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State Constitutional Torts: Deshaney, Reverse-Federalism and Community

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STATE CONSTITUTIONAL TORTS: *DESHANEY*, REVERSE-FEDERALISM AND COMMUNITY

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"With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them."[1]

Section 1983 is a federal statute that creates a damages action against state and local government officials and against local governments for their harm-causing Fourteenth Amendment violations.[2] This constitutional tort, whose doctrinal aspects have become quite complex,[3] renders defendants accountable for damages, subject to various immunities and other hurdles read into the statute by the Supreme Court against the "background of tort liability."[4] As a

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

2. The statute reads as follows:

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

42 U.S.C. § 1983 (1988).

3. So complex, in fact, that it is the subject of a two-volume treatise now in its third edition and accompanied by a thick annual supplement. *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (3d ed. 1991 and 1995 Ann. Cum. Supp.) [hereinafter CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION].

4. This dictum comes from the seminal section 1983 decision, *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part by Monell v. Department of Social Services*, 436 U.S. 658 (1978). The manner in which the Supreme Court has used this dictum for creating

jurisprudential matter, these doctrines are a blend of Kantianism and utilitarianism—Kantian in their emphasis on corrective justice and utilitarian in their development of constitutional tort immunities.[5]

Section 1983 has a clear nationalizing purpose. It was, after all, enacted to ensure state and local government compliance with the Fourteenth Amendment.[6] Nevertheless, federalism—particularly the promotion of state experimentation and local democracy—has played, and continues to play, a significant part in Supreme Court decisions articulating the scope of the constitutional tort as a matter of section 1983 statutory interpretation. Examples of the influence of federalism include: the existence and scope of absolute and qualified individual immunities;[7] the "official policy or custom" requirement for local government liability;[8] and the various "procedural" defenses the Court has applied to section 1983, such as statutes of limitations, preclusion and abstention.[9]

Further, federalism is sometimes implicated in the scope of the very constitutional provisions that serve as the basis for many section 1983 damages actions.[10] This is surely true in procedural due process cases such as *Parratt v. Taylor*[11] and *Hudson v. Palmer*.[12] In such cases the Court has insisted that as a matter of constitutional interpretation, certain procedural due process claims involving random and unauthorized conduct can be defeated on the constitutional merits where the state provides an adequate postdeprivation remedy.

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individual immunities is detailed in CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, chs. 7 and 8, dealing respectively with absolute and qualified immunity.

5. See, for example, the debate between John Jeffries, Jr. and this author regarding these jurisprudential questions. John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989); Sheldon H. Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990). For the connection between Kantianism and corrective justice, *see* Ernest Weinrib, *Essay: The Gains and Losses of Corrective Justice*, 44 Duke L. J. 277 (1994).

6. This is evident from its title: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

7. *See* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, chs. 7 and 8.

8. *See id.* ch. 6.

9. *See id.* ch. 9.

10. As a result, these constitutional provisions have the identical scope whether it is damages or injunctive relief that is sought in a particular case.

11. 451 U.S. 527 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986).

12. 468 U.S. 517 (1984).

Similarly, in *Daniels v. Williams*,[13] a substantive due process case, the Court required a state of mind more culpable than negligence because it did not want section 1983 to displace state tort law. Also, the Court's recent Eighth Amendment cases are accurately characterized as attempts to limit the scope of constitutional tort actions brought by prisoners through the use of heightened state of mind requirements, such as deliberate indifference.[14]

The influence of federalism is especially obvious in those constitutional tort cases raising substantive due process affirmative duty issues. For example, in *DeShaney v. Winnebago County Department of Social Services*,[15] the Supreme Court ruled that the due process clause does not impose an affirmative duty on the government to protect a person from harm caused by a private third party, here a young child brutally beaten by his father.[16]

The Court conceded that sometimes affirmative duties can be created by special relationships. When a person is injured while in the custody of or under the control of the state, the state may owe a duty to that person because it has contributed to the danger by limiting the person's freedom. But in *DeShaney*, that the state had previously taken temporary custody of the child was not sufficient to create this special relationship. The determinative factor was that the state had not worsened the child's position when it returned him to his father, even though the social workers should have been aware of the danger to the child from the father.

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13. 474 U.S. 327 (1986).

14. *E.g.*, *Farmer v. Brennan*, 114 S. Ct. 1970 (1994), defining the subjective part of the Eighth Amendment prison conditions test as deliberate indifference amounting to criminal recklessness.

