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SHOOTINGS ON CAMPUS: SUCCESSFUL SECTION 1983 SUITS AGAINST THE SCHOOL?

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SHOOTINGS ON CAMPUS: SUCCESSFUL §1983 SUITS AGAINST THE SCHOOL?

By Susan S. Bendlin

Shootings on school campuses have shocked the public time and time again. In January of 2013 alone, eight school shootings occurred and half took place on college or university campuses. Despite efforts to enhance security, establish threat assessment teams, and implement other preventive measures, schools have not been able to avoid the tragic incidents of gun violence that have killed and injured dozens of innocent students, faculty, and administrators on college campuses across the nation.

Grieving parents and other loved ones reach out for comfort and support. Why did this senseless act of violence happen? Whose fault is it? What can we do? In their sorrow, frustration, disbelief, and anger, the survivors want answers. In many instances, the shooter is also dead. If still alive, the shooter most likely faces serious criminal charges. Knowing that the killer will be criminally punished is small comfort to victims’ families. Grieving parents wonder if there is any other relief available. It is axiomatic that money damages cannot bring a deceased

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3 Many commentators have addressed ways to prevent tragedies from occurring on campuses. See, e.g., Brett Sokolow et al, College and University Liability for Violent Campus Attacks, 34 J.C. & U.L. 319, 345-46 (2008); Eric Hoffman, Taking a Bullet: Are Colleges Exposing Themselves to Tort Liability By Attempting to Save Their Students? 29 Ga. St. U. L. Rev. 539, 541-43 (Winter 2013). This Article will not address those aspects, but will focus instead on liability after the tragedy has occurred.
child back to life, nor can money ever replace the value of any human being. One possible source of relief, nonetheless, is a suit against the university where the tragic slaying took place.

This Article will examine one approach to redress through the civil justice system: a federal lawsuit for deprivation of the deceased student’s constitutional Due Process rights under the fourteenth amendment. The question is whether the victims or their families can recover monetary damages in federal court from a school or university based on that institution’s failure to protect students from violence caused by a third-party shooter. The short answer is “maybe, but . . .” The longer answer will be discussed in this Article.

Part I establishes the context by presenting factual information about campus shootings. Part II discusses the federal remedy of bringing a section 1983 action against a public school for deprivation of fourteenth amendment Due Process rights. Part II has three subsections. II(A) discusses the general rule from the landmark case of DeShaney v. Winnebago County Department of Social Services where the United States Supreme Court held that a state is not responsible for protecting a person from private third-party violence and is not liable for the resulting injuries. Subsections II(B) and II(C) discuss two exceptions to that general rule: the special relationship exception and the state-created danger theory. While the Article is intended to focus primarily on post-secondary school shootings on college campuses, some valuable legal guidance comes from recent lower school cases that are also described. Part III discusses the abandonment of the state-created danger theory by the Fifth and Eleventh Circuits. Part IV is the Conclusion.

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4 Monetary damages can nonetheless compensate survivors for medical costs and other expenses associated with the tragic event as well as for pain and suffering.
5 Victims or their representatives could also choose to bring a tort action for negligence against the university in state court -- or in federal court if ancillary to a federal claim -- but this Article focuses only on the section 1983 constitutional cause of action.
PART I: STARTLING STATISTICS ON COLLEGE CAMPUS SHOOTINGS

In the first eight months of 2013, seven different colleges were the scene of on-campus shootings. From 2008 to 2012, there were fifteen reported shootings on college campuses resulting in a total of twenty-nine deaths. Previously, between 1966 and 2008, at least sixteen violent campus shootings occurred at universities and colleges across America, causing eighty-eight deaths and eighty-two non-fatal injuries. Further, the violent acts left countless others mourning the death of their mothers, fathers, sons, or daughters.

One of the first campus shootings to be nationally publicized occurred at the University of Texas. The shocking assault on the university’s Austin campus on August 1, 1966 triggered a change in society’s perception of safety on the campuses of colleges and universities across the country. The violent event began at approximately 11:30 a.m. that day when undergraduate student Charles Whitman lugged his military storage box filled with firearms and other supplies to an elevator on the ground floor of the 307 foot tall bell tower on campus. After reaching the observation deck on the twenty-eighth floor, Whitman encountered 51-year old Edna Townsley, the receptionist (also a mother of two young boys). Whitman struck the woman multiple times with the butt of his rifle and left her on the floor to die. He had another encounter inside the tower that resulted in two more deaths before he aimed his rifle at the student-filled campus.

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7 http://en.wikipedia.org/wiki/List_of_school_shootings_in_the_United_States. GET BETTER SOURCE?  
11 Id.
below. People who sought cover behind buildings watched helplessly as those unable to run fast enough fell victim to the senseless wrath of Charles Whitman.

When the nightmare at the Texas bell tower ended, there were forty-six victims, including thirteen fatalities. One victim was an unborn child whose skull was shattered when a bullet pierced the expectant mother’s midsection.\footnote{H.D. Quigg’s report on the 1966 Texas Tower Shooting, \url{http://www.downhold.org/lowry/doc.html}.} The horrific shooting spree resulted in increased security measures at the tower\footnote{Id.} and sent ripples across the nation to other colleges. The University of Texas is just one of the many American universities that has sadly become the scene of some of the nation’s most horrific mass slayings.

The much-publicized tragedy at Virginia Tech remains the deadliest shooting incident on the campus of an educational institution in American history.\footnote{Deadliest U.S. Shootings, \url{http://www.washingtonpost.com/wp-srv/special/nation/deadliest-us-shootings/}.} In April 2007, Seung-Hui Cho, a senior at Virginia Tech, made two separate attacks on the university’s campus, resulting in the death of thirty-two individuals and injuries to numerous others before he committed suicide, bringing the death toll to thirty-three.\footnote{Worst U.S. Shooting Ever Kills 33 on Va. Campus, \url{http://www.nbcnews.com/id/18134671/ns/us_news-crime_and_courts/t/worst-us-shooting-ever-kills-va-campus/#.Ua-KYfmcfUU}.} The first attack began at 7:15am on April 17, 2007. Cho, armed with two handguns, entered a dormitory hall where he killed two students.\footnote{(Worst U.S. Shooting Ever Kills 33 on Va. Campus, \url{http://www.nbcnews.com/id/18134671/ns/us_news-crime_and_courts/t/worst-us-shooting-ever-kills-va-campus/#.Ua-KYfmcfUU}).} A warning regarding the shooting in the dormitory hall was not sent out to students and faculty until approximately 9:26am, and that warning failed to tell students not to report to class.\footnote{Id.} At the
same time that first warning was sent, Cho had already begun his second attack inside another building on campus.¹⁸

The first responders to the 911 call regarding Cho’s second attack arrived on scene just before the last gunshots rang out, and they could not stop the shooter before he was able to kill thirty innocent people and take his own life.¹⁹ “It’s probably one of the worst things I’ve seen in my life”, said Campus Police Chief Wendell Flinchum when describing the scene inside the building where the second shooting took place.²⁰ A reporter for the New York Times wrote, “[w]itnesses described scenes of mass chaos and unimaginable horror as some students were lined up against a wall and shot. Others jumped out of windows to escape, or crouched on floors to take cover”.²¹ In the aftermath of the Virginia Tech rampage, many universities re-examined their security procedures and began to assess risks on campus more systematically by establishing threat assessment teams.²²

¹⁸ Id.
¹⁹ Then-chair of the English Department at Virginia Tech Prof. Lucinda Roy described the delicate and horrible dilemma faced by school officials immediately afterwards: “Those who knew anything about Cho were balanced precariously on the rim of free speech. A variety of critics perched next to us, waiting to dissect every word. The media had taken up residence on the rim, secreting the tabloids underneath their jackets. Next to the media sat the twins FERPA and HIPAA, coy and tight-lipped, unwilling to reveal much about what you could and couldn’t say about the academic or medical records of the perpetrator, and next to them the National Rifle Association (NRA) stood poised to ambush those who mentioned guns in the same breath as Seung-Hui Cho because, as the NRA proclaimed for years with its perverse logic, ‘Guns don't kill people, people kill people.’ Next in line were the accusers eager to blame someone for something--anything at all, it didn't really matter.” Lucinda Roy, Insights Gleaned from the Tragedy at Virginia Tech, 17 Wash. & Lee J. Civil Rts. & Soc. Just. 93, 100 (2010).

Despite enhanced security measures across the country, fatal gun attacks have continued to occur on several campuses. Among them was a murder/suicide on Feb 8, 2008 in a classroom at Louisiana Technical College in Baton Rouge. A female student gunned down two other students and then killed herself in front of roughly twenty other students who were in the room that morning.\(^{23}\) Just six days later, on Valentine’s Day, a similar tragedy occurred at Northern Illinois University.\(^{24}\) There, a former graduate student opened fire in a classroom, killing five students before shooting himself. Several more were wounded; there were twenty-two victims including the perpetrator.

The most deadly of the post-Virginia Tech college campus shootings occurred in 2012 at Oikos University in Oakland, California. One Goh, a former student at the university, arrived on campus the morning of April 2 and began firing shots at approximately 10:30am.\(^{25}\) Perhaps in an attempt to emulate the Virginia Tech shooter, Goh entered a classroom and told students, “Get in line, I’m going to kill you all”, before firing multiple rounds of ammunition at students from his .45-caliber handgun.\(^{26}\) One Goh shot and killed seven people.\(^{27}\) He injured three others.

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27 Among those slain was Sonam Choedon, a student in the nursing program at Oikos University. [That Other School Shooting](http://www.nytimes.com/2013/03/31/magazine/should-it-matter-that-the-shooter-at-oikos-university-was-korean.html?pagewanted=all). Nearly a year following the tragedy, her brother described to a *New York Times* reporter how the event has impacted his life and his daily struggle of coping with the loss of his sister. “I used to be a monk, so I never drank or smoked or anything”, said Nyima [the brother]. *Id.* “Since my sister’s death, I
More recently, just a few hundred miles south of Oikos University (where One Goh had senselessly executed seven people), a different California community mourned the loss of five innocent people after a deadly shooting on the campus of a Santa Monica college. The rampage began on June 7, 2013 when John Zawahri killed his father and brother inside their home. Id. The shooter then hijacked a car and headed toward the college campus which he formerly attended. While on campus, Zawahri murdered three people before the police were able to stop him inside the library. The final death toll was six.

