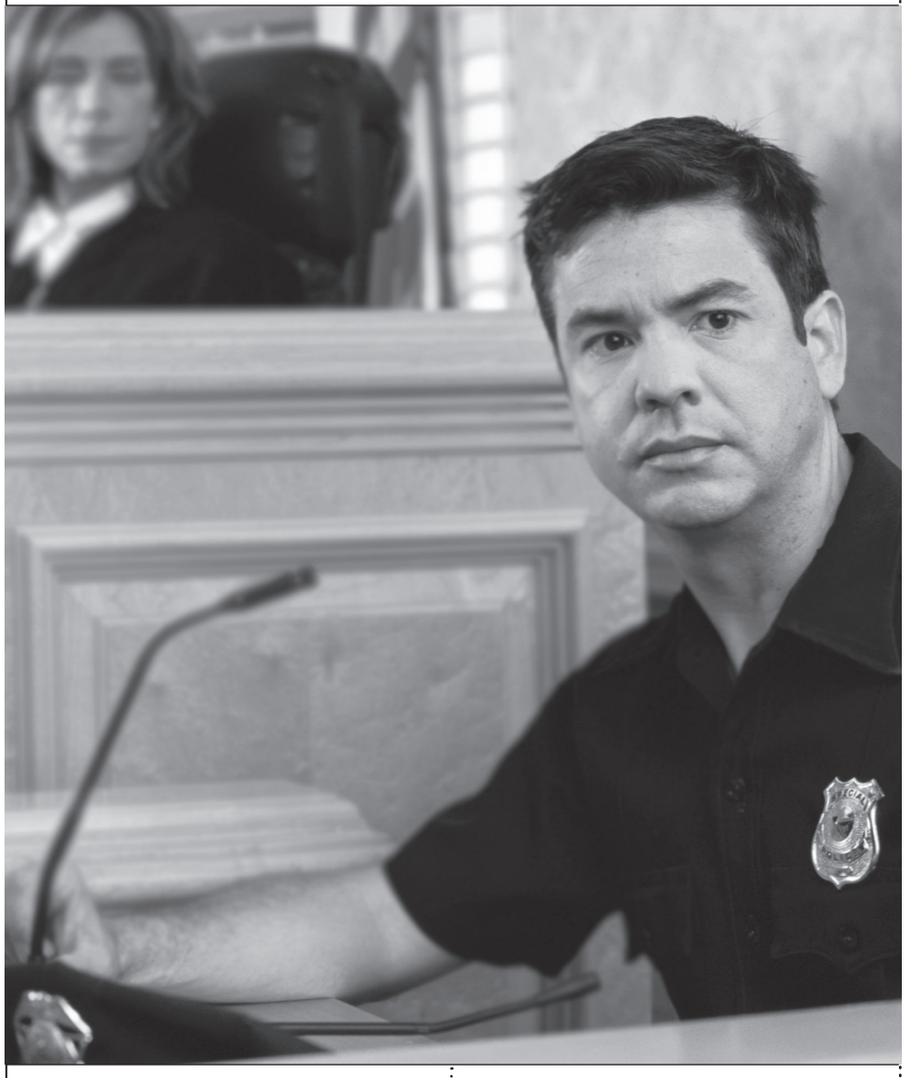
Emergency Response Liability in the Aftermath of *DeShaney* and its Exceptions

by Janet M. Spugnardi and Wm. Andrew Messer



"9-1-1, what's your emergency?" So often, a city's involvement in responding to an emergency situation begins with these four little words. So often, these situations end in a tragedy. As lawyers, we know all too well how people dealing with tragic situations often look for someone to blame. What happens if they place blame on the very people who they called for help and who came to their aid? This article examines the potential civil rights liability of our Nation's first responders—police officers, firefighters, and paramedics—in these emergency situations.

