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 (3d Cir. 2013) (en banc).

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving a person of "life, liberty, or property, without due process of law."[1] Generally, the Fourteenth Amendment does not require the states to guarantee citizens protection from each other.[2] There are two exceptions to this rule. First, the state has a duty to protect citizens with whom it has a "special relationship."[3] Such a relationship arises "when the State takes a person into its custody and holds him there against his will."[4] Second, the state has a duty to protect a citizen when the state creates or exacerbates the dangerous situation in which the citizen finds himself — this is referred to as the "state-created danger" exception.[5] Recently, in *Morrow v. Balaski*,[6] the Third Circuit held that a school had no duty under either the special relationship or state-created danger exceptions to protect two children from another student who verbally and physically assaulted them.[7] As a result, the two bullied students had no substantive due process claim against the school.[8] While the court reached the correct conclusion on the state-created danger exception, it should have found that schoolchildren are in a special relationship with the state. *Morrow*'s conclusion to the contrary, however, follows a unanimous line of decisions from the other circuits,[9] indicating that the burden has largely passed to state legislatures to reform bullying[10] legislation so that the laws provide stronger guarantees of student safety.

Brittany and Emily Morrow were students at Blackhawk High School in Beaver County, Pennsylvania.[11] In January 2008, Shaquana Anderson physically assaulted Brittany in the lunch room.[12] The Morrows' moth-

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1 U.S. CONST. amend. XIV, § 1.

2 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

3 *Id.* at 197–98.

4 *Id.* at 199–200.

5 *See* Morrow v. Balaski, 719 F.3d 160, 177 (3d Cir. 2013) (en banc).

6 719 F.3d 160.

7 *See id.* at 164, 177, 179.

8 *See id.* at 176.

9 *Id.* at 170.

10 Bullying is defined in educational research as a "persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child." Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 645 (2004).

11 *Morrow*, 719 F.3d at 164.

12 *Id.*

er reported Anderson to the police, and Anderson was eventually adjudicated delinquent and ordered to stay away from Brittany.[13] The school allowed Anderson to return despite a school disciplinary policy that required the expulsion of students who committed criminal offenses.[14] Once back at school, Anderson recommenced bullying the Morrow sisters both verbally and physically.[15] After a violent attack in September 2008 in which Anderson elbowed Brittany in the throat, the Morrows' parents met with school officials, but the officials indicated that they could not ensure the two girls' safety and suggested that the parents transfer their daughters to another school.[16] The Morrow sisters changed schools in October 2008.[17]

The Morrow sisters and their parents thereafter brought a suit under 42 U.S.C. § 1983[18] against Blackhawk School District and Blackhawk High School's Assistant Principal, Barry Balaski.[19] Citing the special relationship and state-created danger exceptions, the Morrows alleged that the school district had denied them due process under the Fourteenth Amendment by failing to protect them from Anderson.[20]

The district court dismissed the Morrows' federal claim and declined to exercise supplemental jurisdiction over their state claim.[21] The court found that Third Circuit precedent makes clear that no special relationship exists between schools and students.[22] Further, the school officials took no action that put the Morrows in greater danger than they would have been in otherwise, so the situation did not fall within the state-created danger exception.[23] The Morrows appealed.[24]

The Third Circuit, sitting en banc, affirmed.[25] Writing for the majority, Chief Judge McKee[26] first held that there was no "special rela-

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[13] *Id.*

[14] *Id.* at 200 (Fuentes, J., dissenting).

[15] *Id.* at 164 (majority opinion). The bullying included racially motivated assaults, verbal harassment, and an attempt by Anderson to push Brittany down a flight of stairs. *Id.* at 187 (Fuentes, J., dissenting).

[16] *Id.* at 164–65 (majority opinion).

[17] *Id.* at 165.

[18] Section 1983 provides a cause of action to a plaintiff when a state actor violates one of his federal rights. 42 U.S.C. § 1983 (2006).

