THE CONSTITUTIONAL HALL PASS: RETHINKING THE GAP IN § 1983 LIABILITY THAT PUBLIC SCHOOLS HAVE ENJOYED SINCE *DESHANEY*

I. INTRODUCTION

On six occasions during the 2007–2008 school year, Tommy Keyes picked up nine-year-old Jane Doe from her elementary school during school hours.[1] On each occasion, the school, despite adopting an official check-out policy that authorized only the adults listed on a student's "Check-Out Form" to pick up that student, released Jane to the unauthorized Keyes.[2] Tragically, the basic fear motivating the policy was realized; Jane was sexually assaulted each time she was released to Keyes.[3]

Jane's father and grandmother brought suit against Keyes and the Covington County School District.[4] After the district court granted Defendants' motion to dismiss,[5] the Fifth Circuit reversed, holding that Doe's complaint pleaded a facially plausible claim.[6] However, after a successful petition for rehearing *en banc*,[7] the Fifth Circuit double-backed on its initial ruling and upheld the district court's decision to grant Defendants' motion to dismiss.[8] Notably, in the small window of time before the court revisited the case, the Fifth Circuit's initial ruling garnered academic support.[9]

The confused saga that is *Covington County* illustrates a broad, often counter-intuitive area of Due Process jurisprudence. In *Covington County* and hundreds of similar cases, students seek to hold public schools liable for privately inflicted harm that is in some way traceable to the school.

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1. Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 340 (5th Cir. 2011), *rev'd en banc*, 675 F.3d 849 (5th Cir. 2012).
2. *Id.*
3. *Id.*
4. *Id.* at 337. The list of what the court referred to as the "Education Defendants," as opposed to individual defendant Keyes, included the School Board, the School Board's president, the Superintendent of the school district, and other unnamed school personnel. *See id.* at 335.
5. *See* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 637 F. Supp. 2d 392, 395 (S.D. Miss. 2009) (holding plaintiff had no constitutional right to be protected from harm inflicted by a private actor).
6. *Covington Cnty.*, 649 F.3d at 353.
7. Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 659 F.3d 358, 359 (5th Cir. 2011).
8. *See* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 852 (5th Cir. 2012).
9. *See, e.g.*, Taylor D. Cooper, *When a Public School Can Be Liable for Private Acts of Violence: The New Direction Taken in* Covington County, 41 J.L. & EDUC. 427 (2012).

Like Jane's case, this area of law is filled with tragic facts, including galling individual or institutional carelessness.[10]

This Note aims to examine the inconsistencies that arise when considering the broad immunity from Due Process liability that public schools enjoy under current interpretations of a touchstone Supreme Court decision, *DeShaney v. Winnebago County Department of Social Services*[11] and 42 U.S.C. § 1983[12] liability. Specifically, this Note argues that the current prevailing application of *DeShaney* to § 1983 claims against public schools is insufficient to address the egregious misconduct committed by public schools and their officials that result in constitutional violations to its students. First, in Part II, this Note discusses *DeShaney* and examines its role in § 1983 liability. Part III surveys the federal courts of appeals' application of *DeShaney* to claims against public schools and highlights how the two narrowly construed, *DeShaney*-based exceptions to immunity create a problematic gap in liability for public-school defendants. Finally, Part IV proposes a less formalistic approach to public-school liability based on establishing a balancing test to determine that liability.

II. SECTION 1983, *DESHANEY*, AND THE ORIGIN OF ITS EXCEPTIONS

A. 42 U.S.C. § 1983 & DeShaney

Section 1983[13] authorizes individuals to sue the state and its officials when they violate that individual's Fourteenth Amendment Due Process

10. *See, e.g.*, Brown v. Sch. Dist. of Phila., 456 F. App'x 88, 89 (3d Cir. 2011) (concerning the sexual assault of a mentally handicapped, female student by five fellow students during lunch hour); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989) (concerning a high school band director's sexual assaults of female plaintiff during her four years of high school despite the school principal's awareness of the band director's past attempts to sexually assault students).

11. 489 U.S. 189 (1989).

12. *See* 42 U.S.C. § 1983 (2012) (imposing liability on a person who, when acting "under color of any [state] statute, ordinance, regulation, custom, or usage," deprives another of a constitutional right).

13. 42 U.S.C. § 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 the proper proceeding for redress.

Id.

rights.[14] This authorization has given rise to a particular claim—the "constitutional tort."[15] Though early indications supported a plaintiff-friendly interpretation of § 1983,[16] liability for constitutional torts has been substantially limited to avoid overly burdening the government.[17]

DeShaney is perhaps the most notorious case to limit the state's liability for claims brought under § 1983.[18] Joshua DeShaney was the infant son of divorced parents Melody and Randy DeShaney.[19] After the couple's divorce in 1980, Randy was awarded custody of Joshua.[20] Shortly thereafter, the father and son moved to Winnebago County, Wisconsin.[21] In 1982, the first evidence of Randy's abuse of Joshua surfaced when Randy's second wife told police that Randy would hit Joshua, causing bruising and other marks.[22] A year later, Joshua was admitted to the hospital where the treating physician suspected child abuse.[23] Winnebago County's Department of Social Services ("DSS") immediately obtained a court order that placed Joshua in the hospital's custody and assembled a group to investigate Joshua's situation with his father.[24] The group found insufficient evidence of abuse to keep Joshua in the court's custody but recommended a number of protective measures.[25]

With charges of child abuse dismissed, Joshua returned to Randy's custody.[26] Only a month later, Joshua again visited the emergency room

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14. The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Due Process Clause does not "require[] the state to protect . . . its citizens against private actors," but "[i]t is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 189, 198.

15. *See* Susanna M. Kim, Note, *Section 1983 Liability in the Public Schools After* DeShaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101, 1107 (1994).

16. *See, e.g.*, Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 685 (1978) (arguing Congress intended § 1983 "to give a broad remedy for violations of federally protected civil rights").

17. *See* Kim, *supra* note 15, at 1107 ("[A] number of requirements have been attached to section 1983 claims in order to limit the potential burdens on the government.").

18. *See id.* at 1108 (recognizing *DeShaney* as one of the Supreme Court's "most controversial opinions").

19. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 192 (1989).

20. *Id.* at 191.

21. *Id.*

22. *Id.* at 192. Randy's second wife made these remarks to police at the time of her divorce from Randy. *Id.*

23. *Id.*

24. *Id.* The DSS's assembled team included doctors, hospital personnel, a detective, a lawyer, and several social workers. *See id.*

25. *Id.* These included enrollment in a preschool program, counseling for Randy, and advising that Randy's current girlfriend move out of the house. *Id.*

26. *Id.*

where treating physicians made yet another report to DSS of suspected child abuse.[27] The DSS once again concluded there was nothing it could do but make monthly visits to Joshua's home.[28] During these visits, the DSS noted several injuries on Joshua and that Randy had failed to comply with the previous DSS recommended protective measures.[29] The caseworker's notes at this time revealed her continuing suspicions of child abuse.[30]

Emergency room personnel made a third report of suspected child abuse to DSS in November 1983.[31] On two subsequent visits to the DeShaney's home, DSS was deprived of the opportunity to see Joshua because he was "too ill."[32] DSS again failed to act.[33] In March 1984, when Joshua was four years old, the inevitable occurred; Randy beat his son so brutally that Joshua fell comatose and required emergency surgery.[34] Tragically, "Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded."[35]

Joshua's mother brought a § 1983 action against Winnebago County, the DSS, and some DSS personnel.[36] After summary judgment was granted for the defendants in the district court and affirmed in the Seventh Circuit,[37] the Supreme Court affirmed.[38] In a 6–3 decision, Chief Justice Rehnquist, writing for the majority, held that the DSS's failure to protect Joshua from the highly suspected abuse of his father did not violate Joshua's substantive due process rights.[39] While the Court acknowledged the tragic facts of the case before it, it summarized the issue with language that amounts to "sorry, but our hands are tied."[40] This holding articulates

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 193.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* The complaint alleged that by failing to intervene to protect Joshua with knowledge, or knowledge it should have had, of Joshua's abuse at the hands of Randy, the DSS violated Joshua's Fourteenth Amendment Due Process rights. *Id.*
37. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 304 (7th Cir. 1987).
38. *DeShaney*, 489 U.S. at 194.
39. *See id.* at 203 (refusing to countenance an "expansion of the Due Process Clause of the Fourteenth Amendment").
40.

