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Rebecca Aviel
University of Denver, rebecca.aviel@du.edu

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COMPULSORY EDUCATION AND SUBSTANTIVE DUE PROCESS: ASSERTING STUDENT RIGHTS TO A SAFE AND HEALTHY SCHOOL FACILITY

by
Rebecca Aviel[*]

This Article asserts that students have a substantive due process right to a public school facility that meets minimum health and safety requirements. Students who cannot afford private school are effectively required by law to spend six to eight hours a day in whatever facilities their state education system provides. Constitutionally protected rights to personal security and bodily integrity are implicated when these facilities directly threaten students' immediate health and safety—for example, locked or non-functional bathrooms, unsafe drinking water, or classroom walls covered with asthma-inducing mold. Compulsory education under these conditions violates the substantive limits on state action set by the Due Process Clause.

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I. INTRODUCTION

On May 17, 2000, a state-wide class action suit was filed in Superior Court of the State of California on behalf of children attending public schools that "lack the bare essentials required of a free and common school education that the majority of students throughout the State enjoy: trained teachers, necessary educational supplies, classrooms, even seats in classrooms, and facilities that meet basic health and safety standards."[1]

The complaint, in addition to charging the state with unequal provision of educational resources such as books and certified teachers, alleged conditions that directly threaten students' health and safety. At Luther Burbank Middle School in San Francisco,

> [t]wo of the three bathrooms…are locked all day, every day. The third bathroom is locked during lunch and other periods during the school day, so there are times during school when no bathroom at all is available for students to use. Students have urinated or defecated on themselves at school because they could not get into an unlocked bathroom. . . . When the bathrooms are not locked, they lack toilet paper, soap, and paper towels, and the toilets frequently are clogged and overflowing.[2]

At Balboa High School, with a student population of approximately 1,200 students, the girls have access to only one bathroom, with four stalls. During the 1999−2000 school year, a soiled feminine napkin and a moldy ice cream bar remained on the floor of one of the stalls for the entire school year.[3] At Fremont High School, a campus with 2,000 students, the girls have access to only two unlocked bathrooms, with a total of six stalls. At Wendell Helms Middle School in San Pablo, the ceiling tiles are cracked and falling off, causing students to worry that they will be hit with falling tiles.[4] At Gulf Avenue Elementary School in Wilmington, the school addresses its janitorial duties by requiring students to pick up trash around the school during their instructional time. When it is their class' turn to clean the school, students spend five minutes of their reading time "picking up such items as beer bottles, used condoms, broken glass, cigarette butts, and bullets."[5] At Mark Keppel

[1] First Amended Complaint for Injunctive and Declaratory Relief at 9, Williams, v. State of California, No. 312236 (Cal. Super. Ct. August 14, 2000).

[2] *Id.* at 25.

[3] *Id.* at 26.

[4] *Id.* at 27–28.

[5] *Id.* at 43.

High School in Alhambra, in a classroom fashioned from a corrugated metal shed, temperatures have reached as high as 120 degrees.[6] The water at Bryant Elementary School in San Francisco is unsafe for drinking.[7] At Garfield Elementary School, the classrooms and school grounds are infested with rats and mice and strewn with rodent feces. There is mold on classroom walls so severe that students and teachers have become sick.[8]

The *Williams* plaintiffs asserted that subjecting some children—predominantly African-American, Latino, and Pacific Islander children from low-income families[9]—to these conditions, while others are educated in safe and healthy facilities, violates the equal protection guarantee.[10] In this Article, I argue that subjecting children to dangerous, unsanitary conditions at school also constitutes a free-standing substantive due process violation, regardless of what is provided to other children in other schools. Substantive due process protects individuals from deprivations of certain fundamental liberty interests regardless of the fairness or correctness of the procedures used to effect the deprivation.[11] The first step in the substantive due process analysis, then, is to identify the fundamental liberty interest of which a plaintiff has been deprived. If a liberty interest exists, courts then consider whether the state has infringed upon the interest in violation of due process.[12]

Articulating the liberty interest at stake when public school facilities threaten student health is admittedly no simple matter. From a perspective of child welfare and educational policy, the problem with schools devoid of bathrooms or heat, plagued with used condoms or asthma-inducing mold, is rather obvious. Yet as distressing as the conditions being alleged in this case are, one might be skeptical of the effectiveness of framing the wrong as the deprivation of a liberty interest; it would read, perhaps, as a freedom from spending six hours a day in a building with no heat or functioning bathrooms. It seems at first somewhat clumsy and transparent; the plaintiffs clearly want

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[6] *Id.* at 34.

[7] *Id.* at 27.

[8] *Id.* at 28.

[9] *Id.* at 10 (The schools at which these manifestly substandard conditions exist are overwhelmingly populated by low-income and nonwhite students and students who are still learning the English language. In 37 of 46 schools described in this complaint, more than half the student body is eligible for free or reduced-price meals at school. "Nearly all the Plaintiffs in this action are black, Latino or Latina, or Asian Pacific American, and in 42 of the 46 schools described here, nonwhite students constitute far more than half the student body. In 30 of the 46 schools, more than 30 percent of the students are still learning the English language.").

[10] In 2004 the Williams plaintiffs entered into a settlement agreement with the state that allocated money for educational materials and facility repair at the state's lowest performing schools, established a complaint procedure with a 30-day response deadline, required the collection and presentation of school quality data, and held school districts to federal teacher quality standards. Nanette Asimov, *Landmark Deal Reached for State's Poor Schools: 1 Million Low Income Students to Get Equal Access to Good Facilities and Textbooks*, S.F. CHRON., Aug. 11, 2004, at A1.

[11] *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

[12] *See* Washington v. Glucksberg, 521 U.S. 702, 719 (1996).

something more than they want a *freedom* from something. However, the health and safety of school facilities do take on a constitutional dimension once we recognize that children are *required* to be there, not merely by social and economic realities, but by law. Compulsory education laws in every state require children to attend school.[13] For the many children whose families cannot afford to send them to private school, complying with the law necessarily means attending public school. When a state provides only dangerous, unhealthy schools to fulfill this legislative requirement, the state intrudes upon constitutionally protected rights to personal security[14] and bodily integrity.[15] Compulsory education under these conditions violates the substantive limits on state action set by the Due Process Clause.

Whereas the equal protection claim is obviously a relative one, in its most perfect form doing no more than to afford each public school student whatever it is that the most fortunate one has access to, the due process claim, if successful, would preclude states from complying with the equal protection requirement by equalizing ever downwards. It would constitutionalize each child's right to a minimally safe and healthy facility in which to spend the school day.

The power of this notion is also its vulnerability: such a claim is susceptible to being classed as a request that the government act, rather than a request that the government refrain from acting. A plaintiff cast as a seeker of constitutionally-imposed affirmative state involvement in her health and welfare labors against a heavy burden. Courts have traditionally interpreted the Constitution as a "charter of negative liberties," setting forth restrictions on government power rather than imposing even the most minimal affirmative duties.[16] Under this view, the government satisfies its constitutional obligations by refraining from depriving individuals of life, liberty, and property without due process of law; it has no constitutional duty to protect individuals from deprivations caused by third parties, nor is it required to provide individuals with the means to protect themselves from such deprivations. Seen from this view, the purpose of the Due Process Clause is "to protect the people from the State, not to ensure that the State protected them from each other."[17] As articulated by Justice Rehnquist, "our cases have recognized 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."[18]

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[13] *See* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 1 (4th ed. 2002). *See also, e.g.*, TEX. EDUC. CODE ANN. §§ 25.082, 25.083 (Vernon 2005); 24 PA. STAT. ANN. §§ 13-1326 to 13-1330 (West 1992); 105 ILL. COMP. STAT. 5/26-1 to 2 (1993); N.M. STAT. ANN. § 22-12-1 (West Supp. 2005).

[14] *See* Youngberg v. Romeo, 457 U.S. 307 (1982).

[15] *See* Rochin v. California, 342 U.S. 165, 172 (1952).

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

[17] DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 196 (1989).

[18] *Id.*

In spite of the fervor with which courts have pronounced this lack of constitutional duty, they have also delineated certain circumstances in which the Constitution does impose upon the state affirmative duties of care and protection. These duties arise when the state has taken action to constrain an individual's liberty to the extent that she cannot care for herself. In *Estelle v. Gamble*, [19] the Court found that the Eighth Amendment prohibits states from incarcerating individuals and then failing to provide them with adequate medical care. The Court reasoned that because the prisoner is unable "by reason of the deprivation of his liberty" to care for himself, it is only "just" that the State be required to care for him.[20] In *Youngberg v. Romeo*, the court found that the substantive component of the Fourteenth Amendment's Due Process Clause requires states to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others.[21]

Subsequently, in *DeShaney v. Winnebago County Department of Social Services*, the court clarified the rationale behind these two cases, stating that

> when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, 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.[22]

The *DeShaney* court explained that due process protections are triggered by a 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."[23]

The Supreme Court has never decided whether compulsory education constitutes the sort of restriction on liberty that gives rise to affirmative duties under the Due Process Clause. Although a number of circuit courts have held that compulsory education does *not* constitute the sort of restriction on liberty contemplated in *DeShaney*, these decisions, like *DeShaney* itself, all concern a state's responsibility to protect individuals from acts of third parties, rather than the state itself.

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[19] 429 U.S. 97 (1976).

[20] *Id.* at 104 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

[21] 457 U.S. 307, 318 (1982).

[22] 489 U.S. at 200.

[23] *Id.*

Like many commentators, I believe that *DeShaney* was wrongly decided.[24] I also believe that the constitutional error has been compounded by circuit courts applying *DeShaney* to subsequent cases—in school settings and otherwise—that are distinguishable on their facts and more appropriately categorized under one of the *DeShaney* exceptions, to be explored further in this Article. However, my primary goal in this Article is to argue that neither *DeShaney* nor its progeny foreclose relief for plaintiffs involved in school improvement litigation in either state or federal courts.

