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## And What of the Meek?: Devising a Constitutionally Recognized Duty to Protect the Disabled at State Residential Schools

Yama Shansab

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## AND WHAT OF THE MEEK?: DEVISING A CONSTITUTIONALLY RECOGNIZED DUTY TO PROTECT THE DISABLED AT STATE RESIDENTIAL SCHOOLS

*Section 1983 provides a statutory right to a remedy for Fourteenth Amendment due process violations. The Supreme Court has suggested that the state only has a duty to protect when an individual is incarcerated, involuntarily institutionalized, or has other similar restraints of his or her personal liberty. Based on this, courts generally have found that schools have no constitutional duty to protect their students against injury from other students or staff members. Lower courts have struggled with what constitutes other similar restraints, but have generally been unwilling to find that a state has a constitutional duty in all but the most egregious situations.*

*This Note posits that handicapped students at residential schools are in situations sufficiently similar to incarceration or involuntary institutionalization that the schools should have a constitutional duty to protect these students. The proposed duty would allow those students least able to protect themselves an avenue of recovery while preserving the general no-duty rule in the more universal public school settings.*

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We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.<sup>1</sup>

## INTRODUCTION

A curious tension dwells at the heart of the nation's legal and political sentiments. Today's popular political climate often reverberates with calls for less federal intrusion into state affairs. The recent retrenchment of affirmative action,<sup>2</sup> as well as the seemingly perennial twin tirades against the

<sup>1</sup> *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (opinion by Posner, J.).

<sup>2</sup> See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.) (finding that a state university law school's admissions program violated equal protection rights by giving substantial racial preferences), *cert. denied*, 116 S. Ct. 2581 (1996); see also Amy Wallace, *UC Regents*

Internal Revenue Service and Big Government,<sup>3</sup> demonstrate a disenchantment with federal involvement in local matters. At the same time, however, federal intercession has been actively sought out to provide remedies for the most personal of problems affecting our society. The enactment of the Violence Against Women Act of 1994, for example, created a right to civil damage remedies in federal court for gender-motivated abuse of women, even when the abuser is not a state actor.<sup>4</sup> In the wake of the Supreme Court's 1992 decision in *Franklin v. Gwinnet County Public Schools*<sup>5</sup> to hold school officials responsible under Title IX<sup>6</sup> for the sexual harassment of students by teachers or other employees, lower courts have begun to "extend that duty to include harassment of students by other students."<sup>7</sup>

Hardly curious, then, against the backdrop of these tensions and developments, is the continuing debate over whether schools have a constitutional duty to protect their students. So far, the general rule has been to relieve schools of any constitutional duty to protect their students.<sup>8</sup> The basis for this general no-duty rule stands against the great weight of scholarly com-

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*Refuse to Yield on Affirmative Action Ban*, L.A. TIMES, Jan. 19, 1996, at A1 (discussing the University of California Board of Regents's refusal to vote on proposals to revive an admissions policy of race and gender-based preferences).

<sup>3</sup> See, e.g., Clay Chandler & Albert B. Crenshaw, *Clinton to Propose Board to Act as IRS Watchdog; National, Local Citizen Panels Envisioned*, WASH. POST, Oct. 3, 1997, at A1 (discussing congressional and presidential responses to the public's complaints about the Internal Revenue Service); Liz Spayd, *Welcome to the State of Paranoia; Why America Wallows in Waco and Whitewater*, WASH. POST, July 23, 1995, at C1 (discussing American's distrust of government).

<sup>4</sup> See, e.g., Violence Against Women Act of 1994 (VAWA), 42 U.S.C. §§ 13931-14040 (1994), especially 42 U.S.C. § 13981 (1994).

<sup>5</sup> 503 U.S. 60 (1992).

<sup>6</sup> See Education Amendments of 1972 §§ 901-909, 86 Stat. 235, 373-75 (1972), (current version at 20 U.S.C. §§ 1681-88 (1994)). Title IX states, in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994); see also *Franklin*, 503 U.S. at 65 (holding that Title IX could support a claim for monetary damages under its implied right of action).

<sup>7</sup> David G. Savage, *School Officials Face Lawsuits if They Ignore Sexual Harassment of Students*, L.A. TIMES, Sept. 2, 1996, at A24.

<sup>8</sup> See *infra* Part III; see also Matthew J. Conigliaro, Recent Development, *Walton v. Alexander: The Fifth Circuit Limits a State's Fourteenth Amendment Duty to Protect to Instances of Involuntary Restraint*, 70 TUL. L. REV. 393, 406-07 (1995) (stating that "[w]hether the circuit courts are correct in their interpretation of the law in this area . . . state officials can take comfort in the fact that this is one subject upon which the circuits, at least for now, agree").

mentary,<sup>9</sup> a few district court decisions,<sup>10</sup> and some suggestive language by several federal circuit courts.<sup>11</sup>

The debate, bristling with thorny issues, continues unabated, both through litigation<sup>12</sup> and media coverage.<sup>13</sup> The issues surrounding the debate over a school's duty to protect its students are thorny, and the different situations in which these issues can surface are myriad. Because the question of a school's duty to its students sweeps broadly across many factual circumstances and legal issues, three hypothetical scenarios might best illustrate the precise inquiry this Note addresses.

In Scenario One, Abby is an able-bodied student attending a local high school. Abby, fourteen years old and therefore under the age of majority,<sup>14</sup> attends an after-school social event hosted by a school-sponsored organization. Students arrive at and leave the event, which is held inside the school building, as they wish. While waiting outside—but still on school grounds—with friends for a ride home, Abby is shot and killed by another student.<sup>15</sup> Scenario One asks whether the school had a constitutional duty to protect Abby from the violent act of the other student.<sup>16</sup> This scenario falls outside the scope of this Note.<sup>17</sup>

In Scenario Two, Bobby, also under the age of majority and thus compelled to attend his junior high school by virtue of the state truancy and

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<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* notes 173-98 and accompanying text.

<sup>11</sup> See *infra* Parts III.B.1-2.

<sup>12</sup> See, e.g., *Stevens v. Umsted*, 921 F. Supp. 530 (C.D. Ill. 1996) (holding that the superintendent of a residential school for visually impaired students owed no duty to protect a developmentally and visually challenged child from sexual abuse perpetrated by other students over a ten-year period), *aff'd*, 131 F.3d 697 (7th Cir. 1997). As footnote 20, the Introduction, and Part V below will make apparent, this Note focuses mainly on situations similar to the *Stevens* case, that is, a school's constitutional duty to protect disabled students at residential schools.

<sup>13</sup> See, e.g., David Heckelman, *School Chief Not Liable for Attacks on Disabled Student*, 142 CHI. DAILY L. BULL. 65 (1996); James G. Sotos, *School Had Limited Duty to Protect Student*, 142 CHI. DAILY L. BULL. 107 (1996).

<sup>14</sup> Because Abby is under the age of majority, the state's truancy and compulsory attendance laws apply. The significance, if any, of these statutes is discussed in Part II.

<sup>15</sup> This scenario is loosely, but not exactly, based on *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994). The cases upon which Scenarios One through Three are based have been varied in factual detail to better illustrate the breadth of potential issues, most of which fall outside the scope of this Note, which is concerned specifically with the residential school setting for disabled students.

<sup>16</sup> The Fifth Circuit said "no" in *Leffall*, 28 F.3d at 530, holding a school not liable when one student shot another at a school-sponsored dance, but suggesting that a duty would exist if a school official were to harm a student.

<sup>17</sup> Many commentators have addressed the issue of whether to find a broad duty to protect in such settings. Part IV attempts to summarize the positions taken by the commentators who have written about the field in general.

mandatory attendance laws, is threatened repeatedly by a fellow student. Bobby alerts school officials of the threats made against him. Even while armed with such knowledge, the school officials take no action to protect Bobby from the other student, who, the officials know, has a record of sexually violent behavior. Ultimately, the other student sexually molests Bobby on numerous occasions over the course of the year.<sup>18</sup> Asked in a different way, Scenario Two presents the question of whether school officials effectively deprived Bobby of his constitutional liberty interest as protected by the Fourteenth Amendment.<sup>19</sup> This scenario also falls outside the scope of the present inquiry.

In Scenario Three, Chris, aged nine, is severely visually impaired and functions intellectually on the level of a five-year-old. Chris attends a state residential school for the visually impaired. Over a ten-year span, other students at the school sexually molest Chris. The superintendent of the school has notice of the sexual attacks, but does not provide Chris with an environment reasonably safe from continued sexual abuse.<sup>20</sup> The court holds, however, that the handicaps notwithstanding, Chris had no constitutional right to be protected from repeated sexual abuse at the residential school. This Note addresses Scenario Three.

Despite the differences among the above scenarios, in all three the constitutional and federal statutory backgrounds are the same. The cases constituting the bases for the scenarios all were brought under the federal statute 42 U.S.C. § 1983. Section 1983 provides a statutory right to a remedy for Fourteenth Amendment due process violations.<sup>21</sup>

This Note consists of five parts. Part I discusses 42 U.S.C. § 1983 and its foundations. Part II addresses two main themes: (1) the *DeShaney* decision and its impact on the duty of state schools to protect their students, as well as the pre-*DeShaney* foundations for finding such a duty; and (2) qualified immunity under the Eleventh Amendment of the Constitution, especially the way in which these immunities can effectively bar recovery, even if a

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<sup>18</sup> There are multiple cases upon which this scenario is loosely, but not precisely, based. Two of these cases are *B.M.H. v. School Board*, 833 F. Supp. 560 (E.D. Va. 1993), and *Doe v. Taylor Independent School District*, 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993), *vacated*, 15 F.3d 443 (1994) (en banc), *cert. denied*, 513 U.S. 815 (1994).

<sup>19</sup> See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that a teacher may use such force as he or she reasonably believes is necessary for the proper control, training, or education of a child). *Ingraham* acknowledged that freedom from bodily restraint and punishment falls within the liberty interest in personal security that is protected from state deprivation without due process of law. See *id.* at 672-75.

<sup>20</sup> Scenario Three, the general focus of this Note, is based loosely, but not exactly, on the plaintiff's complaint, which was dismissed with prejudice, in *Stevens v. Umsted*, 921 F. Supp. 530 (C.D. Ill. 1996), *aff'd*, 131 F.3d 697 (7th Cir. 1997).

<sup>21</sup> See *infra* Part I.

duty to protect were found to exist. Part III discusses the case law in this area, which, though it generally finds no duty to protect, evinces (1) divergences and misconceptions among courts, creating ambiguity and speculation that a duty to protect students may exist in some circumstances; and (2) differences in opinion in at least two, and perhaps three, district court cases. Part IV discusses the positions among the commentators, who for the most part have dealt exclusively with the broad issue of whether there should be found a constitutional duty to protect students at school. Part V recommends that a constitutional duty to protect the disabled at state residential schools is the most factually tenable, and least judicially expansive, solution to the sweeping no-duty-to-protect dilemma.

## I. PROVIDING CIVIL REMEDIES FOR DEPRIVATIONS OF CONSTITUTIONAL RIGHTS: 42 U.S.C. § 1983

### A. *The Constitutional Dimension Requirement*

Section 1983 was enacted to provide remedies at law and in equity against deprivations of constitutional and federal statutory rights.<sup>22</sup> When a student suffers an unlawful harm at school, he is likely to have suffered the deprivation of the right to be free from unlawful harm.<sup>23</sup> This begs the question: If a wrong has been committed against the student, why not let him recover in tort? Put another way: When would a wrong rise to the level of a constitutional deprivation actionable under § 1983?

To be sure, § 1983 does not replace traditional tort law.<sup>24</sup> The Court

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<sup>22</sup> See 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983, at 5 (3d ed. 1991). Section 1983, entitled "Civil Action for Deprivation of Rights," states in pertinent part:

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.

42 U.S.C. § 1983 (1994).

<sup>23</sup> This right extends to "unlawful harms." Corporal punishment administered to a student at least instinctively may be perceived as creating some kind of harm, even if the net result of the punishment yields a benefit to society. Corporal punishment, however, when reasonably administered for a child's proper control, training, or education, thus far has been held to be constitutional. See, e.g., *Ingraham*, 430 U.S. at 161.

<sup>24</sup> See *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986). But see Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 760 (1992) (arguing that in reshaping § 1983, contemporary tort law should "flesh out not only ancillary procedural and remedial gaps but also the statute's most basic standards of liability and defense"). The suggestions in Part V of the Lewis and

has been vocal, if not completely clear, in its distinctions between tort law and actions cognizable under § 1983: "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."<sup>25</sup> Furthermore, traditional civil wrongs do not necessarily give rise to constitutional deprivations by virtue of the location of the act or the relationship of the actors.<sup>26</sup> To this end, even if a defendant were a state actor, the violation would not necessarily take on constitutional dimensions.<sup>27</sup> Particularly in the school setting, the mere fact that an element of supervision exists between school officials and students, supervisory liability, or respondeat superior, "cannot be a basis of [constitutional] liability."<sup>28</sup>

### B. *The Synergy Between the Fourteenth Amendment and § 1983*

In order to show an actionable constitutional violation, a claim must tap into the synergy between § 1983 and the Fourteenth Amendment.<sup>29</sup> The Fourteenth Amendment commands that states may not "deprive any person of life, liberty, or property, without due process of the law."<sup>30</sup> Two interrelated components may be said to constitute the Fourteenth Amendment's Due Process Clause: (1) a procedural component and (2) a substantive component. The Court in *Daniels v. Williams*<sup>31</sup> described the interplay between the procedural and the substantive components of the Due Process Clause:

By requiring the government to follow appropriate *procedures* when its agents decide to "deprive any person of life,

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Blumoff article "are designed principally to foster entity accountability and to further the subsidiary goals of compensating victims and facilitating the dynamic declaration of federal rights." *Id.* at 761.

<sup>25</sup> *Daniels*, 474 U.S. at 332.

<sup>26</sup> "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 333 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

<sup>27</sup> "[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Id.* (quoting *Baker v. McCollan*, 433 U.S. 137, 146 (1979)).

<sup>28</sup> *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3d Cir. 1989) (*Stoneking II*) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)), *cert. denied*, 493 U.S. 1044 (1990).

<sup>29</sup> Due process became applicable to the states when "[t]he Due Process Clause of the Fifth Amendment [was] later incorporated into the Fourteenth." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

<sup>30</sup> U.S. CONST. amend. XIV, § 1.

<sup>31</sup> 474 U.S. 327 (1986).



liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, . . . [the Due Process Clause] serves to prevent governmental power from being "used for purposes of oppression."<sup>32</sup>

The synergistic effect of the Fourteenth Amendment and § 1983 lies in their roots.<sup>33</sup> Section 1983 originally was based on section 1 of the Ku Klux Klan Act of April 20, 1871.<sup>34</sup> The rationale behind § 1983 was to deter and punish de facto state approval of private deprivations of constitutional rights.<sup>35</sup>

### C. *Stating a Claim Under 42 U.S.C. § 1983*

To state a claim under § 1983, a plaintiff must show (1) that an action was taken under the color of state law<sup>36</sup> and (2) that he suffered "a deprivation of a right protected by the Constitution."<sup>37</sup> A bifurcated, albeit contextually related, analysis emerges. First, the act constituting the deprivation must be classifiable as a state action.<sup>38</sup> To be so classified, the theory(ies) behind the claim must qualify as state action under either (1) a negative, or anti-interference analysis, or (2) an affirmative, or obligation-to-act, analysis;<sup>39</sup> however, any act arguably qualifying as a state action still may es-

<sup>32</sup> *Id.* (emphasis added) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)).

