

Innocence Lost and No Remedy to Be Found: A New Standard for *Section 1983* Supervisory
Liability in the Context of Sexual Abuse of Students in Public Schools

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Introduction

Each year the innocence of childhood slips from the grasp of many young students when they undergo the horror of sexual abuse by a school employee. A 2004 report by the U.S. Department of Education found that approximately 9.6% of children in school (approximately 3.4 million students in kindergarten through 8th grade) are subjected to sexual misconduct on the part of a school employee.¹ The reality and gravity of teachers sexually abusing vulnerable children is deeply disturbing. Children constitute one of the most vulnerable populations in our society. The government treats children differently from adults and seeks to protect children through various means, such as statutes prohibiting child abuse and neglect, laws requiring children to be placed in approved car seats, and the creation of juvenile courts. One of parents' greatest concerns is the safety and health of their children.

On the other hand, the purpose of school is to foster growth and learning. Schools, through teachers and administrators, have the responsibility of "inculcat[ing] the habits and manners of civility"² and teaching "fundamental values necessary to the maintenance of a democratic system."³ Parents teach children at a young age to respect and obey their teachers and others in authority over them. Believing their children will be protected, parents daily entrust their children to public schools. Teachers and administrators stand *in loco parentis* over the students entrusted to their care, giving the school the right to teach, inculcate values, and

¹ Shakeshaft. (The author found the most accurate data on the prevalence of sexual misconduct by school employees came from research conducted for the American Association of University Women in the Fall of 2004. The definition of school employee includes teachers, counselors, and other school employees).

² *Bethel Sch. Dist. v. Fraser*, 78 U.S. 675 (1986).

³ *Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982).

maintain discipline.⁴ The value and vulnerability of children combined with the importance and authority of schools makes sexual abuse by a teacher at school a heinous violation of a child.

A teacher's sexual abuse of a student on school grounds violates the student's constitutional right to bodily integrity.⁵ Deterring the proliferation of sexual abuse and providing an adequate remedy for abuse in the federal courts will better protect students' safety and constitutional rights. Deterrence and protection will be furthered if school supervisors, such as principals and superintendents, are held legally responsible when they are put on notice of a teacher's sexual abuse and fail to take reasonable steps to investigate the abuse and take remedial actions.

Part 1 of this paper discusses the history and purpose of *42 U.S.C. § 1983*, the federal statute that allows individuals to sue persons acting under the authority of the state for depriving them of a constitutional right.⁶ Part 1 also discusses substantive due process and the rights that students have under the Due Process Clause of the 14th Amendment. Part II outlines *DeShaney v. Winnebago County Department of Social Services*, the case in which the Supreme Court held that the Constitution does not impose a duty on the government to protect individuals.⁷ This section will also cover the exceptions to *DeShaney* in which the state does have a duty to protect. Finally, part III argues that a student should have an adequate federal remedy against school supervisors who are responsible for constitutional violations that take place under their authority. The standard for holding school supervisors liable in their individual capacity should change from an actual notice and deliberate indifference standard to a "notice" and "reasonableness" standard.

I. *Section 1983* and Substantive Due Process

⁴ *Vernonia Sch. Dist. 47J v. Wayne Acton*, 515 U.S. 646 (1995).

⁵ *P.B.*, 96 F.3d 1298.

⁶ Civil Action for Deprivation of Rights, *42 U.S.C. § 1983* (2005) (In pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...").

⁷ 489 U.S. 189 (1989).

A. Background and Purpose of *Section 1983*

Section 1983, enacted in 1871, creates a federal cause of action against a person who, acting under color of state law, “subjects, or causes to be subjected” an individual to a violation of that individual’s constitutional rights.⁸ The purpose of *1983* is to provide a unique federal remedy for constitutional violations that were committed by someone acting under the authority of the state.⁹ Instead of pursuing civil rights claims in state court where prejudice or bias might prevail, a plaintiff could go directly to a federal court as the guardian of constitutional rights. The federal court stands between states and the people to ensure that people acting under the authority of state law do not abuse their position and violate constitutionally protected rights.¹⁰

In *Monroe v. Pape* the Supreme Court clarified several aspects of *Section 1983*.¹¹ The Court held that to invoke *1983* in a federal court the plaintiff did not first have to exhaust state remedies. Justice Douglas wrote, “It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”¹² The Court also held that *1983* should be interpreted using tort law as a background “that makes a man responsible for the natural consequences of his actions.”¹³ A final important point made in this case was that a person could act under color of state law or under the authority of the state as required in *1983* and still commit acts that state law would not authorize.¹⁴

B. Substantive Due Process Right to Bodily Integrity

Substantive due process rights are those rights protected by the Due Process Clause of the 14th Amendment but are not specifically listed in the Constitution. Substantive rights are a

⁸ 42 U.S.C. § 1983.

⁹ Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (West Group 1997).

¹⁰ *Id.*

¹¹ 365 U.S. 167 (1961).

¹² *Id.* at 183.

¹³ *Id.* at 187.

¹⁴ *Id.*

“constitutional guarantee of respect for those personal immunities which...are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or are ‘implicit in the concept of ordered liberty.’”¹⁵ One such right protected by the 14th Amendment is the right to bodily integrity.¹⁶ School children have the right to be free from governmental intrusion on their bodily integrity.¹⁷ Specifically, students have the constitutionally protected right to be free from sexual abuse by a teacher or school employee.¹⁸

Section 1983 provides a federal cause of action against school officials who, acting under the authority of state law, violate a student’s constitutionally protected rights.¹⁹ For students to state a *1983* claim they “must show that they have asserted a recognized ‘liberty or property interest within the purview of the Fourteenth Amendment, and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law.’”²⁰ Since the first element of a *Section 1983* claim is an assertion of a constitutionally protected right, some courts debated whether sexual assault was in fact a violation of a substantive due process right.²¹ Recently, students’ substantive right to bodily integrity has been established and most courts recognize this right without further debate.²² To have a successful *Section 1983* claim, students

¹⁵ *Rochin v. California*, 342 U.S. 165, 169 (1951). The Due Process Clause of the 14th Amendment and specifically substantive due process rights are complex topics. They are not the topic of this paper. This paper does not propose even to begin to address the issues related to substantive due process.

¹⁶ *P.B. v. Koch*, 96 F.3d 1298, 1303 (9th Cir. 1996).

¹⁷ Students’ right to be free from intrusions of their bodily integrity was first recognized by the Supreme Court in *Ingraham v. White*, 430 U.S. 651 (1977), a case in which the Court determined that corporal punishment did not necessarily violate the students’ constitutionally protected rights.

¹⁸ *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994).

¹⁹ *Id.* at 450.

²⁰ *Id.* quoting *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990).

