COMMENTARY

CHILD ABUSE AS SLAVERY: A THIRTEENTH AMENDMENT RESPONSE TO *DESHANEY*

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Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
U.S. CONSTITUTION[1]

The Thirteenth Amendment of the Constitution is a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government."[2] In a single stroke, the Amendment outlawed the "peculiar institution" of southern chattel slavery — auction blocks, overseers, iron chains, and all. Yet the Amendment is more than a mere nineteenth-century relic, written only to reform a "peculiar" time and place. Its framers' disgust with "the peculiar institution" led them to announce a more universal, transcendent norm: slavery, of all forms and in all places, shall not exist. Emancipation did not discriminate by age; the Amendment freed minors as well as adults. Nor did the Amendment discriminate on the basis of familial status; many slaves in 1865 were mulattoes fathered by white slavemasters, yet they were also plainly protected. The Amendment embraced not only those slaves with some African ancestry, but all persons, whatever their race or national origin. Its sweeping words and vision prohibited not only forced labor for the master's economic enrichment, but all forms of chattel slavery — whether the ultimate motive for such domination, degradation, and dehumanization was greed (as in the cotton market) or sadism (as at the end of a lash). Finally, the Amendment compelled abolition of even "private" enslavement perpetuated not by the force of law, but

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[1] U.S. CONST. amend. XIII, § 1.

[2] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).

by the violence of master over slave. The de facto condition of slavery, the Amendment commanded, shall not exist in America.

Therefore, as we shall show in greater detail below, the Thirteenth Amendment in both letter and spirit extends its affirmative protection to a slave even if: (1) the slave is a child, (2) the slave child is the offspring of the master, (3) the slave child has no African roots, (4) the slave child is not used to maximize the master's financial profit, and (5) the child's enslavement is de facto, and not de jure. One such slave child was Joshua DeShaney.

In Part I of this Commentary, we introduce the reader to Joshua DeShaney and the Supreme Court opinions that grew out of the child abuse he suffered. In subsequent Parts, we argue that the Thirteenth Amendment creates dramatic remedial opportunities for Joshua and others like him. The idea that the Thirteenth Amendment might apply to child abuse will no doubt strike many readers as novel, if not farfetched. We ask these readers for patience and remind them that, for example, only a generation ago, the ideas that abortion and pornography implicate equality rights for women — ideas now widely held — were seen by many as similarly novel and farfetched. By the end of this Commentary, we hope to establish that the plight of Joshua DeShaney implicates the core concerns of the Thirteenth Amendment, and that the Amendment speaks to the horror of child abuse with remarkable directness. Indeed, we believe that this Amendment — and not the doctrine of substantive due process — provides the best constitutional vehicle to conceptualize and characterize cases like Joshua's.

I. JOSHUA AND THE SUPREME COURT

A. Substantive Due Process

In *DeShaney v. Winnebago County Department of Social Services*,[3] the Rehnquist Court held that the state of Wisconsin had no constitutional duty under the Due Process Clause of the Fourteenth Amendment to protect a young child from his father's physical abuse. The facts of the case were heart-wrenching.[4] In his first five years of life, Joshua DeShaney endured repeated beatings at the hands of his father, and thereby suffered severe brain damage. During these years, Joshua remained in his father's custody even though Wisconsin's Winnebago County Department of Social Services (DSS) had strong reason to believe that Joshua was the victim of serious abuse. In January of 1983, after being admitted to a local hospital for multiple wounds,

[3] 489 U.S. 189 (1989).

[4] *See id.* at 191–94; *id.* at 208–09 (Brennan, J., dissenting).

Joshua was temporarily removed from his father's custody, but a Wisconsin juvenile court soon returned the child to his father. During the course of monthly visits throughout 1983, a DSS caseworker methodically observed and recorded many signs of Joshua's victimization but took no further action to protect the child. In both February and November of 1983, a local emergency room contacted DSS to report that Joshua had been treated yet again for injuries believed to have been caused by child abuse. On both occasions the caseworker chose to take no action to remove Joshua from his father's custody. In March of 1984, a few weeks before his fifth birthday, Joshua suffered a final and savage beating. His subsequent hospitalization revealed a history of traumatic head injuries, leading doctors to conclude that Joshua would have to spend the rest of his life in an institution for the profoundly retarded. Joshua and his biological mother then brought suit against DSS and other local officials for their failure to remove Joshua from his father's custody in the face of repeated evidence of physical abuse.

Ruling that the Due Process Clause does not require a state "to protect the life, liberty, and property of its citizens against invasion by private actors,"[5] the Supreme Court denied Joshua's constitutional claim. Chief Justice Rehnquist, writing for the majority, sharply distinguished Joshua's case from *Youngberg v. Romeo*,[6] a case in which the mother of a man who had been institutionalized by Pennsylvania successfully brought a due process claim against the state[7] for its failure to protect its ward from injury. *Romeo*, said the *DeShaney* Court, stood only for the proposition that:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . [The state may not] by the affirmative exercise of its power so restrain[] an individual's liberty that it renders him unable to care for himself, and at the same time fail[] to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety . . . .[8]

Taken at face value, this language actually calls into question the Court's result in *DeShaney*. One could easily argue that the state of

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[5] *DeShaney*, 489 U.S. at 195.

[6] 457 U.S. 307 (1982).

[7] Following the usage in *DeShaney*, we shall simply refer to suits against state agents and subdivisions as suits against "the state." *See DeShaney*, 489 U.S. at 194–203. We therefore ignore for present purposes important differences among these suits as to deterrence effect, economic incidence, legal liability, and governmental immunity — differences that one of us has analyzed in greater detail elsewhere. *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466–92, 1504–19 (1987).

[8] *DeShaney*, 489 U.S. at 199–200.

Wisconsin, "by the *affirmative* exercise of its power," did in fact "restrain" Joshua's "liberty" while "failing to provide for his basic human need[]" for "reasonable safety." After all, Wisconsin's family law affirmatively gave father Randy DeShaney a legal right to physical custody over Joshua.[9] As Justice Brennan observed in his dissent in *DeShaney*, "Wisconsin . . . effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him."[10] If Joshua had fled the home of his abusive father — with the help, let us say, of his mother (who had been stripped of custody when Joshua was an infant) — the local or state police stood ready to capture and return Joshua to his father's custody. In fact, a Wisconsin juvenile court had temporary custody over Joshua in January 1983 and affirmatively returned him to his father's care.

The Supreme Court, in an aside, acknowledged that the case might have been different if DSS had placed Joshua in an abusive foster home.[11] However, the distinction between biological parents and foster parents is dubious because in both situations, the state, through its family law, chooses who shall have legal custody over a ward. Biology is not destiny; a biological parent's custody over his offspring is not merely "natural" and prepolitical. Rather, like property, custody is a *legal* concept, shaped and enforced by the state. For example, a biological father of a child whose mother is legally married to another man at the time of the child's conception and birth is typically *not* recognized as the legal father with legal rights of custody.[12] Never-

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[9] *See* David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 65–66; *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that judicial enforcement of the common law of libel is state action).

[10] *DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting). Like Professor Strauss, *see supra* note 9, we go beyond Justice Brennan in emphasizing the hidden hand of the state not merely in establishing the DSS, but, more fundamentally, in creating a legal regime of parental custody.

[11] *See DeShaney*, 489 U.S. at 201 n.9.

[12] *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (holding that a mere biological connection between a father and a child "is not the stuff of which fundamental rights . . . are made"); Lehr v. Robertson, 463 U.S. 248, 261 (1983) (holding that the "mere existence of a biological link" between a natural parent and child does not trigger "substantial protection under the Due Process Clause"); *id.* at 260 ("'Parental rights do not spring full-blown from the biological connection between parent and child.'" (emphasis deleted) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))). In our view, as long as the state acts through general and prospective legislation, it has considerable authority to change custody rules, either in favor of or away from biological parents — to make matters simple, assume a law that would not reallocate custody for any lives in being, including lives in utero. As we shall develop below, however, the state's custody regime must, as a constitutional matter, be plausibly in the child's interest. *See infra* pp. 1373–78 (arguing that restrictions on parental custody are applicable to all families). Although other constitutional constraints may also exist, we shall not attempt to analyze them here.

