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Shades of *DeShaney*: Official Liability under 42 U.S.C. 1983 for Sexual Abuse in the Public Schools

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SHADES OF *DESHANEY*: OFFICIAL LIABILITY UNDER 42 U.S.C. § 1983 FOR SEXUAL ABUSE IN THE PUBLIC SCHOOLS

I. INTRODUCTION

May school officials and school systems be held liable under 42 U.S.C. § 1983[1] when their students are sexually abused at school by a faculty member or another student? The answer to this question turns on the interpretation of *DeShaney v. Winnebago County Department of Social Services*.[2] The Supreme Court held in *DeShaney* that public officials and agencies do not have an affirmative duty of protection, unless the person needing protection is in the custody of the official or agency.[3] The federal courts have had some difficulty in applying *DeShaney* to cases where there has been sexual abuse in the schools, and two perspectives have emerged on the issue of whether students are in the custody of the schools. Two recent appellate court decisions, *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*[4] and *Doe v. Taylor Independent School District*,[5] illustrate these two positions. The

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1. 42 U.S.C. § 1983 (1988) (creating liability for deprivation of constitutional rights under color of state law).

2. 489 U.S. 189 (1989).

3. *Id.* at 200-01.

4. 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

5. 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1436 (1993), *vacated*, 987 F.2d 231 (5th Cir. 1993). The Fifth Circuit reheard *Taylor* en banc and vacated the decision. Thus, *Taylor* is no longer binding precedent in the Fifth Circuit. However, the *Taylor* opinion provides the most coherent argument for holding a school constitutionally liable for the safety of its students, and will therefore be analyzed in this paper. Additionally, upon rehearing, the Fifth Circuit sidestepped *DeShaney*, and avoided the issue of whether the public schools have custody of their students. *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994). Instead the court upheld liability against the school's principal under the "alternative liability" theory. *Id.* at 457. The "alternative liability" theory is discussed in section VII of this Note. *See infra* notes 242-77 and accompanying text.

Middle Bucks court held that students were not in the custody of the school and therefore the school officials did not have an affirmative duty to protect their students.[6] In contrast, the *Taylor* court held that students were in the custody of the school and school officials do have a duty to protect the students.[7] Whether a school will be liable for sexual abuse depends on how a court interprets the meaning of custody in *DeShaney*.

First, this Note examines how widespread sexual abuse in the public schools has become. Second, this Note describes the history, purpose, and applicability of 42 U.S.C. § 1983. Third, the Note discusses the development of § 1983, and how, in certain circumstances, public officials can be held constitutionally liable for inaction. Fourth, this Note examines the *DeShaney* decision which promulgated the "custody" test for determining constitutional liability for government inaction. Fifth, there is a detailed examination of the arguments in the *Middle Bucks* and *Taylor* opinions which each applied the *DeShaney* test differently in cases of sexual abuse in the public schools. Sixth, this Note evaluates possible alternative theories for holding school systems and school officials liable for sexual abuse that occurs at school. In conclusion, this Note advocates the proposition that school systems should be found to have custody of their students, and therefore, should be held accountable for failing to protect the students from sexual abuse. This approach effectuates the purpose of the Fourteenth Amendment and provides schoolchildren with the protection they need.

II. THE PROBLEM OF SEXUAL ABUSE IN THE PUBLIC SCHOOLS

There is a widespread problem of sexual abuse of children in the public schools. In 1993, there were 160 reported allegations of sexual abuse in the New York Public School System; however, school investigators believed that only a fraction of the incidents were actually reported.[8] Unfortunately, the abuse reported in New York appears typical of other school systems.[9]

News reports from the last several years indicate how acute this problem has become. For example, in June 1993, nine elemen-

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6. *Middle Bucks*, 972 F.2d at 1372.

7. *Taylor*, 975 F.2d at 147.

8. Josh Barbanel, *Panel Named To Prevent Child Abuse In Schools*, N.Y. TIMES, Dec. 10, 1993, at B3 (detailing the establishment of a commision to address sexual abuse of children by school employees).

9. *Id.*

tary school students were charged with sexually abusing a classmate.[10] On March 8, 1993, a substitute teacher was charged with sexually abusing an eleven-year-old female student, and "[t]he teacher had threatened the girl with punishment if she told anyone."[11] In December 1990, a school bus driver was charged with sexually abusing seven students repeatedly.[12] In April 1990, a public school Dean was arrested for sexually abusing a thirteen-year-old girl.[13] The February 10, 1989 issue of the *Washington Post* reported that police were investigating two reports of child sexual abuse, one involving a teacher who molested thirteen girls over a two-to-three year period, and another where a male teacher sexually abused several of his male students.[14] In February 1988, the Fairfax, Virginia County school system dismissed eight employees for sexually abusing students.[15] In February 1986, four Chicago public school teachers were arrested for sexually abusing their students.[16] Ed Stancik, six weeks after assuming the post of chief investigator for the New York City school system, had five teachers arrested for sexual abuse, and was investigating twenty-five "serious allegations."[17] Mr. Stancik stated that the sexual abuse in the schools "seems to be worse than was anticipated," and that he was "surprised by the extent of the problem."[18] These are only a few of the numerous examples of sexual abuse in the public schools.

The extent of sexual abuse in the public schools is also indicated by the measures that the school systems and state legislatures have taken to curb the abuse. For example, the Washington state House of Representatives considered a bill that "would bar any

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10. Melinda Henneberger, *Yonkers School Game or Sex Abuse?*, N.Y. TIMES, June 25, 1993, at B4 (reporting alleged abuse of a student by other students that school officials explained as a "game" that got out of hand).

11. *Substitute Teacher Held on Sex Charge*, N.Y. TIMES, Mar. 9, 1993, at B3 (detailing a teacher's arrest on a charge of sexually abusing a student).

12. Robert E. Tomasson, *Bus Matron Charged in Sex Abuse of Handicapped Students*, N.Y. TIMES, Dec. 4, 1990, at B2.

13. Sylvia Moreno, *Discipline Dean Accused of Molesting Pupil*, NEWSDAY, Apr. 24, 1990, at 32.

14. *Abuse Reports in Howard*, WASH. POST, Feb. 10, 1989, at C6.

15. D'Vera Cohn, *Fairfax Schools Cited 8 Over Sexual Impropriety*, WASH. POST, Feb. 9, 1988, at B1.

16. Jerry Thornton & Henry Wood, *Public School Teacher Charged in Sexual Abuse of 2 Students*, CHI. TRIB., Feb. 27, 1986, at 7.

17. Dennis Hevesti, *Investigator Arrests Five in Six Weeks in the Sexual Abuse of Students*, N.Y. TIMES, Mar. 29, 1991, at B3.

18. *Id.*

person who has sexually abused a child from ever holding a job in the public schools."[19] However, current Washington law allows a person who has been convicted of sexual abuse to receive teaching credentials ten years after the conviction.[20] In Connecticut, two state representatives introduced a bill that would allow schools to do background checks on all job applicants.[21] The Chicago Board of Education has implemented criminal background checks on all new employees.[22] In addition, a "hot line" has been set up to encourage students to report incidents of sexual abuse.[23] The New York public school system "has formally declared a ban on sexual relationships between school employees and students."[24] This sample of measures taken by schools and state legislatures to stop sexual abuse indicates how serious a topic and how widespread a problem sexual abuse has become.

One disturbing aspect of the problem is the apparent lack of concern on the part of some school officials. Their collective reaction to sexual abuse has been described as a "conspiracy of silence,"[25] indicating that many school administrators choose to ignore sexual abuse in the hope that the problem will disappear. Specifically, there are numerous instances where school officials have decided to ignore, or even conceal, evidence of sexual abuse.

An example of this "conspiracy of silence" occurred recently at a high school near Washington, D.C. Ronald Price, a teacher at Northeastern High School, was convicted on September 10, 1993, of sexually abusing three female students.[26] "A State panel found that Price's conduct was common knowledge . . . and that high-ranking school officials failed to investigate complaints."[27] Another

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19. *A Better Environment for Kids—Two Bills To Make Public Schools Safer*, SEATTLE TIMES, Feb. 24, 1993, at A6.

20. *Id.*

21. Dan Haar & Kathleen Megan, *Police Checks of Teachers Illegal; East Hartford Legislators Want To Bring Them Back; Criminal Histories Schools Issue*, HARTFORD COURANT, Jan. 12, 1993, at A1 (detailing efforts to reinstate background checks of teachers which had previously been a violation of state law).

22. Casey Banas, *School Board Requires Background Checks*, CHI. TRIB., March 14, 1986, at 7.

23. Jean Latz Griffin & Jerry Thornton, *Former Teacher Tosses a Line to Sexually Abused Students*, CHI. TRIB., March 10, 1986, at 1.

24. Sylvia Moreno, *Board of Ed Bans Sex Between Students, Staff*, NEWSDAY, May 30, 1991, at 4.

25. Barbanel, *supra* note 8, at B3.

26. Lisa Leff, *Arundel Schools Grant Amnesty for Failure to Report Abuse*, WASH. POST., Oct. 4, 1993, at D3.

27. *Id.*

example of this callous attitude toward sexual abuse occurred in a New York public school. An eight-year-old girl was raped on school grounds by the school's custodian.[28] "The girl eventually reported the rape to Mrs. Moolenar [the principal], who responded by interrogating the youngster in an intimidating manner and alerting the custodian to the complaint before the case had been reported to the police. . . ."[29] Mrs. Moolenar's intention was to get the girl to recant her allegation,[30] and the truly sad aspect of this incident is that the school board did not discipline Mrs. Moolenar for her actions.[31]

Another example of this willful blindness occurred in a New York school in 1990. A teacher lied on his employment application to conceal a public indecency conviction, and charges pending in New Jersey for sexually assaulting two seven-year-old students at a school where he had previously taught.[32] The school's principal knew of the teacher's background, including the sexual molestation charges, yet failed to notify the school board.[33]

In Chicago, Ann Benedict, a former teacher, has set up a "hot line" to allow students to report sexual abuse. Benedict states that "the hot line is necessary because the present system does not adequately protect students."[34] In fact, the school faculty usually ignores sexual abuse, and "[w]hen there is a sex abuser in a school, it is usually common knowledge among the teachers.[35] The teachers don't come forward because the school system is an army system, and you don't make waves."[36] Thus, the problem of widespread sexual abuse in the public schools is compounded by a conspiracy of silence that attempts to ignore or conceal the problem.

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28. Sam Dillon, *Board Reconsiders Discipline of Principal in Bronx Rape*, N.Y. TIMES, Feb. 27, 1993, at 25.
29. *Id.*
30. Josh Barbanel, *Board Fails To Charge Principal*, N.Y. TIMES, March 3, 1993, at B3.
31. *Id.*
32. Sylvia Moreno, *Fernandez Removes Principal; Didn't Heed Sex Claims About Teacher*, NEWSDAY, Jan. 12, 1990, at 7.
33. *Id.*
34. Griffin & Thornton, *supra* note 23, at 1.
35. *Id.*
36. *Id.*

III. *42 U.S.C. § 1983*

"A primary function of the federal courts is to provide relief against governments and government officers for their violations of the Constitution and laws of the United States."[37] 42 U.S.C. § 1983 is the mechanism under which citizens can sue state and local governments and government officers for constitutional violations.[38] The text of 42 U.S.C. § 1983 reads:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage . . . 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. . . .[39]

Specifically, § 1983 creates a cause of action against local governments and their officials if they violate a citizen's constitutional or legal rights.[40] To advance a § 1983 claim, a plaintiff must show that a "person" acting "under color of state law" violated a right granted to him or her by the Constitution or by a federal law.[41]

A. *The Scope of 42 U.S.C. § 1983 and the Meaning of "Under Color of State Law"*

Section 1983 was first passed in 1871 in response to violence against blacks in the South.[42] Widespread violence against blacks, initiated or encouraged by the Ku Klux Klan, erupted in the South after the Civil War, and the Southern states were unable or unwilling to put a stop to the Klan's illegal activities.[43] Congress reacted by creating a federal remedy for these civil rights violations:

> [O]ne reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice,

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37. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 369 (1989) (describing and analyzing the doctrines and policies that shape the jurisdiction of the courts of the United States).

