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It's Time for the Fourth Circuit to Rethink Deshaney

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IT’S TIME FOR THE FOURTH CIRCUIT TO RETHINK *DESHANEY*

Dale Margolin Cecka *

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I. INTRODUCTION

Each year, the media uncovers sex abuse scandals, which implicate educational institutions.¹ Civil actions are slowly making their way to

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federal courts, through 42 U.S.C. § 1983 claims (“§ 1983”), Title IX, and other causes of action.² In 2015, the Fourth Circuit heard *Doe v. Rosa*, in which the parent plaintiffs sought to extend civil liability to the Citadel’s president, for failing to protect their minor sons from sex abuse inflicted by one of the Citadel’s employees.³ In dismissing the matter, the Fourth Circuit followed precedent set by the Supreme Court years ago in *Deshaney*.⁴ This interpretation of *Deshaney*, however, is no longer valid in light of the growing number of sexual misconduct cases involving educational institutions. Strictly applying *Deshaney* encourages schools to place their interests higher than the security of their students. In fact, other circuits have already reinterpreted *Deshaney*⁵ in this context. Although *Doe* suffered from causation problems, an alternate legal interpretation would better protect young people and would hold institutional actors liable when they are aware of sexual misconduct within their walls.⁶ Until the Fourth Circuit rethinks the general duty that schools have to appropriately protect their students and the public, the number of sex scandals and cover-ups in the jurisdiction will proliferate.

The first part of this article describes *Doe* and the conservative approach taken by the Fourth Circuit.⁷ The second part places *Doe* within the history of the *Deshaney* framework.⁸ The third part outlines the ways in which *Doe* could have gone the other way using a more nuanced § 1983 civil rights claim.⁹ The fourth part describes Title IX and surrounding case law which give validity to the civil rights claim.¹⁰ The fourth part also discusses the federal Clery Act, which does not create a private right of action, but does reinforce the duties of education institutions to the public.¹¹ In the final section, I argue that *Deshaney* can be inappropriate when applied to sexual

1. See, e.g., Ajla Glavasevic, *St. George’s: Sex Abuse Scandal Rocks a Rhode Island Town*, LAW STREET (Jan. 12, 2016), <http://lawstreetmedia.com/blogs/education-blog/st-georges-sex-abuse-scandal-rocks-rhode-island-town/>.

2. See Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV., 1465, 1465 (1998) (citing 42 U.S.C. § 1983 (1994); 20 U.S.C. § 1681(a) (1994)).

3. *Doe v. Rosa (Rosa)*, 795 F.3d 429, 431 (4th Cir. 2015).

4. *Id.* at 438–42 (citing *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989)).

5. See *Wyke v. Polk Cty. Sch. Bd.*, 129 F.3d 560, 567 (11th Cir. 1997); *Dwares v. City of NY*, 958 F.2d 94, 99 (2nd Cir. 1993).

6. See *Doe*, 795 F.3d at 439.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.

11. See *infra* Part V.

misconduct cases involving educational institutions.¹² I call for a revisit of *Deshaney* in light of the recent sexual misconduct scandals involving schools, and the special relationship that institutions have with their students and with the public.¹³

II. DOE AND THE FOURTH CIRCUIT’S CONSERVATIVE RESPONSE

A. *The Facts*

The plaintiffs in *Doe v. Rosa* were John Doe 2 and his young brother John Doe 3 (“the Does”).¹⁴ The Does brought two 42 U.S.C. § 1983 claims¹⁵ (one each for Doe 2 and Doe 3), based on the Fourteenth Amendment, against the Citadel’s president, John W. Rosa.¹⁶ They alleged that Rosa violated an affirmative duty under the Due Process of the 14th Amendment to protect the brothers from being molested by an employee of the Citadel.¹⁷ They claimed that the Rosa violated their 14th amendment due process right to bodily integrity.¹⁸

Louise ReVille, a youth summer camp counselor at the Citadel, provided personal childcare for the Doe family and sexually abused the minor boys from 2005 until July or August 2007.¹⁹ The abuse occurred outside of the Citadel,²⁰ but Reville was employed by the Citadel during the time of the abuse, until April 2007.²¹ According to ReVille’s testimony, he abused Doe 2 at least twelve times in 2005 and three or four times a week in 2006.²² Eventually, ReVille moved into the Does’ home to take care of Doe 2 and Doe 3.²³ The abuse, consisting of “sexual truth-or-dare-games, oral sex, physical touching, and masturbation,” continued almost daily between the summers of 2006 and early 2007.²⁴

12. *See infra* Part VI.

13. *See infra* Part VI.

14. *Doe v. Rosa (Rosa)*, 795 F.3d 429, 431 (4th Cir. 2015).

15. *Id.* at 436.

16. *Id.* at 431.

17. *Id.* at 431.

18. *Id.* at 436–37.

19. *Id.* at 431.

20. *Id.* at 435.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

In April 2007, a former camper's father made a complaint to Rosa that ReVile had molested his son in 2002 while a counselor at the camp.²⁵ Rosa referred the complaint to the Citadel's General Counsel, who responded to the report by confronting ReVile with the accusations made against him.²⁶ The General Counsel told ReVile that "from the Citadel's standpoint their main concern was to protect the institution."²⁷ At the time, ReVile was employed by the Citadel at their Writing Center (the camp was no longer in operation as of 2006)²⁸. ReVile resigned from this position sometime in April 2007.²⁹ However, neither the General Counsel nor Rosa reported the abuse to the authorities.³⁰ Furthermore, they appeared to take measures to conceal, or at least gloss over, the allegations.³¹ For example, after the Citadel Summer Camp's director learned of the allegations, she reported to the General Counsel that ReVile had been dismissed from his prior job at a prep school.³² The Director also disclosed to the General Counsel that she had found ReVile in summer 2003 committing a terminable offense by being in the barracks alone with a camper rubbing Icy Hot on the camper's leg.³³ Neither the General Counsel nor Rosa did anything to investigate these facts in light of the Doe allegation.³⁴

The abuse stopped briefly after ReVile was approached by the General Counsel in April 2007.³⁵ But after ReVile did not hear anything further from the Citadel or law enforcement, he took the silence as "news that [he] was not going to get in trouble."³⁶ The abuse resumed before the end of May 2007 and continued through August when the Does moved to Atlanta.³⁷

The Does alleged, moreover, that Rosa failed to report the Camper Doe complaint to law enforcement,³⁸ that he failed to notify the Citadel's Title IX

25. *Id.* at 431.

26. *Id.* at 432.

27. *Id.*

28. *Id.*

29. *Id.* at 432–33. It is disputed whether the resignation took place before or after ReVile was confronted by the General Counsel, but for the purposes of the summary judgment, the Second Circuit assumed that the Does' version of the facts that he resigned after the confrontation was true.

30. *See id.* at 433.

31. *See id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.* at 435.

36. *Id.*

37. *Id.*

38. *Id.* at 431.

Coordinator,³⁹ and that he failed to adhere to the requirements of the federal Clery Act.⁴⁰ Moreover, the Citadel withdrew a challenge to ReVille's application for unemployment benefits, and ReVille testified that he believed this was because the Citadel "did not want to have anything to do with [him] as far as any kind of confrontation or anything."⁴¹ Rosa and the General Counsel also appeared before The Citadel's Board of Visitors to provide information on Camper Doe's allegations against ReVille, but, according to a third-party investigative report commissioned by The Citadel, such minimal detail was given that the Board did not understand the nature of the sexual abuse investigation.⁴²

This intentional cover-up on the part of Rosa and the Citadel, the Does argued, gave ReVille the opportunity to continue abuse to Doe 2 and Doe 3 from late spring to early summer of 2007.⁴³ The District Court granted Rosa's motion for summary judgment in both actions and the Court of Appeals upheld the ruling stating that Rosa did not create the danger that placed the Does in the position of being molested by the camp counselor.⁴⁴

B. The Fourth Circuit's Holding

The Fourteenth Amendment forbids "any [S]tate" from depriving "any person of life, liberty, or property, without due process of law"⁴⁵ and 42 USC § 1983 offers damages to any person deprived under color of state law of a right secured by the Constitution or federal law.⁴⁶ To state a § 1983 Fourteenth Amendment claim, a plaintiff must allege a state actor or person acting under color of state law engaged in conduct that violated a right protected by the Constitution or laws of the United States.⁴⁷

The Court in *Doe* found that the Does met the state actor element for a § 1983 claim because the Citadel is a public university having authority granted by state law.⁴⁸ The Does met the second element by alleging that a

39. *Id.* at 434. *See infra* Part IV.

40. *Id.* *See infra* Part IV.

41. *Id.* at 435.

42. *Id.*

43. *Id.* at 436.

44. *Id.* at 431, 436.

45. U.S. CONST. amend. XIV, § 1.

46. *See* 42 U.S.C. § 1983.

