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Some Moral Implications of Finding No State Action

*Theodore Y. Blumoff**

While the State may have been aware of the dangers that Joshua 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.¹

The fact is that freedom, like simple absence, of which it is a species, or like power, to which it sometimes leads, is not necessarily either good or bad in itself.²

I. INTRODUCTION

Our conceptions of justice flow both through and around prevailing moral norms, in a filtration process to which all judges are inextricably bound. Professor Lon Fuller, writing a half century ago, stated the issue this way:

The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common mo-

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Throughout my career, friends kind enough to read and comment on early drafts and sections of my work product have often saved me from myself. Those generous enough to comment on this work include Erwin Chemerinsky, Linda Edwards, Fred Gedicks, Hal Lewis, David Oedel, Jack Sammons, and Sidney Watson. I also presented draft sections of this work at the Sixth Annual Symposium on "Law, Religion and Ethics" at Hamline University School of Law in October 1993. Comments by and conversations with Marie Ashe, Alan Freeman, Emily Hartigan, Howard Lesnick, Betty Mensch, and Tom Shaffer at that symposium proved extremely helpful. My colleagues at a Faculty Symposium at Mercer University School of Law provided criticism that significantly improved the final product. Special appreciation is due to former Dean Phil Shelton and Interim Dean Dick Creswell for providing much needed time and financial support. Finally, Nancy Bladich (J.D., Mercer University School of Law, 1994) provided valuable research assistance.

1 *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 (1989) (Rehnquist, C.J.).

2 John Somerville, *Toward a Consistent Definition of Freedom and its Relation to Value*, in *NOMOS IV: LIBERTY* 289 (Carl J. Friedrich ed., 1962).

rality which will define the good man. When he sees his office in this light, the judge will realize . . . how significantly creative his work is, and how sinister is the temptation to evade his responsibilities to the future by adopting a passive and positivistic attitude toward "the existing law."³

As Fuller understood, judges and justices may earnestly desire and affirmatively seek to undermine the reality of this creativity, but they are hopeless to escape it.⁴ Indeed, unless judges engage in self-deception by assuming the status of mere technicians, they are—or should be—aware of the moral authority of judging.⁵

3 LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 137-38 (1940). In Fuller's view, courts have influenced the "shap[e of] common morality," particularly with respect to "judge-made law." *Id.* at 135. But two facts, I think, support the argument that his insight applies to contemporary constitutional interpretation as well. First, Fuller did not exclude constitutional jurisprudence from the force of his remarks. Indeed, his sweeping critique of positivism and its effect on democracy seems unbounded by the common law. *See, e.g., id.* at 118-33. Second, and more importantly, the interpretation of the open-textured language of the Fourteenth Amendment is very similar to common law interpretation. In fact, the command of the Equal Protection Clause—equal treatment for those similarly situated with respect to the law—is a basic tenet of common law adjudication. *See, e.g., EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING* 3 (1949).

4 Later in life, Fuller seemed to limit the scope of a judge's moral options to something very similar to procedural morality. *See* LON L. FULLER, *THE MORALITY OF LAW* 41-44 (1964) (discussing the "internal morality" of law); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978).

5 *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 30-33 (1962). This does not mean that the Justices are always free to acknowledge their understanding, although the self-deception discussed in the text may reflect captivity to "an ideologically induced illusion about the nature of moral ontology." CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 9 (1989). Alternatively, they may well realize that the sociology of the Supreme Court limits disclosure of their complete understanding of the process they shepherd. Here, the real issues concern the institutional-political and theoretical limitations on the Court's ability to acknowledge the way it uses precedent.

In many of the Court's more difficult constitutional cases, the Justices consult historical sources in an effort to reconcile their decision with the intent of the Framers. In this effort they act like historians, gathering textual evidence before embarking on the fundamentally imaginative process that deciding these crucial issues compels. Historians, however, at least appear to have a broader warrant for manipulating their sources than do Supreme Court Justices, for historians cross-examine their evidence in a creative process whose outcome often turns on the idiosyncratic experiences of each scholar. *See, e.g.,* R.G. Collingwood, *The Historical Imagination*, reprinted in *THE PHILOSOPHY OF HISTORY IN OUR TIME* 66 (Hans Meyerhoff ed., 1959) (originally published in R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 231-49 (1946)). In fact, the Justices undertake the exact same process, but, by contrast, cannot own their creativity. Our notion of justice requires the Justices to present themselves as the faithful interpreters of an autonomous text. Unlike historians for whom no text claims autonomy, the Justices are foreclosed from taking personal responsibility for their original use of source material. Anything less than absolute allegiance to text risks the charge of "super legislature." *See* Theodore Y. Blumoff, *The Court's Uses of History*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNIT-*

Some decisions, because of their apparent indifference to the moral consequences of judging, push us over the edge. *DeShaney v. Winnebago County Department of Social Services*⁶ has done that to me.⁷ Since God's cruelest challenge is surely the parent's loss of a child, the majority opinion's characterization of Joshua DeShaney's brain death by a brutal father as "undeniably tragic" is jarringly callous. Indeed, the Court seemed to make the result of the case appear preordained.⁸ The opinion's relentless syllogism tried to scrub away the residue of the choices its facts demanded. But the issues were not self-deciding. Indeed, like any cert-worthy case, *DeShaney* arrived on the Court's docket with respectable arguments and useful precedent on both sides.⁹

Although I retell the tragic story of Joshua DeShaney in Part II, I will not belabor that process because his story has been told before and often. Rather, I want to use *DeShaney* as a vehicle to discuss more generally the morality of judging. To that end, I examine the opinion itself in Part III and its doctrinal and jurisprudential underpinnings in Part IV. It is within the choices the Justices make that the external morality¹⁰ of judging becomes inescapable.

In *DeShaney*, the currency of those choices was "state action." This doctrine precludes the finding of a constitutional violation in the absence of an act attributable to government.¹¹ Stated simply,

ED STATES 373 (Kermit Hall ed., 1992).

6 489 U.S. 189 (1989).

7 Cf. Linda Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1020 (1990) (stating that *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), had a similar effect on the author).

8 *DeShaney*, 489 U.S. at 191. In his dissent, Justice Blackmun likened the Court's approach to the "formalistic legal reasoning" espoused by "antebellum judges who denied relief to fugitive slaves." *Id.* at 212 (Blackmun, J., dissenting).

9 See *id.* at 203-12 (Brennan, J., dissenting); *id.* at 212-13 (Blackmun, J., dissenting).

10 I distinguish between Fuller's essentially procedural "internal morality" of judging—our commitment to written findings, fair process and the like—and the personal sense of morality each judge or justice brings to the process, which originates outside of both the adjudicatory process and the moral norms explicit or implicit in the constitutional provision at issue. See *infra* text accompanying notes 153-64.

11 Government "action" is needed to state a claim against the federal government as well as against a state government. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). While my primary focus in this work is on nonobvious state intrusions and the Fourteenth Amendment, my conclusions about moral responsibility would also apply in the context of nonobvious federal intrusions. Of course, the separation of powers concerns that can influence the Court as it searches for instances of nonobvious federal misconduct are not identical to the federalism issues that the current Court has imported into

the Court held that because the actual beating came from Joshua's father, there was no state action—the Due Process Clause placed no affirmative obligation on the State to prevent that beating, no matter what the State's agents knew, or how easily the beating could have been prevented. I hope to show that neither the text of the Fourteenth Amendment nor precedent compelled this result. Instead, with the single and important exception of the search for state action in race-related cases, the Court has engaged in line drawing that has turned the state action component of the Fourteenth Amendment into a forceful shield for the state, rather than a simple description of when federal protection of individual liberty is required.

In this process of interpreting state action, the Court has lost sight of, or deceived itself about, at least one facet of the doctrine's jurisprudential underpinning. The Supreme Court has insisted that the state action requirement protects individual liberty by cabining an area of conduct free from federal constraints and thus insuring a realm of privacy.¹² As many commentators have noted in various ways, this understanding of state action permits individuals to make certain choices that enhance "individual autonomy, individual dignity, and pluralism."¹³ But as I demonstrate in Part IV, no conception of privacy—understood as prima facie freedom from regulation—¹⁴ was enhanced by the *DeShaney* opinion.

Instead, the current Court's state action jurisprudence harkens back to Justice Miller's view of federal power in the *Slaughterhouse*

instances of colorable state involvement. Nonetheless, the concerns seem similar enough that any differences should not affect the Court's ethical obligations.

12 "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); see also, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988); *Price v. Hawaii*, 939 F.2d 702, 707 (9th Cir. 1991); *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1293 (7th Cir. 1990) (Ripple, J., dissenting); *Dunwoody Homeowners Ass'n v. DeKalb County, Georgia*, 887 F.2d 1455, 1461 (11th Cir. 1989); *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989).

13 Jody Y. Jakosa, *Parsing Public from Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193, 207 (1984); see also, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-2, at 1691 (2d ed. 1988) (concluding that the state action doctrine serves two not wholly compatible interests: federalism and privacy, the latter by "stop[ping] the Constitution short of preempting individual liberty . . . to make certain choices").

14 See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 7-9 (1992).

Cases,¹⁵ where his stated fear of “fetter[ing] and degrad[ing] state government” made possible the regime of Jim Crow, an era of our history virtually devoid of public decency toward the most vulnerable members of society.¹⁶

In the final section, Part V, I return to the law of Joshua’s case and draw conclusions about the current Court’s view of its role in shaping public morality, including most importantly the idea that the whole of our state action jurisprudence defines a significant part of the relationship of each individual to the federal judicial system. Thus, a decision like *DeShaney* makes at least two dramatic, if implicit, statements: (1) we are all on our own in this “free world,” relying on government at our peril; and (2) none of us is highly valued within the federal judicial system. In my view, if these two statements are true, they speak volumes about the Court’s attitude toward its role in shaping public values.¹⁷

I want to clarify that when I address the Supreme Court’s role in creating and reinforcing public moral values, my focus is exclusively on constitutional interpretation. This is not to deny, however, that the external morality of judging plays a part in statutory interpretation as well. My point here is that the two tasks—constitutional interpretation and statutory interpretation—are different, for at least three reasons. First, at least with respect to the open-textured commands of the Fourteenth Amendment, constitutional interpretation is more indeterminate than traditional statutory analysis. Thus, the Court has more room to choose than is often the case with statutes. Second, the Supreme Court has often stated that it is freer to revisit constitutional precedent than statutory interpretation.¹⁸ The absence of a congressional corrective underlies this willingness to reshape constitutional precedent. Third, and most important, when Congress enacts legislation, it defines our public values, and its members are often mindful of public morality.¹⁹ The primacy of the congressional

15 83 U.S. (16 Wall.) 36 (1872).

16 See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974) (tracing the history of segregation in the aftermath of Reconstruction).

17 In this sense, I cannot agree fully with Professor Beermann, who concluded that the *DeShaney* Court avoided issues of governmental responsibility for helplessness and the morality of the state standing by while one individual does violence to another. See Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1079 n.6. In my view, the Court spoke clearly to a piece of the problem raised by the first issue.

18 See, e.g., *Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989).

19 See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of*

role in shaping public values is clearly as it should be in a democracy, at least as a general rule. But when Congress has not spoken, which is often the case when state action is at issue, the Court may be the only voice articulating our national conception of public morality.