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm

the broader principle of *DeShaney*: the state owes no affirmative duty to its citizens to protect them from the harms perpetrated by private actors.[41]

B. DeShaney's *Exceptions*

Despite *DeShaney*'s general rule that a state owes no affirmative duty to protect individuals from private harm, two exceptions have surfaced in *DeShaney*'s wake: the "special relationship" exception and the "state-created danger" exception.[42]

1. Special-Relationship Exception

Within the *DeShaney* analysis, the Supreme Court left open an area in which the state may have an affirmative duty to protect individuals if those individuals sit in a particular relationship with the state.[43] This is the so-called "special relationship" exception.[44] In *DeShaney*, the Court stated, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[45] The focus of

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> inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.

Id.

Justice Brennan, in dissent, seized on the last sentence of the above, and argued that in Joshua's case, the state owed a Constitutional duty to Joshua. *See id.* at 203 (Brennan, J., dissenting) ("'The most that can be said of the state functionaries in this case,' the Court today concludes, 'is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.' Because I believe that this description of respondents' conduct tells only part of the story and that, accordingly, the Constitution itself 'dictated a more active role' for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney.") (internal citation omitted).

41. *See id.* at 197 ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."). The Court, in so holding, built upon previous decisions that limited a state's Due Process liability. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding no duty for state to provide adequate housing under Due Process Clause); Harris v. McRae, 448 U.S. 297, 317–18 (1980) (holding no duty for state to provide medical services under Fifth Amendment Due Process).

42. *See* Allen v. Susquehanna Twp. Sch. Dist., 233 F. App'x 149, 152–53 (3d Cir. 2007) (recognizing the "'special relationship' and 'state-created danger' exceptions to the general rule that states do not have an affirmative duty to protect its citizens from private harms by non-state actors").

43. *See DeShaney*, 489 U.S. at 202.

44. *See* Kim, *supra* note 15.

45. *DeShaney*, 489 U.S. at 199–200. The Court went on to note:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter,

the special-relationship exception is on whether the state has affirmatively deprived an individual of liberty through "incarceration, institutionalization, or other similar restraint" such that they are incapable of providing for their basic needs and welfare.[46] The Supreme Court has ruled that the state has sufficiently deprived an individual of liberty so that a special relationship is created when it imprisons or involuntarily commits an individual.[47] In *DeShaney*, the Supreme Court also acknowledged that circuit courts have recognized special relationships giving rise to liability when the state places children in foster homes.[48] There is some suggestion that the relationship must arise involuntarily on the part of the plaintiff, and the qualifying relationships thus far recognized—*e.g.* prisoner-warden—seem to support this requirement.[49] However, in *DeShaney*'s discussion of special relationships, there is no mention of an involuntary-confinement requirement.[50] Additionally, when a special relationship is found, state actors can be held liable both for affirmative conduct and for failing to act.[51] Under the special-relationship exception, then, a state can be liable for Due Process violations when an individual is harmed by private actors.[52]

> medical care and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. at 200.

The Court was building on precedent set in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding involuntarily committed individuals have Due Process rights to reasonably safe conditions of confinement) and *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding state has duty to provide prisoners with adequate medical care under the Eight Amendment prohibition of cruel and unusual punishment).

46. *DeShaney*, 489 U.S. at 200.

47. *See Estelle*, 429 U.S. at 103–04; *Youngberg*, 457 U.S. at 315.

48. While acknowledging that circuit courts have found that a special relationship may be created when the state places a child in foster care, the Court declined either to endorse or reject such a theory. *See DeShaney*, 489 U.S. at 189 n.9. *See also* Doe v. New York City Dep't of Soc. Servs., 649 F.2d 134, 141–42 (2d Cir. 1981); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 794–97 (11th Cir. 1987) (en banc).

49. *See* Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1261 (10th Cir. 1998) (citing Liebson v. New Mexico Corrections Dep't, 73 F.3d 274, 276 (10th Cir. 1996)) ("This court has held that a plaintiff must show involuntary restraint by the government official in order to establish a duty to protect under the special relationship theory.").

50. *DeShaney*, 489 U.S. at 200–01.

51. *See DeShaney*, 489 U.S. at 200 ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time *fails to provide for his basic human needs* . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.") (emphasis added).

52. *See, e.g.*, Meador v. Cabinet for Human Res., 902 F.2d 474, 476 (6th Cir. 1990) ("We hold that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes" under a special-relationship theory.).

2. State-Created Danger Doctrine

Another exception that developed after *DeShaney* arises under the "state-created danger" theory.[53] Under this exception, the state may be liable for private harm inflicted upon individuals if the state somehow created the danger that led to the harm.[54] Before the Court issued its opinion in *DeShaney*, Judge Posner articulated an early version of this exception in *Bowers v. DeVito*.[55] There, he stated, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."[56] It was not until after *DeShaney*, however, that federal courts started to shape the contours of a state's affirmative duty to protect individuals who did not have a special relationship with the state.[57]

Unlike the special-relationship exception, the state-created danger theory has not been uniformly accepted by the federal circuit courts.[58] The First and Fifth Circuits have either never applied the state-created danger theory or have rejected it outright.[59] When the courts that do recognize the

53. *See generally* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1 (2007) (tracing the development of the state-created danger theory).

54. *See* Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989). *Wood* is one of the first cases to recognize a state-created danger exception post-*DeShaney*. *See* Chemerinsky, *supra* note 53, at 9. In *Wood*, a state trooper took a drunk driver into custody, leaving the driver's passenger, Wood, alone on the side of the road without keys to the car. *Wood*, 879 F.2d at 586. The passenger was subsequently raped on her walk home. *Id.* The Ninth Circuit held that "[a]lthough [the state trooper] did not himself assault Wood, he allegedly acted in callous disregard for Wood's physical security, a liberty interest protected by the Constitution." *Id.* at 589.

55. 686 F.2d 616, 618 (7th Cir. 1982). In *Bowers*, a woman was killed by a man who had recently been released from a state mental hospital. *Id.* at 617.

56. *Id.* at 618. Despite its utterance before *DeShaney*, this "snake pit" language has become shorthand for describing cases in which the state might fairly be said to have created the danger in dispute. *See, e.g.*, Eric W. Schulze & T.J. Martinez, *Into the Snakepit: Section 1983 Liability Under the State-Created Danger Theory for Acts of Private Violence at School*, 104 EDUC. L. REP. 539, 539 (1995).

57. *See* Matthew D. Barrett, Note, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 217 (2002). *See also* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) ("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.") (emphasis added). The emphasized language seems to at least indicate an exception when the state creates a danger.

58. *See* Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005).

59. *See, e.g.*, *id.* ("[The First Circuit] has, to date, discussed the state-created danger theory, but never have found it actionable on the facts alleged."); Beltran v. City of El Paso, 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a state-created danger theory of § 1983 liability even where the question of the theory's viability has been squarely presented.") (internal quotations omitted). *Cf.* McClendon v. City of Columbia, 305 F.3d 314, 325 (5th Cir. 2002)

exception apply it to the facts of a given case, the results differ substantially. Because the Supreme Court mandated that allegations of negligence alone cannot sustain Due Process claims,[60] the circuit courts have wrestled with determining exactly what kind of state conduct can be subject to § 1983 liability. Though the tests differ significantly, it is clear that the state's conduct must meet some stricter standard than mere negligence—for instance, deliberate indifference[61]—to constitute an actionable Due Process claim.[62]

Additionally, there are common currents that run through the majority of the case law in applying the state-created danger test. Of course, all circuits adhere to the Supreme Court mandate that mere negligence is insufficient to show an actionable constitutional claim.[63] Most, if not all, require the state actor's conduct be deliberately indifferent or more.[64] All the circuits seem to require affirmative conduct in creating the danger as opposed to merely passive conduct or failing to act.[65] But besides these broad themes, and despite over two decades of case law, there still exist nontrivial inconsistencies in the ways the circuit courts analyze state-created dangers.[66] For instance, some circuits require actual knowledge of the harm before a plaintiff can prevail on a § 1983 claim, while others accept constructive knowledge.[67] With substantial differences like these, it is no wonder why Erwin Chemerinsky has bemoaned the lack of guidance

(en banc) ("We have not yet determined whether a state official has a . . . duty to protect individuals from state-created dangers . . . .") (citations omitted).

