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# The Constitutional Duty of Teachers to Protect Students: Employing the "Sufficient Custody" Test

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# The Constitutional Duty of Teachers to Protect Students: Employing the “Sufficient Custody” Test

We are poignantly aware of the seeming transformation of our public schools from institutions of learning into crucibles of disaffection marred by increasing violence from which anguish and despair are often brought to homes across the nation.<sup>1</sup>

## INTRODUCTION

At 8:00 a.m., Mrs. Mary Jones brings her fourteen-year-old son Jeff to school. Although Mrs. Jones knows that it is a dangerous world out there, she is confident about leaving her son in the hands of the competent teachers at the local high school.

Also at 8:00 a.m., Mrs. Sandy Smith, the high school’s history teacher, walks down the hallway to her first class. As she passes the locker of Stanley Jordan, a linebacker on the school football team, she notices him placing a small firearm on the top shelf of his locker. Mrs. Smith, who is only five feet tall, decides she is not paid enough to put her life on the line by approaching Stanley. She feels her best course of action is to inform the principal or a security officer. However, before she can make it to the principal’s office, several other small problems arise and by the time she walks into her 8:30 a.m. class, Mrs. Smith has forgotten about Stanley and his firearm.

At 10:30 a.m., both Jeff Jones and Stanley Jordan walk into Mrs. Smith’s history class. On their way through the door, Jeff accidentally bumps Stanley. Stanley, having “borrowed” his father’s gun for the day, decides to put a scare into Jeff. Unfortunately, Jeff does not scare as easily as perhaps he should, and Stanley feels compelled to back up his threat. At 12:30 p.m., Mrs. Jones finds out that Jeff has died of a gunshot wound he received while at school.

Although Stanley is likely criminally liable, is Mrs. Smith in any way liable as well? As an ordinary citizen, she has no affirmative duty to

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<sup>1</sup> *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 992 (10th Cir. 1994).

protect a third person.<sup>2</sup> Does she have a duty as a teacher? What level of protection should Mrs. Jones have been able to expect the local school to provide to her son and other students?

The above example is meant to show the two sides of holding a teacher constitutionally liable for injury to students caused by third persons. On one hand, parents expect a certain degree of protection for their children when they are at school. Although they cannot reasonably expect teachers to insure the safety of their children, they do expect teachers to act responsibly to prevent dangerous situations when they have the power and opportunity to do so.

On the other hand, how much should teachers have to endure? Teachers are paid comparatively little for a job that is arguably the one most responsible for shaping our nation—a job that is already made difficult by student apathy and parental meddling.<sup>3</sup> The addition of a constitutional duty to protect students from any type of foreseeable danger in schools, when schools get more dangerous every day, is a tremendous burden to place on them.

This Note treats the issue of whether teachers should have a constitutional duty to protect children, while at school, from third parties.<sup>4</sup> If the courts decide that this duty exists, then teachers could be

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<sup>2</sup> See *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898) ("The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law."), *partially overruled by Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976) (holding that "owners and occupiers of land shall be governed by the test of reasonable care . . . in the maintenance and operation of their property").

<sup>3</sup> See, e.g., Mike Dunne, *Survey: Teachers Like Profession, But Low Morale Still a Big Problem*, *ADVOC.*, Aug. 15, 1994, at A1 ("In addition to low pay, many teachers complained about lack of appreciation for their role in society."); Connie C. Sexton, *Teachers' Rally Aims at Ending Wage Freeze*, *ARIZ. REPUBLIC/PHOENIX GAZETTE*, Sept. 14, 1994; (Northwest Phoenix Community), at 3 (discussing the attempt of 500 teachers to convince school board members to grant pay raises); Terrence Stutz, *Lone Star Teachers Losing Heart; Poll Shows Many Leave Citing Work Conditions*, *DALLAS MORNING NEWS*, Sept. 18, 1994, at A1 ("The main source of [dissatisfaction] is not the low salary that many teachers say they receive . . . . Nearly 44 percent . . . cited working conditions as the reason.").

<sup>4</sup> Schoolchildren are subject to harm from dangers present at school which are not human as well as from those presented by other students; for the sake of simplicity, however, this Note uses the term "third parties" to refer to both these human and non-human dangers. It should be noted, however, that this Note does not cover the related topic of liability of the school board or administration for the intentional actions of the teacher (e.g., sexual harassment of the student by the teacher). Although some similar elements exist, the liability of administration for the acts of a teacher involves some divergent elements concerning proof of knowledge and training. For a good treatment of

sued under federal laws for recovery by children who are injured while in their care.<sup>5</sup>

The circuit courts apply a bright-line test to determine the imposition of liability;<sup>6</sup> however, the circuits are split regarding the proper application of the test.<sup>7</sup> This Note argues that the courts should not limit themselves to a bright-line analysis but should look at the individual situation of the student to determine liability. The test proposed by this Note is the "sufficient custody" test.<sup>8</sup>

Part I of this Note focuses on the historical basis of 42 U.S.C. § 1983<sup>9</sup> torts as a means of imposing liability when a constitutional duty to protect is found. Such a duty usually arises through the finding of a special relationship involving the state's custody of the citizen.<sup>10</sup> Part II focuses on the rationale for the imposition of a constitutional duty in situations where custody does not exist.<sup>11</sup> Part III then examines how

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this subject, see Gail P. Sorenson, *School District Liability for Federal Civil Rights Violations Under Section 1983*, 76 Educ. L. Rep. 313 (West) (Oct. 8, 1992) (concluding that liability should arise "once duty, cause and custom (or policy) are shown" and that the government, not the individual, should bear the loss).

<sup>5</sup> This Note deals only with the narrow issue of a teacher's constitutional duty to protect children. Even when no constitutional liability attaches, a teacher may still be terminated, and state remedies may still be available. For a discussion of common law duties of teachers, see Donald H. Henderson et al., *The Use of Exculpatory Clauses and Consent Forms By Educational Institutions*, 67 Educ. L. Rep. 13 (West) (June 20, 1991) (concluding that a subjective standard must be applied when deciding whether "exculpatory agreements or consent forms" give rise to express or implied assumption of the risk).

<sup>6</sup> When determining the issue of custody in an ordinary school setting, courts make a judgment about schools in general without looking at the situation in the particular case before them.

<sup>7</sup> In applying the bright-line test, courts have come to differing conclusions as to whether an ordinary school setting presents enough custody to warrant the imposition of a duty on teachers to protect students from third parties. The Fifth Circuit appears to favor imposing this duty. See *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994); *Walton v. Alexander*, 20 F.3d 1350, *reh'g, en banc, granted*, 1994 U.S. App. LEXIS 16495 (5th Cir. 1994); see also *infra* notes 107-43 and accompanying text. However, several circuits have refused to impose this duty. See, e.g., *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1266 (1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); see also *infra* notes 68-90 and accompanying text (discussing *Dorothy J.*, *Middle Bucks*, and *Maldonado*).

<sup>8</sup> This test will be fully explained *infra* in part IV.

<sup>9</sup> 42 U.S.C. § 1983 (1988).

<sup>10</sup> See *infra* notes 14-41 and accompanying text.

<sup>11</sup> See *infra* notes 42-55 and accompanying text.

courts have applied this rationale specifically to the school environment.<sup>12</sup> Part IV presents this Note's proposal for the "sufficient custody" test.<sup>13</sup>

#### I. LIABILITY OF STATE ACTORS FOR VIOLATION OF DUE PROCESS IN § 1983 ACTIONS

The constitutional duty placed on the teaching profession is based upon the Fourteenth Amendment.<sup>14</sup> This amendment only prevents a state actor from violating a person's due process rights and does not generally create a duty for a state actor to protect the public.<sup>15</sup> However, if a "special relationship" exists between the victim and the state, then that relationship creates a corresponding obligation for protection.<sup>16</sup> Therefore, if courts rule that a teacher has a special relationship with his or her students,<sup>17</sup> then the teacher can be constitutionally liable if a student's due process rights are harmed in any way. Section 1983 provides the student with the right to sue the teacher for this type of harm.<sup>18</sup> The federal tort claim gives students an avenue of recovery when state laws still provide immunity for state actors.<sup>19</sup>

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<sup>12</sup> See *infra* notes 56-197 and accompanying text.

<sup>13</sup> See *infra* notes 198-247 and accompanying text.

<sup>14</sup> The pertinent part of this amendment states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

<sup>15</sup> "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." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989).

<sup>16</sup> "It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198.

<sup>17</sup> A "special relationship" in this context would be created by custody of the student. This notion is discussed at length within this Note. See *infra* notes 65-173 and accompanying text.

<sup>18</sup> According to 42 U.S.C. § 1983 (1988) (codifying the Civil Rights Act of 1871): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>19</sup> See, e.g., Ralph D. Mawdsley, *Compensation for the Sexually Abused Student*, 84 Educ. L. Rep. 13 (West) (Sept. 23, 1993) (detailing the difficulties students face in trying to obtain a recovery).

The U.S. Supreme Court has dealt with § 1983 torts<sup>20</sup> in a variety of contexts.<sup>21</sup> Three decisions directly relate to the issue of a state actor's duty to protect a citizen. The first two, *Estelle v. Gamble*<sup>22</sup> and *Youngberg v. Romeo*,<sup>23</sup> dealt with the issue of what duties the state has in relation to incarcerated or involuntarily committed persons. In *Estelle*, the Court stated that, due to incarceration, prisoners could not care for themselves.<sup>24</sup> Therefore, the state has a duty to provide adequate medical care.<sup>25</sup> The Court in *Youngberg* furthered this reasoning by applying it to involuntarily committed mental patients.<sup>26</sup> Although the *Youngberg* Court found that the state has an affirmative duty to protect involuntarily committed mental patients under the Due Process Clause of the Fourteenth Amendment, the Court also realized that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."<sup>27</sup> Thus, the Court found an affirmative duty to protect a citizen who is placed fully within the state's custody.

The U.S. Supreme Court then applied the *Estelle-Youngberg* rulings to a situation where custody was unclear. In the case of *DeShaney v. Winnebago County Department of Social Services*,<sup>28</sup> the Department of Social Services ("D.S.S.") had been alerted to the possibility that Joshua DeShaney was being abused by his father.<sup>29</sup> Over a two-year period, a D.S.S. caseworker compiled a case file containing three instances of abuse reported by treating physicians and her personal observations of

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<sup>20</sup> Commentator Gail Sorenson notes that claims arising under 42 U.S.C. § 1983 are often labeled as "constitutional torts." Sorenson, however, shies away from the term "constitutional tort" since the commentator does not want to belie the importance of § 1983 in these cases. Thus, Sorenson argues that these suits should be called "section 1983 torts." Sorenson, *supra* note 4. Since the author has no reason to dispute these findings, this Note refers to these torts as § 1983 torts.

