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Constitutional Law - Fourteenth Amendment - State Action - Substantive Due Process

Jerome Kaharick

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Constitutional Law—Fourteenth Amendment—State Action—Substantive Due Process—The United States Supreme Court has held that the failure of a state operated child protection agency to provide adequate protection to a child from his parent's violence does not violate that child's rights under the substantive component of the Due Process Clause.


Joshua Deshaney, a minor child, lived with his father, Randy Deshaney, pursuant to a divorce decree which awarded custody of Joshua to his father.1 In March of 1984, Randy Deshaney beat Joshua with such severity that he lapsed into a life threatening coma from which he has not fully recovered.2

Winnebago County Department of Social Services (hereinafter DSS) first learned of potential child abuse in January of 1982, when Randy Deshaney's second wife complained to the police that Randy had previously hit Joshua and was abusing the child.3 DSS interviewed Randy Deshaney who denied any wrongdoing.4 DSS did not pursue the matter on this particular occasion.5

In January of 1983, Joshua was admitted to the hospital.6 The examining physician, suspecting child abuse, notified DSS.7 DSS obtained a court order placing Joshua in the temporary custody of the hospital.8 Three days later, an ad hoc committee, "The Child Protection Team,"9 concluded that the evidence was insufficient to warrant any further retention of Joshua in the custody of the court.10 The committee recommended the implementation of certain preventative measures.11 "Based on the recommendation of

2. Id at 1002.
3. Id. at 1001.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id. This team consisted of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers and various hospital personnel. Id.
10. Id.
11. Id. These measures included; enrolling Joshua in a preschool program, providing
the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father."

One month later, hospital emergency room personnel called DSS to report that Joshua had once again been treated for injuries they suspected to be child abuse. The caseworker decided that there was no basis for offering DSS protection to Joshua at this time. Over the next six months, the caseworker recorded that suspicious injuries appeared on Joshua’s head and that the recommendations of the Child Protection Team had not been followed. No DSS action was taken to remove Joshua from his father’s custody.

In November of 1983, the emergency room personnel once again notified DSS that Joshua had been treated for injuries that were suspicious and possibly caused by child abuse. On the caseworker’s visits to Joshua’s home, to monitor his status, she was told that Joshua was too ill to see her. DSS did not take any action. This incident was followed by the March, 1984 beating of Joshua which was the subject of the complaint.

The complaint was instituted by Joshua and his mother under title 42 of the United States Code, Section 1983, in a United States District Court against Winnebago County, DSS, and various caseworkers involved in monitoring Joshua’s case. The basis of the complaint was that the respondents deprived Joshua of his liberty interest without due process of law in violation of the Four-

\[\text{his father with certain counseling services and encouraging his father’s girl friend to move out of the home. Id.}\]

12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 1002.
19. Id.
20. Id.

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

Id.

22. Deshaney, 109 S. Ct. at 1002.
teenth Amendment\textsuperscript{23} of the United States Constitution. The deprivation occurred due to the respondents’ failure to protect Joshua from a “risk of violence” that the respondents perceived or should have perceived.\textsuperscript{24} The District Court granted the respondent’s motion for summary judgment.\textsuperscript{25}

The Court of Appeals for the Seventh Circuit affirmed\textsuperscript{26} the district court’s decision, holding that the petitioners did not make out an actionable section 1983 claim.\textsuperscript{27} The Court of Appeals gave two reasons for their decision.\textsuperscript{28} First, the Due Process Clause does not impose the requirement that a state or local government protect its own citizens from “private violence” or mishaps inflicted by non state actors which is not attributable to the conduct of its employees.\textsuperscript{29} The Court rejected the “special relationship”\textsuperscript{30} theory first enunciated in \textit{Jensen v. Conrad}\textsuperscript{31} and applied in \textit{Estate of Bailey by Oare v. County of York}.\textsuperscript{32} Second, relying on \textit{Martinez v. California}.
fornia, the causal connection between the conduct of DSS and Joshua's injuries was not sufficient to establish a deprivation of constitutional rights providing an actionable claim under section 1983.

Recognizing the conflicts between the holdings among the Circuit Courts of Appeal and the importance of the issue to the functioning of state and local governments, the Supreme Court of the United States granted certiorari. The decision of the Court of Appeals was affirmed.

The issue presented in this case was whether the failure of a state-operated child protection agency to provide adequate protective services to a child from an abusive parent, and who is later harmed by that parent, constitutes a violation of that child's substantive Due Process rights under the Fourteenth Amendment of the United States Constitution. The majority opinion held that the failure of a state operated child protection agency to provide adequate protection to a child from his parent's violence does not violate that child's rights under the substantive component of the Due Process Clause.

The majority opinion began by defining the nature of petitioner's claim as one which involved the substantive rather than the procedural component of the Due Process Clause. The petitioners did not claim that the state denied Joshua protection without appropriate procedural safeguards. The petitioner argued

the victim or perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight."

33. 444 U.S. 277 (1980). In Martinez, the appellants' fifteen year old daughter was murdered by a parolee five months after being released from prison despite having a history of sex offenses. Id. at 279-280. Appellant brought an action under 42 U.S.C. Section 1983 claiming that the parolee, state officials, by releasing the parolee, subjected the decedent to a deprivation of her life without due process of law. Id. at 283. The court held that the parolee was in no sense an agent of the parole board. Id. at 285 The parole board was not aware that the appellant's decedent faced any special danger as distinguished from the general public. Id. The appellant's death was too remote a consequence of the parole officers action to hold them responsible. Id.

