in Philadelphia, but after his father died, his mother recognized that she was

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[20] *See* Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011); Johnson v. Florida, 348 F.3d 1334, 1339 (11th Cir. 2003); Collignon v. Milwaukee Cnty., 163 F.3d 982, 988 (7th Cir. 1998); *infra* notes 199–215 and accompanying text.

[21] *See* J.R. v. Gloria, 593 F.3d 73, 79–81 (1st Cir. 2010); *infra* notes 218–220 and accompanying text.

[22] *See infra* notes 28–49 and accompanying text.

[23] *See infra* notes 50–90 and accompanying text.

[24] *See infra* notes 91–143 and accompanying text.

[25] *See infra* notes 144–240 and accompanying text.

[26] *See infra* notes 241–276 and accompanying text.

[27] *See infra* notes 277–293 and accompanying text.

[28] *Youngberg*, 457 U.S. at 309.

unable to care for him.[29] She asked the Philadelphia County Court of Common Pleas to admit Romeo to a state facility on a permanent basis, explaining in her petition that she could neither care for Romeo nor control his violence.[30] The court committed Romeo to the Pennhurst State School and Hospital pursuant to the state's involuntary commitment provision.[31] Over a two-year period, Romeo suffered injuries on at least sixty-three occasions, both self-inflicted and allegedly at the hands of other residents.[32] Romeo's mother filed suit, alleging that officials knew or should have known of Romeo's plight, and yet they failed to institute appropriate preventive procedures in violation of his constitutional rights.[33]

The Supreme Court agreed with Romeo's mother. The Court unanimously held that Romeo "enjoy[ed] constitutionally protected interests in conditions of reasonable care and safety."[34] First, it explained that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."[35] Second, it recognized a right to freedom from bodily restraint.[36] Third, Romeo's liberty interest required "the State to provide minimally adequate or reasonable training" sufficient to safeguard individual safety and avoid undue restraint.[37]

Having recognized Romeo's constitutional rights grounded in the Due Process Clause, the Court acknowledged the need "to balance 'the liberty of the individual' and 'the demands of an organized society.'"[38] The Court cautioned that the balancing should not be left to the unguided discretion of judges or juries, and that the "involuntarily com-

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[29] *Id.*

[30] *Id.*

[31] *Id.* at 310.

[32] *Id.*

[33] *Id.*

[34] *Youngberg*, 457 U.S. at 324.

[35] *Id.* at 315 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

[36] *Id.* at 316.

[37] *Id.* at 319. Because Romeo's severe intellectual disability made it clear that no amount of training would facilitate his release, the Court was not required to decide the more difficult question of whether the constitutionally protected liberty interest includes the right to sufficient training to lead to freedom. *Id.* at 318. In a concurring opinion, three justices maintained that they were inclined to recognize a constitutional right to training sufficient to maintain the skills Romeo possessed at the time he entered the state facility. *Id.* at 327 (Blackmun, J., concurring). Chief Justice Warren Burger, however, in a separate concurrence, would have flatly held that there is no constitutional right to training, or "habilitation," per se. *Id.* at 330 (Burger, C.J., concurring).

[38] *Id.* at 320 (majority opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

mitted are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[39] Thus, it rejected the Eighth Amendment criminal recklessness standard.[40] Because the Court acknowledged that deference should be given to the judgment of qualified professionals, however, it determined that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[41] Because the jury was erroneously instructed to apply an Eighth Amendment standard of liability, the case was remanded for further proceedings.[42]

Notably, the Court defined a "professional" decisionmaker as someone "competent, whether by education, training or experience, to make the particular decision at issue."[43] The justices also recognized that day-to-day decisions regarding care may be made by employees who lack formal training, but whom qualified persons nonetheless supervise.[44]

Although Romeo was "involuntarily committed," it is noteworthy that his mother sought the commitment.[45] Indeed, in a separate concurrence, Chief Justice Warren Burger remarked, "The State did not seek custody of respondent; his family understandably sought the State's aid to meet a serious need."[46] In fact, at least one case before *Youngberg* treated the constitutional claims the same regardless of whether the plaintiff was technically admitted to the state facility as a voluntary or involuntary patient.[47] After *Youngberg*, decisions from the U.S. Courts of Appeals for the Second, Fifth, and Eighth Circuits rejected a rigid voluntary/involuntary distinction for analyzing constitutional obligations imposed on officials entrusted with the care of those

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[39] *Id.* at 321–22.

[40] *See Youngberg*, 457 U.S. at 321–22.

[41] *Id.* at 323; *see also* Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. Rev. 1383, 1405–06 (2008) (discussing the professional judgment standard in the context of a state civil commitment statute).

[42] *Youngberg*, 457 U.S. at 325.

[43] *Id.* at 323 n.30.

[44] *Id.*

[45] *Id.* at 309.

[46] *Id.* at 329 (Burger, C.J., concurring).

[47] *See* Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978) (holding that once admitted, whether voluntarily or involuntarily, the mentally ill patient "had a constitutional right to a basically safe and humane living environment").

in state institutions.[48] This was the status of the law in 1989 when the Supreme Court rendered its controversial decision in *DeShaney*.[49]

II. *DeShaney*'s Erosion of Substantive Due Process Protection

Joshua DeShaney was a young boy who was severely beaten by his father on numerous occasions, eventually rendering him permanently brain damaged.[50] Joshua was not in any state institution; rather, he lived with his father.[51] Social workers received numerous complaints of abuse, but they failed to remove Joshua from his father's custody.[52] The father's second wife complained to the police about the child abuse.[53] Further, examining physicians in a local hospital where Joshua was admitted with multiple bruises and abrasions notified social workers, as did emergency room personnel one month later when Joshua was again treated for suspicious injuries.[54] Although the caseworker made monthly visits to the DeShaney home and observed suspicious injuries, she did nothing more, even after a third emergency room notification that Joshua was being treated for injuries believed to have resulted from child abuse.[55]

The central question before the U.S. Supreme Court in *DeShaney* was whether the state owes any duty to protect a victim when the state learns that a third party poses a special danger to that person.[56] Although the child's caseworkers knew that Joshua had been hospitalized several times for injuries his father had inflicted, the Supreme Court, in a five-to-four ruling, held that a state's failure to protect an individual

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[48] *See* Savidge v. Fincannon, 836 F.2d 898, 907–08 (5th Cir. 1988) (holding that a voluntarily admitted child with an intellectual disability, who was subjected to health-threatening conditions in a state facility, could pursue a substantive due process claim for deprivation of his constitutional right to minimally adequate shelter and medical care); Soc'y for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1245 (2d Cir. 1984) (recognizing that children with intellectual disabilities in a state institution were "entitled to safe conditions and freedom from undue restraint" under the Due Process Clause, whether they were voluntarily or involuntarily admitted); Ass'n for Retarded Citizens of N.D. v. Olson, 713 F.2d 1384, 1393 (8th Cir. 1983) (holding that intellectually disabled residents of the state school had a right to reasonably safe conditions whether or not they consented to admission).

[49] *See DeShaney*, 489 U.S. at 195; *infra* notes 50–70 and accompanying text.

[50] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 193 (1989).

[51] *Id.* at 191.

[52] *Id.* at 192–93.

[53] *Id.* at 192.

[54] *Id.*

[55] *Id.* at 192–93.

[56] *See DeShaney*, 489 U.S. at 195.

against private violence does not constitute a violation of the Due Process Clause.[57]

The majority provided three core justifications for its ruling. First, Chief Justice William Rehnquist repeatedly stressed that Joshua's father injured him, and his father was a private party over whom the state had no control.[58] Second, Joshua's mother challenged the government's failure to act, but the Court held that the Due Process Clause was intended only to prevent government officials from affirmatively acting in an arbitrary way.[59] Third, Joshua was not in a custodial relationship with the state.[60] The Court acknowledged that the state has an affirmative duty to care for and protect those who are in a custodial relationship with the state, such as convicted prisoners.[61] The Court also cited *Youngberg*'s holding that substantive due process "requires the State to provide [civilly] committed [individuals] with such services as are necessary to ensure their 'reasonable safety' from themselves and others."[62] The *DeShaney* Court described Romeo as someone involuntarily committed—a person in the state's custody "against his will."[63] The majority, however, also quoted the more expansive language from *Youngberg*, which acknowledged "a duty to provide certain services and care" to institutionalized persons who are "wholly dependent on the State."[64]

Ultimately, the Court reasoned that the State of Wisconsin neither played a part in creating the dangers Joshua faced "nor did it do anything to render him any more vulnerable to them."[65] Moreover, in the absence of a custodial relationship or a situation in which the state creates or enhances the danger, injured parties cannot bring substantive due process claims.[66]

A stinging four-justice dissent challenged what it called the majority's "restatement of *Youngberg*'s holding" when the majority implied

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[57] *Id.* ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

[58] *See id.* at 197 ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); *id.* at 203 ("[T]he harm was inflicted not by the State of Wisconsin, but by Joshua's father.").

[59] *See id.* at 196.

[60] *Id.* at 201 ("[T]he harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor.").

[61] *Id.* at 198.

[62] *DeShaney*, 489 U.S. at 199 (quoting Youngberg v. Romeo, 457 U.S. 307, 324 (1982)).

[63] *Id.* at 199–200.

[64] *Id.* at 200 (quoting *Youngberg*, 457 U.S. at 317).

[65] *Id.* at 201.

[66] *See id.*

that Romeo's constitutional rights rested solely on the state's affirmative act of involuntarily restraining his freedom.[67] Rather, Justice William Brennan cited *Youngberg*'s reasoning that state officials infringed Romeo's rights "*by failing to provide* constitutionally required conditions of confinement."[68] It was not the state that rendered Romeo unable to care for himself, but rather the fact that he had the mental capacity of an eighteen-month-old child, and his civil commitment "separated him from other sources of aid that . . . the State was obligated to replace."[69] Similarly, the State of Wisconsin, through its child welfare program, worsened Joshua's position by cutting off potential rescuers.[70]

A. *Substantive Due Process Rights in the Wake of* DeShaney*: Voluntary Versus Involuntary Commitment*

Before *DeShaney*, several appellate courts held that the Due Process Clause guaranteed the right to a safe and humane environment for all patients committed to state institutions, whether involuntarily or voluntarily. Although Romeo was technically an involuntary admit under Pennsylvania law,[71] the Second, Fifth, and Eighth Circuits have held that individuals admitted to state institutions do not waive their due process rights by consenting to admission.[72] As the Second Circuit explained, "there is a due process right to freedom from governmentally imposed undue bodily restraint for anyone at any time," and "anyone in a state institution has a right to safe conditions."[73] Several of these decisions recognized that the distinction between voluntary and involuntary commitment of individuals with severe mental disabilities is spurious.[74] Those who find themselves in state institutions based upon the

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[67] *See id.* at 206 (Brennan, J., dissenting).

[68] *DeShaney*, 489 U.S. at 206 (Brennan, J., dissenting) (quoting *Youngberg*, 457 U.S. at 315).

[69] *Id.* Applying *Youngberg*'s standard, the dissent would have held Joshua's caseworkers liable if their decisions demonstrated a substantial departure from professional judgment, but not simply because they acted negligently or made a mistake of judgment. *Id.* at 211–12.

[70] *Id.* at 210.

[71] *Youngberg*, 457 U.S. at 310.

[72] *See* Savidge v. Fincannon, 836 F.2d 898, 907 n.44 (5th Cir. 1988) (explaining that "Savidge has liberty interests even though he was not institutionalized through formal commitment proceedings"); Soc'y for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1245–46 (2d Cir. 1984) (rejecting the voluntary/involuntary distinction); Ass'n for Retarded Citizens of N.D. v. Olson, 713 F.2d 1384, 1392–93 (8th Cir. 1983) (noting that consent to confinement does not render an individual's liberty less worthy of protection).

[73] *Soc'y for Good Will*, 737 F.2d at 1245–46.

