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AVOIDING SORROW IN *MORROW*: A SPECIAL RELATIONSHIP SHOULD EXIST BETWEEN A SCHOOL AND ITS STUDENTS

Abstract: In 2013, in *Morrow v. Balaski*, the U.S. Court of Appeals for the Third Circuit held that a school did not have a constitutional duty to protect two students from being bullied. The court reasoned that no special relationship existed between the school and the students and the school's actions did not create the harm that was inflicted on the students. This Comment argues that courts should find a special relationship between a school and its students when a school's behavioral restrictions render the students dependent on the school for their safety.

INTRODUCTION

The Due Process Clause of the Fourteenth Amendment does not generally compel the state to protect individuals from harm by third parties.[1] Although the state itself cannot infringe on an individual's liberty without due process, the state generally has no constitutional duty to protect individuals from private citizens doing so.[2] There are two exceptions to this rule, however: when a special relationship exists between the state and the individual, or when the state's affirmative action creates or enhances the risk of harm to the individual.[3] In 2013, the U.S. Court of Appeals for the Third Circuit, sitting en banc, held in *Morrow v. Balaski* that the state did not have a duty to protect two students, as the public school did not have a special relationship with the students,

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[1] *See* U.S. CONST. amend. XIV, § 1; Morrow v. Balaski (*Morrow III*), 719 F.3d 160, 166 (3d Cir.) (en banc) (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989)) ("[A]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."), *cert. denied*, 134 S. Ct. 824 (2013).

[2] *See DeShaney*, 489 U.S. at 195–97; *Morrow III*, 719 F.3d at 166.

[3] *See DeShaney*, 489 U.S. at 199–201; *Morrow III*, 719 F.3d at 167, 177; Bright v. Westmoreland Cnty., 443 F.3d 276, 282 (3d Cir. 2006); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1369, 1373 (3d Cir. 1992); *see also, e.g.*, Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 366 (6th Cir.) (noting that the Due Process Clause of the Fourteenth Amendment does not protect individuals from private actors except when special relationships exist or when a state's affirmative acts increase the risk of harm), *cert. denied*, 133 S. Ct. 282 (U.S. 2012); Campbell v. State of Wash. Dep't of Soc. & Health Servs., 671 F.3d 837, 842, 845 (9th Cir. 2011) (noting that a state's failure to protect private citizens does not violate the Fourteenth Amendment unless the special relationship or state-created danger exception applies); Buchanan-Moore v. Cnty. of Milwaukee, 570 F.3d 824, 827–28 (7th Cir. 2009) (explaining that the Due Process Clause does not impose a duty on the state to protect individuals from each other unless the state has a special relationship with the individual or the state affirmatively places the individual in a situation of danger they would not otherwise be in).

and that the school's discretion in implementing its disciplinary policies did not amount to an affirmative action that enhanced the risk of harm.[4]

This Comment argues that a school should have a constitutional duty to protect its students when a school—through its policies and decisions—prevents children from protecting themselves while at school.[5] Part I of this Comment provides an overview of the scope of a state's constitutional duty to protect individuals from harm by third parties and reviews the facts and procedural history of *Morrow*.[6] Part II reviews the majority's rationale, and the dissent's contentions, for the holding that the state did not have a constitutional duty to protect the students.[7] Finally, Part III argues that courts should find a special relationship between a school and its students when its policies and decisions place restrictions on students during the school day.[8]

I. SUBSTANTIVE DUE PROCESS: WHEN THE STATE HAS A DUTY TO PROTECT

A. *The State Has a Duty to Protect Individuals When There Is a Special Relationship or When the State Creates the Danger*

The Due Process Clause of the Fourteenth Amendment protects persons from harmful state actions regardless of whether the state acted according to fair procedures.[9] If a state violates this right, or any other right secured by the U.S. Constitution or the laws of the United States, the affected individual may bring a claim under 42 U.S.C. § 1983.[10] In 1989, however, in *DeShaney v. Winnebago County Department of Social Services*, the U.S. Supreme Court

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[4] *See Morrow III*, 719 F.3d at 171–72, 178–79.

[5] *See DeShaney*, 489 U.S. at 200; *Morrow III*, 719 F.3d at 188 (Fuentes, J., dissenting); *infra* notes 63–78 and accompanying text.

[6] *See infra* notes 9–42 and accompanying text.

[7] *See infra* notes 43–62 and accompanying text.

[8] *See infra* notes 63–78 and accompanying text.

[9] *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (distinguishing between the substantive and procedural due process components of the Due Process Clause of the Fourteenth Amendment); Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (quoting *Collins*, 503 U.S. at 125) (noting that a substantive due process claim protects individuals against government action "regardless of the fairness of the procedures"); *see also Morrow III*, 719 F.3d at 166. The Due Process Clause provides that the state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Protecting persons from harmful state action is referred to as "substantive" due process. *See Collins*, 503 U.S. at 125.

