

# THE STATE-CREATED DANGER DOCTRINE: A VIABLE FEDERAL CLAIM FOR STUDENT VICTIMS OF PEER SEXUAL ABUSE

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## ABSTRACT

*A recently decided Fifth Circuit case—Fisher v. Moore—highlights a troubling inequality that currently exists in the law. There, a mother brought various federal claims against a school district and a group of school officials after another student sexually assaulted her daughter twice while at school. In both instances, school officials permitted the daughter—a thirteen-year-old with severe intellectual disabilities—and the other student—a boy known to pose an especially serious risk to his female classmates—to wander the school unattended, notwithstanding both students’ Individualized Education Programs. To make matters worse, the second assault took place well after the school district and its officials were made aware of the first incident.*

*The mother asserted two claims: one under Title IX and the other under § 1983. The § 1983 claim sought to hold school officials liable under a unique theory of constitutional liability—the state-created danger doctrine. Despite being recognized in ten circuits, the Fifth Circuit has continuously refused to adopt the doctrine, and it once again declined to do so in Fisher. Accordingly, the mother was left with only her Title IX claim. And while that statute can, in fact, provide a remedy for victims of peer sexual abuse, the Supreme Court has significantly limited the kinds of remedies available to Title IX plaintiffs. Specifically, plaintiffs suing under the statute are precluded from obtaining emotional distress damages. This unfortunate reality completely ignores the unquestionably horrific effects associated with childhood sexual abuse. This Comment explains why—despite the concerns held by the Fifth and Eleventh Circuits—the state-created danger doctrine accords with current substantive due process jurisprudence. Accordingly, this Comment argues that the Court should recognize the doctrine as a viable theory of liability so as to provide victims, like the one in Fisher, a chance at*

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*obtaining a remedy that more appropriately reflects the severity of their trauma.*

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## I. INTRODUCTION

Imagine two young girls, each getting ready to attend another day of classes at a local public school.<sup>1</sup> One of the girls lives with her parents in Clovis, New Mexico, and the other lives with her parents only 100 miles away in Lubbock, Texas.<sup>2</sup> At thirteen years of age, these children have by now grown accustomed to spending their falls and springs sitting in a classroom.<sup>3</sup> And while they attend schools with a myriad of other children, these girls enjoy a unique educational experience due to their intellectual disabilities.<sup>4</sup>

Sending children off to school can be difficult for any parent, but most can only imagine the heightened anxiety felt by parents of children with special needs.<sup>5</sup> At least in theory, however, these feelings are somewhat tempered for the parents of these two girls due to the Individualized Education Programs in place for each of them—plans that provide that they are to be constantly supervised while at school.<sup>6</sup>

At the same time, picture two other students also getting ready to attend school—one in Clovis and the other in Lubbock.<sup>7</sup> These other students, boys also under the age of eighteen, have a more than checkered history of behavioral problems.<sup>8</sup> In fact, on at least one prior occasion, these students told school officials that they were going to be rapists when they grew up.<sup>9</sup> Not surprisingly, Individualized Education Programs had been put into place for these students as well—plans which also required that they be supervised constantly.<sup>10</sup>

Envision discovering that, notwithstanding the programs in place for both sets of students, each are allowed to wander school hallways unattended.<sup>11</sup> Upon noticing the girls leaving a restroom together with the boys, school officials began to ask questions.<sup>12</sup> As it turns out, these boys had acted on their dangerous propensities by sexually assaulting the two girls.<sup>13</sup> School officials soon notify the girls' parents, the school districts launch an

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1. The Introduction sets out a hypothetical based on a recently decided Fifth Circuit case. *See Fisher v. Moore*, 73 F.4th 367 (5th Cir. 2023).

2. Distance from Clovis, NM to Nearby Cities, DISTANCESTO.COM, <https://www.distancesto.com/city/clovis/us/21228.html> (last visited Sept. 6, 2024).

3. *See Fisher*, 73 F.4th at 369.

4. *See id.*

5. Andrew Cheng & Cynthia Lai, *Parental Stress in Families of Children with Special Educational Needs: A Systematic Review*, 14 FRONTIERS IN PSYCH 1, 1 (Aug. 10, 2023), <https://www.frontiersin.org/articles/10.3389/fpsy.2023.1198302/full>.

6. *See Fisher*, 73 F.4th at 369–70.

7. *See id.* at 370.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

investigation, and everyone involved is quickly made aware of the tragedies that took place.<sup>14</sup>

Now imagine the unthinkable. Imagine finding out that only two months later, it happens again—the same two girls victimized by the same two boys.<sup>15</sup>

Should these girls and their families decide to file suit in federal court, each would likely assert Title IX claims against their school districts.<sup>16</sup> Additionally, given the limited kinds of damages available to plaintiffs who sue under that statute, they may also wish to bring state-created danger claims under § 1983.<sup>17</sup> But what if I were to tell you that while the doctrine could provide the girl from Clovis with a chance at obtaining more comprehensive relief, the same could not be said about the girl from Lubbock.<sup>18</sup> Rather, the girl from Lubbock—assuming she was able to successfully litigate her Title IX claim—could only ever obtain damages for things like medical bills and hospital treatment.<sup>19</sup> But what about the real-world effects of her trauma? The psychological duress?<sup>20</sup> The increased risk of suicidal idealization?<sup>21</sup> The unfortunate reality is that because remedies for these sorts of non-physical injuries fall outside the ambit of damages available under Title IX,<sup>22</sup> the girl from Lubbock and her family would be left to face these effects without help from the judiciary.<sup>23</sup>

This Comment sets out to provide a solution to this problem. Part II begins by going over basic information pertaining to peer sexual abuse.<sup>24</sup> Next, Part II describes in detail the case that inspired the hypothetical set out in Part I: *Fisher v. Moore*.<sup>25</sup> Part II then touches upon the doctrine of sovereign immunity and how—in some states that have yet to adopt the state-created danger theory of liability—it prevents plaintiffs like the one in

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14. *See id.*

15. *See id.*

16. JARED P. COLE & CHRISTINE J. BACK, CONG. RSCH. SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 1 (2019).

17. *See* discussion *infra* Section II.D.3 (explaining that § 1983 is the statute under which plaintiffs may bring state-created danger claims).

18. *See* discussion *infra* Section II.D.2 (discussing the Fifth Circuit's refusal to recognize state-created danger claims).

19. *See* discussion *infra* Section II.E.2 (describing the narrow category of damages recoverable under Title IX).

20. Kathryn Kosmides, *Long-Term Effects of Child Sexual Abuse and Molestation*, HELPING SURVIVORS OF SEXUAL ABUSE & ASSAULT, <https://helpingsurvivors.org/child-sexual-abuse/long-term-effects/> (last modified July 11, 2024).

21. *Id.*

22. *See* discussion *infra* Section II.E.2 (explaining the breadth of Title IX damages).

23. *See* discussion *infra* Sections II.E.1–2 (discussing the differences in remedies available to plaintiffs in different states).

24. *See* discussion *infra* Section II.A (providing background information and statistics on peer sexual abuse).

25. *See* discussion *infra* Section II.B (detailing the facts and procedural history of *Fisher v. Moore*).

*Fisher* from advancing state law claims.<sup>26</sup> Part II next addresses substantive due process generally before detailing the evolution of the state-created danger doctrine—a relatively novel theory of constitutional liability.<sup>27</sup> Part II then engages in a focused discussion pertaining to the remedies available under § 1983.<sup>28</sup> Part II finishes by examining Title IX, the other federal remedy mentioned by the Fifth Circuit in *Fisher*.<sup>29</sup> Part III then begins by explaining why the damages currently available to plaintiffs suing under Title IX are plainly insufficient in cases involving peer sexual abuse.<sup>30</sup> Next, Part III embarks upon a constitutional analysis that shows how and why the state-created danger doctrine accords with the Supreme Court’s current substantive due process jurisprudence.<sup>31</sup> Lastly, Part IV summarizes the critical points made throughout the Comment.<sup>32</sup>

## II. BACKGROUND

Students should be able to attend school without having to worry about being sexually assaulted by one or more of their fellow students. Unfortunately, however, thousands of incidents of peer sexual abuse occur in K-12 schools each year.<sup>33</sup> Despite this grim reality, the sole legal remedy currently available to student victims living in states like Texas and Alabama fails to adequately reflect the devastating effect sexual abuse can have on young students.<sup>34</sup> This portion of the Comment serves to both explain the contours of this problem and provide background information related to its proposed solution.<sup>35</sup>

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26. See discussion *infra* Section II.C (examining sovereign immunity in the states that fall under the jurisdiction of the Fifth and Eleventh Circuits).

27. See discussion *infra* Sections II.D.1–2 (discussing substantive due process and the state-created danger doctrine).

28. See discussion *infra* Section II.D.3 (examining § 1983 from a damages perspective).

29. See discussion *infra* Section II.E (providing information regarding Title IX’s emergence—and inadequacy—as a remedy for student victims of peer sexual abuse).

30. See discussion *infra* Section III.A (explaining why Title IX is an insufficient remedy for student victims of peer sexual abuse).

31. See discussion *infra* Sections III.B–C (engaging in a constitutional analysis geared towards addressing the Fifth and Eleventh Circuits’ issues pertaining to the state-created danger doctrine).

32. See discussion *infra* Part IV (summarizing key points made throughout the Comment).

33. *Sexual Violence in Schools*, NEA TODAY (Jan. 2021), <https://www.nea.org/nea-today/all-news-articles/sexual-violence-schools>.

34. See discussion *infra* Sections II.C, II.E (explaining sovereign immunity’s bar to state law relief in Texas and Alabama as well as the deficiencies accompanying Title IX).

35. See discussion *infra* Part II (providing background information and introducing the constitutional analysis).

A. *Understanding the Pervasiveness of the Problem Presented by Peer Sexual Abuse*

Unfortunately, peer sexual abuse is a pervasive and unique issue that has impacted the lives of thousands of students across the country.<sup>36</sup> The phenomenon is most commonly understood as “[s]exually harmful behavior between children involving an aggressor and a child who does not seek or want the sexual interaction.”<sup>37</sup> Not surprisingly, instances of peer sexual abuse occur most frequently in settings where children are surrounded by others their own age, including—and especially—schools.<sup>38</sup> And while adult-on-child sexual abuse typically garners more attention in the media and elsewhere, the pervasiveness of peer sexual abuse is undeniable.<sup>39</sup> In fact, data collected by the United States Department of Justice “indicate[s] that one out of three reported cases of child sexual abuse are peer-to-peer abuse allegations.”<sup>40</sup>

The detrimental effect child sexual abuse has on survivors who reach adulthood evinces the seriousness of this issue.<sup>41</sup> These survivors often experience a variety of long-term symptoms, including sexual disturbance or dysfunction, depression, and anxiety.<sup>42</sup> Additionally, the short-term effects associated with peer sexual abuse—including suicidal thoughts, reduced self-esteem, and eating disorders—are equally disturbing.<sup>43</sup> And while nothing could ever truly remedy the pain and suffering experienced by victims and their families, many have looked to the judiciary as a source of potential relief.<sup>44</sup>

B. *When Victims Take to the Courts: Fisher v. Moore*

A recently decided Fifth Circuit case—*Fisher v. Moore*—provides an “unquestionably horrific” example of litigation predicated upon peer sexual abuse.<sup>45</sup> There, a mother asserted claims against a Texas public school district and various school officials after a student allegedly known to pose “an especially serious risk to female students” sexually assaulted her daughter

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36. *Sexual Violence in Schools*, *supra* note 33.

37. See GREGORY LOVE & KIMBERLEE NORRIS, *Peer-to-Peer Child Sexual Abuse Risk: Protecting Children from Other Children*, ABUSE PREVENTION 2 (2020), [https://www.guideone.com/sites/default/files/2021-02/Peer-Sexual-Abuse\\_%5BAPS%5D.pdf](https://www.guideone.com/sites/default/files/2021-02/Peer-Sexual-Abuse_%5BAPS%5D.pdf).

38. *See id.*

39. *See id.*

40. *Id.*

41. *See Kosmides*, *supra* note 20.

42. *See id.*

43. *See id.*

44. *See* THE ASSOCIATED PRESS, *Students Sexually Abused by Peers Face Struggles in Court*, EDUC. WK. (May 22, 2017), <https://www.edweek.org/leadership/students-sexually-abused-by-peers-face-struggles-in-court/2017/05>.