Of course, once a general custody regime is in place, any state attempt to deprive an

theless, the Court concluded that the state of Wisconsin bore no responsibility for Joshua's confinement to the custody of his father: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[13]

The Court's narrow application of *Youngberg* reflected its obvious concerns about "substantive due process" and "affirmative" rights. The Court took pains to point out that Joshua's claim triggered "the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the state denied Joshua protection without according him appropriate procedural safeguards, but that it was categorically obligated to protect him in these circumstances."[14] The Court was clearly suspicious of any such "categorical" obligation to "protect." If, under the Due Process Clause, the government were responsible for every private wrong, an unending parade of horribles of government liability might be unleashed: victims of crime would sue the government for inadequate police services; victims of fire would sue the government for inadequate fire services; victims of poverty would sue the government for inadequate social services; and so on. Judge Posner, writing for the Seventh Circuit in *DeShaney*, expressed this anxiety when he wrote: "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."[15] Thus, despite the extent of state action in Joshua's case, the Supreme Court, closely following Judge Posner, refused to cognize Joshua's substantive due process claim.

B. The Thirteenth Amendment: A Preliminary Analysis

Joshua's attorneys did not assert a Thirteenth Amendment claim. But Justice Blackmun, in his passionate dissent in *DeShaney*, set the stage for such a claim when he compared the majority in *DeShaney* to "the antebellum judges who denied relief to fugitive slaves."[16] The analogy between antebellum slavery and child abuse — an analogy that Justice Blackmun's provocative language invites but does not develop — seems both striking and fruitful. Consider the following preliminary analysis.

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individual guardian of custody would implicate due process concerns, as would any state attempt to deprive an individual of other legal rights.

[13] *DeShaney*, 489 U.S. at 201.

[14] *Id.* at 195 (citation omitted).

[15] DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 301 (7th Cir. 1987).

[16] *DeShaney*, 489 U.S. at 212 (Blackmun, J., dissenting).

Like an antebellum slave, an abused child is subject to near total domination and degradation by another person, and is treated more as a possession than as a person. Unless the state acts to protect an abused child, the child's status bears an eerie resemblance to that of a pre-Civil War American slave. For example, if a child runs away, the state typically returns her to parental custody, just as antebellum judges returned fugitive slaves to their masters. And just as antebellum states enforced the legal rights of masters to physical control over their slaves, today's states continue to enforce the legal rights of parents to physical control over their children.

To be sure, it is unhelpful to conceptualize all children as slaves, for this conceptualization would imply that there is no difference between a free child and a slave child. But it would be equally unhelpful to categorically exempt all children from Thirteenth Amendment scrutiny, for that exemption, too, obscures the key difference between a free child and a slave child. Although virtually all children are in some form of parental "custody," custody alone should not be confused with slavery, at least when children are involved. Under ordinary circumstances, parental custody does not violate the Thirteenth Amendment because, it is presumed, the parent exercises control over the child in the interests of that child. But when a parent perverts this coercive authority by systematically abusing and degrading his ward — treating his child not as a person but as a chattel, acting as if he had title over the child rather than a trusteeship on behalf of the child — the parent violates the Thirteenth Amendment and should be subject to suit.

Whereas the Fourteenth Amendment applies only to state conduct, the Thirteenth applies to private conduct as well. The absence of a "state action" trigger in the Thirteenth Amendment does more than just allow the slave to bring suit against the private master; the Amendment's broad mandatory language that slavery "shall [not] exist" commands the state to affirmatively protect the child once it knows of concrete, identifiable, de facto slavery within its borders. To carry out this obligation, the state must enact and actively enforce child abuse laws within its jurisdiction. Thus, the Amendment prohibits both private action *and* state inaction whenever the state is aware of private slavery.[17]

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[17] Even if this state inaction theory were rejected, however, Joshua still should have prevailed on the facts of *DeShaney*. Because the state of Wisconsin stood behind Randy's custody over Joshua, the Thirteenth Amendment required the state to eliminate any de facto slavery that took place under the color of state custody law. In other words, there *is* state action in cases of parental child abuse if we look carefully — the state acts by erecting and enforcing a child's servitude to his parents. Both the broad (state inaction) and the narrow (state custody) theories of the Thirteenth Amendment explain why a damage suit, in Joshua's case, properly lay against Wisconsin rather than against, for instance, Alaska or the United States.

A Wyoming court originally awarded custody to Joshua's father pursuant to a divorce decree. Subsequently, his father moved to Wisconsin, which continued to enforce the custody rights.

The state's affirmative obligation under the Amendment, however, would not unleash the parade of liability that troubled the *DeShaney* Court. Unlike a potentially unbounded substantive due process claim, a Thirteenth Amendment claim would not expose the state to liability for every private wrong. Under the Thirteenth Amendment, a state has an obligation only in concrete, identifiable cases of slavery or involuntary servitude — not in every case involving liberty or property.

Preliminarily, then, the Thirteenth Amendment lens appears to be a powerful tool that enables us to see *DeShaney* in a new light. More careful study of the Amendment confirms and deepens the foregoing analysis.

II. A Closer Look at the Thirteenth Amendment: Child Abuse as Slavery

In 1865, We the People of the United States, via the Thirteenth Amendment, declared that slavery must stop. Most immediately, the Amendment targeted the system of chattel slavery entrenched in the so-called confederate and border states — a complex web of laws, customs, practices, and attitudes euphemistically referred to as "the peculiar institution." But the Amendment's sweeping words and underlying vision are more universal, outlawing slavery of all forms and in all places.

But what, precisely, *is* "slavery"? For our purposes a good working definition of "slavery"[18] is: "A power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons." Implicit in this definition is a rejection of the idea that "slavery" depends necessarily on adulthood, biological otherness, race, forced labor, or state action. In other words, a person can be a Thirteenth Amendment "slave" whether or not she is a minor; whether or not the "master" is a blood relation of the "slave"; whether or not she has African roots; whether or not the enslavement takes the form of forced "labor"; and whether or not the enslavement is officially sanctioned by state law. Insofar as a child like Joshua is treated as chattel and subjected (legally or illegally) to domination and degradation by a parent, such a child — of any race — is guaranteed

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There is no indication from the record that Wyoming or the United States government had any knowledge of his father's propensity for violence against Joshua.

[18] It would be difficult to offer a comprehensive definition of "slavery" suitable for all purposes (philosophical, historical, linguistic, and so on) — perhaps as difficult as fashioning an all-purpose definition of the equally vital but elusive concept of "freedom." Our task here, however, is more limited, for we seek a definition of "slavery" within the meaning of § 1 of the Thirteenth Amendment, a working definition suitable for judges and exemplified (though not necessarily exhausted) by the peculiar historical practices the Amendment was plainly meant to abolish.

protection by both the literal terms and the underlying vision of the Thirteenth Amendment. Legislative history, judicial precedent, and slave narratives all support this broad reading of the Amendment's letter and spirit.

A. Legislative History

The history of the Amendment makes clear that slavery was understood as intimately connected with issues of family servitude. Critics of slavery in the mid-nineteenth century repeatedly linked the "peculiar institution" with polygamy. For example, the Republican Platform of 1856 declared that "it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism — Polygamy, and Slavery."[19] In a famous speech before the Senate on the admission of Kansas to the Union, Republican Senator Charles Sumner of Massachusetts refined the analogy:

> By license of Polygamy, one man may have many wives, all bound to him by marriage-tie, and in other respects protected by law. By license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law. Surely, Sir, is not Slavery barbarous?[20]

The analogy between slavery and polygamy was neither casual nor merely an expedient political slogan designed to forge an alliance between anti-slavery and anti-Mormon voters. Rather, the analogy was a deep, almost literal, equation. Slavery in the antebellum South was *itself* a polygamy of sorts. As popular abolitionist tracts emphasized in graphic — almost lurid — terms, slavery gave white masters free sexual access to a virtual harem of black women slaves[21] — "concubines," in Sumner's pointed language. Indeed, in an earlier speech on Kansas, Sumner had suggested, in quite provocative double entendres, that "slavery" was the "mistress" of the southern white man, and in particular, the "mistress" of Senator Andrew Butler of South Carolina.[22]

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[19] NATIONAL PARTY PLATFORMS 1840–1972, at 27 (Donald B. Johnson & Kirk H. Porter eds., 1973).

