

2018

The Privacy of the Public School

Emily Suski

University of South Carolina - Columbia, esuski@law.sc.edu

Follow this and additional works at: https://scholarcommons.sc.edu/law_facpub



Part of the [Education Law Commons](#)

Recommended Citation

Emily Suski, *The Privacy of the Public School*, 77 *Maryland L. Rev.* 427 (2018).

This Article is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE PRIVACY OF THE PUBLIC SCHOOLS

EMILY SUSKI*

This Article compares the liability of the public schools with that of families for harms to children in their care. Families serve as an apt vehicle for comparative analysis because families' and schools' responsibilities for children overlap substantially. Despite these overlapping responsibilities, however, the law allows schools to evade liability for harms to children and penalizes families for the same or similar harms.

Drawing on feminist theory on privacy and the public/private divide, this Article argues that the limits of public school liability mean they have privacy. Feminist theorists identify privacy as freedom from regulation and intrusion into decision-making. Public schools enjoy privacy in this sense because when they allow or cause harm to children, they are largely not held legally responsible. In the context of harms to children, therefore, the public/private divide is inverted.

Recognizing this public school privacy has significance in three ways. First, it highlights how the law privileges school authority over the rights of children. Second, recognizing public schools' privacy allows for its deconstruction. Third, once deconstructed, elements of this privacy justify a theoretical argument that the Fourteenth Amendment imposes a duty on schools to protect children, and that children have a corollary right to be free from harm in school.

INTRODUCTION

If time is the measure of responsibility, then the institutions with the most responsibility for children are families and schools. Yet, when children

© 2018 Emily Suski.

* Assistant Professor, University of South Carolina School of Law; LL.M., Georgetown University Law Center; J.D., University of North Carolina. The author would like to thank Professors Margaret Martin Barry, Derek Black, Maxine Eichner, Ann Eisenberg, Michele Gilman, Josh Gupta-Kagan, Colin Miller, Claire Raj, and Shelley Welton for their thoughtful comments on this Article as well as the participants of the Works in Progress session at the Association of American Law Schools Conference on Clinical Legal Education. Binford Griffin also provided excellent research assistance.

are harmed in their care, the law holds schools far less responsible than families. Two recent cases illustrate this difference. In one, *In re L.Z.*,¹ a mother lost custody of her son for injuries inflicted by his aunt.² Those injuries included bruises to his cheeks due to having an “adult planting a thumb in one cheek [and her other fingers on the other cheek] and squeezing the child’s face between the thumb and fingers.”³ In the other, *Domingo v. Kowalski*,⁴ a child was subjected to virtually identical treatment.⁵ There, though, the adult inflicting the injury was a school teacher, and the court excused the force as “minimal,”⁶ “related to a legitimate pedagogical purpose,”⁷ and “resulting in no demonstrated serious injury.”⁸ As a result, the school faced no responsibility for the harm to the child.⁹

These cases reflect an inversion of the public/private binary.¹⁰ The public/private binary has been extensively explored in feminist literature.¹¹

1. 111 A.3d 1164 (Pa. 2015).

2. *Id.* at 1186.

3. *Id.* at 1167.

4. 810 F.3d 403 (6th Cir. 2016).

5. *Id.* at 407–08.

6. *Id.* at 414.

7. *Id.* at 412.

8. *Id.* at 416. As reflected by the number of cases heard in the federal courts of appeals alone, harm to children in school happens with some degree of frequency, not to mention claims heard in federal district and state courts about such harms. Indeed, at least seven federal courts of appeals have considered cases involving harms to children to decide just the question of whether the Fourteenth Amendment imposes a duty of care for students on schools. See *infra* note 393 and accompanying text.

9. *Domingo*, 810 F.3d at 416. The comparison also raises the question of whether the child welfare system too easily imposes liability on families and what should be done about that. Resolving that question is beyond the scope of this Article and indeed has been thoughtfully explored by other scholars. See, e.g., Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (2005); Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 916 (2014).