47. *See id.*

48. *Doe v. Rosa (Rosa)*, 795 F.3d 429, 436 n.5 (4th Cir. 2015) ("There is no disagreement that Rosa could be a state actor for § 1983 purposes when acting in his capacity as the President of The Citadel, as The Citadel is a public university of the state of South Carolina.")

constitutional right to bodily integrity was violated.⁴⁹ § 1983 imposes liability on state actors who cause the “deprivation of any rights, privileges, or immunities secured by the Constitution,” including conduct that deprives an individual of bodily integrity.⁵⁰ Courts regularly find that State actions that result in sexual abuse of children can be actionable under § 1983.⁵¹

However, the Fourth Circuit found that due process liability was limited by the Supreme Court’s ruling in *DeShaney v. Winnebago County Department of Social Services*.⁵² The Court held that following *DeShaney* precedent, Rosa did not create the danger that the Does’ faced.⁵³ The Does claim against Rosa is “purely an omission claim,” and “[n]o amount of semantics can disguise the fact that the real ‘affirmative act’ here was committed by [ReVille], not by [Rosa].”⁵⁴

The court went on to explain that to establish § 1983 liability based on a state-created danger theory, “a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission.”⁵⁵ The court concluded that, “[g]iven the clear rule under *DeShaney* . . . the Does’ claim fails because they could not demonstrate [Rosa] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille.”⁵⁶ The court held that because Does’ abuse began two years before Rosa was made aware of Camper Doe’s complaint, Rosa ‘could not have created a danger that already existed.’⁵⁷

The court also found that Rosa did nothing to create or increase the risk of the Does’ abuse specifically during the early summer months of 2007, as the Does contended.⁵⁸ Although the abuse was horrific, the court found that nothing occurred between them and ReVille in the summer of 2007 that had

49. *Id.* at 436–37 (citing *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir.1994) (“addressing a ‘student’s constitutional right to bodily integrity in physical sexual abuse cases’”).

50. *Id.* (citing 42 U.S.C. § 1983).

51. *See generally* *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir.1994) (holding “that schoolchildren do have a liberty interest in their bodily integrity . . . and that physical sexual abuse by a school employee violates this right.”).

52. *See Rosa*, 795 F.3d at 438; *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 197 (1989).

53. *See Rosa*, 795 F.3d at 439.

54. *Id.* at 441 (citing *Pinder v. Johnson*, 54 F.3d 1169, 1175–76 (4th Cir. 1995)).

55. *Id.* at 439.

56. *Id.*

57. *Id.* at 439 (quoting *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir.1998)).

58. *Id.*

not been ongoing for two years unrelated to any action by Rosa.⁵⁹ Using the *DeShaney* standard, the court found “allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger.”⁶⁰ The Does were thus placed in “no worse position than that in which [they] would have been had [Rosa] not acted at all.”⁶¹

III. *DESHANEY*

In *DeShaney*⁶² the Supreme Court decided the scope of a state actor’s liability for failing to protect an individual from harm.⁶³ In *DeShaney*, a mother, on behalf of her child, brought a § 1983 action against officials from the state’s social services agency.⁶⁴ The child had been beaten and permanently brain damaged by his father.⁶⁵ The mother alleged that the state officials “failed to remove the child from his father’s custody, despite repeated reports and evidence of the father’s abuse, and that failure to act deprived the child of a liberty interest in violation of his due process rights.”⁶⁶ The Supreme Court ultimately denied *DeShaney*’s federal constitutional claim because:

Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The 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. Nor does history support such an expansive reading of the constitutional text . . . the Due Process Clause of the Fourteenth Amendment was intended to prevent government “from abusing [its] power, or employing it as

59. *Id.*

60. *Id.* at 439–40 (citing *DeShaney v. Winnebago Cnty. Dept. of Social Services*, 489 U.S. 189, 201 (1989)).

61. *Id.* at 440 (citing *DeShaney*, 489 U.S. at 201).

62. *DeShaney*, 489 U.S. 189.

63. *See id.* at 191.

64. *See id.* at 193.

65. *See id.*

66. *Rosa*, 795 F.3d at 437 (citing *DeShaney*, 489 U.S. at 191).

an instrument of oppression[.]” Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.⁶⁷

According to the *DeShaney* Court, even though the Winnebago County Department of Social Services was aware of the harm the child was facing, it did not have a duty to protect him.⁶⁸

Despite this reasoning, the *DeShaney* Court did find two narrow exceptions where state actor liability might attach.⁶⁹ The first is the state-custody or special-relationship exception.⁷⁰

A. State Custody

The state custody exception is evoked “when the State takes a person into its custody and holds him there against his will.”⁷¹ According to the *DeShaney* Court, [“the affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf.”⁷² Therefore, if a state actor has restricted the physical liberty of an individual, the state is prohibited from harming him.⁷³ The state in these instances has a “special relationship”⁷⁴ with the individual. Following *DeShaney*, the Supreme Court has found this special relationship to exist with prisoners,⁷⁵ pretrial detainees,⁷⁶ and involuntarily committed persons at mental institutions.⁷⁷

The Supreme Court does not recognize a 14th Amendment custodial relationship between the state and children in foster care. However, several

67. *Id.* (citing *DeShaney*, 489 U.S. at 195–96).

68. *See DeShaney*, 489 U.S. at 202.

69. *See id.* at 199–201 (discussing a few instances when state actor liability has attached).

70. *See id.* at 199–200.

71. *Id.* at 199–200.

72. *Rosa*, 795 F.3d at 437–38 (citing *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189 at 200(1989)).

73. *See DeShaney*, 489 U.S. at 200.

74. *Id.* at 194.

75. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (ruling that the Eighth Amendment establishes that states owe affirmative duties to prisoners).

76. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (holding that states have an affirmative duty to provide to keep pretrial detainees safe).

77. *See Youngeberg v. Romeo*, 457 U.S. 307, 319 (1982) (holding that states owe an affirmative duty to involuntarily committed individuals in institutions under substantive due process).

circuits hold that foster children have a substantive due process right to safe conditions while in custody, and that state agencies can be held liable if that right is violated.⁷⁸

B. State Created Danger

The *Deshaney* Court carved out a second category of case where a state actor could be liable for failing to protect an individual.⁷⁹ The Court noted that *Deshaney* may have been different if the state had contributed to the dangerous conditions the child faced or increased the vulnerability to the dangerous conditions:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.⁸⁰

This dicta lead to “state-created danger” jurisprudence in the circuit courts.⁸¹ In state-created danger cases, the government is held constitutionally liable for actions towards private citizens which created or

78. See Addendum B to L.J. By and Through Darr v. Massina, 699 F.Supp. 508, 539 (1988) (holding that a special relationship existed between Baltimore's foster care children and the Baltimore City Department of Social Services and that foster children are entitled to reasonably safe placements free from emotional or physical harm.). *But see* White by White v. Chambliss, 112 F.3d 731, 734 (4th Cir. 1997) (holding that negligence was not enough to prove a Substantive Due Process Claim under the Fourteenth Amendment because the daughter's death did not “result from the DSS defendants' violation of any “clearly established” statutory or constitutional rights of which a reasonable person would have known (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); *see also* Con v. Bull, 307 F. App'x 631, 634 (3d Cir. 2009) (holding that the defendants did not exhibit deliberate indifference to child's safety).

79. See *DeShaney v. Winnebago Cty. Dep't. of Soc. Servs.* 489 U.S. 189, 200 (1989).

80. *Id.* at 201.

81. See generally Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1 (2007) (discussing state-created danger cases decided by courts throughout the country).

increased the harm they ultimately suffered.⁸² There are a number of circuits that understand *DeShaney* in this way, although they interpret the state-created danger theory differently. Some circuits have detailed and elaborate tests for state created danger.⁸³ These courts consider how much the state has contributed to making a citizen more vulnerable to the harm than he or she would have otherwise been.⁸⁴ Other courts have more vague state-created danger tests with less defined scopes.⁸⁵ Still others tend to reject or show hesitancy towards using a state-created basis altogether.⁸⁶

One salient controversy in state-created cases is whether the plaintiff has to have been in custody in order for the court to analyze whether the state created or increased danger.⁸⁷ On the one hand, the Fifth Circuit requires custody before it will apply a state created danger theory.⁸⁸ On the other hand, in the Seventh Circuit, state actor liability is available in non-custodial settings.⁸⁹ The Seventh Circuit recognizes that if the state actor places an individual in danger then it must, “to the extent of ameliorating the incremental risk,” protect the individual from harm.⁹⁰ The Eight Circuit also holds that the plaintiff need not be in the actual custody of the state actor for

82. See *id.* at 3 (citing *DeShaney*, 489 U.S. at 199–200).

83. See Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent “State-Created Danger” Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL U. L. REV. 177, 204 (2002) (discussing the differences between circuits on the issue of state-created danger and indicating that “[t]he Tenth Circuit’s state-created danger analysis is the most elaborate of all of the federal circuits that have adopted the theory.” Other Circuits with well-defined tests such as the third circuit in *Kneipp v. Tedder*, 95 F.3d 1199, 1208–11 (3rd Cir. 1996).

84. See *Dykema v. Skournal*, 261 F.3d 701, 705 (7th Cir. 2001) (citing *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993)); *Monfils v. Taylor*, 165 F.3d 511, 518 (7th Cir. 1998) (citing *Reed*, 986 F.2d at 1126); *Reed*, 986 F.2d at 1126.

85. See Barrett, *supra* note 83, at 190 (stating that “[t]he Second, Sixth, Seventh, Eighth, Ninth and D.C. Circuits [have] [c]ryptic, [s]ingle-[s]entence [t]ests [w]hich [a]re [i]ll-[d]efined [i]n [s]cope”).