<sup>21</sup> For a good treatment of the history of 42 U.S.C. § 1983, see Susan B. Shoemaker, D.T. v. Independent School District: *Limiting Liability Under 42 U.S.C. § 1983*, 24 URB. LAW. 393 (1992) and Sorenson, *supra* note 4.

<sup>22</sup> 429 U.S. 97 (1976) (determining whether the state has an affirmative duty to protect prisoners).

<sup>23</sup> 457 U.S. 307 (1982) (determining whether the state has an affirmative duty to protect involuntarily committed mental patients).

<sup>24</sup> *Estelle*, 429 U.S. at 103-04.

<sup>25</sup> *Id.*

<sup>26</sup> *Youngberg*, 457 U.S. at 321-22.

<sup>27</sup> *Id.* at 315-16.

<sup>28</sup> 489 U.S. 189 (1989).

<sup>29</sup> *Id.* at 192-93.

indications of abuse.<sup>30</sup> Although at one point the state temporarily took Joshua into custody, he continued to reside permanently at home, with the caseworker making periodic visits.<sup>31</sup> About six months after Joshua's last visit to the emergency room, his father beat him so severely that he fell into a life-threatening coma.<sup>32</sup> Joshua's mother, who did not live with Joshua and his father, then filed an action under § 1983; she claimed that the D.S.S. deprived Joshua of his liberty without due process of law by not protecting him from his father.<sup>33</sup>

Initially, the *DeShaney* Court reiterated its basic position that the Due Process Clause generally does not create a duty for the state to act affirmatively to protect its citizens and that the Clause was enacted only to limit the state's power to act.<sup>34</sup> The Court then looked at this issue in light of the *Estelle-Youngberg* reasoning. In those cases, the Court had found that the state had an affirmative duty to act for its citizens' protection.<sup>35</sup> However, the Court decided *Estelle* and *Youngberg* based on a special relationship between the victim and the state created by *complete* control. "Taken together, they [*Estelle* and *Youngberg*] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."<sup>36</sup>

In *DeShaney*, however, Joshua had not been taken into custody,<sup>37</sup> nor was the state, through the D.S.S., in control of Joshua's personal freedom. To the Court, the issue of control dominated over the issue of whether the state was aware of the danger Joshua faced. "The affirmative duty to protect [arose] 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 ha[d] imposed on his freedom to act on his own

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 192.

<sup>32</sup> *Id.* at 193.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 195-96 (noting that the Due Process 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").

<sup>35</sup> See *supra* notes 22-27 and accompanying text.

<sup>36</sup> *DeShaney*, 489 U.S. at 199-200.

<sup>37</sup> Although Joshua had been temporarily taken into custody, this temporary situation was not enough for the Court to impose liability. "That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him 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 . . ." *Id.* at 201.

behalf."<sup>38</sup> Therefore, even though it seemed obvious that Joshua was in danger and the D.S.S. had in fact taken some positive steps to safeguard him, the D.S.S. had no duty to protect Joshua from harm unless it had taken him into custody.<sup>39</sup> Since the Court found no custody, the D.S.S. prevailed.<sup>40</sup>

Even though the U.S. Supreme Court ruled that the state control in Joshua's situation did not rise to the level of custody, the Court did not use language that would limit these suits to the *Estelle-Youngberg* context only.<sup>41</sup> Therefore, courts were left open to determine if custody exists in other situations. One of the most intriguing situations involves determining whether a custodial relationship exists between teachers and schoolchildren.

## II. RATIONALE FOR THE IMPOSITION OF CONSTITUTIONAL LIABILITY FOR STATE ACTORS, ESPECIALLY TEACHERS<sup>42</sup>

It appears that the situation for schoolchildren lies somewhere between *Estelle-Youngberg* (incarceration and institutionalization), and *DeShaney* (no custody by the state). In most states, statutory law requires children to attend school.<sup>43</sup> Also, while children are in school, teachers generally acquire "in loco parentis" control.<sup>44</sup> Both of these factors

<sup>38</sup> *Id.* at 200.

<sup>39</sup> *Id.* at 201 & n.9 (stating that if Joshua had been placed in a foster care home, the situation would likely move more towards incarceration or institutionalization).

<sup>40</sup> *Id.* at 202. The Court rejected petitioners' argument that a "special relationship" existed between Joshua and the state "because the State knew that Joshua faced a special danger of abuse at his father's hands." *Id.* at 197.

<sup>41</sup> See *supra* notes 22-27 and accompanying text.

<sup>42</sup> Teachers are used here since they are representative and provide readily identifiable examples. The reader should be aware, however, that school officials such as principals may also be held liable under the same theories as teachers.

For example, if a student were injured in a teacher's classroom, the teacher would be liable if the constitutional duty applied. Likewise, the principal could be held liable if the requisite gross negligence could be proved on his or her part.

<sup>43</sup> See, e.g., KY. REV. STAT. ANN. § 159.010(1) (Michie/Bobbs-Merrill 1992) ("[E]ach parent . . . having in custody . . . any child between the ages of six (6) and sixteen (16) shall send the child to a regular public day school for the full term that the public school of the district in which the child resides is in session . . .").

<sup>44</sup> "'Loco parentis' exists when person undertakes care and control of another in absence of such supervision by latter's natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent." BLACK'S LAW DICTIONARY 787 (6th ed. 1990) (citing *Griego v. Hogan*, 377 P.2d 953, 955 (N.M. 1963)); see also *Conley v. Board of Educ.*, 123 A.2d 747, 752 (Conn. 1956) ("It has long been a Connecticut concept that the teacher is in loco



indicate a form of control which could be determined to create a custodial situation.

However, unlike prisoners or involuntarily committed mental patients, children are not primarily controlled by the state, since parents still retain principal control of their children. A child can be removed from school by the parent at any time, and the child still spends a minority of his or her time at school. "Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home."<sup>45</sup> Despite this language and the fact that the *DeShaney* Court seemed to rule that a violation could occur only when there is incarceration or institutionalization,<sup>46</sup> courts have been able to find language in *DeShaney* which may support an affirmative duty for teachers arising out of a "custodial" situation.

The first area discussed by lower courts when interpreting *DeShaney* is whether the decision actually prohibits the finding of custody outside of the prison or mental ward. The U.S. Supreme Court does not seem to adhere to a hard-line stance. "In the substantive due process analysis, 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 . . . ."<sup>47</sup> It is the inclusion of "other similar restraint of personal liberty" which allows for conjecture regarding whether the Court might permit some form of restraint, which does not reach the level of complete control, to trigger a violation of due process.

The more liberal interpretation appears to be borne out by the Court's indication that Joshua may have been considered in custody had he been placed in a foster home.<sup>48</sup> The *DeShaney* Court noted that some appellate courts had determined that liability may attach when the state places a child in a foster home.<sup>49</sup> Although the Court refused to lend its approbation to these rulings, these appellate court cases can be construed as demonstrating

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parentis.").

<sup>45</sup> *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (focusing on both Eighth Amendment and procedural due process issues as related to corporal punishment).

<sup>46</sup> *Supra* notes 28-40 and accompanying text.

<sup>47</sup> *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 200 (1989) (emphasis added).

<sup>48</sup> *Id.* at 201 n.9. "Had the State by the affirmative exercise of its power 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." *Id.*

<sup>49</sup> *Id.*

another sort of control that might create custody.<sup>50</sup> Thus, the *DeShaney* Court seemed to acknowledge that at least one situation exists in which incomplete custody would still give rise to the duty. Consequently, although by no means a definitive answer for the school environment,<sup>51</sup> the *DeShaney* decision does provide some guidance and support for the proposition that something short of an *Estelle-Youngberg* situation can suffice to create custody.

Moreover, certain language in the *DeShaney* decision indicates that liability could attach when the state somehow creates the danger which injures the person.<sup>52</sup> The Court indicated that the state, by affirmatively creating a danger, would likely have a corresponding duty to protect a person from that danger.<sup>53</sup> If the state had somehow created or exacerbated the danger that Joshua faced, liability might have attached.<sup>54</sup>

Either through custody or creation of the danger, the U.S. Supreme Court has left an open window to find control in other areas. Since *DeShaney*, lower courts have grappled with determining what circumstances invoke the constitutional duty to protect children under school supervision. This Note focuses on one of these areas, namely the classroom environment.<sup>55</sup>

### III. APPLICATION OF THE *DESHANEY* RATIONALE IN DECIDING CASES INVOLVING THE SCHOOL ENVIRONMENT

Since *DeShaney*, courts and commentators alike have used custody or creation of the danger to find a constitutional duty to protect children

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<sup>50</sup> The Court compared an institutionalization or incarceration situation with keeping Joshua in a foster home. The Court seemed to indicate that a foster home situation might be enough for custody, although it refused to answer the question. *Id.*

<sup>51</sup> A foster home would be very different from a school environment when comparing instances of control. A foster child/orphan lives in a foster home and consequently spends most of his or her time under the state's supervision. A student, on the other hand, spends little time under the school's supervision since he or she is in school only during a small portion of his or her week. Moreover, whereas an orphan depends entirely on the state for his or her welfare, a student relies on his or her parents.

<sup>52</sup> *DeShaney*, 489 U.S. at 201 ("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.").

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* The court emphasized that although Joshua's situation naturally compels a person to feel that Joshua and his mother should be compensated for the "grievous harm inflicted upon them," one must remember, "that the harm was inflicted not by the State of Wisconsin, but by Joshua's father." *Id.* at 202-03.

<sup>55</sup> Before examining the "sufficient custody" test, it is beneficial to see how courts have used the analysis in *DeShaney* to decide this issue.

in the classroom setting.<sup>56</sup> The logic of the courts generally follows a basic pattern. First, the court determines whether custody exists, based on either the amount of "restraint of personal liberty"<sup>57</sup> or a comparison to a foster home situation.<sup>58</sup> If the court does not find this requisite custody, the court then determines if the state somehow created the danger.<sup>59</sup> If either custody or creation of the danger were found, then the duty to protect would arise and a teacher could be held liable for a student's injury if the requisite level of culpability was found.<sup>60</sup>

Using this analysis, one circuit court<sup>61</sup> and numerous commentators<sup>62</sup> favor finding a duty for teachers to protect schoolchildren while they are at school. Most circuits, however, follow the strict ruling in *DeShaney* and determine that teachers do not have enough control over

<sup>56</sup> See, e.g., Steven F. Huefner, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940 (1990).