15. 489 U.S. 189 (1989).

16. The constitution is a "charter of negative liberties." This phrase was used by Judge Posner in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (plaintiff's decedent was killed by a mentally ill person whom defendants allegedly failed to keep incarcerated), where he declared:

> It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Id. at 618.

Whatever one thinks of the outcome in the case of "poor Joshua,"[17] the *DeShaney* Court was guided by federalism considerations. It was concerned with the implications of constitutionalizing state and local government obligations, and of thereby freezing them nationally. In the Court's view, these kinds of obligations are better determined locally as the outcome of democratic resource allocation decisions. State and local governments and their constituents should decide whether and how much to spend for social services and what kinds of programs they want. Similarly, states should develop their own tort liability rules for official misconduct rather than have those rules dictated by federal constitutional tort rules—the "font of tort law" rationale.[18]

Furthermore, the *DeShaney* Court was sensitive to chilling the independence of social service officials for reasons similar to those articulated in the Court's immunity cases. If *DeShaney* had been decided differently, the Court reasoned, local officials would have faced the "damned if you do and damned if you don't" prospect of constitutional tort actions by *children* for failure to remove and protect them, and constitutional tort actions by *parents* for removing children in an attempt to protect them. In the Court's view, this would have created decisionmaking paralysis.

Viewed thus from a federalism perspective, the Supreme Court's section 1983 statutory interpretation decisions as well as its related constitutional decisions, particularly *DeShaney*, are influenced directly by the desire to promote state and local government experimentation and democratic decisionmaking.

What does all this have to do with state constitutional torts? Simply this—federalism takes on a different and intriguing spin in the context of a hypothetical state court *DeShaney*-type damages action brought under a *state* constitution's due process clause. I suggest that the federalism concerns reflected in the Court's federal constitutional torts case law are for the most part inapplicable to state constitutional torts because it is easier for the deliberative democratic process to override state constitutional torts decisions through state constitutional amendments. Further, since state court judges usually are elected, they are more politically accountable than life-time appointed federal judges.[19] Consequently, countermajoritarian arguments against activist

17. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

18. *Id.* at 203.

19. *See* Burt Neuborne, *Positive Rights*, 20 RUTGERS L.J. 881, 899-900 (1989) (making a similar point in connection with constitutionally based minimum standards of care for the

judicial review lose much of their force. Indeed, to the extent that federalism concerns still remain relevant, they actually cut in favor of the development of dynamic state constitutional torts doctrines.

In addition, state constitutional torts present a valuable "reverse-federalism" opportunity for the states to learn from the federal experience what to do (and what not to do) regarding state constitutional torts and affirmative state constitutional duties. Finally, the development of state constitutional torts liability, particularly in *DeShaney*-like situations, may help promote a heightened sense of community among the citizens of the state.

These matters are of more than academic interest. There has been accelerating interest in state bill of rights issues, prompted in part by the Burger and Rehnquist Courts' perceived retreat from individual rights at the national level. It has also been generated by Justice Brennan's famous law review article[20] where he argues forcefully for interpretations of state bill of rights provisions going beyond Supreme Court interpretations of the Federal Bill of Rights.

I. DESHANEY HYPOTHETICAL[21]

Consider the following hypothetical: a male intruder entered the bedroom of a woman and her two young children, a boy and a girl, in the middle of the night while they were sleeping and attempted to rape the woman under threat of death. After struggling with the rapist, she escaped from the apartment, leaving her children behind, and immediately called the police, frantically telling them that her children were in danger and that the police should come immediately. Within a few minutes the police arrived and one officer assumed command. The woman tried to tell him that her children were in her apartment with a dangerous man who had threatened to kill her. The officer insisted that he could not understand what she was saying because she was "incoherent." However, bystanders had little difficulty understanding her.

The officer asked the woman questions that suggested he was skeptical of her story—he wondered aloud whether she knew the man

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poor).

20. Brennan, *supra* note 1.

21. This hypothetical is based on *Jane Doe v. Calumet City*, 641 N.E.2d 498 (Ill. 1994), which raised various state tort law issues as well as a section 1983 sex discrimination issue.

and why she had left her children with a stranger. She began to scream at him to break down the door to the apartment but he refused because he did not want responsibility for any property damage. She then attempted to rescue her children herself but police officers stopped her. Police officers also stopped neighbors who tried to rescue the children.