II. THE CONTEXT: JOSHUA'S "UNDENIABLY TRAGIC" LIFE²⁰

"The facts of this case," Chief Justice Rehnquist begins, "are undeniably tragic."²¹ Joshua DeShaney was born in 1979. One year later, a Wyoming court consigned him to the custody of his father, Randy DeShaney, under a 1980 divorce decree. Randy DeShaney moved with Joshua to Winnebago County, Wisconsin, remarried, and shortly thereafter divorced a second time. Joshua's problems were about to begin.

Wisconsin's Department of Social Services (DSS) first became aware of Joshua's problems in January 1982, when the police department notified the DSS that Randy DeShaney had abused Joshua. DeShaney denied the charge in an interview, and the DSS let the matter drop. A year later, Joshua was taken to a local hospital with multiple bruises and abrasions. The examining physician suspected abuse and duly informed the DSS. The DSS moved the court for an order placing Joshua in the nominal, temporary custody of the hospital. Within seventy-two hours, an ad hoc, interdisciplinary "Child Protection Team" met to determine Joshua's future. Everyone involved in this process believed Joshua had been abused.²² The county attorney, however, for unrecorded reasons, concluded that there was insufficient evidence of abuse. Accordingly, the Child Protection Team returned Joshua to his father, although it persuaded Randy DeShaney to agree to cooperate with the DSS in an effort to protect Joshua. Under this agreement, Randy DeShaney was to enroll Joshua in a preschool program, obtain counseling for himself, and make his girlfriend leave the home. The juvenile court then dismissed the abuse case against

Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding religious exemption to Title VII's prohibition on employment discrimination); see also 16 U.S.C. § 1531 (1988) (listing the findings and purposes of Congress in enacting the Endangered Species Act of 1973).

20 *DeShaney*, 489 U.S. at 191. Except as otherwise specifically noted, all of the facts are taken from the majority opinion, *id.* at 191-93, and the Petition for Writ of Certiorari, *DeShaney v. Winnebago County Dep't of Social Servs.*, No. 87-154 (July 17, 1987) (LEXIS, Genfed library, Briefs file) [hereinafter *Cert. Petition*].

21 *DeShaney*, 489 U.S. at 191.

22 *Cert. Petition*, *supra* note 20.

DeShaney.²³

During the next year, Joshua was repeatedly admitted to the local hospital, each time bearing suspicious traumatic injuries. In November 1983, the local hospital again notified the DSS caseworker of suspected abuse. The caseworker declined to take action, but did visit Joshua's house monthly for the next half year. During these visits, she noted "in detail that seems almost eerie in light of her failure to act"²⁴ a number of suspicious injuries to the boy's head and the fact that Randy DeShaney was not abiding by the terms of the agreement. Toward the end of 1983, the authorities again apprised the DSS of physical abuse to no avail. On each of the next two visits, the caseworker was told that Joshua was too ill to be seen.

Finally, in March 1984, the predictable occurred: Randy DeShaney beat Joshua so severely that Joshua suffered permanent brain damage. When word of this last blow reached the caseworker, her response speaks plainly to the level of culpability attending her failure to intervene: "I just knew the phone would ring some day and Joshua would be dead."²⁵

Despite three trips to the emergency room, strong signals from the treating physicians, complaints lodged by third parties, and nearly twenty home visits, the DSS did nothing. And therein lay Joshua's legal hurdle—for having done nothing, the Court held, the DSS could not be a state actor subject to substantive due process limitations.²⁶

III. DUTY AND STATE ACTION IN *DESHANEY*

DeShaney belongs in the universe of cases in which duty and state action co-extend: if there is no duty, there is no state action, and vice versa. So the question could be framed as follows: May the State remain deliberately indifferent to the conduct of one private party who inflicts an injury on another person if state activity surrounds that conduct, if the State's agents are or should be aware of the potential injury, and if the State has the capacity and

23 "The DSS officials filed their internal report, noting that child abuse was strongly suspected and promising that they would continue to actively and closely monitor the child." *Id.* One of the many ironies of Joshua's story is that the DSS *did actively monitor* the case.

24 *DeShaney*, 489 U.S. at 209 (Brennan, J., dissenting).

25 *Id.* (quoting *DeShaney*, 812 F.2d 298, 300 (7th Cir. 1987)).

26 *Id.* at 194-203.

the formal desire, reflected in statutory warrants to intervene in abusive situations, to prevent such conduct? Does this form of "inaction" give rise to a constitutional duty?

The *DeShaney* opinion's major premise, i.e., that the Due Process Clause is "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security,"²⁷ proved dispositive. Indeed, the Court held that the Fourteenth Amendment "confers no affirmative right to governmental aid, even where such aid may be necessary to secure life."²⁸ It followed that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, . . . the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them."²⁹ No state action therefore means no duty.

Reaching this conclusion was not as straightforward as the Court's logic suggested because the idea of "duty" is not self-executing. Rather, "duty" reflects a conclusion reached after examining the interests and expectations implicated and the relationships among the parties involved.³⁰ Traditionally, interests like Joshua's vis-a-vis the government have not been highly regarded. First-semester torts students quickly encounter the common law's deeply rooted indifference to the humane obligation to take reasonable affirmative steps to help one in obvious need. The able doctor, we learn, can turn away a sick patient with impunity;³¹ one can entice a colleague into a pool of deep water and then stand idly by and watch that colleague drown;³² and the observer can even refuse to give warning to a youngster about to be mangled in a dangerous machine.³³ All this, we learn, is "nonfea-

27 *Id.* at 195. Others have elaborated on the formal nature of the opinion. See Beermann, *supra* note 17, at 1082; Aviam Soifer, *Moral Ambition, Formalism and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989).

28 *DeShaney*, 489 U.S. at 196.

29 *Id.* at 196-97.

30 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356-59 (5th ed. 1984). One might well ask why an analysis from tort law should be used to determine duties of a constitutional nature. The brief answer is twofold: First, where else would one look for context other than the law of torts and crimes? Second, the Supreme Court has repeatedly looked to tort law to explicate 42 U.S.C. § 1983, which is the primary vehicle for stating constitutional violations against the states. See Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 764-67 (1992).

31 See *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901).

32 See *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959).

33 See *Buch v. Amory Mfg. Co.*, 44 A. 809 (N.H. 1898). Similar cases are collected in

sance" for which no liability lies. Yet this doctrine of nonfeasance is a radical, insupportable distinction between what is moral and what is legal; it is premised either on a misguided sense of rugged individualism or a radical Millian notion of noninterference with individual liberty.³⁴

But the modern common law has come to recognize the inhumanity of its own predilections. Whether the nonfeasance norm traces its origins to a Darwinian conception of social evolution or a Millian bias for virtually unmitigated liberty, the nonfeasance norm recognizes an exception that is codified in section 324 of the *Second Restatement of Torts*:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or

(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.³⁵

The *DeShaney* Court implicitly recognized this exception, noting that after the DSS took temporary custody of Joshua and returned him to his father, "it placed him *in no worse position than that in which he would have been had it not acted at all . . .* Under these circumstances, the State had no constitutional duty to protect Joshua [indefinitely]."³⁶

KEETON ET AL., *supra* note 30, § 56, at 375 nn.22, 23 & 28.

34 See Robert L. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946). *But see* Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198-200 (1973) (arguing that imposing a duty to act for the benefit of another creates unprincipled social interference with individual liberty).

35 RESTATEMENT (SECOND) OF TORTS § 324 (1965).

36 *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 (1989) (emphasis added). Interestingly, the Court cited § 323 of the Second Restatement, the more general exception. Section 324 is a particular application of the exception, more closely on point in this case. See RESTATEMENT (SECOND) OF TORTS § 324 cmt. a (1965). The Seventh Circuit had omitted entirely any consideration of § 324, choosing instead to approach the issue of tort liability through a causation analysis. Judge Posner, a former torts professor and the author of a number of works on the rescue doctrine, concluded that the DSS's role in causation was "trivial," because "if the Department had never existed, Joshua would have sustained the [same] injuries for which he is seeking damages in this suit." *DeShaney*, 812 F.2d 298, 302-03 (7th Cir. 1987).

Asking the counterfactual question, "what if the DSS never existed" is simply the

The Court failed, however, to answer the central question posed by section 324(b): a position worse than what? Section 324(b)'s text gives one answer: "a worse position than when the actor took charge of him." But that answer fails, and the question persists because of the discontinuity among section 324(b)'s plain text, the mission of rescue, and the example the *Restatement's* drafters give to illustrate the operation of this subsection.³⁷ Comment g states:

If the actor has succeeded in removing the other from a position of danger to one of safety, he cannot change his position for the worse by unreasonably putting him back into the same peril, or into a new one. Thus, while A, who has taken B from a trench filled with poisonous gas, does not here obligate himself to pay for B's treatment in a hospital, he cannot throw him back into the same trench, or leave him lying in the street where he may be run over.³⁸

If we determine "worse position" solely by reference to the literal meaning of the text—"than when the actor took charge of him"—A should be able to put B back in the trench without breaching the duty section 324 creates, for under these circumstances A has, to quote Chief Justice Rehnquist, "placed him *in no worse position* than that in which he would have been had [A] not acted at all."³⁹

Imbedded in comment g's hypothetical is an assumption that most of us would find morally reprehensible: that the rescuer, having the ability and opportunity to pull B from the trench, would opt for placing B back into the trench without any good reason. To make sense of section 324's obligation, therefore, and to give some meaning to the ontology of rescue, "no worse position" must mean something else, e.g., "no worse than the best position the rescuer achieved after the rescue effort began." If this

wrong way of approaching cause-in-fact. The traditional question—and the one on which plaintiffs would have borne the risk of nonpersuasion had the case gone forward—is almost the opposite: But for the agency's failure to intervene effectively at an earlier date, would Joshua have suffered permanent injuries? The question must be phrased this way because if Joshua would have suffered the same permanent injury despite the defendant's allegedly substandard conduct, i.e. its failure to intervene, the plaintiff is not entitled to recover. KEETON ET AL., *supra* note 30, § 41, at 264-65. So we are at least left to speculate about why Judge Posner framed the question as he did.

³⁷ See DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY FOR INJURY 415 n.2 (1985).

³⁸ RESTATEMENT (SECOND) OF TORTS § 324 cmt. g (1965).

³⁹ *DeShaney*, 489 U.S. at 201 (emphasis added).

is the duty section 324 imposes, *DeShaney* simply missed the point. In so doing, moreover, the Court failed to give Joshua DeShaney and his natural mother a chance to prove that by initially taking charge of Joshua, the DSS put him in a worse position than he had achieved both when it acquiesced in Joshua's return to his father and when it failed to remove him once again from his father.⁴⁰ The DSS threw Joshua back into the trench.