[20] Senator Charles Sumner, The Barbarism of Slavery, Speech in the United States Senate on the Admission of Kansas as a Free State (June 4, 1860), *in* 5 THE WORKS OF CHARLES SUMNER 1, 21 (1872).

[21] On white men's sexual access to slave women, see JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 93–104 (1988); and EUGENE D. GENOVESE, ROLL, JORDAN, ROLL 413–31 (1976). On abolitionist literature concerning this topic, see D'EMILIO & FREEDMAN, *supra*, at 101.

[22] *See* Senator Charles Sumner, The Crime Against Kansas, Speech in the United States Senate (May 19–20, 1856), *in* 4 THE WORKS OF CHARLES SUMNER 125, 144 (1871).

The implication that Senator Butler was sleeping with slaves was lost on no one, and within days led Butler's young cousin, Congressman Preston Brooks, to cane the defenseless Sumner

This system of "polygamous concubinage," which linked white masters with black slaves, generated a large number of mulatto offspring who were treated as slaves by their biological fathers. In the striking words of southern diarist Mary Boykin Chesnut, "[l]ike the patriarchs of old, our men live all in one house with their wives and their concubines; and the mulattoes one sees in every family partly resemble the white children."[23] Thus, the relationship between master and slave in many cases was quite literally a relationship between biological father and child. During the debates over the passage of the Thirteenth Amendment, various Democratic defenders of slavery analogized the relationship between master and slave to that of parent and child. As one opponent of the Amendment recognized:

> The domestic institution of slavery is one of these [social and domestic] relations, and was recognized in the States of this Confederation as a species of proprietary interest. The Constitution describes slaves, and I suppose children and apprentices might come under the same class as persons bound to service.[24]

In the words of another supporter of slavery:

> The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves.[25]

Similarly, Republican Congressman Samuel Shellabarger of Ohio noted in passing the analogy between "parents" and "masters."[26] In 1865, Democratic Congressman James Brown of Wisconsin proposed an alternative Thirteenth Amendment, which, among other things, would have created a sweeping exception to the ban on involuntary servitude for all "relations of parent and child, master and apprentice, guardian and ward."[27] Neither his general alternative amendment nor his specific textual exception was accepted by the Reconstruction Congress.

Thus, both supporters and opponents of slavery understood that the "peculiar institution" was tightly bound up with private and intimate relations between persons linked by sex and blood. Although

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into bloody unconsciousness while Sumner was seated at his desk on the floor of the Senate. *See id.* at 257.

[23] GENOVESE, *supra* note 21, at 426 (quoting MARY B. CHESNUT, A DIARY FROM DIXIE 21–22 (Ben A. Williams ed., 1949)).

[24] CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood).

[25] CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. Chilton White).

[26] *See* CONG. GLOBE, 37th Cong., 2d Sess. 1636 (1862).

[27] CONG. GLOBE, 38th Cong., 2d Sess. 528 (1865).

such relations were centuries old, the Thirteenth Amendment broke sharply with custom insofar as custom condoned the condition of slavery. As one legislator noted, antiquity cannot justify a practice because antiquity, at one point, also practiced polygamy and cannibalism.[28] To end slavery was thus to radically restructure this "private" sphere, and to reorder not simply the political and economic system but the social fabric as well. Accordingly, unlike virtually every earlier provision of the Constitution, the Thirteenth Amendment contained no state action requirement.

B. Judicial Interpretation

1. Supreme Court Precedent. — When it first considered the Thirteenth Amendment in the *Slaughter-House Cases*,[29] the Court noted that the Amendment protects a class broader than African slaves: "[W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter."[30] The Court concluded that judges must look to the "pervading spirit" of the Civil War amendments when interpreting the terms "slavery" and "involuntary servitude."[31]

The "pervading spirit" of the Thirteenth Amendment, as the Court explained a decade later, prohibits not only state action, but private action as well — private action either in conformity with or in violation of law. Thus, in the *Civil Rights Cases*,[32] the Court declared that "the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[33] When one person enslaves another — whether or not the slavery is backed by the state — the Thirteenth Amendment's sweeping command that slavery "shall [not] exist" is violated. This basic

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[28] *See* CONG. GLOBE, 38th Cong., 1st Sess. 1438 (1864) (statement of Sen. James Harlan).

[29] 83 U.S. (16 Wall.) 36 (1873).

[30] *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72; *see also* United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151) (holding that the Thirteenth Amendment "throws its protection over everyone, of every race, color, and condition"). These pronouncements resonate with the emphatic understanding of the Reconstruction Congress, the members of which repeatedly emphasized that the Thirteenth Amendment embraced all races, not simply blacks. *Cf.* Bailey v. Alabama, 219 U.S. 219, 231 (1911) (dismissing from consideration in a Thirteenth Amendment case the fact that the plaintiff in error was black); KENNETH M. STAMPP, THE PECULIAR INSTITUTION 194 (1956) ("Some slaves were whites by any rational definition as well as by all outward appearances . . . .").

By claiming that § 1 of the Thirteenth Amendment embraces slaves of all races, we do not necessarily endorse the *Bailey* Court's claim that race is utterly irrelevant in determining whether "slavery" exists in a given context. Race may be especially relevant in determining which "badges and incidents" of slavery Congress may abolish under § 2. *See* The Civil Rights Cases, 109 U.S. 3, 35–36 (1883) (Harlan, J., dissenting).

[31] *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72.

[32] 109 U.S. 3 (1883).

[33] *The Civil Rights Cases*, 109 U.S. at 20.

principle has been repeatedly affirmed by the Supreme Court over the last century. Consider, for example, Justice O'Connor's majority opinion in *United States v. Kozminski*,[34] decided less than a year before *DeShaney*:

> [F]rom the general intent to prohibit conditions "akin to African slavery," as well as the fact that the Thirteenth Amendment extends beyond state action, we readily can deduce an intent to prohibit compulsion through *physical coercion* . . . . [O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of *physical or legal* coercion. . . . [The amendment encompasses servitudes enforced] by the use or threat of *physical* restraint or *physical* injury, *or* by the use or threat of coercion through *law* or the *legal* process.[35]

The *Kozminski* Court also understood that the Amendment protects minors as well as adults. Thus, the Court discussed at length an 1874 "Padrone Statute" designed to implement the Thirteenth Amendment by preventing the enslavement of "young boys"[36] — enslavement that often took place with the consent of the boys' parents.[37] In one of the earliest and most important cases arising under the Thirteenth Amendment, Chief Justice Salmon P. Chase on circuit invalidated a coercive apprenticeship involving a ten-year-old girl, an apprenticeship initially agreed to (though under suspicious circumstances) by the girl's mother.[38]

Finally, in a series of turn-of-the-century Thirteenth Amendment decisions, the Court, even though presented with cases of forced labor, declined in its dicta to so limit the reach of the Amendment.[39] In one key case, the Court put forth an expansive dictionary definition of slavery: "[I]n Webster slavery is defined as 'the state of entire subjection of one person to the will of another . . . .'"[40] This definition rightly transcends mere economics; although forced labor for economic gain was one characteristic of slavery as practiced in the antebellum South, forced labor itself does not exhaust the meaning of slavery.[41] Primarily, it does not capture the power relationship of the master over the slave — a system of dominance and degradation in which

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[34] 487 U.S. 931 (1988).

[35] *Id.* at 942, 944, 952 (emphasis added).

[36] *See id.* at 947–48.

[37] *See, e.g.*, United States v. Ancarola, 1 F. 676, 680, 683 (C.C.S.D.N.Y. 1880).

[38] *See In re* Turner, 24 F. Cas. 337, 337, 340 (C.C.D. Md. 1867) (No. 14,247); *see also* Respublica v. Keppele, 2 Dall. 197, 199 (Pa. 1793) ("[N]o parent, under any circumstances, can make his child a *servant* . . . .") (emphasis in original).

[39] *See* Bailey v. Alabama, 219 U.S. 219, 241 (1911); Hodges v. United States, 203 U.S. 1, 17 (1906); Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

[40] *Hodges*, 203 U.S. at 17.

