THE TORT OF NEGLIGENCE OR THE STATE-CREATED DANGER: TWO AVENUES FOR SCHOOL LIABILITY IN THE CASE OF THE INJURED STUDENT INFORMANT

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ABSTRACT

Schools use students as the watchdogs of the school to report to authorities about drugs and weapons possession. There is a lack of liability assigned to schools for placing students in this inherently dangerous situation. If it is absolutely necessary for high schools to use students as informants, courts should charge schools with an affirmative duty to protect student informants.

Where there is a duty, there is the potential to breach that duty, thus exposing the school to liability for negligence. So long as that breach of a duty causes an injury to the plaintiff through cause in fact, proximate cause, or the state-created danger a student can successfully assert a claim for negligence. Plaintiffs assert negligence claims through showing the existence of a duty on the part of the defendant to protect the plaintiff, a breach of that duty, and a showing that the defendants’ breach was either the cause in fact or the proximate cause of the plaintiff’s injury.

Additionally, school districts should be held liable for using students as informants because the use of student informants is a state-created danger. When state actors knowingly place a student in a perilous situation, they have presented themselves with a ‘state-created danger’ liability. Courts acknowledge being an informant places the person in danger, therefore it follows that encouraging and requesting students to act as informants is precisely a state-created danger. Parents and students can assert a claim in federal court under 42 U.S.C. § 1983 for deprivation of rights secured under the Constitution when that deprivation results in injury. The asserted claim comes under the Fourteenth Amendment as a violation of the student’s due process rights and their liberty interest in the right to personal security.
Students have suffered both physical and verbal abuse because other students believed they were informants. Due to the highly dangerous nature of being an informant, when a school takes the chance with a student’s safety through utilizing him or her as an informant, the school should face liability in making that dangerous choice.

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Adolescence is enough suffering for anyone.
~John Ciardi, 1962

INTRODUCTION

Tommy, a teenage boy, sees two other boys exchange money for drugs in the restroom between classes. He debates telling the principal because during orientation and in the student handbook the school requires students to inform an authority figure about this type of situation. In fact, the school recently held a drug awareness assembly charging students with the duty to report such incidents. The school repeatedly stresses there may be consequences for not letting an authority figure know of such events.

Tommy does not want to be a tattletale, nor does he want to get in trouble with the principal. He hesitates and thinks, “Which is worse, not telling and risk getting into trouble at school or telling and risk being labeled a tattletale?” He goes to the principal and tells him what he witnessed in the boys restroom. The two boys are brought into the principal’s office and searched for the drugs, which the principal finds. The principal confiscates the drugs and suspends the boys. After some thought, the boys pieced together it was Tommy who ‘snitched’ on them.
Later that day the two boys attack their informer in the hall before last period. They take turns kicking and punching him, spitting on him while calling him a rat and a snitch. The boys leave Tommy beaten and bloody on the floor. His injuries are so bad he is taken to a local hospital. The school calls his mother, who never imagined receiving a phone call like this. Her boy is a good student, one who has never been in confrontations before. She wants to know who is responsible for her son lying in the hospital.

Although there are few cases exactly like this because so few students have sued, this issue has arisen in regards to police informants and it is only a matter of time before the issue appears with a student informant. Most of the cases publicized involve police informants. But, in February 2008, Western High School in Las Vegas, Nevada distributed letters to its students requesting information about the shooting of a high school sophomore.¹ Many of those letters never left campus because of a great reluctance to come forward since students feared those involved would seek retaliation.² The word around school made it clear that if anyone said a name, that person would be shot.³ Despite this, the school still requested student involvement with no regard to the danger posed to those students that may come forward.⁴

There is sufficient information showing high schools utilize students as informants and that such utilization results in harm to the student.⁵ However, published research about these

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¹ ‘Snitches’ are Heroes, LAS VEGAS REVIEW JOURNAL, February 28, 2008, at 6B (detailing a shooting just off school grounds. The sophomore was shot in the back when he came to the aid of a friend who had been jumped.)
² ‘Snitches’ are Heroes, supra note 1 (The school distributed the letters to students in the hopes someone would come forward with information regarding the shooting. Most students hesitated because of the threats, as well as an apparent school rule among students. “You don’t talk mess to a person with a gun,” reported a student.)
³ Snitches’ are Heroes, supra note 1.
⁴ Snitches’ are Heroes, supra note 1.
⁵ Test this Program, THE AUGUSTA CHRONICLE, April 17, 2005, at A04 (In Richmond County, Georgia, a newly elected trustee proposed paying pupil for turning in classmates for drugs and weapons possession); In Class and in Prison, LOS ANGELES TIMES, April 11, 2004, at 4 (“Administrators rely on student informants to warn them when gang feuds are brewing”).
incidents is “virtually nonexistent,” and therefore the problem goes largely overlooked. Schools use students to find out about drugs and weapons possession in school and there is a lack of liability assigned to the school district to protect the student from this inherently dangerous situation.

This article will assert courts should charge schools with an affirmative duty to protect student informants. Part I of this Note establishes some background regarding the existence of student, as well as police, informants. Part II discusses the elements of negligence while presenting a number of ways to satisfy the causation element, including a relationship to the state-created danger. Part II also proposes alternative methods for satisfying the schools duty to keep the schools safe, which also suffice to show a breach when the schools chose student informants over those safer alternatives. Part III discusses the state-created danger as a judicially created law which should be applied uniformly to school districts in the event they choose to use students as informants. Finally, Part IV concludes with an overview for imposing an affirmative duty on schools that choose to continue utilizing students as informants.

I. BACKGROUND

Schools recruit students as informants. They do not provide protection for the students. Schools request students to volunteer information in the event they witness another student violating the rules of the school. It is often the case that students commit these offenses in small

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6 Mary Dodge, Juvenile Police Informants: Friendship, Persuasion, and Pretense, YOUTH VIOLENCE AND JUVENILE JUSTICE, 2006, 4: 234-246, http://yvj.sagepub.com/cgi/content/abstract/4/3/234 (last visited June 22, 2008) (addressing the lack of discussion among law enforcement officers); E-mail from Mary Dodge, Author, Juvenile Police Informants: Friendship, Persuasion, and Pretence, Associate Professor, University of Colorado at Denver (April 20, 2008, 07:28:08 PST) (reiterating the difficulty of finding research in this area because of reluctance to admit the use of juvenile informants).
groups. Therefore, if one student snitches on others, it becomes apparent who the snitch was and puts them in jeopardy.

A. Student Informants

Informants provide police and schools with information ranging from rule breaking to gang activity. Schools often use students to relay information to the proper school officials when they know of drugs or weapons in another student’s possession.\(^7\) Often, schools use this information to justify the search of another student.\(^8\)

Schools recruit student informants through rewards programs or sometimes even in exchange for a lesser punishment for breaking rules themselves.\(^9\) A number of schools created programs targeted at increasing the use of student informants.\(^10\) Most of these programs provide some sort of reward, often monetary in nature, for information leading to the discovery of drugs or weapons in the possession of another student.\(^11\)

1. The Use of Students as Informants in Our Schools

Schools utilize various informant programs.\(^12\) Some schools are able to enroll its high school students as informants through the use of state legislation.\(^13\) while other schools pay

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\(^7\) See Test this Program, supra note 5; Michael A. Mohammed, N.O. Schools Crime Hotline Earns an A Students Rewarded for Phoning in Tips, New Orleans Times Picayune, June 9, 2004, at 1 (explaining how the Crimestoppers Safe School Hotline works).


\(^9\) See Test this Program, supra note 5; see Mohammed, supra note 7.

\(^10\) Test this Program, supra note 5; see Mohammed, supra note 7; Allen O. Battle, ‘Trust’ Program Needs Tweaking to Pay Off, MEMPHIS COMMERCIAL APPEAL, October 22, 2006, at V3 (trying to convey to students being an informant is not the equivalent to tattling, therefore hoping to increase student participation in the program); Matthew Franck, APS Considers Crime Stoppers, ALBUQUERQUE JOURNAL, December 29, 1997, at A1 (explaining Crime Stoppers programs pay rewards to informants for information on unsolved crimes); see also Better Late Than Never, LOS ANGELES TIMES, February 24, 1995, at N20 (describing another program intended to increase student participation by rewarding students with up to $75 in gift certificates).

\(^11\) See Test this Program, supra note 5; see Mohammed, supra note 7; see Battle, supra note 10; Franck, supra note 10; see Better Late Than Never, supra note 10.

\(^12\) Fla. Stat. § 1006.07 (West 2007) (District school board duties relating to student discipline and school safety); Tex. Gov’t. Code Ann. § 414.001 (Vernon 2007) (Crime Stoppers Advisory Council Definitions); see Test this Program, supra note 5; see Mohammed, supra note 7; see Battle, supra note 10; Franck, supra note 10; see Better Late Than Never, supra note 10.
students for information regarding rule breakers. Some schools utilize crime watch programs. A Florida statute encourages schools to use students as informants through such programs as a way to keep students safe; “By resolution of the district school board, implement a student crime watch program to promote the responsibility among students to assist in the control of criminal behavior within the schools.” Some Texas high schools make use of Crime Stoppers, an organization that rewards individuals for passing on information about criminal activity to the appropriate law enforcement agency, not necessarily the school.

Some schools even offer cash as a reward for information related to drug or weapons possession by another student. Schools in New Orleans have made use of a Crime Stoppers Safe School Hotline. In its first year, the program “paid out about $2,000 in reward money.” The program works the same way as those in Texas and Louisiana, by paying monetary rewards to anonymous informants. Kell High School in Cobb County, Georgia established a rewards program to pay students for turning in classmates who are in possession of drugs or weapons. Similar to these schools, some schools in Tennessee use a program called Trust Pays. This program pays students who come forward with information about drugs and weapons in school.