[74] *See, e.g.*, *Savidge*, 836 F.2d at 908 n.44 (recognizing that "Savidge's confinement at the [state facility] was no more 'voluntary' than Romeo's confinement" and citing the

unilateral application of their parents or guardians are effectively involuntary admits.[75] Further, adults who suffer from severe mental illness may be incapable of expressing a desire to leave the state institution, or they may lack the finances to go elsewhere.[76]

Despite these arguments, the growing consensus among federal courts after *DeShaney* is that the involuntary nature of Romeo's admission gave rise to substantive due process protection. Thus, any custodial situation short of involuntary commitment does not create due process rights to safe conditions of confinement, freedom from unreasonable restraint, or training.[77] Under this view, residents have no right to pro-

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passage in *Youngberg* that describes how Romeo's mother petitioned for his permanent admission to the state facility due to her inability to control him); *Soc'y for Good Will*, 737 F.2d at 1245 n.4 (recognizing that plaintiffs were "unlikely to have sufficient understanding to recognize that they are being admitted to a school for the mentally retarded and to understand the distinction between voluntary and involuntary status or the provisions governing release"); *see also* Kolpak v. Bell, 619 F. Supp. 359, 378–79 (N.D. Ill. 1985) (explaining that although the plaintiff was admitted voluntarily, "he may well have had only a *de jure*, and not a *de facto*, right to leave").

[75] *See* Thomas A. Eaton & Michael Lewis Wells, *Government Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 Wash. L. Rev. 107, 145 & n.187 (1991) (attacking the involuntary confinement requirement because a voluntarily admitted patient is unable to look out for his or her own interests and the patient's relatives do not have the ability to care for him or her, and noting that "[i]t is difficult to see why the circumstances of the patient's commitment entitle him to less attention from directors and employees of the institution than an involuntary patient receives").

[76] *See* Ass'n for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 473, 484 (D.N.D. 1982) (noting that plaintiffs with severe intellectual disabilities are incapable of giving consent, and even when plaintiffs may be capable of giving informed consent to admission, it is questionable whether the consent is truly "voluntary in light of pressures from family and the high cost and unavailability of alternative care"), *aff'd*, 713 F.2d 1384 (8th Cir. 1983).

[77] *See, e.g.*, Campbell v. Wash. Dep't of Soc. & Health Servs., 671 F.3d 837, 843–45 (9th Cir. 2011) (holding that a mother who voluntarily committed her developmentally delayed thirty-three-year-old daughter to a state facility could not bring a substantive due process action for the drowning of her adult child, even though state officials monitored and controlled every aspect of the deceased's daily life and prevented her from leaving the facility), *cert. denied*, 133 S. Ct. 275 (2012); Torisky v. Schweiker, 446 F.3d 438, 446 (3d Cir. 2006) (holding that "the District Court erred in concluding that the state owes an affirmative due process duty of care to residents of a state [mental] institution who are free to leave state custody"); Suffolk Parents of Handicapped Adults v. Wingate, 101 F.3d 818, 822–24 (2d Cir. 1996) (holding that because severely disabled adults were not involuntarily institutionalized, *Youngberg*'s requirement that due process mandates the exercise of professional judgment does not apply); Brooks v. Giuliani, 84 F.3d 1454, 1465–67 (2d Cir. 1996) (holding that an "expressed intent to provide assistance," without an "affirmative act of restraining the individual's freedom to act," does not create any duty on the part of state guardians vis-à-vis intellectually disabled adults placed in residential care, and concluding that "the State Defendants had no duty under the Due Process Clause to provide professionally adequate care" because the intellectually disabled patients were voluntarily in the state's care); Walton v. Alexander, 44 F.3d 1297, 1305 (5th Cir. 1995) (holding that mere custody will not support a substantive due process claim where a "person *voluntarily resides*

fessionally adequate care unless the state, through formal involuntary commitment proceedings, has limited the individual's ability to act on his or her own behalf.[78]

At least one court has continued to question *DeShaney*'s voluntary/involuntary distinction,[79] whereas others have tried to circumvent it through a more flexible approach. For example, an Eighth Circuit opinion acknowledged that, even if a patient is initially voluntarily admitted, a change in her condition, coupled with a statutorily imposed duty to refuse to release a "voluntary" patient who poses a substantial risk of harm to herself or others, might render the situation "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[80] Similarly, in 2006, the Third Circuit reasoned that an initially "voluntary commitment may, over time, take on the character of an involuntary one," and commitments labeled as "voluntary" may arguably be *de facto* deprivations of liberty from their inception.[81]

In recent decisions, however, most appellate courts have moved toward a rigid adherence to the voluntary/involuntary legal distinction, insulating professionals from any constitutional liability for their mis-

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in a state facility under its custodial rules" (citing *DeShaney*, 489 U.S. at 200); Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 991–92 (1st Cir. 1992) (holding that a patient's voluntary commitment in a state mental treatment facility did not "trigger a corresponding due process duty to assume a special responsibility for his protection," and rejecting the plaintiff's argument that his mental condition, which "may have made him functionally dependent on his caretakers," imposed upon the state a constitutional duty to provide for his safety and well-being).

[78] *See Suffolk*, 101 F.3d at 824; *Brooks*, 84 F.3d at 1466–67; *Walton*, 44 F.3d at 1305.

[79] *See* Lanman v. Hinson, 529 F.3d 673, 682 n.1, 682–84 (6th Cir. 2008) (questioning the distinction between voluntary and involuntary commitment, and reasoning that a patient voluntarily committed to a state institution enjoys a constitutional right to freedom from undue bodily restraint, but not deciding "whether the State owes the same affirmative constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg*").

[80] Kennedy v. Schafer, 71 F.3d 292, 294–95 (8th Cir. 1995) (quoting *DeShaney*, 489 U.S. at 201 n.9); *see also Walton*, 44 F.3d at 1306–07 (Parker, J., concurring) (arguing that the state's acceptance of custody and its extensive control over a minor resident at a state school for the deaf rendered it more than a "passive player in the facts and circumstances" that led to the sexual molestation of a minor resident by a fellow student). A few federal district courts in the wake of *DeShaney* similarly held that a voluntarily committed incompetent patient may be a de facto involuntary patient based on evidence of the statutorily prescribed guidelines for restraining patients or actions of facility staff persuading a patient to withdraw requests for relief. *See* Estate of Cassara v. Illinois, 853 F. Supp. 273, 278–80 (N.D. Ill. 1994); United States v. Pennsylvania, 832 F. Supp. 122, 125 (E.D. Pa. 1993); Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215, 222 (E.D. Pa.), *aff'd sub nom.* Halderman *ex rel.* Halderman v. Pennhurst State Sch. & Hosp., 977 F.2d 568 (3d Cir. 1992).

[81] *Torisky*, 446 F.3d at 446 (citation omitted).

conduct. For example, the Eighth Circuit in 1995 applied a flexible approach and held that when the state placed a voluntarily admitted patient on suicide watch, thereby depriving her of a degree of liberty, the substantive due process right to appropriate professional care was triggered.[82] In sharp contrast, another Eighth Circuit panel in 2012 rejected claims brought by the estate of a voluntarily admitted patient who committed suicide three days after her doctor removed her from suicide watch.[83] The court reasoned that the decision to take the patient off suicide watch could not be challenged under the Due Process Clause.[84] Similarly, although the Ninth Circuit initially appeared to ignore the voluntary/involuntary distinction,[85] in 2011 a Ninth Circuit panel ruled that mere custody does not support a substantive due process claim where persons "voluntarily" reside in a state facility.[86] Further, the Seventh Circuit in a 1983 decision reasoned that confinement to a mental institution creates a de facto special relationship with the state,[87] but relying on *DeShaney*, the court now holds that mere residence in a state facility does not suffice to create such a relationship when the person is admitted voluntarily.[88]

Significantly, the State of Tennessee, in defending itself against substantive due process claims brought by residents with intellectual disabilities at a state-operated home, recently acknowledged that "a circuit split existed in the early 1990s regarding . . . *Youngberg* rights."[89] The State then asserted that there is now "a consensus that states do not owe *Youngberg* rights to [intellectually disabled] residents who have been voluntarily placed into state care by a parent or other legal representative"—rather, involuntary confinement is necessary before residents' *Youngberg* rights are implicated.[90]

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[82] *Kennedy*, 71 F.3d at 294–95.

[83] Shelton v. Ark. Dep't of Human Servs., 677 F.3d 837, 842–43 (8th Cir. 2012).

[84] *Id.* at 843.

[85] *See* Neely v. Feinstein, 50 F.3d 1502, 1507 (9th Cir. 1995) (asserting broadly that mental patients in state institutions have a right to personal security); *see also* Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 991 (10th Cir. 1992) (stating that the Due Process Clause imposes a duty to provide safe living conditions "to disabled persons who are institutionalized or wholly dependent on the state").

[86] *Campbell*, 671 F.3d at 845.

[87] *See* Lojuk v. Quandt, 706 F.2d 1456, 1466 (7th Cir. 1983).

[88] Stevens v. Umsted, 131 F.3d 697, 703–04 (7th Cir. 1997) (holding that a disabled student residing in a state school for the disabled was not "in custody" for purposes of a claim arising from assault by other students, because the student was voluntarily admitted to the school).

[89] United States v. Tennessee, 615 F.3d 646, 655 (6th Cir. 2010).

[90] *Id.*

B. *Reining in* DeShaney*'s Negative Impact on the Rights of the Civilly Committed*

The existence or nonexistence of constitutional rights should not hinge on arbitrary, irrational distinctions. There are several arguments that should be made to ensure the rights of all those civilly committed in state institutions. First, as some appellate courts recognized before *DeShaney*, drawing a legal distinction between voluntary and involuntary patients ignores the reality that most of those committed to state institutions have no real say regarding their confinement, due to their mental incapacity or financial situation.[91] One study of various state commitment statutes indicates eight overlapping types of commitment, but only one permits patients to discharge themselves freely.[92] Under many "voluntary" commitment laws, patients who seek to leave may be subject to continued confinement for evaluation, or they may be required to undergo treatment procedures without consent.[93] Further, third-party commitment by parents or guardians may appear voluntary, but once committed, discharge may not occur without an administrative or judicial proceeding.[94] In any event, a resident placed in a state institution as a result of a third party initiating commitment proceedings did not exercise his or her own free choice.

The facts in *Youngberg* clearly demonstrate the irrationality of basing substantive due process analysis on commitment status. Romeo's mother sought out state help and voluntarily left her son's care to the state.[95] The state nonetheless had a duty to protect his liberty rights because, under Pennsylvania law, the commitment was characterized as an involuntary placement.[96] In sharp contrast, in 2011 in *Campbell v. Washington Department of Social and Health Services*, the Ninth Circuit held that a severely mentally incapacitated thirty-three-year-old patient in a state institution, who drowned in a bathtub, had no protection under the substantive due process guarantee.[97] The patient's mother alleged that state employees acted with deliberate indifference to the safety of their charge by leaving the patient unattended in the bath-

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[91] *See supra* notes 71–76 and accompanying text.

[92] *See* John Parry, *Involuntary Civil Commitment in the 90s: A Constitutional Perspective*, 18 Mental & Physical Disability L. Rep. 320, 321–22 (1994).

[93] *Id.* at 321.

[94] *Id.* at 321–22.

[95] *See supra* notes 45–46 and accompanying text.

[96] *See Youngberg*, 457 U.S. at 309–10.

[97] *Campbell*, 671 F.3d at 845.

tub.[98] But the court, without examining these allegations, dismissed the mother's claims because she "voluntarily" admitted her daughter.[99] The Ninth Circuit rejected the argument that the state's involvement, including monitoring and controlling every aspect of the deceased's daily life, preventing her from leaving the facility, and failing to inform the mother of her ability to terminate the custodial relationship, converted voluntary custody into de facto involuntary custody.[100] Further, the fact that the mother's guardianship rights had been terminated due to her failure to complete paperwork did not alter the voluntary nature of the confinement.[101]

As for mentally ill adults, litigation against state facilities has demonstrated that in many situations, voluntariness in connection with admission and exit from state institutions is an illusory concept.[102] Indeed, one year after *DeShaney*, the Supreme Court, in *Zinermon v. Burch*, addressed the due process rights of an individual allegedly voluntarily admitted to a state institution under circumstances that clearly indicated that the patient was incapable of giving consent.[103] The admitting staff reported that "Burch was hallucinating, confused, and psychotic and believed he was in heaven."[104] Nonetheless, because he was "voluntarily" admitted, the staff held Burch in a state facility for 152 days without any hearing concerning his admission or treatment.[105]

The *Zinermon* Court observed that it was highly foreseeable that a patient requesting treatment for mental illness, like Burch, might be incapable of informed consent.[106] Thus, Florida's statutory provision allowing "voluntary" patients to be detained without procedural safeguards did not insulate the state from liability for its procedural due process violation in failing to ensure that the patient had the mental

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[98] *Id.* at 841–42.