To begin with, the types of harms alleged in *Williams* and similar cases complicate the neat division between affirmative and negative obligations invoked by federal courts. The distinction between affirmative and negative duties loses its grip when the harm is caused exclusively by the state's combination of action and inaction, and there is no third party to attenuate the link. Such a claim should be evaluated according to the standard substantive due process inquiry described above.

Although the distinction between state and private action can be critiqued through the lens of policy arguments, rights theory, comparative constitutional law, and a number of other ways, it is one that our constitutional jurisprudence has entrenched (or enshrined, depending on one's perspective). While a custodial relationship may be the barometer by which we measure a state's Fourteenth Amendment obligation to prevent harm caused by private parties, no such custody is required to trigger a state's responsibility to ensure that its own actions do not threaten bodily integrity. *DeShaney* and its progeny are developing the standard for state obligations in the face of private harm, as opposed to state obligations in the face of its own harmful action and inaction. Thus, nothing in *DeShaney* requires a plaintiff to show that the restrictions inherent in compulsory education are identical to those found in prisons or mental institutions in order to establish a substantive due process right to school facilities—state-created, state-monitored, state-managed—that meet some minimal level of safety and sanitation. Such a claim is consistent with the principle set forth in *Youngberg*: a state, having undertaken to restrict an individual's liberty, has a corresponding responsibility to provide those minimal services necessary to protect bodily integrity.

[24] *See, e.g.*, Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514 (1989) (arguing that "Chief Justice Rehnquist's opinion for the majority in *DeShaney* is an abomination. It is illogical and extremely mechanistic; it also abuses history, fails to consider practical impact, and demonstrates moral insensitivity. Not only that, it is wrong."); 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. CIV. RTS. L.J. 243, 243 (2003) (arguing that *DeShaney* rests on "legal voodoo" and offers "rough justice" to abused children); Kristen L. Davenport, Note, *Due Process—Claims of Abused Children Against State Protective Agencies—The State's Responsibility After* DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), 19 FLA. ST. U. L. REV. 243, 253 (1991) (arguing that the *DeShaney* decision fails to hold states accountable for their ever-increasing roles in the teaching and nurturing of children).

Part II of this Article argues that plaintiffs involved in school improvement litigation can make out a substantive due process claim that the state may not compel them to attend unsafe and unsanitary school facilities. Part III argues that such a claim is not foreclosed by precedent, even if cast as an attempt to impose affirmative duties on states; *Estelle*, *Youngberg*, and *DeShaney* indicate that the Constitution does impose affirmative duties upon states in some circumstances. Part IV asserts that imposing obligations on states to provide safe and healthy school facilities is consistent with this framework. I first argue that *DeShaney* and its progeny set standards for state obligations in the face of harm caused by private parties. I then argue that, under section 1983, harms suffered by plaintiffs are caused by *state* actors. *DeShaney* and its progeny are therefore inapplicable to a claim such as the one sketched out above, where there is no harmful third party action, but rather harm caused by the state's restriction on liberty and subsequent neglect. Even if *DeShaney* did apply, compulsory education is sufficiently custodial to trigger affirmative constitutional duties according to that standard. Supreme Court cases have invoked again and again the unique custodial nature of the school environment, a conclusion that is borne out by a functional analysis of the school setting. Part V suggests that while a plaintiff claiming a due process right to safe and healthy school facilities could survive the current Court's conceptual distinction between affirmative and negative liberties, this distinction is artificial and illusory.

II. PLAINTIFFS CAN MAKE OUT A SUBSTANTIVE DUE PROCESS CLAIM THAT STATES MUST NOT COMPEL THEM TO ATTEND UNSAFE SCHOOL FACILITIES

The claim that the Due Process Clause prohibits the state from confining students to dangerous, unhealthy school facilities finds support in a line of cases invalidating government action regardless of the correctness of the procedures followed by the state.[25] Under this method of constitutional analysis, courts first ask whether the claimed liberty interest is constitutionally cognizable, and if so, proceed to balance the plaintiff's liberty interest against the state's interest in the restriction.[26] Over a range of contexts, these cases continually reaffirm that the guarantee of due process found in the Fifth and Fourteenth Amendments includes a substantive component, which forbids the government to infringe upon fundamental liberty interests at all unless the restriction is narrowly tailored to serve a compelling state interest.[27]

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[25] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579 (2003) (invalidating state sodomy statute); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (invalidating state prohibition on distribution of contraception to unmarried persons); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating state prohibition on use of contraception and counseling, aiding, or abetting use of contraception); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating state statute prohibiting the teaching of foreign languages to children who have not passed the eighth grade).

[26] Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 279 (1990).

[27] Reno v. Flores, 507 U.S. 292, 302 (1993).

In substantive due process analysis, the case will often be won or lost in the framing of the liberty interest. The Court has indicated that substantive due process analysis "must begin with a careful description of the asserted right."[28] While this recurrent admonition has often been used to deny the existence of a fundamental right, the Court recently indicated in *Lawrence v. Texas* that constitutional error occurs in the other direction as well. In overturning *Bowers v. Hardwick*,[29] the *Lawrence* Court announced that the *Bowers* Court had articulated the claimed liberty interest at an inappropriate level of specificity, and therefore "misapprehended the claim of liberty there presented to it."[30] The lesson has broad application: any liberty interest can be articulated so narrowly as to render absurd the claim that it is protected by the Constitution; the *Lawrence* opinion clearly instructs that to do so is erroneous. To phrase the liberty interest at stake for the *Williams* plaintiffs as a constitutional right to bathrooms or ventilation is analogous to the error in *Bowers*, in which the Court preordained the outcome by framing the right in question as "a fundamental right to engage in homosexual sodomy."[31] The *Lawrence* Court corrected the mistake by articulating the right at a higher level of abstraction, something akin to a right to engage in private consensual intimate conduct without government interference.[32] In this case, plaintiffs seek to vindicate rights to bodily integrity and personal security, liberty interests that have a long and respectable pedigree in constitutional jurisprudence.[33] These rights are compromised by school facilities strewn with decomposing rodent corpses and asthma-inducing toxic mold. Some of the conditions found in public school facilities inflict humiliation as well as physical harm. A middle school student who urinates or defecates upon himself because the school he attends in compliance with state law has no unlocked and functioning bathrooms suffers an assault on personal dignity that the state is not permitted to inflict.[34]

A state that has been characterized by the Court as intruding upon a fundamental liberty interest is unlikely to successfully articulate a compelling government interest that justifies the deprivation. In *Lawrence*, after characterizing the right at issue, the Court assessed the state's interest in a single sentence, asserting summarily that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[35] Likewise, the state cannot assert any legitimate interest in forcing children from low income families to spend six to eight

[28] *Id.* at 302.

[29] 478 U.S. 186 (1986).

[30] 539 U.S. 558, 567 (2003).

[31] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[32] Lawrence v. Texas, 539 U.S. 558, 662 (2003).

[33] *See* Youngberg v. Romeo, 457 U.S. 307, 315 (1982) ("[T]his Court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause.").

[34] There are particularly heightened dignitary interests associated with excretory functions; *see, e.g.*, Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968) ("In our culture the excretory functions are shielded by more or less absolute privacy.").

[35] *Lawrence,* 539 U.S. at 578.

hours a day in facilities with no bathrooms, inadequate heating and ventilation, or any of the myriad health and safety risks alleged by the *Williams* plaintiffs. An attempt by the state to assert interests in promoting local management of schools, or managing budgetary constraints according to its own discretion, should be rejected as assertions of an interest in doing nothing about the problem.

While the Court's recent pronouncement in *Lawrence* grew out of a fact pattern quite distinct from the school context, the Court long ago recognized that restrictions on liberty effected (or caused) by certain forms of compulsory education can rise to the level of a constitutional violation. *In Pierce v. Society of Sisters*, the Supreme Court overturned a compulsory *public* education law; without analyzing the constitutional significance of the law's effect on children's liberty interests, the Court found the Oregon state law requiring public school enrollment to be an impermissible interference with the ability of parents and guardians to "direct the upbringing and education of children under their control."[36] In light of the consensus that has emerged subsequently regarding compulsory education laws in their current form, which prescribe educational requirements that can be fulfilled at public or private schools,[37] the *Pierce* decision stands primarily as a protection of the right of families who can afford the tuition to send their children to private school.

Commentators have noted that, confronted with the validity of compulsory public education under the Due Process Clause, the *Pierce* Court had three choices: it could have upheld compulsory public schooling, allowing states who chose to exercise it a state monopoly over education; it could have abolished compulsory education altogether, taking the stronger version of the argument that such laws interfere with parents' rights to direct the upbringing of their children; or, it could have chosen, as it did, to allow states to mandate schooling but require that parents be allowed to opt out of public school if they so choose.[38] Although the Court's approach is characterized as the "*Pierce* compromise," a more apt characterization would be the *Pierce* bifurcation. It bisects the due process analysis of compulsory education into spheres based on family wealth. For those who cannot afford private school tuition, compulsory public education is still very much a reality, and the *Pierce* decision has done nothing to alleviate whatever due process violation lies therein.

Nonetheless, constitutionalizing a right to minimally safe and healthy school facilities for those who cannot afford private school does not require an extension of the *Pierce* holding to contemporary compulsory education laws. The argument is not that the state commits a due process violation simply by requiring that all children receive schooling in some form; rather, the claim is that de facto compulsory public education in unsafe and unsanitary conditions constitutes a restriction on liberty that violates substantive due process. This articulation, while fitting within the Court's current substantive due process framework, deliberately elides the distinction between affirmative duties and

[36] 268 U.S. 510, 534–35 (1925).

[37] *See* YUDOF ET AL., *supra* note 13, at 1, 12–18.

[38] *Id.*

negative liberties. It reflects the insight that a state can effect unconstitutional deprivations of liberty with both action and inaction. But even if such a conceptual move is rejected by a court suspicious of lurking claims to affirmative duty and reluctant to allow the plaintiffs to frame the wrong as a deprivation, a claim to safe and healthy school facilities can succeed under the Court's affirmative duty precedents.