<sup>57</sup> *DeShaney*, 489 U.S. at 200; see *infra* notes 65-143 and 151-73 and accompanying text.

<sup>58</sup> See *infra* notes 144-50 and accompanying text.

<sup>59</sup> See *infra* notes 174-94 and accompanying text.

<sup>60</sup> If the court determines that a duty exists, based on either custody or creation of the danger, then the conduct of the teacher must be evaluated to see if it was culpable. The standard applied in these cases is very lenient toward the teacher. Courts judge the conduct based on whether it rises to the level of "deliberate indifference to an affirmative duty," *Pagano v. Massapequa Public Schools*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989), is "grossly negligent," or is "callously indifferent," *Lopez v. Houston Independent School District*, 817 F.2d 351, 355 (5th Cir. 1987).

<sup>61</sup> The Fifth Circuit is the lone circuit to find such a duty of teachers. See *infra* notes 107-43 and accompanying text.

<sup>62</sup> Several commentators have written in favor of imposing a duty on school teachers or administrators. See, e.g., Karen M. Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123 (1994); Adam M. Greenfield, Note, *Annie Get Your Gun "Cause Help Ain't Comin": The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588 (1993); Barbara L. Horwitz, Casenote, *The Duty of Schools to Protect Students from Sexual Harassment: How Much Recovery Will the Law Allow?*, 62 U. CIN. L. REV. 1165 (1994); Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools After DeShaney: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101 (1994); see also Michael Gilbert, Comment, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471 (1993) (arguing that a constitutional duty should apply only when the student was actually harassed or injured by a teacher, not a third party). *But see* Stephen Faberman, Note, *The Lessons of DeShaney: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97 (1993) (arguing that an affirmative duty to protect students should not be imposed on teachers).

the students.<sup>63</sup> These courts, moreover, would not impose a duty based on creation of the danger.<sup>64</sup>

### A. *Decisions Involving Custody*<sup>65</sup>

Several circuit court cases<sup>66</sup> and district court opinions<sup>67</sup> have wrestled with whether a teacher has a constitutional duty to protect schoolchildren. These cases focus most directly on whether a school has the requisite custody of its students to justify the invocation of this duty. Those decisions which have concluded that teachers should have no duty to protect students are handled first.

In *Maldonado v. Josey*,<sup>68</sup> the Tenth Circuit was faced with a situation in which a fifth-grade student, who was left unattended in a cloakroom for approximately twenty minutes, caught his bandanna on a hook in the wall and died.<sup>69</sup> The *Maldonado* court looked at the control exerted in a school situation and ruled that it did not rise to the level of custody. The court ruled this way despite two factors which could have indicated control: 1) the state had truancy laws which compelled attendance at school,<sup>70</sup> and 2) the court had previously ruled that a child who was placed in a private foster care facility was in custody.<sup>71</sup> The

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<sup>63</sup> See *infra* notes 68-90 and accompanying text.

<sup>64</sup> See *infra* notes 174-88 and accompanying text.

<sup>65</sup> This section includes any decisions that might have been made by comparing the school situation to that of foster care. This comparison, although a different approach, is still just a determination of how much control is sufficient to create the duty. The only case that has explicitly explored the issue of comparing the school setting with a foster care situation is *Pagano v. Massapequa Public Schools*, 714 F. Supp. 641 (E.D.N.Y. 1989), discussed *infra* at notes 144-50 and accompanying text.

<sup>66</sup> See *infra* notes 68-78 and 107-43 and accompanying text.

<sup>67</sup> See *infra* notes 79-106 and 144-57 and accompanying text. Because numerous decisions regarding this issue have been made at both the circuit and district court levels, the author has selectively picked cases to be thoroughly examined in the following sections. Although several other cases are mentioned in passing, the compilation of the existing case law is by no means complete.

<sup>68</sup> 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1266 (1993).

<sup>69</sup> *Id.* at 728. Although the teacher's conduct in this situation did not appear to be deliberately indifferent, the court did not address this issue. The lack of discussion on this issue may be because the court did not need to decide this issue since they refused to impose a duty, or because the court assumed deliberate indifference was found by the lower court.

<sup>70</sup> *Id.* at 731. The court utilized the reasoning in *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992). See *infra* notes 73-78.

<sup>71</sup> *Maldonado*, 975 F.2d at 729-30. The court so ruled in *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992). But see *Pagano v.*

court did not find either of these factors persuasive enough to impose a duty on teachers.<sup>72</sup>

The court in *Maldonado* relied heavily on the decision of the Third Circuit in *D.R. v. Middle Bucks Area Vocational Technical School*.<sup>73</sup> D.R. filed suit along with another student,<sup>74</sup> claiming they were sexually molested at school by their classmates for a period of about six months.<sup>75</sup> The court found no custody, basing its decision primarily upon the child's intermittent presence at school<sup>76</sup> and the fact that D.R. had lines of communication open outside of the school.<sup>77</sup> "The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help."<sup>78</sup>

Two district court decisions which similarly refused to find a duty for school teachers are *Dorothy J. v. Little Rock School District*<sup>79</sup> and *B.M.H. v. School Board*.<sup>80</sup> Both *Dorothy J.* and *B.M.H.* provide excellent demonstrations of how courts make the determination of whether the duty should be imposed.

*Dorothy J.* closely mirrors the reasoning in *DeShaney*. In *Dorothy J.*, Brian B., the son of Dorothy J., was in a program that taught life and social skills to the educable mentally handicapped.<sup>81</sup> During school hours on two consecutive days, another student sexually assaulted and raped Brian B.<sup>82</sup> The court began its analysis with the proposition that the Constitution does not normally impose an affirmative duty on the

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Massapequa Public Schools, 714 F. Supp. 641 (E.D.N.Y. 1989), which is discussed *infra* notes 144-50 and accompanying text.

<sup>72</sup> *Maldonado*, 975 F.2d at 732-33.

<sup>73</sup> 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

<sup>74</sup> The other student, L.H., was left out of most of the discussion in the opinion since she had already reached the age of majority. Therefore, she was not compelled to attend school.

<sup>75</sup> *Middle Bucks*, 972 F.2d at 1366. This activity occurred in both a unisex bathroom and a darkroom attached to the plaintiffs' classroom and included "offensive touching of their breasts and genitalia, sodomization and forced acts of fellatio." *Id.*

<sup>76</sup> *Id.* at 1371.

<sup>77</sup> *Id.* at 1372.

<sup>78</sup> *Id.*

<sup>79</sup> 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993). The Eighth Circuit, in upholding the lower court, agreed with the reasoning of the district court. *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d at 732. Therefore, because the district court's reasoning and explanation of the facts are more extensive, this Note continues to cite from that court's opinion.

<sup>80</sup> 833 F. Supp. 560 (E.D. Va. 1993).

<sup>81</sup> *Dorothy J.*, 794 F. Supp. at 1407.

<sup>82</sup> *Id.* at 1407.

state to protect citizens from other citizens.<sup>83</sup> However, the *Dorothy J.* court purported that a teacher might be liable for these harms if a "special relationship" existed between the teacher and student.<sup>84</sup> This special relationship could arise through an affirmative action by the state resulting in either custody or creation of the danger.<sup>85</sup>

In ruling that custody of schoolchildren did not exist, the *Dorothy J.* court discounted the theories of "in loco parentis" and truancy laws. Of "in loco parentis," the court stated that duties under state law could not reach the level of a constitutional violation. "A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law."<sup>86</sup> The court also discounted the effects of truancy laws, stating, "The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child."<sup>87</sup> In so holding, the court cited to the U.S. Supreme Court's ruling in *Ingraham v. Wright* for authority.<sup>88</sup>

The *Dorothy J.* court noted several public policy considerations for refusing to embrace a broad imposition of liability based on custody. The court surmised that unlimited liability might ensue since a teacher could be sued for a skinned knee when the required "state of mind" (complete indifference or gross negligence) was shown.<sup>89</sup> In addition, protecting a student from other students might pose too great a burden on the teachers. It could force teachers to be "constitutionally obliged to assume roles similar to policemen or even prison guards in protecting students from other students."<sup>90</sup>

In *B.M.H.*, the plaintiff was an eighth-grade female student who was sexually assaulted by a male classmate, Student H.<sup>91</sup> Before the assault took place, Student H. threatened B.M.H., and B.M.H. reported those

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<sup>83</sup> *Id.* at 1409-10.

<sup>84</sup> *Id.* at 1411. Compare this with the reasoning of the court in *Arroyo v. Pla*, 748 F. Supp. 56 (D. P.R. 1990), which is discussed *infra* notes 100-06, 189-92 and accompanying text.

<sup>85</sup> *Dorothy J.*, 794 F. Supp. at 1411-20.

<sup>86</sup> *Id.* at 1413 (quoting *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989)).

<sup>87</sup> *Id.* at 1412 (discussing *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir. 1990)).

<sup>88</sup> *Id.* at 1413-14 (citing *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1973)) (noting that compulsory education laws are different from incarceration in that school children have the freedom to return home and lead normal unrestricted lives). See *supra* note 45 and accompanying text.

<sup>89</sup> *Dorothy J.*, 794 F. Supp. at 1414.

<sup>90</sup> *Id.*

<sup>91</sup> *B.M.H. v. School Bd.*, 833 F. Supp. 560, 562 (E.D. Va. 1993).

threats to Linda Singleton, her history teacher.<sup>92</sup> Singleton subsequently relayed the incident between B.M.H. and Student H. to Edward G. Webb, another teacher at the school.<sup>93</sup> However, neither of the teachers punished Student H. or took any measures to protect B.M.H.<sup>94</sup> Three days after B.M.H. reported the threat, Student H. assaulted her on school grounds.<sup>95</sup>

The court began its analysis by reviewing Fourth Circuit opinions which discussed custody in relation to the *DeShaney* decision.<sup>96</sup> From this analysis, the court determined that the only factor relevant to a determination of the constitutional duty is "whether the state has so restrained the victim as to prevent him from acting on his own behalf."<sup>97</sup> In spite of the fact that the teachers actually knew of the potential danger to the student,<sup>98</sup> the court ruled that no "special relationship" existed between the students and the teachers.<sup>99</sup> Therefore, even with the added element of "foreseeability" of the danger, the court used similar reasoning to that employed in the *Dorothy J.* opinion to find no constitutional duty.