38. *Id.*

39. 42 U.S.C. § 1983 (1988).

40. CHEMERINSKY, *supra* note 37, at 370.

41. *Id.* at 377.

42. PETER H. SCHUCK, SUING GOVERNMENT 47 (1983) (stating that 42 U.S.C. § 1983 was originally Section 1 of the Ku Klux Klan Act).

43. CHEMERINSKY, *supra* note 37, at 373.

> passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[44]

Thus, this legislation was passed because Congress did not believe that state courts would protect the constitutional rights of blacks.[45]

Despite the statute's broad language, it was originally interpreted narrowly as a remedy for a specific problem, namely "the mistreatment of Southern blacks during the Reconstruction."[46] Section 1983 was seldom used prior to 1939, and then only to challenge the constitutionality of voting restrictions.[47] But, from that point on, the Supreme Court began to expand the use of § 1983 to cases involving the deprivation of due process rights.[48]

The 1961 Supreme Court decision in *Monroe v. Pape* is responsible in large part for the expansion of § 1983's applicability.[49] In *Monroe*, the plaintiff alleged that:

> thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with the flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed one of them to the floor; that the police ransacked every room . . . that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours . . . that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having

44. Monroe v. Pape, 365 U.S. 167, 180 (1961). *See also* CHEMERINSKY, *supra* note 37, at 374 (discussing the purpose of § 1983).
45. CHEMERINSKY, *supra* note 37, at 374.
46. SCHUCK, *supra* note 42, at 47.
47. *Id.* at 47-48.
48. *Id.* at 48.
49. Monroe v. Pape, 365 U.S. 167 (1961).

been filed against him.[50]

The issue before the Supreme Court was the meaning of the phrase "under color of state law" in § 1983.[51] The defendants argued that they were not liable under § 1983 because by violating state law they could not be acting "under color of state law".[52] Thus, the defendants advocated the position "that 'under color of' state law included only action taken by officials pursuant to state law."[53]

However, the Court rejected the defendants' interpretation of "under color of state law." The Court stated that the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[54] Therefore, whenever a government official takes action in his official capacity, he or she is acting under the color of state law even if the official's actions are illegal under state law. Consequently, when school officials are performing their official duties, they are acting under the color of state law, and are liable under § 1983 for their constitutional torts.

B. "Person" and § 1983 Liability

The Supreme Court, in *Monell v. Department of Social Services*,[55] held that municipal governments were "persons" and therefore could be held liable under § 1983.[56] The Court explained that "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[57] However, the Court limited municipal liability by holding that a municipality cannot be subject to liablity under § 1983 on a *respondeat superior* theory.[58] Instead, municipal governments are only liable for their own constitutional violations and not for the

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50. *Id.* at 203 (Frankfurter, J., dissenting).

51. *Id.* at 171.

52. *Id.* at 184.

53. *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 327 n.10 (1940)).

54. Monroe v. Pape, 365 U.S. 167, 184 (1961).

55. 436 U.S. 658 (1978).

56. *Id.* at 690-95 (overruling the portion of Monroe v. Pape that held that municipal governments were not persons under § 1983). State governments cannot be sued in federal court because these suits are precluded by the Eleventh Amendment to the U.S. Constitution. *See* CHEMERINSKY, *supra* note 37, at 339.

57. *Monell*, 436 U.S. at 690; *see also* CHEMERINSKY, *supra* note 37, at 390 (discussing the application of § 1983 to municipalities).

58. *Monell*, 436 U.S. at 691; *see also* CHEMERINSKY, *supra* note 37, at 390. Note that municipal governments are not liable for punitive damages under § 1983. *See* City of Newport v. Fact Concerts, 453 U.S. 247, 259 (1981).

violations of their employees.[59] Since school systems are a local governmental unit, they are "persons" under § 1983 and can he held liable under the statute.

Additionaly, both state government officials and local government officials are "persons" under § 1983 and are subject to liability accordingly.[60] However, the Supreme Court has exempted some of these individuals from § 1983 liability when they are acting in a certain capacity. Specifically, "the Court has recognized absolute immunity for those performing judicial, legislative, and prosecutorial functions."[61] However, government officials acting in an executive or administrative capacity are still liable under § 1983.[62] Because school officials are local government officials acting in such capacities, they are subject to liability under § 1983.

IV. THE ROAD TO *DESHANEY*

Using § 1983, which creates a vehicle whereby independent violations of statutory or constitutional law can be redressed, sexually abused students can attempt to hold both the school officials and the school system liable for a deprivation of their Fourteenth Amendment liberty rights. A constitutional tort claim can be asserted under § 1983 when a public official deprives an individual "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[63] Therefore, when a public official deprives an individual of his or her Fourteenth Amendment liberty right to bodily integrity, that official is liable for the deprivation.

However, mere negligence is insufficient to establish liability for a constitutional tort.[64] The *Taylor* court based this finding on the Supreme Court's holding in *Daniels v. Williams*[65] that negligent conduct does not violate the due process clause of the Four-

59. *Monell*, 436 U.S. at 691.

60. CHEMERINSKY, *supra* note 37, at 402.

61. *Id.* at 407 (finding that police officers also have immunity when acting as witnesses, and the President of the United States has absolute immunity).

62. However, these officials do have a "good faith" affirmative defense. *See id.* at 414.

63. 42 U.S.C. § 1983. *See also* William D. Valente, *School District and Official Liability for Teacher Sexual Abuse of Students Under 42 U.S.C. § 1983*, 57 EDUC. LAW REP. 645, 645 (1990) (discussing the theories of constitutional tort liability for school districts and supervisors under § 1983).

64. Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 142 (5th Cir. 1992), *cert. denied*, 113 S. Ct 1436 (1993), *vacated*, 987 F.2d 231 (5th Cir. 1993), *reheard en banc*, 15 F.3d 443 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994).

65. 474 U.S. 327 (1986).

teenth Amendment.[66] However, in another Supreme Court case, state actors were held liable under 42 U.S.C. § 1983 because they were "deliberately indifferent" to the injuries that their conduct caused.[67] Therefore, since school officials can only be held liable for the sexual abuse occuring in their schools if they are deliberately indifferent, the school official would have to know or strongly suspect that sexual abuse was occurring, but do nothing to stop if from continuing.

Most constitutional tort claims arise in the context of a government official's action that deprives an individual of his or her fundamental liberties.[68] However, plaintiffs may also bring a § 1983 claim against an official for inaction if that official had an affirmative duty to protect the plaintiff's liberties.[69] In light of this, the Supreme Court has stated that a state does not have a duty to protect individuals unless there is an affirmative duty of care that the state has with respect to that particular individual.[70]

The Court first recognized a circumstance which called for an affirmative duty of care in *Estelle v. Gamble*.[71] The Supreme Court held that prison officials who, willfully or through deliberate indifference, withheld medical treatment from inmates committed a constitutional tort by violating the Eighth Amendment prohibition of cruel and unusual punishment and were liable under § 1983.[72] The Court reasoned that since the state's incarceration of the prisoners prevented the prisoners from providing medical care for themselves, the state assumed an affirmative duty to provide necessary medical care.[73] The Court stated that it is necessary "that the public be required to care for the prisoner, who cannot by reason

66. *Id.* at 332.

67. City of Canton v. Harris, 489 U.S. 378, 388 (1989). *See also* Sivard v. Pulaski County, 959 F.2d 662, 669 (7th Cir. 1992) (requiring deliberate indifference for culpability under § 1983); Lopez v. Houston Indep. Sch. Dist., 817 F.2d 351, 355 (5th Cir. 1987) (requiring deliberate indifference or gross negligence for culpability under § 1983).

68. Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After* DeShaney, 90 COLUM. L. REV. 1940, 1943 (1990).

69. *Id.*

70. DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 197-98 (1989) The Court stated that "[a]s a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause". *Id.* at 197. It is only "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198.

71. 429 U.S. 97 (1976).

72. *Id.* at 104-05.

73. *Id.* at 104.

of the deprivation of his liberty, care for himself."[74] Thus, incarceration creates an affirmative duty for the state to care for and protect prisoners.

In *Youngberg v. Romeo*[75] the Supreme Court extended the *Estelle* analysis from violations under the Eighth Amendment to violations under the Fourteenth Amendment. The Supreme Court held that a mentally retarded person involuntarily committed to a state mental institution retained his Fourteenth Amendment liberty rights, and the state had an affirmative duty to provide safe conditions and reasonable training.[76] The state, by committing a mentally retarded person, assumes an affirmative duty to protect and care for that person. If the state fails, it becomes liable to that person for the deprivation of his or her Fourteenth Amendment liberty rights.

V. THE *DESHANEY* DECISION

DeShaney has sparked the current controversy over whether school officials can be held liable under § 1983 for sexual abuse that occurs at school. In *DeShaney*, the Supreme Court attempted to clarify when a public official or agency may be liable for constitutional deprivations.[77] The Court held that in order for the state to have an affirmative duty to care for or protect an individual, that individual must be in the state's custody.[78] However, the problem with *DeShaney* is that it did not define custody, and thus the circuit courts are interpreting "custody" differently.

The facts of the *DeShaney* case are "undeniably tragic."[79] In March 1984, Joshua DeShaney, then four years old, was severely beaten by his father, Randy DeShaney, while he was living with him.[80] As a result of this beating, Joshua suffered severe brain damage and will spend the rest of his life in an institution for the profoundly retarded.[81] The Winnebago County Department of Social Services (DSS) suspected prior to this beating that Joshua was

74. *Id.* (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).
75. Youngberg v. Romeo, 457 U.S. 307 (1982).
76. *Id.* at 316-19.
77. DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 195-200 (1989) (discussing alternative duties imposed on the states by the Constitution).
78. *Id.* at 200.
79. *Id.* at 191.
80. *Id.* at 193.
81. *Id.*

being abused.[82] In January 1982, Randy DeShaney's second wife filed a complaint with the police that Randy was abusing Joshua. The DSS interviewed Randy DeShaney but did not pursue the allegations after Randy denied them. In January 1983, Joshua was admitted to a hospital for treatment of multiple abrasions and bruises suffered as a result of beatings. DSS filed a child protection action. However, DSS concluded that it did not have enough evidence to justify removing Joshua from his father's home. Instead, DSS recommended that Randy DeShaney get counseling and enroll Joshua in a preschool program. Randy DeShaney agreed to cooperate with the DSS, and the juvenile court dismissed the child protection action. In February 1983, Joshua was once again admitted to the hospital for treatment of injuries caused by beatings administered by his father, but the DSS caseworker concluded that there was still not enough evidence to support a child protection action. Over the next six months, the caseworker made monthly visits to the DeShaney home. During these visits, she noticed that Randy DeShaney was not following any of the recommendations made in January 1983, and that Joshua often had suspicious head injuries. In November 1983, Joshua was again admitted to the emergency room for injuries that the physicians believed to be caused by child abuse. During the next two visits by the case worker after the November incident, Randy DeShaney would not allow the caseworker to see Joshua. These facts established that prior to the March 1984 beating that left Joshua brain damaged, the DSS was well aware that Joshua was in continuous danger at the hands of his father.