86. See *id.* at 205 (“The First and Fourth Circuits have not recognized the state-created danger theory as a legitimate legal claim.”).

87. See Chemerinsky, *supra* note 81, at 3 (citing *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189 at 200(1989)).

88. See *id.* at 3 (citing *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) (“explaining that if the Fifth Circuit acknowledged the state-created danger theory, then the plaintiff would have to show that the defendant acted with deliberate indifference, meaning that ‘the state actor both knew and disregarded an excessive risk to the victim’s health and safety’”); *Pinder v. Johnson* 54 F.3d 1169, 1175 (4th Cir. 1995). See also *Dwares v. City of NY*, 985 F.2d 94, 99 (2nd Cir. 1993) (finding liability where [state officials] in some way assisted in creating or increasing the danger to the victim”).

89. Barrett, *supra* note 83, at 193 (citing *Archie v. City of Racine*, 847 F.2d 1211, 1222 (7th Cir. 1988)).

90. *Id.* (quoting *Archie*, 847 F.2d at 1223).

liability under a state-created danger claim, so long as the state affirmatively acted.⁹¹ The Second Circuit also treats the state-created danger and custodial relationship theories as distinct, requiring only one or the other to trigger potential liability.⁹² However, in the Second Circuit a “causal relationship”⁹³ must exist connecting the creation or increased likelihood of the danger to the state actor’s alleged actions. The Second Circuit also requires that the state actor had notice of the alleged harm at the time it occurred.⁹⁴

Another controversy in state-created danger jurisprudence is the definition of custody itself. The Eleventh Circuit defines custody broadly to include situations other than incarceration or institutionalization.⁹⁵ In the Eleventh Circuit, liability can attach when “state affirmatively acts to restrain an individual’s freedom to act on his own behalf, either ‘through incarceration, institutionalization, or other similar restraint of personal liberty.’”⁹⁶ According to the Eleventh Circuit, there is affirmative duty to protect individuals from third party harm that “arises from the limitations that state places on the individual’s ability to act on his own behalf, not from the state’s knowledge of the individual’s predicament or from expressions of intent to help him.”⁹⁷

The Fourth Circuit merges the special relationship and state-created danger theories and rejects the state-created danger claim as useful by itself.⁹⁸ The Fourth Circuit also requires custody, although it has not explicitly limited “custody” to incarceration or institutionalization.⁹⁹ The leading Fourth Circuit case to apply state-created danger is *Pinder v. Johnson*.¹⁰⁰ In *Pinder*, the Court began by finding that *DeShaney* leaves

91. See *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).

92. Chemerinsky, *supra* note 81, at 3 (citing *Pena v. Deprisco*, 423 F.3d 98, 109 (2d Cir. 2005)). “The Second Circuit stated: ‘We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability.’”

93. See Barrett, *supra* note 83, at 190 (citing *Cook v. Groton*, No. 97-73070, 1997 WL 722936, at *2 (2d Cir. Nov. 19, 1997)).

94. See, e.g., *Robertson v. Arlington Cent. Sch. Dist.*, No. 00-7170, 2000 WL 1370273, at *3 (2d Cir. Sept. 19, 2000) (The court held that the defendant could not be liable for sexual abuse by a disabled student against another student where the school has no notice of a prior incident.).

95. See *Wyke v. Polk Cty. Sch. Bd.*, 129 F.3d 560, 569 (11th Cir. 1997) (citing *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.* 489 U.S. 189, 200 (1989)).

96. *Id.*

97. *Id.* at 570 (citing *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.* 489 U.S. 189, 200 (1989)).

98. See *DeShaney*, 489 U.S. at 197–98.

99. *Id.* at 199–200.

100. See *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995).

open-ended how large of a role the state must play in the creation of danger or vulnerability before it assumes a corresponding constitutional duty to protect.¹⁰¹ The *Pinder* court held that at some point, such actions do create a duty.¹⁰² However, only custodial relationships trigger a duty.¹⁰³ Moreover, according to other Fourth Circuit cases, a real duty exists only where there is an actual connection between a state-created claim and the custodial relationship.¹⁰⁴

Pinder, in conjunction with *DeShaney*, constructs a narrow scope of § 1983 liability based on a state-created danger theory.¹⁰⁵ The state actor must create or increase “the risk of private danger, and do so “directly through affirmative acts, not merely through inaction or omission.”¹⁰⁶ In other words, “state actors may not disclaim liability when they themselves throw others to the lions,” but that does not “entitle persons who rely on promises of aid to some greater degree of protection from lions at large.”¹⁰⁷ Although the Fourth Circuit has a conservative approach to state-created danger compared to many other Circuits, it has left open the concept of custody to potentially include non-physical situations.¹⁰⁸

IV. ALTERNATIVE INTERPRETATIONS OF *DOE*

Doe could have been interpreted another way according to the holdings of other Circuit Courts, particularly regarding sexual abuse, and the development of 14th Amendment case law.

101. *See id.* at 1172.

102. *See id.* at 1174 (*DeShaney*, 489 U.S. at 199–200).

103. *See id.*

104. *See e.g.*, *Edwards v. Johnston Cty. Health Dep’t*, 885 F.2d 1215 (4th Cir. 1989); *Piechowicz v. U.S.*, 885 F.2d 1207 (4th Cir. 1989).

105. *See Pinder*, 54 F.3d at 1174; *DeShaney*, 489 U.S. at 200.

106. *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015).

107. *Id.* (quoting *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995)).

108. *See DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.* 489 U.S. 189, 200 (1989) (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from §the limitation which it has imposed on his freedom to act on his own behalf.” Only defining custody as a “limitation” “imposed on freedom.”).

A. *The 14th Amendment*

1. *State Created Danger*

As discussed in part II, some circuits have a more liberal interpretation of state-created danger.¹⁰⁹ An expanded state create danger theory was first developed by the Seventh Circuit in *White v. Rochford*¹¹⁰ and *Bowers v. DeVito*.¹¹¹ The Seventh Circuit held that the Constitution protects persons who, while not in state custody, are nevertheless placed by the state in a position of danger and then left defenseless.¹¹² According to the Seventh Circuit, when the state, by its actions, throws a person in a “snakepit” without the ability to protect himself, the fourteenth amendment's guarantee of due process is triggered.¹¹³

Later, in *Wood v. Ostrander*,¹¹⁴ the Ninth Circuit held that police officers could be liable for the rape of the passenger of a car after she was left by the police on the side of the road in a high crime area.¹¹⁵ *Davis v. Brady*¹¹⁶ also involved police stopping a drunk driver, but police were responsible for injuries resulting to the drunk driver himself when he was left by the police with his keys and then collided with another vehicle.¹¹⁷ The court, like the Ninth Circuit in *Wood*, held that it was the government that put this person in danger and the government should be held liable.¹¹⁸ Similarly, in *Munger v. City of Glasgow*¹¹⁹ police were called to a bar when there was a dispute and ultimately kicked a man out of the bar and took away his keys.¹²⁰ It was a cold night and he was dressed just in jeans and a T-shirt.¹²¹ The police would not let him back in the bar or in his car.¹²² The man died of hypothermia.¹²³ The court held that it was the government that

109. *See supra* Part II.

110. *See White v. Rochford*, 592 F.2d 381 (7th Cir. 1979).

111. *See Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982).

112. *See White*, 592 F.2d at 382.

113. *Bowers*, 686 F.2d at 618.

114. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

115. *Id.* at 586.

116. *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998).

117. *Id.* at 1027.

118. *Id.*

119. *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082 (9th Cir. 2000).

120. *Id.* at 1084.

121. *Id.*

122. *Id.*

123. *Id.* at 1085.

created the danger and the government was responsible for depriving his life without due process.¹²⁴

A particularly nuanced approach was also taken in *Paine v Johnson*.¹²⁵ The guardian of the estate of a pretrial detainee, who allegedly suffered from bipolar disorder, brought suit against the city and city police officers, alleging civil rights violations in connection with the detainee's arrest and subsequent release from custody to a high risk situation, given her mental condition, in which she was ultimately raped.¹²⁶ Police officers were denied summary judgment because fact issues existed as to whether the officer who released detainee from custody violated detainee's substantive due process rights under the fourteenth amendment.¹²⁷ Significantly, the court held that many factors or conduct of two or more persons may operate at same time, either independently or together, to cause injury or damage; in such case *each* may be proximate cause, as required to establish liability under the constitution.¹²⁸ Moreover, the court held that legal causation is a fact-specific inquiry and involves consideration of time, geography, range of potential victims, and nature of harm that occurred.¹²⁹

Also relevant here is *Currier v. Doran*,¹³⁰ where the victim was a defenseless child.¹³¹ In *Currier*, a social worker transferred custody of a child from the mother to the father.¹³² The father subsequently killed the child.¹³³ The mother brought a § 1983 suit to hold the social worker could be liable for state-created danger.¹³⁴ The Tenth Circuit, finding the social worker liable, held that the child “would not have been exposed to the dangers from their father but for the affirmative acts of the state [social worker].”¹³⁵

The Second Circuit has taken a totality of circumstances approach which allows a plaintiff to use circumstantial proof of causation that a state actor increased a danger.¹³⁶ In *Dwares v. City of New York*,¹³⁷ police

124. *Id.* at 1088.