The families of the victims killed in these and other college shooting rampages likely similar feelings of grief and anger. This understandable emotional response leads to questions such as why the shooting was not stopped quickly enough, or how and why school officials were not aware of the shooter’s violent propensities before the shooting occurred. This Article will explore a university’s responsibility and potential liability for school shootings by examining one potential avenue for legal relief -- the federal cause of action that an injured victim or the estate of a deceased victim may bring.

**PART II : A FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. §1983**

One remedy for victims or their families is to bring a suit for money damages in federal court under 42 U.S.C. §1983 (2006). The statute provides:

need to drink a glass of whiskey to go to bed”. He continued, “I cannot go outside because I think everyone has a gun”. When asked whether Nyima was angry about what happened, he replied, “Of course I am angry. I am angry at the government because there are too many guns. I am angry at the school because they didn’t do enough to deal with this guy. I am angry at the guy who shot my sister…” Id.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The specific constitutional right implicated in school shooting claims is a Fourteenth Amendment substantive Due Process right. The Due Process Clause of the Fourteenth Amendment provides that a state shall not “deprive any person of life, liberty, or property, without due process of law.” In school shooting cases, the alleged constitutional violation is that the victim has been deprived of his liberty by the public university officials’ failure to warn or protect him from grave danger. The nature of this Due Process liberty interest will be discussed in more detail in the following subparts that address Supreme Court precedent and more recent litigation in federal courts involving public schools as well as colleges and universities.

The threshold inquiry is whether the typical college student has a Due Process liberty interest that is violated when a university fails to warn or protect the student from a shooting rampage. “The first step in evaluating a section 1983 claim is to ‘identify the exact contours of the underlying right said to have been violated’ and [then] to determine ‘whether the plaintiff has alleged a deprivation of a constitutional right at all,’” according to the United States Supreme Court. If the plaintiff establishes that a constitutional violation occurred, the second step is to

31 U.S. Const. amend. XIV, section 1.
decide whether the school’s actions caused the constitutional violation. The following section
of the Article will describe the liberty interest at stake.

A. The Nature of the 14th Amendment Due Process Right as Described in Section 1983

Litigation

In the landmark case DeShaney v. Winnebago County Department of Social Services, the
United States Supreme Court addressed a fourteenth amendment Due Process claim and clarified
the parameters of a constitutional violation of a victim’s liberty interest. The DeShaney case
involved a young boy who was so severely abused by his father that he had to be
institutionalized due to permanent brain injuries. The Winnebago County Department of
Social Services had been notified of the abuse by police and medical doctors on several
occasions. A social worker visited the home roughly twenty times and documented the abuse. However, after a temporary removal, the boy was returned to his abusive father’s custody. The boy’s mother brought a section 1983 suit alleging that the state had deprived the child of his liberty interest by failing to protect him once the life-threatening abuse was made known to the
appropriate governmental agency.

Describing DeShaney’s situation as “undeniably tragic”, the United States Supreme Court
nonetheless held that there was no constitutional violation. The majority stated, “nothing in the
language of the Due Process Clause itself requires the State to protect the life, liberty, and

Doe v. Claiborne County, 103 F.3d 495, 505 (6th Cir. 1996).
35 DeShaney, 489 U.S. at193.
36 DeShaney, 489 U.S. at 209 (Brennan, J. dissenting).
37 DeShaney, 489 U.S. at 192.
38 DeShaney, 489 U.S. at 191.
39 DeShaney, 498 U.S. at 191.
40 DeShaney, 498 U.S. at 191.
property of its citizens against invasion by private actors." The Court continued, “[t]he Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law’, but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”

Since Joshua DeShaney’s injuries were inflicted by his own father and not by a state actor, the Court concluded that there had been no deprivation of the boy’s liberty by the state itself. Although the county agency had intervened, it had no duty to act affirmatively to prevent injury. Despite the DeShaneys’ claim that the state knew of the abuse and had undertaken the duty of helping Joshua, the Supreme Court ruled that there was no affirmative duty to help.

The Court reiterated that the “Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” The federal courts have allowed two very narrow exceptions to that general rule. The two exceptions are (1)

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41 DeShaney, 498 U.S. at 195.
42 DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 195 (1989). See also Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984) (stating that the Constitution “is a charter of negative rather than positive liberties. ... The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.”).
43 DeShaney, 498 U.S. at 196 (citing Harris v. McRae, 448 US 297, 317-18 (1980) and Lindsey v. Normet, 405 U.S. 56, 74 (1972)). Note that the Supreme Court re-emphasized this language from DeShaney again in 1992, stating “'[t]he Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security,' and further, ‘its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those [life, liberty, or property] interests do not come to harm through other means.’" Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125-26 (1992).
when a “special relationship” exists between the State and the person injured, or (2) where the State’s actions have created the very danger that caused the harm to the victim.\textsuperscript{45}

**B. The Special Relationship Exception**

The *Deshaney* Court planted the seed for the special relationship exception in the Fourteenth Amendment context by stating that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being”\textsuperscript{46} In other words, when the State affirmatively restrains an individual’s freedom to act on his or her own behalf, a special relationship is created and the State owes the restrained individual a constitutional duty of care or protection.\textsuperscript{47} “It is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the ‘deprivation of liberty’ triggering the protections of the Due Process clause, not its failure to act to protect his liberty interests against harms inflicted by other means.”\textsuperscript{48}

Prior to the *DeShaney* case, the special relationship exception had been described in the Eighth Amendment context by the Supreme Court in a 1976 decision involving an incarcerated prisoner.\textsuperscript{49} Without using the phrase “special relationship,” the Supreme Court indicated that when the State has actively restrained a person and deprived him of the ability to care for

\textsuperscript{45} DeShaney, 489 U.S. at 201.
\textsuperscript{47} DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198-99 (1989) (citing Estelle v. Gamble, 429 U.S.97 (1976) (requiring the State to provide medical assistance to incarcerated prisoners, and Youngberg v. Romeo, 457 U.S. 207 (1982) (holding that in a case involving a patient involuntarily committed to a mental hospital, a constitutional duty is imposed on the State to provide institutionalized individuals with “services necessary to ensure their reasonable safety from themselves and others”)).
himself, the State has a “constitutional duty of care or protection”. 50 It is the act of taking custody of a person that triggers the state’s duty to provide basic care for him.

The other example of the “special relationship” exception that was recognized by the Supreme Court involved a “severely mentally retarded” patient who was involuntarily institutionalized.51 It was a custodial situation where the state restrained the individual’s liberty to such a great extent that the state had to assume the duty of care. 52 The patient’s family argued that he had a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution and that the state “infringed these rights by failing to provide constitutionally required conditions of confinement.”53 The Supreme Court agreed that under those circumstances “there is a constitutionally protected liberty interest in safety and freedom from restraint”.54 Not every limitation on liberty, however, amounts to a constitutional infringement.55

Aside from incarcerated prisoners and involuntarily institutionalized patients, the Supreme Court has recognized no other categories of persons whose custodial situations give rise to a special relationship with the state under the Due Process clause. In DeShaney, the Court acknowledged that some federal circuits had looked at the custodial role of the state in foster care situations and had in some instances adopted an additional special relationship exception.56

Neither approving nor disapproving that extension of the special relationship exception, the

51 Youngberg v. Romeo, 457 U.S. 307, 309 (1982) (“Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills.”).
Court stated, “[w]e express no view on the validity of this analogy, however, as it is not before us in the present case.”\(^57\)

To date, the United States Supreme Court has not specifically addressed whether a special relationship under the Due Process clause exists between a student and a public school. The Supreme Court did, however, discuss a school’s role and relationship with its students in *Vernonia School District 47J v. Acton*, where the Court upheld a public school’s authority to test student athletes for drugs.\(^58\) Although it was the student-athletes’ Fourth Amendment right at issue, and not their Fourteenth Amendment liberty interests, the view expressed in *Vernonia* was instructive as to the Court’s view of the school’s control over its students. The Supreme Court stated that schools have the authority -- as temporary custodians over schoolchildren -- to compel drug tests.\(^59\) However, the Court has treated the particular dangers of drug usage in schools as a uniquely compelling safety issue and has granted schools some latitude in controlling illegal drug abuse.\(^60\) The *Vernonia* Court was careful to specify that it was not suggesting “that public schools as a general matter have such a degree of control over children as to give rise to a constitutional ‘duty to protect’”.\(^61\) Thus, the Court has hinted, at the very least, that public schools do not have the sort of custodial relationship with students that is analogous to that of a warden to prisoners and mental hospitals to involuntarily hospitalized patients.\(^62\) It seems

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\(^57\) DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 201 n.9 (1989).


\(^60\) See Morse v. Frederick, 551 U.S. 393, 407-08 (2007).

\(^61\) Vernonia, 55 U.S. at 655 (referencing DeShaney, 489 U.S. at 200.).

\(^62\) See Morrow v. Balaski, 719 F.3d 160, ___ (3d Cir. 2013) (referring to Vernonia and stating, “Moreover, although the statement was made in the context of the Court's analysis of a student athlete's reasonable expectation of privacy in public schools, the citation to *DeShaney* is no less pertinent to our inquiry because it provides insight into the Court's interpretation of *DeShaney* 's application to public schools. Indeed, short of an actual holding on the precise issue here, it is difficult to imagine a clearer or more forceful indicator of the Court's own interpretation of *DeShaney* and the special relationship exception recognized there as applied to public schools.”)
unlikely that this Court will recognize a special relationship exception to the Fourteenth Amendment as between schools and their students.

1. Public Schools (Grades K-12) and the “Special Relationship” Exception

This Article focuses on the liability of colleges and universities, but some excellent judicial opinions have been issued in public school cases involving school children in grades K-12 and are described here to provide a good analytical framework. Several section 1983 suits have been brought against school districts, alleging that school officials violated the students’ constitutional rights by failing to protect them from the violent acts of third persons. The outcome of these cases often hinges on whether there is a DeShaney-type special relationship between the school and the student. If not, then the school has no constitutional duty to protect a student from third-party violence. Among the most recent pronouncements on the special relationship exception are the split opinions of en banc panels in the Third and Fifth Circuits. 