Joshua, by his mother, brought a 42 U.S.C. § 1983 claim against the DSS.[83] The complaint argued that the DSS had deprived Joshua of his Fourteenth Amendment right to bodily integrity without due process of law by failing to protect Joshua from his father.[84] The district court granted a summary judgment for DSS.[85] The Seventh Circuit Court of Appeals affirmed the district court's decision, stating that local governments do not have a duty to protect people from violence committed by private actors.[86]

The Supreme Court, in an opinion by Chief Justice Rehnquist,

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82. For the following background of the *DeShaney* matter, see generally *id.* at 192-93.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 193-94.

held that the Winnebago County Department of Social Services did not have a constitutional duty to protect Joshua from his father.[87] The Court's reasoning was based on the notion that:

> nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The 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.[88]

Thus, the Due Process Clause was intended to prevent government officials from abusing their power and performing *actions* that deprive people of their liberty rights.[89] However, there is no constitutional right to government aid when a private citizen intrudes upon the liberty of another citizen; therefore, public officials cannot be held liable under § 1983 for their *inactions* when failing to protect individuals.[90]

The Court did state that under certain limited circumstances a government agency or official may have an affirmative duty to protect an individual.[91] When the state has a special relationship with an individual, the state has an affirmative duty to protect that individual.[92] *DeShaney* limits "special relationships" to instances where the state has custody of the individual.[93] Thus, the state assumes a duty of care "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself."[94] The Court referred to both *Estelle* and *Youngberg* as examples of situations where the state has restrained an individual's liberty, and thereby assumed a duty to care for that individual.[95] In sum, public officials have an affirmative duty of protection if, and only if, the individual is in the state's custody.

87. *Id.* at 203.
88. *Id.* at 195.
89. *Id.* at 196 (citing Davidson v. Cannon, 474 U.S. 344, 348 (1986)).
90. *Id.* at 197.
91. *Id.* at 198.
92. *Id.* at 199-200 (defining the relationship as cases in which the State has taken a person into custody against his will).
93. *Id.*
94. *Id.* at 200.
95. *Id. See also* Youngberg v. Romeo, 457 U.S. 307 (1982) (finding that the State has a duty to committed mental patients); Estelle v. Gamble, 429 U.S. 97 (1976) (finding that the state has a duty toward individuals); *supra* notes 71-76 and accompanying text.

Joshua's attorneys argued that a special relationship existed between Joshua and DSS. They stated that a special relationship was created because the DSS knew that Joshua was in danger, and DSS had stated its intention to protect Joshua.[96] However, the Court rejected this argument, insisting that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[97] Thus, only in instances where the individual is in the state's custody is there an affirmative duty of protection.

The Court then applied these principles to the facts of the case and concluded that the DSS was not liable under 42 U.S.C. § 1983. Joshua was injured by his father who was not a state actor, therefore, the state did not actively deprive Joshua of his Fourteenth Amendment liberty rights.[98] In addition, the court held that DSS could not be held liable for failing to protect Joshua because he was not in the custody of the DSS when his injuries occurred.[99] Since Joshua was in the custody of his father, there was no special relationship between DSS and Joshua, therefore, DSS had no affirmative duty to protect Joshua.[100]

VI. OFFICIAL LIABILITY FOR SEXUAL ABUSE IN THE PUBLIC SCHOOLS

There are two distinct positions on how *DeShaney* should be applied to situations of sexual abuse in the public schools. Plaintiffs in these cases assert that the school officials have an affirmative duty to protect the students from sexual abuse.[101] However, according to *DeShaney*, public officials only have affirmative duties when an individual is in their custody.[102] Therefore, the point of contention is whether the school systems have custody of the stu-

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96. *DeShaney*, 489 U.S. at 197.
97. *Id.* at 200.
98. *Id.* at 201.
99. *Id.*
100. *Id.*
101. *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir.) (finding the children to be in the school's custody), *cert. denied*, 115 S. Ct. 70 (1994). *But see* D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d. Cir 1992) (rejecting plaintiff's claim that children were in the school's custody), *cert. denied*, 113 S. Ct. 1045 (1993).
102. DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 199-200 (1989).

dents while they are in school. In *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*,[103] the Third Circuit Court of Appeals held that students are not in the custody on the school system. In *Doe v. Taylor Independent School District*,[104] the Fifth Circuit Court of Appeals found that students are in the custody of the schools.

A. *The* Middle Bucks *Decision*

The plaintiffs in *Middle Bucks* were two students, D.R. and L.H., who attended a graphic arts class at the Middle Bucks school.[105] While attending the class during the 1989-90 school year, they were sexually abused by several male students. Plaintiff D.R. was attending Middle Bucks because she was hearing impaired and had related communication problems. She asserted that from January 1990 to May 1990 several male students in her class would force her into the classroom's unisex bathroom and sexually abuse her two to four times per week. In addition, L.H. stated that she was sexually abused two or three times each week from December 1989 to May 1990. The perpetrators touched the girls' genitalia and breasts, sodomized them, forced them to perform fellatio, and forced them to watch other students endure similar abuse.

The school officials did nothing to stop this ongoing abuse. Susan Peters was the student teacher of the graphic arts class. She witnessed the plaintiffs being dragged off into the bathroom by the perpetrators, yet she did not put a stop to this behavior. Peters admitted that she could not control the classroom, and that she herself along with other female students were subjected to nonsexual abuse in the classroom. This abuse consisted of obscene language and gestures, and offensive but not sexual touching. L.H. stated that she told Assistant Director Bazzel of Middle Bucks about the abuse, but Bazzel took no action. Plaintiffs also asserted that other school officials knew of the chaotic situation in the

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103. 972 F.2d at 1372-73.

104. 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1436 (1993), *vacated*, 987 F.2d 231 (5th Cir. 1993), *reheard en banc*, 15 F.3d 443 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994).

105. For the following facts in the *Middle Bucks* case, see D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

classroom, but took no steps to remedy the problem.

The plaintiffs filed a claim against the school and several named school officials under 42 U.S.C. § 1983.[106] The district court granted the defendants' motion to dismiss for failure to state a claim.[107] The district court held that the school did have an affirmative duty to protect the students from sexual abuse; however, it dismissed the claim because the complaints did not allege that the officials had sufficient knowledge of the abuse.[108] Without such knowledge, the officials could not be deliberately indifferent, and therefore, would not have the requisite mental culpability required for liability under § 1983.[109]

On appeal, the Third Circuit held that the defendants were not liable under § 1983 because they had no affirmative duty to protect D.R. or L.H. from sexual abuse.[110] The court noted that in order to have an affirmative duty of protection, there must be a special relationship between the state agency and the individual.[111] It relied on the fact that "*DeShaney* . . . declined to impose a constitutional duty upon a state to protect the life, liberty, or property of a citizen from deprivations by private actors absent the existence of a special relationship."[112] In addition, the Third Circuit stated that *DeShaney* limited these special relationships to situations where the individual is in the custody of the state agency.[113]

The plaintiffs contended that the Pennsylvania truancy laws that mandate school attendance "so restrain school children's liberty that [the] plaintiffs can be considered to have been in state 'custody' during school hours for Fourteenth Amendment purposes."[114] However, the court rejected this argument because mandatory school attendance does not achieve the threshold of "custody" as defined in *DeShaney*.[115] Therefore, the court held that the plaintiffs were not in the custody of the school.[116] In contrast, the *Middle Bucks* court noted that *Estelle* and *Youngberg* are examples

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 1368-69.
111. *Id.* at 1369.
112. *Id.*
113. *Id.* at 1370.
114. *Id.*
115. *Id.* at 1371.
116. *Id.*

of custody. Incarceration and institutionalization are situations where the individuals are physically restrained and are unable to meet their basic needs. These "persons are wholly dependent upon the state for food, shelter, clothing, and safety. It is not within their power to provide for themselves, nor are they given the opportunity to seek outside help to meet their basic needs. Obviously, they are not free to leave."[117] The court also implied that the physical restraint would have to be on an around the clock basis when it stated that "[t]he state's duty to prisoners and involuntarily committed patients exists because of the *full time* severe and *continuous* state restriction of liberty."[118] The court reasoned that only a similar restraint, one that deprives a person of the opportunity to attend to his or her basic needs, physically confines them, and prevents them from leaving, will satisfy the definition of "custody."

The Third Circuit then applied its interpretation of "custody" to the facts of the case, and concluded that D.R. was not in the school's custody. The plaintiffs were not in the school's custody because the students were not physically restrained, and certainly not restrained twenty-four hours a day.[119] Instead, the plaintiffs did "leave the school building every day" and "[t]he state did nothing to restrict their liberty after school hours."[120] Also, "the school defendants did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs."[121] The court reasoned that the plaintiffs' situation was not like that of a prisoner or mental patient, because the plaintiffs were able to communicate freely with the outside world, and the defendants "did not deny [the plaintiffs] meaningful access to sources of help."[122] Therefore, the school's control over the plaintiffs was sufficiently extensive to constitute custody and thus it did not fall within the special relationship discussed in *DeShaney*.[123] Therefore, the school did not have an affirmative duty to protect the plaintiffs from the sexual abuse.

Chief Justice Sloviter dissented in the *Middle Bucks* opinion. Sloviter argued that the majority interpreted *DeShaney* too narrowly

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117. *Id.*
118. *Id.* (emphasis added).
119. *Id.*
120. *Id.* at 1372.
121. *Id.*
122. *Id.*
123. *Id.*

and contended that individuals can be in the "custody" of a state agency even when the agency does not have "total and continuous custody of the individuals."[124] He argued that "*DeShaney* contains no language to support the majority's holding that the duty to protect can be triggered only by involuntary, round-the-clock, legal custody."[125] Sloviter concluded that in this case there was a special relationship because the plaintiffs were in the "functional custody" of the school.[126]

According to the dissent, four factors place the students in the functional custody of the school. These factors are: (1) school attendance is mandated by law, (2) the students are minors whose judgment is not mature, (3) the schools have discretion in controlling student behavior, and (4) the schools exercise control over the students.[127] In explaining these four factors, the dissent observed that truancy laws make attendance involuntary: "[a]lthough a student is not held in school under shackles, there is substantial compulsion associated with schooling."[128] Second, students are minors, and "the law recognizes that their judgment may not be fully mature and developed."[129] Third, the school officials have discretion in controlling the students because "they are considered to stand *in loco parentis* toward the students."[130] Fourth, because the school stands *in loco parentis*, the "school officials can exercise control over the movements of their students."[131] Thus, students are compelled to be at a certain place for a specified time each day, a place where the officials there have complete authority over the students. In addition, students themselves do not possess the mental maturity to look out for their best interests. These factors considered together create a situation where the state has rendered students incapable of acting in their own interest, much like a prisoner or a committed mental patient, and therefore, the state assumes a duty of protection.[132] In conclusion, the dissent would have re-

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124. *Id.* at 1377 (Sloviter, J., dissenting).
125. *Id.* at 1379.
126. *Id.*
127. *Id.* at 1377 (Sloviter, J., dissenting).
128. *Id.* at 1379 (Sloviter, J., dissenting).
129. *Id.* at 1380 (Sloviter, J., dissenting).
130. *Id.* at 1379.
131. *Id.*
132. *Id.* at 1377 (noting that these factors "combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody").

manded the case, and had the lower court determine whether the defendants violated their duty to protect the plaintiffs.[133]

B. *The* Taylor *Decision*[134]

In *Doe v. Taylor Independent School District*,[135] a female student was sexually abused by a teacher for over one year. Lynn Stroud, the teacher, had a reputation for "favoring" his female students, which included writing them love notes and physically touching them in an inappropriate manner. The school began receiving complaints about Stroud's behavior in 1985. The plaintiff, Jane Doe, was a freshman at Taylor High during the 1986-87 school year and was assigned to Stroud's class. Stroud became enamored with the fourteen-year-old Doe and set out to seduce her. Stroud gave Doe good grades without requiring her to do any work, and he would take her to lunch and buy her alcoholic beverages. Eventually, Stroud and Doe engaged in nonintercourse sexual activity on the school grounds in the laboratory attached to his classroom or at the school's field house. In addition, Stroud sexually abused Doe in his home.