[19] *Morrow*, 719 F.3d at 163. The Morrows also brought a state law claim against Balaski alleging "negligence and/or gross and willful misconduct." *Id.* at 165 (internal quotation marks omitted).

[20] *Id.* at 165.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See id.* at 164.

[26] Chief Judge McKee was joined in full by Judges Sloviter, Scirica, Rendell, Smith, Fisher, Chagares, Hardiman, and Greenaway. Judge Ambro joined in the Court's judgment in part, con-

tionship" between the Morrows and Blackhawk.[27] Based on the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*,[28] Chief Judge McKee determined that the critical indicator of a special relationship is that the state has restricted a person's ability to act on his own behalf.[29] Conceding that a child at school does not have full independence, Chief Judge McKee nonetheless found that Third Circuit precedent and Supreme Court dictum support the conclusion that there is no special relationship between children and schools.[30]

Addressing Third Circuit precedent first, Chief Judge McKee summarized the court's en banc decision in *D.R. v. Middle Bucks Area Vocational Technical School*,[31] which determined that the state's restriction of schoolchildren's liberty does not create the same type of custody that the state possesses over involuntarily committed patients or incarcerated prisoners[32] — groups that are in a special relationship with the state according to the Supreme Court.[33] Chief Judge McKee then looked to Supreme Court dictum in *Vernonia School District 47J v. Acton*,[34] which he claimed had clarified the issue.[35] In *Vernonia*, the Court held that random drug testing of student athletes did not violate the students' Fourth Amendment rights, in large part because the students were children "committed to the temporary custody of the state."[36] In passing, the Court addressed the implications of its holding on a school's duty to protect: "[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect.'"[37] Chief Judge McKee maintained that while the dictum was not binding, the court

curring with regard to the state-created danger exception but dissenting with respect to the special relationship exception. *Id.* at 185 (Ambro, J., concurring in part and dissenting in part).

[27] *Id.* at 164 (majority opinion).

[28] 489 U.S. 189 (1989). In *DeShaney*, a county social services department returned a young boy, Joshua DeShaney, to his father's custody despite evidence of child abuse and then allowed him to stay with his father over the coming months despite documenting further abuse, until finally DeShaney's father beat him so severely that he fell into a coma and suffered permanent brain damage. *See id.* at 192–93.

[29] *Morrow*, 719 F.3d at 168.

[30] *See id.* at 168–69.

[31] 972 F.2d 1364 (3d Cir. 1992) (en banc). In *Middle Bucks*, the court held that a school had no constitutional obligation to protect two students who, while at school, were habitually sexually and physically assaulted by other students. *See id.* at 1366, 1377.

[32] *See Morrow*, 719 F.3d at 168–69.

[33] *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (special relationship between state and committed patient); Estelle v. Gamble, 429 U.S. 97, 103–05 (1976) (special relationship between state and prisoner).

[34] 515 U.S. 646 (1995).

[35] *Morrow*, 719 F.3d at 169.

[36] *Vernonia*, 515 U.S. at 654; *see id.* at 664–65.

[37] *Id.* at 655.

could not "lightly ignore" it.[38] Further, he pointed out that "short of an actual holding on the precise issue here, it is difficult to imagine a clearer or more forceful indicator of the Court's own interpretation of . . . the special relationship exception . . . as applied to public schools."[39] Finally, Chief Judge McKee asserted that students are never fully in the custody of the school because they remain "primarily dependent on their parents."[40]

The court also rejected the applicability of the state-created danger exception.[41] Citing Third Circuit precedent, Chief Judge McKee determined that the state has an obligation under the exception only if a state actor's affirmative act created or exacerbated the danger that caused the person harm.[42] He found that Blackhawk had not taken any affirmative action that made the situation more dangerous for the Morrow sisters.[43]

Concurring, Judge Smith wrote separately to emphasize that the doctrine of stare decisis requires that there be a "special justification" before a court can depart from precedent, in this case *Middle Bucks*.[44] Judge Smith found that no special justification existed because *Middle Bucks* was "not so clearly wrong" that it should be cast aside,[45] subsequent legal developments had strengthened the decision,[46] and "factual developments" regarding the extent of control that schools exerted over students did not "undermine the decision's reasoning."[47]