10. For example, and perhaps most prominently, Catharine MacKinnon has critiqued the public/private divide and notions of privacy generally, and family privacy in particular, as the marker of women’s subordination and oppression. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191–92 (1989); see also Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 322–23 (1993) (exploring meanings of “public” and “private” and assessing the criticisms of them). Anne C. Dailey has also described the ways regulation of the family flout notions of family privacy. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 997–99 (1993). Martha Albertson Fineman has critiqued the concept of family privacy as one that relegates caretaking, which she sees as a collective responsibility to a particular, and at least sometimes problematic, sphere. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 292, 299 (2004). As a result of this work and the work of others, Katharine Bartlett describes “[f]eminist successes in achieving reform [particularly] in the area [of domestic violence as] quite impressive.” Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 495 (1999).

11. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985) (arguing that the myth of “the private family is an incoherent ideal and that the

There, “public” is identified as that which is regulated, particularly by the government.¹² “Private” is the opposite.¹³ It is unregulated and free from intrusion.¹⁴ In that sense, families have long been considered private.¹⁵ Absent maltreatment, families have had a great deal of freedom to care for children as they see fit.¹⁶ Indeed, caretaking itself has been deemed private in that it has been seen as properly the role of families and not the state.¹⁷ Families, thus, undertake private tasks and have privacy in doing so. In contrast, public schools have understandably been considered wholly public. They are not just regulated by the state.¹⁸ They are creatures of it.¹⁹

At the same time, though, the notion that there is a stark, impregnable divide between the public and private spheres has been exposed as false, particularly with respect to the family.²⁰ Families are very much regulated.²¹ Mandatory school attendance laws require that families send their children to school.²² Family leave laws determine how much time employees can take away from work to care for family members.²³ These and other laws, therefore, demonstrate that families’ authority over the care of children is not unfettered. What has not yet been explored, however, is the extent to which the public/private binary founders because public entities have some degree of privacy.²⁴ This Article explores that question with respect to the public schools.

rhetoric of nonintervention is more harmful than helpful”); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974, 984–86 (1991) (exploring the problems of notions of privacy, including its contribution to the oppression of women, and also the value in affirmative notions of privacy).

12. See *infra* notes 318–321 and accompanying text.

13. See *infra* notes 318–323 and accompanying text.

14. See *infra* notes 318–323 and accompanying text.

15. See *infra* notes 327–332 and accompanying text.

16. MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 120 (2010) (“[I]t is families, not the state, who are responsible for safeguarding children’s welfare.”).

17. *Id.*; see *infra* notes 331–332 and accompanying text.

18. See *infra* notes 378–380 and accompanying text.

19. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (identifying boards of education as “creatures” of the state); see also *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446, 457–58 (Mo. 1994) (en banc) (“School districts are creatures of state law established to carry out governmental functions . . .”).

20. As Katharine Bartlett writes, “[f]eminism’s principal contribution to the law of the family in the United States has been to open up that institution to critical scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others.” Bartlett, *supra* note 10, at 475.

21. See *infra* notes 347–348 and accompanying text.

22. See *infra* note 349 and accompanying text.

23. See *infra* note 350 and accompanying text.

24. One particularly notable exception to the public nature of public institutions is the state secrets privilege and other information held by the government but shielded from public knowledge out of national security and other concerns. For example, in *United States v. Reynolds*, the Supreme

This Article argues that the public/private binary fails with respect to the public schools. In the context of responsibility for harm to children, the public schools have privacy—more than even the family—and the privacy is evidenced in two primary ways. First, public schools do the caretaking work traditionally relegated to the private sphere. For reasons both practical and legal, public schools and families share nearly identical caretaking responsibilities over children.²⁵ Children—particularly young children—cannot ensure their own safety or impose their own discipline. They need families and, when they are in school, schools to do that for them. The law has recognized this point.²⁶ Indeed, the Supreme Court has identified these roles for both families and schools, and it has used them to justify its decisions.²⁷ The Court has said that both families and schools educate students for citizenship, socialize them to morals and values, discipline them, and keep them safe.²⁸ Because these responsibilities have traditionally been deemed primarily the function of the family and not the state, they have been considered private.²⁹ Schools, therefore, have a role to play in carrying out activities traditionally deemed private.

