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

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ABSTRACT

Imagine the horror experienced by parents who hear that a violent shooter has opened fire on the college campus where their only child is a freshman. As school shootings continue to occur across the country, this imagined horror is a reality for some parents. This Article examines whether victims or their families can recover monetary damages in federal court from a school or university based on that institution’s failure to protect students from a campus shooter. Rather than addressing tort liability, the analysis centers around whether a plaintiff can successfully bring a § 1983 action against a state university for a deprivation of his or her Fourteenth Amendment rights under the Due Process Clause.

The general rule is that the state has no duty to protect the life, liberty, and property of its citizens against the violence of private parties. There are two exceptions: (1) when a special relationship exists between the state and the injured person, and (2) when the state’s actions have created the very danger that caused the harm to the victim. This Article explores recent federal decisions as to the applicability of these exceptions. The conclusion is that neither theory is likely to be a successful avenue for relief in a school shooting case. Although this result is very harsh for grieving families, it is legally correct. The Due Process Clause was not intended to stretch so far as to make the state responsible for injuries inflicted by private actors.

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Shootings on school campuses have shocked the public time and time again. In January 2013 alone, eight school shootings occurred, half of which took place on college or university campuses.\(^1\) Despite efforts to enhance security, establish threat assessment teams, and implement other preventive measures, schools have not been able to avoid the tragic incidents of gun violence that have killed and injured dozens of innocent students, faculty, and administrators on college campuses across the nation.\(^2\)


After shootings occur, grieving parents and other loved ones reach out for comfort and support. Why did this senseless act of violence happen? Whose fault is it? What can we do? In their sorrow, frustration, disbelief, and anger, the survivors want answers. In many instances, the shooter is also dead. But knowing that the killer will be criminally punished is small comfort to victims’ families. Grieving parents wonder if there is any other relief available. It is axiomatic that money damages cannot bring a deceased child back to life, nor can money ever replace the value of any human being. Nonetheless, monetary damages can at least compensate survivors for medical costs and other expenses associated with the tragic event, as well as for pain and suffering. One possible source of relief is a suit against the university where the tragic slaying took place.

This topic is powerful, painful, and poignant for me because I identify with both sides in such cases. As the mother of a college student, I can scarcely imagine how crippling the grief and shock would be if my own daughter were shot. Yet, as a dean of students for more than 20 years, I find it devastating that caring, dedicated college administrators are being blamed for these violent tragedies.

This Article explores a university’s potential liability for school shootings by examining one potential avenue for legal relief—the federal cause of action that an injured victim, or the estate of a deceased victim, may bring under 42 U.S.C. § 1983. The specific constitutional right implicated in § 1983 school shooting suits is a Fourteenth Amendment substantive due process right. The Due Process Clause of the Fourteenth Amendment provides that a state shall not “deprive any person of life, liberty, or property, without due process of law.” In school shooting cases,


5. Victims or their representatives could also choose to bring a tort action for negligence against the university in state court—or in federal court if ancillary to a federal claim—but this Article focuses only on the § 1983 cause of action.


7. U.S. CONST. amend. XIV, § 1.
the alleged constitutional violation is that the victim has been deprived of liberty by the public university officials’ failure to warn or protect from grave danger.\textsuperscript{8}

The threshold inquiry is whether a state university has a constitutional duty to warn or protect students from a shooting rampage on campus. The general rule announced in \textit{DeShaney v. Winnebago County Department of Social Services} is that the state has no duty to protect persons from private acts of violence by third parties.\textsuperscript{9} Federal courts have allowed two very narrow exceptions to that general rule: (1) when a “special relationship” exists between the state and the person injured, or (2) when the State’s actions have created the very danger that caused the harm to the victim.\textsuperscript{10}

The question, then, is whether the victims or their families can recover monetary damages in federal court from a school or university based on that institution’s failure to protect students from violence caused by a third-party shooter. The short answer is “maybe, but . . .” The longer answer will be discussed in this Article.

Part I establishes the context by presenting factual information about campus shootings. Part II discusses the federal remedy of bringing a § 1983 action against a public school for deprivation of Fourteenth Amendment Due Process rights. Part II has three subsections. Subsection II(A) discusses the general rule from the landmark \textit{DeShaney} case, in which the U.S. Supreme Court held that a state is not responsible for protecting a person from private third-party violence and is not liable for the resulting injuries.\textsuperscript{11} Subsections II(B) and II(C) discuss the two exceptions to that general rule: the special relationship exception and the “state-created danger” theory. While the Article is intended to focus primarily on postsecondary school shootings on college campuses, some valuable legal guidance comes from recent lower school cases that are also described.

Part III discusses the abandonment of the state-created danger theory

\textsuperscript{8} \textit{See, e.g.}, Nannay v. Rowan Coll., 101 F. Supp. 2d 272, 279 (D.N.J. 2000) (en banc); see also Castaldo v. Stone, 192 F. Supp. 2d 1124, 1136 (D. Colo. 2001) (listing a claim of this nature against a county school district).


\textsuperscript{10} \textit{See, e.g.}, Morrow v. Balaski, 719 F.3d 160, 167 (3d Cir. 2013); Patel v. Kent Sch. Dist., 648 F.3d 965, 971–72 (9th Cir. 2011); Uhlig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995).

\textsuperscript{11} \textit{DeShaney}, 489 U.S. at 195.
by the Fifth and Eleventh Circuits. Part IV is the conclusion. After examining recent case law, the Article concludes that plaintiffs in a school shooting case will probably not succeed in asserting a constitutional claim against a state university for two reasons. First, federal circuits have held that there is no special relationship in school-versus-student cases. Second, the state-created danger theory has been misunderstood, and the better approach is for courts to follow the Fifth and Eleventh Circuits and decline to apply it. This conclusion sounds very harsh for grieving families, but it is legally correct. Very simply put, the remedy available under the Due Process Clause does not stretch so broadly as to render the government liable for violent shootings committed by private parties.

I. STARTLING STATISTICS ON COLLEGE CAMPUS SHOOTINGS

In 2013, several different colleges were the scene of on-campus shootings. From 2008 to 2012, there were 15 reported shootings on college campuses resulting in a total of 29 deaths.\(^{12}\) Previously, between 1966 and 2008, at least 16 campus shootings occurred at universities and colleges across America, causing 88 deaths and 88 nonfatal injuries.\(^{13}\) Further, the violent acts left countless others mourning the death of their mothers, fathers, sons, or daughters.

One of the first campus shootings to be nationally publicized occurred at the University of Texas. The shocking assault on the university’s Austin campus on August 1, 1966 triggered a change in society’s perception of safety on college and university campuses across the country. The violent event began at approximately 11:30 a.m. that day when undergraduate student Charles Whitman lugged his military storage box filled with firearms and other supplies to an elevator on the ground floor of the 307-foot-tall bell tower on campus.\(^{14}\) After reaching the observation deck on the 28th floor, Whitman encountered the 47-year-old receptionist, Edna Townsley, who was also a mother of two young boys.\(^{15}\) Whitman likely struck Townsley multiple times with the butt of his rifle and left her on the

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15. Id. at 127.
floor to die.\textsuperscript{16} He had another encounter inside the tower which resulted in two more deaths before he aimed his rifle at the student-filled campus below.\textsuperscript{17} People who sought cover behind buildings watched helplessly as those unable to run fast enough fell victim to the senseless wrath of Charles Whitman.\textsuperscript{18}

When the nightmare at the Texas bell tower ended, there were 47 victims, including 16 fatalities.\textsuperscript{19} One victim was an unborn child whose skull was shattered when a bullet pierced the expectant mother’s midsection.\textsuperscript{20} The horrific shooting spree resulted in the tower being closed\textsuperscript{21} and sent ripples across the nation to other colleges. The University of Texas is just one of the many American universities that have sadly become the scene of some of the nation’s most horrific mass slayings.

The much-publicized tragedy at Virginia Tech remains the deadliest campus shooting in American history.\textsuperscript{22} In April 2007, Seung-Hui Cho, a senior at Virginia Tech, made two separate attacks on the university’s campus, resulting in the death of 32 individuals and injuries to numerous others before he committed suicide, bringing the death toll to 33.\textsuperscript{23} The first attack began at 7:15 a.m. on April 16, 2007.\textsuperscript{24} Cho, armed with two handguns, entered a dormitory hall where he killed two students.\textsuperscript{25} A

\begin{itemize}
  \item \textsuperscript{16} \textit{Id.} at 128–29.
  \item \textsuperscript{17} \textit{Id.} at 132.
  \item \textsuperscript{18} \textit{See generally} Pamela Colloff, \textit{96 Minutes}, \textsc{TEX. MONTHLY}, Aug. 2006, http://www.texasmonthly.com/story/96-minutes?fullpage=1 (interviewing witnesses about their reactions, responses, and observations during the rampage).
  \item \textsuperscript{19} \textit{Timeline of School Shootings, supra} note 13.
  \item \textsuperscript{20} H.D. Quigg, \textit{Doc Quigg’s Report on Texas Tower Shooting}, \textsc{Downhold.org}, http://www.downhold.org/lowry/doc.html (last visited Nov. 30, 2013); \textit{see} Colloff, \textit{supra} note 18 (quoting the mother, who survived: “I knew immediately that I’d lost the baby”).
  \item \textsuperscript{21} Colloff, \textit{supra} note 18. The tower has reopened and has security guards on the ground floor and the observation deck. Marlee Macleod, \textit{Charles Whitman: The Texas Bell Tower Sniper}, \textsc{TRUTV: CRIME LIBRARY 7}, http://www.trutv.com/library/crime/notorious_murders/mass/whitman/index_1.html (last visited Nov. 30, 2013). Individuals wishing to take in the scenery atop the tower on the observation deck must also pass through metal detectors to enter the deck area. \textit{Id.}
  \item \textsuperscript{22} \textit{Deadliest U.S. Shootings}, \textsc{WASH. POST}, http://www.washingtonpost.com/wp-srv/special/nation/deadliest-us-shootings (last updated Sept. 23, 2013).
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.}
\end{itemize}
warning regarding the shooting in the dormitory hall was not sent out to
students and faculty until approximately 9:26 a.m., and that warning failed
to tell students not to report to class.26 By the time that first warning was
sent, Cho had already begun his second attack inside another building on
campus.27

The first responders to the 911 call regarding Cho’s second attack
arrived on the scene just before the last gunshots rang out, and they could
not stop the shooter before he was able to kill 30 innocent people and take
his own life.28 When describing the scene inside the building where the
second shooting took place, Campus Police Chief Wendell Flinchum said,
“It’s probably one of the worst things I’ve seen in my life.”29 A reporter for
the New York Times wrote, “Witnesses described scenes of mass chaos and
unimaginable horror as some students were lined up against a wall and
shot. Others jumped out of windows to escape, or crouched on floors to
take cover.”30 In the aftermath of the Virginia Tech rampage, many
universities reexamined their security procedures and began to assess risks
on campus more systematically by establishing threat assessment teams.31

Those who knew anything about Cho were balanced precariously on the rim of
free speech. A variety of critics perched next to us, waiting to dissect every
word. The media had taken up residence on the rim, secreting the tabloids
underneath their jackets. Next to the media sat the twins FERPA and HIPAA,
coy and tight-lipped, unwilling to reveal much about what you could and
couldn’t say about the academic or medical records of the perpetrator, and
next to them the National Rifle Association [] stood poised to ambush those
who mentioned guns in the same breath as Seung-Hui Cho because, as the
NRA proclaimed for years with its perverse logic, “Guns don’t kill people,
people kill people.” Next in line were the accusers eager to blame someone for
something—anything at all, it didn’t really matter.