[10] *See* 42 U.S.C. § 1983 (2006); *Morrow III*, 719 F.3d at 165–66; *Nicini*, 212 F.3d at 806. Section 1983 protects individuals from any deprivation of their constitutional rights by a person acting under color of state law. *See* 42 U.S.C. § 1983. Section 1983 claims must establish what right has been allegedly violated and whether there has been any deprivation of that right. *See Morrow III*, 719 F.3d at 165–66.

held that, as a general matter, a state's failure to protect an individual from harm by third parties does not violate the Due Process Clause.[11]

Nevertheless, some federal appeals courts recognize two limited exceptions that compel the state to protect an individual from harm by third parties.[12] First, the state has an affirmative duty to protect when a special relationship exists between an individual and the state.[13] A special relationship exists between the state and an individual when the state takes the individual into its custody and holds the person against her will.[14] The duty to protect arises from the state's restraint of the individual's liberty, which prevents the person from providing for her own protection.[15] In the public school context, however, federal appeals courts have declined to recognize a special relationship between public schools and students because schools do not exercise sufficient restraint over students.[16]

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[11] *See DeShaney*, 489 U.S. at 197, 200–01 (noting that only in limited circumstances does a state have a duty to protect); *Morrow III*, 719 F.3d at 167.

[12] *See, e.g.*, *Morrow III*, 719 F.3d at 167; *Pahssen*, 668 F.3d at 366; *Campbell*, 671 F.3d at 842, 845; *Buchanan-Moore*, 570 F.3d at 827–28.

[13] *See DeShaney*, 489 U.S. at 198, 199–200; *Morrow III*, 719 F.3d at 167.

[14] *See DeShaney*, 489 U.S. at 200–01; *Middle Bucks*, 972 F.2d at 1370. An actor that takes an individual into custody has a duty to control the conduct of third parties to prevent harm if the actor (a) knows or has reason to know of their ability to control conduct of third parties, and (b) knows or has reason to know of the necessity and opportunity for control of third parties. *See* RESTATEMENT (SECOND) OF TORTS § 320 (1965). This rule is applicable to those in charge of public schools, including teachers. *See id.* § 320 cmt. a; Daniel B. Weddle, *You're on Your Own, Kid . . . But You Shouldn't Be*, 44 VAL. U. L. REV. 1083, 1092–93 (2010) [hereinafter *You're On Your Own, Kid*] (explaining that the inclusion of educators in section 320 of the Restatement of Torts is reasonable because students are compelled by law to attend school, forced to matriculate with other students who may harm them, and cannot protect themselves in the absence of their parents).

[15] *See DeShaney*, 489 U.S. at 200 (explaining that the state's restraint of the individual's ability to act on his or her own behalf, not its failure to protect, triggers constitutional protection); *see also* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (explaining that the state has a duty to provide for an involuntarily committed person's basic needs and safety); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (explaining that the state has a duty to provide for a prisoner's medical needs); *Morrow III*, 719 F.3d at 167–68 (noting that it is clear from *DeShaney* that a state's duty to protect comes from limitations placed on an individual's freedom).

[16] *See, e.g.*, *Morrow III*, 719 F.3d at 170 (explaining that other federal appeals courts' decisions reinforce the *Morrow III* court's decision not to recognize a special relationship); Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 857–58 (5th Cir. 2012) (affirming precedent stating that a school does not have a special relationship with its students); Patel v. Kent Sch. Dist., 648 F.3d 965, 973–74 (9th Cir. 2011) (explaining that compulsory attendance and the school's status of *in loco parentis* does not create a special relationship); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (noting that state-mandated school attendance does not create such a restrictive custodial relationship to impose a duty to protect). For example, in the 1992 case *D.R. v. Middle Bucks Area Vocational Technical School*, the U.S. Court of Appeals for the Third Circuit rejected the argument that the state's compulsory school attendance laws and the school's *in loco parentis* authority over students amounted to the necessary physical custody during school hours. 972 F.2d at 1371–72; *see also* BLACK'S LAW DICTIONARY 858–59 (9th ed. 2009) (defining *in loco parentis* as "[o]f, relating to, or acting as temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent").

Second, a state has an affirmative duty to protect individuals from harm when the state's actions create the danger that caused the harm.[17] To trigger this duty under the state-create danger theory, four requirements must be met: (1) the harm is foreseeable and fairly direct; (2) the state's action "shocks the conscience;" (3) the individual is a foreseeable victim; and (4) the state's affirmative action renders the individual more vulnerable than if the state had not acted.[18] Notably, the fourth factor implies that the state must take an affirmative action to create the danger, rather than merely failing to exercise its authority.[19] In other words, the state creates an opportunity for harm that would otherwise not exist.[20]

B. *The Morrows' Due Process Claim*

A series of threats and physical assaults from a fellow student Shaquana Anderson at Blackhawk High School in Beaver County, Pennsylvania, led sisters Brittany and Emily Morrow to bring a cause of action pursuant to 42 U.S.C. § 1983 against the school district and the Assistant Principal, Barry Balaski.[21] On January 5, 2008, Anderson threatened Brittany by phone and online via MySpace.[22] Two days later, Anderson physically attacked Brittany in the lunchroom of their high school.[23] In accordance with its "No Tolerance Policy," the school suspended Brittany and Anderson for three days.[24] Anderson was then charged with simple assault, terroristic threats, and harassment.[25]

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[17] *See DeShaney*, 489 U.S. at 201; *Morrow III*, 719 F.3d at 167, 177; Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996).

