

Moral Ambition, Formalism, and the “Free World” of *DeShaney*

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[T]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.¹

Introduction: For Arthur S. Miller

Arthur S. Miller was a scholarly friend of mine. We never met, however, and I do not remember that we ever talked by phone. Arthur befriended me and taught me through his written words. He wrote an amazing array of books, articles, op-ed pieces, and the like, but he still found time to write letters—charming, vigorous, challenging letters. He corresponded with me faithfully over a decade or so. Regretfully, my side of the correspondence was much less regular. Nevertheless, Arthur sent a stream of reprints and drafts; I occasionally sent along something I’d finally finished. If there is

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1. *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967) (Skelly Wright, J.), *aff’d sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), *further relief ordered*, 320 F. Supp. 409 (1970), *order denying motion to hold defendants in contempt*, No. 82-66 (D.D.C. Feb. 17, 1973).

For a critical account of Judge Skelly Wright’s continued active involvement in this long litigation that attempted to desegregate and equalize the public schools in the District of Columbia, see D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 106-70 (1977). For a better account of the benefits as well as the costs of institutional litigation, or at least an account much closer to the views about the appropriate judicial role expressed in this Essay, see L. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989) (recounting the study of federal Judge Frank M. Johnson and the Alabama prison litigation).

such a thing as a scholar's scholar, Arthur Miller served as a worthy example of that threatened genus.

Arthur Miller used the written word provocatively. He provoked new thoughts and contributed fresh ideas across a number of areas, including some he staked out virtually by himself. His passionate concern for improving humanity's chances for the future, despite the threat of nuclear and population explosions and what he called the Positive State, led Arthur to probe prevailing categories of legal thought. He helped his readers see through legalism to what was going on behind the façade. Some of his best work used skeptical realism to challenge core concepts, often heavily laden with barnacles, such as separation of powers, the private/public distinction, and national security. Arthur Miller's work was driven in large measure by passionate concern for posterity and by a kind of populist faith that greater understanding might produce reform, not merely resignation and cynicism.

In this Essay, I discuss a recent United States Supreme Court decision, *DeShaney v. Winnebago County Department of Social Services*.² This case underscores an important point Arthur developed decades ago about the crucial role of major premises in judicial decisions.³ *DeShaney* also illustrates why he was concerned about misleadingly static categories that float above reality and prompt lawyers to ignore the pervasive role of government and of flux in the modern welfare state.⁴ Finally, it contrasts sharply with Arthur's concern that constitutional law should reflect "moral precepts of action as well as legal limitations," in keeping with his repeated message that "[f]reedom is a *social* right as well as something of value for an individual."⁵

Chief Justice Rehnquist's opinion for the majority in *DeShaney* is an abomination. It is illogical and extremely mechanistic; it also abuses history, fails to consider practical impact, and demonstrates moral insensitivity. Not only that, it is wrong. The decision holds that the state has no constitutional duty to protect a child not in custody. In Part I, I explore some of *DeShaney*'s shortcomings as judicial craftsmanship. In Part II, I briefly assess its historical stance and its dangerous practical implications. In the Conclusion, I comment on the profoundly troubling lack of "moral ambition"⁶ in

2. 109 S. Ct. 998 (1989).

3. Miller, *On the Choice of Major Premises in Supreme Court Opinions*, 14 J. PUB. L. 251 (1965) [hereinafter Miller, *Major Premises*].

4. See, e.g., A.S. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* (1968) [hereinafter A.S. MILLER, *AMERICAN CAPITALISM*]; Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962) [hereinafter Miller, *Affirmative Thrust*].

5. Miller, *Affirmative Thrust*, *supra* note 4, at 422, 417. One of Arthur's favorite quotations, from a decision he considered a watershed in American constitutional law, says in part: "[T]he liberty safeguarded [by due process] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (Hughes, C.J.).

6. *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting) (quoting A. STONE, *LAW, PSYCHIATRY, AND MORALITY* 262 (1984)).

DeShaney. It is primarily this failure that makes *DeShaney's* compartmentalized, neo-Social Darwinian approach so chilling. Tragically, *DeShaney* exemplifies the moral obtuseness in legal thinking that was Arthur Miller's primary target throughout his distinguished scholarly career.

The *DeShaney* majority delights in machismo conceptualism. The opinion of the Court is a terrible example of the familiar judicial quest for safe-houses designed by drawing rigid lines. Judges strive for some mythical locus of certainty where they, at least, can escape the more complicated relationships of common humanity. The powerful dissenting opinions in *DeShaney* highlight a competing perception of reality that is full of change and connection. The dissenters' worldview involves a complex continuum rather than a world that can be run with a simple on/off switch.⁷ Unfortunately, the *DeShaney* majority's binary *weltanschauung* has an intuitive appeal, though its pedigree is hardly sympathetic. This approach echoes opinions by justices such as Peckham, Brewer, and McReynolds. Its "fixation on the general principle that the Constitution does not establish positive rights"⁸ is also reminiscent of the tough and efficient principles proclaimed by many state court judges, a century or so ago, while they engaged in cold-blooded expansion of common law doctrines such as assumption of risk, the fellow-servant rule, and a property right to operate a business free of labor strife.⁹

7. This realistic approach adopted by the dissenters has been key to our most important constitutional law decisions since 1937. See, e.g., the decisions following *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that constituted the 1937 "revolution," discussed in A.S. MILLER, *AMERICAN CAPITALISM*, *supra* note 4, at 76-114; the line of cases begun in the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and expanded in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, discussed and built upon in J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); and the factually sensitive First Amendment decisions such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), flowing out of the civil rights movement, discussed in H. KALVEN JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

8. *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting).