Judge Ambro joined Judge Fuentes's dissent with respect to the special relationship exception but wrote a concurrence on the state-created danger exception.[48] In his concurrence, he asserted that the state-created danger exception was "not intended to turn on the semantics of act and omission," but to distinguish between situations where the government affirmatively increased the risk and situations where the government merely could have done more.[49] Judge Ambro concluded that

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[38] *Morrow*, 719 F.3d at 169.

[39] *Id.* at 170.

[40] *Id.* at 173.

[41] *See id.* at 178–79.

[42] *Id.* at 177 (citing Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996)). In *Kneipp*, the panel held that the state had a duty to protect a severely intoxicated woman who froze to death because police officers created the dangerous situation when they removed her from her husband's protection by detaining her and then let her go on her own. *See* 95 F.3d at 1201–02, 1211.

[43] *See Morrow*, 719 F.3d at 178–79.

[44] *Id.* at 179 (Smith, J., concurring) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

[45] *Id.* at 181.

[46] *Id.* at 182.

[47] *Id.* at 182–83.

[48] *Id.* at 185 (Ambro, J., concurring in part and dissenting in part).

[49] *Id.* at 185–86.

Blackhawk took no actions that increased the Morrows' risk but only failed to do all it could have to prevent the bullying.[50]

Judge Fuentes dissented.[51] He argued that the Morrows had adequately pled the existence of both exceptions to move beyond the pleadings stage.[52] Judge Fuentes reasoned that the situation was within the "certain narrow circumstances" necessary to create a special relationship because the state compelled the Morrows to attend school, the school exercised control over the Morrows as well as Anderson, and the school enforced policies that prevented the Morrows from protecting themselves.[53] Judge Fuentes further rejected the conclusion from *Middle Bucks* that *DeShaney* imposed a "'round-the-clock' physical custody" requirement.[54] For Judge Fuentes, the most significant factor was not who retains permanent custody over the child but rather whether the state acts as the exclusive caregiver at the time.[55] Judge Fuentes also argued that the Morrows had presented adequate support to show that their situation fell within the state-created danger exception.[56] He concluded that the school had taken an affirmative action that put the Morrow sisters at greater risk of danger when it declined to follow its disciplinary policy and expel Anderson.[57]

While the court reached the correct decision on the state-created danger exception, it should have found that a special relationship exists between schoolchildren and the state. Instead, the court relied too heavily on the Supreme Court's dictum in *Vernonia* and the flawed interpretation of *DeShaney* developed in *Middle Bucks*. As a result, the court's decision is inconsistent with *DeShaney*'s construction of the special relationship exception. Given that most circuits have reached the same conclusion as the Third Circuit, however, constitutional protections against bullying are increasingly unlikely. As a result, it falls to state legislatures to prevent bullying by strengthening their laws.

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[50] *See id.* at 186.

[51] *Id.* at 186 (Fuentes, J., dissenting). Judge Fuentes was joined by Judges Nygaard, Jordan, Vanaskie, and, in part, Ambro. *Id.* Judge Nygaard also dissented separately to reaffirm his prior dissent in *Middle Bucks* on the grounds that the two students in that case had stated viable constitutional claims. *Id.* at 202 (Nygaard, J., dissenting).

[52] *Id.* at 193–94, 201 (Fuentes, J., dissenting).

[53] *Id.* at 188. Chief Judge McKee agreed that a special relationship could exist between the state and schoolchildren in "certain narrow circumstances," but found that the circumstances in *Morrow* were "endemic" to all relationships between students and schools. *Id.* at 171 (majority opinion).

[54] *Id.* at 189 (Fuentes, J., dissenting) (quoting D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1379 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting)).

[55] *See id.* at 190.

[56] *See id.* at 201.