<sup>33</sup> See Lewis & Blumoff, *supra* note 24, at 760. In fact, Professors Lewis and Blumoff wrote that § 1983 "was passed to ensure" enforcement of the Fourteenth Amendment. *Id.* Their article goes on to state that § 1983 "was originally passed as § 1 of the Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983 (West Supp. 1997)), and titled 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Id.* at 756 n.2.

<sup>34</sup> See 17 Stat. 13 (1871); see also NAHMOD, *supra* note 22, at 5.

<sup>35</sup> See Lewis & Blumoff, *supra* note 24 (providing, among other things, an excellent and concise contextual and historical treatment of § 1983). This Note, which could hardly begin to address the plethora of issues accompanying a complete analysis of § 1983, will limit its discussion of § 1983 to the role it plays under the present inquiry. The failings of such an approach, it is hoped, will be excused.

<sup>36</sup> See *Brown v. City of Lake Geneva*, 919 F.2d 1301 (7th Cir. 1990) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970)).

<sup>37</sup> *Stevens v. Umstead*, 921 F. Supp. 530, 532 (C.D. Ill. 1996) (quoting *Brown*, 919 F.2d at 1301), *aff'd*, 131 F.3d 697 (7th Cir. 1997).

<sup>38</sup> See *infra* Part I.D.1-2 (addressing this aspect of stating a § 1983 claim).

<sup>39</sup> See *infra* Part I.D.1-2 (discussing the "negative, or anti-interference, prong" and the "affirmative, or obligation-to-act, prong"). Although I have labeled these analyses in

cape § 1983 liability if the standard of care attendant to the duty has not been transgressed.<sup>40</sup> Furthermore, in discussing the second element necessary to state a § 1983 claim—"a deprivation of a right protected by the Constitution"<sup>41</sup>—the analytical focus must shift to the constitutional contours, as interpreted by the Supreme Court, of finding a constitutional right leading to recovery.<sup>42</sup>

*D. Circumstances Recognizing § 1983 Claims: Constitutional Theories or Blunderbuss Bases for Finding or Denying Relief?*

When classified and compartmentalized, as is done below, the different, though highly interrelated,<sup>43</sup> theories upon which a plaintiff may assert a claim for constitutional deprivation under § 1983 have conceptual appeal; however, given the constricted confines within which courts find such constitutional liability,<sup>44</sup> and taking into account the numerous theories arguing for liability, it might be argued that these bases, or predicates, for finding a constitutional duty are really a shotgun approach for finding relief.<sup>45</sup> Ac-

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my own way, I have drawn upon generally established terminology.

<sup>40</sup> See *infra* Part I.D.3 (discussing the quantum, or standard, of care applicable to § 1983 claims).

<sup>41</sup> *Stevens*, 921 F. Supp. at 532 (quoting *Brown*, 919 F.2d at 1301).

<sup>42</sup> Because this shift entails several ancillary inquiries, the whole of Part II is devoted to attempting this analysis. For example, in discussing when the deprivation of a right will allow recovery, the question of applicable immunities to liability is subsumed by, but nevertheless set out separately in, Part II.

<sup>43</sup> After reading Part I.C, these theories, although often discussed by courts as though they are discrete, may appear so interrelated that the lines of abstract demarcation at times become blurred to the point of disappearance. This assertion perhaps merits an entire study unto itself and cannot, therefore, be dealt with adequately here; however, a short example might well be warranted: Courts have deliberated over finding § 1983 liability when the state has "created a danger," as well as when a state has taken a person into "custody" so as to restrain the person's ability to take care of himself. It might be argued with some force of logic that when the state takes a citizen into custody—by sending the citizen to jail, for example—and harm befalls her even partly as a result of being in custody, the state effectively has helped create the danger. To delineate between these abstract classifications for convenience, it might be asserted that the harm inflicted upon the citizen was attributable to an actor not officially related to the state, such as a fellow prisoner, for example. In that case, it might be argued, the state did not create the danger, thus extricating one theory's classification from direct overlap with another. To varying degrees, however, the circularity of such logic—namely, as a need for a scheme of theoretical classifications—might not seem all too easily escapable, despite any likely real-world concerns over causation.

<sup>44</sup> See *infra* Part IV.

<sup>45</sup> See, for example, Lewis & Blumoff, *supra* note 24 *passim*, who discuss § 1983's lack of teeth, so to speak.

according to extant judicial decisions, classifying these theories is necessary for the analysis that follows.

### 1. *The Negative, or Anti-Interference, Prong*

The Constitution has been characterized as a "charter of negative liberties."<sup>46</sup> Although the citizenry can expect to be protected from unconstitutional *interference* by the government, the government is absolved from *affirmative constitutional obligations*.<sup>47</sup> Under the "negative" rights construct, two main situations surface in which courts have been willing to countenance a claim under § 1983.<sup>48</sup> First, when the state "creates a danger," an unconstitutional interference, and thus an action under § 1983, may lie.<sup>49</sup> Second,<sup>50</sup> a § 1983 action may arise under the negative-prong analysis when a state official, acting in an official capacity, interferes with the (negative) right to be free from unconstitutional government intrusion.<sup>51</sup>

<sup>46</sup> *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

<sup>47</sup> *See id.*

<sup>48</sup> Although such unconstitutional state *interference* requires an act of some sort, and thus might appear to be affirmative in nature, the focus of the analytic inquiry of when a § 1983 claim is recognized falls primarily on the right in question—namely the broad, superalternate right to be left alone, that is, to be free of interference. This right falls under the concept of a "charter of negative liberties," not on the narrower, subalternate fact-specific inquiry. This is not to say, however, that a particular act in question cannot affect which right may be at stake and to what degree such a right will be protected. That is, there is certainly a right to be free from unconstitutional intrusions on one's liberty under the Fourteenth Amendment. If such an intrusion were found to have occurred, it is not overreaching to say that although an intrusion such as corporal punishment, when reasonably administered, would not likely constitute a viable § 1983 claim, *see, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977), an unreasonable police search might give rise to a valid claim, *see, e.g., Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978).

<sup>49</sup> "The state-created danger theory, utilized to find a constitutional tort duty under § 1983 *outside of a strictly custodial context*, has been recognized by several court of appeals." *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373 (3d Cir. 1992) (en banc) (emphasis added) (citing *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984)), *cert. denied*, 506 U.S. 1079 (1993). The significance of the emphasized portion of the quote will become apparent in Part II.A.2.

<sup>50</sup> A third situation may well exist for finding an actionable § 1983 claim under the negative, or anti-interference, prong. In *Middle Bucks*, 972 F.2d at 1376-77, the Third Circuit Court of Appeals addressed the theory of a "[c]onspiracy to [d]eprive [p]laintiffs of [c]onstitutional [r]ights," but denied liability.

<sup>51</sup> *See* Stephen Faberman, *The Lessons of DeShaney: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97, 100 (1993) (citing *Monroe*, 365 U.S. at 172

## 2. *The Affirmative, or Obligation-to-Act, Prong*

The characterization of the Constitution as a “charter of negative liberties”<sup>52</sup> notwithstanding, the government at times may have an affirmative duty to secure constitutional rights.<sup>53</sup> For example, the government may have an affirmative duty to protect against the conduct of its subordinates.<sup>54</sup> The government also may have an affirmative duty to act when it has taken “a person into its *custody* and holds him there against his will . . . .”<sup>55</sup> A third situation falls roughly between a government’s duty to protect against the conduct of its subordinates and when the government has taken a person into its custody: “A state defendant may be held liable for deliberately and recklessly establishing and maintaining a *custom, practice or policy* which caused harm to a student when a teacher sexually molested a student.”<sup>56</sup>

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(permitting suit under § 1983 when a police officer entered a home in the middle of the night and forced the plaintiff to stand naked while an illegal search took place)).

<sup>52</sup> *Bowers*, 686 F.2d at 618.

<sup>53</sup> See *infra* notes 54-56.

<sup>54</sup> See *City of Canton v. Harris*, 489 U.S. 378 (1989). In *Canton*, the Court held that a municipality’s failure to train police officers could be the basis of a § 1893 claim if it constituted deliberate indifference to a detained person’s constitutional rights. See *id.* at 388-90.

<sup>55</sup> *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (emphasis added) (discussing the Supreme Court’s holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Youngberg v. Romeo*, 457 U.S. 307 (1982)). The “custody” classification also has been called “special relationship custody,” mainly by plaintiffs borrowing, perhaps, from the pre-*DeShaney* language of the *in loco parentis* construct. See, e.g., *Middle Bucks*, 972 F.2d at 1369-70; see *infra* Part II.B. The Third Circuit, for example, played down the “special relationship” language, and instead stressed “custody”: “Our court has read *DeShaney* primarily as setting out a test of physical custody.” *Middle Bucks*, 972 F.2d at 1370 (citing *Philadelphia Police & Fire Ass’n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 167 (3d Cir. 1989)). Indeed, the *DeShaney* court distanced itself from the theme of “special relationships” giving rise to “affirmative duties to act under the common law of tort” by stating: “[T]he claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation.” *DeShaney*, 489 U.S. at 202 (referring to Professors Prosser’s and Keeton’s seminal work on the law of torts, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

<sup>56</sup> *Middle Bucks*, 972 F.2d at 1376 (emphasis added) (citing *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)(1990)) (*Stoneking II*), cert. denied, 493 U.S. 1044 (1990)). The Third Circuit did not find that *Stoneking II*’s “linchpin” triggered liability in *Middle Bucks* because, it stated flatly, “[§] 1983 liability [in *Middle Bucks*] may not be predicated upon a *Stoneking II* type theory because private actors committed the underlying acts.” *Id.*

### 3. *The Quantum, or Standard, of Care*

If § 1983 does not “purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,”<sup>57</sup> and if the “Constitution deals with the large concerns,”<sup>58</sup> it may be asked what degree of care must be breached for a plaintiff successfully to raise a § 1983 claim. The Supreme Court repeatedly has announced a standard of care it calls “deliberate indifference.”<sup>59</sup> Deliberate indifference seems to fall short of intentional conduct, and more than “merely negligent”<sup>60</sup> conduct probably is needed for liability to attach under § 1983.<sup>61</sup> The deliberate indifference standard also applies to municipalities.<sup>62</sup>

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<sup>57</sup> *Daniels v. Williams*, 474 U.S. 327, 332 (1986); see also *supra* note 25 and accompanying text.

<sup>58</sup> *Daniels*, 474 U.S. at 332.

<sup>59</sup> See *Estelle* 429 U.S. at 104 (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)). The Court in *Estelle* went on to say: “Regardless how evidenced, deliberate indifference . . . states a cause of action under § 1983.” *Id.* at 105. The rationale underlying this standard was explained by the following:

Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence *deliberate indifference* to serious medical needs. *It is only such indifference that can offend “evolving standards of decency” . . .*

*Id.* at 106 (emphasis added).

<sup>60</sup> *Daniels*, 474 U.S. at 333.

<sup>61</sup> For example, the Court has announced: “But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying right; and depending on the right, merely negligent conduct *may* not be enough to state a claim.” *Id.* at 333 (emphasis added). The language used by the Court in *Daniels* on the one hand seems to require more than “merely negligent” conduct. On the other hand, as the seemingly permissive language in the excerpt from *Daniels* reveals, the Court seems to have suggested that the deliberate indifference standard might not be a standard of care cast in stone.

<sup>62</sup> “[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives’ by city policymakers.” *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986)). (Returning parenthetically to the discussion on whether the theories upon which constitutional liability claims are brought conceptually merit classification, or whether they constitute blunderbuss approaches to finding such liability. The instant language in *Canton v. Harris* could appear to foreclose liability under the “creation of danger” theory because often no choice is made, or available, in such cases).

Even if numerous, previously recognized theories of state action or inaction<sup>63</sup> are advanced and an arguable case of deliberate indifference is shown, the "underlying right"<sup>64</sup> still must be established.<sup>65</sup> This underlying right will be shaped<sup>66</sup> to a great extent by which state action or inaction allegedly led to the situation evincing deliberate indifference. Despite the varied factual circumstances in which § 1983 liability has been alleged in the lower courts, so far such an underlying constitutional right has been established only in a handful of Supreme Court decisions. It is to these cases that the present investigation now turns.

## II. THE CONSTITUTIONAL CONTOURS OF FINDING § 1983 LIABILITY: TRADITIONAL PRE-*DESHANEY* THEORIES OF LIABILITY, *DESHANEY*, AND IMMUNITIES

Two traditional and sometimes interrelated<sup>67</sup> theories<sup>68</sup> of § 1983 lia-

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<sup>63</sup> See *supra* Part I.D.1-2.

<sup>64</sup> *Daniels*, 474 U.S. at 330.

<sup>65</sup> The Supreme Court has said: "The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." *Harris*, 489 U.S. at 388 n.8; see also *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3d Cir. 1989) (*Stoneking II*) (holding that a former student could maintain a civil rights action against school officials for enforcing policies that caused harm to student in form of the continued assault), *cert. denied*, 493 U.S. 1044 (1990). The language in *Harris* does not diminish the precedential value of the deliberate indifference standard; rather, it supports the organizational approach set forth in this Note, which breaks down the elements of a § 1983 claim by broadly distinguishing among (1) the alleged state action or inaction, see *supra* Parts I.C, I.D.1-2; (2) the standard of care, see *supra* Part I.D.3; and (3) the underlying constitutional right, see *infra* Part II. This organizational approach does not conflict with what the Supreme Court said in *Estelle v. Gamble*: "Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." 429 U.S. 97, 105 (1976). Upon close reading, the language used by the Court subsumes, albeit under *Estelle*'s narrow factual confines, each element necessary for stating a claim under § 1983, thereby affirming the conceptual scheme used in Parts I and II because no court likely would allow § 1983 liability to attach solely upon a showing of deliberately indifferent conduct, absent a cognizable theory of state action or inaction as well as an underlying constitutional right.

<sup>66</sup> Because the particular theory asserting a state's action or inaction will shape the underlying constitutional right, these two elements of a § 1983 suit may be said to exist in a legally axiomatic symbiosis.

<sup>67</sup> Once again, conceptual demarcations could be collapsed to create one theory, where before there were two. Namely, one could argue that custody subsumes *in loco parentis*, or that *in loco parentis* occupies but one area within the broader custody analysis. Because the post-*DeShaney* decisions perpetuate the distinction, so will this Note.