Second, public schools have privacy because the law limits their liability when children are harmed in their care. Indeed, the law holds the public schools less responsible than the family for such harms. Although child abuse and neglect laws have created a system for imposing responsibility on the family when children are harmed, no such system exists for the schools.³⁰ Instead, when children suffer harms in school, they face an uphill battle to hold the school responsible. Children injured in school could theoretically make out a substantive due process claim or a Title IX harassment claim, to

Court concluded that the United States properly invoked its state secrets privilege in response to a request for an accident report by three widows whose husbands had died as the result of a military aircraft crash. 345 U.S. 1, 11 (1953). The federal Freedom of Information Act serves as another example. It has nine enumerated categories of information that are exempt from disclosure. 5 U.S.C. § 552(b) (2012). Even in these examples, though, privacy is not the conceptualization applied to withholding that information from the public. Instead, the information is treated as exceptional—secret, even—but not private.

25. See *infra* Part I.C.

26. See *infra* Part I.B.

27. See *infra* Part I.B.

28. See *infra* Part I.B.

29. To be sure, the Supreme Court never calls the work of schools “caretaking” or “private.” It nonetheless is such in the sense that it is the work generally relegated to the private sphere. So, even when the Supreme Court has found the state to have some caretaking obligation, it has been the exception to the norm. It has been justified only when the state has prevented individuals from caring for themselves, as in the case of prison inmates or persons involuntarily committed to mental health facilities. See *infra* notes 382–383 and accompanying text.

30. See *infra* Part III.B.

name two. Those claims, however, are not easy to establish.³¹ The threshold legal standards and the facts that must be alleged to support them serve as high bars to success.³² The public schools, therefore, enjoy privacy in the sense that they enjoy freedom from regulation or intrusion into decisionmaking that allows or causes harm to children.³³

This comparison between the child welfare system and claims against schools is made not to suggest that a child-welfare-like system be developed for adjudicating claims of harm to children in school. That such a system exists for claims against the family when claims against the public schools are fraught with barriers to success, however, does reflect the relative willingness of the legal system to hold these two institutions responsible for harms to children. The law stands far more ready to hold the family responsible for harms to children than schools.

Exposing this privacy of the public schools has value in three ways. First, it highlights how the law privileges school authority over children's rights and therefore leaves children vulnerable to harm.³⁴ Second, recognition of public schools' privacy allows for its deconstruction.³⁵ Third, once deconstructed, elements of this privacy support a theoretical argument that the Fourteenth Amendment imposes a duty on schools to protect children.³⁶ This Article, therefore, contributes to the scholarly discourse on public school liability and children's rights by offering a way to hold schools more accountable for harms to children.

This Article proceeds in four Parts. Part I explains more fully how, under the jurisprudence touching on the roles of the family and the public schools, the roles of both institutions are markedly similar and can be summed up as caretaking roles.³⁷ While these similarities might suggest that

31. A child abuse case against an individual school staff member for harms to a child might succeed, but a claim against the public school itself is far more challenging to establish. For example, in *T.W. ex rel. Wilson v. School Board of Seminole County*, a child abused by his teacher in school lodged an unsuccessful claim against the public schools to hold them accountable for his harms, but the teacher was separately charged with and found guilty of criminal child abuse. 610 F.3d 588, 597 (11th Cir. 2010).

32. See *infra* Part III.B–C.

33. This is not to say that public schools are not regulated at all and are therefore totally private. They are regulated in numerous ways, just largely not when it comes to harms to children in school. See *infra* notes 364–367 and accompanying text.

34. See *infra* Part III.B.2.

35. See *infra* Part IV.A.

36. See *infra* Part IV.A.

37. Martha Fineman discusses this kind of caretaking more broadly as meeting dependency needs, or the needs of those “not autonomous and independent” in arguing that there is a collective responsibility for meeting those needs. FINEMAN, *supra* note 10, at xiii. Maxine Eichner has also argued the state should play a greater role in supporting caretaking, though she alternately calls these needs caretaking and dependency needs. EICHNER, *supra* note 16, at 9–10.

the two institutions share similar degrees of responsibility for harms to children in their care, Part II demonstrates that is not the case. In analyzing child welfare laws and cases, it describes the ease with which responsibility is imposed on families for harms to children. It then compares this level of responsibility to that of the public schools by discussing some of the principal claims a child could make against the public schools for harms suffered in school. This discussion shows how limited public school responsibility is. Part III argues that this limited responsibility means that public schools have privacy. It first mines feminist theory on the concept of privacy to explain how it operates generally. It then applies these concepts of privacy to the public schools to show how they enjoy it to a greater degree than families.³⁸ The consequence of this privacy is that school authority is privileged over student rights. Finally, Part IV contends that dismantling the myth that public schools are fully public offers a way to correct the privileging of school authority over children's rights. Deconstructing public schools' privacy into its component parts reveals how some aspects of that privacy support a theoretical argument for the development of a school's constitutional duty to protect children from harm and an affirmative right of children to be free from that harm in school. Part V also offers a framework for courts to consider in evaluating this duty and this right.

