SHACKLED AND CHAINED IN THE SCHOOLYARD: A NEW APPROACH TO SCHOOLS' SECTION 1983 LIABILITY UNDER THE SPECIAL RELATIONSHIP TEST

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INTRODUCTION

Nine-year-old Montana Lance was a fourth grade student enrolled in Stewart Creek Elementary School.[1] Montana was diagnosed with emotional disturbance, a learning disability, and a speech impediment.[2] School officials were aware that Montana was the frequent target of bullies. He was called "gay" because of his speech impediment, and students refused to speak to him or sit with him at lunch.[3] The bullying caused Montana to suffer from depression and he expressed suicidal thoughts to school administrators.[4] After a confrontation with his bullies, school officials punished Montana with an in-school suspension.[5] During his in-school suspension Montana asked to use the bathroom unsupervised and hung himself.[6]

Schools were once safe havens for children to grow and learn.[7] Today, children like Montana face abuse in schools at alarming rates.[8] Montana's parents sought to hold the school responsible for his untimely death and filed a 42 U.S.C. Section 1983 claim alleging that the school and school officials had been deliberately indifferent in their duty to take steps to protect Montana's Fourteenth Amendment liberty interests.[9]

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[1] Estate of Lance v. Lewisville Indep. Sch. Dist., No. 4:11—CV—00032, 2011 WL 4100960, at *1 (E.D. Tex. Aug. 23, 2011).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id. at *2.*

[6] *Id.*

[7] Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 553-54 (2004) (discussing the growth of violence, besides just physical harm, in schools).

[8] *Id.*

[9] *Lance*, 2011 WL 4100960 at*2.

However, the Supreme Court, in *DeShaney v. Winnebago County Department of Social Services*,[10] refused to impose a duty on the state to proactively protect a child from a third party.[11] The Court declined to impose on a state social services department an affirmative duty to protect a child from his abusive father, despite the fact that the department had been supervising the child.[12] The Court explained its reluctance to impose an affirmative duty by pointing out that the Due Process Clause imposes no duty on the state to provide members of the public with adequate protective services.[13] In light of that precedent, numerous courts have refused to impose affirmative duties to protect citizens from harm on state entities.[14] Rather, the Constitution is regarded as a "charter of negative liberties" that seeks to avoid government intrusion on a citizen's interests, but imposes few affirmative duties to protect those interests.[15]

Despite the sweeping language in *DeShaney*, the Court explicitly recognized an exception to the general rule—where an affirmative duty would be imposed—in situations involving state custody.[16] The Court explained that when the state takes a person into its custody and restrains his ability to protect his own rights, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and wellbeing.[17] Courts and commentators have since debated the scope of this exception.[18] Some have argued that the custodial nature of the relationship is the *sine qua non* of the *DeShaney* exception.[19] Others have argued for a more expansive interpretation, reading the dicta in *DeShaney* as requiring a "special relationship," of which a custodial relationship is only one example.[20] More often than not, in the context of the affirmative duties of schools pursuant to Section 1983, the disagreements between parties, courts and commentators is not over whether a custodial relationship is required, but rather whether a school is a custodian of a student.

This Note argues that this enduring debate misses the mark. Courts and commentators have become fixated on defining the relationship between schools and students, and have analogized that relationship to instances in which the Supreme Court has already found that a custodial relationship exists: prisons and involuntary institutions. As a result of this confusion, there is a circuit split and

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[10] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[11] *Id.* at 201.

[12] *Id.* at 197-98.

[13] *Id.* at 198.

[14] *See* discussion *infra* Part II.A.

[15] Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

[16] *DeShaney*, 489 U.S. at 200. The Court broadly defined custody in this manner and declined to enumerate a particular test for determining a custodial relationship with the state, thus leaving open the possibility that this exception can arise in a variety of situations. *See* discussion *infra* Part II.

[17] *DeShaney*, 489 U.S. at 199.

[18] *See* discussion *infra* Part II.A-B.

[19] *See infra* Part II.A.

[20] *See infra* Part II.B.

division among district courts. Moreover, despite sharp disagreement in the academic literature, a bright-line boundary has been erected as to whether a relationship is custodial or not, resulting in litigation boiling down to whether or not a school is like a prison. This interpretation—emphasizing custodial taxonomies—is the wrong approach.

This Note seeks to resolve the split between courts and commentators by reframing the question in more functional terms. The relevant focus should not be on categorization, but rather on balancing, and a standard-based approach for assessing Section 1983 liability should be preferred over a custodial-rule approach. This Note argues that a balancing test examining and comparing rights, modes of infringement, government interests, and modern realities of institutions will lead to a more consistent analysis. Specifically, this Note argues that the fetishization of the custodial relationship as the *a priori* requirement for liability obscures many of the contemporary facts of modern education and schooling.

Part I of this Note provides a brief overview of the requirements for maintaining a suit for damages under 42 U.S.C. Section 1983, with a particular focus on the Supreme Court's jurisprudence—especially *DeShaney*—concerning affirmative duties and special relationships. Part II focuses on the split between courts as to whether schools owe an affirmative duty or have some special relationship with students under *DeShaney*. The majority of courts have found that there is no special relationship in the context of the school-student relationship, but more recently, a panel decision in the Fifth Circuit case *Doe ex rel. Magee v. Covington County School District* held that in certain situations there is a duty for public schools to protect students from private violence. The case was reheard *en banc* and, over a strong dissent, the panel decision was vacated. However, the original panel decision and strong dissenting remarks on rehearing reinvigorate the ideological split regarding the special relationship between schools and students. Part III argues that neither the majority nor minority jurisdictions have correctly applied the special relationship test to schools. The majority of courts have interpreted the *DeShaney* test too narrowly, and while the Fifth Circuit panel decision correctly determined there to be a special relationship, the decision unnecessarily created too rigid of a line as to when and where this special relationship can exist in the context of schools. Relying on existing theorization from the education field, Part III argues that the modern realities of school require a broader balancing approach in assessing a school's affirmative duty to protect a student's liberty interest.

I. SECTION 1983 LIABILITY AND THE AFFIRMATIVE DUTY TO PROTECT LIBERTY INTERESTS

A. Section 1983 Liability and DeShaney

The Due Process Clause of the Fourteenth Amendment provides that the states cannot deprive any person of "life, liberty, or property, without due process of law."[21] Along with the Fourteenth Amendment, Congress also enacted 42 U.S.C Section 1983 to provide a measure of redress for individuals harmed by state actors.[22] Under Section 1983, individuals may bring an action against state officials in federal court for damages resulting from a deprivation of rights secured by the United States Constitution or federal laws.[23] One reason Congress enacted this legislation was to afford a federal right in federal courts if actions by the state violated a citizen's constitutional rights.[24] To establish a claim under Section 1983, plaintiffs must demonstrate both that they were deprived of an existing federal right and that the deprivation occurred under color of state law.[25] A violation does not occur by mere negligence—rather, it must be shown that the state acted with deliberate indifference to the injuries at issue.[26] The plaintiff bears the burden of proving deliberate indifference.[27]

Most lawsuits under Section 1983 arise out of an action by a state actor that violates a constitutional right.[28] In those cases, plaintiffs will allege either that a state actor knowingly violated a right or that the actor breached a duty directly resulting in the violation of a constitutional right.[29] In *Monroe v. Pape*, the Supreme Court expanded the use of Section 1983 liability to include instances where a state official allegedly violates the right of the plaintiff while acting in an official role, but not in a manner authorized by the state.[30]

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[21] U.S. CONST. amend. XIV.

[22] *See* 42 U.S.C. § 1983 (1996).

[23] *See id.*

[24] *See* Monroe v. Pape, 365 U.S. 167, 179-80 (1961).

[25] *See* 42 U.S.C. § 1983 (1996). The statute imposes liability on any party acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws[.]" *Id.*

[26] *See* Davidson v. Cannon, 474 U.S. 344, 358 (1986) (reasoning that prison officers' negligence in not protecting an inmate from an attack did not approach the sort of abusive government conduct the Due Process Clause was designed to prevent).

[27] *See id.*

[28] *See Monroe*, 365 U.S. at 195.

[29] *See* City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) (allowing a § 1983 claim against municipality for failing to train police officers to give appropriate medical attention).