[99] *Id.* at 843.

[100] *Id.* at 844–45.

[101] *Id.* at 844.

[102] *See Halderman*, 784 F. Supp. at 222 (noting that approximately fifty percent of the residents at a state institution had not been legally committed); *see also* Christopher Slobogin et al., Law and the Mental Health System 705, 860–61 (5th ed. 2009) (arguing that a substantial number of decisions to enter a residential facility voluntarily are made when a person is in official custody or is faced with the prospect of involuntary commitment as the main alternative to voluntary admission); Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 Denv. U. L. Rev. 1169, 1173–75, 1185 (1997) (noting that many commitment decisions are made while individuals are incompetent or are the result of coercion).

[103] *See* Zinermon v. Burch, 494 U.S. 113, 118 (1990).

[104] *Id.* (internal quotation marks omitted).

[105] *Id.* at 120.

[106] *Id.* at 136.

capacity to provide legal consent.[107] This failure, the Court implied, demonstrated that state officials did not exercise professional judgment.[108] *Zinermon* arguably put state officials on notice that they must obtain actual informed consent to avoid liability. Nonetheless, administrative and treatment procedures are less complicated for voluntary patients, creating an incentive for hospital staff to unduly influence or coerce patients to elect voluntary status, as occurred in *Zinermon*.[109]

Any argument that those voluntarily admitted into state institutions have waived their constitutional rights under the Due Process Clause makes little sense in the context of individuals incapable of giving consent or who lack any real alternative due to their financial situation.[110] Further, those who do voluntarily commit themselves have not knowingly consented to treatment that falls below accepted professional standards. By emphasizing the involuntary nature of Romeo's commitment, *DeShaney* extended an invitation to lower courts mechanically to deny due process rights to patients committed to the state's custody. The analysis shifted from a consideration of the state's actual relationship and involvement with a civilly committed patient, who depends on the institution for appropriate care and protection from dangerous conditions of confinement, to the purely technical question of the patient's admission status.[111] Federal courts took a wrong turn when they ceased to look beyond labels to recognize de facto involuntary status, based either on the reality of the initial commitment process or on changed circumstances.[112]

In addition to critiquing the arbitrariness of the voluntary/involuntary distinction, this Article invokes three distinguishing factors in *DeShaney* to rein in the Supreme Court's assertion that substantive due process is triggered only where the state affirmatively restrains a person's liberty.[113] First, *DeShaney* involved a noncustodial situation—the Court in fact implied that if Joshua had been placed in foster care, it may have

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[107] *Id.* at 135–37.

[108] *See id.* at 138–39.

[109] *See supra* notes 103–109 and accompanying text.

[110] *See supra* notes 102–109 and accompanying text.

[111] *See DeShaney*, 489 U.S. at 206–07 (Brennan, J., dissenting) (stressing that the state's failure to act in *Youngberg* to protect Romeo, rather than its affirmative act of restraining him under involuntary commitment, led to his injuries).

[112] *See supra* notes 82–88 and accompanying text (explaining that the Seventh, Eighth, and Ninth Circuits have recently adopted a strict voluntary/involuntary legal distinction that insulates professionals from liability when a plaintiff is voluntarily committed).

[113] *See DeShaney*, 489 U.S. at 195.

ruled differently.[114] Second, the Court emphasized that third parties, over whom the state had no control, had inflicted the injury.[115] Third, the Court characterized the caseworker's behavior as involving only government inaction—the state "played no part" in creating the dangers that Joshua faced, and did nothing "to render him any more vulnerable to them."[116] The Court suggested that the situation would be different if the government had taken affirmative action that somehow created—or at least increased—the danger that Joshua faced.[117] These three factors provide direction for circumventing *DeShaney*'s harsh edict.

First, unlike cases directly analogous to *DeShaney*, cases premised on *Youngberg* involve residents who are in the state's physical custody and who are wholly dependent on the state institution for their basic needs.[118] As one commentator has persuasively argued, "The custody concept should be linked to the condition of being in an environment subject to the state's control and supervision, rather than to the process of how one got there."[119] Under most state statutes, residents in state institutions are not free to leave.[120] Further, regardless of state law, they are de facto deprived of their liberty once the state assumes custody over them.

Second, rather than challenging the conduct of private parties, *Youngberg* plaintiffs are suing state officials who directly cause harm to patients by adopting policies or making decisions regarding staffing or treatment that substantially depart from professional judgment.[121]

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[114] *See id.* at 201 n.9 (acknowledging that the situation in which the state removes a child from "free society" and places him or her in a foster home might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect"). Lower courts since *DeShaney* have uniformly recognized a constitutional right to protection from unnecessary harm on the part of children placed in foster care settings. *See, e.g.*, Doe *ex rel.* Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 172–75 (4th Cir. 2010) (joining the Third, Sixth, Seventh, Eighth, and Tenth Circuits in determining that a special custodial relationship exists when the state takes a child from his or her caregiver and places the child in foster care, and holding that placement of a child in a known, dangerous foster care environment in deliberate indifference to the child's right to reasonable safety and security violates substantive due process).

[115] *DeShaney*, 489 U.S. at 197.

[116] *Id.* at 201.

[117] *See id.* at 201 n.9.

[118] *See supra* notes 73–76 and accompanying text.

[119] Karen M. Blum, DeShaney*: Custody, Creation of Danger, and Culpability*, 27 Loy. L.A. L. Rev. 435, 444 (1994).

[120] *See supra* notes 91–94 and accompanying text.

[121] *See, e.g.*, T.E. v. Grindle, 599 F.3d 583, 589–90 (7th Cir. 2010) (reasoning that although state actors do not have a due process obligation to protect citizens from private violence absent a special custodial relationship, school officials may be liable for their own conduct in adopting policies that are deliberately indifferent to the constitutional rights of

Plaintiffs are seeking to hold government officials liable for their *own* constitutional violations—not for harm that non-state actors perpetrate—whether by making affirmative decisions or by failing to prevent the constitutional wrongdoing of their staff.[122] The Sixth Circuit has recognized this distinction. It concedes that the voluntary or involuntary status of a patient is relevant to whether the state has a duty to protect a patient from harm by third-parties and non-state actors, but concludes that the patient's status "is irrelevant as to his constitutional right to be free from the State depriving him of liberty without due process," including the right to be free from physical abuse at the hands of the state.[123]

Third, *Youngberg* plaintiffs often assert that government officials took affirmative action that actually created or enhanced the danger, triggering substantive due process protection even in the absence of an involuntary situation.[124] All circuits, except for the Fifth,[125] have recognized the so-called "state-created danger theory" as a basis for imposing substantive due process liability for government wrongdoing.[126]

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children); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 n.3 (5th Cir. 1994) (reasoning that *DeShaney* does not foreclose a due process claim against a school teacher, rather than fellow students, for violating a student's substantive due process rights because *DeShaney* did not suggest that individuals have no due process rights against an offending state actor); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 724–25 (3d Cir. 1989) (reasoning that *DeShaney* did not affect whether municipal policymakers could be held liable for recklessly making decisions that allegedly resulted in a student's sexual abuse by her teacher because that determination was not dependent upon the existence of a special custodial relationship).

[122] *See* Ammons v. Wash. Dep't of Soc. & Health Servs., 648 F.3d 1020, 1028 (9th Cir. 2011) (recognizing hospital administrators' duty to protect minor patients from a staff member's sexual assault), *cert. denied*, 132 S. Ct. 2379 (2012).

[123] *Lanman*, 529 F.3d at 682 n.1.

[124] *See infra* notes 125–126 and accompanying text.

[125] *See* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849, 864 (5th Cir. 2012) (en banc) (confirming that the Fifth Circuit has never explicitly adopted the state-created danger theory).

[126] *See* J.R. v. Gloria, 593 F.3d 73, 79 n.3 (1st Cir. 2010); Waybright v. Frederick Cnty., 528 F.3d 199, 207–08 (4th Cir. 2008); McClendon v. City of Columbia, 305 F.3d 314, 324–25 (5th Cir. 2001) (recognizing multiple circuits' adoption of the state-created danger theory). The circuits, however, are divided as to what elements a plaintiff must meet to come within this doctrine, and most courts have developed draconian five- or six-prong tests that invariably deny relief, by requiring, for example, that the harm to specific victims must be foreseeable and that the officials committed affirmative acts to increase the danger, putting a victim at substantial risk of serious immediate harm. *See, e.g.*, Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 925–27 (10th Cir. 2012) (holding that hospital personnel could not be held responsible for the death of an unattended patient who was promised constant monitoring because providing untruthful assurances to the decedent and his family did not constitute "affirmative conduct" sufficient to invoke the state-created danger theory, even when the state actors were aware of a serious risk that they expressly promised to

Although this Article urges an expansive interpretation of the "custodial" requirement to include all civilly committed individuals, the state-created danger theory provides an alternative basis for imposing liability. For example, if a patient's condition worsens in the state institution due to the state's failure to provide care or treatment, the state has enhanced the danger that the individual may do harm to himself or herself or be particularly vulnerable to harm that staff or fellow patients impose.[127] Further, professionals who fail to screen, train, or discipline staff affirmatively subject residents to an increased risk of harm. Admittedly, "failure to act" cases raise the *DeShaney* Court's concern that the Due Process Clause be interpreted to reach only affirmative acts by state officials. The Court in *Youngberg*, however, recognized an affirmative obligation on the part of the state to confine the individual under "conditions of reasonable care and safety" that are "reasonably nonre-

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eliminate but failed to do so); *Campbell*, 671 F.3d at 845–47 (holding that state employees who ordered a developmentally delayed resident in a state facility to take an unsupervised bath could not be held liable for the resident drowning in the bathtub because the state employees' conduct did not create the situation that resulted in the drowning); Walter v. Pike Cnty., 544 F.3d 182, 194–95 (3d Cir. 2008) (requiring the plaintiff to show that affirmative acts harmed him and concluding that the defendant's failure to warn the plaintiff about a suspect's likelihood of engaging in violent behavior must be characterized as inaction); *cf.* Paine v. Cason, 678 F.3d 500, 510–11 (7th Cir. 2012) (holding that police who arrested a woman with bipolar disorder and then released her in a hazardous neighborhood where she was raped and suffered permanent brain damage violated the victim's constitutional rights by gratuitously increasing her risk of injury); Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 428–31 (2d Cir. 2009) (holding that a police officer's behavior enhanced the danger to a victim of domestic abuse by affirmatively encouraging or condoning her husband's misconduct). For a discussion of the multi-prong tests that courts have developed to insulate officials under the state-created danger theory, see Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 Fla. L. Rev. 519, 537–41 (2008).

[127] The Tenth Circuit's 2012 decision in *Gray v. University of Colorado Hospital Authority* presents this scenario. *Gray*, 672 F.3d at 912–13. The patient and his family were specifically told that he would receive twenty-four-hour-per-day intensive care monitoring, understanding that anything less would expose him to life-threatening epileptic seizures because he had been taken off of his medication. *Id.* at 912. But hospital protocol permitted "staff to leave patients unattended and unobserved," and during a period of unattendance the patient experienced a seizure and died. *Id.* Nonetheless, the court narrowly construed the state-created danger theory, ruling that untruthful assurances do not constitute "affirmative conduct" sufficient to invoke this theory, because rendering a person more vulnerable to a known risk does not create a constitutional duty to protect. *See id.* at 921–22. Further, the defendant's policy of permitting staff to leave patients experiencing seizures unattended could not qualify as the requisite affirmative act because it did not pose a direct threat to a particular individual and lacked a causal link between the danger and the resulting harm. *Id.* at 925–27.

strictive" and to provide the individual with any training that may be required by these interests.[128]

The core of substantive due process is its protection against a state's "abuse of power," which should encompass claims based on government inaction that can be causally linked to the constitutional rights deprivation.[129] Quite simply, a "failure to act" claim can be recast as an affirmative decision to provide treatment or care that falls below accepted professional standards, contrary to *Youngberg*'s "affirmative act" mandate.[130] In addition, a core problem with imposing liability only when government officials take affirmative action is that it creates an incentive not to act—not to provide the care and treatment that comports with professional judgment to those who find themselves totally reliant on a state institution.[131]

This Article focuses on substantive due process rights, but the irrationality of treating voluntarily admitted patients differently than those involuntarily admitted also raises equal protection problems. Although the Supreme Court has ruled that classifications based on intellectual disability or mental incapacity do not trigger strict scrutiny,[132] it is irrational to provide or deny fundamental liberty interests based on what is often a state's arbitrary statutory characterization of its civilly commit-

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[128] *Youngberg*, 457 U.S. at 324.