The *DeShaney* Decision

In 1989, in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, the United States Supreme Court considered the issue of the constitutional duty the government owed to the public for governmental aid or protection services.[1] The facts of *DeShaney* were "undeniably tragic"—the repeated beatings of a four-year-old boy by his father, over the course of two years.[2] Despite receiving numerous complaints that the boy was being abused, the County department of social services never removed the child from his father's custody. The father ultimately beat the child so severely that the boy fell into a coma and suffered permanent brain damage, rendering him profoundly mentally retarded. The boy and his mother brought a 42 U.S.C. § 1983 due process claim against the County, the department of social services, and various employees of the department for failing to intervene to protect the boy from his father's violence.[3] The Court observed that the intent of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other."[4] With that purpose in mind, the Court held that the Due Process Clause did not impose a duty on the state to provide members of the public with particular protective services or governmental aid, "even where such aid may be necessary to secure life, liberty, or property."[5]

The *DeShaney* Court seemingly recognized two exceptions to this general rule.[6] First, the Court stated that the Constitution imposed, upon the state, a duty of care towards individuals who were in the custody of the state.[7] This exception is known as the "special relationship theory." Under the special relationship theory, "it is the State's affirmative act of restraining an individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause ..."[8] Second, the Court seemed to suggest that state officials also have a duty to protect individuals from harm when the state actors' actions created or exacerbated a danger to the individual.[9] This exception has been termed the "state-created danger theory."[10] A majority of the federal circuits have adopted the special relationship and state-created danger theories of Section 1983 liability.[11] Despite the fact that "there is no federal constitutional right to rescue services, competent or otherwise," and that the Fourteenth Amendment does not "place an affirmative obligation on the State to provide competent rescue services if it chooses to provide them,"[12] a number of plaintiffs have attempted to use the

DeShaney exceptions to impose liability on local governments and governmental employees, including 9-1-1 operators and first responders, regarding the handling of emergency situations.

The "Special Relationship" Theory

The special relationship exception to *DeShaney* has often been invoked, and upheld, in cases involving prisoners,[13] pre-trial detainees,[14] those involuntarily committed to mental institutions,[15] and foster children.[16] An emerging trend has been for plaintiffs to seek to apply the special relationship theory in emergency response situations.

The U.S. Court of Appeals for the Sixth Circuit has twice addressed whether a special relationship can be created in a situation where an emergency medical technician (EMT) responds to a 9-1-1 call, places an injured or distressed individual in an ambulance and, in the ambulance, provides inadequate medical care. *Baker v. City of Detroit* involved a woman experiencing severe respiratory distress who called 9-1-1.[17] While transporting the woman to the hospital, the paramedic never took her vital signs, did not properly assess her medical condition, injected her with a higher dose of a drug than she should have received, and violated protocols for administering the drug. The woman went into full cardiac arrest and subsequently died as a result of the overdose from the drug injections. The plaintiff alleged that, by placing and securing the woman in the ambulance, the paramedic created a special relationship with her and thereby, owed her a duty to provide adequate medical care.[18] The Sixth Circuit rejected this argument, finding that no special relationship had been created. Crucial to the decision was the fact that the "restraints on liberty mentioned in *DeShaney* involved the application or threat of force and a show of authority made with the intent of acquiring physical control."[19] The court noted the fact that the distressed caller had voluntarily called 9-1-1 and desired to be treated by the paramedic in holding that a custodial relationship, as envisioned under *DeShaney*, had not been created because there was not "a restraint on personal liberty sufficient to give rise to a special relationship."[20]

In *Jackson v. Schultz,* EMTs were dispatched in response to a 9-1-1 call about a shooting at a bar.[21] Upon arrival, the EMTs found the shooting victim alive, but bleeding profusely.

