Opening the “Snake Pit”: Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine

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In the aftermath of the horrific school shooting at Sandy Hook Elementary School in Newtown, Connecticut, parents, students, and school administrators began to fear the unthinkable—that a violent, ruthless criminal could invade their school campuses and randomly target innocent youth. Even though statistics show that violent crime in elementary and secondary schools is on the decline, trepidation and anxiety on school campuses across the country is at an all-time high.

In response to this perceived threat, in 2013, lawmakers in over thirty states proposed bills that, if passed, would authorize school officials to carry weapons on their persons during the school day. Currently, at least eleven states have adopted this “armed-teachers” approach in fighting the war against school violence.

This Article explores the potential § 1983 liability that the armed-teachers approach could create. Historically, § 1983 shields public schools from liability for the injuries resulting from the unforeseeable, violent acts of third parties. But when schools themselves invite the risk onto campus, they become vulnerable, throwing schoolchildren into the “snake pit” of danger and exposing themselves to liability under the government-created risk doctrine. Walking the reader through the elements of a state-created danger claim brought by a plaintiff whose injury or death was proximately caused by the armed-teachers approach, this Article examines the inherent risk involved in bringing firearms into schools, especially when guarded by inadequately trained, or in some cases untrained, teachers.

Furthermore, where school districts adopt armed-teachers policies and fail to adequately train or supervise those teachers serving as quasi-security guards pursuant to their policy, they expose themselves to Monell liability. Most districts that have adopted this approach have done so for fiscal reasons, but because the cost of hiring security is lower than the cost of the risk of injury and resultant damages incurred by the school, the money-saving justification is foolhardy and, at best, illogical.

Finally, this Article cautions that schools must not lose sight of the appropriate role and function of our schoolteachers. With education reform and teacher effectiveness at the crux of a national debate, schools should be wary of muddying the role of our educators. Instead, schools should allow teachers to focus on educating and leave the patrol-work to the properly trained experts.
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Opening the “Snake Pit”: Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine

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I. INTRODUCTION

Noah Pozner, age six, “had a huge heart[,] . . . was . . . a little bit rambunctious, [had] lots of spirit, . . . [and] was really the light of the room.”¹ Grace McDonnell, age seven, had just celebrated her birthday by blowing out the candles on “a purple cake with a turquoise peace sign and polka dots.”² Grace “was all about peace and gentleness and kindness.”³ Chase Kowalski, age seven, loved baseball and the Cub Scouts and had just asked Santa Claus for his missing two front teeth for Christmas.⁴ Ben Wheeler, age seven, “loved The Beatles, lighthouses and the No. 7 train to Sunnyside, Queens.”⁵ He “was an irreplaceably bright and spirited boy whose love of fun and excitement at the wonders of life and the world could rarely be contained.”⁶

On December 14, 2012, Noah, Grace, Chase, and Ben, along with sixteen of their peers and six educators, lost their young lives when the unthinkable happened at Sandy Hook Elementary School in Newtown, Connecticut.⁷ Within the span of approximately six horrific minutes, a lone shooter, armed with semiautomatic pistols and an assault rifle, entered the school and turned an entire nation upside-down.⁸

² Id.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.

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The 2012 Sandy Hook massacre is the latest in a litany of horrifying school shootings, including Columbine and the Virginia Tech tragedies. Recently, it seems that law enforcement officials are intervening on a weekly, and sometimes even a daily, basis, preventing perpetrators from inflicting violence on school campuses.


With children as targets and school campuses seemingly vulnerable to attack, parents, teachers, and administrators face difficult, perhaps unanswerable, questions. At what point did school campuses become battlegrounds, where schoolchildren go to learn in an environment permeated with fear and terror? Do schools have a legal duty to protect students from the random, unforeseeable violent acts of third parties? What measures should schools take to anticipate and prevent these unthinkable acts? Should teachers and school administrators actively participate in schools’ efforts to guard and protect the children in their custody by carrying weapons on their persons during the school day? Are teachers the appropriate individuals to assume the role of security guards, and are they adequately trained to use a weapon effectively during a fast-paced, traumatic, live-shooter event?

Schools have responded to these questions by implementing a variety of measures to improve school safety. Safety measures on K-12 campuses include the use of metal detectors, the presence of security guards, rules and regulations regarding student conduct and dress, profiling of potentially violent students, anti-bullying instructional programs, and counseling and mediation.13

Despite the use of these broad measures, the National Rifle Association and conservative-minded lawmakers insist that representatives of every school in the country should be armed with guns in anticipation of an attack.14 Consistent with this line of thinking, several states have adopted a radical approach to protecting students from the unforeseeable, violent crimes of third parties by arming teachers and school administrators with handguns during the school day.15

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14 See Thomas Christoph Keller, Comment, ABC’s and AR-15’s: Arming Arkansas’s Teachers, 67 Ark. L. Rev. 687, 687 (2014) (quoting the infamous proclamation made by NRA CEO Wayne LaPierre in the wake of the Sandy Hook massacre that “[t]he only thing that stops a bad guy with a gun is a good guy with a gun”).

To date, no school utilizing this strategy has faced a live-shooter situation. However, research and anecdotal evidence suggest that equipping teachers and school administrators with guns increases the risk of harm to students; studies testing the efficacy of police training to prepare officers for live-shooter situations demonstrate that even the best training produces high rates of misfiring and bystander injuries. In light of this evidence, it is readily apparent that teachers would be much less effective than police officers in wielding guns during a live-shooter situation. A recent training exercise in Arkansas during which a pro-gun senator accidentally shot an actor posing as a teacher with a rubber bullet illustrates that arming the untrained actually increases the likelihood of harm during a live-shooter event.

This Article posits that while arming teachers may appear to be cost effective and gives the perception of greater safety, it actually creates a greater risk of foreseeable harm to students and exposes schools to legal liability. Generally, schools owe no legal duty to protect students from violence caused by third parties. However, this strict no-duty rule has exceptions. Arming teachers constitutes a government-created danger and pierces the no-duty rule. While schools, as government entities, and teachers acting within the scope of their official duties are shielded from liability based on common-law negligence, they can be held legally liable for civil rights violations. The “armed teachers” model generates a government-created risk, exposing schools to liability under 42 U.S.C. § 1983 and ultimately frustrating its essential purpose: protecting children and limiting school district liability.

This Article proceeds in four parts. Part II summarizes school districts’ varying responses to the rising threats of violence in the elementary and secondary school setting. Part III first presents an overview of the current legal landscape governing school district liability, cautioning districts that courts have limited schools’ immunity to those situations in which the risk involved was unforeseeable and outside the school’s direct control. It then introduces two exceptions to the general no-duty rule: (1) where injury is

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16 See infra notes 130–34 and accompanying text.
18 See, e.g., Morrow v. Balaski, 719 F.3d 160, 167, 170 (3d Cir. 2013) (explaining that public schools have a constitutional duty to protect students from harm caused by third parties only if there is a “special relationship” between the school and the student and citing case law from other circuits holding that there is generally no such relationship).
caused by a government-created danger, and (2) where a municipality failed to adequately train its employees after implementing a policy that clearly necessitates proper training. Part IV analyzes the potential for teacher liability when a gun-related injury or death is proximately caused by the armed-teachers approach. It concludes that armed-teacher victims, under the government-created risk doctrine, will be able to proceed at least beyond the motion-to-dismiss stage, exposing teachers to § 1983 liability.

Part V then analyzes a school district’s potential Monell liability, predicated upon the district’s adoption of an armed-teachers policy without providing adequate training to its employees.

In conclusion, this Article suggests a roadmap for combating school violence and cautions schools to be wary of muddying the role of our schoolteachers. With education reform and teacher effectiveness at the crux of a national debate, this Article advises schools to allow teachers to focus on educating, and leave the patrol-work to the properly-trained experts.

II. SCHOOL DISTRICTS’ RESPONSES TO THREATS OF VIOLENCE ON CAMPUS

In the wake of the last few decades, during which horrific tragedies like Columbine, Virginia Tech, and Sandy Hook became a real peril to schoolchildren across the country, parents of primary and secondary schoolchildren began to perceive,\(^20\) justifiably or not,\(^21\) a heightened threat

\(^{20}\) See, e.g., EDWARD GAUGHAN ET AL., LETHAL VIOLENCE IN SCHOOLS: A NATIONAL STUDY 2 (2001), http://www.alfred.edu/teenviolence/docs/lethal_violence_in_schools.pdf [http://perma.cc/4R3R-463C] (indicating that more than 75% of secondary schoolchildren believe that a school shooting could occur in their community); Lydia Saad, Parents’ Fear for Children’s Safety at School Rises Slightly, GALLUP (Dec. 28, 2012), http://www.gallup.com/poll/159584/parents-fear-schools-safety-rises-slightly.aspx (indicating that more than 50% of parents of primary and secondary schoolchildren believe that a school shooting is “very or somewhat likely” to occur in their community); School Violence, Gun-Related Injuries in Top 10 Child Health Concerns in U.S., 22 C.S. MOTT CHILD. HOSP. NAT’L POLL ON CHILD. HEALTH 1 (2014), http://mottnpch.org/sites/default/files/documents/081114_top10.pdf [http://perma.cc/GG9K-A3AM] (finding that school violence and gun-related injuries were fifth and ninth, respectively, in the national top ten child health concerns list).

of violence on campus. In response to this perceived threat, lawmakers, school administrators, and parent advocacy groups have implemented various approaches to minimize the risk.

Aimed at preventing the most extreme forms of violence, among the most commonplace safety measures used in schools today are weapons deterrence and the use of campus security and police officers. In the 2009–2010 school year, 84% of high schools, 73% of middle schools, and 51% of primary schools reported that they used security cameras to monitor their schools. In addition, schools commonly use metal detectors and conduct searches on student lockers and bags, especially in large urban middle and high schools.

School districts and local law enforcement are increasingly teaming up to ensure that more campuses have a security-guard presence. According to the National Center on Education Statistics, 43% of schools reported the presence of one or more security guards, security personnel, School Resource Officers (SROs), or sworn law enforcement officers at their schools at least once a week during the school year. Of that 43%, 12% of primary schools, 25% of all combined K-12 schools, 51% of middle schools, and 63% of high schools reported that their security officers routinely carried a firearm at school.

President Barack Obama has allotted millions of dollars nationwide to fund more SROs in schools that opt to utilize them. This executive

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23 In 1990, Congress passed the Gun-Free School Zones Act, which made it unlawful for “any individual knowingly to possess a firearm” in a school zone. 18 U.S.C. § 922(q)(1)(A) (1998 ed., Supp. V.). After facing a constitutional challenge in the U.S. Supreme Court in United States v. Lopez, 514 U.S. 549 (1995), where the Court held that the law exceeded Congress’ authority under the Commerce Clause, id. at 551, the law was amended to forbid the possession in a school zone of a firearm that “has moved in or that otherwise affects” interstate commerce. 18 U.S.C. § 922(q)(2)(A) (2012). The law does not appear to prohibit school districts from allowing teachers or other school officials to carry or discharge firearms on campus pursuant to a district-sanctioned security program. At the state level, “almost all states and D.C. prohibit guns in K-12 schools, but only 39 states and D.C. apply this prohibition to people who have been granted a permit to carry a concealed weapon.” Guns in Schools Policy Summary, LAW CTR. TO PREVENT GUN VIOLENCE (Nov. 1, 2013), http://smartgunlaws.org/guns-in-schools-policy-summary/#footnote_29_5686 [http://perma.cc/5CUF-6L5R].

24 ROBERS ET AL., supra note 13, at 86–88 (noting that 43% of K-12 and 28% of primary schools reported the presence of one or more security staff at their school at least once a week in 2009–2010).

25 Id. at 84.

26 Id. at 86.

27 Id.

28 Id. at 88.

29 See Evan Perez & Bryan Koenig, Obama Admin Funding Cops in Schools, CNN (Sept. 27, 2013, 4:31 PM), http://politicalticker.blogs.cnn.com/2013/09/27/obama-admin-borrows-a-page-from-the-nra-funding-cops-in-schools/ [http://perma.cc/SRXL-LH7V] (explaining that the Community Oriented Policing Services grants, about $125 million over a three-year period and announced annually by the Justice Department, will be given priority to place armed police officers in schools); see also
support follows the trend initiated by former President Bill Clinton in 1999 when he introduced the Safe Schools/Healthy Students Initiative and provided federal funding to over fifty communities for anti-violence programming. In 2000, former President Clinton bolstered the use of campus officers by providing more than $60 million to support 452 officers nationwide as part of the Justice Department’s COPS in Schools program.

With a rising number of schools utilizing SROs on campus, skeptics and critics on both sides of the “guns-in-school” debate are passionately voicing their concerns. Advocates of placing armed representatives on K-12 campuses urge either for a larger presence or a more aggressive role, outraged that shootings are still occurring at schools, while opponents argue that the presence of SROs is unnecessary, ineffective, or overly burdensome and expensive. In fact, opponents point to the fact that Columbine high school employed an armed security officer on April 20, 1999. Although community resource officer Neil Gardner engaged in a shootout with perpetrator Eric Harris, the exchange of gunfire did not deter Harris from entering the school building and continuing on with his killing spree.

Wherever one’s position lies with respect to the use of security measures in K-12 schools, most can agree that armed security officers, if used, should be properly trained and well-prepared to respond to another Columbine- or Sandy Hook-like event. Several organizations have created training programs for school security, including programs designed to simulate a live-shooter situation. Still, in an effort to cut costs, many

DeMitchell, supra note 21, at 283 (summarizing the executive response to the shooting at Sandy Hook Elementary School).


34 Id.

states have passed legislation or are interpreting existing legislation to allow teachers and administrators to carry guns on campus during the school day. In 2013, more than thirty state legislatures introduced bills that would permit school officials to carry guns on public or private school campuses.