III. THE CONSTITUTION DOES IMPOSE AFFIRMATIVE DUTIES ON STATES IN SOME CIRCUMSTANCES

The Court has recognized that in some circumstances, the protection of negative liberties ensured by the Constitution requires states to act affirmatively. While prisons and mental institutions have been found definitively to give rise to such circumstances, the applicability of this principle in other settings remains unclear. The Supreme Court has subsequently indicated that only in settings in which the state has restrained an individual's ability to act on her own behalf does the Due Process Clause confer an affirmative right to governmental aid.

A. Prisons

In *Estelle v. Gamble*, the Supreme Court considered a prisoner's claim that prison authorities subjected him to cruel and unusual punishment in violation of the Eighth Amendment by failing to provide him with medical treatment.[39] The Court held that the Eighth Amendment prohibition on cruel and unusual punishment requires states not only to refrain from "physically barbarous punishments,"[40] but to avoid causing pain and suffering through *inaction*. The Court reasoned that, by virtue of his incarceration, an inmate must rely on prison officials to meet his medical needs; if they "fail to do so, those needs will not be met."[41] In considering the evolving standards of decency which serve as guideposts in Eighth Amendment analysis,[42] the Court noted that many states had adopted legislation which evidenced an intent to codify the common law view 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."[43] In extreme cases, a failure to care for a prisoner with serious medical needs will lead to "'torture or lingering death' the evils of most immediate concern to the drafters of the Amendment."[44] The Court thus concluded that inaction that manifests "deliberate indifference to serious medical needs of prisoners

[39] 429 U.S. 97, 101 (1976).
[40] *Id.* at 102.
[41] *Id.* at 103.
[42] *Id.* at 102 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
[43] *Id.* at 104 (quoting Spicer v. Williamson, 191 N.C. 487, 490 (1926)).
[44] *Id.* at 103 (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)).

constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[45]

B. Mental Hospitals

The insight that states must sometimes act affirmatively to avoid infringement of negative liberties was extended beyond the Eighth Amendment context in *Youngberg v. Romeo*. There the Supreme Court considered substantive due process claims brought by the mother and next friend of an involuntarily committed mental patient, Nicholas Romeo. A thirty-three year-old with the mental capacity of an 18-month child, Romeo had an IQ between 8 and 10 and was unable to talk or engage in the most basic forms of self-care. He had lived with his parents until he was twenty-six, at which point his father died and his mother was unable to care for him. Within two weeks of his father's death, Romeo's mother sought his temporary admission to a hospital. Shortly thereafter she petitioned the Philadelphia County Court of Common Pleas to admit Romeo to a state facility on a permanent basis. She explained that Romeo's disabilities gave rise to violent behavior that she was unable to control without her husband's assistance: "Since my husband's death I am unable to handle him. He becomes violent—Kicks, punches, breaks glass; He can't speak—wants to express himself but can't. He is [a] constant 24 hr. care. [W]ithout my husband I am unable to care for him."[46] Romeo was examined by a physician and a psychologist, pursuant to the applicable involuntary commitment provision of Pennsylvania state law. The doctor and psychologist certified that Romeo was severely retarded and unable to care for himself, and Romeo was committed to the Pennhurst State School and Hospital by the Court of Common Pleas.[47]

Pennhurst failed to adequately address Romeo's violent behavior—the very problem for which Romeo's mother had sought commitment. Romeo was injured on numerous occasions, both by his own violence and by the reactions of other residents to his behavior. His mother, concerned about these injuries, objected several times to Romeo's treatment, and finally filed a complaint in federal district court alleging that Romeo had suffered injuries on at least sixty-three occasions during the two year period of his confinement. Alleging that the director of Pennhurst and two officials with applicable supervisory authority either knew or should have known that Romeo was suffering these injuries, she claimed that the failure to implement appropriate preventive procedures violated Romeo's rights under the Eighth and Fourteenth Amendments.[48]

Shortly after the filing of that complaint, Romeo was transferred from his ward to the hospital for treatment of a broken arm. He was physically restrained for portions of each day according to a doctor's order, to protect both Romeo and other patients in the hospital, some of whom were in traction or were being

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[45] *Id.* at 104.

[46] Youngberg v. Romeo, 457 U.S. 307, 309 n.2 (1982).

[47] *Id.* at 309–10.

[48] *Id.* at 310.

treated intravenously. His mother filed a second amended complaint, roughly a year after the first filing, alleging that "defendants were restraining respondent for prolonged periods on a routine basis."[49] The second complaint added a claim that defendants' failure to provide Romeo with "appropriate 'treatment or programs for his mental retardation'" also constituted a violation of Romeo's constitutional rights.[50]

At trial, Romeo introduced evidence of his injuries and the conditions in his unit, while the hospital administrators introduced evidence that Romeo had in fact participated in programs teaching basic self care skills such as feeding, showering, dressing, self-control, and toilet training.[51] Evidence was also introduced that hospital staff members had designed a behavior modification program intended to reduce Romeo's aggressive behavior that included "periods of separation from other residents" and use of "muffs" on his hands to prevent Romeo from harming himself or others.[52] The program was never implemented because of Romeo's mother's objections.[53] The jury was instructed that "only if they found the defendants 'deliberate[ly] indifferen[t] to the serious medical [and psychological needs] of Romeo' could they find that his Eighth and Fourteenth Amendment rights had been violated."[54] The jury returned a verdict for defendants, on which judgment was entered.

The Court of Appeals, sitting en banc, reversed and remanded for a new trial. The appeals court found erroneous the application of the "deliberately indifferent" standard to the facts of Romeo's case. The "deliberately indifferent" standard, adopted by the Supreme Court in *Estelle v. Gamble*,[55] addresses prisoners' rights under the Eighth Amendment's prohibition on cruel and unusual punishment. The appeals court in *Youngberg* held that the Fourteenth Amendment, rather than the Eighth Amendment, was the appropriate source for analyzing the rights of the involuntarily committed. Under the Fourteenth Amendment, the involuntarily committed retain liberty interests in freedom of movement, personal security, and habilitation that can only be limited "by an 'overriding, non-punitive' state interest."[56] The en banc court did not agree, however, on the relevant standard to use in determining whether the plaintiff's rights had been violated, and the Supreme Court granted the petition for certiorari.

The Court's analysis immediately noted that Romeo had been committed under the laws of Pennsylvania and that he did not challenge the lawfulness of the commitment.[57] The court emphasized that "the mere fact that Romeo has been committed under proper procedures does not deprive him of all

[49] *Id.* at 311.
[50] *Id.*
[51] *Id.* at 311–12.
[52] *Id.* at 311 n.8.
[53] *Id.* at 311–12.
[54] *Id.* at 312.
[55] 429 U.S. 97 (1976).
[56] *Youngberg*, 457 U.S. at 313.
[57] *Id.* at 315.

substantive liberty interests under the Fourteenth Amendment."[58] Romeo, seeking to vindicate substantive liberty interests that survive lawful commitment, argued that the Fourteenth Amendment required conditions of confinement that protect his interests in safety, freedom of movement, and a certain degree of appropriate treatment and training.[59] The Court announced a two-step decision-making process that would first ascertain whether liberty interests in safety, freedom of movement, and training do in fact exist, and if so, whether they have been infringed in this particular case.[60]

The Court analyzed each of these three claims separately. Finding that the first two claims, asserting rights to safety and freedom of movement, involve liberty interests recognized by prior decisions, the Court dealt with these summarily. The Court treated as interchangeable a right to safe conditions and a right to personal security, and referred to *Ingraham v. Wright* for the proposition that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."[61] The Court cited *Hutto v. Finney* for the proposition that the right to personal security is "not extinguished by lawful confinement, even for penal purposes."[62] Blurring somewhat the distinction between the Eighth and Fourteenth Amendments, the Court reasoned that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[63]

With regards to the second claim, the Court likewise asserted that freedom from bodily restraint "always has been recognized as the core of the liberty protected by the Due Process Clause."[64] The Court emphasized that, like the right to personal security, the right to freedom from bodily restraint also survives lawful confinement.[65]

The Court found Romeo's third claim, asserting a right to "minimally adequate habilitation," to be "more troubling."[66] Taking the term "habilitation" to mean "training and development of needed skills,"[67] the Court noted Romeo's assertion that the right he claims is for "minimal" training and that "he would leave the type and extent of training to be determined on a case-by-case basis in 'light of present medical or other scientific knowledge.'"[68] The Court, in its own words, began its analysis of the asserted right to training by

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[58] *Id.*

[59] *Id.* The State conceded that Romeo and others similarly situated have rights to adequate food, shelter, clothing, and medical care.

[60] *Id.*

[61] *Id.(* quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

[62] *Id.(* citing Hutto v. Finney, 437 U.S. 678 (1978)).

[63] *Id.* at 315–16.

[64] *Id.* at 316 (citing Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 18 (1979)) (Powell, J., concurring in part and dissenting in part).

[65] *Id.* at 316.

[66] *Id.*

[67] *Id.* at 316–17.

[68] *Id.* at 317.

reference to "established principles," starting with the premise that "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border."[69] Also fundamental, however, is the principle that when an individual is "institutionalized" and "wholly dependent on the State," then a "duty to provide certain services and care does exist."[70] This much was conceded by the hospital officials, who relied on the principle that even when such a duty exists, "a State necessarily has considerable discretion in determining the nature and scope of its responsibilities."[71]

The essential assumption underlying the Court's analysis is that the habilitation programs were intended to reduce Romeo's aggressive behavior so that he could reside at the hospital safely and without physical restraint, or at least with less of it. Having explicitly assumed that Romeo sought only that degree of training necessary to protect his liberty interests in safety and freedom from restraint, the Court avoided "the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*."[72] The Court then concluded that Romeo's liberty interests did indeed "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[73]

Having determined that liberty interests claimed by Romeo did exist, the Court then proceeded to the second stage of its analysis: did the State infringe upon those liberty interests in violation of due process? The Court articulated a simple balancing test: "whether [an individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."[74] Indicating its reluctance to leave this balancing to the "unguided discretion of a judge or jury," the Court set about to consider "the proper standard for determining whether a State adequately has protected the rights of the involuntarily committed mentally retarded."[75]

The Court rejected the approach taken by the majority of the Court of Appeals, which would have required a state to show "compelling" or "substantial" necessity for the use of physical restraints or conditions of less than absolute safety. Instead, the Court adopted essentially a "professional judgment" standard. With regards to interests in safe conditions and freedom from restraint, "the Constitution only requires that the courts make certain that professional judgment in fact was exercised."[76] With regards to the interest in habilitation, "the minimally adequate training required by the Constitution is

[69] *Id.* (citing Harris v. McRae, 448 U.S. 297, 318 (1980) (publicly funded abortions); Maher v. Roe, 432 U.S. 464, 469 (1977) (medical treatment)).