Lucinda Roy, No Right to Remain Silent: The Tragedy at Virginia Tech 141–
42 (2009).

26. Alex Johnson et al., Worst U.S. Shooting Ever Kills 33 on Va. Campus,
and_courts/t/worst-us-shooting-ever-kills-va-campus#.Ua-KYfmcfUu.
27. Id.
28. Id. Professor Lucinda Roy, then-chair of the English Department at
Virginia Tech, described the delicate and horrible dilemma faced by school officials
immediately afterward:

LUCINDA ROY, NO RIGHT TO REMAIN SILENT: THE TRAGEDY AT VIRGINIA TECH 141–
42 (2009).

29. Johnson et al., supra note 26 (internal quotation marks omitted).
30. Christine Hauser & Anahad O’Connor, Virginia Tech Shooting Leaves 33
shooting.html?pagewanted=all.
31. See Sokolow et al., supra note 2, at 345; Hoffman, supra note 2, at 541–43,
Despite enhanced security measures across the country, fatal gun attacks have continued to occur on several campuses. Among them was a murder-suicide on February 8, 2008, in a classroom at Louisiana Technical College in Baton Rouge. A female student gunned down two other students and then killed herself in front of roughly 20 other students who were in the room that morning. Just six days later, on Valentine’s Day, a similar tragedy occurred at Northern Illinois University. There, a former graduate student opened fire in a classroom, killing five students before shooting himself. Several more were wounded; there were 22 victims, including the perpetrator.

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

551 (discussing the formation of threat assessment teams that are typically composed of school psychologists, residence life officials, deans of students, and public safety officers).


33. Id.


35. Id.

36. Id.


40. Id. Among those slain was Sonam Choedon, a Tibetan nursing student. Id. Nearly a year after the tragedy, her brother, Wangchen Nyima, described to a New York Times reporter how the event has impacted his life and his daily struggle of coping with the loss of his sister. Id. “I used to be a monk, so I never drank or smoked or anything,” Nyima said. Id. “Since my sister’s death, I need to drink a glass of
More recently, just a few hundred miles south of Oikos University, a different California community mourned the loss of five innocent people after a deadly shooting on the campus of a Santa Monica College. The rampage began when John Zawahri killed his father and brother inside their home. The shooter then hijacked a car and headed toward the campus where he formerly attended college. While on campus, Zawahri murdered three people before the police were able to stop him inside the library. The final death toll was five, including Zawahri.

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

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

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

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

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42. Id.
43. Id.
44. Id. Two of the victims were Carlos Navarro Franco, a groundskeeper for the school, and his daughter, Marcela Franco, who was on campus to purchase textbooks for her summer courses. Id.
45. Carter et al., supra note 3.
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...46

The specific constitutional right implicated in school shooting claims is a Fourteenth Amendment substantive due process right.47 The Due Process Clause of the Fourteenth Amendment provides a state shall not “deprive any person of life, liberty, or property, without due process of law.”48 In school shooting cases, the alleged constitutional violation is that the victim has been deprived of liberty by the public university officials’ failure to warn or protect the victim from grave danger.49 The nature of this due process liberty interest is discussed in more detail in the following subparts that address Supreme Court precedent and more recent litigation in federal courts involving public schools as well as colleges and universities.

The initial question is whether the typical college student has a due process liberty interest that is violated when a university fails to warn or protect the student from a shooting rampage. According to the Supreme Court, “the first step [in evaluating a § 1983 claim] is to identify the exact contours of the underlying right said to have been violated” and “determine...whether the plaintiff has alleged a deprivation of a constitutional right at all.”50 If the plaintiff establishes a constitutional violation occurred, the second step is to decide whether the school’s actions caused the constitutional violation.51

A. The Nature of the Fourteenth Amendment Due Process Right as Described in § 1983 Litigation

In the landmark case DeShaney v. Winnebago County Department of Social Services, the Supreme Court addressed a Fourteenth Amendment

due process claim and clarified the parameters of a constitutional violation of a victim’s liberty interest. DeShaney involved a young boy who was so severely abused by his father he had to be institutionalized due to permanent brain injuries. The Winnebago County Department of Social Services had been notified of the abuse by police and medical doctors on several occasions. A social worker visited the home roughly 20 times and documented the abuse. However, after a temporary removal, the boy was returned to his abusive father’s custody. The boy’s mother brought a § 1983 suit alleging that the state had deprived the child of his liberty interest by failing to protect him once the life-threatening abuse was made known to the appropriate governmental agency.

Describing DeShaney’s situation as “undeniably tragic,” the Court nonetheless held that there was no constitutional violation. The majority stated that “nothing in the language of the Due Process Clause itself requires the [s]tate to protect the life, liberty, and property of its citizens against invasion by private actors.” The Court continued:

The [c]lause is phrased as a limitation on the [s]tate’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the [s]tate itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the [s]tate to ensure that those interests do not come to harm through other means.


Id. at 193.

Id. at 192–93.

Id. at 209 (Brennan, J., dissenting).

Id. at 192 (majority opinion).

Id. at 191.

Id.

Id. at 195.

Id.; see also Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

Jackson, 715 F.2d at 1205 (citations omitted).
Because Joshua DeShaney’s injuries were inflicted by his own father and not by a state actor, the Court concluded that there had been no deprivation of the boy’s liberty by the state itself.\(^61\) Although the county agency had intervened, it had no duty to act affirmatively to prevent injury.\(^62\) Despite the DeShaneys’ claim that the state knew of the abuse and had undertaken the duty of helping Joshua, the Supreme Court ruled that there was no affirmative constitutional duty to help.\(^63\)

The Court reiterated that the "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."\(^64\) The federal courts have allowed two very narrow exceptions to that general rule: when a special relationship exists between the state and the person injured, or when the state’s actions have created the very danger that caused the harm to the victim.\(^65\)

**B. The Special Relationship Exception**

The *DeShaney* Court planted the seed for the special relationship exception in the Fourteenth Amendment context by stating that “when the state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”\(^66\) In other words, when the state affirmatively restrains an individual’s freedom to act on his or her own behalf, a special relationship is created and the state owes the restrained individual a constitutional duty of care or protection.\(^67\) “[I]t 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

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61. *DeShaney*, 489 U.S. at 201.
62. *See id.*
63. *See id.* at 201-02 (explaining that although breaching a voluntarily assumed duty might violate state tort law, not all torts are constitutional violations).
67. *See id.* at 198-99 (citing cases involving prisoners or involuntarily committed mental patients).
the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.\textsuperscript{68}

Prior to the \textit{DeShaney} case, the special relationship exception had been described in the Eighth Amendment context by the Supreme Court in a 1976 decision involving an incarcerated prisoner.\textsuperscript{69} Without using the phrase \textit{special relationship}, the Supreme Court indicated that when the state has actively restrained a person and deprived him of the ability to care for himself, the state has a constitutional duty of care or protection.\textsuperscript{70} It is the act of taking custody of a person that triggers the state’s duty to provide basic care for him.

The other example of the special relationship exception the Supreme Court recognized involved a severely mentally retarded patient who was involuntarily institutionalized.\textsuperscript{71} It was a custodial situation in which the state restrained the individual’s liberty to such a great extent that the state had to assume the duty of care.\textsuperscript{72} The patient’s family argued that he had a “constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that [the state] infringed these rights by failing to provide constitutionally required conditions of confinement.”\textsuperscript{73} The Supreme Court agreed that under those circumstances “there is a constitutionally protected liberty interest in safety and freedom from restraint.”\textsuperscript{74} Not every limitation on liberty, however, amounts to a constitutional infringement.\textsuperscript{75}

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

\begin{itemize}
\item \textsuperscript{68} Id. at 200.
\item \textsuperscript{69} Estelle v. Gamble, 429 U.S. 97, 103 (1976).
\item \textsuperscript{70} See id.
\item \textsuperscript{71} Youngberg v. Romeo, 457 U.S. 307, 309 (1982) (“Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I. Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills.”).
\item \textsuperscript{72} See id. at 317.
\item \textsuperscript{73} Id. at 315.
\item \textsuperscript{74} Id. at 318.
\item \textsuperscript{75} See id. at 320.
\end{itemize}
relationship exception. Neither approving nor disapproving that extension of the special relationship exception, the Court stated, “We express no view on the validity of this analogy, however, as it is not before us in the present case.”

To date, the Supreme Court has not specifically addressed whether a special relationship under the Due Process Clause exists between a student and a public school. The Court did, however, discuss a school’s role and relationship with its students in *Vernonia School District 47J v. Acton*, and upheld a public school’s authority to test student athletes for drugs. Although it was the student athletes’ Fourth Amendment rights at issue, and not their Fourteenth Amendment liberty interests, the view expressed in *Vernonia* was instructive as to the Court’s view of the school’s control over its students. The Court stated that schools have the authority, as temporary custodians over schoolchildren, to compel drug tests in certain circumstances. However, the Court has treated the particular dangers of drug usage in schools as a uniquely compelling safety issue and has granted schools some latitude in controlling illegal drug abuse. The *Vernonia* Court was careful to specify that it was not suggesting “that public schools as a general matter have such a degree of control over children as to give rise to a constitutional ‘duty to protect.’” The Court has hinted, at the very least, that public schools do not have the sort of custodial relationship with students that is analogous to the relationship between wardens and prisoners or psychiatric-hospital administrators and involuntarily hospitalized patients. It seems unlikely the current Court will recognize a special relationship exception to the Fourteenth Amendment as between schools and their students.

1. **Public Schools (Grades K–12) and the Special Relationship Exception**

   This Article focuses on the liability of colleges and universities, but some excellent judicial opinions have been issued in public school cases.

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77. Id.
79. *See id.* at 656.
80. *Id.* at 665.
82. *Vernonia*, 515 U.S. at 655 (quoting *DeShaney*, 489 U.S. at 200).
involving schoolchildren in grades K–12, and are described here to provide a good analytical framework. Several §1983 suits have been brought against school districts alleging that school officials violated the students’ constitutional rights by failing to protect them from the violent acts of third persons. The outcome of these cases often hinges on whether there is a Deshane type special relationship between the school and the student. If not, then the school has no constitutional duty to protect a student from third-party violence. Among the most recent pronouncements on the special relationship exception are the split opinions of en banc panels in the Third and Fifth Circuits.