Among others, states like Arkansas, Kansas, Colorado, South Dakota, Tennessee, Texas, and Utah authorize schools to allow teachers and other personnel to carry firearms on campus during the school day. Notably, these laws indicate a vast disparity regarding the amount of required training for teachers participating in armed-teachers programs. For example, Kansas law leaves it up to a governing school body, such as a school board, to prescribe any training requirements, while the Tennessee law requires all teachers participating in such a program to complete a forty-hour training program. The Georgia “guns-everywhere” law allows boards of education to adopt an armed-teachers policy, but it does not set forth a minimum number of training hours for participating teachers and school staff. Utah is one of the only states that authorizes individuals who hold concealed carry permits to carry licensed, concealed weapons onto public school campuses without exception.


See, e.g., Keller, supra note 14, at 688–89 (recounting the efforts of some school districts in Arkansas to lawfully arm public school employees).


Tenn. Code Ann. § 49-6-815 (1), (2) (West, Westlaw through 2015 1st Reg. Sess.).


Utah Code Ann. § 76-10-505.5 (West, Westlaw through 2015 Gen. Sess.).


specific requirements other than those required to obtain concealed carry permits.\textsuperscript{48}

III. PROTECTING THE HERD: SCOPE AND LIMITATIONS OF SCHOOL DISTRICTS’ LEGAL DUTY TO PROTECT

When a child falls victim to a shooting on a public school campus, her parents and survivors have few legal remedies. Generally, schools and teachers cannot be sued in their official capacities for negligence unless sovereign immunity is waived.\textsuperscript{49} Injured parties may, however, bring a federal cause of action against a school district, as an arm of the government, under 42 U.S.C. § 1983.\textsuperscript{50} That section provides an avenue through which a plaintiff can sue a state entity in federal court for the deprivation of her constitutional rights.\textsuperscript{51} Section 1983 holds liable anyone acting under color of state law who “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 [federal] laws.”\textsuperscript{52} A § 1983 claimant must satisfy two elements: (1) she was “deprived of an existing federal right,” and (2) “the deprivation occurred under color of state law.”\textsuperscript{53}

With respect to gun-related injuries, the constitutional right implicated in § 1983 actions is the Fourteenth Amendment’s substantive due process right.\textsuperscript{54} The touchstone of due process is protection against government power arbitrarily and oppressively exercised.\textsuperscript{55}

\textsuperscript{48} Id. Please see the Appendix for a more detailed overview of state laws that currently allow teachers to “pack heat” during the school day.

\textsuperscript{49} Many states statutorily bar suits against municipalities. Plaintiffs seeking to recover against a school district based on a state law negligence theory should check to see if their jurisdiction provides sovereign immunity to school districts.

\textsuperscript{50} 42 U.S.C. § 1983 (2012); see also Susan S. Bendlin, Shootings on Campus: Successful § 1983 Suits Against the School?, 62 DRAKE L. REV. 41, 49–50 (2013) (“The specific constitutional right implicated in school shooting claims is a Fourteenth Amendment substantive due process right.”).


\textsuperscript{52} 42 U.S.C. § 1983.

\textsuperscript{53} Colson, supra note 51, at 172.


\textsuperscript{55} Daniels v. Williams, 474 U.S. 327, 331 (1986); Miller v. City of Philadelphia, 174 F.3d 368, 374 (3d Cir. 1999).
The Due Process Clause provides that no state entity may "deprive any person of life, liberty, or property, without due process of law."\(^{56}\) School shooting victims advance the theory that they have been deprived of "life" or "liberty" due to the school’s failure to protect them from the violent acts of third parties.\(^{57}\) But, the U.S. Supreme Court, which has "traditionally interpreted the Constitution as a 'charter of negative liberties,' setting forth restrictions on government power rather than imposing even the most minimal affirmative duties,"\(^{58}\) has explained that the purpose of the Due Process Clause is to "protect the people from the State, not to ensure that the State protected them from each other."\(^{59}\)

Indeed, the Due Process Clause "forbids the state itself to deprive individuals of life, liberty, or property without 'due process of law.'"\(^{60}\) Generally, however, a state entity has no affirmative duty to protect "against invasions of private actors."\(^{61}\) As Justice Rehnquist best explained, "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."\(^{62}\)

While it is well-established that a state actor does not have an affirmative duty to protect its students,\(^{63}\) courts have recognized two exceptions to this rule: (1) the special relationship theory\(^{64}\) and (2) the state-created danger doctrine.\(^{65}\) Moreover, school districts may also find themselves exposed to Monell liability for adopting an armed-teacher policy.\(^{66}\) In determining whether a district is liable under Monell, courts ask whether the underlying constitutional violation was ratified by some

\(^{56}\) U.S. CONST. amend. XIV, § 1.

\(^{57}\) Id.; see also Bendlin, supra note 50, at 43–44.

\(^{58}\) Rebecca Aviel, Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility, 10 LEWIS & CLARK L. REV. 201, 204 (2006) (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).


\(^{60}\) Id. at 195 (emphasis added).


\(^{62}\) Deshaney, 489 U.S. at 196.

\(^{63}\) Id.; cf. Lisa E. Heinzerling, Comment, Actionable Inaction: Section 1983 Liability for Failure to Act, 53 U. CHI. L. REV. 1048 (1986) (advancing the argument that the "no affirmative duty to protect" approach is misguided); Steven F. Huefner, Affirmative Duties in the Public Schools After Deshaney, 90 COLUM. L. REV. 1940 (1990).

\(^{64}\) Deshaney, 489 U.S. at 197–98 (noting petitioner’s advancement of the special relationship theory but declining to accept it).

\(^{65}\) D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373–74 (3d Cir. 1992) (recognizing the state-created danger doctrine but declining to adopt it in this case).

\(^{66}\) See Monell v. Dep’t of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978) (holding that municipalities can be named as defendants in a § 1983 lawsuit).
municipally established policy, practice, or custom. Each of these exceptions provides a likely avenue of recovery to victims of school shootings that are proximately caused by the armed-teachers approach.

IV. TEACHER “STATE ACTOR” LIABILITY UNDER 42 U.S.C. § 1983

School shooting victims may bring a § 1983 action against both an individual teacher (the “state actor”) whose actions proximately caused their injuries and the school district itself, which may have proximately caused their injuries because of a school-created policy or practice. Consequently, both individual actors and the school district are vulnerable to liability for any injuries proximately caused by the armed-teachers approach.

A. School-Student: A Special Relationship?

According to public opinion, many American citizens believe that schools should protect schoolchildren from violence on campus. This general consensus is reflected in the stance adopted by the U.S. Department of Education and the Obama Administration. This widely held opinion is based, in part, on the unique relationship between parents, schools, and the state that mandates, through compulsory education laws, that children attend elementary and secondary schools. The argument follows that because the state mandates that children attend school and parents entrust their children to schools during the day, the student-school relationship is custodial in nature, giving rise to a duty to protect children during the school day. To date, however, the Supreme Court has veered from its no-government-duty rule only under exceptional circumstances.

67 Id. at 694.
69 See THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT’S PLAN TO OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 10 (2013), http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf [https://perma.cc/2AMT-DJGR] (stating that the government, along with the cooperation of schools, “need to make our schools safer, not only by enhancing their physical security and making sure they are prepared to respond to emergencies like a mass shooting, but also by creating safer and more nurturing school climates that help prevent school violence”).
71 See Ali Davison, Note, Shackled and Chained in the Schoolyard: A New Approach to Schools’ Section 1983 Liability Under the Special Relationship Test, 19 CARDOZO J.L. & GENDER 273, 290 (2012) ("The special relationship exception is intended to induce the state to protect those who are made vulnerable by restraints imposed by the state itself. When states use compulsory schooling laws to mandate that children are to be separated from their primary caregivers during the school day, this
In the landmark case *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that a special relationship exists, imposing an affirmative duty to protect, only when a state entity confines a person in its custody against her will, rendering that person unable to care for herself. Consequently, state entities have an affirmative duty to protect people who are incarcerated or institutionalized, as they are officially considered to be in the custody of the state and unable to care for themselves. Some courts have also imposed an affirmative duty arising out of a special relationship on state entities that foster children.

Although the Supreme Court has declined to acknowledge a “special relationship” between a school and its students, it has yet to decide whether compulsory education laws impose a duty on schools to protect children during the school day. Several circuit courts have considered whether state compulsory attendance laws create a special relationship between public schools and their students, and those circuits generally have held that forced school attendance does not create a custodial relationship establishing an affirmative duty upon the school to protect its students because schools are not responsible for students’ “basic needs.”

limits the liberties of individuals who are already particularly vulnerable members of society,” (footnote omitted); see also Bendlin, supra note 50, at 52–54 (discussing the “special relationship exception” at length and explaining that “when the state affirmatively restrains an individual’s freedom to act on his or her own behalf, a special relationship is created and the state owes the restrained individual a constitutional duty of care and protection”).

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73 Id. at 199–200.
74 Id. at 198–99 (citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976)); see also Youngberg v. Romeo, 457 U.S. 307, 318–19 (1982) (recognizing the substantive due process component of the Fourteenth Amendment to include the responsibility of states to ensure the “reasonable safety” of institutionalized mental patients); Bendlin, supra note 50, at 52–53 (discussing the “special relationship exception” in the context of incarceration, institutionalization, and “other similar restraints of personal liberty” (quoting *DeShaney*, 489 U.S. at 200)).
75 D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (noting that “some courts have imposed a constitutional duty to protect foster children by analogy to involuntarily institutionalized individuals” and citing such cases).
76 See Bendlin, supra note 50, at 54 (“[T]he Supreme Court has not specifically addressed whether a special relationship under the Due Process Clause exists between a student and a public school.”).
77 E.g., Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 994 (10th Cir. 1994) (explaining that this court has “clearly held compulsory school attendance laws do not spawn an affirmative duty to protect,” even when danger may be “foreseeable”); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (“Public school attendance does not render a child’s guardians unable to care for the child’s basic needs.”); Middle Bucks, 972 F.2d at 1372 (holding that requiring a high school student to attend class did not prevent her from being able to meet her “basic human needs,” and thus no special relationship existed); Maldonado v. Josey, 975 F.2d 727, 732–33 (10th Cir. 1992) (“Compulsory attendance laws do not alter the fact that parents retain ultimate responsibility for their child’s food, shelter, clothing, medical care, and reasonable safety.”); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272–73 (7th Cir. 1990) (holding that compulsory school attendance does not restrict a child from meeting his or her “basic human needs,” and thus a school district has no affirmative duty to protect schoolchildren).
In *Morrow v. Balaski*, the U.S. Court of Appeals for the Third Circuit held that a school had no duty arising out of a special relationship to protect two students from verbal and physical assault inflicted upon them by another student. The court clarified its holding in *D.R. v. Middle Bucks Area Vocational Technical School*, in which it recognized a difference between the type of custody that the state possesses over involuntarily committed patients or incarcerated prisoners and that which it possesses over schoolchildren. Despite the fact that the Supreme Court in *Vernonia School District 47J* recognized that children were “committed to the temporary custody of the State” for the purposes of upholding random drug testing of student athletes, the Third Circuit explained that schoolchildren are never in the full custody of the school because they remain “primarily dependent on their parents.”

The Third Circuit’s staunch position with respect to the special relationship rule has come under significant criticism. Commentators have condemned this approach, arguing that the student-school relationship is inherently “special” because of the requirement that children attend school. Nonetheless, since attendance at school neither relieves parents of the ability to take care of their children’s basic needs nor confines children against their will, no special relationship exists giving rise to a school’s affirmative duty to protect. Consequently, victims of school shootings will

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78 719 F.3d 160 (3d Cir. 2013).
79 Id. at 171.
80 972 F.2d 1364 (3d Cir. 1992) (en banc).
81 Id. at 1371–72.
83 Id. at 654. The Court did admonish, “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.’” Id. at 655.
85 See Aviel, supra note 58, at 227 (“While Scalia attempted to forestall the natural conclusion that the responsibility would ‘as a general matter’ give rise to a constitutional duty to protect as contemplated by *DeShaney*, the caveat was limited to a subordinate clause, unsupported by a reference to other case law or factual findings and utterly at odds with the rest of the Court’s analysis . . . .” (footnote omitted)); Colson, *supra* note 51, at 193 (“[T]he Supreme Court has explicitly acknowledged children’s dependency on school officials for protection, and it has allowed schools to relax individual students’ rights in order to protect the student body as a whole.”); Davison, *supra* note 71, at 290 (criticizing the fact that there has been some inconsistency in Supreme Court precedent concerning the presence of a custodial relationship between schools and students); cf. Recent Case, *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992), 106 HARV. L. REV. 1224, 1228 (1993) (noting that other decisions regarding the constitutional rights of students have relaxed these rights in order to allow school officials to promote safety); Michael Gilbert, Comment, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471, 501 (1993) (“[T]he idea of foregoing the categorical ‘special relationship’ doctrine in favor of a more direct inquiry into vulnerability and access to assistance is well-supported in literature and case law.”).
not find solace in the special-relationship exception to the general no-duty rule.

B. Opening the “Snake Pit.”86 The State-Created Danger Doctrine

After the Newtown, Connecticut school shooting, Arkansas Senator Jeremy Hutchison passionately spearheaded the advocacy effort to arm Arkansas teachers with guns.87 However, after participating in an “active shooter” simulation in Clarksville, Arkansas, during which he mistook “a teacher who was confronting a . . . ‘bad guy’” as being the perpetrator and shot the teacher with a rubber bullet,88 Hutchinson called the incident “utterly ridiculous” and confessed that his position on arming teachers with guns had shifted.89 Now recognizing how chaotic even a shooting simulation can be, Hutchinson confessed that the exercise “opened [his] eyes,”90 and that his “position now is that schools must have control over security systems. It’s a complex issue—police need training, and it needs to be continual.”91

Hutchinson and other avid supporters of the armed-teachers approach have changed their tunes after opening their eyes to the potential risks posed by allowing minimally trained, or in some cases untrained, teachers and administrators to carry firearms on school campuses.92 When a school or its agents knowingly and voluntarily bring a danger onto campus and put students at greater risk, even supporters of the armed-teachers approach can agree that the school’s voluntary invitation of danger should trigger a duty to protect students from any potential injuries resulting from that danger. Although courts have not extended the special relationship exception to the no-duty rule in school settings, there is a second exception

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86 The Seventh Circuit famously stated, in referring to the state-created danger doctrine, that “[i]f the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.” Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
88 Volsky, supra note 87.
89 Stebner, supra note 87.
90 Id.
91 Id. (emphasis added).
that would impose a duty on school districts to protect students from violence.