13 See § 1006.07; see § 414.001.
14 See Test this Program, supra note 5; see Mohammed, supra note 7; see Battle, supra note 10; Franck, supra note 10.
15 See Test this Program, supra note 5; see Mohammed, supra note 7; see Battle, supra note 10; Franck, supra note 10; see Better Late Than Never, supra note 10.
16 § 1006.07.
17 Brief on the Merits of Real Party in Interest Matthew T. Hinterlong, In re Arlington Indep. Sch. Dist. No. 03-0691 (Supreme Court of Tex., 2003) (while the Tex. Crime Stoppers shares a name with programs in Ga., La., and Tenn., those states do not appear to have Crime Stoppers listed in their statutes and codes).
19 Mohammed, supra note 7.
20 Mohammed, supra note 7
21 Franck, supra note 10
22 See Test this Program, supra note 5
23 See Battle, supra note 10.
24 See Battle, supra note 10.
There is a real fear of retaliation. Schools express concern for student safety. A Board member for Albuquerque Public Schools expressed concern about retaliation over the use of informants in their Crime Stoppers program.\(^{25}\) This serious concern centers on the need to protect the student informant’s identity.\(^{26}\) It is common knowledge that it is dangerous for an adult informant, even with police protection.\(^{27}\) These informants are subject to dangers, including the risk of death.\(^{28}\) Therefore, it is only logical that being an informant is a very dangerous position to place young students.\(^{29}\) In a school setting it is possible the student informant is one of the few people to whom the guilty party confessed.\(^{30}\) Acting on that information can put that student informant in danger, possibly even put their life at risk.\(^{31}\) Students reasonably fear this threat of retaliation.\(^{32}\)

The obligation of keeping the school safe should not fall on the shoulders of the students. The role of the student is to attend school to get an education, not to enforce a safe school environment.\(^{33}\) The National Education Reform sets and defines National Educational Goals.\(^{34}\) Congress established these goals which assert it is the job of the “parents, businesses, and

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\(^{25}\) Franck, supra note 10.

\(^{26}\) Battle, supra note 10.


\(^{28}\) Id.

\(^{29}\) Cal. Penal Code § 701.5 (West 2007) (detailing the procedures police must adhere to when utilizing minors as informants); Williamson v. City of Va. Beach, 786 F.Supp. 1238, 1247 (E.D.Va. 1992) (acknowledging the dangerous nature of being an informant).

\(^{30}\) Battle, supra note 10.

\(^{31}\) Id.

\(^{32}\) Paula King, Parents Want End to School Bullying, CONTRA COSTA TIMES, December 17, 2005, at F4.


\(^{34}\) § 5812.
governmental and community organizations [to] work together to ensure the rights of students to study in a safe and secure environment that is free of drugs and crime.”\textsuperscript{35}

2. \textit{The Dangerous Effects of Promoting the Use of Student Informants in Our Schools}

Students have suffered both physical and verbal abuse because other students believed they were informants. While there has not yet been a case directed specifically at a school’s liability for the harm suffered by a student informant, the existence of instances of student harm are ample. Two teenagers beat a high school student on school grounds at Irvine High School in California because they believed he was an informant.\textsuperscript{36} At another California high school, a student threatened two other students for telling on him.\textsuperscript{37} Throughout the school day the students were called “snitches” and “black rats” in addition to a threat of being shot after school.\textsuperscript{38} In a Texas High School, a student took out a knife and threatened to kill a female student, her mother, and her father if she told anyone about a hit list she had seen.\textsuperscript{39} The threats or actual harm occurred on school property in each case.\textsuperscript{40}

Students are not the only ones affected by conflicts between a student attacker and a student informer. In a Wyoming High School, reasons for refusal to renew a principal’s contract included a disagreement over how to handle a situation in which students harmed another for

\textsuperscript{35} § 5812 (“National Education Goals are... (7) Safe, disciplined, and alcohol- and drug-free schools... (B) The objectives for this goal are... (ii) parents, businesses, governmental and community organizations will work together to ensure the rights of students to study in a safe and secure environment...)."

\textsuperscript{36} \textit{Youth Sues Police over Anonymity in Drug Investigation}, \textit{Los Angeles Times}, November 15, 1989, at 6 (The student did not admit whether or not he was an informant, but that he did talk with the Irvine Police Department about drugs at the school).

\textsuperscript{37} \textit{In re Ruben}, No. B191432 at 1 (Cal. App. 2 Dist. Feb. 6, 2007) (At Hollywood Entertainment High School in Los Angeles County, students heard another telling his friends he put a gun in a film canister).

\textsuperscript{38} \textit{Id.} at 2.

\textsuperscript{39} \textit{In re B.P.H.}, 83 S.W.3d 400, 403 (Tex. App., 2002) (A juvenile intended to retaliate against a student informant for telling authorities of his plan to kill school members and take hostages).

\textsuperscript{40} \textit{See Youth Sues Police over Anonymity in Drug Investigation, supra} note 36; \textit{see also} Schmidt v. Fremont County Sch. Dist. No. 25, 558 F.2d 982, 983 (10th Cir. 1977) (explaining a student who informed on a narcotics pusher was physically beaten at the school); \textit{see also In re Ruben}, No. B191432 at 1; \textit{see also In re B.P.H.}, 83 S.W.3d at 403.
being a police informer.\textsuperscript{41} The student revealed information about a drug dealer and was subsequently ridiculed and physically beaten at the high school.\textsuperscript{42} Eventually the parents removed their child from the school out of fear for his safety.\textsuperscript{43}

\textbf{B. When Bad Things Happen to Good People}

We typically associate the use of informants with the police or other governmental enforcement agencies. Police agencies recruit adult informants.\textsuperscript{44} They often prove to be a useful tool in locating major drug and arms dealers.\textsuperscript{45} These informants receive police protection,\textsuperscript{46} and generally witness protection programs are successful because they are well organized and experienced institutions.\textsuperscript{47} However, high schools are not as well organized or experienced institutions capable of providing sufficient student protection. Therefore, utilizing students puts them at risk.

State laws and regulations illustrate the danger of being an informant.\textsuperscript{48} Following the death of a police informant in California, legislators passed a law regulating the use of minors as police informants.\textsuperscript{49} It is popularly known as “Chad’s Law” because it was enacted after the death of Chad MacDonald, a minor who worked as a police informant in Brea, CA.\textsuperscript{50} Chad

\begin{thebibliography}{9}
\footnotesize
\bibitem{41} Schmidt, 558 F.2d at 984.
\bibitem{42} \textit{Id}.
\bibitem{43} \textit{Id}.
\bibitem{44} Mary Dodge, \textit{supra} note 6; \textit{see generally} Ying Jing Gan v. City of New York, 996 F.2d 522, 525 (2d Cir. 1993) (discussing the policy of not charging criminals who are capable of giving information to aid in the investigation of matters of a higher level of concern. The court held the plaintiff failed to allege facts sufficient to support their contentions the district attorney failed to provide protection to the informant).
\bibitem{45} \textit{See Witness Protection Program Faces Challenges, supra} note 27.
\bibitem{46} \textit{Id}.
\bibitem{47} \textit{Id}. (Since 1970, the federal witness protection program has relocated more than 7,500 witnesses).
\bibitem{49} \textit{Id}.
\bibitem{50} \textit{Id}.
\end{thebibliography}
became a police informant subsequent to his own arrest for possession of methamphetamine.\textsuperscript{51} Almost three months after his arrest, authorities found Chad tortured and strangled in a Los Angeles alley.\textsuperscript{52} The police report indicates the accused beat Chad while making racial slurs and calling him a narc.\textsuperscript{53} Eventually, the city of Brea paid $1 million to Chad’s mother in a settlement.\textsuperscript{54}

Under current law, when the police use an informant between the ages of 12 and 17, they must first get a court order authorizing the use of the minor.\textsuperscript{55} The court must: 1) find probable cause that the minor committed the alleged offense; 2) advise the minor of the mandatory minimum and maximum sentence for the alleged offense; 3) disclose the benefit the minor may obtain by cooperating with the police officer; and 4) receive the consent of the minor’s parent or guardian.\textsuperscript{56} The specificity of these requirements, which take time and thorough discussion, indicate that being an informant is dangerous by its very nature.

The Virginia Beach Police Department issued General Order 9.11, which established the procedures for police to follow when using informants.\textsuperscript{57} The General Order guidelines outline the necessary written parental permission required if the police intend to use a juvenile as an informant.\textsuperscript{58} Regardless of the enactment of General Order 9.11, officers associated with a

\begin{itemize}
\item \textsuperscript{51} Stuart Pfeifer and Tony Saavedra, \textit{Lawyer: Teen was Trying for Last Deal}, \textit{The Orange County Register}, March 28, 1998 (explaining there was an indication the Orange County District Attorney’s Office approved of Chad MacDonald as an informant).
\item \textsuperscript{52} Pfeifer and Saavedra, supra note 51, \textit{See also} Eric Bailey, \textit{Law Signed Limiting Use of Youth Informants Politics}, \textit{Los Angeles Times}, September 26, 1998 at B4 (adding Chad’s girlfriend also suffered at the hands of his assailants. She was found earlier in a canyon. She had been raped, shot and left for dead. There is no mention of whether she too, was an informant.)
\item \textsuperscript{53} See, Pfeifer and Saavedra, supra note 51.
\item \textsuperscript{54} John McDonald, \textit{Brea Settles Informant Case}, \textit{The Orange County Register}, August 27, 2002 (The attorney for Chad MacDonald’s mother stated the amount would hopefully send a message to police departments they cannot use teenagers as informants).
\item \textsuperscript{55} Cal. Penal Code § 701.5 (West 2007).
\item \textsuperscript{56} § 701.5.
\item \textsuperscript{58} Id. at 1248.
\end{itemize}
teenage informant had never been exposed to it.\textsuperscript{59} General Order 9.11 had been in existence for five years before the teenage informant, Robert Williamson, took his own life.\textsuperscript{60} Robert’s mother asserted a claim against the Virginia Beach Police Department alleging Robert’s involvement with police, combined with the fear that harm could come to his family, led to his suicide.\textsuperscript{61} Ultimately, the court granted the defendant’s motion for summary judgment.\textsuperscript{62} The court held the police did not exercise sufficient control over Robbie and the claim did not clearly establish a potential violation of any constitutional rights in a manner that would deprive defendants of qualified immunity.\textsuperscript{63}

Although Robert’s family did not recover for his death, the U.S. District Court still fully acknowledged the dangers associated with being an informant.\textsuperscript{64} “The use of informants by the police entails considerable risk to the informants and to their families . . . those risks . . . have to be guarded against.”\textsuperscript{65} This fully acknowledged inherent danger of being an informant is reason enough to prevent the use of minors.