[41] *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 99 (1982) ("There is nothing in the nature of slavery which requires that the slave be a worker.").

the master may treat the slave as a possession rather than as a person.[42] Some slaves were so physically abused that they were unable to work. Clearly the Thirteenth Amendment did not exclude these people from its protection simply because they served a sadistic master — a Simon Legree — rather than a merely greedy master.[43]

2. Antebellum Precedent. — That slavery was at root a power relation, involving the domination of the master and the degradation of the slave, was not lost on antebellum judges. In 1842, Judge Turley of the Tennessee Supreme Court confirmed this interpretation of slavery in *Jacob v. State*:[44] "[T]he right to obedience and submission, in all lawful things . . . , is perfect in the master . . . ."[45] Judge Ruffin of the North Carolina Supreme Court described the master/slave relationship in even blunter terms: "Such obedience [of a slave to a master] is the consequence only of uncontrolled authority over the body. . . . The power of the master must be absolute, to render the submission of the slave perfect."[46] These judicial statements define slavery without reference to forced labor or economic gain. A leading antebellum anti-slavery tract similarly characterized slavery as an institution of power, not profit: "We have seen that 'the legal relation' of slave ownership, being the relation of an owner to his property, invests him with *unlimited power*."[47]

In determining the status of a slave, antebellum courts took no notice of a child's biological connection to the master. The law considered children of white masters and enslaved women to be the property of their biological fathers. A leading abolitionist treatise summarizing southern slaves codes explained:

> In all these laws it is laid down that the *child* follows the condition of *the mother*, whoever the *father* may be! The same usage, whether with or without written law, prevails in all our slave States; and under its sanction, the slave "owner" very frequently holds and sells his own children as "property" . . . .[48]

C. Slavery Through Slave Eyes

A definition of slavery under the Thirteenth Amendment should also reflect how southern slaves interpreted their condition. Slave

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[42] *See* GENOVESE, *supra* note 21, at 4 ("Theoretically, modern slavery rested . . . on the idea of a slave as *instrumentum vocale* — a chattel, a possession, a thing, a mere extension of his master's will."); STAMPP, *supra* note 30, at 193 ("Legally, the slave was less a person than a thing.").

[43] *See* STAMPP, *supra* note 30, at 182 (describing the "sadist . . . Madame Lalaurie, of New Orleans, who tortured her slaves for her own amusement").

[44] 22 Tenn. (3 Hum.) 493 (1842).

[45] *Id.* at 520.

[46] State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

[47] WILLIAM GOODELL, THE AMERICAN SLAVE CODE 155 (Arno Press 1969) (1853) (emphasis in original).

[48] *Id.* at 248–49 (emphasis in original).

diaries and oral histories provide insight into the evil that the Amendment sought to eradicate. These narratives indicate that forced labor was only one part of the slave's condition. The most common and tragic story was the near-total proprietary power that a master wielded over a slave.[49] For example, former slave Allen V. Manning thought that he had "belonged" to his master and "that I was his own chattel-property and he could do with me like he wanted to . . . ."[50] Manning's description of slavery closely corresponds to the descriptions given by the antebellum judges. As property, a southern slave was subject to the near-absolute control of another — control that at times included the master's de facto power over life and death.[51] For example, Katie Rowe recalled her former master's chilling threats:

> 'Them Yankees ain't gwine git this far, but iffen they do, you all ain't gwine git free by 'em, 'cause I gwine free you before that. When they git here they gwine find you already free, 'cause I gwine line you up on the bank of Bois d'Arc Creek and free you with my shotgun!'[52]

Even if a particular master cared for his slaves and refrained from physically abusing them, the *involuntary* nature of slavery still required the implicit (and often explicit) threat of violence.

Many a slave received no solace or protection from the fact that his master was, in fact, his biological father. As Frederick Douglass reminded his many readers, the possibility that his master was his biological father did not prevent his enslavement:

> The whisper that my master was my father, may or may not be true; and, true or false, it is of but little consequence to my purpose whilst the fact remains in all its glaring odiousness, that slaveholders have ordained, and by law established, that the children of slave women shall in all cases follow the condition of their mothers . . . .[53]

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[49] *See* JULIUS LESTER, TO BE A SLAVE 28 (1968). To be sure, there were many cases of slaves defending themselves against physical punishment. *See, e.g.*, LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 175 (Benjamin A. Botkin ed., 1945) [hereinafter LAY MY BURDEN DOWN]. Nevertheless, slaves who attempted to defend themselves were forced into hiding or flight to the North to avoid greater physical punishment. These sporadic outbursts of resistance did not prevent slavery from being slavery.

[50] LAY MY BURDEN DOWN, *supra* note 49, at 93.

[51] *See* DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 57–58 (1966); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 55–57, 188–90 (1978); JACOBUS TENBROEK, EQUAL UNDER LAW 124 & n.3 (1965). De jure, masters were typically free to rape or assault slaves, but not to murder them. However, because of the gross imbalance of actual power (the slaves' inability to testify, judicial deference to masters' disciplinary judgments, and the like), murder prosecutions were quite rare. *See* STAMPP, *supra* note 30, at 217–24, 360.

[52] LAY MY BURDEN DOWN, *supra* note 49, at 103–04.

[53] FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE 49 (Houston A. Baker, Jr., ed., 1982).

The Thirteenth Amendment, which was undeniably adopted with persons like Allen V. Manning, Katie Rowe, and Frederick Douglass in mind, thus legitimately applies to any situation in which one person is subject to another's near-absolute physical domination and degradation — even if that other is his own biological father.[54]

D. The Abused Child as a Slave

The current status of abused children like Joshua DeShaney is thus strikingly akin to the status of antebellum slaves like Frederick Douglass. Although the precise form of their enslavement no doubt differed in many ways, both Joshua DeShaney and Frederick Douglass were essentially "slaves" — human beings treated as chattel and subject to domination and degradation by their masters. Even the narrative voice of today's abused children resembles the tone of nineteenth-century slave narratives. As one abused child, Loretta, remembered in words reminiscent of slave Katie Rowe's, "I was six or seven when [Father] got out a big machete and said he was going to kill us all."[55] The legal analogy between southern slaves and abused children is also evident. The laws of the southern states recognized the near-absolute power of master over slave. Similarly, when child abuse rules are not enforced, state custody law effectively grants parents absolute proprietary power to dominate and degrade their children. Before the Thirteenth Amendment, if a slave fled the master, the Constitution provided that any "Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall . . . be delivered up on Claim of the Party to who such Service or Labor may be due."[56] Today, a fugitive or runaway child will still "be delivered up" to the custody of the parent, unless the state, in order to protect an abused child, refuses to enforce its grant of parental custody.

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[54] The men and women who served as slaves understood that they were — quite literally — treated as perpetual children, referred to by their first names only, or by the generic "boy" and "girl." Indeed, Dean Miller has argued that the vision of "slave as child" has deep legal, linguistic, and cultural roots in a vast number of slave regimes, including Greece, Rome, Indonesia, China, Africa, and Iceland. *See* Dean A. Miller, *Some Psycho-Social Perceptions of Slavery*, 18 J. SOC. HIST. 587, 588–89 (1985).

[55] GREGGORY W. MORRIS, THE KIDS NEXT DOOR: SONS AND DAUGHTERS WHO KILL THEIR PARENTS 26 (1985). An abused child typically sees no real alternative to parental custody. For various reasons, few children come forward with allegations of physical abuse. One such reason is fear; the parent threatens the child with more physical punishment if the child reveals the abuse. In addition to fear, an abused child often does not want to harm the parent by telling. An abused child suffering from continual humiliation and degradation might also feel that he somehow deserves the punishment. Finally, a very young child often cannot understand what is happening to him or communicate details about the abuse to others. *Cf.* United States v. Kozminski, 487 U.S. 931, 947–48 (1988) (holding that the "victim's age or special vulnerability" is relevant to an analysis of situational coercion).

[56] U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

III. Further Refinements

A. The Competing Analogy: "Family" Versus "Slavery"

A definition of slavery as total control of one human being by another[57] might, without further qualification or elaboration, seem to "emancipate" all children from parental custody at birth. Yet, to some extent, the Thirteenth Amendment was intended to *protect* black families from being undermined and ripped asunder by slavery. One of the justifications for abolition was the strengthening of family ties — after emancipation, masters would no longer be able to thwart a slave parent's control over (or even access to) her child by physically separating them or, even more horrific, by breaking up the family on the auction block.[58] Republican Senator Henry Wilson of Massachusetts proclaimed:

> [W]hen this amendment to the Constitution shall be consummated . . . the sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation. . . . Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which make sacred alike the proud homes and lowly cabins of freedom.[59]

Republican Congressman John A. Kasson of Iowa was even more explicit in affirming that abolition would protect "the right of father to his child — the parental relation."[60] There is no indication, however, that the Thirteenth Amendment was intended to maintain de facto conditions of slavery *within* a nominal "family" or "parental" structure.