²¹ See, e.g., *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3rd Cir. 1989) (proper inquiry was whether the student’s rights were constitutionally based; court held that student’s right to freedom from invasion of bodily integrity was an established right) and *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (“The first step...is to determine whether the Constitution, through the Fourteenth Amendment’s substantive due process component, protects school-age children attending public schools from sexual abuse inflicted by a school employee.” The court determined the right to be free from state-occasioned invasion of bodily integrity is a substantive due process right.).

²² See, e.g. *Doe v. Claiborne County*, 103 F.3d 495, 506 (6th Cir. 1996) (“[I]t is well established that persons have a fourteenth amendment liberty interest in freedom from bodily

must also prove that the defendant, acting under the authority of state law, actually deprived them of their constitutional right.²³ This prong is much harder to prove and is the focus of most cases, thus it will be taken up later in this paper.

II. *DeShaney* and The Duty to Protect

The vulnerability of children suggests that children need to be and should be protected. As previously mentioned, both the law and parents take many steps to protect children because they cannot fully protect themselves. Children's safety and protection suffered tremendously at the hands of the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*.²⁴

A. *DeShaney*: Facts, Holding, and Implications

In *DeShaney* the Supreme Court limited the government's duty towards individuals by declaring that state agents do not normally have an affirmative duty to protect individuals from harm.²⁵ The facts of this case are heart wrenching and tragic. The Winnebago County Department of Social Services received complaints that three-year-old Joshua DeShaney was being physically abused by his father, so Joshua was placed in temporary protective custody. Social workers, a pediatrician, a psychologist, a police detective, and the county's lawyer formed a team to investigate the alleged abuse, and they determined Joshua was safe to return to his father under supervision and a safety agreement. For a little over a year, social workers made routine visits to Joshua's home where they observed suspicious injuries. In addition, Joshua was treated twice in the emergency room for suspicious injuries; however, the social worker took no further action to protect Joshua from the abuse of his father. When Joshua was five years old,

injury.") and *Doe v. Gooden*, 214 F.3d 952, 956 (8th Cir. 2000) ("There is no question that students have a constitutional right to be free from sexual abuse and sexual molestation under the Fourteenth Amendment.")

²³ *Taylor Indep. Sch. Dist.*, 14 F.3d 443.

²⁴ 489 U.S. 189 (1989).

²⁵ *Id.*

his father beat him so severely that he suffered head trauma and brain damage. Joshua will likely spend the rest of his life in an institution.²⁶

Joshua, through his mother, unsuccessfully brought a *Section 1983* claim against the county's department of social services and some of its employees. Noting the tragedy of these facts, the Court held that the state had no affirmative duty to protect Joshua from the harm his father inflicted on him.²⁷ The Due Process Clause of the 14th Amendment is a limitation on state's powers; it does not require a "State to protect the life, liberty, or property of its citizens against invasion by private actors."²⁸ The purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other."²⁹ Joshua had no federal remedy for the lack of protection given to him and the terrible and lasting harm he suffered. In other words, this vulnerable five-year-old child was at the mercy of his father's abuse.

The implication of the Court's holding in *DeShaney* is staggering. Children, arguably the most vulnerable members of our society, do not have the right to the affirmative protection of the state. Parents are not or cannot shield their children from all atrocious violations; however, the state has no duty to help children. When the violation is either at the hands of the parent (as in *DeShaney*) or when the parents are unable to be present (as when children are at school), the holding of *DeShaney* remains: the state has no affirmative duty to protect.³⁰

B. Exceptions to *DeShaney*'s No Duty to Protect Rule

While firmly stating that state actors do not have an affirmative duty to protect, the Court recognized exceptions to the general rule. The first exception is the "special relationship" exception.³¹ A special relationship exists "when the State by the affirmative exercise of its power

²⁶ *Id.*

²⁷ *Id.* at 195.

²⁸ *Id.*

²⁹ *Id.* at 196.

³⁰ *Id.*

³¹ *Id.* at 198.

so restrains an individual's liberty that it renders him unable to care for himself.”³² When a special relationship exists between the state and an individual, the state has the duty to protect and provide for the individual. The Court has recognized that a special relationship exists in two circumstances: prisoners³³ and involuntarily held mental patients.³⁴ In a footnote, Justice Rehnquist states that the outcome of *DeShaney* might have been different if Joshua had been in foster care, thus leaving open the possibility that the special relationship test might be extended beyond prisoners and involuntarily held mental patients.³⁵

A second exception noted in *DeShaney* is the “state created danger” exception.³⁶ Under the “state created danger” exception, a state actor may be liable if he or she “created the plaintiffs' peril, increased their risk of harm, or acted to render them more vulnerable to danger.”³⁷ For example, in *Wood v. Ostrander* a police officer arrested a drunk driver and impounded the driver’s car leaving the passenger stranded on the side of the road.³⁸ The passenger was raped after she accepted a ride with a passerby. She successfully brought a *Section 1983* claim against the police officer under the theory that a state actor, with deliberate indifference, rendered her in a position in which she was more vulnerable to danger.³⁹

The final “exception” to the general rule of no affirmative duty to protect is not actually an exception. When evaluating a *1983* claim courts have applied a “deliberate indifference” test when no special relationship existed and the state did not create the danger. This test is not an exception to the no duty to protect rule; rather, it is a different theory of liability under *1983*. The Supreme Court addressed the issue of municipal liability under the “deliberate indifference” test in *City of Canton v. Harris*.⁴⁰ The Court held that under *1983* a municipal can be liable only if the

³² *Id.* at 200.

³³ *Estelle v. Gamble*, 429 U.S. 97 (1976).

³⁴ *Youngberg v. Romeo*, 457 U.S. 307 (1982).

³⁵ *DeShaney*, 489 U.S. at 201.

³⁶ *Id.*

³⁷ *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir. 1994) (finding no state created danger when student was killed at school by a stray bullet shot by a non-student).

³⁸ 879 F.2d 583 (9th Cir. 1989).

³⁹ *Id.*

⁴⁰ 489 U.S. 378 (1989)

municipal adopted a policy or custom that amounts to a deliberate indifference to the constitutional rights of a person and that policy or custom actually causes the harm.⁴¹ This is an extremely high standard. Courts have also applied the municipal liability standard when the defendant is being sued in his or her individual capacity.⁴² The deliberate indifference standard in the context of sexual abuse at school will be taken up later in this paper.