[129] *See DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting) ("[I]naction can be every bit as abusive of power as action . . . ."). Pre-*DeShaney*, Judge Richard Posner colorfully remarked, "If the state puts a man in a position of danger from private persons and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

[130] *See* Eaton & Wells, *supra* note 75, at 109 n.9 (noting that "the distinction between acts and omissions often turns on how one poses the question"). Professors Thomas Eaton and Michael Lewis Wells more broadly challenge the *DeShaney* majority's conclusion that due process was not intended to provide affirmative protection of life, liberty, or property against invasion by private parties. *See id.* at 119. Significantly, history supports the view that those who drafted the Fourteenth Amendment, as well as 42 U.S.C. § 1983, were concerned with Ku Klux Klan violence and the inaction of local sheriffs in response. *Id.* Section 1983 permits any individual within the jurisdiction of the United States who has been deprived of federal rights by a state actor under color of law to seek damages or injunctive relief. 42 U.S.C. § 1983 (2006).

[131] Eaton & Wells, *supra* note 75, at 128 ("Encouraging cost effective protective action would reduce the overall injury costs to society and eliminate some harms to some individuals.").

[132] Heller v. Doe, 509 U.S. 312, 315 (1993). *But cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (holding that the requirement of a special use permit for a home for individuals with intellectual disabilities was based on "irrational prejudice" and was, therefore, invalid under a rational basis test).

ted.[133] Further, it is incongruous that states should owe a duty of care and protection to individuals committed to state institutions due to mental incapacity following a criminal conviction, while at the same time having no constitutional obligations with regard to those "voluntarily" committed to the same institutions.[134]

The Supreme Court has recognized equal protection claims rooted in the denial of core liberty interests, acknowledging that heightened scrutiny of government action is triggered based on either the recognition of a suspect class or the existence of a fundamental right that is allocated arbitrarily among different groups.[135] Because the right to life and personal liberty are fundamental rights, a classification that guarantees these rights to those involuntarily committed to state institutions, despite denying them to those purportedly "voluntarily" admitted, could not withstand strict scrutiny.[136] The Supreme Court, however, acknowledged that the liberty interests it recognized in *Youngberg* did not trigger strict scrutiny; rather, Romeo's interests had to be "balanced" against the state's competing interests, which need not be proven compelling.[137] Nonetheless, striking that balance based on idiosyn-

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[133] *Cf. DeShaney*, 489 U.S. at 197 n.3 (noting that the selective denial of services to "certain disfavored minorities" would violate the Equal Protection Clause (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). Although patients voluntarily admitted into state institutions are not recognized as disfavored minorities, all classifications must meet a minimal rationality test. *See Cleburne*, 473 U.S. at 450.

[134] *See* West v. Schwebke, 333 F.3d 745, 748–49 (7th Cir. 2003) (holding that involuntarily committed patients, including civilly committed sex offenders, are entitled to an assessment of their needs using professional judgment).

[135] Erwin Chemerinsky, Constitutional Law: Principles and Policies 691–92 (4th ed. 2011) (explaining that the Court has used the Equal Protection Clause to protect fundamental rights including the right to procreate, vote, access the judicial process, and travel between states).

[136] *See* Seide v. Prevost, 536 F. Supp. 1121, 1136 (S.D.N.Y. 1982); *see also Ass'n for Retarded Citizens*, 561 F. Supp. at 485 n.14 (indicating that "the denial of liberty rights to voluntarily committed patients may itself violate the state's fourteenth amendment duty to give all its citizens equal protection of the law" (citing Bruce G. Mason & Frank J. Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 Creighton L. Rev. 124, 127 (1976)).

[137] *See Youngberg*, 457 U.S. at 320. The Supreme Court has stated that different constitutional claims are subjected to "varying levels of review." Chemerinsky, *supra* note 135, at 552 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)). The lowest level of review is the "rational basis test," which all laws challenged under either the Due Process Clauses or the Equal Protection Clause must meet. *Id.* Under rational basis review, "the government's objective only need be a goal that is legitimate for the government to pursue." *Id.* The middle level of review is "intermediate scrutiny," which requires that a law be "substantially related to an important government purpose" for it to be upheld. *Id.* at 552. The most demanding level of review is strict scrutiny, which requires that a law be "necessary to achieve a compelling government purpose" to be held constitutional.

cratic differences in commitment statutes subjects those who are similarly situated to disparate treatment, contrary to the most basic guarantee of equal protection.

As discussed, the actual "voluntariness" of patients entering state facilities under state commitment statutes is clearly in doubt.[138] Further, even those who truly voluntarily admit themselves to state institutions do not knowingly consent to forfeiture of their basic liberty rights to treatment and care that comport with professional judgment. The fact that core liberty interests are at stake, and that these interests are often allocated based on "irrational" classification schemes, highlights the constitutional problems inherent in broadly reading *DeShaney* to foreclose *Youngberg* claims except by those the state has formally involuntarily committed. The "forced custodial relationship" approach, which requires an involuntary custodial relationship to trigger a due process analysis, fails to recognize that other types of government involvement with the injured party should give rise to constitutional protection.

Thirty years ago, the Supreme Court in *Youngberg* emphasized that states incur a duty to care for institutionalized, wholly dependent individuals.[139] *DeShaney* altered the judicial landscape, creating a circuit split as to when this constitutional duty is triggered.[140] The emerging consensus has been to adhere rigidly to the voluntary/involuntary distinction, denying any constitutional protection from abuse of government power to those civilly committed in state institutions.[141] As one scholar persuasively argued five years after *DeShaney*, "the criterion of involuntariness should not serve as a talisman for either the duty owed or the standard of culpability applied."[142] All patients who are civilly

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Id. at 554; *see also Cleburne*, 473 U.S. at 440 (discussing statutes that make classifications based on race, alienage, or national origin and explaining that "these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

[138] *See supra* notes 91–94 and accompanying text.

[139] *Youngberg*, 457 U.S. at 317. Although the mentally incapacitated may not have any affirmative rights to government services, once the state decides to provide care and treatment facilities for them, substantive due process mandates that the facilities be run in a manner consistent with the constitutional rights of the residents. *See Soc'y for Good Will*, 737 F.2d at 1246.

[140] *See* Blum, *supra* note 119, at 435 (noting that five years after *DeShaney*, no "clear consensus" had emerged as to the state's duty to protect persons outside the context of involuntary confinement); *see also supra* notes 77–81 and accompanying text.

[141] *See supra* notes 82–90 and accompanying text.

[142] *See* Blum, *supra* note 119, at 438–39. To support her conclusion, this scholar relied on cases involving children voluntarily placed in the foster care system by their parents when the state had no constitutional duty to care for or protect the children, as compared to its obligation to those involuntarily placed. *See id.* at 443–44. She forcefully concludes

committed, whether voluntarily or involuntarily, are subject to the state's control and supervision and thus should be entitled to substantive due process protection. Recognizing a duty of care for all those committed to state institutions will not open the floodgates by transforming basic torts into constitutional violations. Rather, *Youngberg* mandates only that government officials make decisions regarding those in its care that do not substantially depart from professional judgment.[143]

III. The Impact of *Lewis*'s Shocks-the-Conscience Substantive Due Process Standard on Claims Brought by the Civilly Committed

Because the U.S. Supreme Court, in its 1989 *DeShaney* decision determined that there was no constitutional duty to protect Joshua DeShaney from his father, it did not address the state of mind or level of culpability required to make out a substantive due process violation.[144] Prior to the Court's 1998 decision in *County of Sacramento v. Lewis*,[145] the lower courts adopted multiple standards to govern this issue, including gross negligence,[146] recklessness,[147] deliberate indifference,[148] and the shocks-the-conscience test.[149] The shocks-the-conscience language, which addresses level of culpability rather than any prerequisite state of mind, has its origin in the Supreme Court's 1952 decision in *Rochin v.*

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that "[c]ommon sense and notions of basic fairness dictate that all children, whether placed voluntarily or involuntarily in the state's care, should be entitled to equal rights under the Constitution." *Id.* at 444.

[143] *See infra* note 154 and accompanying text.

[144] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 n.10 (1989).

[145] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (limiting the definition of constitutionally "arbitrary" behavior to "only the most egregious official conduct").

[146] *See* Simescu v. Emmet Cnty. Dep't of Soc. Servs., 942 F.2d 372, 375 (6th Cir. 1991) (holding that gross negligence suffices for a substantive due process claim); Fargo v. City of San Juan Bautista, 857 F.2d 638, 640 & n.3 (9th Cir. 1988) (holding that gross negligence or recklessness is sufficient to state a due process claim), *abrogated by* Lewis v. Sacramento Cnty., 98 F.3d 434 (9th Cir. 1996), *rev'd sub nom.* Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998).

[147] *See* Germany v. Vance, 868 F.2d 9, 18 (1st Cir. 1989) (holding that reckless or callous indifference is required for a substantive due process violation).

[148] *See* Redman v. Cnty. of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991) (recognizing deliberate indifference as the level of culpability required for pretrial detainees to establish a violation of their personal security interests).

[149] *See* Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 720–21 (4th Cir. 1991) (recognizing the shocks-the-conscience standard as the appropriate test for adjudicating substantive due process claims).

California.[150] Antonio Richard Rochin invoked substantive due process defensively in a criminal proceeding to exclude evidence that the state obtained when it pumped his stomach.[151] The Court reasoned that the official's abusive conduct shocked the judicial conscience.[152] Notably, thirty years later, the *Youngberg* Court neither mentioned *Rochin* nor invoked its shocks-the-conscience language. In fact, outside the context of the exclusionary rule, the Supreme Court prior to *Lewis* largely ignored the shocks-the-conscience test.[153]

A. Youngberg*'s Professional Judgment Standard*

The Supreme Court in *Youngberg* recognized that, although the decisions of professional administrators are presumptively valid and must be given considerable deference, they will be held unconstitutional if they are "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[154] The Court did not hold that the substantial departure from professional judgment must "shock the conscience," nor did it discuss any state-of-mind requirement.[155]

At least one critic, nonetheless, has challenged the *Youngberg* standard as providing insufficient protection to those who are civilly committed. Professor Susan Stefan has argued that the presumption of validity and the strong deference that the justices afforded professionals were unwarranted.[156] She asserts that the Court erroneously relied on the assumption that professionals act neutrally, whereas, in reality, their

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[150] *See* Rochin v. California, 342 U.S. 165, 172 (1952).

[151] *Id.*

[152] *Id.* at 173 (holding that forcibly pumping the defendant's stomach violated the Fourteenth Amendment's Due Process Clause).

[153] *But see* Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992) (arguing, in part, that a city's deliberate indifference to a worker's safety did not "shock the conscience" of federal judges and thus was not actionable (citing *Rochin*, 342 U.S. at 172)). The *Collins* Court, however, focused on the employer-employee relationship at issue, and it was not until *Lewis* that the Court affirmatively adopted "shocks the conscience" as the governing standard for all challenges to misconduct by members of the executive branch. *See* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 312–20 (2010) (tracing the birth and development of the shocks-the-conscience test from *Rochin* through *Lewis* and arguing that the Court erred in subjecting misconduct by members of the executive branch to a more rigorous standard than challenges to legislative or judicial abuses of power).

[154] Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

[155] *See infra* notes 247–276 and accompanying text.