[30] *Monroe*, 365 U.S. 167. In *Monroe*, the plaintiff brought a § 1983 action against police officers who illegally searched his house. Although the police officers were acting against state law when they conducted the illegal search, the Supreme Court reasoned that if the constitutional violation is made by a state official acting in an official capacity, it is still considered under the color of law for the purpose of § 1983. *Id.*; *see also* Steven F. Huefner, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940 (1990) (discussing the significant impact of *Monroe* on § 1983 claims).

1. *DeShaney v. Winnebago County Department of Social Services*

The more difficult cases are those in which the violation results from acts by private third parties. Does a state actor have an affirmative duty in those cases to protect an individual against such a violation? In the landmark case *DeShaney v. Winnebago County Department of Social Services,* the Supreme Court confirmed that states do not have a duty to protect individuals from injuries caused by private actors.[31] In 1984, four-year-old Joshua DeShaney was beaten into a coma by his father and suffered permanent brain damage.[32] Prior to the beating, Wisconsin's Department of Social Services was aware that Joshua had been treated several times for suspicious injuries at the hands of his father.[33] Despite this, caseworkers concluded that there was not enough evidence to illustrate child abuse, and Joshua remained in his father's home.[34] Following the beating, Joshua's mother brought an action against the state claiming that the state had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to protect him against the risk of violence at his father's hands.[35]

The Supreme Court rejected DeShaney's claim, and stated as a general matter that a state's failure to protect an individual against private violence is not a violation of the Fourteenth Amendment's Due Process Clause.[36] The Court reasoned that:

> While the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.[37]

Despite the "undeniably tragic" facts of the case, the Court reasoned that the Due Process Clause was meant to protect citizens from the state, and could not be extended as a protection from private individuals.[38] Though the state should have stepped in to help Joshua, the Court did not consider the state's passivity as an affirmative action.[39]

DeShaney did, however, carve out a narrow exception to this rule.[40] The Court explained that the state does have an affirmative duty to protect individuals

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31 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

32 *Id.* at 193.

33 *Id.* at 192

34 *DeShaney*, 489 U.S. at 193.

35 *Id.*

36 *Id.* at 197.

37 *Id.* at 201.

38 *Id.* at 195.

39 *See DeShaney*, 489 U.S. at 195.

40 *Id.* at 198.

from private violence when there is a special relationship between the state and the victim.[41] These special relationships exist in limited circumstances where the state restrains an individual so that he is unable to care for himself, thus necessitating a greater degree of protection.[42] In order for there to be an affirmative duty, the state must act in such a way as to deprive the individual of his liberties.[43] Essentially, when the state puts an individual in a situation where he cannot provide his own basic needs, a special relationship exists. The state must compensate for the restraint it places on such an individual by stepping in and affirmatively protecting the provision of basic needs.[44] In *DeShaney*, the Court rejected the argument that the state had a special relationship with Joshua, and thus an affirmative duty to protect him; however the Court noted two specific situations where a special relationship definitively exists: incarceration and involuntary institutionalization.[45]

B. Defining "Special Relationships": Prisoners, Patients, and Foster Children

Special relationships that give rise to an affirmative duty to protect individuals from constitutional violations have been recognized in a limited set of circumstances. In *Estelle v. Gamble,* the Supreme Court found that prison officials who willfully—or through deliberate indifference—withheld medical treatment from inmates committed a constitutional tort by violating the prohibition of cruel and unusual punishment under the Eighth Amendment and were thus liable under Section 1983.[46] The Court found that by incarcerating the prisoners, the state deprived them of the ability to provide their own medical care.[47] The state created a restraint on the prisoner's ability to provide for this basic need and consequently assumed a corresponding affirmative duty to provide necessary medical care.[48]

Following this reasoning in *Youngberg v. Romeo*, the Supreme Court found that if the state involuntarily institutionalized mentally incapacitated individuals to a state mental institution, these individuals were restrained to such a degree that they were unable to provide for their own basic needs.[49] Therefore, if a state

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[41] *Id.*

[42] *DeShaney*, 489 U.S. at 200 (explaining that when the State, by the affirmative exercise of its power "restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."); *see also* Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).

[43] *DeShaney*, 489 U.S. at 198.

[44] *Id.* at 200.

[45] *Id.* at 198-199.

[46] *Estelle*, 429 U.S. at 97.

[47] *Estelle*, 429 U.S. at 104 (reasoning that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself" and when a person is dependent on the state a duty to provide certain care and services does exist).

[48] *Id.*

[49] Youngberg v. Romeo, 457 U.S. 307, 321-25 (1982).

institutionalizes an individual, it has the affirmative duty to protect him or her.[50] As is the case with incarcerated prisoners, an affirmative obligation is imposed since the state creates a situation where individuals are rendered more vulnerable and need additional protection.[51]

Some circuits have followed this reasoning to find that special relationships exist when children are placed in foster care or under state supervision.[52] In *K.H. Through Murphy v. Morgan*, a seventeen-month-old child was transferred through nine different foster parents in four years, one of whom sexually and physically abused her.[53] The child brought a Section 1983 suit against the Department of Children and Family Services alleging a deprivation of her constitutional right to liberty.[54] The court found that there was a special relationship between the state and foster child.[55] The state had deliberately removed the child from the custody of her parents, and could not place her in danger without violating her Fourteenth Amendment rights.[56] Thus, in the case of foster care, when the state removes children from their parents' homes and places them under state supervision, it assumes the responsibility to not act deliberately indifferent towards their care.[57] The rationale behind this theory is that a child in foster care is in the functional custody of the state.[58] The state has no obligation to protect a child from the abuse of her own parents, but once the state removes the child is from their custody, it assumes a limited responsibility for her safety.[59]

As discussed above, the Supreme Court has found that imprisonment and institutionalization create the basis for imposing on the state an affirmative duty to protect, and some circuit courts have found that the same duty also exists in the case of foster care. In these situations, the state uses its power to intervene into the lives of individuals and places them in situations where they are restrained in such a way that they cannot provide for their own basic needs or protect themselves from danger.[60] The fundamental factor in each of these decisions is that when individuals are put in a vulnerable position where they rely strongly on the state for their care, the state assumes the responsibility to protect their constitutional liberties. Similarly, students in schools are equally as vulnerable to constitutional

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[50] *Id.*

[51] *Id.*

[52] *See* K.H. Through Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990); Griffith v. Johnston, 899 F.2d 1427, 1439 (5th Cir. 1990) (holding that the state creates a special relationship when it removes children and places them under state supervision); Doe v. N.Y.C. Dep't Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1981) (holding that foster care creates a special relationship situation).

[53] *Murphy*, 914 F.2d at 848.

[54] *Id.* at 847.

[55] *Id.* at 849.

[56] *See id.*

[57] *See Griffith*, 899 F.2d at 1439.

[58] *See id.*

[59] *See id.*

[60] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

violations as prisoners, institutionalized individuals, and foster children, and they deserve to be protected by their schools.

II. DIVISION OVER *DESHANEY'S* APPLICATION TO SCHOOLS

The *DeShaney* Court left open the possibility that "other similar restraint[s] of personal liberty," in contexts besides prisons or state institutions, could create an affirmative duty to protect.[61] By leaving this possibility open, lower courts struggle with what constitutes a "similar restraint of personal liberty."[62] Though schools do not have custody of children in the same sense that the state has continuous physically custody over a prisoner, mandatory school attendance laws, the custodial relationship of schools over students, and the sense of restrained liberty children feel during the school day leaves open the possibility that a special relationship may exist. Courts are divided on that point, with a majority finding an absence of such a special relationship.

A. The Majority Position: Students are Unlike Prisoners and thus No Special Relationship Exists

Most courts have held that schools do not have special relationships with students—and therefore the state—and thus their Section 1983 claims must fail.[63] Courts have largely based these opinions on the view that schools do not have physical custody over students since children leave school at the end of the day and return back to the protection of their parents.[64] The agreement the courts reach in each of these cases is that the custodial relationship between students and schools cannot be characterized in a way analogous to a prisoner, thereby denying the existence of a special relationship.[65] Without a special relationship there are no affirmative duties placed on the state to protect students.[66] In defining custody, these courts consider and rely heavily on the nature of the control itself. They consider only whether there is physical confinement, whether the state was supplying all, and not just part, of the individual's basic needs, and the involuntariness of the confinement. After weighing these factors, the majority of courts find that schools do not act in a way that physically confines students and deprives them completely of the ability to provide for their own basic needs.[67]

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[61] *See Deshaney*, 489 U.S. at 190.