[70] *Id.*

[71] *Id.* at 317 (citing Richardson v. Belcher, 404 U.S. 78, 83–84 (1971); Dandridge v. Williams, 397 U.S. 471, 478 (1970)).

[72] *Id.* at 318.

[73] *Id.* at 319.

[74] *Id.* at 321.

[75] *Id.*

[76] *Id.*

such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is reasonable . . . we emphasize that courts must show deference to the judgment exercised by a qualified professional."[77]

C. Other Custodial Settings

In *DeShaney v. Winnebago County Department of Social Services*, the Court considered substantive due process claims brought on behalf of Joshua DeShaney against a state social services agency.[78] Four-year old Joshua DeShaney was beaten and permanently injured by his father during a period of time when the department was visiting and monitoring the household.

The facts of the case, as noted by the Court, are "undeniably tragic."[79] Joshua was born in 1979.[80] His parents were divorced in 1980, and a Wisconsin court awarded custody of Joshua to his father, Randy DeShaney. Shortly afterwards, Randy DeShaney moved to Winnebago County, taking Joshua with him.[81] He married again, and in January 1982, his second wife complained to the police that Randy DeShaney had "hit the boy causing marks and [was] a prime case for child abuse."[82] The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the allegations, and DSS did not pursue the matter further until notified by a physician that Joshua had been admitted to a local hospital in January 1983 with multiple bruises and abrasions.[83] DSS then obtained an order from the Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. The county convened a "Child Protection Team," consisting of a pediatrician, a psychologist, a police detective, the county's lawyer, hospital personnel, and several DSS caseworkers, who met and determined that there was insufficient evidence of child abuse to retain Joshua in court custody.[84] Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to his father's custody.[85] The Child Protection Team did recommend various measures to protect Joshua, including enrolling him in a preschool program, providing counseling services to his father, and encouraging his father's girlfriend to move out of the home; Randy DeShaney entered into a voluntary agreement with DSS, promising to cooperate with respect to these recommendations.[86]

A month later, emergency room staff called the DSS caseworker handling Joshua's case to report that he had once again sustained suspicious injuries; the

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[77] *Id.* at 322.
[78] 489 U.S. 189 (1989).
[79] *Id.* at 191.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 192. Randy DeShaney's second marriage also ended in divorce.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

caseworker concluded that there was no basis for action. She did make monthly visits to the DeShaney home for the next six months, during which she observed that Joshua continued to show a number of suspicious injuries on his head, he was not enrolled in preschool, and his father's girlfriend had not moved out of the home.[87] The observations were all "dutifully recorded" in the caseworker's files, along with her "continuing suspicions that someone in the DeShaney household was physically abusing Joshua," but she took no further action.[88] In November 1983, DSS was notified by emergency room personnel that Joshua had once again been admitted for injuries that they believed to be caused by child abuse. On the caseworker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. In March 1984, Randy DeShaney beat Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. While Joshua did not die, he suffered brain damage severe enough to confine him to an institution for the profoundly retarded for the rest of his life.[89]

Joshua and his mother brought a 42 U.S.C. section 1983 action against Winnebago County, DSS, and various individual employees of DSS, alleging that these parties had deprived Joshua of liberty in violation of the Fourteenth Amendment by failing to protect him against his father's violence of which they knew or should have known. The District Court granted summary judgment for the defendants. The Court of Appeals for the Seventh Circuit affirmed, holding that the Due Process Clause of the Fourteenth Amendment does not require a state or local government entity to protect its citizens from "private violence, or other mishaps not attributable to the conduct of its employees."[90] The Supreme Court granted certiorari to resolve "when, if ever, the failure of a state or local government entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights."[91] The Supreme Court affirmed the dismissal.

The Court began its analysis by identifying the claimed liberty interest as "freedom from unjustified intrusions on personal security."[92] As in the *Youngberg* opinion, the Court's analysis noted that Joshua was invoking the substantive rather than procedural protections of the Due Process Clause, claiming not that the state denied him protection without according appropriate procedural safeguards, but rather that the state was "categorically obliged to protect him in these circumstances."[93] The Court immediately signaled the basis for its rejection of this argument, asserting that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty,

[87] *Id.* at 192–93.
[88] *Id.* at 193.
[89] *Id.*
[90] *Id.* at 193–94.
[91] *Id.* at 194.
[92] *Id.* at 195 (citing Ingraham v. Wright, 430 U.S. 651, 673 (1977)).
[93] *Id.*

and property of its citizens against invasion by private actors."[94] The Court explained that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State 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 State to ensure that those interests do not come to harm through other means."[95] Nor, in the Court's view, did history support "such an expansive reading of the constitutional text."[96]

Petitioners also contended that even if the Due Process Clause generally did not confer an affirmative right to government aid, such a duty may arise out of "'special relationships' created or assumed by the state with respect to particular individuals."[97] According to this argument, the state of Wisconsin created such a relationship with Joshua because it had become aware of the danger he faced and had undertaken to protect him from that danger proclaiming "by word and by deed its intention to protect him."[98] The Court rejected this theory as well, asserting that only relationships with some custodial element give rise to affirmative duties. The Court asserted that *Estelle* and *Youngberg*, although setting forth circumstances in which "the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," afforded Joshua no relief. The Court first characterized these decisions as standing "only for the proposition that when the State takes a person into 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."[99] The Court clarified that the affirmative duty to protect recognized in previous cases arises from the limitation which the state itself has imposed on an individual's freedom to act on his own behalf. The duty does not stem from the state's knowledge of an individual's "predicament," nor from the state's expressions of intent to help.[100]

IV. IMPOSING A CONSTITUTIONAL DUTY ON STATES TO PROVIDE SAFE SCHOOL FACILITIES IS CONSISTENT WITH THIS FRAMEWORK

While *DeShaney* limits recovery for a wide range of plaintiffs asserting that the state has failed to fulfill constitutionally imposed obligations to protect individuals from harm, it does not pose a barrier for plaintiffs involved in the type of school improvement litigation exemplified by the *Williams* case. *DeShaney*'s limitations apply only to state obligations to prevent harm caused by *private* actors. The harms alleged by the *Williams* plaintiffs are caused by action and inaction on the part of *state* actors. And yet, even if the *Williams*

[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 197.
[98] *Id.* at 197.
[99] *Id.* at 199–200.
[100] *Id.* at 200.

plaintiffs were unable to show that responsible individuals were acting under color of state law for purposes of section 1983 liability, *DeShaney* indicates that the state bears responsibility for protecting individuals from harm caused by private actors where the state and the individual are in a custodial relationship.

A. DeShaney*'s holding does not preclude relief for unsafe school facilities*

1. DeShaney *applies only to state obligations to prevent private harm*

The *DeShaney* holding turns on the distinction between state and private action. Briefly stated in the Court's own words: "we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[101] This distinction didn't just limit the Court's holding, it was absolutely essential to it. The Court insisted that the distinction was required by precedent and doctrine, which the dissenting members of the Court certainly rejected,[102] but it was undoubtedly necessary to legitimate the Court's holding in light of its acknowledgment that the case presented "undeniably tragic" circumstances.[103]

Thus, while *DeShaney* has been criticized by scholars,[104] and was disastrous for some of society's most vulnerable members,[105] nothing in its holding suggests that a custodial relationship is necessary to trigger an affirmative obligation to prevent harm caused purely by the state's own combination of action and inaction. Taking *DeShaney* at its word means conducting a different analysis when a student's injury is caused by the state.

A pair of decisions from the Fifth Circuit illustrates this approach. Both cases involved sexual assault of female students by adults employed at the school; the plaintiff abused by a teacher was entitled to relief for violation of due process rights while the plaintiff abused by a janitor was not. The difference in the two outcomes hinged on the existence of state action.

In the first case, *Doe v. Taylor Independent School District*,[106] Lynn Stroud, a biology teacher, initiated a sexual relationship with Jane Doe, a 14-

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[101] *Id.* at 196.

[102] *See Id.* at 203 (Brennan, J., dissenting); *Id.* at 212 (Blackmun, J., dissenting).

[103] *Id.* at 191.

[104] *See, e.g.*, Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 508–11 (1991) (arguing that congressional debates on the Fourteenth Amendment show that establishing a federal constitutional right to protection was one of the central purposes of the amendment); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 10 (1989) (suggesting that the Court's view of the state was "primitive" and "stilted").

[105] *See, e.g.*, S.S. v. McMullen, 225 F.3d 960, 962 (8th Cir. 2000) (en banc) (holding that under *DeShaney* a three year old child who was sexually abused after state social workers returned her to her father's custody did not have a substantive due process claim against the state, despite the social workers' knowledge that the child's father associated with a convicted pedophile).