The Court characterized the DSS's conduct *sub rosa* as nonfeasance. But even this process is troublesome and ultimately normative. For example, in the estimable old case of *Newton v. Ellis*,⁴¹ the defendant, under contract with the local health board to dig wells, failed to set out lights when leaving work one evening. As a result, the plaintiff's carriage fell into the unlit hole causing injury. Although the litigation context is not entirely clear, an attempt was made to characterize the defendant's conduct as nonfeasance—an omission to light the hole. Lord Campbell disagreed:

The action is brought for an improper mode of performing the work. How can that be called a nonfeasance? It is the doing unlawfully what might be done lawfully: digging improperly without taking the proper steps for protection from injury Cases . . . [of] mere nonfeasance are inapplicable: the action here is for doing what was positively wrong.⁴²

One might well ask whether Lord Campbell's second declarative sentence represents conclusion or description. Surely, the contracting company's misconduct *was* an omission. That it was part of a larger project—and thus constituted action—was a normative judgment wholly dependent on competing conceptions of the scope of the project and on unarticulated norms of behavior. As Lord Person wrote a century later: "If a hole is dug on Monday and on Tuesday somebody falls into it, is the accident due to the static condition prevailing on Tuesday or to the operations which took place on Monday?"⁴³

40 I am assuming as well that the Court would require something more than mere negligence in the breach of § 324. See *DeShaney*, 812 F.2d at 302 (assuming that the DSS's failure to intervene was a "sufficiently aggravated form of negligence to escape the bar of" *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), "which hold that simple negligence does not violate section 1983").

41 119 Eng. Rep. 424 (K.B. 1855).

42 *Id.* at 427. The actual holding of the case deals with whether or not the defendant came within the terms of a statute.

43 *Videan v. British Transp. Comm'n*, 2 Q.B. 650, 678 (1963), [1963] 2 All E.R. 860, 874.

Lord Person's question is itself not self-answering. It is answerable only by assessing the defendant's conduct against a normative baseline that reflects the measure of social responsibility we choose for our society. The *DeShaney* Court's nonfeasance determination was similarly normative—it reveals the Justices' allotment of federal protection for the most vulnerable members of our society.

IV. OF PUBLIC AND PRIVATE LIVES: THE DOCTRINE AND JURISPRUDENCE OF STATE ACTION

"While the State may have been aware of the dangers that Joshua 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."⁴⁴ Consequently, Chief Justice Rehnquist concluded, caution is required: Before yielding to the impulse to sympathize with Joshua and award "adequate compensation for the grievous harm inflicted upon [him,] . . . it is well to remember once again that the harm was not inflicted by the State of Wisconsin, but by Joshua's father."⁴⁵ The State simply stood by and did nothing. The injuries suffered, in other words, issued from private, not public, misconduct. Accordingly, the State breached no duty recognized by the substantive component of the Fourteenth Amendment's Due Process Clause.

This section explores the three subjects implicit in *DeShaney's* holding: (1) the public/private distinction; (2) the "freedom" which the designation "private" begets; and (3) the "state action" case law which, in part, is deemed to protect the private realm. The discussion serves as grounding for the conclusion that *DeShaney* served none of the values of the public/private distinction.

A. *Of Public and Private Life*

"A complete human being," the moral philosopher Stuart Hampshire writes, "has two human faces, one a communicative, consensus-seeking, politically active, reasonable face, . . . [and] the other a private and autonomous, perhaps detached and secretive, uncompromising face of a person pursuing his own distinctive good, perhaps guided in this by a comprehensive morality."⁴⁶ We

44 *DeShaney*, 489 U.S. at 201.

45 *Id.* at 202-03.

46 Stuart Hampshire, *Liberalism: The New Twist*, N.Y. REV. BKS., 43, 44 (Aug. 12, 1993) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

live both public and private lives, but what we cherish as public and private is not self-defining. Rather, "public-ness" and "private-ness" depend in large part on how we use the terms. Our use of the terms reflects the contingent nature of our social and cultural history. Hampshire suggests that the need to distinguish between public and private spheres of life is cross-cultural. If so, these spheres contain different attributes from culture to culture because what we designate as public and private is "inherently normative" and sensible "only . . . by reference to norms of behavior."⁴⁷

Efforts to separate the public from the private within our culture—to mark for all time the boundary between regulable and nonregulable—come to naught. As Robert Dahl noted, "[e]fforts to define the domain [of personal choice] . . . always fail."⁴⁸ Indeed, they must fail because our social and cultural history is itself contingent. Any organizing principle we might devise to sort public from private could, by definition, account only for past norms of behavior, if it can account for any separation at all. The ongoing nature of contingency, moreover, means at least that our hypothetical principle cannot foresee its own future applicability.⁴⁹

But the inability to escape contingency has not prevented us from attempting to describe the various functions served by public and private realms. For example, Benn and Gaus postulate three senses in which we use the terms "public" and "private."⁵⁰ They note that we sometimes use the terms to connote "access" or ac-

47 Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 969 (1989); accord Stanley I. Benn & Gerald F. Gaus, *The Public and the Private: Concepts and Actions*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 3, 5 (Stanley I. Benn & Gerald F. Gaus eds., 1983) (noting that the relationship among the ways in which the terms are used depends as much on ideology as logic).

The normative nature of privateness is well illustrated with the simple reminder about community life in Europe before the Reformation. At that time, the major distinction among western polities was temporal versus spiritual rather than private versus public. Thus, whereas we today ask whether certain conduct, such as religious belief, is consigned to the public or private sphere, the Augustinian world asked if the conduct was of this world or God's. The idea that one could relegate religion or religious practice to a "private" sphere would have lacked any coherence in the western world before the Enlightenment. See *id.*

48 ROBERT A. DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY 19 (1970), quoted in Francis Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 23, 26.

49 On the self-contradictory nature of prediction, see Peter Medawar, *Expectation and Prediction*, in PLUTO'S REPUBLIC 309 (1982) (summarizing the ideas of Karl Popper).

50 Benn & Gaus, *supra* note 47, at 7-11.

cessibility to the following: territory, activities, information about oneself,⁵¹ and resources. To be "private" in this use is to control accessibility. We also use the terms as a shorthand for questions of "agency": Is someone acting for or on his own behalf—that is, privately—or for the community, a public entity? Finally, we can designate the nature of the "interest" involved in certain activities by reference to public and private, i.e., whether something is said or done for the public's or a private citizen's gain or loss.⁵²

The key in this discussion of *DeShaney* and the external morality of judging is that if we deem a matter private in any of the senses described above, we assume at least a presumptive entitlement to engage in that conduct free from regulation. Thus, government generally bears the burden of demonstrating why this particular conduct should not remain unencumbered.⁵³ Moreover, implicit in this understanding of privacy as "prima facie free from regulation" is the understanding that "privacy," whether viewed as having only instrumental value or some ultimate value,⁵⁴ depends on the ability to choose. "Private," used to invoke some measure of freedom, "is understood in terms of a range of options available to an agent who is seen, at least potentially, as a chooser."⁵⁵ This chooser must of necessity have the capacity to make meaningful choices, else the deprivation of privacy is meaningless.

"Private" used to denote "freedom from regulation" lacks

51 Cf. Gavison, *supra* note 14, at 6 (contending that to be private is to be unknown and unobserved). Charles Fried has elevated this sense of privacy to a *conditio sine qua non* of personhood, arguing that "without privacy," relationships of love, respect, friendship and trust "are simply inconceivable." Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968). See generally Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in NOMOS XIII: PRIVACY 1 (J. Roland Pennock & John W. Chapman eds., 1971).

52 Gavison, *supra* note 14, at 6, partially truncates these two categories, noting that the individual-versus-society use of these terms are a function of the size of the group, but that when we use "private" in this sense, we are speaking about self-regarding conduct.

53 See *id.* at 7-9. The "generally" qualification acknowledges that sometimes even "private" activities, such as conveyances of real estate, must abide by certain publicly-imposed formalities that limit private choices. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1691-92 (1976).

54 Compare Somerville, *supra* note 2, at 290 (concluding that "there is no necessary relation between freedom, as such, and value") with Fried, *supra* note 51, at 477 (opining that privacy is more than an instrumental value; it is necessary for love, respect, friendship and trust; that "without privacy [these relations] are simply inconceivable").

55 See Somerville, *supra* note 2, at 295 ("Of course, no freedom can be acted on unless there is the power, the capacity, to act. But freedom is freedom, whether it is acted on or not."); W.L. Weinstein, *The Private and the Free: A Conceptual Inquiry*, in NOMOS XIII: PRIVACY, *supra* note 51, at 27, 34.

content and therefore value. "[F]reedom is, in an inescapable sense, negative, involving always an indication that something is absent."⁵⁶ As such it is "amoral." To place a value judgment on freedom, we have to consider the context; the values we attach to freedom "follow[] from the existence or nonexistence of a *particular* freedom in a *particular* context."⁵⁷

While we might consider some freedoms as prepolitical in the sense that they do not depend upon the formation of government for their continued exercise,⁵⁸ it is also the case that government—including the Court—can play a significant role in constructing preferences for those freedoms. Law Professor Cass Sunstein writes, "reinforce[s] social understandings about presumptive rights of ownership," public or private, which, in turn, affect perceptions about the importance and value of the preference.⁵⁹ To the extent that law is defined either by the common law or common law-like interpretations of our constitutions, judges affect public perception. An exclusive focus on individual rights, including privacy as freedom from regulation, tends to "obscur[e] and distort[] the reality of the social construction of rights and duties."⁶⁰ One might well ask, therefore, what kind of "free world" *DeShaney* both reflects and constructs. What kind of "free world" requires us to live as "choosers" in a protected private world whose constituting document provides no redress for a child abused, even as the knowing state sits idly on the sidelines and watches?

B. *The Variety of Freedoms*

Free, then, from or for what? "State action," the Court has written, "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."⁶¹ We can deter-

56 Somerville, *supra* note 2, at 295.

57 *Id.* at 299.

58 For example, it is difficult to imagine that the constitutors of our government did so in order to impinge upon the rights of individuals to make choices about reproduction. That it never occurred to them to do so is sufficient evidence to suggest that the "right," which undeniably preceded government, was retained after its formation.

59 Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 8 (1991).

60 Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 403-04 (1988); accord Sunstein, *supra* note 59, at 9 (noting, in this light, that it is very difficult to accept preferences "as given" or as the basis for decisions in a global sense). See generally JON ELSTER, *SOUR GRAPES* (1983).

61 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); see also, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988); *Price v. Hawaii*, 939 F.2d 702, 707 (9th Cir. 1991);

mine whether individual freedom is served in a particular case only by measuring the result in that case against the types of freedoms or privacy interests that might be served. In this section, I attempt to set out the baselines for making this measurement. Privacy as freedom, it turns out, is multi-sensed, claiming no fewer than four different values.

First, when the Court spoke about the "free world" it might have meant nothing more than the routine use of the word "free" as opposed to "incarcerated." That is undoubtedly a part of its intended usage; the placement of the "free world" quote in the *DeShaney* opinion underscores this meaning.⁶² Much suggests, however, that this was not the only meaning. The Court's discussion of both rescue and causation suggests that something else was at work.⁶³ After all, if the only crucial facts were lack of custody and the identity of the perpetrator, then these discussions were not just dicta, they were irrelevancies. But even if we were to limit our understanding of "free" to the antonym of "incarcerated," we could still read *DeShaney* for instruction about the type of freedom one can enjoy in the nonincarcerated world. Given the punishment that would befall Joshua, the freedom our society has to offer Joshua is questionable at best.