[18] *See Morrow III*, 719 F.3d at 177; *Bright*, 443 F.3d at 281; *Kneipp*, 95 F.3d at 1208–09. These particular elements of the state-created danger theory are specific to Third Circuit cases. *See Morrow III*, 719 F.3d at 177; *Bright*, 443 F.3d at 281; *Kneipp*, 95 F.3d at 1208–09.

[19] *See DeShaney*, 489 U.S. at 201; *Bright*, 443 F.3d at 282; *Middle Bucks*, 972 F.2d at 1374.

[20] *See Morrow III*, 719 F.3d at 177–78; Rivas v. City of Passaic, 365 F.3d 181, 197 (3d Cir. 2004) (explaining that the fourth factor examines whether the state used its authority to create harm that would not otherwise exist); *see also* Chris W. Pehrson, Bright v. Westmoreland County*: Putting the Kibosh on State-Created Danger Claims Alleging State Actor Inaction*, 52 VILL. L. REV. 1043, 1061–62 (2007) (explaining that, after the 2006 U.S. Court of Appeals for the Third Circuit decision *Bright v. Westmoreland County*, the fourth prong requires the state to take an affirmative action that causes the individual to be in greater danger than if the state had not acted).

[21] *See* Morrow v. Balaski (*Morrow I*), No. 10-292, 2011 WL 915863, at *1 (W.D. Pa. Mar. 16, 2011), *aff'd*, 719 F.3d 160 (3d Cir. 2013).

[22] *Id.*; Petition for Writ of Certiorari at 3, Morrow v. Balaski (*Morrow IV*), 134 S. Ct. 824 (2013) (No. 13-302), 2013 WL 4822221, at *4 (U.S. Sept. 3, 2013) [hereinafter Petition for Writ of Certiorari] (explaining that Anderson posted a note online stating she was going to "kill Brittany" and made the threat over the telephone later in the day with Emily).

[23] *Morrow I*, 2011 WL 915863, at *1.

[24] *Id.*

[25] *Id.* at *1.

Despite these charges, Anderson returned to school, where later that month, she attempted to throw Brittany down a set of stairs.[26]

On April 9, 2008, a juvenile court placed Anderson on probation and ordered her to have no contact with Brittany.[27] In September, Anderson was adjudicated as delinquent based on assault charges and was again ordered to have no contact with Brittany.[28] Both no contact orders were provided to the school and to Assistant Principal Balaski.[29] Although the school's policies required expulsion when students commit criminal acts on school grounds or at school activities, Anderson remained in school and continued to attack the Morrows.[30] The school indicated it could not guarantee Brittany and Emily's safety, and recommended that the sisters should transfer to a different high school.[31]

After these incidents, Brittany and Emily brought a § 1983 claim against the school district and Balaski in the U.S. District Court for the Western District of Pennsylvania.[32] The Morrows alleged that the defendants violated their substantive due process rights to be free from harm and to a public education.[33] The Morrows argued that the school's compulsory attendance laws and its knowledge of the no contact orders created a special relationship with the Morrows and thus a duty to protect them from Anderson.[34] Additionally, the Morrows argued that ignoring the school's own expulsion policy and allowing Anderson to return to school created a danger that would not have otherwise existed.[35] The defendants moved to dismiss, arguing that, as a mater of law, the

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[26] *Id.* at *2. Anderson also called Brittany a "cracker" and "retarded," stating that Brittany "had better learn to fight back," and asked Brittany, "[W]hy don't you learn to talk right." *Id.*

[27] *Id.*

[28] *Id.*; Brief and Appendix for Appellants Volume I of II (Pages A1–A16) at 5, *Morrow III*, 719 F.3d 160 (No. 11-2000), 2011 WL 2687930, at *3 (3d Cir. July 5, 2011) [hereinafter Brief for Appellants].

[29] *Morrow I*, 2011 WL 915863, at *2.

[30] *See id.* at *2. On September 12, 2008, Anderson boarded Brittany's school bus and threatened her. *Id.* At the football game that evening, Anderson elbowed Brittany in the throat. *Id.* Days later, Anderson's friend, Abbey Harris, struck Emily in the throat. *Id.* All of these incidents were reported to Assistant Principal Balaski. Brief for Appellants, *supra* note 28, at 6.

[31] *Morrow I*, 2011 WL 915863, at *2.