At the federal appellate level, it has been argued that compulsory school attendance laws create a custodial relationship between the school and the student, thus creating a concomitant constitutional duty to protect and provide for its students. No circuit, however, has formally adopted this type of special relationship exception. Arguments based on compulsory education laws, as well as the doctrine of in loco parentis, have failed. Despite clear decisions from the

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63 The other theory of recovery, that the state itself created or enhanced the danger, is addressed in Part II C.
64 See Morrow v. Balaski, 719 F.3d 160, ___ (3d Cir. 2013) (stating “[E]very other Circuit Court of Appeals that has considered this issue in a precedential opinion has rejected the argument that a special relationship generally exists between public schools and their students. See, e.g., Hasenfus v. LaJeunesse, 175 F.3d 68, 69–72 (1st Cir.1999); Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 857–58, 863 (5th Cir.2012) (en banc); Doe v. Claiborne Cnty., 103 F.3d 495, 509–10 (6th Cir.1996); J.O. v. Alton Cnty. Unit Sch. Dist. 11, 909 F.2d 267, 268, 272–73 (7th Cir.1990); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 731–33 (8th Cir.1993); Patel v. Kent Sch. Dist., 648 F.3d 965, 972–74 (9th Cir.2011); Maldonado v. Josey, 975 F.2d 727, 729–33 (10th Cir.1992); Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 568–69 (11th Cir.1997))”.
65 See Morrow v. Balaski, 719 F.3d 160, ___ (3d Cir. 2013)(stating that quoting D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1370-72 (3d Cir. 1992): “We rejected the plaintiff’s argument that Pennsylvania’s compulsory school attendance laws and the school’s exercise of in loco parentis authority over its
courts, plaintiffs continue to argue that a special relationship could and should exist between the school and a child.

a. Third Circuit

In a recent decision, the United States Court of Appeals for the Third Circuit, sitting en banc, declined to extend the special relationship exception to the association between a public school and its students.66 Two high school students, Emily and Brittany Morrow, were bullied and assaulted at school by a fellow student and her accomplice. The victims’ mother notified police, who charged the bully, Shaquana Anderson, with simple assault and other minor offenses. She was ordered by the juvenile court to have no contact with Brittany Morrow. The school also suspended Shaquana but she returned to school after three days and again attacked Brittany.67 Ultimately, the parents sent their daughters to a different school and sued the principal and the school district under 42 U.S.C. section 1983, claiming that the school’s act of allowing the bully to re-enroll in school was an affirmative act that violated their daughters’ Due Process liberty interests.68

After a thoughtful discussion of DeShaney and persuasive authority from other Circuit Courts of Appeal69, the Third Circuit rejected the Morrow’s contention that there was a special relationship based on the school’s actual knowledge of the danger, “combined with ‘the quasi-

67 Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (stating that Shaquana tried to throw Brittany down the stairs and school and called her “retarded”).
69 See note 64, supra. Note that while it is true that almost every circuit has addressed the issue, there is a slight disparity in the cited authority between the majority opinion and the concurrence. The majority did not include the Fourth Circuit, but the concurrence cites a Fourth Circuit case and indicates that only the Second and D.C. Circuits have not addressed this question squarely. Morrow v. Balaski, 719 F.3d 160, ___ (3d Cir. 2013) (Smith, J., concurring).
custodial relationship that exists in all cases between a public school and its pupils”.\textsuperscript{70} The majority wrote that “students in public schools continue to be primarily dependent on their parents for their care and protection, not on their school.” \textsuperscript{71} The court thus distinguished its recognition of a special relationship exception in a foster care case, \textit{Nicini v. Morra}.\textsuperscript{72} In that case, the court had stated that when the state actively seeks out foster children and “plac[es] them with state approved families . . . , the state assumes an important continuing, if not immediate, responsibility for the child's wellbeing.”\textsuperscript{73} In contrast, “[d]espite the students' compulsory attendance in school during the school day and the school's authority to act \textit{in loco parentis} during that time, the school's authority and responsibility neither supplants nor replaces the parent's ultimate responsibility for the student,” unlike in a foster care situation. \textsuperscript{74} Therefore, since there is no significant custodial relationship, the Third Circuit declined to recognize a special relationship between schools and their students.

\textbf{b. Fifth Circuit}

The same result was recently reached in the Fifth Circuit, also sitting en banc, where the court wrote in \textit{Doe ex rel. Magee v. Covington County School District ex rel. Keys}:\textsuperscript{75}

We reaffirm, then, decades of binding precedent: a public school does not have a \textit{DeShaney} special relationship with its students requiring the

\begin{quote}
\textsuperscript{70} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013).
\textsuperscript{71} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013). This statement echoes earlier Third Circuit precedent in \textit{Middle Bucks}, 972 F.2d at 1370-72 where the court had stated, “We rejected the plaintiffs' argument that Pennsylvania's compulsory school attendance laws and the school's exercise of \textit{in loco parentis} authority over its students so restrain the students' liberty that they can be considered to have been in state “custody” during school hours for Fourteenth Amendment purposes.”
\textsuperscript{72} Nicini v. Morra, 212 F.3d 798,808 (3d Cir. 2000) (en banc) (recognizing a “special relationship” exception based on the state’s role in placing a child in the custody of a foster family).
\textsuperscript{73} Nicini v. Morra, 212 F.3d 798,808 (3d Cir. 2000) (en banc).
\textsuperscript{74} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (“Unlike foster care, the restrictions that schools place on students generally, and the specific restrictions alleged here, are different \textit{in kind} from the restrictions faced by the prisoners at issue in \textit{Estelle} or the institutionalized persons in \textit{Youngberg}.”)
\textsuperscript{75} Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849 (5th Cir. 2012)(en banc).
\end{quote}
school to ensure the students' safety from private actors. Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody . . . Without a special relationship, a public school has no constitutional duty to ensure that its students are safe from private violence.  

The concurring opinion by Judge Jolly was even more emphatic: “There is no room—not an inch—for confusion. The law yesterday and today is bare and bald:

No DeShaney special relationship exists between a public school and its students.”

In that case, the parents of nine-year old Jane Doe sued the school district and several school administrators in their official and individual capacities, alleging that the school’s check-out policy created a danger to students and that the policy caused Jane’s injury. The policy in question permitted school employees to release students without first verifying that the person picking up the child was included on the “Permission to Check-Out Form”. Young Jane Doe was raped on six different occasions when school officials allowed her to leave school with a man who was not listed on her “check out form”.

The District Court dismissed the suit for failure to state a claim. On appeal, a Fifth Circuit panel reversed, finding that the Does had pleaded a plausible claim that the school violated Jane’s substantive Due Process right because it had a special relationship with her and because of the school’s deliberate indifference to her safety. The Fifth Circuit emphasized on rehearing that “a State's failure to protect an individual against private violence simply does not

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78 Id.
79 Id.
80 Id. at 853.
constitute a violation of the Due Process Clause.” The en banc panel affirmed the district court’s dismissal, finding that the school had no constitutional duty to protect Jane from third-parties because there was no special relationship between the school and its pupil.

The dissent viewed this case as being the exception to the general rule against finding a special relationship because Jane was especially vulnerable. Stating that there was little or nothing that the parents could have done to protect their young daughter while she was at school, the dissent indicated that there was a sufficient custodial relationship to render the school responsible for nine-year old Jane’s safety.

However, the majority looked at persuasive authority from the Ninth Circuit that rejected the argument that compulsory school attendance laws create a special relationship between public schools and students. Just as Jane Doe was young and vulnerable, the plaintiff in that case, Patel v. Kent School District, was vulnerable because she was a developmentally disabled student, but the Ninth Circuit held nonetheless that there was no special relationship between the school and its pupil. The age or vulnerability of a particular student does not create a special relationship with the school; it is the parents who have custody over the child and it is the parents who have a duty to care for the child’s basic needs.

The court indicated that only three circumstances involve a constitutional duty based on the special relationship exception: incarceration, involuntary institutionalization, and placement.

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81 Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 855-56 (5th Cir. 2012) (citing DeShaney at 197.)
82 Id. at 855.
84 Patel v. Kent School District, 648 F.3d 965 (9th Cir. 2011).
85 Id. at 973–74.
86 Id. at 974.
87 Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 960 (5th Cir. 2012) (referring also to Patel v. Kent School District, 648 F.3d 965, 973-74 (9th Cir. 2011)).
of children in foster care.\textsuperscript{88} The court declined to extend the exception to school children, quoting an earlier Fifth Circuit opinion in \textit{Walton v. Alexander}.\textsuperscript{89} Only in extreme circumstances where the state has “taken the plaintiff’s liberty . . . by its affirmative act” and “used its power to force a ‘special relationship’” will the state become potentially liable for a Due Process violation, stated the court.\textsuperscript{90} In school situations, the state has not taken custody of the children in that fashion.

c. Tenth Circuit

In a frequently cited 1992 case, \textit{Maldonado v. Josey}, the Tenth Circuit also held that that “compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school”.\textsuperscript{91} In that case, fifth grader Mark Maldonado was left unsupervised for roughly twenty minutes and during that time he suddenly choked and died.\textsuperscript{92} The father filed a § 1983 suit alleging that the teacher’s failure to supervise his son resulted in his death. The main issue was whether the compulsory school attendance laws were a sufficient restraint on the child’s freedoms so as to create a special relationship and impose upon the State an “affirmative constitutional duty to protect students

\textsuperscript{88} \textit{Id.} at 856.
\textsuperscript{89} \textit{Walton} v. \textit{Alexander}, 44 F.3d 1297 (5th Cir. 1995)(en banc). The \textit{Walton} court had opined that it would be inconsistent with the text and history of the Due Process Clause to extend it so as “to impose on the state the obligation to defend and to pay for the acts of non-state third parties.” \textit{Id.} at 1305.
\textsuperscript{90} Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 857 (5th Cir. 2012)(discussing \textit{Walton} v. \textit{Alexander}, 44 F.3d 1297, 1305 (5th Cir. 1995)(en banc)).
\textsuperscript{91} Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992)(referencing D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3rd Cir. 1992) and J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990)).
\textsuperscript{92} Maldonado v. Josey, 975 F.2d 727, 728 (10th Cir. 1992).
from the private actions of third parties while they attend school”. The court in *Maldonado* held that there was no such special relationship.