Second, the "free world" the Court spoke about could refer to freedom from government interference regarding child-rearing decisions.⁶⁴ This sense of freedom has at least two dimensions, one dealing with agency, i.e., who speaks for Joshua, and one with access, i.e., who controls the gate to Joshua's home life. Thus, freedom may mean nonregulation generally with respect to decisionmaking about childcare. Alternatively, it could signify a particularized freedom from physical interference in the home. In either sense, even state intervention to prevent child abuse could be viewed as infringing on the associational interests of family⁶⁵ or

Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281, 1293 (7th Cir. 1990) (Ripple, J., dissenting); Dunwoody Homeowners Ass'n v. DeKalb County, Georgia, 887 F.2d 1455, 1461 (11th Cir. 1989); Gorenc v. Salt River Project Agric. Improvement and Power Dist., 869 F.2d 503, 506 (9th Cir. 1989).

62 See *DeShaney*, 489 U.S. at 201 n.9 (discussing the potential implications of a decision by the state to remove Joshua from "free society").

63 Compare *supra* text accompanying note 39 (discussing the Court's truncated treatment of the duty to rescue issue) with *supra* text accompanying notes 30-43 (discussing a more extended, traditional tort approach to rescue issues).

64 See *DeShaney*, 489 U.S. at 203.

65 Horowitz, *supra* note 60, at 403. A significant feminist critique concludes that protecting the integrity of the family leaves women and children particularly vulnerable to

the integrity of Joshua's or his father's personhood.⁶⁶

It would be a substantial mistake to dismiss this freedom as a general matter. Absent dire emergencies, we should hesitate and hesitate again before creating incentives to displace parental decisionmaking or to remove children from their homes. But there are at least three responses to this danger. First, the state clearly *does* contemplate that under the proper circumstances, children will—in fact must—be removed from the family home for their own welfare.⁶⁷ As a general matter, therefore, there is no reason to withhold federal liability for fear of creating incentives for removal in a proper case. Second, to the extent that incentives may be created to remove quickly or face liability, they can be, and have been, substantially controlled through the law of § 1983 by controlling the level of culpability required for recovery⁶⁸ and by normal implementation of immunity defenses.⁶⁹ Third, it borders perversion to dignify any associational interest in the context, and no such interest ever trumps brutal child abuse.⁷⁰

the kind of violence experienced in *DeShaney*. See generally CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 191 (1989); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1568 (1983) [hereinafter Olsen, *The Family and the Market*].

66 Benn, *supra* note 51, at 6, explains this form of freedom:

What [the bystander] resents is surely that [Henry] Higgins [in recording Eliza Doolittle's speech during Act I of *Pygmalion*] fails to show proper respect for persons; he is treating people as objects or specimens—like 'dirt'—and not as subjects with sensibilities, ends, and aspirations of their own, morally responsible for their own decisions, and capable, as mere specimens are not, of reciprocal relations with the observer.

67 See, e.g., WIS. STAT. ANN. § 48.981 (West 1987 & Supp. 1993-1994); see also Santosky v. Kramer, 455 U.S. 745 (1982).

68 See *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (holding that the Equal Protection Clause requires establishing that the challenged activity was undertaken "because of," not merely "in spite of" its adverse effects") (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)); *Daniels v. Williams*, 474 U.S. 327 (1986) (requiring more than negligence to demonstrate a "deprivation" under the Fourteenth Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (same).

69 It is difficult even to describe the proof that would be required were plaintiffs to sue successfully the county entity in a case such as *DeShaney*. Suffice it to say that the plaintiffs would have to establish a recurring failure to intervene in abusive situations. See *City of Canton v. Harris*, 489 U.S. 378 (1989).

70 The Court alluded to another potential federalism interest with the cryptic, almost pro forma shibboleth that "the Due Process Clause . . . does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202 (citations omitted). The unarticulated interest would be fear of the redistributive consequences of a contrary holding.

There are a number of ways to respond to this concern short of further choking

We also employ the idea of "freedom" more globally, as in comprehensively private and entirely self-regarding. For John Stuart Mill, this comprehensive libertarianism recognized only one limitation:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.⁷¹

On this view, unless one "person's conduct affects prejudicially the interests of others," society lacks jurisdiction over the individual; but, if the basic proscription is violated, "the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion."⁷² The tremendous weight the Court places on the fact of custody underscores the idea that this is at least one significant notion of freedom that drives the Court's conception of the Due Process Clause. Thus, the Due Process Clause is activated only when the person affecting the individual is the State or another person in the custody of the State.

Finally, freedom as a *prima facie* entitlement to noninterference may refer to voluntary, consensual servitude to a right way of living in a comprehensive community.⁷³ This form of freedom places an enormous premium on rationality, for it may, perhaps counterintuitively, require the adherent to relinquish certain freedoms.⁷⁴ This species of freedom finds constitutional support be-

off due process, *see, e.g.*, *Siebert v. Gilley*, 500 U.S. 226 (1991); *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part* by *Daniels v. Williams*, 474 U.S. 327 (1986), or further hampering recovery under § 1983 or its *Bivens* counterpart, *see, e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Anderson v. Creighton*, 483 U.S. 635 (1987). First, the citations above suggest that the Court has already gone a long way toward eliminating the Due Process Clause as a source of constitutional torts. Second, to the extent that tort law does provide the basis of constitutional violations, the Court has substantially enhanced the level of culpability required to satisfy a *prima facie* case. *Daniels*, 474 U.S. at 330-31. Finally, it is difficult to understand what sources other than tort law or the common law of crimes one would consult as background for establishing the contours of constitutional violations. In that sense, the shibboleth above is almost disingenuous.

71 John Stuart Mill, *On Liberty*, in *UTILITARIANISM AND OTHER WRITINGS* 135 (Mary Warnock ed., 1962).

72 *Id.* at 205.

73 *See* Michael Walzer, *A Note on Positive Freedom in Jewish Thought*, 1 *S'VARA* 7 (1990).

74 Donald H. Regan, *Justifications for Paternalism*, in *NOMOS XV: THE LIMITS OF THE LAW* 189, 190-91 (J. Roland Pennock & John W. Chapman eds., 1974), notes that one of the traditional justifications for paternalism holds that coercive intervention is justified

yond state action and in the privacy mandated by the Establishment Clause. Joshua's lack of capacity, however, undermines any contrivable interest in this variation of freedom to which the Court could have alluded.

C. State Action

Privacy as freedom from regulation, i.e., as imposing a restriction on government access to certain individual decisions, constitutes one of the interests to which the state action doctrine ministers. This section examines briefly the Court's pre-*DeShaney* state action precedents. It does so because fair criticism of the Court for failing to decide a particular case in a particular way requires that at least three conditions be present.⁷⁵ First, one must be able to make the case that the Justices were unconstrained by the clear intent of the drafters of the provision at issue. Our commitment to democratic principles charges us with nothing less. Second, the Court must have maneuvering room within the confines of its own precedent—it must not be foreclosed by past precedent, fairly construed. Third, even if past precedent is not unambiguously on point, the developing contours of past dicta, combined with existing precedent, suggest one, fairly unambiguous outcome. In such a case, it may be unwarranted (and at least questionable) to critique the Court for failing to travel along the unfolding landscape. As the following section demonstrates, measured against these three principles of fair criticism, the *DeShaney* opinion was not predetermined.

As a feature of our Fourteenth Amendment jurisprudence, the demand for state action followed the Reconstruction Congress's failed early efforts to extend some measure of social equality to newly freed slaves in the form of an open accommodations act.

when the target individual lacks relevant information about the consequences of his acts. Professor Regan suggests that the warrant for this interference is tied to the nexus between freedom and rationality, but he professes an inability to understand that connection. *Id.* at 191. I think the underpinnings of this relationship turn on the appreciation that (a) we are entitled to use our freedom to bind ourself in ways that eliminate freedom in the future, for example, when we enter long term contracts; and (b) marital commitments to the contrary, we permit such binding, but only when we are or could be reasonably aware of the consequences of that act. The logic of freedom to constrain oneself is treated in the seminal work JON ELSTER, *ULYSSES AND THE SIRENS* (1979).

⁷⁵ These ideas were first developed in a statutory context in Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 72-73 (1990).

The Supreme Court refused to project federal authority in the absence of some "obnoxious" use of state authority. Justice Bradley wrote of the Fourteenth Amendment that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."⁷⁶ The Court continued:

[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the [Fourteenth Amendment] rights of citizens . . . , no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.⁷⁷

Accordingly, individual wrongdoing, however heinously motivated, would escape federal statutory prohibition unless "some shield of State law or State authority" accompanied the misconduct.⁷⁸ The national court system was otherwise closed.

In addition to protecting a sphere of individual liberty, we also view the state action doctrine as a federalism limitation that protects the state from federal intrusions. The *Civil Rights Cases* stand for no less.⁷⁹ But that view is at least incomplete. If there is state action in nonobvious situations, the putative defendant is usually an individual acting under or at the fringe of some state authority, and not the State through the policies or practices of its subdivisions, agencies, and employees. If there is no state action, however, there will often be no claim against the State at all, under state or federal law. Thus, absent active misconduct by the State, the state action requirement limits any invasion of the State, which now generally bears no federal constitutional responsibility to legislate affirmatively or otherwise undertake an active commitment to protect individual liberties.

That absence of responsibility follows from the *Civil Rights*

⁷⁶ The *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

⁷⁷ *Id.* at 13.

⁷⁸ *Id.* at 17.

⁷⁹ The Court found support for its narrow reading of the Fourteenth Amendment in the Tenth Amendment, the font of federalism, which reserved primary responsibility for guaranteeing individual liberties to the state, notwithstanding the Civil War. *Id.* at 15. See generally Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 762 (arguing that "obliterating the distinction between state action and private action . . . eviscerate[s] the fourteenth amendment's restriction on the authority of the national government vis-a-vis the states" regarding the regulation of individual relationships).

Cases, which made the unmistakable point that the common law permits individuals to undermine values that would command constitutional protection were those same values infringed by some affirmative state conduct.⁸⁰ While an unlawful imprisonment might, for example, find redress in a common law tort against the wrongful jailer, the defendant's discriminatory animus alone⁸¹ would not implicate a constitutional guarantee. Conventional wisdom thus holds that common law norms of conduct are simply background, the ambient creatures of nature,⁸² and that official inaction, which can surely serve as a cover for discriminatory conduct undertaken by "private" actors, generally fails to create state action.

The remainder of this section is a partial challenge to the conventional wisdom. State action today generally makes a radical *sub rosa* distinction between issues implicating race and, with only a few First Amendment exceptions,⁸³ all other issues. When race is implicated, the shield erected by state inaction may suffice to turn a private actor into a guarantor of civil rights; official state "inaction" may constitute "state action." With only a narrow exception, when issues other than race are involved, however, the plaintiff must demonstrate something very close to intentional state misconduct, thus creating a redundant probe for the appropriate

80 The *Civil Rights Cases* contain language that could be read more broadly to permit Congress to prohibit any unjust laws, common or statutory. The *Civil Rights Cases*, 109 U.S. at 14 (An act of Congress "does not profess to be corrective of any constitutional wrong committed by the States; . . . [i]t applies equally to . . . States which have the justest laws respecting the personal rights of citizens."). That conceivable reading, however, cannot be squared with, among other things, the furor that arose when *Shelley v. Kraemer*, 334 U.S. 1 (1948), was decided. See *infra* text accompanying notes 85-87.