III. Section 1983 and Right to Bodily Integrity in the Context of Public Schools

The Supreme Court determined that the Due Process Clause of the 14th Amendment does not impose a duty on states to protect their citizens, and public school officials are no exception to this rule.⁴³ In other words, public school officials have no constitutional duty to protect the students at their school from harm. Criminal law holds the perpetrator responsible for his actions and state tort law provides a cause of action against school officials for torts such as failure to supervise;⁴⁴ but are children being adequately protected? This paper argues the answer is an emphatic no. Why are millions of vulnerable children being sexually abused by their teachers, the very people they are taught to entrust? Because the law is not sufficient to give school supervisors and administrators an incentive to protect the children in their care. This section argues that to protect the nation's children in the aftermath of *DeShaney* the courts must move away from a deliberate indifference standard to a lower and more appropriate notice and reasonableness standard.

⁴¹ *Id.*

⁴² See, e.g., *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035 (10th Cir. 1993). For a further discussion on the deliberate indifference standard for municipal and individual liability, see, Laura Oren, *Symposium on Section 1983: Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 Chi.-Kent. L. Rev. 747 (1997). This symposium will be further discussed later in this paper.

⁴³ *DeShaney*, 489 U.S. 189.

⁴⁴ Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting From Lack or Insufficiency of Supervision*, 38 A.L.R.3d 830 (2005). For a further annotation on the topic of state tort laws see, Christopher Bello, Annotation, *Personal Liability of Public School Teacher in Negligence Action for Personal Injury or Death of Student*, 34 A.L.R.4th (2004).

A. Scope of Paper

Before beginning this section, it is appropriate to outline the scope of this paper. First, this paper is not discussing cases in which a student sexually assaulted another student on school grounds. The failure of teachers, supervisors, and administrators to protect students in these cases is also tragic; however, these cases are beyond the scope of this paper.⁴⁵ In addition, many scholars have written compelling arguments that courts should extend the “special relationship” exception, giving public schools an affirmative duty to protect students; therefore, this paper will not specifically argue for the extension of the special relationship exception.⁴⁶ Finally, this paper will not address the state created danger exception, which creates an affirmative duty to protect.⁴⁷ The following section will address cases in which teachers or other school employees have sexually abused students on school grounds, and the students have sued school supervisors in their individual capacity under *42 U.S.C. 1983* claiming the defendants “subjected or caused to be subjected” the students to a violation of their right to bodily integrity.⁴⁸

B. Section 1983 Elements

When children enter the schoolhouse gates they do not shed their constitutional rights,⁴⁹ including their substantive due process right to bodily integrity. A school employee's sexual abuse of a student violates the student's constitutional rights, and liability must be enforced to

⁴⁵ For articles that comment on peer on peer abuse see, Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 Harv. C.R.-C.L. L. Rev. 169 (Winter, 1995); Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools After DeShaney: The “Special Relationship” Between School and Student*, 41 UCLA L. Rev. 1101 (April, 1994); and “Constitutional Claims Involving School Crime or Violence,” *Education Law § 12.04* (Matthew Bender & Company, Inc. 2004).

⁴⁶ See, e.g., Peter Gallagher, *The Kids Aren't Alright: Why Courts Should Impose a Constitutional Duty on Schools to Protect Students*, 8 Geo. J. Poverty Law & Pol'y 377 (Summer, 2001); Robert C. Slim, *The Special Relationship Doctrine and a School Official's Duty to Protect Students from Harm*, 46 Baylor L. Rev. 215 (Winter, 1994); and Mark Levine, Comment, *The Need for the “Special Relationship” Doctrine in the Child Protection Context*, 56 Brooklyn L. Rev. 329 (Spring, 1990).

⁴⁷ For an annotation discussing the state created danger theory see, Joseph M. Pelliccioutti, Annotation, *“State-Created Danger,” or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.A. § 1983*, 159 A.L.R. Fed. 37 (2005).

⁴⁸ Civil Action for Deprivation of Rights, *42 U.S.C. § 1983* (2005).

⁴⁹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

hold defendants responsible and to deter future violations. For the deterrent effect to be greatest, students sue supervisors under *Section 1983*. Students must prove three elements to have a successful *1983* claim. First, they must prove that they had a constitutional right that was violated. Second, they must prove that a person acting “under the color of state law” violated the right. Finally, they must show that the defendant was personally responsible for subjecting them or causing them to be subjected to a violation of their constitutional right.⁵⁰

In 1997 Laura Oren wrote for a symposium on *Section 1983* in which she addressed the issue of sexual abuse by school employees.⁵¹ Oren addresses each of the elements that students must prove when they sue defendants as individuals in their supervisory positions; however, this paper will focus on the last element, the personal fault of each defendant.⁵² Oren writes that students who have been sexually abused by school employees clearly have grounds for claiming a violation of a substantive due process right “in freedom from arbitrary intrusions by governmental agents on...bodily integrity.”⁵³ As for the second element of a student’s *1983* claim, Oren eloquently argues that a teacher does not have to be acting within his or her “scope of employment” to be acting “under color of state law” such that when a teacher sexually abuses a student they fit under *1983*’s “color of state law” requirement.⁵⁴ For a full discussion of these two elements, please read Oren’s symposium article.

The final element, a defendant’s personal responsibility for the constitutional violation, is often the hardest to prove. The student must prove that the individual supervisor (normally a principal or superintendent) is personally responsible for the constitutional violation. The courts have imposed a “deliberate indifference” standard by which the student must prove individual defendants liable. The deliberate indifference standard is too high and must be replaced by a

⁵⁰ *42 U.S.C. 1983.*

⁵¹ *Symposium on Section 1983: Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 Chi.-Kent. L. Rev. 747 (1997).

⁵² *Id.*

⁵³ *Id.* at 750.

⁵⁴ *Id.* at 770.

“reasonableness” standard in order to protect students and create the proper deterrence for school supervisors.

C. Standard of Liability for Supervisors in Their Individual Capacity

The Supreme Court has rejected using either a *respondeat superior* or vicarious liability theory to hold defendants personally liable for a constitutional violation committed by someone under their authority.⁵⁵ The Court reads the “subjects or causes to be subjected”⁵⁶ language of 1983 as requiring the personal fault or direct responsibility of the defendant.⁵⁷ Although the personal responsibility requirement was originally reached for suits involving municipal liability, lower courts have adopted it when a supervisor is being sued in his or her individual capacity.⁵⁸ The lower courts have also adopted the standard of supervisor liability from the standard set forth in municipal liability cases.⁵⁹ Although the courts differ in the wording of the standard, the general rule is that the student must prove the supervisor was personally responsible or “caused” the deprivation by showing the supervisor’s actions amounted to a “deliberate indifference” to the student’s constitutional rights.⁶⁰ As exemplified in school sex abuse cases, this standard is unreasonably high and fails to stop the sexual abuse of children in schools.

1. Heightened Deliberate Indifference Standard in Appellate Court Cases

⁵⁵ *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) (addressing the issue of municipal liability under 1983).