34. Deshaney, 109 S. Ct. at 1002.
35. Id.
36. Id.
37. Id. at 1004.
38. Id. Rehnquist, C.J., delivered the opinion of the Court, in which White, Stevens, O'Connor, Scalia and Kennedy, J.J., joined. Id. at 1000.
40. Id.
that the Wisconsin child protection statute\textsuperscript{41} gave Joshua an entitlement to receive services enjoying Due Process protection. The Court declined to hear this argument as it was not pleaded in the complaint, argued to the Court of Appeals, or raised in the petition for certiorari.\textsuperscript{42}

The majority opinion continued its rationale by stating that nothing in the language of the Due Process Clause requires the state to protect the life, liberty or property interests of the citizenry against deprivations of those interests by private non state actors.\textsuperscript{43} The state does not have an affirmative obligation to ensure that those interests do not come to harm through means other than those involving state action.\textsuperscript{44} The majority states that the Due Process Clause of the Fourteenth Amendment was intended to prevent government from using its power in an abusive manner as an instrument of oppression.\textsuperscript{45} The purpose of the Due Process Clause is to protect people from the state, not to protect them from each other.\textsuperscript{46} Since the Due Process Clause does not impose a duty on the state to provide its citizens with any particular type of protective services, the state cannot be held liable under that clause for injuries that might have been avoided had it chosen to provide such services.\textsuperscript{47}

Petitioners next argued that a “special relationship”\textsuperscript{48} existed between Joshua and DSS, thus requiring due process protection. Once the state became involved in protecting Joshua from danger, the state acquired an affirmative duty, to protect Joshua in a reasonably competent manner.\textsuperscript{49} The Court rejected this argument.\textsuperscript{50} While the court has recognized affirmative state duties to care for particular individuals in prior decisions,\textsuperscript{51} they had no such duty in

\begin{itemize}
\item \textsuperscript{41} WIs. Stat. Ann. § 48.981 (West 1983). Section 48.981 provides:
\item Definitions
\item (a) “Abuse”
\item 1 Physical injury inflicted on a child by other than accidental means.
\item (2) Persons required to report a physician . . . social or public assistance worker. . .
\item Id.
\item \textsuperscript{42} Deshaney, 109 S. Ct. at 1003 n.2.
\item \textsuperscript{43} Id. at 1003.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 1004.
\item \textsuperscript{48} See Supra, note 30.
\item \textsuperscript{49} Deshaney, 109 S. Ct. at 1004.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Estelle v. Gamble, 429 U.S. 97 (1976). A prison inmate brought an action under 42 U.S.C. Section 1983 against the state correction department medical director and prison
this case.\textsuperscript{52} The substance of this line of cases is that when the state takes a person into custody and holds him there against his will, it acquires a constitutional duty to assume responsibility for the safety and general well being of the individual.\textsuperscript{53} The Court stated that the \textit{Estelle-Youngberg}\textsuperscript{54} analysis did not apply to this case.\textsuperscript{55} The harms that Joshua suffered were not inflicted by the state nor did they occur while he was in the custody of the state, but while he was in the custody of his natural father, who cannot be considered a "state actor."\textsuperscript{56} Thus, the respondents failure to provide Joshua with adequate protection against his father's violence did not violate his rights under the substantive component of the Due Process Clause.\textsuperscript{57}

The majority opinion next discussed the relation of state tort law concepts to the complaint at hand as providing a possible cause of action and relief for the petitioners. By voluntarily undertaking to protect Joshua against a danger that it did not create, the state may have acquired a duty under state tort law principles\textsuperscript{58} to provide him with protection from such danger.\textsuperscript{59} The

\begin{itemize}
\item officials claiming he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of an injury he received while doing prison work. \textit{Id.} at 98. The court held that "deliberate indifference to a person's serious injury states a cause of action under section 1983." \textit{Id.} at 105. "An inmate must rely on prison authorities to treat his needs; if the authorities fail to do so, those needs will not be met." \textit{Id.} at 103.

\textit{Youngberg v. Romeo}, 457 U.S. 307 (1982). On his mother's petition, respondent was involuntarily committed in a state institution. Respondent's mother, concerned about injuries which respondent suffered at the institution, filed and action under 42 U.S.C. Section 1983 against the institution's officials. \textit{Id.} at 310. The complaint alleged that respondent suffered injuries and that the institution failed to initiate protective measures thus violating his rights under the Eighth and Fourteenth Amendments. \textit{Id.} The Court held that the respondent had a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment to safe conditions of confinement, freedom from unreasonable bodily restraints and minimal training required by those interests. \textit{Id.} at 315-319.
\item \textit{Deshaney}, 109 S. Ct. at 1004-1005.
\item \textit{Id.} at 1005.
\item \textit{See supra note 51.}
\item \textit{Deshaney}, 109 S. Ct. at 1006.
\item \textit{Id.}
\item \textit{Id.} at 1007.
\item \textit{Restatement (Second) of Torts} § 323 (1965) provides:
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.
\textit{Id.} at 1006.
\item \textit{Deshaney}, 109 S. Ct. at 1006.
\end{itemize}
Court did not give further consideration to this rationale because the petitioner's claim was based on the Due Process Clause of the Fourteenth Amendment which does not transform every tort committed by a state actor into a constitutional violation.\textsuperscript{60}

The dissenting opinion,\textsuperscript{61} written by Justice Brennan takes issue with the majority's characterization of the case. The dissent focuses on the action that Wisconsin has taken with respect to the problem of abused children rather than concentrating on the actions the state failed to initiate.\textsuperscript{62}

In \textit{Estelle v. Gamble}\textsuperscript{63} and \textit{Youngberg v. Romeo}\textsuperscript{64} certain individuals were confined by the state. This initial state action rendered these individuals powerless to help themselves or to seek help from sources that were unconnected to the state.\textsuperscript{65} The majority dismissed \textit{Youngberg} by characterizing the confinement as the deprivation of liberty triggering the protections of the Due Process Clause.\textsuperscript{66} However, in \textit{Youngberg} the confinement was not challenged but rather the state's failure to provide constitutionally required conditions of confinement.\textsuperscript{67} In the opinion of the dissent, the conduct in \textit{Youngberg} (confinement) would have led to no injury, and therefore no actionable claim under section 1983, unless the state had failed in some respect to protect the person confined from himself and from others.\textsuperscript{68} In addition, state action can involve more than actual physical restraint.\textsuperscript{69}