81 See, e.g., 42 U.S.C. § 1985(3) (1988) (prohibiting conspiracies to deprive persons of equal protection).

82 See Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1016-17 (1987); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 397-98 (concluding that state action protects majoritarian decision-making from judicial scrutiny). See generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

83 See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing the common law of defamation without mentioning the need for some affirmative state act); *Marsh v. Alabama*, 326 U.S. 501 (1946) (finding state action sufficient to implicate speech and religion rights in a company-owned town); TRIBE, *supra* note 13, § 18-6, at 1711-15 (distinguishing *New York Times* and *Shelley v. Kraemer* on the basis of the underlying claims raises two interesting questions: First, why distinguish cases that came out the same way? Second, what does the underlying claim have to do with "state action?") As it turns out, the underlying claim has everything to do with "state action," but this cannot be a result of the Framers' intent or the amendment's language.

level of culpability.⁸⁴ Under these circumstances, only affirmative action suffices. The three categories of state action inquiry are: race/inaction cases, nonrace/action cases, and nonrace/inaction cases.

1. Race and Inaction

The links among race, discrimination by private individuals in the ordering of their affairs, and the inactive State were forged in a dispute centering on the legality of a restrictive covenant that arose immediately after World War II. By executing contracts, individuals commit themselves to future performance. Contract law thus partakes of all the attributes of privacy. A restraint on alienation, for example, controls access to territory (the land whose saleability is confined), defines agency (on whose behalf the signatories to the agreement act), and designates interest (again, what persons are bound by parallel agreements). When the Court declared in *Shelley v. Kraemer* that "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection,"⁸⁵ thereby prohibiting state judicial enforcement of "private agreements, . . . which have as their purpose the exclusion of persons of designated race . . . from the ownership or occupancy of real property,"⁸⁶ the hold of the *Civil Rights Cases* seemed broken.⁸⁷

But even the critics of *Shelley*⁸⁸ allow that "[t]he outcome . . . [was] morally right," especially in context: African-Americans had fought and died fighting Nazism in Europe.⁸⁹ Commentators

84 See, e.g., *Daniels v. Williams*, 474 U.S. 327 (1986) (holding that something more than negligence is required to sustain a claim of "deprivation" under the fourteenth amendment). There is an exception to this culpability search: when the deprivation of a property interest is alleged, the performance of even ministerial tasks triggers due process protections. See, e.g., *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478 (1988); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

85 *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

86 *Id.* at 4 (stating the issue in the case).

87 See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959) (questioning why state recognition of an agreement, which the Supreme Court acknowledged the individuals had a right to enter, constituted state action). See generally Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129 (finding a defense for the outcome in *Shelley*, but nonetheless questioning the opinion's doctrinal soundness).

88 How can it be, critics asked, that an individual retained the liberty to enter into restrictive covenants, but that the attempt to enforce that essentially private right generated impermissible public action when the individuals sought to vindicate the right in court? See, e.g., Wechsler, *supra* note 87, at 29-31.

89 Schwarzschild, *supra* note 87, at 153; cf. Lino A. Graglia, *State Action: Constitutional*

more sympathetic to the Court's efforts in *Shelley* concur. Professor Mark Tushnet reasons that the case is not about privacy in decisionmaking because there is little doubt the State could regulate racially restrictive covenants. Rather, the case is really about whether the majority can regulate housing however it sees fit while the State stands by passively.⁹⁰ Similarly, Professor Allen writes that racially restrictive covenants, by being perceived as "private," simply permitted the rest of society to turn a blind eye to the moral repugnancy of institutional racism. In this view, as in Tushnet's, the Court's opinion made it both illegal and morally repugnant to allow continued apathy while the private housing market excluded African-Americans on account of race.⁹¹

Another attempt to use state power to perpetuate discrimination in public accommodations, this time in a privately-owned restaurant located in a public parking garage, was declared unconstitutional state action in *Burton v. Wilmington Parking Authority*.⁹² The Court found impermissible state conduct in a number of acts, including the presence of the state flag waving above the facility and "at appropriate places thereon official signs indicating the public character of the building," the public ownership of the building, the failure of the state agency to demand nondiscrimination in its contract with the restaurateur (that is, state inaction), and the conferral of mutual benefits.⁹³

Phoenix, 67 WASH. U. L.Q. 777, 788 (1989) (commenting that *Shelley* "illustrates with stark clarity both the Court's belief and the truth that it is exempt from any requirement that its opinions make sense").

90 Tushnet, *supra* note 82, at 397.

91 Francis A. Allen, *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709, 714-15 (1989).

92 365 U.S. 715 (1961). Delaware law was ambiguous. A Delaware statute, as construed, may have affirmatively permitted discrimination if failing to do so would be "offensive" to most other customers. *Id.* at 726-27 (Stewart, J., concurring). However, the very need to adjudicate this case suggests that in the apartheid days preceding the 1964 Civil Rights Act the restaurateur's appetite for racial discrimination would have been tolerated if undertaken without state authority.

93 *Id.* at 724. The Court's discussion of the "benefits mutually conferred" under the lease arrangement noted that the state enjoyed revenue that resulted from discrimination, and conferred tax breaks upon and provided other financial benefits to the private party. This created a "Catch-22." Had the agency refused to tax the restaurant and thus foregone the ill-gotten benefits, it would have provided a windfall to the discriminator. On the other had, by accepting the taxes, it benefitted from discrimination. I read this to mean that the agency had two—and only two—permissible choices: refuse to lease entirely, or lease but demand a non-discrimination condition, i.e., demand action. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1633 (2d ed. 1991); TRIBE, *supra* note 13, § 18-7, at 1715.

The private exploitation of political signs and symbols to effectuate racial discrimination may also provide some explanation for the "white primary" cases.⁹⁴ For example, in *Smith v. Allwright*,⁹⁵ the Court found state action, despite the absence of explicit state approval for the discriminatory conduct, in two features of the case. First, a host of statutes and regulations surrounded the procedure by which the all-white primary electorate elected the nominee who was eventually placed on the general election ballot.⁹⁶ Second, the Court stated that in the context of a constitutional democracy, the State could not remain inactive while a whole segment of the population was disenfranchised.⁹⁷ Some affirmative action to guarantee voting rights was required.

In *Terry v. Adams*,⁹⁸ the Court found state inaction impermissible in the Texas Democrats' follow-up effort to disenfranchise Blacks. The Court chided the State for "permit[ting] a flagrant abuse of [electoral] processes" when the results were primary and general elections that became "no more than perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded."⁹⁹

State inaction, in light of the State's ability to prevent race discrimination, was also unacceptable in *Evans v. Newton*.¹⁰⁰ After years of municipally-controlled trusteeship over a segregated park devised to the City, the Court refused to infer that mere formal

94 The Court initially gave its constitutional imprimatur to the State of Texas, which, through its inertia, appeared to provide official sanction to "private" (state Democratic Party) racial exclusion in primary voting. *Grovey v. Townsend*, 295 U.S. 45 (1935). In two previous cases, the Court unexceptionably struck down Texas statutes that permitted racial exclusion in violation of the Fourteenth Amendment. See *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).

95 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

96 *Id.* at 653 n.6, 661.

97 *Id.* at 664. ("This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.")

98 345 U.S. 461 (1953). Undeterred by the *Smith* decision, the Democratic Party of Texas tried again to oust African-Americans from meaningful participation in the state electoral process by fashioning a "pre-primary" under the auspices of the racially exclusive "private" Jaybird Democratic Association. The Association, as Justice Black pointed out in a decision that mustered no majority, adopted "precisely the same qualifications [for office] as those prescribed by Texas entitling electors to vote at county-operated primaries." *Id.* at 469. Although the state did not "control" this part of the elective process, "for more than fifty years," this had been "the only effective part . . . of the elective process that determines who shall rule and govern in the county." *Id.*

99 *Id.*

100 382 U.S. 296 (1966).

severance of the trusteeship relationship ended municipal segregation. Under the circumstances, the majority read a silent record as creating the inference that the City "remain[ed] entwined in the management or control of the park, . . . [and therefore] remain[ed] subject to . . . the Fourteenth Amendment."¹⁰¹ The authority it had previously exploited required more than mere formal disentanglement—it required an affirmative demonstration of clean hands.¹⁰²

The final case that illustrates the potency of inaction in the context of racial discrimination is the Court's 1991 *Edmonson* deci-

101 *Id.* at 301. As Justice White noted, in light of the City's clear wish to avoid potential Fourteenth Amendment violations, the better inference from a silent record was that the City had severed all ties. *Id.* at 305 (White, J., concurring); *accord id.* at 318 (Harlan, J., dissenting). Instead, as Justice Harlan noted in dissent and without a hint of irony, the majority was moved by "human impulses" rather than sound constitutional principles, as if justices could eliminate their humanity in decision-making. *Id.* at 315.

This radical impulse to sever emotion from judicial process is reminiscent of the distinction made by some of the ante-bellum courts confronted with emancipation litigation based on state law. *See, e.g.,* *State v. Post*, 20 N.J.L. 368 (1845) (distinguishing between "feeling" and "legal intelligence"); *see also* ROBERT M. COVER, *JUSTICE ACCUSED* 55-59 (1975). Justice Blackmun, dissenting in *DeShaney*, makes much the same point with respect to the majority opinion. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

The language and structure of the *DeShaney* opinion are also reminiscent of state court judges writing at the turn of the century. Such judges, one historian has noted, read their state constitutions "as instruments of caution . . . read[ing] them as instruments that preserve[] historic truths about democratic society and right reason." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 317 (1973). They used their authority to preserve the rights of the states.

I do not mean to suggest that state court authority promoted state intervention. To the contrary, the period was marked by a negative conception of the state. *See, e.g.,* SIDNEY FINE, *Laissez Faire and the General Welfare State* ch. V (1956); ARNOLD M. PAUL, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (1960).

102 The Court, in effect, erected a presumption based on its view of human nature. Macon's City fathers had stood idly by and permitted one of its most treasured City resources to be used as an instrument of apartheid for several generations. During that time, the park enjoyed state tax benefits as well as City services. Given that history, the City had failed to disprove that its imprimatur had "dissipated *ipso facto* by the appointment of 'private' trustees." *Evans v. Newton*, 382 U.S. 296, 296 (1966). Viewed in this light the Court's holding is instructive: "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." *Id.* at 301.

There was, of course, what many, including Justice Harlan, viewed as an alternative "public function" rationale for the decision. *Id.* at 301-02. It is at least worth noting, however, that this alternative was not described as a holding, and it seems to have been proffered more as a way of buttressing the Court's prior conclusion, based on the history and nature of the park, than as a truly independent *ratio decidendi*.

sion, holding that private civil litigants could not use peremptory challenges to exclude prospective jurors on the basis of race.¹⁰³ Justice Kennedy, writing for the majority, tried mightily to squeeze the facts into two recognized state action tests. He argued that the *Lugar* inquiry,¹⁰⁴ an analysis that emerged in a nonrace situation, controlled. *Lugar* created a two-part test asking (1) whether the claimed violation resulted from the exercise of a right grounded in State authority; and (2) if so, whether it was fair to attribute the private party's conduct to the State.¹⁰⁵ The first part was easily answered affirmatively; the second was a struggle, ultimately decided on the basis of the "overt, significant assistance of state officials" the attorney received.¹⁰⁶ To prove his point, Justice Kennedy cited a host of federal statutes that generally implicated juror selection, concluding with the observation that when the attorney exercises a peremptory challenge, "the judge advises the juror he or she has been excused."¹⁰⁷

Although the dissenting justices seemed to get the better of the doctrinal dispute,¹⁰⁸ Justice Kennedy was nonetheless ex-

103 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). *Edmonson* is among the progeny of *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that prosecutors may not use their peremptory challenges to discriminate on the basis of race).