45. *See Fisher v. Moore*, 73 F.4th 367, 369–70, 374 (5th Cir. 2023).

twice while at school.<sup>46</sup> The daughter, who was only thirteen years old at the time of the assaults, “suffer[ed] from several mental and physical disabilities.”<sup>47</sup> Given the nature of her disabilities—coupled with her tendency to leave class without permission—the daughter had an Individualized Education Plan (IEP) that required school officials to accompany her “at all times” while on school grounds.<sup>48</sup>

The other student involved in the case (hereinafter referred to as “the aggressor”) also had an IEP that “requir[ed] him to be escorted and supervised at all times.”<sup>49</sup> However, unlike the daughter, the aggressor’s need for constant supervision stemmed from the danger he posed to other students.<sup>50</sup> Prior to assaulting the daughter the first time, the aggressor demonstrated a propensity for sexual misconduct.<sup>51</sup> On one occasion, he told school officials that “he ‘was going to be a rapist when he gr[ew] up.’”<sup>52</sup> On another occasion, he went beyond making lewd sexual remarks and actually groped one of his female peers.<sup>53</sup>

On the day of the first assault, school officials permitted the aggressor and the daughter to wander the school unattended.<sup>54</sup> The students then ended up in the boy’s restroom, where the aggressor ultimately “forced [the daughter] to perform oral sex on him.”<sup>55</sup> After school officials noticed the two students leaving the restroom together, the daughter “conveyed to the staff members that she had been sexually assaulted.”<sup>56</sup> Soon after, the school district launched an investigation and discovered security camera footage which confirmed both students’ location at the time of the incident.<sup>57</sup>

Two months later, “it happened again.”<sup>58</sup> Once again, school officials permitted the daughter to “navigate the school hallways without supervision.”<sup>59</sup> While roaming the school unattended, the aggressor noticed the daughter enter the girl’s restroom.<sup>60</sup> He then “followed her inside . . . climbed under the stall [she] was using and sexually assaulted her again.”<sup>61</sup>

Following these tragic events, the girl’s mother brought suit in the United States District Court for the Southern District of Texas.<sup>62</sup> The mother

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46. *Id.* at 368, 370.

47. *Id.* at 369–70.

48. *Id.*

49. *Id.* at 370.

50. *Id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 368.

asserted a claim against her daughter's school district under Title IX, which "provides a cause of action for 'student-on-student harassment' under certain circumstances."<sup>63</sup> Additionally, the mother asserted a § 1983 claim against various school officials, including two of her daughter's teachers, the school's principal and vice-principal, and the manager of the school district's special-needs program.<sup>64</sup> The mother urged the court to hold the officials liable "under the so-called 'state-created danger' doctrine."<sup>65</sup> Specifically, she alleged that the officials had violated the due process clause of the Fourteenth Amendment by "creat[ing] or increas[ing] the danger" her daughter faced while "act[ing] with deliberate indifference."<sup>66</sup>

Eventually, the Fifth Circuit acknowledged its repeated refusal "to recognize the state-created danger doctrine" and declined to use this case as a vehicle to do so.<sup>67</sup> The court ultimately remanded the mother's case back to the district court with instructions to dismiss her § 1983 claim.<sup>68</sup> Prior to ending its opinion, however, the Fifth Circuit majority underscored the availability of Title IX as a potential source of relief, noting that "Title IX may well provide [the daughter] a remedy."<sup>69</sup>

### *C. Sovereign Immunity and Its Bar to Relief in Certain States Covered Under the Jurisdiction of the Fifth and Eleventh Circuits*

Prior to discussing the federal remedies mentioned in *Fisher*, it feels appropriate to examine the doctrine of sovereign immunity and how its application prevented the mother in that case from asserting a more traditional state law claim.<sup>70</sup> Additionally, given the Fifth and Eleventh Circuits' unique stance on the state-created danger theory of liability,<sup>71</sup> this portion of the Comment focuses on sovereign immunity as it has developed in states covered under those circuits' jurisdiction: Texas, Louisiana, Mississippi, Georgia, Alabama, and Florida.<sup>72</sup>

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63. *Id.* at 369.

64. *Id.*

65. *Id.* at 368.

66. *Id.* at 371.

67. *Id.* at 372 (collecting cases).

68. *Id.* at 375.

69. *Id.* at 374–75.

70. See discussion *infra* Sections II.E.1–2 (discussing the various remedies available).

71. See *infra* note 137 and accompanying text (noting that the Fifth and Eleventh Circuits are the only Circuit Courts of Appeals that have yet to adopt the state-created danger doctrine).

72. See Hon. Priscilla Richman, *U.S. Court of Appeals for the Fifth Circuit – Brief History*, U.S. CT. OF APPEALS FOR THE FIFTH CIR., <https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history#:~:text=In%201981%2C%20the%20Fifth%20Circuit,of%20the%20new%20Eleventh%20Circuit> (last visited Sept. 6, 2024).

The conduct at issue in *Fisher* would have certainly given rise to a common law claim for negligent supervision.<sup>73</sup> These claims—in the context of student-on-student harassment—stem from the breach of a duty described in the Restatement (Second) of Torts as the “Duty of Persons Having Custody of Another to Control Conduct of Third Persons.”<sup>74</sup> The Restatement provides that actors “who voluntarily take[] the custody of” an individual in a manner which “subject[s] him to association with persons likely to harm him” undertake “a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the [individual].”<sup>75</sup> The Restatement further provides that such a duty arises when an actor “knows or has reason to know that he has the ability to control the conduct of the third persons” likely to harm the individual in his custody.<sup>76</sup> Additionally, the comments to this section of the Restatement explicitly establish the rule’s applicability “to teachers or other persons in charge of a public school.”<sup>77</sup>

Nevertheless, the mother in *Fisher* could have never successfully brought a claim predicated upon a breach of the above-described duty because of Texas’s extremely limited waiver of sovereign immunity.<sup>78</sup> Across the country, the doctrine precludes plaintiffs from asserting state law claims against state officials or institutions unless and until the state affirmatively consents to suit.<sup>79</sup> And while Texas has affirmatively consented to suit—i.e., waived its sovereign immunity—for some claims, it has only done so “in certain, narrowly defined circumstances.”<sup>80</sup> Pertinent to the topic at hand, the Texas Torts Claims Act—which governs the range of torts state governmental units may be held liable for<sup>81</sup>—explicitly provides that “[e]xcept as to motor vehicles, [the Act] does not apply to . . . school district[s].”<sup>82</sup> Thus, although the mother in *Fisher* may have very well been able to prevail on a state law claim for negligent supervision, any such claim against the school district or its employees would have been doomed from the start.<sup>83</sup>

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73. See generally *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 377 F. Supp. 2d 952, 968–69 (D. Kan. 2005) (describing a plaintiff’s physical harm as being a prerequisite for negligent supervision claims involving student-on-student harassment).

74. RESTATEMENT (SECOND) OF TORTS § 320 (AM. L. INST. 1965).

75. *Id.*

76. *Id.* § 320(a).

77. *Id.* § 320 cmt. a.

78. *Id.* § 320.

79. See *New Albany Main St. Props. v. Watco Cos., LLC*, 75 F.4th 615, 619 (6th Cir. 2023) (“When a plaintiff pursues state claims against state defendants, these defendants may also invoke the state’s own common-law or constitutional rules of sovereign immunity.”).

80. *Tex. Tech Univ. Health Sci. Ctr. v. Jackson*, 354 S.W.3d 879, 884 (Tex. App.—El Paso 2011, no pet.) (citing *Tex. Dep’t of Crim. Just. v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001)).

81. See *Rodriguez v. Christus Spohn Health Sys. Corp.*, 628 F.3d 731, 736 (5th Cir. 2010).

82. TEX. CIV. PRAC. & REM. CODE ANN. § 101.051.

83. See *id.*

Interestingly, Alabama has adopted a somewhat similar, yet even narrower, approach to sovereign immunity.<sup>84</sup> Described by one court as a “nearly impregnable and almost invincible wall,” Article I, Section 14 of the Alabama Constitution “provides the State an unwaivable, absolute immunity from suit.”<sup>85</sup> This “absolute immunity” applies to numerous entities operating throughout Alabama, including the state’s public school boards.<sup>86</sup> Not surprisingly, § 14 has been interpreted in a manner which bars plaintiffs from bringing negligent supervision claims against school-board officials in their official capacity.<sup>87</sup> Accordingly, Alabama plaintiffs similarly situated to the mother in *Fisher* would also be prevented from asserting negligent supervision claims due to the extensive reach of the state’s sovereign immunity.<sup>88</sup>

Three of the states falling under the jurisdictions of the Fifth and Eleventh Circuits—Georgia, Mississippi, and Florida—have adopted an approach to sovereign immunity that focuses on whether the governmental conduct giving rise to a plaintiff’s claim is “discretionary” in nature.<sup>89</sup>

In Georgia, the breadth of a school district’s protection under the doctrine of sovereign immunity—in the context of negligent supervision claims—turns on the definiteness of a given school’s policy on student supervision.<sup>90</sup> For example, in *Barnett v. Caldwell*, the Georgia Supreme Court found that because “[s]chool districts and boards are entitled to sovereign immunity . . . from personal liability for injuries sustained as a result of the negligent performance of *discretionary* official acts,”<sup>91</sup> a school was entitled to immunity when its policy on student supervision was not “so clear, definite, and certain in directing [a teacher’s] actions that it established a ministerial duty.”<sup>92</sup> Thus, the ability of a plaintiff in Georgia to assert negligent supervision claims against public schools varies on a case-by-case basis.<sup>93</sup>

Mississippi, on the other hand, has adopted a somewhat similar—though considerably broader—approach to public school sovereign immunity.<sup>94</sup> Like Georgia, schools in Mississippi are entitled to the protection afforded by

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84. See *J.D.P. by & through Oliver v. Montgomery Cnty. Bd. of Educ.*, No. 2:20-CV-420-WKW, 2021 WL 706759, at \*7 (M.D. Ala. Feb. 23, 2021).

85. *Id.* (citing *Ex parte Town of Lowndesboro*, 950 So. 2d 1203, 1206 (Ala. 2006) (citations and quotations omitted)).

86. *Id.*

87. *Id.* (citing *Ex parte Dangerfield*, 49 So. 3d 675, 681 (Ala. 2010)).

88. *Id.*

89. See *Barnett v. Caldwell*, 809 S.E.2d 813, 819 (Ga. 2018); *J.E. v. Jackson Pub. Sch. Dist.*, 264 So. 3d 786, 791 (Miss. Ct. App. 2018); *Doe v. Escambia Cnty. Sch. Bd.*, 599 So. 2d 226, 227 (Fla. Dist. Ct. App. 1992).

90. See *Barnett*, 809 S.E.2d at 818–19.

91. *Chisolm v. Tippens*, 658 S.E.2d 147, 151 (Ga. Ct. App. 2008) (emphasis added).

92. See *Barnett*, 809 S.E.2d at 816–17.

93. *Id.* at 818–19.

94. *Jackson Pub. Sch. Dist.*, 264 So. 3d at 791.

sovereign immunity when a plaintiff's claim involves the breach of a "discretionary but not ministerial dut[y]."95 However, the Mississippi Supreme Court has interpreted one of the state's statutes as imposing on public schools a ministerial duty to "use ordinary care and to take reasonable steps to minimize foreseeable risks to students."96 Accordingly, regardless of the policies that happen to be in place, it is unlikely that school officials conducting themselves in a manner similar to the officials in *Fisher* would be shielded from state law liability.97

Of the three "discretionary" states, Florida's approach to school board sovereign immunity is the most plaintiff-friendly.98 In Florida, sovereign immunity—in the context of negligence—applies "to 'discretionary' governmental functions but not to acts that are 'operational' in nature."99 And because Florida courts have explicitly held that a "[s]chool [b]oard and its teachers are under a common law and statutory duty to supervise the activity of students under their care and control, and such duty is operational," plaintiffs in the state would not be barred from asserting negligent supervision claims.100

Lastly, Louisiana's adopted approach is—for all intents and purposes—completely opposite to Texas's because Louisiana "expressly disclaim[s]" sovereign immunity "unless there is a specific statute granting an immunity."101 In the context of negligence, Louisiana's constitution explicitly provides that "[n]either the state, a state agency, nor a political subdivision shall be immune from suit and liability . . . for injury to person or property."102 Accordingly, Louisiana plaintiffs asserting state law claims predicated on peer sexual abuse would be free to do so without having to fret over the applicability of sovereign immunity.103

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95. *Id.* (citing *Smith ex rel. Smith v. Leake Cty. Sch. Dist.*, 195 So. 3d 771, 774–75 (¶ 9) (Miss. 2016)).