125. *See Paine v. Johnson*, 689 F. Supp. 2d 1027, 1082 (N.D. Ill. 2010).

126. *Id.* at 1082.

127. *Id.* at 1087.

128. *Id.* at 1079 (quoting *Beard v. Mitchell*, 604 F.2d 485, 497 (7th Cir. 1979)).

129. *See id.* at 1082.

130. *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001).

131. *Id.* at 909.

132. *Id.*

133. *Id.* at 910.

134. *See id.* at 917.

135. *Id.* at 918.

136. *See* Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: Deshaney Is Still Wrong and Castile Rock Is More of the Same*, 16 TEMP. POL. & CIV. RTS. L. REV. 47, 51 (2006).

officers were liable for assuring skinheads in advance they would not intervene if they attacked a political rally.¹³⁸ The court found this “crossed the *DeShaney* line from passive to affirmative acts.”¹³⁹ In *Pena v. DePrisco*,¹⁴⁰ police officers failed to stop off-duty colleagues from heavy drinking and speeding off to return to duty while inebriated.¹⁴¹ The drunk officers killed three pedestrians, and the on-duty officers hindered the investigation into the incident.¹⁴² The court ruled that although failure to act, and no more, is not sufficient to create state created danger, the drinking of the supervisory personnel with the other officers creates the situation where a reasonable juror could find that the defendants “implicitly but affirmatively condoned the danger-creating behavior.”¹⁴³

This expanded state created danger approach could be applied to *Doe. Rosa*, through the General Counsel,¹⁴⁴ made ReVille aware that he knew about his sexual misconduct.¹⁴⁵ ReVille was constructively aware that the Citadel did not notify the proper authorities.¹⁴⁶ ReVille admitted that he continued abusing the Does, defenseless children, after he was confronted and realized that nothing was going to happen to him.¹⁴⁷ The decision by the Citadel *not* to report affirmatively condoned ReVille’s behavior, empowering him to molest the Does again during the summer of 2007.¹⁴⁸

137. *Dwares v. City of NY*, 985 F.2d 94 (2nd Cir. 1993).

138. *Id.* at 96–97.

139. *See Oren, supra* note 136, at 50 n.34 (citing *Dwares*, 985 F.2d at 99).

140. *Pena v. Deprisco*, 423 F.3d 98 (2nd Cir. 2005).

141. *See Oren, supra* note 136, at 50.

142. *Id.*

143. *See id.* at 51 (citing *Pena*, 432 F.3d at 111).

144. There is factual dispute over whether Rosa directed or knew about the General Counsel’s actions, but for purposes of summary judgment, the court assumes facts in the light most favorable to plaintiff. In order for liability to attach for a supervisor in § 1983, the supervisor’s “own individual actions” must have violated the Does’ rights. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978)). There is no respondeat superior liability in § 1983 cases. A supervisor is not guilty of civil rights violations solely by virtue of his position as supervisor. There is, however, debate in circuit courts over what constitutes individual actions; in the Second Circuit, supervisors can still be held liable if they knew their subordinates were committing a civil rights violation and they looked the other way or ignored it. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (quoting *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir. 1986)). The *Doe* Court did not reach the issue of respondeat superior since it rejected the Does’ claim based on lack of state created danger. “Nonetheless, because we find the claim fails as a matter of law, we need not delve further into the sufficiency of the Does’ proof.” *Doe v. Rosa (Rosa)*, 795 F.3d 429, 439 n.7 (4th Cir. 2015).

145. *Rosa*, 795 F.3d at 432–33.

146. *See id.* at 435.

147. *Id.*

148. *See id.*

This executive decision by Rosa was a positive contribution which lead to further abuse.¹⁴⁹ Under the circuit holdings above, it could be circumstantial proof that Rosa's actions caused the abuse of the Does in the summer of 2007.

2. *Alternative Theory of Liability in School Cases*

Doe can also be analogized to school sexual abuse cases, where school officials have been held liable for sexual abuse of students by employees.¹⁵⁰ Although the special relationship theory has limited applicability in school settings,¹⁵¹ an alternative liability theory has developed in some circuits.¹⁵² No special relationship is required for liability to attach under this alternative theory.¹⁵³

Many circuits have adopted an alternative liability approach, which imposes liability on a school district if a student's deprivation of rights is consistent with a school or district's custom or policy, or if it results from an act of those who are ultimately responsible for setting policy in that area of school business.¹⁵⁴ *Stoneking II* was the first case to apply this theory.¹⁵⁵ *Stoneking* was a high school student who was sexually abused for four years by the school's band director.¹⁵⁶ He forced her to engage in various sexual acts in the band room and on band-related trips.¹⁵⁷ The band director later pled guilty to various sex-related crimes.¹⁵⁸ The school's principal had received complaints about the director from numerous students, including one alleging that he had attempted to rape another student.¹⁵⁹ The principal's response, after refusing to investigate the student charges, was to require the student to publicly retract the allegations.¹⁶⁰ The principal concealed a file of the various complaints and allegations made against the

149. *See id.*

150. *See, e.g., Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 722 (3d Cir. 1989).

151. Some courts find that schools have custody of children. Most do not. *See* Robert G. v. Newburgh City Sch. Dist., No. 89 CIV. 2978 (RPP), 1990 WL 3210 (S.D.N.Y. Jan. 8, 1990); *cf. J.O. v. Alton Cmty. Unit Sch. Dist.* 11, 909 F.2d 267 (7th Cir. 1990). In any event, since the Doe children were not in any conceivable form of custody, this theory is not explored further here.

152. *See, e.g., Stoneking*, 882 F.2d at 725.

153. *Id.*

154. *See id.*; *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

155. *See Stoneking*, 882 F.2d at 725.

156. *Id.* at 722.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 729.

director at his home.¹⁶¹ The assistant principal and the superintendent were also informed of the complaints against Wright, but neither of them took any action to correct the situation.¹⁶² Stoneking filed a claim against the school district, the principals and the superintendent under § 1983.¹⁶³

This case is significant because it was appealed while *DeShaney* was pending. The first time it was before the Third Circuit, the Court, held that both schools and their officials could be liable under § 1983 based on the theory that the students were “functional custody” of the school.¹⁶⁴ However, *Stoneking I* was decided before *DeShaney*.¹⁶⁵ After *DeShaney* was decided, the Supreme Court remanded *Stoneking I* to the Third Circuit to reconsider the decision in light of *DeShaney*.¹⁶⁶

On remand, the Third Circuit once again held that the defendants could be liable under § 1983.¹⁶⁷ However, this time the court based its decision on an alternative liability theory because it was afraid that the “uncertainty of the law” under *DeShaney* would delay the relief needed by the plaintiff.¹⁶⁸ The court held that under § 1983 school officials were liable if they “established and maintained a policy, practice or custom which directly caused her constitutional harm.”¹⁶⁹ The *Stoneking II* court cited an earlier case, *City of Canton v. Harris*, which held that a municipality could be liable under § 1983 where the failure to train (officers) amounts to “deliberate indifference” to the rights of persons with whom the police come into contact.¹⁷⁰ Similarly, according to *Stoneking II* a reasonable jury could conclude that the defendants’ actions, and inactions, communicated to Wright the message that his conduct was acceptable.¹⁷¹ A jury could find that this implicitly established a custom or policy that the teacher’s sexual abuse of students would not be punished.¹⁷² The court also distinguished the facts of *Stoneking* from *DeShaney* because the perpetrator in *DeShaney* was

161. *Id.*

162. *Id.* at 722.

163. *Id.*

164. *Id.* at 723 (citing *Stoneking v. Bradford Area Sch. Dist. (Stoneridge I)*, 856 F.2d 594, 601 (3d Cir. 1988), *vacated*, 882 F.2d 720 (3d Cir. 1989)).

165. *Id.* at 721.

166. *Id.*

167. *Id.* at 731.

168. *Id.* at 724.

169. *Id.* at 725.

170. *Id.* at 725 (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)).

171. *Id.* at 728.

172. *Id.* at 724–25.

a private citizen, whereas in *Stoneking II*, the perpetrator was a state employee “subject to (the) defendants’ immediate control.”¹⁷³

The alternative liability theory was further defined and expanded *Doe v. Taylor Independent School Dist.*¹⁷⁴ The Fifth Circuit found that school officials have a duty not to callously disregard a student’s constitutional rights.¹⁷⁵ In applying the theory, the *Taylor* court held that school officials may be “liable for the malfeasance of their subordinates if they know or should be aware of the transgressions, yet consciously choose not to put an end to them, for such dereliction can only be viewed as implicit condonation of the subordinate’s constitutional indiscretion.”¹⁷⁶

Alternative liability theory can be applied to *Doe*. Alternative liability theory is most useful for cases where school officials ignore a pattern of sexual abuse. The facts of *Doe* fit this. The President learned of several independent incidents regarding *Doe 1*, and actively ignored them.¹⁷⁷ Rosa’s behavior included ignoring the graphic details of the summer camp director’s disclosure and her prior knowledge of Reville’s past.¹⁷⁸ Rosa also appeared before the Board of Visitors of the Citadel but gave them the impression that the sexual abuse allegations were inconsequential or false.¹⁷⁹ The Citadel, under Rosa’s watch, even invited Reville back to campus several times after his resignation in 2007 to speak at special events and attend the unveiling of a building.¹⁸⁰ These collective actions on the part of Rosa and the Citadel could be characterized as a policy of ignoring and cover up sexual abuse.