[32] *See Morrow III*, 719 F.3d at 163; *Morrow I*, 2011 WL 915863, at *1. In addition, the Morrows brought a supplemental state law claim for negligence and/or gross negligence or willful misconduct against the school district and Balaski. *Morrow I*, 2011 WL 915863, at *1. Notably, there was no fear of tort liability in *Morrow* due to Pennsylvania's immunity statute. *See* 42 PA. CONS. STAT. ANN. § 8541 (West 2007) ("Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof of any other person."); *see also Morrow III*, 719 F.3d. at 183–84 (Smith, J., concurring) (noting that states are allowed to create their own statutory scheme for imposing liability on schools for not protecting students from harm).

[33] *See Morrow III*, 719 F.3d at 166; *Morrow I*, 2011 WL 915863 at *1; Brief for Appellants, *supra* note 28, at 6.

[34] *See* Brief for Appellants, *supra* note 28, at 7.

[35] *Id.* at 7–8.

state did not have a duty to protect the Morrows.[36] The district court dismissed the Morrows' complaint with prejudice, finding that that no special relationship existed between the Morrows and the school, and that the state-created danger theory did not apply.[37]

On appeal, the Third Circuit, sitting en banc, held that the school did not have a duty to protect and thus affirmed the district court's decision.[38] The court reasoned that the school did not have a special relationship with the Morrows because the Morrows remained dependent on their parents.[39] Moreover, the school did not create or increase their risk of danger because the school's decisions to permit Anderson to return to school and to ignore its own disciplinary procedures were not affirmative acts.[40] On September 3, 2013, the Morrows filed a petition to the Supreme Court to request review of the Third Circuit decision.[41] On December 16, 2013, the petition was denied.[42]

II. Special Relationships and the State-Created Danger Theory

Despite the Third Circuit's holding that the school had no duty to protect the Morrows, the court was not unanimous regarding whether the special relationship or state-created danger exceptions applied.[43] Section A of this Part discusses the majority's reasoning for, and the dissent's arguments against, finding no special relationship between the Morrows and the school.[44] Section B of this Part examines the majority's reasoning for, and the dissent's arguments against, finding that the school took no affirmative action that increased the risk of harm to the Morrows.[45]

A. *Special Relationship*

In *Morrow*, the Third Circuit concluded that a special relationship did not exist between the public school and the Morrows and thus the state did not

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[36] *See Morrow I*, 2011 WL 915863, at *3.

[37] *Morrow III*, 719 F.3d at 165; *Morrow I*, 2011 WL 915863, at 5–7. The district court also denied supplemental jurisdiction over the state law claims. *Morrow I*, 2011 WL 915863, at 6–7.

[38] *See Morrow III*, 719 F.3d at 165, 179. Prior to *Morrow III*, the Third Circuit had reordered a hearing en banc. Morrow v. Balaski (*Morrow II*), 685 F.3d 1126, 1126 (3d Cir. 2012).

[39] *See Morrow III*, 719 F.3d at 170–71, 173–74.

[40] *See id.* at 177–78.

[41] Petition for Writ of Certiorari, *supra* note 22, at 25.

[42] *Morrow IV*, 134 S. Ct. at 825.

[43] *Compare Morrow III*, 719 F.3d 160, 165, 173–74, 177–79 (3d Cir.) (holding that neither the special relationship nor state-created danger exceptions applied), *cert. denied*, 134 S. Ct. 824 (2013), *with id.* at 188–89, 193–94 (Fuentes, J., dissenting) (arguing that the school did have a special relationship with the Morrows and that the state-created danger exception applied).

[44] *See infra* notes 46–54 and accompanying text.

[45] *See infra* notes 55–62 and accompanying text.

have a duty to protect the students from Anderson.[46] A duty to protect did not arise, according to the court, because the school's authority during school hours did not place a restriction on the Morrows' freedom to provide for their own well-being.[47] The court reasoned that the Morrows remained dependent on their parents to meet their basic needs, and the school's authority over them during school hours did not usurp their parents' ultimate authority.[48] Moreover, the court reasoned that states are better suited to provide protection and remedies for students through tort claims and the political process rather than through § 1983 claims.[49]

Dissenting in *Morrow*, Judge Julio Fuentes argued that a special relationship did exist between the school and the Morrows because the school had sufficiently restricted the Morrows' liberty to the extent the students could not care for themselves during the school day.[50] Although parents retain ultimate custody over their child, their authority is limited while the child is in school.[51] Moreover, as indicated by the U.S. Supreme Court, a special relationship can exist even if the state does not have complete physical custody of an individual.[52] As such, the dissent analogized the Morrows' situation to a foster care

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[46] *See Morrow III*, 719 F.3d at 169–71, 172–73. To reach this conclusion, the Third Circuit relied on the 1989 U.S. Supreme Court decision *DeShaney v. Winnebago County Department of Social Services*, the Court's 1995 decision *Vernonia School District 47J v. Acton*, as well as the 1992 U.S. Court of Appeals for the Third Circuit case *D.R. v. Middle Bucks Area Vocational Technical School*. *See id.* at 167–74 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 654–55 (1995); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 192-93, 199–200 (1989); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366, 1371–72, 1377 (3d Cir. 1992)).