9. These judges also were particularly concerned to have judges patrolling to keep the boundaries of the free world crisply defined and thereby to make the free world free for individual autonomy. It was an age with a "dominant . . . gospel of greed," as Charles Sanders Peirce put it, when men "seemed to relish a ruthless theory." R. WILSON, *IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860-1920*, at 56 (1968) (quoting Peirce). Yet even these American followers of Herbert Spencer made exceptions for children and others they perceived as in need of protection despite their vigorous celebration of struggle in the world of "Nature, red in tooth and claw." See *DARWINISM AND THE AMERICAN INTELLECTUAL* 98-99 (R. Wilson ed. 1967) ("If there was a genuine American Spencerian it was [John] Fiske . . . who had one important original idea in his long and prolific scholarly life: that the family introduced a moral buffer between man and the law of struggle."); see also E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* (1934); B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT* (1942); Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-*

In some respects, however, *DeShaney* may go even further. It is an opinion that cries out for the curmudgeonly critique of blatant constitutional law fallacies exemplified by Thomas Reed Powell or Adolf A. Berle Jr.'s destruction of category mistakes. Arthur Miller's similar puncturing of pompous posturing would easily show us that the *DeShaney* majority has turned its back on realism in favor of the false symmetry of categorical constructs invoked to decide the case. (There is some comfort in knowing that Arthur would have warned against overestimating the import and impact of any constitutional law decision). It is a trifle ironic, therefore, but also sadly fitting, to write about *DeShaney*, a tragic throwback to last century's high formalism, in memory of Arthur S. Miller and the "capacity for outrage"¹⁰ he celebrated in others and embodied himself.

I. "Poor Joshua!"¹¹ *Creating the Present Through
Judicial Craftsmanship*

Chief Justice Rehnquist begins his opinion with a bare-bones description: "Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived."¹² Standing alone, this opening sentence encapsulates the majority opinion. (This first sentence also hides how much more complicated and appalling the facts of this case turn out to be, as Justice Brennan's dissent makes painfully clear). Because this "boy" lived with his father, the majority holds, the state could not be implicated in the horrific series of beatings Joshua endured as a toddler, culminating in "brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded."¹³ Though state officials knew of and easily could have protected Joshua from his terrible situation, the state owed the boy no constitutional duty of protection. "While the State may have been aware of the dangers that Joshua faced *in the free world*," Rehnquist writes, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them."¹⁴ Therefore, Joshua, who was two years old when the police were first told of his beatings and four years old at the time of the severe final beating, could not validly claim that he had

1921, 37 BUFFALO L. REV. 1 (1988/89); Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895*, 8 INDUS. REL. L.J. 307 (1986).

10. See, e.g., A.S. MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT (1984) [hereinafter A.S. MILLER, JUDICIAL ODYSSEY]. The phrase itself is Abraham Sofaer's worthy description of J. Skelly Wright. *Id.* at 5.

11. *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting).

12. *Id.* at 1001.

13. *Id.* at 1002. Rehnquist does note that "[t]he facts of this case are undeniably tragic," *id.* at 1001, and that the state's failure to protect Joshua was "calamitous in hindsight," though it "simply does not constitute a violation of the Due Process Clause." *Id.* at 1007. The Court also notes that Joshua's father was later convicted of child abuse. *Id.* at 1002.

14. *Id.* at 1006 (emphasis added). An indication of how easy it would have been for the majority to reach the opposite result, and to do so on narrow grounds, is contained in a footnote, in which Rehnquist states that a claim of "'entitlement'" to protection premised on Wisconsin statutes was not timely raised. *Id.* at 1003 n.2.

been deprived of liberty in violation of the Due Process Clause of the Fourteenth Amendment.

In order to get to this hard-nosed response to a tragic situation, Rehnquist must severely diminish the actual extent of involvement by the Winnebago County Department of Social Services (DSS). It is left to Brennan's dissent to detail the repeated visits by DSS staff—and their persistent, inexplicable failure to act. Even in holding against Joshua DeShaney's claim in the lower court, Judge Richard Posner framed the constitutional question to be whether "a reckless failure by Wisconsin welfare authorities" to protect Joshua might violate the Due Process Clause.¹⁵ With the exception of Rehnquist's stark attempt to minimize the facts, his majority opinion closely tracks Posner's approach below in this case, and in a series of other decisions in which Posner has led the Seventh Circuit to deny that any government has any constitutional duty to protect its citizens in any way.¹⁶

Although Posner purports to use history to support this radical claim, the Supreme Court majority primarily relies upon a divide-and-conquer tactic that is true neither to text nor to logic. Rehnquist does allude to history with a blatantly ahistorical methodology that I will criticize in the next section, but the decision is mainly *ipse dixit* derived from ideology rather than from the occurrences or ideas of the past.

Rehnquist begins with arid generalities about the scope of due process. He asserts that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."¹⁷ Moreover, he says, the language of the Due Process Clause cannot be

15. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 299 (7th Cir. 1987).

16. In *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), for example, Posner wrote: "The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." See also *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (stating that "the Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them," so that even gross negligence by a police officer at the scene of a fatal automobile accident could not be a deprivation of due process). Apparently, under *DeShaney's* reasoning, even a police officer who arrested an adult driver and then left young children unattended in a car would not be liable for their subsequent injuries. See *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (holding for the Pre-Posner Seventh Circuit that such police conduct could violate the Due Process Clause).

17. *DeShaney*, 109 S. Ct. at 1003. This assertion sounds somewhat persuasive until you think about it. That is, nothing in the Due Process Clause specifies what its grand outlines mean in any context, even when it comes to protecting property rights. Yet Rehnquist and the other justices in the majority did not require specificity when they recognized the right of a beach owner to rebuild without being required to grant an easement to the public to reach the beach, thereby overruling the views of state officials

extended “to impose an affirmative obligation on the State.”¹⁸ Finally, with the cold and false logic Rehnquist seems to favor these days—reasoning that revolves around the theme that greater power necessarily includes lesser power—he writes: “If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.”¹⁹

Here abstraction even triumphs over its own premises. Rehnquist glides from a state’s choice to provide services, in the sense of establishing and funding protective services for its citizens, to the choice, by the very state employees who are thereby “provided,” to withhold such services from someone like Joshua. Moreover, he ignores the powerful preemptive quality of the state’s initial protective decision, thereby ousting other institutions that might provide such services. Finally, he is blind to the fact that even in the majority’s mere nightwatchman theory of government, it surely is significant when the nightwatchman falls asleep on the job.

It is difficult, to be sure, to argue in the abstract as to precisely what a governmental duty to protect encompasses and how it should be limited. That is why history and some awareness of flux in the meaning of constitutional words, structures, and interpretations, are crucial. It is also why the majority’s failure to come to grips with the facts of this case, and with the repeated, tragic interventions by the state, is particularly appalling.