On Valentine's Day, Stroud gave Doe a love note which was found by Brittani B., one of Doe's friends. Brittani took the note and gave it to Principal Lankford of Taylor High. Lankford told Brittani that he was aware of rumors that Stroud and Doe were sexually active. However, the only action Lankford took in response to the valentine was to transfer Brittani (not Doe) out of Stroud's class. Later that February, Mike Caplinger, the superintendent of the school district, received complaints from other school officials about Stroud's relationship with Doe. When Caplinger contacted Lankford about this complaint, he was informed about the other complaints Lankford had received about Stroud. However, no action was taken.

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133. *Id.* at 1383.

134. Again, it will be noted that Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1436 (1993), has been vacated, 987 F.2d 231 (5th Cir. 1993), and reheard en banc, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 70 (1994). Although this case is no longer binding precedent in the Fifth Circuit, it will be analyzed because it provides the most complete argument for finding students in the custody of the school and allowing students, who are victims of sexual abuse while at school, to sue the school system and the school officials under 42 U.S.C. § 1983. *See supra* note 5.

135. For the following facts of the *Doe* case, see *Taylor*, 975 F.2d at 138-40.

In March or April 1987, when Doe was only fifteen, she finally gave in to Stroud's pressures and they engaged in intercourse. Over the next several months, Stroud had intercourse with Doe on and off school grounds. By this time Stroud's "relationship" with Doe was common knowledge among the students and faculty of Taylor High and among some of the students' parents. In June 1987, Caplinger received a complaint from the parents of another student who witnessed Stroud and Doe exhibiting inappropriate behavior at a festival, but Caplinger dismissed the complaint without any investigation.

On July 15, 1987, Doe's parents discovered a number of love letters which Stroud had written to Doe. Up until this time, they had no idea of the relationship because the school officials had not informed Doe's parents of the complaints against Stroud. Doe's parents notified Caplinger, who later spoke with Doe and Stroud. The two denied that they were sexually involved. Apparently, Doe lied because "she feared the repercussions of disclosure." Caplinger was satisfied with the denials; he took no action and did not investigate any further.

Stroud continued to sexually abuse Doe when classes resumed in the fall of 1987. On October 5, 1987, Doe's mother found more love letters and consulted her attorney. The attorney discussed the matter with Doe and was able to get Doe to admit what was happening. The attorney reported this to Caplinger, who finally suspended Stroud. Later, Stroud resigned and pled guilty to criminal charges.

Doe filed several claims, including a claim under 42 U.S.C. § 1983 against Stroud, Lankford, Caplinger, and the school district.[136] Doe argued that the school system and its officials failed to protect her from violations of her Fourteenth Amendment right to bodily integrity.[137] The defendants' motion for summary judgment was denied, and the defendants appealed.[138]

The Fifth Circuit affirmed the trial court's refusal to grant the defendants' motion for summary judgment.[139] The court held that "[s]chool superintendents and principals have a duty to police the halls of our public schools to insure that schoolchildren, who are obligated to attend, have an opportunity to learn and study in a

136. *Id.*
137. *Id.* at 142.
138. *Id.* at 141.
139. *Id.* at 149.

school environment free from sexual molestation and harassment."[140] Thus, the court remanded the case to the district court for a trial to determine whether the defendants violated their duty to protect Doe.[141]

The *Taylor* court interpreted *DeShaney* broadly to find that the school and its officials had an affirmative duty to protect their students from sexual abüse.[142] Basically, the court found that students are in the custody of the schools.[143] The school creates a special relationship by compelling the child to attend,[144] and this relationship gives rise to an affirmative duty of protection.[145]

The *Taylor* court further interpreted *DeShaney* as stating that "custody" exists when the state restrains individuals in a way which prevents those individuals from protecting themselves.[146] Therefore, the state must assume the duty to protect those whom it has rendered helpless. In the case of schools, truancy laws remove children from their parents for a part of each day. Children rely upon their parents for protection because "a child is ordinarily incapable of fending for himself."[147] Removing the child's source of protection places the child in the school's custody and creates a special relationship. Therefore, the state assumes the duty to protect the students "when it renders the guardian of that child powerless to act on the child's behalf."[148]

140. *Id.*

141. *Id.*

142. There is no serious contention that sexual abuse by a teacher is not a violation of a student's Fourteenth Amendment liberty rights: "[T]he Constitution proscribes public school teachers from sexually molesting our schoolchildren." *Id.* at 142.

143. *Id.* at 147.

144. *Id.*

145. *Id.*

146. *Id.* at 146.

147. *Id.*

148. *Id.*

VII. ANALYSIS OF *MIDDLE BUCKS* AND *TAYLOR*[149]

A. *"Custody"*

The difference between the result in *Middle Bucks* and the result in both *Taylor* and the *Middle Bucks* dissent is how the court interpreted the term "custody." Both courts agree that the Fourteenth Amendment generally does not place an affirmative duty of protection on the government. The *Middle Bucks* court stated "that 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'"[150] The *Taylor* court also acknowledged that the state normally has no duty of protection because "the Due Process Clause does not require a governmental body to assist the public."[151]

Both decisions also agreed that there must be a special relationship between the state and the individual in order for the state to have an affirmative duty of protection. The *Middle Bucks* majority relied on *DeShaney* in asserting that "'in certain limited circum-

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149. This Note analyzes *Middle Bucks* and *Taylor* because they provide a detailed explanation of their holdings. For cases that have held that schools do not have an affirmative duty to protect their students, see Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992) (addressing a student strangled by a bandana in a school cloakroom), *cert. denied*, 113 S. Ct. 1266 (1993); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990) (finding that children were not rendered incapable of caring for themselves in a sexual molestation case); Doe v. Petaluma City Sch. Dist., 830 F. Supp 1560 (N.D. Cal. 1993) (stating that compulsory attendance does not create a special relationship); Elliott v. New Miami Bd. of Educ., 799 F. Supp 818 (S.D. Ohio 1992) (finding that a special relationship arises where the state has prevented the plaintiff from protecting him or herself); Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp 1405 (E.D. Ark. 1992) (holding that no special relationship exists between the school and a mentally handicapped student), *aff'd*, 7 F.3d 729 (8th Cir. 1993). For cases that have held that schools owe their students an affirmative duty of protection, see Lichtler v. County of Orange, 813 F. Supp 1054 (S.D.N.Y. 1993) (imposing a duty to protect school children from weather disaster); Waechter v. School Dist. No. 14-030, 773 F. Supp 1005 (W.D. Mich. 1991) (stating that handicapped students had the necessary custodial relationship under *DeShaney*); Pagano by Pagano v. Massapequa Pub. Sch., 714 F. Supp 641 (E.D.N.Y. 1989) (recognizing an affirmative duty of the school to protect after 17 incidents of abuse by other school children).

150. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1369 (3d. Cir. 1992) (quoting DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 193 (1989)), *cert. denied*, 113 S. Ct. 1045 (1993).

151. Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 146 (5th Cir. 1992) (quoting Griffith v. Johnston, 899 F.2d 1427, 1439 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991)), *cert. denied*, 113 S. Ct. 1436 (1993), *vacated*, 987 F.2d 231 (5th Cir. 1993), *reheard en banc*, 15 F.3d 443 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994).

stances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.'"[152] The *Middle Bucks* dissent also recognized that only certain types of relationships give rise to an affirmative duty of protection.[153] The *Taylor* court voiced its agreement on this point by stating that "a duty to provide adequate protective services may arise out of 'special relationships' created or assumed by the state with regard to particular individuals."[154]

The *Middle Bucks* and *Taylor* courts, and the *Middle Bucks* dissent also recognized that *DeShaney* limited special relationships to instances where the State has the individual in its custody. The *Middle Bucks* court stated that *DeShaney* "left open the possibility that the duty owed by a state to prisoners and the institutionalized might also be owed to other categories of persons in custody."[155] Analogously, the *Middle Bucks* dissent acknowledged that under *DeShaney* a special relationship is formed when the State restrains an individual's freedom.[156] The *Taylor* court stated that "[a] special relationship exists 'when the State by an affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself.'"[157] Thus, these cases agree that special relationships are limited to instances where the state takes a person into its custody by limiting that person's freedom.

However, the courts differ in their interpretations of what constitutes custody. The critical language of *DeShaney* which describes "custody" states that "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."[158] The two positions, symbolized by *Taylor* and *Middle Bucks*, disagree on what exactly constitutes a "similar restraint of personal liberty."

152. *Middle Bucks*, 972 F.2d at 1369 (quoting *DeShaney*, 489 U.S. at 198).
153. *Id.* at 1377 (Sloviter, J., dissenting).
154. *Taylor*, 975 F.2d at 146 (quoting *Griffith*, 899 F.2d at 1439).
155. *Middle Bucks*, 972 F.2d at 1370.
156. *Id.* at 1379. The dissent avoids using the term "custody" because it feels that "custody" has connotations of full time physical restraint; however, the dissent does recognize that *DeShaney* limited "special relationships" to instances where the State limits an individual's freedom. *Id.*
157. *Taylor*, 975 F.2d at 146, (quoting Griffith v. Johnston, 899 F.2d 1427, 1439 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991)).
158. *DeShaney*, 489 U.S. at 200.

The *Middle Bucks* court narrowly interpreted the language in *DeShaney*. The court noted that "[t]he state's duty to prisoners and involuntarily committed patients exists because of the full time severe and continuous state restriction of liberty in both environments."[159] Thus, the court interpreted "other similar restraint of personal liberty" to be a restraint that mimics incarceration or institutionalization requiring full time and continuous restraint of personal freedom. In addition, such restraint must be "severe" in that it "renders [the individual] unable to care for himself, and at the same time fails to provide for his basic human needs *e.g.* food, clothing, shelter, medical care, and reasonable safety."[160] As a final requirement, the restraint must also be physical in nature.[161] Therefore, to the *Middle Bucks* court, custody meant full time and continuous physical restraint that prevents the individual from meeting his or her basic needs.

In contrast, the *Taylor* court and the *Middle Bucks* dissent interpreted *DeShaney's* "other similar restraint" language broadly. The *Middle Bucks* dissent noted that "*DeShaney* requires that the state have imposed some kind of limitation on a victim's ability to act in his own interests."[162] However, the state can limit an individual's ability to act in his or her best interest without necessarily placing the individual in continuous physical custody.[163] In addition, both the *Taylor* court and the *Middle Bucks* dissent believed that the state creates a special relationship when it makes an individual dependent upon the state. The *Middle Bucks* dissent explained that "'[a] proper analysis should look to [the] *implications* of custodial control, rather than only to the control itself, because it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian.'"[164] In accordance with this view, the *Taylor* court asserted that the state creates a special relationship in the school situation because "[p]arents, guardians, and the children themselves have little choice but to *rely* on the school officials for some measure of protection."[165] Thus,

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159. *Middle Bucks*, 972 F.2d at 1371.
160. *Id.* at 1370 (quoting *DeShaney*, 489 U.S. at 200).
161. *Id.*
162. *Id.* at 1379 (Sloviter, J., dissenting) (quoting Horton v. Flenory, 889 F.2d 454, 458 (3d. Cir. 1989)).
163. *Id.*
164. *Id.* at 1379 n.2 (Sloviter, J., dissenting) (quoting Huefner, *supra* note 68, at 1957).
165. *Taylor*, 975 F.2d at 147 (emphasis added).

when the state limits a person's freedom in a manner that makes the person dependent upon the state for protection, the state has taken that person into its functional custody, and therefore, has a duty to protect that person.