<sup>68</sup> Here, the term traditional refers to theories advanced before the Court's decision

bility have resulted in judicial recognition of an underlying constitutional right: "custody" and "*in loco parentis*" status.<sup>69</sup> "Custody" continues to provide a valid and recognized theory for articulating a state's duty for a § 1983 claim.<sup>70</sup> A similar constitutional claim brought under a theory of "*in loco parentis*" would likely fail after the Court's 1989 landmark decision in *DeShaney v. Winnebago County Department of Social Services*.<sup>71</sup> Moreover, even when a judicially recognized theory of § 1983 is advanced and accepted, and conduct rising to the level of deliberate indifference is proved, potent immunities for state entities and officials usually prevent the recovery of damages in a § 1983 suit.<sup>72</sup>

### A. Custody

#### 1. The Prisoner Scenario

One theory of custody has created an underlying constitutional right

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in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (holding that a state, through its protective services, has no duty to protect a child from private violence). Other theories, such as those identified in Parts I.D.1 and I.D.2, have arisen since that decision.

<sup>69</sup> See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976) (custody analysis); *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 600-03 (3d Cir. 1988) (*Stoneking I*) (*in loco parentis* analysis), *vacated sub nom. Smith v. Stoneking*, 489 U.S. 1062 (1989). "*In loco parentis*," translated from the Latin, simply means "in place of the parent," and the term's meaning has been described thus: "Anyone who serves *in loco parentis* may be considered to have responsibilities of guardianship, either formal or informal, over minors." EUGENE EHRLICH, *AMO, AMAS, AMAT AND MORE: HOW TO USE LATIN TO YOUR OWN ADVANTAGE AND TO THE ASTONISHMENT OF OTHERS* 154 (1985).

<sup>70</sup> See *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1370-71 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993). At least one other theory of a state's action or inaction, apart from "custody" or "*in loco parentis*"/"special relationship," yielded judicial recognition of an underlying constitutional right. The Third Circuit's decision in *Stoneking II* allowed a student to maintain a § 1983 action against school officials for their alleged deliberate indifference to the consequences, policies, practices, and customs of failing to take action with respect to complaints of the sexual misconduct of a teacher who allegedly caused the student to suffer a constitutional harm. See *Stoneking II*, 882 F.2d at 722-23; see also *supra* Part I.D.2. The Third Circuit issued this ruling even on the heels of the Supreme Court's decision in *DeShaney*. Custody is discussed in Part II.A. Part II.C discusses five analytical factors flowing from *DeShaney*.

<sup>71</sup> 489 U.S. 189 (1989). Compare *Stoneking I*, 856 F.2d at 600-03, with *Middle Bucks*, 972 F.2d at 1370-71. The demise of "*in loco parentis*" as a recognized theory leading to § 1983 recovery is discussed in Part II.B.

<sup>72</sup> See *Lewis & Blumoff*, *supra* note 24, at 756-57. Immunities are addressed in Part II.D.

sufficient for finding § 1983 liability under a prisoner scenario: “[W]hen someone is incarcerated, the Eighth Amendment (via the Fourteenth) requires the State to provide him with adequate medical care.”<sup>73</sup> A restraint-on-liberty rationale undergirds the theory of custody that recognized an underlying constitutional right. The progenitor of the restraint-on-liberty rationale can be found in the Court’s reasoning in *Estelle v. Gamble*:<sup>74</sup>

[E]lementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. . . . “[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”<sup>75</sup>

In 1989, the *DeShaney* decision became the successor of the “narrow range of cases”<sup>76</sup> recognizing an underlying right under a theory of custody.<sup>77</sup>

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<sup>73</sup> *Camp v. Gregory*, 67 F.3d 1286, 1291-92 (7th Cir. 1995) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). A reminder is in order here. By its holding, the Court in *Estelle* did *not* formulate a theory of strict liability for prisons: “Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege *acts or omissions* sufficiently harmful to evidence *deliberate indifference* . . . that can offend ‘evolving standards of decency’ . . . .” *Estelle*, 429 U.S. at 106 (emphasis added). Even when adequate custody obtains in fact, that is, the underlying constitutional right is recognized, the plaintiff-prisoner still must base his claim on a theory allowing the right to be found and must show deliberate indifference on the part of the state.

<sup>74</sup> 429 U.S. 97 (1976) (holding that the Constitution imposes an affirmative duty on the state to provide prisoners with adequate medical care).

<sup>75</sup> *Id.* at 103-04 (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)).

<sup>76</sup> *Gregory*, 67 F.3d at 1297.

<sup>77</sup> See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989). The *DeShaney* decision, confirming its successorship to the restraint-on-liberty rationale, stated:

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, not its failure to act to protect his liberty interests against harms inflicted by other means.

*Id.* at 200 (emphasis added) (citations omitted). The emphasized language in the above quote has led one judge to argue quite discerningly that *DeShaney* in effect staked out a broader position than the Court did in *Estelle*. See, e.g., *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1379 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting), *cert. denied*, 506 U.S. 1079 (1993); see also *DeShaney*, 489 U.S. at



## 2. *The (Involuntary?) Mental Patient Scenario*

The custody theory coupled with the restraint-on-liberty rationale has been employed in one other setting that recognized a plaintiff's underlying constitutional right. When the state committed a person to a state mental institution against her will, the Court found that the Constitution imposed affirmative duties upon the state to provide the patient with services necessary to ensure the safety of the patient and others.<sup>78</sup> In its reasoning in *Youngberg v. Romeo*, the Court injected a new, or at least a newly articulated, variable in the restraint-on-liberty rationale: namely, whether the establishment of an underlying right must turn on the voluntariness of the particular restraint on liberty.<sup>79</sup> Nowhere in *Youngberg* did the Court enunciate explicitly that the voluntariness variable constitutes a requisite component of the restraint-on-liberty rationale. In fact, in discussing the general nature of the "historic liberty interest," the Court quoted its decision in *Ingraham v. Wright*,<sup>80</sup> a case that addressed corporal punishment in a public day school, a setting that so far has not been likened successfully to prisons or state mental institutions.<sup>81</sup> In comparing the involuntarily committed mental patient with a prisoner, however, the Court said: "[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>82</sup>

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199 (citing *Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983) ("[T]he Due Process Clause . . . require[s] the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police").

<sup>78</sup> See *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the Court enunciated the affirmative duties the state owed to the patient:

[T]he State is under a duty to provide [the patient] with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints . . . or the likelihood of violence. [The patient] thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.

*Id.* at 324.

<sup>79</sup> See *id.* at 314-19.

<sup>80</sup> 430 U.S. 651 (1977).

<sup>81</sup> See *Youngberg*, 457 U.S. at 315 (quoting *Ingraham*, 430 U.S. at 673).

<sup>82</sup> *Id.* at 315-16 (emphasis added). This language does not have to be read as binding a requirement of "involuntariness" to the restraint-on-liberty rationale. It can be argued that the Court in *Youngberg*, as per the facts of that case, in effect was issuing a warning to mental institutions that the committed, even if involuntarily committed, may not be further restrained such that those restraints would constitute punishment. See discussion *infra* Part V.

## B. "In Loco Parentis"

As an alternative to "custody," *in loco parentis* is the other traditional theory that led to judicial recognition of an underlying constitutional right in a § 1983 suit.<sup>83</sup> Often invoked in the school setting, *in loco parentis* status has been used to show sufficient custody over a student for the purpose of establishing a constitutional right to require the state to act or refrain from acting.<sup>84</sup> After *DeShaney*, however, *in loco parentis*, even when coupled

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<sup>83</sup> See, e.g., *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 600-03 (3d Cir. 1988) (*Stoneking I*), *vacated sub nom.* *Smith v. Stoneking*, 489 U.S. 1062 (1989). *Stoneking I* is a pre-*DeShaney* decision that perhaps best serves as a paradigm for illustrating both the *in loco parentis* theory and its shared conceptual roots with the custody theory. In fact, *Stoneking I* announced the proposition that *in loco parentis* status might rise to the level of "functional custody," thus eroding the distinction between custody, found in the prisoner and (involuntary) mental patient scenarios, and *in loco parentis*, usually applicable in educational settings. *Id.* at 601. The Supreme Court apparently rejected the erosion between a pure "custody" analysis and one based on *in loco parentis*, which in the wake of *DeShaney* no longer sufficed as a theory to establish an underlying right in § 1983 suits. The Supreme Court thus remanded *Stoneking I* to the Third Circuit for reevaluation consistent with its then recently announced decision in *DeShaney*. See *id.* at 604. Far from reversing its finding that a student had an underlying right not to be sexually abused by a teacher, the Third Circuit did not interpret *DeShaney* on its ambiguities, but instead chose to base its decision on a broad reading of *DeShaney*. It reclassified the theory of liability and held that *DeShaney* did not bar a finding that school officials faced liability as a result of setting up *policies, practices, and customs* that displayed deliberate indifference to the safety of students. See *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989) (*Stoneking II*), *cert. denied*, 493 U.S. 1044 (1990); see also *supra* Parts I.D.1-2.

<sup>84</sup> For example, the Third Circuit's pre-*DeShaney* ruling in *Stoneking I* said: "Moreover, Pennsylvania law has since 1911 explicitly vested school officials with authority *in loco parentis* over students." 856 F.2d at 601. The court cited the relevant Pennsylvania statute, which stated:

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

*Id.* at 601 n.10 (quoting 24 PA. STAT. ANN. § 13-1317 (Purdon Supp. 1988) (amended 1992)). Finally, the Third Circuit decided: "There is thus an adequate basis from the Pennsylvania child abuse reporting and *in loco parentis* statutes, coupled with the broad common law duty owed by school officials to students, to conclude there was a desire on the part of the state to provide affirmative protection to students." *Id.* at 603.

Other pre-*DeShaney* cases from other circuits likewise rested their decisions on *in loco parentis* theories of creating an underlying constitutional right to expect or be free from state action. See generally Barbara L. Horwitz, Case Note, *The Duty of Schools to Protect Students from Sexual Harassment: How Much Will the Law Allow?* Doe v. Taylor Independent School District, 975 F.2d 137 (5th Cir. 1992), *cert. denied sub nom.*

with school truancy and mandatory attendance laws, no longer suffices as a theory to establish an underlying constitutional right under § 1983.<sup>85</sup> The *DeShaney* decision, however, did more than clearly discard *in loco parentis* as an effective theory upon which to base a § 1983 suit.

C. *The DeShaney Decision: Constitutional Clarity or Just More Confusion by Judicial Constriction?*

At the age of five, after a history of abuse, Joshua DeShaney was so severely beaten by his father, Randy DeShaney, that Joshua was left permanently "profoundly retarded."<sup>86</sup> The county's department of social services previously had received complaints of Randy DeShaney's ongoing abuse of Joshua.<sup>87</sup> Social workers took steps to protect Joshua, including obtaining a court order to place Joshua under the temporary custody of the hospital that had treated him for injuries suspected to have been inflicted by

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Caplinger v. Doe, 113 S. Ct. 1066 (1993), *reh'g granted en banc*, 987 F.2d 231 (5th Cir. 1993), 62 U. CIN. L. REV. 1165, 1211 n.239 (1994) (citing the following pre-*DeShaney* cases: Lopez v. Houston Indep. Sch. Dist., 817 F.2d 351, 356 (5th Cir. 1987) (finding that a school bus driver "was entrusted with care of students attending school under Texas' compulsory education statute"); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982) (stating that a school had a duty to protect students from harm posed by antisocial activities), *cert. denied*, 436 U.S. 1207 (1983); Doe v. Durtschi, 716 P.2d 1238, 1243-44 (Idaho 1986) (holding that a school district could be liable for its negligence arising out of a teacher's sexual assault of students); Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 973 (Wash. 1988) (holding that a public school could not condition a student's participation in athletics on the student's releasing the school district from all potential negligence claims because school districts had a duty to protect students in its custody).

<sup>85</sup> Thus the Third Circuit, the same circuit that had gone so far as to recognize a "functional custody" analysis in *Stoneking I*, now said: "[S]ection 13-1317 [Pennsylvania's *in loco parentis* statute] 'invests authority in public school teachers; it does not impose a duty upon them.'" D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371 (3d Cir. 1992) (*en banc*) (emphasis omitted) (quoting a 1982 Pennsylvania Commonwealth court decision based not on *in loco parentis*, but on a child protective service law), *cert. denied*, 506 U.S. 1079 (1993). Chief Judge Sloviter, who authored the "functional custody" language of *Stoneking I*, dissented from the majority opinion, writing: "In their capacity as 'parents,' school officials can exercise control over the movements of their students." *Id.* at 1380 (Sloviter, C.J., dissenting); see also Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992) (stating that *in loco parentis* does not create a duty that rises to a constitutional level), *aff'd*, 7 F.3d 729 (8th Cir. 1993). Several lower court decisions in the Second Circuit may constitute an exception to the apparently universal demise of the utility of an *in loco parentis* argument in § 1983 suits. Part III addresses the case law and, by inclusion, the applicable exceptions.

<sup>86</sup> *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 193 (1989).

<sup>87</sup> See *id.* at 189.

his father.<sup>88</sup> The complaint alleged that in the face of frequent reports of abuse and her own firsthand suspicions of the abuse, the social worker “did nothing more” than record these incidents in her files.<sup>89</sup>

In a § 1983 suit brought by Joshua and his mother against Winnebago County Department of Social Services, Joshua alleged that the county social services department deprived him of “his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known.”<sup>90</sup> The Court rejected Joshua’s claims, basing its decision on three grounds:

- (1) “a State’s failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the State to provide members of the general public with adequate protective services”;<sup>91</sup>
- (2) “the State’s knowledge of [Joshua’s] danger and expressions of willingness to protect him against the danger” did not establish a “‘special relationship’ giving rise to an affirmative constitutional duty to protect”;<sup>92</sup> and
- (3) absent the State’s creation of danger, “the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation.”<sup>93</sup>

In its decision, the Court unveiled five factors relevant to the present analysis. First, the Court held that some state action—namely, taking an individual into custody—is necessary to find a special relationship under which a state’s duty to protect the individual arises.<sup>94</sup> The Court further buttressed its internal line of reasoning by referring to the restraint-on-liber-

<sup>88</sup> See *id.* at 192.

<sup>89</sup> *Id.* at 193.

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

<sup>91</sup> *Id.* at 189.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 190.

<sup>94</sup> See *id.* at 197-99. The language of the decision shows that *DeShaney* eschewed the “special relationship” argument and instead focused its discussion on a “custody” analysis:

Taken together, [the *Estelle* and *Youngberg* cases relied upon by the petitioners in *DeShaney*] 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.