At that point, the woman told the police she believed the back door to her apartment was open. The officer in command then walked around, looked at the back door, but did not attempt to check whether it was open. He and other police officers rang the apartment bell and knocked on the window but there was no response. Thirty minutes had elapsed. At that time a higher-ranking police officer arrived at the scene and instructed the other officers to enter. They were able to do so because the back door was in fact open. When they entered the apartment they discovered the intruder raping the woman's young daughter. For a half-hour he had raped her repeatedly and forced her to perform deviate sexual acts. He had also choked and threatened the woman's young son.

If the woman chose to bring a federal constitutional torts claim on behalf of her children, she could use section 1983 to seek a damages remedy against the commanding officer who refused to act promptly, as well as the police department itself. Because section 1983 does not create constitutional rights, she would have to allege a constitutional violation, in this case a substantive due process claim, against these defendants. The claim against the commanding officer in his individual capacity[22] would have to satisfy not only the requirements for the prima facie case, but also to overcome the possibility of qualified immunity. The claim against the police department, while not implicating qualified immunity, would have to satisfy an additional section 1983 prima facie case requirement for local government liability—proof of an official policy or custom.[23]

The constitutional basis for the woman's claim is most relevant at the outset because it raises a classic *DeShaney* issue. As was true of the plaintiff in *DeShaney*, the woman (and her children) would lose

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22. This is a damages action against the official personally. If the suit is successful, the official is personally liable. However, the official may be able to assert either absolute or qualified immunity. In contrast, an official capacity damages action is a damages action against the relevant local government body. Here, the official policy or custom requirement must be met and individual immunities are inapplicable. *See* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, § 6.16.

23. The plaintiff's burden is often quite significant. *See id.* § 6.12.

because of the absence of an affirmative substantive due process duty to rescue. The argument could be made that the commanding officer worsened the situation for the children by stopping the woman and the neighbors when they attempted to rescue the children. However, under the case law in the circuits this may not be sufficient to create a special relationship between the children and the defendants in the absence of a custodial relationship or its equivalent.[24] Moreover, *DeShaney* emphasized that even if state tort law imposes an affirmative duty to rescue, that is not determinative for substantive due process affirmative duty purposes.[25]

Assume, therefore, that no affirmative duty is created by the federal due process clause. As a result, the woman would lose her section 1983 damages action against both the police officer and the police department on the constitutional merits.[26] The question is whether she should be able to maintain a state constitutional tort action based on the state's due process clause. If the state's due process clause is found applicable, damages liability could follow depending on the availability of individual and governmental defenses and immunities.[27]

II. FEDERALISM AND REVERSE-FEDERALISM

Important differences exist, of course, between the legislative creation of state constitutional torts and their judicial creation.[28] But even where it is a state legislature that creates a state constitutional tort statute akin to section 1983, state courts must still engage in the

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24. *See id.* § 3.14 (analyzing *DeShaney*). *See also* Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) (refusing to find affirmative duty despite claim that police and fire officials worsened plaintiffs' situation).

25. Also, as was true in *DeShaney*, it is not plausible in the hypothetical to argue that the State itself created the danger. *Cf.* L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992) (applying danger-creating rationale as end-run around *DeShaney*'s no-duty rule).

26. The issues of individual immunities and local government liability would not have to be reached.

27. These issues parallel those implicated in section 1983 statutory interpretation.

28. *See generally* Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985). Among other things, Professor Friesen argues that "[a] legislative solution is preferable to judicial action in this area for at least four obvious reasons." *Id.* at 1284. These are: reducing the costs of trial and error; providing guidance for affected parties; promoting greater participation by the affected parties and others, resulting in more sensible and workable rules; and educating the public and others through the open legislative process. *Id.* I want to put these considerations to one side for present purposes.

process of constitutional interpretation. This process creates a healthy kind of constitutional torts dialogue between the branches. My aim here, though, is not to analyze this dialogue but rather to explore some of the federalism and reverse-federalism aspects of both constitutional and statutory interpretation in a state constitutional torts context.

Recall from *Monroe v. Pape*[29] that section 1983 is to be interpreted against "the background of tort liability that makes a man responsible for the natural consequences of his actions."[30] That is, the scope of section 1983 liability, at least as a statutory matter,[31] is to be informed by the common law of torts. Although justices have disagreed on whether the scope is limited to the common law of torts as of 1871 when section 1983 was enacted, or whether section 1983 interpretation should take account of more recent tort law developments,[32] the importance of the "background of tort liability" gloss on section 1983 is that Congress and the federal courts are to learn from the states.[33]

This learning process—states as teachers, Congress and the federal courts as students—is not unique to section 1983. It reflects what many consider an important component of federalism: the states serve as laboratories in which experiments are conducted, with the results available to other states and the federal government.[34] Here, the

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29. 365 U.S. 167 (1961).