Justice Brennan recognized that "the State's knowledge of an individual's predicament and its expressions of intent to help him can amount to a limitation of his freedom to act on his own behalf or to obtain help from others."\textsuperscript{70} If a state deprives a person of private sources of aid and then refuses aid, any harm that results from its inaction is attributable to the state's conduct and ac-

\begin{itemize}
  \item 60. Id. at 1007.
  \item 61. Id. Justice Brennan with whom Justice Marshall and Justice Blackmun join. 109 S. Ct. at 1007.
  \item 62. Deshaney, 109 S. Ct. at 1008.
  \item 63. 429 U.S. 97 (1976).
  \item 64. 457 U.S. 367 (1982).
  \item 65. Deshaney, 109 S. Ct. at 1008.
  \item 66. Id. at 1008-1009.
  \item 68. Deshaney, 109 S. Ct. at 1009.
  \item 69. White v Rochford, 592 F.2d. 381 (7th Cir. 1979). In \textit{White}, police officers arrested the guardians of young children. Id. at 382. The police officers left the children on a busy stretch of highway at night. Id. The court held this to be a violation of due process. Id. at 384-385.
  \item 70. Deshaney, 109 S. Ct. at 1009.
\end{itemize}
Wisconsin law invites and directs, its citizens to depend on local departments of social services to protect children from abuse. Many people may have contributed information and advice on what to do with Joshua, but, it was up to DSS to make the final decision upon whether to disturb Joshua’s current living arrangements. Wisconsin’s child welfare program, has relieved ordinary citizens and governmental authorities of any obligation to do anything more than report their suspicions of child abuse to DSS. Wisconsin’s child protection program in effect was a confinement of Joshua Deshaney to Randy Deshaney’s violent home until DSS decided to take action to remedy the situation. The state intervened in Joshua’s life via its child protection program and, by virtue of this intervention, acquired knowledge that Joshua was in grave danger of parental child abuse. Justice Brennan stated, “My disagreement with the Court arises from its failure to see that state inaction can be every bit an abuse of power as state action, that oppression can result when a state undertakes a vital duty and then ignores it.”

Justice Blackmun’s dissent focused on concepts of natural justice and a broad interpretation of fundamental rights. Justice Blackmun admonished the Court for being unmoved by natural sympathy. The facts of this case involved more than just passivity, they involve active state intervention in the life of Joshua Deshaney and this intervention was the impetus triggering a fundamental duty to aid Joshua once the state learned of his predicament. By focusing on the formalistic and rigid concepts of state action or inaction, the Court failed to give proper meaning to the protection designed to be enforced via the Fourteenth Amendment. Justice Blackmun believes formalistic reasoning has no place in the interpretation of the broad meaning of the Fourteenth Amendment. Faced with a broad or narrow interpretation of the

71. Id.
72. Id. at 1010.
73. Id. at 1010-1011.
74. Id. at 1011.
75. Id.
76. Id.
77. Id. at 1012.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
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Fourteenth Amendment, Justice Blackmun would adopt a "sympathetic" reading, invoking the concepts of fundamental justice and recognizing that compassion and the process of judgement are coterminous.\(^83\)

An essential prerequisite for the redress of a grievance involving a violation of rights under the Due Process Clause of the Fourteenth Amendment via section 1983 is state action. Therefore, the Deshaney decision must be viewed in light of the concept of "state action" as it has developed to date. The first reasoned treatment of the concept of state action came in the Civil Rights Cases.\(^84\) The significance of these cases, for purposes of the development of the concept of state action, lies in the Court's explanation of the concept. The Court held that the individual invasion of individual rights was not the province of the Fourteenth Amendment.\(^85\) The concern of the Fourteenth Amendment was in nullifying state legislation which violated the privileges and immunities, due process, or equal protection of the laws of citizens of the states.\(^86\) The Fourteenth Amendment existed to provide a remedy against the operation of state laws and the activities of state executive and judicial officials which infringed on fundamental rights as specified in the Fourteenth Amendment.\(^87\)

The Civil Rights Cases enunciated the basic concept that the Fourteenth Amendment only prohibits "state action" and does not deal with purely private conduct.\(^88\) However, the definition of the term "state action" has generated and continues to generate significant controversy.\(^89\) The following cases suggest the definitional pa-
rameters that the Court has laid down over the years in an attempt to define the concept. The first type of state action is where a public or government function is performed by a private actor to the deprivation of an individual’s rights secured by the Constitution.\textsuperscript{90} The state cannot avoid responsibility under the Constitution for the conduct of private parties when the state delegates otherwise governmental functions to private parties.\textsuperscript{91} Private actors are subject to the same constraints imposed on the state by the Constitution when they perform activities or functions which involve areas of governmental operations.\textsuperscript{92} Private individuals performing governmental activities are subject to the same restraints imposed on the state by the Constitution and are termed public functions.\textsuperscript{93}

In \textit{Marsh v. Alabama},\textsuperscript{94} the appellant, was distributing religious literature on the sidewalks of a town owned by a private company.\textsuperscript{95} The appellant was arrested for trespass because she failed to heed the warnings of the town management which required written permission to solicit on company owned sidewalks.\textsuperscript{96} The issue presented was whether a state could impose criminal punishment on a person who undertook to distribute religious articles on the sidewalk premises of a company owned town contrary to the wishes of the town’s management.\textsuperscript{97} The Court held that a state cannot impose criminal punishment on a person who undertook to distribute religious literature on the premises of a company owned town contrary to the wishes of the town’s management.\textsuperscript{98} The Court further held that the owners of privately held bridges, ferries, turnpikes and railroads which are used primarily for public enterprise may not operate them as freely as one who is engaged in purely private enterprise.\textsuperscript{99} “Since these facilities are operated primarily to benefit the public and since their operation is essentially