The federal circuit courts have consistently held that compulsory attendance laws do not establish a special relationship between an individual and the school. Given that federal courts have not adopted a special relationship exception even in situations where schoolchildren are compelled by law to attend school, one can certainly infer that at the postsecondary level of education, where there are no compulsory attendance laws, it will be almost impossible for a plaintiff successfully to allege a special relationship under §1983.

2. Higher Education Cases and the “Special Relationship” Exception

At the college level, successfully asserting the special relationship exception in §1983 suits remains a largely unwinnable task for plaintiffs. One example is seen in *Apffel v. Huddleston*, a suit brought by parents of a college student who died at a college function. The student, Jason Apffel, went to a party for incoming freshman at Dixie College in Utah. Although hosted by the college, the party took place off-campus near Snow Canyon State Park. During the event, Jason climbed the sandstone hills near where the party was held and fell to his death. Jason’s parents filed a § 1983 suit against school officials and argued that both the special relationship and state-created danger theories applied. As a basis for establishing a special relationship, the parents alleged that a contractual relationship existed between plaintiff and the

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93 *Id.* at 732.
95 *Id.* at 1130.
96 *Id.* at 1132.
college because the plaintiff paid tuition and other fees to the college. Arising from this alleged contractual relationship, claimed the parents, was a duty that the school officials would “conduct student activities in a reasonably safe environment and manner, particularly since decedent’s parents were out of state and unable to personally care for their son”.  

In rejecting the parents’ argument, the federal district court concluded that “no special relationship is created in such situations solely by virtue of the student/university relationship.”  

Dismissing the notion that a university has a custodial relationship with its students, the court stated: “[c]olleges and universities are educational institutions, not custodial.” Further, the court noted that college students are “adults,” not “children requiring or needing constant supervision.” The court dismissed the plaintiff’s special relationship claim by stating “decedent’s status as an out-of-state freshman is insufficient to create a special relationship or an affirmative duty between plaintiffs and defendants”. The student’s “free will or ability to protect himself was [never] impaired by the defendants”, and “it was neither the duty nor the right of the defendants nor any other state actors to protect Jason Apffel from himself or the obvious danger posed by climbing the cliffs”, the court stated in concluding that there was no special relationship.

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97 Id. at 1132.
98 Apffel v. Huddleston, 50 F. Supp. 2d 1129, 1132 (D. Utah 1999) (citing DeShaney, 489 U.S. at 200 as well as Tenth Circuit precedent in Maldonado v. Josey, 975 F.2d 727, 730 (10th Cir. 1992)).
99 Id.
100 Id. at 1133.
101 In making its determination, the court stated that tuition payments “do not create a contractual relationship between parents and a college sufficient to trigger an affirmative duty to protect from injury during an extracurricular activity, without more”. Apffel v. Huddleston, 50 F. Supp. 2d 1129, 1133 (D. Utah 1999)
102 Id. at 1134. Further, the court noted that Jason, the decedent, was an adult who decided to attend the party and also decided to climb the sandstone cliff on his own will.
Another plaintiff’s unsuccessful attempt at establishing a special relationship for purposes of this exception to Deshaney’s rule is seen in Griffin v. Troy State University. In that case, Brandy Hobson was a freshman at Troy State University in Alabama when she was killed in her dormitory room by Johnathan Rumph. Troy State University required all freshmen to live in the campus dormitories, and advertised that adequate security measures were provided for the safety of students living in those on-campus facilities. However, on the night of Hobson’s death, the door to the dormitory hall was unlocked and her attacker entered through the unlocked door. Her estate brought a section 1983 claim against the state university and officials.

The district court rejected the argument that the special relationship exception applied, pointing to the decedent’s voluntary choice to attend the university. The university had not taken custody of her against her will. The court addressed Troy State University’s requirement that all freshmen live in the on-campus dormitories by stating, “Hobson retained liberty over her life such that she was not in the custody of TSU.” The court summed up its reasoning by stating that “it would be illogical to conclude that a college freshman would have such a right based on voluntarily attending a college with an on-campus living requirement” when “grade school children in public schools do not have a special relationship with the state through the school, despite compulsory attendance laws . . .”. The court concluded that it was “unwilling to

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104 Id. at 1278.
105 Id.
107 Id. at 1283. The court referenced the United States Supreme Court’s expressly stated reluctance to expand the concept of substantive due process.
108 Griffin v. Troy State Univ., 333 F. Supp. 2d 1275, 1283 (M.D. Ala. 2004) aff’d, 128 F. App’x 739 (11th Cir. 2005) (noting that the Eleventh Circuit had previously announced in Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994) that “every circuit court faced with the issue has rejected the notion that compulsory attendance laws create the necessary custodial relationship to give rise to a constitutional duty to protect students from third parties”).
expand the concept of substantive due process to include a right to protection against injury by third parties to all state university or college students required to live in on-campus dormitories.”

Overall, schools have been protected from liability in § 1983 suits brought against them when the basis of the suit is the alleged “special relationship” between the victim of the third party violence and the public school or university. Because of the difficulty of establishing a special relationship between the victim and the school, plaintiffs’ § 1983 suits also rest on the basis of the second exception to Deshaney’s general rule, that is, the state-created danger theory.

B. STATE- CREATED DANGER EXCEPTION

Although the general rule is that the State has no constitutional duty to protect individuals from injury caused by the violent attacks of a private actor, the state may have a duty in situations where the danger was created or enhanced by the state’s affirmative acts. This exception is called the state-created danger theory. The theory derives from language in Deshaney: “While the State may have been aware of the dangers that Joshua faced . . ., it played no part in their creation, nor did it do anything to render him more vulnerable . . .”

The Court continued, “[the State] placed him in no worse position than that in which he would have been had it not acted at all . . . [and] [u]nder these circumstances, the State had no constitutional duty to protect Joshua.”

109 Id. at 1283. See also, id. at 1282 where the court had referenced the United States Supreme Court’s expressly stated reluctance to expand the concept of substantive due process, as announced in Collins, 503 U.S. at 125.

110 DeShaney, 498 U.S. at 201.
111 DeShaney, 498 U.S. at 201.
The state-created danger theory applies when “a state actor creates a danger that harms an individual or renders him or her more vulnerable to that danger”. For plaintiffs, asserting a § 1983 suit and persuading the courts to find liability based on the state-created danger theory is still a difficult task; however, courts have been more willing to find state actors liable based on the state-created danger theory than on the special relationship theory.

Almost all of the federal circuits have adopted some form of the state-created danger theory, but the test differs slightly from court to court. To illustrate these approaches, cases from the Third, Sixth, and Tenth Circuits will be described in this section.

The Eleventh Circuit, by contrast, has expressly abandoned what it had previously called the special danger test. In addition, the Fifth Circuit has announced that – despite confusion among its various panels – it has never adopted the state-created danger theory.

1. Public Schools (Grades K-12) and the “State-Created Danger” Exception

   a. Third Circuit

   The Third Circuit, sitting en banc in 2013, articulated a four part test for the state-created danger exception. Although the case involved high school students, not university students, the thoughtful analysis reveals one court’s most recent interpretation of the test. The Third

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113 White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999).


115 Morrow v. Balaski, 719 F.3d 160, at *14 (3d Cir. 2013)
Circuit stated that “liability may attach where the state acts to *create* or *enhance* a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process. To prevail on this theory, a plaintiff must prove four elements:

1) the harm ultimately caused was foreseeable and fairly direct;
2) a state actor acted with a degree of culpability that shocks the conscience;
3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.\textsuperscript{117}

In *Morrow v. Balaski*, also discussed, supra., the Third Circuit focused on the fourth element of the above-stated test because the school argued that it did not create the danger or make the Morrow’s daughters any more vulnerable than they otherwise were. The Morrows, however, argued that the school’s “affirmative act was suspending [the bully] Anderson, and then implicitly inviting her to return to school following the suspension.”\textsuperscript{119} In so doing, “school officials affirmatively used their authority to create a danger that Anderson would attack Brittany and Emily once again”, argued the parents.\textsuperscript{120}

\textsuperscript{116} Morrow v. Balaski, 719 F.3d 160, at *14 (3d Cir. 2013) (citing *Kneipp*, 95 F.3d at 1205). GET CITE
\textsuperscript{117} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) ((citations and internal quotation marks omitted).”
\textsuperscript{118} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013); see also id. at ___ (Fuentes, J., dissenting) (stating that “the first and third elements were not in dispute in this case”).
\textsuperscript{119} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013).
\textsuperscript{120} Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013)(“The Morrows also point to the ‘affirmative act’ of allowing Anderson to board the Morrow children’s school bus, where Anderson threatened to attack Brittany.”)
The court ruled that the test for state-created danger was not met, stating, “[a]lthough the suspension was an affirmative act by school officials, we fail to see how the suspension created a new danger for the Morrow children or ‘rendered [them] more vulnerable to danger than had the state not acted at all.”” 121 The court continued, “[i]n addition, the fact that Defendants failed to expel Anderson, or, as the Morrows would describe it, “permitted” Anderson to return to school after the suspension ended, does not suggest an affirmative act.”122

The court emphasized that “clearly passive inaction” does not amount to an affirmative act, and the Third Circuit’s version of the state-created danger rule requires an affirmative act.123 Judge Ambrose (concurring in part and dissenting in part) agreed with this aspect of the majority’s decision, and put it even more forcefully: “This test, I believe, is not intended to turn on the semantics of act and omission. Instead, the requirement serves an important purpose: to distinguish cases where government officials might have done more to protect a citizen from a risk of harm in contrast to cases where government officials created or increased the risk itself.”124 It is only in the latter instance that the Due Process clause is implicated. Summing up the importance of construing the state-created danger exception very narrowly, Judge Ambrose stated, “[f]ederal courts cannot be the forum for every complaint that a government actor could have taken an alternate course that would have avoided harm to one of our citizens.”125 The en banc panel affirmed the previous dismissal of the case. 126

123 Morrow,719 F.3d at ___ (acknowledging that the line between action and inaction is hard to define).
124 Morrow, 719 F.3d at ___ (Ambro, J., concurring in part and dissenting in part).
125 Morrow, 719 F.3d at ___ (Ambro, J., concurring in part and dissenting in part).
b. Sixth Circuit