But Rehnquist seeks the high road. He purports to be bound by

and the California Court of Appeals. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (Justice Stevens joined in *DeShaney* but dissented in *Nollan*, along with the three *DeShaney* dissenters, Justices Brennan, Blackmun, and Marshall; Justice Kennedy was not yet on the Court). This type of beachfront property regulation surely was not addressed with any more specificity in the Fourteenth Amendment than was Joshua DeShaney’s liberty claim, nor does Justice Scalia’s holding in *Nollan* show reverence for leaving plaintiffs exclusively to state remedies.

The requirement of a textual basis for a Due Process Clause interpretation would also undo the Court’s settled “reverse incorporation” approach to the denial of equal protection by the federal government, see *Bolling v. Sharpe*, 347 U.S. 497 (1954), to say nothing of the selective incorporation of the Bill of Rights that has dominated constitutional discourse during much of this century. What virtually all the justices in the majority in *DeShaney* are willing to invent—with even less textual basis—in the service of inherent executive power and the “reason of state” doctrine provides a particularly glaring contrast with *DeShaney*’s niggardly approach to “liberty.” See, e.g., the decisions discussed and criticized in A.S. MILLER, *THE SECRET CONSTITUTION AND THE NEED FOR CONSTITUTIONAL CHANGE* (1987); Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980).

18. *DeShaney*, 109 S. Ct. at 1003.

19. *Id.* at 1004 (The confusing *them* reference in the quotation is not the only awkward syntax in this decision.). It is worth noting that this sentence, and the entire thrust of *DeShaney*, marks the decision’s potential utility when judges are asked to decide, for example, if a school district may close its public schools, so long as it does so without obvious, provable invidious discriminatory motivation. For a fine description and critique of the greater-includes-the-lesser approach, see Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). Cf. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (stating a view closer to that of the *DeShaney* majority). It should be sobering to note that one of the primary justifications for slavery was that the greater power to kill captives was said to include the lesser power to enslave them and their progeny.

text and logic as he works from his crucial initial premises.²⁰ Yet this high road is so rarefied that its abstractions climb toward cloud-cuckoo-land. The majority offers textualism without consideration of the textual context of the specific words at issue; indeed, the textual structure of the Fourteenth Amendment as a whole and the history of the amendment and the statutes based upon it are treated as entirely irrelevant.

The majority's next step in pursuit of its "neat and decisive divide between action and inaction"²¹ is simply to divide the world into two universes, reminiscent of the heyday of the Cold War, when Rehnquist studied law. Joshua has no cause to complain against the state, the Chief Justice insists, because the problems confronting this two- to four-year-old child were "dangers Joshua faced in the free world."²² In the free world, government has no constitutional duty to its citizens; in the other world, the world of incarceration and institutionalization, the state may owe some affirmative duty to an individual, derived entirely "from the limitation . . . imposed on his freedom to act on his own behalf."²³

Because no government had locked up Joshua, he ought to have taken care of himself.²⁴ That is what individuals, rugged or not, are

20. Brennan's dissent drives home the extent to which the majority's decision is preordained by its initial "perspective" and its "baseline," to the point that Brennan accuses the majority of proclaiming a general principle that is really a product of the justices' own "fixation." *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting). See generally Miller, *Major Premises*, *supra* note 3 (describing and decrying the judicial tendency to follow initial premises unrealistically and uncritically).

21. *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting).

22. *Id.* at 1006.

23. *Id.* This dichotomy may be an adaptation of the binary choice drawn by the state officials to distinguish "state custody" from when Joshua was "at liberty." Brief for Respondents at 25, *DeShaney* (No. 87-154). Rehnquist's use of *free world* is innovative, however. A LEXIS search discloses that the relatively rare previous uses of the phrase in Supreme Court opinions, all since World War II, have been primarily in political or military contexts. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 282 n.12 (1984) (Powell, J., dissenting); *Reid v. Covert*, 354 U.S. 1, 86 (1957) (Clark, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting); *Schneiderman v. United States*, 320 U.S. 118, 120 (1943). The only exceptions to the usual usage—e.g., "United States troops are stationed in many countries as part of our own national defense and to help strengthen the Free World struggle against Communist imperialism," *Wilson v. Girard*, 354 U.S. 524, 548 (1957)—were in *Hutto v. Finney*, 437 U.S. 678, 681 (1978) (quoting the district court's description of routine prison conditions in Arkansas as "'a dark and evil world completely alien to the free world'"), and in *Bute v. Illinois*, 333 U.S. 640, 677 n.1 (1948) (Douglas, J., dissenting) (quoting Cohen & Griswold, *Denial of Counsel to Indigent Defendant Questioned*, N.Y. Times, Aug. 2, 1942, at 6E, col. 5) (attacking *Betts v. Brady*, 316 U.S. 455 (1942), and claiming a greater right to counsel for a criminal defendant). These earlier usages conflict with Rehnquist's distinction between the free world and the world of incarceration, because they were concerned with criminal processes *within* the free world.

24. After all, as District Judge Reynolds found, the social worker had noted that Joshua, "who was four years old at the time, was trained to make his bed and prepare his own breakfast every morning." *DeShaney v. DeShaney*, No. 85-C-310 (E.D. Wis. June 20, 1986), in *Petition for Cert.*, app. at 58, *DeShaney* (filed July 17, 1987) (No. 87-154).

expected to do in the free world. The majority concedes that the state "may have been aware of the dangers that Joshua faced in the free world," but insists that state intervention "placed him in no worse position than that in which he would have been had it not acted at all."²⁵ To hold otherwise, even in the face of the state's "expressions of intent to help him," would transform the state into "the permanent guarantor of an individual's safety by having once offered him shelter."²⁶

The idea that the state did not worsen Joshua's situation by appearing to protect him, that it is absolved because it did not affirmatively erect an obstacle, is belied by the record.²⁷ But the either/or approach seems even more forced when it is compared to Rehnquist's own, directly inconsistent words in another recent decision involving the rights and constitutional status of children.