\textsuperscript{90} NOWAK, ROTUNDA, YOUNG, \textit{CONSTITUTIONAL LAW} 426 (1986).
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. “Thus the operation of an election system, the governance of cities and towns and perhaps the operation of seemingly public facilities such as parks will be deemed public functions regulated by the Constitution”. Id.
\textsuperscript{94} 326 U.S. 501 (1946). The Court held that it is a violation of due process for a state to impose criminal punishment on a person for distributing religious literature in a company-owned town which conflicts with regulations of company-run management. Id. at 509.
\textsuperscript{95} Id. at 503.
\textsuperscript{96} Id. at 503-504.
\textsuperscript{97} Id. at 502.
\textsuperscript{98} Id. at 509
\textsuperscript{99} Id. at 506.
a public function, it is subject to state regulation.  

Another type of state action concerns those cases where there is significant state involvement in private conduct or governmental encouragement of private conduct that amounts to state action. In assessing the government's complicity for the wrongs committed by private parties otherwise encouraged or directed by the state, the Court must consider whether there is a sufficient nexus between the wrong committed and the government encouragement. In Burton v. Wilmington Parking Authority, the owner of a privately-owned restaurant located in an off-street parking garage, owned and operated by a state agency, refused service to a person because of race. The Court considered whether the discriminatory practices of a privately owned business located in a state owned and operated building could be considered state action subject to the protections of the Fourteenth Amendment. The Court inferred that while the state is not required by the Constitution to prohibit private discrimination, the state may not abdicate its responsibilities by ignoring them or not discharging them if such action would deny a person equal protection of the laws. This action of the state agency in maintaining and operating the garage was held to be significant participation in the private conduct, therefore it was considered state action.

In Reitman v. Mulkey, a state passed a constitutional amendment which repealed an anti-discrimination in housing statute and prevented further legislation regulating the sale or rental of property. An apartment owner then refused to rent to the petitioners because of their race. The issue was whether the amendment to the California Constitution denied to any person equal protection of the laws within the meaning of the Fourteenth Amendment to the United States Constitution. The Court held that the California amendment was intended to authorize and did authorize racial

100. Id.
102. Id.
104. Id. at 716.
105. Id.
106. Id. at 725.
107. Id. at 724.
109. Id. at 374.
110. Id. at 372.
111. Id. at 370.
discrimination in the housing market and thus significantly encouraged and involved the state in private discrimination which was violative of the United States Constitution.\textsuperscript{112}

Finally, government administration of private discrimination and judicial enforcement of private discrimination have been found to be within the concept of state action.\textsuperscript{113} In Evans v Newton,\textsuperscript{114} a park established by a testamentary trust required that it be used for white persons only.\textsuperscript{115} The city of Macon, Georgia was the trustee and operator of the park.\textsuperscript{116} The city allowed blacks to use the park because it contended it could not maintain the park on a segregated basis.\textsuperscript{117} Individual members of the Board of Managers of the park brought suit to have the city removed as trustee.\textsuperscript{118} Black citizens intervened in the suit alleging that racial segregation was contrary to the laws of the United States and that the court should refuse to appoint private trustees.\textsuperscript{119} The Supreme Court held that the public character of the park required it to be treated as a public institution subject to the commands of the Fourteenth Amendment, regardless of who has title.\textsuperscript{120}

In Shelley v. Kraemer,\textsuperscript{121} a group sought to enforce a covenant restricting the sale of certain real property to members of a particular race. The issue presented was whether the enforcement, by state courts, of restrictive covenants may be deemed the acts of the state.\textsuperscript{122} The Supreme Court held that although adhering to restrictive covenants on a voluntary basis is not state action, judicial enforcement of the covenants constitutes state action.\textsuperscript{123}

With the foregoing areas of state action defined, it is important to consider the limits of the doctrine in light of the most recent developments. In Moose Lodge v. Irvis,\textsuperscript{124} appellee was refused service at appellant's establishment because of his race. The appellee claimed that since the appellant was issued a liquor license by a state agency that authorized the sale of alcoholic beverages, the

\textsuperscript{112} Id. at 381.
\textsuperscript{114} 382 U.S. 296 (1966).
\textsuperscript{115} Id. at 297.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id at 298.
\textsuperscript{120} Id. at 302.
\textsuperscript{121} 334 U.S. 1 (1948).
\textsuperscript{122} Id. at 18.
\textsuperscript{123} Id. at 20.
\textsuperscript{124} 407 U.S. 163 (1972).
refusal of services involved state action. The issue in this case was whether the discriminatory actions of a private establishment, which is issued an operating license by the state, are state actions subject to the protections of the Fourteenth Amendment. The Court stated that:

The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessaries of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct as set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions.

In Jackson v. Metropolitan Edison Co., respondent, a privately owned utility, subject to state regulation by a public utility commission, terminated the electrical service of the petitioner for failure to pay. Petitioner brought a section 1983 action seeking damages due to this termination. The petitioner argued that under state law she had an entitlement to reasonably continuous electrical service to her home and that the respondent's termination of that service was a deprivation of her property interest in violation of the Fourteenth Amendment. The Court held that there was not a sufficient connection between the respondent's actions in terminating petitioner's service and the respondent's conduct to attribute the action to the state for purposes of the Fourteenth Amendment. The Court stated that, "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself."