\textbf{C. Assigning Liability}

As discussed above, some states have requisites in place to protect minor informants utilized by police.\textsuperscript{66} Additionally, there are liability standards for school districts regarding negligence that results in a foreseeable injury to a student.\textsuperscript{67} These standards relate to the use of

\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 1247.
\textsuperscript{61} \textit{Id.} at 1246.
\textsuperscript{62} \textit{Id.} at 1253 and 1261.
\textsuperscript{63} \textit{Id.} at 1253.
\textsuperscript{64} \textit{Id.} at 1247.
\textsuperscript{65} \textit{Id.}
\textsuperscript{67} Jesik v. Maricopa County Cnty. Coll. Dist., 611 P.2d 547, 550 (Ariz. 1980) (public schools in Ariz. are liable for negligence when the school fails to use ordinary care under the circumstances); M.W. v. Panama Buena Vista Union Sch. Dist., 110 Cal. App. 4th 508 (2003) (finding the school negligent when it failed to provide adequate supervision of school premises); Perna v. Conejo Valley Unified Sch. Dist., 192 Cal. Rptr. 10 (1983) (discussing how school
student informants. Despite this relation, there are no provisions which hold school districts liable in the event a student informant receives injuries as a result of becoming an informant.

As discussed in detail below, courts hesitate to assign liability to school districts for injuries incurred through a third party primarily for one of three reasons. First, schools cannot be expected to guarantee student safety in every possible situation. Second, there has been a lack of a showing of a causal connection between the acts of the school and the injuries received by the student. Third, the imposition of liability insurance costs could create a burden the district may not be able to overcome. When parents decide to bring an action against a school for their child’s injuries, the claim may be asserted in federal court under 42 U.S.C. § 1983 as a state-created danger or in state court as a negligence claim.

The author proposes two theories discussed below for imposing liability for utilizing student informants. The first theory centers on the tort claim of negligence, with the potential of utilizing the state-created danger to satisfy the causation element. The second theory rests on bringing a claim in federal court under 42 U.S.C. § 1983 for deprivation of rights secured under the Constitution when that deprivation results in injury.

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68 Mirand v. City of N.Y., 637 N.E.2d 263, 266 (N.Y. 1994) (holding a school liable for negligent supervision); Hoyem v. Manhattan Beach City Sch. Dist., 2150 Cal. Rptr. 1 (1978) (stating a school is liable for injuries proximately caused by the schools negligent supervision of a student).
70 Mirand, 637 N.E.2d at 266.
71 Young, 885 F. Supp. at 979.
72 Hoyem, 150 Cal. Rptr. at 1.
74 42 U.S.C. § 1983 (2000); see also Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996) (asserting a § 1983 claim against the school for violation of students Fourteenth Amendment right to due process by exacerbating the risk the student would be harmed by other students and by encouraging an environment in which the student would be harmed).
II. NEGLIGENCE

Negligence is another possible claim for harm suffered by a student who acts in the capacity of an informant. The recovery for parents and students under a negligence claim varies from jurisdiction to jurisdiction since negligence is a claim under state tort law. Negligence claims consist of showing the existence of a duty on the part of the defendant to protect the plaintiff, a breach of that duty, and a showing that the defendant’s breach was the cause in fact and the proximate cause of the plaintiff’s injury.

School officials have a common law duty to take necessary precautions to protect students in their care against anticipated foreseeable dangers. Schools have a duty to supervise student’s conduct on school grounds. In doing so, the school must exercise reasonable and ordinary care under the circumstances. Failure to do this results in a breach of that duty.

There must be a causal link between the injuries incurred and the school’s breach of duty. The plaintiff must prove both the cause in fact, also known as actual cause, and proximate cause of the injuries sustained resulted from the defendant’s breach of duty of ordinary care. Cause comes in the form of cause in fact, proximate cause, or through an application of the state-created danger. Cause in fact requires proof that but for the schools breach, the student would not have received injuries. Proximate cause exists when the injuries that occur to the plaintiff...

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74 See generally A.B.A., supra note 72 at 2. However, as per 28 U.S.C. § 1367, the parents have the option to bring a negligence claim in federal court through supplemental jurisdiction. The parents could file a tort claim of negligence attached to a § 1983 claim for violation of the student’s Constitutional rights.
75 MARTHA M. McCARTHY ET AL., supra note 8 at 435.
76 Id.
77 M. W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673, 679 (2003) (this duty arises in part because of the compulsory nature of education).
78 Stowers v. Clinton Central Sch. Corp., 855 N.E.2d 739, 745 (Ind. 2006) (The Indiana Supreme Court has recognized the existence of a duty on behalf of the school to exercise reasonable and ordinary care for the safety of children left in their care); Jesik v. Maricopa County Cmty. Coll., 611 P.2d 547, 550 (Ariz. 1980) (“A public school district in Arizona is liable for negligence when it fails to exercise ordinary care under the circumstances”).
79 F. HARPER ET. AL., SCHOOL VIOLENCE HARPER, JAMES, AND GRAY ON TORTS 100 (3d. ed. 2007).
are the natural and probable results of the defendant’s negligence, and not bizarre or extraordinary.\(^8^0\)

While courts hesitate to assign liability to school districts, there are a number of cases in which courts held schools liable for negligence in claims asserted by its students.\(^8^1\)

**A. Duty**

Overall, schools have a duty to protect their students.\(^8^2\) The school, its administrators and teachers, are held to a uniform standard of care which a reasonably prudent person would exercise under similar circumstances.\(^8^3\) This is a non-delegable duty of the schools.\(^8^4\) The duty to protect students is not one that can be satisfied by charging other students to report signs of danger, such as drug and weapon possession.\(^8^5\) This is something only the teachers and school authorities are responsible for because of the high level of importance in maintaining a safe learning environment.

A California Appellate court found a school owed a duty to its students because there was a special relationship between the student and the school.\(^8^6\) In *M.W. v. Panama Buena Vista Union School District*, a student successfully sued the school district for negligent supervision.\(^8^7\)

\(^8^0\) Doe v. Lafayette School Corporation, 846 N.E.2d 691, 700 (Ind. 2006) (finding the school to be the proximate cause of Doe’s injuries because the injuries were the natural and probable consequences of the defendants acts and could reasonable have been foreseen in light of the circumstances).

\(^8^1\) M.W., 110 Cal. App. 4th at 508 (holding school liable for negligent failure to supervise); Perna v. Conejo Valley Unified Sch. Dist., 192 Cal. Rptr. 10 (1983) (holding a school liable for negligent supervision of students on school premises); State of Fla. v. Christie, 939 So. 2d 1078 (Fla. 2005) (remanding the Circuit Courts grant of a motion to dismiss regarding allegations against a public-school teacher for child neglect); Mirand v. City of N.Y., 637 N.E.2d 263, 266 (N.Y. 1994) (holding a school liable for negligent supervision).

\(^8^2\) State of Fla., 939 So. 2d 1079; Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996).

\(^8^3\) M.W., 110 Cal. App. 4th at 517.

\(^8^4\) Taylor v. Heritage House Children’s Center of Shelbyville, Inc., 547 N.E.2d 244, 251(Ind. 1989) (stating a non-delegable duty is inherent in the very nature of certain kinds of businesses).

\(^8^5\) Id.

\(^8^6\) See generally M.W., 110 Cal. App. 4th at 517 (holding a special relationship exists based on the compulsory nature of education).

\(^8^7\) Id. at 508.
The court asserted that school authorities must supervise, at all times, the conduct of the children on school property.\textsuperscript{88}

The Supreme Court in Minnesota was even more specific in regards to its definition of duty as applied to the duty the school owes to its students.\textsuperscript{89} In instructing the jury, the Court defined duty as “ordinary care . . . to protect its students from injury resulting from the conduct of other students under circumstances where such conduct would reasonably have been foreseen and could have been prevented by the use of ordinary care.”\textsuperscript{90}

In Tommy’s situation, it is likely he would incur injury, and that foreseeable injury creates a legal duty for the school to protect against such injuries.\textsuperscript{91} Tommy was the only boy in the bathroom to witness the drug deal. Because of this, it was not difficult for the rule breakers to figure out who the informant was. Tommy’s situation is not unique. In small settings, rule breakers can easily discover the informant.\textsuperscript{92}

In \textit{Nabozny v. Podlesny}, a student reported multiple instances of abuse at the hands of other students, who targeted him because he was gay.\textsuperscript{93} The court found that because the school knew Nabozny was the target of assault, the duty to supervise became elevated, and yet they failed to remedy the situation of Nabozny’s repeated harassment.\textsuperscript{94} The school had a duty

\textsuperscript{88} \textit{Id.} at 517.
\textsuperscript{89} \textit{See} A.M.J. v. Royalton Public Sch., No. 05-2541 at 3 (D. Minn. Dec. 12, 2006) (discussing the use of an expert to determine the definition of duty required to prove a negligence claim).
\textsuperscript{90} \textit{Id.} (italics added).
\textsuperscript{91} Norris v. Corrections Corporation of America, No. 3:07CV-273-H slip op. at 1 (W.D.Ky. Nov. 13, 2007) (holding the foreseeability of the injury defines the scope of the duty).
\textsuperscript{92} \textit{See In re Ruben}, No. B191432 at 1 (Cal. App. 2 Dist. February 6, 2007) (explaining how there were only 20-25 people in a lunch room when two students were discussing a gun they had in school. Here, the students were able to determine who their informants were because when the gun was put in a canister the informants witnessed it and the rule breakers knew they were the same two who could hear their conversation).
\textsuperscript{93} Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (Nabozny’s classmates would refer to him as a “faggot”, physically abuse him, and spit on him. Two of the classmates grabbed Nabozny, forced him to the ground, and proceeded in a mock rape, exclaiming Nabozny should enjoy it. Nabozny reported this torment to his guidance counselors and the principal).
\textsuperscript{94} \textit{Id.}
because they knew of an identifiable risk of harm. Therefore, even though the school did not itself create the risk, their awareness of it established a duty.

In the case of student informants, even if the court finds a student of his own free will reported violations to the principal, the school should be aware of the risk posed to that student and therefore has a duty to protect that informant. This results in a duty because of the inherent danger that accompanies being an informant. Therefore, even if Tommy had turned in the students involved in the drug transaction without encouragement by the school, the school still has a duty to protect him.

Some states give constitutional rights or have legislation regarding student safety at school. These states have made no mention in their Constitutions or statutes that students have a duty to keep their schools safe; rather, it is the responsibility of the school to keep the school safe. There are alternative means by which a school can discover drugs and weapons possession; therefore they do not need to recruit students to do so. By choosing this method for discovery, the school thereby concomitantly chooses to create a foreseeable risk as well.