*Arroyo v. Pla*<sup>100</sup> is an interesting opinion to compare with *B.M.H.* and *Dorothy J.* because of its general disregard for the logic used in those cases.<sup>101</sup> In *Arroyo*, Eddie M. Roman was accidentally shot and killed by one of his classmates.<sup>102</sup> Although the court spoke of special relationships in the opinion, it never decided the issue of custody but instead based its opinion on the fact that the perpetrator of the crime was not a state actor.<sup>103</sup> The most likely explanation for this ruling is that the

<sup>92</sup> *Id.* During history class, the boy said to B.M.H., "I am going to screw you, no matter what, even if it's in school and even if I have to rape you." *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 565-70. The court refused to follow an earlier decision's finding of a "special relationship" in a similar situation. The court distinguished the two cases on the fact that the earlier decision involved a sexual assault of a student by a teacher, not a third party. *Id.* at 566 n.11.

<sup>97</sup> *Id.* at 569.

<sup>98</sup> See also *Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991, 994 (10th Cir. 1994) ("We hold foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship.").

<sup>99</sup> *B.M.H.*, 833 F. Supp. at 565.

<sup>100</sup> 748 F. Supp. 56 (D. P.R. 1990).

<sup>101</sup> See *supra* notes 79-99 and accompanying text.

<sup>102</sup> *Arroyo*, 748 F. Supp. at 57.

<sup>103</sup> *Id.* at 60. The court stated that "[a]lthough young children are required by law to attend school and it may be said that these children are under the custody of the state while they attend classes, the determining factor in this case is that the death of Eddie

court ignored the custody issue because no facts indicated that any of the defendants acted with complete indifference or gross negligence.<sup>104</sup> The court did not find that the administrators should have implemented measures to detect whether students had weapons,<sup>105</sup> nor do the facts give any indication that the teacher had any way of knowing that the student was carrying a gun.<sup>106</sup>

The only circuit court ruling in favor of applying the duty to teachers comes from the Fifth Circuit. In *Doe v. Taylor Independent School District (Doe I)*,<sup>107</sup> a student brought an action against the school district for alleged sexual harassment by her biology teacher.<sup>108</sup> Although *Doe I* did not involve harm inflicted on a student by a third party, and thus falls outside of the scope of this Note,<sup>109</sup> this decision provides a valuable discussion as to whether a school has custody of its pupils. The *Doe I* court relied on its decision in *Lopez v. Houston Independent School District* in deciding the custody issue.<sup>110</sup>

In *Lopez*, John Lopez was knocked unconscious when a fight broke out on the school bus on which he was riding.<sup>111</sup> Lopez alleged that his school bus driver did not act to break up the fight in time or take the

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was caused solely by a private individual." *Id.* Moreover, the court noted that schools do not have an affirmative duty to protect students by taking measures to detect weapons since a recent U.S. Supreme Court decision held that school officials do not have the right to implement "periodic, random searches" of students. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)). Thus, by discussing the above two factors, the court sidestepped the issue of whether a state actor should have a duty to protect an individual from harm from a third party.

Although the finding of no state action could be construed as negating any creation of the danger by the school, the custody issue still should be addressed by the court; a constitutional duty to protect arises when the state either retains enough control to constitute custody or creates the danger.

<sup>104</sup> Although a determination of a lack of gross negligence would preclude any finding of liability for the teacher, by disregarding any determination of "special relationship," the court essentially ignored the logic of the *DeShaney* decision.

<sup>105</sup> *Arroyo*, 748 F. Supp. at 60.

<sup>106</sup> *Id.* at 58.

<sup>107</sup> 975 F.2d 137 (1992), *vacated*, 15 F.3d 443 (5th Cir. 1994) (en banc).

<sup>108</sup> *Id.* at 139. Coach Lynn Stroud had a history of flirting with the girls at school and of showing overt favoritism to certain girls in his class. Regarding Jane Doe, whom Stroud met when Doe was a freshman, the court stated, "Coach Stroud became enamored with her to the point of obsession." *Id.* Although advised repeatedly of Stroud's behavior, school officials allowed his romantic involvement with Doe to continue for over a year. *Id.* at 139-41.

<sup>109</sup> See *supra* note 4.

<sup>110</sup> *Doe I*, 975 F.2d at 144 & n.6 (referring to *Lopez*, 817 F.2d 351 (5th Cir. 1987)).

<sup>111</sup> *Lopez*, 817 F.2d at 352.



affirmative steps necessary to get Lopez medical treatment after realizing that he had been knocked unconscious.<sup>112</sup> Although the court did not undertake an in-depth analysis of the custody issue, it stated that the school bus driver "was entrusted with the care of students attending school under Texas' compulsory education statute."<sup>113</sup> Thus, the court remanded the case back to the trial court for a determination of liability since the bus driver's "alleged failure to protect John or to render emergency aid abuses state power, and supports a § 1983 action if the jury finds it rose to the level of callous indifference and was a cause of injury."<sup>114</sup>

Based on the holding in *Lopez*, the court in *Doe I*, even after *DeShaney*, decided that a school should be liable for failing to protect students while at school.<sup>115</sup> The court noted, "Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment."<sup>116</sup> Thus, "school officials have a constitutional duty to protect schoolchildren from known or reasonably foreseeable harms occurring during or in connection with school activities."<sup>117</sup>

However, about a year and a half later, *Doe I* was reheard en banc in *Doe v. Taylor Independent School District (Doe II)*.<sup>118</sup> In this decision, the court distanced itself from the finding of a "special relationship" based on the *DeShaney* notion of custody.<sup>119</sup> The court limited its decision to the specific facts of the case; the court only ruled on the issue of whether a constitutional duty to protect exists when the harm is perpetrated by a state actor.<sup>120</sup> Consequently, the court did not discuss

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<sup>112</sup> *Id.* at 352-53.

<sup>113</sup> *Id.* at 356.

<sup>114</sup> *Id.*

<sup>115</sup> *Doe I*, 975 F.2d at 138. Although the court stated, "The 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," the court cited its decision in *Lopez* as authority for finding that duty. *Id.* at 148 n.14 (citing *Lopez*, 817 F.2d at 356).

<sup>116</sup> *Id.* at 147. The court even went so far as to assert that truancy laws might be deemed unconstitutional if they forced parents to surrender their children without imposing a corresponding duty on the schools to protect the students. *Id.*

<sup>117</sup> *Id.* at 144.

<sup>118</sup> 15 F.3d 443 (5th Cir. 1994) (en banc).

<sup>119</sup> *Id.* at 451. The court stated that the remarks cited by appellants "from the *DeShaney* court simply do not address the issues involved in this case." *Id.* at 451 n.3. The court expressly eliminated from its decision any reference to liability for the actions of third parties.

<sup>120</sup> *Id.* "It is incontrovertible that bodily integrity is necessarily violated when a *state*

a teacher's constitutional duty to protect the student from harm inflicted by a third party.<sup>121</sup>

Interestingly, *Doe II* did not mention the *Lopez* decision as a means of imposing a duty where the perpetrator is a third party.<sup>122</sup> The court explained the absence of *Lopez*'s authority in its decision in *Leffall v. Dallas Independent School District*,<sup>123</sup> stating, "It is unclear how much of *Lopez*'s rationale survives *DeShaney*."<sup>124</sup> The *Leffall* court continued by saying, "We did not address the question of whether a special relationship exists in an ordinary public school setting in our en banc decision in *Doe v. Taylor Indep. Sch. Dist. [Doe II]*."<sup>125</sup> Therefore, after the en banc decision in *Doe II*, it appeared that the Fifth Circuit's status as the lone defender of schoolchildren's rights had disappeared.

However, the issue was resurrected by the court's decisions in *Leffall* and *Walton v. Alexander*.<sup>126</sup> In *Leffall*, the court was presented with a case where a student had been shot at a high school dance.<sup>127</sup> This case obviously entailed an injury inflicted by a third person; thus, *Leffall* squarely presented the exact issue which the court had explicitly avoided deciding in *Doe II*.<sup>128</sup> In analyzing the duty of a teacher to protect students from harm by third parties, the court examined the *DeShaney* holding<sup>129</sup> and then

actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment." *Id.* at 451-52 (emphasis added).

<sup>121</sup> Since the court's opinion in *Doe I* was vacated by this opinion, the court's ruling in *Doe II* effectively eliminated the dicta from *Doe I*. It was this dicta that indicated that the court would impose a constitutional duty on a teacher to protect a student from harm from a third party. See *supra* notes 107-17 and accompanying text.

<sup>122</sup> Although the *Doe II* court cited the *Lopez* decision, the court only mentioned *Lopez* for its deliberate indifference standard, which the *Doe II* court then applied. *Doe II*, 15 F.3d at 453.

<sup>123</sup> 28 F.3d 521 (5th Cir. 1994).

<sup>124</sup> *Id.* at 527.

<sup>125</sup> *Id.* at 528. The court stated further:

[W]e refused even to consider whether a *DeShaney* special relationship arises in the public school context because the issue was wholly irrelevant on the facts of [*Doe II*]. The special relationship doctrine is properly invoked in cases involving harms inflicted by third parties, and it is not applicable when it is the conduct of a state actor that has allegedly infringed a person's constitutional rights.

*Id.* at 528-29 (citing *Doe II*, 15 F.3d at 451 n.3) (citations omitted).

<sup>126</sup> 20 F.3d 1350 (5th Cir. 1994).

<sup>127</sup> *Leffall*, 28 F.3d at 523. Dameon Steadham was fatally shot in the head outside of a school-sponsored dance when several students began to "fire handguns randomly and recklessly into the air." *Id.*

<sup>128</sup> See *supra* notes 118-25 and accompanying text.

<sup>129</sup> *Leffall*, 28 F.3d at 526.

reviewed the decisions of other circuit courts on this issue.<sup>130</sup> However, since the student was attending a dance after school, the court was able to distinguish this case from the cases considered in other circuits.<sup>131</sup> Consequently, the Fifth Circuit avoided a decision on the issue of custody during school hours. Yet, the court did not foreclose the possibility of imposing that duty if a case on point should arise. As the court explained:

[W]e need not go so far as have some of our sister circuits and conclude that no special relationship can ever exist between an ordinary public school district and its students; we conclude only that no such relationship exists during a school-sponsored dance held outside of the time during which students are required to attend school for non-voluntary activities.<sup>132</sup>

Therefore, the court implicitly kept alive the idea that compulsory attendance provides the required custody to impose a constitutional duty on teachers to protect students from outside harm.