As the majority and dissenting opinions deal with the applicability of the substantive component of the Due Process Clause of the Fourteenth Amendment to the case, an understanding of the hist-

125. Id. at 165.
126. Id. at 171.
127. Id. at 173.
128. 419 U.S. 345 (1974). Petitioner, whose utility service was terminated for failure to pay a bill, claimed that a state-regulated utility was a state actor and therefore respondent's failure to properly notify her was a violation of due process denying her a property interest under the Fourteenth Amendment. Id. at 347-348. The Court held that the utility was not a state actor. Id.
129. Id. at 347.
130. Id. at 348.
131. Id. at 358-359.
132. Id. at 351.
torical development of the concept is necessary to shed light on the
Court's rationale. The concept of substantive due process has its
genus in the case of *Calder v. Bull.* The actual holding of the
case is not as important as the concepts developed by two opinions
set forth in the case. Justice Chase laid down the concept of natu-
ral law which later became known or embellished in the concept of
fundamental rights. Briefly stated, the position held that there are
certain rights that are so fundamental to human beings that no
government can take away or abridge regardless of the power of
the majority. Furthermore, any legislation which abridged the
natural rights of the people could be held invalid by the Supreme
Court. Justice Iredell laid down the concept of positive law and
held that the legislature could exercise only that power given to
it. Justice Iredell's position would not allow the courts to enforce
natural law principles for fear that they must necessarily reflect
the individual Justice's view of the natural law.

Early in the Court's history, the Court was prepared to rely on
the principle of natural justice. However, this concept began to
shrink during the 1830's. In *Barron v Mayor and City Council*
the Court ruled that the Fifth Amendment provision, prohibiting
the taking of private property for public use without just compen-
sation, is a limitation on the federal government and is not appli-
cable to legislatures of the states.

In 1868 the Fourteenth Amendment was made part of the

133. 3 U.S. (3 Dall.) 386 (1798).
135. *Id.*
136. *Id.* The Iredell position states, the ideals of natural justice are regulated by no
fixed standard; the ablest and purest men have differed upon the subject; and all the court
could properly say in such an event would be that the legislature (possessed of an equal
right of opinion) has passed an act which, in the opinion of the judges, was inconsistent with
the abstract principles of natural justice.
*Id.* at 399.
137. *Nowak, Rotunda, Young, Constitutional Law* 332 (1986).
138. *Terrett v Taylor,* 13 U.S. (9 Branch) 43 (1815). In *Terrett* this was made evident.
[T]hat the legislature can repeal a statute creating private corporations or conferring
to them property already acquired under the faith of previous laws, and by such re-
peal can vest the property of such corporations exclusively in the state, or dispose of
the same to such purposes as they may please, without the consent or default of the
Corporations, we are not prepared to admit; and we think ourselves standing upon the
principle of natural justice, upon the fundamental laws of every free government,
upon the Spirit and the letter of the Constitution of the United States, and upon the
decisions of the most respectable judicial tribunals in resisting such doctrine.
*Id.* at 52.
139. 32 U.S. (7 Pet.) 243 (1833).
140. *Id.* at 250-251.
United States Constitution. The initial inquiry was whether the Due Process Clause of the Amendment was merely procedural or substantive. If the Due Process Clause was procedural, life, liberty, and property could be taken by the state as long as appropriate procedural safeguards were in place. If the Due Process Clause was substantive, life, liberty, and property could not be taken by the state at all regardless of the procedural guarantees given. One of the first areas to give the Due Process Clause of the Fourteenth Amendment substantive meaning was in the protection of economic interests. That is, due process protection precluded the state from passing legislation or taking action to infringe on the individual’s ability to engage in economic endeavors. In *Lochner v. New York* the State of New York passed a statute forbidding employment in a bakery for more than sixty hours a week or ten hours a day. The issue to be decided was whether an individual’s right to purchase and sell labor is part of the liberty interest protected by the Fourteenth Amendment. The Court held that the statute was invalid as a deprivation of liberty protected under the Fourteenth Amendment. Justice Holmes, in a dissenting opinion, took the view that, the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Justice Harlan, dissenting, found fault with the whole concept of interpreting legislation and would leave that chore to those situations where the Constitution of the United States was involved.

In *Nebbia v. New York* the Court moved away from substantive due process protection of economic rights via the Due Process

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141. The Fourteenth Amendment states that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.
143. Id.
144. Id.
145. Id. at 343.
146. 198 U.S. 45 (1905). The Court invalidated a New York statute forbidding employment in a bakery for more than 60 hours a week or 10 hours a day. Id. at 64.
147. Id. at 53
148. Id.
149. Id. at 76.
150. Id. at 66-73.
151. 291 U.S. 502 (1934). The Court upheld a New York regulation setting minimum milk prices which sought to assure reasonable returns to milk producers and dealers.
Clause of the Fourteenth Amendment. This case concerned whether it was a violation of the due process rights of individual buyers and producers of milk products for the State of New York to regulate and set minimum milk prices for producers and milk dealers.\textsuperscript{152} The Court held:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to overrule it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.\textsuperscript{153}

Having discussed the development, expansion and ultimately the rejection of substantive due process under the Fourteenth Amendment in the area of economic interests, the historical development, expansion and retrenchment of substantive due process in the area of individual rights will be reviewed. As to what rights are protected against encroachment by state governments under the Fourteenth Amendment, initially two theories were advanced on the application of the Bill of Rights to the states. Under the total incorporation theory, the Bill of Rights was to be applied to the states via the Fourteenth Amendment.\textsuperscript{154} After the passage of the Fourteenth Amendment, the argument was made that the first ten amendments to the United States Constitution were applicable to the states via the Due Process Clause of the Fourteenth Amendment.\textsuperscript{155} In other words, no state could deny any citizen those rights enumerated in the Bill of Rights of the United States Constitution without due process of law. This concept was rejected in \textit{Palko v Connecticut}.\textsuperscript{156}

