

suasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.”¹³⁵⁰

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being “no affirmative right to governmental aid,” the Court announced in *DeShaney v. Winnebago County Social Services Department*¹³⁵¹ that “as a general matter, . . . a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, although the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,¹³⁵² and for failure to ensure reasonable safety for involuntarily committed mental patients,¹³⁵³ no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and “did not occur while [the child] was in the State’s custody.”¹³⁵⁴ Although the state may have incurred liability in tort through the negligence of its social workers, “[not] every tort committed by a state actor [is] a constitutional violation.”¹³⁵⁵ “[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child’s] father.”¹³⁵⁶

Judicial inquiry into the existence of “state action” may lead to different results depending on what remedy is sought to be enforced. While cases may be brought against a private actor to compel him to halt his discriminatory action (for example, to enjoin him to admit blacks to a lunch counter), one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Enforcing the latter remedy might well avoid constitutional issues that an order directed to

¹³⁵⁰ 457 U.S. at 1011.

¹³⁵¹ 489 U.S. 189, 197 (1989).

¹³⁵² *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹³⁵³ *Youngberg v. Romeo*, 457 U.S. 307 (1982).

¹³⁵⁴ 489 U.S. at 201.

¹³⁵⁵ 489 U.S. at 202.

¹³⁵⁶ 489 U.S. at 203.