*Id.* at 199-200 (emphasis added). The Court’s analysis associates custody with the theory of the state’s action or inaction, rather than with the pure underlying right that custody, as a theory, axiomatically shapes. See, e.g., *supra* note 65. This specific distinction by association corroborates the organizational scheme in Parts I.D.1 through I.D.3, and in Part II herein.

ty rationale earlier found to apply in *Estelle*<sup>95</sup> and *Youngberg*.<sup>96</sup> "We reasoned that because the prisoner is unable 'by reason of the deprivation of his liberty to care for himself,' it is only 'just' that the State be required to care for him."<sup>97</sup>

Second, if the state takes no part in creating the danger, the state generally has no duty to protect.<sup>98</sup> Because the government has no affirmative duty to protect individual persons from one another, neither must the government be the guarantor of an individual's future protection, even if it previously had acted to protect the individual.<sup>99</sup> Here, however, the Court's reasoning becomes less internally consistent. While the Court on the one hand distinguishes § 1983 claims arising under constitutional due process grounds from common law tort duties, it nevertheless invokes the language of the tort rescuer-rescued rule.<sup>100</sup> That rule disallows the termination of a rescue attempt if, once undertaken, termination would leave the victim worse off than before the rescue began.<sup>101</sup> Under *DeShaney*, the government may initiate, then terminate, protection of an individual, as long as the termination does not make the person any worse off.<sup>102</sup>

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. That the State 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

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<sup>95</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>96</sup> *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>97</sup> *DeShaney*, 489 U.S. at 198-99 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976), and quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)). What the Court calls the "deprivation of liberty" rationale is referred to by this Note as the "restraint-on-liberty rationale." This is done to avoid confusion with discussions that employ the language "deprivations of constitutional rights." The potential for confusion arises from the repeated use of the word "deprivation."

<sup>98</sup> *See id.* at 200-03. One is reminded once more of a very real overlap between the two theories of a state's action or inaction—"custody" and "creation of danger." That the Court chose to retain the conceptual distinction remains noteworthy. *See supra* Parts I.D.1-3.

<sup>99</sup> *See id.* at 199-202.

<sup>100</sup> *See id.* at 202.

<sup>101</sup> *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965) (stating that one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion)).

<sup>102</sup> *See id.* at 199-202.

all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.<sup>103</sup>

Third, *DeShaney* revealed a patent ambiguity in its strict construction of constitutional duties. In a well-known footnote, the Court created what might be called the traditional ambiguity that courts and commentators have seized upon to liken the school setting to "foster care," of which the Court said: "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."<sup>104</sup> In attempting to apply the "custody" analogy to schools, courts<sup>105</sup> and commentators<sup>106</sup>

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<sup>103</sup> *Id.* at 201. The argument, however, is not that the state owes a permanent, or unending, duty to protect the individual. Rather, the argument is that for the time during which the state does act—when a disabled child resides at a state residential school—then during that time, the state owes a constitutionally recognized duty to protect. See, e.g., Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940 (1990). It seems that, at least among the commentators, Huefner was the first to write of this critical distinction.

<sup>104</sup> *DeShaney*, 489 U.S. at 201 n.9 (emphasis added). One commentator, for instance, directly corroborates that this is "an oft-cited footnote, that an affirmative duty to protect might arise where the state, by the affirmative exercise of its power, removes a child from free society and places him in a foster home operated by its agents." Faberman, *supra* note 51, at 110 n.91. Technically, it may be noted that the Court's footnote creates at least one patent, and perhaps two latent, ambiguities. First, the Court did not disclose whether it recognized the foster home situation as fully analogous to incarceration or institutionalization (patent ambiguity). Second, the Court did not make clear whether it contemplated other "analogous" situations, apart from the foster care situation, in order to recognize a duty to protect (possible latent ambiguity). The Court did state, however, that "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—" may trigger the Due Process Clause. *DeShaney*, 489 U.S. at 200. Thus, this first latent ambiguity may a priori never have arisen. The Court, however, has not addressed whether involuntariness is a sine qua non in recognizing a duty by analogy (latent ambiguity). This latent ambiguity escaped the Court's clarification and, like its patent counterpart, has found its way into the circuit court decisions. See *infra* Part V.B.1.

<sup>105</sup> For an overview of the major cases and their reasoning in this area, see *infra* Part III. As the case law in Part III reveals, this approach by analogy at best has produced only dicta, at least on the federal circuit court level, with two New York district courts having held to the contrary as per the apparently prevailing attitude in the Second Circuit. See *Robert G. v. Newburgh City Sch. Dist.*, 1990 WL 3210 (S.D.N.Y. Jan. 8, 1990) (denying a motion to dismiss a female student's claim against school officials based on a sexual assault perpetrated by a substitute teacher); *Pagano v. Massapequa Public Schs.*, 714 F. Supp. 641 (E.D.N.Y. 1989) (denying a motion to dismiss a student's claim against school officials based on a series of physical and verbal assaults

have focused on the elements of school attendance—namely, truancy and compulsory attendance laws, and *in loco parentis* status—and the circumstances particular to the student—age, ability to articulate complaints, and type of school.

Fourth, footnote nine in the *DeShaney* decision is remarkable not only for creating the patent ambiguity of analogizing foster homes to custody in the prisoner or mental patient settings to find a constitutional duty, but also for creating a latent ambiguity: “[W]e might have a situation sufficiently analogous to incarceration or *institutionalization* to give rise to an affirmative duty to protect.”<sup>107</sup> Quietly absent from the Court’s reference to “institutionalization” as a basis for custody is any mention of the *voluntariness* of that institutionalization.<sup>108</sup> This latent ambiguity arises in the face of the

by other students).

<sup>106</sup> For an overview of the trends and analyses among commentators writing on the broad subject of a duty to protect in the general school setting, see *infra* Part IV.

<sup>107</sup> *DeShaney*, 489 U.S. at 201 n.9 (emphasis added).

<sup>108</sup> See *supra* Part II.A.2. The American edition of *The Oxford Dictionary and Thesaurus* defines “institutionalize” as follows:

*v.tr.* 1 (as INSTITUTIONALIZED *adj.*) (of a prisoner, a long-term patient, etc.) made apathetic and dependent after a long period in an institution. 2 place or keep (a person) in an institution . . . 2 see *put away* 3 (PUT’).

PUT AWAY . . . (3 A jail, incarcerate, send up, *Brit.* send down, *sl.* jug; confine; see also IMPRISON) 1. *B commit, institutionalize* . . .

THE OXFORD DICTIONARY AND THESAURUS 776, 1219 (American ed. 1996) (emphases added). This rather straightforward reading of “institutionalize” would, under the definitions above, be susceptible to being interpreted as meaning both penal incarceration and mental institutionalization; however, because the Court in *DeShaney* specifically used both phrases—incarceration and institutionalization—in discussing two different cases *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Youngberg v. Romeo*, 457 U.S. 307 (1982), the noun “institutionalization” might well be read to exclude any relation to imprisonment. Although the verb “institutionalize” is transitive, from which a passive can be formed, and might thus be read to imply that the Court was referring only to the involuntary commitment of a patient by the state, that is, a commitment or institutionalization rendering a patient’s will passive and thus the institutionalization involuntary, this analysis is neither complete nor satisfactory. Although the state may institutionalize a person, so may, and often do, the family, the doctor, or the friends of a patient. To say that the patient was institutionalized does not say who, according to the Court, must have done the institutionalizing in order for sufficient custody to arise. As a possible guidepost, one might recall that the restraint-on-liberty rationale undergirds the validity and vitality of the custody theory, which in the first instance gives rise to the Court’s discussion of incarceration and institutionalization. If that is so, then it might be argued that the restraint on one’s liberty, which is both the crux of the custody theory and its nexus for establishing an underlying constitutional right, does not depend solely upon compulsion, that is, voluntariness or involuntariness. This perhaps is necessarily so because different settings produce different degrees of restraint as well as the attendant compulsion, if indeed there is any. By way of example, a comatose patient may have his liberty restrained through institutionalization although no compulsion accompanied

Court's repeated references to *Youngberg v. Romeo*,<sup>109</sup> which held that the state had a constitutional duty to protect an involuntarily institutionalized mental patient. So far, the courts remain split on whether voluntarily and involuntarily committed patients, or voluntarily and involuntarily attending students, should be entitled to the same constitutional rights.<sup>110</sup>

Fifth, because of *DeShaney's* strict constitutional construction of the Due Process Clause, and the resulting curtailment of actionable deprivations of rights in § 1983 suits, state tort actions often are left as the only means to redress constitutional wrongs.<sup>111</sup> Apart from ignoring the potential constitu-

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the act of placing the patient in the institution. Additionally, the identity of the institutionalizing party would not affect the compulsion analysis, for, under this example, no identity exists. This illustration might be uncommon in daily life, but other examples may be devised to demonstrate that different degrees of restraint on one's liberty may be accompanied by different degrees of compulsion—again, if any happens to exist. *But cf. Buffington v. Baltimore County*, 913 F.2d 113 (4th Cir. 1990) (involving a suicidal detainee kept in county jail on criminal charges brought by his family to keep him under temporary protective custody), *cert. denied*, 499 U.S. 906 (1991).

<sup>109</sup> 457 U.S. 307 (1982).

<sup>110</sup> See, e.g., *Stevens v. Umsted*, 921 F. Supp. 530, 534 (C.D. Ill. 1996) (acknowledging, before dismissing with prejudice Stevens's complaint for want of a constitutional duty to protect a handicapped child at a residential school, that "the courts disagree . . . whether states are liable for injuries caused to voluntary state mental patients"), *aff'd*, 131 F.3d 897 (7th Cir. 1997). The cases that District Judge Richard Mills cited in *Stevens v. Umsted* are the following: *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 993 (1st Cir. 1992) (holding that the Commonwealth's possibly negligent actions "did not take on the added character of violations of the federal Constitution"); *Buffington*, 913 F.2d at 119 ("Nothing in the [*DeShaney*] Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody."); *Fialowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (3d Cir. 1990) (finding no due process right to protection because a resident at a state "home had been placed there by his parents' insistence and apparently was free to leave"); *Kolpak v. Bell*, 619 F. Supp. 359, 378 (N.D. Ill. 1985) ("[W]hile the court need not consider the constitutional significance of voluntary admission on this motion, there is much logic in cases that find voluntary and involuntary residents entitled to the same constitutional rights to a safe environment.") *Id.* at 535 n.5 (emphasis added). Cases discussing aspects of voluntariness in the school setting are discussed in Part III.

<sup>111</sup> See *DeShaney*, 489 U.S. at 202. To this end, the Court said: "[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.* The Court went even further in distinguishing constitutional violations from state tort remedies:

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



tional dimensions of certain claims, however, judicially compelled or de facto reliance upon state tort remedies forces plaintiffs to confront damage caps protecting states from unlimited liability.<sup>112</sup> A number of policy arguments suggest that a narrow reading of § 1983 remedies should be rejected;<sup>113</sup> but even if the elemental hurdles blocking a plaintiff's suit against a state actor under § 1983 were not enough, one further stumbling block exists: immunity.<sup>114</sup>

#### D. *Qualified Immunity and Eleventh Amendment Immunity*

##### 1. *Qualified Immunity*

A state actor may be named as a defendant in a § 1983 suit in his individual or official capacity.<sup>115</sup> A state actor who is so named in his individual capacity will likely escape liability under the doctrine of qualified immunity.<sup>116</sup> The question that surfaces next is: When does qualified immunity insulate a state actor in his individual capacity? The case of *Harlow v. Fitzgerald*<sup>117</sup> supplied the modern judicial answer: "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known*."<sup>118</sup> Thus, "[i]f, as a matter of law, the official could not have known about the existence of the right allegedly infringed, he [the official] escape[s] accountability."<sup>119</sup> In formulating its objective standard test for

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*Id.* at 203 (emphasis added).

<sup>112</sup> For example, John Hefner, Jr., the plaintiff's attorney in *Stevens v. Umsted*, noted, "[I]f he had not raised the constitutional issue, he would have had to file suit in the Illinois Court of Claims, where a \$100,000 limit on recovery applies." Heckelman, *supra* note 13, at 65; see also *Stevens*, 921 F. Supp. 530.

<sup>113</sup> In addition to Lewis and Blumoff's article, *supra* note 24, Part V of this Note develops arguments as they possibly pertain to the setting of residential schools for the disabled.

<sup>114</sup> See *infra* Part II.D.

<sup>115</sup> "By its terms, § 1983 liability attaches to '[e]very person' who causes the loss of rights secured by the Constitution and laws of the United States. Thus an individual state actor is unexceptionally within the statute's reach." Lewis & Blumoff, *supra* note 24, at 769.

<sup>116</sup> See generally *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (establishing that state government officials with discretionary functions are entitled to qualified immunity unless their actions violate clearly established law).

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

<sup>118</sup> *Id.* at 818 (emphasis added).

<sup>119</sup> Lewis & Blumoff, *supra* note 24, at 779 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). This "objective standard" was further described by the Court:

qualified immunity, "the Court simply" relied "entirely on an inquiry into the official defendant's 'presumptive knowledge of and respect for "basic, unquestioned constitutional rights."'"<sup>120</sup>

## 2. *Eleventh Amendment Immunity*

If a state official is sued in her official capacity for damages under § 1983, the Eleventh Amendment may bar all claims.<sup>121</sup> Some evidence exists that even if the underlying constitutional right in a § 1983 suit were recognized, and all other elements of the claim proved, an official capacity suit still would be barred by the Eleventh Amendment.<sup>122</sup> Professors Lewis

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If the law at [the time an action occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

*Harlow*, 457 U.S. at 818-19. Lewis and Blumoff persuasively criticize this objective standard for determining qualified immunity:

In the end, the test for individual immunity in § 1983 actions rests on an unnecessary fiction. . . . It is fictional because the purportedly "objective" standard for determining qualified immunity rests on the fragile belief that the relatively low-level employee most likely to have actual citizen contact, the cop on the beat, for example, appreciates the current state of constitutional law.

Lewis & Blumoff, *supra* note 24, at 783 (citations omitted).

<sup>120</sup> *Id.* at 779.

<sup>121</sup> "Qualified immunity does not apply to official capacity suits. But the Eleventh Amendment does, and in this case, the Eleventh Amendment would presumably bar Plaintiffs' claim for damages." *Stevens v. Umsted*, 921 F. Supp. 530, 536 (C.D. Ill. 1996), *aff'd*, 131 F.3d 697 (7th Cir. 1997). The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Apparently, although the text of the Amendment does not address suits by citizens of a state brought against that same state, Eleventh Amendment immunity nevertheless attaches. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (extending the protections of the Eleventh Amendment to suits brought by a citizen against his own state).

<sup>122</sup> "Clearly a suit against the state for monetary damages or other retroactive relief is barred by the eleventh amendment, *regardless of the predicate for liability*." *Kolpak v. Bell*, 619 F. Supp. 359, 371 (N.D. Ill. 1985) (emphasis added) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 456 U.S. 89, 103 (1984); *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974)). One commentator insightfully clarified the interrelation between suits against school boards or districts and the Eleventh Amendment:

Most school boards or school districts . . . are considered local governmental bodies, not arms of the state and thus can be sued in federal court. See *Mt.*

and Blumoff made the following observation about § 1983's potency: "In the past thirty years, the jurisprudence of this statute [§ 1983] in its historic sphere—the redress of constitutional violations—has been molded by an almost self-canceling dialectic: bursts of expansion in scope, followed by equally striking doctrinal contractions."<sup>123</sup> A brief glimpse into selected federal court decisions may allow the present inquiry to truly discern whether § 1983, as applied to the school setting, currently is enjoying a judicial burst of expansion or a doctrinal contraction in the wake of *DeShaney*, a decision that created perhaps as much ambiguity as it did clarity.