1. Refining the Robertson *Dictum.* — The Supreme Court has suggested that family relations are generally not within the scope of the Thirteenth Amendment. In *Robertson v. Baldwin*,[61] the Court noted in passing that the Thirteenth Amendment was not intended to

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[57] Of course, the careful reader will note that this crude definition of slavery differs in subtle but important ways from the working definition we have embraced. *See supra* p. 1365.

[58] As Republican Senator James Harlan of Iowa noted in the debate over the adoption of the Thirteenth Amendment:

> Another incident [of slavery] is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet, according to the matured judgment of these slave States, this guardianship of the parent over his own children must be abrogated to secure the perpetuity of slavery.

CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

[59] *Id.* at 1324. For similar statements, see CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard); CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Sen. Ingersoll); and *id.* at 2955 (statement of Sen. Kellogg).

[60] CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

[61] 165 U.S. 275 (1897).

apply to the "exceptional" case of "the right of parents and guardians to the custody of their minor children or wards."[62] This right, the Court implied, was well established at the time of the Thirteenth Amendment, and was not meant to be eliminated by the Amendment. Yet surely it goes too far to exempt all "parental" relations from Thirteenth Amendment scrutiny, for such a categorical exemption would have allowed many white men in 1865 to continue to enslave their mulatto offspring simply by calling themselves "fathers" rather than "masters." Surely the Amendment applied to a true slave child — a young Frederick Douglass — *even if the slave's master was also his father.*

But how can we recognize the true slave child, as distinct from the free child? As *Robertson* reminds us, unlike a free adult, a free child is customarily subject to the custody, control, and guardianship of another. This distinction, however, does not support a categorical exemption for child custody cases; such an exemption would imply, contrary to both case law[63] and common sense, that no distinction exists between a free child and a slave child, and that the Amendment is thus inapplicable to children. Instead, the *Robertson* insight must be refined into a doctrinal test that looks beyond custody per se — a test tailored to mark the subtle but all-important line between freedom and slavery in the specific case of children.

Although the *Robertson* dictum rested on immemorial custom, custom alone cannot be the sole test of the Thirteenth Amendment's meaning, because the Amendment was designed to challenge long-standing institutions and practices that violated its core values of personhood and dignity. Any exception to the Amendment's reach must be limited to those historic practices that are consistent with the Amendment's central thrust. With this caveat in mind, we must remember that the custodial right of parents invoked by the *Robertson* Court was itself a *limited* right. At the time of the Thirteenth Amendment, "the right of parents . . . to the custody of their minor children" was limited by child abuse laws; a parent could be held criminally liable for unduly harsh physical punishment.[64]

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[62] *Id.* at 282.

[63] *See supra* p. 1369.

[64] *See, e.g.*, Neal v. State, 54 Ga. 281, 282 (1875) (holding that a father's use of a saw to whip a ten year old girl was "cruel and outrageous abuse of the parental authority" and actionable as criminal assault); Fletcher v. People, 52 Ill. 395, 396–97 (1869) (upholding a parent's false imprisonment conviction for "shocking inhumanity," "needless cruelty," and the "wanton imprisonment . . . of a blind and helpless boy" and holding that "inhuman beating" is criminally actionable); State v. Bitman, 13 Iowa 485, 486 (1862) (holding that a father's "inhuman[] whipping and beating [of] his own child" was sufficient to satisfy the requirements of assault and battery); State v. Mann, 13 N.C. (2 Dev.) 263, 265–66 (1829) (noting that a parent could be charged with unduly harsh physical punishment of his child); Commonwealth v. Blaker, 1 Brewster 311 (Phila. County Ct. 1867) (holding that "excessive" parental punishment was ac-

Indeed, protection against such abuse was *precisely* one of the markers that distinguished the free child from the slave. In 1829, North Carolina Supreme Court Judge Ruffin responded as follows to the claim that in extreme cases of abuse, a master could be charged with battery upon a slave, just as a parent could be charged with unduly cruel abuse of a child: "There is no likeness between the cases. . . . *The difference is that which exists between freedom and slavery* . . . ."[65] Throughout the antebellum era, a key legal distinction between "slaves" and free "apprentices" (whose masters exercised powers in loco parentis) was that free apprentices could not be beaten at will.[66] Consider also the language of the Illinois Supreme Court in 1870:

> [T]he power of the parent must be exercised with moderation. He may use correction and restraint, but in a reasonable manner. He has the right to enforce only such discipline, as may be necessary to the discharge of his sacred trust; only moderate correction and temporary confinement. . . . [In Rome, the law] gave fathers the power of life and death, and of sale, over their children. In this age and country, such provisions would be atrocious.[67]

Therefore, it was not well established at the time of the Amendment that a parent could severely abuse a *free* child.

Courts have long conditioned a parent's right to custody of a free child on the interests of the child. As Justice Story observed in the 1824 case of *United States v. Green*,[68] parents do not have an absolute "property" right[69] to the custody of free children:

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tionable as assault and battery); Johnson v. State, 21 Tenn. (2 Hum.) 283 (1840) (declaring, in a decision around 1837, that "cruel and merciless punishment" by parents was a criminal act and reserving for the jury the question of whether tying a daughter to a bedpost for hours and whipping her with cowskin at regular intervals — in addition to other beatings — violated the legal standard). The above cited material, drawn from a variety of American jurisdictions, stands in some tension with the suggestion that "'[t]he first state intervention to protect a child from parental abuse occurred in 1874.'" JUDITH AREEN, FAMILY LAW 1182 (2d ed. 1985) (quoting Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Abuse and Neglect Cases*, 63 GEO. L.J. 887, 903 (1975)). *But cf.* Areen, *supra*, at 900 & n.77 (noting briefly *Johnson* and *Fletcher*).

For a general discussion of this topic, see WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 243–46 (1896). Even if child abuse laws were not vigorously enforced in the pre-Civil War period, it is evident from these cases that a parent's legal right to custody was not unconditional.

[65] State v. Mann, 13 N.C. (2 Dev.) at 265 (emphasis added); *see also* STAMPP, *supra* note 30, at 186 (noting that by the mid-nineteenth century, the lash was considered too "cruel" for the punishment of "free men," but was still commonly used on slaves).

[66] *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 442 (1989).

[67] People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 285 (1870).

[68] 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256).

[69] *See generally* Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV.

> When, therefore, the court is asked to lend its aid to put the infant into the custody of the father . . . it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant . . . . It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody.[70]

A parent's control over a *free* child is more akin to trusteeship than title: parental custody is justified only if such custody is plausibly in the interests of the child. Thus, we can recast the insight of the *Robertson* dictum as follows: the Thirteenth Amendment does not invalidate parents' discipline and control over children *in ordinary circumstances* because family control is in the children's interest.[71]

Because minors often lack the ability to make fully informed and autonomous decisions on their own behalf, we cannot simply look to their subjective will to determine whether a servitude is "involuntary" and thus violative of the Amendment. By necessity we must fashion a less subjective test, focusing instead on whether custody over a child looks more like the "family" system the Amendment was designed to protect, or the "slavery" system it was designed to prohibit.[72] As we have seen, biology alone cannot distinguish "family" from "slavery" — nor can race, birthdate, or legitimacy. If a slave child named Joshua Frederick Douglass had been born in 1860 as the mulatto offspring of white father Randy and a black slave mother, it would be easy for us to see cruel and purposeless beatings of Joshua as emblematic of the evils of slavery. But why should it matter that the real Joshua was born not in 1860, but in 1979? Or that he was presumably not mulatto, but white?[73] Or that he was not "illegitimate" at birth? Or that his master called him "son" or that he did not have the middle and last names "Frederick Douglass"? A slave by any other name is still a slave.[74] *When custody ceases to be plausibly in the interests of the child, it looks more like title than trusteeship, and thus more like true "slavery" than true "family."*

1135, 1156–57 (recounting the move to the "best interests" test); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1072–74 (1979) (same).

[70] *Green*, 26 F. Cas. at 31–32; *see also* JAMES KENT, COMMENTARIES ON AMERICAN LAW 205 (1873) (discussing the power of the state to remove a child from parental custody).