60. *See* Davidson v. Cannon, 474 U.S. 344, 347–48 (1986) (holding lack of due care is insufficient to fall under abusive conduct prohibited by the Due Process clause). *Davidson* involved a state prisoner who alerted prison officials that a specific inmate was threatening to attack him. *Id.* at 345. The relevant prison officials did not act on the warnings, and the plaintiff was attacked by that inmate, resulting in serious injuries. *Id.* at 345–46.

61. *See McClendon*, 305 F.3d at 326 ("[C]ourts applying both the 'special relationship' exception to the *DeShaney* rule and the 'state-created danger' exception to the *DeShaney* rule have generally required plaintiffs to demonstrate (or, at the motion-to-dismiss stage, to allege) that the defendant state official *at a minimum* acted with deliberate indifference toward the plaintiff.").

62. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) ("[N]egligently inflicted harm is categorically beneath the threshold of constitutional due process.").

63. *See id.*

64. *See infra* Part II.B.2.a–c.

65. *See infra* Part II.B.2.a–c. Compare this with the special relationship exception, where state actors can be liable for inaction.

66. *See infra* Part II.B.2.a–c.

67. *Compare* Carey v. City of Wilkes-Barre, 410 F. App'x 479, 483 (3d Cir. 2011) (holding that a state actor's conduct might shock the conscience if he or she "disregarded a known or obvious consequence of his action") (internal quotations omitted) *with* Fields v. Abbott, 652 F.3d 886, 891 (8th Cir. 2011) ("[A]n official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference*.") (internal quotation marks omitted) (emphasis added).

from the Supreme Court on this issue.[68] Alas, the state-created danger doctrine remains an opaque glass obscuring when state actors can be held liable for alleged due process violations. The lack of clarity in this area of law is especially troublesome when—as is the focus of this Note—public schools and their officials perpetrate the alleged harm.

Further examination of the various tests used by these courts is a helpful illustration of this inconsistency in determining whether a state-created danger has been established.

a. The Fourth and Eighth Circuits: Heavy Burdens of Actual Knowledge or Intent

The Fourth and Eighth Circuits impose the heaviest burdens for a § 1983 plaintiff, requiring that he or she show the state had actual knowledge of a risk or that the state had an actual intent to harm.

The Fourth Circuit maintains that the state must act affirmatively and that the act must "shock the contemporary conscience" to constitute a violation of due process.[69] In a recent case, *Slaughter v. Mayor and City Council of Baltimore*,[70] the court elaborated on the "shock the conscience" standard. *Slaughter* concerned a firefighter who was killed during a training exercise and whose representatives alleged a § 1983 claim, contending that the fire department failed to provide adequate equipment, training, notice of risk, and generally a safe working environment.[71] In deciding if the state's conduct "shocked the conscience," the court held that the question turned on whether the state intended to harm the plaintiff.[72] After *Slaughter*, the Fourth Circuit appears to require proof of intent to harm in order to properly find a state-created danger.[73]

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68. Chemerinsky, *supra* note 53, at 26 ("I think [the state-created danger doctrine] is a scenario where we do need the Supreme Court. It is about due process, an area where we need a national, uniform set of rules.").

69. *See* Pena v. DePrisco, 432 F.3d 98, 110, 112 (2d Cir. 2005) ("In order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'") (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 853, 840 (1998)).

70. 682 F.3d 317 (4th Cir. 2012).

71. *Id.* at 319, 322.

72. *Id.* at 323 ("[W]e hold that the Baltimore City Fire Department's constitutional liability in this case turns on whether it *intended to harm* the new recruits.").

73. In *Slaughter*, the Court is clearly worried about an over-inclusive standard of state liability emitting from the state-created danger doctrine. However, its argument simply burns a straw man; the Court only considers the possibility that liability could arise *merely* from the state having created the

The Eighth Circuit has articulated a multi-part test to determine whether a state-created danger exists. An Eighth Circuit plaintiff must prove:

> (1) that she was a member of a limited, precisely definable group, (2) that the municipality's conduct put her at a significant risk of serious, immediate, and proximate harm, (3) that the risk was obvious or known to the municipality, (4) that the municipality acted recklessly in conscious disregard of the risk, and (5) that in total, the municipality's conduct shocks the conscience.[74]

For the Eighth Circuit, conduct that shocks the conscience may require an underlying intent to harm, however in some cases a lower standard—deliberate indifference—can suffice.[75] "Deliberate indifference requires that an official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[76] Under this standard, plaintiffs face the stiff burden of showing that the actor had actual knowledge of the specific risk of harm that eventually actualized.[77]

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danger, regardless of the culpability of the state conduct. Fretting the "practical consequences" of the straw man, the Court quotes the following passage from *Waybright v. Frederick County*:

> [B]y finding a state-created danger here, we might well inject federal authority into public school playground incidents, football (or even ballet) practice sessions, and class field trips, not to mention training sessions for government jobs that require some degree of physical fitness. Sometimes practice is demanding because games are demanding, and training is demanding because jobs are demanding, and how best to conduct these sessions can rarely be the focus of a constitutional claim.

Id. at 323 (quoting Waybright v. Frederick Cnty., 528 F.3d 199, 208 (4th Cir. 2008)).

74. Fields v. Abbott, 652 F.3d 886, 891 (8th Cir. 2011) (internal quotation marks omitted).

75. *Id.* ("'in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold.'") (quoting Terrell v. Larson, 396 F.3d 975, 978 (8th Cir. 2005)). The Eighth Circuit categorically denounced a gross negligence standard for § 1983 claims. *Id.* The Court also distinguished state conduct that was deliberate and conduct undertaken in the context of an emergency; the deliberate indifference standard should be applied only when conduct is in the former category. *Id.*

76. *Id.* at 892 (quoting Hart v. City of Little Rock, 432 F.3d 801, 806 (8th Cir. 2005)) (internal quotation marks omitted).

77. *Id.* at 893. *Fields* concerned a jailer who was injured when two inmates exploited a problematic interior door handle on the jail's drunk-tank door. *Id.* at 889. Despite prior incidents of inmates using the door handle to harm jail employees, the Court found that there was no evidence to show "whether any of the Miller County individual defendants subjectively believed that the drunk-tank door handle was dangerous." *Id.* at 893.

b. The Third, Sixth, Seventh, and Ninth Circuits: A Smaller But Substantial Hurdle

In contrast to the Fourth and Eighth Circuits, a § 1983 plaintiff has a lighter, yet still substantial, burden to bear. The Third Circuit applies a structured test with four elements:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
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> (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
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> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.[78]

Though the Third Circuit has requirements that the Fourth Circuit does not have—*i.e.* (1) and (3) above—the "shock the conscience" standard in the Third Circuit is much less stringent than the Fourth Circuit's requirement of intent to harm. In *Carey v. City of Wilkes-Barre*,[79] the Third Circuit stated that a state actor's conduct might shock the conscience if he or she "disregarded a known or obvious consequence of his action."[80] This looks much more like a gross negligence standard than a higher showing of intent.[81]

The Sixth Circuit applies a test that narrows the class of plaintiffs that can assert a state-created danger theory of liability, as the Third Circuit does. In the Sixth Circuit, a plaintiff must show:

> (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's

78. Brown v. Sch. Dist. of Phila., 456 F. App'x 88, 91 (3d Cir. 2011) (quoting Sanford v. Stiles, 456 F.3d 298, 303–04 (3d Cir. 2006)).

79. 410 F. App'x 479 (3d Cir. 2011).

80. *Id.* at 483 (quoting Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997) (internal quotation marks omitted)).

81. *See* Ye v. United States, 484 F.3d 634, 638 n.2 (3d Cir. 2007) (noting that "gross negligence may be sufficient").

> actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.[82]

The state actor must act with deliberate indifference.[83] The "should have known" language in (3) above indicates that, unlike the Eighth Circuit, the plaintiff can succeed by showing that the actor had constructive knowledge of the risk.[84]

In the Seventh Circuit, a plaintiff trying to succeed on a state-created danger theory must show that: (1) the state actor, by affirmative acts, created or increased the risk of danger; (2) the state actor's conduct was a proximate cause of the plaintiff's injuries; and (3) the conduct shocked the conscience.[85] The Seventh Circuit uses a deliberate indifference standard to decide whether the state actor's conduct shocks the conscience.[86]

Like the Seventh Circuit, the Ninth Circuit recently articulated a three-part test for a state-created danger. The court must decide "(1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger."[87] Part (2) above—stating the danger must be known *or* obvious—indicates that, like the Sixth Circuit, the Ninth Circuit does not require proof that the state actor had actual knowledge of the dangerous condition.

c. The First, Second, Tenth and Eleventh: Confusion and Lack of Clarity

The First Circuit has confused case law with respect to the state-created danger doctrine. The court has acknowledged the difficulty and

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82. Cutlip v. City of Toledo, 488 F. App'x 107, 117 (6th Cir. 2012) (quoting Estate of Smithers v. City of Flint, 602 F.3d 758, 763 (6th Cir. 2010)).