### III. CONSTERNATION IN THE CASE LAW DESPITE THE NEAR NO-DUTY CONSENSUS<sup>124</sup>

The law of the circuit courts nearly uniformly reveals that schools generally have no duty to protect their students.<sup>125</sup> Variations among the decisions do exist, however, especially in cases involving handicapped students at residential schools.<sup>126</sup> The confusion in the cases—amid the jumble of

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Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). In some states, however, a suit directly against a school *will* be barred by the Eleventh Amendment. For example, the Ninth Circuit in *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), stated that "California has selected a different path from that of most states. California has vested control of school funding in the state rather than local governments." *Id.* at 254. A determinative factor in the decision was the fact that school boards in California, unlike most school boards, do not derive their funding mainly through local property taxes.

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, 472 n.3 (1993).

<sup>123</sup> Lewis & Blumoff, *supra* note 24, at 769.

<sup>124</sup> This Note does not aim to treat the subtleties in the cases constituting the broad no-duty rule formulation, for example, the importance, if any, of whether the transgressor or actor is a fellow student, a teacher, or other individual. Such an undertaking would render this Note too unwieldy. Part III focuses on the judicial unease palpable in some of the more important cases among the circuits, which, in at least three district court decisions, has produced an opportunity to establish a bright-line exception to the general no-duty rule in the case of residential schools for the disabled.

<sup>125</sup> See Conigliaro, *supra* note 8, at 406-07.

<sup>126</sup> See, e.g., *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc) (holding that a school had no duty to protect a voluntary residential student from sexual assault by a classmate); *Spivey v. Elliot*, 29 F.3d 1522 (11th Cir. 1994) (finding that a special relation existed between a student at a residential school and the state and that the special relation imposed a duty on the state to protect the student from sexual assault by a classmate, but also finding that the duty was not clearly established at the time of the attack and the officials were protected by qualified immunity), *aff'd*, 41 F.3d 1497 (1995); *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 144 (5th Cir. 1992) (finding that whether a school superintendent and principal had qualified immunity against suit brought by a high school student molested by a teacher depended on whether the super-

§ 1983 theories for recovery, its standard of care, and the necessity for establishing an underlying constitutional right—may well be due to an unease born of judicial conscience and, arguably, constitutional axiom.

### A. *The Broad No-Duty Rule*

When the Third Circuit refused in *Stoneking v. Bradford Area School District*<sup>127</sup> to dismiss a § 1983 suit brought by a student against her teacher for sexual abuse, it stated that (1) the plaintiff had a constitutionally protected right to be free from sexual abuse by her school teacher once the defendants had notice of the teacher's alleged abuse of another student and that (2) because "students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as the *functional custody* of the school authorities, at least at the time they are present."<sup>128</sup> Because *DeShaney* was decided shortly after the Third Circuit's refusal to dismiss, *Stoneking I* was remanded to the Third Circuit for reconsideration in line with the Supreme Court's holding in *DeShaney*.<sup>129</sup> In *Stoneking II*,<sup>130</sup> the Third Circuit avoided the question of custody and instead refused to dismiss the complaint on grounds that school policies and customs maintained in deliberate indifference to *Stoneking's* constitutional rights were actionable under § 1983.<sup>131</sup>

The Third Circuit soon reversed its position in *D.R. v. Middlebucks Area Vocational Technical School*,<sup>132</sup> holding that a deaf student repeatedly raped by fellow students was not in the custody of the school.<sup>133</sup> The existence of custody over the student could not be recognized, the court said, because the parents remained the primary caretakers of the student and, for its part, the school had not created or limited D.R.'s access to outside sup-

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intendent and principal acted with deliberate indifference to the student's constitutional rights), *cert. denied*, 506 U.S. 1087 (1993), *vacated*, 15 F.3d 443 (5th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 815 (1994).

<sup>127</sup> *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 601 (3d Cir. 1988) (*Stoneking I*), *vacated sub. nom. Smith v. Stoneking*, 489 U.S. 1062 (1989).

<sup>128</sup> *Id.* at 601 (emphasis added); *see also supra* note 83.

<sup>129</sup> *Stoneking I*, 489 U.S. at 604.

<sup>130</sup> *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989) (*Stoneking II*), *cert. denied*, 493 U.S. 1044 (1990). The Third Circuit's decision relied heavily on *City of Canton v. Harris*, 489 U.S. 378 (1989) (establishing the deliberate indifference standard for determining whether a municipality can be held liable under § 1983 for a failure to train its officials).

<sup>131</sup> *Stoneking II*, 882 F.2d at 725.

<sup>132</sup> *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993).

<sup>133</sup> *See id.*

port, or created or exacerbated the danger posed by the student defendants.<sup>134</sup>

Out of the Fourth Circuit arose the case of *B.M.H. v. School Board*.<sup>135</sup> The court found the Chesapeake, Virginia, school had no duty to protect an eighth grade student from rape by a fellow classmate, even where, as here, the school had prior notice from the eighth grader that she had been threatened.<sup>136</sup> The district court, basing its holding on the restraint-on-liberty rationale, concluded that custody did not exist.<sup>137</sup>

A different—but in today's society highly relevant—scenario arose in *Maldonado v. Josey*.<sup>138</sup> The Tenth Circuit, effectively rejecting the concept of functional custody first discussed in *Stoneking I*, found no duty to protect an elementary student who choked to death while left unattended for twenty minutes in a cloakroom.<sup>139</sup> Already in 1990, the Seventh Circuit had held that Illinois school authorities did not have an affirmative duty under the Due Process Clause to prevent alleged sexual abuse of school children by a teacher.<sup>140</sup> Absent a showing that the manner in which the state exercised its power over the children rendered them incapable of caring for themselves, no duty arose.<sup>141</sup>

For a time, the Fifth Circuit appeared to be the first of the circuits to break away from the no-duty-to-protect rule.<sup>142</sup> In *Doe v. Taylor Independent School District (Doe I)*,<sup>143</sup> the Fifth Circuit held that "school officials

<sup>134</sup> See *id.* Chief Judge Sloviter's dissent rose above the en banc decision. Chief Judge Sloviter invoked the specter of the language in *Stoneking I* and *Stoneking II*, stating that nothing in *DeShaney* precluded a functional custody analysis. Chief Judge Sloviter also argued forcefully on several other points, namely that the Court in *DeShaney* had stated:

[A] duty to protect can arise from 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* . . . ." The Court did not say "other similar types of *custody*," which it could easily have done if it had so meant. Involuntary custody is just one type of "limitation which [the State can] impose[] on [an individual's] freedom to act on his own behalf."

*Id.* at 1379 (Sloviter, C.J., dissenting) (quoting *DeShaney*, 489 U.S. at 201) (citations omitted). Chief Judge Sloviter's observations, once again both principled and perceptive, point to yet another ambiguity created as a result of the *DeShaney* decision. See *supra* Part II.C. and accompanying notes.

<sup>135</sup> 833 F. Supp. 560 (E.D. Va. 1993).

<sup>136</sup> See *id.* at 562.

<sup>137</sup> See *id.*

<sup>138</sup> 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993).

<sup>139</sup> See *id.*

<sup>140</sup> See *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267 (7th Cir. 1990).

<sup>141</sup> See *id.*

<sup>142</sup> See Horwitz, *supra* note 84, at 1224-25.

<sup>143</sup> *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992) (*Doe I*), *cert. de-*

have a constitutional duty to protect schoolchildren from known or reasonably foreseeable harms occurring during or in connection with school activities."<sup>144</sup> *Doe I* involved sexual harassment perpetrated against a student by her biology teacher as opposed to a fellow student. At the time, this case gave hope to some commentators that the monolithic no-duty-to-protect rule might not endure.<sup>145</sup> Upon rehearing the case in *Doe II*, however, the court limited its findings to the facts, thus effectively extinguishing the inference that a duty to protect from third parties, especially fellow students, might be found.<sup>146</sup> The Fifth Circuit later confirmed this restricted reading of *Doe II* in 1994.<sup>147</sup> In so confirming, the Fifth Circuit held in *Leffall v. Dallas Independent School District* that a school was not liable when one student shot another at a school dance.<sup>148</sup> Yet again, however, the circuit court vacillated, stating:

[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>149</sup>

Despite the Fifth Circuit's partial break with the no-duty rule and ambiguities found in other circuits, the First, Third, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have refused to recognize a broad duty to protect in the school setting.<sup>150</sup>

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nied, 506 U.S. 980 (1993), vacated, 15 F.3d 443 (5th Cir. 1994) (en banc) (*Doe II*), cert. denied, 513 U.S. 815 (1994).

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

<sup>145</sup> See, e.g., Horwitz, *supra* note 84, at 1224-25.

<sup>146</sup> See *Doe II*, 15 F.3d at 457 n.12.

<sup>147</sup> See *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994) (holding that no special relationship existed between a school district and a parent, and that state actors were not deliberately indifferent to a student's constitutional rights).

<sup>148</sup> See *id.*; see also *supra* Introduction, Scenario One.

<sup>149</sup> *Leffall*, 28 F.3d at 529.

<sup>150</sup> See Faberman, *supra* note 51, at 114. This presumption by Faberman reinforces the position of his argument, which is discussed in Part IV. As Part III.B also shows, ambiguities exist in the Seventh and Eleventh Circuits. Moreover, these are not mere ambiguities of language, but indicate judicial concern for denying recovery under § 1983 in even the most egregious cases of constitutional violation: namely, when disabled or very young students are abused at public residential schools. To support his assertion, Faberman cites, for example, *Stauffer v. Orangeville School District*, 1990 WL 304250 (N.D. Ill. May 17, 1990), as a case in which a federal district court in the

## B. Cases Directly or Nearly On Point and the Exceptions to the No-Duty Rule

### 1. Cases Directly or Nearly on Point

Despite the consensus among the circuits that public day schools generally have no duty to protect their students, the narrow issue of whether residential schools have a duty to protect their disabled students recurrently resurfaces in the courts. The case of *Stevens v. Umsted*,<sup>151</sup> perhaps an otherwise unremarkable district court decision, illustrates this recurrence. It also may illustrate the media's and the public's interest in its implications.

In *Stevens*, the district court dismissed the plaintiff's § 1983 suit because it found that the residential school's level of custody over the severely visually impaired and developmentally disabled plaintiff, Bradley Stevens, was not sufficient for the court to recognize Bradley's underlying constitutional due process rights "to be secure in his person and to be placed in a safe environment free from . . . sexual assaults."<sup>152</sup> Bradley, today nineteen, entered the residential school at the age of nine.<sup>153</sup> Over a span of ten years, fellow students sexually abused him despite the superintendent's alleged notice of some of the prior abuse.<sup>154</sup>

District Court Judge Richard Mills acknowledged that, in the Seventh Circuit at least, the level of custody was not alone measured according to the voluntariness or involuntariness of the custodial relationship.<sup>155</sup> He said, moreover, that if the duty to protect were to exist, it nevertheless would be so novel as to entitle the superintendent to qualified immunity.<sup>156</sup> In a final footnote, a further, perhaps more revealing, concern appeared: "By allowing this case to proceed, this Court would add to the list of individuals

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Seventh Circuit held that no affirmative obligation to protect existed when a student was sexually assaulted by other students. See Faberman, *supra* note 51, at 139 n.120. As Part III.B reveals, this characterization is not altogether accurate.

<sup>151</sup> 921 F. Supp. 530, 535 (C.D. Ill. 1996), *aff'd*, 131 F.3d 697 (7th Cir. 1997).

<sup>152</sup> *Id.* at 531 (quoting the plaintiff's complaint). The circular logic, or rather illogic, forced upon the district court by the very real ambiguities still felt in the wake of *DeShaney* are analyzed in greater detail in Part V.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> Whether this is so remains debatable, if not altogether doubtful. For an in-depth analysis, see *infra* Part V.

<sup>156</sup> See *Stevens*, 921 F. Supp. at 536-37. The court noted that when, as here, a plaintiff fails to specify whether a defendant is being sued in his official or individual capacity, the Seventh Circuit courts construe § 1983 claims as naming defendants in their official capacities. Defendants named in their official capacities may escape liability under the Eleventh Amendment. See *supra* Part II.D.1.

whom the states owe a duty to protect.”<sup>157</sup> In its narrow interpretation, the *Stevens* court failed to recognize what another district court in the Seventh Circuit, writing nearly six years before *Stevens* and just shortly after the Supreme Court’s *DeShaney* decision, acknowledged:

Although the State has no general duty to protect students from . . . third parties, this duty could conceivably be imposed under the facts of this specific case. By allowing Stauffer [the plaintiff and a special education student] to go to the restroom unsupervised with another student who had a prior history of sexually molesting others and who had threatened Plaintiff, it is possible that the teacher placed Stauffer in a hazardous situation. State actors are under a duty to protect a person from the violence of others if they themselves put the person in a position of danger. . . . *Since the plaintiff might fit within this exception to the general rule that the State has no duty to protect students from the acts of third parties*, this court denies Defendant’s motion to dismiss the portion of the complaint dealing with the school’s duty of protection.<sup>158</sup>

The district court in *Stevens v. Umsted* did recognize,<sup>159</sup> however, that:

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<sup>157</sup> *Id.* at 536 n.11.

<sup>158</sup> *Stauffer v. Orangeville Sch. Dist.*, 1990 WL 304250, at \*6 (N.D. Ill. May 17, 1990) (citing *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982)).

<sup>159</sup> The *Stevens* decision also referred to *Spivey v. Elliot*, 29 F.3d 1522 (11th Cir. 1994), *aff’d*, 41 F.3d 1497 (11th Cir. 1995). In *Spivey*, the Eleventh Circuit originally had held that a residential student had a special relationship with the state, potentially triggering a constitutional duty to protect the student. Because the constitutional right was not clearly established at the time of the act, however, as per the qualified immunity inquiry, defendants escaped liability. This was potentially groundbreaking because the Eleventh Circuit’s finding of such a duty could have been interpreted to have henceforth established such a constitutional right. If the Eleventh Circuit were to have found such a duty, then future defendants would not have been likely to have availed themselves of a qualified immunity defense, for they might have been deemed to have known of a residential student’s constitutional right to protection as a result of the Eleventh Circuit’s finding. Before this could occur, however, the court withdrew its decision *sua sponte* because it thought “it [was] enough to decide that there was no clearly established constitutional right allegedly violated by the defendants.” *Spivey*, 41 F.3d at 1498. The withdrawal might make some wonder whether the Eleventh Circuit indulged in a judicial technicality. The Eleventh Circuit soft-pedaled the issue:

This exercise is probably of more interest to the bench and bar for future cases than to the parties in this particular case. Once there has been a determination that there is no “clearly established” right, the parties can accomplish little in pursuing the question of whether there is a right at all.