[47] *See Morrow III*, 719 F.3d at 168; *see also DeShaney*, 489 U.S at 200 (explaining that the restraint of the individual's freedom to act on her own behalf amounts to a violation of due process); *Middle Bucks*, 972 F.2d at 1366, 1371–73, 1376 (rejecting the argument that the school had a duty to protect two female students from assault by male students because their parents remained their primary caretakers and the children remained residents of the their homes).

[48] *See Morrow III*, 719 F.3d at 170–71, 173–74. According to the court, a school's restrictions on students in general and those in this particular case are different in kind from the restrictions placed on prisoners, institutionalized patients, or children in foster care. *See id.* For example, unlike prisons, schools need parent permission to administer medical treatment. *See id.* at 173.

[49] *See id.* at 176–77; *id.* at 183–84 (Smith, J., concurring) (writing separately to note when a prior en banc decision can be overruled). *But see* Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise,* 77 TEMP. L. REV. 641, 666 (2004) [hereinafter *Bullying in Schools*] (noting that immunity from tort liability protects schools from any liability for decisions they make).

[50] *See id.* at 188 (Fuentes, J., dissenting); *see also id.* at 185 (Ambro, J., concurring in part and dissenting in part) (agreeing that a special relationship existed but arguing that the state did not make an affirmative act).

[51] *See id*. at 190–91 (Fuentes, J., dissenting) (explaining that parents cannot withdraw their student from school except in very limited and egregious circumstances). The dissent described restrictions that the school places on students during the school day, such as prohibiting cell phones and regulating behavior in school buses, the cafeteria, and sporting activities. *See id.*; *see also Bullying in Schools*, *supra* note 49, at 666.

[52] *See DeShaney*, 489 U.S. at 200 ("[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint

placement, where a child still exercises freedom but is also still dependent on the state.[53] Ultimately, Judge Fuentes concluded that the state's compulsory attendance laws, the no contact orders, the school's custody of all the students involved, and the school's "No Tolerance" policy together restricted the girls' ability to protect themselves.[54]

B. *State-Created Danger Theory*

The *Morrow* court held that even though the defendants allowed Anderson to return to school, that action did not create any risk of harm to the Morrows that would give rise to a constitutional duty to protect.[55] A state's action creates danger that causes harm to an individual when the state's affirmative action rendered the individual more vulnerable than if the state had not acted.[56] The court reasoned that the school's decisions not to implement its disciplinary procedure and to allow Anderson to return to school were not affirmative acts.[57] If all decisions not to act were construed as affirmative acts, the court explained, it would be difficult to limit to the exception.[58]

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of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . . ."); *Morrow III*, 719 F.3d at 188–90, 192 (Fuentes, J., dissenting) (arguing that *DeShaney* did not create a complete physical custody requirement for a special relationship).

[53] *Morrow III*, 719 F.3d at 191–92 (Fuentes, J., dissenting); *see* Mary Kate Kearney, DeShaney's *Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 284 (2002) (explaining that foster care isolates children from other means of protection, which makes them dependent on the state); *see also* Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000) (explaining that foster children and prisoners are similar because both depend on the state for their daily needs).

[54] *See Morrow III*, 719 F.3d at 187–88, 191, 193 (Fuentes, J., dissenting); *see also Nicini*, 212 F.3d at 808. Alternatively, the dissent argued that the Third Circuit should have found that a special relationship existed because the court did not necessarily need to rely on its precedent in *Middle Bucks* due to that decision's flawed reasoning. *See Morrow III*, 719 F.3d at 195–96 (Fuentes, J., dissenting); *see also* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992) (explaining that an en banc court may, upon review, set aside its own precedent when the holding was fundamentally flawed). According to the dissent, the *DeShaney* court did not hold that the creation of a duty through a special relationship requires complete physical custody, rather it provided non-exhaustive examples of restrictions that qualified as a special relationship. *See Morrow III*, 719 F.3d at 195 (Fuentes, J., dissenting); *see also Middle Bucks*, 972 F.2d at 1377 (Sloviter, J., dissenting) (articulating that the majority read *DeShaney* too narrowly).

[55] *See Morrow III*, 719 F.3d at 178–79 (majority opinion) (rejecting the Morrows' argument that failing to expel Anderson or letting her board the Morrows' school were affirmative actions).

[56] *See id.* at 167, 177; Bright v. Westmoreland Cnty., 443 F.3d 276, 281–82 (3d Cir. 2006) (emphasizing that the fourth element requires an affirmative act, not merely a failure to act); Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (concluding that there was a state-created danger because the police officers' affirmative acts of detaining a woman, sending her husband home, and then leaving her to walk home intoxicated created the situation that led to her injuries).