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95 See generally Vance v. Peter, 97 F.3d 987 (7th Cir. 1996) (noting a prisoner's letters to administrators conveying notice of risk to health, triggers the duty to act).
96 See generally Nabozny, 92 F.3d 446.
97 Williamson v. City of Va. Beach, 786 F. Supp. 1238, 1253 (E.D. Va. 1992) (acknowledging the need for strict guidelines when using informants because of the dangerous nature); In re B.P.H, No. 2-01-241-CV, 83 S.W.3d 400,403 (Tex. App. August 15, 2002) (describing a need for retaliation statutes to protect informants since oftentimes offenders seek to harm those who turned them in); In re D.A.R., No. 08-01-00075-CV, 73 S.W.3d 505, 511-12 (April 4, 2002) (expressing a fear of retaliation should the officer chose to use a student informant).
98 Cal. Const. art. 1, § 28 (stating all students have an inalienable right to attend campuses that are safe); Tenn. Code Ann. § 49-6-4203 (West 2007) (stating that schools must protect students and secure a safe environment).
99 Granted, Fla. has within a statute that student crime watch programs shall be provided by the school district. However, the statute also maintains the school must implement other means to improve school safety, thus recognizing that there are other ways to detect violators without making use of a student informant.
B. Breach

In a claim for negligence, if there is a viable alternative which is less costly, failure to utilize that alternative is a breach. Breach exists when there is a failure on the part of the defendant to act with care under the circumstances. Judge Hand established a formula with which courts can determine the existence of a breach. Combined with the utility of the defendant’s conduct, the burden of precaution is weighted against the probability and severity of the harm incurred. Basically, it is the balance of preventing the risk against causing the risk. If it is cheaper to prevent the risk than it is to cause it, then the defendant breached a duty when the risk occurs. Courts also determine breach through a showing the school had notice of the dangerous conduct which caused the injury. Notice of the risk can be either actual or reasonably anticipated.

Additionally, a school breaches its duty of due care when school officials fail to keep the students in a safe environment. Because schools have a duty to maintain a drug and weapon free environment, they must implement safety measures. The random and occasional presence of dog sniffing searches is a “pre-emptive strike” for some schools. If students are on notice that any minute a drug sniffing dog could search them, they are less likely to bring drugs to school. Additionally, metal detectors are a solution to weapons possession in schools.

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101 See generally U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (establishing the ‘Hand Formula,’ meaning liability exists when the burden of precaution is less than the severity of the injury multiplied by the probability of the injury occurring).
102 Id.
103 Id.
104 Id.
106 Marshall v. Cortland Enlarged City Sch. Dist., 697 N.Y.S.2d 395, 396 (1999) (holding plaintiff did not present sufficient evidence to show defendant was on notice of an existing inherent danger of a wooded area, therefore there was no duty to provide additional supervision).
The use of these methods satisfies the school’s duty to exercise ordinary care to maintain school safety.

In Tommy’s case, the school did not exercise ordinary care in its handling of the situation. The school must maintain safety and it chose to do this by using student informants. Defendants owe a duty when there is an increased risk of danger to the scope of potential plaintiffs. Due to the school’s choice to actively recruit student informants, the school has a duty to prevent harm to those students as they are foreseeable plaintiffs within the zone of danger.

If anything, the duty of care imposed on the school in such a situation rises beyond that of simply ordinary care. When there is a risk of physical harm which is reasonably perceived, that risk defines a duty of supervision. Risk imports a relation to duty and therefore the school has a duty to protect Tommy when it creates a risk of physical harm via retaliatory violence.

Furthermore, placing the responsibility on students to spot drug use and weapons is a non-delegable duty, meaning it is not a responsibility the school can bestow upon its students. Teachers, as an extension of the school, have the responsibility to spot drug use. Training to do this goes hand in hand with random dog sniffing searches.

Certain responsibilities should remain with the school, thus resulting in non-delegable duties. The Supreme Court of Indiana used § 214 of the Restatement (Second) of Agency to

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112 See id. at 373.

113 Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928) (stating negligence and risk are terms of relation).

114 Taylor v. Heritage House Children’s Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 251(Ind. 1989).
define non-delegable duty.\textsuperscript{115} The court cited “one may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another.”\textsuperscript{116} The responsibility of keeping a school safe is a prime example of something which cannot be delegated to teenagers rather than the adults at the school.

Available alternatives to the recruitment of students as informants are the utilization of dog sniffing searches for drugs\textsuperscript{117} and metal detectors for weapons.\textsuperscript{118} Past cases show schools express concern with the use of dog sniffing searches, primarily student claims asserting a violation of their constitutional rights.\textsuperscript{119} The Supreme Court, however, held it was not contrary to students’ constitutional rights to have dogs led up and down the aisles in classrooms, sniffing for drugs.\textsuperscript{120} In the interest of school safety, the adherence to strict probable cause as justification for searches is not a requisite in a high school setting.\textsuperscript{121}

Some schools use metal detectors in their entrances to prevent students from bringing weapons into the school.\textsuperscript{122} While this does not raise many student rights issues, cost is a factor

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\item See generally id. at 244 (holding the “center had a non-delegable duty to a resident to furnish the same standard of care comparable to that of a common carrier”).
\item Id. at 251.
\item Bethany Lye, \textit{Deputy Dog}, \textit{People Weekly}, Nov. 19, 2007, at 118 (describing the use of an eight pound Chihuahua to sniff for drugs in hard to reach places, also avoiding damage to student property); \textit{Law & Order}, \textit{St. Louis Post-Dispatch}, Nov. 21, 2006, at B8 (describing Madison County deputy sheriffs use of drug sniffing dogs to search Alton High School); Michael Miller, \textit{supra} note 109.
\item Joseph L. Wagner, \textit{Cleveland Schools Plain Detectors at Games}, \textit{Cleveland Plain Dealer}, Nov. 15, 2007, at A1 (describing plans to utilize metal detectors at Cleveland high school games and after school events); Joyce Bailey, \textit{Government Digest}, \textit{Macon Telegraph}, July 16, 1996, at B2 (Superintendent of the Houston County Schools wanted school board to approve the purchase of walk-through metal detectors for each high school to be used at home basketball games); Nancy San Martin, \textit{Dade School Officials to Use Metal Detectors to Find Weapons}, \textit{South Florida Sun-Sentinel}, March 12, 1993, at 2B (Dade County School Board members agreed to try metal detectors at high schools to discover weapons possession).
\item See Doe v. Renfrow, 451 U.S. 1022, 1025 (1981) (dissenting opinion regarding use of dogs to sniff student is invasion of reasonably expected privacy right of student); see Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) (holding it is not a violation because the school has joint control with the student over the lockers); see C.G. v. State of Fla., 941 So. 2d 503, 504 (2006) (holding there must be reasonable grounds to believe the search will result in evidence).
\item Renfrow, 451 U.S. at 1025.
\item New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (holding that while Fourth Amendment prohibition on unreasonable searches applies to schools, the basis for the search does not have to be probable cause).
\item Wagner, \textit{supra} note 118; Bailey, \textit{supra} note 118; San Martin, \textit{supra} note 118.
\end{enumerate}
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for some schools. Metal detectors can cost anywhere from $200 for hand held wands to $4000 for walk-through machines. This presents a problem for some schools since budgets are often a concern among school boards. Regardless of these concerns, the potential costs of lawsuits arising from student injuries, far outweighs the cost of a few machines and routine maintenance. Therefore, failure to utilize this less costly alternative is a breach on behalf of the school.

The principal at Tommy’s school has a duty to protect his students. Through the utilization of students as informants, schools fail to exercise due care in maintaining a safe environment for all those students. Additionally, releasing the rule breakers and failing to properly supervise them, the principal failed in his duty because he did not prevent them from beating the informant. A reasonably prudent person in similar circumstances would not have sent the rule breakers off on their own and left Tommy unprotected, knowing the exchange occurred in close quarters (the bathroom) where there were only a few student witnesses. It is reasonable for the principal to anticipate retaliation because this is known to occur when students become informants.

The student informant would not have received such injuries had the school not so strongly advocated for students to inform about drug and weapons possession in the school. The duty of care elevated beyond mere supervision when the school successfully recruited a student informant. It extended to protecting that student informant from foreseeable harm. The school breached this duty because the school failed to provide safety measures for the student informant, resulting in injuries.

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123 Bailey, supra note 118; San Martin, supra note 118.
124 Bailey, supra note 118; San Martin, supra note 118.
125 In re Ruben, No. B191432 at 2 (Cal. App. 2 Dist. Feb. 6, 2007); In re B.P.H., 83 S.W.3d 400, 403 (Tex. App., 2002).
126 W. PAGE KEETON ET. AL., see supra note 111.
C. Causation

The student must show the school’s breach was the cause of the injuries sustained.\textsuperscript{127} Causation contains two elements, cause in fact and proximate cause.\textsuperscript{128} The student who, at the hands of rule breakers seeking retaliation, sustained injuries would not have occurred but for the school’s acts of recruitment proves cause in fact.\textsuperscript{129} In a situation involving redundant multiple causes, such as a principal releasing rule breakers and those rule breakers beating the informant, a substantial factor test is applied in place of the ‘but for’ test.\textsuperscript{130} The student showing the injuries received were the natural and probable consequences of the school enrolling the student as an informant proves proximate cause.\textsuperscript{131} Courts established proximate cause in response to the wide scope of liability left by cause in fact.\textsuperscript{132} Should there be independent causes, where either would be sufficient but it is unknown which actually caused the injury, the proximate cause test provides the plaintiff with an avenue to establish liability.\textsuperscript{133}

1. Cause in Fact

Courts determine cause in fact through a showing that but for the negligent acts, the injury would not have occurred.\textsuperscript{134} But for the principal and the school not encouraging students to be informants, Tommy would not have told the principal what he saw and therefore the rule breakers would not have beat up Tommy.