Other circuits have adopted the state-created danger exception, but have defined it slightly differently. For example, the Sixth Circuit’s test\textsuperscript{127} for establishing a state-created danger was applied by a federal district court\textsuperscript{128} in 2011 in \textit{Doe v. Big Walnut Local School District Board of Education}.\textsuperscript{129} In that case, David and Mary Doe and their son brought a \$ 1983 suit against the school district and officials alleging that the son’s substantive due process rights had been violated.\textsuperscript{130} The son, John Doe, suffered from a cognitive disorder that prevented him from learning at the same pace as his classmates and made social interaction difficult for him.\textsuperscript{131} John Doe was bullied and harmed by his fellow students at Big Walnut Middle School.\textsuperscript{132} Although school officials had met with the student and his parents several times and had implemented plans to minimize the risks of John being bullied,\textsuperscript{133} the parents claimed that the school caused the boy’s liberty interest to be violated.\textsuperscript{134}

Quickly disposing of the special relationship exception,\textsuperscript{135} the court proceeded to analyze the case in light of the Sixth Circuit’s three-pronged test for the state-created danger exception to \textit{DeShaney}, which is:

\begin{itemize}
\item[(1)] an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party;
\item[(2)] a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from risk that
\end{itemize}

\textsuperscript{127} \textit{Koulta v. Merciez, et al.}, 477 F.3d 442, 445 (6th Cir. 2007).
\textsuperscript{128} The United States District Court for the Southern District of Ohio is within the Sixth Circuit.
affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.\textsuperscript{136}

Although the exact words in the Sixth Circuit’s test differ from the wording of the Third Circuit’s, the tests have many similarities. Concerning the first prong, both circuits require an affirmative act by the state. With regard to the affirmative act, school officials in \textit{Big Walnut} argued that their actions did not increase John Doe’s risk of being exposed to bullying.\textsuperscript{137} In fact, they took affirmative steps to protect him such as allowing him to leave classes early to avoid bullies.\textsuperscript{138} He would have been in “the same or even greater danger even if the state officials had done nothing”.\textsuperscript{139}

The court looked next at whether “the state’s actions placed the plaintiff specifically at risk, as distinguished from risk that affects the public at large.”\textsuperscript{140} Under the Sixth Circuit’s test, the second element requires that the threat be specifically directed against the plaintiff.\textsuperscript{141} The parents alleged that the state increased John’s risk of being bullied by placing him and all of the students with disabilities in the same classroom, thereby creating “a volatile mix of emotionally and academically disabled children” known for their violent tendencies or lack of ability to control their behaviors.\textsuperscript{142} The second affirmative act was to leave that class unsupervised.\textsuperscript{143}

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\textsuperscript{138} Id. at 752.
\textsuperscript{140} Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742, 753 (S.D. Ohio 2011). Although the language here is different, it is similar to the language in the third prong of the Third Circuit’s test which requires the plaintiff to be “a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions”. However, the Third Circuit clarified that “the threat does not have to be against a specific individual”. \textit{See}, Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 (3d Cir. 1997).
\textsuperscript{141} Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742, 753 (S.D. Ohio 2011) (stating “the special danger requirement which requires plaintiffs to establish that the state’s action placed John Doe specifically at risk as “distinguished from a risk that affects the public at large”).
\end{flushright}
The alleged danger, however, was not specific to John Doe, as many other students were involved in altercations or other incidents. The school officials argued that there was no evidence to show that the actions of the school personnel put John Doe, in particular, at an increased risk of a special danger. 144

The final element under the Sixth Circuit’s test is satisfied if the plaintiff can establish “that the state acted with the requisite culpability to establish a substantive due process violation under the Fourteenth Amendment.”145 The language the court used in this element is also similar to the language used by the Third Circuit.146 Both circuits require a showing that the state actors acted with “deliberate indifference” to the plaintiff.147 In Big Walnut, the court ruled that the plaintiff could not show that the state actors acted with deliberate indifference toward their son; therefore, the plaintiffs could not establish liability under the state-created danger theory.148 The court in Big Walnut granted the defendant’s summary judgment on the plaintiff’s § 1983 claim.

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c. Tenth Circuit

The Tenth Circuit has also recognized the state-created danger exception in cases involving § 1983 claims. In a consolidated case, two mothers filed separate § 1983 claims against school districts.150 The first plaintiff was the mother of Charles Graham, a student who

143 Id.
144 Id.
148 Id. at 754.
149 Id. at 755.
had been shot and killed by another student while on the school campus.\footnote{Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 992 (10th Cir. 1994).} She contended that the state actors (school employees) were given warnings about a student who threatened her son and who was on campus with a gun, but the state actors’ failure to do anything after receiving the warning led to the violation of her son’s substantive Due Process rights.\footnote{Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 992 (10th Cir. 1994).} The second plaintiff was the mother of Benjamin Pointer, a student who was stabbed on his school’s campus. She alleged that the state actors “knew or should have known of the danger to her son but failed to take action to secure his safety”.\footnote{Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 992 (10th Cir. 1994).} The plaintiffs sought recovery under the state-created danger theory. In the court’s analysis of the state-created danger theory, the court said that the requisite proof “necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger”.\footnote{Id. at 995 (quoting L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992)).} The plaintiff’s allegations only alleged a failure to act on behalf of the state actors. Therefore, the court held, “because plaintiffs cannot point to any affirmative actions by the defendants that created or increased the danger to the victims, the argument [that the state-created danger exception applies] must also fail”.\footnote{Id.} The court concluded: “[i]naction by the state in the face of a known danger is not enough to trigger the obligation; according to DeShaney the state must have limited in some way the liberty of a citizen to act on his own behalf. In the absence of a custodial relationship, we believe plaintiffs cannot state a constitutional claim based upon the defendants' alleged knowledge of dangerous circumstances.”\footnote{Graham v. Independent School District No. I–89, 22 F.3d 991, 995 (10th Cir.1994) (citation and internal quotation marks omitted).}
In a different case, a federal district court in Colorado\(^\text{157}\) also addressed the state-created danger theory in claims brought in the wake of the tragic Columbine High School shootings.\(^\text{158}\) The plaintiffs alleged that the school officials (state actors) knew about the attackers’ potential plan to commit their all-out assault on the school.\(^\text{159}\) Further, the plaintiffs claimed that the two shooters, who were students at Columbine, made the attack on the school as revenge for the bullying that had been done to them, and that bullying was a product of the school’s environment as fostered by the school officials.\(^\text{160}\) After concluding the “special relationship” exception did not apply to the case, the court addressed the state-created danger exception.

The court applied a five-pronged test to establish whether the state actors created or enhanced the danger to the plaintiff. That test, announced by the Tenth Circuit in \textit{Uhlrig v. Harder},\(^\text{161}\) involves these elements:

1) whether plaintiff was a member of a limited and specifically definable group; 2) whether defendant’s conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; 3) whether the risk to plaintiff was obvious or known; 4) whether defendant acted recklessly in conscious disregard of that risk; and 5) if such conduct, when viewed in total, “shocks the conscience” of federal judges.\(^\text{162}\)

As for the first element, the plaintiff claimed that the “limited and specifically definable group” was Columbine High School students. Since the plaintiff’s child was a student at Columbine, she was a “member of a limited and specifically definable group”.\(^\text{163}\) The court

\(^{157}\) The United States District Court for the District of Colorado sits within the Tenth Circuit.
\(^{159}\) \textit{Id.} at 1135.
\(^{161}\) Uhlrig v. Harder, 64 F.3d 567, 571 (10th Cir. 1995).
\(^{162}\) Uhlrig, 64 F.3d at ___.
looked at the messages the shooters had made regarding the attack and reasoned that “the only characteristic necessary to be the object of their rage was to be a Columbine High School student at school on April 20, 1999”. The student body was deemed a specific, identifiable group and the first factor of the *Uhlrig* test was satisfied in *Castaldo*.

In regard to the second factor, it was undisputed that the harm in *Castaldo*, a mass school shooting, was a serious harm, but the school argued that the risk was not “immediate or proximate” because the events leading up to the shooting on April 20 occurred over the period of a year. The court agreed, quoting *Graham* : “the risk must be of a limited duration, not merely that a person may act violently in the future”, and ruled that the plaintiffs failed to satisfy this element of the *Uhlrig* test.

Analyzing the third factor, the court ruled that the plaintiffs satisfied this element only as to four school officials. One defendant, a school counselor, had read a violent story the shooter had submitted in a class. Another defendant was aware of the shooters’ past incidents involving hacking into school computers and breaking into lockers. He also knew the shooters had talked about blowing up the school, and admitted he “was not totally shocked” at what the shooters had done. Another defendant, a teacher, had viewed a video recording of the two shooters pretending to shoot other students using fake guns. The fourth defendant had also

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167 Id.
169 Id. at 1134.
170 Id. at 1134.
viewed a video recording of the shooters on the Columbine campus acting out a shooting.\textsuperscript{171} As to these defendants, the element of “known risk” was met.