[57] *See Morrow III*, 719 F.3d at 178–79. A school that ignores bullying or takes ineffective measures in response to it will not meet the state-created danger theory criteria because the state has not made the situation worse. *See Bullying in Schools*, *supra* note 49, at 669. According to the court, Anderson's suspension, while an affirmative act, did not increase the danger to the Morrows. *See Morrow III*, 719 F.3d at 178–79. Additionally, the court concluded that the decisions not to expel Anderson and to allow her to board the Morrows' school bus—despite the no contact order—only indi-

Despite these concerns, Judge Fuentes's dissent argued that the school's decision constituted an affirmative act and thus the Morrows had a claim under the state-created danger theory.[59] Judge Fuentes viewed the affirmative action requirement as assessing whether the state increased the risk of harm, regardless of whether the state took an affirmative action or merely decided whether to use its authority.[60] In this case, an affirmative action that increased the risk of harm could be inferred because the school used discretion in allowing Anderson to return to school.[61] As a result of the school's decision to violate its own disciplinary procedures, the girls were at an increased risk of danger, thereby triggering an affirmative duty for the school to protect them.[62]

III. A Special Relationship Between a School and Its Students

A school should be constitutionally liable when children are unable to protect themselves from harm, in particular bullying from other students.[63] Because parents do not have the ability to adequately provide for their children's safety while at school, this responsibility should be imposed on the adults to

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cate that the school failed to take any affirmative action. *See id.* Similarly, other federal appeals courts have refused to construe school inaction as an affirmative act. *See, e.g.*, Sanford v. Stiles, 456 F.3d 298, 312 (3d Cir. 2009) (explaining that a guidance counselor's failure to act to prevent a student's suicide is not an affirmative act); McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 465–66 (6th Cir. 2006) (concluding that a teacher leaving her students unattended was not an affirmative act that created or increased the risk of harm).

[58] *See Morrow III*, 719 F.3d at 178 (reasoning that if the court were to accept that the decisions to take one action over another or to take no action at all were affirmative acts, the "state-created danger *exception* would swallow the rule").

[59] *See id*. at 201 (Fuentes, J., dissenting).

[60] *See id*. at 199 (arguing that the decision not to act is an affirmative use of authority); *see also Bullying in Schools*, *supra* note 49, at 669 (suggesting that a school's failure to act actually encourages harassment in schools). Notably, one court following the Third Circuit's formulation of the state-created danger theory found the theory satisfied where a school official threatened disciplinary action if a female student defended herself from attacks by male students. *See* Carroll K. v. Fayette Cnty. Bd. Of Educ., 19 F. Supp. 2d 618, 624 (S.D.W. Va. 1998).

[61] *See Morrow III*, 719 F.3d at 200 (Fuentes, J., dissenting) (arguing that the school admitted during oral argument that the principal could have, but did not, initiate the process to expel Anderson).

[62] *See id*. at 200–01 (criticizing the majority for dismissing the argument, without explanation, that the school's deviation from its disciplinary code is an affirmative act).

[63] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); *Morrow III,* 719 F.3d 160, 188 (3d Cir.) (Fuentes, J., dissenting), *cert. denied*, 134 S. Ct. 824 (2013); *see also Bullying in Schools*, *supra* note 49, at 666 (acknowledging that significant restrictions are placed on students during the school day and that parents cannot always afford to homeschool or transfer their child to a private school to avoid harm). *See generally You're on Your Own, Kid*, *supra* note 14, at 1083–94 (arguing that courts should impose a duty on schools to reduce and prevent bullying). The ineffectiveness of state bullying laws further supports that children need constitutional protection. Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & Educ. 603, 638–39, 644–48 (2012) (finding no significant difference between the prevalence of bullying based on the presence of state anti-bullying legislation or based on the severity of state anti-bullying laws).

whom parents have given temporary authority.[64] Finding that a special relationship exists between the school and its students in certain instances will inspire greater care in the drafting of school policies and, in the case of bullying, more attention to improving a school's social climate instead of merely reacting to incidents.[65] Ultimately, utilizing the special relationship exception will compel schools to tend to the safety of their students, regardless of whether they contributed to the danger.[66]

In contrast, the state-created danger theory should not be used to establish a duty to protect due to the difficulty in determining whether a school took an affirmative action.[67] To construe inaction generally as an action would too greatly expand the state-created danger exception, causing schools to take severe action against student misconduct out of fear of liability.[68] The facts in

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[64] *See Morrow III*, 719 F.3d at 190, 194 (Fuentes, J., dissenting). Using special relationships between students and teachers to *broaden* a student's constitutional right would work similarly to using special relationships to *diminish* other constitutional rights—to promote a safer school environment. *See, e.g.*, Shade v. City of Farmington, Minnesota, 309 F.3d 1054, 1061 (8th Cir. 2002) ("The nature of administrators' and teachers' responsibilities for the students entrusted to their care, not school boundary lines, render the Fourth Amendment standard in the public-school context less onerous."); M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979) (identifying that teachers have a unique relationship with their students with regard to discipline and protection while in their care and custody, which justifies greater flexibility when applying the Fourth Amendment in a school setting); Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV 1563, 1571 (2009) (noting that schools can limit a student's First Amendment freedom of speech rights because schools are obligated to provide safe learning environments).