3. *Deliberate Indifference and Shock the Conscience*

There is a final catch-all framework deciding for 14th amendment liability when other theories do not apply. The Supreme Court has established three levels of fault for state action—negligence, deliberate indifference and conduct that shocks the conscience.¹⁸¹ The Supreme Court

173. *Id.* at 724.

174. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992).

175. *Id.* at 138.

176. *Id.* at 145.

177. *Doe v. Rosa*, 795 F.3d 429, 432 (4th Cir. 2015).

178. *Id.* at 431.

179. *Id.* at 435. According to a third party investigative report commissioned by the Citadel, The Board was led to believe the allegations were made by a parent who was angry that his son was not admitted to the Citadel.

180. *Id.* (Reville came back after his resignation to speak to the Honor Committee and incoming freshman as well as coming back to attend the unveiling of the new “Honor Court”).

181. *Payne v. Churchich*, 161 F.3d 1030, 1040 (7th Cir. 1998).

stated, “[L]iability for negligently inflicted harm is a category beneath the threshold of constitutional due process.”¹⁸² Deliberate indifference is the standard to employ “when actual deliberation [by a state actor] is practical. The highest standard to apply is the “shocks the conscience” test.¹⁸³ It is not always clear which standard to apply in 14th amendment cases,¹⁸⁴ but sexual abuse cases regarding deliberate decisions about children can employ the deliberate indifference test.¹⁸⁵

Youngberg v. Romeo was the first Supreme Court case to recognize that a state actor may be liable under the 14th amendment for deliberate indifference.¹⁸⁶ The case raised the substantive due process rights of those who have been involuntarily committed to state institutions.¹⁸⁷ Although recognizing that the decisions of qualified professionals regarding the treatment and conditions of confinement should be deemed presumptively valid, the Court acknowledged that the liberty interest required the state “to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.”¹⁸⁸ Balancing the competing concerns, the Court held that substantive due process is violated if professional decisions constitute “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”¹⁸⁹ The Supreme Court, in *Zinermon v. Burch*, reiterated that substantive due process “bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’”¹⁹⁰

In *County of Sacramento v. Lewis*, the Supreme Court specified that deliberate indifference implies the opportunity for actual deliberation.¹⁹¹ The Court determined that the standard could not reasonably apply to police officers who face a situation calling for fast action.¹⁹² Thus, the Court held that injuries resulting from “high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability

182. *Id.* (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

183. *Id.* (quoting *Sacramento*, 523 U.S. at 851–52).

184. *See id.* (citing *Sacramento*, 523 U.S. at 849).

185. *See, e.g., Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994).

186. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

187. *Id.* at 309.

188. *Id.* at 319.

189. *Id.* at 323.

190. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

191. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

192. *Id.* at 853.

under the Fourteenth Amendment.”¹⁹³ Relying on Lewis, most appellate courts applied a deliberate indifference test in non-emergency situations.¹⁹⁴

An illustrative case to distinguish the difference between shock the conscience and deliberate indifference is *Williams* in the 6th Circuit.¹⁹⁵ This case involved the inappropriate touching of a fourth grade male student, by a teacher, who also molested five other classmates.¹⁹⁶ The student sued the school district on a number of claims, including a § 1983 action which survived motion for summary judgment.¹⁹⁷ The court held that standard of deliberate indifference can be met by a failure to act, or by a response that is clearly unreasonable in light of the known circumstances.¹⁹⁸

Some circuits have gone further to hold that a state actor’s actions regarding a child can violate the Fourteenth Amendment if they go against professional judgment.¹⁹⁹ The Tenth Circuit has explained that in the context of a child’s rights, the “professional judgment” standard requires more than mere negligence but *less* than deliberate indifference.²⁰⁰

A reasonable jury could conclude that Rosa’s actions demonstrated deliberate indifference to the rights of Reville’s victims and potential future victims. Rosa certainly did not use appropriate professional judgment; he violated several federal statutes (Title IX and The Clery Act, discussed further below), as well as South Carolina’s mandatory reporting laws.²⁰¹ Arguably, Rosa also had a lapse in professional judgment by deciding to take steps to cover up the Doe report of abuse, which resulted in continued abuse.

Even by the deliberate indifference standard, a reasonable jury could conclude that Rosa is liable. He made decisions which involved time and deliberation. Whether characterized as a “policy” or not, no one could argue that The Citadel acted in an emergency situation.

193. *Id.* at 854.

194. *See, e.g., Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 364 (6th Cir. 2005).

195. *Id.*

196. *Id.* at 362.

197. *Id.* at 363.

198. *Id.* at 369.

199. *See, e.g., Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1143 (10th Cir. 2006) (noting that a failure of professional judgment that results in some inquiry to a child violates the child’s constitutional rights) (quoting *Yvonne L. v. N.M. Dep’t of Human Serv.*, 959 F.2d 883, 890 (10th Cir. 1992)).

200. *Id.* at 1144.

201. See S.C. CODE ANN. § 63-7-310. (Mandated reporter laws require individuals in certain types of employment to report suspected abuse or neglect of a child to Social Services.)

B. Other Federal Child Sex Abuse Cases

Federal jurisprudence, aside from § 1983, regarding child sex abuse and schools can also be applied to *Doe*. These cases involve claims of negligent hiring and supervision.²⁰² They are relevant because Reville was an employee of the Citadel, who allegedly committed sexual abuse prior to and while employed by the Citadel.²⁰³ During Reville's tenure at the Citadel, the school was made aware of various allegations about his past and about his inappropriate behavior with children attending the camp.²⁰⁴

In *Jean-Charles v. Perlitz*²⁰⁵ the plaintiffs were children who attended a residential school for poor children in Haiti where they were sexually abused by Perlitz, the Head Master of the school.²⁰⁶ The complaint alleged that board members and other officials who were affiliated with the school "each had a duty to supervise Perlitz."²⁰⁷ The defendants argued that because they did not actually employ Perlitz, they could not be liable, but the court disagreed.²⁰⁸ Further, the defendants contended that they did not have notice of Perlitz's propensity for abusing children.²⁰⁹ However, the court agreed with plaintiffs that when one board member saw Perlitz show the children pornographic video and "colluded with Perlitz to conceal the abuse" this was enough to support a negligent supervision claim.²¹⁰ In holding the rest of the officials liable, the court used a totality of the circumstances approach: "Taking the allegations of the complaint as a whole, it is plausible to conclude that the defendants had a duty to supervise Father Carrier [board member] in connection with his activities relating to PPT."²¹¹ In particular, the court pointed to the cover-up of inappropriate behavior when it held that the University and various individuals could be imputed knowledge and liability.²¹²

202. See, e.g., *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 279–80 (D. Conn. 2013).

203. *Doe v. Rosa*, 795 F.3d 429, 431 (4th Cir. 2015).

204. *Id.* at 432.

205. *Jean-Charles*, 937 F. Supp. 2d at 279.

206. *Id.*

207. *Id.* at 282.

208. *Id.*

209. *Id.* at 283.

210. *Id.*

211. *Id.* at 284.

212. *Id.* at 288–89 ("The complaint alleges that Father Carrier knew at least one PPT student was living at Perlitz's home, witnessed Perlitz show at least one student a pornographic video, and stopped communicating with the PPT administrator who confronted Perlitz about sexual abuse. Viewed in the context of the allegations of the complaint as a whole, these allegations concerning Father Carrier's knowledge of Perlitz's wrongful activities raise a plausible inference that he knew or should have known PPT was violating § 1591.

Another relevant federal case is *Pettengill*, which, in applying state law, distinguished claims of negligent supervision from negligent hiring.²¹³ The plaintiff alleged that his Boy Scout scoutmaster sexually abused him both during the time he was in Boy Scouts and later when the scoutmaster was employed at the Haverhill Public Library.²¹⁴ The scoutmaster actually began abusing boy scouts (at least two others) in the mid-1970s, giving them alcohol and sleeping with them alone in tents.²¹⁵ The defendant molested the plaintiff hundreds of times.²¹⁶ Plaintiff sued the City of Haverhill under negligent supervision and negligent hiring theories.²¹⁷ The Court held that a claim of negligent supervision alone would likely be barred against the City because the abuse did not occur while the defendant was acting within the scope of his employment, however a claim for negligent hiring was sufficient to stand because it was the actions of one or more employees of the city of Haverhill that “materially contributed” to the defendant “being in charge of teenage boys at the Library and gaining increased autonomy.”²¹⁸ The Court reasoned that “if Pettengill can prove that Haverhill negligently hired Curtis, it may have “originally caused” the situation and, therefore, it would not be immune from suit pursuant to § 10(j).”²¹⁹ Similarly, if negligent promotion of Curtis by Haverhill created a new risk by giving Curtis more autonomy, that too would make Haverhill the “original cause” of Pettengill’s injuries.²²⁰ In addition, these theories of negligence against Haverhill made “it irrelevant that Curtis was not acting within the scope of his employment when he allegedly abused Pettengill.”²²¹ Therefore, Haverhill’s motion to dismiss was denied.²²²

Rosa and the General Counsel created a new risk of abuse to the Does by confronting Reville but then not reporting him. As discussed, this confrontation had an effect on Reville: he admitted that it caused him to feel empowered to further abuse the Does because he never heard anything

Fairfield argues that Father Carrier’s knowledge cannot be imputed to the University under the adverse interest exception . . . However, the allegations of the complaint taken as a whole do not compel the conclusion that the exception applies as a matter of law. Accordingly, these claims survive.”).