⁵⁶ 42 U.S.C. 1983 (2005).

⁵⁷ *Monell*, 426 U.S. at 691.

⁵⁸ *Doe v. Claiborne County*, 103 F.3d 495, 511 (6th Cir. 1996) (finding “supervisory liability” for individual capacity claims cannot be based on a *respondeat superior* theory; rather the defendant must have “caused” the deprivation).

⁵⁹ In Oren’s article, *Section 1983 and Sex Abuse in Schools*, the writer details the case history of the standard for municipal liability under 1983, which led to the adoption of a similar standard for supervisory liability.

⁶⁰ *Claiborne County*, 103 F.3d at 513.

One of the first post-*DeShaney* cases to address sexual abuse at the hands of a teacher was *Stoneking II*.⁶¹ The Third Circuit held that the plaintiff could maintain a 1983 claim by alleging the supervisor, “with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused her constitutional harm.”⁶² Over a period of almost five years Kathleen Stoneking was sexually and physically abused by Wright, the school’s band director. Wright forced Kathleen to engage in sexual acts in the band room, on band trips, and in his car. Before and during this time, the principal and assistant principal received at least five complaints of sexual misconduct against Wright, including another band member stating that Wright attempted to rape her. The principal recorded the allegations in a private record kept at his home rather than an official school record. He did not take any remedial action against Wright; instead, he gave Wright excellent performance evaluations and discouraged others from pursuing complaints against Wright. In one situation the principal even forced a student to publicly recant her allegation of sexual assault by Wright. The court found that “a jury could construe such actions [by the principal]...as ‘encouraging a climate to flourish where innocent girls were victimized.’”⁶³ The principal lost his summary judgment appeal in *Stoneking II* because he intentionally concealed and discouraged complaints and created a climate that facilitated sexual abuse.⁶⁴ Since the defendant lost his motion for summary judgment this case was a victory for the student; however, the heightened standard set forth in *Stoneking II* proved to be too difficult in subsequent cases.

Several years later, the Third Circuit affirmed summary judgment for a school superintendent in *Black v. Indiana Area School District*.⁶⁵ A school bus driver sexually molested several girls on the school bus over a period of four years. Allegations were made against the

⁶¹ *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3rd Cir. 1989). In *Stoneking I* the court used a special relationship theory to hold the principal liable under *Section 1983*; however, after the Supreme Court decided *DeShaney*, this case went back on remand to the 3rd Circuit for further considerations in light of *DeShaney*.

⁶² *Id.* at 725.

⁶³ *Id.* at 730.

⁶⁴ *Id.*

⁶⁵ 985 F.2d 707 (3rd Cir. 1993).

bus driver in 1985 and 1988, and this action was commenced after the 1988 allegations. The court found that the superintendent did not show deliberate indifference to the constitutional violation of the students' rights because he responded promptly to the 1985 allegations when he conducted an investigation, met with the parents and the bus driver, and determined that no sexual abuse had taken place. The court admitted that his investigation could have been more thorough and he failed to notify Children and Youth Services. In addition, the affidavits might have supported that the superintendent "failed by a large margin to meet the standard of care of reasonably prudent educators;" however, no jury could find the superintendent was deliberately indifferent.⁶⁶ It seems that when school principals "fail by a large margin" to reasonably abate the constitutional risk of sexual abuse, children are not being adequately protected at school.

To prove supervisor liability in the Sixth Circuit, a plaintiff must prove the defendants were confronted with "such a widespread pattern of constitutional violations that their actions or inactions amounted to a deliberate indifference to the danger [of sexual abuse]...[and] the steps they did take...encouraged the specific incident of misconduct or in some other way directly participated in it."⁶⁷ In this case, a fourteen-year-old girl was sexually abused by Jeffrey Davis, the coach of the high school boys' baseball team. Doe was the scorekeeper for the team, and while traveling back and forth to games Davis would sexually molest her on the school bus. The abuse of power and authority by the coach is heinous, but the events that led up to Doe being the scorekeeper for Davis are very troubling.⁶⁸

Prior to Davis becoming the coach of the high school baseball team, he taught physical education at another school. The year before the sexual abuse of Doe took place the Department of Human Services investigated Davis for accusations of sexual assault and found that four out of nine accusations had merit. Davis was removed from his position working with children. The next summer, Principal Barnard offered Davis another job working at a different school as a physical education teacher and coach. Davis tried to tell Barnard about the DHS

⁶⁶ *Id.* at 713 n.3.

⁶⁷ *Doe v. Claiborne County*, 103 F.3d 495, 513 (6th Cir. 1996).

⁶⁸ *Id.*

investigation, but Barnard ignored him. Barnard later testified that he knew about the DHS investigation and that Davis was supposed to be removed from all student contact, but thought the allegations had been dismissed. The School Board authorized rehiring Davis and found that the DHS investigation and allegations were dismissed. Barnard allegedly closely supervised Davis. Knowing Davis's history, Barnard personally gave permission for Doe to be the scorekeeper for Davis's team. At this point, Davis began sexually abusing Doe.⁶⁹

The Sixth Circuit noted, the individuals involved in this case, including Barnard, "may have been sloppy, reckless, or neglectful in the performance of their duties...[but the d]efendants here were simply not confronted with such a widespread pattern of constitutional violations that their actions or inaction amounted to a deliberate indifference to the danger of Davis sexually abusing students."⁷⁰ DHS did a thorough investigation of nine sexual abuse allegations and found that at least four had merit. DHS stated that immediate action needed to take place to remove Davis from contact with students, yet the supervisors were deemed to not have had enough notice to say they were deliberately indifferent to the risk of constitutional violations.⁷¹ The heightened standard set forth in this opinion is completely unreasonable and will fail to prevent future sexual assaults.

Students in the Tenth Circuit must overcome a 4-part deliberate indifference test to prove defendants liable in their individual capacity.⁷² In *Jojola v. Chavez*, Bridget Jojola was walking down the hall of her high school when Chavez, the school custodian, forced her into an empty classroom and forcibly sexually molested her.⁷³ Bridget, a high school senior, brought a *Section 1983* claim against Hayes, the school principal, and Fraissenet, the superintendent, claiming they knew of and were deliberately indifferent to the constitutional risk that Chavez posed. Prior to the assault on Bridget, a complaint was made that Chavez made a hole in the wall of the girl's locker room through which he watched girls. There were also rumors that Chavez had committed

⁶⁹ *Id.*

⁷⁰ *Id.* at 513.

⁷¹ *Id.* at 502.

⁷² *Gates v. Unified Sch. Dist.*, 996 F.2d 1035 (10th Cir. 1993).