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

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84. See, e.g., Morrow v. Balaski, 719 F.3d 160, 166 (3d Cir. 2013) (en banc) (threats and assaults); Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 855 (5th Cir. 2012) (en banc) (molestation); Maldonado v. Josey, 975 F.2d 727, 728 (10th Cir. 1992) (failure to supervise resulting in strangulation).

85. See, e.g., Morrow, 719 F.3d at 167; Covington Cnty. Sch. Dist., 675 F.3d at 855; Maldonado, 975 F.2d at 729.

86. See, e.g., Morrow, 719 F.3d at 170; Covington Cnty. Sch. Dist., 675 F.3d at 858; Maldonado, 975 F.2d at 732. The other theory of recovery, that the state itself created or enhanced the danger, is addressed infra Part II.C.

87. See, e.g., Covington Cnty. Sch. Dist., 675 F.3d at 861.

88. See Morrow, 719 F.3d at 170 (“Every other Circuit Court of Appeals that has considered this issue in a precedential opinion has rejected the argument that a special relationship generally exists between public schools and their students.”); see also Covington Cnty. Sch. Dist., 675 F.3d at 857–58; Patel v. Kent Sch. Dist., 648 F.3d 965, 973–74 (9th Cir. 2011); Hasenfus v. LaJeunesse, 175 F.3d 68, 71–72 (1st Cir. 1999); Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 569 (11th Cir. 1997); Doe v. Claiborne Cnty., 103 F.3d 495, 510 (6th Cir. 1996); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); Maldonado, 975 F.2d at 732; J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

89. See, e.g., Covington Cnty. Sch. Dist., 675 F.3d at 861 (“Mississippi's compulsory education law is therefore insufficient . . . to create a special relationship between the school and Jane. . . .”); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371–72 (3d Cir. 1992) (holding the doctrine of in loco parentis only creates authority to act, not a constitutional duty to do so). The Supreme Court has held that school authorities may act as temporary guardians or caretakers of a child, or in loco parentis, during a school day. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).
Despite clear decisions from the courts, plaintiffs continue to argue a special relationship could and should exist between the school and a child.

a. Third Circuit. In a recent decision, the United States Court of Appeals for the Third Circuit, sitting en banc, declined to extend the special relationship exception to the association between a public school and its students.\(^{90}\) Two high school students, Emily and Brittany Morrow, were bullied and assaulted at school by a fellow student and her accomplice.\(^{91}\) The victims’ mother notified police, who charged the bully, Shaquana Anderson, with simple assault and other minor offenses.\(^{92}\) She was ordered by the juvenile court to have no contact with Brittany Morrow.\(^{93}\) The school also suspended Shaquana but she returned to school after three days and again attacked Brittany.\(^{94}\) Ultimately, the Morrows sent their daughters to a different school and sued the principal and the school district under 42 U.S.C. § 1983, claiming that the school’s act of allowing the bully to reenroll in school was an affirmative act that violated their daughters’ due process liberty interests.\(^{95}\)

After a thoughtful discussion of DeShaney and persuasive authority from other circuit courts of appeal,\(^{96}\) the Third Circuit rejected the Morrows’ contention that there was a special relationship based on the school’s actual knowledge of the danger, “combined with the quasi-custodial relationship that exists in all cases between a public school and its pupils,”\(^{97}\) and stated that “knowledge cannot create a duty that did not otherwise exist.”\(^{98}\) The majority wrote that “students in public schools continue to be primarily dependent on their parents for their care and

\(^{90}\) Morrow, 719 F.3d at 173.

\(^{91}\) Id. at 163.

\(^{92}\) Id. at 164.

\(^{93}\) Id.

\(^{94}\) Id. (“[Shaquana] attacked Brittany by attempting to throw her down a set of stairs. During that incident, [Shaquana] allegedly called Brittany a ‘cracker’ [and] told her that she was ‘retarded’ . . . .”).

\(^{95}\) See id. at 165.

\(^{96}\) Id. at 166–70. While it is true that almost every circuit has addressed the special relationship issue, Morrow contains a slight disparity in cited authority between the majority opinion and the concurrence. The majority did not include the Fourth Circuit, but the concurrence cites a Fourth Circuit case and indicates that only the Second and D.C. Circuits have not addressed this question squarely. Compare id. at 170, with id. at 185 (Smith, J., concurring).

\(^{97}\) Id. at 172 (majority opinion) (internal quotation marks omitted).

\(^{98}\) Id. at 173.
protection, not on their school." The court thus distinguished its recognition of a special relationship exception in a foster care case, Nicini v. Morra. In that case, the court stated that when the state actively seeks out foster children and "plac[es] them with state approved families . . . the state assumes an important continuing, if not immediate, responsibility for the child’s well-being." In contrast, "[d]espite the students’ compulsory attendance in school during the school day and the school’s authority to act in loco parentis during that time, the school’s authority and responsibility neither supplants nor replaces the parent’s ultimate responsibility for the student," unlike a foster care situation. Therefore, since there is no significant custodial relationship between schools and their students, the Third Circuit declined to recognize a special relationship.

b. Fifth Circuit. The same result was recently reached in the Fifth Circuit, also sitting en banc, in Doe v. Covington County School District:

We reaffirm, then, decades of binding precedent: a public school does not have a DeShaney special relationship with its students requiring the school to ensure the students’ safety from private actors. Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody. Without a special relationship, a public school has no constitutional duty to ensure that its students are safe from private violence.

The concurring opinion by Judge E. Grady Jolly was even more emphatic: “There is no room—not an inch—for confusion. The law yesterday and today is bare and bald: No DeShaney special relationship exists between a public school and its students.”

In Covington County School District, the parents of nine-year-old Jane Doe sued the school district and several school administrators in their official and individual capacities, alleging that the school’s checkout policy

99. Id. This statement echoes earlier Third Circuit precedent. See D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1370–72 (3d Cir. 1992) ("[School] children remain resident in their homes. Thus, they may turn to persons unrelated to the state for help on a daily basis.").
100. Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000) (en banc).
101. Id. (quoting D.R., 972 F.2d at 1372).
102. Morrow, 719 F.3d at 173.
104. Id. at 870 (Jolly, J., concurring).
created a danger to students and caused Jane’s injury. The policy in question permitted school employees to release students without first verifying that the person picking up the child was included on the “Permission to Check-Out Form.” Young Jane Doe was raped on six different occasions when school officials allowed her to leave school with a man who was not listed on her checkout form.

The district court dismissed the suit for failure to state a claim. On appeal, a prior Fifth Circuit panel reversed, finding that the plaintiffs pleaded a plausible claim that the school violated Jane’s substantive due process right because it had a special relationship with her, and also because of the school’s deliberate indifference to her safety. Yet on rehearing, the Fifth Circuit emphasized that “a [s]tate’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” The en banc panel affirmed the district court’s dismissal, finding that the school had no constitutional duty to protect Jane from third parties because there was no special relationship between the school and its pupil.

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

However, the majority considered persuasive authority from the Ninth Circuit rejecting the argument that compulsory school attendance laws create a special relationship between public schools and students.

105. Id. at 852–53 (majority opinion).
106. Id. at 853.
107. Id.
108. Id. at 854.
109. Id. (citing Doe v. Covington Cnty. Sch. Dist., 649 F.3d 335, 353–54 (5th Cir. 2011)).
110. Id. at 855 (quoting DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 197 (1989)) (internal quotation marks omitted).
111. Id. at 863.
112. See id. at 880 (Wiener, J., dissenting) (suggesting that Jane’s age differentiated her from teenage students who could better protect themselves from sex offenders).
113. Id. at 878.
114. Id. at 860 (majority opinion) (citing Patel v. Kent Sch. Dist., 648 F.3d 965,
Just as Jane Doe was young and vulnerable, the plaintiff in Patel v. Kent School District was vulnerable because she was a developmentally disabled student, but the Ninth Circuit held nonetheless that there was no special relationship between the school and its pupil. The Fifth Circuit agreed that age or vulnerability of a particular student does not create a special relationship with the school; it is the parents who have custody over the child, and it is the parents who have a duty to care for the child’s basic needs.

The court indicated that only three circumstances involve a constitutional duty based on the special relationship exception: incarceration, involuntary institutionalization, and placement of children in foster care. The court declined to extend the exception to schoolchildren, quoting an earlier Fifth Circuit opinion in Walton v. Alexander. Only in “extreme circumstances” in which the state has “taken the plaintiff’s liberty... by its affirmative act” and “used its power to force a ‘special relationship’” will the state become potentially liable for a due process violation. In school situations, the state has not taken custody of the children in that fashion.

c. Tenth Circuit. In a frequently cited 1992 case, Maldonado v. Josey, the Tenth Circuit also held “that compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school.” In that case, fifth grader Mark Maldonado was left unsupervised for roughly 20 minutes, and

973–74 (9th Cir. 2011).

115. See Patel, 648 F.3d at 968 (“[A.H.] is classified as mildly mentally retarded... [She is] sometimes unable to complete basic tasks like holding her eating utensils correctly, blowing her nose, and zipping her clothes.”).

116. Id. at 973–74.


118. Id. at 856.

119. Id. at 857. The Walton court had opined that it would be inconsistent with the text and history of the Due Process Clause to extend it so as “to impose on the state the obligation to defend and to pay for the acts of non-state third parties.” Walton v. Alexander, 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc).

120. Covington Cnty. Sch. Dist., 675 F.3d at 857 (quoting Walton, 44 F.3d at 1305) (internal quotation mark omitted).

121. See id. at 857–58 (“Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody.”).

during that time he suddenly choked and died. The father filed a § 1983 suit alleging that the teacher’s failure to supervise his son resulted in his death. The main issue was whether the compulsory school attendance laws were a sufficient restraint on the child’s freedoms so as to create a special relationship and impose upon the state “an affirmative constitutional duty to protect students from the private actions of third parties while they attend school.” The court in *Maldonado* held that there was no such special relationship.

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

2. *Higher Education Cases and the Special Relationship Exception*

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

123. *Id.* at 728.
124. *Id.*
125. *Id.* at 732.
126. *Id.* at 733.
127. *See* Morrow v. Balaski, 719 F.3d 160, 170 (3d Cir. 2013) (en banc) (citing cases from the First, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that have also declined to adopt a special relationship exception between public schools and students).
129. *Id.*
130. *Id.*
131. *Id.*
state-created danger theories applied. As a basis for establishing a special relationship, the parents alleged that a contractual relationship existed between plaintiff and the college because the plaintiff paid tuition and other fees to the college. The parents claimed that the contractual relationship implied a duty imposed on the school officials to “conduct student activities in a reasonably safe environment and manner, particularly since decedent’s parents were out of state and unable to personally care for their son.”