[106] 15 F.3d 443 (5th Cir. 1994).

year old freshman in his class. The teacher wrote suggestive comments on her homework and test papers, bought Doe lunch and alcoholic beverages, and gave her high grades without requiring her to do class work. Sexual contact occurred both on and off school grounds, continuing into the fall of Doe's sophomore year, at which point Doe's parents discovered the existence of the relationship. Doe then brought a section 1983 action against the teacher, the high school principal, the superintendent, and the school district, claiming that these defendants deprived her of rights to bodily integrity protected by the Due Process Clause of the Fourteenth Amendment. The court found it clear that Jane Doe had been deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment, holding that "[i]t is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment."[107]

The defendants had argued that *DeShaney* supported their position that Doe was not deprived of any constitutional right when she was sexually molested by the teacher.[108] The argument seemed to run along the following lines: schoolchildren cannot be said to be affirmatively restrained by the state merely because they are compelled to attend school; thus no special relationship exists between the school child and the state. Therefore, the child possesses no substantive due process rights in his status as a public school student.[109] The court unequivocally rejected this argument, characterizing it as a "serious misreading" of *DeShaney*.[110] The court described at length the circumstances and holding of *DeShaney*, concluding that only in rejecting an argument asserting a constitutional duty to protect citizens from harm by *private* actors did the Supreme Court suggest that state officials' duty to protect citizens under the due process clause was limited to those persons whose freedom has been affirmatively restrained by the State.[111] The court emphasized that *DeShaney* "does not suggest that individuals, whether under the state's care or not, have no due process rights against an offending state actor."[112] The court concluded this analysis by asserting that "*DeShaney* does not in the slightest diminish the constitutional due process rights belonging to Jane Doe against Lynn Stroud."[113]

In the second case, *Doe v. Hillsboro Independent School District*,[114] Jane Doe, a thirteen-year old student in the eighth grade, was kept after school to do some "special work on her studies."[115] After a period spent studying, Jane Doe was asked by her teacher to go upstairs to retrieve some supplies kept in a

[107] *Id.* at 451–52.
[108] *Id.* at 452.
[109] *Id.* at 451 n.3.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] 113 F.3d 1412 (5th Cir. 1997).
[115] *Id.* at 1414.

different section of the school building. While upstairs, the school custodian trapped Jane Doe in an empty classroom and raped her. In the course of the sexual assault, the custodian physically assaulted Doe, causing bodily injury in addition to the rape. Claiming deprivations of constitutional rights, Doe brought suit under section 1983 against the Hillsboro Independent School District as well as its trustees and present and past superintendents.

In spite of the fact that the custodian was a school district employee, the court denied recovery, premising its decision on the fact that the custodian was not acting under color of state law. The court found the case to be thus appropriately analyzed under *DeShaney*, which, in the Fifth Circuit's view, "rejected the contention that the government owes a constitutional duty to protect people from the misdeeds of other private actors in the absence of a special relationship."[116] The court then explicitly held that compulsory attendance laws, without more, were insufficient to create a special relationship giving rise to a constitutional duty of school officials to protect students from private actors.[117] The court indicated that in so holding it was joining "every circuit court that has considered the issue."[118] Because the school's custody over children is "intermittent" and because "parents remain the primary source for the basic needs of their children," the court found that the restrictions imposed by attendance laws were simply not "analogous to the restraints of prisons and mental institutions."[119]

A concurrence further highlighted that the decision was premised on the distinction between state and private action, noting that while the janitor was considered a private actor, the school officials, if shown to have met the "deliberate indifference" standard for supervisory liability under section 1983,[120] would be liable if their indifference played a sufficiently causal role in the harm suffered by the student. The concurrence emphasized that

> nothing in today's majority opinion lessens or curtails the ability of the law to conclude that public school supervisors, as state actors, are the actual perpetrators of the violation of a student's constitutional right to bodily integrity when evidence is sufficient to demonstrate that there is a "real nexus" between the violation suffered by the student and such supervisors' deliberate indifference to reports or complaints of abuse.[121]

A rigid doctrinal division between private harm and state harm is reflected in other circuit court decisions as well. In *D.R. v. Middle Bucks Area Vocational Technical School*, the Third Circuit found that Pennsylvania school

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[116] *Id.*

[117] *Id.* at 1415.

[118] *Id.* at 1415 (citing Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996); Sargi v. Kent Bd. Of Educ., 70 F.3d 907, 911 (6th Cir. 1995); Dorothy J. v. Little Rock Sch. Dist., F.3d 729, 732 (8th Cir. 1993); D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1368–73 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990)).

[119] *Hillsboro Indep. Sch. Dist.*, 113 F.3d at 1415.

[120] *Discussed infra*, Part III(A)(2).

[121] *Hillsboro Indep. Sch. Dist.*, 113 F.3d at 1418.

officials did not owe an affirmative duty to protect hearing-impaired female students from sexual abuse inflicted by their classmates.[122] The court held that the students could not establish state liability because "plaintiffs' harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence."[123] The First Circuit has similarly described *DeShaney* as "holding that ordinarily a state's failure to intervene to prevent harm to an individual by a private actor is not a constitutional violation."[124]

As these examples illustrate, *DeShaney* has been consistently applied by circuit court decisions as pertaining to state duties to protect individuals from third party harm. A number of scholars and commentators have similarly characterized the *DeShaney* holding, describing the Court, for example, as having chosen to "severely limit those instances where the state owes an affirmative duty, by reason of its special relationship with citizens, to protect them from harm from others."[125]

Thus, *DeShaney* and its progeny do not foreclose relief for plaintiffs alleging harms similar to those at issue in the *Williams* case. Where school facilities are so decrepit and unsanitary as to present a threat to the health and safety of children required to be there, only state actors are implicated. The state's restriction on liberty, through the imposition of compulsory attendance, and the state's subsequent failure to maintain the facilities in a manner that does not compromise bodily integrity,[126] comprise the chain of events (and omissions) leading to the deprivation. Such plaintiffs would not be asking the court to find that the state had a duty to intervene where a private actor posed a risk to students, as in *DeShaney*. Nor, importantly, would these plaintiffs be claiming that the state has a general duty to provide services to those within its border, as in the cases cited by the *DeShaney* court[127] to rebut such a proposition. Rather, the claim is that the state may not, consistent with the Due Process Clause, confine children to facilities which threaten their health. The extent to which the state, by its own combination of action and inaction, can be said to have *caused* the harm posed by dangerous facilities so as to meet section 1983's liability requirements, is addressed in the next section.

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[122] 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993).

[123] *Id.* at 1375.

[124] Hasenfus v. LaJeunesse, 175 F.3d 68, 71 (1st Cir. 1999).

[125] Stephen Faberman, Note, *The Lessons of* DeShaney: *Special Relationships, Schools, & the Fifth Circuit*, 35 B.C. L. REV. 97, 110 (1993).

[126] Implicit, of course, is the state's failure to pursue an alternative option that would stave off the due process violation, namely, ensuring that every child had the means to attend a private or other adequately funded and managed school in which to satisfy the state's compulsory education requirement.

[127] Harris v. McRae, 448 U.S. 297, 317–18 (1980) (no obligation to fund abortions or other medical services); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing).

2. Harms alleged by the Williams *plaintiffs are caused by state actors*

Admittedly, the inquiry into whether harm to students in a school setting was caused by state action is not a simple one. Depending on which entities are named in the complaint, plaintiffs have to navigate both constitutional state action requirements and the requirements imposed by the text of section 1983 and subsequent Supreme Court interpretive decisions. My primary purpose in this Article is to explore when *constitutional* doctrine permits students to claim that school conditions violate their due process rights. However, confronted with claims that students' constitutional rights have been violated by school employees and officials, appellate courts seem to be using section 1983 doctrine to find that no relevant state actor was implicated.[128] Given that section 1983 creates a cause of action for individuals whose constitutional rights have been violated, it is a particularly pernicious form of the tail wagging the dog: eager to find that the alleged harm was caused by a private actor so that *DeShaney* precludes the imposition of constitutional duty on the state, courts exploit the safe havens created by decisions interpreting section 1983. A brief review of Supreme Court precedent in this area therefore seems necessary to establish that when school facilities threaten student health and safety, state actors are implicated, not merely in a common-sense, intuitive way, but so as to satisfy increasingly burdensome section 1983 liability requirements.

The text of 42 U.S.C. section 1983 creates a private cause of action against any person who "under color" of state law causes deprivations of rights secured by the Constitution.[129] For purposes of section 1983 liability, "person" has been interpreted to apply to municipalities,[130] including cities, counties and school boards,[131] but not states.[132] The Supreme Court has declared that in suits against government officials and entities, an action can be considered to have been taken "under color" of state law for purposes of establishing section 1983 liability whenever the Fourteenth Amendment requirement of state action is satisfied.[133] However, even if plaintiffs can show that the alleged harm stems from state action so as to meet the "under color" requirement, they still have to show that each of the entities and individuals they wish to hold liable *caused* the relevant deprivation. A police officer conducting an unreasonable search

[128] *See, e.g.*, D.T. v. Indep. Sch. Dist. No. 16, 894 F.2d 1176, 1192 (10th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990) (teacher was not acting under color of state law when he molested three boys in his fifth grade class).

[129] 42 U.S.C. § 1983 (2000). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or District of Columbia, subjects, or causes to be subjected, any citizen of the United State 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."

[130] Monell v. Dept. of Soc. Serv. of N.Y., 436 U.S. 658 (1978).

[131] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) ("The important consequence of *Monell* was to render city, county, and school board treasuries liable in § 1983 damages actions for violations of constitutional and statutory rights by their officials….").

[132] Quern v. Jordan, 440 U.S. 332 (1979).

[133] Lugar v. Edmonson Oil Co., 457 U.S. 922, 928, 930 (1982).

and seizure in violation of the Fourth Amendment will be a state actor liable under section 1983,[134] but plaintiffs face additional hurdles if they wish to name the officer's supervisors and/or the municipality in the complaint.[135] This dynamic is even more powerful in the circumstances surrounding the *Williams* case, where many of the harmful circumstances alleged by the *Williams* plaintiffs stem from omission: failure to adequately heat the school building, failure to maintain the ceiling so that tiles do not fall on students' heads, and so on.[136] Even where plaintiffs can identify affirmative acts leading to the alleged harms, at the risk of belaboring the obvious, they are unlikely to wish to exact recovery from the school custodian who physically takes the key and locks the bathroom. The higher up plaintiffs wish to go, the more difficult the causation burden.

The Court exacerbated the burden in *Monell* by foreclosing the possibility of municipality liability premised solely on a respondeat superior theory.[137] Thus, municipalities will not be held liable merely by virtue of having employed an individual that violates a protected right, but rather, only upon a showing that the violation occurred pursuant to governmental policy or custom.[138] Although the Court did specify that such policy or custom did not need to have received "formal approval through the body's official decisionmaking channels" in order to render the municipality liable,[139] questions remained about the meaning of *Monell's* "policy or custom" standard. In *Pembaur v. City of Cincinnati*, the Court evaluated whether the decision of a single officer could be considered an adequate basis for

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[134] Even if his actions are also unlawful under relevant state law, so that his actions are taken under pretense of, rather than actual, state authority. *See* Monroe v. Pape, 365 U.S. 167 (1961).

