The Duty to Protect School Children: The Effect of the Third Circuit's Middle Bucks Decision

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I. Introduction

A violation by the state of a person's constitutionally protected right triggers a cause of action under 42 U.S.C. § 1983. Congress' purpose in enacting § 1983 was to provide a remedy to parties deprived of constitutional rights by a state official's abuse of his position while acting under color of state law. In the years since its passage in 1871, the courts have expanded the application of 1983, allowing it to evolve to reflect the needs of a changing society. Recently, courts have struggled with the question of whether liability under § 1983 can be extended to situations where a private individual is responsible for the conduct causing the constitutional violation.

The Third Circuit Court of Appeals recently decided a difficult § 1983 case, D.R. v. Middle Bucks Area Vocational Technical School. In Middle Bucks, the court required the existence of "special relationship" custody between the victim and the state before a finding of § 1983 liability can be made when private individuals inflict the injuries. Because the court refused to acknowledge the blatant disregard of the school and its officials for the safety of the plaintiffs, public school students who were subjected repeatedly to the humiliation of sexual abuse by fellow students during school hours in the classroom, the Third Circuit failed to extend § 1983 liability to the school and its officials. This decision, grounded on an unnecessarily strict interpretation of legal precedent and an extremely
shortsighted evaluation of the facts, is a travesty and serves to shield public schools and their employees from § 1983 liability when students' constitutionally protected rights are violated by private individuals while students are in the intermittent custody of the school.

II. COMPONENTS OF A CLAIM UNDER 42 U.S.C. § 1983

A brief overview of § 1983 and its components will facilitate an understanding of its application in the Middle Bucks setting. Originally passed as § 1 of the Ku Klux Klan Act of 1871,6 § 1983 provided protection for former slaves from abuses of government.7 Since its passage, applications of this statute have continued to evolve as new constitutional protections have been recognized.8 However, courts have become aware of the potential for § 1983 to become a means of finding tort liability of government officials and have become increasingly unwilling to expand its coverage in recent years.9

A. Analysis of “Protected Constitutional Right”

Plaintiffs alleging a § 1983 violation must first prove that they have been deprived of a constitutionally protected right. The historical expansion of rights guaranteed by the Fourteenth Amendment has resulted in the general characterization of a constitutionally protected right as one that is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”10

An analysis of prior decisions provides guidance for establishing when a right is or has become fundamental and, therefore, protected although it may not be specified in the Constitution itself. Several courts have recognized the existence of a substantive right to be free from bodily abuse. In Ingraham v. Wright,11 the Supreme Court addressed the issue of whether the Fourteenth Amendment liberty interests extend to protect school children from abuses of corporal punishment. The Court concluded that, “where school authorities, acting under color of state law,
deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.”

In *P.L.C. v. Housing Authority of the County of Warren,* the plaintiff brought a § 1983 complaint against the Housing Authority after one of its employees, who had been provided with a key by the Housing Authority, entered her apartment and raped her. The court reasoned that “plaintiff’s right to be free from such bodily injury and harm is a right of constitutional magnitude.”

Even more convincing of the recognition of the constitutional right to maintenance of bodily integrity is the *Doe v. New York City Department of Social Services* decision. That case examined whether a state agency could be liable for failing to protect a child from physical and sexual abuse at the hands of the child’s foster father. The court failed to address directly the threshold requirement that the plaintiff establish the existence of a constitutional right. However, the question of entity liability warranted close inspection by the court, inferring that the constitutional right to be free from physical and sexual abuse was “a given.”

Finally, a case involving the physical and sexual abuse of handicapped children by the school district bus driver, *Doe “A” v. Special School District of St. Louis County,* provides language which compels the recognition of a constitutionally protected right. According to the court, “[t]he acts intrude upon the personal privacy and bodily integrity of these children. The acts intrude in ways more personal than a jailhouse beating and in ways which will surely leave psychological scars long after physical healing is complete.” Clearly, therefore, judicial precedent exists which supports the conclusion that the right to be free from state intrusions into bodily integrity rises to a level requiring constitutional protection.