The fourth factor, “that the school defendants were subjectively aware of the risk at hand”, was also met in regard to same four defendants based on information they knew.\textsuperscript{172}

The court next questioned whether the school officials’ failure to confront the bullying and teasing amounted to “conscience shocking” conduct.\textsuperscript{173} Comparing the failure to address in-school bullying and teasing to other conduct that had not been deemed “conscience shocking”, the court ruled that the conduct in this case did not shock the conscience of federal judges.\textsuperscript{174} The court also analyzed whether failing to respond to the shooters’ videos and other activities was conscience shocking conduct. In an urgent situation, only that conduct which involves the intent to harm will shock the conscience of federal judges, the court said.\textsuperscript{175} But, in a non-emergency situation, where the “state actors have the time to truly deliberate, something less than intent to harm, such as calculated indifference, may shock the conscience of the court”.\textsuperscript{176} The activities leading up to the shooting occurred over the course of a year; therefore, the state actors had “time to deliberate”.\textsuperscript{177} The \textit{Castaldo} court concluded that the state actors’ failure to “anticipate and

\textsuperscript{171} Id. at 1134.
\textsuperscript{172} Id. at 1172.
\textsuperscript{174} Id. at 1173 (citing Martinez v. Chama Valley Indep. Sch. Dist. No. 19, 77F.3d 1253 (10th Cir. 1996) (holding teacher calling young student a prostitute was not conscience shocking conduct); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 725-26 (6th Cir. 1996) (holding teacher slapping student was not conscience shocking conduct)).
\textsuperscript{175} \textit{Castaldo} v. Stone, 192 F. Supp. 2d 1124, 1173 (D. Colo. 2001).
\textsuperscript{176} \textit{Castaldo} v. Stone, 192 F. Supp. 2d 1124, 1173 (D. Colo. 2001).
\textsuperscript{177} Id.
prevent future behavior” was not “conscience shocking in a constitutional sense.” 178 Therefore, the court dismissed the § 1983 claim against the school officials.179

2. Higher Education Cases and the “State-Created Danger” Exception

The same five pronged test from Uhlrig and Castaldo was applied in Apffel v. Huddleston, also discussed supra.180 The case involved the college student who died while attending an off-campus party hosted by the college when he climbed a cliff and fell. In addition to the special relationship argument (which failed), the plaintiffs also argued that the state-created danger exception applied.181

The Apffel court found that the first element of the test was met because Jason Apffel was “a member of a limited and specifically definable group”, the group of out-of-state freshmen at Dixie College. 182 The plaintiff, however, failed to satisfy the second element, “that defendants’ conduct put plaintiffs at substantial risk of serious, immediate and proximate harm”. 183 The plaintiffs failed to provide sufficient facts regarding the significance or relevance of prior falls that occurred at the cliffs. For example, the court explained that “if thousands of people climb the cliffs each year, eight falls or near-falls may not be significant”. 184 Lacking this factual information, the court could not find that the “defendants’ conduct put plaintiffs at substantial risk of serious, immediate and proximate harm”. 185

178 Id. at 1174.
The third element -- that “the risk was obvious or known” -- was not met. 186 Similar to
the reasoning as to the second element, there were insufficient facts to show that the risk was
obvious or known to the defendants. 187 The pleadings alleged that other individuals had fallen
off the cliffs in the past, but did not show that the school officials knew that if they “plan[ned] a
party in the vicinity of the cliffs, students [would] leave the party, climb the cliffs and likely be
injured”. 188

To satisfy the fourth element, the plaintiff must show that “defendants acted recklessly in
conscious disregard of [the] risk”. 189 The court stated that even if the defendants had knowledge
of prior accidents, it would be a “huge leap” to find that defendants acted recklessly in hosting
the party near the cliffs. The court explained that “there are no allegations of previous mishaps at
similar parties; no allegations involving the number of students who were lured away by the
cliffs; no allegations that the cliff climbing was sanctioned or encouraged or that decedent’s free-
will was overcome by defendants in some way”. 190 Therefore, the pleadings did not sufficiently
allege that the school officials’ conduct was “reckless or in conscious disregard of a known risk”.
191 Thus, the fourth element was not met.

To satisfy the last element of the five- pronged test, the school officials’ conduct must
“shock the conscience” of federal judges. 192 To satisfy the “shock the conscience” standard, “a
plaintiff must do more than show that the government actor intentionally or recklessly caused

192 Id. at 1134-45.
injury to the plaintiff by abusing or misusing government power". \(^{193}\) The court explained, “the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking”. \(^{194}\) In conclusion, the court found that “to plan a freshman party in a state park used regularly by the public for recreational activities is not conscience shocking”. \(^{195}\) Further, the area where the party was held was designed for such use and thus, the activity was normal, not shocking. The fifth element was not met.

The court in *Appflel* additionally stated that apart from the five-pronged test, “a plaintiff must show that the charged state entity and the charged individual actors created the danger or increased the plaintiff’s vulnerability to the danger in some way”. \(^{196}\) In other words, the court explained, if the danger was present before the state actors intervened, the state actors would not be held liable for having “created” a danger that already existed. \(^{197}\) The danger to the decedent of falling from the cliff existed long before the college hosted its party. Therefore, the college and its officials could not be held liable; the cliff and the dangers associated with climbing it were not created by the college. Ultimately, the plaintiff’s argument for a state-created danger failed. \(^{198}\)

Another Tenth Circuit case involving the state-created danger theory in a § 1983 claim is *Gray v. University of Colorado Hospital Authority*. \(^{199}\) The decedent, Charles Gray, arrived at the University of Colorado Hospital seeking treatment for epilepsy. Assurances were given to Gray’s

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\(^{195}\) *Id.* at 1137.
\(^{196}\) *Id.* at 1138.
\(^{197}\) *Id.* at 1138.
\(^{198}\) *Id.* at 1138.
\(^{199}\) *Gray* v. Univ. of Colorado Hosp. Auth., 672 F.3d 909 (10th Cir. 2012).
family that he would be under 24-hour care during his treatment at the hospital; however, the university hospital had a policy which allowed staff in the Epilepsy Monitoring Unit to leave patients unattended for moments of time.\textsuperscript{200} While Gray was left unattended during a period of time, he suffered a seizure.\textsuperscript{201} Upon returning, the staff member observed that Gray was not breathing. He was later pronounced dead. \textsuperscript{202}

The court thoroughly reviewed prior case law in the Tenth Circuit regarding the state-created danger theory,\textsuperscript{203} for “the only theory upon which [Plaintiffs] proceeded was a due process violation under the danger creation theory”.\textsuperscript{204} The court made slight reference to the test set forth in \textit{Uhlrig} to determine whether the state-created danger theory applied.\textsuperscript{205} However, the court focused on two preconditions to the applicability of the state-created danger exception that were not included as numbered “factors” in the \textit{Uhlrig} test – first, an affirmative act by the state that places the plaintiff in danger or increases plaintiffs vulnerability to danger, and second, a private act of violence.\textsuperscript{206} The court found that the assurances given to the Gray family that their son would be under 24-hour supervision were not sufficient to constitute “an affirmative act rendering decedent vulnerable to danger within the meaning of the danger creation exception”.\textsuperscript{207}

Second, the Tenth Circuit addressed the “private act of violence” precondition to the applicability of the state-created danger theory.\textsuperscript{208} For the state-created danger exception to be implicated, the court explained, there must be a violent act by a private person. “The state-created danger theory indulges the legal fiction that an act of private violence may deprive the

\textsuperscript{200} \textit{Id.} at 912.
\textsuperscript{201} \textit{Id.} at 911
\textsuperscript{202} \textit{Id.} at 912.
\textsuperscript{203} Gray v. Univ. of Colorado Hosp. Auth., 672 F.3d 909, 915-22 (10th Cir. 2012).
\textsuperscript{204} Gray v. Univ. of Colorado Hosp. Auth., 672 F.3d 909, 915 (10th Cir. 2012).
\textsuperscript{205} \textit{Id.} at 920.
\textsuperscript{206} Gray, 672 F.3d at 925.
\textsuperscript{207} \textit{Id.} at 925 (explaining that in light of \textit{DeShaney}, “assurances of protection from the State do not constitute affirmative conduct sufficient to invoke the state-created danger theory of constitutional liability”).
\textsuperscript{208} Gray v. Univ. of Colorado Hosp. Auth., 672 F.3d 909, 927(10th Cir. 2012).
victim of [his] constitutional guarantee” to due process.\textsuperscript{209} The court continued, “[b]efore the fiction may operate, however, a state actor must create the danger or render the victim more vulnerable to the danger that occasions the deprivation of life, liberty, or property…” but liability depends upon “a private act that deprives the victim of life, liberty, or property”.\textsuperscript{210} The Grays could not point to any private act of violence. Rather, the plaintiffs had claimed that “the immediate or direct cause of the decedent’s death was negligence on the part of state actors”.\textsuperscript{211} Negligence of state actors, even if proven, is not sufficient to trigger liability under section 1983; the state’s act must be a “deliberate” decision.\textsuperscript{212} Therefore, plaintiffs failed to allege an act that would give rise to liability. In conclusion, the court held that “the state created danger theory of constitutional liability has no role to play in a proper resolution of Plaintiffs’ grievance”, and affirmed the district court’s dismissal of the case.\textsuperscript{213}

\textbf{b. Third Circuit}

The Third Circuit’s test has also been applied by a federal district court in a case involving a murder-suicide on the campus of Rowan College.\textsuperscript{214} A representative of Cindy Nannay, the murdered young woman, filed a claim against Rowan College and school officials alleging a deprivation of her “liberty interest in personal security and her liberty interest to be free from bodily harm” in violation of her substantive due process rights.\textsuperscript{215} Nannay had been in

\textsuperscript{209} \textit{Id.} at 927.
\textsuperscript{210} \textit{Id.} at 928 (explaining that if the state actor caused the harm directly – without the involvement of a private actor – that state official would be liable directly under section 1983 and the legal fiction of the state-created danger exception would be unnecessary).
\textsuperscript{211} \textit{Id.} at 927.
\textsuperscript{212} \textit{Id.} at 929.
\textsuperscript{213} \textit{Id.} at 927.
\textsuperscript{214} \textit{See} Nannay v. Rowan Coll., 101 F. Supp. 2d 272, 286 (D.N.J. 2000) (holding the state actors did not create the danger).
an abusive relationship with the man who ultimately shot her.\textsuperscript{216} The two lived together until their break-up in July of 1996, at which point Nannay approached a dean at Rowan College (where she worked at the college radio station), and asked if the college would provide her with housing under the circumstances.\textsuperscript{217} The dean provided free on-campus housing and access to the college’s counseling service for Nannay.\textsuperscript{218} On August 12, 1996, she arranged for her ex-boyfriend to meet her at the college’s radio station to deliver some of her belongings, and she asked her manager to be there to ensure that her boyfriend did not do anything violent to her.\textsuperscript{219} The manager said he would be there, but also offered to give her money to replace those belongings so the meeting between the two could be avoided completely. Nannay refused his offer. When her ex-boyfriend arrived on campus, he shot Nannay twice with a shotgun, killing her, and then killed himself. \textsuperscript{220}