[156] Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 Yale L.J. 639, 644–46 (1992).

decisions may reflect bias against racial minorities and the indigent, groups that are overrepresented in state institutions.[157] In her study, Professor Stefan presents stunning statistics regarding the misdiagnosis of racial minorities.[158] For example, schizophrenia was misdiagnosed in black patients at almost twice the rate of white patients.[159] Further, she notes that public concerns regarding limited resources may conflict with individual interests and may color professional judgment.[160] Because even the exercise of professional judgment may invade constitutional rights, she opines that the Court "abdicated its responsibility to provide a barrier between the individual and unwanted professional intrusion by the state."[161]

Youngberg's ruling is now thirty years old, but the concerns that Professor Stefan raised in 1992 are even more valid today—namely, racial minorities and the indigent are still clearly overrepresented in state institutions.[162] Additionally, fiscal constraints have worsened the conditions in these institutions.[163] Despite its drawbacks, however, the *Young-*

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[157] *Id.* at 659–60.

[158] *Id.* at 660.

[159] *See id.*

[160] *Id.* at 661 ("[P]rofessional judgment, as envisioned by the Supreme Court, is distorted beyond recognition by the limited resources, coercive environment, and unavoidable conflicts of interest inherent in the public sector."). Professor Stefan forcefully argues that professional judgment is impossible in light of conditions in state institutions, such as the one in which *Youngberg*'s Romeo was institutionalized. *See id.* at 662–63. She opines that the *Youngberg* standard is even less protective than rational basis analysis because the court simply inquires as to whether the decision conforms to professional judgment, rather than examining the lack of a relationship between the decision and some stated purpose. *See id.* at 678 ("[T]he rational relationship requirement is clearly an improvement over the professional judgment standard.").

[161] *Id.* at 643. Ultimately, she concedes that the *Youngberg* standard is more appropriate where a plaintiff claims an affirmative entitlement to professional services, as opposed to situations where the individual seeks to limit state restrictions on privacy or liberty. *Id.* at 667–70. Other commentators have criticized the dichotomy between affirmative and negative rights, which became the Supreme Court's focus in *DeShaney*. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2273 (1990).

[162] Lisa C. Ikemoto, *Racial Disparities in Health Care and Cultural Competency*, 48 St. Louis U. L.J. 75, 93–94 (2003) (discussing a 2001 Surgeon General report that documented racial disparities in the mental health system, such as the misdiagnosis and excessive confinement of racial minorities, and arguing that the report suggests that the healthcare system's culture is ethnocentric (citing U.S. Dep't of Health & Human Servs., Mental Health: Culture, Race, and Ethnicity 67 (2001)). *See generally* Stefan, *supra* note 156 (summarizing Professor Stefan's concerns).

[163] *See, e.g.*, Patten v. Nichols, 274 F.3d 829, 833 (4th Cir. 2001) (noting that after a psychiatric patient's death, the U.S. Department of Justice concluded that the state institution "was not providing its patients with adequate mental health treatment or medical care"); *see also* Nat'l Alliance on Mental Illness (NAMI), State Mental Health Cuts: The Continuing Crisis 1 (2011), http://www.nami.org/ContentManagement/ContentDisplay.

berg standard has become the best shield for plaintiffs against arbitrary government decision making. An examination of *Lewis* and its progeny demonstrates that the Supreme Court's adoption of the shocks-the-conscience standard for substantive due process violations has imposed a nearly insurmountable obstacle to holding government officials responsible for their abuses of power.

B. Lewis*'s Shocks-the-Conscience Standard*

In *Lewis*, the Court revisited the meaning of substantive due process as a limitation on executive power.[164] At issue was the alleged reckless conduct of a deputy sheriff who instigated a deadly high-speed chase of two boys riding a motorcycle who failed to obey an officer's command to stop.[165] Phillip Lewis, the passenger, was struck and killed.[166] The Court confirmed that substantive due process could be used to challenge abuses of executive power, noting that "[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action."[167] The majority cautioned, however, that with regard to specific acts of government officials, only the most egregious official action could be considered constitutionally arbitrary.[168] Invoking *Rochin*, the Court ruled that only an abuse of power that "shocks the conscience" will be actionable.[169]

The *Lewis* Court did not articulate a specific state of mind; rather, it explained that what amounts to conscience-shocking conduct depends on the circumstances.[170] It recognized that "negligently inflicted harm is categorically beneath the threshold of constitutional due process," whereas "conduct intended to injure . . . is . . . most likely to rise to the conscience-shocking level."[171] The Court then cautioned that a case "falling within the middle range . . . such as recklessness or gross negli-

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cfm?ContentFileID=147763 (reporting deep cuts—$1.6 billion—to state spending on services for individuals living with serious mental illness between 2009 and 2011, endangering tens of thousands of citizens). The NAMI report further noted that in June 2011, there were significant reductions in federal Medicaid rates resulting in a projected loss of $14 billion for state Medicaid programs. NAMI, *supra*, at 4. In addition, 4000 psychiatric hospital beds and numerous community service programs have been eliminated since 2010. *Id.* at 6.

[164] *See Lewis*, 523 U.S. at 845–46.

[165] *Id.* at 836–37.

[166] *Id.* at 837.

[167] *Id.* at 845.

[168] *Id.* at 846.

[169] *Id.* (citing *Rochin*, 342 U.S. at 172–73).

[170] *Lewis*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . .").

[171] *Id.* at 849.

gence, is a matter for closer calls."[172] It emphasized that "the measure of what is conscience shocking is no calibrated yard stick,"[173] and that in the middle-range cases, courts should engage in an "exact analysis of circumstances," rather than "mechanical application" of predetermined rules.[174] The Court suggested that in cases where there is time to exercise professional judgment, deliberate indifference would meet the standard,[175] whereas in emergency situations like the high-speed chase at issue, only an intent to harm will be viewed as conscience-shocking.[176]

Despite its recognition of a "fluid" standard for analyzing substantive due process claims,[177] the Court acknowledged that it was ratcheting up the standard for when government officials may be held accountable for constitutional wrongdoing, "lest the Constitution be demoted to what we have called a font of tort law."[178] Following the Court's lead, the lower federal courts have relied on the loaded shocks-the-conscience language to deny relief, except in cases involving the most egregious violations of civil rights. Some courts have expanded the types of cases where intent to harm must be shown,[179] whereas others have adopted a stringent deliberate indifference test.[180] For example, detainees bringing substantive due process claims alleging excessive force must demonstrate that they have been subjected to "unnecessary and wanton infliction of pain."[181] Additionally, students claiming excessive corporal punishment must prove that school officials acted with "intentional malice or sadism" in order to state an actionable claim.[182]

This stringent culpability standard mirrors the Supreme Court's interpretation of the rights of convicted inmates under the Eighth Amendment. In 1994, in *Farmer v. Brennan*, the Supreme Court held that inmates must meet a subjective deliberate indifference test, requir-

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[172] *Id.* (internal quotation marks and citation omitted).

[173] *Id.* at 847.

[174] *Id.* at 850.

[175] *Id.* at 851–52.

[176] *Lewis*, 523 U.S. at 854–55.

[177] *Id.* at 850.

[178] *Id.* at 848 n.8 (explaining that "executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims").

[179] Levinson, *supra* note 153, at 325–27 (noting how many appellate courts have held that even where there is time to deliberate, the intent-to-harm standard must be met whenever government officials are required to balance difficult competing interests).

[180] Levinson, *supra* note 126, at 565–79 (discussing student corporal punishment and detainee claims where courts have ratcheted up the deliberate indifference test).

[181] Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

[182] Levinson, *supra* note 153, at 327–28 & nn.121–22 (citing Davis v. Carter, 555 F.3d 979, 980–81, 984 (11th Cir. 2009); Ellis *ex rel.* Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006)).

ing proof that a guard actually knew that an inmate faced a substantial risk of serious harm and yet acted with deliberate indifference to that risk.[183] Most circuits have erroneously extended this standard to govern substantive due process claims brought by innocent students and detainees not yet convicted of any crime.[184] In addition, some federal courts have superimposed the shocks-the-conscience standard and its baggage on substantive due process claims brought by the civilly committed.[185]

C. *Circuit Split on* Lewis*'s Impact on* Youngberg *Claims*

As noted above, the Supreme Court in *Youngberg* did not mention the shocks-the-conscience test.[186] Moreover, it specifically rejected the use of an Eighth Amendment standard, reasoning that the liberty rights of the civilly committed are greater than those of convicted felons.[187] Nonetheless, some appellate courts have ruled that *Lewis*'s shocks-the-conscience standard has eclipsed *Youngberg*'s "substantial-departure-from-professional-judgment" standard, and that this triggers the Eighth Amendment subjective deliberate indifference test.[188] Other courts have ruled that the shocks-the-conscience standard is no different than the *Youngberg* standard, but in many cases these courts have superimposed a stringent state-of-mind requirement that was not part of the original *Youngberg* analysis.[189] In many circuits, the decisions reflect a distinct move from a pre-*Lewis* plaintiff-friendly standard to a post-*Lewis* defendant-friendly standard.[190]

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[183] Farmer v. Brennan, 511 U.S. 825, 837–38 (1994).

[184] Levinson, *supra* note 153, at 325–31 (collecting cases).

[185] *See infra* notes 191–220 and accompanying text.

[186] *See supra* notes 154–155 and accompanying text.

[187] *See supra* notes 40–42 and accompanying text.

[188] *See infra* notes 191–220 and accompanying text.

[189] *See infra* notes 191–220 and accompanying text.

[190] Before *Lewis*, some courts asserted that the state-of-mind requirement for substantive due process violations was simply "failure to exercise professional judgment." *See* Nielsen v. Basit, No. 83 C 1683, 1992 WL 18850, at *2 (N.D. Ill. Jan. 27, 1992). Others adopted gross negligence, recklessness, or deliberate indifference. *See, e.g.*, Dorris v. Cnty. of Washoe, 885 F. Supp. 1383, 1386 n.3 (D. Nev. 1995); *see also Patten*, 274 F.3d at 843–44 (noting the circuit split as to what state of mind must accompany the "substantial departure from accepted professional judgment," with the Second and Third Circuits adopting a gross negligence standard, and the Tenth Circuit mandating proof of deliberate indifference).

1. The Transition from *Youngberg* to *Lewis*'s Shocks-the-Conscience Standard

The U.S. Court of Appeals for the Eighth Circuit has taken the most stringent approach to claims brought by the civilly committed, ignoring *Youngberg* and applying *Lewis*'s shocks-the-conscience test, which it equates with the Eighth Amendment deliberate indifference test. For example, in 2004, in *Moore ex rel. Moore v. Briggs*, the Eighth Circuit held that an intellectually disabled resident at a state home could not succeed on his substantive due process claim unless he had evidence that the defendants actually knew that he faced a substantial risk of serious harm and yet disregarded that risk by failing to take adequate measures to protect him.[191] The plaintiff alleged that state employees placed a known pedophile in the facility without sufficiently supervising him or providing him with adequate therapy, even after he had assaulted another resident.[192] Without mentioning *Youngberg*, the court held that the shocks-the-conscience test had to be met and that the *Lewis* Court "equated deliberate indifference for substantive due process and Eighth Amendment purposes."[193] It concluded that "the record [was] devoid of evidence showing the subjective recklessness required to prove deliberate indifference."[194] A few months earlier, another Eighth Circuit panel cited *Youngberg* as having established "an affirmative duty to undertake some responsibility for providing [the patient] with a reasonably safe environment," but it also superimposed *Lewis*'s threshold requirement that the state actors must have engaged in conscience-shocking behavior.[195]

Before *Lewis*, the Seventh Circuit vociferously rejected the use of the Eighth Amendment deliberate indifference test in the civil com-

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[191] Moore *ex rel.* Moore v. Briggs, 381 F.3d 771, 773–74 (8th Cir. 2004); *see also* Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006) (explaining that a patient involuntarily confined in a state mental health facility must prove that state officials were deliberately indifferent to a known excessive risk to patient safety). The Eighth Circuit has also held that *Youngberg* should not apply to civilly committed patients who challenge the adequacy of their treatment, rejecting the position of many circuits that have interpreted *Youngberg* to require at least minimally adequate treatment. *See* Strutton v. Meade, 668 F.3d 549, 557–58 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 124 (2012).

[192] *Moore*, 381 F.3d at 773–74.

[193] *Id.* at 774 (citation omitted). As discussed in Part IV, this opinion misreads *Lewis*, which cited the Eighth Amendment test as only one of several ways to satisfy the shocks-the-conscience standard, depending on the specific context in which the claim arises. *See infra* notes 241–293 and accompanying text.

[194] *Moore*, 381 F.3d at 774.