The state-created danger exception opens a school and its agents up to liability by recognizing an inherent affirmative duty to protect students from harms that are brought onto campus by the school itself or its employees.\(^{93}\) Originally drawn from language in *Deshaney*,\(^{94}\) and now recognized in most of the circuits,\(^{95}\) the state-created danger theory applies when a plaintiff establishes the following four elements:\(^{96}\) (1) a state actor performs an affirmative act that creates or increases the risk of injury to the

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\(^{93}\) See D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1373–74 (3d Cir. 1992) (“Liability under the state-created danger theory is predicated upon the states’ affirmative acts which work to plaintiffs’ detriments in terms of exposure to danger.”); see also Gremo *v.* Karlin, 363 F. Supp. 2d 771, 782 (E.D. Pa. 2005) (“The rule that the state has no responsibility to protect its citizens from the violent acts of private parties finds a second exception when a state actor creates a danger that harms an individual or renders him or her more vulnerable to that danger.”).


\(^{95}\) Almost all of the eleven circuits have expressly recognized the state-created danger exception, with the First and Fourth Circuits applying it on a case-by-case basis. The Fifth Circuit has consistently side-stepped the question of whether to adopt it. Note, however, the Fifth Circuit is not opposed to adopting the doctrine. See Estate of C.A. v. Castro, 547 F. App’x 621, 626–27 (5th Cir. 2013) (“[T]he district court did not hold that the state-created danger doctrine was ‘not viable’ in the Fifth Circuit. Rather, it evaluated the doctrine, noted that the circuit has yet to adopt the theory, and concluded that ‘the present case would not appear to provide the right vehicle for the Fifth Circuit to adopt the state-created danger doctrine because “[t]he plaintiffs would fail to satisfy one or more of the necessary elements suggested in Covington.’ We agree.” (alterations in original)); *Doe ex rel.* Magee *v.* Covington Cnty. Sch. Dist., 675 F.3d 849, 864 (5th Cir. 2012) (stating that the court “declin[ed] to use [the] en bane opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory”). Notably, the Fifth Circuit in *Morris v. Dearborne*, 181 F.3d 657, 663–64, 672 (5th Cir. 1999), in which a teacher falsely authored a report that a four-year-old student was sexually molested, serving as the basis for removing the child from his family home, held that a § 1983 claim could survive based on a state actor’s conduct that subjected the child to the deprivation of rights. Without invoking the state-created danger exception, the court explained:

> The district court . . . stated that direct participation is not necessary for liability under § 1983. Any official who “causes” a citizen to be deprived of her constitutional rights can also be held liable. The district court held that the requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights. . . . We agree with the district court that in order to establish Dearborne’s liability, the Plaintiffs must prove that she set in motion events that would foreseeably cause the deprivation of Plaintiff’s constitutional rights.

*Id.* at 672.

\(^{96}\) Some circuits articulate the elements differently. See Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 15–18 (2007) (explaining how the test for state-created danger varies in certain jurisdictions). For purposes of this Article’s analysis, the four elements outlined above generally represent the main inquiries involved in any circuit premised upon the state-created danger doctrine. The last element, discussed in depth in Part IV.B.4, *infra*, has been interpreted more leniently in some circuits. See, e.g., Walker *v.* Detroit Pub. Sch. Dist., 535 F. App’x 461, 464 (6th Cir. 2013) (articulating the final element of a state-created danger claim as requiring that “the state knew or should have know that its actions specifically endangered the plaintiff”).
plaintiff; (2) the plaintiff is a member of a discrete class of persons, as opposed to the public at large; (3) the defendant’s affirmative act is the proximate cause of the plaintiff’s harm, and the harm ultimately caused was reasonably foreseeable and fairly direct; and (4) the act “shocks the conscience” of the court.97

Much of the case law providing context for the state-created danger exception in the school setting comes out of the Third and Tenth Circuits.98 In the seminal Tenth Circuit case, *Armijo ex rel. Chavez v. Wagon Mound*

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97 See Willhauck v. Town of Mansfield, 164 F. Supp. 2d 127, 134–35 (D. Mass. 2001) (outlining the First Circuit elements as: (1) a state actor performs an affirmative act increasing the risk of harm, and (2) the act shocks the conscience); Santucci v. Newark Valley Sch. Dist., No. 3:05-CV-0971, 2005 WL 2739104, at *5 (N.D.N.Y. Oct. 24, 2005) (outlining the Second Circuit elements as follows: (1) “the [state] actor must have acted affirmatively;” (2) “there must be evidence that the state actor had culpable knowledge of the danger;” (3) “there must be evidence that the state actor’s conduct caused the injury;” and (4) “there must be evidence that the state actor’s conduct was so egregious or outrageous that it is conscience-shocking”); Morrow v. Balaski, 719 F.3d 160, 177 (3d Cir. 2013) (outlining the Third Circuit elements as: (1) “the harm ultimately caused was foreseeable and fairly direct;” (2) “a state actor acted with a degree of culpability that shocks the conscience;” (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 (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”); Carroll K. v. Fayette Cnty. Bd. of Educ., 19 F. Supp. 2d 618, 624 (S.D.W. Va. 1998) (looking to the elements that the Third Circuit adopted because the Fourth Circuit has not articulated its own test); Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003) (outlining the Sixth Circuit elements as: (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 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”); King ex rel. King v. East St. Louis Sch. Dist. 189, 496 F.3d 812, 817–18 (7th Cir. 2007) (outlining the Seventh Circuit elements as: (1) “the state, by its affirmative acts, must create or increase a danger faced by an individual;” (2) “the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual;” and (3) “the state’s failure to protect the individual must shock the conscience”); Avalos v. City of Glenwood, 382 F.3d 792, 799 (8th Cir. 2004) (outlining the Eighth Circuit elements as: (1) the plaintiff must be a member of a “limited, precisely definable group;” (2) the state’s conduct must have placed plaintiff “at significant risk of serious, immediate, and proximate harm;” (3) the risk must have been obvious or known to the state; (4) the state must have “acted recklessly in conscious disregard of the risk;” and (5) “in total, [the state’s] conduct shocks the conscience”); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062–64 (9th Cir. 2006) (outlining the Ninth Circuit elements as: (1) the state must have affirmatively created a danger; and (2) the state must have exhibited deliberate indifference to a danger that was known or obvious); Armijo ex rel. Chavez v. Wagon Mound Publ. Schs., 159 F.3d 1253, 1264 (10th Cir. 1998) (outlining the Tenth Circuit elements as: (1) the plaintiff was “a member of a limited and specifically definable group;” (2) the state’s conduct must have placed plaintiff “at substantial risk of serious, immediate and proximate harm;” (3) the risk must have been obvious or known to the state; (4) the state must have “acted recklessly in conscious disregard of the risk;” (5) in total, the state’s conduct shocks the conscience; and (6) the actors must have affirmatively acted to increase the risk of harm to the plaintiff).

98 E.g., Sanford v. Stiles, 456 F.3d 298, 301–02 (3d Cir. 2006); Armijo ex rel. Chavez v. Wagon Mound Public Schs., 159 F.3d 1253 (10th Cir. 1998).
Public Schools, the family of a sixteen-year-old, mentally ill special education student (Armijo), who committed suicide, sued Wagon Mound Public Schools alleging that the school deprived him of substantive due process. After Armijo threatened physical harm to a teacher, he was suspended. The principal directed the school guidance counselor, who was aware of Armijo’s suicide risk, to drive Armijo home without notifying his parents. Armijo’s parents returned home hours later to find their son lying dead in the bedroom from a self-inflicted gunshot wound to the chest. In considering whether the school’s actions in sending a mentally ill student home without notifying the parents constituted a “state-created danger,” the court explained that:

The key to the state-created danger cases . . . lies in the state actors’ culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party’s [acts] to occur.

Where the proof showed that school officials knew Armijo was depressed and suicidal, and that he had access to firearms at home, the facts were sufficient to survive summary judgment on Armijo’s state-created danger claim.

1. **Affirmative Act that Creates or Increases the Risk to the Plaintiff**

Many of the school district cases in which plaintiffs have raised the state-created danger exception have been dismissed for want of affirmative danger-creating action. Finding an actor liable under the state-created

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99 159 F.3d 1253 (10th Cir. 1998).
100 Id. at 1256.
101 Id. at 1256–57.
102 Id. at 1257.
103 Id.
104 Id. at 1263 (citations omitted) (quoting Johnson v. Dallas Ind. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994)) (internal quotation marks omitted); see also Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) (holding that plaintiffs “may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been”); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (explaining that *DeShaney* “establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual’s danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.”).
105 Armijo, 159 F.3d at 1264.
106 See, e.g., Sanford v. Stiles, 456 F.3d 298, 301–02, 312 (3d Cir. 2006) (per curiam) (finding no
danger theory is based on “affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.”\textsuperscript{107} Stated differently, the plaintiff must “allege affirmative acts that were the ‘but for cause’ of the risks they faced,” and mere “failures to act cannot form the basis of a valid § 1983 claim.”\textsuperscript{108}

In the school context, the concept is the same. Consequently, courts have overwhelmingly held that a school district’s failure, either to carry out its disciplinary policy or to intervene in student conduct that poses a risk to others, constitutes merely passive inaction and does not satisfy the “affirmative act” requirement.\textsuperscript{109} In this vein, in Walker v. Detroit Public School District,\textsuperscript{110} the Sixth Circuit Court of Appeals dismissed a shooting victim’s state-created danger claim against a school district premised upon the district’s merger of two schools with a known history of gang-related violence.\textsuperscript{111} The court explained that the merging of the two schools was not an affirmative act because “chronic gang-related violence was present both before and after the merger.”\textsuperscript{112} Ultimately, neither the merger of the

\textsuperscript{107} Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

\textsuperscript{108} Bennett \textit{ex rel. Irvine v. City of Philadelphia}, 499 F.3d 281, 287–88 (3d Cir. 2007); \textit{see also}, e.g., Ye v. United States, 484 F.3d 634, 641–42 (3d Cir. 2007) (holding that government-employed physician’s assurance that a cardiac patient was “fine,” without rendering more advanced treatment, did not constitute an affirmative act that gave rise to a claim for a constitutional deprivation, even if the facts supported a state law medical malpractice claim); Jones v. Reynolds, 438 F.3d 685, 691 (6th Cir. 2006) (holding that a police officer’s observation and subsequent failure to intervene in a dangerous drag race on a public street did not constitute an “affirmative act” increasing any risk to a spectator); Stover v. Camp, 181 F. App’x 305, 308 (3d Cir. 2006) (holding that an injured driver’s state-created danger claim could not prevail against the township for failing to make an intersection where multiple accidents had occurred safer because no affirmative action was pled); Rivera v. Rhode Island, 402 F.3d 27, 30, 38 (1st Cir. 2005) (holding that the state’s inaction, even despite its promise to protect a witness in exchange for her testimony in a murder trial, was not an affirmative act that satisfied a state-created danger claim).

\textsuperscript{109} \textit{See}, e.g., Morrow v. Balaski, 719 F.3d 160, 178 (3d Cir. 2013) (holding that the school’s failure to expel a student-bully—instead suspending her—did not enhance or exacerbate the danger caused to two other student victims); \textit{see also} Robinson v. Sch. Dist. of Phila., No. 13-6632, 2014 WL 3304143, at *1–2 (E.D. Pa. July 8, 2014) (holding that a school district’s failure to prevent excessive bullying did not amount to affirmative action such that the elements of a state-created danger claim could be satisfied); Thomas v. East Orange Bd. of Educ., 998 F. Supp. 2d 338, 353–54 (D.N.J. 2014) (holding that school district’s failure to prevent excessive bullying did not amount to affirmative action in satisfaction of the state-created danger claim).

\textsuperscript{110} 535 F. App’x 461 (6th Cir. 2013).

\textsuperscript{111} \textit{Id.} at 466.

\textsuperscript{112} \textit{Id.}
schools nor the school’s failure to intervene in the gang violence constituted an affirmative act that created or increased the risk of harm to the plaintiff.113

Similarly, in *Morrow v. Balaski*,114 where school officials told parents of two female students that they could not guarantee the girls’ safety, the court declined to find any affirmative act sufficient to satisfy a state-created danger claim.115 After a physical altercation between one of the daughters and the attacker, the school suspended both students and allowed them to return after they served the duration of their suspensions.116 The court rejected the Plaintiffs’ argument that the act of allowing the attacker to return to school was an “affirmative act” sufficient to create a risk, explaining that the “[c]omplaint simply attempt[ed] to redefine clearly passive inaction as affirmative acts.”117

But, in recognizing that the “line between action and inaction is not always easily drawn,”118 the Third Circuit in *Middle Bucks* explained that “[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.”119 Therefore, the threshold inquiry requires a difficult parsing out of action from inaction. “Rather than focusing on the often metaphysical question of whether [officials’] behavior amounts to affirmative conduct or not, we have focused on whether [the victim] was safer before the state action than he was after it.”120 Furthermore, the Third Circuit has emphasized, “it is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause.”121

A state-created danger claim premised upon the armed-teachers approach undoubtedly satisfies the affirmative act requirement. Unlike in *Walker* and *Morrow*, where the complained-of actions resulted in a student environment with the same amount of risk or danger as before the complained-of conduct,122 the implementation of the armed-teachers approach actually invites a new danger onto campus. Instead of preserving

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113 *Id.*
114 719 F.3d 160 (3d. Cir. 2013).
115 *Id.* at 178.
116 *Id.* at 164.
117 *Id.* at 178.
118 *Id.* at 177.
119 D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1374 (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).
120 Walker v. Detroit Public School Dist., 535 F. App’x 461, 464–65 (6th Cir. 2013) (quoting Koula v. Merciez, 477 F.3d 442, 445–46 (6th Cir. 2007)).
121 Phillips v. County of Allegheny, 515 F.3d 224, 235 (3d Cir. 2008) (emphasis in original) (quoting Bright v. Westmoreland County, 443 F.3d 276, 282 (3d Cir. 2006)).
122 Walker, 535 F. App’x at 466; Morrow, 719 F.3d at 178.
the status quo, as the school actors did in *Walker* and *Morrow*, the armed-teachers approach creates and enhances a new risk to students.