[57] *Id.* at 200–01. Chief Judge McKee rejected this argument, reasoning that such a determination would label all decisions whether to use school authority as affirmative actions, allowing the "*exception* [to] swallow the rule." *Id.* at 178 (majority opinion).

The majority was correct to find that the Morrows had no claim under the state-created danger exception because Blackhawk took no affirmative action that increased the children's risk.[58] The school's failure to follow its own disciplinary policy — highlighted by both the dissent and the Morrows[59] — was not an affirmative action based upon the standard of past Third Circuit state-created danger cases.[60] An affirmative action requires more than a mere failure to act — even if the failure violates a mandatory policy.[61] Instead, the state must participate in some way in the creation of the danger.[62]

The court should have held, however, that a special relationship exists between states and schoolchildren. In reaching the opposite conclusion, the court placed too much emphasis on the Supreme Court's dictum in *Vernonia*. Although courts should "not idly ignore considered statements the Supreme Court makes in dicta,"[63] *Vernonia* can easily be read to leave the question whether there is a duty to protect schoolchildren for a later case. The Court stated that its decision in *Vernonia* did not itself "suggest" that schools exercise the necessary degree of control over children to give rise to a constitutional duty to protect.[64] *Vernonia* did not establish that there is *not* such a degree of control. The Third Circuit therefore had sufficient leeway to find a special relationship.

The *Morrow* majority also should not have relied on the Third Circuit's flawed interpretation of *DeShaney* in *Middle Bucks*. The Supreme Court denied a special relationship in *DeShaney* because Joshua DeShaney was not in the state's custody when he suffered harm.[65] In *Middle Bucks*, the Third Circuit, relying on *DeShaney*, held that there was no special relationship between the abused students and the school because, unlike with prisoners and the involuntarily committed, there was no "full time severe and continuous state restriction of liberty."[66] As then–Chief Judge Sloviter pointed out in her *Middle Bucks*

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58 *See id.* at 178–79.

59 *Id.* at 178.

60 *See, e.g.*, Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996).

61 *See id.* at 1206–08 (collecting cases showing failure to act is insufficient to satisfy the state-created danger exception); *see also Morrow*, 719 F.3d at 186 (Ambro, J., concurring in part and dissenting in part) (distinguishing between failure to act and taking an action that increased risk).

62 *See Kneipp*, 95 F.3d at 1207 (citing D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1375 (3d Cir. 1992) (en banc)).

63 *In re* McDonald, 205 F.3d 606, 612 (3d Cir. 2000); *see Morrow*, 719 F.3d at 169 (citing *McDonald*, 205 F.3d at 612–13).

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

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

66 *Middle Bucks*, 972 F.2d at 1371.

dissent, however, *DeShaney* never required that the state's custody be "round-the-clock."[67]

The Third Circuit should have cast aside *Middle Bucks*'s round-the-clock requirement for Judge Fuentes's approach — which emphasizes the degree of restraint, rather than the duration[68] — as this approach is more in line with the Supreme Court's decision in *DeShaney*. The Supreme Court stated in *DeShaney* that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and his general well-being."[69] Writing further, the Court established that the critical indicator is that the state has rendered a person "unable to care for himself."[70] The state holds schoolchildren in custody against their will[71] and deprives them of their ability to care for themselves by subjecting them to the school's rules and schedule.[72] Although there are substantial differences between a student's situation and that of the incarcerated or involuntarily committed, most of those differences stem from the fact that children are only temporarily in the state's custody.[73] *DeShaney* never indicated, however, that the state's control had to be permanent, and when one examines solely the extent of the state's control over the child, it is quite substantial.

Given that all circuits to consider the question have come to the same conclusion as the Third Circuit,[74] it seems increasingly unlikely that the courts will provide constitutional protections to bullied children. The burden thus rests on state legislatures to provide assurances that children will be kept safe while at school. Given the prevalence

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[67] *Id.* at 1379 (Sloviter, C.J., dissenting) (demonstrating that nothing in *DeShaney* prevents part-time restrictions of liberty from being sufficient to create a special relationship).