[62] *See* discussion *infra* Part II.A.

[63] *See e.g.*, D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1370, 1372 (3d. Cir. 1992) (finding no special relationship where two middle school girls were sexually molested by class mates); Soper v. Hoben, 195 F.3d 845, 853 (6th Cir. 1999) (finding no special relationship where a mentally disabled student was sexually assaulted at school); Stevenson *ex rel.* Stevenson v. Martin Cnty. Bd. of Educ., 3 Fed. Appx. 25, 31 (4th Cir. 2001) (finding that the middle school student bullied by other students was not in a special relationship with his school).

[64] *See* discussion *infra* Part II.A.

[65] *See Middle Bucks*, 972 F.2d at 1371-72.

[66] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198 (1989).

[67] *See e.g.*, Middle Bucks, 972 F.2d at 1372; Stevenson, 3 Fed. Appx. at 31; Patel v. Kent Sch.

This position reflects the view that *DeShaney* requires the state to have complete control over an individual's life in order to create a special relationship, and schools do not exercise this degree of control.[68] In contrast to mental patients and prisoners, students are not restrained from exercising basic liberty rights and have other channels and caretakers to provide for their basic rights.

The Third Circuit's opinion in D.R. v. Middle Bucks Area Vocational Technical School was one of the first post-*DeShaney* decisions to address the issue of special relationships in public schools.[69] There, the court held that students are not in the custody of schools, and thus no special relationship exists.[70] In an attempt to fit into the *DeShaney* exception, the plaintiffs argued that the state's mandatory attendance laws "so restrain school children's liberty that plaintiffs can be considered to have been in state 'custody' during school hours for Fourteenth Amendment purposes."[71] The Third Circuit rejected this reasoning, finding that unlike individuals incarcerated or institutionalized by the state, students are primarily under the care of their parents, and thus do not have the custodial relationship with the state necessary to form a special relationship.[72]

Recall that in the *Estelle* and *Youngberg* cases, the Court held that institutionalization and incarceration amounted to physical custody over individuals.[73] Since students are free to leave school at the end of the day and return to their parents, the *Middle Bucks* court found it difficult to analogize a student's relationship with a school to the relationship between a prisoner or institutionalized individual and the state.[74] The court reasoned that institutionalized individuals are under continuous surveillance, are wholly dependent on the state for their basic needs, and have no opportunities to seek outside help.[75] The court found that this focus on the student's ability to return to parents at the end of the day was in accord with the Supreme Court's previous interpretations of the student-child relationship since "even while at school the

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Dist., 648 F.3d 965, 973 (9th Cir. 2011).

[68] *See* Stephen Faberman, Note, *The Lessons of* DeShaney*: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97, 130-131 (1993) (arguing that regardless of whether children are in the custody of schools, *DeShaney* contemplated control where the state was "so intertwined" with the individual as to assume responsibility for the welfare of that person).

[69] *Id.* at 130-31.

[70] *See Middle Bucks*, 972 F.2d at 1372. The plaintiffs, D.R. and L.H., are two female students with learning disabilities who attended an arts class at Middle Bucks School together. Plaintiff D.R. alleged that over a period of five months, several male students in her class would force her into the classroom's unisex bathroom and sexually abuse her two to four times per week. During approximately the same period, plaintiff L.H. alleged that she was similarly sexually abused two or three times each week. Despite frequent complaints from the girls, they were left in an unruly and often unsupervised classroom with their alleged attackers. The students brought a § 1983 claim against the school and several named school officials, alleging that the school and officials knew of this sexual abuse and continued to nothing about it. *Id.* at 1366.

[71] *Middle Bucks*, 972 F.3d at 1370.

[72] *See id.* at 1371.

[73] *See* discussion *supra* Part I.B.

[74] *See Middle Bucks*, 972 F.2d at 1372.

[75] *Id.* at 1371.

child brings with him the support of family and friends . . . ."[76] The court also implied that there would need to be physical custody twenty-four hours a day in order for there to be special relationship.[77]

Additionally, the majority opinion found that unlike prisoners and institutionalized individuals who were involuntarily placed in the custody of the state, students are not compelled to attend public school.[78] The court noted that parents were choosing to send their children to public schools since home schooling and private schools were viable options as well.[79] The majority believed this apparent choice in other schooling options further weakened any notion that a custodial relationship exists between schools and their students.[80] Again, in focusing on the apparent ability of children to leave school, the court sought to differentiate students from individuals who are unable to leave the confinement of the state.[81]

The reasoning used by the *Middle Bucks* court has been applied by other courts in rejecting the special relationship between students and schools.[82] Although some courts have acknowledged that children are in the custody of the state during school hours, they are unwilling to compare this to the total deprivation felt by prisoners and institutionalized individuals.[83] Another issue raised by these courts is the question of the practicability of imposing the special relationship on schools.[84] In Dorothy J. v. Little Rock School District, the United States District Court for the Eastern District of Arkansas found that imposing such a duty on schools would force school officials to assume the roles of police officers or prison guards.[85] Additionally, liability could be imposed on schools in minor circumstances or anytime a child skinned his knee.[86] Thus, these courts have

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[76] *Id.* at 1372-73 (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1971) (denying students Eighth Amendment protection from corporal punishment)).

[77] See *id.* at 1372.

[78] *Id.* at 1371.

[79] *Middle Bucks*, 972 F.3d at 1371.

[80] *See id.*

[81] *Id.*

[82] *See, e.g.*, Patel v. Kent Sch. Dist., 648 F.3d 965, 973-74 (9th Cir. 2011) (holding that students did not meet the strict *DeShaney* custody standard because parents could remove children from school at any time); Crispim v. Athanson, 275 F.Supp.2d 240 (D. Conn. 2003); Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (holding that because the student was not physically unable or restrained from leaving the school, he was not considered to be in the school's custody).

[83] *See e.g.*, Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999); Stevenson *ex rel.* Stevenson v. Martin Cnty. Bd. of Educ., 3 Fed. Appx. 25, 31 (4th Cir. 2001) (stating that children are unlike institutionalized individuals and prisoners because parents possess the ability to provide for their children's basic needs, thus allowing students to retain defenses against constitutional violations, and therefore do not fall under state custody); *see also* Huefner, *supra* note 30, at 1955 (noting that many post-*DeShaney* opinions have read *DeShaney* as holding affirmative constitutional duties only exist in physical custodial relationships).

[84] Dorothy J. v. Little Rock Sch. Dist., 94 F.Supp. 1405, 1414 (E.D. Ark. 1992).

[85] *Id.*

[86] *Id.*

found that the special relationship is legally and administratively inapplicable to the student-school context.[87]

The Supreme Court has thus far declined to acknowledge a special relationship in opinions addressing the student-school relationship.[88] In *Vernonia School District 47J v. Wayne*,[89] the Supreme Court limited the Fourth Amendment protections afforded to school children in the context of mandatory drug testing policies. Justice Scalia, writing for the majority, stated that this limitation was based upon the unique relationship between a school and its students.[90] This relationship was described as "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[91] Thus, the Court rejected the notion that schools exercised power over schoolchildren similar to mere "parental power" and extended to a level of supervision and control more in harmony with compulsory education laws.[92] The Court reasoned that this heightened level of control is necessary because teachers and school officials have the duty and power to enforce rules to ensure appropriate conduct of schoolchildren.[93]

The language of the Court seems to describe a custodial situation where a child's power to act is restrained to a level similar to that of an incarcerated or involuntarily committed individual. However, the Court, without explanation, flatly asserted that the degree of control exercised by schools does not "give rise to a constitutional 'duty to protect[.]'"[94] Therefore, the Court described the relationship to be custodial and restraining in a way that would not be constitutionally acceptable for "free adults," yet declined to correspondingly give students the affirmative protections afforded to adults who are restrained by the state.[95]

These majority-position courts manifest the view that the state must have absolute control over an individual's ability to provide essential needs in order to create a special relationship. Since parents retain the ability to provide for their children and students are not physically confined in schools, this level of control is absent, and no special relationship exists.[96] The minority position rejects this

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87 *See id.*

88 *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

89 *See id.* at 664-65.

90 *See id.* at 655.