83. *Id.*

84. *See* Ewolski v. City of Brunswick, 287 F.3d 492, 513 n.7 (6th Cir. 2002) ("Of course, an official's subjective awareness of a risk may be proved circumstantially by evidence suggesting that the defendant official being sued had been exposed to information concerning the risk and thus 'must have known' about it.") (internal quotation marks omitted).

85. *See* Jackson v. Indian Prairie Sch. Dist., 653 F.3d 647, 654 (7th Cir. 2011).

86. *Id.* at 655.

87. *See* Henry A. v. Willden, 678 F.3d 991, 1002 (9th Cir. 2012).

inconsistency among the circuits in applying the doctrine.[88] A review of First Circuit case law in this area reveals no instance of the court awarding a plaintiff recovery on the basis of the state-created danger theory. But, in a rare discussion of the doctrine, the court alluded to the necessity of showing a conscience-shocking affirmative act for a claim to be actionable.[89] Whatever the precise standard for a state-created danger the First Circuit employs, it's clear that the court would impose heavy burdens for a plaintiff pursuing such a theory.[90]

The Second and Eleventh Circuits' state-created danger tests are much more informal and, in many ways, underdeveloped.[91] The Second Circuit, in *Okin v. Village of Cornwall-On-Hudson Police Dep't*,[92] stated that a state-created danger may arise when "[t]he affirmative conduct of a government official . . . communicates, explicitly or implicitly, official sanction of private violence."[93] While not articulating a specific test, the Second Circuit seems to focus on whether the conduct was affirmative—as opposed to passive—and whether it increased the risk of harm.[94] There has been some indication that the Second Circuit uses a deliberate indifference standard;[95] however, due to a lack of case law developing the specific contours of the state-created danger test, it's not clear exactly how the Second Circuit applies the doctrine.[96]

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88. *See* Soto v. Flores, 103 F.3d 1056, 1065 (1st Cir. 1997). The Court noted:

> The history of the state-created danger theory . . . is an uneven one. The distinction between affirmatively rendering citizens more vulnerable to harm and simply failing to protect them has been blurred. Moreover, courts have sometimes found that a given action, while rendering the plaintiff more vulnerable to danger, did not amount to a constitutional violation, but instead should be viewed as a state law tort.

Id. (citing Cannon v. Taylor, 782 F.2d 947, 950 (11th Cir. 1986)). Rather than ruling directly on the state-created danger issue, the Court disposed of the case using another principle, finding that the right was not sufficiently established at the time of injury. *Id.*

89. *See* Rivera v. Rhode Island, 402 F.3d 27, 35–37 (1st Cir. 2005). The Court remarked that "[w]e add a few words about the separate shock the conscience test which plaintiff would also have to meet if she established a duty" in the context of a state-created danger claim. *Id.* at 38. It also noted that "[m]erely alleging state actions which render the individual more vulnerable to harm, under a theory of state created danger, cannot be used as an end run around *DeShaney's* core holding." *Id.*

90. Meléndez-García v. Sánchez, 629 F.3d 25, 36 (1st Cir. 2010).

91. *See* Robischung-Walsh v. Nassau Cnty. Police Dep't, 421 F. App'x 38, 41 (2d Cir. 2011) (merely requiring affirmative, risk-creating acts for state-created danger in addition to conscience-shocking conduct as required to state any substantive due process claim).

92. 577 F.3d 415 (2d Cir. 2009).

93. *Id.* at 429.

94. *Robischung-Walsh*, 421 F. App'x at 41.

95. Cash v. Cnty. of Erie, 654 F.3d 324 (2d Cir. 2011) (requiring deliberate indifference for municipal liability in a § 1983 claim and never explicitly referencing the state-created danger theory).

96. *See* Lombardi v. Whitman, 485 F.3d 73, 80–81 (2d Cir. 2007); Matican v. New York, 524 F.3d 151, 157–58 (2d Cir. 2008); Pena v. DePrisco, 432 F.3d 98, 107–12 (2d Cir. 2005).

It is also unclear exactly what the Eleventh Circuit's standards are for finding a state-created danger.[97] At least acknowledging the difference between a special relationship exception and a state-created danger, the court has recognized the latter arises "only when the officials cause harm by engaging in conduct that is arbitrary, or conscious [sic] shocking, in a constitutional sense."[98] Still, other Eleventh Circuit cases have revealed a resistance to recognizing § 1983 liability where there is no special relationship, thus nullifying the state-created danger exception.[99]

The Tenth Circuit has articulated a five-part test that seems to be an amalgamation of the other circuits' standards. A state-created danger exists in the Tenth Circuit when:

> (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.[100]

Despite the seemingly rigorous test articulated by the Court, the Tenth Circuit has been identified as plaintiff-friendly when deciding state-created danger claims.[101] A recent decision however, indicates that this may not be entirely accurate; the Tenth Circuit itself has recognized the amount of variance in the case law applying its test and acknowledged that applying its test sometimes resembles "trying to fit a square peg in a round hole."[102]

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97. *See, e.g.*, Barrett, *supra* note 57, at 188–89 ("The contours of the Eleventh Circuit's state-created danger test are not clearly defined and seem to be the most ambiguous of all of the federal circuits that have adopted the theory as a viable constitutional claim.").

98. Doe v. Braddy, 673 F.3d 1313, 1318 (11th Cir. 2012) (internal quotation marks omitted) (quoting White v. Lemacks, 183 F.3d 1253, 1257 (11th Cir. 1999)). Rather than articulating a workable standard, the Court is merely quoting boilerplate constitutional language from *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992).

99. *See* K.A. v. Waters, 448 F. App'x 7, 8–9 (11th Cir. 2011). In *Waters*, adoptive parents brought suit against a county social services department for returning children to their natural mother, who lived in extremely squalid conditions and had an abusive boyfriend who harmed the children. *Id.* at 8. The basis of the complaint was that the defendants had failed to properly inspect the children's potential home. *Id.* Not once did the Court mention the state-created danger doctrine despite the alleged affirmative state action of returning the children to their natural mother without following proper protocol. *Id.* at 8–10. The Court proceeded only with a special relationship analysis. *Id.*

100. Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001).

101. *See* Chemerinsky, *supra* note 53, at 10 (labeling *Currier* as "[o]ne of the best cases for plaintiffs").

102. *See* Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 922 (10th Cir. 2012).

III. *DESHANEY* GOES TO SCHOOL

Soon after the *DeShaney* opinion, the circuit courts faced numerous § 1983 claims against public schools and/or their officials. In line with the theme of inconsistent application of *DeShaney*, results were mixed.

A. Is There a Special Relationship?

Many § 1983 claims against public schools attempted to use exclusively a special relationship theory as the sole basis for liability. Early attempts were fairly successful. In *Doe v. Taylor Independent School District*,[103] for example, the Fifth Circuit held that a student's § 1983 claim against the school's superintendent and principal can survive summary judgment. In that case, a coach/teacher initiated and continued a sexual relationship with a high school freshman.[104] Over the course of the relationship, it became common knowledge that the two were in some kind of romantic relationship.[105] The court cited *DeShaney* and, acknowledging state mandatory attendance laws, noted, "by compelling a child to attend public school, the state cultivates a special relationship with that child and thus owes him an affirmative duty of protection."[106] However, the plaintiff's victory was short-lived; the court granted a petition for rehearing and the opinion was vacated.[107]

Nearly a year later, the Eleventh Circuit reached a similar result in *Spivey v. Elliott*.[108] There, an eight-year-old boy, Tremain Spivey, was sexually abused by an older schoolmate at a state-run school for the deaf.[109] The court found that a special relationship existed between the school and Spivey because he spent the majority of the week at the school

103. 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1066 (1993), *reh'g granted*, 987 F.2d 231 (5th Cir. 1993).

104. *Id.* at 139–41.