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\textsuperscript{128} BARRY LINDAHL LEE, MODERN TORT LAW: LIABILITY AND LITIGATION § 4:2 (2d ed. 2007) (explaining there is not total agreement on the elements of causation, however the above are the generally recognized components).
\textsuperscript{129} F. HARPER, \textit{supra} note 79.
\textsuperscript{130} \textit{See} Anderson v. Minneapolis, St. P. & S. St. M. R.R. Co., 179 N.W. 45, 46 (Minn. 1920) (giving the jury instructions saying if the defendants actions were a substantial contribution to the damages incurred, then the defendant must be found liable even if other causes contributed).
\textsuperscript{131} Lafayette Sch. Corp., 846 N.E.2d at 700.
\textsuperscript{132} F. HARPER, \textit{supra} note 79 at 101.
\textsuperscript{133} F. HARPER, \textit{supra} note 79 at 101.
\textsuperscript{134} \textit{See} Martin v. City of Washington, 848 S.W.2d 487,493 (Mo. 1993) (stating “the simplest test for proximate cause is whether the facts show that the injury would not have occurred in the absence of the negligent act”).
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However, some courts may find both the encouragement on behalf of the school and the beating from the rule breakers problematic in determining a but for cause because both contributed to Tommy’s injuries. Both the principal and the rule breakers are contributing factors causing Tommy’s injuries. In this situation, courts adopt a substantial factor test.\textsuperscript{135} Under this test, cause in fact is satisfied if the conduct contributing to the injury was such that a reasonable person would regard the conduct as the cause of the injury.\textsuperscript{136} A reasonable trier of fact could infer the school’s recruitment of informants was a substantial cause, because that conduct led to the subsequent beating by the students Tommy turned into the principal. However, regardless of a finding of cause in fact, the court must still find proximate cause.

2. Proximate Cause

Proximate cause is proved by showing that if the student is within the scope of risk that could result from the school’s conduct, the school is the cause of that harm.\textsuperscript{137} The injuries must have been reasonably foreseeable to hold the school liable, but knowledge of the specific injury is not required.\textsuperscript{138} In other words, looking back in time, was the harm that occurred the type expected from such conduct?\textsuperscript{139} In hindsight, if the injuries were the natural and probable consequences of the risk created by the school, then the school is the proximate cause of the injuries.\textsuperscript{140}

Generally, when there are intervening criminal acts of a third party, those acts severe the causal link between the defendant’s act and the plaintiff’s injuries.\textsuperscript{141} However, if the criminal

\textsuperscript{135} BARRY LINDAHL LEE, supra note 128 at § 4:5.
\textsuperscript{136} Clark v. Leisure Vehicles, Inc., 292 N.W.2d 630, 635 (Wis. 1980); Young v. Bryco Arms, 821 N.E.2d 1078, 1086 (Ill. 2004).
\textsuperscript{137} See generally Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928).
\textsuperscript{139} BARRY LINDAHL LEE, supra note 128 at § 4:4.
\textsuperscript{140} Id.
\textsuperscript{141} See Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (C.A.D.C. 1970) (finding as a matter of law, there is a duty for landlords to protect tenants from foreseeable criminal acts by third parties).
intervention by the third party is a reasonably foreseeable result of the circumstances created by the defendant, then proximate cause may be found.\textsuperscript{142} Here, the defendant’s act was to recruit Tommy as an informant. A foreseeable consequence to this act is the criminal intervention of third parties, those Tommy chooses to turn over to the principal.

Courts consider all of the surrounding circumstances when determining foreseeability.\textsuperscript{143} It is not necessary to show the exact injury that resulted from defendant’s breach of duty was foreseeable.\textsuperscript{144} It is sufficient to show that injuries of the same general type were foreseeable.\textsuperscript{145} In other words, it is sufficient for the principal to anticipate the physical fight. The principal did not have to anticipate specific acts, such as the spitting and kicking of Tommy.

In \textit{Mirand v. City of New York}, the Court of Appeals found the school liable for negligent supervision.\textsuperscript{146} Two students were threatened and attempted to report the threats to the security office to no avail.\textsuperscript{147} On that particular day, no security guards were present at their usual spots.\textsuperscript{148} Because of this lack of presence, the court reasoned it was not unreasonable for the jury to infer danger was foreseeable to the sisters.\textsuperscript{149} A reasonable person would make the inference through the following chain of thoughts: ‘The school normally had security guards to prevent

\textsuperscript{142} \textit{Id.}; Baker c. Simon Property Group, Inc. et. al., 614 S.E.2d 793 (Ga. App. 2005) (holding if “intervening criminal act is a reasonably foreseeable consequence of defendant’s negligent act”, then the intervening cause does not supersede the defendant’s negligence.); Bell v. Bd. of Educ. Of the City of N.Y., 687 N.E.2d 1325 (N.Y. 1997) (holding proximate cause can be decided as a matter of law when the criminal intervention of third parties is a reasonably foreseeable consequence of the defendant’s acts).


\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Mirand v. City of N.Y.}, 637 N.E.2d 263, 267 (N.Y. 1994).

\textsuperscript{147} \textit{Id.} at 265 (while attempting to avoid further confrontation with another female student, two sisters attempted to report the altercation to the security office. There were no guards in the office at the time, but the sisters ran into an art teacher and told her about the altercation. The art teacher directed the sisters back to the security office, where again, they found no security guards. Eventually, the student, and two male companions caught up with the sisters and proceeded to beat them with a hammer and cut them with a knife).

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.} at 266 (stating, “The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school’s negligence”).
violence. The security guards were not where they were supposed to be. The girls got beat up. The school breached their duty of maintaining a safe environment. Therefore, the school is responsible to the girls for their injuries.’

Similarly, the risk to Tommy which is reasonably perceived is of a retaliatory act by those he reported to the principal. The school recruited Tommy as an informant. The school failed to protect him after he reported to the principal what he observed. Tommy sustained injuries because he was an informant for the school. The school is responsible for those injuries because it is reasonably foreseeable those students who were caught would seek revenge on the individual who caused them to be caught.

Here, the students beat up Tommy after they were caught, which was after Tommy informed the principal of their wrongdoings. Therefore, there is a natural sequence of events which led up to Tommy incurring injuries.

a. Knowledge of Informant Identity to Prove Foreseeability

Simple knowledge of the injured party’s identity was sufficient to establish foreseeability and therefore prove proximate cause. Often the rule breakers determine the identity of their informer. Because of this, it is reasonably foreseeable students will seek retaliation. In this situation, it is likely Tommy would receive an injury, and that foreseeable injury creates a legal duty for the school to protect against such injuries. Tommy was the only boy in the bathroom to witness the drug deal. Because of this, it was not difficult for the rule breakers to figure out

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150 Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996).
151 King, supra note 32.
who the informant was. Tommy’s situation is not unique. In small settings, rule breakers can easily discover the informant.\textsuperscript{153}

In \textit{Nabozny v. Podlesny}, a student successfully showed causation by proving the defendant’s knew the Plaintiff’s identity.\textsuperscript{154} In \textit{Nabozny}, the perpetrators knew the status of the student they attacked and that status was the exact reason for the attacks.\textsuperscript{155} The school knew about the continual harassment Nabozny suffered at the hands of other students.\textsuperscript{156} This knowledge created a duty on the part of the school, which they subsequently breached by failing to protect Nabozny.\textsuperscript{157} Therefore, the resulting injuries to Nabozny were a direct and natural consequence of failing to supervise and maintain a safe environment.\textsuperscript{158}

While this situation did not center on a student informant, it established a connection between the identity of a person and resulting injuries based on knowledge of that identity.\textsuperscript{159} Similarly, when an informant’s identity is known, that is the direct cause of the injuries. Tommy’s attackers determined the identity of the informant. The students attacked Tommy based on his status as the informant. When identity is discoverable, it is foreseeable that retaliation will occur.

3. Applying State-created Danger to Prove Causation

Through the utilization of the state-created danger, the states have another avenue to find causation in a negligence action. When schools choose to recruit students as informants, they are

\textsuperscript{153}See \textit{In re Ruben}, No. B191432 at 1 (Cal. App. 2 Dist. February 6, 2007) (explaining how there were only 20-25 people in a lunch room when two students were discussing a gun they had in school. Here, the students were able to determine who their informants were because when the gun was put in a canister the informants witnessed it and the rule breakers knew they were the same two who could hear their conversation).

\textsuperscript{154}See \textit{Nabozny}, 92 F.3d at 451(showing student did not keep the fact he was gay hidden from other students and the result was consistent attacks by other students strictly because of his status as a gay man).

\textsuperscript{155}Id.

\textsuperscript{156}Id. at 452

\textsuperscript{157}Id. (applying analysis from \textit{Reed v. Gardner}, 986 F.2d 1122 (7th Cir. 1993): the school failed to remedy the situation despite their knowledge of the repeated attacks. This knowledge imposed a heightened duty on behalf of the school to protect the student since they exacerbated the danger posed to the gay student).

\textsuperscript{158}Id. at 459.

\textsuperscript{159}Id.
creating the potentially dangerous situation in which a number of informants have found themselves. Since schools have a duty to maintain school safety,\textsuperscript{160} when they breach that duty by placing students in dangerous situations any naturally following events are the results of that breach.\textsuperscript{161}

Tommy’s situation exemplifies this theory. First, the principal recruited students to be informants. Second, Tommy followed this charge and subsequently, rule breakers got in trouble. Finally, the rule breakers beat up the informant. These are normal consequences under these circumstances.\textsuperscript{162}

Even though the schools prior conduct of recruiting informants may have been innocent at the time, it did create a perilous situation, therefore creating a duty to prevent harm.\textsuperscript{163} Because the school encouraged students to become informers for drugs and weapons, it opened the door for the students who chose to be informants to sustain injuries. When the school did this, it created an affirmative duty which it subsequently breached by not protecting Tommy. Had the school not recruited Tommy, the rule breakers would not have injured him. Therefore, the school presented a state-created danger by recruiting students as informants, and Tommy’s subsequent injury resulted from this danger.