12. *Id.* at 674.
14. *Id.* at 965.
15. *Id.* at 962.
17. *Id.* at 136-137.
20. *Id.* at 1145.
B. Interpreting “Color of State Law”

In a historical decision, *Monroe v. Pape*,\(^2\) the United States Supreme Court linked the “color of state law” provision of § 1983 to the well-settled interpretation of state action for purposes of the Fourteenth Amendment.\(^2\) Originally passed to supply enforcement teeth for the Fourteenth Amendment,\(^2\) § 1983 specifically sought to remedy government-perpetrated harms,\(^2\) harms which are viewed as qualitatively different because of the constitutional implications.\(^2\)

1. Liability of Individual Defendants

Claims brought under § 1983 have identified at least three categories of individual perpetrators: 1) a state actor who is also the perpetrator of the act;\(^2\) 2) a state actor who is not the actual perpetrator but was responsible for a policy which allegedly allowed or encouraged the perpetrator who was also a state actor;\(^2\) and 3) a state actor, again, who is not the actual perpetrator but whose policy allegedly allowed or encouraged the actual perpetrator who was a private individual.\(^2\) A finding of individual liability for all three categories of actors has become increasingly difficult, particularly for those who fall into the third category.\(^2\)

Another aspect of individual liability pertinent to the *Middle Bucks* case is that in order for liability to attach for an alleged violation of § 1983, the plaintiff must establish that the defendant’s acts exceeded

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22. *See Lewis*, supra note 1, at 769.
23. *Id.*
24. *Id.* at 769-74.
25. *Id.*
27. *See D.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176 (10th Cir. 1990)* (focusing on the policies enacted by the individual defendants which allowed the offensive conduct of an employee to occur); *see also Stoneking v. Bradford Area Sch. Dist., 667 F. Supp. 1088 (W.D. Pa. 1987)* (Stoneking I) (finding that a “special relationship” existed between the individual defendants and the plaintiff which allowed liability to attach); Robert G. v. Newburgh City Sch. Dist., 1990 WL 3210 (S.D.N.Y. 1990).
28. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (holding that liability under § 1983 does not extend to injuries sustained by plaintiff due to the conduct of a private actor in the absence of a “special relationship” with the state as exemplified by situations where the state has acted to limit the plaintiff’s freedom to act on his own behalf, e.g., in situations of incarceration or involuntary institutionalization).
29. *See infra text* accompanying notes 33-36. While an in depth analysis of the scope of § 1983 is beyond the focus of this paper, it is sufficient to note that courts have evolved an expansive defense of qualified immunity which has all but eliminated liability for individuals who as state actors deprive any person of his constitutionally protected rights. *Id.*
mure negligence. The Court has stated that "the Due Process Clause is simply not implicated by a negligent act by an official causing unintended loss of or injury to life, liberty or property." This standard applies to both acts of commission and acts of omission by state actors.

Fearing the possibility of opening "litigation floodgates" and increasing judicial interference with discretionary decisions by government officials, courts have allowed the affirmative defense of qualified immunity to develop to insulate government officials from potential liability. The direct result of this broad application of qualified immunity is that fewer government officials are held individually accountable for violations of § 1983 while suit against governmental units may be more likely to succeed. Several courts have held, however, that qualified immunity will fail if the right violated has been recognized previously as one of "unmistakable application and clarity." In other words, individual defendants may be entitled to qualified immunity only if reasonable officials in the defendant's position at the time of the incident could have believed that their conduct complied with established legal standards.

2. Entity Liability

Prior to Monell v. Department of Social Services, Monroe v. Pape supplied the legal precedent for concluding that entity defendants lie wholly outside § 1983. The identity of a municipality as a "person" within the meaning of § 1983 was established by the Supreme Court in Monell. Based on Monell, a municipality or other governmental entity may be liable, within limits, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Therefore, liability of a municipality or entity such as a school district is predicated upon the execution of a governmental policy or custom.

31. Id. at 328.
33. Lewis, supra note 1, at 758-59.
34. Id. at 759.
35. Id. (citing Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) and Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982)).
39. Id. at 187.
41. Id. at 694.
In decisions after *Monell*, the Court has provided guidance in the area of municipal liability. In *Brandon v. Holt*, the Court was forced to decide whether the Memphis City police department was liable under § 1983 for the acts of a police officer who viciously assaulted plaintiffs. The Court held that “judgment against a public servant in his ‘official capacity’ imposes liability on the entity he represents provided, of course, the public entity received notice and an opportunity to respond.”