I. THE OVERLAPPING ROLES OF THE FAMILY AND THE PUBLIC SCHOOLS

The two institutions with the greatest responsibility for the care of children over the course of their childhoods are families and schools.³⁹ In part

38. This point gives rise to a separate, but closely related, question about why schools have less responsibility than families for harms to children. Exploring this question will be the work of a subsequent article. Both that article and this one fit within the framework of other research projects this Author has completed exploring the boundaries of public school authority and responsibility. See generally Emily Suski, *A First Amendment Deference Approach to Reforming Anti-Bullying Laws*, 77 LA. L. REV. 701 (2017); Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63 (2014) [hereinafter Suski, *Beyond the Schoolhouse Gates*]; Emily F. Suski, *Dark Sarcasm in the Classroom: The Failure of the Courts to Recognize Students' Severe Emotional Harm as Unconstitutional*, 62 CLEV. ST. L. REV. 125 (2014) [hereinafter Suski, *Dark Sarcasm*].

39. Students generally spend much of the day, five days per week for nine or more months of the year, in school. All states require children attend school, and according to the Center for Public Education, most states require students attend school for between 170 and 180 days per year for 900 to 1000 hours of instruction. Jim Hull & Mandy Newport, *Time in School: How Does the U.S. Compare?*, CTR. FOR PUB. EDUC. (Dec. 2011), <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Time-in-school-How-does-the-US-compare>; *Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, NAT'L CTR. FOR EDUC. STAT., http://nces.ed.gov/programs/staterform/tab5_1.asp (last visited Jan 21, 2018) [hereinafter *Table 5.1*]. Of course there are interim places where children also spend much of the day. As Laura Rosenbury has argued, the law needs to recognize these spaces and the implications of children spending time there as well. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834 (2007).

perhaps reflecting this, when courts have identified the roles of families and the public schools with respect to children, they are remarkably similar. They include providing children with an education, dispensing discipline, and ensuring their safety.⁴⁰ These roles, therefore, boil down to caretaking, or meeting the needs of children that children cannot meet on their own.⁴¹

While courts all over the country, from local state courts to federal courts, have undoubtedly found cause to address the roles of the family and the public schools with respect to children, the review that follows focuses on the Supreme Court's discussions on that topic. It does so in part for brevity and in part because the Supreme Court's influence on this topic, as with any other, is profound. Although the Court's statements on the roles of families and schools are made by way of justifying and explaining its decisions, they are by no means mandates.⁴² They are nonetheless significant because they reflect the Court's understandings and expectations, as well as society's more generally. As such, the Court has found some of the roles to be constitutionally protected.⁴³

A. *The Family's Roles with Respect to Children*

When the Supreme Court has addressed the role of the family with respect to children, it generally is assessing state regulations affecting and limiting family decision-making in realms such as child education, childcare, and child upbringing. In sum, this jurisprudence reveals that the Supreme Court understands families' roles to include providing education for their children, helping them to develop moral standards, teaching them to understand and embrace the basic principles of citizenship, and caring for and disciplining them.⁴⁴ While more is surely expected of families, the legal system understands families to carry out these duties at the very least.⁴⁵ Calling these

40. See *infra* Part II.B.

41. As already noted, Martha Fineman would call these needs "dependency needs" while Maxine Eichner primarily calls them "caretaking." See *supra* note 37, and accompanying text. This Article calls them caretaking, in part, because the description so aptly fits the work.

42. While the Supreme Court does not mandate that families perform any of these roles, states do. Parents can be prosecuted for neglect for doing things like failing to care for their children and failing to send them to school. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (noting that while "[t]here is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education" and thus override a parent's generalized objection to it, the objection in this case was protected by the First Amendment because it was grounded in specific religious bases).