96. *Id.* (citing *Smith ex rel. Smith v. Leake Cty. Sch. Dist.*, 195 So. 3d 771, 774–75 (¶ 14) (Miss. 2016)).

97. *Id.*

98. *See Van Etten by Van Etten v. Sch. Bd. of Okaloosa Cnty.*, 614 F. Supp. 3d 1112, 1125 (N.D. Fla. 2022); *Doe v. Escambia Cnty. Sch. Bd.*, 599 So. 2d 226, 227 (Fla. Dist. Ct. App. 1992).

99. *Van Etten*, 614 F. Supp. 3d at 1125 (citing *Kaisner v. Kolb*, 543 So. 2d 732, 736 (Fla. 1989)).

100. *See Escambia Cnty. Sch. Bd.*, 599 So. 2d at 227.

101. *Christy v. McCalla*, 79 So. 3d 293, 306 n.1 (La. 2011) (Knoll, J., dissenting) (citing *Jacobs v. City of Bunkie*, 737 So. 2d 14, 19 (La. 1999)).

102. LA. CONST. art. XII, § 10.

103. *See Vaughn ex rel. Vaughn v. Orleans Par. Sch. Bd.*, 802 So. 2d 967, 969 (La. App. Ct. 2001), *writ denied*, 818 So. 2d 773 (La. 2002) (considering a negligent supervision claim—without mentioning immunity—arising out of an incident where a second-grade student was sexually assaulted by his classmates).

### *D. Substantive Due Process and the State-Created Danger Doctrine*

The “so-called ‘state-created danger’ doctrine” discussed by the Fifth Circuit in *Fisher* is “an exception to the general rule that government has no duty under the Due Process Clause to protect people from privately inflicted harms.”<sup>104</sup> Currently, the Fifth and Eleventh Circuits stand alone in their refusal to recognize the doctrine as a viable theory of constitutional liability.<sup>105</sup> This portion of the Comment first provides a brief overview of substantive due process before examining the evolution of the state-created danger doctrine.<sup>106</sup> This portion then concludes with a focused discussion on § 1983—the statutory vehicle for state-created danger claims.<sup>107</sup>

#### *1. Understanding the Substantive Side of Due Process*

The Due Process Clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.”<sup>108</sup> And while the plain text of the Fourteenth Amendment may seem to only guarantee procedural protection, the Court has long interpreted the Due Process Clause to “contain[] a substantive element as well.”<sup>109</sup> In *Daniels v. Williams*, the Court explored the historical development of constitutional due process.<sup>110</sup> In comparing the Due Process Clause to its “forebear in the Magna Carta,” the Court repeated its long-held understanding that both the procedural and substantive components of due process function “to secure the individual from the arbitrary exercise of the powers of government.”<sup>111</sup>

After acknowledging the shared purpose between the procedural and substantive components—i.e., the protection against arbitrary exercises of governmental power—the Court explained that each component serves to achieve this purpose in a unique way.<sup>112</sup> In discussing procedural due process, the Court noted that “[b]y requiring the government to follow appropriate procedures when its agents decide to ‘deprive any person of life, liberty, or property,’ the Due Process Clause promotes fairness.”<sup>113</sup> On the other hand,

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104. *Fisher v. Moore*, 73 F.4th 367, 368–69 (5th Cir. 2023).

105. See *infra* note 137 and accompanying text (discussing the circuit split).

106. See discussion *infra* Sections II.D.1–2 (examining substantive due process before proceeding to describe the evolution of the state-created danger doctrine).

107. See discussion *infra* Section II.D.3 (discussing § 1983 from a damages perspective).

108. U.S. CONST. amend. XIV, § 1.

109. 1 State and Local Government Civil Rights Liability § 1:17 (citing *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring)).

110. *Daniels*, 474 U.S. at 331.

111. *Id.* (first citing Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); then quoting *Hurtado v. California*, 110 U.S. 516, 527 (quoting *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819))).

112. See *id.*

113. *Id.*

in discussing substantive due process, the Court reasoned that “by barring certain government actions *regardless of the fairness of the procedures used to implement them*, [substantive due process] serves to prevent governmental power from being ‘used for purposes of oppression.’”<sup>114</sup>

Properly understood, then, substantive due process pertains to the justifications—as opposed to the procedures—accompanying governmental exercises of power and protects against those exercises which are arbitrary in the constitutional sense.<sup>115</sup> In a later Section, this Comment will explore how the Supreme Court has gone about defining the contours of constitutional arbitrariness.<sup>116</sup> Prior to reaching this discussion, however, this Comment next addresses a unique and relatively novel theory of substantive due process liability: the “so-called ‘state-created danger’ doctrine” at issue in *Fisher*.<sup>117</sup>

## 2. The Evolution of the State-Created Danger Doctrine

The state-created danger doctrine has its genesis in the Supreme Court’s decision in *DeShaney v. Winnebago County Department of Social Services*.<sup>118</sup> There, a boy and his mother sued a social services department and some of its employees after the boy “fell into a life-threatening coma” upon being severely beaten by his father.<sup>119</sup> And although the Court acknowledged the “grievous harm inflicted upon” both the boy and his mother as a result of the father’s conduct, it ultimately affirmed a grant of summary judgment in favor of the department and its employees.<sup>120</sup> The Court based its determination on the general rule that the doctrine of due process does not impose on states an obligation to protect citizens from harm arising out of private conflict.<sup>121</sup>

The Court did, however, recognize an exception to this general rule in instances where a state enters into a “special relationship” with a particular citizen.<sup>122</sup> The Court specified that such a relationship arises when a state “so restrain[s] an individual’s liberty” as to prevent him from being able to “care

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114. *Id.* at 331–32 (emphasis added) (internal citation omitted) (quoting *Murray’s Les v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856)).

115. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (clarifying that arbitrary exercises of governmental authority are “exercise[s] of power without any reasonable justification in the service of a legitimate governmental objective.” (citing *Daniels*, 474 U.S. at 331)).

116. *See* discussion *infra* Sections III.B.1.a–b (examining the Court’s current tests for substantive due process).

117. *Fisher v. Moore*, 73 F.4th 367, 368–69 (5th Cir. 2023).

118. *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, 178 (2002).

119. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 191–93 (1989).

120. *Id.* at 193–94, 202–03.

121. *Id.* at 196.

122. *See id.* at 197–98.

for himself” and “provide for his [own] basic human needs—e.g., food, clothing shelter, medical care, and reasonable safety.”<sup>123</sup> The Court then referenced two categories of cases in which it had previously found the exception to apply: those involving the medical needs of prisoners and those involving “involuntarily committed mental patients.”<sup>124</sup> And although commentators have advanced compelling arguments to the contrary,<sup>125</sup> courts have consistently refused to apply this exception in the context of public schools.<sup>126</sup>

The *DeShaney* Court also implicitly suggested the existence of a second exception to the general rule regarding states and their lack of a constitutional duty to protect citizens from private conflict.<sup>127</sup> When discussing the dangers that ultimately resulted in the boy’s coma, the Court emphasized that “the State . . . played no part in their creation, nor did . . . anything to render him any more vulnerable to them.”<sup>128</sup> After reiterating that the State “placed [the boy] in no worse position than that in which he would have been had it not acted at all,” the Court concluded that “[u]nder these circumstances, the State had no constitutional duty to protect” the boy from his abusive father.<sup>129</sup>

In the months following *DeShaney*, the Ninth Circuit used the above-quoted dicta to adopt a new theory of constitutional liability: the theory now referred to as the state-created danger doctrine.<sup>130</sup> In *Wood v. Ostrander*, a Washington state police officer left a woman in an area known to be especially dangerous after arresting the driver of a vehicle in which the woman had been a passenger.<sup>131</sup> After turning down multiple offers, the woman—who had been walking in brisk weather without any kind of a coat or jacket—accepted a ride from a stranger.<sup>132</sup> Instead of taking her home, the stranger then drove the woman to a secluded location and raped her.<sup>133</sup>

The woman ultimately sued the police officer under § 1983, alleging that his conduct amounted to a violation of her substantive due process rights.<sup>134</sup> After recognizing personal security to be a constitutionally

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123. *See id.* at 199–200.

124. *See id.* at 198–200 (first citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) [medical needs of prisoners]; then citing *Youngberg v. Romeo*, 457 U.S. 307, 314–25 (1982) [involuntarily committed mental patients]).

125. *See* Lindsey Hovland, *Due Process-Fifth Circuit Incorrectly Holds School Lacks DeShaney Special Relationship with Students*, 66 SMU L. REV. 385, 390 (2013); Anita Binayifaal, *Reexamining School Liability and the Viability of a Special Relationship Claim in the Aftermath of DeShaney v. Winnebago County Department of Social Services*, 87 ST. JOHN’S L. REV. 1071, 1099–1101 (2013).

126. *Morrow v. Balaski*, 719 F.3d 160, 170 (3d Cir. 2013), *as amended* (June 14, 2013) (collecting cases).

127. *See DeShaney*, 489 U.S. at 201.

128. *Id.*

129. *Id.*

130. *See Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989).

131. *Id.* at 586.

132. *Id.*

133. *Id.*

134. *Id.* at 586, 589–90.

protected liberty interest, the Ninth Circuit held that the woman had created a genuine issue of fact as to whether the officer “deprived her of [that] liberty interest . . . by affirmatively placing her in danger and then abandoning her.”<sup>135</sup> Accordingly, the Ninth Circuit reversed the district court’s grant of summary judgment in favor of the police officer and, in so doing, became the first court to recognize the state-created danger doctrine.<sup>136</sup>

Today, most of the United States Circuit Courts of Appeals—all but the Fifth and Eleventh—have adopted the doctrine as a viable theory of constitutional liability.<sup>137</sup> In 2020, the First Circuit became the tenth and most recent court to do so when it embraced the doctrine in *Irish v. Fowler*.<sup>138</sup> There, a woman reached out to a police department the morning after she had been “kidnapped and raped [] repeatedly” by a former lover.<sup>139</sup> Upon meeting with the two detectives assigned to her case, the woman informed the officers that her attacker had repeatedly threatened her.<sup>140</sup> Additionally, she told the detectives that she was afraid her attacker “would become terribly violent” if he found out that she had spoken with the police.<sup>141</sup>

Notwithstanding the woman’s concern, the detectives later left the attacker a voicemail in which one of them identified himself as a “state police detective.”<sup>142</sup> Upon listening to the message, the attacker became enraged.<sup>143</sup> The ensuing chaos then reached its crescendo when the attacker broke into the woman’s home.<sup>144</sup> Once inside, the attacker shot multiple people, including the woman’s boyfriend and mother.<sup>145</sup> And while the woman was initially able to escape through a bathroom window, the attacker wound up kidnapping her again before driving away in a stolen truck.<sup>146</sup> Nearly ten hours after the shooting began, the attacker was eventually apprehended.<sup>147</sup>

The woman then sued the detectives under the state-created danger theory of liability, alleging that they had exacerbated an already dangerous situation by leaving the voicemail at issue.<sup>148</sup> In discussing the contours of the doctrine, the court noted three requirements present throughout each of the circuits that had already adopted it.<sup>149</sup> First, each circuit “require[s] that the defendant affirmatively act[] to create or exacerbate a danger to a specific

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135. *Id.* at 586, 589, 596.

136. *Id.* at 586, 596.

137. *See Irish v. Fowler*, 979 F.3d 65, 73–75 (1st Cir. 2020).

138. *See id.*

139. *Id.* at 68.

140. *Id.*

141. *Id.*

142. *Id.* at 69.

143. *Id.*

144. *See id.* at 69–71.

145. *Id.* at 71.

146. *Id.*

147. *Id.*

148. *See id.* at 67.