In the suit, the plaintiff alleged that the helpful, voluntary actions of the college’s dean and the radio station manager created a constitutional duty to protect Nannay from the violent attack by her ex-boyfriend.\textsuperscript{221} The plaintiff argued that by providing her campus housing and agreeing to be present when Nannay faced her ex-boyfriend, the college officials “ lulled Cindy [Nannay] into a false sense of security, such that she let her guard down”.\textsuperscript{222} The court rejected this argument, citing \textit{Deshaney}: “the affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from the expressions of intent to help him but from

\begin{itemize}
\item \textsuperscript{216} Nannay v. Rowan Coll., 101 F. Supp. 2d 272, 274 (D.N.J. 2000).
\item \textsuperscript{217} \textit{Id.} at 275.
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.} at 277.
\item \textsuperscript{220} \textit{Id.} at 278.
\item \textsuperscript{221} \textit{Id.} at 286.
\item \textsuperscript{222} \textit{Id.} at 286.
\end{itemize}
the limitation which it has imposed on his own freedom to act on his own behalf”. 223 The court first ruled that there was no special relationship between Nannay and Rowan College. 224 Although plaintiff alleged that the defendants’ attempts to help Nannay created a duty of care to protect her and also increased the danger to her, the court held that the state-created danger theory did not apply. In concluding that the plaintiff failed to show that the defendants created the danger, the court stated “the State defendants did not create an opportunity for [the ex-boyfried] to kill [Nannay] that would not have otherwise existed”.225

PART III: ABANDONING THE STATE-CREATED DANGER EXCEPTION

In two federal circuits, the state-created danger theory is not viable. Sitting en banc, the Fifth Circuit announced clearly that it has not adopted the state-created danger theory although some earlier panel decisions seemed to embrace the theory.226 “Unlike many of our sister circuits, we have never explicitly adopted the state-created danger theory,” stated the majority in Doe ex rel. Magee v. Covington County School District ex rel. Keys.227 The Eleventh Circuit had previously adopted what it called the “special danger” theory, but declared it “dead and buried” in White v. Lemacks.228 This section of the Article takes a closer look at why these two circuits no longer recognize the doctrine.

A. Eleventh Circuit

225 Id. at 287.
228 White v. Lemacks, 183 F.3d 1253,1259 (11th Cir. 1999).
The view of the Eleventh Circuit is that the “special danger” doctrine was superseded by the Supreme Court’s 1992 holding in Collins v. City of Harker Heights, Tex. To date, no other circuit has interpreted Collins as supplanting the state-created danger theory. (It should be noted that the Supreme Court itself has never adopted the state-created danger theory, which arose from dictum in its DeShaney decision.) In Collins, the Supreme Court stated that when there is no custodial relationship, a person’s due process rights can be violated only when a government official acts in a way “that can be characterized as arbitrary, or conscience shocking, in a constitutional sense.” The implication, as construed by the Eleventh Circuit, is that in non-custodial situations, there are no alternative theories for relief any longer. To the extent that the state-created danger theory (or the “special danger” approach, as the Eleventh Circuit called it) was an alternative argument, it is no longer viable after Collins. A successful section 1983 claim will lie only if the plaintiff proves that a state actor’s conduct shocked the conscience, and the standard is a difficult to meet.

It was in White v. Lemacks, an employment case (not a school case) that the Eleventh Circuit announced that the death of its special danger doctrine. The doctrine “has been supplanted . . . .” “We pronounce Cornelius dead and buried”, stated the court. A few years after the Eleventh Circuit’s abandonment of the doctrine, the plaintiffs in a section 1983 suit against Troy

230 Collins, 503 U.S. at 128 (quoted by White, 183 F.3d at 1258)(emphasis added).
231 White, 183 F.3d at 1258; see also id. at 1259 (stating that the shocks the conscience “standard is to be narrowly interpreted and applied”).
232 White, 183 F.3d at 1258.
233 White, 183 F.3d at 1258.
234 Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) (applying the now-abandoned special danger theory in an employment case).
235 White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999). The circuit abolished both the special relationship exception and the state-created danger theory as they pertain to cases where a government employee raises a substantive Due Process complaint. “To summarize, the ‘special relationship’ and ‘special danger’ doctrines applied in our decision in Cornelius are no longer good law, having been superseded by the standard employed by the Supreme Court in Collins [a government employment case]”. Id.
State University tried to argue that the university had violated their daughter’s (and their own) due process rights through the institution’s deliberate indifference to her safety and well-being in the dormitory.\(^{236}\) The federal district court in Alabama looked to Eleventh Circuit precedent and stated, “as the special danger doctrine no longer exists in this circuit, the Plaintiffs cannot maintain a claim . . . under that doctrine.”\(^{237}\)

The Eleventh Circuit indicated that the Supreme Court left open the possibility that “deliberate indifference on the part of government officials or employees will ‘shock the conscience’ in some circumstances”.\(^{238}\) However, in school cases where there is no custodial relationship between the institution and the student, courts within the Eleventh Circuit have not held that any instances of school officials’ conduct are “conscience shocking”.\(^{239}\)

**B. Fifth Circuit**

Sitting en banc, the Fifth Circuit in 2012 announced that it has never adopted the state-created danger theory. The court stated, “[d]espite the potential confusion created by *Scanlan*\(^{240}\) and *Breen*\(^{241}\), recent decisions have consistently confirmed that ‘[t]he Fifth Circuit has not

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\(^{236}\) Griffin v. Troy State University, 333 F. Supp. 2d 1275, 1280 (M.D. Ala. 2004) aff’d, 128 F. App’x 739 (11th Cir. 2005). There is no indication that plaintiffs pleaded that the university’s actions amounted to a direct violation of section 1983 (that is, by claiming that the school caused her to be subjected to a deprivation of her rights). Instead, the plaintiffs apparently relied on the state-created danger theory.

\(^{237}\) Griffin v. Troy State University, 333 F. Supp. 2d 1275, 1281 (M.D. Ala. 2004) aff’d, 128 F. App’x 739 (11th Cir. 2005).

\(^{238}\) White, 183 F.3d at 1258. (citing Collins v. City of Harker Heights, Tex., 503 U.S. 115, ___ (1992)).

\(^{239}\) *See, e.g.*, Broaders v. Polk County School Board, 2011 WL 2604793, No. 8:10-CV-2411-T-27EAJ (M.D. Fla. 2011).

\(^{240}\) Scanlan v. Texas A&M University, 343 F.3d 533 (5th Cir.2003).

\(^{241}\) Breen v. Texas A&M University, 485 F.3d 325 (5th Cir.2007)
adopted the ‘state-created danger’ theory of liability.’242 Moreover, the court continued, ‘[w]e decline to use this en banc opportunity to adopt the state-created danger theory in this case [Doe ex rel. Magee v. Covington County School District ex rel. Keys] because the allegations would not support such a theory.’243 That case was the one brought by parents whose daughter was raped repeatedly after the school allowed her to leave with a stranger.244 The parents relied on Fifth Circuit precedent to argue that the state-created danger rule supported their claim for relief.245

Indeed, the Scanlan opinion in 2003 laid out the test for state-created danger that the circuit would apply if it were going to do so.246 In essence, then, the court announced how to proceed on a state-created danger claim without expressly stating that it would actually allow such a claim. The test would be: ‘[1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] that the defendants acted with deliberate indifference to the plight of the plaintiff.’247 Additionally, as summarized in Doe ex rel. Magee, ‘‘[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and ... they must have used their authority to create an opportunity that would not otherwise have existed for the third party’s crime to occur.’’248 Finally, the court had also offered as guidance,

242 Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 864-66 (5th Cir. 2012)(citing Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir.2010); see also Bustos v. Martini Club, Inc., 599 F.3d 458, 466 (5th Cir.2010) (“[T]his circuit has not adopted the state-created danger theory.”)).
244 Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, PAGE (5th Cir. 2012).
245 Id. The precedential cases were Scanlan v. Texas A&M University, 343 F.3d 533 (5th Cir.2003), and Breen v. Texas A&M University, 485 F.3d 325 (5th Cir.2007)(involving suits filed after the 1999 bonfire collapse at Texas A&M University).
246 Doe ex rel. Magee, 675 F.3d at 865 (quoting Scanlan, 343 F.3d at 537-38).
247 Doe, 675 F.3d at 865 (quoting Piotrowski v. City of Houston, 237 F.3d 567, 585 (5th Cir.2001) (citation and internal quotation marks omitted)).
“even if it is assumed that the state-created-danger theory applies, liability exists only if the state actor is aware of an immediate danger facing a known victim.” 249

In light of that precedent, it is unsurprising that plaintiffs, including the Does, sought to avail themselves of the state-created danger theory. The confusion is understandable. The Fifth Circuit seemed to analyze whether the test could be met in the Does’ case, again without actually adopting it, and ruled against the Does: “They do not allege that the school knew about an immediate danger to Jane’s safety, nor can the court infer such knowledge from the pleadings. Without such allegations, even if we were to embrace the state-created danger theory, the claim would necessarily fail.” 250

In a well-reasoned concurring opinion, Judge Higginson suggested how the Does could have framed their case differently so as to allege a direct cause of action under section 1983 without having to rely on the state-created danger theory. 251 He wrote, “Plaintiffs do not complain that government persons subjected Jane to rape, but they come close to complaining that government persons caused her to be subjected to rape. If the complaint had asserted that the affirmative act of releasing Jane to Keyes was a causal act of recklessness or deliberate indifference or intentionality that caused her to be subjected to injury, and specifically to the deprivation of her right to bodily integrity, the complaint properly would proceed through discovery to trial.” 252

He reminded the court of “the three inter-related elements of section 1983: (1) state action, as (2) the cause-in-fact of (3) a deprivation of right protected by the Constitution.” 253 Judge Higginson thoughtfully articulated his position that “section 1983 should be construed literally”. 254 A literal reading of section 1983 would “acknowledge that the statute protects not just against government persons who subject citizens to a constitutional deprivation but also against government persons who cause citizens to be subjected to such deprivations . . .” 255 He added that the government should be held accountable for wrongdoing in “cases where a government person causes a victim ‘to be subjected’ to a violation” and not just in those “cases where the government person ‘subjects’ the victim to the actual violation . . .” 256

Referring to the state-created danger theory, Judge Higginson wrote that “the existence of this ill-defined notion of government liability has provided a leaky bucket for the grey zone cases that properly should go to a jury as to state action and causation without any extra-statutory gloss which courts conjure.” 257 “[G]overnment persons,” he wrote, “[who act] intentionally or recklessly or through deliberate indifference, must know they will be held blameful if they cause a citizen

257 Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 874 (5th Cir. 2012) (Higginson, J. concurring)(describing what he called “difficult cases [that] arise often out of a grey zone where a government person’s alleged recklessness or deliberate indifference or intentionality is inextricably intertwined with a not-remote injury allegedly inflicted by a third person . . .” Id. at 873).
to be subjected to a rights deprivation even if the ‘actual violation’ is inflicted by a third person, as would be true if, for example, a sheriff released a prisoner to a vengeful lynch mob.”