[65] *See* Neiman, *supra* note 63, at 616–17 (explaining that immediate disciplinary action in response to bullying, such as zero tolerance policies, are not adequate long-term solutions because successful bullying intervention programs incorporate skills training, counseling, and mediation); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 152–53 & n.25 (2009) (arguing that "zero tolerance" policies and systems of progressive discipline fail to stop bullying because they focus on the misconduct rather than the community prejudices that cause the victim to be vulnerable); *see also Bullying in Schools*, *supra* note 49, at 700.

[66] *See Morrow III*, 719 F.3d at 202 (Fuentes, J. dissenting) (explaining that when the state interferes with a child's ability to protect themselves, the state should be seen as responsible for protecting the child).

[67] *See id.* at 186 (Ambro, J., concurring in part and dissenting in part); *see also, e.g.*, Sanford v. Stiles, 456 F.3d 298, 312 (3d Cir. 2009) (explaining that a guidance counselor's failure to act to prevent a student's suicide is not an affirmative act); McQueen v. Beecher Cmty. Sch. 433 F.3d 460, 465–66 (6th Cir. 2006) (concluding that a teacher leaving her students unattended was not an affirmative act that created or increased the risk of harm).

[68] *See Morrow III*, 719 F.3d at 186 (Ambro, J., concurring in part and dissenting in part); *see also Bullying in Schools*, *supra* note 49, at 679 (explaining that "zero tolerance" policies' lack of proportionality and reasonableness can lead to expulsion and suspension instead of educating offenders about their actions). In *Morrow*, Pennsylvania's immunity statute insulated the school from tort liability. *See* 42 PA. CONS. STAT. ANN. § 8541 (West 2007). Although there are strong benefits to this legislative choice, it still leaves students and parents like the Morrows without recourse. *See Bullying in Schools*, *supra* note 49, at 683 (explaining that immunity protects the state treasury from being inun-

Morrow illustrate the inadequacies of the state-created danger theory, as it is difficult to characterize the school's decision not to enforce its own misconduct policy as an affirmative action.[69] Nevertheless, the school's decision *can be* incorporated into the special relationship analysis because it further restricted the Morrows' liberty.[70]

Courts should therefore recognize a special relationship between a school and its students when the school imposes restrictions that limit students' ability to protect themselves.[71] Because children become dependent on the school to provide for their safety during the school day, the limits imposed on the freedom of the students to act on their own behalf should give rise to a duty to protect under the Fourteenth Amendment.[72] Although compulsory attendance and a school's *in loco parentis* authority is not enough to create the duty to protect, situations such as a school's failure to adhere to a no tolerance policy for bullying can place a much greater restriction on the ability of students to provide for their own needs.[73] These types of conditions create student dependence on a

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dated by damage awards and relieves school officials' fear of liability for their decisions, but leaves parents without remedies when students are harmed).

[69] *See Morrow III*, 719 F.3d at 185–86 (Ambro, J., concurring in part and dissenting in part) (reasoning that the fourth prong of the state-created danger test distinguishes between when the state could have done more to protect an individual and when the state actually increased or created the danger); *see also DeShaney*, 489 U.S. at 203 (reasoning that if citizens want a system that imposes liability when the state fails to act, they may create one through tort law, but liability cannot be imposed by the Court's expansion of due process); *Sanford*, 456 F.3d at 312 (holding that failure to act to prevent a suicide is not an affirmative act); *McQueen*, 433 F.3d at 465–66 (concluding leaving students unattended is not an affirmative act); *Bullying in Schools*, *supra* note 49, at 670 (concluding that courts will likely not find fault with the school in bullying cases when officials fail to act).

[70] *See Morrow III*, 719 F.3d at 186 (Ambro, J., concurring in part and dissenting in part) (explaining that the school's decision not to act is more relevant to the special relationship exception). *But see* Carroll K. v. Fayette Cnty. Bd. of Educ., 19 F. Supp. 2d 618, 624 (S.D.W. Va. 1998) (reasoning that plaintiff's state-created danger theory claim survived a motion to dismiss because of the school's hostile environment toward females and the principal's statements to a female student that she could not defend herself against physical attacks by male students).

[71] *See Morrow III*, 719 F.3d at 171 ("[W]e do not foreclose the possibility of a special relationship arising between a *particular* school and *particular* students under certain unique and narrow circumstances."); *id.* at 188, 190–91 (Fuentes, J., dissenting); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372–73 (3d Cir. 1992); *see also Fourteenth Amendment Duty to Protect—Third Circuit Holds That State Has No Duty to Protect Schoolchildren from Bullying Under the Special Relationship or State-Created Danger Exceptions*—Morrow v. Balaski, *719 F.3d 160*, 127 HARV. L. REV. 811, 816–18 (2013) (arguing that the Third Circuit should have found a special relationship between states and school children).