B. The Broader Interpretation is the Appropriate Standard

The broader interpretation that would allow for affirmative duties under relationships less restrictive than incarceration or institutionalization is a more appropriate reading of *DeShaney*. *DeShaney* itself did not narrowly define custody. The *Middle Bucks* dissent noted that "*DeShaney* contains no language to support [the *Middle Bucks* majority's] holding that the duty to protect can be triggered only by involuntary round-the-clock, legal custody."[166] If the Supreme Court had intended custody to exist only when the individual was incarcerated or institutionalized, the Court would not have included the phrase "other similar restraint" in its *DeShaney* opinion.[167] *Middle Bucks* interpreted custody so narrowly that an individual would have to be in a prison or a mental institution to be in custody. This interpretation would make the additional language in *DeShaney* superfluous. In fact, "*DeShaney* expressly recognized that there could be situations, beyond incarceration and institutionalization, where constitutional protections may be evoked."[168]

DeShaney linked custody to control when it held that the state had an affirmative duty when it exercised its authority over an individual and prevented that individual from caring for himself or herself.[169] However, the state can have enough control over an individual to limit that individual's ability to protect himself or herself without imposing twenty-four-hour physical restraint. For example, truancy laws exert control over the students by forcing them to be in school at the specified times. However, the *Middle Bucks* court contended that truancy laws exert less significant control because they only mandate that a child receive an education, and a parent could instead place the child in private school.[170]

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166. *Middle Bucks*, 972 F.2d at 1379.

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

168. Christopher Barr, *Recent Decision*, 66 TEMP. L. REV. 1063, 1071 (1993) (explaining the reconciliation of the *Stoneking* decisions with *DeShaney*).

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

170. *Middle Bucks*, 972 F.2d at 1371. The court noted that "it is the parents who decide whether that education will take place in the home, in public or private schools." *Id.*

Arguably, this is not a realistic view because private school is not affordable for most families. Therefore, the truancy laws in effect mandate public school attendance.[171] The *Middle Bucks* majority ignored the fact that public schools have a great deal of authority and control over the students. The court stated that "faculty and school officials have many of the privileges and immunities of parents under state law including *in loco parentis* status, and the right to administer proper discipline in order to maintain the classroom."[172] Thus, the state exerts control over children through its truancy laws and should expect to have the responsibilities which come with that control.

The control that the state exerts in requiring children to attend school prevents the children from caring for themselves. According to *Middle Bucks*, "parents remain the primary caretakers [of their children], despite their presence in school."[173] Therefore, the child's safety is the responsibility of the parents and not the school.[174] However, the *Middle Bucks* court missed a key point that *Taylor* acknowledged. Since children are too immature to provide for their own protection, their source of protection is their parents, the "primary caretakers."[175] By removing a child from the home, the state is removing the child from its source of protection and is depriving the child of the ability to protect itself because "it renders the guardian of that child powerless to act on the child's behalf."[176] "It is undeniable that schools not only restrict a student's ability to act on his or her own behalf, but also prevent parents or others from acting on the student's behalf."[177] Therefore, mandating school attendance creates an affirmative duty of protection. It meets *DeShaney's* criterion that the state exercise its power in a way that prevents an individual from caring for his or her own needs.

Additionally, the *Middle Bucks* court was misguided in its assertion that physical restraint is a necessary component of custody. It noted that *DeShaney* used incarceration and institutionalization as examples of custody, and concluded that a common element

171. Barr, *supra* note 168, at 1072.
172. *Id.* at 1071.
173. *Middle Bucks*, 972 F.2d at 1371.
174. *Id.* at 1371-73.
175. *Taylor*, 975 F.2d at 146.
176. *Id.*
177. Barr, *supra* note 168, at 1072.

of these was physical confinement because prisoners and mental patients "are not free to leave."[178] However, it makes no difference whether the state deprives liberty through force or threat of force. Truancy laws are in essence a threat of force because they rely on the principle of punishing parents or guardians for a child's absence from school. This is just as compulsory as the actual use of force, i.e., physically restraining someone. The *Middle Bucks* dissent noted that "[a]lthough a student is not held in school under shackles, there is substantial compulsion associated with schooling."[179] Thus, although the mechanism of deprivation is different, both force and threats of force are instances where the state is depriving the individual of his or her liberty. The absence of actual physical restraint in the school situation does not remove the custodial nature of the relationship.

Furthermore, the *Middle Bucks* court was incorrect in distinguishing the school situation from incarceration and institutionalization on the grounds that children have outside avenues of communication. The *Middle Bucks* court found that students are not in the custody of the school because the students still have the ability to communicate with people outside of the school.[180] In contrast, prisoners and mental patients must route all of their communications through state officials.[181] Therefore, the schools do not have the degree of control necessary to achieve custody because the state does "not deny [students] meaningful access to sources of help."[182]

However, the court's notion that children have access to outside help is flawed. The trauma associated with sexual abuse often psychologically prevents the victim from revealing the abuse. Federal case law has recognized the notion that child-victims of sexual abuse often are unable to relate their experiences.[183] Additionally, experts in the field of child psychology recognize that children are

178. *Middle Bucks*, 972 F.2d at 1371.
179. *Id.* at 1379 (Sloviter, J., dissenting).
180. *Id.* at 1372.
181. *Id.*
182. *Id.*
183. *See* Myers v. Morris, 810 F.2d 1437, 1459-60 (8th Cir. 1987) (noting that "the record contains materials documenting the reluctance of juvenile sexual abuse and incest victims to disclose the experience"), *cert. denied*, 484 U.S. 828 (1987); Doe v. New York City Dep't of Social Serv., 709 F.2d 782, 785 (2d Cir. 1983) (finding that "a great majority of abused children deny occurrence of such abuse"), *cert. denied sub nom.* Catholic Home Bureau v. Doe, 464 U.S. 864 (1983).

reluctant to speak of their abuse. One expert writes that interviewing child-victims "is sometimes very difficult [because] [m]any children will not want to [sic] talk about the sexual abuse."[184] This same expert included a separate section in her book on how to interview children who are reluctant to disclose their experiences because "[t]he child who willingly and readily talks about the sexual abuse is the exception rather than the rule."[185] Another work used the term "silent rape" in referring to the widespread phenomenon of adolescent victims hiding the fact that they are being abused.[186] The authors observed that "the adolescent may be the least likely person to report what has happened to the authorities. Sadly, many adolescent victims do not tell their parents or family members."[187] Thus, it is a well-established fact that children who are victims of sexual abuse are reluctant to reveal their experiences when interviewed by a psychiatrist and are even less likely to volunteer the information on their own.

The law also recognizes that a child's judgment is not fully mature. Justice Sloviter in his *Middle Bucks* dissent observed that Pennsylvania children "cannot vote, they cannot serve in the armed forces, if arrested, they are tried in juvenile courts, and if pregnant, they must ask a parent for permission to have an abortion."[188] Therefore, the final flaw with the *Middle Bucks* position is that the court expected sexually abused children to behave like fully rational adults, not recognizing that psychological barriers close off channels of outside communication.

C. *The Foster Care Analogy*

Both the *Middle Bucks* and *Taylor* courts tried to support their respective views by comparing the student-school relationship to a foster care relationship. The *DeShaney* Court decided not to address the issue whether the state would have an affirmative duty of protection when a child is placed in foster care. The Court stated that

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184. KATHLEEN COULBORN FALLER, CHILD SEXUAL ABUSE: AN INTERDISCIPLINARY MANUAL FOR DIAGNOSIS, CASE MANAGEMENT, AND TREATMENT 156 (1988) (discussing the characteristics and evaluation process of child sexual abuse as well as the techniques for intervention).

185. *Id.* at 184.

186. DIANA SULLIVAN EVERSTINE & LOUIS EVERSTINE, SEXUAL TRAUMA IN CHILDREN AND ADOLESCENTS 74 (1989) (providing guidelines for the assessment and treatment of child and adolescent sexual abuse).

187. *Id.*

188. *Middle Bucks*, 972 F.2d at 1380 (Sloviter, J., dissenting) (citations omitted).

> [h]ad the State . . . removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. . . . Several Courts of Appeals have held . . . that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.[189]

Several circuit courts, as the *DeShaney* Court mentioned, have held that the state has an affirmative duty to protect children in foster care. The Second Circuit, in *Doe v. New York City Department of Social Services*,[190] held that the state has a duty to protect foster children because "[w]hen individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution."[191] The Eleventh Circuit, in *Taylor by Walker v. Ledbetter*,[192] also held that a § 1983 claim could be brought against state officials for failing to protect children in foster care.[193] The court stated that "[t]he liberty interest in this case is analogous to the liberty interest in *Youngberg*. In both cases, the state involuntarily placed the person in a custodial environment. . . ."[194] Thus, this behavior is sufficient to establish an affirmative duty of protection.[195]

The *Taylor by Walker* court subscribed to the position that the state has an affirmative duty of protection toward children placed in foster care because "[a] special relationship between the state and a child arises."[196] The special relationship, and thus an affirmative duty, is formed because the state has used its power to re-

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189. *DeShaney*, 489 U.S. at 201 n.9.

190. 649 F.2d 134 (2nd Cir. 1981), *cert. denied sub nom.*190. Catholic Home Bureau v. Doe, 464 U.S. 864 (1983).

191. *Id.* at 141.

192. 818 F.2d 791 (11th Cir. 1987), *cert. denied,* 489 U.S. 1065 (1989).

193. *Id.* at 797.

194. *Id.* at 795. *See* Youngberg v. Romeo, 457 U.S. 307, 319 (1982) (holding that a minor in a state mental health facility has a Fourteenth Amendment liberty interest in "minimally adequate or reasonable training to ensure safety and freedom from undue restraint").

195. *Taylor by Walker*, 818 F.2d at 795.

196. *Taylor*, 975 F.2d at 146.

move the child's normal source of protection. The court recognized that "[a] child generally depends on his parents to guard against the dangers of his surroundings. . . . By removing the child from his home, even when the child's best interests lie in such action, the state thereby obligates itself to shoulder the burden of protecting the child from foreseeable trauma."[197] The *Taylor by Walker* court then applied this logic to the school situation. Since the school removed the child from its home for a portion of the day, it therefore the assumed a duty to protect the child while the child was at school.[198] According to the *Taylor by Walker* court, the student-school situation is analogous to foster care, and therefore, the state has a duty to protect the students.

The *Middle Bucks* court also recognized that the state could have an affirmative duty to protect children in foster care, but the court distinguished the student-school relationship from the foster care context.[199] The court stated that "the child's placement [in foster care] renders him or her dependent upon the state, through the foster family, to meet the child's basic needs. Students, on the other hand, do not depend upon the schools to provide for their basic human needs."[200] In addition, children are in foster care around the clock, whereas "[p]ublic school students are required to spend only 180 six-hour days in the classroom per year."[201] Furthermore, when a child is placed in foster care, the state, as well as the foster parents who are agents of the state, become the child's primary caretakers. In contrast, "during the school day . . . parents or others remain a child's primary caretakers and decisionmakers."[202] Therefore, according to the *Middle Bucks* court, a child in foster care is more analogous to a prisoner or a mental patient than a student. Even if the state has an affirmative duty of protection to children in foster care, this duty cannot be extended to students whose situation does not mimic foster care.[203]

It is clear from the foster care analogy that the *Middle Bucks* court interpretated *DeShaney* too narrowly. Despite the arguments

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197. *Id.*
198. *Id.*
199. *Middle Bucks*, 972 F.2d at 1372.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 1372.

of the *Middle Bucks* court, foster care is radically different from incarceration or institutionalization. Physical restraint, one of the key elements of incarceration and institutionalization, is missing in the foster care context. Children are not kept under lock and key in foster homes. Yet, the *Middle Bucks* court rejects the notion that schools have custody of the students because the students are not physically restrained.[204] To be consistent, the *Middle Bucks* court would have to deny that foster care can give rise to an affirmative duty of protection. However, since the state does have an affirmative duty of protection in the foster care situation, the *Middle Bucks* court's interpretation of *DeShaney*, which would exclude foster care from situations where the state has a duty to protect the individual, is incorrect.