Also, municipal liability under § 1983 requires a determination that the entity’s challenged policy or custom is the “but for” cause of the plaintiff’s injury. In other words, the plaintiff would not have been injured “but for” the municipality’s action or inaction based on its policies or customs. This determination is, therefore, fact intensive. Proximate causation can result from entity actions based on deliberate choice, actions consistent with a settled entity custom, or inaction rising to the level of “deliberate indifference” to a frequently recurring circumstance. In cases where the alleged governmental policy causing the plaintiff’s injuries is a failure to act, the plaintiff must prove that the supervisory failure to act or to investigate communicated a message of toleration or approval to the offending subordinate. Liability is predicated upon more than mere “inaction and insensitivity.”

In its *Middle Bucks* decision, the Third Circuit Court of Appeals relied on a controversial United States Supreme Court decision, *DeShaney v. Winnebago County Department of Social Services*, to determine whether § 1983 liability should extend to the individual school defendants and the school as an entity defendant. In *DeShaney*, the Supreme Court limited the finding of § 1983 liability in cases where the perpetrator of the offensive conduct is a private actor to those situations where a “special relationship” exists between the plaintiff and the state actor. An example of such a special relationship occurs when the state attempts to limit the plaintiff’s freedom to act on his own behalf (in situations of incarceration or institutionalization for example).

44. Id. at 468-69.
45. Id. at 471-72.
47. Id.
48. Lewis, supra note 1, at 757. See also City of Canton v. Harris, 109 S. Ct. 1197, 1204 (1989).
50. Chinchello, 805 F.2d at 133.
52. Id. at 200.
The facts presented by the *DeShaney* case were numbing. A four-year-old boy, Joshua DeShaney, lived in the legal custody of his abusive father.\(^53\) The child had acquired a lengthy medical record with the local hospital and with the County Department of Social Services (DSS) as the victim of child abuse.\(^54\) In spite of the repeated reported incidents and serious warning signs of severe child abuse, DSS failed to take action.\(^55\) Joshua remained in his father's custody.\(^56\) Ultimately, Joshua was beaten so severely that he was admitted to the hospital in a coma, with brain damage that resulted in profound retardation.\(^57\) In spite of the protective nature of DSS's actions, the Court held that the State owes an affirmative duty to protect against harm "when the State takes a person into its custody and holds him there against his will."\(^58\) However, Joshua's injuries were inflicted while he was in the custody of his father. The state was therefore not liable under § 1983.\(^59\)

C. *Applicability to Middle Bucks*

This review of the components of a § 1983 claim indicates that in order to succeed, the *Middle Bucks* plaintiffs had to show that a constitutionally protected right had been violated, and that the actions of private individuals responsible for the violations were allowed to occur under a school policy, in this case, a policy of inaction, enforced by the deliberate indifference of school officials. If the court found that the school officials had a policy of deliberate indifference, then liability could also be imposed on the school district.

III. STATEMENT OF THE CASE

A. *Facts*

The facts of the *Middle Bucks* case, as presented in the plaintiffs' complaint,\(^60\) describe an alarmingly chaotic, physically and emotionally degrading environment existing in a graphic arts classroom in Middle Bucks Area Vocational Technical School, a part of the public school system in Bucks County, Pennsylvania. The plaintiffs were D.R., a sixteen-

\(^{53}\) *Id.* at 191.

\(^{54}\) *Id.* at 192.

\(^{55}\) *Id.* at 193.

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 199-200.

\(^{59}\) *Id.* at 202.

\(^{60}\) D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1378 (3d Cir. 1992) (dissenting opinion of Chief Judge Sloviter disclosing complaint's allegations in more detail).
year-old girl with a near-total hearing impairment and the accompanying problems of articulation,\(^6\) and L.H., a seventeen-year-old girl.\(^6\) Evidence presented in the case, including the plaintiffs' complaint\(^6\) and videotapes of classroom activities,\(^6\) reveals that these girls were subjected frequently, two to four times per week for a five-month period in the spring of 1990, to verbal abuse as well as physical and sexual assault by fellow students within the classroom.\(^6\) The offensive conduct, as described by D.R. in her complaint, extended not only to acts of offensive touching but also to acts of sodomy, fellatio and masturbation.\(^6\)