Under the state-created danger doctrine, “liability exists when the state affirmatively places a particular individual in a position of danger the individual would not have otherwise faced.” When minimally-trained teachers bring firearms onto K-12 campuses, they are placing students in a position of danger the students would not otherwise have faced.

The current guns-in-school debate has focused primarily on the correlation between the presence of guns on school campuses and the overall rate of school crimes. While the statistical data supports both sides' positions, there is ample data evidencing the fact that the presence and use of guns (as opposed to other forms of weapons), because of their inherently dangerous and deadly nature, results in both higher incidences of injuries and in injuries that are more severe. The armed-teachers approach increases incidences of gun-related injuries and death by inviting onto campus three main threats: (a) a higher risk of misfires and stray bullets due to inadequately-trained, or in some cases untrained, teachers;

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123 Monfils v. Taylor, 165 F.3d 511, 516 (7th Cir. 1998) (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993)).


(b) a school official’s impulsive, irrational misuse of a weapon; and (c) the risk of gun-related accidents as a result of greater gun accessibility in the school building.

a. Scenario A: A Higher Risk of Misfires and Stray Bullets Due to Inadequately-Trained Teachers

Opponents of the armed-teachers approach express concern that armed-teacher laws and school district policies currently do not mandate sufficient firearms, trauma response, and other relevant training for teachers carrying firearms on campus. Without adequate training, the argument goes, there is a greater probability that gun-related accidents will occur, resulting in a higher risk of bystander injury and death.

When analyzing states’ mandatory training requirements, both the quantity and the quality of the training are important. Of the states with statutory authorization of the armed-teachers approach, some of them require minimal or even no training. Those that do require training do not necessarily require simulated live-shooter training or training that will prepare teachers who otherwise have no law enforcement experience to respond during a traumatic live-shooter event in a safe manner.

Short of adopting inhumane and risky research methods, it is impossible to obtain reliable data on the effectiveness of an armed teacher’s response during a live-shooter event. Nonetheless, the overwhelming body of research indicating a high correlation between

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127 See, e.g., KAN. STAT. ANN. § 75-7c04(b) (West, Westlaw through 2015 1st Reg. Sess.) (requiring only eight hours of firearms training); UTAH CODE ANN. § 76-10-505.5 (West, Westlaw through 2014 Gen. Sess.) (requiring no training).

extensive field experience/training and a law enforcement officer’s effectiveness in responding to a live-shooter event is instructive.129

i. Potential for Misfiring

Despite undergoing extensive training, there remains a high rate of shooting inaccuracy amongst police officers in live-shooter events—with the percentage of missed shots ranging between 52%130 and 82%.131 In yet another study, the International Association of Chiefs of Police examined all shooting incidents in thirty-five American cities from 1987–1996 to determine police accuracy rates.132 The study revealed that 65% of police officers’ shots missed their intended target.133 Of course, as the rate of shooting inaccuracy increases, so does the rate of bystander injuries and deaths as people are caught in the crossfire.134

Where the rate of shooting error for police officers is between 52%–82%, imagine the rate of error for gun-toting teachers with much less or no training at all.135 Indeed, there is a high probability that the misfiring rate

129 See, e.g., Michael T. Charles & Anne G. Copay, Acquisition of Marksmanship and Gun Handling Skills Through Basic Law Enforcement Training in an American Police Department, 5 INT’L J. POLICE SCI. & MGMT. 16, 29 (2003) (concluding that “students significantly improved their marksmanship and gun handling skills as a result of the firearms course”).

130 Id. at 17. This Illinois study showed that from 1995 to 1997, the State of Illinois studied a group of 216 police recruits (185 males, 31 females) with little to no firearm experience or training. Id. at 16. The recruits were administered a firearms pre-test in areas of marksmanship and gun handling, fifty hours of firearms training, and then a firearms post-test in the same areas. Id. at 17, 20. In the pre-test, the recruits performed poorly in both marksmanship and gun handling. Id. at 22. After the training, however, the recruits scored significantly higher on their post-test. Id. at 21. In that same time frame, a review of a sample of police officers’ shooting statistics in the line of duty showed that 52% of all total shots missed the intended target, while 34% resulted in injury of the target, and 14% of shots resulted in death of the target. Id. at 17. Moreover, from 1987–1996, 696 police officers were feloniously killed in the United States, and 91.5% of those officers were killed by firearms. Id. at 16–17.


133 Id. at 17.


135 See supra text accompanying notes 16–17 (discussing the likelihood that teachers would
for armed teachers is even greater than the 52%–82% rate for trained officers. This is especially true if the required training for armed teachers does not include exercises with moving targets and reality-based simulations.

ii. Ability to Translate Learned Skill into Action

Even when teachers receive training in an effort to reduce shooting inaccuracy, it remains questionable whether full-time teachers serving as part-time security guards can safely translate skills learned during training into action during an actual live-shooter event. A Michigan study examined the inherent benefit of reality-based training in preparing armed officers to respond more effectively in live-shooter situations. Specifically, it considered which of two widely used shooting stances officers employed after receiving extensive training at the firing range in one particular stance. The study revealed that officers used a different stance than the one they were taught to use at the firing range. These results indicate that even the vast majority of highly trained police officers abandon learned skills and knowledge when involved in a live-shooter situation.


137 Id.
138 Id.
139 Id.
iii. Need for Better Training: Quantity and Quality

To be adequately prepared to respond during a live-shooter event, first responders must understand much more than how to point and shoot in static situations. First responders must also understand when it is appropriate to pull the trigger and when they should stand down, how to minimize the natural bodily psychosomatic responses that occur during a traumatic event, and how to safely ensure that no innocent bystanders are injured in the crossfire. None of these essential skills are taught in a basic firearms handling course or even during shooting rounds at a firing range.

One study indicated that the human body’s fight-or-flight response provides another obstacle to first responders during a live-shooter event. An analysis of World War II and FBI studies demonstrates that humans possess a natural resistance to killing other humans. The body’s natural “fight or flight” response endangers even the most highly trained police officers. Indeed, in 1998–2000, out of 148 police officers killed in the line of duty, 84.5% of them never fired a shot at their killer. To combat this problem, military and law enforcement organizations have begun to incentivize good marksmanship scores in training.

“No matter how well we are trained to a stimulus/response; [sic] our brains are hardwired to override those trained responses by a more

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141 Id.

142 See, e.g., COLO. REV. STAT. ANN. § 18-12-203(h) (West, Westlaw through 2015 1st Reg. Sess.) (providing that although one must obtain a training certificate from a handgun training course in order to obtain a permit, “the applicant shall have discretion in selecting which handgun training class to complete”).

143 See Active Shooter Training and the OODA Loop Theory, CGPGMG (Nov. 23, 2014), http://cpgmg.com/active-shooter-training-and-the-oodaloop-theory/ [http://perma.cc/X8Y5-PB8W] (explaining that, at the time he starts shooting, an active shooter is already three steps ahead of potential victims in the “Observing, Orienting, Deciding, Acting” Loop, and thus the shooter does not have to initially deal with the fight-or-flight reaction, putting him at a major strategic advantage).

144 See SEIBEL, supra note 136, at 10 (discussing research noting that, during WWII, only 15%–20% of American riflemen fired upon exposed enemy soldiers with their individual weapons).

145 Id. at 11.

146 Id. at 10–11. Perhaps, schools using armed teachers should provide a similar incentive system for teachers with good marksmanship. Teachers are already evaluated on their teaching effectiveness, so if schools ask teachers to assume an additional role as a security guard, where the stakes are so high, they should also be evaluated on their effectiveness as a security guard.
powerful ‘instinctual’ response in survival skills.”¹⁴⁷ When exposed to trauma, the human body, as a visceral response to the fear of death, becomes “the most clumsyest.”¹⁴⁸ It releases anxiety hormones, including adrenaline, and the heart rate rapidly increases, decreasing the body’s ability to successfully carry out both complex and fine motor skills, like unlocking and loading a gun and pointing and shooting.¹⁴⁹ Indeed, when the heart rate rises to over 145 beats per minute (BPM), the body’s ability to successfully perform any task, including critical survival skills requiring good hand-eye coordination and the ability to rely on small muscles or a series of muscles, decreases exponentially.¹⁵⁰ Similarly, when the sympathetic nervous system is activated, it sends the heart rate from its normal 60–80 BPM to well over 200 BPM within seconds.¹⁵¹ At “a heart rate over 175 BPM . . . [even the well-trained] officer may experience . . . irrational behavior such as ‘freezing in place,’ becoming submissive, or passive.”¹⁵²

Police officers and experienced security guards, who are in the field on a daily basis and whose training is of a greater quantity and quality than that of armed teachers, are better able to manage the body’s natural responses to trauma because they have more routine exposure to high trauma events. But when the body’s natural “fight or flight” response is activated, even trained police officers can abandon their training. It is therefore unlikely that inadequately trained (or, in some cases, untrained) teachers will effectively respond during a live-shooter event simply because they are carrying a firearm. To the contrary, the statistics demonstrate that arming teachers will make schools more dangerous.

The collective research indicates that, without receiving comprehensive training and experience in each of the aforementioned categories, gun-toting teachers bring a new danger onto campus. But state laws that authorize armed-teacher policies generally do not dictate training of sufficient quantity and quality. In fact, some states do not even specify a minimum number of training hours,¹⁵³ and those states that do require only minimal training in basic gun handling and fixed-target shooting.¹⁵⁴

¹⁴⁷ Id. at 14.
¹⁴⁸ Id. at 6.
¹⁴⁹ Id. at 6, 16.
¹⁵⁰ Id. at 16.
¹⁵¹ Id. at 17.
¹⁵² Id. at 21.
¹⁵³ See, e.g., OR. REV. STAT. ANN. § 166.370 (West, Westlaw through 2015 Reg. Sess.) (stating the requirements for individuals who can possess firearms on school property).
¹⁵⁴ See, e.g., COLO. REV. STAT. ANN. § 18-12-203 (West, Westlaw through 2015 1st Reg. Sess.) (stating that the only training required to obtain a concealed carry permit is a training certificate from a handgun training class obtained within the ten years preceding submittal of the application).
The potential for accidental shootings by teachers on school campuses is a real threat and has occurred tragically in recent incidents in New York and Ohio. Where professionally trained police officers are effective only 18%–48% of the time, it follows that minimally trained teachers with guns will be less effective, putting students at a higher risk of injury from a misfired bullet.

b. Scenario B: Misuse of Guns

Not only may teachers accidentally shoot students due to a lack of appropriate training and experience, but there is also at least a slight risk that they may misuse a weapon in a moment of frustration or rage. In 2010, a University of Alabama biology professor brought a gun to campus. The professor shot and killed three faculty members and injured three students.

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155 See Kieran Crowley, Packin’ Prof Pulls a ‘Plax’, N.Y. POST (Nov. 18, 2011), http://nypost.com/2011/11/18/packin-prof-pulls-a-plax/ [http://perma.cc/9U5Y-44EL] (reporting that a former New York City law enforcement officer and criminal justice professor at Long Island University stepped out of a classroom to secure his gun when he accidentally discharged the firearm and shot himself in the leg); Mary Beth Lane, Instructor Shoots Student in Gun-Safety Class, COLUMBUS DISPATCH (Aug. 13, 2013, 6:03 AM), http://www.dispatch.com/content/stories/public/2013/08/12/concealed-carry-accidental-shooting.html [http://perma.cc/3EZ2-AZNU] (reporting that an instructor for a gun safety class discharged his gun and shot a twenty-six-year-old student in the arm). It was later revealed that several years prior to this incident, the instructor accidentally shot a friend of his daughter while the children were on a haunted hayride. Mary Beth Lane, Accidental Shooting Was Not First for Firearms Instructor, COLUMBUS DISPATCH (Aug. 22, 2013, 7:07 AM), http://www.dispatch.com/content/stories/public/2013/08/21/accidental-shooting-was-not-first-for-firearms-instructor.html [http://perma.cc/4HPV-YNFP]. He claimed that he wanted to create a “scary effect” by firing the weapon into the air and thought the gun was loaded with blanks. Id.

others during a faculty meeting. In 2012, a Florida Spanish teacher who was fired earlier in the day returned to school with a gun and shot and killed the headmistress and then himself. In November 2013, a substitute teacher at Cheyenne Middle School in Oklahoma interrupted students during an online test and shouted to the students who were not paying attention, “[i]f you don’t stop going to that website, I will shoot you and tell your parents you died by natural causes.” Similarly, in Utah, New Jersey, and Tennessee, teachers at junior high schools have threatened to shoot students, teachers, and staff.

Further, the United States Department of Education has studied the frequency of the use of corporal punishment in K-12 schools. According to a study conducted by the Department, in the 2006–2007 academic year, a total of 268,684 students were subjected to corporal punishment. At least 33,039 of those students were classified as disabled under the Individuals with Disabilities Education Act or section 504 of the Rehabilitation Act.