[68] *See Morrow*, 719 F.3d at 188–89 (Fuentes, J., dissenting); *see also* Ali Davison, Note, *Shackled and Chained in the Schoolyard: A New Approach to Schools' Section 1983 Liability Under the Special Relationship Test*, 19 CARDOZO J.L. & GENDER 273, 286–88, 292 (2012) (arguing that courts should look not to formal definitions of custody based on around-the-clock confinement but rather to the extent that student liberty is restricted during the school day).

[69] *DeShaney*, 489 U.S. at 199–200.

[70] *Id.* at 200.

[71] *See Morrow*, 719 F.3d at 190 (Fuentes, J., dissenting) (describing criminal repercussions for parents in Pennsylvania who refuse to send their children to school and the great difficulties parents face when trying to remove their children from school, even after violent bullying).

[72] *See* Mary Kate Kearney, DeShaney*'s Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 296 (2002) (relating that a child at school must depend on the state for well-being, and that a school has complete control over his schedule and interactions).

[73] *See* Stephen Faberman, Note, *The Lessons of* DeShaney*: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97, 129 (1993) (describing how children are at school for only 180 six-hour days per year, each of which ends with the children reunited with their parents).

[74] *See, e.g.*, Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 857–58 (5th Cir. 2012) (en banc); Patel v. Kent Sch. Dist., 648 F.3d 965, 973–74 (9th Cir. 2011); Doe v. Claiborne Cnty., 103 F.3d 495, 509–10 (6th Cir. 1996).

of bullying[75] and the great harms that it can have on children both in terms of psychological[76] and educational[77] impact, the legislatures must work to improve their existing bullying policies.

Current bullying statutes are inconsistent and often have lofty ambitions but limited effect.[78] While forty-six states had passed bullying laws as of 2011,[79] only twenty of the forty-six states required formal review of district policies,[80] and only fifteen states mandated that school personnel report firsthand knowledge of bullying on school grounds.[81] Further, disciplinary responses to bullying varied widely[82] with only fifteen states drafting procedures for imposing criminal sanctions on bullies.[83]

The result of these inconsistent statutory protections is that many children are placed each day in the same dangerous position as the Morrows. They are outside the supervision of their parents but have no assurance — other than that provided by the often empty rhetoric of state bullying laws — that they will be kept safe from bullies. As the circuit courts have largely foreclosed constitutional remedies, the state legislatures must act to correct this problem by toughening their existing statutes so that all children can have an opportunity to learn in peace, free from the bullying of their peers.

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[75] Studies have found that as many as 20% of students are bullied. *See, e.g.*, VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 2 (2011); Weddle, *supra* note 10, at 650; *see also* VICKI NISHIOKA ET AL., REL NW., STUDENT-REPORTED OVERT AND RELATIONAL AGGRESSION AND VICTIMIZATION IN GRADES 3–8, at 10 (2011) (showing that 29.3% of girls and 42.3% of boys reported being hit, kicked, or pushed one or more times in the last thirty days).

[76] A 2013 study found that children who are bullied have a higher prevalence of agoraphobia, generalized anxiety, and panic disorder in young adulthood. William E. Copeland et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, 70 JAMA PSYCHIATRY 419, 422 (2013); *see also* Weddle, *supra* note 10, at 646–48 (noting that bullying frequently leaves its victims with lifelong emotional problems and often plays a central role in children's suicidal thoughts).

[77] Bullied elementary school students are less connected to school and have poorer academic outcomes while bullied middle school students are more likely to have problems with truancy and school avoidance. NISHIOKA ET AL., *supra* note 75, at 2.

[78] *See* Weddle, *supra* note 10, at 678 ("[Statutes] may encourage something like a whole-school process guided by research-based principles, but they do not require it and may not fund it.").

[79] STUART-CASSEL ET AL., *supra* note 75, at 3.

[80] *Id.* at 31–32.

[81] *Id.* at 36–37.

[82] *Id.* at 68–69.

[83] *Id.* at 39.