104 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

105 *Edmonson*, 500 U.S. at 620 (citing *Lugar*, 457 U.S. at 939-42).

106 *Id.* at 622 (quoting *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988)).

107 *Id.* at 624. Justice Kennedy also found support for the state action holding in the "traditional government function" strand of analysis. After concluding that the jury is a "quintessential governmental body, having no attributes of a private actor," Justice Kennedy cited *Terry v. Adams*, one of the "white primary cases," *see supra*, text accompanying notes 98, 99, for the proposition that "[i]f a government confers on a private body the power to choose the government's employees or officials, the private party will be bound by the constitutional mandate of race-neutrality." *Edmonson*, 500 U.S. at 625. This was especially the case in the jury selection arena, he argued, because "[t]hrough the motive of a peremptory challenge may be to protect private interest, the objective of jury selection is to determine representation on a governmental body." *Id.* at 626.

108 As Justice O'Connor pointed out, the evidence marshalled to support the essentially empirical notion of "significant assistance"—establishing qualifications and voter lists, devising forms to fill out, paying per diems, and so on—have nothing to do with the discretionary nature of the challenge. *Edmonson*, 500 U.S. at 634 (O'Connor, J., dissenting). Moreover, the dissent also noted accurately that in the ordinary nonrace-related constitutional challenge, the party seeking to establish state action must demonstrate that the government "is responsible for the specific conduct of which the plaintiff complains." *Id.* at 632 (O'Connor, J., dissenting) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). At the very least, as applied by Justice Kennedy, the word "responsible" must be replaced with "permits," for no one claimed that the decision to discriminate against a prospective juror on the basis of race was the responsibility of the trial court beyond the fact that the judge could prevent it if he had knowledge of it.

pounding an important point. Juries are democratic representatives in the adjudication process. They are surrounded by the trappings of government authority—American and state flags, honorable incantations that begin the proceedings, judges dressed in ceremonial garb sitting high above and presiding over the trial, and an order and ritual that government creates and controls. In this sense, Justice Kennedy's citation to *Burton* that government's "power, property, and prestige" stands behind the discrimination is surely correct.¹⁰⁹ The more powerful analysis of this particular issue, though, was provided by Judge Alvin Rubin, dissenting from the Fifth Circuit's en banc decision below:

[A] judge is intimately involved in the process that Tocqueville termed America's "greatest advantage" in "rub[bing] off th[e] private selfishness which is the rust of society." By . . . permit[ting] peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval.¹¹⁰

On this theory, it is simply impermissible for the State to "establish and maintain a system of jury selection that authorizes blatant racial discrimination by litigants using the courts set up by, paid for, and operated by the government."¹¹¹ To do so is to corrupt the system by "complicity in the facilitation of racial bigotry."¹¹²

In each of the race-related cases, inaction was simply insuffi-

The dissent's analysis of the government function strand of state action also seemed more faithful to recent precedent. The "government function" rationale has fallen on hard times. In more recent cases, the party seeking to employ the test has failed to meet the "exclusivity" requirement, i.e., the requirement that the governing function a private party undertakes is one over which the State traditionally enjoyed *exclusive* domain. *Id.* at 640 (O'Connor, J., dissenting) (citing *Flagg Bros., Inc., v. Brooks*, 436 U.S. 149, 157 (1978) and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). But if, for example, public defenders, who are paid by the state, are not thereby made state actors, *Polk County v. Dodson*, 454 U.S. 312 (1981), and if they too not only use, but are also prevented from the racially discriminatory use of, peremptory challenges, *see Powers v. Ohio*, 499 U.S. 400 (1991), it is only with difficulty that one can conclude that the use of peremptory challenges is "exclusive" to the state.

109 *Edmonson*, 500 U.S. at 624 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

110 *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 233 (5th Cir. 1990) (en banc) (Rubin, J., dissenting) (footnote omitted) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295-96 (Vintage Books ed. 1945)). Judge Rubin's opinion is ably discussed by his former law clerk. *See* Peter M. Shane, *The Rust That Corrodes: State Action, Free Speech, and Responsibility*, 52 LA. L. REV. 1585, 1588-91 (1992).

111 *Edmonson*, 895 F.2d at 233.

112 Shane, *supra* note 110, at 1590.

cient to discharge the States' obligations. When the Court manages precedent in this context it seems to appreciate that it cannot ignore the role it plays in shaping who we are as a people. Recall that in *Burton*, *Shelley*, *Edmonson*, and the other cases discussed above, no one claimed that state officials acting at the periphery of the private misconduct themselves participated in or even actively encouraged the discriminatory acts.¹¹³ At least in retrospect, it was sufficient for a finding of state action that in each case a similar paradigm existed: the State acted at the periphery of the alleged unconstitutional racial discrimination; it knew of or had the wherewithal to discover the existence of discrimination; and it had the power to prevent it, but chose instead a path of deliberate indifference. Unless we indulge the counterintuitive assumption that the Framers and ratifiers of the Fourteenth and Fifteenth Amendments intended different constructions of the same words as a function of context, we are justified in concluding as a matter of inference from the Framers' intent that the constitutional requirement of state action need be no greater than that paradigm. And yet, the Court has been dramatically less likely to find state action outside the race context.

2. Nonrace and Action: the Search for Culpable State Misconduct

For many of the reasons set out in the discussion of *Edmonson* above, the paradigm I have drawn from the race-related cases clearly will not suffice when issues other than racial discrimination come under scrutiny. Mere state knowledge and tolerance of, accompanied with an ability to prevent, the wrongful conduct is insufficient. Rather, in these cases, something very close to a state command or direction to engage in the impermissible conduct is required. In the cases described in this subsection, the Court searches for state action that appears intentional or at least designed to effect the private misconduct. Current controlling doctrine in nonrace-related cases is drawn from the Court's 1982 *Lugar* opinion and its two-part test.¹¹⁴ Recall that the test, which

113 A significant exception to this line of cases is *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in which the Court found no state action by a lodge that received its liquor license from the state and refused to serve blacks because of their race. Professor Tribe makes the important point, however, that a constitutional claim would surely have encountered no state action barrier had it been brought against the liquor control board that issued the license. *TRIBE*, *supra* note 13, § 18-7, at 1717-18.

114 The pedigree for *Lugar's* two-part "joint participant" test, which seemed to collapse all prior categories of state action into one formulation, of course precedes that

purports to synthesize several decades of the Court's state action jurisprudence, requires (1) a finding that the claimed violation resulted from the exercise of a right or privilege grounded in state authority; and (2) if it did, that it was fair to attribute the private party's wrongful conduct to the State.¹¹⁵ In virtually every nonrace-related case that has reached the Court on this second issue, the Court has required something very close to intentional action by the government agency or official implicated.

In companion cases decided during the *Lugar* term, the Court steadfastly refused to find state action. In *Blum v. Yaretsky*, for example, the Court held that unless the State "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."¹¹⁶ That the State "approv[ed] of or acquiesc[ed] in" the transfer, without hearings, of Medicaid patients in a state-

case. See, e.g., *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-76 n.3, 176-77 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

One set of casebook authors has advanced the intriguing suggestion that *Edmonson* attempts a new synthesis of state action case law. See DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 204 (1993). It is undeniably the case that Justice Kennedy's elaboration of *Lugar*'s second inquiry appears to set out a three part, conjunctive analysis to determine if *Lugar* is met. He writes the following:

Our precedents establish that, in determining whether a particular action . . . is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

Edmonson, 500 U.S. at 621-22 (citations omitted).

To put the matter bluntly, for a number of reasons I am not convinced that *Lugar*, which seems to extend state action in ways that are at best inconsistent with some prior precedent, see *supra* note 107, in fact contracts the doctrine's coverage, a necessary inference if *Edmonson* reflects this new synthesis. (Is there any plausible way, for example, that Delaware's ownership of a parking facility in *Burton* could be characterized as a "traditional governmental function"?)

In the first place, each of the cases cited was one in which the Court found the state action requirement satisfied. Thus, if the *Edmonson* formulation requires the plaintiff to meet all three prongs of *Lugar*'s second part, we would be left with the mildly counterintuitive notion that none of the supporting precedent could meet this new test. Second, I simply cannot accept the inference that cases like *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), both of which required a targeted state policy, now fall before *Edmonson*'s less restrictive reading of this prong. See *supra* note 107. Finally, a new synthesis faithfully applied would be impossible to satisfy. Rather, the three parts seem to be alternative ways to establish state action, each of which "is relevant to examine." *Edmonson*, 500 U.S. at 621.

¹¹⁵ *Edmonson*, 500 U.S. at 620 (citing *Lugar*, 457 U.S. at 939-42).

¹¹⁶ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

subsidized nursing facility made no difference.¹¹⁷

The Court similarly disposed of due process and free speech claims lodged by a discharged teacher against her "private" school employer, though the employer received virtually all its financing from the State and virtually all of its problem students via state referrals. Noting that the State had "relatively little involvement in personnel matters," although it did approve initial hiring decisions, the Court in *Rendell-Baker v. Kohn* quoted the language set out above in the *Blum* opinion.¹¹⁸ It noted, moreover, that the discharge decisions were "not compelled or even influenced by any state regulation;" indeed, "[the State] showed relatively little interest in the school's personnel matters."¹¹⁹

Not even a congressionally authorized monopoly over the use of national language and symbols suffices to create state action unless government "coerce[s]" or "encourage[s]" the very decision plaintiff seeks to challenge.¹²⁰ *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* found no state action where the USOC refused to authorize use of the word "Olympic" by the Gay Olympics. Only if the state actor lends "overt, significant assistance" that is "pervasive and substantial" to the conduct that causes a loss, such as a command that defective notice be given, will the Court find the requisite state action.¹²¹

In these cases, the official conduct required to attribute "private" behavior to the State—encouraging the transfer of patients, maintaining a policy that was "compelled or influenced" by state regulatory authority, coercing a discriminatory decision, and positively commanding the filing of a notice—partakes of intentional or designed activities. What is curious about this line of cases is that the Fourteenth Amendment already requires a level of culpability akin to intent in order to state a claim for a violation of its underlying provisions.¹²² The upshot is that the party seeking to

117 *Id.* at 1004-05.

118 *Rendell-Baker v. Kohn*, 457 U.S. 830, 836 (1982).

119 *Id.* at 841.

120 *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (finding no state action where USOC refused to authorize use of the word "Olympic" for Gay Olympics).

121 *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486-87 (1988). Finding that the judge's overt assistance was "significant" is an overstatement; the judge merely opened the estate and duly informed creditors. On the willingness of the Court to find state action more readily when the allegation is a deprivation of property rather than liberty, see *supra* note 84 (cases cited).

122 *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (holding that the Equal

establish "state action" must satisfy the court at the outset of the action that she can prove the underlying culpability necessary to violate the due process and equal protection provisions of the Fourteenth Amendment itself.¹²³ In these cases, the state action requirement becomes a method of short-circuiting claims by maintaining judicial control over and disposing of the intent issue before trial.¹²⁴

3. Nonrace-related, Culpable, Custodial Inaction

Where race is the issue, inaction may constitute action, at least when the government is aware of the existence of a potential constitutional deprivation, operates within or near the boundaries of the misconduct and has the wherewithal to prevent it. When issues other than race are implicated, the Court generally requires culpable, hands-on action. In the narrow range of nonrace cases discussed in this subsection, culpable inaction can create state action.