91 *Id.*

92 *Id.*

93 *Vernonia*, 515 U.S. at 655.

94 *Id.*

95 *Id.* at 655; *see also* Peter Gallagher, *The Kid's Aren't Alright: Why Courts Should Impose a Constitutional Duty on Schools to Protect Students*, 8 GEO. J. ON POVERTY L. & POL'Y 377, 380-81 (2001) (arguing that the paradoxical reasoning behind cases like *Vernonia* is inconsistent with the view that there is no special relationship between students and schools).

96 *See* Faberman, *supra* note 68, at 130 (arguing that regardless of whether children are in the custody of schools, *DeShaney* contemplated control where the state was "so intertwined" with the individual as to assume responsibility for the welfare of that person).

analysis and points to different factors to conclude that schools have a special relationship with students.[97]

B. The Minority Position: the Focus on the Age of the Student

In *Doe ex rel. Magee v. Covington County School District ex rel. Board of Education*, the Fifth Circuit split from the majority of the circuits and decided there was a special relationship between the school and a student.[98] Thomas Keyes repeatedly signed a fourth grade student, Jane Doe, out of school during the school day, and sexually molested and raped her.[99] Jane Doe's school had an express sign out policy where only specifically identified individuals could check out students.[100] Keyes was not one of the identified individuals listed to check Jane Doe out of school.[101] However, Keyes was allowed to check Jane Doe out of school on multiple occasions undetected—once doing so using Jane's mother's name.[102] Jane Doe and her guardian sued the school pursuant to Section 1983, alleging that the school was in a special relationship with Jane and thus had a correlative duty not to act deliberately indifferent toward her safety.[103] The Fifth Circuit panel decision held that compulsory education laws do not necessarily create a special relationship between schools and students, but the specifics of that particular case created a special relationship with the student and school.[104]

The Fifth Circuit panel decision distinguished this case from other cases where there had been no special relationship for two reasons.[105] First, the court found that Jane's young age made her especially vulnerable, and created a duty to protect her from third party violence.[106] Second, the court found that the school's express check out policy had isolated Jane and affirmatively placed her in the hands of the Keyes.[107] The court found that the school's affirmative exercise of power in placing Jane in the hands of an unauthorized individual also created a duty to protect.[108] The court then determined that the combination of these two factors

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[97] *See* discussion *infra* Part II.B.

[98] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Bd. of Educ., 649 F.3d 335 (2011), *reh'g en banc ordered*, Doe *ex. rel.* Magee v. Covington Cnty. Sch. Dist. ex rel. Bd. of Educ., No. 09-60406, 2011 WL 4470009, at *1 (5th Cir. Sept. 26, 2011). The subsequent panel decision was vacated after being reheard *en banc*. Doe *ex. rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Bd. of Educ., 675 F.3d 849 (5th Cir. 2012). The *en banc* decision was decided over a vigorous dissent by Judge Weiner, the author of the panel opinion, and joined by Judge Dennis who staunchly argued that "the majority never addresses just what it is that Jane's parents conceivably could have done, or should have done, to safeguard her in this situation. *Magee*, 675 F.3d at 879.

[99] *Magee*, 649 F.3d at 341.

[100] *Id.* at 340.

[101] *Id.* at 340-41.

[102] *Id.* at 341.

[103] *Id.*

[104] *See id.* at 351.

[105] *Id.* at 345.

[106] *Id.*

[107] *Id.* at 347.

[108] *Id.*

distinguished this case from other student-school relationships where the court had not found a special relationship to exist.[109] On rehearing, the court vacated the panel decision, and instead embraced the majority position on special relationships between schools and students.[110]

The minority position evinced in the panel decision, however, has been accepted by other courts as well. Recall Montana Lance,[111] who committed suicide after being tormented by school bullies. In that case, the U.S. District Court for the Eastern District of Texas supported the reasoning in *Magee* in holding that a special relationship existed between Montana and his school.[112] Following the reasoning in *Magee,* the court found that Montana's young age and emotional disabilities were sufficient to find a special relationship between him and the school. The court additionally reasoned that, like in *Magee*, the school had taken affirmative actions that created a special relationship. The school's affirmative action of punishing Montana when he was bullied by other students "instilled in him the notion that the school, an institution he was taught to trust, would not protect him."[113] Like Jane in *Magee,* the affirmative exercise of the school's power further restricted Montana and obligated the school to protect him.[114]

The minority positions reject the analysis of the majority-*Middle Bucks* opinions that hold there is never a special relationship in the student-school context because schools lack formal legal custody over students. The *Magee* panel decision and subsequent district court decisions stand for the reasoning that special relationships exist when specific factors are present—such as the very young age of a student or when the school affirmatively places the child in the injurious situation.[115] Both the majority and minority positions fail to understand the true nature of student-school relationships leaving only one possibility: a new framework must be created that assesses the individual interaction between the school and student that determines whether a special relationship exists.

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[109] *Id.* at 348.

[110] Magee, 675 F.3d at 864 (asserting on rehearing that they were "compelled by precedent" to conclude the school did not have a constitutional duty). Like other courts embracing the majority position on special relationships between schools and students, the Court also argued that compulsory attendance was not enough to create custody and that focusing on the age of the student would create arbitrary line drawing. *Id.* at 860-61.

[111] *See* discussion *supra* Introduction.

[112] Estate of Lance v. Lewisville Indep. Sch. Dist., No. 4:11—CV—0032, 2011 WL 4100960 (E.D. Tex. Aug. 23, 2011).

[113] *Id.* at *7.

[114] *But see,* Estate of A.R. v. Grier, No. H—10—0553, 2011 WL 3813253 (S.D. Tex. Aug. 26, 2011) (reasoning that, unlike in *Magee*, the action taken by the school was not an affirmative exercise of power that further restricted the student). Here, the school expressly allowed a ten-year-old student with little swimming abilities to swim in a pool without adequately monitoring her. Similar to the court's decision in *Magee*, they focused on the nature of the action causing injury, but ultimately found the school had not acted in manner to make the student especially vulnerable. Based on this finding, the court held that no special relationship existed between the girl and the school. *Id.*

[115] *See Magee*, 649 F.3d 335, *reh'g en banc ordered*, No. 09-60406, 2011 WL 4470009 (Sept. 26, 5th Cir. 2011).

III. A NEW FRAMEWORK FOR ANALYZING "SPECIAL RELATIONSHIPS" AND SCHOOLS

A. The Problem with the Focus on Custody

While courts are split in deciding whether a "special relationship" exists between schools and students so as to subject schools to Section 1983 liability, this division merely reflects two sides of the same coin. Almost all of the courts, whether finding a "special relationship" or not, have based their analyses on whether a school has formal custody over a child. Many of these opinions have attempted to analogize public schooling to incarceration or institutionalization, extracting seemingly contrived rules based on the number of hours in a day an institution has control over a person, or the age of a child. These courts are asking the wrong questions and are coming up with answers that do not reflect the modern realities of school.

1. The Focus on Lack of Continuous Physical Custody

To start, when courts apply *DeShaney* to schools and find a lack of custody—and therefore the absence of a "special relationship"—they misunderstand the relationship between schools and students. Instead, these decisions focus on artificial distinctions between instances where a state does have custody, like in a prison, and schools. A common, artificial point of differentiation is duration: how long the institution is in control of a person.[116] Decisions like the *Middle Bucks* majority dismiss the notion that schools have custody of students because students are not confined around the clock.[117]

DeShaney contains no language to support the *Middle Bucks* line of reasoning that the duty to protect can only be caused by involuntary and continuous custody.[118] Though *DeShaney* specifically acknowledges that when a person is in the physical custody of the state this imposes the affirmative duty to protect, the Court did not limit special relationships to these instances.[119] Rather, the Court explained the necessity of imposing the special relationship on the state as arising from the "limitation which it has imposed on his freedom to act on his own behalf."[120] Therefore, the question is not whether the individual is in the physical custody of the state, but instead whether the state has *imposed* some kind of limitation on the individual's ability to act in his or her own interests.[121] Similarly, the Court's earlier opinions in *Estelle v. Gamble* and *Youngberg v. Romeo* illustrate

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[116] *See* D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992).

[117] *Id.*

[118] DeShaney v. Winnebago Cnty. Dep't of Soc.Servs., 489 U.S. 189 (1989).

[119] *See id.* at 200.