30. *Id.* at 187.

31. This does not apply to interpretations of federal constitutional provisions. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court, while implying a Fourth Amendment damages actions against federal law enforcement officers and rejecting the argument that a state tort remedy might be available, declared: "The interests protected by state laws regulating trespass and invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Id.* at 394.

32. *See, e.g.*, Smith v. Wade, 461 U.S. 30 (1983), where the majority and the dissent debated the prevailing punitive damages rules in existence in 1871, when section 1983 was enacted, as well as whether those rules should control current section 1983 punitive damages rules. The Court rejected a malicious intent requirement for section 1983 punitive damages, opting instead for a standard of recklessness or callous disregard for a plaintiff's federally protected rights. *See also* Owen v. City of Independence, 445 U.S. 622 (1980), where the Court used the current tort concept of risk-spreading as partial justification for its holding that local governments are not protected by qualified immunity from section 1983 damages liability.

33. I do not intend to exclude the possibility of learning from pre-*Erie* federal common law as well.

34. *E.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (Brandeis, J., dissenting) (arguing that federalism allows states to serve as laboratories with the freedom to

experiments involve the use of tort concepts of individual and governmental accountability for harm caused. These experiments are useful when Congress and the federal courts attempt to articulate similar concepts, although not necessarily identical ones, in a section 1983 setting.[35]

From a reverse-federalism perspective, the federal experience with section 1983 in general, and with *DeShaney* in particular, can serve as a laboratory for the development of state constitutional torts. In our hypothetical, even if the circuits interpret *DeShaney* as barring the woman's federal substantive due process claim, state courts could interpret their own due process clause differently, perhaps based on morality, efficiency, or some combination. And once state courts did so, they (or the state legislature) could learn from the federal experience how to structure their own state law of constitutional torts liability.

1. Federalism and State Constitutional Torts

In our hypothetical, assume that the federal due process clause was not violated. Thus the nationalizing purpose of section 1983 is inapplicable. The state is not a wrongdoer for federal purposes. Therefore, unlike in section 1983 cases, there is no concern with a federal court's second-guessing state and local government conduct, and the independence of the states is not adversely affected. Also absent is any federal sensitivity to utilizing scarce federal judicial resources or to trivializing the United States Constitution.

Even though the federal due process clause has not been violated, other federalism concerns remain relevant to the state constitutional torts issue. In our hypothetical, if a state court were to find an affirmative due process duty, the state would be competing with the federal government[36] because the woman would now have a viable

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experiment).

35. In light of the broad language of section 1983, Congress effectively delegated most of the interpretive questions to the Supreme Court.

36. *See* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1236-38 (1994) (discussing "States as Decentralized Competitors" in connection with the development of *state* remedies for the conduct of *federal* officials that violates the *federal* constitution). In this essay I do not address what Professor Amar calls "converse-1983"; my focus is instead on the violation of *state* constitutional rights by *state* and *local government* officials and the availability of a *state* constitutional torts remedy.

alternative to filing (and losing) a section 1983 action in federal court. This development would render the state constitution more relevant to the lives of the citizens of the state. It would also enhance generally the influence of state constitutions which have all too often been downplayed, if not altogether ignored, by attorneys in constitutional torts litigation.[37]

In addition, the state would truly be conducting its own experiment with affirmative due process duties. Thus, the state court could determine independently[38] whether recognizing a state affirmative due process duty in such situations would unduly paralyze state and local governments and their officials, to the ultimate detriment of state citizens. In the hypothetical, for example, the court could assess the impact of affirmative due process duties on the operations of the police department, just as it might do in a *DeShaney* child abuse case with regard to the effect of affirmative duties on the provision of social services.

Moreover, the creation of state constitutional torts in this affirmative duty setting would emphasize the role of the states as guardians of legal rights.[39] This role has been diminished for many reasons, including the Supreme Court's constitutional torts decisions, beginning with *Monroe v. Pape* itself. In cases involving state and local government officials, both state tort law and state constitutional law

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37. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (1994); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed. 1993).