[71] *See, e.g.*, JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 3–14 (1979) (explaining the importance of the family structure for child development).

[72] *See supra* p. 1373.

[73] *Cf.* Bailey v. Alabama, 219 U.S. 219, 231 (1911) (dismissing from consideration in a Thirteenth Amendment case the fact that the plaintiff in error was black).

[74] For an analysis of other possible distinctions between Joshua DeShaney and Joshua Frederick Douglass, see *infra* pp. 1378–82.

To put this point as a textual argument, the Amendment prohibits both "involuntary servitude" *and* "slavery" — whether "voluntary" or not. In the case of an adult held against her will, even if her master's daily treatment of her is not overtly abusive, her servitude is nonetheless involuntary and therefore prohibited.[75] In the case of minors, however, we should focus less on "involuntary servitude" and more on "slavery," which in this context is usefully understood as domination and degradation not plausibly for the benefit of the child. When the child's interests are utterly disregarded, the child is in effect being treated as a possession, as a chattel — as a *slave* — rather than as a "free" person with interests (even if not a fully formed will) of her own, interests worthy of respect. In extraordinary circumstances of severe physical abuse, parental custody rights cannot be justified as serving the child's interests. This was evident in Joshua's case.[76]

2. Where to Draw the Line? — The state must have a mechanism to distinguish between those custody relationships that appear to serve the child's interest and those that plainly do not — that is, between legitimate ("family") and illegitimate ("slavery") forms of parental control. Thus, the Thirteenth Amendment requires the state to have and to enforce child abuse laws; these laws are constitutionally compelled. Certainly, there is a continuum between permissible and mandatory state intervention. For example, the state is not compelled to terminate parental custody in every instance of physical punishment. However, at some point, the state has a constitutional obligation to protect the child. Clearly, this point is reached in cases like Joshua's involving a pattern of extreme abuse.

Most states have already approximated this point of mandatory intervention in laws that define what kinds of parental misconduct and child abuse justify criminal punishment.[77] In *DeShaney*, for

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[75] What is more, if a servitude is truly involuntary, any daily kindness within the servitude exists only in the shadow of the violence and/or legal coercion that would occur if the servant attempted to escape or end the servitude. *See supra* p. 1371.

[76] Legitimate parental discipline and control may include requiring a child to work at home (for example, chores) or in the market (for example, a newspaper route). As we have already noted, the Thirteenth Amendment doctrine of voluntarism, which is applicable to competent adults, does not automatically apply to minors. *See supra* p. 1376. But the personhood principle underlying the Thirteenth Amendment *does* apply. At some point, severe physical punishments for shirking, or outrageous demands for child labor (especially where the labor directly benefits the parent) cease to be plausibly in the child's interest, and clearly constitute child abuse prohibited by the Thirteenth Amendment. For early applications of the Amendment in the context of forced child labor (parental complicity notwithstanding), see *supra* notes 36–38 and accompanying text.

[77] We focus here on the substantive standard of conduct, and not on the standard of proof (for example, the "preponderance of the evidence" standard versus the "beyond a reasonable doubt" standard). With respect to the standard of proof, criminal rules seem inappropriate for civil child abuse cases under the Thirteenth Amendment. In those cases, we propose that the same standards of proof applicable to other civil Thirteenth Amendment cases — peonage cases, and the like — should apply.

example, the Supreme Court was well aware that Wisconsin had in fact convicted Randy DeShaney for criminal child abuse.[78] In short, although the Thirteenth Amendment requires legal line-drawing to distinguish legitimate "family" from illegitimate "slavery,"[79] similar lines have already been drawn, and are enforced daily in our criminal codes that define child abuse. Thus, a court looking to fashion justiciable Thirteenth Amendment standards has a helpful array of existing laws from which to choose.[80]

B. The Formalist Disanalogy

Are there any relevant differences between the real Joshua DeShaney and the fictional slave child Joshua Frederick Douglass? Once we get beyond the superficially striking but legally irrelevant differences of race, birthdate, and legitimacy, only two major differences remain.[81] First, Joshua Frederick Douglass could be sold by his abusive biological father to another, but Joshua DeShaney could not. Yet as we have already seen, power, domination, and dehumanization are the essence of slavery. Vulnerability to sale is simply one contingent capitalist attribute of the master's near-absolute power over the slave. In a non-capitalist regime, lords might not be permitted to sell their serfs, but that would hardly mean that the system was not a form of slavery. Even if he could not be sold, Joshua was treated not as a person, but as a chattel, as a thing, as — quite literally — a punching bag. Under these circumstances, had Randy been allowed to sell custody over Joshua to someone willing to protect Joshua's

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[78] *See DeShaney*, 489 U.S. 189, 193 (1989).

[79] In the employment/peonage context, similar line-drawing is necessary to mark the subtle but all-important border between freedom and slavery — between the free labor system the Amendment seeks to protect and the forced labor system it seeks to prohibit.

Even if the particular line we propose in the child abuse context were for some reason unacceptable, our larger argument would remain; *some* line must be drawn between slavery and freedom, and any line that categorically exempts minors, biological offspring, legal wards, or noneconomic forms of slavery from Thirteenth Amendment scrutiny would betray the letter and spirit of that Amendment.

[80] In cases where parental enslavement of children takes the form of economic exploitation rather than brute physical abuse, *see supra* note 76, truancy and child labor statutes may be more relevant than child abuse statutes per se for fashioning justiciable standards. Of course, courts in Thirteenth Amendment cases need not accept future changes — motivated by a state's desire to avoid liability — to these standards; *past* laws may be a better baseline in helping judges to strike the proper Thirteenth Amendment balance.

[81] In addition to the distinctions noted in the text, it might be argued that Joshua DeShaney's enslavement was only temporary; upon reaching adulthood, at least, Joshua would be freed. But that would hardly mean that Joshua was never enslaved in the first place. The fictional Joshua Frederick Douglass would have been emancipated in 1865, and the real Frederick Douglass escaped in his early twenties, but they too were slave children *until* emancipated. In any case, the Thirteenth Amendment prohibits even temporary slavery and involuntary servitude, as the *Turner* and "Padrone Statute" cases — involving children who would have been freed upon reaching maturity — make clear. *See supra* p. 1369.

interests — say, his mother — such a sale would have looked more like emancipation than like slavery.[82]

Second, the fictional Joshua Frederick Douglass suffered lawful beatings at the hands of his biological father, whereas the beatings endured by the nominally free Joshua DeShaney were committed unlawfully. A formalist defender of the *DeShaney* holding might argue that this difference is dispositive; Wisconsin should not be held legally liable for Joshua's injuries because the state did, after all, place formal limits on Randy's custodial rights over Joshua. As with race, birthdate, legitimacy, and marketability, however, this formalist distinction is less weighty than might first appear.

The formalist defense of *DeShaney* begins on solid ground by emphasizing the fundamental difference between a regime where severe physical abuse of a child is lawful and a regime where such conduct is prohibited. Indeed, as argued above, this difference — not biology — is a critical dividing line between "family" law and "slavery" law. But the formalist errs in focusing only on "law on the books" rather than "law in action." The Thirteenth Amendment is concerned not only with the purity of state statute books, but also with the reality of freedom in America. To reiterate the central dictum of the *Civil Rights Cases*: "The amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[83] Or as the Court put the point in a later case, the Amendment "denounces a status or condition, irrespective of the manner or authority by which it is created."[84]

Even the Fourteenth Amendment, built around an explicit state action requirement, focuses on "law in action." As the Court held early on, laws that were unassailable as written on the statute books would, if improperly applied in practice, violate the Fourteenth Amendment.[85] The concern with de facto abuse of power is even more prominent in the Thirteenth Amendment, which lacks a state action trigger.

Thus, *Kozminski* and a long line of earlier cases make clear that the Thirteenth Amendment applies even when a private party, in violation of law, uses brute physical force to enslave another and hold

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[82] *See* STAMPP, *supra* note 30, at 97, 194 (describing the de facto and de jure emancipation accomplished by the parental ransoming of slave children). Vulnerability to sale is simply a surface symptom — a marker — of the essential evil of slavery: the treatment of a human being as a thing, not as a person. Just as true slavery can exist without this marker, so can the marker exist without true slavery, as the concept of ransom illustrates.