In \textit{Palko}, the appellant was tried and convicted of second degree murder for which he was sentenced to life imprisonment.\textsuperscript{157} Predicated on error, the state appealed the decision and a new trial was

\begin{itemize}
\item \textsuperscript{152} Id. at 521.
\item \textsuperscript{153} Id. at 537.
\item \textsuperscript{154} \textsc{Nowak, Rotunda, Young, Constitutional Law} 315 (1986).
\item \textsuperscript{155} Id.
\item \textsuperscript{156} 302 U.S. 319 (1937). The Fourteenth Amendment does not guarantee that whatever would be a violation of the original Bill of Rights if done by the Federal Government, is also unconstitutional if done by a state, by force of the Fourteenth Amendment. \textit{Id.} at 323.
\item \textsuperscript{157} \textit{Id.} at 320-321.
\end{itemize}
ordered. Subsequently, the appellant was convicted of first degree murder and sentenced to death. The appellant argued that he was deprived of due process of law under the Fourteenth Amendment. The issue presented was whether the Fourteenth Amendment guarantees against state action those acts that would be a violation of the original Bill of Rights if done by the federal government. The Court held that the Fourteenth Amendment did not include some aspects of the double jeopardy prohibitions of the Fifth Amendment. The Palko Court, in effect, determined that rather than total incorporation of the Bill of Rights there would be selective incorporation. Under the selective incorporation theory, select provisions of the Bill of Rights were held applicable to the states via the Fourteenth Amendment. To determine which select provisions apply, the relevant inquiry is whether a particular guarantee is implicit in the concept of ordered liberty.

In Duncan v. Louisiana the appellant was convicted in a Louisiana state court of battery. Under that state's law, battery was considered a misdemeanor punishable by a maximum penalty of two years imprisonment. The appellant sought a jury trial but his request was denied by the Louisiana state court. The issue was whether the right to trial by jury, as guaranteed by the Sixth Amendment of the United States Constitution, is equally applicable to the states via the Fourteenth Amendment. The Court held that under the Fourteenth Amendment, a right to trial by jury is guaranteed in all criminal cases in state courts which, were they tried in federal court, would come within the protections of the Sixth Amendment. The Court also held that the relevant inquiry was whether the right was fundamental to the American scheme of

158. Id. at 321.
159. Id.
160. Id. at 322.
161. Id. at 323.
162. Id.
163. Id. at 324-328.
164. Id.
165. Id. at 325.
167. Id. at 146.
168. Id.
169. Id.
170. Id. at 147.
171. Id. at 149.
The early opinions are pervasive with finding some enumerated provision in the Bill of Rights and its applicability to the states. It is against this background that the development of unenumerated rights finding substantive due process protection is set forth. The keynote unenumerated fundamental right is the right of privacy. The first significant case in the development of the right was *Rochin v. California.* Police officers, searching the premises of Rochin, saw capsules lying on a night stand beside the bed. Rochin seized the capsules and swallowed them. Rochin was handcuffed and taken to a hospital where his stomach was pumped producing the capsules. The capsules contained morphine for which Rochin was convicted of possession of narcotics. The Supreme Court held that the police officers conduct violated due process because it shocked the Court's conscience. "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a sense of justice." Justice Black concurred in the judgment but found protection in the Fifth Amendment. "[F]aithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous [fourteenth amendment due process] standards stated by the majority".

In *Griswold v. Connecticut* Griswold was convicted of violating a state statute which made it a criminal offense to use contraceptives or counsel others in their use. The issue was whether the Connecticut statute violated the Due Process Clause of the Fourteenth Amendment. The Court held that a zone of privacy exists

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172. Id.
174. Id. at 166.
175. Id.
176. Id.
177. Id.
178. Id. at 172.
179. Id. at 173.
180. Id. at 174.
181. Id. at 175.
182. 381 U.S. 479 (1965). The appellant, director of Planned Parenthood League of Connecticut, gave information to married persons as to the means of preventing conception. *Id.* at 480. A Connecticut statute made it a crime to use contraceptives or counsel others in their use. *Id.* The appellant was found guilty under the statute. *Id.*
183. Id. at 481.
protected by the Fourteenth Amendment which the state cannot abridge. The Court cited various decisions to advance the proposition that the specific guarantees of the Bill of Rights have penumbras, formed by emanations from the guarantees of the Bill of Rights that help give them life and substance. Thus, the Court held that these guarantees create a zone of privacy which the state cannot abridge.

Perhaps the most significant part of the Griswold opinion, in terms of due process development, is that of Justice Harlan concurring in the judgment. Justice Harlan's position basically states that the Bill of Rights may provide help in determining some of the rights protected by the Due Process Clause but Due Process protection is not dependent on finding some enumerated provision of the Bill of Rights applicable to redress the injury. The Due Process Clause is broad enough to protect rights outside of the Bill of Rights.

Finally in Roe v. Wade concerning whether a woman has a right to terminate a pregnancy without state interference, the Court finds a fundamental right of privacy existing. Roe, unmarried and pregnant, wanted to terminate her pregnancy by abortion. She was unable to obtain a legal abortion in Texas because her life was not in danger. Roe challenged the statute as an unconstitutional invasion of her right to privacy protected by the Fourteenth Amendment. The issue was whether the Texas stat-

184. Id. at 484.
185. Id.
186. Id. at 485.
187. Id. at 499.

[T]he proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty." While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Id. at 500.
188. Id.
189. Id.
190. 410 U.S. 113 (1973). "The Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution." Id. at 152-153. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake". Id. at 155.
191. Id. at 120.
192. Id.
193. Id.
ute, denying a woman an abortion, was a deprivation of her personal liberty in privacy under the Fourteenth Amendment. The court held that the Texas abortion statute was a violation of the Due Process Clause of the Fourteenth Amendment.

Another area to receive fundamental rights treatment under the Due Process Clause of the Fourteenth Amendment is family living arrangements. In Moore v. East Cleveland an ordinance which limited occupancy of houses to single families but defining family so as to preclude the appellant from living with her two grandsons was invalidated.