38. *Compare* Lawrence Sager, *Forward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985) (arguing that strategic considerations based upon differences in regulatory scope, on variations among the states and on disparities in judicial experience in the actual workings of institutions strongly suggest that state courts should not defer to Supreme Court interpretations of parallel constitutional provisions on grounds of a common political morality).

39. Dissenting in *Monroe v. Pape*, Justice Frankfurter stated:

> The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.

Monroe, 365 U.S. 167, 237 (1961) (Frankfurter, J., dissenting).

While I think Justice Frankfurter was wrong on the Fourteenth Amendment point, he was certainly correct that states have (and should have) a significant role as guardians of individual rights.

have to a considerable extent been displaced by the development of section 1983 case law. After all, since section 1983 provides a remedy in federal court, with attorney's fees as a bonus for winning plaintiffs, there is often no good reason to file a risky state law claim, particularly in state courts where there may be a pro-defendant tendency.[40] But if a state constitutional torts action is available where a section 1983 action is not, the states would again become important guardians of their citizens' rights.

This fits comfortably within proposals to shift responsibility from the federal government to the states in many areas, proposals prompted by the November, 1994, election results. Greater state responsibility appears to be both the order and the catch-phrase of the day. But greater state responsibility creates the potential for greater state abuse, and hence a corresponding need for more protection for a state's citizens. Instead of having this protection imposed from the outside by the federal government, state constitutional torts could, by analogy to section 1983, aid in state and local government compliance with state constitutional provisions. State constitutional torts could thus serve as a check on the states' abuse of their own power.

2. Reverse-Federalism: Learning From the Federal Experience

A. Affirmative Duties

The Supreme Court in *DeShaney* rejected affirmative substantive due process duties for various reasons, including federalism concerns. But once those federalism concerns are eliminated, what can the states learn from the federal experience with such duties?

It is true that judicially imposed affirmative obligations under a state's due process clause may reduce political decision making regarding the allocation of funds for government services. It may also, to some extent, reduce citizen participation in the political process. Similarly, state affirmative duties could unduly chill independent decision making at the state and local levels.

But these factors "only counsel hesitation"[41] and should not be determinative. A state court is in a better position than a federal court

40. Moreover, federal courts have pendent jurisdiction over state law claims that arise out of the same transaction or occurrence as the section 1983 claim. *See* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, § 1.11.

41. The "special factors counseling hesitation" standard was used in *Bivens v. Six*

in the parallel situation[42] to decide whether affirmative duties should be read into the state's due process clause. Even if the financial impact is extensive, the court can still impose such obligations on the state and its local governments as a matter of justice and fairness. It can similarly weigh the chilling effect on independent governmental decisionmaking. As to political participation, the citizens of the state can, if they wish, respond to the judicial creation of such affirmative duties by amending the state constitution, or at least the due process clause. In most cases this would be far easier to accomplish at the state level than at the federal level.

For example, in the hypothetical, the state court could impose an affirmative due process obligation on the police beginning with their taking physical control of the scene, even though arguably they did not worsen the situation of the woman and her children. This would avoid the imposition of a general, and perhaps overly expensive (and expansive), governmental due process obligation to provide services in the first place.[43] The state court could look to its own tort law for guidance on these state due process issues, although that law should surely not be determinative.[44]

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

42. In many states the judges of the highest appellate courts are voted on by the electorate, in contrast to federal judges who have lifetime appointments. There is thus a greater degree of political accountability in the state judiciary. *See* Neuborne, *supra* note 19, at 899-900 (speaking in similar terms of the "enhanced democratic pedigree" of state court judges).

43. Had it wished to do so, the Supreme Court could have decided *DeShaney* narrowly in favor of the plaintiff so as to avoid a general affirmative duty to provide social services. *See* Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and Its Aftermath*, 66 WASH. L. REV. 107 (1991).

44. *See* Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974) (arguing that tort law should inform section 1983 interpretation but not dictate it). Along similar lines, state legislatures and courts should be wary of blindly applying common law tort-related procedural hurdles, such as notice of claim statutes, to state constitutional torts. *Cf. Felder v. Casey*, 487 U.S. 131 (1988) (holding that a state's notice of claim statute could not be applied to a *state court* section 1983 damages action against a local government even in the absence of discrimination against section 1983 claims; the Court reasoned that applying the notice of claim statute would unduly burden the exercise of section 1983 rights).