105. *Id.* at 138–41. It was shown that the principal and the superintendent were made aware of Coach Stroud's "unprofessional" relationship with the student—and even past students—on numerous occasions, even before the Coach ultimately had sex with the student. *Id.* at 139–40. Despite holding a meeting with Coach Stroud about the alleged misconduct, the principal and the superintendent took no action to terminate or discipline Coach Stroud. *Id.* at 140. To get a feel for the kind of relationship Coach Stroud pursued with the 14-year-old student, see the following letter written by Coach Stroud early in his pursuit: "To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever—for real—I love you." *Id.* at 139.

106. *Id.* at 147. The Court specifically stated that the public school's constitutional duty to protect its students from harm "arises by virtue of state law which compels public school attendance." *Id.* at 144 n.6.

107. *See* Doe v. Taylor Indep. Sch. Dist., 987 F.2d 231 (5th Cir. 1993).

108. 29 F.3d 1522 (11th Cir. 1994).

109. *Id.* at 1523.

and his special needs made him particularly dependent on the school, analogous to prisoners and the civilly committed.[110] However, the court ultimately found for the school on a qualified immunity theory because Spivey's constitutional right was not "clearly established" at the time of the alleged violation.[111] *Spivey* has something else in common with *Taylor School District*; the precedential effect of its opinion was destroyed by post-adjudication action.[112] On *sua sponte* reconsideration, the Court disavowed the original finding that there was a constitutional duty arising from a special relationship between the school and Spivey.[113]

Despite some inkling that a special relationship could arise between a student and school, other cases coming after *DeShaney* suggest a more hostile approach to this notion. In *J.O. v. Alton Community Unit School District 11*,[114] the Seventh Circuit denied elementary students' § 1983 claims against their school district, concluding there was no special relationship between the school district and the students on which liability could rest.[115] The students' claim was based on their sexual molestation at the hands of a teacher employed by the school district.[116] The court acknowledged that though prisoners and mental patients may not be the only people entitled to the special-relationship exception to *DeShaney*, "the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises."[117]

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110. *Id.* at 1525–26. The Court used these special characteristics to distinguish this case from other cases that concerned more ordinary school-student relationships:

> A hearing impaired boy only eight years old necessarily depends upon the adults with whom he resides for his care. If the State did not tend to Tremain's basic needs while he resided at the school, those needs would go unmet . . . . [W]e find unpersuasive the State's argument that Tremain was not committed to the full-time care of the State.

Id. at 1526.

111. *Id.* at 1527. This ruling is based on the principle that state actors are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

112. Spivey v. Elliot, 41 F.3d 1497 (11th Cir. 1995).

113. *Id.* at 1499. The Court, on reconsideration, recognized that since the case could be, and in fact was, decided on other grounds—*i.e.* the "clearly established" element of qualified immunity—then it is imprudent to rule on peripheral constitutional issues like whether a special relationship exists. *Id.* at 1498–99. On the special relationship issue in the original *Spivey*, the Court stated: "[t]his panel has chosen to withdraw all of its prior opinion which relates to whether the complaint alleges a constitutional right so that the opinion will serve as no precedent on that issue." *Id.* at 1499.

114. 909 F.2d 267 (7th Cir. 1990).

115. *Id.* at 272.

116. *Id.* at 268. The students did not bring suit against the molester himself; rather, they named the school district, the board of education, the superintendent, and the school's principal. *Id.*

117. *Id.* at 272. Notably, the plaintiffs did not put forward a state-created danger theory of

The conclusion that no special relationship exists between students and their school soon became the norm around the circuit courts.[118] Generally, courts have focused on a handful of elements when declining to find a special relationship, including: the extent of restraint upon the student's liberties, duration of restraint, the voluntary or involuntary nature of the student's relationship with the school, parental involvement, and extent of the student's dependency on the school.[119] These factors reveal a focus on determining whether a public school has sufficiently deprived the student of his or her liberty so that he cannot care for his basic needs.[120]

B. The Plaintiff's Impotent Armory

Occasionally, plaintiffs asserting § 1983 claims against public schools have attempted to show sufficient deprivation giving rise to a special relationship on two bases: state compulsory attendance laws and the legal principle of *in loco parentis*.[121]

In every state, there are compulsory attendance laws that require children within a certain age bracket to attend school.[122] While the ages to which the so-called truancy laws apply vary, they generally impact children aged six to sixteen.[123] Typically, subject to some well-regulated exceptions,[124] parents of the children in violation of truancy laws are held criminally liable.[125] Plaintiffs use compulsory attendance laws to bolster

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liability, instead focusing exclusively on a special-relationship theory. *Id.* at 271–72 ("[T]he plaintiffs do not allege that the school defendants promoted school policies that encourag[ed] a climate to flourish where innocent [children] were victimized.") (internal quotation marks omitted).

118. *See, e.g.*, Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992); Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521 (5th Cir. 1994).

119. *See, e.g.*, *Middle Bucks*, 972 F.2d at 1371–72.

120. *See* Patel v. Kent Sch. Dist., 648 F.3d 965, 974 (9th Cir. 2011). Using *DeShaney* as its analytical bedrock, the Court concluded the school did not meet the high threshold of deprivation needed to establish a special custodial relationship. *Id.*

121. *See Middle Bucks*, 972 F.2d at 1370.

122. *See* David Allen Peterson, Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway?*, 24 WASHBURN L.J. 274, 278 n.50 (1984).

123. *See Compulsory Attendance Laws Listed by State*, NAT'L CTR. FOR SCH. ENGAGEMENT, http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/15.pdf (last visited Aug. 17, 2014).

124. For example, a parent may homeschool his or her child, but may be required to show that the educational experience is as valuable as one would receive from a public school. *See, e.g.*, ALASKA STAT. ANN. § 14.30.010 (West 2007).

125. *See, e.g.*, ALA. CODE § 16-28-12 (1975) ("Each parent, guardian, or other person having control or custody of any child required to attend school or receive regular instruction by a private tutor who fails to have the child enrolled in school or who fails to send the child to school, or have him or her instructed by a private tutor during the time the child is required to attend a public school . . . or fails to compel the child to properly conduct himself or herself as a pupil in any public school in

their § 1983 claims by arguing that these laws quite clearly impact the voluntariness of their attendance at the defendant school. And, for that reason, their relationship with the school is akin to those between prisoners, mental patients, and foster children and their custodians.[126] The touting of compulsory attendance laws is aimed at probing some open-ended language in the *DeShaney* decision: "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, *or other similar restraint of personal liberty*—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."[127] Plaintiffs hope that compulsory attendance laws constitute this "similar restraint of personal liberty" by mandating, with threat of criminal liability, that children attend school. However, the courts have routinely struck down this argument.[128]

Another option for a § 1983 plaintiff is to use the doctrine of *in loco parentis* to premise a special relationship between school and student. *In loco parentis* denotes a legal relationship in which a nonparent individual or entity assumes the rights and duties that normally attach to the parental relationship.[129] For instance, a person standing *in loco parentis* with a child is responsible for providing at least some protection and for furnishing basic necessities and care to the child.[130] It is fairly settled that *in loco parentis* applies in public schools, though the precise scope of the school's assumption of duties is unclear.[131] The doctrine of *in loco*

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accordance with the written policy on school behavior adopted by the local board of education pursuant to this section and documented by the appropriate school official which conduct may result in the suspension of the pupil, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than one hundred dollars ($100) and may also be sentenced to hard labor for the county for not more than 90 days.").

126. *See Middle Bucks*, 972 F.2d at 1371–72. The argument is that, like the special relationship between prisoners and wardens, the involuntary nature of a student's attendance creates a similar special relationship where the state's duties to protect arise.

127. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (emphasis added).

128. *See, e.g.*, Patel v. Kent Sch. Dist., 648 F.3d 965, 973 (9th Cir. 2011) ("Although we have not yet applied *DeShaney* to the context of compulsory school attendance, every one of our sister circuits to consider the issue has rejected" the argument that compulsory attendance is sufficient to create a special relationship).

129. *See generally* James L. Edwards, Note, *In Loco Parentis: Definition, Application, and Implication*, 23 S.C. L. REV. 114, 114 (1971). *See also* 67A C.J.S. *Parent and Child* § 346 (2002).

130. *See* Edwards, *supra* note 129, at 115. *See also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) ("These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.").