[195] Beck v. Wilson, 377 F.3d 884, 890 (8th Cir. 2004).

mitment context.[196] Some recent Seventh Circuit decisions, however, embrace this standard. Thus, an involuntarily civilly committed repeat sex offender who challenged the conditions of his confinement was required to meet the Eighth Amendment standard, namely *Farmer*'s subjective deliberate indifference test.[197] The court asserted that in the context of medical professionals, the subjective deliberate indifference test has been described as the "professional judgment" standard, but that both standards were the same.[198]

In a 1998 decision, the Seventh Circuit explained in greater detail why the *Youngberg* and Eighth Amendment standards were equivalent.[199] Although acknowledging that "the professional judgment standard . . . is at least as demanding as the Eighth Amendment 'deliberate indifference' standard," the court rejected the notion that it was *more* demanding.[200] The court conceded that the Eighth Amendment subjective deliberate indifference standard is used to determine whether conduct amounts to unlawful punishment for convicted persons, but it reasoned that "there is minimal difference in what the two standards require of state actors," because "[o]nly the criminal recklessness standard provides adequate notice of what conduct is or is not permitted."[201] In short, for a civilly committed patient to show that a state actor's decision was a substantial departure from accepted professional judgment, the plaintiff must show that the professional knew about a serious medical need and subsequently disregarded that need.[202]

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[196] *See* Estate of Porter *ex rel.* Nelson v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994) (asserting that the application of the deliberate indifference test to involuntarily committed patients "would undermine the Court's pronouncement that involuntarily committed patients are entitled to more protected 'conditions of confinement' than convicted criminals").

[197] Sain v. Wood, 512 F.3d 886, 894 (7th Cir. 2008).

[198] *Id.* at 894–95 ("A medical professional acting in his professional capacity may be held to have displayed deliberate indifference only if the decision [meets the *Youngberg* standard]." (internal quotation mark and citation omitted)). Ultimately, the court concluded that the district court erred in denying summary judgment for the defense because the doctor's decisions were not "based on a professional judgment" that "amounted to deliberate indifference." *Id.* at 896.

[199] Collignon v. Milwaukee Cnty., 163 F.3d 982, 988 (7th Cir. 1998).

[200] *Id.* (citation omitted).

[201] *Id.* at 989.

[202] *Id.*; *cf.* King v. Kramer, 680 F.3d 1013, 1018–19 (7th Cir. 2012) (holding that although pretrial detainees must meet an Eighth Amendment criminal recklessness standard to prove that nonmedical staff acted with deliberate indifference regarding an alleged denial of medical treatment, deliberate indifference on the part of medical staff may be inferred when the medical professional's decision is "such a substantial departure from accepted professional judgment . . . as to demonstrate that the person responsible did not base the decision on such a judgment" (quoting Estate of Cole *ex rel.* Pardue v. Fromm, 94 F.3d 254, 261–62 (7th Cir. 1996)); West v. Schwebke, 333 F.3d 745, 748–49 (7th Cir. 2003)

Cases in the Eleventh Circuit reflect the same transition from the *Youngberg* professional judgment standard to the subjective deliberate indifference test of the Eighth Amendment.[203] Thus, in 2006, in *Lavender v. Kearney*,[204] the Eleventh Circuit reasoned that "the due process rights of the involuntarily civilly committed are at least as extensive as the Eighth Amendment rights of the criminally institutionalized" and concluded that:

> [R]elevant case law in the Eighth Amendment context also serves to set forth the contours of the due process rights of the civilly committed. Accordingly, for an involuntarily civilly-committed plaintiff to establish a § 1983 claim for violation of his due process rights, he must show that state officials were deliberately indifferent to a substantial risk to his safety.[205]

The First Circuit has similarly reasoned that the two standards are "not all that far apart."[206] In 2011, in *Battista v. Clarke*, the First Circuit explained that "[b]oth the *Farmer* and *Youngberg* tests leave ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources."[207] In reviewing the approaches of other circuits on this question, the court noted that the Tenth Circuit also applies the deliberate indifference test regarding medical care for the civilly committed without even mentioning *Youngberg*,[208] whereas the Fourth Circuit applies the professional judgment

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(holding that involuntarily committed sex offenders are entitled to have their needs assessed based on the exercise of professional judgment and questioning whether seclusion for twenty or more consecutive days could be justified on treatment or security grounds).

[203] *See* Johnson v. Florida, 348 F.3d 1334, 1339 (11th Cir. 2003) (explaining that "*Youngberg* recognized that patients involuntarily committed to state custody enjoy a substantive due process right to reasonable care and safety . . . . [but] courts were instructed only to make certain that professional judgment in fact was exercised, not to second-guess the outcome of that judgment" (internal quotation marks and citations omitted)); Kyle K. v. Chapman, 208 F.3d 940, 943 (11th Cir. 2000) (debating who constitutes a "professional" decisionmaker and citing *Youngberg* as the governing standard for those who fit within the definition).

[204] Lavender v. Kearney, 206 F. App'x 860, 863 (11th Cir. 2006).

[205] *Id.* at 863 (internal quotation marks and citations omitted); *see also* A.P. *ex rel.* Bazerman v. Feaver, 293 F. App'x 635, 651, 653 (11th Cir. 2008) (adopting the deliberate indifference standard in the context of children in foster care, and explaining that "in order to establish deliberate indifference, a plaintiff must allege that the defendant had (1) subjective knowledge of a substantial risk of serious harm, and yet (2) disregarded that risk").

[206] *See* Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011).

[207] *Id.*

[208] *See id.* at 453 n.4 (citing Ketchum v. Marshall, 963 F.2d 382 (10th Cir. 1992) (unpublished table decision)). The Tenth Circuit earlier reasoned that, because of the ambiguity

test, not deliberate indifference,[209] and the Seventh Circuit has basically ruled that the two standards are equivalent.[210]

Battista involved a civilly committed, anatomically male patient suffering from gender identity disorder who was denied hormone therapy despite the recommendation of health care professionals that this treatment was medically necessary.[211] Sandy Battista had sought to castrate herself with a razor after having been refused hormones for several years.[212] Ultimately, the court ruled that because Battista's substantive due process claims met both the *Youngberg* and *Farmer* standards, it did not have to decide whether, under *Youngberg*, "civilly committed persons are entitled to an extra margin of protection."[213] Notably, the First Circuit had broadly proclaimed ten years earlier that a failure to protect patients from harm violates substantive due process under the *Youngberg* standard, even if the failure does not shock the conscience.[214] The First Circuit changed course in 2010, holding that, even if *DeShaney*'s special relationship standard is met, plaintiffs must additionally establish that the official misconduct rose to a conscience-shocking level, which requires "stunning evidence of arbitrariness and caprice."[215]

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surrounding the content of both the deliberate indifference and professional judgment standards, there may not, as a practical matter, be much difference between the two. Yvonne L. *ex rel.* Lewis v. N.M. Dep't of Human Servs., 959 F.2d 883, 894 (10th Cir. 1992). In *Yvonne L.*, involving the rights of foster children, the court ultimately adopted the professional judgment standard rather than the deliberate indifference standard, reasoning that "foster children, like involuntarily committed patients, are 'entitled to more considerate treatment and conditions' than criminals." *Id.* (quoting *Youngberg*, 457 U.S. at 321–22); *cf.* Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1246 (10th Cir. 2003) (reciting *Youngberg*'s holding that "[s]tates must ensure reasonable care and safety to persons within their custody," including children in foster care, but nevertheless asserting that "the state may be liable when a state actor shows deliberate indifference to serious medical needs of a child who is in state custody" (internal quotation marks and citation omitted)); James v. Grand Lake Mental Health Ctr. Inc., 161 F.3d 17, *10 (10th Cir. 1998) (unpublished table decision) (holding that substantive due process claims against doctors at a state hospital failed because the doctors' decisions, which lacked a strong medical basis, did not rise to *Lewis*'s shocks-the-conscience standard).

[209] *See Battista*, 645 F.3d at 453 n.4 (citing *Patten*, 274 F.3d at 833–42).

[210] *See id.* (citing *Sain*, 512 F.3d at 894–95; Ambrose v. Puckett, 198 F. App'x 537, 539–40 (7th Cir. 2006)).

[211] *Id.* at 450–51.

[212] *Id.* at 450.

[213] *Id.* at 453–55.

[214] Davis v. Rennie, 264 F.3d 86, 97–99 (1st Cir. 2001).

[215] J.R. v. Gloria, 593 F.3d 73, 79–81 (1st Cir. 2010) (internal quotation marks omitted) (noting that such a showing requires that officials were aware of a danger that they chose to ignore).

The Third Circuit has also fully embraced *Lewis*'s shocks-the-conscience standard. In *Benn v. Universal Health System, Inc.*, decided in 2004, the Third Circuit addressed whether physicians in a state psychiatric facility could be held liable for failing to protect a resident from committing suicide.[216] The court explained that the failure could not be considered conscience-shocking "where the decision is a product of the authorities' professional judgment."[217] This statement could imply that when decisions do fail the professional judgment standard, they meet the *Lewis* test. The court emphasized, however, that the "threshold question" is whether the behavior is so egregious that it shocks the conscience.[218] Thus, even if a professional decision falls substantially below medical standards, it will not be found to violate substantive due process unless it is also "conscience-shocking."[219] Notably, in earlier rulings, the Third Circuit followed the *Youngberg* test, not a deliberate indifference standard, in assessing failure-to-protect, excessive restraint, and failure-to-habilitate claims brought by institutionalized persons with intellectual disabilities.[220]

2. A More Plaintiff-Friendly Approach in the Second, Fourth, Sixth, and Ninth Circuits

In contrast to the First, Third, Seventh, Eighth, Tenth, and Eleventh Circuits, other appellate courts have taken a more plaintiff-friendly approach. For example, in 2010 in *Bolmer v. Oliveira*, the Second Circuit resolved the conflict by concluding that whenever state personnel violate the *Youngberg* standard, the conduct should automatically be deemed conscience-shocking.[221] Thus, in the Second Circuit, a psychiatrist's decision to have a patient involuntarily committed will be found to shock the conscience if it falls substantially below standards

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[216] Benn v. Universal Health System, Inc., 371 F.3d 165, 174 (3d Cir. 2004).

[217] *Id.* at 175 (internal quotation marks and citation omitted).

[218] *Id.* at 174.

[219] *Id.* at 175.

[220] *See* Shaw *ex rel.* Strain v. Strackhouse, 920 F.2d 1135, 1139, 1150 (3d Cir. 1990) (reasoning that the plaintiff's burden is greater "when trying to show deliberate indifference than when trying to establish a failure to exercise professional judgment," and that the *Youngberg* standard "should have been applied to the primary care professionals, supervisors and administrators named as defendants"); *see also* Boring v. Kozakiewicz, 833 F.2d 468, 472 (3d Cir. 1987) (stating that "[t]o apply the Eighth Amendment standard to mentally retarded persons would be little short of barbarous").

[221] *See* Bolmer v. Oliveira, 594 F.3d 134, 144–45 (2d Cir. 2010); *see also* Blum, *supra* note 119, at 479 ("Conduct by professionals that represents a significant departure from accepted professional practice and that causes constitutional injury to those entrusted in their care should meet the shocks-the-conscience standard of the court.").

generally accepted in the medical community.[222] In *Bolmer*, it was unnecessary for the court to determine separately whether the conduct shocked the conscience under *Lewis*.[223] The court reasoned that the professional judgment standard "imposes liability for conduct that is at least grossly negligent," and that "*Lewis* does not preclude liability for such middle-range culpability."[224] Notably, the Second Circuit applied an objective medical standards analysis, explaining that the court does not read *Lewis* as requiring a subjective analysis of the professional's state of mind.[225]

Similarly, in 2001 in *Patten v. Nichols*, the Fourth Circuit flatly rejected the defense's argument that government officials could not be held liable for the death of a psychiatric patient absent proof of deliberate indifference regarding the denial of medical care.[226] Rather, *Youngberg*'s professional judgment test applied, which the court acknowledged is much more protective than the Eighth Amendment deliberate indifference test.[227] The court recognized that the same "denial of medical care" substantive due process claim is analyzed under a subjective deliberate indifference test when brought by pretrial detainees.[228] It reasoned, however, that a different culpability standard was justified because pretrial detainees are sufficiently different from the civilly committed in terms of why they are in custody, where they are held and by whom, and how long they will be confined.[229]

The Sixth Circuit has also ruled that *Youngberg*, not the deliberate indifference test, governs claims brought by a psychiatric patient against professional employees of a state facility.[230] Like the Fourth Circuit, the Sixth Circuit has recognized that those involuntarily committed as psychiatric patients have greater substantive due process rights than in-

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[222] *See Bolmer*, 594 F.3d at 144–45.