B. The Elements of State Constitutional Torts Liability

There is considerably more to be learned from the federal constitutional torts experience than how to approach due process affirmative duties. In addition to the interpretation and application of other state constitutional provisions,[45] state courts or state legislatures must confront issues regarding the conditions and scope of damages liability. Once it is determined that a state constitutional torts defendant has harmed the plaintiff, is that defendant protected by any defenses or immunities? If the defendant is a state or local government, what additional requirements beyond those for individual liability, if any, should be imposed on the state constitutional tort plaintiff? How are damages—compensatory and punitive—measured; when (if at all) are punitive damages available and against whom? What of a state governmental action requirement?[46]

If the purposes of state constitutional tort liability are to encourage official compliance with the state constitution and to compensate for harm caused, then in answering these questions the state court or state legislature must weigh the dual interests of deterrence and compensation against the important interest in promoting effective decision making by state and local government officials. The costs of litigation to the parties and to the state are also relevant in formulating state constitutional torts rules.[47]

For example, the federal constitutional torts doctrinal structure is such that certain officials—legislators, judges, and prosecutors—are absolutely immune from damages liability when they function legislatively, judicially, or as advocates of the state in criminal

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45. Like the interpretation of the state's due process clause, interpretations of other state constitutional provisions need not be identical in scope to those of parallel federal constitutional provisions. *See* Sager, *supra* note 38. On the other hand, state court judges should be sensitive to the possible trivialization of state constitutional rights. For example, tortious acts by state and local government officials should not automatically constitute state constitutional violations.

46. *See infra* notes 58-60 and accompanying text.

47. Attorney's fees are obviously an important, and often, controversial component of these costs. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1988 & Supp. V 1993), applies to section 1983 actions whether brought in federal or state court. *See generally* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, ch. 10 (discussing entitlement to and computation of attorney's fees for prevailing plaintiffs). However, section 1988 does *not* apply to state constitutional torts.

proceedings.[48] Absolute immunity is quite powerful because it is designed to protect these defendants from the costs of defending, and not just the costs of liability. All other officials are protected by qualified immunity, a defense that was initially designed to reduce the costs of their liability but one that has been expanded by the Supreme Court to include the costs of defending as well.[49]

These rules, developed partly from the "background of tort liability"[50] and partly as a matter of policy, are quite complicated. Qualified immunity in particular has required the expenditure of considerable federal judicial resources at both the district court and court of appeals levels.[51] At the same time, state and local governments and their officials are often compelled at great expense to defend section 1983 damages actions. When this is combined with the even more complicated requirements for local government liability arising out of the need to prove an official policy or custom,[52] the twin purposes of deterrence and compensation are not promoted. Thus, even when a plaintiff overcomes qualified immunity, the official who is found personally liable will frequently turn out to be judgment proof, while the local government—the deep pocket defendant—may be found not liable at all. Even worse for the purposes of deterrence and compensation, if it is a state official who is personally sued under section 1983 for damages, the state itself cannot be sued because it is not a person under section 1983.[53]

State courts and legislatures should therefore consider absolving state and local government officials from personal damages liability altogether for their unconstitutional conduct unless they also acted willfully or wantonly, a high standard of culpability. Only where their conduct reaches this level should individual defendants be liable for both compensatory and punitive damages.[54] In all cases, however, their

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48. CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, ch. 7 (dealing with absolute individual immunity and the functional approach).

49. *Id.* ch. 8 (dealing with qualified immunity and its rationale).

50. *See supra* note 4 and accompanying text.

51. This is ironic because the Supreme Court developed its qualified immunity doctrines for the very purpose of reducing the costs of defending against constitutional torts litigation.

52. *See generally* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, ch. 6 (discussing liability through attribution from policymakers).

53. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989).

54. I am assuming for present purposes that current absolute immunity rules would be eliminated because they would be unnecessary for the most part. However, a state court or

governmental employer, whether the state or a local government, should be held liable under a respondeat superior theory for compensatory damages only. This scheme would encourage compliance with the state constitution because state and local governments would have incentives to train and supervise their officials so as to minimize state constitutional violations. At the same time, this would eliminate the very complicated immunity and local government liability rules of the federal constitutional torts structure and provide a deep pocket defendant for the injured plaintiff.[55]

In the hypothetical, then, a state court or legislature could provide that the officer would not be personally liable unless he acted willfully or wantonly,[56] a difficult burden that may not be satisfied in this case.[57] But since he did violate the due process rights of the woman and her children, the police department, or the local government, would be liable for compensatory damages.