In *Schall v. Martin*,²⁸ in order to uphold extensive pretrial detention of accused juvenile delinquents, then-Justice Rehnquist's majority opinion argued that a juvenile's interest in freedom "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."²⁹ For pretrial detainees, then, there are more than two worlds. Any attempt to reconcile the approaches in the two decisions, perhaps using a distinction between "juveniles" and younger children, immediately fails. That is because, Rehnquist continued, "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, *the State must play its part as parens patriae*."³⁰ Thus, the state *must* play its role as *parens patriae* when it comes to detaining children. Without any textual basis, Rehnquist simply took notice in *Schall* that children are, after all, not really free. They are "always in some form of custody."³¹ In stark contrast, *DeShaney* says we must find a

25. *DeShaney*, 109 S. Ct. at 1006.

26. *Id.*

27. The Court relies on *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (finding that the government has no obligation to fund medically necessary abortions), and *Martinez v. California*, 444 U.S. 277 (1980) (holding that state officials who released a parolee were not liable for the death of a private citizen he killed), to make a causal claim: the state officials did nothing equivalent to erecting an obstacle or hurdle in the plaintiff's path. *DeShaney*, in turn, became an important precedent for Rehnquist's argument for the plurality in the abortion decision, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). Because the state need not operate hospitals at all, according to Rehnquist, it is free to prohibit any use of public facilities and personnel for performing abortions. In contrast to his own rigidity about the meaning of due process in *DeShaney*, it is ironic that Rehnquist criticizes *Roe v. Wade*, 410 U.S. 113 (1973), and several abortion decisions following it, for creating a "virtual . . . Procrustean bed," *Webster*, 109 S. Ct. at 3056, in their interpretation of due process.

28. 467 U.S. 253 (1984).

29. *Id.* at 265.

30. *Id.* (emphasis added).

31. That this inconsistency is not a mere slip of the judicial pen is clear when one considers other Rehnquist opinions about the status of children, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (concluding that teenage males are not "in need of the special solicitude of the courts"); *Craig v. Boren*, 429 U.S. 190, 218-19 (1976) (Rehnquist, J., dissenting) (rejecting the argument that heightened scrutiny is warranted for statutes discriminating on the basis of gender and age), as well as other opinions in

specific text in the Due Process Clause before any obligation as *parens patriae* is owed to Joshua. Without such language, the state's greater power—it need not do anything, according to Rehnquist—necessarily includes its lesser power to do something that worsens the situation, so long as the ineptitude is not intentionally invidious discrimination.³² Joshua must be left to his father's hands, to the everyday struggle of a violent state of nature, to "the dangers of the free world."³³ Poor Joshua!

II. *Transforming the Past, Controlling the Future*

A. *History: The Past*

In his opinion for the Seventh Circuit in *DeShaney*, Posner claimed: "The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents."³⁴ Posner knows this. He does not need any authority. Conflating 1787 with 1866, he claims to have history as well as some Libertarian totem on his side: "The men

which he joined. *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the constitutional rights of children are more restricted in the school setting); *Lehman v. Locoming County Children's Servs. Agency*, 458 U.S. 502 (1982) (holding that federal habeas corpus sec. 2254 does not extend to a constitutional challenge to a state statute under which a mother lost parental rights involuntarily, given federalism and finality interests); *Bellotti v. Baird*, 443 U.S. 622, 634-35 (1979) (noting that the status of minors is unique in many respects, and requiring that "constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children").

32. *DeShaney*, 109 S. Ct. at 1004 n.3. The Court here notes that the Equal Protection Clause prohibits selective denial of protective services to certain (unspecified) disfavored minorities. For an attempt to address the overwhelming practical problem of proof of such bad motive, and its lack of support in the Court's precedents prior to *Washington v. Davis*, 426 U.S. 229 (1976), see Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981). If anything, Supreme Court decisions since 1981 have made it even less possible to meet such a burden in the practical world of litigation.

33. State officials apparently received information on 11 occasions strongly indicating severe child abuse of Joshua. The respondents dispute the number, just as they dispute whether the social worker involved knew of cigarette burns or only "wondered" whether the marks she saw were cigarette burns. Brief for Respondents at 4-5 n.7, *DeShaney* (No. 87-154). Any fair reading of the record, however, suggests that a dispute over the precise number of incidents fades into unimportance in light of the horrific life Joshua obviously led. State officials did nothing to aid him even after the state had taken temporary custody, set up the interdisciplinary "Child Protection Team," established a plan as a condition of returning Joshua to his father's custody to which Joshua's father consented but which he blatantly failed to follow, and had a social worker visit Joshua's home who repeatedly and dutifully made entries revealing evidence of abuse but did nothing. The record discloses more than ten separate police and emergency room contacts with Joshua during his two years in Wisconsin, and approximately the same number of social worker visits. *DeShaney v. DeShaney*, No. 85-C-310 (E.D. Wis. June 20, 1986), in Petition for Cert., app. at 52-61, *DeShaney* (filed July 17, 1987) (No. 87-154).

34. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987). This statement actually may be a slight modification of Posner's even more radical position in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). See *supra* note 16.

who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services."³⁵ Supplemented only by the claim that political remedies, and any remedies that the states in their discretion saw fit to provide, "were assumed to be adequate,"³⁶ this assertion is the entirety of Posner's historical argument.³⁷ It must be comforting to have a direct line to what worried an undefined cohort of Framers who achieved consensus as they floated together across a century. And it cannot be said that Posner is guilty of "law office history."³⁸ Instead, he practices *ex cathedra* history. He is so in tune with the ghostly voices that harmonized in the Constitution adopted in 1789 and amplified in 1868—or perhaps in 1787 and 1866, when the constitutional texts were formally proposed—that he need never venture down to the dirty world of historic evidence.