⁷³ 55 F.3d 488 (10th Cir. 1995).

sexually inappropriate acts. Another parent complained to a previous principal that Chavez made inappropriate sexual remarks to her daughter. In an amended complaint, Bridget alleged that Chavez had been removed as a bus driver because of inappropriate contact with teenage girls, and he had been transferred to the high school because at the middle school he was caught unhooking the bra straps of middle school girls.⁷⁴

The court applied the four-part test set out in *Gates v. Unified School District*.⁷⁵ To hold individual defendants liable, the plaintiff must prove: 1) the defendant received notice of a pattern of constitutional violations of the right to be free from sexual abuse; 2) the defendant was deliberately indifferent to the violations; 3) the defendant did not take proper remedial steps; and 4) the failure to take proper remedial steps caused the plaintiff's injuries.⁷⁶ Applying this test in *Jojoba*, the court found that Hayes and Fraissenet did not have actual knowledge of a pattern of constitutional violations.⁷⁷ In total, Bridget alleged four incidents of sexually inappropriate behavior in addition to the circulating rumors about Chavez; however, the defendants were not put on notice that Chavez was at risk for violating the constitutional rights of students.⁷⁸

The Eighth Circuit also adheres to the four-part test for finding defendants personally liable under 1983.⁷⁹ The plaintiff must prove that the defendant had notice of a pattern of unconstitutional acts by his subordinates, demonstrated deliberate indifference to or tacit authorization of the unconstitutional acts, failed to take proper remedial steps, and the defendant's remedial failure caused the injury to the student.⁸⁰ Several handicapped children were sexually abused by their school bus driver. Prior to the abuse, supervisors of the bus driver received several complaints alleging the bus driver had kissed a boy, put his hands down a boy's pants, spanked a boy, and touched boys' crotches. Because these complaints were isolated, the court held that the defendants were not on notice of the risk that the bus driver would violate

⁷⁴ *Id.* at 491.

⁷⁵ 996 F.2d at 1041.

⁷⁶ *Id.*

⁷⁷ 55 F.3d at 491.

⁷⁸ *Id.*

⁷⁹ *Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642 (8th Cir. 1990).

⁸⁰ *Id.* at 645.

students' constitutional rights to be free from sexual abuse. Also, the defendants were not deliberately indifferent to the violation of the students' constitutional rights. The court stated, "if negligence could form the basis for a finding of liability, plaintiffs' showing might have been adequate to take the case to a jury. Measured against the deliberate indifference-official policy standard of liability, however, plaintiffs have failed to establish a submissible case."⁸¹

The four-part test of the Eighth and Tenth Circuits as well as the heightened knowledge and deliberate indifference standards of the Third and Sixth Circuits fall extremely short of protecting constitutional rights and deterring the violation of students' right to be free from sexual abuse. The Fifth Circuit comes the closest to having an adequate standard of liability, but as will be discussed this standard still fails students. In *Doe v. Taylor Independent School District*, the Fifth Circuit outlined a three-part test for supervisory liability under *Section 1983*.⁸² The plaintiff must prove, 1) the defendant learned of facts or a pattern of sexually inappropriate behavior of a subordinate that pointed plainly towards the conclusion that the subordinate was sexually abusing students; 2) the defendant "demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse;" and 3) the failure to take action caused the student's injury.⁸³

Jesse Stroud was a biology teacher at Taylor Independent High School. During his six years as teacher and coach at the school numerous rumors and allegations of sexually inappropriate relationships with female students surrounded Stroud. The court states, "it was no secret within the school community that Coach Stroud behaved inappropriately toward a number of young female students."⁸⁴ Not only did students and teachers know of the inappropriate behavior of Stroud, including notes, candy, flowers, and inappropriate touchings of girls, the principal and even members of the community were aware of Stroud's behavior. The school librarian reported to the principal that she had witnessed Stroud grabbing girls around the waist

⁸¹ *Id.* at 647.

⁸² 15 F.3d 443 (5th Cir. 1994).

⁸³ *Id.* at 454

⁸⁴ *Id.* at 445.

and hugging them and that she had received two phone calls from parents complaining about Stroud. The principal told Stroud to not be “too friendly” with the female students.⁸⁵

The school guidance counselor also told the principal about inappropriate behavior she had observed and heard. The principal suggested that the girls complaining of Stroud’s favoritism were “a little bit jealous” of the girls in the favored group. The principal did not warn Stroud about his behavior. After these incidents had taken place without any action on the principal’s part, Doe entered high school. By late fall of her freshman year, Stroud was touching and kissing Doe. The school was full of rumors about Stroud’s relationship with Doe. A friend of Doe found a note written by Stroud in Doe’s purse. She took the note to the principal and told him that she thought Doe and Stroud were having a sexual relationship. The principal examined the note and determined that it looked like Stroud’s handwriting but it had no signature. The principal took no action after receiving this note except for transferring that student out of Stroud’s class. Stroud and Doe had repeated sexual intercourse in the spring of Doe’s freshman year.⁸⁶

The summer after Doe’s freshman year, Doe’s parents found photographs of Doe and Stroud, so they reported their concern to the superintendent. After meeting with the parents, the superintendent talked to the principal. At this point, the principal threatened Stroud with disciplinary action, but Stroud denied any sexual relationship with Doe. Stroud received a firm warning, but no action was taken. Finally, in the fall of Doe’s sophomore year, Doe’s parents found more evidence of her relationship with Stroud and called an attorney. The sexual relationship was finally disclosed and Stroud was fired and charged with criminal molestation.⁸⁷

The Fifth Circuit found that the facts were overwhelming that the principal had knowledge of the constitutional violation, so Doe met the first prong of the 1983 test for individual defendants. The Fifth Circuit also found that the principal was deliberately indifferent when he failed to take any action to stop the constitutional violation. He dismissed complaints by parents, the librarian, the guidance counselor, and other students. He suggested other students were jealous and he

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

flippantly and with apathy dismissed the note written by Stroud that was brought to him by another student. He failed to record the complaints and he failed to remove Doe from Stroud's presence.⁸⁸

The facts in *Doe v. Taylor Independent School District* were so overwhelming against the principal that the Fifth Circuit appropriately rejected the defendant's motion for summary judgment on the basis of knowledge of and deliberate indifference to the constitutional violations inflicted by Stroud. The principal's actions would likely meet the standard of deliberate indifference set out in the other circuits' decisions; however, an important part of the Fifth Circuit's decision is the different standard for deliberate indifference. As Laura Oren points out in her article previously discussed, deliberate indifference under the Fifth Circuit's three-part test is presumed when, in the face of known sexual abuse, the supervisor fails to take appropriate remedial steps.⁸⁹

2. Proposed Notice and Reasonableness Standard

To provide some perspective, the question that is sought to be answered is, what is the appropriate standard of liability under *Section 1983* for defendants (principals, superintendents, etc) being sued in their individual capacity as supervisors for constitutional violations committed by their subordinates. The circuit courts declared that the appropriate standard is actual knowledge of a pattern of sexual abuse by the subordinate and deliberate indifference to the subordinate's unconstitutional acts. This extremely high standard is inappropriate and ineffective.