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

Another plaintiff’s unsuccessful attempt at establishing a special relationship for purposes of this exception to DeShaney’s rule is seen in Griffin v. Troy State University. Brandy Hobson was a freshman at Troy State University in Alabama when she was killed in her dormitory room by

132. Id. at 1131–32.
133. Id. at 1132.
134. Id.
135. Id.
136. Id. at 1133.
137. Id.
138. Id. In making its determination, the court stated that a tuition payment “does not create a contractual relationship between parents and a college sufficient to trigger an affirmative duty to protect from injury during an extracurricular activity, without more.” Id.
139. Id. at 1134. Further, the court noted that Jason was an adult who decided to attend the party and also decided to climb the sandstone cliff of his own will. Id.
Jonathan Rumph.\textsuperscript{141} Troy State University required all freshmen to live in the campus dormitories and advertised that adequate security measures were provided for the safety of students living in those on-campus facilities.\textsuperscript{142} However, on the night of Hobson’s death, the door to the dormitory hall was unlocked and her attacker entered through the unlocked door.\textsuperscript{143} Her estate brought a § 1983 claim against the university and its officials.\textsuperscript{144}

The district court rejected the argument that the special relationship exception applied and pointed to the decedent’s voluntary choice to attend the university.\textsuperscript{145} The university had not taken custody of her against her will.\textsuperscript{146} It was argued that by requiring all freshmen to live on campus, Troy State University created a custodial relationship with them, but the court was not persuaded and held, “Hobson retained liberty over her life such that she was not in the custody of TSU.”\textsuperscript{147} The court summed up its reasoning by stating that “it would be illogical to conclude that a college freshman would have such a right based on voluntarily attending a college with an on-campus living requirement” when “[g]rade [schoolchildren] in public schools do not have a special relationship with the state through the school, despite compulsory attendance laws.”\textsuperscript{148} The court was “unwilling to expand the concept of substantive due process to include a right to protection against injury by third parties to all state university or college students required to live in on-campus dormitories.”\textsuperscript{149}

Overall, schools have been protected from liability in § 1983 suits brought against them when the basis of the suit is the alleged special relationship between the victim of the third-party violence and the public

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1278.
\item Id.
\item Id.
\item Id. at 1277.
\item Id. at 1282.
\item See id.
\item Id. at 1283.
\item Id. The Eleventh Circuit had previously announced that “every federal circuit court of appeal to address the question of whether compulsory school attendance laws create the necessary custodial relationship between school and student to give rise to a constitutional duty to protect students from harm by non-state actors has rejected the existence of any such duty.” Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994).
\item Griffin, 333 F. Supp. 2d at 1283. The court referenced the United States Supreme Court’s expressly stated “reluctance to expand the concept of substantive due process.” Id. at 1282.
\end{enumerate}
\end{footnotesize}
school or university. Because of the difficulty of establishing a special relationship between the victim and the school, § 1983 suits also rest on the basis of the second exception to DeShaney’s general rule—the state-created danger theory.

C. State-Created Danger Exception

Although the general rule is that the state has no constitutional duty to protect individuals from injury caused by the violent attacks of a private actor, the state may have a duty when the danger was created or enhanced by the state’s affirmative acts. This exception is called the state-created danger theory and derives from language in DeShaney: “While the [s]tate may have been aware of the dangers that Joshua faced... , it played no part in their creation, nor did it do anything to render him more vulnerable... .”\textsuperscript{150} The Court continued, “[the state] placed him in no worse position than that in which he would have been had it not acted at all... . Under these circumstances, the [s]tate had no constitutional duty to protect Joshua.”\textsuperscript{151}

The state-created danger theory applies when “a state actor creates a danger that harms an individual or renders him or her more vulnerable to that danger.”\textsuperscript{152} For plaintiffs, asserting a § 1983 suit and persuading the courts to find liability based on the state-created danger theory is still a difficult task; however, courts have been more willing to find state actors liable based on the state-created danger theory than on the special relationship theory.

Almost all of the federal circuits have adopted some form of the state-created danger theory,\textsuperscript{153} but the test differs slightly from court to court. To illustrate these approaches, cases from the Third, Sixth, and Tenth Circuits will be described in this section.

The Eleventh Circuit, by contrast, has expressly abandoned what it


\textsuperscript{151} \textit{Id.}


\textsuperscript{153} See, e.g., Pena v. DePristo, 432 F.3d 98, 109 (2d Cir. 2005); Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005); Sargi v. Kent City Bd. of Educ., 70 F.3d 907, 912-13 (6th Cir. 1995); Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995); Uhlig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373-74 (3d Cir. 1992); Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990).
had previously called the special danger test. In addition, the Fifth Circuit has announced that—despite confusion among its various panels—it has “never explicitly adopted the state-created danger theory.”

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

   a. Third Circuit. The Third Circuit, sitting en banc in 2013, articulated a four-part test for the state-created danger exception. The Third Circuit stated that “liability may attach where the state acts to create or enhance a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process.” To prevail on this theory, a plaintiff must prove four elements:

   1) the harm ultimately caused was foreseeable and fairly direct;

   2) a state actor acted with a degree of culpability that shocks the conscience;

   3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant’s acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions, as opposed to a member of the public in general; and

   4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

   In Morrow v. Balaski, the Third Circuit focused on the fourth element of the test because the school argued that it did not create the danger or make the Morrows’ daughters any more vulnerable than they otherwise were. The Morrows, however, argued that the school’s “affirmative act was suspending [the bully] Anderson and then implicitly inviting her to

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157. Id. (citing Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996)).
158. Id.
159. Id.; see also id. at 196–97 (Fuentes, J., dissenting) (“The first and third elements are not in dispute in this case.”).
return to school following the suspension.”160 In so doing, the parents argued, “school officials affirmatively used their authority to create a danger that Anderson would attack Brittany and Emily once again.”161

The court ruled that the test for state-created danger was not met and stated that “[a]lthough the suspension was an affirmative act by school officials, we fail to see how the suspension created a new danger for the Morrow children or ‘rendered [them] more vulnerable to danger than had the state not acted at all.’”162 The court continued: “In addition, the fact that [d]efendants failed to expel Anderson, or, as the Morrows would describe it, ‘permitted’ Anderson to return to school after the suspension ended, does not suggest an affirmative act.”163

The court emphasized that “clearly passive inaction” does not amount to an affirmative act, and the Third Circuit’s version of the state-created danger rule requires an affirmative act.164 Judge Thomas Ambro agreed with this aspect of the majority’s decision, and put it even more forcefully:

This test, I believe, is not intended to turn on the semantics of act and omission. Instead, the requirement serves an important purpose: to distinguish cases where government officials might have done more to protect a citizen from a risk of harm in contrast to cases where government officials created or increased the risk itself.165

It is only in the latter instance that the Due Process Clause is implicated.166 Summing up the importance of construing the state-created danger exception very narrowly, Judge Ambro stated, “[f]ederal courts cannot be the forum for every complaint that a government actor could have taken an alternate course that would have avoided harm to one of our citizens.”167 The en banc panel affirmed the previous dismissal of the case.168

160.     Id. at 177 (majority opinion).
161.     Id. The Morrows also argued the school committed “the ‘affirmative act’ of allowing Anderson to board the Morrow children’s school bus, where Anderson threatened to attack Brittany.” Id.
162.     Id. at 178 (alteration in original) (quoting Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006)).
163.     Id.
164.     Id.
165.     Id. at 185–86 (Ambro, J., concurring in part and dissenting in part).
166.     Id. at 186.
167.     Id.
168.     Id. at 179 (majority opinion).
b. Sixth Circuit. Other circuits have adopted the state-created danger exception, but have defined it slightly differently. For example, the Sixth Circuit’s test for establishing a state-created danger was applied by a federal district court in 2011 in Doe v. Big Walnut Local School District Board of Education. In that case, David and Mary Doe and their son brought a § 1983 suit against the school district and officials alleging that the son’s substantive due process rights had been violated. Their son, John Doe, suffered from a cognitive disorder that prevented him from learning at the same pace as his classmates and made social interaction difficult for him. John Doe was bullied and harmed by his fellow students at Big Walnut Middle School. Although school officials had met with the student and his parents several times and had implemented plans to minimize the risks of John being bullied, the parents claimed that the school caused the boy’s liberty interest to be violated.

Quickly disposing of the special relationship exception, the court analyzed the case in light of the Sixth Circuit’s three-pronged test for the state-created danger exception to DeShaney, which is:

(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, as distinguished from risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.

Although the exact words in the Sixth Circuit’s test differ from the wording of the Third Circuit’s, the tests have many similarities. Concerning the first prong, both circuits require an affirmative act by the state. With regard to the affirmative act, school officials in Big Walnut

169. See Koula v. Merciez, 477 F.3d 442, 445 (6th Cir. 2007).
171. Id. at 744.
172. Id.
173. Id. at 745.
174. Id. at 753–54.
175. Id. at 750.
176. Id. at 752 (quoting Koula v. Merciez, 477 F.3d 442, 445 (6th Cir. 2007)).
178. See Morrow, 719 F.3d at 177; Big Walnut Local Sch. Dist. Bd. of Educ.,
argued that their actions did not increase John Doe’s risk of being exposed to bullying.\textsuperscript{179} In fact, they took affirmative steps to protect him, such as allowing him to leave classes early to avoid bullies.\textsuperscript{180} He would have been in “the same or even greater danger even if the state officials had done nothing.”\textsuperscript{181}

The court next examined whether “the state’s action placed [the plaintiff] specifically at risk as ‘distinguished from a risk that affects the public at large.’”\textsuperscript{182} Under the Sixth Circuit’s test, the second element requires that the threat be specifically directed against the plaintiff.\textsuperscript{183} The parents alleged that the state increased John’s risk of being bullied by placing him and all of the students with disabilities in the same classroom, thereby creating “a volatile mix of emotionally and academically disabled children” known for their violent tendencies or lack of ability to control their behaviors.\textsuperscript{184} The second affirmative act was to leave that class unsupervised.\textsuperscript{185} The alleged danger, however, was not specific to John Doe, as other students were also involved in altercations or other incidents.\textsuperscript{186} The school officials argued there was no evidence to show that the actions of the school personnel put John Doe, in particular, at an increased risk of a special danger.\textsuperscript{187}

The final element under the Sixth Circuit’s test is satisfied if the plaintiff can establish “that the state acted with the requisite culpability to establish a substantive due process violation under the Fourteenth