43. See *infra* Part II.A.1.

44. See *infra* notes 50–65 and accompanying text.

45. In *Prince v. Massachusetts*, for example, the Court noted that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. 158, 166 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). As much as the Court then identifies some obligations of families in order to decide this proper line between state regulations

family roles “roles” or “duties,” though, understates the matter. In most cases, the Court not only identifies these roles and duties but also states that they are liberty interests.⁴⁶ As such, they are of course more than mere tasks the families have responsibility for carrying out, as the terms “role” or “duty” might suggest. They also carry heightened doctrinal protections.⁴⁷

1. *The Family’s Role in Educating Children and Its “Additional Obligations”*

In a pair of cases decided nearly a century ago but just two years apart, the Supreme Court identified families as having a significant role in the education of children. This role includes both a voice in determining the substance and the process of children’s education. In *Meyer v. Nebraska*,⁴⁸ the Court discussed the family’s role in deciding the substance of children’s education in order to resolve whether a Nebraska state law that prohibited the teaching in schools of any language other than English before ninth grade violated parents’ and teachers’ Fourteenth Amendment liberty interests.⁴⁹ In finding those liberty interests violated, the Court said that they include the right not only of the teacher to teach but also the “right of parents to engage [the child].”⁵⁰ The Court said that “it is the natural duty of the parent to give [their] children education” as well as to “control the education of their own.”⁵¹ While this right of control is not unlimited, the Court nonetheless clearly identifies that families have a role in and a right to determine the substance—here, the teaching of German—of a child’s education.⁵²

Two years later, the Supreme Court decided *Pierce v. Society of Sisters*,⁵³ which gave it cause to consider the family’s role in making decisions about the process by which children receive their education.⁵⁴ In *Pierce*, the

and family decisionmaking regarding children, it also acknowledges what may seem obvious: that parents have comprehensive caretaking responsibilities regarding their children and any roles the Court identifies, then, are but a subset of those comprehensive caretaking responsibilities. *Id.* at 166–67.

46. *See infra* Part II.C.

47. An exception among the cases cited here in which parents’ responsibilities do not imbue them with heightened protection is *Prince v. Massachusetts*. There, the Supreme Court acknowledged the significance of parents’ caretaking responsibilities but, nonetheless, found the parent’s Fourteenth Amendment rights had not been violated when the state infringed upon her decision-making regarding her children in the form of prosecution for violating child labor laws. 321 U.S. at 166–67.

48. 262 U.S. 390 (1923).

49. *Id.* at 398–99.

50. *Id.* at 400.

51. *Id.* at 400–01.

52. *Id.* at 401.

53. 268 U.S. 510 (1925).

54. *Id.* at 532.

Court heard a Fourteenth Amendment challenge to an Oregon statute that required parents to send their children to public school without any relevant exception for private or parochial schools.⁵⁵ To reach its conclusion that the statute violated the parents' liberty interests, the Court reiterated the principle in *Meyer* that parents' liberty rights include the right to "direct the upbringing and education of children under their control."⁵⁶ Because the rights in *Pierce* involved parents' decisions over how, or the process by which, children receive an education, *Pierce* represents the idea that parents' liberty interests in the control of their children's education includes some control over the process by which they get that education. In addition, the *Pierce* decision identifies that the parents' role with respect to their children involves more than just controlling their education. The Court said in *Pierce* that parents "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations[.]" though it did not elaborate on what those additional obligations are.⁵⁷

2. *The Family's Role in the Inculcation of Moral Standards, Religious Beliefs, and Elements of Good Citizenship*

In *Wisconsin v. Yoder*,⁵⁸ the Court identified some of those "additional obligations."⁵⁹ *Yoder* involved the question of whether the State of Wisconsin could require Amish children to attend school in violation of their religious beliefs.⁶⁰ Three Amish parents challenged the law and their resulting criminal convictions.⁶¹ In upholding the Wisconsin Supreme Court's decision to overturn the convictions based on the First Amendment, the Supreme Court noted that parents have an interest and a role in directing the upbringing of their children, including their religious upbringing.⁶² The Court also cited *Pierce*'s identification of "additional obligations" parents have in raising children.⁶³ It said that these "additional obligations" "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."⁶⁴ In order to teach these beliefs and standards of citizenship, families can opt to not send their children to school—at least when doing so

55. *Id.* at 530. The Court noted that the issue in the case was not whether the state has the power to require that children be educated by attendance at some school. *Id.* at 534. The question instead was whether the state could preclude attendance at non-public schools. *Id.*

56. *Id.* at 534–35.