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The EMTs did not administer any life support to the victim or transport him to a trauma center, in violation of the city's policies. The victim died in the back of the ambulance. The victim's mother filed suit against the EMTs, asserting that they violated her son's due process rights because they provided him with no medical care while he was in their custody in the ambulance.[22] The Sixth Circuit held that the special relationship exception did not apply because the decedent was never in custody, nor was his personal liberty restrained by the EMTs so as to fit within the exception to *DeShaney.*[23] The court observed that the "overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf."[24] Here, the EMTs did nothing to restrain the decedent—his "liberty was 'constrained' by his incapacity, and his incapacity was in no way caused by the defendants."[25]

The Sixth Circuit's view of the custodial nature of a special relationship is echoed by other courts. The U.S. Court of Appeals for the Fourth Circuit has observed that, "[a]s *DeShaney* indicates and our case law specifies, a 'special relationship' is all but synonymous with a custodial relationship."[26] The key to a special relationship is "the exercise of coercion, dominion, or restraint by the state. The state must somehow significantly limit an individual's freedom or impair his ability to act on his own before it will be constitutionally required to care and provide for that person."[27]

The U.S. Court of Appeals for the Fifth Circuit's view of the special relationship also equates it with a custodial relationship. *Beltran v. City of El Paso* involved a Section 1983 action against the City of El Paso and its 9-1-1 operator, stemming from the operator's mishandling of an emergency call.[28] A 15-year-old girl had called 9-1-1 to report that her father was drunk, potentially violent, and that the girl feared for her life. The caller repeatedly asked the operator

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to send the police to her house, and the operator assured her that officers were on their way. However, the 9-1-1 operator misclassified the call, resulting in a delayed response by the police. The operator told the caller to stay locked in the bathroom for her safety, and then disconnected the call. Soon thereafter, the father shot and killed the girl and her mother in their home. The plaintiff argued that, by encouraging the girl to stay in the bathroom and telling her that police were en route, the operator created a special relationship with the caller and "became the custodian of [her] safety."[29] The Fifth Circuit rejected the argument that a special relationship theory applied because the operator did not "affirmatively place [the caller] in custody by restraining her in the bathroom."[30]

Recently, the U.S. Court of Appeals for the Third Circuit affirmed the grant of summary judgment in favor of a municipality, where the district court rejected a special relationship theory in the context of a 9-1-1 emergency response. In *Badway v. City of Philadelphia*, Richard Badway collapsed at his girlfriend's apartment after complaining of chest pain.[31] His girlfriend called 9-1-1 and was repeatedly assured that "help was on the way."[32] Unfortunately, there was a delayed response in the arrival of EMTs; further, the EMTs who arrived first were not qualified to perform invasive procedures or administer drugs, and could not transport patients to the hospital. The two certified paramedics who could perform invasive procedures and administer drugs did not arrive until 21 minutes and 32 seconds after the 9-1-1 call. The paramedics intubated Badway, administered intravenous drugs, and transported him to the hospital, where he died. Badway's executor brought suit against the City, arguing that Philadelphia had known about the deficiencies in its emergency response procedures that resulted in a delay in providing appropriate emergency services to Badway, which caused his death.[33] The district court concluded that there was no special relationship created because the City did not affirmatively act to restrain Badway's freedom. Moreover, even if the City had taken "involuntary physical custody" of Badway by taking the 9-1-1 call, a lapse of 21 minutes was not sufficient to constitute full-time and continuous custody that rose to the level of a special relationship. On appeal, the Third Circuit affirmed, reiterating that providing inadequate emergency services did not amount to a constitutional deprivation.[34]

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The "State-Created Danger" Theory

A majority of federal circuits have adopted the state-created danger exception suggested in *DeShaney*, though not with a uniform approach as to the required elements for such a claim.[35] Among those circuits that have adopted the theory, a common thread has emerged in cases in which the state-created danger exception was found to apply. Courts have consistently predicated a state-created danger claim upon a requirement of an affirmative act on the part of the state actor; a mere omission or failure to protect will not, generally, impose liability under the state-created danger theory.[36]