\textsuperscript{179} Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d at 753.
\textsuperscript{180} Id. at 747.
\textsuperscript{181} Id. at 753 (quoting Bowman v. Williamson Bd. of Educ., 488 F. Supp. 2d 679, 684 (M.D. Tenn. 2007)) (internal quotation mark omitted).
\textsuperscript{182} Id. (quoting Koultia v. Merciez, 477 F.3d 442, 447 (6th Cir. 2007)). Although the language here is different, it is similar to the language in the third prong of the Third Circuit’s test, which requires the plaintiff to be “a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions.” Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 (3d Cir. 1997). However, the Third Circuit clarified that the threat does not have to be against a specific individual. See id.
\textsuperscript{183} Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d at 752 (quoting Koultia, 477 F.3d at 445).
\textsuperscript{184} Id. at 753.
\textsuperscript{185} See id.
\textsuperscript{186} See id. at 747–48 (listing reported instances of bullying against Doe, some of which also included threats or actions against other students).
\textsuperscript{187} Id. at 753.
Amendment.”\textsuperscript{188} The language the court used in this element is also similar to the language used by the Third Circuit. Both circuits require a showing that the state actors acted with “deliberate indifference” to the plaintiff.\textsuperscript{189} In \textit{Big Walnut}, the court ruled that the plaintiff could not show that the state actors acted with deliberate indifference toward their son; therefore, the plaintiff could not establish liability under the state-created danger theory.\textsuperscript{190} The court in \textit{Big Walnut} granted the defendant’s summary judgment on the plaintiff’s § 1983 claim.\textsuperscript{191}

c. \textit{Tenth Circuit}. The Tenth Circuit has also recognized the state-created danger exception in cases involving § 1983 claims. In a consolidated case, two mothers filed separate § 1983 claims against school districts.\textsuperscript{192} The first plaintiff was the mother of Charles Graham, a student who had been shot and killed by another student while on campus.\textsuperscript{193} She contended that the state actors—school employees—were given warnings about a student who threatened her son and who was on campus with a gun, but the state actors’ failure to do anything after receiving the warning led to the violation of her son’s substantive due process rights.\textsuperscript{194} The second plaintiff was the mother of Benjamin Pointer, a student who was stabbed on his school’s campus.\textsuperscript{195} She alleged that the state actors “knew or should have known of the danger to her son but failed to take action to secure his safety.”\textsuperscript{196} The plaintiffs sought recovery under the state-created danger theory.\textsuperscript{197} In its analysis of the state-created danger theory, the court said that the requisite proof “necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger.”\textsuperscript{198} The plaintiffs only alleged a failure to act, not an affirmative action, by the state.\textsuperscript{199} Therefore,

\begin{itemize}
\item 188. \textit{Id.} (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 510 (6th Cir. 2002)) (internal quotation marks omitted).
\item 189. \textit{Compare id., with Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910} (3d Cir. 1997).
\item 190. \textit{Big Walnut Local Sch. Dist. Bd. of Educ.}, 837 F. Supp. 2d at 753.
\item 191. \textit{Id.} at 755.
\item 193. \textit{Id.}
\item 194. \textit{Id.}
\item 195. \textit{Id.}
\item 196. \textit{Id.}
\item 197. \textit{See id.} at 995.
\item 198. \textit{Id.} (quoting L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992)) (internal quotation marks omitted).
\item 199. \textit{See id.} at 993.
\end{itemize}
the court held, “[b]ecause plaintiffs cannot point to any affirmative actions by the defendants that created or increased the danger to the victims, th[e] argument [that the state-created danger exception applies] must also fail.”

In *Castaldo v. Stone*, a Colorado federal district court also addressed the state-created danger theory in suits brought in the wake of the tragic Columbine High School shootings. The plaintiffs alleged that school officials—state actors—knew about the attackers’ potential plan to commit their all-out assault on the school. Further, the plaintiffs claimed that the two shooters, who were students at Columbine, made the attack on the school as revenge for the bullying done to them and the bullying was a product of the school’s environment fostered by the school officials. After concluding the special relationship exception did not apply to the case, the court addressed the state-created danger exception.

The court applied a five-pronged test to establish whether the state actors created or enhanced the danger to the plaintiffs. The test, announced by the Tenth Circuit in *Uhlig v. Harder*, involves the following elements:

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

As for the first element, the plaintiffs claimed that the “limited and specifically identifiable group” was Columbine High School students. In other words, because the plaintiffs’ child was a student at Columbine, he was a member of a limited and specifically definable group. The court examined the messages the shooters had made regarding the attack and

200. Id.
202. Id. at 1135.
203. Id. at 1172.
204. Id.
205. Id. at 1172–73.
206. Id. at 1153 (citing *Uhlig v. Harder*, 64 F.3d 567, 571 (10th Cir. 1995)).
207. Id. at 1172.
208. Id.
reasoned that “the only characteristic necessary to be the object of their rage was to be a Columbine High School student at school on April 20, 1999.”209 The student body was deemed a specific, identifiable group, and the first factor of the Uhrlig test was satisfied in Castaldo.210

With regard to the second factor, it was undisputed that the harm in Castaldo, a mass school shooting, was a serious harm, but the defendants argued that the risk was not “immediate nor proximate” because the events leading up to the shooting on April 20 occurred over the period of a year.211 The court agreed: “[T]he risk must be of a limited duration, not merely that a person may act violently in the future,” and ruled that the plaintiffs failed to satisfy this element of the Uhrlig test.212

Analyzing the third factor, the court ruled that the plaintiffs satisfied this element only as to four school officials.213 One defendant, a school counselor, had read a violent story the shooter had submitted in a class.214 Another defendant was aware of the shooters’ past incidents involving hacking into school computers and breaking into lockers.215 He also knew the shooters had talked about blowing up the school, and admitted he “was not totally shocked” at what the shooters had done.216 Another defendant, a teacher, had viewed a video recording of the two shooters pretending to shoot other students using fake guns.217 The fourth defendant had also viewed a video recording of the shooters on the Columbine campus acting out a shooting.218 As to these defendants, the element of “known risk” was met.219

The fourth factor, “that the [s]chool [d]efendants were subjectively aware of the risk at hand,” was also met with regard to the same four defendants based on information they knew.220

209. Id.
210. Id.
211. Id.
212. Id. (citing Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 995 (10th Cir. 1994)).
213. Id.
214. Id. at 1135.
215. Id.
216. Id.
217. Id.
218. Id.
219. Id. at 1172.
220. Id. at 1172–73.
The court next questioned whether the school officials’ failure to confront the bullying and teasing amounted to “conscience-shocking” conduct.\textsuperscript{221} Comparing the failure to address in-school bullying and teasing to other conduct that had not been deemed conscience shocking, the court ruled that the conduct in this case did not shock the consciences of federal judges.\textsuperscript{222} The court also analyzed whether failing to respond to the shooters’ videos and other activities was conscience-shocking conduct.\textsuperscript{223} In an urgent situation, the court explained, only conduct that involves the intent to harm will shock the conscience of federal judges.\textsuperscript{224} But, in a nonemergency situation, in which the “state actors have the time to truly deliberate, something less than intent to harm, such as calculated indifference, may shock the conscience of the court.”\textsuperscript{225} The activities leading up to the shooting occurred over the course of a year; therefore, the state actors had “time to deliberate.”\textsuperscript{226} On balance, the \textit{Castaldo} court concluded that the state actors’ failure “to anticipate and prevent future behavior” was not “conscience shocking in a constitutional sense.”\textsuperscript{227} Therefore, the court dismissed the § 1983 claim against the school officials.\textsuperscript{228}

2. \textit{Higher Education Cases and the State-Created Danger Exception}  

The same five-pronged test from \textit{Uhlrig} and \textit{Castaldo} was applied in \textit{Apffel v. Huddleston}.\textsuperscript{229} The case involved a college student who fell off a cliff and died while attending an off-campus party hosted by the college.\textsuperscript{230} In addition to the special relationship argument, which failed, the plaintiffs also argued that the state-created danger exception applied.\textsuperscript{231} The \textit{Apffel} court found that the first element of the test was met because Jason Apffel was “a member of a limited and specifically definable group,” the group of out-of-state freshmen at Dixie College.\textsuperscript{232}

\begin{itemize}
\item \textsuperscript{221} See \textit{id.} at 1173.
\item \textsuperscript{222} \textit{id.}
\item \textsuperscript{223} \textit{id.}
\item \textsuperscript{224} \textit{id.}
\item \textsuperscript{225} \textit{id.}
\item \textsuperscript{226} See \textit{id.} at 1172.
\item \textsuperscript{227} \textit{id.} at 1174.
\item \textsuperscript{228} \textit{id.}
\item \textsuperscript{229} Apffel v. Huddleston, 50 F. Supp. 2d 1129, 1136 (D. Utah 1999).
\item \textsuperscript{230} \textit{id.} at 1130.
\item \textsuperscript{231} \textit{id.} at 1134.
\item \textsuperscript{232} \textit{id.} at 1136.
\end{itemize}
plaintiffs, however, failed to satisfy the second element, “that defendants[’] conduct put plaintiffs at substantial risk of serious, immediate and proximate harm.” The plaintiffs noted that there had been “eight falls or near-falls in recent years,” but the court determined this did not provide sufficient information regarding the significance or relevance of prior falls that occurred at the cliffs. The court explained that more context was needed, indicating by way of example that “[i]f thousands of people climb the cliffs each year, eight falls or near-falls may not be significant.”

Lacking this factual information, the court could not find that the “defendants[’] conduct put plaintiffs at substantial risk of serious, immediate and proximate harm.”

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

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

233. Id.
234. Id.
235. Id.
236. Id.
237. Id.
238. Id. at 1137.
239. Id.
240. Id. (alteration in original) (internal quotation marks omitted).
241. Id.
242. Id.
243. Id.
the fourth element was not met. 244

To satisfy the last element of the five-pronged test, the school officials’ conduct must “shock the conscience” of federal judges. 245 “[T]o satisfy the ‘shock the conscience standard,’ a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power.” 246 The court explained, “the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.” 247

The court found that “to plan a freshman party in a state park used regularly by the public for recreational activities is not [conscience] shocking.” 248 Further, the area where the party was held was designed for such use and thus, the activity was normal and not considered shocking. 249 The fifth element was not met 250.