213. *Pettengill v. Curtis*, 584 F. Supp. 2d 348 (D. Mass. 2008).

214. *Id.* at 353–54.

215. *Id.* at 354.

216. *Id.*

217. *See id.* at 366 (characterizing the plaintiff’s causes of action against the City of Haverhill as negligent supervision and negligent hiring).

218. *Id.* at 367.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

again.²²³ He realized he was not going to get in any trouble.²²⁴ Even though Reville was not acting with the scope of employment when he abused the Does, he was still under their supervision.²²⁵ Rosa and the General Counsel were aware of alleged behavior which they had a legal obligation to report and which was the same behavior to which the plaintiffs were tragically subjected.²²⁶

V. TITLE IX AND THE CLERY ACT

Even though the Does were not students at the Citadel, the federal statutes and case law regarding how schools handle sexual abuse and sexual harassment, namely Title IX and the Clery Act, are relevant. Reville was a former employee of the Citadel, an educational institution which is subject to Title IX in all of its endeavors, including summer camps²²⁷. The President of the Citadel, Rosa, was made aware of sexual abuse that Reville committed prior to, and while employed by, the institution.²²⁸ The sexual abuse took place on a school facility.²²⁹

A. Title IX

Title IX, enacted in 1972, is a federal statute which prohibits educational institutions from discriminating against students based on sex.²³⁰ Title IX provides “an offer of funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”²³¹ Title IX’s prohibition of discrimination includes sexual harassment of a student by a teacher at a

223. *Doe v. Rosa (Rosa)*, 795 F.3d 429, 435 (4th Cir. 2015).

224. *Id.*

225. *See id.* (noting how Reville was no longer working “at the Writing Center” and abused “the Does more frequently.”).

226. *Id.* at 434.

227. *See id.* at 431; 434 (noting how The Citadel has policies that required the college’s president to report sexual assault to the college’s Title IX Coordinator).

228. *Id.* at 431.

229. *Id.* at 432 (“The father told [the Citadel’s General Counsel] that Camper Doe had been sexually abused by a counselor known as ‘Skip’ while attending the Citadel Summer Camp in 2002. Skip had allegedly shown Camper Doe pornography and masturbated with him and showered with the campers.”).

230. *See* 20 U.S.C. § 1681(a) (2012) (The statute specifically instructs that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

231. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

federally funded institution.²³² Although Title IX is silent regarding an individual's right to initiate a private cause of action against an institution or program receiving federal funds, the Supreme Court has interpreted a private right of action to exist.²³³ The Supreme Court has also held that a 42 U.S.C. § 1983 action alleging unconstitutional gender discrimination in schools can be brought simultaneously as a Title IX claim.²³⁴

I. Case Law

The leading Supreme Court case which addressed teacher-on-student sexual harassment and Title IX is *Gebser v. Lago Vista*.²³⁵ *Gebser* determined the standard of liability for schools under Title IX. If officials of the institution who have authority to address sexual harassment have actual notice of harassment, they will be liable if they respond to that notice with deliberate indifference.²³⁶ "Deliberate indifference" in Title IX is nominally the same standard as applied and discussed above for § 1983 cases.²³⁷ Deliberate indifference is generally defined as an intentional failure to act in a situation where remedial action is required.²³⁸

There are circuit discrepancies regarding the definition of actual notice in sexual harassment and sexual abuses cases in education.²³⁹ In *Bloomer v. Becker College*, the plaintiff was a student on the equestrian team who filed a formal complaint with the institution that the defendant (her coach) had been sexually harassing her.²⁴⁰ Plaintiff was told by the College that because of a pending investigation, she would have to return at a later

232. *Id.* at 277 (framing the issue before the Court as when a school district will be held liable under Title IX for the sexual harassment of a student by a teacher).

233. *Cannon v. Univ. of Chi. et al.*, 441 U.S. 677, 716–17 (1979). See also *Baynard v. Malone*, 268 F.3d 228, 237 (4th Cir. 2001) (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (Title IX "is enforceable through a judicially implied private right of action for damages against a school district.")).

234. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 258 (2009).

235. *Gebser*, 524 U.S. 274.

236. *Id.* at 290.

237. *Id.* at 291.

238. *Indifference*, Black's Law Dictionary (10th ed. 2014) (Deliberate indifference: "Conscious disregard of the harm that one's actions could do to the interests or rights of another.").

239. Compare *Bloomer v. Becker Coll.*, No. 09-11342-FDS, 2010 WL 3221969, at *5 (D. Mass. Aug. 13, 2010) (regarding that actual notice can be shown by proving the institution was aware of complaints by other students regarding the same harassing employee), with *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (finding that the principal "should have been aware of the potential" for abuse, but that there was no evidence the principal was "in fact aware that a student was being abused.").

240. *Bloomer*, at *1.

date.²⁴¹ The Court concluded that not only did Becker have actual knowledge but they chose not to address the situation.²⁴² The *Bloomer* Court also defined the notice required to allow a plaintiff to “show that an institution had ‘actual notice’ by showing that it was aware of complaints by other students regarding the same harassing employee.”²⁴³ The court further stated that “the majority of courts that have considered the scope of the “actual knowledge” requirement have concluded that ‘actual knowledge of discrimination’ can take the form of knowledge about the alleged harasser’s conduct towards others which indicates some degree of risk that the harasser would subject the plaintiff to similar treatment.”²⁴⁴ The court found that Becker acted with deliberate indifference toward Plaintiff by choosing not to address the situation adequately in light of the fact that it was aware of multiple complaints about the coach.²⁴⁵

In contrast, in *Baynard* the Court found that the school did not have sufficient notice to create “actual knowledge” of the sexual harassment because the plaintiff did not report to someone with the authority to remedy the situation.²⁴⁶ The Court found that the student plaintiff, who had been molested by her elementary school teacher could not sue the superintendent and personal director under Title IX for deliberate indifference because there was no “actual knowledge of molestation, or power to take remedial action on behalf of board, as required to support recovery against board under Title IX.”²⁴⁷ After numerous complaints had been made to the principal, he then decided to notify the superintendent who began an immediate investigation into the teacher.²⁴⁸ The teacher resigned and Baynard did not report the continuing abuse until she was a freshman in college.²⁴⁹ The court found that the superintendent conducted a thorough investigation once he became aware of the allegations.²⁵⁰

There are also discrepancies regarding the definition of deliberate indifference in Title IX.²⁵¹ In *Lipsett v. University of Puerto Rico*,²⁵² the

241. *Id.* at *5.

242. *Id.*

243. *Id.* at *4 (citing *Brodeur v. Claremont Sch. Dist.*, 626 F.Supp. 2d 195, 208 (D.N.H. 2009)).

244. *Id.* at *4.

245. *Id.*

246. *Baynard*, *supra* note 239, at 238–39.

247. *Id.* at 239.

248. *Id.* at 233–34.

249. *Id.* at 234.

250. *Id.* at 236.

251. Compare *Lipsett v. Univ. of Puerto Rico*, 864 F. 2d 881 (1st Cir. 1988) (noting that the plaintiff presented evidence from which the court could find that the failure by school

court found the University's failure to investigate a pattern of derogatory comments and threats against the plaintiff that she would be pushed out of the program based on her sex could demonstrate deliberate indifference.²⁵³ According to the court "that the record presents sufficient evidence from which it could be inferred that the University and individual defendants Drs. Blanco, Gonzalez, and Santiago, but not Dr. Maldonado, violated § 1983. First, the record could support a finding that the failure by Drs. Blanco and Gonzalez to investigate and put a stop to the harassment directed against the plaintiff constituted 'gross negligence amounting to deliberate indifference.'"²⁵⁴

In *Hayut v. State Univ. of New York*, the court found that the university did not act with deliberate indifference when, upon learning of allegations of sexual harassment from the victim, it took steps to remove the Professor from the University but did not immediately report it to the SUNY grievance board.²⁵⁵ The court determined there was no "merit to Hayut's claim that Dean Varbero violated federal law and, therefore, exhibited deliberate indifference as a matter of law when he failed to report Hayut's verbal complaint immediately to the SUNY New Paltz Affirmative Action Office."²⁵⁶

Doe is more like *Bloomer* and *Lipsett* than *Hayut* because the university in Hyat actually took positive steps to remove the perpetrator.²⁵⁷ In contrast, in *Bloomer*, *Lipset*, and *Doe*, the institutions were on notice of multiple complaints and of corroborating evidence, yet they deliberately ignored or

employees to investigate and take reasonable measures constituted deliberate indifference), *with Hayut v. State Univ. of NY*, 352 F.3d 733, 753 (2d Cir. 2003) (finding that no reasonable jury could find that the responses by the defendants demonstrated deliberate indifference, and that there was no evidence to support Title IX liability).

252. *Lipsett*, 864 F. 2d 881.

253. *Id.* at 914.

254. *Id.* at 903.

255. *Hayut*, 352 F.3d at 753.