[135] Where plaintiffs seek damages, a plaintiff's interest in naming supervisors and municipalities in spite of the increased difficulty in showing causation is financial as well as symbolic, of course; plaintiffs need to name a defendant that can pay the judgment should one issue. While I do not attempt a comprehensive review of the structural and procedural barriers plaintiffs face when attempting to vindicate federal rights, it is worth noting here that plaintiffs are barred by Eleventh Amendment state sovereign immunity doctrine from bringing suits in federal court against states. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890). Where plaintiffs seek prospective injunctive relief, rather than damages, the doctrine of *Ex parte Young* allows them to sue state officials in their individual capacities. *See Ex parte* Young, 209 U.S. 123, 148, 168 (1907).

[136] A notable exception is the allegation that students at Gulf Avenue Elementary School are required to spend portions of their reading time picking up trash around the school, including used condoms, broken glass, cigarette butts, etc. Another exception is where school bathrooms are locked—an affirmative act rather than an omission, albeit one that shows the functional weakness of this distinction. From the perspective of a student's bodily integrity, it matters little whether a bathroom is unavailable because the school has locked it or because the school has simply failed to fix a broken toilet. The conceptual frailty of the act-omission distinction, and its relationship to the Court's rigid division of negative rights and affirmative duties, will be further explored in the final section of the Article. First Amended Complaint, *supra* note 1, at 43.

[137] Monell v. Dept. of Soc. Serv. of N.Y., 436 U.S. 658, 690 (1978).

[138] *Id.* at 690–91.

[139] *Id.*

governmental liability under section 1983.[140] The official in question was a county prosecutor who had instructed police officers to make what was alleged to be an unconstitutional entry. Because the prosecutor had authority under state law to decide whether the officers should enter, and because his decision could fairly be said to "represent official policy," his decision was sufficient to render the municipality liable. The Court later considered *which* officials are capable of making decisions that render a municipality liable under section 1983. In *City of St. Louis v. Praprotnik*, the Supreme Court affirmed that state law determines who is a policymaking official whose decisions can be said to reflect governmental custom or policy.[141] An important and limiting caveat in the Court's decision, however, is that a policymaker who delegates discretion to act to her subordinates does not give those subordinates the kind of policymaking authority that makes the municipality liable for their conduct.

Tracing policymaking authority up a chain of command in order to establish causation is a complicated, factually intensive analysis in any event. The foregoing Supreme Court decisions have limited the extent to which the conduct of government officials can render liable their supervisors and municipalities, but particular problems exist when the alleged wrong at the supervisory or municipal level is predominantly one of a failure to monitor subordinates. Under the strict standard of *City of Canton v. Harris*,[142] supervisors and municipalities can be liable for failing to train subordinates to avoid constitutional violations only when a plaintiff can show a policy of training (or lack thereof) that reflects "deliberate indifference" to plaintiff's rights, and that the policy of training was the "closely related" cause of the violation of the plaintiff's federally protected rights.[143]

The assertion that state rather than private actors cause the harm suffered by children who attend schools with unsafe and unsanitary facilities is consistent with this line of cases. Were discovery to reveal, for example, district-level policies that explicitly instructed school principals to save money on janitorial services by keeping bathrooms locked, plaintiffs would be well on their way to satisfying the standard set forth in *Monell*, allowing liability at the entity level where constitutional rights are violated pursuant to government policy or custom.

Even in the absence of such a finding, school districts and municipalities themselves should be considered to have primary authority for ensuring that school facilities do not threaten student health. This argument offers a powerful end run around *Canton*, but is fairly reasonable in its own right. No individual janitor, principal, or school site committee has the authority to direct maintenance operations that address many of the harms alleged in *Williams*: to replace failed heating systems, build additional bathrooms proportionate to increased enrollment, or engage decontamination services to remove toxic mold from classrooms. Such authority is located in the first instance at the district or

[140] 475 U.S. 469, 480 (1986).
[141] 485 U.S. 112 (1988).
[142] 489 U.S. 378 (1989).
[143] *Id.* at 388, 391.

municipal level and its failure to act is thus not a failure to prevent harm caused by subordinates, as in *Canton*; its omissions cause the constitutional violation directly.

B. Even if DeShaney *did apply, states are required to provide safe and healthy school facilities*

Even if the *Williams* plaintiffs are unable to satisfy the tests described above, such that individuals or entities responsible for unsafe and unsanitary school conditions are considered private rather than state actors, *DeShaney* does not foreclose recovery. *Estelle* and *Youngberg* set forth the principle that within a custodial relationship, the state's obligation to keep an individual safe and secure covers harm from all sources. *DeShaney* confirms that where a state restricts an individual's freedom of action through "incarceration, institutionalization, or other similar restraint on personal liberty,"[144] the constitution imposes a "corresponding duty to assume some responsibility for his safety and general well-being."[145] By indicating that foster care, for example, might be sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect,[146] the Court signaled that affirmative duties are triggered by restraints on liberty other than those found in prisons and mental institutions.[147]

A scheme of compulsory education which requires children to be in school six to eight hours a day, for anywhere between 180−210 days a year, and is backed with the enforcement power to hale parents into court for failing to ensure their children's attendance, is sufficiently custodial to trigger affirmative constitutional duties. Supreme Court precedent analyzing constitutional rights in schools recurrently relies on the custodial nature of the school environment. A functional analysis of the school setting also reveals characteristics of custody sufficient to trigger constitutional duties.

1. Supreme Court precedent indicates that schools have custodial authority

The Supreme Court has repeatedly invoked the unique nature of the school environment in its constitutional jurisprudence. The Court has found time and time again that the custodial responsibility vested in school officials is so profound that constitutional analysis proceeds differently in schools than in any other setting.[148] In *Vernonia School District v. Acton*, the Supreme Court, in an

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

[145] *Id.*

[146] *Id.* at 201 n.9.

[147] *See also Recent Case: Due Process Clause – Custodial Relationships – Third Circuit Finds No Affirmative Duty of Care By School Officials to Their Students*. – D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, No. 92-816, 1993 U.S. LEXIS 897 (Jan. 19, 1993), 106 HARV. L. REV. 1224 (1993) [hereinafter *Recent Cases:* D.R.] (arguing that *DeShaney* hinted that affirmative constitutional duties might arise out of state custody less restrictive than twenty-four hour incarceration).

[148] Unsurprisingly, the difference tends to have a restrictive rather than enhancing function on student rights. While each of these decisions can be criticized on their own

opinion written by Justice Scalia, upheld a school policy requiring suspicionless drug testing for all student athletes against Fourth and Fourteenth Amendment challenges.[149] The Court first noted that whether a particular search meets the Fourth Amendment's reasonableness standard is determined by balancing the intrusion into individual's privacy interests against the promotion of "legitimate governmental interests."[150] The Court then stated that while the Fourth Amendment's reasonableness standard generally requires obtaining a warrant supported by probable cause,[151] a search unsupported by probable cause can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[152] After swiftly announcing that "special needs" exist in the public school context,[153] the Court ostensibly proceeded to conduct the balancing test set forth above. The force of the school's custodial authority was operative on both sides of the balancing test: first, students were characterized as having few legitimate expectations of privacy in school due to the degree of supervision and control exercised by school officials acting *in loco parentis*; on the other end, the school's interest in conducting the search was considered compelling because of its "special responsibility" for children entrusted to its care.

The Court, describing the state's power over school children, noted that "the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[154] In support of this assertion the Court noted that public schools routinely require children to submit to various examinations, including dental and dermatological checks and hearing and vision screening. Even more intrusive is the requirement present in all fifty states that public school students be vaccinated against diphtheria, measles, rubella, and polio.[155]

The Court also pointed out that its own precedent had repeatedly "acknowledged that for many purposes school authorities act *in loco parentis*." [156] The Court concluded a review of several of its school-based cases[157] by reiterating that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary

terms, their purpose here is to highlight the Supreme Court's view of schools as inherently custodial.

[149] 515 U.S. 646 (1995).

[150] *Id.* at 652, 653 (quoting Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 619 (1989)).

[151] *Id.* at 653.

[152] *Id.* at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[153] *Id.*

[154] *Id.* at 655.

[155] *Id.* at 656.

[156] *Id.* at 655 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)).

[157] *Id.* (citing Tinker v. Des Moines Independ. Cmty. Sch. Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975); Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260 (1988)).

responsibility for children."[158] While 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*,[159] 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, which repeatedly and explicitly relied on a view of the state as a guardian and the school as a custodial setting.

This view determined the Court's analysis of the weight of the state interest in the drug testing program as much as it had governed the analysis of student privacy interests. The Court emphasized the physical and psychological effects of drug use and drug addiction, and suggested that "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction."[160] The Court, anticipating the charge that this decision would serve to erode Fourth Amendment protections, cautioned against the assumption that suspicionless drug testing would "readily pass muster" in other contexts.[161] It explicitly asserted that "the most significant element in the case" was that the drug policy "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[162] The Court entrenched this notion in the test it set forth for determining when a search in the public school setting is reasonable: "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[163]

The Court extended the *Vernonia* holding in *Board of Education of Independent School District No. 92 v. Earls*, allowing a school drug testing policy for all students engaged in extra-curricular activities.[164] The reasoning reinforced the idea that permitting the school to conduct suspicionless drug testing of various segments of the student body was grounded in the custodial nature of the school environment. The dissent attempted to limit *Vernonia* by characterizing that holding as having been premised on the school district's assertion that it was the athletes who were both leaders of the school's drug culture and most susceptible to the physiological damage of drug use.[165] The

[158] *Id.* at 656.

[159] *Id.* at 655 ("While we do not, of course, suggest 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,' see DeShaney v. Winnebago County Dep't of Soc. Serv., [citation omitted], we have acknowledged that for many purposes school authorities act *in loco parentis* . . . .").