When a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate. . . .[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

One other area to receive fundamental rights treatment under the Due Process Clause of the Fourteenth Amendment involves the rights of the involuntarily committed. In Youngberg v. Romeo on his mother's petition, respondent was involuntarily committed in a state institution. Respondent's mother was concerned about certain injuries which respondent had suffered at the institution, and filed a section 1983 action against the institution's officials. The complaint alleged that the respondent had suffered certain injuries and that the institution failed to initiate preventative measures thus violating his rights under the Fourteenth Amendment. The question presented was whether an individual, who was involuntarily committed to a state mental institution, has substantive rights under the Due Process Clause of the Fourteenth Amendment to safe conditions of confinement, freedom from bodily restraint, and training or rehabilitation. The Court held that the respondent had a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment to safe conditions of confinement, freedom from unreasonable bodily

194. Id. at 129.
195. Id. at 164.
197. Id. at 499.
199. Id. at 309.
200. Id. at 315-316.
201. Id. at 309.
restraints and minimal training required by those interests.\textsuperscript{202}

As with substantive economic due process, substantive due process protection of individual rights has been limited by a number of decisions. Concerning the right to privacy, the Court held in \textit{Maher v. Roe}\textsuperscript{203} that \textit{Roe v. Wade} did not establish an unqualified right to an abortion but only a right to be free from burdensome interference by the state concerning abortion decisions.\textsuperscript{204} Similarly in \textit{Harris v. McRae}\textsuperscript{205} the Court held that the Hyde Amendment, limiting federal funding of abortion under Medicaid to those necessary to save the life of the mother, to be constitutional.\textsuperscript{206} These cases established that while a woman had a privacy right from undue burden by the state in terminating a pregnancy, the right of privacy did not extend to the states's affirmative duty to provide the funding of abortion.\textsuperscript{207}

Concerning the area of family living arrangements, in \textit{Village of Belle Terre v Boraas}\textsuperscript{208} certain individuals leased their house to six unrelated college students. These individuals challenged a zoning ordinance which restricted land use to one-family dwellings.\textsuperscript{209} The ordinance defined family to mean not more than two unrelated persons living together as a single unit.\textsuperscript{210} The Court upheld the ordinance as economic legislation which bore a rational relation to a legitimate state objective.\textsuperscript{211}

Having briefly traced the historical development of the concepts of state action and substantive due process under the Fourteenth Amendment, the focus of this note now shifts to an analysis of the majority and dissenting opinions of \textit{Deshaney} based on the application of these historical developments and other relevant material germane to the opinions. In any section 1983 action, two essential elements are necessary in order to obtain relief under this section: (1) whether the conflict centers on conduct which was committed by a person acting under color of state law; and (2) whether that

\begin{itemize}
  \item \textsuperscript{202} \textit{Id.} at 391-392.
  \item \textsuperscript{203} 432 U.S. 464 (1977). \textit{Maher} concerned Connecticut's use of medicaid funds to reimburse women for costs of only medically necessary first trimester abortions but not for elective or therapeutic abortions. \textit{Id} at 466.
  \item \textsuperscript{204} \textit{Id.} at 473-474.
  \item \textsuperscript{205} 448 U.S. 297 (1980).
  \item \textsuperscript{206} \textit{Id.} at 317.
  \item \textsuperscript{207} \textit{Id.} at 315-318.
  \item \textsuperscript{208} 416 U.S. 1 (1974).
  \item \textsuperscript{209} \textit{Id.} at 3.
  \item \textsuperscript{210} \textit{Id.} at 2.
  \item \textsuperscript{211} \textit{Id.} at 8.
\end{itemize}
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conduct has deprived a person of his rights, privileges, or immunities secured by the Constitution or the laws of the United States.\textsuperscript{212} As the majority opinion developed, the petitioner's claim failed in regard to both elements.

The majority opinion discussed at length that the conduct that was the impetus, and in fact the cause, of Joshua Deshaney's injuries was the action and conduct of Randy Deshaney, Joshua's father. As plainly set forth in the \textit{Civil Rights Cases}\textsuperscript{213} "individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment."\textsuperscript{214} The regulation of private rights is not the province of the Fourteenth Amendment but rather to provide a mode of redress against the actions of state officials, legislative, executive, or judicial which subverts the fundamental rights guaranteed in the amendment.\textsuperscript{215} The petitioners did not, nor could they, claim that Randy Deshaney was in any way performing a public or governmental function as in \textit{Marsh v Alabama}\textsuperscript{216} Randy Deshaney was the actor responsible for Joshua Deshaney's injuries. The state did not delegate or otherwise clothe Randy Deshaney with any governmental authority. The petitioners could not claim that there was significant involvement between the state and Randy Deshaney so as to make his actions imputable to the state as recognized in \textit{Burton v. Wilmington Parking Authority}\textsuperscript{217} There was no connection between Randy Deshaney and the state of Wisconsin that would make his action attributable to the state. Furthermore, there can be no claim that the government approved or in any way encouraged the conduct of Randy Deshaney as in \textit{Reitman v. Mulkey}.\textsuperscript{218}

In determining whether there was a sufficient nexus between Randy Deshaney's action and the government, there is lacking any degree of government encouragement in the actions that Randy Deshaney took towards Joshua. It may be argued that the action of DSS encouraged Randy Deshaney to continue to beat Joshua be-

\begin{itemize}
\item \textsuperscript{212} Parrat v. Taylor, 451 U.S. 527 at 535 (1981). In \textit{Parrat}, respondent, a prisoner at a Nebraska correction facility, brought an action under 42 U.S.C. Section 1983 claiming a violation of Fourteenth Amendment Due Process when property he ordered through mail order was lost. \textit{Id.} at 529. The court held that the Nebraska tort claims procedure provided the proper remedy. \textit{Id.} at 542.
\item \textsuperscript{213} 109 U.S. 3 (1883).
\item \textsuperscript{214} \textit{Id.} at 11.
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} 326 U.S. 501 (1946).
\item \textsuperscript{217} 365 U.S. 715 (1961).
\item \textsuperscript{218} 387 U.S. 369 (1967).
\end{itemize}
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cause he was aware of DSS's insensitivity. However, this is precisely an example of an argument that is too attenuated from the facts and lacking the necessary predicate of a sufficient nexus between the state action and private conduct. The state did not physically abuse or take part in the conduct or action that resulted in Joshua Deshaney's injuries. The "state action" requirement of a section 1983 claim, based on the Fourteenth Amendment, is absent.