The Court recognized a common law duty to attend to the health needs of inmates in *Estelle v. Gamble*.¹²⁵ The rationale was uncomplicated: "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."¹²⁶ The State's obligation to fulfill basic health and security need not depend on either the identity of the culprit or, for that matter, the imprisonment of the victim. For example, in *Youngberg v. Romeo*,¹²⁷ the Court recognized the State's Four-

Protection Clause requires establishing that the challenged activity was undertaken "because of," not merely "in spite of," its adverse [consequences]" (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)); *Daniels v. Williams*, 474 U.S. 327 (1986) (requiring more than negligence to demonstrate a "deprivation" under the Fourteenth Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (same).

123 There is, of course, an irony in this development, at least as applied to cases in which the only hands-on state involvement is essentially ministerial: The state escapes liability if it does absolutely nothing, but incurs liability if its active participation is non-discretionary. Compare *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) with *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). See generally Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982).

124 Professor Lewis and I have noted a similar trend throughout § 1983 litigation. *Lewis & Blumoff*, *supra* note 30, at 805.

125 429 U.S. 97 (1976). The common jailer's duty has a long pedigree. See, e.g., WILIAM L. PROSSER, *THE LAW OF TORTS* 349 n.41 (4th ed. 1971) (cases cited).

126 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); accord *West v. Atkins*, 487 U.S. 42 (1988).

127 457 U.S. 307 (1982).

teenth Amendment obligation to protect a severely mentally retarded adult from physical injury suffered, not at the hands of the State, but at the hands of other patients in the hospital. This "historic liberty interest," the Court wrote, "is not extinguished by lawful confinement,"¹²⁸ a conclusion that necessarily implies the existence of a right independent of incarceration.¹²⁹

Finally, nearly a decade before *DeShaney*, the Court had hinted that the State might face civil liability for the death of a fifteen year old girl murdered by a parolee in *Martinez v. California*.¹³⁰ Although a number of immunity issues drove the cluttered opinion, the ambiguous resolution of the § 1983 claim—that the State's action in releasing the perpetrator did not violate the Fourteenth Amendment—provided a basis for potential liability in *DeShaney*. The *Martinez* Court seemed to base its decision that the State could not face liability on three separate conclusions: (1) that the decision to release did not amount to "state action"; (2) that the allegations did not rise to the level of a "deprivation"; and, (3) that the chain of causation was too attenuated.¹³¹ But this last ground was framed to suggest that a future victim of state inaction might state a claim for deprivation of life:

Her life was taken by the parolee five months after his release Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence.¹³²

On the strength of this passage, one lower court found potential liability for the failure of a child protective service to protect a

128 *Id.* at 315 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (freedom from corporal punishment)) (citing *Hutto v. Finney*, 437 U.S. 678 (1978) (freedom of prisoners from cruel and unusual punishment in conditions of confinement)).

129 Motion For Leave To File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the American Civil Liberties Union Children's Rights Project et al. at 12, *DeShaney v. Winnebago County Dep't of Social Servs.*, No. 87-154 (on file with author).

130 444 U.S. 277 (1980).

131 *Id.* at 284-85. In *DeShaney*, Justice Rehnquist rather curiously adopted only the third alternative as the holding of *Martinez*. *DeShaney*, 489 U.S. at 197 n.4. This is curious because the third alternative is the only "holding" of the three that implicates a potential duty based on *DeShaney's* facts.

132 *Martinez*, 444 U.S. at 285.

child, despite the lack of a custodial relationship.¹³³ A second court indicated that it would find liability in a proper case.¹³⁴ In language that could have been taken in part from the race-related state action cases discussed above, both courts listed the factors it would consider crucial: custody or prior custody by the State, a formal state desire to provide affirmative protection, and knowledge of the victim's plight.¹³⁵ *DeShaney* interpreted this line of cases at the lowest level of abstraction.¹³⁶

V. . *DESHANEY* AND THE MORALITY OF JUDGING

On the eve of the decision, the question of whether to find liability in Joshua's case was open. The unambiguous intent of the Fourteenth Amendment's drafters and ratifiers did not compel the decision. Indeed, the Court had ample room to move within the joints of past precedent and, in fact, had predicted just this sort of case in *Martinez*.¹³⁷ The Justices' personal predilections about their roles as judges and the level of generality at which they applied precedent would determine the outcome.

They carried those predispositions to the public/private distinction, a pervasive part of our constitutional jurisprudence, and one that is by its nature highly susceptible to change based on the

133 *Estate of Bailey By Oare v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985).

134 *Jensen v. Conrad*, 747 F.2d 185, 195 (4th Cir. 1984) (deciding the case on immunity grounds), *cert. denied*, 470 U.S. 1052 (1985).

135 *Bailey*, 768 F.2d at 509 (citing *Jensen*, 747 F.2d at 194 n.11).

136 "Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. Despite noting the DSS's careful, even macabre, record of abuse and that the DSS's failure to take custody in the light of manifest need deprived Joshua of meaningful life, the Court implicitly rejected the relevance of past custody: "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. Having placed no "limitation . . . on his freedom to act," *id.*, the State owed four-year-old Joshua no duty; the door to federal relief was closed.

On the appropriate level of generality in constitutional adjudication, compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6. (1989) (identifying and applying the "most specific level at which a relevant tradition protecting, or denying protection to, [the] asserted right"). For a discussion of the Court's general precedent that moved toward an affirmative duty arising under the Due Process Clause, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

137 It would require overstatement to conclude that the emerging legal landscape pointed toward potential liability in *DeShaney*. See *supra* text accompanying note 75. The conclusion in the text is unexceptionable.

idiosyncratic views of the justices. It is, in fact, a moving target. Criticized by feminists,¹³⁸ Critical Legal Studies scholars,¹³⁹ and others,¹⁴⁰ the distinction nonetheless exists¹⁴¹ and will undoubtedly remain an important, if troublesome feature of our constitutional order for the foreseeable future.¹⁴² If we follow the Court and agree that the distinction plays some role in maintaining a part of our life free from federal regulation and constitutional restraint, then we must ask at least two questions: how, if at all, does a case like *DeShaney* serve us, and what, if anything, does it tell us about the society of which we are a part?

A. *DeShaney's Doctrine*

On the doctrinal level, at least outside the context of race, *DeShaney* stood state action on its head. Prevailing notions insist that state action serves individual liberty.¹⁴³ It must be noted, however, that this freedom from federal constraints is achieved in the service of the Fourteenth Amendment,¹⁴⁴ which insures

138 See, e.g., MACKINNON, *supra* note 65, at 91; Olsen, *The Family and the Market*, *supra* note 65. See generally Gavison, *supra* note 14, at 1.

139 See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 *id.* at 1358.

140 See, e.g., Horowitz, *supra* note 60, at 402-03 (noting that the categories are "extremely malleable"); Seidman, *supra* note 82, at 1007 (describing the boundary between public and private spheres as "shifting, uncertain, and contested"); Weinstein, *supra* note 55, at 27. See generally *Symposium on the State Action Doctrine*, 10 CONST. COMM. 309, 309-441 (1993).

141 My own position is largely congruent with that of Professor Gavison, *supra* note 14. I find the distinction both necessary and unavoidable: necessary because I cannot imagine the value of or pleasure in many exercises over whose access I do not retain a large measure of control, and unavoidable because, while acknowledging that much of the distinction is contingent and contestable, it seems nonetheless to enjoy a universal if varied existence. See Hampshire, *supra* note 46, at 44.

142 The comment in the text is deliberately understated. To rid ourselves of the distinction would require a paradigm shift that I cannot now imagine. At the very least, the Court would have to overturn the *Civil Rights Cases*, 109 U.S. 3 (1883), and we as a polity would have to repudiate formally the Establishment Clause, which demands the split, as does the First Amendment itself, and as do our more general notions about freedom of conscience.

143 "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982); see Jakosa, *supra* note 13, at 207 (concluding that the state action requirement permits individuals to make certain choices that enhance "individual autonomy, individual dignity, and pluralism"); see also *supra* note 12 (cases cited).

144 Some conduct attributable to government is required to state a claim against the federal government as well. See, e.g., Edmondson v. Leesville Concrete Co., 500 U.S. 614

against *state* intrusions on human dignity and autonomy. It also bears remembering in this context that the Fourteenth Amendment operates against the *states* in two very different, but very active ways; and both of these ways demand the exercise of *federal* authority. First, the federal judiciary is called upon to restrain entirely certain state options—the command of the Due Process Clause. Second, the federal judiciary must demand at least minimum rationality with respect to other state options—the command of the Equal Protection Clause. The Fourteenth Amendment reflects the understanding that both federal judicial oversight and federal legislation may be necessary to insure individual dignity in post-Reconstruction America; Congress received specific authorization to “enforce, by appropriate legislation, the provisions of this article” against the *States*.¹⁴⁵

Thus, the conventional view of state action as a limitation on federal judicial power¹⁴⁶—and especially the current Court’s impoverished conception of that view, a sort of doubling of the restrictive use of federal judicial authority—presents an apparent paradox: The Fourteenth Amendment exists as a federally guaranteed mandate of individual security (and autonomy) from intentionally arbitrary state conduct; but the “state action” language, also a part of that amendment, purports to limit federal intrusions into state realms of control, purportedly to protect the individual. Race aside, far from serving individual liberty, the state action doctrine, shorn of its original historical purpose and divorced from its unitary linguistic formulation, often serves only an unbridled effort to protect the State’s fisc, a rather unprincipled sort of federalism.

B. Some Moral Limits on Judging: Deshaney’s Jurisprudence

We honor the rule of law in our constitutional order as necessary to harness our temptation to aggrandize power. As Professor Sargentovich has noted, advocates of the rule of law “take[] to heart the liberal fear of political power, and seek[] to constrain such power by means of law.”¹⁴⁷ So we continue to pay homage

(1991); *Columbia Broadcasting Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973).

145 U.S. CONST. amend. XIV, § 5. In fact, congressional control of the Fourteenth Amendment is in theory potent enough to override jurisdictional limitations imposed on the federal courts by the Eleventh Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

146 *The Civil Rights Cases*, 109 U.S. 3 (1883).

147 Thomas O. Sargentovich, *The Contemporary Debate About Legislative-Executive Separation*

to Montesquieu¹⁴⁸ even as we recognize the impossibility of governing within a rigid conception of separation of powers.¹⁴⁹ Few would challenge or seek to undermine the basic structure of our government, driven by the framework ideal that legislators legislate, the executive executes, and the judiciary judges. At the same time, a conception that limits the judicial rule to exercising "a limited veto over legislative and executive action . . . severely distorts reality."¹⁵⁰

1. Public and Private

The State placed no "limitation" on Joshua's "freedom to act." These chilling allusions to freedom and the "free world" lack all coherence in reference to a brain damaged four year old. The gravamen of the complaint was the DSS's *failure* to remove this child from his home—that DSS should have temporarily limited Joshua's freedom to remain with his natural father so that it might be preserved for a time when it was meaningful. What is the "free world" that these decision-makers envision? How did they pass the decision's moral moment impervious to the irrelevance of any conception of freedom as applied to three and four year old children? The simple truth is that no justification for the state action doctrine as a servant of liberty was advanced in *DeShaney*.