The court in Apffel additionally stated that apart from the five-pronged test, “a plaintiff must also show that the charged state entity and the charged individual actors created the danger or increased the plaintiff’s vulnerability to the danger in some way.” 251 In other words, the court explained, if the danger was present before the state actors intervened, the state actors would not be held liable for having created a danger that already existed. 252 The danger to the decedent of falling from the cliff existed long before the college hosted its party. 253 Therefore, the college and its officials could not be held liable because the cliff and the dangers associated with climbing it were not created by the college. 254 Ultimately, the plaintiffs’ argument for a state-created danger failed. 255

Another Tenth Circuit case involving the state-created danger theory

244. See id.
245. See id. at 1134.
246. Uhlig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).
247. Apffel, 50 F. Supp. 2d at 1135 (quoting Uhlig, 64 F.3d at 574).
248. Id. at 1137.
249. See id.
250. See id.
251. Id. at 1138.
252. Id.
253. See id.
254. Id.
255. Id.
in a §1983 claim is Gray v. University of Colorado Hospital Authority.\textsuperscript{256} The decedent, Charles Gray, arrived at the University of Colorado Hospital seeking treatment for epilepsy.\textsuperscript{257} Assurances were given to Gray’s family that he would be under 24-hour care during his treatment; however, the hospital had a policy that allowed staff in the Epilepsy Monitoring Unit to leave patients unattended for moments of time.\textsuperscript{258} During a period of time when Gray was left unattended, he suffered a seizure.\textsuperscript{259} Upon returning, the staff member observed that Gray was not breathing, and he was pronounced dead within an hour of the staff member’s return.\textsuperscript{260}

The court thoroughly reviewed prior case law in the Tenth Circuit regarding the state-created danger theory\textsuperscript{261} because “the only theory upon which [plaintiffs] proceeded was a due process violation under the ‘danger creation’ theory.”\textsuperscript{262} The court made passing reference to the test set forth in Uhlrig to determine whether the state-created danger exception applied.\textsuperscript{263} However, the court focused on two preconditions to the application of the exception that were not included as numbered factors in the Uhlrig test—first, an affirmative act by the state that places the plaintiff in danger or increases plaintiff’s vulnerability to danger and a private act of violence.\textsuperscript{264} The court found that the assurances given to the Gray family that their son would be under 24-hour supervision were not sufficient to constitute “an affirmative act rendering decedent vulnerable to danger within the meaning of the danger creation exception.”\textsuperscript{265}

Second, the Tenth Circuit addressed the “private violence” precondition.\textsuperscript{266} For the state-created danger exception to be implicated, the court explained, there must be a violent act by a private person:

The state-created danger theory indulges the legal fiction that an act of

\textsuperscript{256} See Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 922 (10th Cir. 2012).
\textsuperscript{257} Id. at 911.
\textsuperscript{258} Id. at 912.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id. at 915–22.
\textsuperscript{262} Id. at 915.
\textsuperscript{263} Id. at 920 (quoting DeAnzona v. City & Cnty. of Denver, 222 F.3d 1229, 1235 (10th Cir. 2000)).
\textsuperscript{264} See id. at 925.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 927.
private violence may deprive the victim of [his] constitutional guarantee [of due process.] Before the fiction may operate, however, a state actor must create the danger or render the victim more vulnerable to the danger that occasions the deprivation of life, liberty, or property.\textsuperscript{267}

But liability depends upon “a private act that deprives the victim of life, liberty, or property.”\textsuperscript{268} The Grays could not point to any private act of violence.\textsuperscript{269} Rather, they had alleged “that the immediate or direct cause of the decedent’s death was negligence on the part of state actors.”\textsuperscript{270} Negligence of state actors, even if proven, is not sufficient to trigger liability under § 1983; the state’s act must be a “deliberate” decision.\textsuperscript{271} Therefore, plaintiffs failed to allege an act that would give rise to liability.\textsuperscript{272} In conclusion, the court held that “the state created danger theory of constitutional liability has no role to play in a proper resolution of [p]laintiffs’ grievance,” and affirmed the district court’s dismissal of the case.\textsuperscript{273}

\textbf{a. Third Circuit.} The Third Circuit’s test has also been applied by a federal district court in a case involving a murder-suicide on the Rowan College campus.\textsuperscript{274} A representative of Cindy Nannay, the murdered young woman, filed a claim against Rowan College and its officials alleging a deprivation “of her liberty interest in personal security and her liberty interest to be free from bodily harm,” in violation of her substantive due process rights.\textsuperscript{275} Nannay had been in an abusive relationship with the man who ultimately shot her.\textsuperscript{276} The two lived together until their breakup in July of 1996, at which point Nannay approached a dean at Rowan College—where she was a student and also worked at the college radio station—and asked if the college would provide her with housing under the

\begin{itemize}
\item \textsuperscript{267} \emph{Id.}
\item \textsuperscript{268} \emph{Id.} at 928 (explaining that if the state actor caused the harm directly—without the involvement of a private actor—that state official would be liable directly under § 1983, and the legal fiction of the state-created danger exception would be unnecessary).
\item \textsuperscript{269} \emph{Id.} at 927.
\item \textsuperscript{270} \emph{Id.}
\item \textsuperscript{271} \emph{Id.} at 929.
\item \textsuperscript{272} See \emph{id.} at 930.
\item \textsuperscript{273} \emph{Id.}
\item \textsuperscript{274} See \emph{Nannay v. Rowan Coll.,} 101 F. Supp. 2d 272, 285–86 (D.N.J. 2000).
\item \textsuperscript{275} \emph{Id.} at 279.
\item \textsuperscript{276} \emph{Id.} at 274.
\end{itemize}
circumstances.\textsuperscript{277} The dean provided free on-campus housing and access to the college’s counseling service.\textsuperscript{278} On August 12, 1996, Nannay arranged for her ex-boyfriend to meet her at the college’s radio station to deliver some of her belongings, and she asked her manager to be there to ensure that her ex-boyfriend did not do anything violent to her.\textsuperscript{279} The manager told Nannay he would be there, but also offered to give her money to replace her belongings so the meeting between the two could be avoided.\textsuperscript{280} Nannay refused his offer.\textsuperscript{281} When her ex-boyfriend arrived at the station, he shot Nannay twice with a shotgun, killing her, and then killed himself.\textsuperscript{282}

In the suit, the plaintiff alleged that the helpful, voluntary actions of the dean and the radio station manager created a constitutional duty to protect Nannay from the violent attack by her ex-boyfriend.\textsuperscript{283} The plaintiff argued that by providing campus housing and agreeing to be present when Nannay faced her ex-boyfriend, the college officials “lulled Cindy [Nannay] into a false sense of security, such that she let her guard down.”\textsuperscript{284} The court rejected this argument, quoting \textit{DeShaney}: “the affirmative duty to protect arises not from the [s]tate’s knowledge of the individual’s predicament or from the expressions of intent to help him but from the limitation which it has imposed on his own freedom to act on his own behalf.”\textsuperscript{285} The court ruled that there was no special relationship between Nannay and Rowan College.\textsuperscript{286} Although plaintiff alleged that the defendants’ attempts to help Nannay created a duty of care to protect her and also increased the danger to her, the court also held that the state-created danger theory did not apply.\textsuperscript{287} In concluding that the plaintiff failed to show that the defendants created the danger, the court stated “the [s]tate defendants did not create an opportunity for [the ex-boyfriend] to

\begin{itemize}
  \item \textsuperscript{277} Id. at 275. At the same time, Nannay informed the dean of a “physical incident” that was the basis for her new housing needs. \textit{Id.}
  \item \textsuperscript{278} \textit{Id.}
  \item \textsuperscript{279} \textit{Id.} at 277.
  \item \textsuperscript{280} \textit{Id.}
  \item \textsuperscript{281} \textit{Id.}
  \item \textsuperscript{282} \textit{Id.} at 278.
  \item \textsuperscript{283} \textit{Id.} at 286.
  \item \textsuperscript{284} \textit{Id.}
  \item \textsuperscript{285} \textit{Id.} (quoting \textit{DeShaney} v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989)).
  \item \textsuperscript{286} \textit{Id.} at 286–87.
  \item \textsuperscript{287} \textit{Id.}
\end{itemize}
kill . . . Nannay that would not have otherwise existed."

III. ABANDONING THE STATE-CREATED DANGER EXCEPTION

In two federal circuits, the state-created danger theory is not viable. Sitting en banc, the Fifth Circuit announced clearly that it has not adopted the state-created danger theory, although some earlier panel decisions seemed to embrace the theory.\textsuperscript{289} "Unlike many of our sister circuits, we have never explicitly adopted the state-created danger theory," stated the majority in \textit{Doe v. Covington County School District}.\textsuperscript{290} The Eleventh Circuit previously adopted what it called the "special danger" theory, but declared it "dead and buried" in \textit{White v. Lemacks}.\textsuperscript{291} This section of the Article takes a closer look at why these two circuits no longer recognize the doctrine.

A. Eleventh Circuit

The view of the Eleventh Circuit is that the special danger doctrine was superseded by the Supreme Court's 1992 holding in \textit{Collins v. City of Harker Heights}.\textsuperscript{292} To date, no other circuit has interpreted \textit{Collins} as supplanting the state-created danger theory. In \textit{Collins}, the Supreme Court stated that when there is no custodial relationship, a person's due process rights can be violated only when a government official acts in a way "that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."\textsuperscript{293} Previously, in noncustodial situations, the Eleventh Circuit had allowed claims to proceed based on the special danger exception.\textsuperscript{294} But in \textit{White v. Lemacks}, the court interpreted \textit{Collins} to mean that a § 1983 claim in noncustodial cases will be successful only if the plaintiff proves that a state actor's conduct shocked the conscience.\textsuperscript{295}

\begin{flushleft}
\textsuperscript{288} \textit{Id.} at 287.
\textsuperscript{289} \textit{Doe v. Covington Cnty. Sch. Dist.}, 675 F.3d 849, 864-65 (5th Cir. 2012) (en banc).
\textsuperscript{290} \textit{Id.} at 864.
\textsuperscript{291} \textit{White v. Lemacks}, 183 F.3d 1253, 1259 (11th Cir. 1999).
\textsuperscript{292} \textit{Id.} (holding that the theory "was dealt a fatal blow by \textit{Collins}"); see \textit{Collins v. City of Harker Heights}, 503 U.S. 115, 128 (1992). The Supreme Court itself has never adopted the state-created danger theory, which arose from dictum in its \textit{DeShaney} decision. \textit{See} \textit{DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.}, 489 U.S. 189, 201 (1989).
\textsuperscript{293} \textit{Collins}, 503 U.S. at 128.
\textsuperscript{294} \textit{See, e.g., Cornelius v. Town of Highland Lake}, 880 F.2d 348, 359 (11th Cir. 1989) (town employee abducted from town hall by prisoners on work release).
\textsuperscript{295} \textit{White}, 183 F.3d at 1258.
\end{flushleft}
Eleventh Circuit’s interpretation eliminates all other alternative approaches, including the state-created danger theory. Moreover, the shocks the conscience standard is difficult to meet and will not be a viable avenue for relief in most instances.\textsuperscript{296}

It was in \textit{White}, an employment case—not a school case—that the Eleventh Circuit announced that the special danger doctrine “has been supplanted.”\textsuperscript{297} “[W]e pronounce \textit{Cornelius} dead and buried,” stated the court.\textsuperscript{298} A few years after the Eleventh Circuit’s abandonment of the doctrine, the plaintiffs in a § 1983 suit against Troy State University tried to argue that the university had violated their daughter’s, and their own, due process rights through the institution’s deliberate indifference to her safety and well-being in the dormitory.\textsuperscript{299} The federal district court in Alabama looked to Eleventh Circuit precedent and stated, “as the special danger doctrine no longer exists in this circuit, the Plaintiffs cannot maintain a claim . . . under that doctrine.”\textsuperscript{300}