What can the states learn from the Fourteenth Amendment's state action requirement in the federal constitutional torts setting?[58] Should

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legislature could decide that absolute immunity should be retained in whole or in part even where state constitutional torts plaintiffs allege willful and wanton conduct because the interest in protecting certain defendants from the costs of defending in such cases outweighs whatever interests in deterrence and punishment would otherwise be promoted.

55. *Cf.* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981) (suggesting that current federal constitutional torts rules may overdeter government officials and employees and arguing for enterprise liability).

56. This is a higher standard than the currently prevailing substantive due process standard in the circuits, which is deliberate indifference. *Cf.* Farmer v. Brennan, 114 S. Ct. 1970 (1994) (in cases concerning prison conditions, the Eighth Amendment is violated only if deliberate indifference, *i.e.*, criminal recklessness, is established). *See* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, § 3.07.

57. Interestingly, in the actual case on which the hypothetical is based, *Jane Doe v. Calumet City*, 641 N.E.2d 498 (Ill. 1994), the court found that the plaintiff's allegations against the commanding officer were sufficient to create a jury question concerning the willful and wanton nature of his conduct for purposes of the Illinois Tort Immunity Act. That Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." ILL. ANN. STAT. ch. 745, paras. 1-210 (Smith-Hurd 1987).

58. While section 1983 refers to action under color of law, the Supreme Court has ruled that where state action is present, so too, is action under color of law. Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-29 (1982). As a practical matter, state action and color of law are the same for federal constitutional torts purposes.

Much has been written about state action. For an overview of the state action tests and color of law, *see* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 3, ch. 2.

state constitutional torts actions be available against private persons? The answer initially depends on what the state constitution actually provides. If the state's due process clause contains a state governmental action requirement,[59] then a private person ordinarily could not violate due process.[60]

The difficult question that each state must answer for itself is which, if any, of its constitutional provisions should apply to private conduct. In dealing with this question, states should remember that constitutional compliance is not cost-free. Procedural due process, for example, can be quite expensive. More significantly, to the extent that state constitutional provisions, such as those protecting freedom of speech, press and religion, apply to private persons, private autonomy could be adversely affected. This is one of the underlying policy considerations for the federal state action requirement; and it is analogously applicable in the state constitutional law setting as well.

III. COMMUNITY

Community is a topic that is not ordinarily considered in the constitutional torts context. By "community" I mean the citizen's sense of belonging to, feeling a part of, and participating in a political entity that has a past, a present and a future, that transcends any individual citizen's interests, and that promotes values important to the citizen.[61] Community comprehends (but is not limited to) the citizen-state relationship and the citizen-citizen relationship.

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59. Such a requirement has been termed "state state action." Nancy M. Burkoff, *Individual Rights and the Pennsylvania Constitution: Is There a State State Action Requirement?*, 67 TEMP. L. REV. 1051 (1994). *See generally* Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 Ga. L. Rev. 327 (1990).

60. In the section 1983 setting, private persons can be held liable in damages for conspiring with state and local government officials. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). In the absence of a conspiracy, private person liability requires that the nominally private conduct be attributed to government by means of one of the applicable state action tests.

61. Richard Nisbet writes that Plato's THE REPUBLIC "has had the effect of making the ideal of politics, of political power, of the political bond, of the political community, the most distinctive and most influential of all types of community to be found in Western philosophy." RICHARD NISBET, THE SOCIAL PHILOSOPHERS: COMMUNITY AND CONFLICT IN WESTERN THOUGHT 3 (rev. ed. 1982).

At the federal constitutional torts level, community concerns arise only indirectly. When the Supreme Court relies on federalism concerns either in formulating section 1983 doctrines or in interpreting various constitutional provisions in a constitutional torts setting, it is providing space for state and local governments to act in a manner responsive to the wishes of their electorates, including the development of state tort doctrines tailored to state needs. However, at the state constitutional torts level, there is a more positive aspect to the promotion of community.