In *Walton*, the Fifth Circuit found the requisite custody needed to impose a constitutional duty in a situation involving a special education school.<sup>133</sup> While a student at the Mississippi School for the Deaf, "Walton was sexually assaulted by a fellow student."<sup>134</sup> After reporting this assault to school officials, including the defendant-appellant Dr. Alma Alexander, the school suspended both Walton and his assailant for three days.<sup>135</sup> Upon returning to school, Walton once again was assaulted by the same student because, according to Walton, the school "took insufficient measures to shield him from the assailant."<sup>136</sup>

The court focused on the issue of whether the custody imposed upon these deaf students by the school was enough to create a constitutional duty for the superintendent to protect Walton from other students.<sup>137</sup> In

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<sup>130</sup> *Id.* at 528-29. The *Leffall* court noted, "Several of our sister circuits have concluded that the relationship between school district and student is not a special relationship within the meaning of *DeShaney*." *Id.* (citing cases from the Third, Seventh, Eighth, and Tenth Circuits).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 529. The court concluded that "even though Steadham may have been compelled to attend school during the day, any special relationship that may have existed lapsed when compulsory attendance ended." *Id.*

<sup>133</sup> *Walton v. Alexander*, 20 F.3d 1350, 1355, *reh'g, en banc, granted*, 1994 U.S. App. LEXIS 16495 (5th Cir. 1994).

<sup>134</sup> *Id.* at 1353.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Because Walton went directly to the superintendent for help, the court viewed the

making this determination, the court ascertained whether the situation at the School for the Deaf more closely resembled an *Estelle-Youngberg* situation,<sup>138</sup> or the situation in *Middle Bucks*.<sup>139</sup> Evaluating this special education setting, the Fifth Circuit found that *Middle Bucks* was not controlling. "There are several factors that exist in this residential special education school which distinguish this case from those cases involving students who attend day classes . . . ."<sup>140</sup> Since Walton's school more resembled a prison than a regular high school, the court held that "Walton falls within a category of persons in custody by means of 'similar restraints of personal liberty,' thereby establishing the existence of a 'special relationship' between Alexander [the superintendent] and Walton . . . ."<sup>141</sup>

While both *Leffall* and *Walton* addressed several issues concerned with a teacher's constitutional duty to protect students from third-party harm, neither decision directly addressed the everyday situation of students at school.<sup>142</sup> However, the court revealed much by stating in

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superintendent as having a direct relationship with the boy, which allowed the court to determine the issue of a special relationship between the superintendent and her students as if it were between a teacher and her students.

<sup>138</sup> See *supra* notes 22-41 and accompanying text.

<sup>139</sup> See *supra* notes 73-78 and accompanying text.

<sup>140</sup> *Walton*, 20 F.3d at 1355. The court used the following factors to conclude that this residential school situation was more similar to institutionalization than to day school: (1) the school was a boarding school with twenty-four hour custody of the student, (2) the student was deaf and lacked the basic communications skills that normal children possess, (3) the student was obviously not free to leave while he lived at the school, and (4) economic realities essentially force most Mississippi families with deaf children to send their children to the school. *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 529 (5th Cir. 1994) (citing *Walton*, 20 F.3d at 1355).

The use of factors to evaluate a school is indicative of the sufficient custody test espoused later in this Note. See *infra* notes 198-247 and accompanying text. In this situation, though, the Fifth Circuit has only evaluated a few factors and has applied it only to a residential school for the handicapped. The sufficient custody test, on the other hand, is broader and could be used to evaluate any public or private school a child might attend.

<sup>141</sup> *Walton*, 20 F.3d at 1355 (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989)). However, even though the court found a constitutional duty to protect Walton, it did not find that the superintendent, Alexander, had acted with the requisite indifference to be held liable for the second assault. "Alexander's actions may have been ineffective in halting the molestation, but her actions did not reflect that she was deliberately indifferent." *Id.* at 1356.

<sup>142</sup> This issue has, of course, been addressed directly by the courts which have ruled that a teacher does not have the duty to protect students while they are at school. See *supra* notes 68-106 and accompanying text.

*Leffall*, "[W]e need not . . . conclude that no special relationship can ever exist between an ordinary public school district and its students."<sup>143</sup> Thus, it appears, by reading this opinion in conjunction with the court's decision in *Doe I*, that the Fifth Circuit would likely rule that a teacher has a constitutional duty to protect students from third parties.

Two district courts similarly have imposed a duty upon teachers to protect school children, albeit in a more direct way. In *Pagano v. Massapequa Public Schools*,<sup>144</sup> Sean Pagano alleged that he was verbally and physically attacked by other students while he was in the fifth and sixth grades.<sup>145</sup> He further alleged that he told school officials of this abuse, but they did nothing to prevent it.<sup>146</sup> The court, relying on the *DeShaney* Court's indication<sup>147</sup> and the Second Circuit's decision that a foster home could constitute a custodial environment,<sup>148</sup> opined that the situation faced by a schoolchild more closely resembles the situation faced by a foster child than the situation faced by Joshua DeShaney.<sup>149</sup> Thus, the court determined that school is a custodial environment and that a custodial relationship exists between a teacher and student.<sup>150</sup> Consequently, constitutional liability attaches.

Similar to *Pagano*, *Waechter v. School District No. 14-030*<sup>151</sup> also found the requisite custody needed to invoke a constitutional duty to protect within the school environment. In *Waechter*, a gym coach forced Michael Waechter, a fifth-grade special education student, to run sprints as punishment.<sup>152</sup> As a result of these sprints, Michael died of cardiac arrhythmia.<sup>153</sup> The court applied a broad interpretation of *DeShaney*.<sup>154</sup> Instead of looking at whether the school had functional

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<sup>143</sup> *Leffall*, 28 F.3d at 529.

<sup>144</sup> 714 F. Supp. 641 (E.D.N.Y. 1989).

<sup>145</sup> *Id.* at 642.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 643 (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)).

<sup>148</sup> *Id.* (discussing *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981)).

<sup>149</sup> *Id.* at 643.

<sup>150</sup> *Id.* ("The facts of the present case . . . appear to be closer to those of *Doe* than *DeShaney* in that the victim and the perpetrator(s) were under the care of the school in its *parens patriae* capacity at the time these alleged incidents occurred.")

<sup>151</sup> 773 F. Supp. 1005 (W.D. Mich. 1991). Although this case deals with a teacher's conduct, it differs from a case involving sexual harassment since the teacher in *Waechter* did not intend the harm that flowed from his actions.

<sup>152</sup> *Id.* at 1007.

<sup>153</sup> *Id.*

<sup>154</sup> A broad interpretation means only that custody can be found outside of the *Estelle-*

control of the student, the court considered "whether the state actor exercised control over the individual's 'personal liberty' under color of state law."<sup>155</sup> The court found that, since the defendant teacher was in control of Michael and knew of his physical limitations,<sup>156</sup> the standard of custody was met.<sup>157</sup>

Unlike the majority of courts ruling on this issue, most commentators favor imposing a constitutional duty on schoolteachers.<sup>158</sup> One commentator, Steven Huefner, specifically focuses on the issues of custody and creation of the danger.<sup>159</sup> As he explains:

[B]ecause schools should be considered custodial, even a court that refuses to impose affirmative constitutional duties except in the presence of a custodial relationship should hold them liable for reckless or deliberately indifferent failures to act. But even without categorizing schools alongside prisons as custodial institutions, a court should be willing to impose such duties because of the extensive role the school plays in shaping the environment of the harm.<sup>160</sup>

To reach this conclusion, Huefner reasons that the *DeShaney* decision should not be read narrowly to allow recovery only when complete control exists but instead should be read more broadly.<sup>161</sup>

A broader reading would allow courts to find that school is in fact a custodial environment.<sup>162</sup> Huefner's argument for custody is based on not only the truancy laws<sup>163</sup> and state "in loco parentis" laws,<sup>164</sup> but also the fact that a court's interpretation of custody should not be overly formalistic. Instead, he argues that a court should be more cognizant of

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*Youngberg* context. See generally Huefner, *supra* note 56.

<sup>155</sup> *Waechter*, 773 F. Supp. at 1009 n.5.

<sup>156</sup> *Waechter* was affected by a myriad of problems, including a congenital heart defect, learning disabilities caused by a childhood case of meningitis, and legs of uneven length. Because of these limitations, *Waechter* was under a doctor's orders to refrain from exerting himself physically or participating in competitive sports. *Id.* at 1007.

<sup>157</sup> *Id.* at 1009. Although the court found the defendant in this case had a duty, it is arguable whether it established a broad standard for all teachers.

<sup>158</sup> See *supra* note 62. To appreciate the arguments made in favor of strictly enforcing a duty to protect students while they are at school, see the seminal work of Huefner, *supra* note 56, which is discussed at length herein.

<sup>159</sup> See Huefner, *supra* note 56.

<sup>160</sup> *Id.* at 1972.

<sup>161</sup> *Id.* at 1954-65.

<sup>162</sup> *Id.* at 1958.

<sup>163</sup> *Id.* at 1967.

<sup>164</sup> *Id.* at 1966-67.

the level of protection on which the victim relied or depended instead of focusing on any objective view of custody. According to Huefner, the courts "should be concerned principally with the extent to which the state, by limiting the victim's freedom or by taking upon itself the responsibility for some of her care, increases the victim's *dependence* on state protection."<sup>165</sup> This dependence would indicate a custodial environment for all schoolchildren.

Huefner cites several public policy reasons for creating this duty and for broadly interpreting *DeShaney*.<sup>166</sup> First of all, children might not be compensated for their injuries if limited to state remedies.<sup>167</sup> Furthermore, even if state remedies are available, Huefner opines that the extra incentive to avoid federal suits will push schools to become safer places.<sup>168</sup> He also defends placing this extra duty on teachers by pointing out that teachers must keep a safe environment if children are to be taught effectively.<sup>169</sup> Moreover, since the standard of complete indifference is so low, the duties of the teacher will not be raised significantly above those at common law.<sup>170</sup> In addition, Huefner supports his argument by stating that schools can institute extreme measures of security without opposition, while a government service like the D.S.S. in *DeShaney* could be sued for invasion of privacy.<sup>171</sup>

This discussion of circuit and district court decisions indicates that, almost without exception, courts use a bright-line test to determine whether liability will attach.<sup>172</sup> Either custody exists in an *Estelle-Gamble*

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<sup>165</sup> *Id.* at 1957 (emphasis added).

<sup>166</sup> *Id.* at 1969-71.

<sup>167</sup> *Id.* at 1970; see also Mawdsley, *supra* note 19 (discussing sexual abuse of students by teachers and the difficulty sexually abused students face in bringing forth claims against those teachers).

<sup>168</sup> Huefner, *supra* note 56, at 1971.

<sup>169</sup> *Id.* at 1970.

<sup>170</sup> *Id.* at 1970-71.

<sup>171</sup> *Id.* at 1970; see also *supra* notes 28-40 and accompanying text. *But see* New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (holding that school officials only have the right to implement searches of students when reasonable suspicion exists, i.e., "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.").