Had Posner actually considered the historic context of the Constitution makers, he would have noticed disagreement, confusion, ambivalence, and the general messiness of mixed motives and ambitions. People surely did not talk about social workers or "child protection teams." Congressmen did not even debate the problem of child abuse, though there was concern about apprenticeship as a form of forbidden involuntary servitude. Thus, Posner might have claimed support for the argument that the Due Process Clause was not intended to reach Joshua DeShaney's terrible situation. But he also would have found a long history of communal responsibility for children perceived to be in trouble, and little support for the proposition that the state had left such children, or their families, alone,

35. *DeShaney*, 812 F.2d at 301. This assertion is a fine example of the argument-from-false-dichotomy technique favored by Posner and by the majority in *DeShaney*. Posner's claim is belied not only by the considerable force Congress attempted to place behind the panoply of civil rights statutes it passed between 1866 and 1875 (including military occupation of the recalcitrant South), but also by section 1 of the Fourteenth Amendment itself, which specifically mentions "protection" as well as "privileges or immunities" as constitutional claims that states may not deny. Posner's argument also ignores the rest of that amendment and the context of its passage, and the Thirteenth and Fifteenth Amendments, which hardly suggest willingness to leave law and order and everything else to the discretion of the states, or to political remedies as administered by the states, in the wake of the Civil War.

36. *Id.*

37. The ratification of the Fifteenth Amendment in 1870 surely undercuts Posner's claim that political remedies were assumed to be adequate in the immediate post-Civil War political climate. He does concede, however, that a state "may not invidiously withdraw its protection from a disfavored minority without violating the equal protection clause in its most fundamental sense." *Id.* at 301. His only other "concession" is a tip of the word processor to an article by his colleague, David Currie, in which, according to Posner, the exceptions to Posner's principle of a constitution are "well discussed" but not applicable. *Id.* (citing Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986)). It might be added that Currie neither ventures into historical details nor directly confronts Posner's radical claims in this article.

38. For criticisms of the "law office history" methodology, see Casper, Jones v. Mayer: *Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Wiecek, *Clio As Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W.L. REV. 227 (1988). The standard critique charges lawyers and judges with ripping citations out of historical context, but Posner uses no citations at all.

entirely "free" to do their own thing.³⁹

The notion of rights in 1787-89 was hardly exclusively negative, moreover, and those who gathered in Philadelphia hardly met there in order to leave all relationships between individuals and government to the discretion of the states. Perhaps Posner regards Chief Justice John Marshall as merely eccentric when he wrote in *Marbury v. Madison*:⁴⁰ "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."⁴¹

This is hardly the place to delve into the complexity of the first constitutional period, nor to explore the active role of government on both state and federal levels to create new rights and vested expectations through "the release of energy" across what white Americans perceived to be an unsettled continent.⁴² The very effort to adopt a national Constitution was inconsistent with the idea of a purely negative government. Additionally, any close reading of the entire constitutional text—including the Necessary and Proper Clause and the Ninth Amendment, for example—must confront open-ended governmental powers and unenumerated rights that cannot be reconciled with Posnerian history.⁴³

39. See, e.g., M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 236-37, 289-307 (1985) (noting that during the antebellum period, judges began to emphasize child welfare concerns over the exclusive family preferences of the common law, and this trend accelerated after the Civil War); R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 14-21, 363-89 (1981) (explaining that town governments were responsible for supervising and providing for the poor, and supervised apprenticeship systems for needy children); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 14-15, 169-72, 210-16 (1971) (discussing governmental intervention to protect children in postcolonial and Jacksonian society); Bardaglio, *Challenging Parental Custody Rights: The Legal Reconstruction of Parenthood in the Nineteenth-Century American South*, 4 CONTINUITY & CHANGE 259, 269-80 (1989) (recognizing that even in the South, which lagged behind the North in elevating child welfare concerns over family interests, judges invoked the idea that the state had the duty as *parens patriae* to protect children, and noting that this idea became widespread after the Civil War); Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1050 (1979) (discussing the burst of pre-Civil War social reforms in the United States, unparalleled in other countries, premised on responding to the particular needs of children). Cf. M. LESY, WISCONSIN DEATH TRIP (2d ed. 1983) (revealing photographs suggesting the harsh 19th-century life in a small Wisconsin town).

40. 5 U.S. (1 Cranch) 137 (1803).

41. *Id.* at 163.

42. J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-70 (1956). See generally O. HANDLIN & M. HANDLIN, COMMONWEALTH (1947); L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948); and the articles by Harry Scheiber and Paul Gates available in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES (2d ed. 1988).

43. For recent explorations of the ideas and politics surrounding 1787, see, e.g., excellent collections of essays published to mark the Bicentennial, BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (1987), and THE FRAMING AND RATIFICATION OF THE CONSTITUTION (1987). For a cogent affirmative

If anything, Posner's ahistorical fallacy is even less convincing about the immediate post-Civil War period. Speeches surrounding the passage and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments brim over with declarations of a national obligation to assure federal protection of the rights of citizens, including but not limited to the rights of former slaves. The debates over the numerous civil rights acts from 1866 to 1875 are replete with vehement pronouncements about the reciprocal relationship of allegiance and protection. Sponsors and supporters of these acts repeatedly emphasized the federal duty to provide protection when state officials invaded or failed to protect the full and equal rights of all citizens.⁴⁴

The title and the context of the Ku Klux Klan Act of 1871, the precursor of 42 U.S.C. § 1983 at issue in *DeShaney*, surely indicates concern to protect private citizens from private violence. Also, as the Supreme Court has noted many times in recent decades, this statute was part of a transformation of federalism. For example: "The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era."⁴⁵ Section 1983 was primarily intended to interpose federal protection against unconstitutional state action, whether done by the state legislatures or by state judges or by executive branch officials. Finally, although surely not models of clarity, the relevant speeches in Congress and the historical context of the 1860s and early 1870s make clear that "deliberate inactivity"⁴⁶ by state and local officials, in the face of brutal depredations, was a central concern of the post-Civil War period.

The Ku Klux Klan Act of 1871, for example, "was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages."⁴⁷ To be sure,

reading of the text of the pre-Civil War Constitution, see, e.g., C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960); Black, *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 187* (1985); Black, *Further Reflections on the Constitutional Justice of Liveliness*, 86 *COLUM. L. REV.* 1103 (1986).

44. The historical literature is voluminous, of course, but I still favor Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 *N.Y.U. L. REV.* 651 (1979), for a discussion of historical sources and a detailed introduction to the widespread perception of the national government's duty to protect the "full and equal" rights of all citizens in the context of section 1 of the 1866 Civil Rights Act, unquestionably the precursor of section 1 of the Fourteenth Amendment.

45. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 503 (1982); see also, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

46. Note, *Developments in the Law—Section 1983 and Federalism*, 90 *HARV. L. REV.* 1133, 1154 (1977).

47. *Id.* at 1154; see also M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 156-64 (1986); E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 412-59 (1988); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 335-515 (1982); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); J. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984); R. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 53-57 (1985); Note, *supra* note 46, at 1153-56. The very

Congress was not precise. It did not specify what rights were covered, what degree of state abdication would make a federal case, nor to what extent coverage was to be truly national, rather than merely aimed at the protection of blacks and their white allies from both governmental and private depredations in the South. But that murkiness only underscores what is amiss in Posner's attempt to blast away original intent, to the extent it can be discovered, leaving conceptual constructs that only purport to be based in history.

Rehnquist bothers with history even less than does Posner. The entire historical discussion in *DeShaney* is a précis of Posner's argument about the purpose of the Due Process Clause: "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."⁴⁸ Rehnquist himself once noted that the "Civil War Amendments to the Constitution . . . serve as a sword, rather than merely as a shield, for those whom they were designed to protect."⁴⁹ But he now carves a gaping hole in the shield and buries the sword altogether. On Rehnquist's peculiar view, the Civil War was fought to protect state sovereignty. The amendments and statutes to guarantee the fruits of Union victory merely sought to return discretionary power to the states, so long as state officials did not restore slavery.

It is impossible, of course, to be certain about what Representative Jonathan Bingham or Senator Lyman Trumbull might have decided if faced with a legal question such as that presented in *DeShaney*. In a less anonymous world of a small Wisconsin town a century ago, it is hard to imagine, but conceivable, that Joshua's father would have been left alone to commit repeated acts of violence against his son. Yet it is also hard to construct the precise analogy for the "child protection team" that "stood by and did nothing

terms of the Ku Klux Klan Act, as they survive in 42 U.S.C. § 1983, suggest affirmative federal protection of "rights, privileges, or immunities" against both active and passive deprivations. Every person is liable who, under color of law, "custom, or usage," either "subjects, or causes to be subjected" any citizen or other person within the jurisdiction of the United States to deprivation of any rights or privileges, as well as immunities. 42 U.S.C. § 1983 (1982) (emphasis added).

48. *DeShaney*, 109 S. Ct. at 1003.

49. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). There have been indications that this statement was not mere rhetoric to cushion the restrictive holding in *Edelman*, which found an Eleventh Amendment barrier to federal judicial remedies against state officials. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress could use power under section 5 of the Fourteenth Amendment to overcome Eleventh Amendment barriers); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (arguing that the Civil War Amendments were intended to provide limitations on the authority of state governments, and to empower Congress to resolve the problems society might confront even a century later).

when suspicious circumstances dictated a more active role,”⁵⁰ which is Rehnquist’s “protection” description of how the state officials performed as Joshua’s tragedy unfolded.

Actually, history cannot answer Rehnquist’s question directly. Moreover, history complicates the neatness of using ideology as the decisive reference point, but does not support the Court’s misdirected nostalgia for a continuous golden age of laissez-faire, conveniently said to be reflected throughout the Constitution. If anything, the post-Civil War Amendments suggest an entirely different thrust: an attempt to interpose the federal government against state action and inaction that deprive “any citizen . . . or other person” of what the politicians of the era considered to be “rights, privileges, or immunities secured by the Constitution and laws.”⁵¹

The *DeShaney* majority’s binary approach and *ex cathedra* history misses another crucial factor—the development of due process doctrine since Reconstruction. Taken at its word, the majority would not accept incorporation of any of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment. The Rehnquist-Posner account of due process does not seem to accept any constitutional requirements on the states to protect any citizens other than those in custody or victims of overt, intentional invidious discrimination by state officials. Moreover, the majority in *DeShaney* rejects a point made by Justice Frankfurter—certainly not generally considered a judicial activist—who once noted: “Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.”⁵² Yet the *DeShaney* majority requires just such a catalogue, allegedly to be found in history, text, and logic. As the next sections show, *DeShaney* is actually grounded in ill-conceived, anti-democratic policy and in a rigid, ideological commitment that produces considerable moral obtuseness.

*B. Being Practical: On Not “Yielding to That Impulse” of “Natural Sympathy”*⁵³

A major thrust of the majority opinion in *DeShaney* concerns the slippery-slope danger of “transform[ing] every tort committed by a state actor into a constitutional violation.”⁵⁴ To be sure, several recent decisions support the Court’s claim that “‘not all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.’”⁵⁵ But it took *DeShaney* to transmogrify

50. *DeShaney*, 109 S. Ct. at 1007.

51. 42 U.S.C. § 1983 (1982).

52. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds*, 367 U.S. 643 (1961) (overruling *Wolf* insofar as it held that evidence obtained by searches and seizures in violation of the federal Constitution was nevertheless admissible in state criminal proceedings).

53. *DeShaney*, 109 S. Ct. at 1007.

54. *Id.*

55. *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 335 (1986)).

"not all" into "none." *DeShaney* turns the category of all constitutional torts that are not intentional into an empty set for all citizens who are not in custody. It is ironic that the Court might have used a crabbed version of state action to accomplish the same result,⁵⁶ but its restrictive view of what liberty constitutionally entails is more radical and more clearly designed for use in future cases.

Why is the Court so anxious to eliminate constitutional protection? Questionable assumptions about federalism, federal court docket control, and state and local treasuries obviously enter the majority's calculation. Yet it still would have been very easy to decide this case on the narrow basis of its appalling facts, because the particular governmental inaction, despite repeated contact by state officials, surely rises to the level of "deliberate indifference," "recklessness," or "gross" negligence made actionable even under this Court's recent, stingy precedents.⁵⁷ There are two additional and central, albeit unspoken, "practical" elements of the *DeShaney* Court's revision of the relevant statute, 42 U.S.C. § 1983. First, the Court wishes to keep sympathetic cases away from juries, and second, it desires to impose an extreme, statist view under the guise of leaving matters to the political process. Rehnquist relies on the common urge to separate law from politics. In fact, however, the *DeShaney* majority aggressively uses political ideology to enable judges to control the barrier between legal and political spheres, even as Rehnquist claims that to do otherwise would be judicial arrogation.