[120] *Id.*

[121] *Id.*

that the Court's primary concern when determining whether a special relationship exists is the nature of the restraints on the injured party, not the formal legal custody.[122] Nothing in these opinions suggests that compulsory school attendance cannot restrict personal liberty to the extent that creates a duty to protect.[123] Further, the *DeShaney* opinion itself openly states that other types of custody other than physical incarceration or institutionalization can create an affirmative duty.[124] The Court noted specifically that the placement of a child in foster care, a situation where around the clock confinement does not exists, could possibly create sufficient custody for an affirmative duty to arise, suggesting that restraints other than physical incarceration would suffice in forming a special relationship.[125]

This overly formalistic notion of custody in the *Middle Bucks* line of reasoning ignores the realities of the educational system in this country. The imposition of mandatory schooling laws separates children from their homes and takes away the ability of parents to act on the behalf of their children during this time.[126] Parents reasonably expect that during these hours in which they are effectively forced to be away from their children, schools will provide protection.[127] Children who are dependent on their parents for care and safety reasonably look to teachers and school staff to provide for them during the school day.[128] The role of schools as caretakers of children during the school day is not questioned and constitutes the logic behind the school system.[129] Essentially, schools expect parents to relinquish custody of children during school hours and parents consequently expect that the school will take on the responsibility of protecting their children during these hours when they cannot do so themselves.[130]

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[122] *See* discussion *supra* Part I.B; *see also* Huefner, *supra* note 30, at 1957 (asserting that "*Estelle v. Gamble* and *Youngberg v. Romeo* convey the impression that the Court's primary concern when it determines whether a custodial relationship exists is the vulnerability of the victim when the victim's care is entrusted to the state").

[123] *See* Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV C.R.-C.L. REV. 169, 174 (1995) (noting that although lower federal courts use "special relationship" and "custody" interchangeably, *DeShaney* did not explicitly confine the meaning of special relationship to full time detention).

[124] *DeShaney*, 489 U.S. at 201 n.9.

[125] *Id.*

[126] *See A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1331 (2007) (arguing that requiring students to attend school for "the majority of their waking day" is a restraint on personal liberty since individuals have many liberty interests aside from physical body restraint).

[127] *See* Cary Silverman, Commentary, *School Violence: Is it Time to Hold School Districts Responsible for Inadequate Safety Measures?*, 145 WEST'S EDUC. L. REP. 535, 550 (2000) (arguing that most individuals "instinctually believe" that schools officials have a special relationship with their students).

[128] *See* Michael Gilbert, Comment, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471, 499 (1993) (arguing that by rendering the student's guardian powerless to act on the child's behalf, the state assumes a corresponding duty).

[129] *See id.*

[130] *See id.*

Any other theory of school custody would suggest that although the state requires children to be in school, they are left without protection while there.[131]

Though school children are not forced into the custody of schools in the manner that prisoners are forced to be incarcerated, students are certainly not enrolled in public schools by choice.[132] All states have some form of mandatory attendance laws that require children up to a certain age to attend school.[133] These laws require students to be separated from their parents and placed in the confines of the school for a significant and specified number of hours each day.[134] As the dissent in *Middle Bucks* notes, the law recognizes that children may not have fully mature judgment and thus the law imposes restraints: children cannot vote, they are tried in juvenile courts, and parental consent must be acquired to enter into most contracts.[135] This lack of mature judgment, combined with the requirement that children attend school, should be taken into account when considering exactly the type of custodial control schools exercise over students.

2. The Focus on External Sources of Protection

On a much more basic level, these decisions completely fail to grasp the rationale behind *DeShaney's* special relationship test: the purpose of carving out an affirmative duty in certain special relationships was to protect those who were dependent on the state for protection of their basic needs.[136] Therefore, when determining whether schools have custody over children to the degree that creates an affirmative duty to protect them from constitutional deprivations, the focus should not be on the type or duration of confinement, but rather on whether conditions of enrollment restrain students so that they are dependent on schools for

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[131] *See id.; see also* Maldonado v. Josey, 975 F.2d 727, 735 (10th Cir. 1992) (Seymour, J., concurring) ("I cannot fathom who, other than a teacher or other school staff member, is capable of ensuring the 'reasonable safety' of schoolchildren during the school day and class periods.").

[132] Though the majority in *Middle Bucks*, and the majority in *Magee*, on rehearing argue that students have the option of enrolling in private school or home schooling, due to financial burdens these options are not viable for many students. Only 10% of elementary and secondary students are enrolled in private school and only about 2.9% are homeschooled. *See The Condition of Education,* NATIONAL CENTER FOR EDUCATIONAL STATISTICS (2011), *available at* http://nces.ed.gov/programs/coe/indicator_pri.asp; *see also* Alison Bethel, Note, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students From Harm by Other Students,* 2 PIERCE L. REV. 183, 201-02 (2004) (discussing the lack of choice most students face in choosing where to attend school when forced to do so through mandatory attendance laws).

[133] For example, Pennsylvania's compulsory attendance laws at issue in *Middle Bucks* generally require a child to be enrolled in school up to age seventeen. 24 Pa. Stat. Ann. §§ 13-1326-30, 13-1333, 13-1343 (West 1992).

[134] *See* discussion *supra* note 128; *see also* Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 821(1992) (arguing if a state's interest in education is strong enough to warrant compulsory school attendance, it follows that the state "has a moral duty to maintain student discipline and to protect children from violence that occurs while they are attending the very schools to which the state has bound them to attend.").

[135] D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.,972 F.2d 1364, 1380 (3d Cir. 1992).

[136] *See* DeShaney v. Winnegago Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

protection. Even if students are not imprisoned in schools, held against their will, or considered to be in the physical custody of the state, this does not mean the state has not imposed a limitation on their ability to act in their own interests. For example, many schools prohibit students from leaving campus grounds during the day, using cell phones, or contacting persons outside the school without express permission. Such restrictions significantly impair students' ability to act in their own interests or protect their own safety. Though these restraints are not as confining as physical incarceration, considering the immature judgment of young students and how much they depend on the protection of school officials, these restraints are significant.

Majority-position courts, like the Third Circuit in *Middle Bucks*, also distinguish public schooling from incarceration or institutionalization because children can easily communicate their needs to providers outside of the school.[137] However, these courts fail to consider the effect that trauma or abuse can have on children.[138] Child psychologists have recognized that young victims of sexual abuse are reluctant to speak of their abuse.[139] One study reports that less than ten percent of children who are sexually abused will report the abuse.[140] Similarly, student surveys have shown that a substantial number of bullied schoolchildren are reluctant to inform adults that they are being victimized.[141] Courts have already recognized that victimized children are unable to communicate their abuse experiences.[142] The Supreme Court observed in *Pennsylvania v. Ritchie* that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[143] Thus, while students have the ability to tell parents or family members about abuse, the actual likelihood of this happening is questionable.

In finding that students are unlike prisoners or institutionalized individuals because students are able to convey restraints on liberty to their parents, the

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

138 *See* William W. Watkinson, Jr., *Shades of DeShaney: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1263 (1995). Similarly, the majority opinion in *Magee* on rehearing argues that, "Jane's parents were free at any time to remove Jane from the school if they felt that her safety was being compromised." Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849, 861 (5th Cir. 2012). This statement misses the point that Jane's parents were unable to remove her from the dangerous situation at school because Jane was likely unable to communicate the abuse that was happening outside of their control.

139 *See* Tiffany Sharples, *Study: Most Child Abuse Goes Unreported,* TIME HEALTH, (Dec. 02, 2008), *available at* http://www.time.com/time/health/article/0,8599,1863650,00.html.

140 *Id.* ("As many as 15% are neglected, and up to 10% of girls and 5% of boys suffer severe sexual abuse; many more are victims of other sexual injury. Yet researchers say that as few as 1 in 10 of those instances of abuse are actually confirmed by social-service agencies—and that measuring the exact scope of the problem is nearly impossible.").

141 *See* Christine Oliver & Mano Candappa, *Bullying and the Politics of 'Telling'*, 33 OXFORD REV. OF EDUC. 21 (2007).

142 *See* Myers v. Morris, 810 F.2d 1437, 1459-60 (8th Cir. 1987) (noting the "unique reluctance" of children to disclose sexual abuse); *see also* Doe v. N.Y.C. Dep't of Soc. Servs.,709 F.2d 782, 785 (2d Cir. 1983) (including testimony from a doctor that the majority of abused children deny abuse).