D. *Factual Differences Between* Taylor *and* Middle Bucks

One could argue that the different outcomes in *Middle Bucks* and *Taylor* are just a function of their substantially different facts. The crucial factual difference between the two cases is that in *Taylor*, the offender was a school employee, whereas in *Middle Bucks* the perpetrators were students. Courts may be more willing to place an affirmative duty on the state when the perpetrator is a state employee as opposed to a private citizen.[205] The *Taylor* court stated that "[t]he precise contours of a school official's duty, as it pertains to injuries inflicted by someone other than a school teacher (or other subordinate), is not before us."[206] This implies that the court saw the two situations as distinct, and it may have reached a different result if the abuse had been inflicted by a student. Thus, the difference between the two cases may just be a factual one. However, it seems unlikely that the question of whether schools have custody of their students depends upon who victimizes the students. Instead, the custody analysis is independent of the harm committed, and students are either in the custody of the school or they are not. Custody is not flexible as to the circumstances surrounding a student's injury.

In addition, courts in other contexts have held that both schools

204. *See supra* note 118 and accompanying text (referring to the *Middle Bucks* contention that custody requires 24-hour-a-day physical restraint).

205. Huefner, *supra* note 68, at 1964 (noting that it is more likely that courts will find liability when the perpetrator is a state actor).

206. *Taylor*, 975 F.2d at 147 n.14.

and school officials have an affirmative duty to protect students from other students. The Fifth Circuit explained that when the state mandates school attendance, "it assumes a duty to protect them [the students] from dangers posed by anti-social activities-their own and those of *other students*."[207] In *Lopez v Houston Independent School District*,[208] school officials were found to have a duty to protect students from other students. In *Lopez*, a student was attacked by three fellow students on the school bus. John Lopez, the plaintiff, was injured because he was seated next to the student who was attacked.[209] The bus driver took no action to stop the fight.[210] The *Lopez* court held that the bus driver could be subject to constitutional tort liability for not protecting the student if it were found that he was deliberately indifferent to the student's plight.[211] Therefore, courts have held that school officials have a duty to protect students from each other. Since the question of custody does not depend upon who perpetrates the crime, the factual differences between *Taylor* and *Middle Bucks* cannot be the basis for their conflicting holdings.

E. The Fear of Massive Liability is Unjustified

Those opposed to finding a constitutional deprivation in cases of sexual abuse in the public schools argue that, if the schools have an affirmative duty of protection, then the schools would be open to massive liability. One opponent has urged that "'[l]ocal government officials regard constitutional tort actions as a serious threat to the fiscal health of cities and counties.'"[212] School systems may also fear that if they are found to have custody of the students, giving them an affirmative duty to protect the students, the school will be driven into bankruptcy by litigation.[213] However, the assumption that allowing § 1983 claims will lead to an in-

207. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (emphasis added) (holding that dog sniffing of cars and lockers does not violate the Fourteenth Amendment, but that dog sniffing of children without reasonable suspicion is unconstitutional).

208. 817 F.2d 351 (5th Cir. 1987) (allowing a § 1983 claim to proceed against a bus driver, but prohibiting suit against two superviosry officials).

209. *Id.* at 352.

210. *Id.*

211. *Id.* at 355-56.

212. Huefner, *supra* note 68, at 1961 (quoting Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 650 (1987)).

213. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 650 (1987).

creased number of lawsuits and massive liability has not materialized in other areas where § 1983 claims can be made. In fact, "recent studies of constitutional tort litigation in the federal courts suggest that, contrary to popular perception, the advantages of § 1983 suits have not led to an unusual increase either in filings of such suits or in judgments costly to government bodies."[214] Therefore, fears that the school will be exposed to intolerable liability and litigation expenses is not a valid justification for refusing to extend constitutional protection to victims of sexual abuse in the public schools.

Opponents also fear that if the courts recognize an affirmative duty of protection, then schools will be liable for every minor incident or injury that occurs at school.[215] Specifically, opponents reason that if sexually abused students are allowed to bring constitutional claims against the school, the next time one third-grader gives another third-grader a bloody nose at recess, the school will be liable for not protecting the child's liberty rights. However, this fear is unjustified. For officials to be liable under § 1983, they must be deliberately indifferent to the plight of a student.[216] Mere negligence upon the part of an official will not trigger liability.[217] If schools are found to have an affirmative duty of protection, school officials would be liable only in cases like *Taylor* and *Middle Bucks*, where the officials know that the abuse is occurring but do nothing to stop it. In cases where school officials do not have any knowledge of the ongoing abuse, they could not be deliberately indifferent, and the school system would not liable.

Jones v. Board of Education of School District 50, Archuleta and Hinsdale Counties[218] is an example of a case where the high standard of culpability insulated the school district from liability. In *Jones*, the parents of a child allegedly molested by a fourth grade teacher brought a § 1983 claim against the school district.[219] Summary judgment for the school district was affirmed on appeal, even though the school district *conceded* that it had an affirmative duty to protect the child.[220] The school district was not liable be-

214. Huefner, *supra* note 68, at 1961-62.
215. Eisenberg & Schwab, *supra* note 213, at 645.
216. City of Springfield v. Kibbe, 400 U.S. 259, 269 (1987).
217. City of Canton v. Harris, 489 U.S. 378, 388-89 (1989) (explaining the deliberate indifference standard for § 1983 liability by inaction).
218. 854 P.2d 1386 (Colo. Ct. App. 1993).
219. *Id.* at 1387.
220. *Id.* at 1390.

cause it had not been deliberately indifferent to the student's plight. The court stated that

> there was no breach of that affirmative duty because, as previously stated, the principal, school superintendent, teachers, and members of the school board neither knew or reasonably should have known of the offending teacher's actions until after he was suspended. We [the court] agree that, without such knowledge, the school board could not have acted with reckless or deliberate indifference to its duty to protect plaintiff.[221]

As with the *Jones* case, the high standard of culpability will prevent most cases from becoming § 1983 claims.[222]

F. Federalism Concerns and State Tort Immunity

Those opposed to imposing an affirmative duty of protection upon the schools also defend their position by arguing that a healthy concern for federalism mandates that schools not be held liable under § 1983.[223] The Supreme Court applied this line of reasoning to *DeShaney*. The Court declined to impose such a system of official liability on Wisconsin through the Due Process Clause of the Fourteenth Amendment and suggested instead that voters could impose liability through the tort system.[224] The *Middle Bucks* court also stated that a broader interpretation of § 1983 liability "would readily convert much tortious conduct into constitutional violations at the expense of a decent regard for federalism."[225] Therefore, the argument suggests that in the interests of state autonomy and federalism, the courts should allow the states to

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221. *Id.*

222. Ralph D. Mawdsley, *Compensation for the Sexually Abused Student*, 84 EDUC. L. REP. 13, 20 (1993) (explaining that "supervisory officials will not be liable under Section 1983 where they had no prior actual or constructive knowledge that a teacher posed a threat of sexual abuse to the particular student who had been molested."). *See also supra* notes 64-67 and accompanying text.

223. Eisenberg & Schwab, *supra* note 213, at 645 (stating that under the dominant articulated perception of constitutional tort litigation, § 1983 cases flood the federal courts with questionable claims that belong, if anywhere, in state court).

224. *DeShaney*, 489 U.S. at 203 ("The people of Wisconsin may well prefer a system of liability which would place upon the state and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the state in accordance with the regular law making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.").

225. *Middle Bucks*, 972 F.2d at 1377.

decide whether school officials should be liable for turning their backs on sexual abuse occurring in the public schools.

However, any action against school systems and school officials under state tort law would have to be on a theory of negligent hiring and retention, since respondeat superior liability is inapplicable to these cases.[226] The doctrine of respondeat superior holds an employer liable for the tortious conduct of his or her employees if the tort is committed in the scope of employment.[227] If an action is authorized by the employer and it is in furtherance of the employer's business, the action is within the scope of employment.[228] Respondeat superior also requires the tort to be "foreseeable," defined as "an employee's conduct [that] is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business."[229] Sexual abuse is outside the scope of employment, and it is considered to be an unforeseeable tort. Therefore, "[s]exually molested plaintiffs are generally not successful in respondeat superior because courts refuse to find that the personal, self-serving acts of a sexual abuser are within the scope of authority of the school district or are foreseeable risks that the school district should have to assume."[230]

Victims who choose to seek relief under state tort law must proceed under a negligent hiring and retention theory. Negligent hiring and retention allows a plaintiff to recover from an employer for an employee's acts that were committed outside the employee's scope of employment[231] if the employee is not suited to the task, or is dangerous to the public because he or she places third parties in an unreasonable risk situation.[232] In the school context, a

226. Richard Fossey, *Child Abuse Investigations in the Public Schools: A Practical Guide for School Administrators*, 69 EDUC. L. REP. 991, 996 (1991) (discussing the problems that arise when a public school administrator investigates an allegation of child abuse against a school employee).

227. *Id.* at 995.

228. Bruce Beezer, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 EDUC. L. REP. 1117, 1118 (1990) (discussing the concept of negligent hiring and retention in comparison to respondeat superior).

229. Mawdsley, *supra* note 222, at 25 (quoting Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 291 (Ct. App. 1981)).

230. *Id.*

231. RESTATEMENT (SECOND) OF TORTS § 317 (1965) (stating that an employer can be liable if he or she: (1) knows or should have known of an ability to control the employee; or (2) knows or should have known of an opportunity or necessity for imposing control).

232. *Id.*

school and its administrators would be liable if its officers knew or should have known that a school employee or applicant had a history of sexual abuse and the school retained or hired the person despite the person's record.[233] The school would also be liable in situations where the officers knew of or should have known that an employee sexually abused a student and the school retained the employee notwithstanding this knowledge.[234]

However, many states have governmental immunities that block negligent hiring and retention claims against public schools.[235] Governmental immunity is a doctrine that absolves goverment agencies and officials from tort liability when they are acting in their official capacities. In theory, agencies and officials cannot be sued for carrying out their governmental functions.[236] The rationale for this immunitity is that it promotes "vigorous decisionmaking."[237] This is based on the notion that if officials are subject to lawsuits, they will not be able to make necessary decisions because they will fear being sued. School districts have governmental immunity.[238] Since "hiring and supervision of school personnel is a discretionary governmental function that is necessary to carry out public education,"[239] the school districts and officials are immune from liability for their official actions.[240]

There are a few courts that have not allowed governmental immunity to bar negligent hiring and retention claims against school systems and officials. In *Doe v. Durtschi*,[241] the Supreme

233. Mawdsley, *supra* note 222, at 26-27.

234. *Id.* at 27.

235. *Id.* at 26. *See* Beezer, *supra* note 228, at 1119 (stating that courts in New Mexico, Michigan, Missouri, Pennsylvania, and Wisconsin have upheld governmental immunity for school officials in negligent hiring and retention actions). *See also* Scott J. Borth, Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 540-46 nn.23-48 (1983) (demonstrating that in 13 states, municipal governments and officials have absolute immunity from tort liability, 24 states retain tort immunity but provide for exceptions in certain circumstances, and 15 states have abolished governmental tort immunity).

236. E. EDMUND REUTTER, JR. & ROBERT R. HAMILTON, THE LAW OF PUBLIC EDUCATION 272 (2d. ed. 1976) (giving a general overview of how the law directly affects public education in the United States).

237. SCHUCK, *supra* note 42, at 88.

238. REUTTER & HAMILTON, *supra* note 236, at 272. (explaining that "[s]chool districts, being instrumentalities of the state through which it carries out the state function of education, fall within the category of agencies immune from liability for torts")

239. Beezer, *supra* note 228, at 1119.

240. Mawdsley, *supra* note 222, at 26.

241. 716 P.2d 1238 (Idaho 1986).