149. *Id.* at 73–74.

individual or class of people.”<sup>150</sup> Second, each circuit requires that the defendant act with a level of culpability greater than “mere negligence.”<sup>151</sup> Third, each circuit requires that the plaintiff “show a causal connection between the defendant’s acts and the harm.”<sup>152</sup> Synthesizing these requirements, the First Circuit ultimately adopted the doctrine and set forth its four-part test for state-created danger claims.<sup>153</sup>

### 3. Section 1983: The Statutory Vehicle for State-Created Danger Claims

As cases like *Wood* and *Irish* make clear, plaintiffs who assert state-created danger claims do so under 42 U.S.C. § 1983.<sup>154</sup> First enacted over 150 years ago,<sup>155</sup> § 1983 permits citizens to bring civil causes of action against state actors who have deprived them “of any rights, privileges, or immunities secured by the Constitution,” including the guarantees of substantive due process.<sup>156</sup> Since its enactment, countless plaintiffs have turned to § 1983 in hopes of obtaining federal relief; in fact, according to a statistical study conducted by the U.S. Department of Justice, “[o]ne in every ten civil lawsuits is a [§] 1983 lawsuit.”<sup>157</sup> And while the Supreme Court has significantly limited the kinds of damages recoverable under certain other federal statutes,<sup>158</sup> the same cannot be said about § 1983.<sup>159</sup>

Under § 1983, “the full panoply of compensatory damages is available, including[] recovery for pecuniary and nonpecuniary harms.”<sup>160</sup>

150. *Id.* (first citing *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006); then citing *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061–64 (9th Cir. 2006)).

151. *Irish*, 979 F.3d at 74 (first citing *Butera v. D.C.*, 235 F.3d 637, 651 (D.C. Cir. 2001); then citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)).

152. *Irish*, 979 F.3d at 74 (first citing *Sanford*, 456 F.3d at 304–05; then citing *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir. 2011)).

153. *See id.* at 75 (“In order to make out a state-created danger claim in the First Circuit, the plaintiff must establish: (1) that a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff; (2) that the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public; (3) that the act or acts caused the plaintiff’s harm; and (4) that the state actor’s conduct, when viewed in total, shocks the conscience. (i) Where officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience . . .”).

154. *See Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989); *Irish*, 979 F.3d at 67.

155. Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU DISTRICT OF COLUMBIA (Apr. 20, 2021, 4:15 PM), <https://www.acludc.org/en/news/happy-150th-anniversary-section-1983#:~:text=On%20April%202020%2C%201871%2C%20President,vioate%20their%20federal%20constitutional%20rights>.

156. 42 U.S.C. § 1983.

157. *See* U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (1994), <https://bjs.ojp.gov/content/pub/ascii/CCOPAJ.TXT>.

158. *See* discussion *infra* Section IIE.2 (discussing the limited kinds of remedies available to plaintiffs suing under Title IX).

159. JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 5:18 (3d ed. 1997).

160. *Id.*; *see also Knussman v. Maryland*, 272 F.3d 625, 639 (4th Cir. 2001) (“Compensatory damages for emotional injuries are recoverable under § 1983.”) (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986)).

Additionally, although certainly not appropriate in every case, punitive damages may be awarded under § 1983 “when the defendant’s conduct . . . involves reckless or callous indifference to the federally protected rights of others.”<sup>161</sup> *Casillas-Diaz v. Palau*, a First Circuit excessive force case, illustrates the breadth of damages available to plaintiffs suing under § 1983.<sup>162</sup> There, the First Circuit affirmed a jury’s award “of \$1,300,000 in compensatory and punitive damages” after the court below instructed the jury “that in assessing damages it could consider *any physical, mental, or emotional harm* sustained by the injured parties.”<sup>163</sup>

### *E. The Current State of Title IX*

In *Fisher*, the Fifth Circuit appropriately recognized that Title IX “provides a cause of action for ‘student-on-student harassment’ under certain circumstances.”<sup>164</sup> However, recent cases demonstrate that the relief currently available to successful student plaintiffs is limited to say the least.<sup>165</sup> Accordingly, this portion of the Comment begins by describing Title IX’s emergence as a remedy available to student victims of peer sexual abuse before ultimately examining the limited kinds of damages currently available under the statute.<sup>166</sup>

#### *1. How Title IX Emerged as a Remedy for Victims of Peer Sexual Abuse*

Enacted by Congress in 1972, Title IX provides 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.”<sup>167</sup> And while the plain language of the statute fails to authorize—or even suggest—a right of action allowing private enforcement, the Court recognized the existence of such a right in *Cannon v. University of Chicago*.<sup>168</sup> Over a decade later, in *Franklin v. Gwinnett County Public Schools*, the Court established the availability of damages in suits brought under Title IX’s implicit right of

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161. See *Mathie v. Fries*, 121 F.3d 808, 815 (2d Cir. 1997) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

162. See *Casillas-Díaz v. Palau*, 463 F.3d 77 (1st Cir. 2006).

163. *Id.* at 79, 83, 86 (emphasis added).

164. *Fisher v. Moore*, 73 F.4th 367, 368–69 (5th Cir. 2023).

165. See discussion *infra* Section II.E.2 (detailing the limited kinds of remedies available to plaintiffs suing under Title IX).

166. See discussion *infra* Sections II.E.1–2 (describing Title IX as a source of relief for student victims of peer sexual abuse).

167. 20 U.S.C. § 1681; Christine I. Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442 (2013).

168. Laura L. Dunn, *Much Ado About Cummings: The Curtailment of Civil Rights Enforcement and Its Impact on Title IX*, 56 CREIGHTON L. REV. 277, 278 (2023) (discussing *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979)).

action.<sup>169</sup> In the years following these landmark decisions, a myriad of students “subjected to sexual misconduct” have brought Title IX claims against school districts across the country.<sup>170</sup>

In *Gebser v. Lago Vista Independent School District*, the Court considered whether Title IX could afford a remedy to a student who had been sexually harassed by one of her teachers.<sup>171</sup> In that case, a high school teacher initiated a sexually intimate relationship with one of his students.<sup>172</sup> The two had sex for the first time during the spring semester of the student’s ninth-grade year.<sup>173</sup> Their relationship persisted over the following months but was quickly put to an end when a police officer happened to discover the two “engaging in sexual intercourse.”<sup>174</sup> The officer immediately arrested the teacher, and not long after, the school district terminated his employment.<sup>175</sup>

Alongside her mother, the student asserted multiple claims, including a Title IX claim against the school district.<sup>176</sup> And while the plaintiffs urged the Court to hold the school district liable for the teacher’s misconduct, the Court refused to do so “absent [the district’s] actual notice and deliberate indifference.”<sup>177</sup> Prior to concluding its opinion, the *Gebser* majority noted that sexual harassment is an unfortunate yet “all too common aspect of the educational experience.”<sup>178</sup>

Not even a year after *Gebser* was decided, the Court considered a Title IX claim predicated upon peer sexual abuse in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.<sup>179</sup> There, a mother sued a school district under Title IX, alleging that her daughter had been exposed to a “prolonged pattern of sexual harassment by one of her fifth-grade classmates.”<sup>180</sup> According to the mother’s complaint, the classmate not only made numerous “vulgar statements” directed towards her daughter but also, on one occasion, “rubbed his body against [her daughter] in . . . a sexually suggestive manner.”<sup>181</sup> The classmate’s lewd behavior persisted until he was ultimately “charged with, and pleaded guilty to, sexual battery.”<sup>182</sup>

After assessing the validity of the mother’s claim, the Court held that—in limited circumstances—school districts may be held liable for damages

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169. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992).

170. COLE & BACK, *supra* note 16.

171. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

172. *Id.* at 278.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 278–79.

177. *See id.* at 292–93.

178. *Id.* at 292.

179. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999).

180. *Id.* at 633.

181. *Id.* at 633–34.

182. *Id.* at 634.

under Title IX when a student sexually harasses his or her classmates.<sup>183</sup> Specifically, the Court limited the liability of school districts to instances where a district “exercises substantial control over both the harasser and the context in which the known harassment occurs.”<sup>184</sup> In what could be perceived as a further limit on school district liability, the Court also underscored the importance of a harasser’s identity and suggested that “[p]eer harassment . . . is less likely” to give rise to a meritorious Title IX claim “than is teacher-student harassment.”<sup>185</sup>

Despite these limitations, the Court’s decision in *Davis* nevertheless provided student victims of peer sexual abuse with a federal means by which they could seek judicial relief.<sup>186</sup> However, two subsequent Court cases—*Barnes v. Gorman* and *Cummings v. Premier Rehab Keller, P.L.L.C.*—significantly narrowed the scope of damages available to these victims.<sup>187</sup> Notably, neither *Barnes* nor *Cummings* involved causes of action brought under Title IX,<sup>188</sup> yet the vast majority of courts to consider the issue have found these holdings applicable to Title IX claims.<sup>189</sup>

## 2. *The (Limited) Kinds of Remedies Available to Victims Under Title IX*

In *Barnes*, the Court contemplated the availability of punitive damages in a private cause of action brought under the Americans with Disabilities Act (ADA) and Rehabilitation Act.<sup>190</sup> Like Title IX’s prohibition against gender-based discrimination in federally funded programs, the ADA and Rehabilitation Act prohibit discrimination against the disabled by public entities and recipients of federal funding.<sup>191</sup> In considering the question presented, the Court drew multiple analogies to both Title VI and Title IX.<sup>192</sup> Central to the Court’s analysis was the fact that both the ADA and Rehabilitation Act, like Titles VI and IX, were enacted using “Congress’s power under the Spending Clause to place conditions on the grant of federal funds.”<sup>193</sup> And, because private causes of action brought under each of these statutes inevitably involve a breach of a prescribed condition, the Court

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183. *Id.* at 644.

184. *Id.* at 645.

185. *See id.* at 653.

186. *Id.* at 633.

187. *Dunn*, *supra* note 168, at 286–89.

188. *Id.*

189. *See id.* at 290.

190. *Barnes v. Gorman*, 536 U.S. 181, 183 (2002).

191. *See id.* at 184–85.

192. *Id.* at 185 (noting that Title VI “prohibits racial discrimination in federally funded programs and activities” and that “the Court has interpreted Title IX consistently with Title VI” (citation omitted)).

193. *Id.* at 185–86 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)) (internal citations omitted).

utilized a “contract-law analogy” to determine the scope of damages available to plaintiffs suing under them.<sup>194</sup>

In utilizing a “contract-law analogy” to discern the availability of punitive damages, the Court looked to the kinds of remedies “generally [] available for breach of contract.”<sup>195</sup> And while the Court acknowledged that compensatory damages and injunctive relief are typically available in contract litigation, it recognized that punitive damages are not.<sup>196</sup> Accordingly, the Court held that punitive damages are unavailable in private causes of action brought under the ADA and Rehabilitation Act.<sup>197</sup>

Embracing the contract-law approach from *Barnes*, the Court in *Cummings* later held that emotional distress damages are similarly unavailable to plaintiffs suing under the Rehabilitation and Affordable Care Acts.<sup>198</sup> In reaching its conclusion, the Court paid particular attention to “the Restatement’s similar treatment of emotional distress and punitive damages.”<sup>199</sup> In a thoughtful dissenting opinion, Justice Breyer argued for an approach that focuses on the “nonpecuniary” *purpose* of the Spending Clause statutes—i.e., “eradicat[ing] invidious discrimination.”<sup>200</sup> He noted that, unlike a typical breach of contract, “the primary harm inflicted by discrimination is rarely economic.”<sup>201</sup> However, given the consistency with which the Court has utilized the contract-law analogy in cases brought under the Spending Clause statutes, it remains highly questionable as to whether the Court would follow Justice Breyer’s reasoning in a case brought under Title IX.<sup>202</sup>

And while the Court has yet to consider the spectrum of damages available to plaintiffs suing under Title IX specifically, lower courts have followed the narrow approach adopted in *Cummings*.<sup>203</sup> For example, in *Doe ex rel. v. City of Pawtucket*, the United States District Court for the District of Rhode Island “conclude[d] that emotional distress damages are precluded in private suits to enforce Title IX.”<sup>204</sup> There, a mother and her minor daughter asserted claims against various defendants—including a school committee and various school officials—for damages arising out of “incidents of alleged sexual assault.”<sup>205</sup> Specifically, the plaintiffs sought

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194. *See id.* at 186–87.

195. *Id.* at 187 (citations omitted).

196. *Id.* (citations omitted).

197. *Id.*

198. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216–17, 230 (2022), *reh’g denied*.

199. *Id.* at 224.

200. *Id.* at 235 (Breyer, J., dissenting).

201. *Id.* at 240 (Breyer, J., dissenting).

202. *But see* *Dunn*, *supra* note 168, at 295–97 (suggesting arguments for Title IX plaintiffs attempting to distinguish from *Cummings*).

203. *See Doe ex rel. v. City of Pawtucket*, 633 F. Supp. 3d 583, 587–88, 592 (D.R.I. 2022) (“It is no large leap to conclude that the Supreme Court’s reasoning in *Cummings* applies to Title IX cases.”).

204. *Id.* at 589.