[72] *See Morrow III*, 719 F.3d at 188 (Fuentes, J., dissenting); *cf. id.* at 172–73 (majority opinion) (quoting *DeShaney*, 489 U.S. at 200). The court conceded that the school's knowledge of the no contact orders and the specific incidents may be enough to establish that the school violated an *existing* duty to protect the Morrows, but held that it is not enough to *create* the duty. *See id.* at 173 (majority opinion).

[73] *See DeShaney,* 489 U.S. at 200; Smith v. District of Columbia, 413 F.3d 86, 95–96 (D.C. Cir. 2005); Nicini v. Morra, 212 F.3d 798, 808–09 (3d Cir. 2000) (reasoning that children in foster care are dependent on the state to meet their basic needs even though they enjoy greater freedom than prison-

school for daily needs and thus are similar to restrictions found in a foster care or independent living care situation, where courts have found a special relationship.[74]

Furthermore, finding that a school has a constitutional duty to protect students when their ability to protect themselves is restricted will prevent students from taking matters into their own hands when faced with a bully.[75] Given the prevalence of bullying and state anti-bullying measures, schools should have an affirmative duty to protect children from private violence.[76] Moreover, the factual development of other liberty restricting measures over students during the school day supports a finding of such an affirmative duty.[77] Schools are exhibiting greater control over students with the development of technology that further limits their ability to provide for their own protection.[78]

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ers); *Morrow III*, 719 F.3d at 174. In *Morrow*, the school's "No Tolerance Policy" and decision not to expel Anderson, despite two no contact orders, placed a much greater restriction on the ability of the girls to provide for their own needs. *See* 719 F.3d at 187–88, 191, 193 (Fuentes, J., dissenting); *see also Nicini*, 212 F.3d at 808.

[74] *See Morrow III*, 719 F.3d at 191–93 (Fuentes, J., dissenting); *Smith*, 413 F.3d at 95–96; *Nicini*, 212 F.3d at 808–09; *see also* RESTATEMENT (SECOND) OF TORTS § 320 (1965) (indicating that, after taking an individual into custody, there is a duty to control the conduct of third parties if the actor has reason to know of their ability to control such conduct and has reason to know of the necessity and opportunity for control of third parties).

[75] *See Morrow III*, 719 F.3d at 187–88 (Fuentes, J., dissenting); *Middle Bucks*, 972 F.2d at 1377 (Sloviter, J., dissenting). According to one commentator:

> In effect, the state has created for the child a property interest in a free education, compelled her to avail herself of it, and then has acquired no duty to protect either that property interest or her liberty interest in bodily integrity, at least so far as those interests are threatened by others who themselves have been brought into her life by state compulsion.

Bullying in Schools, *supra* note 49, at 670; *see also* Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES, Sept. 13, 2013, at A1, *available at* http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html?pagewanted=all (describing twelve-year old girl who committed suicide after being cyberbullied).

[76] *See* Neiman, *supra* note 63 at 628 (noting that as of November 2010, forty-five states have laws addressing school bullying); SIMONE ROBERS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, at v (2012), http://nces.ed.gov/pubs2012/2012002rev.pdf (noting that in 2009, 39% of sixth graders, 33% of seventh graders, 32% of eighth graders, 28% of ninth graders, 27% of tenth graders, 21% of eleventh graders, and 28% of twelfth graders reported being bullied at school); VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 47–48 (2011), http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf (noting that forty-one states have model bullying policies or guidelines for school districts).

[77] *See Morrow III*, 719 F.3d at 195–96 (Fuentes, J., dissenting) (explaining that schools exercise greater control over students through electronic tracking of their movements, monitoring social media, and locking classrooms).

[78] *See id.*; Stephen Ceasar & Howard Blume, *To Lock Classroom Doors or Not?,* L.A. TIMES, Jan. 13, 2013, http://articles.latimes.com/2013/jan/13/local/la-me-school-security-20130114 (describing that some schools require classrooms to be locked while others leave it to the discretion of the administrators and teachers); Maurice Chammah & Nick Swartsell, *Student IDs That Track the Students*,

CONCLUSION

A school should have a constitutional duty to protect its students during the school day when restrictions at school prevent its students from protecting themselves. When a school restricts students' liberty, the students become dependent on the school to meet their needs, which creates a special relationship. The Third Circuit in *Morrow v. Balaski* should have found a special relationship between the school and the Morrows because the students were dependent on the school to meet their needs when the school did not enforce its own disciplinary policy.

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N.Y. TIMES, Oct. 6, 2012, at A27A, *available at* http://www.nytimes.com/2012/10/07/us/in-texas-schools-use-ids-to-track-students.html (describing an identification device that uses radio frequencies to track students).