131. *See* Morse v. Frederick, 551 U.S. 393, 416 n.6 (2007) (Thomas, J., concurring) ("At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools."). Cases in which the issue of *in loco parentis* frequently appears are First

parentis has been used to grant schools the power to discipline students, make and enforce rules, and generally maintain a functioning school environment.[132] But, the flip-side of the doctrine—namely, the imposition of duties on the one standing *in loco parentis* to the child—has been less discussed.[133] For example, in *Bethel School District No. 403 v. Fraser*,[134] the Supreme Court held that schools have an interest in protecting children from coming into contact with lewd or sexually explicit speech.[135] However, the Court did not hold that the school had a duty to prohibit lewd speech, only that it has the power to decide what kinds of speech constitute "lewd" and use disciplinary action to combat against such speech.[136] Even in *Fraser*, the Court is focused on expanding school's rights rather than holding schools accountable for student safety. Thus, it's not surprising that, like compulsory attendance laws, courts have rejected the use of *in loco parentis* as grounds for finding § 1983 liability.[137]

IV. RECONSIDERING COURSE: THE INCONSISTENCIES AND INCOHERENCE IN THE CURRENT APPROACH TO § 1983 CLAIMS AGAINST PUBLIC SCHOOLS

As it stands today, courts have nearly unanimously rejected plaintiffs' arguments that compulsory attendance, even in conjunction with schools' *in loco parentis* duties, can support a public school's § 1983 liability for private actors causing harm to students.[138] But a categorical denial of such arguments is unfortunate and not easily rationalized with case law and an understanding of child psychology.

Amendment, student-speech cases. In these cases, the doctrine is usually employed to show a school's right to restrict student speech. *See id.* Thus, schools have enjoyed using *in loco parentis* as a rights-giving principle. However, when schools dispute duties in § 1983 claims that are in part grounded on an *in loco parentis* theory, it seems that the schools may be having their cake and eating it, too.

132. *Id.* at 413–14.

133. *See* Susan Stuart, In Loco Parentis *in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 981 (2010) ("[T]he Court's authoritarian tendencies remain focused on the school districts' right to discipline and not on the concomitant duty to protect . . . .").

134. 478 U.S. 675..

135. *Id.* at 684.

136. *Id. Fraser*'s plaintiff contested his school's decision to suspend him for a sexually explicit speech he gave at a school assembly. *Id.* at 678. The Court upheld the school's disciplinary action: "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.* at 685.

137. *See, e.g.*, Hasenfus v. LaJeunesse, 175 F.3d 68, 71 (1st Cir. 1999).

138. *See supra* Part III.B.

A. Reviving In Loco Parentis and Compulsory Attendance as Argumentative Bases

When the Supreme Court stated that it does "not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect,'"[139] it was doubtful that the Court intended to completely immunize public schools from liability under *DeShaney*. Regardless, courts have used this statement (averred in dicta) as broad license to reject such claims against public schools.[140]

This is an unreasonable development, as these *DeShaney* cases against public schools take a variety of forms—different plaintiffs, different types of schools, and different degrees of misconduct—that should factor into an analysis of whether liability exists. To have a nearly categorical rule that exempts public schools from § 1983 liability, despite the vast differences among them, is unjust. Fortunately, some courts have recognized the problematic nature of such a sweeping immunization. The Fifth Circuit, for instance, is "loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a due process violation."[141] Still, courts remain extremely hesitant to find liability even in some of the extreme, intuitively valid § 1983 cases.[142]

Reasons abound for the courts' hesitance. Courts find troublesome the degree of voluntariness that parents and students enjoy with respect to school attendance.[143] The Third Circuit, in *Middle Bucks*, distinguished public schools from other situations by emphasizing:

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139. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). This quote is about as close as the Supreme Court has gotten to addressing the issue central to this Note.

140. *See* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 859 n.5 (5th Cir. 2012).

141. *Hasenfus*, 175 F.3d at 72. The Court went on with some extreme examples that might give rise to liability:

> Thus, when *Vernonia* says that the schools do not "as a general matter" have a constitutional "duty to protect," perhaps in narrow circumstances there might be a "specific" duty. If Jamie had suffered a heart attack in the classroom, and the teacher knew of her peril, could the teacher merely leave her there to die without summoning help? If a six-year old child fell down an elevator shaft, could the school principal ignore the matter? Of course, school officials might be held liable in tort for such omissions, but common law liability aside, we hesitate to say for certain that substantive due process plays no role.

Id.

142. *See Covington Cnty.*, 675 F.3d at 863–69.

143. *See* D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371 (3d Cir. 1992). *Middle Bucks* was an early analysis of *DeShaney* as applied in the public school context. The Court downplayed the restraint on personal liberty in the public school context by citing Pennsylvania statutes that gave parents discretion to opt their children out of certain field trips and religious instruction and by trivializing truancy penalties for violating compulsory attendance laws. *Id.* at 1371.

> it is the parents who decide whether that education will take place in the home, [or] in public or private schools . . . . For some, the options may be limited for financial reasons. However, even when enrolled in public school parents retain the discretion to remove the child from classes as they see fit . . . .[144]

Also, the fact that parents remain ultimately responsible as the children's "primary caretakers" weakens the argument for finding a special relationship between a student and his or her school.[145] There is also the concern that finding a special relationship between school and student will open the door to many more lawsuits against school districts.[146] But these concerns are inconsistent with the original reasoning in cases like *DeShaney* and otherwise not as worrisome as they first appear.

In some cases, public schools are so similar to foster care services,[147] involuntary health institutions, and even prisons for §1983 purposes that to exempt public schools and not the others from liability is unjustifiable. As discussed above, courts have regularly found special relationships between the latter institutions and § 1983 plaintiffs.[148] The basis of these special relationships is the state actor's "affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty."[149] Case after case, circuit courts have found that, despite compulsory attendance laws that require children of a certain age to enroll in and attend school, sufficient restraint of personal liberty is absent.[150] However, there is little

144. *Id.*

145. *Id. See also* J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) (holding that students and parents "retain substantial freedom to act"). The *Middle Bucks* reasoning is particularly resonant with other courts confronting the issue of special relationships between school and student, and remains a powerful source of argumentation against such a finding. *See, e.g.*, Patel v. Kent Sch. Dist., 648 F.3d 965, 973–74 (9th Cir. 2011).

146. Jennifer Childress, *Appeals Court to Weigh In on School District's Duty to Protect Students Against Harm by a Private, Third Party*, TEX. SCH. ADM'RS' LEGAL DIGEST ONLINE (Nov. 10, 2011), http://parkplacepubs.biz/wordpress/appeals-court-to-weigh-in-on-school-district%E2%80%99s-duty-to-protect-students-against-harm-by-a-private-third-party/.

147. For a good discussion regarding the distinction between foster care services and public schools, see *Middle Bucks*, 972 F.2d at 1372–73. The Third Circuit holds that in foster care services, the "state assumes an important continuing, if not immediate, responsibility for the child's well-being. In addition, the child's placement renders him or her dependent upon the state, through the foster family, to meet the child's basic needs." *Id.* at 1372. However, as is argued in Part IV of this Note, a public school functions in much the same way.

148. *See supra* text accompanying notes 45 & 48.

149. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1988).

150. *See supra* text accompanying note 126.

to distinguish the restraint on liberty public schools typify, especially in cases of young children or those children that require special supervision.

The Fifth Circuit's opinion in *Walton v. Alexander*[151] is an example of a federal court recognizing that a student can be sufficiently restrained by his or her school to give rise to § 1983 liability (though the opinion, in line with theme, was reversed *en banc*).[152] *Walton* concerned a hearing-impaired student at Mississippi's School for the Deaf who was repeatedly sexually assaulted by a fellow student.[153] The court found a special relationship existed between the plaintiff and her school, distinguishing it from other cases that found no such relationship between a student and his or her school.[154] To distinguish the case, the court relied on specific facts, such as the plaintiff's impaired communication skills, the school's twenty-four hour custody of the plaintiff, the school's strict rules restraining students from leaving its campus, the lack of viable educational options available to plaintiff's family, and the plaintiff's "dependen[ce] on the School for his basic needs."[155]

Walton, unfortunately, was reversed,[156] but its first iteration represented the exceptional case that critically examines the unique facts and context of the student's victimization.[157] The refusal to confront the specific facts of a case is an unfortunate norm in § 1983 claims, considering that in cases like *Walton* and *Patel*, there is arguably little to distinguish the relationship of the students and their schools with other relationships the

151. 20 F.3d 1350 (5th Cir. 1994), *rev'd en banc*, 44 F.3d 1297 (5th Cir. 1995).

152. *Id.* at 1355.