In \textit{White}, the Eleventh Circuit nonetheless indicated that the Supreme Court left “open the possibility that deliberate indifference on the part of government officials or employees will ‘shock the conscience’ in some circumstances.”\textsuperscript{301} However, in school cases where there is no custodial relationship between the institution and the student, courts within the Eleventh Circuit have not held any instances of school officials’ conduct to be conscience shocking.\textsuperscript{302}

\begin{itemize}
\item \textsuperscript{296} \textit{Id.} at 1259 (stating that the shocks the conscience “standard is to be narrowly interpreted and applied”).
\item \textsuperscript{297} \textit{Id.} at 1258.
\item \textsuperscript{298} \textit{Id.} at 1259. The circuit abolished both the special relationship exception and the state-created danger theory as they pertain to cases in which a government employee raises a substantive due process complaint: “To summarize, the ‘special relationship’ and ‘special danger’ doctrines applied in our decision in \textit{Cornelius} are no longer good law, having been superseded by the standard employed by the Supreme Court in \textit{Collins}.” \textit{Id.}
\item \textsuperscript{299} Griffin v. Troy State Univ., 333 F. Supp. 2d 1275, 1280 (M.D. Ala. 2004), aff’d, 128 F. App’x 739 (11th Cir. 2005). There is no indication that plaintiffs pleaded that the university’s actions amounted to a direct violation of § 1983—that is, by claiming that the school caused her to be subjected to a deprivation of her rights. Instead, the plaintiffs apparently relied on the state-created danger theory. \textit{See id.}
\item \textsuperscript{300} \textit{Id.} at 1281.
\item \textsuperscript{301} \textit{White}, 183 F.3d at 1258.
\end{itemize}
B. Fifth Circuit

Sitting en banc, the Fifth Circuit in 2012 announced that it has never adopted the state-created danger theory. The court stated: “Despite the potential confusion created by Scanlan and Breen, recent decisions have consistently confirmed that ‘[t]he Fifth Circuit has not adopted the ‘state-created danger’ theory of liability.’” Moreover, the court continued, “[w]e decline to use this en banc opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory.” Covington County School District was brought by parents whose daughter was raped repeatedly after the school allowed her to leave with a stranger. The parents relied on Fifth Circuit precedent to argue that the state-created danger rule supported their claim for relief.

Indeed, the Scanlan opinion in 2003 laid out the test for state-created danger that the circuit would apply if it were going to do so. In essence, then, the court announced how to proceed on a state-created danger claim without expressly stating that it would actually allow such a claim. The test would contain two parts: “[f]irst, that] the defendants used their authority to create a dangerous environment for the plaintiff and [second, that] the defendants acted with deliberate indifference to the plight of the plaintiff.” Additionally, as summarized in Covington County School District, “[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party’s crime to occur.” Finally, the court said, “even if it is assumed

303. Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (en banc) (alteration in original) (quoting Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010)). Two 2010 decisions were the confirmation the court mentioned. See Kovacic, 628 F.3d at 214; Bustos v. Martini Club, Inc., 599 F.3d 458, 466 (5th Cir. 2010) (“[T]his circuit has not adopted the state-created danger theory.”). Scanlan and Breen are two prior cases debating whether the Fifth Circuit recognizes the theory. Breen v. Tex. A&M Univ., 485 F.3d 325, 336 (5th Cir. 2007), withdrawn in part, 494 F.3d 516, 518 (5th Cir. 2007); Scanlan v. Tex. A&M Univ., 343 F.3d 533, 538 (5th Cir. 2003).

304. Covington Cnty. Sch. Dist., 675 F.3d at 865.

305. Id. at 853.

306. Id. at 864.

307. Scanlan, 343 F.3d at 537–38.

308. See id.

309. Id.

310. Covington Cnty. Sch. Dist., 675 F.3d at 865 (alterations in original) (quoting Piotrowski v. City of Houston, 237 F.3d 567, 585 (5th Cir. 2001)) (internal quotation marks omitted).
that the state-created-danger theory applies, liability exists only if the state actor is aware of an immediate danger facing a known victim.”

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

In a well-reasoned concurring opinion, Judge Stephen Higginson suggested how the plaintiffs could have framed their case differently so as to allege a direct cause of action under § 1983 without having to rely on the state-created danger theory. He wrote:

Plaintiffs do not complain that government persons subjected Jane to rape, but they come close to complaining that government persons caused her to be subjected to rape. If the complaint had asserted that the affirmative act of releasing Jane to Keyes was a causal act of recklessness or deliberate indifference or intentionality that caused her to be subjected to injury, and specifically to the deprivation of her right to bodily integrity, the complaint properly would proceed through discovery to trial.

He reminded the court of the “three inter-related elements of [§] 1983: (1) state action, as (2) the cause-in-fact of (3) a deprivation of right protected by the Constitution.” Judge Higginson thoughtfully articulated his position that “Section 1983 should be construed literally.” A literal reading of § 1983 would “acknowledge that the statute protects not just against government persons who subject citizens to a constitutional deprivation but also against government persons who cause citizens to be

311. *Id.* (quoting Lester v. City of Coll. Station, 103 F. App’x 814, 815-16 (5th Cir. 2004)) (internal quotation marks omitted).
312. *Id.* at 866.
313. *Id.* at 871 (Higginson, J., concurring).
314. *Id.*
315. *Id.* at 872.
316. *Id.* at 874.
subjected to such deprivations.”\textsuperscript{317} He added that the government should be held accountable for wrongdoing in “cases where a government person causes a victim ‘to be subjected’ to a violation” and not just in those “cases where the government person ‘subjects’ the victim to the actual violation.”\textsuperscript{318}

Referring to the state-created danger theory, Judge Higginson wrote that “the existence of this ill-defined notion of government liability has provided a leaky bucket for the grey zone cases that properly should go to a jury as to state action and causation without any extra-statutory gloss which courts conjure.”\textsuperscript{319}

\begin{quote}
[G]overnment persons [who act] intentionally or recklessly or through deliberate indifference, must know they will be held blameworthy if they cause a citizen to be subjected to a rights deprivation even if the ‘actual violation’ is inflicted by a third person, as would be true if, for example, a sheriff released a prisoner to a vengeful lynch mob.\textsuperscript{320}
\end{quote}

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

**IV. CONCLUSION**

The answer to the question of whether the victims of a campus shooting—or their families—can recover money damages from a state university by bringing a federal action under 42 U.S.C. § 1983 is “maybe, but probably not.” As discussed, there are currently two theories of recovery in suits alleging a deprivation of the Fourteenth Amendment right to due process in school shooting situations: the special relationship exception and the state-created danger theory. Neither is likely to result in

\begin{itemize}
\item 317. Id. at 875.
\item 318. Id. at 872.
\item 319. Id. at 874.
\item 320. Id. at 873.
\end{itemize}
compensation for the plaintiff.

In a § 1983 substantive due process case, the special relationship exception is a losing argument for victims in school shooting cases. The majority of circuits have refused to find a special relationship in the K–12 setting where compulsory education laws create a type of custodial role for school officials. Particularly at the university level, where attendance is voluntary, there is no realistic way to prove that the state actors had custody over a college student so as to create a special relationship. Without a special relationship, there is no constitutional duty for the state school to warn or protect its students from third-party violence.321 “That is not to say that schools have absolutely no duty to ensure that students are safe during the school day. Schools may have such a duty by virtue of a state’s tort or other laws. However, [§] 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.”322

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

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground

321.    Id. at 860–61 (majority opinion).

While we should have every reason to expect that public schools can and will provide for the safety of public school students, no matter their age, our precedents, and the decisions of every other circuit to have considered this issue, dictate that schools are simply not constitutionally required to ensure students’ safety from private actors.

Id. 322.    Id. at 858 (alteration in original) (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)); see Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 691, 703–04 (Iowa 2013) (affirming a trial verdict in favor of a plaintiff on negligence claims against a school whose failure to supervise a special education student led to her being sexually assaulted).
in this field.\textsuperscript{323}

This Article suggests that the better approach is to abandon the formality of the state-created danger test altogether, following the lead of the Eleventh and Fifth Circuits. Judge Higginson got it right and expressed it eloquently in his concurrence in \textit{Covington County School District} when he wrote that § 1983 should be construed literally.\textsuperscript{324} The statutory language specifically includes those instances in which a state actor caused someone to be deprived of a constitutional right as well as those instances where a state official’s act directly deprived the person of a protected right.\textsuperscript{325} However, not all courts have embraced this direct approach. Some cling to the concept that unless a custodial relationship exists, a victim simply cannot hold the state responsible for deprivation of a Fourteenth Amendment due process right. For example, one federal district court sitting within the Fifth Circuit has already expressly rejected the direct approach advocated by Judge Higginson.\textsuperscript{326} In \textit{Estate of Brown v. Cypress Fairbanks Independent School District}, the court acknowledged that the plaintiffs had based their suit on Judge Higginson’s literal reading of § 1983.\textsuperscript{327} The court dismissed the suit, however, stating that without a special relationship, the school district had no duty to protect its student from nonstate actors, and “[b]ecause Plaintiff has not—and cannot—allege such a special relationship, there is no foundation for stand-alone statutory liability under § 1983.”\textsuperscript{328}

This interpretation—that there must be some sort of custodial relationship before the duty to protect attaches—is admittedly consistent with the Supreme Court’s discussion in \textit{Collins}.\textsuperscript{329} The Supreme Court

\begin{subnotes}
\item 324. \textit{Covington Cnty. Sch. Dist.}, 675 F.3d at 874 (Higginson, J., concurring).
\item 325. \textit{Id.}
\item 327. \textit{Id.} at 637 n.7.
\item 328. \textit{Id.} at 638. This Author is not convinced that the district court correctly applied Judge Higginson’s approach, but that issue is ultimately one for the Fifth Circuit to resolve.
\item 329. \textit{See} \textit{Collins v. City of Harker Heights}, 503 U.S. 115, 127-28 (1992). Importantly, \textit{Collins} did not involve a school or a student. Rather, it was a suit brought by the surviving spouse of a municipal employee who died on the job, and the Supreme Court noted that there was nothing involuntary or custodial about the relationship between that employee and the city that would have given rise to a duty to provide special care. \textit{See id.} at 128 (“Petitioner cannot maintain... that the city deprived
\end{subnotes}
there reviewed some of its prior decisions—cases involving pretrial detainees, persons in mental institutions, and convicted felons—indicating that the Due Process Clause required some duty of protection and care, and every instance involved a custodial relationship. The Court’s discussion seemed to imply that the obligation to “satisfy certain minimal custodial standards” exists only when individuals “have already been deprived of their liberty.”

Nonetheless, Collins clearly left open the possibility that a direct § 1983 suit—meaning a suit that alleges that the state actor caused the victim to be deprived of a right—could be brought if the state engages in conduct that is “arbitrary, or conscience shocking, in a constitutional sense.”