4. Proving Causation in the Case of Student Attacked While off School Grounds

It is not always the case that students sustain injuries while they are on school property.\textsuperscript{164} Schools are liable for injuries sustained by students off school property if the school is the

\begin{itemize}
  \item \textsuperscript{160} State of Fla. v. Christie, 939 So. 2d 1078, 1079 (Fla. 2005).
  \item \textsuperscript{161} Mirand v. City of N.Y., 637 N.E.2d 263, 266 (N.Y. 1994).
  \item \textsuperscript{162} \textit{Id.; see also} Schmidt v. Fremont County Sch. Dist. No. 25, 558 F.2d 982, 983 (10th Cir. 1977).
  \item \textsuperscript{163} RESTATEMENT (SECOND) OF TORTS § 314 cmt.a. (2007).
  \item \textsuperscript{164} Perna v. Conejo Valley Unified Sch. Dist., 192 Cal. Rptr. 10 (1983) (school district will be found negligent if it does not exercise ordinary care in the supervision of its students on school premises and students are subsequently harmed off school property as a result of the negligence); Hoyem v. Manhattan Beach City Sch. Dist., 2150 Cal. Rptr. 1 (1978) (school is liable for injuries proximately caused by schools negligent supervision of student).
\end{itemize}
proximate cause of those injuries.\textsuperscript{165} The proximate cause is considered in light of all the surrounding circumstances.\textsuperscript{166} So long as the resulting injury was foreseeable or reasonably foreseeable, as a natural and probable consequence of the schools behavior, then that behavior is the proximate cause of the injury, regardless of where that injury occurs.\textsuperscript{167}

The California Court of Appeal, Second District, held a school negligent when a teacher held students after class and those students received injuries in the street on their way home after school.\textsuperscript{168} The court reasoned that had the students not stayed after school on a day when the teacher should have known the crossing guard left early, they would have left with all the other students and not been injured in the street.\textsuperscript{169} It was reasonably foreseeable and therefore the proximate cause, that a student crossing a street without a crossing guard would be injured, hence the existence of a crossing guard. Additionally, the school was the cause in fact. But for the teacher’s failure to let the students out on time, the students would not have been injured.\textsuperscript{170}

The California Supreme Court found another school negligent when a motorcycle hit a student who was off school property.\textsuperscript{171} The student was able to prove proximate cause through a showing that lack of supervision allowed the student to skip school, ultimately allowing the motorcycle to hit him off school property.\textsuperscript{172} It was reasonably foreseeable that a motorcycle could hit a student in the absence of adult supervision. Here, cause in fact is also present because

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\textsuperscript{165} Perna, 192 Cal. Rptr. at 11; Mirand, 637 N.E.2d at 267.
\textsuperscript{166} Mirand, 637 N.E.2d at 266.
\textsuperscript{167} Hoyem, 150 Cal. Rptr. at 9 (holding a school liable even though the injuries occurred off school property. The school’s negligence was still the proximate cause of the resulting injuries).
\textsuperscript{168} Perna, 192 Cal. Rptr. at 11.
\textsuperscript{169} Id. at 12.
\textsuperscript{170} Id. (It was known throughout the school that the crossing guard left early every Tuesday, and therefore the teacher should have known there would be no supervision at the cross walk).
\textsuperscript{171} Hoyem, 150 Cal. Rptr. at 10.
\textsuperscript{172} Id. at 2.
\end{flushleft}
but for the schools negligent omission to supervise, the student would not have skipped school and therefore would not have been hit by the motorcycle.\textsuperscript{173}

When schools utilize student informants to find and punish rule breakers, they are both the proximate cause and cause in fact of injuries received by the informant off school property. The school breached its duty to keep the student safe while on school property through its utilization of the student as an informant. Therefore, regardless of whether the injuries occurred on or off school property, the schools negligent supervision of students led to Tommy’s injuries. It is reasonably foreseeable that students will seek retaliation when another ‘rats’ on them, regardless of whether they do it immediately or wait until the student walks home from school. Here, but for the school encouraging Tommy to inform on the rule breakers, he would not have ‘snitched’ and therefore would not have been beat up.

\textbf{III. STATE CREATED DANGER}

As previously stated, there are no cases directly on-point discussing liability on behalf of a school in the event a student informant incurs injury. There are however, analogous situations where courts have discussed the extent to which the police are liable if an informant incurs harm.\textsuperscript{174} The police are liable in these situations because employing informants is a state-created danger.\textsuperscript{175} The exposure of students to a ‘state-created danger’ results because they act as

\textsuperscript{173} \textit{Id.} at 8 (stating a jury could conclude the resulting injuries were reasonably foreseeable to the defendants. “Since at least the days of Huck Finn and Tom Sawyer, however, adults have been well aware that children are often tempted to wander off from school,” and therefore defendants should have provided better supervision for their students.)


\textsuperscript{175} \textit{Id.}
informants for the school. Since the schools create the dangerous situation, they subsequently
create a duty for themselves and therefore, the state-created doctrine applies.\textsuperscript{176}

This doctrine holds a state is liable in the event the state’s own affirmative actions expose
the student to danger.\textsuperscript{177} If a school knowingly places the student in danger, the school as a state
actor is accountable for the foreseeable injuries suffered by the student.\textsuperscript{178} By asking a student to
be an informant, a recognized dangerous situation, schools place that student in danger and
therefore should be held liable for any injuries the student suffers. Through the use of the state-
created danger doctrine, students and parents have the ability to bring a §1983 claim or a
negligence claim against the school in the event an injury results from the student’s status as an
informant.

The Supreme Court established the state-created danger doctrine in response to a case
filed against social workers.\textsuperscript{179} However, different approaches within the appellate courts
appeared as a response to applying the state-created danger specifically to schools. The Third
and Fifth circuits have established standards by which the state-created danger applies to
schools.\textsuperscript{180} Additionally, state actors have the defense of qualified immunity available when they
face claims asserting the state-created danger.\textsuperscript{181}

\begin{itemize}
\item [\textsuperscript{176}] See generally Palsgraf v. Long Island R. Co., 162 N.E. 99, 102 (N.Y. 1928) (dissenting opinion argues the scope
of the risk defines the scope of the duty).
\item [\textsuperscript{177}] A.B.A., supra note 72 at 9; Mohammed v. School District of Philadelphia, 196 Fed. Appx. 79, 81 (3d Cir. 2006)
(looking to a number of 3d Cir. federal reporter published opinions, the court here applied the same rules to its
factual situation. Even though this particular case was not selected for publication in the federal reporter and is
therefore not precedential in and of itself, each of the rules derived from it and asserted in this argument have
precedent within the 3d Cir. in other cases discussed infra Parts III.A.1.a-b.).
\item [\textsuperscript{178}] Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994) (explaining the due process clause of the
constitution renders state actors accountable for foreseeable injuries resulting from their conduct).
\item [\textsuperscript{179}] See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989) (The court described the state
created danger as a possibility for holding state actors liable, although in that case the social workers did not create
the danger).
\item [\textsuperscript{180}] See discussion infra Parts III.A.1.b-c.
\item [\textsuperscript{181}] See discussion infra Parts III.A.3.
\end{itemize}
A. The State Created Danger: Judicially Created In DeShaney v. Winnebago County

The U.S. Supreme Court decision in DeShaney v. Winnebago County held the government is not liable for injuries incurred through the acts of a third party. However, the court left room for two scenarios under which a minor can bring a §1983 claim against a government entity: 1) where there is a special relationship between the state and the minor, and 2) the state-created danger. While the Supreme Court did not find the social workers liable for the injuries Joshua sustained, they discussed an analogous situation. The Court held that in order for there to be an affirmative duty, the social workers, through the affirmative exercise of their power, would have had to place Joshua in an abusive foster home operated by its agents. If that had been the case, the social workers would have been found liable for Joshua’s injuries.

Returning to the earlier hypothetical of Tommy’s case, at orientation the school encouraged students to inform an authority figure of their knowledge of another student breaking the rules. The school made it the student’s responsibility and indicated there could be consequences for failing to inform. This created the dangerous situation in which a third party had the opportunity to harm a student. When the school acted on the information given by the student informant without taking protective measures for that student, it knowingly put the student informant in the perilous situation it created.

182 See generally DeShaney, 489 U.S. 189.
183 A.B.A., see supra note 72 at 7.
184 A.B.A., see supra note 72 at 7.
185 A.B.A., see supra note 72 at 7.
186 See Murphy v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990) (holding State actor liable for injuries incurred when child welfare workers removed a child from an abusive parents home and placed her in a number of other abusive foster homes).
1. Appellate Court Interpretations of State-Created Danger

Both the Third and Fifth circuits have heard claims brought against a school under §1983, alleging a state-created danger. These courts interpreted the state-created danger as it is applied to schools similarly to the Supreme Court interpretation in *DeShaney*. Both maintained an affirmative act is required on the part of the state actor in order to assign liability. Each Circuit has given a number of other factors to consider alongside the actual affirmative act. In both *Mohammed v. School District of Philadelphia* and *Johnson v. Dallas Independent School District*, the courts held neither school participated in affirmative acts. However, Tommy’s school encouraged students, effectively enrolling them as informants and therefore, acted affirmatively.

a. Justification for Utilizing *Mohammed*

The author acknowledges this particular case was not selected for publication in the Federal Reporter. The court in *Mohammed* stated its holding applied to this one case. However, the cases the *Mohammed* court cites to have well established the rule derived from them and applied within *Mohammed*. The fact pattern within *Mohammed* analogizes better with the discussion within this note, therefore this note applies *Mohammed* rather than the other cases cited within *Mohammed*. The facts presented within *Mohammed* are particularly applicable here because they involved a plaintiff attempting to hold a school liable for a state created danger. In

188 *Mohammed v. Sch. Dist. of Phila.*, 196 Fed. Appx. 79, 80 (3d Cir. 2006) (A high school student brought an action against the school district for violating his Fourteenth Amendment right to bodily integrity and safety); *Johnson*, 38 F.3d at 199 (Representative of students estate brought the action against the school district and school principal alleging the creation of a dangerous environment).

189 *Mohammed*, 196 Fed. Appx. at 80; *Johnson*, 38 F.3d at 199.

190 *Mohammed*, 196 Fed. Appx. at 81; *Johnson*, 38 F.3d at 201.

191 *Mohammed*, 196 Fed. Appx. at 81; *Johnson*, 38 F.3d at 201.

192 The author seeks to use *Mohammed* as a persuasive tool in developing a consistent standard to apply to a situation where a school creates the danger of obtaining student informants. The author does not rely on *Mohammed* as the independent basis of law to apply in this factual scenario.
the interest of clarity and continuity, *Mohammed* is the basis of discussion rather than the numerous cases cited within *Mohammed*, all of which are published decisions.