These actions were perpetrated against the plaintiffs primarily in the unisex bathroom and the darkroom contained within the graphic arts classroom.\(^7\) A student teacher, also named as a defendant in the lawsuit, was present in the classroom during the alleged offensive behavior\(^8\) and was herself subjected to offensive touching by her students.\(^9\)

The plaintiffs allege that school officials knew of the sexual assaults in the graphic arts classroom.\(^7\) In addition to the first-hand knowledge of the student teacher, L.H. testified that she told the Assistant Director of the school that she had been subjected to offensive sexual conduct.\(^7\) According to the plaintiffs, other officials named as defendants in the lawsuit also knew of the situation.\(^7\) No one took action to stop the shocking behavior or even to remove the plaintiffs from the classroom.\(^7\)

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61. Id. at 1366 n.5.
62. Id. at 1370.
63. Id. at 1378.
64. Id.
65. Id. at 1366.
66. Id. at 1378. Chief Judge Sloviter, in her dissent, listed D.R.'s allegations as follows:
   a) touching by the Perpetrator Defendants, and each of them, of the genital parts of minor Plaintiff;
   b) touching the breasts of minor Plaintiff;
   c) forcing and causing minor Plaintiff to masturbate the Perpetrator Defendants, and each of them;
   d) causing and forcing minor Plaintiff to commit fellatio on the Perpetrator Defendants, and each of them;
   e) the commission of acts of sodomy on minor Plaintiff;
   f) causing and forcing minor Plaintiff to watch and observe the Perpetrator Defendants, and each of them, perform similar offensive sex acts on one or more other female students in the graphics occupations classes;
   g) causing and forcing minor Plaintiff to watch and observe the Perpetrator Defendants have offensive physical contact—apparently non-sexual—with one or more of the school teachers including, but not limited to, Defendant Peters. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id. at 1366.
72. Id.
73. Id.
B. Issue

Under these facts, can the plaintiffs maintain a § 1983 claim, asserting that the defendant school district and school officials are liable for the deprivation of plaintiffs' liberty interests, specifically, their right to maintenance of personal body integrity, when the perpetrators of the offensive conduct were private individuals?

C. Holding

In spite of the shocking factual allegations in this case, the court dismissed the constitutional claims against the school district and the individual school officials on the grounds that the purpose of the Fourteenth Amendment is to protect individuals from actions of the state, not to protect individuals from each other.74 When the perpetrators of the injurious conduct are private individuals, a "special relationship" must exist between the plaintiff and the state whereby the state has acted to restrict the plaintiff's freedom to act on his own behalf before § 1983 liability will attach.75 As in DeShaney, the court held that the facts alleged by the Middle Bucks plaintiffs failed to establish the existence of such a "special relationship."76

IV. Analysis

The Middle Bucks decision focused on the validity of the plaintiffs' constitutional claims which, if allowed, would impose liability on the defendant school district and its employees when the acts causing the violation of plaintiffs' rights were perpetrated by private individuals, the plaintiffs' classmates, while in the classroom. The court applied a strict interpretation of the DeShaney decision to determine whether "special relationship" custody existed between the plaintiffs and defendants.77 The court also attempted to clarify situations in which a theory of "state-created danger" would necessitate a finding of liability.78 Furthermore, under these facts, a theory of liability which requires no special relationship duty but rather a state established policy, custom or practice received only a cursory analysis by the court.79 The court summarily

74. See DeShaney, 489 U.S. 189, at 195.
75. Middle Bucks, 972 F.2d 1364, at 1370.
76. Id. at 1373.
77. Id. at 1368-73.
78. Id. at 1373-76.
79. Id. at 1376.
dismissed plaintiffs' final theory of liability, that the defendants had conspired to deprive plaintiffs of their constitutional rights, because plaintiffs failed to assert any facts to support the existence of a conspiratorial agreement between the school defendants and the student defendants.80

A. "Special Relationship" Custody

Because private individuals' actions deprived the Middle Bucks plaintiffs of their constitutionally protected rights, the court immediately applied the DeShaney analysis for determining whether a "special relationship" existed between the plaintiffs and the school defendants.81 If found to exist, this "special relationship" would serve to place the plaintiffs in the school defendants' custody for purposes of § 1983 liability.82 In other words, the state does not have a duty to protect against actions of private actors unless a "special relationship" exists.83