[160] *Id.* at 662.

[161] *Id.* at 665.

[162] *Id.*

[163] *Id.*

[164] 536 U.S. 822 (2002).

[165] *Id.* at 843 (Ginsburg, J., dissenting). *See also Vernonia*, 515 U.S. at 649 (reviewing the District Court's findings that student athletes were leaders of the drug culture and that the increased likelihood of sports-related injury made them particularly vulnerable to the deleterious effects of drugs).

Court negated this, arguing that the *Vernonia* decision "depended primarily upon the school's custodial responsibility and authority."[166] The Court's language even gave content to the notion of custodial responsibility in a way that is particularly relevant to the issue of dangerous school facilities. In the course of evaluating whether students can be said to have reasonable expectations of privacy, the Court asserted that "[a] student's privacy interest is limited in a public school environment *where the State is responsible for maintaining discipline, health, and safety*." [167]

The conjunction of these two cases has powerful implications for a jurisprudential view of schools as inherently custodial. In *Vernonia*, the District's assertions of particular suspicion and concern with regards to student athletes could serve as a weak proxy for individualized suspicion, or at least factor in a traceable way into the "special needs" analysis, which can make individualized suspicion constitutionally unnecessary. This was essentially the interpretation used by the appellate court in the *Earls* case, which held that in order to constitutionally conduct suspicionless testing of members of student groups, a school must find some identifiable drug abuse problem among a sufficient number of students in a particular group, such that testing that group of students would actually redress the drug problem. This was explicitly rejected by the Court, which asserted that "*Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities."[168]

Even without requiring a school policy to make some reasonable link between groups of students to be tested and likelihood of drug use, the Court could have limited the reach of the "special needs" rationale by suggesting that the a wide variety of extracurricular programs, not just sports, amplify the physiological risk of drug abuse. In *Earls*, the brief for petitioners offered the Court the opportunity to take advantage of that suggestion, pointing out that band members "perform extremely precise routines with heavy equipment and instruments in close proximity to other students,"[169] while the members of Future Farmers of America handle 1,500-pound steers, and the Future Homemakers of America work with cutlery or other sharp instruments.[170] The Court in *Earls* doesn't even avail itself of that fiction, because it doesn't feel that it needs to: it essentially declares that a school's custodial responsibility and authority is powerful enough to allow a school to test students without even

[166] *Earls*, 536 U.S. at 831.

[167] *Id.* at 830 (emphasis added).

[168] *Id.* at 838.

[169] *Id.* at 851-52.

[170] Whether one is persuaded by the argument that these are dangerous activities requiring such a heightened level of supervision as to justify suspicionless drug testing is another matter altogether, as suggested by Justice Ginsburg in dissent: "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of the students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree." *Id.* at 852 (Ginsburg, J., dissenting).

bare pretext of suspicion or heightened need. Schools are not required to articulate a special need *within* the school setting, because the school setting itself is the "special need" that frees the state from the Fourth Amendment's warrant and probable cause requirements.

Nor is it just the Fourth Amendment that gets suspended in schools in service of the school's awesome responsibility to fight the scourge of drug abuse. The First Amendment also gets transmogrified in the school environment. Even *Tinker v. Des Moines Independent Community School District*,[171] which was surely the high water mark for protection of student expression, set forth a special test for protected speech in the school environment that neither is drawn from nor resembles the Court's general First Amendment jurisprudence. Student expression that qualifies as "pure speech" (apparently, symbolic acts with political content discernible to school authorities and judges, as opposed to clothing and hairstyle choices)[172] is protected as long as it causes no material disruptions or substantial interference with the operation of the school.[173] Without further clarification, the standard might be read to allow what amounts to a heckler's veto, an encroachment on speech that the Supreme Court has rejected in other contexts.[174]

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court upheld a school principal's decision to censor portions of the student newspaper he deemed unsuitable for student consumption.[175] The principal objected to two articles, one concerning three students' experiences with pregnancy, and the other concerning divorce.[176] He deleted not only those articles, but everything appearing on the two pages that contained those articles, believing that there was no time to otherwise adapt the planned six-page newspaper before the scheduled printing date.[177] The Court asserted that only when the decision to

[171] 393 U.S. 503 (1969).

[172] *Id.* at 507–08 (contrasting the "pure speech" embodied in the wearing of anti-war arm bands to the regulation of skirt length, clothing, hair style, and deportment).

[173] This standard turns out to be not all that protective of student expression. Three years after *Tinker*, in Tate v. Bd. of Educ., 453 F.2d 975 (8th Cir. 1972), a group of African-American students objected to the school policy of playing the song "Dixie" at pep rallies. The school responded by making attendance at the pep rallies optional – students who did not wish to attend could report to the school gymnasium, and twenty-five black students and five white students availed themselves of this option. Twenty-nine black students did attend the rally, and silently stood up and left in protest when the song was played. Although the program was not interrupted and continued after the students left, the students were suspended from school for five days. The school officials successfully argued that the protest created a disruption and therefore was not protected by *Tinker*.

[174] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (striking down a breach of peace ordinance as construed to prohibit speech that "invites dispute," asserting that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

[175] 484 U.S. 260, 276 (1988).

[176] *Id.* at 263. The student editors had changed the names of individuals interviewed for the Article.

[177] Although these restrictions are less shockingly invasive than the drug testing programs, the school's interest in maintaining control over exploration of ideas as opposed to

censor a school-sponsored publication has "no valid educational purpose" will courts intervene to protect students' constitutional rights.[178]

What is remarkable about this group of cases is that in every one, the Court reiterates that its decision is not premised on the assumption that children have no constitutionally protected rights. The Court will dutifully engage in the recurrent and somewhat pro forma recitation of the evocative *Tinker* dicta regarding the schoolhouse gate and then conclude that the distinct characteristics of the school environment require that these rights yield to the state's interest in the particular school policy at issue. If the Court can invoke the state's custodial responsibility for children when enhanced school control is in tension with children's constitutional rights, it is difficult to justify failing to recognize a custodial relationship when such recognition is *protective* of students' constitutional rights. The conjunction of these cases should be read to indicate that schools have a degree of custodial authority over students that triggers a corresponding duty to protect students from harm caused in the school setting.

2. A functional analysis of the school environment reveals a custodial setting

A functional analysis that is informed by common sense understandings of the school environment reveals "de facto" custody sufficient to trigger affirmative constitutional duties. Legal scholars and commentators have urged courts to undertake a functional analysis of the school setting for purposes of evaluating affirmative constitutional duties. They have emphasized that to do so is perfectly consistent with the language and holding of the *DeShaney* opinion. One such writer suggests that the *DeShaney* holding is best read thus: "If the state enters into a 'special relationship' with an individual, restricting his ability to act on his own behalf in a way that is *functionally analogous* to the already constitutionally established 'special relationships,' then the state may be liable for failing to discharge its affirmative duty to protect the individual."[179] Another writer has argued that *DeShaney* contemplated a "continuum of custodial relationships" and that it is still open "at what point along the custody spectrum the constitutional floor should be pegged."[180] Under this conception, courts should "grappl[e] with the space between the poles of the spectrum" and consider "the unique custodial characteristics of the school." [181]

substances also seems considerably lower. One might go so far as to wonder if nurturing student expression is part of the school's educational mission. This might be less apparent in a case such as *Fraser*, where the expression punished was sexual innuendo, but seems striking in a case such as *Hazelwood*. 484 U.S. 260.

[178] *Kuhlmeier*, 484 U.S. at 271.

[179] Susanna M. Kim, *Section 1983 Liability in the Public Schools After* DeShaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101, 1112 (1994) (emphasis added).

[180] *Recent Cases*: D.R., *supra* note 147, at 1227. ("*DeShaney* appeared to establish a continuum by contemplating explicitly the possibility that state restraints other than physical incarceration might foster a constitutional duty.").

[181] *Id.*

Lower court decisions asserting that school authority over children is not so custodial as to constitute a "special relationship" within the meaning of *DeShaney* rely on rigid, formalist conceptions of custody that do not withstand close scrutiny. Fossilizing the special relationship doctrine where the Supreme Court left it in *DeShaney*, which unequivocally included prisons and mental hospitals but left other applications unspecified, lower courts have made doctrinal assumptions ungrounded in text. One recurring example is the notion that only 24-hour restraints rise to the requisite level of custody.[182] Not only is this absent from *DeShaney*'s text, it seems formalist in the extreme to suggest that the Constitution mandates an all-or-nothing approach, in which 24-hour custody gives rise to affirmative obligations to provide safe conditions that protect personal security, but anything less gives rise to no obligation whatsoever. This mode of analysis makes no distinction between attending school and standing in line at the Department of Motor Vehicles. Yet for any observer willing to consider the real life differences between these situations and the state's respective relationships with these individuals, the vastly divergent implications for an individual's liberty interests are clear.

Children are not merely restrained by the broad legal contours of the compulsory education requirement, but are also subject to the daily practical constraints of childhood, recognizable on the ground but perhaps not from the bench. The majority approach among the lower courts is bereft of any common sense consideration of children's actual dependency on school officials. Once a child arrives at school at 7:45 am, perhaps having completed an hour-long bus ride, there may be no means available for her to leave until the bus returns at 3:15 pm. The idea that she can stroll off campus to find a bathroom should the state fail to provide her with one is absurd. The assertion that "[t]hough attendance may not always be voluntary, the public school remains an open institution" may be true in the narrowest, most literal way, but the observation is a rather hollow one.[183] One court has asserted that "it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs,"[184] but the reality for a child whose school provides no bathrooms or safe drinking water is exactly that. Scholars have suggested that recognizing this dependency remains true to the policies and rationale underlying the special relationship doctrine. One such writer exhorts judges to "recognize the *rationale* for deriving affirmative duties from custodial relationships—not the mere fact of custody, but the *dependency* that results from custody."[185] Decisions failing to do so have "missed an opportunity to

[182] *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (school is not sufficiently custodial because "custody is intermittent and the student returns home each day"); D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1372-73 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079 (1993) (school not custodial because attendance is compulsory only during a fraction of students' waking hours and at the end of the school day students return home).