Regardless, it is not uncommon for courts to allow attorneys to cite to unpublished cases in the briefs submitted to the courts.\(^{193}\) The author also notes the adoption of Federal Rule of Appellate Procedure 32.1.\(^{194}\) As of December 6, 2006 all opinions designated as unpublished or not precedent and issued after January 1, 2007 may not be prohibited or restricted by the court.\(^{195}\) *Mohammed* missed this applicable rule by only seven months.

b. Interpretation and Application of *Mohammed*

In *Mohammed*, the Court discussed the elements of the state-created danger theory.\(^{196}\) To hold a viable claim under §1983, the plaintiff must show: 1) the harm was foreseeable; 2) the state actor acted with a degree of culpability more than willfully disregarding the plaintiff’s safety; 3) “a special relationship must have existed between the state and the plaintiff such that ‘the plaintiff was a foreseeable victim to the defendant’s acts’”; and 4) the state actor used its authority to create a danger rendering the student more vulnerable than had the state not acted at

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\(^{193}\) 1st Cir. R.32.1.0. (allowing for the citation of unpublished opinions which hold persuasive value); 3rd Cir. R.5.7 (stating traditionally the court does not allow citing to its not precedential opinions as authority. However, there is no mention that not precedential opinions may be used as persuasive devices); 4th Cir. R.32.1 (stating that if “a party believes . . . an unpublished decision . . . has precedential value in relation to a material issue in a case and there is no published opinion that would serve as well, such disposition may be cited” so long as it meets the other requirements set forth in FRAP 32.1(b)); 8th Cir. R.32.1A (acknowledging that unpublished decisions may be cited, though they generally are not, if the opinion has persuasive value on a material issue which is relevant to establishing a doctrine of law of the case); 9th Cir. R.36-3 (stating unpublished decisions may not be cited to unless they are relevant under the doctrine of law of the case, for factual purposes, or the existence of a related case); 10th Cir. R.32.1 (stating so long as the unpublished, not precedential case is cited to for persuasive value or under a doctrine of law, then the case may be cited); 11th Cir. R.36-2 (allowing unpublished opinions to be cited to as persuasive authority, but they are not considered binding precedent).


\(^{195}\) Fed. R.App. 32.1 (2007) The Advisory Committee Notes state the new rule does not state how a court has to treat such an opinion, just that the court cannot prohibit the use of such opinions. The Notes proceed to state, “Every court of appeals has allowed unpublished opinions to be cited in some circumstances.”

\(^{196}\) Mohammed, 196 Fed. Appx. at 81 (The court applied the same test used in a number of other 3d Cir. opinions. It specifically states it took the four prong test from Bright v. Westmoreland.) See Bright v. Westmoreland County, 443 F.3d 276 (3d Cir. 2006); Rivas v. City of Passaic, 365 F.3d 181 (3d Cir. 2004); Miller v. City of Philadelphia, 174 F.3d 368 (3d Cir. 1999); Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996). Each case, published in the federal reporters, applies the same analysis as does Mohammed v. Sch. Dist. of Phila., therefore the analysis is established within the Third Circuit.
Applying this court’s test for the existence of a state-created danger to Tommy’s situation, the school is liable for injuries sustained by the student informant.

i. Foreseeability

Being an informant is dangerous, therefore subsequent harm to the informant is foreseeable. Courts determine foreseeability by considering all the surrounding circumstances. If a reasonably prudent person would have foreseen the resulting injuries and failed to prevent injuries of that general type, then that person is negligent. In *M.W. v. Panama Buena Vista Union School District*, the court found it was foreseeable that a student could be injured when the school unlocked the gates to its campus 45 minutes prior to scheduled supervision. The court explained that schools are not dangerous places per se, however given a lack of supervision students could be at risk for physical assault. When Tommy’s principal encouraged students to inform authorities if they have knowledge of the possession of drugs or weapons by another student, because of the inherently dangerous nature of being an informant, a reasonably prudent principal should have foreseen harm might come to student informants.

ii. More than a Willful Disregard?

The court finds willful disregard when the actor desired the results that followed or was at least aware of a substantial certainty the injury would occur, therefore implying a desire.

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197 *Id.*
198 *Williamson v. City of Va. Beach*, 786 F. Supp. 1238, 1253 (E.D. Va. 1992); In re B.P.H, No. 2-01-241-CV, 83 S.W.3d 400,403 (Tex. App. August 15, 2002) (defining retaliation as “intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service of another as public servant, witness, prospective witness, or informant”); In re D.A.R., No. 08-01-00075-CV, 73 S.W.3d 505, 511-12 (April 4, 2002) (explaining how an officer did not question a student the teacher had told the officer had information about another student with a gun because the officer worried about the informing student’s safety).
200 *Id.*
201 *Id.* at 519-20.
202 *Id.*
The Court in *Mohammed* did not find the school culpable beyond a willful disregard for the plaintiff’s safety. The defendants in *Mohammed* were aware of the rampant violence at the school and did not ignore it. Rather, the school made use of surveillance cameras and security guards showing a desire to prevent injuries that may follow due to lack of supervision.

However, when schools utilize their students as informants they are making a conscious choice to put those students in harm’s way. Schools are not simply ignoring the lack of safety; they create an additional unsafe situation. The court could find willful disregard through a finding of the implied desire; meaning through recruiting students into a perilous situation, Tommy’s principal willfully disregarded the student’s safety. The school should be aware there is a substantial certainty student informants will suffer injuries because of the inherent danger of being an informant.

iii. Use of School Authority Creates a Foreseeable Victim

Student informants are foreseeable victims of the school’s actions because enrolling them as informants places students in the dangerous situation. The principal, as the state actor, uses his authority to announce to students at the beginning of the year they should inform him of rule breakers. This creates the dangerous situation for the informant because had the principal not

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204 *Id.* at 81 (citing 3d Cir. decision from *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004), which held culpability is more than acting with a willful disregard). In fact, many of the Third Cir. Courts have looked to the phrase “shocks the conscience” (*see supra* note 92). The court in *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999) stated that behavior which shocks the conscience is a problematic standard, which begs the question of what conduct is consistent with our traditions, and therefore the circumstances of each case are critical.

205 *Id.*

206 *Id.*

207 *Id.* at 82.

208 *Id.* (In the two school years and in the first half of the school in which the attack occurred, over 200 incidents of violence occurred at Olney High School in Phila. However, only one act of violence took place in the particular stairwell where the attack on the student occurred. Therefore, the court decided there was not enough of a certainty harm would result from a lack of surveillance in this area.)

209 *Williamson v. City of Va. Beach*, 786 F. Supp. 1238, 1248 (E.D. Va. 1992) (similar to the situation where the police, as state actors, use their authority to develop and handle informants).
said this at orientation, the student would not feel compelled to report, and therefore would not be vulnerable to the created danger.

Through this authority and the relationship between the principal and his students, the school has created the foreseeable victim. The principal’s exercise of authority placed the student in a vulnerable situation, report and risk peer retaliation or don’t report and risk school repercussions. The principal’s words to the students are important because they fulfill the requisite element of the state actor using its authority in a situation which results in an increased risk of harm to the student informant.

As stated above, *Mohammed* is not precedential because the Federal Reporter did not publish it. However, the court applied solid analysis in reaching its decision. The rule derived from *Mohammed* is simply a rule derived from other, precedential cases with dissimilar fact patterns to a school using informants. The rule itself is good law, and applicable to a situation similar to Tommy’s.

c. Interpretation and Application under *Johnson*

In *Johnson v. Dallas Independent School District*, the Fifth Circuit used a slightly different test to determine if the school was liable for injuries sustained by a student on campus. The Court determined that to find a state-created danger, there must be: 1) actual knowledge a risk of physical danger exists; 2) the state actors created a dangerous environment; and 3) they used their authority to create an opportunity for the third party’s crime to occur which would not have existed had the state not acted.\(^{210}\) As with the test in *Mohammed*, under the *Johnson* test a school should also be held liable for injuries sustained by a student informant.

\(^{210}\) *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994).
i. Knowledge

Similar to the above described application of foreseeability, knowledge of danger exists because history dictates there have been threats and harm resulting from a student’s involvement as an informant. The actual knowledge must be of a serious risk of physical danger. Knowledge of the exact injury is not necessary, just of an injury of the same general nature.

The court in Johnson found the pleadings in the case lacked a showing the school was actually aware of the danger posed to students by nonstudents entering the campus. The court asserted that had there been allegations of previous criminal conduct, the trier of fact could have inferred the school was a high crime area and the lack of security measures led to the non-student having the opportunity to enter campus and fire a gun. Unlike that case, Tommy’s principal knew the possibilities of drugs and weapons existed in his school; otherwise he would not have charged the students with watching out for such things. This knowledge indicates there is a risk of physical danger and by asking students to get involved, the principal knew injuries could result.

ii. Using Authority Resulting in the Creation of a Dangerous Situation

The claim in Johnson also fell short when asserting the school placed the student in a dangerous environment through the use of its authority. There were no facts to show the principal allowed random acts of violence, thus creating a dangerous environment for his

212 Johnson, 38 F.3d at 201 (For example, if the school had previous incidents of criminal conduct, then perhaps the trier of fact could conclude the school was a high-crime area and therefore there would be actual knowledge of a serious risk of physical danger).
214 Johnson, 38 F.3d at 201.
215 Id.
216 Id. (looking to the 5th Cir. Decision in Leffall v. Dallas Indep. Sch. Dist., 28 F.2d 521, 525 (5th Cir. 1994). The Court gathered from the Leffall decision that the defendant would have to be “at least deliberately indifferent to the plight of the plaintiff.”).
students.\footnote{Id.} Rather the school made use of metal detectors and school ID badges to try and prevent non-students from entering the school.\footnote{Id.}

At Tommy’s school, the principal’s encouragement and challenge to look for drugs and weapons created a potentially dangerous situation if a student feels compelled to report the wrong doings of other students. Because of this, the school created a situation which would not have existed had the school not encouraged or recruited the students. Students should not be placed in this dangerous situation. The school used its authority to get students to inform about other students while leaving open the opportunity for the rule breakers to harm the informing student. Unlike \textit{Johnson} where the school itself was looking to prevent criminal activity, Tommy’s school put the responsibility to prevent such activity upon its students. This use of authority resulted in a dangerous situation.