If litigants are to succeed, they will need guidance as to what type of action by the state is egregious enough to meet this conscience shocking standard in non-custodial school situations. The Supreme Court has indicated that liability will attach only if the state actor caused the deprivation of rights by deliberately acting in a manner that shocks the conscience in a constitutional sense. The Fifth Circuit agrees:

Conduct sufficient to shock the conscience for substantive due process purposes . . . has been described as conduct that ‘violates the decencies of civilized conduct’; conduct that is ‘so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency’; conduct that ‘interferes with rights implicit in the concept of ordered liberty; and conduct that is so egregious, so outrageous, that it

Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.”). Id.

330. Id. at 127–28.
331. Id.
332. Id. at 128.
333. The Eleventh Circuit purports to clarify the standard, at least in employment situations, by incorporating the Supreme Court’s language from Collins, but not all courts have phrased it as definitively. See White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999) (“Under Collins, state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is ‘arbitrary, or conscience shocking, in a constitutional sense,’ and that standard is to be narrowly interpreted and applied.” (quoting Collins, 503 U.S. at 116)); see also Handy-Clay v. City of Memphis, 695 F.3d 531, 547–48 (6th Cir. 2012) (attempting to clarify the standard by noting it includes egregious, brutal, and offensive actions).
may fairly be said to shock the contemporary conscience.  

Failure to act will not suffice unless it is truly outrageous. The shocks the conscience standard—admittedly a difficult test to meet—can still be applied in a § 1983 action without going on the semantic detour that is called the state-created danger test.

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

Another roadblock on the federal litigation path is that state actors will be immune from suit in several instances. Various types of immunity may shield parties from suit. Public school and university officials, for example, are shielded from individual liability if the test for qualified immunity is met. The two-step test for qualified immunity is (1) whether the state official’s actions violated a constitutional right, and (2) whether that right was clearly established at the time of the official’s alleged misconduct. In 2009, the Supreme Court announced that the prongs of the test can be addressed in either order, so it is not necessary to analyze the first step before turning to the question of whether a clearly established right existed at the time. In school shooting cases, the due process right is not clearly established because the Supreme Court has not addressed whether there is a special relationship between schools and students, and the circuits—although fairly consistent—are divided in specific instances.

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As for the state-created danger theory, the law is even less clear.\textsuperscript{340} Given this lack of certainty, school officials may be individually immune from suit even if they do violate a student’s rights.\textsuperscript{341}

In summary, the plaintiffs in a school shooting case will probably not succeed in asserting a constitutional claim against the school because (1) circuits have stated that there is no special relationship in student-versus-school cases, and (2) the state-created danger theory has been mangled and misapplied, and the better approach is for courts to follow the Fifth and Eleventh Circuits and decline to apply it. This conclusion sounds very harsh for grieving families, but it is legally correct. Very simply put, the remedy available under the Due Process Clause does not stretch so broadly as to render the government liable for the violent shootings committed by private parties.\textsuperscript{342}

If the prospect of § 1983 relief is so unlikely for plaintiffs in school shooting cases, one may ask why attorneys continue to file these suits on behalf of grieving clients. The answer is twofold.

First, a federal constitutional claim may be the only available remedy in some situations. Relief based on a negligence theory\textsuperscript{343} may not be

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(stating that there should be a special relationship when the student is young and vulnerable and parents can do nothing to protect her while she is in school).
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340. See discussion supra Part II.B.

341. A detailed discussion of immunity is outside the scope of this Article. Various types of statutory immunity and municipal liability will also apply in certain instances. For more information on qualified immunity, see Bendlin, supra note 336, at 1025–29, 1040–48. See also Covington Cnty. Sch. Dist., 675 F.3d at 869 (discussing qualified immunity in the context of a case involving harm befalling students while at school).

342. Section 1983 provides a means of redress if a state actor violates a person’s constitutional rights, but as the Supreme Court has stated, it does not provide redress for negligent acts or third-party violence. DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989).

343. Some plaintiffs may successfully pursue a remedy in tort law when elements of negligence can be proven, especially in light of legal and societal evolution toward finding a duty to protect and to warn students. See Peter F. Lake, The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications For the Post in Loco Parentis College, 37 Idaho L. Rev. 531, 532 (2001); cf. Mitchell v. Cedar Rapids Cnty. Sch. Dist., 832 N.W.2d 689, 703–04 (Iowa 2013) (affirming a negligence verdict against a local school district). However, statutory caps on the amount of damages exist in many states, thus making a tort claim less attractive to plaintiffs. See, e.g., Fla, Stat. Ann. § 768.28(5) (West 2011 & Supp. 2013); Va. Code Ann. § 8.01-195.3 (2007). Moreover, even negligence claims may fail on the merits if the college or university owes no duty. Commonwealth v. Peterson, 749 S.E.2d 307, 313 (Va. 2013)
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available to plaintiffs because many states have statutorily barred some
types of tort actions against state entities.\textsuperscript{344} Immunity doctrines and
statutory caps on the amount of damages that plaintiffs can receive serve as
significant barriers to suits in many states. For example, the legislature in
Florida has limited the amount of damages that can be paid by state
agencies to $200,000 for a single claim.\textsuperscript{345} The rationale is that the state gets
its funds from taxes, and if the state has to pay high sums in civil cases, the
burden will fall unfairly on taxpayers\textsuperscript{346} At least 33 states have statutory
limits on the amount of compensatory damages that the state can pay.\textsuperscript{347}

(finding that Virginia Tech was not liable to victims of the 2007 mass shooting on its
campus).

\textsuperscript{344} See, e.g., ALASKA STAT. \textsection 09.50.250(1) (2012); CAL. GOV'T CODE
\textsection 815.5(a), 815.3(a) (West 2012); COLO. REV. STAT. \textsection 24-10-106(1) (2013); DEL. CODE ANN. tit. 10, \textsection 4001 (1999); GA. CODE ANN. \textsection 50-21-24(2) (West 2012); IDAHO CODE ANN. \textsection 6-904(1) (2010); 745 ILL. COMP. STAT. ANN. 5/1 (West 2010); IOWA CODE
\textsection 669.14(1) (2013); KAN. STAT. ANN. \textsection 75-6104(e) (1997); ME. REV. STAT. ANN. tit. 14,
\textsection 104-B(3) (2003); MICH. COMP. LAWS ANN. \textsection 691.1407(1)-(2) (West 2000); MISS.
CODE ANN. \textsection 11-46-9(1)(d) (West 2013); N.J. STAT. ANN. \textsection 59:2-1(a) (West 2006);
N.M. STAT. ANN. \textsection 41-4-4(A) (2013); S.C. CODE ANN. \textsection 15-78-60(5) (2005); WYO.
STAT. ANN. \textsection 1-39-104(a) (2013).

\textsuperscript{345} FLA. STAT. ANN. \textsection 768.28(5).

that recoveries in tort against the government are funded by taxpayers’ dollars makes
tort claim caps a necessity.”).

\textsuperscript{347} COLO. REV. STAT. \textsection 24-10-114(1); FLA. STAT. ANN. \textsection 768.28(5); GA.
CODE ANN. \textsection 50-21-29(b); IDAHO CODE ANN. \textsection 6-926(1); IOWA CODE ANN. \textsection 75-6105(a); KY. REV. STAT. ANN. \textsection 44.070 (LexisNexis 2007); LA. REV.
STAT. ANN. \textsection 13:5106(B)(1)-(2) (2012); ME. REV. STAT. ANN. tit. 14, \textsection 8105(1); MD.
CODE ANN., STATE GOV'T \textsection 12-104(a)(2) (LexisNexis 2009); MASS. GEN. LAWS ANN.
ch. 258, \textsection 2 (West 2004); MINN. STAT. ANN. \textsection 3.736(4) (West 2013); MISS. CODE ANN.
\textsection 11-46-15(1); MO. ANN. STAT. \textsection 537.610(2) (West 2008); MONT. CODE ANN. \textsection 2-9-
108(1) (2013); NEB. REV. STAT. ANN. \textsection 81-8,224(1) (LexisNexis 2011) (providing that
the legislature must review all claims above a certain amount before they can be paid);
NEV. REV. STAT. \textsection 41.035(1) (2013); N.H. REV. STAT. ANN. \textsection 541-B:14(1) (LexisNexis
2006); N.M. STAT. ANN. \textsection 41-4-19(A)-(B); N.C. GEN. STAT. \textsection 143-299.2 (2011); N.D.
CENT. CODE \textsection 32-12-2-02(2) (2010); OKLA. STAT. ANN. tit. 51, \textsection 154(A) (West 2008);
OR. REV. STAT. ANN. \textsection 30.271(2)-(3) (West 2013); 42 PA. CONS. STAT. ANN. \textsection 8528(b)
(West 2007); R.I. GEN. LAWS \textsection 9-31-2 (2012); S.C. CODE ANN. \textsection 15-78-120(a)(1)-(3);
TENN. CODE ANN. \textsection 9-8-307(e) (2012); TEX. CIV. PRAC. & REM. CODE ANN.
\textsection 101.023(a) (West 2011); UTAH CODE ANN. \textsection 63G-7-604(1) (LexisNexis 2011); VT.
STAT. ANN. tit. 12, \textsection 5601(b) (2002); VA. CODE ANN. \textsection 8.01-195.3; WYO. STAT.
ANN. \textsection 1-39-118(a). Additionally, Delaware limits damages against municipalities and
counties without limiting damages against the state. See DEL. CODE ANN. tit. 10,
\textsection 4013(a).
Second, there is always room for optimism in a system in which the law evolves to reflect contemporary standards of morality and decency. Constitutional jurisprudence is infused with the notion that in a just society, citizens must be treated fairly and humanely.\textsuperscript{348} As contemporary ideas evolve as to the duties that schools owe to students, there is a possibility the current interpretation of the Due Process Clause in these cases will change. The change has not yet occurred in this context, and there still exists no constitutional duty to protect students from the violent acts of a private third party, but the day may come when relief will be granted. For these reasons, aggrieved parents and loved ones who lose a family member in a campus shooting rampage may still seek relief under 42 U.S.C. § 1983 even though the current prospect of prevailing is very slim.

Prevention would be ideal. University officials are understandably horrified by these campus shootings and are working very hard to prevent such violent acts. But it is not an easy task.\textsuperscript{349} Responding to the fatal shootings at Northern Illinois University, President John Peters said in grief and frustration, “I don’t know if any plan can prevent this kind of tragedy.”\textsuperscript{350} Campus administrators find themselves caught, unfortunately, between a Glock and a hard place. The problem of violence on campuses is complex, but many resources are being put toward making colleges safer.\textsuperscript{351} For the victims and families, those efforts, sadly, have not been enough. For them, seeking relief through the court system is but one avenue, and


\textsuperscript{349} After the Virginia Tech shooting, one professor wrote:

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


\textsuperscript{351} See Hoffman, \textit{supra} note 2.
the constitutional deprivation path is not the one likely to lead to redress at this point in time.