205. *Id.* at 586.

damages for, *inter alia*, emotional distress, medical expenses, and pain and suffering.<sup>206</sup> And although the court held that the plaintiffs had “maintain[ed] a viable claim for medical expenses,” it refused to allow their remaining claims to move forward.<sup>207</sup> In so doing, the court precluded the plaintiffs from seeking damages for things like “psychological damage, post traumatic syndrome, and loss of enjoyment.”<sup>208</sup>

### III. THE SUPREME COURT SHOULD UPHOLD THE STATE-CREATED DANGER DOCTRINE AS A VIABLE THEORY OF CONSTITUTIONAL LIABILITY

The Supreme Court should recognize the state-created danger doctrine as a viable theory of constitutional liability available to student victims of peer sexual abuse because doing so would promote judicial equality while affording victims across the country an equal opportunity at obtaining appropriate relief.<sup>209</sup> As previously discussed, ten of the United States Circuit Courts of Appeals have already adopted the doctrine.<sup>210</sup> However, it continues to evade recognition in the Fifth and Eleventh Circuits,<sup>211</sup> leaving Title IX as the sole federal—and sometimes only<sup>212</sup>—remedy available to students subjected to peer sexual abuse in states covered under those circuits’ jurisdiction.<sup>213</sup> And, given the narrow scope of remedies available to Title IX plaintiffs, victims in some of those states are currently precluded from ever recovering damages for psychological harm.<sup>214</sup>

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206. *Id.* at 589.

207. *See id.* at 589–91.

208. *Id.* at 591.

209. *See* discussion *infra* Sections III.A–C (discussing why the state-created danger doctrine liability should extend to victims of peer sexual abuse).

210. *See supra* note 137 and accompanying text (noting that most circuits have recognized this theory of constitutional liability).

211. *See* Vaughn v. City of Athens, 176 F. App’x 974, 976 n.1 (11th Cir. 2006); White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999); *see also* Fisher v. Moore, 73 F.4th 367, 374–75 (5th Cir. 2023) (“Our precedent has repeatedly declined to adopt the state-created danger doctrine.”).

212. As previously discussed, the doctrine of sovereign immunity precludes plaintiffs in Texas and Alabama from asserting state law negligent supervision claims. *See supra* notes 78–88 and accompanying text (discussing the doctrine of sovereign immunity in Texas and Alabama). Additionally, given the stringent school policy specificity requirement, many Georgia plaintiffs would likely be precluded from asserting state law negligent supervision claims as well. *See supra* notes 90–93 and accompanying text (discussing the doctrine of sovereign immunity in Georgia).

213. *See* discussion *supra* Section II.E.2 (discussing the limited remedies available under Title IX).

214. *See* discussion *supra* Sections II.C, II.E.2 (describing how sovereign immunity prevents certain students from being able to bring meritorious state law claims and why students suing under Title IX could not recover damages for emotional distress).

A. *The Remedies Currently Available to Plaintiffs Suing Under Title IX Are Plainly Insufficient*

The seriousness of the effects accompanying childhood sexual abuse cannot be overstated. Children who suffer sexual abuse at the hands of their peers are in many ways similar to other victims, and their traumatic experiences “can go on to negatively impact nearly every aspect of [their] well-being.”<sup>215</sup> Survivors face an increased risk of depression, anxiety, eating disorders, and substance abuse.<sup>216</sup> If left untreated, these conditions “can lead child sexual abuse victims to commit suicide.”<sup>217</sup> In fact, the Center for Disease Control and Prevention has previously found child sexual abuse to be among “the most potent risk factors for suicide.”<sup>218</sup>

Despite this unfortunate reality, victims of peer sexual abuse who turn to Title IX as a potential source of relief have little to no chance at obtaining damages beyond those incurred for “physical injuries and hospital treatments.”<sup>219</sup> And given the severity of issues faced by victims, these limited remedies undoubtedly fall short of providing sufficient relief.<sup>220</sup>

Outside of Title IX litigation, courts have upheld substantial awards for victims subjected to peer-inflicted sexual abuse.<sup>221</sup> For example, in *John Doe No. 93 v. Charter Sch. USA*, a nine-year-old student was awarded \$5,250,000 in damages after he was “physically assaulted and sexually abused on his school bus and at school” by another student.<sup>222</sup> There, the nine-year-old—“by and through his mother individually and as his guardian”—asserted negligent supervision and Title IX claims.<sup>223</sup> Ultimately, the jury opted against finding liability under Title IX but nevertheless chose to award the plaintiff damages based solely upon his state law negligence claim.<sup>224</sup> Notably, the student’s award included damages “for the minor’s severe and permanent physical and psychological injuries, shame, humiliation, and inability to enjoy a normal life.”<sup>225</sup>

Thankfully, the plaintiff in *John Doe No. 93* was able to obtain a remedy that reflected the totality of his trauma, in no small part because of Florida’s

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215. Kosmides, *supra* note 20.

216. *Id.*

217. *Id.*

218. NOGA TSUR ET AL., “Explode into Small Pieces”: Suicidal Ideation Among Child Sexual Abuse Survivors, 131 CHILD ABUSE & NEGLECT 1, 1 (2022).

219. *See Doe ex rel. Doe v. City of Pawtucket*, 633 F. Supp. 3d 583, 590–91 (D.R.I. 2022).

220. *See supra* notes 215–18 and accompanying text (explaining the disturbing effects associated with childhood sexual abuse).

221. Verdict and Settlement Summary, *John Doe No. 93 v. Charter Sch. USA*, 2014 WL 7474906 (Fla. Cir. Ct. Nov. 12, 2014).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

comparatively broad waiver of sovereign immunity.<sup>226</sup> However, student victims like the daughter in *Fisher* who live in Texas, Alabama, or Georgia would almost certainly be precluded from ever attaining similar relief.<sup>227</sup> Accordingly, Title IX—as currently construed by courts across the country—simply falls short of addressing the epidemic that is peer sexual abuse.<sup>228</sup> But all hope is not lost. Rather, hope lies in the unique theory of constitutional liability deemed the state-created danger doctrine.<sup>229</sup> And, despite the concerns held by the only two circuits that have refused to recognize it, this theory falls squarely within the bounds of precedent.<sup>230</sup>

*B. Addressing the Fifth Circuit’s Concern: Why the State-Created Danger Doctrine Accords with the Applicable Test for Substantive Due Process in Cases Involving Peer Sexual Abuse*

In *Fisher*, the Fifth Circuit once again “decline[d] to adopt the state-created danger theory of constitutional liability” notwithstanding the case’s “unquestionably horrific” facts.<sup>231</sup> In explaining the decision, the court expressed its hesitancy “to fashion a new theory of constitutional liability without the benefit of rigorous briefing,”<sup>232</sup> emphasizing that the plaintiff failed to explain “how state-created danger liability meets today’s reinvigorated test” for substantive due process.<sup>233</sup> Specifically, the court expressed doubt as to whether the “right to be free from state-created danger” should be considered “deeply rooted in this Nation’s history and tradition.”<sup>234</sup> And while the Fifth Circuit’s concern—couched in a phrase undoubtedly intertwined with the concept of substantive due process—is certainly understandable, it overlooks a critical point: the existence of a *second* test.<sup>235</sup>

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226. *Id.*

227. *See supra* notes 81–93 and accompanying text (explaining the breadth of sovereign immunity in Texas, Alabama, and Georgia).

228. *See generally* *Doe ex rel. Doe v. City of Pawtucket*, 633 F. Supp. 3d 583 (D.R.I. 2022) (explaining restrictions on forms of recovery under Title IX).

229. *See, e.g.*, *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989) (discussing the seriousness of misconduct in determining whether a constitutional right has been violated).

230. *See id.* at 586, 596.

231. *Fisher v. Moore*, 73 F.4th 367, 374 (5th Cir. 2023).

232. *Id.* at 373 (citing *Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002)).

233. *Id.* at 373–74.

234. *Id.* (first citing *McClendon v. City of Columbia*, 305 F.3d 314, 330 (5th Cir. 2002); then citing *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

235. *See* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (detailing tests for claims based on legislative action and on acts of government officers).

*1. The Doctrine Passes Muster Under the Court's Current Test for Executive Conduct*

Substantive due process is widely regarded as the most confusing constitutional doctrine in American jurisprudence.<sup>236</sup> Born out of the seemingly straight-forward text of the Fourteenth Amendment, substantive due process continues to trouble even the most experienced legal minds.<sup>237</sup> Instead of tackling the doctrine in its entirety, this portion of the Comment focuses on the Supreme Court's distinct treatment of substantive due process in cases predicated on executive—as opposed to legislative—government action.<sup>238</sup>

*a. The Court Recognizes Two Distinct Tests for Substantive Due Process*

The Supreme Court's discussion of substantive due process in *County of Sacramento v. Lewis* is both illuminative and instructive.<sup>239</sup> There, a police officer engaged in a high-speed chase after two teenage boys riding a motorcycle refused to obey another officer's command to stop.<sup>240</sup> During the chase, the officer's patrol car and the boys' motorcycle both attained speeds of "up to 100 miles an hour."<sup>241</sup> Determined to apprehend the teenagers, the police officer followed them "at a distance as short as 100 feet," even though his squad car "would have required 650 feet to stop" given the high speed at which it was traveling.<sup>242</sup> Not surprisingly, the chase wound up resulting in the death of one of the boys—a sixteen-year-old unfortunate enough to be riding the motorcycle as a passenger.<sup>243</sup> The boy's parents ultimately brought an action against the police officer under § 1983, "alleging a deprivation of [the decedent's] Fourteenth Amendment substantive due process right to life."<sup>244</sup>

Upon an eventual grant of certiorari, the Court in *Lewis* was tasked with determining whether the police officer's conduct amounted to a violation of the "Fourteenth Amendment's guarantee of substantive due process . . . ."<sup>245</sup> Prior to reaching its conclusion, the Court discussed the historical evolution

236. See, e.g., *Tun v. Whitticker*, 398 F.3d 899, 900 (7th Cir. 2005) ("This case requires that we once again wade into the murky waters of that most amorphous of constitutional doctrines, substantive due process.").

237. See Hon. Timothy M. Tymkovich et. al., *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1962 (2020).

238. See discussion *supra* Section III.B.1 (exploring the Court's current framework for executive conduct substantive due process claims).

239. See generally *Lewis*, 523 U.S. at 836 (exploring substantive due process jurisprudence).

240. *Id.* at 836–37.

241. *Id.* at 837.

242. *Id.* at 836–37.

243. *Id.* at 837.

244. *Id.*

245. *Id.* at 836.

of due process generally and substantive due process in particular.<sup>246</sup> At the outset of this discussion, the Court recognized that “[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action.”<sup>247</sup>

As previously discussed, the Court has interpreted the Due Process Clause to contain a substantive component which protects citizens against arbitrary exercises of governmental power.<sup>248</sup> But when is a governmental exercise of authority arbitrary *in the constitutional sense*—i.e., actionable under the Due Process Clause? In *Lewis*, the Court established that the answer depends upon the source of the allegedly wrongful government conduct.<sup>249</sup> Specifically, the Court explained that the “criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.”<sup>250</sup>

In so doing, the Court implicitly recognized the existence of two distinct tests for substantive due process: one to be used when a plaintiff’s claim is predicated upon legislative action and the other to be used when a plaintiff’s claim is predicated upon the “specific act[s] of a governmental officer.”<sup>251</sup> And because state-created danger claims involving peer sexual abuse inevitably fall under the latter category, the remainder of the argument explains why such claims could be viable under the Court’s current test for “executive” conduct—i.e., the Court’s current test for claims predicated upon a government official’s specific acts.<sup>252</sup>

#### *b. The “Shocks the Conscience” Test*

The current test for executive conduct claims traces its origins back to the Court’s decision in *Rochin v. California*.<sup>253</sup> There, a man was convicted of possessing an illegal controlled substance after deputy sheriffs pumped his stomach to produce the “chief evidence” necessary for his conviction—two

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246. *Id.* at 845–55.

247. *Id.* at 845.

248. See discussion *supra* Section IILD.1 (explaining the substantive component of the Due Process Clause).

249. *Lewis*, 523 U.S. at 846.