⁹⁰ In light of the vulnerability of children and the benefit of deterring sexual abuse, a more appropriate standard is notice of the risk of a subordinate's unconstitutional acts and a reasonable investigation into the constitutional violation that leads to reasonable remedial steps being taken.⁹¹

⁸⁸ *Id.* at 457.

⁸⁹ *Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 Chi.-Kent. L. Rev. 747, 811 (1997).

⁹⁰ In *Section 1983 and Sex Abuse in Schools*, Oren notes that the "deliberate indifference" standard is also confusing because the exact same language is used to describe several different issues in 1983 cases, 72 Chi.-Kent. L. Rev. at 798.

⁹¹ Oren, at 811, suggests a "notice liability" standard, which will be discussed.

The first prong of the test to establish supervisory liability is actual notice of a pattern of sexually inappropriate behavior of a subordinate.⁹² This prong should be replaced with a lesser “notice” standard that requires a supervisor to have been put on notice of unconstitutional acts of a subordinate. A “notice” standard is more appropriate because it better reflects reality, creates a stronger incentive for supervisors to pay attention to their subordinates’ actions, creates deterrence for supervisors who may look past the indications of abuse, and helps better protect children.⁹³

A “notice” standard requires that before a supervisor can be held personally responsible for causing the violation of a child’s constitutional right to bodily integrity, the supervisor must have been “put on notice” of the unconstitutional acts of a subordinate. According to case history, a defendant must be personally responsible to be held liable under 1983, so a notice standard requires foreseeability and causation.⁹⁴ Foreseeability does not mean that supervisors must actually know of a pattern of constitutional violations. A violation of a child’s right to bodily integrity is foreseeable if the supervisor is put on notice of the risk of a sexual violation.⁹⁵

Foreseeability and a “notice” standard are necessarily case-by-case determinations. The trier of fact must determine whether the supervisor was put on notice of a subordinate’s unconstitutional acts such that the risk of a child being sexually abused by the subordinate was foreseeable. Although this standard requires notice and foreseeability, it does not require actual knowledge of a pattern of violations. For example, a principal might be put on notice when he has had complaints by parents that a teacher acted sexually inappropriate with a student. A principal might be put on notice when other teachers observe inappropriate behavior or students make complaints known to the principal. A principal might even be put on notice when there are strong rumors in the school of an employee’s inappropriate behavior with students. Again, the

⁹² *Gates v. Unified Sch. Dist.*, 996 F.2d 1035 (10th Cir. 1993).

⁹³ See Oren, *Section 1983 and Sex Abuse in Schools*, 72 Chi.-Kent. L. Rev. at 811.

⁹⁴ *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

⁹⁵ See Oren, *Section 1983 and Sex Abuse in Schools*, 72 Chi.-Kent. L. Rev. 747.

notice prong must be based upon the facts of each case while keeping in mind the requirement of foreseeability of the constitutional harm.⁹⁶

A “notice” standard is superior to the requirement of actual knowledge because reality is that although the abuse takes place in private, often strong indications of inappropriate behavior are observed, and it is unrealistic to think supervisors are unaware of the risk of their subordinates unconstitutional acts. Many students are being sexually abused at school by teachers and school employees, but many supervisors are not being held responsible despite ignoring warning signs.⁹⁷ For example, in *Jane Doe “A” v. Special School District*, the area coordinator of the district received a “complaint from a parent that Cerny, [a bus driver,] had put his hand down a boy's pants and pulled down a boy's pants and spanked him.”⁹⁸ In *Gates*, the plaintiff alleged that the defendants knew the teacher “was counseled...concerning attending school functions with students and told that this could jeopardize his professional relationship;” knew the teacher “became romantically involved with a female student...and notwithstanding complaints to the school board concerning [the teacher’s] involvement with this student, his teaching contract was renewed;” and finally, “a board member, had received information that [the teacher] was pursuing Gates prior to the...incident.”⁹⁹ In *Doe v. Claiborne County* the principal knew that DHS conducted an investigation and found that four out of nine sexual molestation allegations had merit. Despite this knowledge, the principal rehired the coach and allowed a young girl to be his scorekeeper, giving him a prime opportunity for sexual abuse.¹⁰⁰

In all of the above cases the defendants were aware of or were “put on notice” of rumors, complaints, investigations, or all of the above, yet they were not held responsible for their role in the students’ abuse. Realistically, it will be a rare case in which the defendant has actual

⁹⁶ See *Id.*

⁹⁷ Charol Shakeshaft, Policy and Programs Study Service, U.S. Dep’t of Educ., Doc No. 2004-09, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004).

⁹⁸ 901 F.2d 642 (8th Cir. 1990) (holding that the area coordinator did not know of a pattern of constitutional violations).

⁹⁹ *Gates*, 996 F.2d at 1036 (holding the defendants were not aware of a pattern of violations).

¹⁰⁰ 103 F.3d at 503 (granting summary judgment to the principal).

knowledge of a violation of a student's constitutional right to bodily integrity.¹⁰¹ Often the cases show that allegations and complaints have been made, strong rumors are known among the students and faculty, and/or observations of inappropriate behavior have been seen. A "notice" standard incorporates the reality of the community in public schools, the community in which these allegations, complaints, and rumors are heard and known by supervisors.¹⁰²

A "notice" standard also creates a stronger incentive for individual supervisors to pay attention to the actions of their subordinates. While a notice standard does not necessitate that a principal watch every move that her teachers and staff make, it does require a principal to be more aware of the circumstances in her school. Principals and superintendents should not ignore allegations and complaints of sexually inappropriate behavior. Concededly, children will falsely accuse and rumors will prove to be untrue; however, principals and other administrators need more of an incentive to protect children. The Supreme Court in *DeShaney* took away the strongest incentive to protect children by denying the existence of a duty to protect.¹⁰³ The Court's failure to protect children from sexual abuse must be countered by creating a stronger incentive for administrators to supervise their subordinates. The notice standard should be limited to cases involving children in public schools. A broad duty to protect does not exist, but a duty to be on notice of subordinates' constitutional violations should exist in the context of public schools to propel the proper incentives. Under the current standard principals must be actually aware of a pattern of unconstitutional acts. This actual notice standard does not give administrators the incentives to heed warnings. If administrators knew they might be liable for subjecting children to sexual abuse, then they would be much more likely to take allegations seriously. Taking allegations and complaints seriously is the incentive that the notice standard seeks to create.