[223] *Id.* at 143.

[224] *Id.* at 144 (citation omitted).

[225] *Id.* at 145.

[226] *Patten*, 274 F.3d at 833–42.

[227] *Id.* at 836–37; *cf.* Waybright v. Frederick Cnty., 528 F.3d 199, 207 (4th Cir. 2008) ("[W]here the state is in a special relationship to a private individual, it acquires a duty to act on that individual's behalf and its failures to act are measured on a deliberate indifference standard . . . .").

[228] *Patten*, 274 F.3d at 837.

[229] *Id.* at 840–41. Ultimately, the Fourth Circuit determined that the treatment decisions of hospital personnel "exhibited both professional concern and judgment and therefore were sufficient to satisfy the requirements of *Youngberg*." *Id.* at 844.

[230] Lanman v. Hinson, 529 F.3d 673, 684 (6th Cir. 2008). The court held, however, that plaintiffs who sue nonprofessional staff must prove they "knew of and disregarded an excessive risk to [the patient's] health or safety." *Id.*; *see also infra* note 282 and accompanying text (discussing this aspect of the case).

mates or pretrial detainees, and that, although a court must balance competing concerns, it must make certain that professional judgment was exercised.[231] Thus, a district court inappropriately granted summary judgment where fact issues remained as to whether the actions and inactions of medical professionals at a psychiatric hospital where mental patients died in large numbers actually reflected professional judgment.[232]

The Ninth Circuit has most consistently held that *Youngberg*'s more protective standard survived *Lewis*. In 2011, in *Ammons v. Washington Department of Social and Health Services*, the Ninth Circuit determined that a staff member at a residential psychiatric hospital had sexual relations with a severely emotionally disturbed fourteen-year-old.[233] The court reasoned that *Youngberg* conferred an affirmative right to reasonably safe conditions, and that a reasonable hospital official would have taken steps to ensure close supervision of a staff member previously accused of inappropriate behavior toward patients.[234] The court emphasized that *Youngberg* imposes a conscious indifference, not an Eighth Amendment criminal recklessness, standard that requires plaintiffs to show that officials were "subjectively aware of the risk."[235] The court explained why this would be contrary to *Youngberg*'s objective standard: "Regardless of whether [the defendant] was subjectively aware of these signals, a jury could conclude that a reasonable hospital administrator in [the defendant's] position of authority . . . would have taken steps to become aware of what was happening . . . ."[236]

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[231] *See* Terrance v. Northville Reg'l Psychiatric Hosp., 286 F.3d 834, 848–50 (6th Cir. 2002).

[232] *Id.; see also* Neiberger v. Hawkins, 239 F. Supp. 2d 1140, 1148–49, 1151 (D. Colo. 2002) (applying *Youngberg*'s professional judgment standard to the superintendent of a mental health facility when criminally insane patients, who were involuntarily committed, alleged that they were denied adequate medical and psychiatric care).

[233] Ammons v. Wash. Dep't of Soc. & Health Servs., 648 F.3d 1020, 1025 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012).

[234] *See id.* at 1032–33.

[235] *Id.* at 1029.

[236] *Id.* at 1033. The *Ammons* dissent argued that *Youngberg* requires only that professional judgment be exercised and that the majority gave insufficient deference to *Youngberg*'s presumption of correctness. *Id.* at 1038 (Bybee, J., dissenting) ("[L]iability may be imposed only when the decision . . . is such a substantial departure from accepted professional judgment . . . as to demonstrate that the person responsible actually did not base the decision on such a judgment." (alteration in original) (quoting *Youngberg*, 457 U.S. at 323)); *see also* Hydrick v. Hunter, 500 F.3d 978, 990 (9th Cir. 2007) (acknowledging that the rights of a sexually violent predator who was civilly committed following a criminal sentence may differ from the rights of a plaintiff who was civilly committed because of mental infirmities, because the former "ha[s] been adjudged to pose a danger to the health and safety of others"), *vacated*, 129 S. Ct. 2431 (2009).

To summarize, the Second, Fourth, Sixth, and Ninth Circuits remain the most protective of the rights of the civilly committed, holding that government decisions that substantially depart from professional judgment violate substantive due process.[237] Significantly, all these courts have rejected the Eighth Amendment subjective deliberate indifference standard.[238] In sharp contrast, the First, Third, Seventh, Eighth, Tenth, and Eleventh Circuits have significantly ratcheted up the culpability standard by equating *Youngberg* with the shocks-the-conscience standard or *Farmer* deliberate indifference test.[239] The decisions demonstrate that when courts follow the *Youngberg* standard, without imposing the shocks-the-conscience standard as an additional or substitute test, plaintiffs are more likely to win their cases, or at least to survive summary judgment.[240]

IV. Reconciling the Shocks-the-Conscience Standard with *Youngberg*

Despite the U.S. Supreme Court's broad pronouncement in *Lewis*, that the shocks-the-conscience test should govern all substantive due process challenges to official misconduct, a close reading of the opinion demonstrates that it was not intended to affect the substantive due process analysis recognized in the Court's 1982 decision in *Youngberg*.[241] The *Lewis* Court admonished that no single liability standard could be articulated because conscience-shocking conduct depends on the circumstances.[242] In fact, to demonstrate the flexibility of substantive due process's culpability standard, the majority cited *Youngberg* as having recognized that, in the context of civil commitment, substantive due process is violated when state personnel fail to exercise professional judgment.[243] In light of this apparent reaffirmation of the *Youngberg* standard, the argument that *Lewis* displaced or weakened the protection of the rights of civilly committed is fatuous.

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[237] *See supra* notes 221–236 and accompanying text.

[238] *See supra* notes 221–236 and accompanying text.

[239] *See supra* notes 191–220 and accompanying text.

[240] *See supra* notes 221–236 and accompanying text.

[241] *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 852 (1998); Youngberg v. Romeo, 457 U.S. 307, 324–25 (1982).

[242] *See Lewis*, 523 U.S. at 850; *supra* notes 170–176 and accompanying text.

[243] *Lewis*, 523 U.S. at 852 n.12; *see also* Bolmer v. Oliveira, 594 F.3d 134, 142–44 (2d Cir. 2010) (arguing that *Lewis* did not preclude liability for mid-range grossly negligent conduct that satisfies the shocks-the-conscience standard).

Further, those courts that have equated the professional judgment standard with the Eighth Amendment's criminal recklessness standard have ignored *Youngberg*'s core holding that the rights of the involuntarily committed are greater than the rights of convicted inmates.[244] The Court in *Youngberg* carefully balanced the liberty interests of patients and residents against the government's interest in institutional security and the safety of those housed in a facility.[245] That balance resulted in the *Youngberg* standard, requiring that professional judgment be exercised.[246] Thus, the Supreme Court's decision in *Lewis* and its imposition of a shocks-the-conscience standard should not be read to displace or ratchet up *Youngberg*'s culpability test.

A. *The Culpability Conundrum*

Much of the confusion in the circuits stems from conflating broad culpability standards with specific state-of-mind prerequisites. In adopting *Youngberg*'s professional judgment standard, the Supreme Court did not articulate any particular state of mind.[247] Further, in assessing whether challenged conduct shocks the conscience, the *Lewis* Court reasoned that the requisite state of mind depends on the context.[248] *Youngberg*'s "substantial departure from accepted professional judgment" test implies an objective inquiry into prevailing medical standards and whether a reasonable professional, applying those standards, would have made the same decision in light of the particular facts in a case.[249] It is not necessary to prove that the professional actually *knew* that her conduct violated accepted professional standards or that she *intended* to deviate from these standards.

Because the *Youngberg* Court mandated a "substantial" departure from accepted professional judgment, most courts have recognized that there must be proof that the challenged decision demonstrated more than mere negligence.[250] Further, in 1986, in *Daniels v. Williams*, the Supreme Court ruled that all substantive due process claims must be

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[244] *See Youngberg*, 457 U.S. at 324–25.

[245] *See id.* at 319–22.

[246] *See id.* at 321.

[247] *See supra* notes 154–155 and accompanying text.

[248] *See supra* notes 171–176 and accompanying text.

[249] *See Youngberg*, 457 U.S. at 323.

[250] *See* Patten v. Nichols, 274 F.3d 829, 843 (4th Cir. 2001); *supra* notes 186–240 and accompanying text.

based on something more than mere negligence.[251] But before *Lewis*, the lower courts were divided as to whether the substantial departure from professional judgment standard required a showing of gross negligence, recklessness, or deliberate indifference.[252] The appellate courts unanimously agreed, however, that the Eighth Amendment subjective deliberate indifference standard does not govern[253] because the Supreme Court in *Youngberg* specifically condemned that standard.[254]

Several appellate court decisions initially tracked *Youngberg*'s clear rejection of the Eighth Amendment standard. The U.S. Court of Appeals for the Seventh Circuit in 1994 ruled that application of the subjective deliberate indifference standard to cases involving involuntarily committed patients conflicted with the *Youngberg* Court's determination that the civilly committed receive greater protections than convicted criminals.[255] The Third Circuit agreed, focusing particularly on the treatment of institutionalized, intellectually disabled individuals.[256] The Eighth Amendment's requirement that officials actually know that inmates face a serious risk of harm provides insufficient protection to the civilly committed. As one federal district court judge explained:

> [P]laintiffs in making out a claim of constitutional violation can employ evidence of misconduct which is not predicated on actual knowledge of harm or risk. To do otherwise would be to endorse neglect by government officials in the care of institutionalized and foster children. Indeed, to allow officials

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[251] Daniels v. Williams, 474 U.S. 327, 332–33 (1986). The *Daniels* Court confirmed that the Due Process Clause was not meant to protect against harm negligently inflicted, but it expressly left open "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Id.* at 334 n.3; *see also Lewis*, 523 U.S. at 849 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.").

[252] *See supra* note 190; *see also* Shaw *ex rel.* Strain v. Strackhouse, 920 F.2d 1135, 1146 (3d Cir. 1990) ("Professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct."); Doe v. N.Y.C. Dep't of Soc. Servs., 709 F.2d 782, 790 (2d Cir. 1983) ("[T]he [*Youngberg*] Court adopted what is essentially a gross negligence standard."); *cf.* Yvonne L. *ex rel.* Lewis v. N.M. Dep't of Human Servs., 959 F.2d 883, 894 (10th Cir. 1992) (doubting whether "there is much difference" between the deliberate indifference standard and the *Youngberg* standard).

[253] *See supra* notes 186–240 and accompanying text; *infra* notes 255–268 and accompanying text.

[254] *Youngberg*, 457 U.S. at 325 ("[W]e conclude that the jury was erroneously instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.").

[255] Estate of Porter *ex rel.* Nelson v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994).

[256] *See* Boring v. Kozakiewicz, 833 F.2d 468, 472 (3d Cir. 1987) ("To apply the Eighth Amendment standard to mentally retarded persons would be little short of barbarous.").