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164 Id.; see also Mileka Lincoln, Teacher’s Aide Investigated for Stabbing Student with Pencil, HAW. NEWS NOW (Feb. 13, 2014, 12:36 AM), http://www.hawaiinewsnow.com/story/24710523/teachers-aide-investigated-for-stabbing-student-with-pencil (reporting that in Hawaii, a teacher’s aide stabbed a special education student with a pencil); Teacher Slams Student’s Face into Desk & Throws Him Against the Wall, REPORTERGARY.COM (May 29, 2013), http://reportergary.com/2013/05/teacher-slams-students-face-into-desk-throws-him-against-the-wall/ [http://perma.cc/QDV4-9N6S] (reporting that a Minnesota teacher grabbed a student involved in a physical altercation with another student, slammed his face into a desk, and shoved him against a wall); Paul Thompson, Teacher ‘Threw Autistic Elementary Student into Wall’ After He Hit and Pinched Her, DAILYMAIL.COM (Feb. 25, 2013, 4:51 PM), http://www.dailymail.co.uk/news/article-2284418/Jacqueline-Zuniga-Lake-County-Florida-teach
Teachers today are overworked, and their patience is already running low. Teachers juggle disruptive students, interpersonal student issues caused by bullying and harassment occurring both in school and on social media, and numerous socio-economic, political, and other systemic obstacles, making it difficult for students to meet academic benchmarks upon which teachers are evaluated. Thus, the classroom can be a highly stressful environment. While the potential that a disgruntled teacher would aim and fire a gun at a problem student is relatively low, it is conceivable that a teacher could, in a fit of rage, misuse an available weapon. Introducing another dangerous variable into an already-stressful environment invites an unnecessary government-created risk, altering the status quo and opening the school and its employees up to potentially avoidable liability.

c. Scenario C: Gun Accessibility to Children and the Risk of Gun-Related Accidents

Another known risk invited onto campus by the armed-teacher approach is the accessibility of inherently dangerous weapons to children, resulting in a higher probability that gun-related accidents could occur. A teacher or administrator, who may be inadequately trained in gun handling,
storage, or safety, has the potential to inadvertently leave a loaded gun in an area accessible to children, resulting in the unthinkable.169

The headlines all too often remind us of the inherent danger of storing firearms in areas that are accessible to children.170 A recent New York Times review of hundreds of child firearm deaths revealed that “accidental shootings occurred roughly twice as often as the records indicate.”171 In fact, “more than half of the 259 accidental firearm deaths of children under the age of 15 identified by The Times in eight states where records were available” were also not reported as accidents.172 Therefore, the risk of accidental killings may be even higher than reflected in the statistics surrounding the debate over how to protect children from guns.173

Moreover, studies have identified a positive association between the presence of guns in the home and the risk of unintentional gun-related injuries and deaths among children and adults.174 These studies foreshadow


171 Luo & McIntyre, supra note 170.

172 Id. For example, the article describes the gun deaths of three-year-old Lucas Heagren, eleven-year-old Cassie Culppeper, and eleven-year-old Alex Whitfield, who were all accidentally shot by other children who gained access to firearms. Id. However, all three of these incidents were not recorded as accidents. Id.

173 Id.

174 See, e.g., John R. Martin et al., Accidental Firearm Fatalities Among New Mexico Children, 20 ANNALS OF EMERGENCY MED. 58, 59–60 (1991) (finding that the twenty-five unintentional firearm fatalities identified in the study occurred most frequently among children playing with loaded guns obtained from a residence); Douglas J. Wiebe, Firearms in U.S. Homes as a Risk Factor for Unintentional Gunshot Fatality, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713 (2003) (“[T]he relative risk of death by an unintentional shooting, comparing subjects living in homes with and without at least one gun, was 3.7.”).

For these reasons, the creation and implementation of a policy allowing teachers to carry firearms on a public school campus is an affirmative act, distinguishable from passive inaction, which alters the status quo and heightens the risk that a student will suffer a gun-related injury on campus.\footnote{See supra Part IV.B.1.} Schools utilizing the armed-teachers approach are therefore throwing students into the “snake pit” and opening themselves up to unnecessary liability.

2. **Plaintiff Is a Member of a Discrete Class**

The second element of a state-created danger claim requires that the plaintiff be a member of a limited and specifically identifiable group.\footnote{See Castaldo v. Stone, 192 F. Supp. 2d 1124, 1172 (D. Colo. 2001) (stating that in order for plaintiffs to successfully plead a state-created danger claim, they must prove that the victims of the shooting—Columbine High School students—were members of a limited and specifically identifiable group).} In other words, “the state’s actions [must] place the victim specifically at risk, as distinguished from a risk that affects the public at large.”\footnote{See Jones v. Reynolds, 438 F.3d 685, 696 (6th Cir. 2006) (stating that to satisfy the second element of the state-created danger doctrine, the state’s actions must place the plaintiff “specifically at risk, as distinguished from a risk that affects the public at large” (quoting Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998))).}

In *McQueen v. Beecher Community Schools*,\footnote{Id. at 468.} five children were left in a classroom with an armed classmate.\footnote{Id.} The court held that the five children were especially at risk, as the shooter was “much more likely to shoot the students in his immediate physical presence than a member of the general public.”\footnote{Id.} The *McQueen* court rejected the counterarguments that (1) the perpetrator could have walked out of the classroom and fired at
students in the hallways, and (2) that the general public was also at risk because the shooter could have walked off school property, or because shots fired within the school could have passed through walls and windows and injured someone outside. With regard to the first counterargument, the court stated that even “if the relevant group [of plaintiffs] included everyone in the school, the special danger requirement still would be satisfied” because the shooter “was much more likely to shoot the students in his immediate physical presence than a member of the general public.” Further, while recognizing the possibility that a member of the public could be injured, the court rejected the second counterargument and held that the risks faced by the public were collateral to and smaller than the risks faced by the five students in the classroom.

When a teacher brings a gun to school pursuant to an armed-teachers policy, the school environment is altered and students are placed at an increased risk of harm. Because this risk includes misfiring during a live-shooter event or injury caused by a misplaced gun on campus, the class of potential plaintiffs undoubtedly includes those students of the particular school at which the armed-teacher works. When weapons are brought onto campus, a student’s mere physical presence on campus automatically classifies her as a member of a limited and specifically identifiable group that is placed at a higher risk than that faced by members of the public at large. As such, a student at a school with an armed-teachers policy would certainly satisfy the “discrete class” element of the state-created danger doctrine.

3. Proximate Cause and Foreseeability

The third element of a constitutional claim predicated on a state-created danger theory requires that the state actor’s affirmative act be the proximate cause of the plaintiff’s harm. Determining whether an act was the proximate cause of the plaintiff’s harm is based on the foreseeability of the plaintiff’s injury. An injury is foreseeable when an actor is aware “of a risk of harm to an individual or class of individuals such that the actor is on notice that his or her act or failure to act significantly enhances that risk of harm.” In Sciotto v. Marple Newton School District, where a high school invited onto campus heavier and more experienced alumni wrestlers

82 Id.
83 Id.
84 Id.
85 King v. E. St. Louis Sch. Dist. 189, 496 F.3d 812, 817–18 (7th Cir. 2007).
86 See Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (finding proximate cause where police officer put plaintiff in danger of foreseeable injury by sending plaintiff home unescorted in a visibly intoxicated state in cold weather).
to “live wrestle” student wrestlers, the court held that a reasonable jury
could find that injury was foreseeable. The record revealed that parents
had expressed safety concerns and that an expert testified that the situation
was an “accident waiting to happen.”

Similarly, in Hillard v. Lampeter-Strasburg School District, the
court held that a student’s brain injuries sustained during a physical
education class exercise called “Fly on the Wall” were reasonably
foreseeable. The Fly on the Wall required a student “fly” to stand on a chair
against the wall while other students taped her to the wall with duct tape.
Plaintiff volunteered to be a fly, and, while standing on the chair against
the wall, lost her footing, fell to the floor, and hit her head. She suffered
temporal and occipital bone fractures, had two brain surgeries, and was on
life support for seven days. In determining that the injury was
foreseeable, the court relied on the fact that the risks associated with the
Fly on the Wall exercise had been previously reported to the school by a
former student who choked during the exercise a year earlier. Since it
was reasonable to conclude that taping a person to a wall above a concrete
floor could result in injury, the court found that proximate cause was easily
established.

In the absence of actual notice, injuries may be reasonably foreseeable
based on a totality of the circumstances analysis. In Kneipp v. Tedder, four
police officers stopped a husband and wife for causing a disturbance
in the street. After questioning the couple and observing that the wife
was so intoxicated that she could not walk without support, the police
released the husband so that he could go home and relieve the babysitter.

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189 Id. at 564–65.
190 Id.
192 Id. at *3.
193 Id. at *1.
194 Id.
195 Id.
196 Id. at *3.
197 Id.
198 See id. (concluding that a jury could find that the superintendent and school district should have
known that a certain physical education activity created a foreseeable risk of injury where parents
had made earlier complaints about the activity restricting their child’s breathing); Sciotto v. Maple
Newton Sch. Dist., 81 F. Supp. 2d 559, 564–65 (E.D. Pa. 1999) (concluding that a jury could find that a
wrestling coach and athletic director should have known that the practice of inviting older alumni
wrestlers to wrestle high school students created a foreseeable risk of injury where expert opined about
dangerousness of such practice, parents had complained about such practice, and relevant rules
addressed such practice).
199 95 F.3d 1199 (3d Cir. 1996).
200 Id. at 1201.
201 Id. at 1201–02.
Subsequently, the police sent the wife home alone without an escort.\textsuperscript{202} Two hours later, she was found at the bottom of an embankment where she had suffered hypothermia and severe brain damage.\textsuperscript{203}

In concluding that the wife’s injuries were reasonably foreseeable, the court considered the totality of the circumstances.\textsuperscript{204} In particular, the court emphasized the fact that the wife’s blood alcohol level was 0.25\%, that it was a particularly cold evening, and that the husband testified that he had to assist his wife and even carry her at times because she could not support herself.\textsuperscript{205} Based on these facts, the court concluded that a jury could find that the wife’s injuries were more likely to occur because of the police officers’ actions in sending an obviously-intoxicated woman home alone.\textsuperscript{206}

The hallmark of a § 1983 claim turns on whether the events that caused the plaintiff’s injuries were reasonably foreseeable in light of the defendant’s actions.\textsuperscript{207} “[T]he requisite causal chain can occur through the ‘setting in motion [of] a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.’”\textsuperscript{208} Each foreseeability analysis turns on the unique facts and circumstances of that particular case.\textsuperscript{209}

When teachers bring firearms onto K-12 school campuses, there are many potential ways in which students could suffer harm. First, an inadequately trained teacher could accidentally shoot a student.\textsuperscript{210} When teachers are armed and ready to respond to a live-shooter event, there is the potential that they may be more likely to engage an active shooter when an adequately-trained law enforcement officer would otherwise not.\textsuperscript{211} In that case, students are more likely to become caught in the crossfire, dodging not only one shooter’s stray bullets, but those of potentially two or more

\textsuperscript{202} Id. at 1202.
\textsuperscript{203} Id. at 1203.
\textsuperscript{204} Id. at 1208, 1211.
\textsuperscript{205} Id. at 1208.
\textsuperscript{206} Id.
\textsuperscript{207} See Gremo v. Karlin, 363 F. Supp. 2d 771, 784 (E.D. Pa. 2005) (“[A] harm is foreseeable when a state actor has actual awareness, based on concrete information, of a risk of harm to an individual or class of individuals such that the actor is on notice that his or her act or failure to act significantly enhances that risk of harm.”).
\textsuperscript{208} Harris v. Roderick, 126 F.3d 1189, 1196 (9th Cir. 1997) (quoting Johnson v. Duffy, 588 F.2d 740, 743–44 (9th Cir. 1978)).
\textsuperscript{209} See, e.g., Semler v. Psychiatric Inst. of Wash., D.C., 538 F.2d 121, 124–25 (4th Cir. 1976) (analyzing foreseeability of danger created by releasing a psychiatric patient from an institution through the particular facts of the patient’s background and medical history).
\textsuperscript{210} See supra Part IV(B)(1)(a)(i) (discussing data indicating greater likelihood of shooting inaccuracy during a live-shooter event).
\textsuperscript{211} See supra Part IV(B)(1)(a)(iii) (discussing literature indicating the difficulty a first-time responder in a live-shooter event would encounter in trying to quell the body’s natural “flight or fight” response so as to respond effectively in the situation).
inadequately trained teachers. There is also the potential that a teacher could misuse a firearm in a moment of rage. 212 Finally, the mere presence of additional firearms on campus, especially when in the possession of untrained teachers, increases the accessibility of weapons to students. With guns easily accessible, a number of unthinkable hypotheticals could place schoolchildren in unnecessary danger. 213

In light of the data linking improper gun use to gun-related accidents and deaths, 214 school officials should—at the very least—be on constructive notice of the enhanced risk of the armed-teacher approach. Moreover, school districts attempting to implement this approach have been met with significant resistance. Superintendents, 215 law enforcement officers, 216 educators, 217 and even the President of National School Safety and Security Services 218 oppose the armed-teachers approach and have expressed impassioned pleas to states and local school boards considering

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212 See supra notes 156–62 and accompanying text (compiling instances in which teachers threatened violence or use of firearms against fellow faculty or students or actually committed violence or used firearms to harm other faculty or students on school grounds).

213 See supra note 170 (compiling tragic news stories concerning the accidental deaths of young children due to negligent storage of firearms).

214 See supra Part IV(B)(1) (discussing studies and anecdotal evidence linking accidental gun injuries and death to misuse of firearms and increased accessibility of guns to children).

215 Kevin R. Jenkins, Area Superintendents Against Arming Teachers, DAILY J. ONLINE (Jan. 23, 2013, 5:24 AM), http://dailyjournalonline.com/news/local/area-superintendents-against-arming-teachers/article_2f89a0d6-654f-11e2-9096-0019bb2963f4.html [http://perma.cc/JY23-9L2G] (reporting that prior to the consideration of Missouri House Bill 70 that would authorize teachers to carry firearms on campus, Dr. Desi Mayberry, a Missouri superintendent, expressed concern “about arming people with no training . . . . [as] [. . . .] the potential for an accident involving a student would be something we’d want to avoid”); id. (reporting that another Missouri superintendent stated: “I see more potential negatives than positives in this. There is a greater chance of accidental shootings. With more guns, the chance goes way up”); id. (reporting that another superintendent stated: “We’re very concerned about the training of any teacher who would be carrying a gun on school grounds. We’re also concerned about accidental shootings”).

216 James Pinkerton, Teachers as First Line of Defense?: Many in Law Enforcement See It as a Dangerous Idea, HOUSTON CHRON., Jan. 21, 2013, at A1 (reporting that the Houston Police Chief expressed concern that “[i]f we give teachers handguns, are we going to give them bulletproof vests to go with them, are we going to give them ballistic helmets? I just don’t think it’s a good idea”); id. (reporting that the Pasadena Police Chief was concerned “about accidents that could occur when children are around firearms” and said that “there are more downsides than pluses”).