57. *Id.* at 535.

58. 406 U.S. 205 (1972).

59. *Id.* at 233 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)).

60. *Id.* at 207.

61. *Id.* at 208–09.

62. *Id.* at 213–14.

63. *Id.* at 233 (quoting *Pierce*, 268 U.S. at 534–35).

64. *Id.*

would “contravene[] the basic religious tenets and practices” of their religious beliefs.⁶⁵

3. *The Family’s Caretaking and Disciplinary Roles*

Finally, in *Prince v. Massachusetts*⁶⁶ and again in later cases like *Santosky v. Kramer*,⁶⁷ the Court lays out two roles for families implied in earlier cases: caretaking and disciplinary roles. Unlike *Meyer*, *Pierce*, and *Yoder*, neither *Prince* nor *Santosky* addressed a regulation regarding the education of children. *Prince* involved a challenge by Sarah Prince to a law prohibiting children under certain ages from working.⁶⁸ Sarah Prince was convicted of violating the statute when she allowed her niece, over whom she had custody, to distribute religious magazines on the street.⁶⁹ She appealed her conviction and argued that it violated her Fourteenth Amendment liberty interests.⁷⁰ Although the Supreme Court upheld the conviction, it stated: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents”⁷¹ Thus, in *Prince*, the Court explicitly identified the parents’ caretaking role over their children.

Santosky raised the question of the proper standard of proof to be used when terminating parents’ rights to their children based on allegations of abuse or neglect.⁷² The petitioners in the case, John Santosky II and Annie Santosky, were the parents of two children, Tina and John III, who were removed from their parents’ care based on allegations of neglect.⁷³ A third child, Jed, born later, was also removed from the home.⁷⁴ Finding by a preponderance of the evidence that the Santoskys were, among other things, “incapable, even with public assistance, of planning for the future of their children,” the Ulster County, New York Family Court terminated their parental rights.⁷⁵ The Santoskys challenged that holding, arguing that the standard of proof violated their Fourteenth Amendment rights.⁷⁶ The Supreme Court

65. *Id.* at 218.

66. 321 U.S. 158 (1944).

67. 455 U.S. 745 (1982).

68. 321 U.S. at 160–61.

69. *Id.* at 161–62. Sarah Prince also had two sons, and they were with her and her niece distributing religious materials on the street. *Id.* at 159. Prince’s convictions under Massachusetts’s child labor laws, however, only involved the work done by her niece. *Id.* at 159–60.

70. *Id.* at 159–60.

71. *Id.* at 166.

72. 455 U.S. at 747–48.

73. *Id.* at 751.

74. *Id.*

75. *Id.* at 752.

76. *Id.*

agreed.⁷⁷ It held that “use of a ‘fair preponderance of the evidence’ standard in such [termination of parental rights] proceedings is inconsistent with due process.”⁷⁸ To reach this conclusion, the Court reiterated the fundamental liberty interest of parents in the “care, custody, and management” of their children.⁷⁹ In doing so, it reaffirmed the role of the family as caretakers and custodians of children.⁸⁰ By naming the “management” of children as among these roles, it also suggested that families’ responsibilities include disciplining their children.⁸¹ Indeed, their interest in the care and management, or discipline, of their children is so strong that it justifies a higher standard of proof than a preponderance of the evidence before their rights to their children can be taken away.⁸²

B. The Public Schools’ Roles with Respect to Children

Just as the Supreme Court has identified some of the roles of families with respect to children, so too has it identified the roles of the public schools. It identified these roles while determining the proper limits of schools’ authority. With the exception of infusing children with religious beliefs, the roles of the public schools’ overlap substantially with those of families.

Before describing these roles, it is worth addressing one potentially nagging point. That is, although the Supreme Court has identified these roles for schools, it does not require that they fulfill them. Consequently, one could

77. *Id.* at 758.

78. *Id.* (quoting Family Court Act, N.Y. FAM. CT. ACT § 622 (McKinney, 1975 & supp. 1981–1982)).

79. *Id.* at 753.

80. *Id.*

81. *Id.* The term “management” implicitly encompasses the authority and right of parents to discipline their children. Indeed, courts have recognized parents’ right to discipline their children. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 593 (1975) (“School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.”) (Powell, J., dissenting) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting)); *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003) (the fundamental right of parents to discipline their children includes the right to delegate that right).