[83] *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

[84] Clyatt v. United States, 197 U.S. 207, 216 (1905).

[85] *See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886); *Ex parte* Virginia, 100 U.S. 339, 346–47 (1880); Virginia v. Rives, 100 U.S. 313, 321 (1880). For an even earlier statement, see United States v. Given, 25 F. Cas. 1324, 1327 (C.C.D. Del. 1873) (No. 15,210) (Strong, J.).

her in bondage.[86] To vindicate the central command of the Amendment, the enslaved person must have legal redress against the master. Historically, this redress has typically taken the form of common law remedies, including the great prospective anti-slavery writs of habeas corpus and personal replevin (the same writs used in many nineteenth-century child custody cases)[87] and the retrospective remedy of damage suits for wrongful imprisonment, trespass, and the like.[88] If a state were ever to repeal these common law remedies, the Thirteenth Amendment would itself provide the basis for both prospective and retrospective redress, under the well established constitutional principles laid down in *Ex parte Young*[89] and *Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics*.[90]

Thus far, it might seem as if the Amendment creates a legal duty only on the part of the private master, and not the state. Such an analysis overlooks the fact that the very idea of a private legal duty logically entails a governmental system to enforce that *legal* duty. A state must, for example, provide courts open to hear the required suits against masters. Hence, the broad command that slavery *shall not exist* does more than impose an absolute duty on private would-be enslavers; it also imposes a duty on the state to provide an adequate apparatus to enforce the emancipation of all persons within its jurisdiction.[91] A state has considerable flexibility in discharging this obligation — for example, criminal punishment of enslavers is not constitutionally compelled — but the state may not simply turn a blind eye to slavery within its jurisdiction.

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[86] *See supra* pp. 1368–70.

[87] *See* Zainaldin, *supra* note 69, at 1052–68.

[88] *See, e.g.*, *In re* Turner, 24 F. Cas. 337, 339–40 (C.C.D. Md. 1867) (No. 14,247) (Chase, C.J.) (holding that the Thirteenth Amendment was self-executing and applicable in a habeas action where a private master sought to hold a young girl captive in violation of state and federal statutes).

[89] *See* 209 U.S. 123, 155–56 (1908).

[90] *See* 403 U.S. 388, 392 (1971).

[91] For broad historical support underlying this reading of the Thirteenth Amendment, see TENBROEK, *supra* note 51, at 157–97. *See also* 1866 CONG. GLOBE, 39th Cong., 1st Sess. 41 (statement of Sen. Sherman) ("To say that a man is a freeman and yet is not able to assert his right, in a court of justice, is a negation of terms."); 1 W. BLACKSTONE, COMMENTARIES *412 ("[T]he law of England abhors, and will not endure the existence, of slavery within this nation . . . . [A] slave or negro, the instant he lands in England, becomes a freeman; *that is, the law will protect him in the enjoyment of his person* . . . .") (emphasis added); Howard J. Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pt. 2), 1950 WIS. L. REV. 610, 628 ("'If the least attempt is made to enslave a white person of any description, he or she can apply to the Law for redress, and have full and ample relief by due course of Law. . . . What abolitionists demand as naked justice is, that the benefit and protection of these just laws, be extended to all human beings alike . . . .'" (quoting CHARLES OLCOTT, TWO LECTURES ON THE SUBJECT OF SLAVERY, AND ABOLITION 44 (1838))); Graham, *supra*, at 656–57 (quoting PHILANTHROPIST, Jan. 27, 1837, at 3) (describing an unknown abolitionist's stance on the "obligation" of judges to entertain habeas petitions from, or on behalf of, slaves).

If, for example, ex-masters in 1870 had formed a Kidnapping Klub, rounding up and enslaving free blacks, a state court would not have been free to simply disregard habeas writs brought by or on behalf of the re-enslaved. Nor is the duty to eradicate slavery within their jurisdiction a duty limited to judges, for the Thirteenth Amendment speaks to *all* state officials. Because of the very nature of slavery and bondage, not all slaves may be in a position to appear in court on their own. Therefore, if other agents of the state, without any justification whatsoever, knowingly allowed a Kidnapping Klub to continue, their actions also would violate the Amendment's command that slavery shall not exist. The lesson of the judge sitting in habeas court is generalizable: *once any arm of the state knows of present, identifiable slavery within its territory, the state must take reasonable steps to end the enslavement.*[92] Thus, the absence of a state action requirement in the Thirteenth Amendment means not only that certain *private* action is banned, but also that certain state *inaction* is prohibited. The two points are closely linked: precisely because the Amendment imposes a legal duty on private masters, it simultaneously requires the state to enforce that legal duty. Put another way, the Amendment *requires* state action under certain circumstances.

The idea that certain clauses of the Constitution require government action — even the expenditure of government funds —is neither outlandish nor counterstructural. For example, Article I, Section 2 requires a decennial census[93] and a biennial congressional election.[94] Censuses and elections require government action and the expenditure of government funds. Yet once we recognize that the Constitution requires the government to act to ensure democracy, what stops us from seeing that the document similarly requires government action to ensure freedom?

In light of the foregoing analysis, Wisconsin's dereliction of its Thirteenth Amendment duty in *DeShaney* is clear. Despite its knowledge of Joshua's victimization, the state turned a blind eye to de facto slavery within its jurisdiction and violated the Amendment just as much as if its judges had simply ignored habeas writs filed on Joshua's behalf.[95] As the Kidnapping Klub hypothetical makes clear, the state

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[92] We thus derive this duty from the core of the Thirteenth Amendment's self-executing command: the habeas judge must *act* on petitions brought before the court. *See supra* p. 1380. By emphasizing this core, we do not mean to suggest that § 1 of the Amendment cannot radiate further, or that Congress, acting under § 2, cannot legitimately impose duties beyond this core. We merely emphasize this core duty to address squarely the "slippery slope" and "boundless duty" criticisms that are often invoked against claims of so-called "affirmative" rights.

[93] *See* U.S. CONST. art. I, § 2, cl. 3.

[94] *See id.* at cl. 1.

[95] As noted earlier, the core of the Thirteenth Amendment is the duty of the state to provide habeas and analogous relief. *See supra* note 92. Wisconsin's subsequent criminal prosecution of Randy in no way makes up for the state's earlier refusal to protect Joshua through civil

must do more than simply put words on paper to prohibit kidnapping, child abuse, and other forms of enslavement within its borders. The Thirteenth Amendment is not satisfied by a state that willfully sees no evil and hears no evil, even if its paper laws speak no evil. Under the principles of *Bivens*[96] and 42 U.S.C § 1983,[97] state officials can and should be held liable for the violation of their constitutional duties.[98]

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remedies akin to habeas; the central demand of the Amendment is freedom and personhood for Joshua, not imprisonment of Randy.

[96] *See* 403 U.S. 388, 397 (1971).

[97] This section of the United States Code specifically encompasses state conduct that either subjects a citizen or "*causes [him] to be subjected*" to a deprivation of constitutional rights. *See* 42 U.S.C. § 1983 (1988) (emphasis added).

[98] In any event, the case for state liability on the facts of *DeShaney* is even stronger than in the Kidnapping Klub hypothetical. Wisconsin was not merely an innocent bystander in *DeShaney*. The state affirmatively took sides by enforcing master Randy's parental servitude and recognizing his legal custody rights. Unlike the Kidnapping Klub, Randy held his slave under the color of state custody law.

The formalist is correct to note that Wisconsin state custody law formally prohibits child abuse, but it is far from clear why this fact should absolve the state of all responsibility. Unlike its relationship to Kidnappers acting wholly outside the law, the state in *DeShaney* gave Randy special legal powers — a servitude of sorts — over Joshua. Because Wisconsin put Randy in a special position of vast power and discretion over Joshua, it should be held responsible for Randy's abuse of that power. Such, indeed, is the general rule in American constitutional law. If a state creates a police officer and vests him with vast power and discretion over ordinary citizens, the state is responsible whenever the officer exercises that power under color of law — even if the officer's conduct transgresses formal state rules, and even if the officer is later criminally prosecuted for his abuse of power. *See* Monroe v. Pape, 365 U.S. 167, 184–87 (1961); Snowden v. Hughes, 321 U.S. 1, 11 (1944); *supra* note 85. If Wisconsin can properly be held liable for a police officer — call him Officer Randy — who abuses his state-created police power to violate constitutional rights of citizens, why should Wisconsin not also be held liable when father Randy abuses *his* state-created custody power to violate Joshua's constitutional right not to be a slave?