2. \textit{Uniform Standard to Apply for State-Created Dangers in Schools}

Essentially, the tests in \textit{Mohammed} and \textit{Johnson} are functionally equivalent. The basic premise of each dictates liability when the school knows with substantial certainty a risk of danger is foreseeable, and the school uses its authority to create the dangerous situation, therefore leaving the student vulnerable to receive injury at the hands of a third party.\footnote{Id.} The only rule difference between the two Appellate cases is \textit{Mohammed}’s additional requirement of a special relationship resulting in the plaintiff being a foreseeable victim to harm.\footnote{Id.} When schools choose to use students as informants, in the interest of creating a uniform standard, courts should disregard the elements of a special relationship. The applicable uniform and synthesized rule

\footnote{Mohammed v. Sch. Dist. of Phila., 196 Fed. Appx. 79, 81 (3d Cir. 2006); Johnson, 38 F.3d at 201.}

\footnote{Mohammed, 196 Fed. Appx. at 81. Because courts consider \textit{Mohammed} to be not precedential, it should pose no problem to leave out one prong derived from that case, thus creating an even more solidly defined uniform law to apply in situations where a student informant incurs harm.}
should be, a school will be held liable in a claim of a §1983 violation when: 1) the school has knowledge with substantial certainty of a foreseeable danger, and 2) the school used its authority to create the dangerous situation, thus leaving the student vulnerable to incur injury from a third party.

The reasoning behind eliminating Mohammed’s requirement of the existence of a special relationship is because it is a concept split throughout the courts. Some courts feel a special relationship exists between a school and its students because of compulsory attendance laws. Other courts feel schools lack the authority to restrain a student’s freedom to act on his own behalf, resulting in an absence of a special relationship. Granted, a special relationship develops between a principal and a student when the principal recruits a student to be an informant, but not in the sense established by the Supreme Court in DeShaney. Because Tommy was free to act and to report, regardless of his internal conflict of facing school punishment if he failed to report, the school did not restrain his freedom to act. In the interest of consistency the requirement of a special relationship should be eliminated because while a special relationship of a type exists, it does not fit the definition given in DeShaney.

In light of the dangerous nature of being an informant, the school has knowledge of a substantial certainty that harm will result from Tommy’s involvement as an informant. The school also satisfies the second part of the standard because it used its authority to create the opportunity for students to be informants through its school policy on reporting drug and weapon

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222 M.W., 110 Cal. App. 4th at 517; Rodriguez, 186 Cal. App. 3d at 714.
223 See generally DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989); Graham v. Indep. Sch. Dist., 22 F.3d 991, 994 (10th Cir. 1994) (holding schools do not have a custodial relationship with its students).
224 See generally DeShaney, 489 U.S. at 200.
possession, thus leaving Tommy vulnerable to harm at the hands of the rule breakers. Therefore, Tommy could bring a successful §1983 claim using the uniform rule.

3. The Defense of Qualified Immunity

When faced with §1983 claims, state actors usually assert they are entitled to qualified immunity, thus avoiding liability. This defense is a judicial attempt to balance the realization that government officials may abuse their powers, however automatically subjecting them to monetary liability may inhibit officials in the discharge of their duties. In other words, state actors can assert this defense in response to allegations of creating a danger or negligence. Courts allow defendants to show they qualify for immunity so long as the defendant was acting within the scope of their duty as a state actor. When claims for civil damages are asserted, state actors must show their conduct did not violate constitutional rights of which a reasonable person would have known. If a state actor can successfully show this, then they receive qualified immunity.

In Wood v. Ostrander, the plaintiff brought a §1983 claim as a result of violation of a right to personal security, which is “a liberty interest protected by the fourteenth amendment.” The Court held that if Wood could establish the facts she asserted in her claim against Ostrander, Ostrander would not be entitled to the defense of qualified immunity because he would have

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225 Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (denying defendants qualified immunity because student who brought claims against the school district was clearly entitled to equal protection, which school officials did not provide); Murphy v. Morgan, 914 F.2d 846, 850 (7th Cir. 1990) (denying child welfare workers qualified immunity because they placed a child in the custody of a foster parent suspected to be a child abuser); Wood v. Ostrander, 879 F.2d 583, 591 (9th Cir. 1989) (denying police officer qualified immunity because a reasonable police officer should have known he was violating the passengers Fourteenth Amendment interest in personal security).


227 Wood, 879 F.2d at 591.

228 See generally Nabozny, 92 F.3d at 454 (applying the Supreme Court decision from Harlow v. Fitzgerald, 457 U.S. 800 (1982) to a suit brought against a high school for violating a students Fourteenth Amendment due process rights).

229 See Wood, 879 F.2d at 591 (reversing a grant for summary judgment because Wood, a rape victim, asserted a genuine factual dispute regarding her Constitutional right, which Ostrander, the police officer who allegedly left her in an unsafe area, violated).
violated a Constitutional right while acting within the scope of performing his duties as a state actor.\textsuperscript{230}

Those employed at a school are state actors and therefore may be eligible to assert the defense of qualified immunity. When named as the defendant in a civil action, state actors assert they were acting within the scope of their duties when the alleged constitutional violation occurred, and therefore are not liable.\textsuperscript{231} State actors often argue there was no clear constitutional violation of which a reasonable person would have known.\textsuperscript{232} However, should a student prove the school created the risk or exacerbated an existing risk, the school would not be entitled to qualified immunity because that type of behavior, creating and exacerbating risks, is outside their duties.\textsuperscript{233} Additionally, leaving an individual vulnerable to physical harm clearly violates the Fourteenth Amendment, thus baring the defense of qualified immunity.\textsuperscript{234} A school or its officials would not receive qualified immunity because it created the dangerous situation by using student informants. Tommy could assert this violation because the school created the situation in which he sustained injuries. Consequently, Tommy’s school would not be entitled to a qualified immunity defense because it created and exacerbated the risk of physical injury and left Tommy more vulnerable to physical harm.

In Bacchiocchi v. Carden, a high school student assaulted another student, which prompted an action against the school board for negligence.\textsuperscript{235} This proved to be a situation in

\begin{itemize}
  \item \textsuperscript{230} Id. at 596.
  \item \textsuperscript{231} Williamson, 786 F. Supp. at 1259 (citing the Supreme Court decision in Westfall v. Erwin, 484 U.S. 292, which stated immunity is available when state actors are acting within the scope of their duties).
  \item \textsuperscript{232} Nabozny, 92 F.3d at 460.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} See Wood, 879 F.2d at 591 (overturning a grant for summary judgment for defendant because plaintiff asserted arguable questions of fact when alleging violation of constitutional right to personal security, which is protected under the Fourteenth Amendment as a liberty interest).
  \item \textsuperscript{235} Bacchiocchi v. Carden No. CV 065000407S, *4 (Conn. Super. Cr. Aug. 17, 2006) (holding qualified immunity as applied to municipal employees means the actor is not negligent unless the circumstances indicated imminent harm to the plaintiff).
\end{itemize}
which the state actor received qualified immunity because the school board did not act outside of its scope of duty regarding safety measures at the school.\footnote{Id.}{236} However, the critical distinction between Bacchiocchi and Tommy’s situation is that Tommy’s principal was acting outside of his scope of duty by enrolling students as informants. He passed his duty onto the students rather than solving the problem himself.

Schools and school officials may also be prevented from asserting the qualified immunity defense if the tort action results from a situation in which it was likely imminent harm to an identifiable person existed.\footnote{Salim v. Proulx, 93 F.3d 86, 88 (2d Cir. 1996) (stating “a public official is liable for discretionary acts only when it would be apparent to the public officer that his failure to act would be likely to subject an identifiable person to imminent harm”)}{237} Students, who the principal requests assist in the search for drugs and alcohol, are an identifiable class of person subject to imminent harm. Court’s have interpreted imminent to mean near at hand, threatening, or on the point of happening.\footnote{Purzycki v. Town of Fairfield, 708 A.2d 937, 941 (Conn. 1998) (stating that “schoolchildren who are statutorily compelled to attend school, during school hours on school days, can be an identifiable class of victims”).}{238} Informants are in this category of harm, especially if their identity is easily discernable to the wrongdoers. Therefore, based on student informants being in the class of persons subject to harm, the school or its officials would not qualify for immunity.

If a student is unable to assert a claim under § 1983, they could still bring a tort action in state court. States should look to the state-created danger and apply it uniformly to the elements within negligence.

\footnote{Purzycki, 708 A.2d at 943-42. The majority appears to infer imminent occasions do not arise when there are circumstances ranging greatly that could occur at any unspecified time. In Chief Justice Callahan’s dissenting opinion, he relies on various dictionary definitions to define imminent. “Black's Law Dictionary defines imminent as: ‘near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous. Something which is threatening to happen at once; something close at hand; something to happen upon the instant; close although not yet touching, and on the point of happening.' Black's Law Dictionary (6th Ed., 1990).” He disagreed with the court’s interpretation of imminent, which he determined did not comport with the ordinary understanding of the word imminent.}{238}
IV. CONCLUSION

Students beat up Tommy because he did what his principal told him to do. Initially, the principal just encouraged students to report incidents of drugs and weapons but then he went on to add there would be consequences for failing to do so. This proved ineffective for improving school safety, because while the principal found two students in possession of drugs, he also exacerbated violence. Even if the principal had not attached consequences but rather offered rewards, the resulting behavior of the rule breakers would have been the same.

Student informants exist in our schools. This raises the issue of a duty to provide protection to those students, similar to that provided to police informants. Statutes and case law, both of which detail strenuous factors which must be met prior to the use of minors as police informants, reflect the dangerous nature of being an informant.

Having students pose as informants is a state-created danger and according to the analysis above, the school should be subject to liability. Danger to student informants is foreseeable in light of the dangerous nature of being an informant. This inherent danger provides the school with knowledge of a substantial certainty that students acting as informants are in a perilous position. Through the school utilizing its authority as a rule maker, it created a dangerous situation and subjected its students to the possibility of retaliatory harm.

Additionally, it is negligent for a school to utilize its students as the watchdogs of school rule compliance and safety. The school is negligent because it has a duty to maintain a safe environment and an even greater duty to protect students when it places students in a dangerous

\[239\] See Test this Program, supra note 5; In Class and in Prison, supra note 5.
\[240\] Cal. Penal Code § 701.5 (West 2007) (detailing a strenuous procedure which must be followed in the event a juvenile is to be used as an informant); Williamson v. City of Va. Beach, 786 F. Supp. 1238, 1247 (E.D. Va. 1992) (listing the requirements the police must satisfy prior to utilizing a juvenile informant).
situation. Through a failure to protect its student informants, a school has breached its duty and therefore is the cause in fact and proximate cause of any harm that befalls the student informant.

There are safer alternatives to using student informants. Because schools must maintain a drug and weapon free environment, they should engage in the use of dog sniffing searches and metal detectors. Neither of these makes any student responsible for the supervision and reporting of another’s behavior. These alternatives help minimize the use of student informants. However, should schools continue to utilize students as informants they should be liable for any resulting injuries sustained by a student informant.