"No court has yet held that a fulltime, residential student at a special state-run school has a constitutional right to a safe environment." The court went on to note that the Fifth Circuit in *Walton v. Alexander*<sup>160</sup> was "the only court to rule on the question [and] held that the superintendent of such a school has no duty to protect."<sup>161</sup>

That ruling in *Walton* is potentially open to constitutional challenge.<sup>162</sup> The nature of that challenge partly flows from the logic used by the Fifth Circuit. The facts in *Walton* reveal that one student sexually assaulted another student who lived at a special state-run residential school for the deaf.<sup>163</sup> Although the court conceded that the state had curtailed the plaintiff's liberties, it said that the disabled plaintiff voluntarily was committed to the school.<sup>164</sup> Voluntariness thus became the sole linchpin of the court's reasoning, which denied the existence of a "special relationship," that is, whether custody over the student arose by virtue of state action or inaction.<sup>165</sup> Hence the Fifth Circuit found that the student's option<sup>166</sup> to at-

*Id.* This withdrawal, however, was not a technicality. Rather, if read carefully, the above portion of *Spivey* effectively chills the recognition of any constitutional duties not clearly announced from the time that *DeShaney* was announced. Hence, the impact of the court's circular logic on § 1983 suits may well prove devastating. The circularity of the decision's logic is discussed further in Part V.

<sup>160</sup> 44 F.3d 1297 (5th Cir. 1995) (en banc).

<sup>161</sup> *Stevens*, 921 F. Supp. at 535 (citations omitted) (citing *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc)). *But see* *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405 (E.D. Ark. 1992) (holding there was no duty to protect a mentally handicapped student enrolled in a program teaching life and social skills, absent some affirmative action by the state such as custody, which, the court held, did not exist), *aff'd*, 7 F.3d 729 (8th Cir. 1993).

<sup>162</sup> Even the district court in *Stevens v. Umsted* said, "[T]he reasoning of the majority in *Walton* has been discredited by the Seventh Circuit in *Camp*." 921 F. Supp. at 535 (citations omitted) (citing *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995) (holding that "a child placed in the guardianship of the state has a due process right not to be placed by the state with a custodian whom [sic] the state knows will fail to exercise the requisite degree of supervision over the child," 67 F.3d at 1294)). The district court in *Stevens* went on to point out that *Camp*, among other decisions, "instructs that voluntariness alone is not a sufficient basis to deny the existence of a duty to protect." *Stevens*, 921 F. Supp. at 536; *see supra* Part II.A, and especially note 108.

<sup>163</sup> *See Walton*, 44 F.3d at 1299-1300.

<sup>164</sup> *See id.* at 1305. The court acknowledged that:

As a resident, Walton slept at the School and took his meals at the School. The School strictly regulated when Walton could come and when he could go. Furthermore, the School severely restricted the conditions under which he could leave the campus. For the most part, the School determined his daily schedule of duties, classes, and activities when he was on campus . . . . *The record will support the factual contentions asserted by Walton.*

*Id.* (emphasis added).

<sup>165</sup> *See id.* at 1303-05.

<sup>166</sup> It may well be argued, as has been done by some, that this "option" to attend or

tend and later to leave the school militated against finding sufficient custody for an underlying constitutional right and duty to attach under § 1983.<sup>167</sup> To this end, the language of the *Estelle-Youngberg-DeShaney* cluster once more was pressed into service to justify granting different constitutional rights to involuntarily and voluntarily committed persons: "Referring to *Estelle* and *Youngberg*, the [*DeShaney*] Court acknowledged 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 safekeeping and general well-being.'"<sup>168</sup> To further buttress its voluntariness test, the court even invoked its recent holding in *Leffall*,<sup>169</sup> which stood for no more than that a school was not constitutionally liable when a student was randomly shot at a school-sponsored after-hours dance.<sup>170</sup>

Judge Parker's concurrence, while agreeing that no § 1983 liability attached under *Walton*, nevertheless disagreed with the majority's reasoning.<sup>171</sup> Although he believed the § 1983 suit failed because the plaintiff did not make a showing of deliberately indifferent conduct, Judge Parker disagreed with the conclusion that "absolutely no duty to residential students of the Mississippi School for the Deaf" existed to provide them "at least some level of protection from assault by other students."<sup>172</sup> That the voluntariness of the restraint on liberty, which comprised the majority's constitutional test, deprived Walton and other disabled students like him of their constitutional rights struck Judge Parker as "arbitrary, illogical, and formalistic."<sup>173</sup> In mitigating the absolute force of the *Estelle-Youngberg-DeShaney* cases, Judge Parker argued that

The majority's holding that custody must be "involuntary" and "against [a person's] will" is so restrictive that it precludes any type of custody short of incarceration or institutionalization giving rise to the duty of protection. In effect, the majority has confined the duty of protection to the circumstances found in *Estelle* and *Youngberg*. Such a narrow

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leave a residential school for the disabled is nothing more than a de jure option, a formality. Upon reflection, this argument is but a clear conceptual extension of the voluntariness and involuntariness debate. See *supra* Part II.A.

<sup>167</sup> See *Walton*, 44 F.3d at 1305.

<sup>168</sup> *Id.* at 1303 (quoting *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 199-200 (1989)).

<sup>169</sup> *Dallas v. Leffall Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994).

<sup>170</sup> See *Walton*, 44 F.3d at 1304.

<sup>171</sup> See *id.* at 1307 (Parker, J., concurring specially).

<sup>172</sup> *Id.* (Parker, J., concurring specially).

<sup>173</sup> *Id.* at 1306 (Parker, J., concurring specially).

application of this duty clearly was not contemplated in *DeShaney*.<sup>174</sup>

Judge Parker quoted the ambiguous language in *DeShaney* to rebut the sweeping effect of the majority's narrow reading of that case:

The precise type of restraint that will create a corresponding affirmative duty was not spelled-out in *DeShaney*, but it seems clear that "similar restraint of personal liberty" means that there may be circumstances other than those in *Estelle* and *Youngberg* that give rise to a constitutional duty to protect.<sup>175</sup>

To refute the majority's characterization of the Fifth Circuit's decision in *Leffall* as controlling *Walton*, Judge Parker wrote that because *Leffall* did not pertain to a school for the disabled with twenty-four-hour custody of its students, it did not involve the same, presumably high, level of custodial control found in *Walton*.<sup>176</sup>

The concurrence also criticized the very heart of the voluntariness test: "Rather than simply asking whether a person entered state custody 'voluntarily,' we should examine the nature of the custodial relationship that existed between the State and the plaintiff."<sup>177</sup> Finally, Judge Parker proposed that instead of testing the voluntariness of the custodial relationship, several

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<sup>174</sup> *Id.* at 1308 (Parker, J., concurring specially).

<sup>175</sup> *Id.* at 1307-08 (Parker, J., concurring specially) (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)). Judge Parker also quoted *Graham Independent School District No. 1-89*, 22 F.3d 991, 994 (10th Cir. 1994): "Nonetheless, *DeShaney* left undefined the precise measure of a state restraint that engenders an individuals [sic] right to claim a corresponding affirmative duty." *Id.* at 1308 n.10 (Parker, J., concurring specially).

<sup>176</sup> See *id.* at 1308 (Parker, J., concurring specially) (citing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 529 (5th Cir. 1994)).

<sup>177</sup> *Id.* at 1309 (Parker, J., concurring specially). Judge Parker then quoted and cited several commentators who "have been critical of 'involuntariness' as a threshold requirement in the context of custodial control exercised in public schools." *Id.* (Parker, J., concurring specially). One commentator whom Judge Parker quoted wrote:

Any insistence that a legal compulsion to attend school be present before an affirmative duty to protect is recognized would result in the drawing of irrational and arbitrary classifications defining the circumstances and situations in which students are afforded constitutional protection. The key to the duty owed should be the state's assumption of responsibility for the care and control of students while they are physically present in a state-created and controlled environment.

*Id.* (Parker, J. concurring specially) (quoting Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 450 (1994)).

factors should be taken into account in determining whether sufficient custody exists to show state action or inaction when establishing whether an underlying constitutional right arises at all:

- (1) "the authority and discretion state actors have to control the environment and the behavior of the individuals in their custody,"<sup>178</sup>
- (2) "the responsibilities assumed by the State,"<sup>179</sup>
- (3) "the extent to which an individual in state custody must rely on the State to provide for his or her basic needs,"<sup>180</sup> and
- (4) "the degree of control actually exercised by the State in a given situation."<sup>181</sup>

## 2. *The True, but Broad-Based, Exceptions*

Courts in the Second Circuit proved themselves willing to impose upon schools a duty to protect students when the theory for finding a constitutional right and deliberate indifference can be proven.<sup>182</sup> The district court in *Pagano v. Massapequa Public Schools*, for example, found that a duty to protect was established, under § 1983, upon an elementary school student's allegation of seventeen incidents of physical and verbal abuse by other students, of which school officials allegedly knew and failed to prevent.<sup>183</sup> The plaintiff's claim was based on a theory of the school's customs, policies, and practices.<sup>184</sup> The district court thus recognized that a claim for state action or inaction under § 1983 had been established.<sup>185</sup>

Most significantly, Chief Judge Platt acknowledged the analogy to the prisoner and state institutionalized patients scenarios drawn by the plaintiff.<sup>186</sup> In moving on to analyze whether an underlying constitutional right existed, Chief Judge Platt, noting the ruling in *DeShaney* announced that very year, drew a distinction between Pagano's situation and

<sup>178</sup> *Id.* (Parker, J., concurring specially). Note the common law tort-duty flavor of Judge Parker's factors for establishing custody.

<sup>179</sup> *Id.* at 1309-10 (Parker, J., concurring specially).

<sup>180</sup> *Id.* at 1310 (Parker, J., concurring specially).

<sup>181</sup> *Id.* (Parker, J., concurring specially).

<sup>182</sup> See *Robert G. v. Newburgh City Sch. Dist.*, 1990 WL 3210 (S.D.N.Y. Jan. 8, 1990) (denying a motion to dismiss a female student's claim against school officials based on a sexual assault perpetrated by a substitute teacher); *Pagano v. Massapequa Public Schs.*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (denying a motion to dismiss a student's claim against school officials based on a series of physical and verbal assaults by other students).

<sup>183</sup> See *Pagano*, 714 F. Supp. at 642.

<sup>184</sup> See *id.* at 642-43 (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978)).

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at 643.

DeShaney's.<sup>187</sup> In doing so, Chief Judge Platt focused on the well-known foster home footnote in *DeShaney*.<sup>188</sup> Stating that the Second Circuit held that a duty existed in the foster home situation,<sup>189</sup> Chief Judge Platt went on to say: "The facts of the present case [*Pagano*], on the face of the complaint, 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>190</sup>

As for the standard of liability, the *Pagano* court accepted that seventeen alleged incidents of repeated negligence may rise to the level of deliberate indifference.<sup>191</sup> The plaintiff, therefore, had "stated a sufficient claim under 42 U.S.C. § 1983 at this juncture to withstand a motion to dismiss."<sup>192</sup>

Later that same year, another New York district court likewise denied a defendant's motion to dismiss a § 1983 claim.<sup>193</sup> In *Robert G. v. Newburgh City School District*, the plaintiff's daughter allegedly was sexually assaulted by a substitute teacher on school grounds during school hours.<sup>194</sup> Relying heavily on the "functional custody" language in *Stoneking I*,<sup>195</sup> the district court stated that New York recognized the "custodial control by the Board of Education of its students."<sup>196</sup> Justifying the

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989)).

<sup>189</sup> See *id.* (citing *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981). *after remand*, 709 F.2d 782 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1983)).

<sup>190</sup> *Id.* It is noteworthy that Chief Judge Platt focused on both the victim's and the alleged perpetrator's relationships to the school. Also noteworthy is the fact that New York courts recognize a school's duty to protect. See, e.g., *Pratt v. Robinson*, 349 N.E.2d 849, 852 (N.Y. 1976) (holding that a school's physical custody over its students creates a duty to protect); *Logan v. City of New York*, 543 N.Y.S.2d 661, 663 (App. Div. 1989) (recognizing that the board of education had a duty to protect its students by virtue of its physical custody over them). The court in *Stauffer* did not accept the sweep of the *Pagano* decision, noting:

This court, however, does not find the reasoning in *Pagano* persuasive. Although the State requires children to attend school, this does not create a deprivation of liberty similar to that imposed on prisoners or persons who are involuntarily committed to a State institution. If this were the case then every time a school child is assaulted by the class bully during recess there would be a tort of constitutional dimensions under § 1983.

*Stauffer v. Orangeville Sch. Dist.*, 1990 WL 304250, at \*5 (N.D. Ill. May 17, 1990).

<sup>191</sup> See *Pagano*, 714 F. Supp. at 643.

<sup>192</sup> *Id.* at 644.

<sup>193</sup> See *Robert G. v. Newburgh City Sch. Dist.*, 1990 WL 3210 (S.D.N.Y. Jan. 8, 1990).

<sup>194</sup> See *id.* at \*1.

<sup>195</sup> *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 601 (3d Cir. 1988) (*Stoneking I*), *vacated sub nom. Smith v. Stoneking*, 489 U.S. 1062 (1988).

<sup>196</sup> *Robert G.*, 1990 WL 3210, at \*3 n.1 (citing cases). See, e.g., *Pratt v. Robinson*,

soundness of the plaintiff's theory for establishing an underlying constitutional right even against the backdrop of *DeShaney*, the court, quoting *Stoneking II*, noted: "Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates."<sup>197</sup> In addition, the court allowed the parties to conduct discovery.<sup>198</sup>

Despite these exceptions and the consternation evident in cases that have found that residential schools had no constitutional duty toward their disabled students, the general no-duty rule remains intact. Thus far, the commentators generally disagree with the reasoning of the courts. It is to their views that the present study will now briefly turn.

#### IV. THE COMMENTATORS CLOSE RANKS—ALMOST

The commentators who have addressed whether schools should have a broad duty to protect students almost completely agree that such a duty should be imposed on public schools. Steven Huefner, whose oft-cited work analyzed the duty of public schools to protect their students in the aftermath of *DeShaney*, argued early on for the courts to allow "noncustodial" theories to establish the kind of state action or inaction that could lead to judicial recognition of an underlying constitutional right to protection.<sup>199</sup> Huefner also reasoned that given the increasingly important role that schools play in student lives, and given the mandatory attendance and *in loco parentis* laws, the student-school relationship should be considered sufficiently custodial, at least during the time students are in attendance, for purposes of recognizing a constitutional duty to protect.<sup>200</sup>

John W. Walters developed a "sufficient custody" test for determining when the duty should be imposed.<sup>201</sup> Taking into account factors such as a particular child's needs and the extent of control exerted over that child, the "test," by measuring the combination of these variables along a continuum, the "Range of School Custody line," would then apply the factors against a

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349 N.E.2d 849, 852 (N.Y. 1976) (holding that a school's physical custody over its students creates a duty to protect); *Logan v. City of New York*, 543 N.Y.S.2d 661, 663 (App. Div. 1989) (recognizing that the board of education had a duty to protect its students by virtue of its physical custody over them).