250. *Id.*

251. See *id.*

252. In *Fisher*, the Fifth Circuit cited to *Dobbs v. Jackson Women’s Health Organization* to support its hesitancy regarding the plaintiff’s state-created danger claim, noting that “the Supreme Court has recently—and forcefully—underscored that substantive due process is a disfavored doctrine . . . .” *Fisher*, 73 F.4th at 373 (citing *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 238–41 (2022)). However, the governmental conduct at issue in *Dobbs* was legislative action—i.e., the passage of Mississippi’s Gestational Age Act. *Dobbs*, 597 U.S. at 232. Accordingly, given *Lewis*’s distinction between claims predicated upon legislative versus executive action, *Lewis*, 523 U.S. at 846, as well as *Dobbs*’ assurance that “[n]othing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion,” *Dobbs*, 597 U.S. at 221, the Fifth Circuit’s reliance upon *Dobbs* was misplaced.

253. *Lewis*, 523 U.S. at 846–47.

capsules containing detectable amounts of morphine.<sup>254</sup> The Court granted certiorari to determine whether the deputy sheriffs—in pumping a suspected man’s stomach to induce vomiting—had violated “the limitations which the Due Process Clause of the Fourteenth Amendment imposes on” state actor conduct.<sup>255</sup> Ultimately, the Court answered in the affirmative, reasoning that the governmental action at issue amounted to “conduct that shocks the conscience.”<sup>256</sup>

In the years since, the Court has applied the *Rochin* test to determine whether an official’s conduct amounts to an abuse of executive power capable of being deemed “arbitrary in the constitutional sense. . . .”<sup>257</sup> And while the shocks the conscience test has received its fair share of criticism, *Rochin* and its progeny have never been overruled.<sup>258</sup> Thus, in order to determine whether the state-created danger theory—in cases involving peer sexual abuse in public schools—accords with the Court’s current test for *executive conduct* (as opposed to legislative action), courts need only consider whether such claims could involve abuses of executive power which “shock the conscience.”<sup>259</sup>

The level of a state official’s culpability is an integral component of the shocks the conscience test.<sup>260</sup> In *Fisher*, the plaintiff alleged that school officials exacerbated her daughter’s danger of being subjected to peer sexual abuse by “act[ing] with deliberate indifference.”<sup>261</sup> In other cases, plaintiffs bringing state-created danger claims resembling the claim at issue in *Fisher* have similarly alleged deliberately indifferent conduct on the part of school officials.<sup>262</sup> And while deliberate indifference is not always sufficient to shock the conscience, the deliberately indifferent conduct alleged in *Fisher* and similar cases certainly could.<sup>263</sup>

In *Lewis*, the Court noted that intentional conduct “would most probably support a substantive due process claim.”<sup>264</sup> However, the Court then acknowledged a series of cases in which “deliberately indifferent conduct” had been sufficient for constitutional liability to attach.<sup>265</sup> And because “[d]eliberate indifference that shocks in one environment may not be so

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254. *Rochin v. California*, 342 U.S. 165, 166 (1952).

255. *Id.* at 168.

256. *Id.* at 172–74.

257. *Lewis*, 523 U.S. at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

258. *See, e.g., id.* at 860–65 (Scalia, J., concurring) (criticizing the shocks the conscience test).

259. *See id.* at 846, 855.

260. *Id.* at 839, 848–50.

261. *Fisher v. Moore*, 73 F.4th 367, 370–71 (5th Cir. 2023).

262. *See, e.g., Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971–72 (9th Cir. 2011) (alleging deliberately indifferent conduct on the part of school officials in a state-created danger case involving peer sexual abuse).

263. *Cf. L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 244 (3d Cir. 2016) (finding a schoolteacher’s deliberately indifferent conduct sufficient to shock the conscience).

264. *Lewis*, 523 U.S. at 849–50.

265. *Id.*

patently egregious in another,” a further inquiry into the nature of these cases is appropriate.<sup>266</sup> The cases alluded to by the Court in *Lewis* involved “the medical needs of” prisoners and pretrial detainees.<sup>267</sup> In one of these cases—*Estelle v. Gamble*—the Court reasoned that a prison official’s “deliberate indifference” to a prisoner’s serious medical needs could amount to the kind of conduct “proscribed by the Eighth Amendment.”<sup>268</sup> In another case involving prisoners—one more pertinent to the topic at hand—the Court announced that “[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”<sup>269</sup>

In *Farmer v. Brennan*, a prisoner alleged that various prison officials had violated his Eighth Amendment right to be free from cruel and unusual punishment by transferring her—“a transsexual who ‘project[ed] feminine characteristics’”—to the prison’s general population.<sup>270</sup> Specifically, the prisoner alleged that the officials were aware that she would be “particularly vulnerable to sexual attack by [other] inmates” and that the officials’ act of nevertheless transferring her to general population “amounted to a deliberately indifferent failure to protect [her] safety.”<sup>271</sup> After announcing that deliberate indifference “requir[es] a showing that [an] official was subjectively aware of the risk” that ultimately causes the plaintiff harm, the Court denied the prison officials’ motion for summary judgment.<sup>272</sup>

Multiple courts—including the Fifth Circuit—have refused to recognize public school officials as having a “*DeShaney* special relationship with [their] students.”<sup>273</sup> And while there are certainly differences that exist between the freedoms available to students and prisoners, their situations are at least similar enough to warrant analogy.<sup>274</sup> Like the prisoner in *Farmer*, students in school depend on those with authority over them—i.e., school officials and teachers—to protect them against dangers involving others over whom those officials also have authority.<sup>275</sup> Accordingly, even if the relationship between a student and the officials presiding over his or her school alone fails to impose upon those officials an affirmative duty of protection, the nature of the relationship nevertheless gives rise to a situation where deliberate indifference could shock the conscience.<sup>276</sup>

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266. *Id.* at 850.

267. *Id.* at 849–50.

268. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

269. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (collecting cases).

270. *Id.* at 831.

271. *Id.* at 830–31.

272. *Id.* at 828–51.

273. *See Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 857 (5th Cir. 2012).

274. *Id.* at 857–62.

275. *See generally Farmer v. Brennan*, 511 U.S. 825 (describing the role of prison officials in protecting prisoners).

276. *See L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 244 (3d Cir. 2016).

Furthermore, the conduct of school officials in cases involving peer sexual abuse often constitutes a series of “unhurried judgments.”<sup>277</sup> In *Lewis*, the Court drew a sharp distinction between situations which call for “an officer’s instant judgment” and those where officials “hav[e] time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.”<sup>278</sup> Unlike situations in which officers are called to make instant judgments, the school officials in *Fisher* had plenty of time to select a course of action.<sup>279</sup> In fact, according to the allegations set forth in the plaintiff’s complaint, school officials had approximately two months following the initial assault to figure out how to prevent the aggressor’s conduct from reoccurring.<sup>280</sup> Therefore, the element of timing also supports the assertion that—in cases like *Fisher*—a school official’s deliberate indifference could be capable of shocking the conscience.<sup>281</sup>

*c. The Assertion of a Fundamental Right Should Not Be Required in Executive Conduct Cases like Fisher*

Returning to the doubt expressed by the Fifth Circuit in *Fisher*: Do students have a fundamental right to be free from dangers created or exacerbated by a school official’s deliberate indifference?<sup>282</sup> Put another way, is a student’s right to be free from state-created danger “deeply rooted in this Nation’s history and tradition?”<sup>283</sup> For reasons explained below, the answers to these questions should have no bearing as to whether the state-created danger theory—at least in the context being examined here—is viable under the Court’s current test for executive conduct.<sup>284</sup>

As previously discussed, the Court in *Lewis* unequivocally established that substantive due process claims involving executive conduct should be treated differently from similar claims predicated upon legislative action.<sup>285</sup> Despite this, courts and scholars continue to overlook this distinction by assuming that a fundamental right needs to be implicated in claims predicated upon the specific acts of individual government officials.<sup>286</sup> In so doing, these courts and scholars have ignored the reality that while deprivations of

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277. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998).

278. *See id.*

279. *See Fisher v. Moore*, 73 F.4th 367, 370 (5th Cir. 2023).

280. *Id.*

281. *Id.*

282. *Id.* at 373.

283. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

284. *See Dobbs*, 597 U.S. at 215.

285. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

286. Shannon Roesler, *State-Created Environmental Dangers and Substantive Due Process*, 73 FLA. L. REV. 685, 719 (2021).

fundamental rights automatically trigger heightened scrutiny, “[s]ubstantive due process protects fundamental and non-fundamental liberties.”<sup>287</sup>

Allowing the fundamental rights approach to coexist with a distinct approach for executive conduct—one that would not require the presence of a fundamental right—would enable the Court to continue pursuing the “core” of substantive due process without having to expand the rights protected under the Constitution.<sup>288</sup> When the Court recognizes a new right as being fundamental, such a decision—in many ways—has the impermissible effect of creating law by virtue of its universal applicability.<sup>289</sup> Deciding cases involving executive conduct on an *ad hoc* basis using a standard that has proven “virtually insurmountable”<sup>290</sup> would prevent the judiciary from usurping the role of the legislature while also affording plaintiffs like the one in *Fisher* an opportunity to seek constitutional redress for egregious governmental conduct.<sup>291</sup>

*d. Even If the Court Were to Require a Fundamental Right, the State-Created Danger Doctrine Could Nevertheless Survive Scrutiny*

To be sure, the Court in *Lewis* left open the question of whether executive conduct plaintiffs need to allege the deprivation of a fundamental right.<sup>292</sup> Specifically, the Court noted that “[if] the necessary condition of egregious behavior were satisfied . . . [there would] be a possibility of recognizing a substantive due process right to be free of such executive action, and only then *might* there be a debate about the sufficiency of historical examples of enforcement of the right claimed . . . .”<sup>293</sup> Additionally, multiple circuits currently require plaintiffs alleging these claims to establish that a government official’s conscience-shocking conduct deprived them of a fundamental right.<sup>294</sup> However, even if the Court were to require state-created danger plaintiffs to allege the deprivation of a fundamental right, the

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287. Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 311 (2015) (citation omitted).

288. *See id.* at 282–86, 313–14 (arguing that “there is no reason that a litigant should have to claim that the infringed liberty interest is ‘fundamental’ before” bringing a claim under the shocks the conscience test).

289. *See id.* at 282–84.

290. *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir. 1995) (describing the shocks the conscience test as a “virtually insurmountable uphill struggle”).

291. *See Fisher v. Moore*, 73 F.4th 367, 368–69 (5th Cir. 2023).

292. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

293. *Id.* (emphasis added).

294. *See, e.g., Hess v. Garcia*, 72 F.4th 753, 765 (7th Cir. 2023) (“The Due Process Clause is violated by an infringement of a fundamental right through an abuse of government power that shocks the conscience of federal judges.” (internal quotation marks and alterations omitted) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992))).

doctrine could—at least in the limited context being examined here—nevertheless pass muster.<sup>295</sup>

As evidenced by the Court’s treatment of substantive due process in *Lewis*, the right to be free from constitutionally arbitrary—i.e., conscience-shocking—governmental conduct is in and of itself “deeply rooted in this Nation’s history and tradition.”<sup>296</sup> When underscoring the Court’s continued understanding of substantive due process as being intended to protect against arbitrary abuses of governmental power, the Court quoted an excerpt from *Bank of Columbia v. Okely*.<sup>297</sup> Notably, *Okely* was decided prior to the Fourteenth Amendment’s ratification in 1868.<sup>298</sup> And given the Court’s previous use of historical sources from around the same time-period,<sup>299</sup> the principles established in *Okely* are undoubtedly relevant to a “deeply rooted” historical analysis.<sup>300</sup> Accordingly, the Court could properly conclude that a student’s right to be free from state-created danger is “fundamental” so long as history and tradition could support characterizing the kind of conduct at issue in *Fisher* as executive action which represents an arbitrary abuse of governmental authority.<sup>301</sup>

From the outset, it should be noted that although public schools were not nearly as prevalent back around the time of the Founding as they are today, their emergence around the time of the Fourteenth Amendment’s ratification supports the notion that a school official’s authority—at least in the context of *public* schools—is “governmental” in the historical sense.<sup>302</sup> When conducting “deeply rooted” analyses, the Court has frequently treated state constitutions prior to 1868 as a favored historical source.<sup>303</sup> Surprisingly, “[a]n astonishing thirty-six out of thirty-seven states in 1868 . . .

295. *Id.*

296. *See Lewis*, 523 U.S. at 860 (Kennedy, J., concurring).

297. *Id.* at 844 (“The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 17 U.S. 235, 244 . . . [1819]: “As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.” (quoting *Hurtado v. Cal.*, 110 U.S. 516, 527 (1884))).

298. *See McDonald v. City of Chi.*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring).