> entrusted with these responsibilities to neglect their duties with impunity would stand the professional judgment standard on its head by placing the officials in a better position if they could claim "I didn't read the report" or "I didn't return phone calls", than if they explained that "I read the report and kept in contact with my charges, and I made this decision because . . .".[257]

Despite courts' application of an Eighth Amendment deliberate indifference standard to pretrial detainees, at least one defendant has challenged the anomaly of applying *Youngberg*'s professional judgment standard to civilly committed patients who are claiming identical constitutional rights violations.[258] In response, the Fourth Circuit persuasively articulated why *Youngberg*, and not the Eighth Amendment, standard should govern.[259] First, the court explained that those in the state's custody due to mental incapacity are there to be given appropriate care and treatment, whereas a pretrial detainee is taken into custody "because the state believes the detainee has committed a crime."[260] Second, the court reasoned that although pretrial detainees are housed in jails or prisons that law enforcement officials supervise, patients are generally housed in hospitals that medical professionals staff.[261] Further, whereas most pretrial detainees face a relatively short period of confinement until their charges are resolved or they are released on bond, those committed to state institutions for mental incapacity often face "lengthy and even lifelong confinement."[262] In short, "The differences in the purposes for which the groups are confined and the nature of the confinement itself are more than enough to warrant treating their . . . claims under different standards."[263]

The Supreme Court's admonition in *Lewis* that substantive due process is a flexible standard dependent on all the surrounding circumstances buttresses the rejection of the Eighth Amendment standard.[264] The core holding in *Youngberg* is that the decisions and actions of professionals must exhibit professional concern and judgment.[265]

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[257] Wendy H. *ex rel.* Smith v. City of Phila., 849 F. Supp. 367, 374 (E.D. Pa. 1994).
[258] *See Patten*, 274 F.3d at 840–41.
[259] *See id.*
[260] *Id.*
[261] *Id.* at 841.
[262] *Id.*
[263] *Id.*
[264] *See Lewis*, 523 U.S. at 850.
[265] *Youngberg*, 457 U.S. at 321.

Romeo's mother sued the hospital administrators on the theory that they failed to institute appropriate procedures to protect her son from injuries they "knew, or should have known" Romeo was receiving.[266] As the Ninth Circuit has explained, "*Youngberg* . . . created a standard whereby whether a hospital administrator has violated a patient's constitutional rights is determined by whether the administrator's conduct diverges from that of a reasonable professional."[267] Further, the *Lewis* Court cited *Youngberg*'s professional judgment standard approvingly, explaining that "[t]he combination of a patient's involuntary commitment and his total dependence on his custodians" mandates the state to reasonably provide for the patient's welfare.[268]

The importance of adhering to the *Youngberg* standard is particularly critical in the context of decisions that budgetary constraints influence, which in many cases may be the real cause for the substantive due process violation.[269] Decisions based on fiscal constraints might not be "conscience-shocking" in the post-*Lewis* sense that malice or ill will toward patients inspire them.[270] On the other hand, the Supreme Court in *Youngberg* reasoned that, although fiscal constraints could insulate individuals from personal liability under a qualified immunity theory, the institution itself could be subject to injunctive relief to address the conditions that gave rise to the constitutional rights violation.[271] In fact, relying on *Youngberg*, some lower courts have ruled that decisions driven by purely budgetary concerns are not insulated by the professional judgment standard and may violate substantive due process.[272]

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[266] *Id.* at 310.

[267] Ammons v. Wash. Dep't of Soc. & Health Servs., 648 F.3d 1020, 1027 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012).

[268] *Lewis*, 523 U.S. at 852 n.12.

[269] *See* Parry, *supra* note 92, at 320 (arguing that "our society has not provided the money, resources, and sustained attention necessary to make [the] care [of persons with mental illness] . . . a compelling financial and programmatic priority").

[270] *See supra* notes 179–182 and accompanying text.

[271] *Youngberg*, 457 U.S. at 321–22.

[272] *See, e.g.*, Kirsch v. Thompson, 717 F. Supp. 1077, 1080 (E.D. Pa. 1988) (explaining that the decision of a professional must be based on medical or psychological criteria, rather than nonmedical or administrative criteria); Baldridge v. Clinton, 674 F. Supp. 665, 670 (E.D. Ark. 1987) (concluding that a professional must determine what is appropriate care based not upon what resources are available, but rather upon medical or psychological criteria); Clark v. Cohen, 613 F. Supp. 684, 704 (E.D. Pa. 1985) (holding that professional judgment must be "based on medical or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria"), *aff'd*, 794 F.2d 79 (3d Cir. 1986); *see also* Frederick L. v. Dep't of Pub. Welfare, 157 F. Supp. 2d 509, 525 (E.D. Pa. 2001) (noting that one's "substantive liberty interest encompasses the right to treatment consistent with the judgment of qualified professionals . . . not affected by funding issues").

A key concern in *Youngberg* was the need for "uniformity in protecting these [liberty] interests."[273] If budgetary considerations can insulate defendants from substantive due process liability, the rights of those committed in civil institutions would depend on how state legislatures decide to fund mental health services. In particular, in light of shrinking budgets and shortfalls, such a standard would violate the *Youngberg* Court's core concern that decisions be based on professional judgment.[274] State professionals obviously cannot act as if they had unlimited resources, but the courts should ensure that balancing fiscal interests against an individual's right to treatment reflects how professionals would act in the private sphere—rejecting treatment choices that are exorbitantly expensive, or of questionable value, would meet an objective professional judgment standard. For example, in *Jackson v. Fort Stanton Hospital & Training School*, decided in 1992, the Tenth Circuit acknowledged that the professional judgment standard does not preclude consideration of resources in considering constitutionally acceptable alternatives.[275] Nevertheless, the court also recognized that, by imposing overly extensive cost restrictions in individual cases, a state could so limit the range of treatment recommendations available to professionals that their judgment would be rendered inadequate to meet constitutional standards.[276]

B. *Challenging the Conduct of Nonprofessionals*

One final point deserves discussion. *Youngberg* addressed the situation where decisions made by professionals are challenged as a violation of substantive due process.[277] Justice Lewis Powell defined a "professional" as "a person competent, whether by education, training or experience, to make the particular decision at issue."[278] The Court distinguished between "persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded," who would be responsible for

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[273] *See Youngberg*, 457 U.S. at 321.

[274] *See id.* at 324; *see also supra* note 163 (discussing data revealing drastic cuts in state mental health budgets since 2009).

[275] Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 991–92 (10th Cir. 1992).

[276] *Id.*

[277] *Youngberg*, 457 U.S. at 321–22.

[278] *Id.* at 323 n.30; *see also* Kyle K. v. Chapman, 208 F.3d 940, 943 (11th Cir. 2000) ("What is implicit in *Youngberg* is that the alleged constitutional violation is related to some aspect of the treatment decision made by a professional decision maker.").

"[l]ong-term treatment decisions," and "employees without formal training but who are subject to the supervision of qualified persons," and who would make "day-to-day decisions regarding care."[279] The Court did not address how to adjudicate substantive due process claims against nonprofessionals.[280] The presumption of validity and the need to defer to experts recognized in *Youngberg* is required only when professionals make decisions.[281] This would suggest that when nonprofessionals are charged with violating the substantive due process rights of the civilly committed, a different, but nonetheless rigorous, standard should apply. Nevertheless, those appellate courts that have recognized the professional/nonprofessional distinction have proceeded to invoke the Eighth Amendment's criminal recklessness standard.[282]

The proper analysis must start with the Supreme Court's holding in *Lewis* that the government officials' action, or failure to act, violates substantive due process only if the conduct "shocks the conscience."[283] The Supreme Court in *Lewis* mandated that, except in the context of a high-speed chase or emergency situation where an intent to harm must be shown, plaintiffs must satisfy a deliberate indifference test to hold a wrongdoer accountable.[284] Unfortunately, the *Lewis* Court did not identify whether it was imposing a subjective or objective deliberate indifference test, and the majority of circuits have adopted the Eighth Amendment subjective deliberate indifference standard, which mandates a showing of criminal recklessness—the defendant must have ac-

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[279] *Youngberg*, 457 U.S. at 323 n.30.

[280] *See id.* at 323 & n.30.

[281] *See id.*

[282] *See, e.g.*, King v. Kramer, 680 F.3d 1013, 1018–19 (7th Cir. 2012) (reasoning in the context of the death of a pretrial detainee that the nonmedical defendants could not be held accountable absent evidence that they were actually aware of an objectively serious medical need and were deliberately indifferent to it, whereas a "medical professional's deliberate indifference may be inferred" when the decision substantially departs "from accepted professional judgment"); Lanman v. Hinson, 529 F.3d 673, 684 (6th Cir. 2008) (reasoning that the subjective deliberate indifference standard should be applied to the conduct of resident care aides sued for allegedly violating the substantive due process rights of a patient who died in a psychiatric hospital); *Shaw*, 920 F.2d at 1147 (holding that defendant residential service aides, charged with failing to protect a profoundly intellectually disabled resident in a state institution from abuse and sexual assault, were nonprofessional employees subject to a deliberate indifference standard rather than the *Youngberg* standard); Clark v. Donahue, 885 F. Supp. 1164, 1168 (S.D. Ind. 1995) ("Where the hospital employee is in no way a trained professional, either administratively or medically, there is no professional judgment to evaluate. . . . Therefore, [his or her] actions are subject to the deliberate indifference standard." (citation omitted)).

[283] *See Lewis*, 523 U.S. at 846.

[284] *Id.* at 851–54.

tual knowledge that an inmate faced a risk of serious harm and yet exhibited deliberate indifference to that risk.[285] Under this "subjective recklessness" standard, officials will escape liability even when they "fail[ ] to alleviate a significant risk that [they] should have perceived but did not."[286] As discussed, the federal appellate courts have applied this standard to substantive due process claims brought by pretrial detainees, despite the Supreme Court's admonition that, unlike convicted felons who are protected only from "cruel and unusual punishment," pretrial detainees cannot be constitutionally subjected to punishment in any manner.[287]

These decisions are wrong for pretrial detainees and even less justified with regard to the rights of the civilly committed.[288] *Youngberg* clearly held that those who are civilly committed are entitled to greater rights than convicted felons.[289] The Court determined that some leeway must be given to professionals who render decisions that impair substantive due process rights.[290] Yet, when nonprofessionals violate a patient's liberty interests, there is no justification for deference.[291] Therefore, courts should impose an objective deliberate indifference standard, examining whether reasonable government officials would have recognized that the challenged conduct impaired a constitutionally protected liberty interest. Although the Supreme Court in *Youngberg* recognized that patients' rights must be balanced against institutional needs, courts should not equate the substantive due process rights of those civilly committed in state institutions to the rights of those who have been charged with or convicted of criminal offenses. Finally, it should be emphasized that hospital professionals may be held accountable for their own failure to manage, supervise, or discipline the nonprofessionals who engage in constitutional wrongdoing. In *Youngberg*, it was the failure of supervisory

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[285] *See supra* notes 177–185 and accompanying text (describing the stringent deliberate indifference standard).

[286] Farmer v. Brennan, 511 U.S. 825, 838 (1994).

[287] In 1979, in *Bell v. Wolfish*, 441 U.S. 520, 539, the Supreme Court reasoned that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *See also* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (reasoning that where there has been no "formal adjudication of guilt . . . the Eighth Amendment has no application").

[288] *See supra* notes 258–268 and accompanying text (discussing *Patten v. Nichols* and the arguments as to why the rights of pretrial detainees should not be equated with the rights of the civilly committed).

[289] *See supra* note 244 and accompanying text.

[290] *See Youngberg*, 457 U.S. at 325.

[291] *See supra* notes 41–44 and accompanying text.

officials to institute appropriate procedures that gave rise to liability under the Fourteenth Amendment.[292] This decision thus provides guidance for adjudicating supervisory liability claims.[293]

Conclusion

Youngberg's professional judgment standard should govern substantive due process claims brought by those civilly committed to a state institution, whether voluntarily or involuntarily.[294] The *Youngberg* standard provides an objective test that carefully balances the competing concerns of personal liberty and institutional security. In sharp contrast, *Lewis*'s shocks-the-conscience test is inherently subjective, and the charged language has led most appellate courts to treat the rights of the civilly committed no differently than those of convicted felons.[295] The Supreme Court in *Lewis* did not overturn *Youngberg*—rather, it cited *Youngberg* as persuasive authority—and thus the two decisions need not be reconciled.[296] Finally, for substantive due process claims against nonprofessionals, an objective deliberate indifference, rather than a subjective Eighth Amendment criminal recklessness, standard should govern. As Justice Harry Blackmun poignantly acknowledged:

> [O]ur Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[297]

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[292] *Id.* at 323 n.30, 324.

[293] The question of supervisory liability, particularly in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), is beyond the scope of this Article. *See generally* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal*/*Connick *World*, 47 Harv. C.R.-C.L. L. Rev. 273 (2012) (providing guidance on how to establish supervisory liability in light of the Court's holding in *Iqbal* that supervisors may not be held accountable for the misdeeds of their agents).

[294] *See supra* notes 91–143 and accompanying text.

[295] *See supra* notes 186–240 and accompanying text.

[296] *See supra* notes 247–276 and accompanying text.

[297] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).