256. *Id.* at 752.

257. *See Doe v. Rosa (Rosa)*, 795 F.3d 429, 434 (4th Cir. 2015) (noting how the plaintiffs complained that The Citadel's dean ignored school policies that required a report of the sexual harassment); *Bloomer v. Becker Coll.*, No. 09-11342-FDS, 2010 WL 3221969, at *2 (D. Mass. Aug. 13, 2010) (noting how the plaintiff complained to the university's dean but the dean told the plaintiff to come back later, and to a teacher, who told the plaintiff that he did not have the authority to help her); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 903 (1st Cir. 1988) (discussing how there was sufficient evidence that the university failed to investigate and stop the harassment). *But see Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 752 (2d Cir. 2003), 352 F.3d at 752 (discussing how the dean of the university held meetings regarding the plaintiff's complaint, including a counseling session with the perpetrator in which the perpetrator was told that disciplinary action would follow).

failed to address them adequately.²⁵⁸ Had the Does been able to bring Title IX claims (if they had been students or campers),²⁵⁹ they might have been able to prove deliberate indifference under Title IX case law. The Citadel failed to report to their Title IX coordinator or investigate alleged sexual abuse by an employee, even after telling complainant that they were investigating.²⁶⁰

2. *Office for Civil Rights*

Title IX actions can also be pursued administratively by filing a complaint through the Office for Civil Rights (“OCR”).²⁶¹ The OCR uses a preponderance of the evidence standard.²⁶² A founded complaint can be resolved a “voluntary resolution agreement” that, if followed would “remedy the identified violation(s) in compliance with applicable civil rights laws.”²⁶³

In 2015, LaPorte Community School Corporation was the subject of a founded complaint which is relevant to *Doe*.²⁶⁴ The complaint alleged that the School subjected a high school student to discrimination on the basis of sex by not responding promptly and effectively to sexual harassment of School employee that occurred in 2007 and 2008.²⁶⁵ The student asserted that, continuing through the time the complaint was filed, the School had not provided him with information to indicate that it was taking action in response to an internal investigation of the events relating to the sexual harassment; that it had not provided him with the results of the investigation;

258. See *Rosa*, 795 F.3d at 432; *Bloomer*, 2010 WL 3221969, at *2; *Lipsett*, 864 F. 2d at 889–92.

259. The Does could not file a Title IX claim because they were not enrolled in the educational institution; See 20 U.S.C. § 1681(a) (protecting persons, “subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

260. See *Rosa*, 795 F.3d at 434 (“In addition to failing to report the Camper Doe allegations or initiate a proper investigation, the Does contend that Rosa actively concealed the allegations.”).

261. See Office for Civil Rights, *How the Office for Civil Rights Handles Complaints*, U.S. DEPT. OF EDU., <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited Mar. 13, 2016) (OCR also enforces Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973, Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act of 1990, and Boy Scouts of America Equal Access Act) [hereinafter OCR].

262. *Id.*

263. *Id.*

264. See Office for Civil Rights, *OCR Complaint No. 05101263*, U.S. DEPT. OF EDU., <http://www2.ed.gov/documents/press-releases/laporte-schools-letter.pdf> (Apr. 27, 2015) (providing how the OCR received a complaint against LaPorte Community School alleging discrimination on the basis of sex).

265. *Id.*

and that the School's failure to respond to the harassment constituted ongoing discrimination.²⁶⁶ This case resulted in a voluntary resolution, which included requiring the School to:

1. issue a statement (following OCR review and approval) to the Corporation community of students, parents, administrators and staff, that it does not tolerate sexual harassment, encouraging any student who believes he or she has been subjected to sexual harassment to report the incident(s) to the Corporation, and including the appropriate contact information for the designated Title IX complaint coordinator;
2. review and revise its written policies and procedures relating to sexual harassment to ensure that they adequately address incidents of sexual harassment of any kind, including sexual harassment and sexual violence of students by employees, provide for the prompt and equitable resolution of complaints alleging sexual harassment, and prohibit retaliation against persons who report harassment or participate in related proceedings and discipline of individuals who engaged in retaliation. The revised policies and procedures are to be implemented following OCR review and approval;
3. examine the Corporation's code of conduct and disciplinary procedures for employees and students to determine whether they appropriately and adequately address violations of the Corporation's sexual harassment policies and procedures.²⁶⁷

Regardless of the outcome of an OCR investigation, a complainant may file suit in federal court.²⁶⁸ Founded OCR complaints and federal cases can conflict. Ultimately, the OCR can make a finding which does not meet the level of liability for a private cause of action in court under Title IX. In *S.D. ex rel. Davis v. Houston County School Dist.*, the Plaintiffs sued the Houston County School District based on Title IX, arguing that the administration was aware of the alleged sexual assault that was occurring with S.D., a middle school female student, and did nothing to correct the situation.²⁶⁹

266. *Id.*

267. *Id.*

268. See OCR, *supra* note 264 (indicating how the decision from the Office Director is the agency's final decision, but that such decision will inform the complainant whether he or she 'may have the right to file a private suit in federal court whether or not OCR finds a violation.'").

269. *S.D. ex rel. Davis v. Houston Cty. Sch. Dist.*, No. 5:12-CV-228 MTT, 2013 WL 4505897, at *4 (M.D. Ga. Aug. 22, 2013).

Before bringing the case, the Plaintiffs filed a complaint with the OCR.²⁷⁰ The OCR's investigation concluded that the defendants did not make either an accurate or thorough enough investigation into S.D.'s allegations.²⁷¹ The OCR mandated that the Defendant create a resolution agreement.²⁷² In the court case, the Plaintiffs argued that the OCR's report created an issue of fact as to whether or not the school administration acted deliberately, which could invoke the deliberate indifference doctrine.²⁷³ However, the Court held that "although the OCR findings may permit the United States Department of Education to impose administrative penalties, there is no implied right of action under Title IX permitting private recovery for violations of these administrative requirements; thus, any such violations cannot support a claim for deliberate indifference."²⁷⁴

3. *Clery Act*

The Federal Clery Act²⁷⁵ is also relevant to *Doe* because it bolsters the claim that the Citadel's actions demonstrate deliberate indifference. The Clery Act is named after Jeanne Clery, who was raped and brutally murdered at Lehigh University;²⁷⁶ after learning that more than thirty violent offenses had occurred on campus during the time their daughter attended the school, they felt that the death of their daughter could have been avoided had those crimes been disclosed.²⁷⁷ The Clery Act requires all colleges and universities participating in federal financial aid programs to keep and disclose information about crime on and near their respective campuses.²⁷⁸ Compliance is monitored by the United States Department of Education, which can impose civil penalties, up to \$35,000 per violation, against

270. *Id.* at *3.

271. *Id.*

272. *Id.*

273. *Id.* at *6.

274. *Id.* (citing *Ross v. Corp. of Mercer Univ.*, 506 F.Supp.2d 1325, 1353 (M.D. Ga. 2007)).

275. 20 U.S.C. § 1092(f) with implementing regulations in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46.

276. Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and Vawa*, 15 *GEO. J. GENDER & L.* 563, 565 (2014) (citing Ken Gross & Andrea Fine, *After Their Daughter is Murdered at College, Her Grieving Parents Mount a Crusade for Campus Safety*, *PEOPLE MAG.*, <http://www.people.com/people/archive/article/0,,20116872,00.html> (Feb. 19, 1990)).

277. *Id.*

278. See, e.g., Layton, *infra* note 279; Lipka, *infra* note 279.

institutions for each infraction and can suspend institutions from participating in federal student financial aid programs.²⁷⁹

The Clery Act does not allow a private cause of action.²⁸⁰ However, each year many educational institutions are found to be in violation of the Clery Act because of not reporting, or negligently reporting, sexual abuse by employees.²⁸¹ Penn State University is just one school which is notorious for having covered up allegations of sexual assault by an assistant coach.²⁸² Even prior to the Jerry Sandusky scandal, a report from a team of investigators sanctioned by the university revealed that the university had no policies in place to meet the Clery Act requirements of mandatory reporting of crime.²⁸³ Countless other schools have also failed to meet the standards set forth in the Clery Act.²⁸⁴ For example, in 2007, Yale faced fines from

279. See Sara Lipka, *Eastern Michigan U. to Pay \$350,000 Fine for Clery Act Violation*, THE CHRONICLE OF HIGHER EDUCATION (Jun. 6, 2008), <http://chronicle.com/article/Eastern-Michigan-U-to-Pay/41112/> (providing how Eastern Michigan University would pay a \$350,000 fine for violating the Clery Act); Lyndsey Layton, *Virginia Tech pays fine for failure to warn campus during 2007 massacre*, THE WASHINGTON POST (Apr. 16, 2014), https://www.washingtonpost.com/local/education/virginia-tech-pays-fine-for-failure-to-warn-during-massacre/2014/04/16/45fe051a-c5a6-11e3-8b9a-8e0977a24aeb_story.html (providing how Virginia Tech paid a \$32, 500 fine for violating the Clery Act after failing to warn its campus community regarding the 2007 mass shooting).

280. 20 U.S.C. § 1092(f)(14)(A)–(B). “Nothing in this subsection may construed to—(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or (ii) Establish a standard of care. (B) Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with [the subsection of this Act] shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce [the subsection of this Act.]”