Court of Idaho found a school district liable for the negligent hiring and retention of a teacher who sexually abused four female students.[242] However, the court based its decision on the fact that the Idaho state legislature had passed a law that effectively waived immunity. "[T]he State in enacting the ITCA [Idaho Tort Claims Act], had 'subjected itself to liability for its own negligent acts and the negligent acts of its employees. . . .'"[243] Thus, the school system was liable only because a state law eliminated its immunity. A few other courts also have refused to allow schools to avoid liability for negligent hiring and retention.[244] However, "[e]ven in jurisdictions that permit law suits for negligence against school districts and employees, courts are often reluctant to find liability for negligent hiring or negligent supervision."[245]

Since state tort law generally cannot hold school officials liable for their deliberate indifference toward sexual abuse, victims must be allowed to turn to federal law for relief. Holding school systems liable under § 1983 is necessary because "[c]omplicated state law immunities may protect municipalities and school districts from many state tort claims but will not insulate them from a constitutional tort suit."[246] Without § 1983 claims, students who are sexually abused will remain helpless to hold school officials liable for ignoring their plight. For example, D.R.'s attorney in *Middle Bucks* acknowledged that there was no state remedy available because of sovereign immunity.[247] Misplaced adherence to "federalism" will obviously not protect the rights of students victimized in the public schools.

G. Case by Case Approach to Custody

A Villanova law professor, William Valente, has proposed a compromise position. Instead of a bright line rule that either places liability on the school or exempts the school from liability, Valente proposes a presumption that schools do not have special relation-

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242. *Id.* at 1242.
243. Beezer, *supra* note 228, at 1120 (quoting *Durtschi*, 716 P.2d at 1243).
244. *Id.* at 1120.
245. Fossey, *supra* note 226, at 992-93.
246. Huefner, *supra* note 68, at 1961.
247. Stephanie B. Goldberg, *School Violence:* DeShaney *Bars Liability*, A.B.A. J., Oct. 1992, at 92, 93.

ships with their students.[248] This presumption could only be overcome if the plaintiff can show "exceptional circumstances" which place him or her in the full custody of the school.[249] In *Middle Bucks*, Valente concludes that the school would be liable under his presumption test because the surrounding circumstances, i.e. the unruly class room, the confinement to that classroom, and D.R.'s vulnerability due to her handicap, created an environment where D.R. was in the custody of the school.[250] However, this approach fails to address the purpose behind § 1983, which is to deter deliberate indifference on the part of school officials when their students are being abused sexually. Valente's presumption test would not provide much deterrence because it only protects the small percentage of students who can prove themselves to have "exceptional circumstances."[251]

VIII. END RUN *DESHANEY*?

Applying *DeShaney* to the school situation would not be a controversial issue if there were other theories under which these victims of sexual abuse could hold the school system and the school officials liable. Two other theories that do not require custody could allow a student to bring a 42 U.S.C. § 1983 claim against the school and the school officials. These theories are the "alternative liability" theory first established in *Stoneking v. Bradford Area School District* (*Stoneking II*),[252] and the "state-created danger" theory. It is necessary to analyze these theories because if they allow students to bring a § 1983 claim, *DeShaney* can be circumvented, and therefore, the question of whether the school has custody of the students would be moot.

A. *Alternative Liability*

Stoneking II was the first case to apply the theory of alternative liability to the problem of sexual abuse in the public schools. Kathleen Stoneking was a student at Bradford Area High School

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248. William Valente, *Liability for Teacher's Sexual Misconduct with Students—Closing and Opening Vistas*, 74 EDUC. L. REP. 1021, 1027 (1992) (discussing § 1983 and the Supreme Court decisions under Title IX).

249. *Id.*

250. *Id.* at 1028.

251. *Id.* at 1028-29.

252. 882 F.2d 720 (3d. Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) [hereinafter *Stoneking II*].

from 1979 until her graduation in 1983.[253] She was sexually abused by Edward Wright, the school's band director.[254] Wright used force, threats of force, intimidation, and coercion to force Kathleen to engage in various sexual acts while she was a high school student from 1980 until 1983, and after her graduation until 1985.[255] Many of these sexual assaults took place in the band room at the high school or on band-related trips.[256] Wright later pled guilty to various sex-related crimes.[257] The school's principal, Frederick Smith, had received complaints about Wright.[258] The most dramatic of these complaints was in 1979.[259] A female student and member of the school band informed Smith that Wright had attempted to rape her.[260] Smith's response was rather callous, and after refusing to investigate the student's charges, he required the *student* to publicly retract the allegations.[261] Smith did tell Wright not to have any "one on one" contact with female students, but Smith made no efforts to enforce this "policy."[262] Smith also kept a personal file of the various complaints and allegations made against Wright, but he kept this file at his home and actively concealed this information from both the students and their parents.[263] Richard Miller, the assistant principal, and Frederick Shuey, the superintendent, were informed of the complaints against Wright, but neither of them took any action to correct the situation.[264] Kathleen Stoneking filed a claim against the school district, Smith, Miller, and Shuey under 42 U.S.C. § 1983.[265]

The first time this case reached the Third Circuit Court of Appeals, the defendants were appealing the denial of their summary judgment motion. The Third Circuit affirmed the district court and held that both schools and their officials could be liable under §

253. Stoneking v. Bradford Area Sch. Dist., 856 F.2d 594, 595 (3d. Cir. 1988) [hereinafter *Stoneking I*], *cert. granted and judgment vacated sub nom.* Smith v. Stoneking, 489 U.S. 1062 (1989).
254. *Stoneking II*, 882 F.2d at 722.
255. *Stoneking I*, 856 F.2d at 595-96.
256. *Id.* at 596.
257. *Stoneking II*, 882 F.2d at 722.
258. *Stoneking I*, 856 F.2d at 595.
259. *Id.*
260. *Id.*
261. *Stoneking II*, 882 F.2d at 722.
262. *Id.* at 729.
263. *Id.*
264. *Stoneking I*, 856 F.2d at 595.
265. *Stoneking II*, 882 F.2d at 722; *Stoneking I*, 856 F.2d at 595-96.

1983 for failing to protect their students.[266] Thus, *Stoneking I* asserted that schools have an affirmative duty to protect their students.[267] The court based this duty on the notion that students are in the "functional custody" of the school: "because students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities, at least at the time they are present."[268] The court's analysis was similar to the analysis done by the *Taylor* court when it reasoned that mandatory attendance creates custody (or functional custody), which forms a special relationship, thus imposing an affirmative duty of protection on the state. Therefore, schools and school officials are liable if they breach that duty.[269] However, *Stoneking I* was decided before *DeShaney*. After *DeShaney* was decided, the Supreme Court remanded *Stoneking I* to the Third Circuit to reconsider the decision in light of *DeShaney*.[270]

On remand, the Third Circuit once again held that the defendants could be liable under § 1983.[271] However, while not rejecting its analysis in *Stoneking I*, the court decided to base its decision in *Stoneking II* on the alternative liability theory because of fears that "uncertainty of the law" caused by *DeShaney* could lead to further delays.[272] The court held that under 42 U.S.C. § 1983 the school officials were liable if they "established and maintained a policy, practice or custom which directly caused her constitutional harm."[273] Additionally, the court stated that "[l]iability of . . . policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the . . . officials and the individuals harmed."[274] Thus, since no special relationship is required for liability to attach, alternative liability circumvents *DeShaney*.

The *Stoneking II* court cited *City of Canton v. Harris*[275] to

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266. *Stoneking I*, 856 F.2d at 602.
267. *Id.* at 603.
268. *Id.* at 601.
269. *See id.* at 600 (citing *Youngberg* and *Estelle* to indicate that the state has an affirmative duty to protect individuals that are in the state's custody).
270. Smith v. Stoneking, 489 U.S. 1062, 1062 (1989).
271. *Stoneking II*, 882 F.2d at 725.
272. *Id.* at 724.
273. *Id.* at 725.
274. *Id.*
275. 489 U.S. 378 (1989) (involving injuries to a person in police custody).

support its decision.[276] In *Harris*, the Court held that a municipality could be liable under § 1983 "where the failure to train [officers] amounts to deliberate indifference to the rights of persons with whom the police come into contact."[277] Similarly, the *Stoneking II* court held that a jury could conclude that the defendants' actions, and inactions, could have been viewed as a communication to Wright that his conduct would not be prohibited, thus establishing a custom or policy that the teacher's sexual abuse of students would not be punished.[278] Thus, schools and school officials may be held liable under § 1983 if they maintain a policy or custom which harms individuals. This alternative liability theory does not require that there be a special relationship between the state and the victim.

The *Taylor* court developed two independent lines of reasoning which both concluded that the school officials could be liable for a § 1983 violation. One theory was that the students were in the "custody" of the school, thus the school had an affirmative duty of protection,[279] and the other was the *Stoneking II* alternative liability theory.[280] The *Taylor* court concluded that "school officials can find themselves liable for the malfeasance of their subordinates if they know or should be aware of the transgressions, yet consciously choose not to put an end to them, for such dereliction can only be viewed as implicit condonation of the subordinate's constitutional indiscretion."[281] Therefore, it was unnecessary for the *Taylor*

276. *Stoneking II*, 882 F.2d at 725.

277. *Harris*, 489 U.S. at 388.

278. *Stoneking II*, 882 F.2d at 728-29 (stating that between 1978 and 1982 Smith and Miller received at least five complaints about sexual assault of female students by teachers and staff members; that Shuey was told about some of these complaints; that Smith recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which they were accused would not reflect negatively on them; and that Smith and Miller discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation). For general discussion of the *Stoneking* cases, see Valente, *supra* note 63, at 645.

279. Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992) (stating that "by compelling a child to attend public school, the state cultivates a special relationship with that child and thus owes him an affirmative duty of protection"), *cert. denied*, 113 S. Ct. 1436 (1993), *vacated*, 987 F.2d 231 (1993), *reheard en banc*, 15 F.3d 443 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994).

280. *Id.* at 144 (holding that school officials may be liable for a policy of "reckless indifference" toward abuse).

281. *Id.* at 145.

court to find the schools liable under *DeShaney* because the alternative liability theory of *Stoneking II* would have provided a sufficient basis for liability.[282]

It should be noted, however, that the alternative liability theory cannot be applied to every case of sexual abuse that occurs in the public schools because it is only applicable to instances where an *employee* of the school has committed the sexual abuse. The *Stoneking II* court distinguished the case from *DeShaney* partly on the basis that the perpetrator in *DeShaney* was a private citizen, whereas in *Stoneking II*, the perpetrator was a state employee "subject to [the] defendants' immediate control."[283] The *Stoneking II* court also implied that alternative liability applies only when state employees commit the torts by stating that "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates."[284] Similarly, the *Taylor* court indicated that alternative liability is limited to instances of malfeasance of subordinates.[285] Furthermore, the *Middle Bucks* court, the same court that decided *Stoneking II*, held that alternative liability did not apply to *Middle Bucks* because the sexual assaults were committed by students, not by state employees, stating that "this case lacks the linchpin of *Stoneking II*, namely, a violation by state actors."[286] Because the perpetrators in *Middle Bucks* were private actors, the case was not distinguishable from *DeShaney*.[287]

Stoneking II is also limited in applicability by the facts of the case itself. Alternative liability may be restricted to cases where school officials ignore sexual abuse that occurs over a period of years. One commentator, in an article advising school administrators about their potential liability in child abuse cases, wrote:

> School administrators should not be alarmed by the *Stoneking* decision. The student's allegations, that school

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282. In fact, this is precisely what the Fifth Circuit did upon rehearing *Taylor*. The court avoided the issue of custody and only applied the alternative liability theory. *Taylor*, 15 F.3d at 452-56.

283. *Stoneking II*, 882 F.2d at 724.

284. *Id.* at 725.