153. *Id.* at 1353.

154. *Id.* at 1355. The Court principally used *Middle Bucks* as its foil, concluding that enough facts distinguished *Walton* from *Middle Bucks* so as to find a special relationship. *Id.*

155. *Id.* Keying on *DeShaney*'s language, which has been oft-repeated in this Note, the Court found that such factors established that plaintiff was in a "category of persons in custody by means of 'similar restraints of personal liberty.'" *Id.*

156. The central issue of the reversal was whether the school had a special relationship with the plaintiff—not the ultimate liability of the school. *Walton*, 44 F.3d at 1300–01.

157. *Cf.* Patel v. Kent Sch. Dist., 648 F.3d 965, 972–74 (9th Cir. 2011) (holding no special relationship between disabled student and school with little more than a passing mention of the unique facts of the case). However, even in the first *Walton* opinion where the court held a special relationship did exist, the court ultimately concluded that the school officials were not deliberately indifferent with respect to the plaintiff's abuse, and thus could not be held liable. *Walton*, 20 F.3d at 1356. The court enumerated the numerous (ineffectual) steps the school took in response to allegations of abuse:

> She filed a report to the Mississippi Department of Welfare; she personally investigated the assault; she provided Walton with medical treatment administered by the School's physician; she called the School's discipline committee to counsel both students and notify each student's parents; she suspended both students from the School campus for three days; and she separated Walton from his assailant as best she could under the circumstances created by the School's budgetary constraints.

Id.

court has deemed sufficient to create a special relationship. In *DeShaney*, the Supreme Court noted that had the state actively taken Joshua from his parents and put him in state-controlled foster care, then a special relationship may have been established.[158]

In the wake of *DeShaney*, circuit courts have taken great pains to distinguish the nature of the school-student relationship from other relationships that give rise to a special relationship. The case law repeatedly makes two main distinctions: first, parents still retain responsibility for their child's basic needs[159] and, second, there remain alternative educational options of which students can avail themselves.[160]

These distinctions are misleading. First, cases like *Walton* make clear that there are some situations where a child who is forced to be enrolled in some form of school cannot possibly be expected to provide for his or her basic needs *while in custody of the school*.[161] When a school mandates a specific check-out procedure, and then allows a stranger to violate it while taking advantage of a young, mentally disabled student,[162] it should not matter that the child's parents retain ultimate responsibility for his or her basic needs. Rather, it should matter that while the student is at school, and the harm occurs while that student is in the school's custody, that he or she is then, at the time of abuse, unable to care for his or her basic needs. This is the situation that the Fifth Circuit contemplated in *Hasenfus* and felt compelled to leave open for the potential of finding a school liable for due process violations.[163] The case law would have us believe that young, mentally disabled children in the custody of their schools are more responsible for their well-being then fully matured, mentally sound incarcerated adults.[164] Though courts have held that a special relationship

158. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 n.9 (1989).

159. *See* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 860 (5th Cir. 2012). *See also* Maldonado v. Josey, 975 F.2d 727, 732–33 (10th Cir. 1992).

160. *See* Allen v. Susquehanna Twp. Sch. Dist., 233 F. App'x 149, 153 (3d Cir. 2007) (pointing out the possibility of plaintiff seeking "the haven of his emotional support classroom").

161. *Walton*, 20 F.3d at 1355. The Court in *Covington County* acknowledged that schools do take custody of their students, but not in the same way that prisons and involuntary health institutions take custody of those subject to their restraints. *See Covington Cnty.*, 675 F.3d at 857–58. What those differences are might be obvious, but why they matter for liability purposes went unstated by the Court. *Id.*

162. *See Covington Cnty.*, 675 F.3d at 852–53; *supra* Part I.

163. *See* Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999); *see also supra* text accompanying note 137.

164. After all, an incarcerated individual—regardless of his particular mental or physical characteristics—is deemed to be in a special relationship with the state, which entails that he is "unable to care for himself." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

should not depend on the individual characteristics of the plaintiff,[165] it seems irresponsible not to consider such factors if the law is to turn on whether an individual is capable of tending to his or her basic needs.[166] After all, an examination of personal competency is essential to determine whether an individual is able to look after his or her personal welfare.

Second, courts emphasize that the involuntary nature of incarceration or institutionalization is meaningfully different from the involuntary nature of students' public school attendance.[167] The primary reason is that parents "voluntarily" choose to send their children to the public schools in question; other options, like private schools and home schooling, exist.[168] However, as *Walton* originally pointed out, the economic or practical realities of many families make it so that the local public school is the only real educational option that children have.[169] Practically, then, compulsory attendance laws make children's attendance at public school effectively involuntary.[170]

Additionally, the federal courts have used *in loco parentis* inconsistently, focusing on the power it gives to schools over their students rather than the concomitant duty to protects their students. In cases where the disciplinary or supervisory power of schools is questioned, the Supreme Court has used *in loco parentis* to justify the school's infringement on its students constitutional rights.[171] Though

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165. *See Covington Cnty.*, 675 F.3d at 859 ("The suggestion that we ought to examine an individual's characteristics to determine whether the state has assumed a duty to care for that person is wholly unsupported by precedent."); Patel v. Kent Sch. Dist., 648 F.3d 965, 974 (9th Cir. 2011).

166. Recall that the reasoning regarding special relationships in *DeShaney* is focused on state action that makes an individual "unable to care for himself." *DeShaney*, 489 U.S. at 200.

167. *See, e.g.*, *Covington Cnty.*, 675 F.3d at 861.

168. *See id.* ("Jane's parents were free at any time to remove Jane from the school if they felt that her safety was being compromised. This reality is a far cry from the situation of incarcerated prisoners, institutionalized mental health patients, or children placed in foster care.").

169. Walton v. Alexander, 20 F.3d 1350, 1355 (5th Cir. 1994).

170. *See supra* text accompanying notes 109–111.

171. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995). In justifying a student-search policy, the Court noted that "the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Id.* at 665. However, the Court did directly combat—but not completely foreclose—the implication that a complementary duty to protect arises.

> While we do not, of course, suggest that public schools *as a general matter* have such a degree of control over children as to give rise to a constitutional duty to protect, we have acknowledged that for many purposes school authorities ac[t] *in loco parentis*[.]

Id. at 655 (emphasis added) (internal citations and quotation marks omitted) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)). *See also* Stuart, *supra* note 133, at 981 (noting the Court's "authoritarian tendencies remain focused on the school districts' right to discipline and not on the concomitant duty to protect, except in rationalizing the expansion of school district discretion to control and discipline").

leaving open the possibility for a school to assume constitutional duties to protect its students, it is clear that the Court recognizes no general duty to protect.[172] It appears, however, that the federal circuit courts have closed this window of possibility and have instead settled on a wholesale rejection of such duties arising from an *in loco parentis* theory.[173] When disregarding the unique facts of a case and ignoring the qualification on the "no duty" principle merely "as a general matter,"[174] the circuit courts have permitted public schools to have *and* eat their cake.

Considering the foregoing, it is quite clear that circuit courts have effectively shut the door on the possibility of a special relationship between a school and its student by rejecting, as premises, *in loco parentis* authority and compulsory attendance. Additionally, the state-created danger doctrine has become an impractical base of liability, especially in the public school context.[175] With some circuit courts requiring actual knowledge of a specific risk to a school's students,[176] or, even more outrageous, an actual intent to harm its students,[177] the state-created danger doctrine appears to be more of a hollow doctrine than an effective tool for redress. Even circuit courts with laxer standards still require affirmative action,[178] ignoring that abhorrent inaction can be even more culpable than affirmative acts in a school environment. Consequently, the courts have effectively immunized public schools from § 1983 liability when students have been harmed at the hands of private actors, even where a school has egregiously mismanaged their own policies.[179] This is especially unfortunate considering the psychological dynamic between schools and their abused students.