While creating incentives for supervisors to be aware of what is happening under their authority, a "notice" standard also creates deterrence for supervisors who turn their head or close

¹⁰¹ *But see Stoneking II and Taylor Indep Sch. Dist.* (both discussed above).

¹⁰² See Oren, *Section 1983 and Sex Abuse in Schools*, 72 Chi.-Kent. L. Rev. at 816.

¹⁰³ 489 U.S. 189 (1989).

their eyes in the face of indications of violations. Although only slightly different from the above rationale, the deterrence rationale also plays an important role in the “notice” standard. The standard first creates the incentive to watch out for children’s rights and then creates deterrence to the supervisor blindly closing their eyes once they become aware of allegations and complaints. For example, in *Claiborne County* the principal spoke with the Davis, the sexual abuser, before rehiring him. Davis tried to explain to the principal that DHS had ordered him not to be near children, and the principal stated that “he didn’t want to hear it.”¹⁰⁴ Under the high “actual knowledge” standard, the principal was found not to have knowledge of a pattern of sexual abuse.¹⁰⁵ This case shows the Sixth Circuit’s standard fails to create any deterrence to ignoring obvious warning signs. Under a notice standard, the principal in *Claiborne County* would not have been able to simply state “he didn’t want to hear it.” A “notice” standard deters this type of inaction.

Finally, the “notice” standard provides better protection for children. Courts should not overlook or undervalue the nature of the crime and the victim who suffers. The children range in age from first grade to seniors in high school.¹⁰⁶ Some of the students are handicapped or have special needs that make them more vulnerable.¹⁰⁷ Children are being molested, abused, and raped. For example, a school custodian forced 13-year-old Jane Doe into an empty classroom where he physically assaulted and raped her. No one knew of the incident until it became evident that she was pregnant.¹⁰⁸ Another example of the terrible nature of the sexual abuse is when a teacher on a school trip molested a sixteen-year-old student. The court writes, “when Ms. Hartley attempted to leave, Godwin grabbed her, pulled her onto his lap, and hugged her. He then laid her down on the bed, ran his hands under her shirt, and rubbed her breasts. Eventually he picked

¹⁰⁴ 103 F.3d at 503.

¹⁰⁵ *Id.* at 513.

¹⁰⁶ *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993) (first-grade girl sexually abused by her teacher); *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707 (3rd Cir. 1993) (six, seven, and eight year old school children sexually molested by bus driver); and *Gates v. Unified Sch. Dist.*, 996 F.2d 1035 (10th Cir. 1993) (17-year-old sexually abused by teacher).

¹⁰⁷ *Jane Doe “A” v. Special Sch. Dist.* 901 F.2d 642 (8th Cir. 1990) (children on bus were all handicap, some were in wheelchairs and some in physical restraints).

¹⁰⁸ *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997).

her up, kissed her on the lips, [and] hugged her again.”¹⁰⁹ Sexual abuse and molestation cause trauma and injury to children. In *P.H. v. School District of Kansas City*, a male student was sexual abused by his teacher. His grades began to drop and he began to miss a lot of classes.¹¹⁰ After freshman Jane Doe was forced to have repeated sexual intercourse with her teacher for a period of over a year, she received psychological counseling for at least three years.¹¹¹

Children are vulnerable and teachers hold positions of power and authority. When parents teach their children to respect their teachers and then entrust their children to the care of the school, they never dream that such a horrible act would occur under the supervision of the administrators. A “notice” standard provides better protection for children because it makes supervisors more accountable. If children have a lower standard to overcome in federal court, then the incentives and deterrent factors will work together to keep children safer.

The second prong of the proposed test for individual supervisor liability under 1983 is a reasonableness standard. The trier of fact determines whether the supervisor, after having been put on notice of a subordinate’s unconstitutional acts, conducts a reasonable investigation into the allegations of constitutional violations and follows up with reasonable remedial measures. This “reasonableness” test replaces the “deliberate indifference” test set out by the circuit courts. The Fifth Circuit has a similar test in which deliberate indifference is presumed if the supervisor fails to take obviously necessary steps needed to prevent or stop the abuse.¹¹² However, the term “deliberate indifference” should be replaced with “reasonableness” to ensure that supervisors understand their responsibility. The heightened deliberate indifference standard is inappropriate because it allows supervisors to get away with minimal investigation in the context

¹⁰⁹ *Hartley v. Parnell*, 193 F.3d 1263 (11th Cir. 1999).

¹¹⁰ 265 F.3d 653 (8th Cir. 2001).

¹¹¹ *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996).

¹¹² *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994).

of vulnerable children being exposed to obviously inappropriate behavior, and it leads to shocking results.¹¹³

A 2001 Eighth Circuit decision illustrates the shocking results that follow from the high deliberate indifference standard.¹¹⁴ In 1992 the local sheriff's department investigated allegations of sexual abuse against Kluck, a teacher in the Elwood School District. Wade, the district superintendent, and the Elwood Board of Education knew of these investigations. The sheriff found evidence of inappropriate remarks, but no evidence of physical contact. In 1993, the school principal recorded 16 conversations with students who alleged Kluck made inappropriate comments or touches. The principal sent Kluck a letter of reprimand, which included allegations of spending too much time alone with middle school boys. The following spring Kluck received bad evaluations of his work. The principal informed Kluck that he would suggest that the Board of Education not renew Kluck's contract. After claiming his due process rights were violated, the superintendent (Wade) and the Board entered into a confidential settlement agreement with Kluck. The agreement included Kluck's voluntary resignation, a letter of recommendation written by Wade, the resignation being categorized as "with good cause," and the removal of any documents from Kluck's record except for the original hiring documents. Wade recommended that the Board accept this agreement and keep it confidential.¹¹⁵

Kluck moved from Nebraska, where Elwood School District was located, to Texas. He was hired as a teacher on the "neutral" recommendation letter written by Wade and with no knowledge of any past allegations of sexually inappropriate behavior. The school in Texas was unable to speak with Wade because Wade failed to return their phone calls. While he was at the school in Texas, Kluck sexually molested thirteen-year-old Justin Kelly. Justin's parents brought a 1983 claim against Wade and the Elwood Board of Education alleging they maintained a policy

¹¹³ See Oren, *Section 1983 and Sex Abuse in Schools*, 72 Chi.-Kent. L. Rev. at 816.

¹¹⁴ *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2001).