In DeShaney, the Supreme Court attempted to define the parameters of a "special relationship." Such a relationship clearly exists when the state takes a person into its custody and holds him there against his will.84 In these situations, the Constitution imposes upon the State a duty to assume some responsibility for a person's safety and general well-being.85 Incarceration86 and involuntary institutionalization87 exemplify special relationship custody. The DeShaney Court stressed that it is the deprivation of liberty which triggers the protections of the Due Process Clause, rather than the State's failure to protect against harm inflicted by other means.88

The Middle Bucks holding implies that the only special relationship that warrants the finding of an affirmative Constitutional duty to protect occurs when the state has full-time custody of the victim.89 Thus the Middle Bucks court interpreted DeShaney narrowly. Only when the state has full-time custody are individuals powerless to provide for themselves, unable to seek outside help to meet their basic needs, and unable

80. Id. at 1376-77.
81. See supra, notes 51-59.
83. Id.
84. Id. at 199-200.
85. Id. at 200.
86. See Estelle v. Gamble, 429 U.S. 97 (1976) (reasoning that because the prisoner is unable to care for himself due to his loss of liberty, it is only "just" that the State be required to care for him).
87. See Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that the State was required to provide those services necessary to protect mental patients from themselves and others).
88. DeShaney, 489 U.S. at 200.
89. See Huefner, supra note 32, at 1949-50.
to leave.\textsuperscript{90}

In contrast, at most, public schools can be viewed as having "inter-
mittent" custody of school children.\textsuperscript{91} The \textit{Middle Bucks} majority characterizes the public school environment as being controlled primarily by
the students' parents.\textsuperscript{92} For example, parents decide whether their children are to be educated at home, public or private schools.\textsuperscript{93} Furthermore, in public schools, parents may, subject to truancy penalties, remove their child as they see fit.\textsuperscript{94} In the case of children qualifying for special education,\textsuperscript{95} parents must approve their child's schedule giving these parents even greater control of their child's educational environment.\textsuperscript{96} The majority concludes, therefore, that plaintiffs failed to estab-
lish the existence of special relationship custody as defined by \textit{DeShaney}. Even though plaintiff D.R. was required by law to attend school\textsuperscript{97} and school defendants were authorized to exercise disciplinary control,\textsuperscript{98} the school defendants did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs.\textsuperscript{99} The court also noted
that, unlike prisoners or mental patients, school children have meaning-
ful access to help\textsuperscript{100} by virtue of their home life\textsuperscript{101} and the lack of restric-
tions placed on student activities by the school after school hours.\textsuperscript{102}

Other courts,\textsuperscript{103} legal scholars\textsuperscript{104} and the \textit{Middle Bucks} dissent\textsuperscript{105}

\textsuperscript{90} \textit{Middle Bucks}, 972 F.2d 1364, 1371.

\textsuperscript{91} See Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadel-
phia, 874 F.2d 156, 168 n.9 (3d Cir. 1989) (holding that where mentally retarded individuals lived at
home and received vocational and support services, it was impossible to find an affirmative duty to
protect for such "intermittent" custody).

\textsuperscript{92} \textit{Middle Bucks}, 972 F.2d 1371. The \textit{in loco parentis} status afforded to Pennsylvania teachers
and principals (13 Pa. Code § 1317) "invests authority in public school teachers; it does not impose a
duty upon them." \textit{Id.} (citing Pennsylvania State Educ. Ass'n v. Department of Public Welfare, 449
A.2d 89, 92 (Pa. Commw. Ct. 1982)). Furthermore, in spite of the \textit{in loco parentis} status of schools,
parents retain the primary caretaker status. \textit{Id.}

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} Plaintiff D.R., by reason of her hearing impairment, qualified for special education. \textit{Id.} at
1366 n.5.

\textsuperscript{96} \textit{Id.} at 1371.

\textsuperscript{97} The Pennsylvania truancy laws reach only to the age of 16. When the offensive incidents
occurred, plaintiff D.R. was 16 years of age and plaintiff L.H. was 17 years of age. Therefore, the
compulsory attendance argument proposed by plaintiffs applies only to D.R. L.H. was no longer
required by law to attend school. \textit{Id.} at 1370.

\textsuperscript{98} See supra note 93 (describing the \textit{in loco parentis} status of school officials).