143 Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

majority courts completely misconstrue the importance of the special relationship. The special relationship exception is intended to induce the state to protect those who are made vulnerable by restraints imposed by the state itself.[144] When states use compulsory schooling laws to mandate that children are to be separated from their primary caregivers during the school day, this limits the liberties of individuals who are *already* particularly vulnerable members of society.[145] The state is effectively exposing children to greater danger by separating them from the caregivers that provide them safety while simultaneously failing to provide any constitutional safeguards to make up for this increased defenselessness—all because parents purportedly have the ability to protect them.[146]

3. Inconsistency in Supreme Court Jurisprudence

Some commentators who disagree with the majority position have suggested that previous Supreme Court opinions addressing the student-school relationship have established that this relationship is custodial in nature and therefore the majority opinions are wrong in finding that there is no affirmative duty to protect.[147] Recall that in *Vernonia* the Supreme Court found the relationship between students and schools was necessarily "custodial and tutelary" in order to maintain discipline and civility in schools.[148] Courts have created a paradox—there has been a reduction in the constitutional rights of students under the reasoning that schools are in a unique position of custodial power to provide a safe learning environment, and yet there is a failure to impose a corresponding duty to affirmatively protect violations of their liberties.[149] This reasoning leaves school children with their constitutional rights restrained by the courts, but without any sort of protections to compensate for this loss of liberty.[150] Critics of this paradox

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[144] DeShaney v. Winnebago Dep't of Soc. Servs., 489 U.S.189, 199-200 (1989).

[145] *See* D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1379-80 (3d Cir. 1992).

[146] *Id.*

[147] *See, e.g.*, Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 227 (2006) ("Scalia attempted to forestall the natural conclusion that this responsibility would 'as a general matter' give rise to a constitutional duty to protect as contemplated by *DeShaney*, the caveat was limited to a subordinate clause, unsupported by any reference to other case law or factual findings, and utterly at odds with the rest of the Court's analysis[.]"); *see also* Colson, *supra* note 123, at 193 ("[T]he Supreme Court has explicitly acknowledged children's dependency on school officials for protection, and it has allowed schools to relax individual students' rights in order to protect the student body as a whole."); Harvard Law Review Association, *Due Process Clause—Custodial Relationships—Third Circuit Finds no Affirmative Duty of Care by School Officials to Their Students*, 106 HARV. L. REV. 1224, 1228 (1993) (noting that other decisions regarding the constitutional rights of students have relaxed these rights in order to allow school officials to promote safety).

[148] *See* discussion *supra*, Part II.A.

[149] *See* Gallagher, *supra*, note 95, at 382. The court observed that courts "herald the special student-teacher relationship and the importance of order and control in helping officials educate and control the nation's invaluable youth, but then refuse to recognize a 'special relationship' sufficient to impose a duty to protect that valuable asset."

[150] *See id.*

argue that courts are swift to find special needs exist in schools when seeking to limit constitutional rights, and should similarly act to expand constitutional rights by finding that a special relationship exists between schools and all students.[151]

4. The Focus on Bright-line Characteristics: the Age of the Student

On the other hand, in *Magee*, the Fifth Circuit panel decision took too much of a bright-line approach in finding that there was a special relationship. There, the court, by focusing on the age of the student, created too rigid of an application.[152] This created rules that act just as inflexibly as the *Middle Bucks* line of thinking, only allowing special relationships to exist where there is complete physical custody.[153] Following these rules can easily produce errors of over- and under-inclusiveness.[154] For example, a younger student like Jane who is unable to leave the school campus during the day and depends on the school to provide any protection from harm is considered in a special relationship with the school.[155] This may not be true of a sixteen-year-old student. However, in some circumstances, a sixteen-year-old student can be subject to the same restraints by her school as Jane. A sixteen-year-old student with learning disabilities may even be more restrained than younger students.[156]

By framing the issue as simply a question of whether a child meets a specific age or other characteristic, the unique relationship between students and schools is ignored. Notably absent from the *Magee* panel decision is any analysis of the student's perspective—whether the child reasonably felt that the school environment rendered her unable to protect herself from danger. Schools exist as support systems for students, and delineating strict lines as to when a special

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[151] *See id.*; *see also* Thomas J. Sullivan & Richard L. Bitter, Jr., *Abused Children, Schools, and the Affirmative Duty to Protect: How the* DeShaney *Decision Cast Children into a Constitutional Void*, 13 GEO. MASON U. C.R. L.J. 243, 261 (2003) ("Because schools must maintain an environment where learning can take place by decreasing students' constitutional rights, schools should also assume affirmative duties protecting those same students from private acts of violence.").

[152] Interestingly, in his dissent on rehearing, Judge Weiner addresses the issue of whether using age alone is an arbitrary factor stating, "[w]e need not decide, in this case—that more subjective factors, such as specific child's (Jane's) mental acuity or degree of social development, should be part of a special relationship inquiry." Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849, 880 (5th Cir. 2012) (Weiner, J. dissenting). However, the dissent notes that the Supreme Court has considered such subjective factors in holding that a state's duty to protect an involuntarily committed psychiatric patient extends to "such training as may be reasonable in light of [the patient's] liberty interests in safety and freedom from unreasonable restraints." *Id.* at 880 n. 17 (quoting Youngberg v. Romeo, 457 U.S. 307, 322 (1982)).

[153] D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch. 972 F.2d 1364, 1372 (3d Cir. 1992).

[154] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV 22, 58 (1922) ("[T]he rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.").

[155] *See* Doe *ex. rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Bd. of Educ., 649 F.3d 335, 359-63 (5th Cir. 2011) (King, J., dissenting) *reh'g en banc ordered*, Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Bd. Of Educ., 2011 WL 4470009, at *1 (5th Cir. Sept. 26, 2011).

[156] *See id.*

relationship exists diminishes the individual relationship a child forms with the school.[157] The *Middle Bucks* custody analysis automatically eliminates any Section 1983 case brought against a school alleging a special relationship between the school and its students.[158] At the same time, the *Magee* panel decision analysis requires such strict guidelines that most students will fail to meet them, leaving a large percentage of students unable to avail themselves of the special relationship exception.[159] A bright-line approach makes the decision maker's job easy in a difficult situation. However, this approach ignores the fact that the parties injured in these cases are the vulnerable youth of the country who need the support of these community systems the most.

B. A Balancing of Factors to Protect the Most Vulnerable Students

Rather than focusing on bright-line rules involving physical custody or a student's age, courts should adhere to *DeShaney* by looking to how the student is limited in providing his or her own constitutional freedoms during the day. This provides a workable balancing of factors that decreases errors of under- and over-inclusiveness. A balancing framework gives more discretion than rules and allows the trier of fact to take into account all relevant factors or the totality of the circumstances.[160] This way, the decision maker can adequately assess the constitutional deprivation at issue, matters of recourse, and other state interests. The educational reality of the situation—and the fact that each student alleging a constitutional deprivation encounters a different experience—reaches the forefront of this type of analysis. Further, this approach allows the decision maker to parallel the *Estelle-Youngberg* analysis,[161] which focuses on the vulnerability of the victim rather than physical custody.

By categorizing children based on age or the amount of hours a day they spend in school, decision makers fail to grasp that schools are unique support systems for students. Each child forms different relationships with teachers, school officials, and peers.[162] Some students may feel less able to protect their own basic needs at school, due to a disability or dependence upon other caretakers, and thus require more protection against violations of their constitutional liberties by school

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[157] *Id.*

[158] *See Middle Bucks*, 972 F.2d at 1372-73.

[159] *See Magee*, 649 F.3d at 359 (King, J., dissenting) ("According to the majority, the stars have aligned and created just the right set of circumstances that expose the School to constitutional liability.").

[160] *See* Sullivan, *supra* note 154, at 59.

[161] *See* discussion *supra* Part I.A.