DeShaney and the hypothetical help make my point. In its emphasis on the Constitution as a charter of negative liberties, *DeShaney* reflects a view of the Fourteenth Amendment state-citizen relationship as a bi-polar relationship between autonomous strangers.[62] Only when there is a special relationship might the state have a federal affirmative due process obligation to protect its citizens from private harm.[63] Otherwise, the state is not constitutionally responsible for its citizens as an affirmative matter.[64]

While there may be valid federalism reasons to adhere to this view in a case similar to *DeShaney* and in the hypothetical, the cost to community may nevertheless be significant in two ways. Citizens may feel estranged from their state political communities which are under no federal constitutional obligation to protect them. Also, citizens may feel estranged from their fellow citizens because of the constitutionally permitted example of non-involvement espoused by *DeShaney*.

If this is correct, the development of state constitutional torts, particularly in the due process affirmative duty context, may enhance the state citizen's sense of belonging to the state's political community. If, in the hypothetical, a damages remedy were available under the state's due process clause against the commanding officer or, better, against the police department and local government, then that would demonstrate the state's commitment to protecting citizens from certain kinds of privately caused harm.[65]

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62. *DeShaney*, 489 U.S. at 194-97; *see* Sheldon H. Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989).

63. *DeShaney*, 489 U.S. at 198-200.

64. *Id.* at 196.

65. In echoing Justice Blackmun's attack on the majority opinion in *DeShaney* as lacking moral ambition, Professor (now Dean) Soifer writes:

> Judges are people, too. They ought not to be entirely immune from the blame we share if we collaborate passively upon encountering reprehensible acts. It is horrific

Of equal significance, this kind of ruling could serve as an example to other citizens that taking personal responsibility for one another and helping one another in dangerous situations (where to do so would not needlessly endanger the rescuer) is perfectly appropriate moral behavior.[66] The state, a political community considerably smaller than the nation, would thereby be engaged in educating its citizens in virtue and in the best way of life. [67]

A communitarian view of affirmative due process duties takes on even more force if one believes that state affiliation is a crucial aspect of an individual's political, economic and cultural identity.[68] Moreover, this view promotes federalism's values of experimentation and democracy because different communities with divergent ideas

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> to be so complacent as to lack ambition to do better. It may be even worse to purport to help someone but to do nothing. We are to blame, surely, if we attend only to ourselves and our business as usual, while we claim to seek justice.

Aviam Soifer, *Moral Ambition, Formalism and the "Free World" of DeShaney*, 57 Geo. Wash. L. Rev. 1513, 1531-32 (1989).

66. Consider, however, Justice Brennan's comment in *DeShaney*:

> In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare programs, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap.

Id. at 209 (Brennan, J., dissenting). Justice Brennan argues that the reliance on the DSS by private persons was induced by the state and that this should give rise to an affirmative due process duty on the state to rescue.

He thus implicitly raises a troublesome empirical question: in the hypothetical, would the imposition of a state affirmative duty whose breach would be actionable in damages as a state constitutional tort encourage citizens by example to take greater personal responsibility for one another? Or would the result be the opposite because there might be even greater reliance on the state if affirmative constitutional duties were created? As indicated in the text, my intuition is that citizens would indeed be encouraged to take greater personal responsibility for one another because of the example of the state.

67. *See* ARISTOTLE, THE POLITICS, bk. 7, ch. 14 & bk. 8, chs. 1-3 (Lord trans. 1984).

68. "Citizens often think in terms of states and make state affiliation a critical aspect of their political, economic, and cultural identity. States are one of a handful of focal points of political loyalties and concerns, and the distinctive role of the states shapes the political culture of American society." Richard Briffault, *What About the "Ism"? Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1306 (1994). *See also* Dan Elazar, *Response to Gardner*, 24 RUTGERS L.J. 975 (1993) (arguing against the unequivocal acceptance of what he terms hierarchical nationalism and in favor of a real federalism that accepts diversity and disorder).

concerning citizens' responsibilities for one other will emerge in different parts of the United States.[69]

IV. CONCLUSION

The development of state constitutional torts provides a unique opportunity for states to define themselves with respect to their citizens. When should a state be responsible for state constitutional harms caused by its officials and employees? Should these constitutional harms include breaches of affirmative state due process duties? When should normative considerations trump financial ones?

The states can learn a great deal from the federal constitutional torts experience, both with regard to affirmative duties and to the doctrinal structure of constitutional torts. This learning process is entirely consistent with important aspects of federalism, particularly state experimentation and democracy. Also, state constitutional torts necessarily implicate notions of community as well. Ultimately, the kind of state constitutional torts regime a state enacts depends in large measure on the kind of state in which its citizens wish to live.

69. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1558 (1994) (describing three general political subcultures: the individualistic, the moralistic and the traditionalistic).