\textsuperscript{99} \textit{Middle Bucks}, 972 F.2d 1372.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} See, eg., Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989); Swader v.
Virginia, 743 F. Supp. 434 (E.D. Va. 1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989).

\textsuperscript{104} See Huefner, supra note 32.

\textsuperscript{105} \textit{Middle Bucks}, 972 F.2d 1377 (Sloviter, c.j., dissenting).
argue forcefully, however, that the majority's interpretation of *DeShaney* was too narrow. Key language from *DeShaney* indicates the Supreme Court did not intend to limit findings of a § 1983 affirmative duty entirely to complete custody situations. A duty to protect can arise from "the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or *other similar restraint of personal liberty* . . . ." Had the Court intended the existence of an affirmative duty to be limited only to custody situations, it could have said "or other similar types of custody."  

Thus, if the focus of the analysis in *Middle Bucks* were changed from an involuntary custody approach, to a noncustodial approach, plaintiffs may have succeeded. It can be effectively argued that schools can and do substantially restrict the personal liberties of students while at school. Often, discipline may require the exercise of the school's *in loco parentis* status. Also, schools effectively control students' movement. In addition, schooling can be viewed as involuntary in that substantial compulsion is associated with it.  

Application of a noncustodial analysis also provides a more realistic view of the psychological component of the situation faced by the *Middle Bucks* plaintiffs. The majority proposed that school children are able to seek outside sources of help, unlike persons in custodial relationships with the state as defined by *DeShaney*. However, it is generally acknowledged that children are reluctant to disclose sexual abuse. In addition, plaintiff D.R. may have been exceptionally vulnerable to the

106. *Id.* at 1379.
107. *DeShaney*, 489 U.S. at 200 (emphasis added).
109. *See* Huefner, *supra* note 32. A noncustodial approach is not precluded by the *DeShaney* decision. *Id.*
110. *See* Middle Bucks, 972 F.2d 1377 (dissenting opinion).
111. *Id.* at 1380.
112. *Id.* Several facts alleged by the *Middle Bucks* plaintiffs demonstrate this form of restriction. For example, D.R. was repeatedly refused passes to use a restroom outside of the graphic arts classroom. This action by the school, in effect, forced her to use the unisex restroom. *Id.* at 1380. Furthermore, students cannot simply walk out of school, as implied by the majority, without violating the truancy laws. *Id.* at 1380-81.
113. *Id.* Chief Judge Sloviter's dissent views the majority's minimalization of compulsory education laws as contrary to reality. *Id.* at 1380. For the vast majority of American households, a public school education is the only financially feasible option available for satisfying the compulsory attendance laws. *Id.* This is in contrast to the majority's assertion that parents may readily choose among the options of private schooling, home schooling, and public schooling. *Id.* at 1371.
114. *See* text accompanying note 100, *supra*.
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indignities of the abusive situation due to her limited ability to communicate effectively.\textsuperscript{116} The majority's contention that because these young girls could have easily sought outside help, their complaint fails to meet the custodial requirements of \textit{DeShaney}, incorrectly simplifies the situation and does not reflect the realities of sexual abuse. State protection should have been found to extend to plaintiffs in this circumstance in spite of the absence of special relationship custody defined by \textit{DeShaney}.

B. \textit{State Created Danger}

Language from the Supreme Court's \textit{DeShaney} decision also serves as the basis for the "state created danger" theory of liability asserted by the \textit{Middle Bucks} plaintiffs.\textsuperscript{117} The Supreme Court noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them."\textsuperscript{118} The clear implication from this language is that if the defendant state officials create the dangerous situation or do anything to increase the plaintiff's vulnerability, then liability may result. The \textit{Middle Bucks} plaintiffs asserted that the school officials' acts or omissions "created a climate which facilitated sexual and physical abuse of students."\textsuperscript{119} According to the majority's interpretation of the plaintiffs' claim, the school defendants caused or increased their risk of harm by:

1) failing to report to the parents or other authorities the misconduct resulting in abuse to plaintiffs;
2) placing the class under the control of an inadequately trained and supervised student teacher;
3) failing to demand proper conduct of the student defendants; and
4) failing to investigate and put a stop to the physical and sexual misconduct.\textsuperscript{120}

Again relying on the quoted \textit{DeShaney} language and a line of post-\textit{DeShaney} decisions,\textsuperscript{121} the court indicated that liability under this theory would be predicated only upon affirmative acts of the defendants.\textsuperscript{122} Since the plaintiffs' allegations included, in the majority's opinion, only

\textsuperscript{116} \textit{Id.} D.R. also feared that if she reported the abuse to anyone, she may lose what she viewed as her last educational opportunity. \textit{Id.}

\textsuperscript{117} \textit{Id.} at 1373.