<sup>197</sup> *Id.* at \*2 (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) (*Stoneking II*), *cert. denied*, 493 U.S. 1044 (1990)).

<sup>198</sup> *See id.* at \*3.

<sup>199</sup> *See* Huefner, *supra* note 103, at 1960-65.

<sup>200</sup> *See id.* at 1967.

<sup>201</sup> *See* John W. Walters, Note, *The Constitutional Duty of Teachers to Protect Students: Employing the "Sufficient Custody" Test*, 83 KY. L.J. 229 (1995). The test, like Walters's analysis, recognizes that the *DeShaney* decision ultimately rested upon a restraint-on-liberty rationale, not on notions of voluntariness or involuntariness.

standard benchmark, the "Constitutional Duty line," which, depending upon the resultant school setting, either would or would not impose a duty to protect.<sup>202</sup> Walters conceded that under his model a court would first assume the existence of a duty—as represented graphically by the "Constitutional Duty line"—and then work its way backward.<sup>203</sup> The resulting analysis thus focuses upon whether the "teacher's conduct was grossly negligent or completely indifferent."<sup>204</sup> Once liability was found to attach under the test, a jury given the claim could measure whether the school deviated from the reasonable standard of custody.<sup>205</sup>

Barbara L. Horwitz's comment also favors establishing a broad public school duty to protect.<sup>206</sup> Horwitz made two especially principled arguments: (1) that as its ultimate purpose § 1983 was meant to protect individuals from governmental abuse of their constitutional rights,<sup>207</sup> and (2) that among some of the alternatives to suits based on § 1983 lurked potential Title IX actions alleging sexual abuse and harassment.<sup>208</sup> Although Horwitz, like many others, overestimated the Fifth Circuit's willingness to create a broad duty to protect in *Doe v. Taylor Independent School District*,<sup>209</sup> she did predict the contemporary shift toward Title IX suits, which are increasingly brought to "pressure school districts into controlling the actions of their employees."<sup>210</sup>

Although most commentators favor the blanket imposition on schools of a general duty to protect their students,<sup>211</sup> Michael Gilbert argued for a

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<sup>202</sup> See *id.* at 256-57.

<sup>203</sup> See *id.* at 256-58.

<sup>204</sup> *Id.* at 257-58.

<sup>205</sup> See *id.* at 263.

<sup>206</sup> See Horwitz, *supra* note 84.

<sup>207</sup> See *id.* at 1225.

<sup>208</sup> See *id.* at 1221-22.

<sup>209</sup> 975 F.2d 137 (5th Cir. 1992) (*Doe I*), *cert. denied*, 506 U.S. 1087 (1993), *vacated*, 14 F.3d 433 (5th Cir. 1994) (en banc) (*Doe II*), *cert. denied*, 513 U.S. 815 (1994).

<sup>210</sup> Horwitz, *supra* note 84, at 1222; see also *Doe I*, 975 F.2d at 138-39 (holding that a school official is liable for the violation of a student's rights by a school employee only when the student demonstrates that the official by action or inaction was deliberately indifferent to the student's constitutional rights); *supra* note 6 and accompanying text.

<sup>211</sup> Other commentators who favor imposing the duty on schools include 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); and 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).

"middle ground."<sup>212</sup> Gilbert's proposed middle ground turned on the identity of the perpetrator who harmed the student: "[C]ourts should find an affirmative duty in the public school setting at least in cases of abuse or molestation by a teacher or school employee."<sup>213</sup> Summarizing his rationale, Gilbert stated:

A court which finds a duty in cases where a teacher or school employee is the perpetrator of the abuse is not necessarily obligated to find that such a duty exists when a student is abused by a fellow student. The "all or nothing" approach is not necessary. All of the public school abuse cases are not the same. As noted, there is a significant difference, with regard to vulnerability and ability to seek assistance, between cases in which the perpetrator is a teacher or school employee and cases in which the perpetrator is a student.<sup>214</sup>

If Gilbert's position holds the middle ground for imposing a duty to protect on public schools, Stephen Faberman broke from the apparent consensus altogether.<sup>215</sup> Faberman, in effect, advocated a strict interpretation of *DeShaney*, rejecting the functional custody analysis within the school setting.<sup>216</sup> Moreover, responding to Stephen Huefner's suggestion for a non-custodial duty analysis, Faberman argued that "even under a non-custodial analysis, the state has not become so intertwined with one of its citizens' lives, that it has assumed responsibility for ensuring that citizen's welfare and protection."<sup>217</sup> Writing without the aid of hindsight, Faberman partially

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<sup>212</sup> Gilbert, *supra* note 122.

<sup>213</sup> *Id.* at 509.

<sup>214</sup> *Id.*

<sup>215</sup> See Faberman, *supra* note 51.

<sup>216</sup> See *id.* at 127-31. Faberman does not ignore *DeShaney*'s patent ambiguities, such as the Court's "analogous" circumstances language and foster home footnote; rather, he limits them to their narrowest linguistic constructions.

<sup>217</sup> See *id.* at 130. On closer examination, Faberman's statement constitutes merely a further rejection of the functional custody analysis—not an argument that, by its own force, undercuts Huefner's oft-quoted statement, which Faberman himself quotes, that "[a] proper analysis should look to the implications of custodial control, rather than only to the control itself, because it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian." *Id.* at 124 (quoting Huefner, *supra* note 103, at 1957). In fairness to Faberman, however, Huefner's argument would be better employed to dispel the arguably mistaken notion that due process rights, and indeed *DeShaney* itself, turn on the voluntariness or involuntariness of the restraint of a person's liberty. Part V attempts, through a conceptually independent approach, to dispel that notion.



devoted his argument against the Fifth Circuit's then recent ruling in *Doe I*,<sup>218</sup> that "school officials have a constitutional duty to protect schoolchildren from known or reasonably foreseeable harms occurring during or in connection with school activities."<sup>219</sup> The Fifth Circuit apparently shared Faberman's unease with such a sweeping rule establishing a public school's duty to protect its students. In 1994, the Fifth Circuit vacated *Doe I*,<sup>220</sup> thus restoring the general no-duty rule in that circuit.

Perplexing, perhaps, is the question why commentators, as well as district and circuit court judges still discuss the troublesome issue of when, if ever, students may hold a due process right not to be harmed at school. To be sure, *DeShaney's* ambiguities continue to prove legally nettlesome, even inconsistent, as a basis for a court's judgement under especially difficult factual circumstances. Could it be, then, that the most egregious cases, those involving abuse at state residential schools for handicapped students, keep alive the debate on an otherwise judicially stable, if not altogether sound, pattern of decisions?

## V. RECOMMENDATION

The imposition of a duty on state residential schools to protect their disabled students, thus recognizing a bright line exception to the general no-duty rule, can be squared evenly under both existing Supreme Court case law<sup>221</sup> and any test measuring the amount of custody that may be exerted by a state before a state's acts or omissions may be used to establish an underlying due process right under § 1983.<sup>222</sup> Of course, that the duty may be recognized constitutionally would not relieve a plaintiff from having to introduce evidence upon which the duty may be based, nor would it relax the standard of care; that is, a plaintiff must still, as per § 1983, show deliberate indifference on the part of the defendant.<sup>223</sup>

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<sup>218</sup> *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992) (*Doe I*), cert. denied, 506 U.S. 1087 (1993), vacated, 987 F.2d 231 (5th Cir. 1993), vacated, 15 F.3d 443 (5th Cir. 1994) (*Doe II*), cert. denied, 513 U.S. 815 (1994).

<sup>219</sup> *Id.* at 144.

<sup>220</sup> 15 F.3d 443 (5th Cir. 1994) (en banc) (*Doe II*), cert. denied, 513 U.S. 815 (1994); see also *supra* notes 143-47 and accompanying text.

<sup>221</sup> See *supra* Part II.

<sup>222</sup> See *supra* notes 178-81 and accompanying text; see also *supra* notes 201-05 and accompanying text (discussing John W. Walters's "sufficient custody" test).

<sup>223</sup> Anything less would allow ordinary negligence to assume "constitutional dimensions." See *supra* Part I.D.3.

### A. *Satisfying the Threshold Tests: Balancing Constitutional Equities*

Several tests have been proposed in trying to measure the necessary amount of a state's custody over a person, before a state constitutionally is required *ex post* to act or refrain from acting.<sup>224</sup> Under Judge Parker's test in *Walton*, for example, four factors would be taken into account.<sup>225</sup> Applying the test to the situation of a young, severely visually impaired and developmentally disabled child bolsters the need for imposing a duty to protect disabled students at residential schools.

First, for the sake of argument, it can be assumed that the authority and discretion of the hypothetical state actor to control the environment and behavior of disabled students in its care,<sup>226</sup> though potentially varying from institution to institution, usually is mandated by policy, custom, and practice, if not state law. A measure of stability thus inheres in the analysis; however, even under the least restrictive environment, the dangers and special needs attendant to disabled students suggests that a residential school for the disabled would need a much greater degree of control over the students than would the typical nonresidential public school for able-bodied students. The facts of *Walton*, as the Fifth Circuit acknowledged, convincingly bear out the high degree of supervision and control likely to exist at a residential school for the disabled.<sup>227</sup>

Second and third, the responsibilities of the state<sup>228</sup> for the students' basic needs<sup>229</sup> in a twenty-four hour residential setting assume comprehensive dimensions. Not only would the state be responsible for the students' education, as it would in the typical nonresidential public school, but in effect it would feed, supervise, and house the disabled children each day

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<sup>224</sup> See *supra* notes 178-81, 201-05, and accompanying text.

<sup>225</sup> See *Walton v. Alexander*, 44 F.3d 1297, 1309-10 (5th Cir. 1995) (en banc) (Parker, J., concurring specially). Judge Parker suggested that rather than consider whether a person was taken into custody voluntarily, the court should determine whether a "special relationship" exists based on

(1) the authority and discretion state actors have to control the environment and the behavior of the individuals in their custody, (2) the responsibilities assumed by the State, (3) the extent to which an individual in state custody must rely on the State to provide for his or her basic needs, and (4) the degree of control actually exercised by the State in a given situation.

*Id.*

<sup>226</sup> Judge Parker referred to "custody." As employed, the word "care" is meant to convey the same meaning as "custody." "Care" is used instead of "custody" to distinguish between the degrees of possible custody—custody falling short of constitutionally cognizable custody and custody rising to the level necessary to establish an underlying constitutional right.

<sup>227</sup> See *Walton*, 44 F.3d at 1299.

<sup>228</sup> See *id.* at 1309-10 (Parker, J., concurring specially).

<sup>229</sup> See *id.* (Parker, J., concurring specially).

and night. Such a relationship assumes both the conceptual and practical contours of full-blown institutionalization.

Fourth, the degree of control actually exercised<sup>230</sup> by the state in a given situation flows nearly directly from the determinations under factors one through three. This fourth factor, however, is not extraneous. Rather, its appropriate role would be to pierce the veil of the *de jure* custody exerted by the residential school over its disabled student. This inquiry draws on the very foundations of an equitable analysis potentially reaching constitutional dimensions. In a suit in which a defendant school has some measure of motive to discount its official custodial relationship with a student, factor four enables a court to focus on the *de facto* quantum of custody exerted.

In applying John W. Walters's "sufficient custody" test,<sup>231</sup> if a disabled plaintiff residing at a residential school were to adequately allege deliberate indifference on the part of the defendant, she seemingly would be entitled to have a duty to protect automatically imposed on the school. If this were not the case, Walters's constitutional duty analysis, even upon a showing of a defendant's deliberate indifference, would deny *a fortiori* the duty to all able-bodied students in typical nonresidential school settings. That result effectively could deprive the test of its potency altogether.

Upon applying these tests, it becomes clear that residential schools for the disabled manifest the requisite quantum of custody for a state's action or inaction to give rise to an underlying due process right of protection. Although tests measuring the sufficiency of custody address the equities and circumstances on a case-by-case basis, such tests partially undermine the certainty that students, as well as school administrators and teachers, presumably would rely upon in conducting their relations. Absent certainty that a duty to protect disabled students at residential schools exists, the net impact on such § 1983 claims merely would be more suits<sup>232</sup> and, perhaps not surprisingly, a more confused body of case law.

Most importantly, once case law sacrifices certainty within the § 1983 setting, both qualified immunity and Eleventh Amendment immunity potentially shatter the already brittle efficacy of § 1983 in its role of redressing constitutional violations. That judicial uncertainty under a case-by-case analysis would expand the already arguably exaggerated aegis of qualified immunity also exposes the circularity of the objective test for immunity.<sup>233</sup>

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<sup>230</sup> See *id.* at 1310 (Parker, J., concurring specially).

<sup>231</sup> See *supra* notes 201-05 and accompanying text.

<sup>232</sup> The reason that more suits would be brought stems from the judicial case-by-case test plaintiffs would face as a threshold determination of whether a duty may be recognized. Once plaintiffs were to believe that their cases differed factually, even if only slightly, from past decisions that led to dismissal, they might risk the costs of bringing suit.

<sup>233</sup> This circularity, in the context of *Stevens*, is discussed below. See *infra* Part V.B.1.

If, for instance, a duty could not be established with certainty—and a case-by-case constitutional test applied by different district and circuit courts would make confusion and uncertainty a real possibility if not an eventuality—then schools and their officials, invoking qualified immunity's objective knowledge test, would escape liability under more compelling circumstances than those upon which they escape today. Rather than rely on tests measuring the equities behind custodial relationships out of a theoretical regard for a case-by-case analysis, to provide disabled students at residential schools with real remedies for the constitutional violations of their rights, one needs only to penetrate the narrow, and often confused, interpretations of already existing case law.

### B. *Broadening the Conceptual Consequences of DeShaney*

#### 1. *The Restraint-on-Liberty Rationale: Remembrance or Reminiscence?*

Courts almost universally hold that schools have no duty to protect their students based on the prevailing narrow interpretation of *DeShaney's*<sup>234</sup> conceptual mooring.<sup>235</sup> Even when disabled students are abused under deliberately indifferent conditions at twenty-four-hour residential schools, courts invoke a cramped characterization of *DeShaney*.<sup>236</sup> By their narrow judicial construction, courts have elevated *DeShaney's* ambiguities<sup>237</sup> to the near demise of its underlying conceptual underpinning: the restraint-on-liberty rationale.<sup>238</sup> Restoring the centrality of the restraint-on-liberty rationale would permit the recognition of a constitutional duty to protect disabled students at residential schools under the Fourteenth Amendment, enforceable through 42 U.S.C. § 1983.<sup>239</sup>

The language in *DeShaney* itself creates the ambiguities upon which the courts have based their narrow no-duty interpretation.<sup>240</sup> The two lines along which courts have refused to recognize a duty to protect directly follow the patent "foster home" ambiguity and the latent "voluntariness" ambi-

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<sup>234</sup> *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>235</sup> See *supra* Part III.A.