281. See, e.g., Layton, *supra* note 279; Lipka, *supra* note 279.

282. Dashiell Bennett, *Jerry Sandusky Sentenced to 30 to 60 Years in Prison*, THE WIRE (Oct. 9, 2012), <http://www.nytimes.com/2012/07/01/sports/ncaafootball/paterno-may-have-influenced-decision-not-to-report-sandusky-e-mails-indicate.html> (former Penn State football coach, Jerry Sandusky, was found guilty of 45 counts of child sexual abuse); Jo Becker, *E-mails Suggest Paterno Role in Silence on Sandusky*, THE NEW YORK TIMES (Jun. 30, 2012), <http://www.nytimes.com/2012/07/01/sports/ncaafootball/paterno-may-have-influenced-decision-not-to-report-sandusky-e-mails-indicate.html> (there are allegations that Joe Paterno knew of these allegations and influenced the decision to not report the allegations to Child Protective Services.)

283. Jenna Johnson, *Federal officials probe Penn State for possible Clery Act violations*, THE WASHINGTON POST (Jul. 17, 2012), https://www.washingtonpost.com/local/education/federal-officials-probe-penn-state-for-possible-clery-act-violations/2012/07/17/gJQA8swirW_story.html/ (indicating that while Sandusky was awaiting sentencing, the U.S. Department of Education initiated a investigation, inquiring about records made to the public spanning thirteen years).

284. See Ana Radelet, *Report: Schools fail to properly handle sexual violence on campus*, THE CT MIRROR (Jul. 9, 2014), <http://ctmirror.org/2014/07/09/report-schools-fail-to-properly-handle-sexual-violence-on-campus/> (providing a 2014 report that indicated that more

the Department of Education for failing to report forcible sex offenses.²⁸⁵ In fact, a 2014 report revealed that colleges and universities routinely fail to follow the rules required of them when it comes to reporting sexual violence on campuses.²⁸⁶

The Clery Act supports the argument that it was well established in law that school officials must report sexual abuse, thus eliminating a qualified immunity claim.²⁸⁷ The Citadel's officials knew of or should have known of this established duty to report. Arguably, Rosa acted deliberately to ignore it when he failed to report alleged sexual abuse which took place on the Citadel's campus (at the camp).

Moreover, Title IX and The Clery Act both demonstrate that the public and the federal government are deeply concerned over the continuing problem of sexual harassment and abuse in schools. The failure of schools across the nation to report allegations of criminal conduct²⁸⁸ show that we need an array of enforcement and accountability measures. Sexual abuse scandals are not just sensational media stories. Congress, on behalf of its constituents, has been trying for decades to enforce laws that make campuses more safe for students and the public.²⁸⁹ A multifaceted approach, including administrative regulations and causes of action, is clearly necessary.

than 40 percent of schools surveyed had not conducted a sexual assault investigation in the past five years).

285. Tyler Kingkade, *Yale Faces \$165,000 Clery Act Fine For Failing to Report Sex Offenses on Campus*, HUFFINGTON POST (May 15, 2013, 6:59PM) http://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html.

286. Radelet, *supra* note 284.

287. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects government officials from individual liability under § 1983 for actions taken while performing discretionary functions, unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Thus, before liability will attach, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

288. *See* Radelat, *supra* note 284.

289. *See* Dunn, *supra* note 276, at 567.

VI. CONCLUSION

“Sexual abuse in education is the clergy-abuse crisis of this decade, if not this century, and you’re going to see more and more of it.”²⁹⁰

This is a quote from the lawyer representing some 40 plaintiffs in the most recent sexual abuse scandal, which is centered around a Rhode Island prep school.²⁹¹ The allegations, spanning three decades, echo a scandal at the elite private school Horace Mann in New York City, just a few years ago,²⁹² and numerous others.²⁹³ The most notorious national scandal, the Jerry Sandusky case,²⁹⁴ involved dozens of state and federal civil law suits on behalf of victims, most of which resulted in settlement.²⁹⁵ The Sandusky saga actually closely resembles the facts of *Doe*, but on a much larger scale.²⁹⁶ So it is notable that several Sandusky victims brought § 1983 claims against Penn State University and its President, the last of which

290. Katherine Q. Seelye, *40 Alumni Assert Sexual Abuse at a Rhode Island Prep School*, THE N.Y. TIMES (Jan. 5, 2016), <http://www.nytimes.com/2016/01/06/us/40-alumni-assert-sexual-abuse-at-a-rhode-island-prep-school.html?mwrsm=Email/>.

291. *See id.*

292. *See* Amos Kamil, *Prep-School Predators*, THE N.Y. TIMES (Jun. 6, 2012), <http://www.nytimes.com/2012/06/10/magazine/the-horace-mann-schools-secret-history-of-sexual-abuse.html>.

293. Richard Winston, *Ex-Marlborough School Teacher Admits Sexually Abusing Students*, L.A. TIMES (Oct. 21, 2015), <http://www.latimes.com/local/lanow/la-me-ln-ex-marlborough-school-teacher-sexually-abuse-sentencing-students-20151021-story.html>.

294. Former assistant football coach for Penn State, Jerry Sandusky, was charged and convicted of multiple counts of sexual abuse of children. Sandusky used his charity, the Second Mile, to find his victims. Other officials at Penn State were implicated in having knowledge of Sandusky’s actions. An independent investigation was done and it found that school officials and coaches knew of the allegations and did not disclose them. The report stated that these officials showed a "total disregard for the safety and welfare of Sandusky's child victims" for 14 years and "empowered" Jerry Sandusky to continue his abuse.” *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, FREEH SPORKIN & SULLIVAN, LLP, 13–15 (July 12, 2012), <http://www.naccop.org/cdn/pdfs/PennStateReportbyFreeh07-12-12.pdf>. [hereinafter Report].

295. Colleen Curry, *Penn State Settles 25 Suits in Jerry Sandusky Case*, ABC NEWS (Aug. 26, 2013), <http://abcnews.go.com/US/penn-state-settles-25-lawsuits-brought-jerry-sandusky/story?id=20069117>.

296. The Sandusky case is similar to *Doe* in *Rosa* in that Sandusky was an employee of a university, but committed sexual abuse against children off campus. Also Penn State officials knew of and covered up the sexual abuse, according to the Freeh Report. Report, *supra* note 294, at 14.

survived all motions to dismiss.²⁹⁷ The federal civil rights action of *John Doe 6 v. The Pennsylvania State University* was settled for an undisclosed, but presumably, large amount, in November 2015.²⁹⁸

The facts of *Doe* in the Citadel case are idiosyncratic in that the victims were not students and they were not enrolled in a school program when they were victimized by a school employee.²⁹⁹ The facts inevitably lead to a negative conclusion, as far as the plaintiffs were concerned. But the circumstances and problems of causation as a matter of law in *Doe* should not obscure the larger issue. Sexual abuse by school employees is rampant³⁰⁰ and educational institutions must help protect the public and make their campuses safe by reporting allegations promptly to the proper authorities. This is not about convicting people, but about making sure allegations are handled properly through criminal justice system.

In *Doe*, the Fourth Circuit missed an opportunity to rethink the twenty-six year old case of *Deshaney*. *Deshaney* left open a window for reinterpretation in sexual abuse school cases. Other Circuits have taken this lead.³⁰¹ The Fourth Circuit in *Doe* could have given *Deshaney*'s dicta more teeth. An alternate interpretation of *Deshaney* would better protect children and young adults who live within the jurisdiction.

No one can disagree that school policies must adhere to federal law. But we must also actively discourage school executives from making decisions that protect employees and seek to preserve an institution's reputation at the expense of the public. Schools must be made accountable for disclosure. One avenue for enforcing disclosure is through federal civil rights actions. The media should not be left with the sole responsibility of

297. See *John Doe 6 v. The Pa. State Univ.*, 982 F.Supp.2d 437, (E.D. Pa. 2013).

298. Ben Finley & Susan Snyder, *Penn State OKs 'extraordinary' amount to settle Sandusky sexual abuse claims*, THE MORNING CALL (Apr. 9, 2015) <http://www.mcall.com/news/nationworld/pennsylvania/mc-penn-state-trustees-settle-litigation-20150409-story.html>.

299. See *Doe v. Rosa (Rosa)*, 795 F.3d 429, 432 (4th Cir. 2015) (providing how the plaintiff's father informed The Citadel's general counsel that the plaintiff had been sexually abused by a counselor while attending summer camp).

300. See, e.g., Douglas Montero, *Secret Shame of Our Schools: Sexual Abuse of Students Runs Rampant*, N.Y. POST (July 30, 2001), <http://nypost.com/2001/07/30/secret-shame-of-our-schools-sexual-abuse-of-students-runs-rampant/> (providing how "at least one child is sexually abused by a school employee every day in New York City schools.").

301. Erwin Chemerinsky, *Government Duty to Protect: Post-DeShaney Developments*, 19 TOURO L. REV. 680, 686-87 (citing *Wood v. Ostrander*, 879 F.2d at 583; *Davis v. Brody*, 143 F.3d at 1021) (providing how the Ninth and Sixth Circuits have ruled in favor of plaintiffs, demonstrating an exception carved out in *DeShaney* in which the government enhances or creates the danger).

informing the public, after the fact, of horrific sex abuse scandals across the country.