\textsuperscript{118} \textit{DeShaney}, 489 U.S. at 201.

\textsuperscript{119} \textit{Middle Bucks}, 972 F.2d 1373.

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{See}, e.g., Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990).

\textsuperscript{122} \textit{Middle Bucks}, 972 F.2d 1373-74.
acts of omission, no liability could attach. In a glaring example of understatement, the majority stated that:

[i]the school defendants' "acts" in assigning student teacher Peters to the graphic arts class and failing to supervise her more closely, as well as their failure to put a stop to the non-sexual pandemonium may have created a recognizable risk that plaintiffs would receive little education in that class, and perhaps, physical injury due to the roughhousing. Failure to recognize the foreseeability of the sexual abuse suffered by the plaintiffs, given the observable activities known to be occurring within the classroom, should have clearly constituted deliberate indifference by the school officials.

The plaintiffs' argument for liability under this "state created danger" theory is strengthened by the fact that the abuses took place during school hours and in the classroom. This factor is unquestionably closely linked to the custody issue. However, given the court's reliance on DeShaney, it should be noted that the quoted DeShaney language referred to "dangers that Joshua faced in the free world," that part of his world over which the state presumably had no control. In contrast, the dangers faced by the Middle Bucks plaintiffs were present in their classroom during school hours, a place and time over which the defendant school officials could have and should have easily exercised control. Therefore, notwithstanding the majority's refusal to find special relationship custody in this case, the determination that the defendants did not affirmatively act to create the environment which deprived the plaintiffs of their constitutionally protected rights should not serve to dispose of the plaintiffs' argument. Rather, because the school tolerated unacceptable risks to the safety of students, it should be liable under § 1983 for its failure to protect students from harm.

C. State Established Policy, Custom or Practice

The third theory of liability proposed by the Middle Bucks plaintiffs is that the school defendants deliberately and recklessly established and maintained a custom, practice or policy which caused the plaintiff's injuries. The court acknowledged that it had recognized the validity of this theory in Stoneking v. Bradford Area School District. However, in Stoneking, the perpetrator of the offensive conduct was an employee of

123. Id. at 1374 (emphasis added).
124. See text accompanying notes 81-116, supra.
125. See supra note 107.
127. Middle Bucks, 972 F.2d 1376.
the state. Therefore, the court determined that Stoneking was inapplicable to the Middle Bucks facts which involved private actors.

Had the court applied a noncustodial analysis to determine that schools affirmatively act to restrain students' personal liberty while they are in attendance and therefore the school owes a duty to protect its students from acts which deprive them of their constitutionally protected right to maintenance of bodily integrity, the next step in the § 1983 analysis would be to determine whether the state's activities were "under color of state law." If the school is executing a policy or custom, the "under color of state law" requirement is met.

In cases brought under § 1983 in which the perpetrators were state actors as opposed to private individuals, deliberate indifference by the state has been found to constitute a "policy or custom" and, thus, support a holding of entity liability. Given the seriousness of the abuse inflicted upon the Middle Bucks plaintiffs, the length of time it was "tolerated," and the fact that at least two teachers and administrators knew of the situation, the school's failure to act definitely rises above mere negligence to the level of deliberate indifference. Furthermore, entity liability requires that the execution of a school policy or custom caused the alleged deprivation of rights. The Middle Bucks plaintiffs could easily assert that they would not have suffered a deprivation of their rights but for the school's policy of deliberate indifference. Therefore, although the Middle Bucks majority indicates that only affirmative acts contributing to the state creation of danger will lead to liability, application of legal precedent and analogy from other categories of § 1983 litigation support the argument that if a duty to protect is owed to the individual, then deliberate indifference, including a complete failure to act, qualifies as a school policy and could support a finding of liability under § 1983.