One possible response is that the *DeShaney* Court implicitly rejected the notion that state custody law could be viewed as state action. This answer overreads *DeShaney*, however, for the Court there held only that the facts did not present sufficient state action to trigger *substantive due process* analysis, *see DeShaney*, 489 U.S. at 195, 202. The Court's reluctance to find state action might have been a result of its desire to limit the scope of substantive due process; both the Court and commentators in recent years have expressed grave concerns about the legitimacy of this doctrine because of its tarnished textual and historical pedigree, its apparently unbounded scope, its ability to transform the Court into a superlegislature, and the like. In light of these legitimate concerns, the *DeShaney* Court might well have used a stiffer state action trigger than would be appropriate in other contexts in which the unique concerns raised by the substantive due process doctrine do not apply. By contrast with substantive due process doctrine, the Thirteenth Amendment is textually and historically grounded, conceptually bounded, and consistent with democratic ideals. Thus, a less stringent state action trigger may be appropriate here — especially in light of the Amendment's unique rejection of state action principles underlying other parts of the Constitution. *Cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST 19–20 (1980) (arguing that the Court's anxiety over the substantive due process doctrine might have led to the stiffening of the "life, liberty, or property" trigger).

C. The Slave Analogy Reconsidered

The characterization of Joshua DeShaney as a "slave child" and the analogy to the hypothetical Joshua Frederick Douglass may strike some critics as more clever than clarifying, more contrived than compelling. Such criticism, however, misses the deep resonance between the facts of *DeShaney* and the vision of the Thirteenth Amendment. The Amendment is not linked to *DeShaney* in some fanciful or far-fetched way; rather, the Amendment powerfully combines and organizes the best moral and analytic objections to the Rehnquist Court's result in *DeShaney*.

For those who consider the violence and cruelty of child abuse a moral abomination,[99] the moral fervor underlying the Thirteenth Amendment is one of the Constitution's best sources of inspiration and illumination. For those who seek to vindicate substantive rights to real world protection,[100] few provisions of the Constitution are as substantive or realist — concerned with de facto power — as the Thirteenth Amendment. For those who want to break down rigid distinctions between "affirmative" and "negative" rights, between state "action" and "inaction,"[101] few provisions hold more promise than an Amendment that has as its hallmark the absence of a state action trigger. For those who believe that the politically and economically powerless — the "little ones," the "discrete and insular," the "worst-off class" — deserve special constitutional solicitude,[102] the "slave[s] and "serv[ants]" at the heart of the Thirteenth Amendment should be emblematic. For those who, following early twentieth-century Progressives, seek to destroy the myth that common law baselines are natural and pre-political, and who seek to interrogate the status quo,[103] the Thirteenth Amendment should loom large: how can we forget the radical redefinition — indeed, the redistribution — of property that Emancipation effected? For those who, following more recent Feminists, seek to remind us that biology is neither destiny nor automatic protection[104] — that traditional family roles are not God-given, and may mask oppression — the stories of Frederick Douglass and his enslaved sisters are powerfully confirmatory.

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[99] *See, e.g.*, Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514–16 (1989).

[100] *See, e.g.*, Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 301, 301–02 (1991).

[101] *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278–87 (1990).

[102] *See, e.g.*, Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078, 1078–79, 1087–94.

[103] *See, e.g.*, Strauss, *supra* note 9, at 53–54, 64–66.

[104] *See, e.g.*, Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1665–66, 1687–89 (1990).

Thus far, we have focused on how the Amendment illuminates the facts of *DeShaney*, but this point can be inverted to show how the facts of *DeShaney* illuminate the Amendment. In other words, child abuse is not some peripheral application of the Amendment, but lies close to its core. The central concern of the Amendment is not labor, not adulthood, not blackness, not state action, not biology, but *slavery* — a system of dominance and subservience, often on a personal scale, and the reduction of human beings to the status of things. In today's world, this central concern is far better embodied in the plight of abused children, than say, in Hollywood actors trying to avoid specific performance of personal service contracts.[105]

In light of all this, the real question is not whether the links between *DeShaney* and the Thirteenth Amendment are contrived, but how so many of us could overlook the obvious linkages.[106]

IV. Choosing the Right Clause

In their suit against Wisconsin, the attorneys for Joshua relied wholly upon the Due Process Clause of the Fourteenth Amendment. Notwithstanding the strength of the due process claim itself,[107] such reliance may have been misplaced. Like gin, the due process clause has been used to combat any and every malady.[108] As we have seen, many of the Rehnquist Court Justices have perfectly sensible and principled reasons to be skeptical of claims wrapped in the language of substantive due process.[109] For two reasons, we believe that the Thirteenth Amendment approach ultimately holds more promise.

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[105] The Amendment is regularly invoked in connection with the proposition that personal service contracts are generally not enforceable by injunction. *See* Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694, 698 (1973); American Broadcasting Co. v. Wolf, 420 N.E.2d 363, 366 (N.Y. 1981); John D. Calamari & Joseph M. Perillo, The Law of Contracts 666 (3d ed. 1987).

[106] Race and sex blinders might be partly responsible for this oversight. Because of the Thirteenth Amendment's special association with the liberation of blacks, mainstream constitutionalists may have overlooked it as a source of universal generative principles. The dominant subconscious sees the Amendment as black, and Wisconsin as white, and so it misses the connection between Frederick Douglass and Joshua DeShaney. Subconscious sexism may also have infected the mainstream analysis. On the rare occasions when the mainstream does focus on slavery, it tends to think about slave men more than slave women. Consequently, it downplays the system of polygamous concubinage within slavery and represses the intimate ties of sex and blood linking masters and slaves. Specialization of academic labor might also be a factor. Because constitutional law and family law fall on different sides of the "public" law/"private" law divide, they are studied by different sets of scholars. The Thirteenth Amendment tends to fall between the cracks.

[107] *See supra* pp. 1361–63.

[108] *See* Charles Black, Jr., Structure and Relationship in Constitutional Law 33 (1969).

[109] *See supra* p. 1363 and note 98.

First, a plaintiff's story is most compelling when cast in terms of the constitutional provision that best captures the victim's plight. In Joshua's case, this provision is not the overworked and abstract language of due process, but the more evocative words of the Thirteenth Amendment. The story of Joshua DeShaney recalls the stories narrated by those slaves whose plight gave rise to the Amendment. Joshua was held by his father in a condition of slavery as brutal, cruel, degrading, and dehumanizing as the slavery practiced in the antebellum South. This is the insight suggested, but not developed, by Justice Blackmun's passionate and compassionate language, and his invocation of fugitive slaves.[110] The state of Wisconsin can be understood as enforcing this servitude by rendering Joshua to his father, just as slaves were rendered to their masters. This is the insight again only suggested by Justice Brennan's description of Wisconsin's confinement of Joshua within the four walls of his father's home.[111]

Second, the Thirteenth Amendment, by its very spirit, specificity, limitations, and tight connection to the facts concerning Joshua DeShaney, counters charges of judicial activism and fears of slippery slopes. Relief for Joshua under the Thirteenth Amendment would not require that victims of random street crime, for example, be given a cause of action against the state. The application of the Thirteenth Amendment is necessarily bounded by its specific textual requirements — "slavery" or "involuntary servitude." This is the response to the *DeShaney* majority's concern about unbounded substantive due process and Judge Posner's parade of horribles once "affirmative constitutional rights" are recognized.[112]

Joshua's brutal mistreatment is better illustrated and addressed by the Thirteenth Amendment than by the Due Process Clause. Because this anti-slavery Amendment captures the full horror of Joshua's plight and blunts the judicial parade of horribles raised to deny Joshua relief, it offers the most appropriate constitutional vehicle for future Joshuas.

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[110] *See supra* p. 1363.

[111] *See supra* p. 1362.

[112] Nevertheless, the Thirteenth Amendment may have applications not previously or only recently explored. For example, the Amendment may provide a cause of action for battered wives who are unprotected by the state. We reserve this issue for separate analysis — it implicates adults, not minors, and may not involve the same kind of state-created custody at issue in *DeShaney*. And for an analysis of the non-justiciable implications of the Thirteenth Amendment for minimal entitlements to education and the like, see Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 40–43 (1990).