¹¹⁵ *Id.* at 776.

or custom that exhibited deliberate indifference towards Justin's constitutional right to bodily integrity, and that the policy or custom proximately caused Justin's injuries.¹¹⁶

The court held that the actions of Wade and the Board of Education did not rise to the level of deliberate indifference. The first reason the court states for finding no deliberate indifference is the defendants did not actually know of Kluck's sexual misconduct. The defendants knew of "rumors, investigations, and student statements but did not possess any conclusive proof that Kluck actually molested students while employed at Elwood."¹¹⁷ They did not possess any conclusive proof because they never did a reasonable investigation of the allegations of sexual misconduct. The principal received more than 16 separate statements accusing Kluck of misconduct and inappropriate comments.¹¹⁸ The defendants knew about the principal's findings, yet did nothing to make a reasonable investigation. Instead, the defendants entered into a confidential settlement agreement that never mentioned sexually inappropriate behavior.

The court went on to find that the defendants did not know that another school district would hire Kluck or that he would sexually molest a child there.¹¹⁹ If Wade, the superintendent, did not think that Kluck would look for another job and be hired at another school he would not have written a letter of recommendation. Finally, the court stated that the letter of recommendation written by Wade did not demonstrate recklessness because it was neutral and not a "good" recommendation. The court totally missed the point that a "recommendation" is by definition "good" unless otherwise stated. To recommend is to vouch that someone is suited for some purpose. The court notes that the recommendation "did not unreservedly endorse Kluck as a teacher;" instead, the other school could have "read between the lines" of the recommendation and realized something might not be right.¹²⁰

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 780.

¹¹⁸ The principal of the school was not a defendant in this case.

¹¹⁹ *Shrum*, 249 F.3d at 780.

¹²⁰ *Id.*

A reasonable investigation into the allegations made by at least 16 different students would likely have prevented Justin from being sexually molested. The superintendent and the Board of Education were more worried about Kluck bringing a due process lawsuit than about the safety of students. Oren notes in her article that school officials concern with employee's due process rights may make them "reluctant to investigate or confront allegations that they believe may involve them in litigation."¹²¹ She goes on to say that the incentives for school supervisors are skewed. They have more of an incentive to protect against lawsuits by employees than to heed flashing warning signs of sexual abuse.¹²² *Shrum* illustrates the concern voiced in Oren's article, which was written four years before the Eighth Circuit decided *Shrum*.

When principals, superintendents, or other supervisors are put on notice that a subordinate has violated a student's constitutional right to bodily integrity, they must conduct a reasonable investigation into the allegations. The duty to make a reasonable investigation into risks of constitutional violations does not impose an overwhelming burden on supervisors. Like the "notice" standard, the "reasonableness" prong is a factual determination. The trier of fact should take all the facts and circumstances into consideration when determining if a supervisor has conducted a reasonable investigation. With less "notice" a supervisor can do less investigation. In other words, if the supervisor has only heard rumors and no actual complaints or observations, the supervisor might need only to question students and teachers about the alleged perpetrator's acts. However, the more notice that a supervisor is given, the stronger the duty becomes to complete a thorough investigation.

In addition to proving that the defendant was put on notice of a constitutional violation and the supervisor failed to make a reasonable investigation into the violations, the plaintiff must also prove that the failure proximately caused the injury.¹²³ Causation is required under 1983.¹²⁴ Supervisors "cause" the injury when they either fail to reasonably investigate or fail to take

¹²¹ *Section 1983 and Sex Abuse in Schools*, 72 Chi.-Kent. L. Rev. at 817.

¹²² *Id.*

¹²³ *Id.* at 811.

¹²⁴ *Doe v. Claiborne County*, 103 F.3d 495, 511 (6th Cir. 1996)

appropriate remedial steps necessary to prevent or stop sexual abuse. Supervisors do not “cause” the injury simply by being a supervisor at the time of the sexual abuse. Causation only occurs after the sexual abuse is foreseeable and despite the foreseeability, the supervisor fails to investigate and take appropriate remedial steps.¹²⁵

3. Potential Problems with a “Notice and “Reasonableness” Standard

One potential problem is that a lower standard will encourage more litigation and open up school supervisors to increased liability. While more litigation is not necessarily a positive result, it definitely is not necessary a negative result. Children must be better protected in the public school setting. If it takes more litigation to hold school supervisors to a higher standard and create better incentives to protect students then more litigation is needed. The purpose of the “notice” and “reasonableness” standard should always be kept in mind; that is, children are vulnerable and they should be protected against the horrific crime of sexual abuse. If it takes more litigation to give appropriate incentives to school officials to prevent constitutional violations then so be it. The goal of protecting children will have been furthered.

Another potential argument against a lower standard is that the lower standard is not needed because state tort law provides adequate remedies. The Eighth Circuit stated, “the purpose of this high fault standard is to distinguish the constitutionally-based § 1983 liability from traditional tort law claims.”¹²⁶ However, the purpose of *Section 1983* was to create a unique federal remedy. The Supreme Court stated, “It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy.”¹²⁷ When constitutional rights are being violated, as they are when teachers sexually abuse their students, the constitutional remedies must be available.

Finally, one might argue that the standard is too indefinite and will lead to unpredictable results. The goal is not to make principals and other school officials paranoid of another lawsuit;

¹²⁵ Oren, *Section 1983 and Sex Abuse in Schools*, 72 Chi.-Kent. L. Rev. 747.

¹²⁶ *Shrum*, 249 F.3d at 779.

¹²⁷ *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

the goal is provide appropriate deterrents and incentives to protect children from sexual abuse. Due process demands that school officials be able to know what triggers a responsibility to investigate and what constitutes a reasonable investigation. School officials know that sexual abuse of a student is a violation of the student's constitutional right to bodily integrity. When a principal has been made aware of or put on notice of some type of violation of a student's rights that notice triggers a responsibility to investigate. What constitutes a reasonable investigation must be considered in light of the circumstances. When courts are determining whether a reasonable investigation was made, they look from the perspective of the school official at the time he was put on notice. For the courts to make the best decision they must take into consideration all the facts and circumstances surrounding the events at issue.

Conclusion

This paper has argued that an appropriate standard for supervisor liability under *Section 1983* for causing a constitutional violation of a student's right to bodily integrity is a "notice" and "reasonableness" standard. If a principal or superintendent is put on notice of a school employee's sexually inappropriate behavior towards a student then the supervisor has a duty to conduct a reasonable investigation into the allegations and take reasonable remedial steps necessary to stop or prevent the unconstitutional acts. Replacing the high actual knowledge and deliberate indifference standard applied in circuit courts with a notice and reasonableness standard will provide appropriate incentives, deterrence, and most importantly will better protect vulnerable students. In light of students' needs for safety and protection, the authority and power of schools, and the terrible nature of sexual abuse, supervisors must be held responsible for their part in causing the constitutional violation of students' bodily integrity. The current standard does not hold supervisors responsible. For the sake of the preventing the sexual abuse of children in school, the standard must be changed.

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