The majority next addressed the concept of whether the conduct of DSS deprived Joshua of his rights secured by the Constitution. In the case of substantive due process rights under the Fourteenth Amendment, the Court recognized situations where the state acquired an affirmative duty to protect the life, liberty, or property of its citizens. As a general matter, the Due Process Clause is normally thought of in the negative i.e., the state cannot take away certain rights rather than in the affirmative i.e., the state has a duty to provide certain rights. However in Youngberg v. Romeo\(^ {220} \) and Estelle v Gamble\(^ {221} \) the Court recognized affirmative duties on the part of the state. The majority points out that in both Youngberg and Estelle it is only when the state confines or otherwise limits an individual's ability to provide for his or her needs that the Due Process Clause triggers affirmative duties of care. Joshua Deshaney was not confined by the state nor under its protection at the time Randy Deshaney acted against him, therefore this avenue of substantive due process affords no protection.

Finally, the majority addresses the concept of state tort law principles as providing a possible mode of redress for the petitioners in this case. The majority points out that it may well be that respondents acted negligently in their handling of the case of Joshua Deshaney.\(^ {224} \) However in Daniels v. Williams\(^ {225} \) the Court

\[ \text{References:} \]

\(^ {219} \) Deshaney, 109 S. Ct. at 1004-1006.
\(^ {220} \) 457 U.S. 307 (1982).
\(^ {221} \) 429 U.S. 97 (1976).
\(^ {222} \) Deshaney, 109 S. Ct. at 1005-1006.
\(^ {223} \) Id.
\(^ {224} \) Id. at 1006.
\(^ {225} \) 474 U.S. 327 (1986). "The petitioner sought to recover damages for injuries allegedly sustained when he fell on a prison stairway." Id. at 328. Petitioner claimed that respondent's negligence deprived him of his liberty interest in bodily integrity. Id. The issue was whether tortious conduct by state officials rises to the level of constitutional tort under 42 U.S.C. Section 1983. Id. at 329. The Court held that the Due Process Clause is simply not implicated by the negligent conduct of a state official. Id. at 334. "Where a government official's acts causing injury to life, liberty or property is merely negligent, no procedure for
held that the Due Process Clause of the Fourteenth Amendment does not provide a remedy for the negligent conduct of state officials or actors. 226 Similarly, as stated in Baker v. McCollan, 227 "Section 1983 imposes liability for violations of rights protected by the [Federal] Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." 228 Therefore, the petitioners' best possible means of redress for the injuries suffered lies not in a claim predicated in the Constitution but rather in a claim against the state invoking traditional tort law principles. 229 The dissenting opinion of Justice Brennan is an attempt to transform the basic fact that Randy Deshaney was responsible for the injuries of Joshua Deshaney into a finding that the State of Wisconsin was in actuality the cause of Joshua Deshaney's injuries.

Justice Brennan characterizes the Youngberg v. Romeo 230 analysis, not as a question of confinement, but rather a case in which the state acquired a duty because an individual was unable to care for himself. Therefore when the state eliminates or restricts private sources of aid, as the Wisconsin child protection laws did, the individuals were unable to care for themselves and the state acquired a duty to provide protection to those individuals.

This argument fails because it is precisely the confinement which triggers the affirmative duties of the state to provide minimal levels of care for the individual. The State of Wisconsin did not confine Joshua Deshaney in the instant case and acquired no duty absent such confinement. Justice Brennan's argument that the Wisconsin child protection program, because it was administered solely by the state, effectively confined Joshua within his home is a novel argument, but definitely not the type of confinement as elaborated in Youngberg and Estelle.
Justice Blackmun's dissent focuses on the nebulous concepts of natural justice. The Justice would have the Constitution become a source of law to redress any grievance that could conveniently fit under the rubric of natural justice. As the historical development of substantive economic due process and even substantive protections of individual rights shows, the Supreme Court is very wary to transgress the boundaries of the rights enumerated in the Constitution itself and the powers given under the Constitution.

The error of Justice Blackmun's dissent is its lack of any case law to support its claim. This dissent does not focus on the enumerated provisions of the Bill of Rights or the unenumerated fundamental rights such as privacy, family living arrangements or conditions of confinement. This dissent instead focuses on concepts unique to the Justice and predicated on his own internal sense of what he believes is right.

The Deshaney case puts forth a set of facts which require careful reading and analysis. Although this case is predicated on a claim involving the Due Process Clause of the Fourteenth Amendment, it is first and foremost a case concerning state action. The salient and consequential fact of this case is that Randy Deshaney was the individual responsible for Joshua Deshaney's plight. Randy Deshaney, and not the State of Wisconsin, was the actor in this case. There is simply no state action in this case. Therefore, the majority opinion takes the position that this case fails due to lack of state action and the claim must stop there.

The majority also signals, by its holding, that the substantive component of the Due Process Clause concerning individual rights will not be expanded beyond the present sphere of the rights protected. Those opinions detailing the protected individual rights are not going to be given an expansive reading.

It appears that the majority makes evident that there is a possible claim against the state involving negligence. The court is amenable to this type of action if the petitioner could prove that DSS was negligent in the way they handled their monitoring of Joshua Deshaney. The court signals that in cases of this type, in the future, the best course of action is that which is predicated on state tort law principles. However, a claim under the same conditions predicated on the Fourteenth Amendment of the Constitution will not be entertained.

Jerome Kaharick