In recent years, the Court has used a variety of devices to restrict constitutional torts. The Court has abused longstanding doctrines of standing and ripeness and has made an inedible porridge, both overly sweet and overly bitter, in its attempts to define what constitutes a protected property right.⁵⁸ *DeShaney* is the culmination of the gambit either to reject the plaintiff's choice of a federal forum entirely or, failing that, to make sure that such a choice turns out to be a mistake, because sympathetic factual issues will never get to the

56. See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding that state action could not be found in the exercise by a private party of power delegated it by the state, which is traditionally associated with sovereignty); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (finding that the state was not sufficiently connected with the termination of services to an individual by a privately owned and operated utility corporation to support a section 1983 action, even though the utility corporation operated under a state-issued certificate of public convenience).

57. See, e.g., *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Paul v. Davis*, 424 U.S. 693 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976).

58. For excellent recent discussions of the problematic cases in this realm, see Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277 (1988); Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

jury.⁵⁹

The idea of leaving matters to the political processes, a notion that Posner and Rehnquist purport to find reassuring as they send plaintiffs away, does not preclude these judges from significantly amending a basic civil rights statute in *DeShaney*. A statute intended to afford broad protection from the Ku Klux Klan and from inaction by state officials in the face of Klan outrages was clearly not limited to affirmative state action. Because Posner and Rehnquist dislike the implications of this statute, however, they take it upon themselves to transform it to be true to the logical implications of what they think it should have said. Nor does their proclaimed respect for the popular will extend to the democracy of the jury box. There is to be no opportunity for checks and balances across the borderlines of their federalism. No federal jury will be allowed to hold state officials accountable for their tortious acts or failures to act, absent proof of invidious and discriminatory motive.

Paradoxically, the *DeShaney* majority's failure to grasp the reality of the modern role of the Positive State produces an approach that is anything but individualism. Its practical import is to allow bureaucrats to do nothing. They may come face-to-face with easily remediable suffering and blink. They may decide to intervene in a manner that is directly and terribly harmful, yet they still will not be held to have caused the harm unless they actually, actively inflicted it themselves. They may give the appearance of acting to remedy a terrible situation, and thereby deter any attempts by third parties to rescue a battered child, yet they will still not be constitutionally liable for the void they create.

Because the state need not render any service, it will not be held constitutionally to have created the harm. This is the clear implication of the greater-includes-the-lesser reasoning of *DeShaney*. State officials may be secure in the knowledge that, at least as a matter of federal law, to fail to improve, and even to make a tragic situation far worse, is entirely acceptable. Rehnquist concedes that even if a person does not have an initial duty to rescue, once that person undertakes a rescue, as a matter of common law, liability may ensue if the rescue attempt is done negligently. But, he argues, to follow

59. An obvious basis for the plaintiffs' effort to get and keep the federal forum was the \$50,000 cap on damages recovery under Wisconsin law. WIS. STAT. ANN. § 893.80(3) (West 1983). Justice Frankfurter, who surely was not an advocate of expansive interpretation of section 1983, nevertheless noted "how important providing a federal trial court was among the several purposes of the Ku Klux Act." *Monroe v. Pape*, 365 U.S. 167, 251 (1961) (Frankfurter, J., dissenting), *rev'd on other grounds*, 436 U.S. 658 (1978) (overruling *Monroe* "insofar as it holds that local governments are wholly immune from suit under § 1983"); see also *Lane v. Wilson*, 307 U.S. 268, 274-75. (1939). Likewise, Justice Holmes often emphasized the importance of respecting a plaintiff's choice of a federal forum when Congress had provided for that choice. For example, in a due process case he wrote that resort to state remedies could not be required because "[a]ll their constitutional rights . . . depend upon what the facts are found to be," which meant that plaintiffs could not be "forbidden to try those facts before a court of their own choosing." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 228 (1908); see also *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 293 (1923).

that approach for state officials would be to "thrust upon"⁶⁰ the people of Wisconsin an unworthy expansion of the Due Process Clause.

*III. The Moral Dimension: Where "Doing Nothing Can Be the Worst Mistake"'*⁶¹

In its haste to confine the liberty protected by the Due Process Clause and to eviscerate section 1983 and thereby reduce access to federal courts, the *DeShaney* majority follows a cruel, purported logic that is aptly labeled "sterile formalism"⁶² in Justice Blackmun's dissent. In doing so, the Court is so "indifferent to . . . indifference"⁶³ as to shock the conscience. A remarkably creaky fiction drives the majority opinion; it is a fiction that demands a leap of illogical faith and rejects attention to history, text, and context. Rehnquist strives for what Holmes long ago called "the logical method and form [that] flatter that longing for certainty and for repose which is in every human mind."⁶⁴ Yet Rehnquist fails to heed Holmes's next words: "But certainty generally is illusion, and repose is not the destiny of man."⁶⁵

Obviously, the definition of a duty to intervene is difficult in itself and rife with the potential for paternalistic abuse or for inefficiencies of various kinds.⁶⁶ This moral issue cries out for context. Joshua DeShaney's horrible experience demands nuanced attention to relationships and to the specific facts of the case before the court,⁶⁷ not some purportedly neutral general principle.

As Mary Ann Glendon points out, the Court's response in *DeShaney* is all too reminiscent of that moment in the first year of law school when a student learns that there is no legal duty to rescue a

60. *DeShaney*, 109 S. Ct. at 1007.

61. *Id.* at 1012 (Blackmun, J., dissenting) (quoting A. STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984)).

62. *Id.*

63. *Id.* (Brennan, J., dissenting).

64. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

65. *Id.*

66. For a fine discussion of the moral quandry surrounding the question of the Good Samaritan, see Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985). For a compelling argument in favor of the duty to intervene against injustice, premised in classical political theory, see Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135 (1989).