[183] *Hillsboro Indep. Sch. Dist.*, 113 F.3d at 1415 (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)).

[184] J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

[185] *Recent Cases*: D.R., *supra* note 147, at 1227.

promote the constitutional interests that underlie the Supreme Court's affirmative duty precedents."[186]

The lower court decisions also fail to take into account a child's subjective experience of power and hierarchy in the school setting. Children are subject to the social and psychological authority of school officials, an authority that is arguably more powerful from a child's perspective than the operative legal authority. It is a cruel system that inculcates values of obedience to and respect for authority figures and then suggests that children must flout authority to protect their personal security and dignity. Ignoring these realities gives a hollow, superficial quality to the resulting analysis, under which only situations where a viewer can perceive physical indicia of restraint qualify as custodial settings.

The presence of shackles, locks and bars is only significant if their absence results in a true freedom to leave; it takes just a bare willingness to engage with the facts of public schooling to see that this is not only false at the level of the choice made by the child, who is both dependent on and subordinate to school officials, but it is false at the level of secondary decisions and consequences as well. State sanctions associated with compulsory education ensure that parents do not have the choice to authorize their children to absent themselves from school facilities that threaten their health and dignity. Any assertion to the contrary, such as the Third Circuit's blithe suggestion that the compulsion is minimal because parents unhappy with conditions at their children's school can select private schools for their children,[187] is based on socioeconomic assumptions so flawed as to border on reckless. While the court does go on to concede that "[f]or some, the options may be limited for financial reasons,"[188] this merely reveals that in spite of the court's awareness of financial inequality, the norm is calibrated with regards to children whose parents can afford to pay; the plight of those who cannot is not cognizable in this court's due process analysis. This is particularly troubling in light of the reality that families with means to pursue alternatives to public schooling are unlikely to be plaintiffs in this type of suit because they will have already escaped the wretched conditions alleged herein. To refuse to recognize a duty to protect students stuck in public schools on the theory that other students can afford to go elsewhere is perverse.

Indeed, the recurrent assertion that schools are not custodial because parents are children's primary caretakers is nonsensical in many of its applications and at times downright malicious.[189] John Doe, bringing a section 1983 suit against the Hillsboro Independent School District for failing to supervise the school janitor that assaulted, raped, and impregnated his thirteen-

[186] *Id.* at 1225.

[187] "It is the parents who decide whether education will take place in the home, in public or private schools, or, as here, in a vocational-technical school." *D.R.,* 972 F.2d at 1371.

[188] *Id.*

[189] *See, e.g.*, *D.R.*, 972 F.2d at 1371 (parents are primary caretakers); *J.O.*, 909 F.2d at 272 (parents retain "primary responsibility" for caring for their children); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 733 (8th Cir. 1993). ("Public school attendance does not render a child's guardians unable to care for the child's basic needs.").

year old daughter, is told that the district has no constitutional duty to protect his daughter while she is at school because "[p]arents remain the primary source for the basic needs of their children."[190] One hardly knows where to begin. This rationale so obviously and utterly fails to address harm caused to children during the hours that *parents are legally obligated to send them to school*. It is analytically bankrupt to invoke a parent's primary responsibility for his or her child's care as a means for denying that the state has a duty to protect that child during those prescribed hours. The correct approach is to realize that

> the state's act of separating children from their parents during prescribed hours, under penalty of state truancy laws, divests parents of their abilities to act on their children's behalf. The resulting dependency establishes the sort of functional custody that should impose on school officials a minimal duty to protect students' liberty interests during school hours.[191]

V. CONCLUSION: THE DOCTRINAL DISTINCTION BETWEEN NEGATIVE LIBERTIES AND AFFIRMATIVE DUTIES IS ILLUSORY

While these lower court decisions rest on absurd empirical assumptions and unnecessarily formalist notions of custody, the most profound analytical flaw originates at *DeShaney*'s rigid distinction between positive and negative liberties that makes custody an issue in the first place. It is canonical that under the Due Process Clause the government's responsibility to refrain from harmful action extends to all situations, custodial or not, when such action interferes with protected liberty interests such as the right to bodily integrity. In *DeShaney*, the Supreme Court purported to apply an equally strong (in its view) supposition that under the Due Process Clause the government has *no* responsibility to refrain from harmful *in*action, even if the inaction results in a deprivation of those very same liberty interests.

Whatever one thinks about the latter supposition on its own terms, the deepest problem with *DeShaney* is that it wasn't a case about state inaction. While this was the lodestar of the majority opinion, because indeed there was no other way to render legitimate a decision freeing the state from responsibility for such an appalling course of events, the fairest assessment of *DeShaney* is that it revealed the state's calamitous blend of action and inaction.[192] While the majority endeavored to remind the reader that the state, after all, did not cause or amplify the harm Joshua suffered, nor did it place him in a "worse position than that in which he would have been had it not acted at all,"[193] this may actually be empirically false. It is not so inconceivable that the

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[190] Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997).

[191] *Recent Cases*: D.R., *supra* note 147, at 1228.

[192] Brennan pointed this out in his dissent, characterizing *DeShaney* as a case about state inaction. DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 203 (1989) (Brennan, J., dissenting).

[193] *Id.* at 201.

stress of intermittent monitoring and potential punitive sanction by the state can aggravate tensions within a household; an abusive parent may very well blame the child for the state's involvement, causing increased frequency and severity of abuse. If the state then turns around and abandons the child after having thus made him more vulnerable, "inaction" hardly captures the blameworthiness of the state's capricious involvement. It is plausible that the state's chosen course of action and inaction in *DeShaney* was unintentionally or not, the *most dangerous possible* combination for Joshua.

While *DeShaney* is certainly vulnerable to all manner of criticism, including charges that it reflects a retreat into "sterile formalism,"[194] a lack of moral ambition,[195] and a mistaken reading of historical underpinnings of the 14th Amendment,[196] my critique here focuses on the artifice of *DeShaney*'s distinction between action and inaction and the corresponding gulf between affirmative duties and negative liberties that the Court sees as so trenchant. The reality on the ground is that the distinction is illusory, in part because states weave back and forth between these two modes. When an individual registers a constitutional protest regarding some outcome of her relationship with the state, a fair assessment of her complaint would cover the whole sequence of the state's choices. As Brennan writes in his *DeShaney* dissent, "a State's actions can be decisive in assessing the constitutional significance of subsequent inaction."[197]

A doctrine built up without this understanding turns on mere nuances in pleading. While we could say the plaintiffs are asking the state to provide them with functioning toilets and adequate heat and ventilation, which would sound like the sort of affirmative duty which the Supreme Court has been so reluctant to impose, we could also say the plaintiffs are asking the state not to compel them to spend six to eight hours a day in a dangerously hot or cold facility with no functioning toilets. While common sense reveals the utter absence of any real difference between the two, an insistence on distinct doctrinal realms for affirmative duties and negative liberties creates very different analytical pathways and quite possibly different results, depending on whether the court accepted the latter claim as implicating a "true" negative liberty.

The better approach is not foreign to our constitutional jurisprudence; in fact, it has a fairly respectable pedigree. In *Youngberg*, which was delivered without dissent, the Court articulated the (affirmative, and therefore controversial) right to training as an adjunct of the (negative, and therefore uncontroversial) rights to bodily safety and freedom from physical restraint. It was clearly intended to be a limiting move, so that the Court didn't have to decide whether the involuntarily committed have an independent constitutional right to training *per se*. But the wisdom this affords may transcend what was lost. It provides the crucial insight that affirmative services provided by the

194 *Id.* at 212 (Blackmun, J., dissenting).
195 Soifer, *supra* note 24, at 1529.
196 *Id.* at 1521. *See also* Heyman, *supra* note 104, at 507.
197 *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting).

state are sometimes so indispensably necessary to protect negative liberty interests that the division retains no constitutional force.

Even Burger, whose concurrence purports to set forth his view that habilitation is not constitutionally required, ends up suggesting that in certain circumstances it might be. He begins by writing: "I would hold flatly that respondent has no constitutional right to training, or 'habilitation,' *per se*."[198] He briefly explains why, and then goes on to state: "I agree with the Court that some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interests in safety and freedom from restraint, but it seems clear to me that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation."[199] Burger, while concurring in the result (and, as he says, much of the Court's opinion), wants to view the state's action in *Youngberg* as unconstitutional because it has violated negative liberties *simpliciter*. But even Burger, who is in such a hurry to hold that there are no constitutionally imposed affirmative duties on states, finds himself having to acknowledge and describe the situations in which affirmative duties do in fact exist. The internal tension in his concurrence reveals the strain: Burger first announces a preference for a holding that clearly rejects a right to training, but then expresses his willingness to require the state to provide "self-care instruction"—as long as everyone understands its status as protective of negative liberties rather than, heaven forefend, a free-standing affirmative right.

While the actual specifics of when and what affirmative services are needed to protect negative liberty will of course vary dramatically from context to context, as a conceptual matter there is no reason that this corridor between affirmative and negative is unique to the mental institution. Michelman suggests that "affirmative acts of state protection are prerequisite to *any* substantial realization of (what anyone could conceivably value in) negative liberty."[200] Once this realization is fully accepted, then a decision like *DeShaney* looks like "evidence to the effect that, in America, hostility to affirmative rights trumps devotion to negative liberty."[201]

Identifying and confronting this hostility, which is so erosive of negative liberties, is particularly important in the context of public schools, where the state's action (mandating attendance) and inaction (wretched neglect of school facilities) are both simultaneous and sustained. A child who day in and day out, year after year, fulfills the state's compulsory education requirement at a public school whose facilities threaten his health, his dignity, or both, is entitled under the Due Process Clause to bring constitutional scrutiny to bear on his relationship with the state.

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[198] Youngberg v. Romeo, 457 U.S. 307, 329 (1982).

[199] *Id.* at 330.

[200] Frank I. Michelman, *Anti-Negativity as Form*, 21 LAW & SOC. INQUIRY 83, 85 (1996) (emphasis added and emphasis omitted).

[201] *Id.*