It has been suggested that the validity of a § 1983 claim should turn on the causal relationship between the inaction and the harm rather than on the existence of a custodial relationship. If the governmental entity has played a key role either in placing the victim in a dangerous situation

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129. In Stoneking, a high school band teacher had sexually abused the plaintiff, one of his students. The conduct was allowed to continue even after school officials became aware of it. Id.
130. See text accompanying notes 21-59, supra.
131. Id.
132. See text accompanying notes 58-60, supra.
133. Middle Bucks, 972 F.2d 1366, 1378.
134. See supra note 30.
135. See text accompanying notes 40-42, supra.
or in increasing the risk of harm to the victim by its inaction then its failure to protect should serve as a basis for § 1983 liability.\textsuperscript{137}

V. IMPLICATIONS OF THE \textit{MIDDLE BUCKS} DECISION

The \textit{Middle Bucks} decision may reflect the Third Circuit's concerns for the potential increase in litigation and concomitant court crowding that could result from a broadened interpretation of \textit{DeShaney}.\textsuperscript{138} However, Chief Judge Sloviter argued that other decisions set limits and provide guidance in this area.\textsuperscript{139} For example, a finding of liability under § 1983 imposes a high standard of culpability,\textsuperscript{140} limitations on the type of conduct on which liability can be based,\textsuperscript{141} and the broad application of the affirmative defense of qualified immunity for individual defendants.\textsuperscript{142}

Chief Judge Sloviter's dissent also points out that if courts were to extend the public school's duty to protect its students to include a situation as that which occurred at the Middle Bucks Area Vocational Technical School, the school could, if justified, exempt itself based on facts peculiar to the case. For example, if the school produced evidence demonstrating that the plaintiffs possessed the maturity required for them to seek outside help under these circumstances, then the duty to protect would not apply.\textsuperscript{143}

Arguably the importance attached to school safety outweighs the concerns for increasing the burden on the schools.\textsuperscript{144} The maintenance of a secure environment is essential to the achievement of the school's primary purpose of education.\textsuperscript{145} This attitude is reflected in the increased latitude afforded to schools as they are allowed to infringe on students' rights while conducting weapons searches, restricting student

\textsuperscript{137} Id.
\textsuperscript{138} A recent study indicates, however, that, for a variety of reasons, this concern has not been realized. See Stewart J. Schwab and Theodore Eisenberg, \textit{Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant}, 73 CORNELL L. REV. 719 (1988).
\textsuperscript{139} \textit{Middle Bucks}, 972 F.2d 1384.
\textsuperscript{140} Id. (citing Davidson v. Cannon, 474 U.S. 344, 347-48 (1986)).
\textsuperscript{141} Id. (citing City of Canton v. Harris, 489 U.S. 378, 385-92 (1989)).
\textsuperscript{142} Id. (citing Harlow v. Fitzgerald, 457 U.S. 800, 813-20 (1982)).
\textsuperscript{143} In support of this argument, the chief judge indicates that maturity evaluations are successfully used in cases where minors seek abortions without parental consent. These situations employ the procedure of judicial bypass to override the required parental consent if the minor presents evidence which demonstrates that she possesses the maturity necessary to understand the ramifications of her decision. \textit{Id.} at 1384 n.8 (citing Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990)).
\textsuperscript{144} See Huefner, supra note 32, at 1969-1971.
\textsuperscript{145} Id. at 1970.
movement off-campus during school hours, and employing other methods designed to increase security. Given the ready acknowledgment by the state and the schools of the potential for danger which would exist at today's public schools if efforts to maintain safety were not taken, it is only logical to extend the state's duty to protect schoolchildren to the public schools. For these reasons, it seems unlikely that a finding of a duty on the part of a school district to protect school children would be accompanied by markedly expanded liability of the school district.

VI. CONCLUSION

The Third Circuit Court of Appeals' application of a narrow interpretation of the Supreme Court's DeShaney decision to a fact situation involving repeated, long-term sexual assault of public school students by fellow students during school hours in the classroom resulted in the dismissal of plaintiffs' claims brought under 42 U.S.C. § 1983. This unfortunate holding serves to effectively eliminate substantive due process protection for school children in spite of the state's direct role, both in creating the injurious environment by compulsory attendance laws and in the maintenance of the injurious environment, by deliberate, reckless indifference to its existence.

Helen Holt Blake

146. Id.