No traditional rationale for carving out and designating as "private" an area of human conduct free from government control was advanced by the *DeShaney* opinion. In fact, the individual interest in "privacy" as a denial of public "access" was affirmatively denigrated by the Court's opinion.¹⁵¹ If *DeShaney* speaks at all to

of Powers, 72 CORNELL L. REV. 430, 451 (1987).

148 C. MONTESQUIEU, *THE SPIRIT OF LAWS*, Book XI, ch. 6, at 202 (T. Nugent trans., 1750, David W. Carrithers ed., 1977) ("When the legislative and executive powers are united in the same person"); cf. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("The Framers provided [for] a vigorous Legislative Branch and a separate and wholly independent Executive Branch . . .").

149 As I have noted elsewhere, a rigid model of total inter-branch independence is not only inconsistent with the ability of government to function, but with Madison's conception of "partial agency" as well. Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1144 (1988). For the Madisonian conception, see *id.* at 1087-88.

150 Graham Hughes, *Social Justice and the Courts*, in *NOMOS XV: THE LIMITS OF THE LAW*, *supra* note 74, at 115 (taking what is by contemporary standards a very traditional view of the role of federal courts).

151 Nor does the decision advance our notions of privacy as "agency" or "interest." In fact, I cannot even frame the question one would ask to determine if these senses of the

incentives for agency intervention in similar cases, it is to create disincentives, despite the presence of state statutes designed to protect children from abuse. From the standpoint of potential federal liability the state is better off permitting our many Joshuas to remain in their abusive conditions. Standing on the sidelines provides a safe harbor, but it does not advance the liberty interests of our future Joshuas.

Freedom's most ardent defenders and theoreticians acknowledge that government intervention is justified—some would say justified only—for the purposes of preventing one individual from harming another.¹⁵² How then do we explain *DeShaney's* result when it was not compelled by our understanding of state action? And here it is well to recall the lesson from the race category of cases and the thinness of the distinction between state action and inaction. These decisions clearly provide that it was not essential for a finding of state action that the State's agent had beaten Joshua. As a matter of parsing the terms "[n]o state shall" and "nor shall any State," little is constitutionally compelled.

Moreover, *DeShaney's* suggestion that liability might have followed had the DSS placed Joshua in a foster home where a foster parent had beaten him or, alternatively, had he still been in custody indicates the weight the fact of custody must bear. The decision's facts, though, were fortuitous in this regard, turning in a large part on timing: Joshua had been in the state's custody but was not at the time of the injury. The custody/freedom distinction would suggest that had Joshua been beaten by his father during an unsupervised noncustodial visit liability could follow. When the gist of the complaint is a reckless failure to intervene, federal physical protection for the most defenseless members of our communities cannot turn on such a distinction, especially in light of detailed knowledge of the potential for grave harm, a state statutory duty to prevent the harm, and the undoubted ability to do so.

2. The External Morality of Judging

This article began with an appreciation of Professor Fuller's two insights: that contemporary moral norms frame a court's work and that even an advertent effort by members of the Supreme Court to avoid affecting public values affects public values. The

word were implicated. See *supra* text accompanying notes 50-52.

152 See *supra* text accompanying notes 71-72.

Supreme Court cannot escape its role in shaping public morality.¹⁵³

In some contexts, the existence and exercise of the Court's moral office is clear. In refusing to permit the public's "irrational prejudice against the mentally retarded" to dictate a City's zoning policy,¹⁵⁴ and in declining to allow even the reality of "[p]rivate biases" in the form of widespread, public "racial prejudice" to dictate the outcome of a child custody battle,¹⁵⁵ the Court did more than interpret the Constitution. Writing about that same Constitution little more than a generation after the adoption of the Fourteenth Amendment, the Court had stated that "[i]f one race be inferior to the other socially, the Constitution . . . cannot put them upon the same plane."¹⁵⁶ One can see in *Palmore* a Court that was unwilling to deny its role as guardian of our collective commitment to justice for people of color, one that reinterpreted the Constitution in light of contemporary moral values and with the hope of reducing private appetites for discrimination.¹⁵⁷

In still another context, adherence to a moral warrant for conduct is unexceptionable. A generation after he wrote the statement quoted above, Professor Fuller addressed what he called the "internal morality" of law, an essentially procedural commitment to clarity, written findings, fair process and so on.¹⁵⁸ Commenting on this "internal morality," Professor Eisenberg noted that "adjudication has a moral force, and this force is in major part a function of those elements that distinguish adjudication from all other forms of ordering."¹⁵⁹ To lose the distinguishing feature of adjudication could, in the long term, result in "forfeiture of the moral force of the judicial role."¹⁶⁰

In other cases, like *DeShaney*, the need for justices to make decisions influenced by their sense of the morality of judging is less clear and less obviously derivable from constitutional text or the adjudicatory form, but no less demanding and demanded. In

153 BICKEL, *supra* note 5, at 30-33.

154 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

155 *Palmore v. Sadoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

156 *Plessy v. Ferguson*, 163 U.S. 537, 552 (1886).

157 Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1130 (1986).

158 *See supra* note 4.

159 Milton A. Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 430 (1978).

160 *Id.*

these cases the moral imperative is "external" to the process and located within each of the justices and the community he or she serves. It is an exaction owing in large part to the nature of language and the dynamism of American society. Language—and our consequent understanding of it—is susceptible to change with time. Thus as we read our Constitution, we earnestly hope to recover some sense of what its drafters had in mind, for without that sense we necessarily undermine a principal value of democracy.¹⁶¹ Yet often all we can legitimately expect is an approximation of contemporaneous meaning. Our finest efforts at defining issues of constitutional adjudication, especially those arising at the margin of our understanding of text and tradition,¹⁶² more often than not yield various alternatives of meaning, i.e., the context of the text and not the text itself.¹⁶³ It is in this manner that "aspects of the interpretive process . . . are intimately linked with the concerns of a justice seeking social order."¹⁶⁴ To deny that individual moral commitments play a part in interpretation on these issues is to engage in self-deception or simultaneously to disavow one's own humanity and practice a form of idolatry—to purport to translate a revealed text that is incapable of self-revelation.

My examination of *DeShaney* suggests that not only has the Rehnquist Court embraced a minimalist conception of individual rights in the face of majoritarian preferences,¹⁶⁵ but a minimalist

161 Although specifically directed at the interpretation of statutes, Professor Sunstein's explanation of the "democratic pedigree" of textualism rests on these same democratic principles. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 113-14 (1990).

162 Cf. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 250 (1988) (arguing that the Framers' intent "will often be *presumptively clear* from the language the constitution makers chose. Beyond that, it will be enough in most cases to learn what people, at the time, *generally* meant when they used certain language and what people involved in the process of enactment thought was at issue.") (first emphasis added). Unfortunately, the ordinary process Professor Kay describes fails precisely on these challenging issues.

163 See generally J.G.A. POCOCK, *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* (1971); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 38 (1969).

164 Hughes, *supra* note 150, at 116 (taking a very traditional view of the role of courts). I do not know whether Professor Hughes would today approve my use of his quote, a point which illustrates the statement in the text at which this note is directed.

165 See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (consigning protection of the free exercise of religion to the political process); *Teague v. Lane*, 489 U.S. 288 (1989) (limiting the applicability of newly declared constitutional rights in habeas corpus proceedings); see also Erwin Chemerinsky, *The Supreme Court 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

conception of the justices' role in shaping public morality. This conception threatens the integrity of the Fourteenth Amendment of which the state action canon—one medium of their moral currency—is a part. This barren understanding of state action also gives short shrift to the Justices' responsibilities in and for a community bound only by its shared civil religion. By yielding their moral office, the Justices encourage the status quo, which is itself a statement of moral commitment. In that process they waste their own precious judicial resource—their moral authority—and squander valuable opportunities to enhance the individual autonomy of those whom the state action qualification was meant to serve.

Most tragically, the Justices also undermine faith in our one shared, near sacred¹⁶⁶ text, the Constitution. We are, as many before me have noted,¹⁶⁷ like no other polity in history, for we share no common religious, ethnic or even tribal culture. Our only shared culture is legal and even that culture is only partially shared; each state's laws are shards in a mosaic whose multi-cast pieces frequently clash. Thus, the only glue that genuinely fastens together the varied tiles of this extraordinary political creation is the Constitution—our holiest, most revered communal document. Respect for its high priests and priestesses is essential, but that respect is now threatened. *DeShaney* is, in my view, immoral, and it creates peril for our body politic that comes in no small part from the perception that we the students of our sacred text take from the work of its most authoritative exegetical scholars. The message many of us propagate is that they—and the state whose action they insulate from national accountability—do not care.

In this nation lacking religious, ethnic, and cultural commonalities, the protections—and the perception of protections—flowing from our national unifying document are crucial. The protections afforded by the Fourteenth Amendment constitute recognition of the deeply offensive nature of harms perpetrated by the state and its agencies.¹⁶⁸ The Court must, therefore, articulate a powerful

166 Whether this shared perception of sacredness is a good or bad thing is, in the context, beside the point. The furor over the flag burning cases demonstrates the notion in text *a fortiori*. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

167 Much of the work of theologian Stanley Hauerwas has been directed at finding a cure for this absence of a common moral heritage. See, e.g., *STANLEY HAUERWAS, COMMUNITY OF CHARACTER* ch. 4 (1981).

168 Concurring in the seminal case *Monroe v. Pape*, Justice Harlan underscored the symbolic virtue of a federal remedy: the deprivation of a federally guaranteed right by action of the government causes unique damage, demanding a specially carved out reme-

countervailing interest to deny guarantees enshrined in the amendment under the circumstances prevailing in *DeShaney*: pre-existing state power, state awareness of the potential for particularized grave harm which it actively seeks to prevent, and reckless state actions at or near the boundary of "private" misconduct.¹⁶⁹

Instead of expounding authoritatively some interest that might serve as a counterweight, the Court served up an indigestible syllogism and a side order of gratuitous prophylaxis: If the state had moved too soon, it could have faced charges of intruding into the parent-child relationship.¹⁷⁰ Although this relationship is one we would denigrate at our peril, it could not be the case that, for fear of saddling the county with liability, the Court was willing to recognize an associational right of Randy DeShaney to abuse his son in the "free world."

At the moral moment, when, given the open nature of the question asked, the Justices were compelled to apply individual external moralities, they told us that the Due Process clause will not help, that our Constitution is indifferent to the reckless conduct of these state officials. In the free world, freedom means absence of federal protection and absence of federal concern for the most vulnerable members of our community. How absurd it seems to consign a brain damaged four year old to life in this free world where such state-perpetrated thoughtlessness lays claim to complete constitutional immunity. And so *DeShaney*, from the perspective of the majority, becomes an easy case dealing primarily with money: Will we require the state to pay?

Applying an external morality to judging is neither good nor bad; it is simply unavoidable. The application of that morality can, however, be an instrument of good or evil. In *DeShaney* it was used for evil, although the Court attempted to disguise the external morality implicit in its decision by wrapping the opinion in the rhetoric of inevitability. It was an evil as much for its implicit statement about our Constitution in the hands of the federal judiciary as for its immediate result. The Justices ignored entirely the constitution's moral and symbolic power.

dy. "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

169 See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1993).

170 *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 203 (1989) (Rehnquist, C.J.).