299. *See, e.g., Timbs v. Indiana*, 586 U.S. 146, 152 (2019) (incorporating the Eighth Amendment’s Excessive Fines Clause after noting that by 1868, “the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines.” (citation omitted)).

300. *See generally Bank of Colum v. Okely*, 17 U.S. 235, 244 (1819) (explaining how individuals should be protected from government overreach).

301. *See Fisher v. Moore*, 73 F.4th at 367, 370 (5th Cir. 2023).

302. *See Todd A. Demitchell, The Duty to Protect: Blackstone’s Doctrine of in Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 B.Y.U. EDUC. & L.J. 17, 22 (2002) (“In Blackstone’s time, the concept of public schools had not developed into the concept of today’s free common school supported by the state.”).

303. *See, e.g., McDonald v. City of Chi.*, 561 U.S. 742, 769 (2010) (describing the number of state constitutions that contained a second amendment analogue in determining whether an individual’s right to bear arms for personal protection is fundamental).

imposed a duty in their constitutions on state government to provide a public-school education.”<sup>304</sup> And while the Court has yet to embrace a student’s right to education as being fundamental, it has frequently acknowledged public education as “the most important function of state and local governments.”<sup>305</sup> Accordingly, given the “astonishing” prevalence of public schools in 1868 and the Court’s repeated characterization of education’s importance, the Court’s continued refusal to recognize public education as a fundamental right is baffling to say the least.<sup>306</sup> Nevertheless, these principles certainly suggest that a school official’s authority over his or her students may have been understood to be “governmental” by a majority of Americans living around the time of the Fourteenth Amendment’s ratification.<sup>307</sup>

Next, an examination of the doctrine of *in loco parentis* is integral to understanding the historical source and significance of a school official’s governmental authority over his or her students.<sup>308</sup> Sir William Blackstone stated in his celebrated *Commentaries on the Laws of England*<sup>309</sup> that a parent who sends their child to school delegates a portion of “his parental authority . . . to the tutor or schoolmaster of his child; who is then *in loco parentis* . . . .”<sup>310</sup> Blackstone then defined the scope of a school official’s authority, noting that a school official standing *in loco parentis*—which translates to “in the place of a parent”<sup>311</sup>—“has such a portion of the power of the parent committed to his charge . . . that of restraint and correction, as may be necessary to answer the purposes for which he is employed.”<sup>312</sup> Accordingly, history and tradition have established that school officials possess a particular kind of parental authority over their students—“that of restraint and correction.”<sup>313</sup>

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304. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 8, 108 (2008).

305. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29, 35 (1973) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

306. See *id.*; Calabresi & Agudo, *supra* note 304, at 108.

307. Cf. *Timbs v. Indiana*, 586 U.S. 146, 152 (2019) (noting state constitutions around the time of the Fourteenth Amendment’s ratification).

308. See WILLIAM BLACKSTONE, *Commentaries on the Laws of England in Four Books*, vol. 1, 4, 453 (1753).

309. Sir William Blackstone’s *Commentaries* serve as an unquestionably important historical source, as evidenced by the Court’s treatment of them in *Dobbs* and similar substantive due process cases. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 238 (2022) (“In concluding that the Eighth Amendment’s protection against excessive fines is ‘fundamental to our scheme of ordered liberty’ and ‘deeply rooted in this Nation’s history and tradition . . . ,’ [Justice Ginsburg’s] opinion traced the right back to . . . Blackstone’s *Commentaries* . . .”).

310. BLACKSTONE, *supra* note 308.

311. John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 713 (2013) (citing BLACK’S LAW DICTIONARY 803 (8th ed. 2004)).

312. BLACKSTONE, *supra* note 308.

313. See *id.*

Commentators have taken the principles underlying the doctrine of *in loco parentis* one step further by suggesting that—upon being delegated a portion of a parent’s authority—school officials necessarily assume a portion of those duties which parents owe to their children,<sup>314</sup> including a duty of protection.<sup>315</sup> First, the notion that school officials acting *in loco parentis* assume a parental duty of protection accords with Blackstone’s understanding “that protection and subjection are reciprocal.”<sup>316</sup> Furthermore, as pointed out by Professor Todd A. Demitchell in his article *The Duty to Protect: Blackstone’s Doctrine of in Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, the Court has previously recognized that “school officials have authority over students by virtue of *in loco parentis* and a concomitant duty of protection.”<sup>317</sup>

Keeping these principles in mind, it becomes clear that Blackstone treated governments in a manner quite similar to school officials standing *in loco parentis*.<sup>318</sup> In his Commentaries, Blackstone spoke of the law as a vehicle by which governments “restrain[] . . . man from doing mischief to his fellow-citizens . . . .”<sup>319</sup> Accordingly, Blackstone viewed governments as possessing an authority not unlike the kind held by school officials standing *in loco parentis*—that of restraint.<sup>320</sup> Furthermore, Blackstone believed that a duty on part of the government to protect its citizens arose out of this authority—reflecting “the doctrine of reciprocal allegiance and protection,” by which citizens consent to giving up a portion of their natural liberty in exchange for government-enforced protection.<sup>321</sup>

In accordance with doctrine of reciprocal allegiance and protection, the traditional common law bestowed upon the executive branch of government is “a duty to enforce the criminal laws to protect the community and its members from violence.”<sup>322</sup> Concomitant with this duty existed the previously-described authority of executive officers—acting as “conservators of the peace”—to apprehend or restrain violent offenders.<sup>323</sup> When an officer charged with protecting the community failed to do so (despite possessing the necessary authority), the officer became “subject to criminal prosecution for neglect of duty.”<sup>324</sup> Furthermore, citizens whom the

314. See Demitchell, *supra* note 302, at 18–19.

315. See BLACKSTONE, *supra* note 308, at 446 (“[T]he duties of parents to legitimate children . . . principally consist in three particulars; their maintenance, their protection, and their education.”).

316. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 517 (1991) (quoting BLACKSTONE, *supra* note 308, at 233).

317. Demitchell, *supra* note 302, at 20 (citing *Bethel Sch. Dist. No. 403 v. Fraser ex rel. Fraser*, 478 U.S. 675, 684 (1986)).

318. *Id.*

319. Heyman, *supra* note 316, at 529 (quoting BLACKSTONE, *supra* note 308, at 125–26).

320. BLACKSTONE, *supra* note 308.

321. See Heyman, *supra* note 316, at 517–19.

322. See *id.* at 538 (citation omitted).

323. *Id.* (citing BLACKSTONE, *supra* note 308, at 343, 349–50).

324. *Id.* at 539 (citing BLACKSTONE, *supra* note 308, at 140).

officers had failed to protect were historically entitled to bring suit against the government itself.<sup>325</sup> In fact, “[d]uring the mid-nineteenth century, . . . [these] claims were consistent with a long tradition of communal liability in England, and were specifically authorized by statute in several American states.”<sup>326</sup> Accordingly, history and tradition support the notion that a government official’s failure to protect those over whom he possesses a lawful ability to restrain amounts to an actionable abuse of governmental authority.<sup>327</sup>

Given Blackstone’s similar treatment of governments and school officials standing *in loco parentis*, history and tradition support characterizing the kind of conduct at issue in *Fisher* as executive action which represents an arbitrary abuse of governmental authority.<sup>328</sup> In *Fisher*, school officials standing *in loco parentis* not only breached their duty to protect the plaintiff’s daughter but also affirmatively misused their authority in a manner which increased the danger that ultimately befell her.<sup>329</sup> And because the traditional common law viewed a failure to protect as an actionable abuse of authority, it follows that conduct which makes those to whom a duty of protection is owed more vulnerable could certainly qualify as an *arbitrary* abuse of governmental authority.<sup>330</sup>

*e. An Alternative Approach: Deprivations and Causation*

Admittedly, despite the historical considerations detailed above, the Court may be unwilling to hold that students possess a fundamental “right to be free from state-created danger.”<sup>331</sup> However, even if this unwillingness were to manifest itself, a Court set on requiring the assertion of a fundamental right could nevertheless embrace the state-created danger doctrine under an alternative approach—one that implicates a right that has already received protection under substantive due process.<sup>332</sup>

As the plain text of the Fourteenth Amendment makes clear, all due process claims—both substantive and procedural—must be rooted in a deprivation “of life, liberty, or property.”<sup>333</sup> And although the vast majority

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325. *Id.*

326. *Id.* (citation omitted).

327. *See id.* at 537–41.

328. *See* BLACKSTONE, *supra* note 308.

329. *See infra* notes 382–385 and accompanying text (explaining how the *Fisher* school officials misused their *in loco parentis* authority).

330. *See* *Hurtado v. California*, 110 U.S. 516, 536 (1884) (standing for the proposition that power can be “[a]rbitrary” when it causes injury to “the persons and property of its subjects . . .”).

331. *See* *Fisher v. Moore*, 73 F.4th 367, 373–74 (5th Cir. 2023); *see also* *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (asserting that a proper fundamental rights analysis involves “refer[ring] to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”).

332. *See id.*

333. *See* U.S. CONST. amend. XIV, § 1.

of these claims seek liability for deprivations inflicted at the hands of governmental officials, precedent supports the notion that they may also be rooted in deprivations *caused* by government officials though ultimately inflicted through the conduct of secondary or third-party actors.<sup>334</sup>

*i. Students Have an Established Liberty Interest in Being Free from Sexual Assault*

For over a century now, the Court has explicitly recognized that individuals possess a fundamental right to bodily integrity.<sup>335</sup> Furthermore, as pointed out by the Seventh Circuit in *Hess v. Garcia*, judicial acknowledgement of this right predates even the founding of our nation.<sup>336</sup> In fact, when examining the historical development of this so-called “right to bodily integrity,” the Seventh Circuit noted that Blackstone traced the origins of the right all the way back to the *Magna Carta*.<sup>337</sup>

In *Hess*, the court was tasked with assessing a student victim’s substantive due process § 1983 claim.<sup>338</sup> There, a high school student went on a ride-along with a police officer as part of a class assignment.<sup>339</sup> Unfortunately, during the ride along, the officer made numerous explicit remarks and engaged in inappropriate sexual behavior.<sup>340</sup> Upon learning that he later conducted himself in a similarly inexcusable manner while out on a ride-along with another student, the victim ultimately sued, alleging that the officer had deprived her of her right to bodily integrity.<sup>341</sup> After examining the approaches taken by other circuits—as well as the Supreme Court<sup>342</sup>—in similar cases, the Seventh Circuit observed that “[c]ase law has established a fundamental right to bodily integrity that includes the right to be free from sexual assault.”<sup>343</sup>

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334. See *supra* notes 153–54 and accompanying text (explaining the precedent of causal harm).

335. See *Cruzan by Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”)).

336. See *Hess v. Garcia*, 72 F.4th 753, 765 (7th Cir. 2023).

337. *Id.*

338. *Id.* at 756, 764.

339. *Id.* at 757.

340. See *id.*

341. See *id.* at 765.

342. See *United States v. Lanier*, 520 U.S. 259, 262 (1997).

343. *Hess*, 72 F.4th at 758, 765 (citing *Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997)).

ii. *Section 1983's Causal Link Justifies Attributing Deprivations Inflicted by Private Actors to State Officials Who Exacerbate a Plaintiff's Danger*

Unlike *Fisher* and other cases predicated upon peer sexual abuse, the cases cited to by the Seventh Circuit in *Hess*—and *Hess* itself—involved deprivations of a victim's bodily integrity inflicted directly by state actors.<sup>344</sup> However, as *Wood v. Ostrander* demonstrates, most of the state-created danger cases involve deprivations of this same right inflicted by private (as opposed to state) actors.<sup>345</sup> And although this kind of vicarious liability is admittedly unique—especially in this particular area of the law—the Supreme Court has previously utilized similar common law principles to “define the contours of constitutional rights.”<sup>346</sup> As pointed out by Professor Shannon Roesler in her insightful article *State-Created Environmental Dangers and Substantive Due Process*, the Court has interpreted § 1983 to include a causal link “that makes a man responsible for the natural consequences of his actions.”<sup>347</sup>

At least one circuit has explicitly made the connection between § 1983's causal link and the state-created danger doctrine.<sup>348</sup> In *Doe v. Rosa*, the Fourth Circuit considered multiple state-created danger claims involving the sexual abuse of children at a military college's summer camp.<sup>349</sup> Prior to ultimately concluding that the plaintiffs failed to make out a viable state-created danger claim, the court discussed the doctrine's footing and noted that “[§] 1983 imposes liability on state actors who *cause* the ‘deprivation of any rights, privileges, or immunities secured by the Constitution.’”<sup>350</sup>

Additionally, some of the circuits that have adopted the state-created danger doctrine have at least implicitly recognized § 1983's causal link by including a causation prong in their doctrinal tests.<sup>351</sup> For example, the First Circuit's test requires plaintiffs asserting state-created danger claims to establish “that the [government official's] act or acts caused the plaintiff's harm.”<sup>352</sup> Similarly, in the Seventh Circuit, “the failure on the part of the state

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344. *See id.* at 758, 767 (collecting cases).