67. District Court Judge Reynolds decided *DeShaney* on a motion to dismiss, which he treated as a motion for summary judgment. *DeShaney v. DeShaney*, No. 85-C-310 (E.D. Wis. June 20, 1986), in Petition for Cert., app. at 48-49, *DeShaney* (filed July 17, 1987) (No. 87-154).

baby drowning in a pond.⁶⁸ Most students absorb that lesson without accepting a complete segregation of moral and legal worlds.⁶⁹ And some come to believe that constitutional law is more aspirational than common law, that “a judge’s highest calling is to ensure in his every decision that the implementation and enforcement of the laws of this country must be to upgrade and civilize the manner in which these laws are enforced,”⁷⁰ and that, in pursuit of “goodness,”⁷¹ it is even sometimes appropriate for a judge to “take the short run into account.”⁷²

The *DeShaney* majority, by contrast, proclaims an abstract, purportedly certain, and general constitutional principle: the state has a limited degree of responsibility. State officials are constitutionally bound to avoid grossly harmful acts or omissions that grievously harm people who live within the confined sphere of state custody. In the much larger world, however, everyone else is fully free and able to take part in the great national free-for-all. Every child, woman, and man, no matter how actually encumbered, is properly relegated exclusively to the political processes and the states for any refuge or redress. No one in this free world—no matter what that person’s condition or age—may look to the federal Constitution for relief, with the possible exception of those rare individuals who are able to prove that invidious discriminatory motivation was the cause of their suffering at the hands of government officials.

Blackmun’s brief dissent in *DeShaney* offers a devastating attack on the majority’s lack of “moral ambition.”⁷³ At first it may seem odd for Blackmun to invoke Robert Cover’s *Justice Accused* (1975), a study of antebellum Northern judges who retreated into formalistic legal reasoning rather than grant relief to fugitive slaves with whom they

68. M. Glendon, *Rights and Responsibilities in Modern Legal Language* (1989) (unpublished manuscript).

69. Law schools fail to give adequate attention to the issue of when and if to maintain the moral/legal gap. Arthur Miller’s last book, A.S. MILLER & J. BOWMAN, *DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS* (1988), provides a fine text for study of such matters. It vividly details events leading up to the Court’s decision in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), to allow a second execution attempt of a poor, incompetently defended black teenager, after drunken deputies botched the first execution attempt on Louisiana’s portable electric chair. Justice Frankfurter’s role particularly merits attention. Frankfurter fought hard to keep a majority together behind the proposition that Francis was the victim of “one of those contingencies which is not the fault of man.” *Id.* at 93 (quoting a note from Frankfurter to Justice Reed, Dec. 14, 1946). Once he achieved that result by a 4-1-4 vote, however, Frankfurter tried unsuccessfully to use his Harvard Law School connections to arrange, behind the scenes, to have the Louisiana governor commute the death sentence. Unfortunately, Willie Francis’s experience provides a grisly precedent for recent events. See Applebome, 2 *Electric Jolts in Alabama Execution*, N.Y. Times, July 15, 1989, at A6, col. 1 (discussing the execution of a mildly retarded murderer—the first retarded person to be executed since the Supreme Court voted to allow such executions in June 1989—that took 19 minutes and two jolts of electricity).

70. Johnson, *Foreword* to A.S. MILLER, *supra* note 10, at x.

71. A.S. MILLER, *JUDICIAL ODYSSEY*, *supra* note 10, at 7.

72. *Id.* at 35 (quoting Judge J. Skelly Wright).

73. *DeShaney*, 109 S. Ct. at 1012 (quoting A. STONE, *LAW, PSYCHIATRY, AND MORALITY* 262 (1984)).

personally sympathized. The analogy, however, is actually (and terribly) appropriate. It lends powerful support to Blackmun's plea for a "'sympathetic'" reading of the Fourteenth Amendment, which "comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."⁷⁴

Blackmun may have a particularly strong reason for the sense of outrage that permeates his dissent. He may be echoing, but also in part atoning for, his own majority opinion in *Wyman v. James*.⁷⁵ In that opinion, his first for the Court, Blackmun held that compulsory home visits by social workers were constitutional even if they forced a welfare mother to choose between continuing to receive her welfare benefits or waiving her Fourth Amendment rights.⁷⁶ Blackmun characterized the social worker as "a friend to one in need."⁷⁷ Thus Blackmun's own early, idealized portrait of a "helping professional" may exacerbate his outrage in *DeShaney*, where the record clearly shows that social workers, and other members of Joshua's "Child Protection Team," grossly and repeatedly failed to help the child. Blackmun began by wanting to trust experts, but he has learned that he often cannot. These experts—and through them the state—purported to come to the aid of "one in need," yet they remained eerily aloof from the suffering of a helpless child.⁷⁸

A crucial lesson of our bleak century, and of the Holocaust in particular, is that it can be morally reprehensible to do nothing in the face of evil. There are, in fact, Supreme Court precedents that suggest that "a State may be found complicit in an injury even if it did not create the situation that caused the harm."⁷⁹ Even if there were no such precedents, however, judges as well as other officials of the state ought to be held accountable when they are complicit with evil, even when they operate in the guise of "merely following the rules."

Judges are people, too. They ought not to be entirely immune

74. *Id.*

75. 400 U.S. 309 (1971).

76. Blackmun directly rejected the unconstitutional conditions argument in the welfare context: "Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." *Id.* at 324. More in keeping with his *DeShaney* dissent, he also stressed the child's separate interest and the particulars of the individual child's case, because "[a]ll was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite)." *Id.* at 322 n.9.

77. *Id.* at 323.

78. Justice Brennan notes that the social worker dutifully recorded her perceptions of what Joshua was undergoing, in detail that is "almost eerie in light of her failure to act upon it." *DeShaney*, 109 S. Ct. at 1010. For a cogent analysis of the attitudes about family violence embedded in law, see M. Minow, *Law and Violence* (Mar. 24, 1989) (unpublished manuscript).

79. *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting) (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

from the blame we share if we collaborate passively upon encountering reprehensible acts. It is horrific to be so complacent as to lack ambition to do better. It may be even worse to purport to help someone but to do nothing. We are to blame, surely, if we attend only to ourselves and our business as usual, while we claim to seek justice. We fail legally as well as morally if we do nothing when we have the direct chance—but lack adequate aspiration—to promote “the betterment of the human condition.”⁸⁰

80. A.S. MILLER & M. FEINRIDER, *NUCLEAR WEAPONS AND LAW* at x (1984).