For example, in *Brown v. Commonwealth of Pennsylvania*, the Third Circuit rejected a state-created danger claim brought by the parents of a one-year-old infant. The child died of asphyxia two days after being transported to a hospital by EMTs responding to a 9-1-1 call that the child was choking on a grape.[37] The EMTs did not arrive until ten minutes after the call had been placed, and did not attempt to reach down and remove the grape from the child's throat (though they did try to restore the child's breathing). The Third Circuit held that, in order to assert a valid substantive due process claim under a state-created danger theory, the state action had to rise to the level of a "shocks the conscience" standard with respect to the actions of emergency medical personnel, given that they had "little time for reflection, typically making decisions in haste and under pressure."[38] The court found that although the EMTs ultimately failed to rescue the child from a pre-existing danger, their actions in attempting a failed rescue did not "shock the conscience" and, thus, failed to fit within the state-created danger exception.

In *Peete v. Metro. Gov't of Nashville and Davidson County*, paramedics, firefighters, and EMTs who responded to a 9-1-1 call were sued for failing to provide medical treatment to a patient experiencing an epileptic seizure, who subsequently died after being restrained by the emergency first-responders.[39] The Sixth Circuit observed the state-created danger exception only applied where the state "cause[d] or greatly increase[d] the risk of harm to its citizens without due process of law through its own affirmative acts."[40] Since the first responders' actions did not expose the patient to private acts of violence, the state-created danger exception did not apply.[41]

Courts have, on occasion, found that failing to protect citizenry does amount to a state-created danger if the state cuts off private sources of aid and fails to provide replacement protection. *Ross v. United States* involved the drowning of a 12-year-old boy in Lake Michigan.[42] Pursuant to a policy promulgated by Lake County and the county sheriff, the sheriff's department prevented civilian rescue efforts of the drowning boy, and threatened to arrest two scuba divers if they entered the water to attempt a private rescue. It took the officially-authorized divers 30 minutes to retrieve the boy from the water. Although he showed signs of life after being pulled from the water, the boy was declared dead the next morning. The Seventh Circuit distinguished the case from *DeShaney*, saying it was not just about the County's policy of refusing to supply rescue services.[43] Instead, endangering the lives of drowning persons by "arbitrarily cutting off private sources of aid without providing a meaningful

alternative" established a cognizable claim under Section 1983.[44] Similarly, the Eighth Circuit has held that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence, beyond the level it would have been absent state action.[45]

Some district courts have relied on *Ross* and likewise found that state action, in cutting off private sources of assistance, is not mere inaction if the state increases a person's vulnerability to private violence, or places the victim in a worse position than if the state had not interfered.[46]

Other circuits, such as the Fifth Circuit, have consistently rejected assertions of a state-created danger in cases of preventing private rescue efforts without providing an alternative to alleviate the danger which the state actors created or aggravated.[47] This emerging area of the law is unsettled; it remains to be seen whether the state-created danger theory will continue to receive expanded treatment by the courts in situations involving rescue attempts where private sources of aid have been cut off, as recognized in *Ross* and *Freeman,* or whether other circuits will follow the Fifth Circuit in rejecting this view.

Conclusion: The Chilling Effect

Kennedy v. City of Ridgefield, a ruling by the U.S. Court of Appeals for the Ninth Circuit, shows an unprecedented expansion of the state-created danger theory. The plaintiffs, the Kennedys, had contacted police to report that a neighbor, Burns, had molested their daughter. They advised the officer of Burns's known, violent tendencies. The officer assured them that they would be notified prior to any police contact with Burns about the allegations, but instead, he met with the Burns family to tell them of the abuse claim. When he later advised the Kennedys of his visit, they expressed fear for their safety. The officer advised that police would patrol the area around both houses and keep on eye on Burns. Burns broke into their home and shot the Kennedys that night, after the police failed to patrol the neighborhood as promised.[48] The majority of the court found the officer was not entitled to qualified immunity because the facts, if accepted as true, were sufficient to establish that he "acted deliberately and indifferently to the danger he was creating."[49]