345. *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989). *See also Hess*, 72 F.4th at 765 (noting that “[t]he right to bodily integrity” is also commonly “referred to as ‘personal security.’”).

346. *See Roesler, supra* note 286, at 723 (citing *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986)); *see also Hartman v. Moore*, 547 U.S. 250, 258 (2006) (“We certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations . . .”).

347. Roesler, *supra* note 286, at 723 n.296 (citing *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978))).

348. *See Doe v. Rosa*, 795 F.3d 429, 436 (4th Cir. 2015).

349. *Id.* at 431.

350. *Id.* at 436 (emphasis added).

351. Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 PENN ST. L. REV. 893, 898–908 (2016).

352. *Irish v. Fowler*, 979 F.3d 65, 75 (1st Cir. 2020).

to protect an individual from such a danger must be the proximate cause of the injury to the individual.”<sup>353</sup>

To be sure, the Court has consistently admonished against interpreting the Fourteenth Amendment in a manner which would allow the Due Process Clause to “supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.”<sup>354</sup> However, further inquiry into the context surrounding this warning demonstrates that it does nothing to impact the viability of the Eighth Circuit’s causal approach to the state-created danger doctrine.<sup>355</sup>

The above-quoted admonition first appeared in *Daniels v. Williams*.<sup>356</sup> There, a prisoner suffered injury after an official left a pillow on the prison’s staircase.<sup>357</sup> In assessing the prisoner’s substantive due process claim, the Court determined that mere negligence is categorically incapable of amounting to a constitutional deprivation.<sup>358</sup> The Court reasoned that “a failure to measure up to the conduct of a reasonable person” is “[f]ar from [the] abuse[s] of power” which the Due Process Clause has always been understood to protect against.<sup>359</sup> Thus, while courts should continue to honor the admonition set forth in *Daniels*, permitting constitutional liability to attach to an official who causes a deprivation of a recognized interest—but only when the conduct of that official amounts to deliberate indifference—would not result in the Fourteenth Amendment “supplant[ing] traditional tort law.”<sup>360</sup>

### C. Why the Eleventh Circuit’s Concern Regarding the Doctrine’s Viability Is Inapposite in Cases Involving Peer Sexual Abuse

As previously mentioned, the Eleventh Circuit is the only circuit apart from the Fifth that does not currently recognize the state-created danger doctrine as a viable theory of constitutional liability.<sup>361</sup> Interestingly, the circuit had previously chosen to adopt the theory before ultimately retracting its position in *White v. Lemacks*.<sup>362</sup> The *White* decision—based entirely upon the Court’s holding in *Collins v. City of Harker Heights*—stripped plaintiffs in Alabama, Georgia, and Florida of their ability to assert state-created

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353. Eisenhauer, *supra* note 351, at 904 (citing King ex rel. King v. East St. Louis Sch. Dist., 496 F.3d 812, 817–18 (7th Cir. 2007)).

354. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

355. See *Fields v. Abbott*, 652 F.3d 886, 890–91 (8th Cir. 2011).

356. *Daniels*, 474 U.S. at 332.

357. *Id.* at 328.

358. *Id.* at 328, 331–32.

359. See *id.* at 332.

360. See *id.*

361. See *supra* note 137 and accompanying text (noting that the Fifth and Eleventh Circuits stand alone in their refusal to adopt the state-created danger doctrine).

362. See *White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999).

danger claims.<sup>363</sup> And while the Eleventh Circuit’s interpretation of *Collins* is sound, the reasoning accompanying its refusal to recognize the doctrine is considerably weaker in cases like *Fisher*.<sup>364</sup>

### 1. A Brief Overview of *Collins v. City of Harker Heights*

In *Collins*, the widow of a former city sanitation department employee brought a substantive due process claim under § 1983 after her husband “died of asphyxia after entering to a manhole to unstop a sewer line.”<sup>365</sup> In her complaint, the widow alleged that the city had violated her husband’s Fourteenth Amendment rights by failing to properly “train[] its employees about the dangers of working in sewer lines and manholes.”<sup>366</sup> More specifically, the widow sought relief based upon her theory—a theory in many ways similar to the one later advanced by the plaintiffs in *Lewis*—“that the city’s ‘deliberate indifference’ to Collins’ safety was arbitrary government action that must ‘shock the conscience’ of federal judges.”<sup>367</sup>

After characterizing the city’s conduct as an “alleged *failure* to train its employees,” the Court ultimately held that the widow fell short of stating a viable constitutional claim.<sup>368</sup> In so doing, the Court underscored a familiar point: the Due Process Clause protects against only those abuses of power which are “arbitrary in a constitutional sense.”<sup>369</sup> And given the Court’s acceptance of “the presumption that the administration of government programs is based on a rational decision-making process that takes account of competing social, political, and economic forces,” the Court emphatically refused to characterize the city’s allegedly improper decision regarding the resources used for the training of its sanitation employees as “arbitrary in a constitutional sense.”<sup>370</sup>

### 2. The Eleventh Circuit’s Overly Narrow Interpretation

In *White v. Lemacks*, the Eleventh Circuit held that the state-created danger doctrine was “no longer good law” after reasoning that it “ha[d] been

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363. *See id.*

364. *Compare id.* (reasoning that the “special danger” doctrine was overruled by *Collins* and that a § 1983 claim exists when governmental officials engage in conduct that is “arbitrary, or conscience shocking, in a constitutional sense”), *with* *Fisher v. Moore*, 73 F. 4th 367 (5th Cir. 2023) (holding that no § 1983 claim existed in a case involving a sexual assault between two minors who were unsupervised in violation of their individualized education programs).

365. *Collins v. City of Harker Heights*, 503 U.S. 115, 117 (1992).

366. *Id.*

367. *Id.* at 126. (citing *Rochin v. California*, 342 U.S. 115, 172 (1952)).

368. *See id.* at 128 (emphasis added).

369. *Id.*

370. *Id.* (citing *Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986)).

superseded by the standard employed by the Supreme Court in *Collins*.<sup>371</sup> In *White*, plaintiffs asserted substantive due process claims—under § 1983—against a group of county defendants after two nurses had been viciously attacked in a prison infirmary.<sup>372</sup> More specifically, the plaintiffs’ claims were fashioned after both the “special relationship” and “special danger”<sup>373</sup> exceptions set forth by the Court in *DeShaney*.<sup>374</sup>

The Eleventh Circuit appropriately compared the plaintiffs’ claims to those alleged in a case that it had decided ten years prior: *Cornelius v. Town of Highland Lake*.<sup>375</sup> There, a town clerk brought suit under § 1983 after she was abducted by two prison inmates.<sup>376</sup> After finding that town and prison officials—i.e., the defendants—had increased the danger faced by the clerk through their affirmative actions (including allowing the inmates to roam unsupervised while participating in a work squad program), the court in *Cornelius* permitted the clerk’s “special danger” claim to survive summary judgment.<sup>377</sup> After acknowledging that the plaintiffs in *White* had similarly alleged that local government officials were “deliberately indifferent to their safety,” the Eleventh Circuit noted that “if *Cornelius* [was] still good law, these plaintiffs probably [] pleaded a valid substantive due process claim.”<sup>378</sup>

In reversing *Cornelius* and simultaneously abandoning the state-created danger theory of liability, the Eleventh Circuit paid particular attention to *Collins*’ discussion of the previously mentioned “rational decision-making process” presumption.<sup>379</sup> Specifically, the court construed *Collins* as standing for the proposition that “when someone not in custody is harmed *because too few resources were devoted to their safety and protection*, that harm will seldom, if ever, be cognizable under the Due Process Clause.”<sup>380</sup> Additionally, the court also made clear that its interpretation applied most directly in the context of government “employee or workplace safety.”<sup>381</sup>

This interpretation—while sensical in the contexts at issue in *Cornelius* and *White*—ignores situations in which non-employee plaintiffs could advance state-created danger claims premised not on a government official’s failure to expend adequate resources, but on a government official’s affirmative misuse of authority. The plaintiff in *Fisher* did not seek to hold school officials liable for failing to devote adequate resources to ensure her

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371. *White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999).

372. *Id.* at 1254.

373. In this context, “special danger” is synonymous with state-created danger. *See id.* at 1256.

374. *See id.* at 1257–58.

375. *See id.* at 1255–56 (citing *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)).

376. *Id.* at 1255.

377. *Id.* at 1256.

378. *Id.*

379. *See id.* at 1257 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992)).

380. *Id.* at 1258 (emphasis added).

381. *See id.* (noting that deliberate indifference “in the context of routine decisions about employee or workplace safety cannot carry a plaintiff’s case across [the] high [shocks the conscience] threshold”).

daughter's safety.<sup>382</sup> Instead, unlike the plaintiff in *Collins*,<sup>383</sup> she sought to hold those officials liable for affirmative conduct—i.e., allowing both her daughter and the aggressor to wander the school unsupervised after having actual notice of the danger her daughter faced.<sup>384</sup> And while one could theoretically characterize this conduct as representing a mere omission, at least one other circuit has previously found similar acts to constitute “an affirmative misuse of [] authority.”<sup>385</sup>

#### IV. CONCLUSION

Despite the concerns held by the Fifth and Eleventh Circuits, the state-created danger doctrine—at least in the context considered here—aligns with the Court's current substantive due process jurisprudence.<sup>386</sup> As previously discussed, state-created danger claims like the one advanced in *Fisher* must be analyzed under the not-so-familiar executive conduct test for substantive due process: a test rooted in the “virtually insurmountable” shocks the conscience standard.<sup>387</sup> And while an official's deliberate indifference may not always be sufficient to shock the conscience, analogous cases demonstrate that the claim at issue in *Fisher* is different.<sup>388</sup> Additionally, this test may not—and should not—require the implication of a fundamental right (as is the case with claims predicated upon legislative as opposed to executive action).<sup>389</sup> And even if the Court were to require the presence of a fundamental right, the doctrine could nevertheless pass muster due to the historical understanding of substantive due process and the distinct but related doctrine of *in loco parentis*.<sup>390</sup> Lastly, § 1983's causal link could permit constitutional liability to attach to responsible government officials when the deprivation at issue is inflicted by a private third-party actor.<sup>391</sup>

Should a case like *Fisher* be granted certiorari, the Court should uphold the doctrine as a viable theory of constitutional liability.<sup>392</sup> If it were to do so,

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382. See *Fisher v. Moore*, 73 F.4th 367, 370 (5th Cir. 2023).

383. See *Collins*, 503 U.S. at 128–29.

384. See *Fisher*, 73 F.4th at 370.

385. See *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 244 (3d Cir. 2016).

386. See discussion *supra* Sections III.B–C (arguing for the viability of the state-created danger doctrine in executive conduct cases involving peer sexual abuse in schools).

387. See discussion *supra* Section III.B.1.b (establishing that the shocks the conscience test is the appropriate framework for courts to utilize when assessing executive conduct substantive due process claims).

388. See *L.R.*, 836 F.3d at 244.

389. See discussion *supra* Section III.B.1.c (arguing that executive conduct claims should not require an assertion of a fundamental right).

390. See discussion *supra* Section III.B.1.d (explaining how the right to be free from state-created danger could be considered “deeply rooted”).

391. See discussion *supra* Section III.B.1.e.ii (discussing § 1983's causal link).

392. See discussion *supra* Part III (arguing for the viability and necessity of the state-created danger doctrine).

the Court could provide student victims across the country with an opportunity to seek emotional distress damages—a remedy currently unavailable to plaintiffs living in Texas and Alabama (and in most cases, plaintiffs living in Georgia as well).<sup>393</sup> The availability of these damages would not only offer more comprehensive relief to victims of peer sexual abuse but also incentivize educators to fulfill their responsibilities more diligently moving forward.<sup>394</sup>

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393. See discussion *supra* Sections II.C, II.E (explaining the limited remedies available to plaintiffs living in Texas, Alabama, and Georgia).

394. See discussion *supra* Part III (explaining the opportunity for relief under the state-created danger doctrine).