<sup>172</sup> The Fifth Circuit, however, appears to deviate from a bright-line analysis. See *Walton v. Alexander*, 20 F.3d 1350, *reh'g, en banc, granted*, 1994 U.S. App. LEXIS 16495 (5th Cir. 1994). The *Walton* court evaluated the *particular* factors which make the school environment custodial, thus, deviating from a bright-line test. However, the *Walton* court decision dealt with a residential special education school, so the decision did not indicate whether the court would deviate from a bright-line test (which provides that either custody exists for all students, or it does not) when evaluating a public school. See *supra* notes 133-41 and accompanying text.

context, or no custody exists at all. However, this result begs the question of whether a bright-line test of "always custody-always not custody" is the best answer. This Note submits that it is not.<sup>173</sup>

### B. Decisions Involving Creation of the Danger

Since a finding of a custodial relationship precludes any determination of the issue of creation of the danger, none of the cases that imposed the duty had any reason to consider this issue. On the other hand, several of the cases that refused to impose a constitutional duty based on custody did consider the issue of creation of the danger. However, none of these courts found that such a duty was created.<sup>174</sup>

One commentator suggests that if a court feels compelled to follow a strict reading of *DeShaney* and thus find that a custody-based duty exists only in cases of incarceration or institutionalization, then the court still can find a duty based on the creation of danger.<sup>175</sup> Such an approach considers the harm to a child at school to be different from the harm Joshua DeShaney sustained because the school would have created and controlled the environment in which the injury was sustained.<sup>176</sup> Therefore, under this theory, a court following a strict control analysis should examine the environment the school has created for the child. If the school has created a larger risk of danger for the child at school, then the teacher and school should be liable when the child is injured as a result of the increased risk.<sup>177</sup> This position can be demonstrated by looking at previously discussed cases that have examined this issue.<sup>178</sup>

In *D.R. v. Middle Bucks Area Vocational Technical School*,<sup>179</sup> the plaintiffs raised the claim of state-created danger based on the fact that a unisex bathroom and a darkroom were attached to the classroom.<sup>180</sup>

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<sup>173</sup> See *infra* notes 198-247 and accompanying text.

<sup>174</sup> *D.R. v. Middle Bucks Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993); *Arroyo v. Pla.*, 748 F. Supp. 56 (D. P.R. 1990).

<sup>175</sup> Huefner, *supra* note 56, at 1968.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Remember that each of these courts considered this idea only after determining that no custody existed in a school setting. See *supra* notes 73-90, 100-06 and accompanying text.

<sup>179</sup> 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

<sup>180</sup> *Id.* at 1375. The plaintiffs claimed that adjoining rooms created the danger since most of the attacks occurred there. Plaintiffs also argued that enclosed rooms attached to the classroom provided a readily available place for attacks to occur. Furthermore, *D.R.*



Plaintiffs also asserted that the school increased the risk of harm to the students by not informing the students' parents of, or investigating and putting a stop to, the illicit behavior.<sup>181</sup> The court ruled that these transgressions did not rise to the level of creation of the danger since they could not be seen as a cause of the harm suffered.<sup>182</sup> However, the court stated that the case was very close.<sup>183</sup>

Similarly, the court in *Dorothy J. v. Little Rock School District*<sup>184</sup> also considered the idea of creation of the danger. This issue was especially poignant since the school placed Brian B.'s attacker, Louis C., in Brian B.'s class with knowledge that he had violent sexual propensities.<sup>185</sup> The court approved of attaching liability where the school created the danger, even in the absence of custody.<sup>186</sup> Like the court in *Middle Bucks*, however, this court could not find a direct causal link between the state's conduct and the attacks on Brian B.; the school had placed Louis C. in the school program two years before the attack occurred.<sup>187</sup> Therefore, creation of the danger did not apply, and the court found no constitutional duty.<sup>188</sup>

In the case of *Arroyo v. Pla*,<sup>189</sup> the court skipped the determination of custody and discussed whether the school created the danger. The plaintiff argued that, through lack of safety measures, the school had

claimed that the teacher did not allow her to leave the room to use another restroom. *Id.* at 1382 (Sloviter, C.J., dissenting).

<sup>181</sup> *Middle Bucks*, 972 F.2d at 1373.

<sup>182</sup> *Id.* at 1375 ("Plaintiffs' harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence that supported liability in [other decisions].").

<sup>183</sup> *Id.* at 1374 ("Although we find this to be an extremely close case, and certainly a tragedy, we are convinced that the school defendants did not create plaintiffs' peril, increase their risks of harm, or act to render them more vulnerable to the student defendants' assaults.").

<sup>184</sup> 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993).

<sup>185</sup> *Id.* at 1408.

<sup>186</sup> *Id.* at 1421.

<sup>187</sup> *Id.* ("If Louis C.'s attack had come a few weeks or even months after his placement in the CBI program, the plaintiff might have a stronger case for the existence of a duty to protect.").

<sup>188</sup> This ruling was upheld in *Dorothy J. v. Little Rock School District*, 7 F.3d 729 (8th Cir. 1993). However, it is interesting to note that on appeal, the plaintiffs added another allegation to their creation-of-the-danger argument. This allegation claimed that a school employee had placed the two boys in the shower together "to confirm his suspicions" that Brian B. was being assaulted. *Id.* at 734. The appellate court noted that such an occurrence would likely change its interpretation of creation of the danger, but it refused to consider the allegation since it was not raised at the district court level. *Id.*

<sup>189</sup> 748 F. Supp. 56 (D. P.R. 1990).

encouraged or created an unsafe environment.<sup>190</sup> According to the plaintiff, "By failing to institute adequate security measures, defendants tacitly approved and encouraged misconduct such as allowing students to carry weapons to school."<sup>191</sup> The court dismissed this argument since the school actually had a guard on duty and the court feared that unwarranted searches of the students might violate rulings handed down by the U.S. Supreme Court.<sup>192</sup>

From these cases, it is apparent that although creation of the danger is a viable theory for imposing a constitutional duty, it is not a theory that courts generally accept. A court's reluctance to accept this argument likely flows from its determination of custody.<sup>193</sup> Thus, when a court rules that the requisite custody is not present, a school would have to place a student in tremendous immediate peril that directly caused harm before a duty to protect would ever be imposed on the teacher.<sup>194</sup>

### C. Conclusions

A majority of the commentators but a minority of the courts have found a constitutional duty for teachers.<sup>195</sup> Courts appear to be much more likely to follow the strict letter of the law as set down by *De-Shaney*, regardless of the views of the commentators. These courts consistently make the determination of duty based on the idea of custody. No court yet has rejected the finding of custody and instead found liability on the basis of creation of danger. This view of custody has resulted in the courts' creation of a bright-line test, where a classroom environment either always will, or always will not, be considered custodial.

Although the constitutional line-drawing in this issue is important, the policy issues should be the determining factor. The competing interests

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<sup>190</sup> *Id.* at 57. Although the court used somewhat faulty reasoning by not deciding the issue of custody first, its discussion of creation of the danger is enlightening.

<sup>191</sup> *Id.* at 60.

<sup>192</sup> *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

<sup>193</sup> It should be noted, however, that several of the courts, which did address and seemingly accept the creation of the danger theory, did not rule for the plaintiff because the court could not find the requisite causal connection between the danger and the harm. See *supra* notes 179-88 and accompanying text.

<sup>194</sup> Arguments that the school is an inherently dangerous environment to which a child is subjected are not very convincing. Schools are generally only a reflection of society. In fact, "[t]en percent of the children visiting Boston City Hospital's pediatric clinic last year had witnessed a shooting or a stabbing before age six." Thomas Toch, *Violence in Schools*, U.S. NEWS & WORLD REP., Nov. 8, 1993, at 30, 34.

<sup>195</sup> See *supra* notes 61-64 and accompanying text.

are between the teachers, who do not believe they should be subjected to this extra burden, and parents, who want to be able to entrust the care of their children to the school. Each side is supported by meritorious arguments, and a person's view is formed by whether they believe the imposition of a duty will force teachers to be "policemen or prison guards"<sup>196</sup> or will merely make teachers more cautious.<sup>197</sup> This Note suggests that a bright-line test is not the best way to choose between these polar opposites and that a solution that can achieve some of the benefits of each position should be employed.

#### IV. "SUFFICIENT CUSTODY" TEST

This Note adopts a view that has only been mentioned in passing<sup>198</sup> and greatly expands on it to create a test for a constitutional duty that will not be subject to bright-line determinations. This test is the "sufficient custody" test. Instead of a bright-line test which either imposes liability whenever a teacher is completely indifferent or never imposes liability at all, this test considers the particular circumstances of each case. However, the circumstances would be based not on the actions of the schools, but rather on the needs of the student.

The needs of the student would be determined by that student's mental capabilities, age, and ability to communicate with adults. These attributes would indicate how much restraint and control are needed for a particular student. As the U.S. Supreme Court stated in *DeShaney*, "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause."<sup>199</sup>

Unlike the situation faced by a prisoner, the question whether a student has been restrained to the point that he or she has been rendered unable to care for himself or herself depends not on the actions of the school and its

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<sup>196</sup> See *supra* note 90 and accompanying text.

<sup>197</sup> See *supra* notes 169-71 and accompanying text.

<sup>198</sup> *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1381 (3d Cir. 1992) (Sloviter, C.J., dissenting) (suggesting that the duty should extend to young children and those with disabilities), *cert. denied*, 113 S. Ct. 1045 (1993); Recent Case, 106 HARV. L. REV. 1224, 1229 (1993) (suggesting case-by-case review for the imposition of liability); see also *supra* note 140.

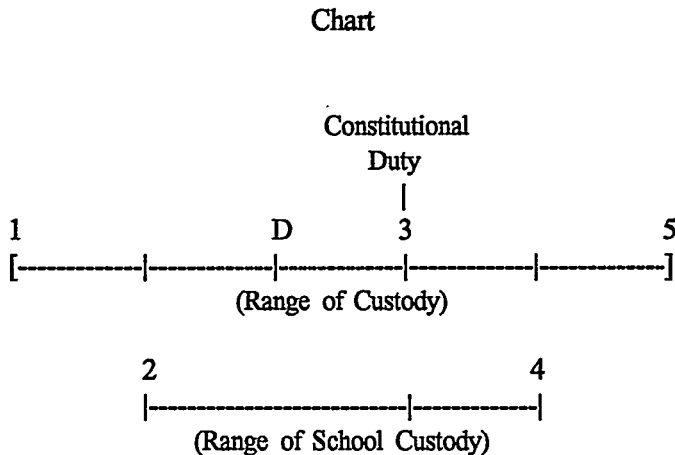
The ideas contained in these sources provide a basis upon which the proposed test has been built.