218 See Arming Teachers and School Staff, NAT’L SCH. SAFETY & SEC. SERVS. (July 24, 2015), http://www.schoolsecurity.org/trends/arming-teachers-and-school-staff/ [http://perma.cc/N8X7-H7F8] (discussing the statements of Kenneth Trump, President of National School Safety and Security Services, who stated that “it is short-sighted for those supporting the idea to believe that educators who enter a profession to teach and serve a supportive, nurturing role with children could abruptly kick into the mindset to kill someone in a second’s notice. Police officers train their entire career and enter each traffic stop and individual encounter with a preparedness and life-safety mindset that is different from the professional training and mindset of educators”).
such an approach. Voiced complaints, coupled with the data suggesting that armed-teachers will be ineffective during a live-shooter event, put schools “on actual notice” of the safety concerns inherent in the armed-teachers approach.

In short, allowing K-12 teachers to carry firearms on campus without proper training is an “accident waiting to happen.” In light of the overwhelming evidence supporting this opinion and the actual complaints and concerns voiced by opponents of such an approach, school districts and school employees implementing the armed-teachers approach should be deemed “on notice” of the multiple foreseeable risks to students. Where the risks associated with the armed-teacher approach are reasonably foreseeable and school districts have been put on actual notice of the potential harm, a plaintiff claiming liability against the school for injuries sustained as a result of the armed-teacher approach should easily satisfy the proximate cause element of a state-created danger claim.

4. Defendant’s Conduct Shocks the Conscience

The fourth and most challenging element of the state-created danger exception asks whether the state actor’s behavior shocks the conscience. This element requires that an “official must both 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.” Furthermore, conduct that shocks the conscience in one environment “may not be so patently egregious in another, and [the Court’s] concern with preserving the

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220 Arming Teachers and School Staff, Nat’l Sch. Safety & Sec. Servs. (July 24, 2015), http://www.schoolsecurity.org/trends/arming-teachers-and-school-staff/ [http://perma.cc/N8X7-H7F8]; see also Gremo v. Karlin, 363 F. Supp. 2d 771, 784 (E.D. Pa. 2005) (“[A] harm is foreseeable when a state actor has actual awareness, based on concrete information, of a risk of harm to an individual or class of individuals such that the actor is on notice that his or her act or failure to act significantly enhances that risk of harm.”); Sciotto v. Marple Newton Sch. Dist., 81 F. Supp. 2d 559, 565 (E.D. Pa. 1999) (“[A] reasonable jury could find—on the basis of expert observations on the dangerousness of the tradition of inviting alumni to wrestling practices, a prior injury under similar circumstances, parental complaints about the safety of the practice, and relevant rules governing high school athletics—that inviting older, heavier, more experienced alumni wrestlers to practice with the Marple Newtown High School wrestling squad and . . . to ‘live wrestle’ with younger, lighter, less experienced members of the high school team . . . created a foreseeable risk of injury, and that a reasonable wrestling coach and athletic director knowing of such a practice, could have foreseen an injury . . . .”).

221 Sciutto, 81 F. Supp. 2d at 564.

222 King v. E. St. Louis Sch. Dist. 189, 496 F.3d 812, 818 (7th Cir. 2007).

constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking."

"[W]hat is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible." Indeed, there is a continuum upon which the degree of culpability required for a state-created danger claim is measured. The level of culpability is inversely related to the amount of time the government actors had to respond to a particular incident. "The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." Historically, "[w]here state officials are asked to make split-second decisions in a hyperpressurized environment, an intent to cause harm is usually required." Conversely, "where officials are afforded the luxury of a greater degree of deliberation and have time to make ‘unhurried judgments,’” conduct demonstrating deliberate indifference is sufficient to establish conduct that shocks the conscience. Moreover, where the state actor is forced to “make something less exigent than a ‘split-second decision, but more urgent than an ‘unhurried judgment,’” the court considers whether the defendant "disregarded a great risk of serious harm rather than a substantial risk."

Thus, in the Third Circuit, the three standards governing the shocks-the-conscience inquiry are: (1) deliberate indifference, where the state actor has ample time to deliberate; (2) gross negligence or arbitrariness that shocks the conscience—which requires that the state actor consciously disregard a great risk of serious harm—where the state actor must act within a matter of minutes or hours; or (3) intent to cause harm, where the state actor makes a split-second decision.

In unique situations where the government intervenes in anticipation of an emergency and, due to its intervention, creates a more dangerous situation, courts have been more willing to find that the behavior was conscience-shocking. For example, the U.S. District Court for the District of New Jersey in Van Orden v. Borough of Woodstown stated that the defendant borough’s actions could be considered conscience shocking.

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225 Sanford v. Stiles, 456 F.3d 298, 310 (3d Cir. 2006).
226 Id. at 310.
227 Id.
229 Id. at 683 (citing Phillips v. County of Allegheny, 515 F.3d 224, 240 (3rd Cir. 2008)).
230 Phillips, 515 F.3d at 241 (quoting Sanford, 456 F.3d at 306).
231 Id.
232 McQueen v. Beecher Cmty. Schs., 433 F.3d 460, 469 (6th Cir. 2006).
because it failed to close Route 40, a main road near a dam, after opening
the dam’s floodgates to control flood waters during Hurricane Irene.234 The
plaintiff’s daughter, whose home had lost power during the hurricane, was
driving on Route 40 to escape from the storm when her car was “‘swept
away by fast-moving water,’” resulting in her drowning.235 After finding
that the defendants’ affirmative acts—the opening of the floodgates, which
caused Route 40 to become “‘inundated with raging flood waters’”—was
the but-for cause of the plaintiff’s daughter’s death, the court turned its
attention to the conscience-shocking inquiry.236

Highlighting the Third Circuit’s approach in developing varying
degrees of culpability in light of the exigency of the situation, the Van
Orden court rejected the Defendants’ argument that the highest level of
culpability should govern since, according to the Defendants, the decision
to open the dam and the simultaneous failure to close Route 40 was in
response to “‘an ever-changing emergency situation’” and a “‘hyper-
pressurized’ situation.”237 Instead, the court relied on facts from the record
indicating that the “[d]efendants had at least several hours ‘to prepare
and/or implement a plan for dealing with the storm’s potential effects,’
before opening the floodgates ‘later [t]hat evening’” and held that Plaintiff
did not have to prove actual intent to harm.238 Ultimately, the court held
that “[r]eleasing ‘raging flood water’ capable of enveloping roads and
bridges and causing serious bodily injury or death, without taking safety
measures to protect citizens, certainly could be considered conduct that
shocks the conscience.”239

Following the Third Circuit’s analytical framework, a school shooting
victim claiming that school actors are liable for the injuries under a state-
created danger theory must first address whether a claim premised on a
teacher’s (1) misfiring, (2) misuse, or (3) misplacement of the gun resulted
from a split-second decision.

Where the but-for cause of the plaintiff’s injuries is the teacher’s act of
misfiring a gun, such a claim, without more, would probably not rise to the
“conscience-shocking” level sufficient to hold individual actors liable,
especially in circuits that differentiate between split-second decisions and
decisions that allow for reasoned deliberation. A teacher’s act of pulling
the trigger (and missing due to inadequate training) is likely a split-second
decision made during a traumatic event that will not satisfy the intent-to-
harm standard, especially where the teacher’s presumed intent in firing the

234 Id. at 684.
235 Id. at 679.
236 Id. at 682, 684.
237 Id. at 683–84.
238 Id.
239 Id. at 684.
weapon at an attacker was to protect her students. Ultimately, the analysis will depend on the number of students in the teacher’s nearby vicinity, the teacher’s experience level, and other contributing factors unique to the particular case.

To satisfy the conscience-shocking element in “settings [that] provide the opportunity for reflection and unhurried judgments,” the appropriate standard is that of deliberate indifference. Where a teacher left six students in a classroom as punishment for not doing their work, the court held that “deliberate indifference is the appropriate standard because [the teacher] had the opportunity to reflect and to deliberate before deciding to leave [the children] unsupervised in the classroom[,] . . . . [and] did not need to make a split-second decision that merits applying a higher standard.” Similarly, where the victim’s injury is proximately caused by a teacher’s misplacement of her gun, deliberate indifference would be the appropriate standard, as the misplacement was likely not a split-second decision made under stressful and chaotic circumstances.

In proving “deliberate indifference” based on a teacher’s misplacement of a gun, a plaintiff must demonstrate that the official was both “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,” and that the teacher drew the inference. A teacher’s act of leaving a gun in an accessible area in a school full of children probably constitutes deliberate indifference since the chance that a student could find the misplaced gun and actually injure herself or others is great.

Finally, a plaintiff’s claim premised upon a teacher’s misuse of a gun would easily satisfy the shocks-the-conscience inquiry, even applying the burdensome split-second-decision standard of “intent to harm.” Under any conceivable circumstance in which a teacher misused a weapon for punitive, intimidation, or other inappropriate purposes, the teacher undoubtedly had actual intent to harm.

“It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law’s spectrum of culpability.” Generally, garden-

240 McQueen v. Beecher Cmty. Schs., 433 F.3d 460, 469 (6th Cir. 2006) (alteration in original) (quoting Bukowski v. City of Akron, 326 F.3d 702, 710 (6th Cir. 2003)).
241 Id.
242 Id. (quoting Sperle v. Mich. Dep’t of Corr., 297 F.3d 483, 493 (6th Cir. 2002); Cantrell v. Huckabee, 433 F. App’x 488, 490 (8th Cir. 2011)).
243 See Martin et al., supra note 174, at 58–61 (finding that the most frequent cause of unintentional gun-related fatalities of children age fourteen and below in New Mexico from 1984–1988 was playing with loaded guns found within their homes).
244 County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).
variety negligence, without more, is not enough to shock the conscience.\(^{245}\) Instead, the shocks-the-conscience inquiry asks “whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning.”\(^{246}\)

Where, pursuant to a school-created armed-teachers policy, a teacher’s misplacement or misuse of a firearm on a K-12 campus is an affirmative act and the proximate cause of a student’s gun-related injury, this act may very well be conscience shocking, and a plaintiff seeking to hold a teacher liable under the state-created danger theory will survive a motion to dismiss, exposing the teacher to potential liability. Ultimately, determining whether the plaintiff is likely to succeed on the merits is fact sensitive.

V. THE MONELL CLAIM: SCHOOL DISTRICT “MUNICIPAL” LIABILITY\(^{247}\)

Generally, municipalities are not liable for the individual actions of their employees, even when those actions are unconstitutional.\(^{248}\) Most circuits will impose municipal liability under § 1983 only when some municipal policy or custom caused the underlying constitutional violation by state actors.\(^{249}\) Therefore, in determining whether schools are liable under a state-created danger theory, the complained-of conduct must have occurred pursuant to a school-established policy, practice, or custom, which essentially “ratifie[s]” the unconstitutional conduct of its employees.\(^{250}\) A § 1983 plaintiff must demonstrate “that defendants, with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the plaintiff] constitutional harm.”\(^{251}\)

\(^{246}\) Lewis, 523 U.S. at 857 (Kennedy, J., concurring).
\(^{247}\) Monell v. Dep’t of Soc. Servs. of N.Y., 436 U.S. 658, 694 (1978) (concluding that a municipality is an entity that may be sued under § 1983 “when execution of a government’s policy or custom . . . inflicts the injury”).
\(^{248}\) See Ian D. Forsythe, A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent, CONSTITUTION SOC’Y, http://www.constitution.org/brief/forsythe_42-1983.htm [http://perma.cc/E7VD-7ZAN] (last visited July 25, 2015) (“In order to hold a local government liable under § 1983, the Supreme Court has interpreted this causation element to require that the harm be the result of action on the part of the government entity that implemented or executed a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers, or the result of the entity’s custom.”).
\(^{249}\) Kneipp v. Tedder, 95 F.3d 1199, 1211–13 (3d Cir. 1996).
Plaintiffs seeking to hold both the individual state actor and the municipality liable must prove that the state actor’s underlying constitutional violation occurred because the actors were behaving in accord with the municipality’s policy.252

A. Constitutional Violation by a State Employee

The first part of a Monell claim considers whether a state actor violated the plaintiff’s constitutional rights.253 An underlying constitutional violation by a state employee—here a teacher—is always a prerequisite to finding that a municipality is liable under a Monell theory.254

Notably, although a municipality’s Monell liability under § 1983 is derivative in nature, and is therefore contingent upon an underlying constitutional violation of the plaintiff’s rights,255 the plaintiff “[does not have to] obtain a judgment against the individual tortfeasors in order to establish the liability of the municipality.”256 As such, a school district may nonetheless incur Monell liability under § 1983 even if an individual teacher is absolved from individual liability.257 For example, where “individual defendants violated the plaintiff’s rights but enjoy qualified immunity, or . . . the plaintiff’s injuries are not solely attributable to the actions of the named individual defendants,” or the claims against the individual defendants are dismissed due to certain procedural defects or settled out of court, the municipality may still face Monell liability.258

The first element of a plaintiff’s Monell claim is satisfied by the underlying constitutional violation discussed in Part IV above—that is, the deprivation of a school shooting victim’s Fourteenth Amendment right to bodily integrity based on a government-created risk. The discussion now turns to the second element.