285. *Taylor*, 975 F.2d at 144. (stating that the plaintiff must show that subordinates committed the offensive acts).

286. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1376 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

287. *See* Barr, *supra* note 168, at 1063-64 (noting that the *Middle Bucks* court relied on an extension of *DeShaney*).

> officials failed to respond to complaints of sexual assault over a period of several years, are quite unusual. Since state law requires school officials to report suspected child abuse immediately to state authorities, there should be few instances in which a student could plausibly claim that school administrators condoned a pattern of sexual assault over a long period of time.[288]

Therefore, because sexual assault cases in schools are unlikely to last for several years, alternative liability will not be available in most cases of sexual abuse.

B. State-Created Danger

The "state-created danger theory" is another way in which state agencies and officials can be held liable under 42 U.S.C. § 1983. Under this theory, the state assumes an affirmative duty to protect an individual.

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.[289]

Many federal courts have applied this theory in a variety of contexts. In *Wood v. Ostrander*,[290] an arresting officer stranded an intoxicated driver's female passenger in a dangerous neighborhood, and the woman was raped while trying to get home.[291] The court held that the police officer had placed the woman in a position of danger, and since the officer failed to protect her, the he was potentially liable for a constitutional tort.[292] The Eleventh Circuit concluded in *Cornelius v. Town of Highland Lake*[293] that the state created a danger by allowing prisoners with records of violence to participate in a work release program at city hall.[294] In *Cornelius*,

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288. Fossey, *supra* note 226, at 994.

289. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (holding that officials were not liable under § 1983 for releasing a mental patient who later killed because they did not place the victim in a position of danger).

290. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

291. *Id.* at 586.

292. *Id.* at 589-90 (reversing the district court's summary judgment dismissal for the police officer).

293. 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990).

294. *Id.* at 359.

two prisoners took a female city clerk hostage and held her for three days.[295] The court concluded that the state had affirmatively created the danger, and therefore, could be held liable under § 1983 for violating the clerk's Fourteenth Amendment rights.[296] Therefore, when a state official's actions place a person in a dangerous situation, the state assumes responsibility for that person's safety. If the state fails to protect that person, the state may be liable under § 1983 for violating the person's Fourteenth Amendment right to bodily integrity.

In *DeShaney*, the Supreme Court recognized that the state would have had an affirmative duty of protection if it had created the danger, and that custody would not have been required in such case to impose liability under § 1983.[297] However, *DeShaney* held that the state-created danger theory was not applicable because the state did not place Joshua DeShaney in danger. "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[298] Since Joshua was already in danger from his father, the state did not create the danger.[299] Additionally, by leaving Joshua in his father's custody, the state did not increase Joshua's danger; therefore, the state could not be liable under the state-created danger theory.[300] This language indicates that if the state had been responsible for Joshua's predicament, the state would have been liable despite the fact that Joshua was not in the state's custody. Therefore, custody may not be necessary in cases where the state creates the danger.

It should be noted, however, that the state-created danger theory is limited to cases where state officials take affirmative actions that create or exacerbate danger to an individual.[301] One can determine from the *DeShaney* holding that failing to diffuse a dangerous situation or failing to prevent harm does not constitute a situa-

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295. *Id.* at 350.
296. *Id.* at 355-59.
297. DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 197-201 (1989).
298. *Id.* at 201.
299. *Id.*
300. *Id.* (noting that "when [the state] returned [Joshua] to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.")
301. *See DeShaney*, 489 U.S. at 201.

tion where the state has created the danger.[302] One court has noted that "[p]ost-*DeShaney* courts have [interpreted *DeShaney*] by asking whether the state actors involved affirmatively acted to *create* plaintiff's danger, or render him or her more *vulnerable* to it."[303]

The limited applicability of the state-created danger theory becomes shockingly clear when one examines the case of *Brown v. Grabowski*.[304] In *Brown*, a woman complained to the police that her former boyfriend had sexually assaulted and threatened her.[305] However, the police took no significant action, and the woman was later murdered by her ex-boyfriend.[306] The court held that the police were not liable under the state-created danger theory because they had not created the danger, nor they had done anything to increase the danger.[307] Similarly, a state-created danger theory could not be used in cases of sexual abuse in the public schools, unless the school officials took affirmative actions that made students more vulnerable to the abuse.

The *Middle Bucks* case dealt with the issue of whether the school officials were liable under a state-created danger theory. The plaintiffs alleged that the school system and its officials

> created a climate which facilitated sexual and physical abuse of students, by: (1) failing to report to the parents or other authorities the misconduct resulting in abuse to plaintiffs; (2) placing the class under the control of an inadequately trained and supervised student teacher; (3) failing to demand proper conduct of the student defendants; and (4) failing to investigate and put a stop to the physical and sexual misconduct.[308]

The physical layout of the classroom, which had a unisex bathroom, was also cited as a factor which increased the danger of sexual abuse.[309] The plaintiffs contended that these factors exacerbated the danger of sexual abuse, and thus, the school and the school officials should be liable under the state-created danger

302. *Id.*
303. *Middle Bucks*, 972 F.2d at 1373.
304. 922 F.2d 1097 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991).
305. *Id.* at 1101-02.
306. *Id.* at 1102-03.
307. *Id.* at 1120-21.
308. *Middle Bucks*, 972 F.2d at 1373 (quoting L.H.'s Amended Complaint).
309. *Id.* at 1375.

theory.[310]

However, the court rejected the plaintiff's argument.[311] According to one commentator, "[t]he majority focused on the fact that the school did not take affirmative actions to create the danger and, therefore, did not have a duty to protect the students."[312] The court did not agree that having a unisex bathroom in any way increased the danger of sexual abuse because "[t]he same conduct could have occurred had the school built separate bathrooms for its male and female students."[313] Additionally, the court held that for the state to be liable under the state-created danger theory, the risk of the plaintiffs' injury must have been forseeable.[314] The court concluded that the school did not create a danger by assigning a student teacher or failing to stop the chaotic atmosphere of the classroom because these actions or omissions did not create a foreseeable risk of sexual abuse.[315] Additionally, the court noted that the school's failure to report the sexual abuse, a state law requirement, was not sufficient for a § 1983 claim.[316] The majority concluded that the defendants did not take affirmative steps that created or exacerbated the danger to the plaintiffs, stating that "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."[317]

Judge Sloviter's dissenting opinion agreed with the plaintiffs that the school had exacerbated the danger of sexual abuse, stating that "the School District cannot claim that it did not play some role in creating the danger to D.R. or making her 'more vulnerable.'"[318] Sloviter believed that the school system's and school officials' conduct did rise to the level of affirmative acts because

> it was the school that designed the unisex lavatory in the

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310. *Id.*
311. *Id.*
312. Barr, *supra* note 168, at 1069.
313. *Middle Bucks*, 972 F.2d at 1375.
314. *Id.* at 1374-75 (citing Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1253 (E.D. Va. 1992) (holding that a city was not liable under § 1983 for a minor informant's suicide because the forseeable risk was retaliation against two informants or his family, not suicide), *aff'd*, 991 F.2d 793 (4th Cir. 1993)).
315. *Id.* at 1373-74.
316. *Id.* at 1375 (citing *Brown* for the proposition that "section 1983 liability arises only from a violation of federal statutory or constitutional rights under the color of state law").
317. *Id.* at 1376 (quoting *DeShaney*, 489 U.S. at 203).
318. *Id.* at 1382 (Sloviter, J., dissenting).

> classroom; it was the school that refused to allow D.R. to use another lavatory; it was the school that hired an inexperienced student teacher; and it was the school that tolerated the chaotic behavior and the sexual aggressiveness of the students.[319]

Sloviter concluded that since these acts contributed to the danger posed by the student defendants, the school should have been liable for increasing the danger of sexual abuse.

Judge Becker wrote a separate dissent in *Middle Bucks*. Becker did not agree with Sloviter's conclusion that the students were in the custody of the school.[320] However, Becker did believe that, in this case, the school should be liable under the state-created danger theory.[321] Becker acknowledged that the state created the danger of sexual assault by compelling D.R. to attend school and confining her "to a dangerous unisex bathroom and chaotic classroom."[322] Becker concluded that "the school took affirmative steps to confine the student to situations where she was physically threatened."[323] Therefore, the school should have been liable under the state-created danger theory.

The state-created danger theory appears to be a tenuous theory on which to base school liability. Whether this theory is applicable to any particular case depends on how the court interprets the school's actions. If the school's actions rise to the level of affirmative acts which create or increase the level of danger, then the school will be liable. However, under *DeShaney*, a school's failure to take action when aware of dangers is not an affirmative action.[324] Courts may be inclined to label school defendants' actions as passive because of "the Supreme Court's strong reluctance to use the Fourteenth Amendment as a source of affirmative duties."[325] Even Justice Becker in his *Middle Bucks* dissent felt that the case was unique, implying that in most cases of sexual abuse in the schools the state would not have created the danger.[326]

319. *Id.*
320. *Id.* at 1384.
321. *Id.*
322. *Id.* at 1384 (Becker, J., dissenting).
323. *Id.*
324. *DeShaney*, 489 U.S. at 195.
325. Huefner, *supra* note 68, at n.138 (relying on *DeShaney*, 489 U.S. at 196 which stated 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").
326. *Middle Bucks*, 972 F.2d at 1384 (Becker, J., dissenting).

Despite the facts of *Middle Bucks*, the majority would not hold the school liable under the state-created danger theory. Therefore, it seems likely that in other cases where the students are sexually abused by other students at school, the state-created danger theory will not apply.

IX. CONCLUSION

Schools should be found to have a special relationship with their students because this effectuates the purpose of the Fourteenth Amendment. Specifically, the Due Process Clause of the Fourteenth Amendment is a limitation on the state's power, and the purpose of the clause is "to secure the individual from the arbitrary exercise of the powers of government' . . . and 'to *prevent* governmental power from being used for purposes of oppression.'"[327] Normally this is a negative right, but, as this Note has demonstrated, in some cases the state may have an affirmative obligation. The purpose of allowing a civil claim under 42 U.S.C. § 1983 against the state and its officials is to enforce the Due Process Clause, and to hold public officials accountable when those officials violate constitutional rights. Holding officials liable not only provides the victim with compensation, but it has the additional effect of deterring the unconstitutional behavior by creating an incentive for those officials not to violate an individual's rights.[328] Therefore, if we want to prevent school officials from behaving the way they did in *Taylor* and *Middle Bucks*, courts should hold them accountable. Allowing school officials to escape liability when they turn their backs on sexual abuse signals to all school officials that willfull ignorance will be tolerated.

DeShaney was an attempt by the Supreme Court to clarify when state agencies would have affirmative duties toward individuals. However, by predicating special relationships on custody, the Court put forth a vague standard. Now, custody does not have a clear definition, and this has led to the controversy as to whether the schools can be liable for the sexual abuse of their students. *Taylor* and *Middle Bucks* are the most recent examples of this controversy. *Taylor* interpreted custody broadly and held that the school was liable, whereas *Middle Bucks* subscribed to a narrow

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327. *DeShaney*, 489 U.S. at 196 (emphasis added) (citing Daniels v. Williams, 474 U.S. 327 (1986)).

328. Huefner, *supra* note 68, at 1962.

definition of custody, and therefore found that the school did not have an affirmative duty to protect its students. However, the alternative liability theory, promulgated in *Stoneking II*, removes from the custody controversy cases where a school employee is the perpetrator of the sexual abuse. In these cases the school system and its officials are liable under § 1983 without finding a special relationship between the school and the student. Special relationships, and therefore, custody, are still necessary to establish liability in cases where the sexual abuse is committed by a student. However, the student's situation at school is significantly analogous to other situations where the courts have recognized that the state has an affirmative duty of protection regardless of who commits the abuse. Therefore, students should be afforded the constitutional protection that § 1983 provides.

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