<sup>199</sup> *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989).

personnel but on the ability of the individual student.<sup>200</sup> This "sufficient custody" test represents a position supported by case law and is the best alternative from a public policy standpoint.

*A. Case-law Basis for the "Sufficient Custody" Test*

The basis for the entire "sufficient custody" test is an interpretation of *DeShaney* and other cases that allows for the use of a range of custody.<sup>201</sup> "DeShaney appeared to establish a continuum by contemplating explicitly the possibility that state restraints other than physical incarceration might foster a constitutional duty."<sup>202</sup> This continuum, or range, runs from complete lack of custody/control on one end, to total custody/control on the opposite end. Within this range of overall control, the issue of school custody can be judged on its own separate range. These ranges can be shown conceptually as follows:



<sup>200</sup> This difference is because prisoners, no matter what their mental or physical condition, have no means to care for themselves. Students, on the other hand, do have the opportunity to care for themselves as long as their mental and physical faculties allow them to do so. Therefore, the particular restraint imposed on the student is not as important as is whether the student is in need of restraint.

<sup>201</sup> It might seem inconsistent to use the notion of a range of custody since custody seems to be an all-or-nothing proposition, which provides that custody either exists or does not. However, this Note's custody continuum practically equates custody with control. See Recent Case, *supra* note 198, at 1227 (suggesting the notion that the courts could judge these cases in "degrees of custody").

<sup>202</sup> *Id.* at 1227. This article criticizes the logic used to decide the *Middle Bucks* case, stating, "The central flaw in the Middle Bucks majority's reasoning lies in the court's characterization of custody as a bright-line issue of locks and bars." *Id.*

In the chart, the line between 1 and 5 represents the continuum of possibilities for the exertion of custody by state actors. The number 1 represents no custody at all, while 5 represents total custody.<sup>203</sup> The line that is marked by 3 shows the division between control that does not rise to the standard of creating a duty (to the left of line 3), and control that does create a duty (to the right of line 3).<sup>204</sup> The "D" on the Range of Custody represents where the *DeShaney* decision would fall.<sup>205</sup>

The line between 2 and 4 represents where the issue of school custody would lie on the range of overall custody.<sup>206</sup> The number 2 represents the lowest amount of custody/control that would be exerted by a school.<sup>207</sup> Likewise, point 4 demonstrates the greatest amount of custody/control applied by a school.<sup>208</sup> The space on the Range of School Custody between the Constitutional Duty line (line 3) and point 4 represents where the duty would be applied in the school setting, and the space between point 2 and 3 indicates where it would not be applied.

To determine whether the school setting should lie to the right or left of the Constitutional Duty line, the court must look at the entirety of the circumstances under which the schoolchild was educated.<sup>209</sup> The entirety of the circumstances under which the child was educated includes two major factors: 1) the child's mental capacity, age, and ability to

<sup>203</sup> Thus, five would represent the situation of the prisoners in *Estelle* and of the involuntarily committed mental patients of *Youngberg*. See *supra* notes 22-41 and accompanying text. Note that the numbers on the chart are used only as reference points and are not meant to be equal distance apart. See *infra* note 206.

<sup>204</sup> Thus, line 3 is the "Constitutional Duty" line.

<sup>205</sup> Since the Supreme Court obviously did not use this test, the *DeShaney* decision is approximated on this continuum to give the reader some perspective. The Court found that some custody was exerted, so it would lie on the line to the right of point 1 (no custody). However, not enough restraint was applied to create a duty based on custody. Therefore, it lies to the left of the Constitutional Duty line (line 3).

<sup>206</sup> This line for school custody is meant to be overlaid on the overall Range of Custody line. However, to facilitate the reader's understanding of the diagram, it is printed below the Range of Custody line. The distance between point 2 and line 3 is greater than line 3 and point 4 because there would be more school situations where there is not sufficient custody to create a constitutional duty.

<sup>207</sup> Since some control is inherent in the classroom setting, the left-most point on the Range of School Custody is still to the right of point 1 on the Range of Custody continuum.

<sup>208</sup> Once again, the school situation stops short of the extreme shown on the Range of Custody continuum. Although school might not be the students' favorite place to be, students are rarely treated as prisoners or confined mental patients.

<sup>209</sup> Although this approach would likely lead to more litigation since more cases would be forced to go to trial to be decided, that effect would hopefully be outweighed by the public policy benefits. See *supra* notes 166-71 and accompanying text.

communicate and 2) the environment which would reasonably protect that child.

The child's mental capacity, age, and ability to communicate relate directly to the amount of control, and therefore the amount of custody, that a school is going to exert. Chief Judge Sloviter employed this argument in her dissent in *Middle Bucks*.<sup>210</sup> "[T]he duty of state entities to protect those already within their charge should be broad enough to extend at least to young children and those who, because of disability or other impairment, are not likely to seek assistance promptly."<sup>211</sup>

However, the peculiar needs of a certain student might not be a valid basis for implying custody. "The 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."<sup>212</sup> In *Dorothy J.*,<sup>213</sup> the district court interpreted this statement to mean that custody can be created only by the actions of the state not by the needs of the children in the state's care.<sup>214</sup> Therefore, it appears that *DeShaney* bars imposing liability based on the individual needs of young or handicapped children. This denial of liability is in direct opposition to Chief Judge Sloviter's dissent in *Middle Bucks*.<sup>215</sup>

However, in employing the "sufficient custody" test (and thereby ascertaining the location of that situation on the Range of School

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<sup>210</sup> 972 F.2d 1364, 1377-84 (3d Cir. 1992) (Sloviter, C.J., dissenting), *cert. denied*, 113 S. Ct. 1045 (1993).

<sup>211</sup> *Id.* at 1381. The theme of this dissent was also argued in Recent Case, *supra* note 198, at 1229. The article submitted that "[o]ne possible approach would be to mandate a case-by-case inquiry that would examine the plaintiff's dependence on state officials for protection and the causal connection between school officials' breaches of duty and the harm to the plaintiffs." *Id.* (footnotes omitted). Although the argument for this dependency test may not be based entirely on the child's special needs, it does appear to be the main concern in advocating a duty in the *Middle Bucks* case. "Middle Bucks held that a hearing-impaired, helpless teenager abused under her teacher's nose must be subjected to no less than twenty-four hour lockup before the state owed her any affirmative duty . . . ." *Id.*

<sup>212</sup> *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989).

<sup>213</sup> 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993).

<sup>214</sup> *Id.* at 1414. The court went on to state, "Absent additional limits on the disabled student's freedom to act other than those routinely part of the school day, the Court cannot say that an affirmative duty to protect exists based solely on the handicap itself." *Id.*

<sup>215</sup> 972 F.2d 1364, 1377-84 (3d Cir. 1992) (Sloviter, C.J., dissenting), *cert. denied*, 113 S. Ct. 1045 (1993). The majority in *Middle Bucks* never addressed this issue. A choice between the two sides is not necessary to support the basis of this Note; hence, the Note does not choose a position.

Custody), the findings of the peculiar needs of the child is not the end determination, but merely a means to get to that end. The end determination, under the *DeShaney* decision, is an evaluation of the limitations on freedom imposed by the school. The particular needs of a certain student or group of students can lead a court to decide the proper limitations on the freedom of the student or group of students.

By working backward and assuming a duty exists, the court's final analysis must focus on whether the teacher's conduct was grossly negligent or completely indifferent.<sup>216</sup> To decide this, the court must have an idea of the reasonable teacher's level of control, so it can determine if the actual conduct grossly deviated from the norm. However, a consistent norm cannot be applied to all classroom settings or environments. Therefore, the norm must be created by determining reasonable conduct in light of the different factors, of which the primary one is the age and mental ability of the student.<sup>217</sup>

In sum, courts must use the age and ability of the child as one factor to construct a "reasonable" environment. The court must then measure this reasonable environment, as opposed to the actual environment involved in the case, to see if it lies to the right of the Constitutional Duty line (line 3) on the Range of School Custody line.<sup>218</sup> If it does, sufficient control is obtained, and the duty is imposed. When the court imposes this duty, the factfinder then compares the actual environment to the reasonable one that has been constructed and determines whether the actual grossly deviates from the norm.<sup>219</sup>

This approach might be best illustrated with an example. Suppose that a teacher takes his class of four-year-old students to the playground. This playground is next to a busy highway. The teacher decides to read a good book and lets the children run completely wild. Inevitably, one of the children is struck by a passing car.

If a court began its examination by looking at the restraints imposed upon the children, then custody in this case would not exist since the teacher exerted no control whatsoever. However, under the "sufficient custody" test, the court would test custody not upon the actual situation as it existed, but upon the situation as it would exist if a reasonable

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<sup>216</sup> This standard has been applied in cases discussed previously. *See supra* note 60.

<sup>217</sup> Other factors might include prior violence that has taken place at the school, the violence present in the neighborhood, or the general environment of the city.

<sup>218</sup> *See* chart, *supra* p. 255.

<sup>219</sup> The term "environment" applies to single occurrences as well as to conduct that happens over a long period of time. The environment of the classroom is as important in an isolated assault as it is in a series of sexual offenses over a period of time.

teacher were in control of the class. In determining the actions of a reasonable teacher in the circumstances, the key factor is the age and abilities of the children. In this case, sufficient custody exists since a reasonable teacher overseeing small children near a road would exert a great deal of control.

Therefore, the U.S. Supreme Court's statement in *DeShaney* that an affirmative duty cannot be created by the needs of the individual<sup>220</sup> appears to be somewhat inconsistent. The only way to judge custody is to look at the limitation placed upon freedom. However, to determine what the normal limitations on freedom are, the courts must use the individual's predicament, even though the U.S. Supreme Court said it should be ignored.<sup>221</sup>

Another factor involved in determining the reasonable environment is creation of the danger.<sup>222</sup> As opposed to using creation of the danger as a second approach to impose a duty, it is best used to support the "sufficient custody" test.<sup>223</sup> It can be used to determine how much the actual conduct deviated from the court's assessment of a reasonable environment. If the school somehow created a dangerous situation,<sup>224</sup> a greater deviation from the norm has been demonstrated.<sup>225</sup>

Putting together all the factors discussed above, the "sufficient custody" test should work quite well on a case-by-case basis. As an example of how the "sufficient custody" test would work, look again at

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<sup>220</sup> *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989); see *supra* note 212 and accompanying text.

<sup>221</sup> *Id.* See the arguments contained *supra* notes 210-15 and accompanying text.