254 See id. at 692 (“[Section 1983] plainly imposes liability on a government that, under color of some official policy, ‘causes’ an employee to violate another’s constitutional rights.”).
256 Askins v. Doe # 1, 727 F.3d 248, 253 (2d Cir. 2013); see also Curley v. Village of Suffern, 268 F.3d 65, 71 (2d Cir. 2001) (stating that “a defendant municipality [will not be saved] from liability where an individual officer is found not liable because of qualified immunity,” with the underlying rationale being that “the municipality enjoys no qualified immunity shield”).
257 Sforza, 2009 WL 857496, at *10 (“[W]here claims against the individual officers have been dismissed without reaching their merits, it is still possible for a jury to find a constitutional violation for which a municipality may, [through] its policies, practices, or customs, be liable.”).
B. Municipal Liability Based on a Failure to Adequately Train

The second element of a Monell claim requires the plaintiff to prove that the municipality was somehow responsible for the underlying constitutional violation. A plaintiff can prove municipal liability under the policy, practice, or custom theory of liability in one of the following four ways: (1) the municipality officially adopted or promulgated a policy that is facially unconstitutional or unconstitutional as applied; (2) the municipality condoned an unconstitutional custom or practice; (3) the unconstitutional decisions were made by officials with final policymaking authority; or (4) the municipality failed to properly train or supervise its employees with respect to the implementation of a municipal policy. In order to show that a policy caused such harm, the policy must be the “moving force” of the deprivation of the plaintiff’s federal rights.

With respect to the armed-teachers approach, plaintiffs are most likely to succeed under the fourth theory of liability. Pursuant to the “failure to train” theory, a school district will be held liable if its “failure to train amounts to deliberate indifference to the [constitutional] rights of persons with whom the [teachers] come into contact” or if the district’s policy is “objectively deliberately indifferent to the likelihood [that] a particular constitutional violation would occur.”

Plaintiffs can satisfy the “deliberate indifference” standard in one of two ways. First, where there is an obvious need to train, the district will be deemed to have actual notice, and its failure to train will constitute deliberate indifference the first time a constitutional violation occurs. Second, in cases where the need to train is not obvious, the district will be deemed to have constructive notice where there is a repeated pattern of constitutional violations arising from the policy.

In determining deliberate indifference, the inquiry turns on the adequacy of the training program in relation to the particular task that the

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259 See, e.g., City of Canton v. Harris, 489 U.S. 378, 388 (1989) (“We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”); Wragg v. Village of Thornton, 604 F.3d 464, 467 (7th Cir. 2010) (“To establish an official policy or custom, a plaintiff must show that his constitutional injury was caused ‘by (1) the enforcement of an express policy of the [village], (2) a widespread practice that is so permanent and well settled as to constitute a custom or usage with the force of law, or (3) a person with final policymaking authority.’”) (quoting Latuszkin v. City of Chicago, 250 F.3d 502, 504 (7th Cir. 2001))); Vesterhalt v. City of New York, 667 F.2d 292, 301 (S.D.N.Y. 2009) (finding that a plaintiff must prove that the municipality adopted a policy that is unconstitutional to state a viable § 1983 claim).
261 Harris, 489 U.S. at 388.
262 Blum, supra note 255, at 843.
263 Harris, 489 U.S. at 390.
264 Id. at 396.
individual state actor must perform pursuant to the municipal policy.\textsuperscript{265} The plaintiff must generally prove that the inadequate training actually caused the underlying violation.\textsuperscript{266}

In \textit{Young v. City of Providence},\textsuperscript{267} on-duty police officers accidentally shot an African American officer, who responded to an incident while off-duty, mistaking him for the perpetrator.\textsuperscript{268} Where the police department instituted an “always armed/always on duty” policy, the First Circuit held that a reasonable jury could find that there was an “obvious” need for the department to train police officers to properly identify other off-duty officers.\textsuperscript{269} Finding that the Department could be held liable for its failure to train, the court relied on ample evidence in the record revealing that it inadequately trained officers in identifying off-duty police officers.\textsuperscript{270} Similarly, in \textit{Combs v. School District of Philadelphia},\textsuperscript{271} the court held that the plaintiff satisfied his burden at summary judgment of proving that the school had exhibited “deliberate indifference” to the risk to students by showing that there may have been insufficient training related to school procedure, which ultimately led to the student’s injury.\textsuperscript{272}

The holdings of \textit{Young} and \textit{Combs} indicate that, due to the inherently dangerous nature of the armed-teachers approach, there is a need for school districts to properly train teachers so they are ready and able to use firearms appropriately, thereby minimizing the risk to student bystanders.\textsuperscript{273} The deliberate indifference standard is thus satisfied if a school district’s failure to properly train an armed teacher results in a student’s gun-related injury or death. As explained above, even the states that require the highest number of training hours for armed teachers probably fail to satisfy the proper training requirements under a \textit{Monell} analysis.

A year after the 9/11 terrorist attacks, President Bush signed the Arming Pilots Against Terrorism Act (APAT Act).\textsuperscript{274} The APAT Act compels the Transportation Security Administration to arm and train any

\begin{footnotes}
\footnotetext{265} Id. at 390; see also Cannon v. City of Philadelphia, 86 F. Supp. 2d 460, 472 (E.D. Pa. 2000) (discussing liability in relation to inadequate training).
\footnotetext{266} Harris, 489 U.S. at 391.
\footnotetext{267} 404 F.3d 4 (1st Cir. 2005).
\footnotetext{268} Id. at 9.
\footnotetext{269} Id. at 9–10.
\footnotetext{270} Id. at 27–28.
\footnotetext{272} Id. at *3. The plaintiff in \textit{Combs} alleged that the school failed to properly and promptly respond to an incident during which he was physically attacked by three other students. Id. at *1. The plaintiff suffered a broken jaw and psychological trauma as a result of the attack. Id.
\footnotetext{273} Id. at *4.
\end{footnotes}
airline pilots who volunteer for the program. Once the pilots complete training and certification, they are known as “Federal Flight Deck Officers.”

Pilots wishing to volunteer for the program must complete a cumbersome, thirteen-page application and submit to a three-hour written psychological exam probing into the pilot’s most private thoughts, feelings, opinions, and emotions. If a pilot passes the initial examination, she must report to a government psychologist for a one-on-one interview, which many pilots (both commercial and military) with top-secret security clearances fail to pass. Assuming the pilot passes the psychological screening, the pilot has to travel, at her own expense, to Artesia, New Mexico, where she would undergo an extensive training program. Even with the stringent requirements and built-in hurdles that pilots must overcome before becoming Federal Flight Deck Officers, the Transportation Security Administration still retains the power to revoke a pilot’s Airline Transport Pilot certificate if it deems her a security threat.

Like pilots, teachers and school officials are entrusted with the safety of children and are expected to ensure a student’s safe passage throughout the school day. Despite this, most of the armed-teacher laws do not impose even minimal psychological evaluation on teachers seeking to carry firearms on campus.

When a student is injured in any of the scenarios posed in Part III above, the school district is vulnerable to liability for implementing an armed-teacher policy without providing adequate training or conducting psychological screenings of employees participating in the program. Like in Young, where the police department’s failure to train employees properly with respect to the “always armed/always on duty” policy constituted deliberate indifference to the likelihood of injury or death, a school district’s failure to properly train teachers to serve as armed security officers pursuant to an armed-teachers policy rises to the level of deliberate indifference. Research indicates that even highly-trained police officers miss their intended target in a live-shooter situation 52%–88% of the

275 Id.
277 Where Are the Armed Pilots?, supra note 274.
278 Id.
279 Id.
280 Id.
281 See infra Appendix.
282 See City of Canton v. Harris, 489 U.S. 378, 392 (1989) ("[W]hile claims such as respondent’s—alleging that the city’s failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city’s failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.").
This level of shooting accuracy is undoubtedly much lower for inadequately trained and improperly screened teachers.

Thus, where the armed-teachers approach requires laypeople to carry firearms in anticipation of an attack, a school’s deficiency in training its teachers to carry out the policy safely would be the “moving force” of a victim’s injuries and would therefore be the primary cause of the deprivation of a student’s right to bodily integrity. Accordingly, a plaintiff seeking to hold a school district liable for an injury or death proximately caused by a teacher’s misfire or misuse of a firearm pursuant to a district’s armed-teachers policy will be able to establish municipal liability under the state-established policy, practice, or custom theory of liability.

VI. CONCLUSION AND RECOMMENDATIONS

With the security trend in primary and secondary schools moving toward a “guns-blazing” approach, and at least a quarter of states allowing teachers and other school personnel to carry firearms on campus during the school day, are American students any safer? How can we be sure that teachers are effective in a live-shooter situation, especially when the minimal training requirements vary drastically by state and are, for the most part, negligible? Finally, how can we ask schoolteachers, who are already tasked with the difficult mission of educating our children, to assume the additional role of school security guard?

As politicians continue to rapidly push statutory authorizations of the armed-teachers approach through the legislative process, these questions will become even more critical. Before hastily adopting such laws, policymakers should take note of the overwhelming evidence demonstrating that, without adequate training, laypersons are not prepared to safely defend bystanders during a live-shooter event simply because they are armed. In fact, the armed-teacher approach actually elevates the risk to students during a live-shooter event. School districts authorizing teachers to carry firearms on campus without providing sufficient training

283 Charles & Copay, supra note 129, at 17.


285 See, e.g., Act of Apr. 22, 2014, § 16-11-127.1(c)(5), 2014 Ga. Laws 432, 434 (requiring only valid authorization by an authorized official for possession or use of a firearm as it relates to school safety); Safe Carry Protection Act, § 16-11-130.1(b), 2014 Ga. Laws 599, 616 (requiring general, non-specific, and non-uniform firearms training); KAN. STAT. ANN. § 75-7c04(a)–(b) (West, Westlaw through 2015 Reg. Sess.) (requiring only eight hours of firearms training); UTAH CODE ANN. § 76-10-505.5 (West, Westlaw through 2015 Gen. Sess.) (requiring no training—only authorization by an approved official).
are creating a new risk, dangling students above a figurative snake pit of danger.

When an armed-teacher’s use of a firearm on school grounds is the proximate cause of a student’s injury or death, that teacher, as a state actor, may be liable under the government-created risk doctrine. Similarly, after a school adopts a policy of arming teachers with guns and fails to adequately train them, it exposes itself to Monell liability for any injuries resulting from the implementation of such policy. Both of these theories of liability are viable because of the safety implications of a school’s own invitation of an inherently dangerous activity onto campus.

Most states that have adopted the armed-teachers approach have invoked fiscal reasons as their justification. But, where the cost of hiring trained law enforcement or private security officers is relatively low compared to the potential cost to student lives placed in greater danger as a result of the armed-teachers approach, the money-saving justification invoked by most school districts is foolhardy and, at best, illogical.

Finally, schools must not lose sight of the appropriate role and function of teachers. With teacher effectiveness under a microscope and student success at the crux of a national debate, the armed-teachers approach unnecessarily muddies the already murky waters.

Teachers are already juggling more responsibilities than they can arguably handle effectively. One disgruntled teacher explained that “between planning lessons, grading papers, writing tests, coming up with activities, lunch duty, tutorials and juggling the requirements for [the school’s] alternative certification program, [she is] stretched to the

286 See supra Part II.
Research has shown that the most important school-based factor impacting a child’s academic success is the quality of her classroom teacher. Despite this, states adopting the armed-teachers approach are expecting teachers to assume a dual role of both educator and armed security guard.

In comparison to the alternatives, the only benefit to the armed-teachers approach is that it may be cost-saving for many schools. But, where the stakes are so high, school districts seeking to increase the presence of armed guards on campus should hire current or former police officers or trained security guards, allowing teachers to focus on educating, and leaving the patrol work to the properly trained experts.

289 Fairbank, supra note 288.
1. **Alabama**

On May 28, 2013, the Alabama State Legislature passed the “Armed Teachers’ Bill.” Instead of allowing all teachers in all districts throughout the state to carry firearms, the new Alabama law applies only to Franklin County, allowing teachers and staff to carry firearms at Franklin County public school campuses. Franklin County lies in Northwest Alabama and has approximately 31,000 residents. Franklin County School District Superintendent Gary Williams justified the adoption of the bill as a necessity since law enforcement takes more than twenty minutes to respond to certain rural schools in the district.

Pursuant to the legislation, any Franklin County principal determining that “the safety of the students at the school is not adequately protected or that additional security is necessary to ensure the safety of the students or employees” may “request volunteers to serve on an emergency security force.” Members of the security force must be current or retired school district employees or residents of the school district. The Franklin County sheriff reviews the list of volunteers for each school and then has the option to approve or deny each potential program participant. Next, the sheriff and administrative school personnel develop “a detailed crisis plan” and establish other rules governing key aspects of the plan, including the storage and carrying of weapons. Further, the firearms must be approved by the sheriff.

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292 See ALA. CODE § 45-30-103(a), (c) (West, Westlaw through Mar. 1, 2015) (“Upon a determination by the principal of any Franklin County public K-12 school that the safety of the students at the school is not adequately protected or that additional security is necessary to ensure the safety of the students or employees, he or she may request volunteers to serve on an emergency security force for the school. Volunteers shall consist of current employees of the school, retired employees of the school, and residents of the school district. . . . Upon formation of an emergency security force, the sheriff, in conjunction with administrative school personnel, shall prepare a detailed crisis plan for the school that includes a comprehensive plan of action for the emergency security force to follow in the event the security of the school is compromised or the safety of students or employees is threatened. The plan shall also specify how and where weapons may be stored and carried by emergency security force members and circumstances under which certain weapons may be used.”).

293 Id. § 45-30-103(a).


296 ALA. CODE § 45-30-103(a) (West, Westlaw through Mar. 1, 2015).

297 Id.

298 Id. § 45-30-103(b).

299 Id. § 45-30-103(c).

300 Id.
Security force members are unpaid, but they may receive a “salary supplement” from the board of education for their service.\(^{301}\) In addition, security force members may receive reimbursement for the “actual necessary expenses incurred in the discharge of [their] duties,” including any expenses related to weapon procurement and training.\(^{302}\)

The legislation classifies members of the emergency security force as reserve deputy sheriffs.\(^{303}\) According to the law, members must participate in all training ordered by the sheriff.\(^{304}\) The Franklin County Sheriff’s Office indicates that reserve deputies are required to attend and qualify under the Alabama Peace Officers Standards and Training (APOST) guidelines.\(^{305}\) APOST requirements indicate that trainees are required to complete a modest forty-three hours of firearms training.\(^{306}\) The statute itself does not impose specific training obligations.