<sup>236</sup> See *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (en banc) (holding that absent a "special relationship," nothing in the Due Process Clause requires a state to protect its citizens from violence at the hands of private actors); *Stevens v. Umsted*, 921 F. Supp. 530, 532 (C.D. Ill. 1996) (holding that a person has no constitutional right to have the government protect him from injuries caused by private actors), *aff'd*, 131 F.3d 697 (7th Cir. 1997).

<sup>237</sup> See *supra* Part II.C.

<sup>238</sup> See generally *supra* Part II.

<sup>239</sup> See *infra* Part V.B.

<sup>240</sup> See *supra* Part III.A.

guity. In *Stevens*, for example, the district court's narrow construction of *DeShaney* was manifest: "By allowing this case to proceed, this Court would add to the list of individuals whom states owe a duty to protect."<sup>241</sup> The court thus construed *DeShaney* narrowly, interpreting it to recognize only three situations in which a duty to protect might arise: incarceration, institutionalization, and the foster home setting.<sup>242</sup> The Eleventh Circuit in *Spivey v. Elliot*<sup>243</sup> likewise refused, by narrowly interpreting *DeShaney*, to find a duty to protect within a residential school setting.

Even if the narrowest possible construction in a case full of ambiguity is most preferable, circularity in logic is not. The circularity in both *Stevens* and *Spivey*, manifest as they are, may be depicted by a simplified syllogism:

No constitutional right because no recognized duty,

No recognized duty because no constitutional right,

Therefore, because no right and no duty, no § 1983 liability.

Apart from being riven with fallacy, the argument, as its conclusion shows, is more than merely illogical: Because this argument actually is advanced by courts, it ex ante deprives plaintiffs recovery under § 1983. It is doubly illogical because, as the *Stevens* court said, the "duty that Plaintiff's claim existed is so novel that, if the Court found it to exist, Umsted [the defendant] would be entitled to qualified immunity."<sup>244</sup>

It is clear that qualified immunity bars "novel" suits; that is, if an official sued in his individual capacity<sup>245</sup> could not objectively have known at the time of the alleged state action or inaction that he was under a particular constitutional duty, he would be insulated from liability.<sup>246</sup> By employing the logic depicted above, courts not only perpetuate antiquated concepts of duty but, as a result, they also chill ex ante the long-standing constitutional right: to redress alleged violations of Fourteenth Amendment rights under 42 U.S.C. § 1983.

Preserving the artifice of the "novelty" of a claim regardless of the frequency with which it is brought can only arrest society's notions of due process. Furthermore, the Supreme Court could not have intended by its decision in *Harlow v. Fitzgerald*<sup>247</sup> perpetually to deny recognition of constitutional rights. Under the present conceptual regime of qualified immunity, combined with disregard for *DeShaney*'s underlying restraint-on-liberty rationale (and reliance instead upon that case's ambiguities), the courts in effect prevent a claim's "novelty" from ever dissipating.

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<sup>241</sup> *Stevens*, 921 F. Supp. at 537 n.11.

<sup>242</sup> *See id.* at 534-36.

<sup>243</sup> 29 F.3d 1522 (11th Cir. 1994), *aff'd*, 41 F.3d 1497 (11th Cir. 1995).

<sup>244</sup> *Stevens*, 921 F. Supp. at 537.

<sup>245</sup> *See supra* Part II.D.1.

<sup>246</sup> *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>247</sup> 457 U.S. 800 (1982).

The Fifth Circuit's decision in *Walton*<sup>248</sup> at least identified that *DeShaney*'s underpinning lay in the restraint-on-liberty (or "deprivation of liberty") rationale.<sup>249</sup> Not unlike the district court in *Stevens*, however, the Fifth Circuit in *Walton* (1) narrowly interpreted *DeShaney*'s conceptual foundation—the restraint-on-liberty rationale,<sup>250</sup> and (2) instead based its refusal to find a duty to protect a disabled student at a residential school upon the latent ambiguity (exemplified by *Estelle*<sup>251</sup> and *Youngberg*<sup>252</sup>) of whether "voluntariness" is a sine qua non for recognizing a duty. Indeed, voluntariness became the focus of the *Walton* case.<sup>253</sup> Because the disabled plaintiff voluntarily lived at the special residential school for the deaf, the court found an insufficient custodial relationship to recognize the school's duty to protect the student.<sup>254</sup> In its analysis, the court therefore compressed voluntariness and the quantum of custody into a single inquiry. Its approach, like the one taken by the *Stevens* court, lacks logical luster.

If one were only to look to the narrowest reading of *DeShaney*, as the *Walton* court did, one would be left with a duty to protect under *Estelle*, *Youngberg*, or circumstances of "other similar restraint of personal liberty,"<sup>255</sup> such as certain foster care situations. Assuming arguendo that one could overlook *DeShaney*'s many ambiguities and relegate the *Estelle* and *Youngberg* holdings to their narrowest consequences, the result is that only three situations yield the kind of custody that gives rise to an underlying constitutional due process right: (1) incarceration, (2) involuntary mental institutionalization, and (3) "other similar restraint of personal liberty." Situations (1) and (2) create a kind of model custody, or Constitutional Custody. Any factual situation hoping to qualify under proposition (3), therefore, must approximate as closely as possible this Constitutional Custody.

Now, the question becomes painfully obvious, if not irrepressible: Can this be done if custody was in any way voluntary? Concededly, perhaps not. The better question to ask, however, is whether the inquiry into voluntariness is logically necessary. It is not, unless one reads the *Estelle-Youngberg-DeShaney* cases so narrowly as to forget their theoretical and

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<sup>248</sup> *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995); see also *supra* Part III.A and accompanying notes.

<sup>249</sup> See *Walton*, 44 F.3d at 1303. In citing *DeShaney*, the Fifth Circuit summarized *DeShaney*'s principal rationale: "This duty to protect, the Court found, arises not because of the state's knowledge of the individual's situation, but from the limitation the state imposed on his freedom to act on his own behalf." *Id.* (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

<sup>250</sup> See *id.* at 1297; see also *supra* Part III.A.

<sup>251</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976), see also *supra* Part III.B.1.

<sup>252</sup> *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>253</sup> See *Walton*, 44 F.3d at 1302.

<sup>254</sup> See *id.*

<sup>255</sup> *Id.* at 1303 (citing *DeShaney*, 489 U.S. at 200).

legal foundation: the restraint-on-liberty rationale. How can the restraint-on-liberty rationale, the very nucleus of the *Estelle-Youngberg-DeShaney* cases, discard the voluntariness inquiry altogether? One only needs to remember, once more, the underlying conceptual rationale for situations (1) and (2) namely, the *Estelle* and *Youngberg* decisions. Even read as narrowly as possible, both cases turn on the restraint-on-liberty rationale, which the Court calls a "deprivation of liberty."<sup>256</sup> That the rationale is not called the "compulsion rationale" nor the "compulsion-leading-to-restraint-on-liberty" rationale (nor the "compulsion-leading-to-the-deprivation-of-liberty rationale") theoretically vindicates those who insist that an incarcerated or involuntarily institutionalized citizen should be afforded greater rights than those who were incarcerated or voluntarily institutionalized (even if "voluntarily" meant merely formally or officially). For the sake of linguistic completeness, one could argue that restraint or deprivation inherently connotes a sense of involuntariness. Thus, to narrowly equate "proposition (3) custody" with "proposition (1) and (2) custody" (or Constitutional Custody) is tautologically to argue that the restraint-on-liberty rationale may only be recognized when an element of involuntariness arises. Such an argument might suffice if restraint, absent involuntariness, lost its meaning altogether.

Not all courts, however, recognize the voluntariness argument.<sup>257</sup> Still, a simple example suffices to belie the argument for an involuntariness requirement. One might imagine a scenario in which a state picks up a mentally diseased vagabond out of his usual alley and institutionalizes him without official consent (but, say, with the vagabond's secret subjective approval). In this scenario, the vagabond would possess all the constitutional protections arising from involuntary institutionalization. If one then pictures that same vagabond voluntarily walking into the same state hospital, on the very morning an order for his confinement was issued, but before it could be carried out (the vagabond being all the while subjectively averse to his

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<sup>256</sup> *Estelle*, 429 U.S. at 103.

<sup>257</sup> See *Buffington v. Baltimore County*, 913 F.2d 113, 119 (4th Cir. 1990) ("Nothing in the [*DeShaney*] Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody."), *cert. denied*, 499 U.S. 906 (1991); *Stevens v. Umstead*, 921 F. Supp. 530, 534 (C.D. Ill. 1996) ("Since *DeShaney*, lower courts have differed in approach and result in a variety of cases. The courts generally agree that public schools are not liable for injuries to one student caused by another. The courts disagree, however, whether states are liable for injuries caused to voluntary state mental patients.") (citations omitted); *Kolpak v. Bell*, 619 F. Supp. 359, 378 (N.D. Ill. 1985) ("[W]hile the court need not consider the constitutional significance of a voluntary admission on this motion, *there is much logic in the cases that find voluntary and involuntary residents entitled to the same constitutional rights to a safe environment.*") (emphasis added).

new surroundings), one is hard pressed to explain why his constitutional rights should now be ignored more casually.

Conversely, what about the voluntariness behind the government's action? Situations can be imagined in which state institutions and individuals act officially, under the imposition of judicial decree or automatic administrative process, but not by preference. On such facts would it lie in the state's mouth to deny it owed a constitutional duty? If so, individual constitutional rights would turn on a state's subjective representations. This prospect might be difficult to imagine, and easy to dismiss, in the case of an administrative agency, but less so with a teacher.

Sole reliance on the patent and latent ambiguities of *DeShaney* to justify reading this case narrowly inflicts even greater damage upon constitutionally recognized doctrine. Because of their focus on whether incarceration and involuntary mental institutionalization lead to sufficient *custody*, courts potentially have and will continue to ignore other theories that have led, and could still lead, to the recognition of an underlying constitutional right. To exult custody as the only theory that could lead to success in a § 1983 suit would imply that other judicially recognized theories—such as failure to control a state official,<sup>258</sup> creation of danger,<sup>259</sup> and deliberately indifferent custom, practice, and policy<sup>260</sup>—amount to nothing more than blunderbuss approaches for pursuing a § 1983 suit. To give full effect to all judicially recognized theories under § 1983, the courts would do well to remember that at the heart of *Estelle*, *Youngberg*, and *DeShaney* lies the restraint-on-liberty rationale and that custody is but one theory through which a constitutionally cognizable restraint on liberty may be recognized.

## 2. Policy Perspectives

It has been argued with some force that today § 1983 is largely a judicial construct.<sup>261</sup> Courts have proved themselves unwilling to recognize a student's due process right to be protected by his school, even when that student is severely disabled and resides at his school day and night.<sup>262</sup> Courts thus have cast into doubt the efficacy, if not the availability, of § 1983 suits, even when deliberately indifferent state action or inaction can be proven.

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<sup>258</sup> See *supra* Part I.D.2.

<sup>259</sup> See *supra* Part I.D.2; *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993).

<sup>260</sup> See *supra* Part I.D.2.; *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d. 720 (3d Cir. 1989) (*Stoneking II*), *cert. denied*, 493 U.S. 1044 (1990).

<sup>261</sup> See *Lewis & Blumoff*, *supra* note 24, at 760.

<sup>262</sup> See, e.g., *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995) (en banc).



The stigma attached to § 1983 by the courts cannot easily be reconciled with judicial permissiveness elsewhere. In the wake of *Franklin v. Gwinnett County Schools*,<sup>263</sup> for example, courts increasingly have awarded monetary damages against schools in suits brought under Title IX.<sup>264</sup> In addition, the Violence Against Women Act<sup>265</sup> of 1994 created a right to civil damage remedies in federal court for gender-motivated abuse of women, even when the abuser is not a state actor.<sup>266</sup> If the broad spectrum of students may recover against schools under Title IX, disabled students at residential schools ought to be allowed similar recovery under § 1983.

Fears that every state tort would be turned into an alleged constitutional violation would be put to rest by a principled, narrow definition of the duty to protect. In addition, in a political climate contemplating subsidized school vouchers, state tort law may soon prove difficult to apply. What is more, the requisite high standard of care under § 1983, coupled with a duty applicable only to the disabled in residential schools, would distinguish more clearly the line between state tort concepts and wrongs reaching constitutional dimensions.

A damage remedy often is the only remedy for an abused disabled child capable of proving deliberately indifferent conduct on the part of a residential state school. Because disabled students are the least able to make known, or extricate themselves from,<sup>267</sup> dangerous situations at residential schools, upon the constitutional equities a bright line exception to the general no-duty rule would provide abused disabled students with monetary relief. A confined constitutional duty to protect the disabled in a residential school setting would promote the principle that due process does not demand a two-dimensional constitutional inquiry—either a duty for all, or none.

In broad, practical terms, by devising the proposed constitutional duty the courts not only would provide relief to those students already harmed by abuses, but the courts also would deter future acts of violence against the disabled. Deterrence would result from the threat of damages; and what creates deterrence today leads to outright reforms in the future. It may be argued that reforms cost money, but so, too, does the determined, and understandably repetitive, litigation often brought by parents of abused disabled children. In establishing a clear-cut exception to the no-duty rule, in effect establishing a duty to protect, schools would be put on notice that

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<sup>263</sup> 503 U.S. 60, 75 (1992) (holding that damage remedies are available for actions brought to enforce Title IX).

<sup>264</sup> See, e.g., *Savage*, *supra* note 7.

<sup>265</sup> 42 U.S.C. §§ 13981-14040 (1994).

<sup>266</sup> See *id.*

<sup>267</sup> See *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987).

If a reluctance to disclose has been found in fully able-bodied children, an even more profound frustration may well be borne by the disabled child who is dependent upon the state for his every need.

questionably inclined teachers, employees or students, absent the institution of appropriate safety or monitoring measures, could cost the school dearly. Such *ex ante* knowledge also would enable schools to procure insurance. As a result of the duty and its deterrence, parents and students would benefit from safer, healthier lives, which in turn would reduce expenses for potential medical, psychological, or homecare treatment, as well as obviate the doubly traumatic prospect of suffering abuse without adequate redress—a cost borne not only by parents, but by society as well.

## VI. CONCLUSION

A constitutionally recognized duty to protect the disabled at state residential schools is the most factually tenable, and least judicially expansive, solution to the dilemma of whether to allow § 1983 remedies for harms caused by a state's deliberately indifferent acts or omissions. Under a meritorious claim, the proposed duty would allow recovery for those least able to protect themselves in a residential school setting, all the while preserving the general no-duty rule that limits any would-be proliferation of constitutional remedies in other, more universal school settings. Recognition of the proposed duty would, therefore, not only provide relief but also promote deterrence.

Disabled students at state residential schools satisfy any constitutionally sound test measuring custody. In addition, *DeShaney's* ambiguities should not be relied upon to dismiss, as blunderbuss bases for recovery, other recognized theories that establish constitutional rights under § 1983. To effectively protect such constitutional rights is to recognize further that the policy considerations undergirding the doctrine of qualified immunity ought not to turn on the kind of circular logic and conceptual artifice that arrest society's evolving notions of due process.

YAMA SHANSAB