[162] *See* Sondra H. Birch and Gary W. Ladd, *Interpersonal Relationships in the School Environment and Children's Early School Adjustment: The Role of Teachers and Peers, in* SOCIAL MOTIVATION: UNDERSTANDING CHILDREN'S SCHOOL ADJUSTMENT, 199 (Cambridge University Press, 1996). This study shows that a variety of factors affect a child's adjustment in school including relationships with parents, academic performance, age, and self-perception.

officials.[163] Moreover, many children come to expect that schools are protected environments.[164] Experiencing a form of abuse at school may leave students helpless and prevent them from seeking assistance on their own.[165] Decision makers should consider the nature of the injurious action—where, when, and how it occurred—and whether the student perceived teachers or schools officials as being the most able to prevent the harm. These realities of the educational system can be taken into consideration under the balancing approach suggested, but are overlooked with blanketed categorizations.

As with any methodological change to the way courts analyze a legal standard, there are criticisms of adopting a balancing approach. In implementing a balancing approach, there exists the possibility of increased arbitrariness and biased decision-making.[166] Rules, on the other hand, make for consistent judgments.[167] Although it is true that a bright-line approach would be easier for decision makers and school officials to observe, the counterargument to this is that rules are also arbitrary and they force decision makers to treat substantively similar cases as somehow different.[168] For example, if there was a rule that only children under the age of ten can be in a special relationship with schools, a child who suffers a constitutional deprivation when she is ten years and one day old will have no recourse, even though she is just as restrained as she was two days earlier. Given that the injuries at hand involve vulnerable children and occur in the institutions that are supposed to be providing them a clearer and brighter future, the need to develop a flexible approach is evident. A standard-based balancing approach affords the opportunity to place more weight on the underlying principle. This is the more appropriate approach, since each student-school relationship is nuanced and different in many ways.

C. Factors that Should be Balanced in Determining Whether a Special Relationship

Instead of bright-line rules, a balancing approach should be used. Under this approach, the parties would have to point to factors that prove the basis of why there is or is not a special relationship concerning the specific student injured. Given that each student possesses a different relationship with the school, these

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[163] *See* Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor: Bullying and Students with Disabilities*, 21 INT'L J. SPECIAL EDUC. 11, 20-21 (2006) (providing an overview of research finding that students with disabilities experience more bullying than their non-disabled peers).

[164] *See* Gallagher, *supra* note 94, at 387.

[165] *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (Jodi Lipson ed., 1993). The survey was created to provide insight into the problem of sexual harassment in schools. *Id.* Additionally, it measured the impact of abuse in schools, finding substantial emotional and educational impacts. *Id.* Children who suffered abuse were more likely to not want to attend school and feel self-conscious and less confident in themselves. *Id.*

[166] *See* Sullivan, *supra* note 154, at 61.

[167] *Id.*

[168] *Id.*

factors should be given different weight depending on the particular circumstances.[169] Though each incident of violence is unique, three factors should be considered by decision makers and courts in determining whether a special relationship exists between the school and student: (1) the physical and mental capabilities of the student; (2) the amount of notice the school had regarding the particular danger; (3) whether the school affirmatively placed the student in a dangerous setting.

1. The Physical and Mental Capabilities of the Student

When determining whether students are limited in providing their own protection, their physical and mental capabilities give the greatest insight into how restrained they are during the school day.[170] Children who do not have high functioning mental capacity or are physically unable to protect themselves from injury or violence will necessarily be more vulnerable and rely on protection from schools more than other children. These are the students who heavily rely on parent or guardians to take care of them outside of school and thus expect the same sort of protection from school officials during the school day.[171] Exploring the physical and mental capabilities of students will also allow the court to understand the student-school relationship from students' perspectives, or rather, students' perceptions of their own capabilities to protect themselves during school. Some students may believe they are unable to protect themselves from violent acts or simply come to expect that school officials, who are often in charge of discipline and security measures, are the ones responsible for providing for their safety during the school day. These legitimate expectations and perceptions of children toward school violence should be considered when determining the student's restrained liberty.

Unlike the majority reasoning in the *Magee* panel decision, age should not be a determinative factor in analyzing the physical and mental capabilities of the student.[172] Even older children are restrained in their abilities to protect themselves during the school day.[173] For example, in *Middle Bucks*, even though the student-plaintiff was not of a particularly young and vulnerable age, she could assert that her physical and mental capabilities—her learning disabilities and fear of disobeying her teacher—made her more in need of the school's protection, thus

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169 *See* Birch, *supra* note 162.

170 *See* Colson, *supra* note 123, at 192 (noting with young children the "coercive nature of the school environment and also the increasing role that schools play in caring for children").

171 *See* Huefner, *supra* note 30, at 1966.

172 Doe *ex. rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Bd. of Educ., 649 F.3d 335 (2011), *reh'g en banc ordered*, 2011 WL 4470009 (5th Cir. 2011).

173 *See* Gallagher, *supra* note 94, at 386 (arguing that the reasoning for imposing the duty is the same "regardless of the students' age" because during school hours "children are entrusted to the care of school officials for their protection because the school situation renders them inherently helpless to protect themselves from certain harms").

creating a special relationship.[174] After the decision maker takes into consideration these factors, the burden would shift to the school to proffer evidence showing that the student's physical and mental capabilities did not restrain her own abilities and that she was able to protect her own constitutional liberties.[175] Such might be the case if the student openly communicated her needs to the teacher or had the clear mental capability to address the alleged attacks.

2. The Amount of Notice the School had of the Danger

Often a school has notice that an unsafe situation exists or that a student is unable to protect against danger.[176] The amount of notice the school has with regard a student's ability to protect himself and notice concerning the injurious danger reflect whether a special relationship exists. When students communicate that harm is occurring or the school knows the potential for danger exists, this alters the perceptions of students as to the capability of the school to protect them from the danger. If students know that the school is aware of a danger, they will reasonably expect authority figures at school to take measures to stop the injury. A child's age and capacities can put a school on notice as to whether he is particularly restrained in his ability to provide for his own needs while at school. Additionally, a school may know that violence is prevalent in the school or students and other third parties pose a threat to their peers.[177] In these cases, schools should be in a special relationship with students since they are on notice that during the school day particular conditions exist rendering these students more vulnerable and dependent on the school for protection.[178]

However, there are also circumstances where a school may be unaware that a student faces a particular danger, and thus the school cannot be said to be restraining the student in a way that creates a special relationship. When considering whether a special relationship exists, the court should examine what information school officials knew regarding the student's vulnerabilities, such as whether the student's parents warned the school previously of any dangers to which

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[174] *See* D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1370 (3d Cir. 1992).

[175] Such a burden-shifting framework that places the initial burden on the student to prove the need for additional protection would insulate the school from frivolous lawsuits.

[176] *See e.g., Middle Bucks*, 972 F.2d at 1367 (where the school knew the plaintiff student had complained of sexual abuse previously); Patel v. Kent Sch. Dist., 684 F.3d 965 (9th Cir. 2011) (holding that the school knew the student acted with inappropriate sexual behavior); Estate of Lance v. Lewisville Indep. Sch. Dist., No. 4:11—CV—00032, 2011 WL 4100960 (E.D. Tex. Aug. 23, 2011) (noting that the school knew the student expressed suicidal thoughts).

[177] *See* Landra Ewing, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence*, 36 BRANDEIS J. FAM. L. 627, 639 (1997-1998) (discussing the irresponsibility of schools that fail to adequately address and prevent violent attacks); *see also* Johnson v. Dall. Indep. Sch. Dist., 38 F.3d 198, 204 (5th Cir. 1994) (Goldberg, J., dissenting) (noting the school district's "apparent ineptitude and fecklessness" in ensuring the safety of students and that plaintiffs should have been able to bring forth evidence of the dangerousness of the school).

[178] *See* Ewing, *supra* note 175.

their child was predisposed, or if similarly injurious incidents occurred in the past. This information demonstrates whether the school was on notice that certain students are more vulnerable and in need of protection than others, regardless of age or any other factors.[179] On the other hand, if the school is unaware of a student's particular vulnerabilities, has numerous safety measures in place to guard against the danger in question, or has never been aware of any similar injuries, the decision maker should conclude that the school was not on notice. This is a fact-sensitive inquiry that endeavors to find out the nature of the injury involved and the relationship the student has with the school. [180]

3. Whether the School Affirmatively Placed the Student in a Dangerous Setting

In certain circumstances, schools are more than just aware of a dangerous situation—they actively place the child in a dangerous situation.[181] Such was the case in *Magee*, where the court found that, by violating its own sign out policy and allowing Jane to be signed out by an unauthorized adult, the school had affirmatively placed her in a dangerous situation.[182] This factor is important because the *DeShaney* Court specifically noted that there was no special relationship where a social worker passively allowed the child to remain in the custody of his father.[183] However, the Court noted that had the social worker actively placed the child into a dangerous situation, there might be a duty to protect the child from private violence.[184]

When a school actively places a student in a dangerous situation, it is clear that this action restrains the child's ability to provide for his or her own basic needs.[185] For example, if the school knows a child faces tormenting from a particular bully and places the student unsupervised in the same classroom as this bully, this action affirmatively places the child in a dangerous situation, thus creating a special relationship.[186] By affirmatively placing a student in a

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[179] *See* Huefner, *supra* note 30, at 1963.