This Article suggests that it would be wise to take Judge Higginson’s approach of ignoring the state-created danger theory in favor of a narrow-but-literal application of section 1983. Alternatively, one could accede to the majority’s approach in the Fifth Circuit – that of simply not adopting the state-created danger exception unless or until a plaintiff succeeds in making out a cognizable claim. Still others might agree with the Eleventh Circuit’s bold approach and declare that the state-created danger theory is dead. It remains to be seen whether other circuits will also abandon the state-created danger theory, which, in any event, does not often provide an avenue for relief in school shooting cases involving third-party violence.

PART IV: CONCLUSION

The answer to the question, “Can the victims of a campus shooting (or their families) recover money damages from a state university by bringing a federal action under 42 U.S.C. section 1983 (2006)?” is “maybe, but probably not”. As discussed, there are currently two theories of recovery in suits alleging a deprivation of the Fourteenth Amendment right to Due Process in school shooting situations: the special relationship exception and the state-created danger theory. Neither is likely to result in compensation for the plaintiff.

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In a section 1983 substantive Due Process case, the special relationship exception is a losing argument for victims in school shooting cases. The majority of circuits have refused to find a special relationship in the K-12 setting where compulsory education laws create a sort of custodial role for school officials, as discussed. Particularly at the university level, where attendance is voluntary, there is no realistic way to prove that the state actors had custody over a college student so as to create a special relationship. Without a special relationship, there is no constitutional duty for the state school to warn or protect its students from third-party violence.

However, as the Supreme Court has stated, “[t]hat is not to say that schools have absolutely no duty to ensure that students are safe during the school day. Schools may have such a duty by virtue of a state's tort or other laws. However, “[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.”

The second exception to the general rule against holding the state liability for third-party violence is the state-created danger test, as discussed. Indications are that the Supreme Court will not adopt the state-created danger exception because doing so would expand the scope of the Fourteenth Amendment Due Process clause. The Supreme Court has expressed its unwillingness to broaden the application of the clause:

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible

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259 See Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 860-61 (5th Cir. 2012)(emphasis in original)(“While we should have every reason to expect that public schools can and will provide for the safety of public school students, no matter their age, our precedents, and the decisions of every other circuit to have considered this issue, dictate that schools are simply not constitutionally required to ensure students’ safety from private actors.”).

decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.\textsuperscript{261}

This Article suggests that the better approach is to abandon the formality of the state-created danger test altogether, following the lead of the Eleventh and Fifth Circuits. Judge Higginson got it right and expressed it eloquently in his concurrence in \textit{Doe ex rel. Magee} when he wrote that section 1983 should be construed literally. The statutory language specifically includes those instances where a state actor “caused [someone] to be deprived” of a constitutional right as well as those instances where a state official’s act directly “deprived” the person of a protected right.\textsuperscript{262}

If litigants are to succeed in direct section 1983 suits (meaning suits that allege that the state actor caused the victim to be deprived of a right), they will need guidance as to what type of action by the state is egregious enough to meet the standard in non-custodial situations.\textsuperscript{263} In school shooting cases where there is no custodial relationship, deliberate indifference is very unlikely to meet the standard of outrageousness. The Supreme Court seems to have made it clear that liability will attach only if the state actor caused the deprivation of rights by deliberately

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{262}]It should be noted, however, that at least one federal court sitting within the Fifth Circuit has expressly rejected the direct approach advocated by Judge Higginson. In \textit{Estate of Brown v. Cypress Fairbanks Independent School District}, 863 F. Supp. 2d 632, 637 n.7 (S.D. Tex. 2012), the court acknowledged that plaintiff had based its suit on Judge Higginson’s plain reading language approach to section 1983. The court dismissed the suit, however, stating that without a special relationship, the school district had no duty to protect its student from non-state actors, and “because Plaintiff has not – and cannot—allege such a special relationship, there is no foundation for stand-alone statutory liability under §1983.” \textit{Id.} at 638. This author is not convinced that the district court correctly applied Judge Higginson’s plain language approach, but that issue is ultimately one for the Fifth Circuit to resolve.
\item[	extsuperscript{263}]The Eleventh Circuit purports to clarify the standard, at least in employment situations, by incorporating the Supreme Court’s language from \textit{Collins}, but not all courts have phrased it as definitively. \textit{See White v. Lemacks}, 183 F.3d 1253, 1259 (11th Cir. 1999) (“Under \textit{Collins}, state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is ‘arbitrary, or conscience shocking, in a constitutional sense,’ and that standard is to be narrowly interpreted and applied.”).
\end{enumerate}
\end{footnotesize}
acting in a manner that shocks the conscience in a constitutional sense. Conduct sufficient to shock the conscience for substantive due process purposes has been described as “conduct that violates the decencies of civilized conduct”; conduct that is ‘so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency’; conduct that ‘interferes with rights implicit in the concept of ordered liberty’; and conduct that ‘is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’” Failure to act will not suffice unless it is truly outrageous. The “shocks the conscience” standard can be readily applied in a section 1983 action without going on the semantic detour that is called the state-created danger test.

Proving causation will be the key to success for a plaintiff in a direct section 1983 action. The crux of it is whether the deprivation of the liberty interest was “state action” or whether it was the solely the act of a private party. Did an action taken by university officials cause the victim’s injury in a campus shooting rampage? The obvious and quick answer would be “no” because a third-party is the perpetrator in the campus shooting incidents, not a school official. That answer, however, is too hasty and belies the sophisticated approaches to causation that are already embedded in section 1983 case law.

In summary, the plaintiffs in a school shooting case will probably not succeed in asserting a constitutional claim against the school because (1) circuits have stated that there is no special relationship in school/student cases, and (2) the state-created danger theory has been mangled and misapplied, and the better approach is for courts to follow the Fifth and Eleventh

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Circuits and decline to apply it. This conclusion sounds very harsh for grieving families, but it is legally correct. Very simply put, the remedy available under the Due Process Clause does not stretch so broadly as to render the government liable for the violent shootings committed by private parties.266

Another roadblock on the federal litigation path is that state actors will be immune from suit in several instances. Various types of immunity may shield parties from suit. Public school and university officials, for example, are shielded from individual liability if the test for “qualified immunity” is met. The two-step test for qualified immunity is (1) whether the state official’s actions violated a constitutional right, and (2) whether that right was clearly established at the time of the official’s alleged misconduct.267 In 2009, the Supreme Court announced that the prongs of the test can be addressed in either order, that is, it is not necessary to analyze the first step before turning to the question of whether a clearly established right existed at the time.268 In school shooting cases, the Due Process right is not clearly established because the Supreme Court has not addressed whether there is a special relationship between schools and students, and the circuits -- although fairly consistent -- are divided in specific instances.269 As for the state-created danger theory, the law is even less clear. Given this lack of certainty, school officials will be individually immune from suit even if they do violate a student’s rights.270

266 Section 1983 provides a means of redress if a state actor violates a person’s constitutional rights, but as the Supreme Court has stated, it does not provide redress for negligent acts or third-party violence.
269 See, e.g., Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 878-79 (5th Cir. 2012)(Wiener, J., dissenting) (stating that there should be special relationship when the student is young and vulnerable and parents can do nothing to protect her while she is in school).
270 A detailed discussion of immunity is outside the scope of this article. Various types of statutory immunity and municipal liability will also apply in certain instances. For more information on qualified immunity, see Susan Bendlin, Qualified Immunity: Protecting “All But the Plainly Incompetent” (And Maybe Some of Them, Too), 45 John Marshall L. Rev. 1023 (Summer 2012); see also Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 870 (5th Cir. 2012) (discussing qualified immunity in the context of a school shooting case).
That is not to say that there is no relief at all. Plaintiffs may be more successful pursuing a remedy in tort law where elements of negligence can be proven, especially in light of legal and societal evolution toward finding a duty to protect and to warn students.\(^{271}\) There may also be other viable theories of recovery\(^{272}\) for injured students and the families of deceased students.

This topic is powerful, painful, and poignant for me because I identify with both sides, the plaintiff and the defendant, in such cases. As the mother of a college student, I can scarcely imagine how crippling the grief and shock would be if my own daughter were shot. As a Dean of Students for more than twenty years, I find it devastating that caring, dedicated college administrators are being blamed for these violent tragedies.

Prevention would be ideal. University officials are understandably horrified by these shootings on campuses and are working very hard to prevent such violent acts.\(^{273}\) It is not an easy task. Responding to the fatal shootings at Northern Illinois University, President John Peters said in grief and frustration, "I don't know if any plan can prevent this kind of tragedy."\(^{274}\) Campus administrators find themselves caught, unfortunately, between a Glock and a hard place.

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\(^{271}\) Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications For the Post in Loco Parentis College*, 37 Idaho L. Rev. 531, 532 (2001).

\(^{272}\) Some situations can be addressed through suits based on harassment or discrimination, for example.

\(^{273}\) After the Virginia Tech shooting, one professor wrote:

> When we quote statistics, talk about trends, devise laws to make things better and invent protocols designed to keep us safe, we often forget to take into account the messiest part of the equation: human beings who refuse to behave according to formulas we have devised for them, and cultures resistant to change. Whatever strategies we come up with must also take into account the fact that many educational institutions, facing severe budget cuts, are struggling to cater to students who are *not* troubled, let alone those who are.


The problem of violence on campuses is complex, but many resources are being put toward making colleges safer.\textsuperscript{275} For the victims and families, those efforts, sadly, were not enough. For them, seeking relief through the court system is but one avenue, and the constitutional deprivation path is not the one likely to lead to redress.

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