2. **Arkansas**

School districts in several states, including Arkansas and Colorado, have developed creative methods of circumventing state laws that prohibit guns on school campuses. Although Arkansas law prohibits all individuals from carrying firearms on any K-12 public or private school campus,\(^{307}\) there is a statutory loophole for “registered commissioned security guard[s].”\(^{308}\) Its provisions allow the Arkansas Board of Private Investigators and Private Security Agencies to license and designate individuals as “commissioned school security officer[s],”\(^{309}\) which the Act defines as “an individual who “[p]rovides security for the school; and . . . [h]as received an authorization issued by the director to carry a firearm in the course of his or her employment.”\(^{310}\) As long as school districts hire “an individual in the capacity of a commissioned security officer or commissioned school security officer, the security department of the private business or school is not required to make application to the Department of Arkansas State Police for any license.”\(^{311}\)

\(^{301}\) Id. § 45-30-103(e).

\(^{302}\) Id. § 45-30-103(e), (f).

\(^{303}\) Id. § 45-30-103(d).

\(^{304}\) Id.


\(^{308}\) Id. § 5-73-119(e)(4).

\(^{309}\) Id. § 17-40-102(10).

\(^{310}\) Id.

\(^{311}\) Id. § 17-40-103(b)(1). But see Keller, supra note 14, at 694–706 (providing an in-depth discussion of the Arkansas licensing scheme).
This body of law is relatively new and has been effective only since September 2015. Prior to that, school boards had to seek licenses from the Arkansas Board of Private Investigators and Private Security Agencies allowing them to designate teachers and staff as “private security officers” under the Act. The Board established the requisite training requirements for applicants to obtain a license. The Board’s policies required a meager ten hours of training.

Arkansas Attorney General Dustin McDaniel issued an advisory opinion stating that school district employees cannot be licensed as private “commissioned security guards” under state law. As an initial response to the advisory opinion, the Board of Private Investigators and Private Security Agencies issued a temporary suspension of all school district licenses, but it later reinstated the licenses for a two-year period.

It remains to be seen whether the Private Security Agency, Private Investigator, and School Security Licensing and Credentialing Act will continue to be construed to allow licensure of public school districts as private security agencies. Alternatively, Arkansas teachers and staff can carry firearms on campus if they participate in the 110 hours of training and become a “reserve deputy,” an official law enforcement position.

As in other states, Arkansas’ justification for this approach is fiscal in nature. “Without money to hire security guards for the five schools [school superintendent David Hopkins] oversees, giving teachers sixty hours of training and their own guns seemed like the only reasonable, economical way to protect the 2,500 public school students in this small town in the Ozark foothills.”

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312 Keller, supra note 14, at 694–706.
313 Id.
314 Id.
317 See generally Keller, supra note 14.
3. **Colorado**

Not long after the Colorado Legislature rejected two bills that would have authorized school districts to allow teachers and staff to carry guns on campus, some rural school districts found a clever way around Colorado’s no-guns-on-campus restriction. Under current Colorado law, school districts may allow only employees who are hired as security officers to carry concealed firearms on school campuses. Despite this prohibition, at least one Colorado school district has hired teachers as security guards, requiring them to only take a refresher course twice a year and fire at least 100 rounds a month at the shooting range. The Dolores County School District hired two principals as security officers and entered into contracts with both of them, memorializing the agreed-upon $1.00-per-year salary as compensation for their new roles.

4. **Georgia**

Although Georgia has historically restricted the possession of firearms and other weapons on school grounds, Governor Nathan Deal recently signed the Safe Carry Protection Act of 2014, a pro-gun amendment to the State’s criminal code, allowing certain individuals to carry firearms in areas otherwise legally designated as “school safety zones.”

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322 COLO. REV. STAT. ANN. § 18-12-214(3)(b) (West, Westlaw through July 1, 2015).

323 Campbell, *supra* note 321.


325 See, e.g., GA. CODE ANN. § 16-11-127.1(b)(1) (West, Westlaw through 2015 Reg. Sess.) (making it unlawful to “carry to or to possess . . . [a weapon or explosive] within a school safety zone”).

statute, dubbed by critics as the “guns everywhere” bill,” took effect on July 1, 2014 and allows any “duly authorized official of a public or private elementary or secondary school or a public or private technical school, vocational school, college, university, or other institution of post-secondary education or a local board of education” to possess or use a firearm which would otherwise be prohibited by the Georgia Code within a school safety zone, at a school function, or on a bus or other transportation provided by a school. While the law does require boards of education to adopt a policy with specific provisions governing the training of personnel approved to carry weapons on campus, it fails to specify a minimum number of required training hours.

5. Indiana

Indiana’s Governor recently signed legislation allowing individuals to store firearms in their vehicles on campus property. The legislation provides defenses to prosecution of gun-related offenses for storing firearms in a locked vehicle outside of plain sight.

While the legislation does not directly discuss the use of firearms on school property, in northeast Indiana, a sheriff offered to deputize teachers to carry handguns in their classrooms less than a week after the Newtown, Connecticut school shooting. Although a generous community member donated $27,000 in firearms and three Indiana school districts expressed a desire to participate in the sheriff’s plan, the effort was foiled when an insurance company stated that it would refuse to provide workers’ compensation coverage to schools with gun-carrying staff members.

6. Kansas

On April 16, 2013, the Kansas Legislature passed a law that authorizes a public school district to allow any individual, school employee or

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327 Osunsami, supra note 326. A spokesperson from Americans for Responsible Solutions, a fierce opponent of the bill, summarized it as follows: “Among its many extreme provisions, it allows guns in TSA lines at the country’s busiest airport, forces community school boards into bitter, divisive debates about whether they should allow guns in their children’s classrooms, and broadens the conceal carry eligibility to people who have previously committed crimes with guns.” Devon M. Sayers & Elliott C. McLaughlin, Georgia Law Allows Guns in Some Schools, Bars, Churches, CNN (Apr. 23, 2014), http://www.cnn.com/2014/04/23/us/georgia-governor-signs-gun-bill/ [http://perma.cc/8MQM-WA6Y].

328 Safe Carry Protection Act, § 1-6(c)(6), 2014 Ga. Laws at 606.

329 See id. § 1-9(b), 2014 Ga. Laws at 616.


331 Id. § 5(b), 2014 Ind. Laws at 1884.


333 Id.
otherwise, to carry a concealed weapon on school district property. 334 The law establishes no minimum standards for school district policies regarding the possession of firearms on school property other than the requirements for obtaining concealed carry licensure. 335 In addition to other basic requirements, Kansas imposes modest training requirements for individuals to obtain a concealed carry permit; indeed, the statute only requires applicants for concealed carry licenses to complete an accredited eight-hour handgun safety course. 336 The law does not specify additional firearm or other experiential training requirements.

Like the Indiana gun law, the new Kansas law may make it difficult for school districts to obtain insurance coverage. After the new regulations became law, EMC Insurance Company, the liability insurer for ninety percent of Kansas’ school districts, cautioned that any districts in the state permitting employees to carry concealed handguns on school property would lose or be denied coverage. 337

7. Oregon

In Oregon, state law permits individuals “authorized by the officer or agency that controls the public building to possess a firearm or dangerous weapon in that public building.” 338 The law has been in place for more than twenty years. 339 Notwithstanding the state’s expansive concealed carry laws, Oregon school districts may impose more limiting weapons restrictions on school staff, and many Oregon districts ban guns on campus grounds. 340 During the state’s last legislative session, a bill that would have prohibited all concealed weapons in schools failed in committee with meager support. 341

Nearly a year after the tragic shooting at Sandy Hook Elementary, at least one Oregon school district lifted a ban that prevented teachers with

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335 See id.
336 KAN. STAT. ANN. § 75-7c04(b)(1) (West, Westlaw through 2015 Reg. Sess.).
337 Yaccino, supra note 332.
339 The specific provision has existed since 1979 and only has been amended once to include the language “or dangerous weapon.” See Act of July 16, 1979, § 2, 1979 Or. Laws 489, 489.
concealed weapon permits from possessing firearms on campus.\textsuperscript{342} At the 4-1 vote, during which the St. Helens School Board received no feedback from teachers in the district about their opinions on the matter, the Board imposed no restrictions, training requirements, or policy guidelines on the seven schools within the district.\textsuperscript{343} Other school boards have considered following St. Helens’ lead and lifting the concealed weapons ban on school campuses across Oregon.\textsuperscript{344}

8. \textit{South Dakota}

On March 8, 2013, the South Dakota Legislature passed a law that authorizes any school board to “create, establish, and supervise the arming of school employees, hired security personnel, or volunteers,” to be known as “school sentinels.”\textsuperscript{345} School district sentinel programs must be approved by the local law enforcement official with jurisdiction over the district.\textsuperscript{346}

Sentinels must complete a training course “as defined by the Law Enforcement Officers Standards Commission.”\textsuperscript{347} The South Dakota Division of Criminal Investigation has developed minimum standards for school sentinels.\textsuperscript{348} Minimum standards include “good moral character,” an examination by a physician for ability to perform duties, and at least eighty hours of training with yearly renewal tests.\textsuperscript{349} Sentinels must also maintain their concealed carry licensure.\textsuperscript{350}

The South Dakota law was enacted to ameliorate the economic burden of providing effective security in public schools. In South Dakota, bill sponsor Representative Scott Craig of Rapid City explained that rural districts do not have sufficient funding to support expenditures on full-time


\textsuperscript{346} Id. § 2, 2013 S.D. Sess. Laws at 210.

\textsuperscript{347} Id. § 3, 2013 S.D. Sess. Laws at 210.


\textsuperscript{349} Id. at 2, 5.

law enforcement officers and, as a result, “they are interested in arming teachers or volunteers.”

9. **Tennessee**

Tennessee’s guns-in-schools law went into effect on July 1, 2013. The law allows school employees and persons “assigned to a school in accordance with a memorandum of understanding between the chief of the appropriate law enforcement agency and the [school district]” to carry firearms on campus.

Tennessee requires that individuals wishing to possess firearms on school property have a concealed carry license, receive written permission from both the “director of schools” and school principal, and be a “law enforcement officer, or have prior service as a law enforcement officer.” The law mandates forty hours of basic training in school policing.

10. **Texas**

The Protection of Texas Children Act, the Texas guns-in-school legislation, went into effect on June 14, 2013. The law allows school districts to appoint “school marshals” that carry firearms according to the district’s written regulations and only at specific schools approved by the district.

The law specifies several topics that must be included or addressed by districts in their written school policies. Applicants must be school employees holding concealed handgun licenses. In addition, district training programs are required to include eighty hours of instruction and psychological examinations. However, a marshal that has “regular, direct contact with students” may not carry a concealed handgun. Instead, the law requires the marshal to store the firearm “in a locked and secured safe within the marshal’s immediate reach when conducting the marshal’s primary duty.” In addition, the law limits the presence of guns on campus by restricting the number of school marshals to one per every

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352 TENN. CODE ANN. § 49-6-815 (West, Westlaw through 2015 1st Reg. Sess.).
353 Id. § 49-6-815(a).
354 Id. § 49-6-815(b).
355 Id. § 49-6-815(b)(3).
357 Id. § 3, 2013 Tex. Gen. Laws at 1742–43.
359 Id. § 5, 2013 Tex. Gen. Laws at 1743–44.
360 Id. § 3, 2013 Tex. Gen. Laws at 1743.
361 Id.
400 students. Opponents of this approach worry about gun access and its potential to result in an increase of gun-related injuries and death on campus.

11. Utah

Utah is one of the only states that authorizes individuals who hold concealed carry permits to carry licensed, concealed weapons onto public school campuses without exception. Thus, it is inferred that teachers who hold concealed carry licenses could do so. In order to be issued a license and be allowed to carry a concealed gun, an individual must, among other things, pass a background check and undergo the required training. Thus, in Utah, teachers who meet all of the statutory licensing requirements are eligible to obtain a license and carry a concealed gun into public schools. Because permit records are closed to the public, parents have no way of knowing which teachers carry weapons.

12. Other States

Numerous other states’ laws require only school board approval, or sometimes even less stringent requirements, in order to arm district employees. Hawaii’s and New Hampshire’s silence on the issue of

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364 See UTAH CODE ANN. § 76-10-505.5(4)(a) (West, Westlaw through 2015 Gen. Sess.) (providing that the ban does not apply to those authorized to possess a firearm who have official permits as regulated by statute); id. § 76-10-505.5(4)(b) (West, Westlaw through 2015 Gen. Sess.) (providing an exemption from punishment for carrying a weapon on school grounds when the "possession is approved by the responsible school administrator").
365 See UTAH CODE ANN. § 53-5-704 (West, Westlaw through 2015 Gen. Sess.) (requiring a variety of identifying documents and training to obtain "general familiarity").
366 See, e.g., ALASKA STAT. ANN. § 11.61.210 (West, Westlaw through 2015 1st Reg. Sess.) (stating that a person commits a crime in the fourth degree if they possess a weapon without "the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer, within the buildings of, on the grounds of, or on the school parking lot of a public or private preschool, elementary, junior high, or secondary school"); CAL. PENAL CODE § 626.9 (West, Westlaw through 2015 Reg. Sess.) (allowing the possession of a firearm in a school zone with the permission of the school district superintendent or his designee); CONN. GEN. STAT. ANN. § 53a-217b (West, Westlaw through 2015 Reg. Sess. and June Spec. Sess.) (exempting from conviction those carrying weapons on school grounds when possessing the weapon as a part of a program approved by school officials); IDAHO CODE ANN. § 18-3302D(4)(b) (West, Westlaw through 2015 1st Reg. Sess. and 1st Ex. Sess.) (exempting from punishment those possessing weapons on school grounds "as an appropriate part of a program, an event, activity or other circumstance approved by the board of trustees or governing board"); IOWA CODE ANN. § 724.4B(2)(b) (West, Westlaw through 2015 Reg. Sess.) (exempting from punishment those carrying weapons on school grounds who have been "specifically authorized by the school" to do so); KY. REV. STAT. ANN. § 527.070(3)(i) (West, Westlaw
allowing district employees to carry concealed firearms has been interpreted to effectively allow the practice.368

At least nineteen states have recently proposed legislation regarding the possession of firearms by district employees on K-12 school campuses.369