[180] It is important to note that this notice requirement resembles the deliberate indifference standard that a plaintiff will have to meet when bringing a § 1983 claim, yet it is pointedly different. The majority approach only considers whether the school was on notice of and acted deliberately indifferent towards a danger only *after* there is determined to be a formal legal custody over the individual. Under this suggested framework, the amount of notice the state has of the danger is considered in determining *whether* a special relationship and thus, legal custody, exists. This allows the decision maker to truly understand if the individual's ability to protect him or herself was restrained. *See* Huefner, *supra* note 30, at 1962 (noting that courts now only take into account the state's role in increasing the risk of harm after it is determined that formal legal custody exists).

[181] *See* Doe *ex. rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Bd. of Educ., 649 F.3d 335, 347 (2011), *reh'g en banc ordered*, 2011 WL 4470009 (5th Cir. 2011).

[182] *See Magee*, 649 F.3d at 347; *see* discussion *infra* Part II.B.

[183] DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189 (1989).

[184] *Id.*

[185] *See Magee*, 649 F.3d at 347.

[186] *See* Bethel, *supra* note 132, at 199 (discussing bullying); *see also* Mary A. Lentz, *Public School Codes of Conduct; Discipline of Threats and Bullying*, LENTZ SCHOOL SECURITY § 4:8 (2011).

dangerous situation, the school plainly strips him of the ability to protect himself,[187] substantially restraining his liberty.[188] Undoubtedly, the line between what constitutes action versus inaction is a difficult one to establish.[189] However, determining whether the school has affirmatively caused the injury to the student should not be the defining factor when uncovering whether a special relationship exists.[190] Rather, this factor allows the decision maker to understand the nature of the student's vulnerability, and exactly how the student became unable to protect his or her own interests at school.

Based on a balancing of the criteria above, there is a greater likelihood that a special relationship between a school and its student exists. Allowing for a special relationship to exist between students and schools could create more opportunities for litigation against schools.[191] However, finding a special relationship between schools and students will not create countless suits "anytime a child skinned his knee on the playground or was beat-up by the school bully."[192] In order to sustain a Section 1983 cause of action, the student must show that the school was deliberately indifferent toward the injury in question.[193] Mere negligence will not be enough to establish liability.[194] The student must show that the school knew the injury was occurring and did nothing to stop it.[195] This is a high standard that puts

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[187] *See* Estate of Lance v. Lewisville Indep. Sch. Dist., No. 4:11—CV—00032, 2011 WL 4100960, *7 (E.D. Tex. Aug. 23, 2011) (discussing how the affirmative exercise of the state's power further disabled the student's ability to protect himself).

[188] *See* Thomas A. Eaton & Michael L. Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath*, 66 WASH. L. REV. 107, 128 (1991) (arguing that constitutional tort liability for government inaction must rest partly on the degree of state involvement in producing the plaintiff's plight).

[189] *See* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Here Judge Posner articulated that the Constitution is a charter of negative liberties. *Id.* However, he conceded "we do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is." *Id.*

[190] *See* Johnson v. Dall. Indep. Sch. Dist., 38 F.3d 198, 207 (5th Cir. 1994) (Goldberg, J., dissenting) (noting that some courts have implied that the action/inaction distinction is crucial but if this logic were followed "then a school that was deliberately indifferent to the risk of fire would be immune to suits for fire related injuries as long as the principal did not strike the match").

[191] *See* Faberman, *supra* note 67, at 116.

[192] Dorothy J. v. Little Rock Sch. Dist., 94 F.Supp. 1405, 1414 (E.D. Ark. 1992); *see* discussion *infra* Part II.A.

[193] *See* Huefner, *supra* note 30, at 1960.

[194] *See id.* The deliberate indifference standard is often difficult for a plaintiff to overcome and permits courts to separate omissions that "amount to an intentional choice" from those that are merely "unintentionally negligent oversight[s]." Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 756 (5th Cir.1993). For example, in Gonzalez, the Fifth Circuit found that a school district's board of trustees was immune from liability after a teacher molested a student. *Id.* The board was informed of two prior incidents of the teacher's inappropriate behavior, and only transferred the teacher. *Id.* at 762. After the transfer, the teacher molested another student. Even on these tragic facts, the court found that the board of trustees had not acted with deliberate indifference in failing to dismiss the teacher after the first two incidents. Although the board's decision to transfer was negligent and inconsistent with the district's handling of other cases of suspected sexual abuse, the board had not turned "a blind eye" to the complaints, but had ordered an investigation and followed the recommendation based on that investigation. *Id.* at 749.

[195] *See* Huefner, *supra* note 30, at 1960.

a great burden on the student.[196] The possibility of defending against claims from students would encourage schools to take into consideration the safety of students who are physically and mentally vulnerable and to implement safety measures protecting against constitutional deprivations.[197] Many schools have already responded to increasing violence by implementing strict security features such as installing metal detectors and enacting zero tolerance policies under which students are suspended or expelled at high rates.[198] In turn, this could incite schools to enact broader policies that deter abuse against all students. Schools would be forced to identify situations where students are rendered especially vulnerable to constitutional deprivations and work to prevent against potential abuses, making the school environment safer overall. Although the costs of potential litigation might be high, this potential cost must be weighed against the costs of continuing with a system that allows school officials to act with deliberate indifference toward students' injuries, without facing any recourse.[199] School systems are at the center of our society and successful schools should be able to protect students from these dangers.[200]

CONCLUSION

Students in schools across the country are increasingly becoming the targets of violent acts from their peers and other third parties. In many cases, the deliberate indifference of schools to injurious acts causes horrifically tragic results. In response to these acts, a majority of courts have found that because the state does not exercise twenty-four hour control over students, they are unlike prisoners and institutionalized individuals, and schools have no affirmative duty to protect against violations of their constitutional liberties. A small minority of courts has found that special relationships can exist between students and schools, thus allowing students recourse against schools for violations of their liberties. However, these courts have focused on a rigid set of factors, creating an unworkable rule that misses the point behind special relationship doctrine and will provide little recourse to some of the most vulnerable students. Both these

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[196] *See id.*; *see also* Watkinson *supra* note 138, at 1269 (discussing the unjustified fears of massive § 1983 liability).

[197] Under a successful § 1983 claim students may receive money damages for constitutional deprivations. Given the minimal monetary resources available to most schools, the threat of these claims would serve as encouragement to guard students from constitutional deprivations.

[198] *See* Russell Skiba & Reece Peterson, *School Discipline at a Crossroads: From Zero Tolerance to Early Response*, 66 EXCEPTIONAL CHILDREN 335 (2000).

[199] *See* Huefner, *supra* note 30, at 1971. *See also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

[200] NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, *available at* http://nces.ed.gov/programs/crimeindicators/crimeindicators2011/intro.asp ("Any instance of crime or violence at school not only affects the individuals involved but also may disrupt the educational process and affect bystanders, the school itself, and the surrounding community.").

positions focus on the nature of the custody and ignore the complex realities of school-student relationships.

If courts want to prevent the deliberate indifference of school officials, an approach that looks to the totality of circumstances and students' actual perceptions should be adopted. Adopting such an approach will allow the students most exposed to danger—those who depend on schools to protect them during school hours—to have protection from constitutional violations. Additionally, this approach will allow schools to achieve safer environments, without creating the burden of potential litigation from each and every student for any injury. The purpose of a Section 1983 claim is to redress constitutional violations committed at the hands of stand officials. Dismissing a case as "tragic" and denying that there is any affirmative duty under the Constitution denies injured children any recourse. If a child's ability to care for his or her basic needs is so restrained, the schools should be put in a special relationship with students, giving rise to an affirmative duty to protect their students' constitutional rights.