A subsequent petition for a rehearing en banc was denied.[50] The opinion dissenting from denial of rehearing en banc describes the inherent dangers posed by expanding civil rights liability in cases involving emergency responses:

> The slippery slope of liability created by the court's opinion has implications of great magnitude for public safety officers everywhere and the ruling cannot be confined to extraordinary cases. This unjustifiable expansion of the state-created danger doctrine raises the possibility of liability every time a person dials 9-1-1 or reports a crime to law enforcement and the police are delayed in their response or follow-up investigation.[51]

Any broadened civil rights liability for emergency first-responders in handling these rapidly evolving, highly-pressurized situations could potentially deter government employees from trying to assist the public they serve. As civil rights cases involving 9-1-1 emergency response continue to be litigated based upon the *DeShaney* exceptions, the federal courts should be cognizant of this potential chilling effect on first responders. After all, a day may come when one of us needs to call 9-1-1, and hopefully, someone will answer the call.

Notes

1. 489 U.S. 189 (1989).
2. *Id.* at 191-93.
3. *Id.* at 193.
4. *Id.* at 196.
5. *Id.* at 196-97.
6. Notably, the Court rejected the argument that either of these exceptions applied to the facts of *DeShaney.*
7. 489 U.S. at 199-200.
8. *Id.*
9. *Id.* at 201 ("While the State may have been aware of the dangers that [the boy] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them").
10. Some cases appear to recognize the state-created danger theory prior to *DeShaney. See e.g.,* Wells v. Walker, 852 F.2d 368, 370-71 (8th Cir. 1988); Escamilla v. City of Santa Ana, 796 F.2d 266, 269 (9th Cir. 1986); Estate of Gilmore v. Buckley, 787 F.2d 714, 722 (1st Cir. 1986); Jones v. Phyfer, 761 F.2d 642, 646 (11th Cir. 1985); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Nonetheless, the state-created danger theory is often cited as having its "origins" in *DeShaney. See e.g.,* Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997).
11. Some courts have questioned whether the state-created danger theory is a separate exception to *DeShaney,* or whether it is "simply in service of the special relationship exception and provides a set of circumstances where the state's actions might create a 'special relationship' and thus a duty to protect." Rivera v. Rhode Island, 402 F.3d 27, 35 n.5 (1st Cir. 2005).
12. Brown v. Commonwealth of Pennsylvania, 318 F.3d 473, 478 (3d Cir. 2003).
13. Estelle v. Gambell, 429 U.S. 97, 103-04 (1976).
14. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).
15. Youngberg v. Romeo, 457 U.S. 307, 315 (1982).
16. Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000).
17. 217 Fed. Appx. 491 (6th Cir. 2007).
18. *Id.* at 494.
19. *Id.* at 495.
20. *Id.* at 494.
21. 429 F.3d 586 (6th Cir. 2005).
22. *Id.*
23. *Id.* at 590-91.
24. *Id.* at 590 (citing *Stemler v. City of Florence,* 126 F.3d 856, 868 (6th Cir. 1997)).
25. *Id.* at 591.
26. Waybright v. Frederick County, 528 F.3d 199, 207 (4th Cir. 2008) (citing *Pinder v. Johnson,* 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995): "This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause.").