<sup>222</sup> For a discussion of this concept, see *supra* notes 179-94 and accompanying text.

<sup>223</sup> Even though the courts have considered this concept, no court has actually used this as an independent reason to impose a duty. Therefore, its best use seems to be as evidence of control.

<sup>224</sup> The idea that a child is placed in danger merely by being brought to school is usurped in the determination of control. Regardless, it would be very difficult to prove that children are exposed to any greater danger at school than they are in their own neighborhood or at a party.

<sup>225</sup> The situation in *Middle Bucks* provides a good example of where this analysis could be employed. See *supra* notes 179-83 for a discussion of how creation of the danger was argued in *Middle Bucks*. In that case, a unisex bathroom and a darkroom were attached to the classroom. The plaintiffs argued that this arrangement helped to foster an environment where they could be attacked. Under the "sufficient custody" test, instead of determining this separately, this factor would be used to determine the deviation from reasonable behavior in the circumstances. If it would be grossly negligent to have such an arrangement, that finding indicates that the entire environment in which the incidents happened might have been handled in a grossly negligent manner.



the situation posed in the introduction of this Note.<sup>226</sup> First, the court must formulate, based on the particular needs of the students, a reasonable environment for the school. In this case, the court would focus on the environment of the class that Mrs. Smith taught. To determine the standard of a reasonable environment, the court would focus primarily on any peculiar needs of the victim, Jeff Jones.<sup>227</sup> Since Jeff apparently had no need for special control or restraint, the court should rule that "sufficient custody" does not exist,<sup>228</sup> and therefore the suit against the teacher would not go to the jury.<sup>229</sup>

Suppose, however, that the class that Jeff and Stanley occupy is for severely mentally and emotionally handicapped children. In this instance, that fact may well suggest a finding of sufficient custody to impose the duty. In that case, the determination of whether the teacher was liable would go to the jury.<sup>230</sup> To determine liability, the jury would take as a basis the actions of a reasonable teacher within a reasonable custodial environment<sup>231</sup> and then compare it with the actual behavior in question. If the actual behavior grossly deviated from the reasonable standard, liability would attach to the teacher.<sup>232</sup>

In conclusion, then, the following steps should be used by a court to determine whether a teacher has a constitutional duty to protect children in a particular school setting. First, the court should develop a reasonable environment by looking mainly at the particular needs of the students at risk or the specific student who was harmed. Second, the court should look at the reasonable environment and control that should have been employed to see if it is sufficient to create custody such that a duty inures.<sup>233</sup> Third, if the reasonable environment does not limit the freedom of the students enough to create a duty, then the court should decide in favor of the teacher. However, if the reasonable environment does limit freedom enough, then a fourth step should be employed. The factfinder should compare this reasonable environment with the actual conduct, including any danger that may have been created by the school.

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<sup>226</sup> See *supra* p. 229.

<sup>227</sup> See the five-step process, *infra* pp. 260-61.

<sup>228</sup> See chart, *supra* p. 255.

<sup>229</sup> See step 3, *infra* p. 260.

<sup>230</sup> See steps 4-5, *infra* pp. 260-61.

<sup>231</sup> In this case, a reasonable custodial environment refers to how the jury perceives that a reasonable teacher, in an environment considered custodial, would handle a situation where she witnessed a gun being kept in a student's locker.

<sup>232</sup> See step 5, *infra* p. 261.

<sup>233</sup> See chart, *supra* p. 255. This analysis must be employed on a case-by-case basis.

Fifth, if the actual environment or conduct does not grossly deviate from the norm or show deliberate indifference, then the factfinder should rule for the teacher. However, if the factfinder should determine that deliberate indifference is shown, then liability against the teacher must be imposed. As illustrated in the example set forth above, this test allows courts the flexibility to make a determination on an individual basis<sup>224</sup> while still retaining enough control over the situation to bring uniformity to the area.

### *B. Public Policy Reasons for the "Sufficient Custody" Test*

Very persuasive arguments exist both for and against imposing a constitutional duty on teachers. The "sufficient custody" test permits courts to make decisions for the right reasons without harming the interests of the teachers.

The first public policy served is relieving some of the responsibility on our already overworked and underpaid teachers.<sup>225</sup> Their ability to protect children has become increasingly taxed as the schools become more dangerous places.<sup>226</sup> It is indicative of the problem that in 1940, teachers rated chewing gum and running in the halls as some of the top disciplinary problems. In 1990, myriad concerns, including drug abuse, robbery, and assault, now top the list of teacher anxieties.<sup>227</sup>

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<sup>224</sup> This approach allows the courts an opportunity to find the duty to protect in cases where it is really warranted. The courts generally dislike dismissing these cases. *See, e.g., D.R. v. Middle Bucks Vocational Technical Sch.*, 972 F.2d 1364, 1365 (3d Cir. 1992) ("This appeal presents us with a classic case of constitutional line drawing in a most excruciating factual context."), *cert. denied*, 113 S. Ct. 1045 (1993); *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405, 1423 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993) ("The court sympathizes with Dorothy J. and her son over the grievous harm they have suffered.").

<sup>225</sup> *See supra* note 3 and accompanying text.

<sup>226</sup> This fact has been demonstrated in several recent articles. *See, e.g., Roll Call of the Dead*, PEOPLE WKLY., June 14, 1993, at 50 (estimating that 31 fatalities occurred in public elementary and high schools during the 1992-93 school year); Susan Reed, *Reading, Writing and Murder: A Survey of Death in America's Public Schools Shows There's No Sanctuary from the Culture of Violence*, PEOPLE WKLY., June 14, 1993, at 44, 44 (noting that "[o]ne of five high school students carries a weapon to school at least once a month" and guns are only second "to automobile accidents as the leading cause of death among young adults"); Toch, *supra* note 194, at 32 (noting that, according to Secretary of Education Richard Riley, violence "has turned many of our classrooms into war zones").

<sup>227</sup> Toch, *supra* note 194, at 34.

As Judge Wright noted in *Dorothy J.*,<sup>238</sup> “[W]ith the epidemic of deadly violence on many school campuses today, teachers would be constitutionally obliged to assume roles similar to policemen or even prison guards in protecting students from other students.”<sup>239</sup> Although Judge Wright advocates no liability whatsoever, the “sufficient custody” test will likewise relieve most teachers of these responsibilities.<sup>240</sup>

One commentator espouses a view opposite to that of Judge Wright, saying, “Imposing affirmative duties on the schools will not pose a threat to the vitality of school systems and administrators. Schools need to maintain a secure environment in order to achieve their primary purpose, that of educating their students.”<sup>241</sup> However, such an affirmative duty to maintain a secure environment rests on the school systems and administrators,<sup>242</sup> not on teachers. A teacher’s job is to teach students, not protect them. Since a secure environment is a better milieu in which to teach, the teacher should be able to rely on the preventative measures employed by the school system.

Although relieving the teacher of this liability might remove one avenue of recovery for an injured student, it is unlikely to limit recoveries substantially. Many students already receive large verdicts based on a school’s breach of its duty of care.<sup>243</sup> Allowing constitutional liability only when the “sufficient custody” test is met will protect most teachers

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<sup>238</sup> 794 F. Supp. 1405 (E.D. Ark. 1992), *aff’d*, 7 F.3d 729 (8th Cir. 1993).

<sup>239</sup> *Id.* at 1414.

<sup>240</sup> The test will relieve most teachers of the duty to protect students from other students, since, in most environments (e.g., public high school), the court will not impose a constitutional duty on the teacher. The exception to this, of course, will be when the students have exceptional needs that would reasonably force the teacher to create a custodial environment. However, these cases will be rare, and these specialized teachers likely will not be surprised that they have an extra responsibility in caring for these students.

<sup>241</sup> Huefner, *supra* note 56, at 1970. Although he does not specifically mention teachers, this liability would apply to teachers just as readily as to administrators or school board members.

<sup>242</sup> Many schools have protection measures already in place. Thomas Jefferson High School in New York “boasts some of the most up-to-date educational equipment in the country,” including several metal detectors and a grieving room that is stocked with counselors. *A Bullet for Teacher: Violence in Schools*, *ECONOMIST*, July 24, 1993, at A26. “Three thousand safety officers—comparable with the ninth largest police force in the U.S.—walk their beats along the corridors of New York City’s schools.” Reed, *supra* note 236, at 44.

<sup>243</sup> For example, a third-grade student was awarded \$350,000 for a sexual assault. Edward A. Adams, *Court Restores Award to Victim of Assault*, 209 N.Y. L.J. 104, 104 (1993).

in everyday situations<sup>244</sup> but will still impose a duty in situations where it is required.<sup>245</sup> This approach will allow judges to impose the duty in situations where restraints on the students' freedom (custody) indicates that a teacher should be constitutionally liable.

Another benefit of restricting the instances in which the duty would be imposed is the idea that older children, or children able to care for themselves, should develop independence. As journalist and sociologist Donna Gaines noted, "Young people . . . are in the peculiar position of being overprotected by adults, yet alienated from them . . . ."<sup>246</sup> In theory, if children were continually able to rely on teachers for complete protection, they might never learn the skills necessary to survive outside of school. "[B]y continuing to isolate teens from the responsibilities of life in the mainstream, adults fail to challenge kids to be powerful and independent."<sup>247</sup>

### CONCLUSION

Although courts appear to favor using a bright-line analysis, the "sufficient custody" test provides courts with a much more flexible framework. The test gives courts the latitude to impose a constitutional duty only in situations where it seems to be warranted by the amount of custody. Once the court determines the reasonable amount of custody used in the circumstances and that the custody in the case at hand achieves the threshold for applying liability, then the claim can be given to the jury. The jury can then evaluate the actual conduct against the reasonable custody in the situation to see if a gross deviation from this standard occurred.

In this way, only teachers that are in special situations with needy students will be subjected to the possibility of a § 1983 suit based on a constitutional duty to protect. These are the teachers that realize they must exert a great deal of control over their students to be able to teach effectively. Therefore, holding them liable for their students' well-being does not greatly change their responsibilities. On the other hand, teachers

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<sup>244</sup> See *supra* note 240.

<sup>245</sup> Huefner argues that the duty will give "added incentive for schools to safeguard their students adequately." Huefner, *supra* note 56, at 1971. The sufficient custody test will also perform this function, but it will apply only in situations where the extraordinary needs of the students merit the extra burden of liability.

<sup>246</sup> Patricia Pearson, *Teenage Mutant Ninja Canadians?*, CHATELAIN, May 1993.

<sup>247</sup> *Id.*

that handle mature students need not stifle those students in the name of protection.

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