B. Changing Course: Psychological Justifications

The tragic fact of these cases is that the victims are generally young students who have been taken advantage of due to their particular

172. *See supra* text accompanying note 141.
173. Patel v. Kent Sch. Dist., 648 F.3d 965, 973 (9th Cir. 2011).
174. *See supra* text accompanying note 141.
175. *See supra* Part II.B.2.
176. *See* Fields v. Abbott, 652 F.3d 886, 893 (8th Cir. 2011) (holding a state actor must be aware of facts constituting the risk and actually make the inference that the risk exists).
177. *See* Slaughter v. Mayor and City Council of Balt., 682 F.3d 317, 323 (4th Cir. 2012) (holding liability turns on whether state employer intended to harm plaintiff employee).
178. *See, e.g.*, Cutlip v. City of Toledo, 488 F. App'x 107, 117 (6th Cir. 2012) (including affirmative action in its enumeration of state-created danger elements).
179. *E.g.* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 853 (5th Cir. 2012).

handicaps.[180] Considering the fact that these students may be incapable of defending themselves against potential abusers while at school, courts should be more apt to hold schools liable when they have failed to protect their vulnerable students. Sexually abused minors rarely disclose their abuse due to fear of suspicion, disbelief, humiliation, or punishment.[181] Compounding this is the fact that sexual abuse by an adult—especially those in a dependent relationship with a child, like teachers[182]—is rarely a one-time occurrence.[183] Consequently, young students are uniquely at risk of ongoing, unreported sexual abuse.

Additionally, schools are in a special position to detect signs of child abuse that might escape parents, especially if such abuse happens in the school environment.[184] Studies have shown that schools are not powerless in educating students about potential abuse, thereby equipping them with the knowledge to combat against it.[185] Importantly, this is not to suggest that schools should have a legal duty to sufficiently educate its students about sexual abuse. However, these facts demonstrate the unique vulnerability of young students who are away from their parents in a school environment. They also demonstrate the special role that schools play in a young student's life, especially when such a relationship is effectively forced upon the children through compulsory attendance laws.[186] Some Circuit judges have recognized that "[s]chool teachers and administrators assume society's duty of providing a safe and orderly environment in which education is possible, given that students [are] too

180. *See, e.g.*, D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366 n.5 (3d Cir. 1992); *Covington Cnty*., 675 F.3d at 853; Patel v. Kent Sch. Dist., 648 F.3d 965, 968 (9th Cir. 2011).

181. Roland C. Summit M.D., *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 187–88 (1983). Dr. Summit enumerates the five symptoms of what he terms the "Child Sexual Abuse Accommodation Syndrome." *Id.* at 177. Those symptoms are secrecy, helplessness, entrapment and accommodation, delayed disclosure, and retraction. *Id.* Together, these symptoms work to delay, obscure, or forestall completely efforts to stop the child's abuse.

182. *See* Sondra H. Birch & Gary W. Ladd, *The Teacher-Child Relationship and Children's Early School Adjustment*, 35 J. SCH. PSYCHOL. 61, 63 (1997).

183. Summit, *supra* note 181, at 184.

184. Many organizations recognize and disseminate materials regarding the school's role in preventing child sexual abuse. *See, e.g.*, *Child Protection*, UNICEF.ORG, http://www.unicef.org/teachers/protection/ prevention.htm (last visited Aug. 17, 2013).

185. *See* Jan Rispens et al., *Prevention of Child Sexual Abuse Victimization: A Meta-Analysis of School Programs*, 21 CHILD ABUSE & NEGLECT 975, 975 (1997). The authors noted that "[t]he most widely applied preventative strategy [for child abuse] focuses on the educational system, not only for reasons of economy of scale, but also because classrooms offer outstanding opportunities to promote discussion and reflection about program content which may enhance its effectivenss." *Id.* They went on to note that "nearly all victimization prevention programs are school-based." *Id.*

186. *See* Part IV.A.

young to be considered capable of mature restraint."[187] It is time for the courts to take this duty seriously. Public schools that are deliberately indifferent to their students' abuse have violated more than a moral duty and should be held liable in constitutional tort.[188]

C. Proposing a Balancing Test

The purpose of the foregoing was to argue that the current approach to finding public schools liable under § 1983 is unduly strict and mechanistic. Rather than a neatly categorical exemption of public schools from § 1983 liability, courts should apply a balancing test to determine whether the school was in a special relationship with the student so that liability attaches.[189]

The balancing test should use several factors, such as the age and mental competency of the plaintiff; the extent of the school's control over the student, including the severity of its rules and policies; the culpability of the school in its action or inaction; and other factors that impact the student's individual liberty.[190] Countervailing interests include the cost of the states having to defend and pay for these § 1983 claims in the face of an affirmative duty to protect certain students. However, this risk of financial burden should be substantially reduced by the balancing test's natural inclination to narrow the scope of students who could bring a successful claim—students of a certain age and sound mind would not be sufficiently deprived of liberty such that a special relationship arises. Another factor that should be weighed is the causal relationship between

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187. Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1473 (9th Cir. 1984) (Kilkenny, J., dissenting). Again, this is one of those cases that grandly tout a school's societal duty to protect its students to emphasize the broad supervisory rights of schools, rather than to hold the schools to legal duties owed to its students. *Id.* The dissenting judge also referenced a school's "broad supervisory and disciplinary powers." *Id.* at 1472.

188. For a similar argument that also uses psychological studies, *see* Kim, *supra* note 15, at 1132–33. Professor Kim states:

> As many courts have stated, students daily leave the confines of the school campus and have the opportunity to get help from other sources. However, it is generally acknowledged that young children have a very difficult time speaking about and disclosing sexual abuse. Psychological studies have shown that many victims of sexual abuse often deny it themselves in order to cope with the trauma they have experienced.

Id. at 1133 (internal citations omitted).

189. As in prisons and involuntary health institutions, special relationships are formed when the state deprives an individual's liberty such that he is unable to provide for his basic welfare. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

190. The factors developed here are aimed at capturing the heart of *DeShaney*'s emphasis on a relationship arising once the state has restrained an "individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty . . . ." *Id.*

the school's action and the harm to the student. If the school is found to have been powerless to stop the harm, or too remote in the causal chain,[191] then no liability should be found. The Fifth Circuit's original decisions in *Covington County* and *Walton* reflect an understanding of this balancing test, as the Court looked to the plaintiffs' ages and disabilities, the impact of the schools' strict rules on the plaintiffs' freedom, and the lack of education options available to the plaintiffs.[192]

Using a balancing test that contemplates these factors, courts can move away from an unduly strict and mechanistic application of *DeShaney* and toward a more nuanced analysis that properly takes into account the heart of due process jurisprudence developed in *Estelle*, *Youngberg*, and *DeShaney*.

V. CONCLUSION

Since *DeShaney*, the circuit courts have become more restrictive in deciding § 1983 claims. This narrow reading has extended into constitutional tort claims against public schools, which is especially problematic. Notwithstanding the tragic nature of many of the cases in this area of the law, the principles originally underlying § 1983 liability have been confused and misapplied. At stake are the constitutional rights of the country's students, students who are often too handicapped or too young to properly guard against abuse when they are in the custody of their schools. To better safeguard the constitutional rights of these students, the law should adopt a flexible balancing test to determine whether their schools are liable for the abuse they have suffered while in the hands of

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191. Basic tort principles of proximate cause should be used in this consideration. For example, if the conduct of the school "has such an effect in producing the harm as to lead reasonable men to regard it as a cause," then the school is not too remote in the causal chain and may be found liable. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965).

192. *See* Walton v. Alexander, 20 F.3d 1350, 1355 (5th Cir. 1994); Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 344–45 (5th Cir. 2011). In the original *Covington County*, the Fifth Circuit used the plaintiff's very young age and the school's affirmative acts as a basis of distinction from precedent, finding a special relationship between school and student. 649 F.3d at 344–45. In the original *Walton*, the Fifth Circuit again expounded on the personal characteristics of the plaintiff, as well as characteristics regarding the school. *Walton*, 20 F.3d at 1355. The Court noted:

> [T]he School had twenty-four (24) hour custody of Walton, a handicapped child who lacks the basic communications skills that a normal child would possess. Because its students are handicapped, the School has to enforce strict rules that impact on what the students can and cannot do. Obviously, Walton was not free to leave when he resided at the School. In addition, the economic realities of most Mississippi families are such that there is no other viable option to them if they want their handicapped children to receive an education.

Id. Unfortunately, as noted earlier, the Fifth Circuit reversed this well-reasoned opinion in an *en banc* hearing. Walton v. Alexander, 44 F.3d 1297, 1299 (5th Cir. 1995) (en banc).

their schools. Schools are traditionally thought of as a place where students can learn and develop in a safe, educational environment. The law should reflect this perspective and hold deliberately indifferent public schools liable for the oftentimes tragic abuse that their students suffer. This means that courts must move away from the mechanistic and overly narrow approach to § 1983 liability currently adhered to and move toward a more flexible balancing test.

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