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27. Wideman v. Shallowford Comm. Hosp. Inc., 826 F.2d 1030, 1035-36 (11th Cir. 1987).
28. 367 F.3d 299 (5th Cir. 2004).
29. *Id.* at 307.
30. *Id.*
31. Badway v. City of Philadelphia, No. 10–2149, 2011 WL 666321 (3d Cir. Feb. 07, 2011), affirming No. CIV.A. 07-1333, 2010 WL 915002 (E.D. Pa. Mar. 15, 2010).
32. *Id.* at *1.
33. *Id.*
34. *Badway*, 2011 WL 666321 at *1.
35. The Circuits that have adopted the state-created danger exception include the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuit. The First, Fourth, and Fifth Circuits have all discussed the state-created danger theory, but have never recognized it as a theory of recovery. The Eleventh Circuit appears to have repudiated the doctrine. For a discussion of the state-created danger exception in various circuits, *see generally,* Breen v. Texas A&M Univ., 485 F. 3d 325 (5th Cir. 2007), *rev'd*, 494 F.3d 516 (5th Cir. 2007).
36. *See, e.g.*, Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997) (finding that police cancelling a 9-1-1 call for medical assistance was an affirmative action that triggered the state-created danger exception).
37. 318 F.3d 473 (3d Cir. 2003).
38. *Id.* at 480.
39. 486 F.3d 217 (6th Cir. 2007).
40. *Id.* at 223.
41. *Id.*
42. 910 F.2d 1422 (7th Cir. 1990).
43. *Id.* at 1431.
44. *Id.*
45. Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990).
46. *See, e.g.*, Schieber v. City of Philadelphia, No. CIV. A. 98-5648, 1999 WL 482310 (E.D. Pa. July 09, 1999), and Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343 (E.D. Wis. 1992).
47. *See, e.g.*, Hale v. Bexar County, 342 Fed. Appx. 921 (5th Cir. 2009); Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992); Martin v. City of League City, 23 F.Supp. 2d 720 (S.D. Tex. 1998).
48. Kennedy v. City of Ridgefield, 439 F.3d 1055 (9th Cir. 2006).
49. *Id.* at 1065.
50. Kennedy v. City of Ridgefield, 440 F.3d 1091 (9th Cir. 2006).
51. *Id.* at 1092 (Tallman, J., dissenting). ML

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15. After the initial rulings finding that zoning was a valid use of the police power in the 1920s and 1930s, federal courts generally absented themselves from the land use arena until cases arose under the First Amendment's free speech protections, including adult entertainment and commercial speech (e.g., signs) issues, and the continuing quest to determine the proper application of the Fifth Amendment's takings clause to land use regulation.
16. Blaesser, Federal Land Use Law, *supra* n. 4 at §7:3, and cases cited.
17. The so-called *Lemon* test, derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), though subject to continuing critical discussion and calls for alteration, remains the current statement of the law. It sets a three-part test by which governmental action (1) must have a secular purpose that neither advances nor inhibits religion; (2) must have a direct and immediate effect that neither advances nor inhibits religion; and (3) must avoid excessive entanglement with religion.
18. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing laws against challenge by Orthodox Jewish merchants by finding a secular purpose in creating uniform day of rest, and that it imposed only indirect burdens).
19. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating a state denial of unemployment compensation to a person who refused to work on Saturdays due to religious beliefs. Justice Brennan created a three-part test analyzing (1) the burden imposed on religious exercise; (2) if such burden was substantial, the regulation had to be justified under a compelling interest standard; and (3) if such an interest existed, whether a less restrictive means could accomplish the result).
20. Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983).
21. Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988).
22. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
23. *Id.* at 878-79.
24. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
25. Blaesser, Federal Land Use Law, *supra* n. 4 at § 7:6.
26. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
27. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
28. *Id.*
29. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
30. *Id.* at 451.
31. *See, e.g.*, Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002) (denying church's claim that its "spiritual duty" to construct a cemetery was violated when the city chose to develop a dedicated street instead of closing it and reverting the land to the church).
32. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).
33. *See, e.g.*, U.S. v. Ballard, 322 U.S. 78 (1944).
34. Wisconsin v. Yoder, 406 U.S. 205 (1972) suggests that a determination of what is a "religious belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 215.
35. Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb *et seq*. The Act was invalidated by the U.S. Supreme Court in *City of Boerne, Texas v. Flores*, 521 U.S. 507 (1997) on the basis that it exceeded Congress's enforcement powers under § 5 of Fourteenth Amendment. Several states have enacted their own versions – Rhode Island, Tennessee, Florida, Illinois, and Connecticut, to name a few. ML