82. *Santosky*, 455 U.S. at 753, 758. More specifically, the Court stated,

[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

Id. at 753. Further, the Court continued,

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. . . . [such] that use of a “fair preponderance of the evidence” standard in such proceedings is inconsistent with due process.

Id. at 758.

perhaps argue that these identified roles have little relevance to legal analysis because they are not doctrinally mandated or protected. Indeed, while the roles identified for families often hold constitutional significance because they fall under the ambit of protected liberty interests, the roles identified for schools do not.⁸³ However, this argument fails to acknowledge that these roles identified for schools and families serve as the rationales in the Court's decision-making. The Court's statements about schools' roles, like families' roles, form the basis, sometimes the sole basis, for its decisions. Thus, they are hardly irrelevant. Moreover, the Court not only uses the roles to justify its decisions, but it also treats them as self-evident and not even warranting a citation. For example, it did both, in *Bethel School District No. 403 v. Fraser*⁸⁴ when it said, without citation, "schools must teach by example the shared values of a civilized social order" to support its conclusion regarding the school's suppression of student speech.⁸⁵ These roles thus serve a significant function in the development of doctrine and for that reason, among others, merit exploration and analysis.

1. *The Public Schools' Role in Educating Students and Preparing Them for Citizenship*

In a number of cases, the Supreme Court has identified the public schools' role to include educating students so they are prepared for citizenship and participation in the democracy. Sometimes that role supports the protection of students' constitutional rights in school, and sometimes it does not. Either way, though, the role is oft-repeated by the Court. In *West Virginia State Board of Education v. Barnette*,⁸⁶ for example, the Court considered the question of whether all students could be required to salute the American flag, including students for whom doing so would be a violation of their beliefs as Jehovah's Witnesses.⁸⁷ In determining that the State of West Virginia could not require the students to salute the flag in violation of their

83. See *infra* Part II.C.

84. 478 U.S. 675 (1986).

85. *Id.* at 683. The Court has done the same thing with respect to families' roles. In *Wisconsin v. Yoder*, the Court coupled parents' roles with their First Amendment interests to justify excepting the parents in question from otherwise "reasonable regulations for the control and duration of basic education." 406 U.S. 205, 213 (1972). It said, "[t]he duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* at 233 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)).

86. 319 U.S. 624 (1943).

87. *Id.* at 628-29. The consequence for failing to salute the flag was extreme: expulsion. What is more, not only did schools have to expel students for failing to salute the flag, but when they did not attend school as a result of that very expulsion, the students and their parents could be prosecuted for delinquency. *Id.* at 629.

religious beliefs, the Court noted that schools perform many “important, delicate, and highly discretionary functions,” but ultimately, what they are doing is “educating the young for citizenship.”⁸⁸ For that reason, the Court stated that students’ constitutional rights must be “scrupulous[ly] protect[ed],” including their First Amendment rights.⁸⁹

Again in other First Amendment cases, the Supreme Court has reiterated that schools are educating students for citizenship. In *Ambach v. Norwich*,⁹⁰ the Court reasoned that a school’s role is to prepare students for citizenship, including by “developing students’ attitude toward government and understanding of the role of citizens in our society.”⁹¹ In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,⁹² the Court had to determine whether a school board on Long Island could ban certain books from school libraries.⁹³ It overturned the ban⁹⁴ and again acknowledged the schools’ role in educating students for citizenship, and it noted that this role required that constitutional rights be protected so students are not taught to “discount important principles of our government as mere platitudes.”⁹⁵

In *Bethel School District No. 403 v. Fraser*, the Court used the school’s role in educating students for citizenship as the rationale for its decision that a student could be suspended for making a lewd speech at school.⁹⁶ In *Fraser*, the Court stated: “The role and purpose of the American public school system . . . [is to] prepare pupils for citizenship”⁹⁷ The Court concluded: “The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission[.]”⁹⁸ and that mission includes teaching students how to appropriately engage in the discourse expected in a democracy.⁹⁹

2. *The Public Schools’ Role in the Inculcation of Morals, Values, and Behavioral Norms*

The Supreme Court has not limited itself to broad statements regarding the public schools’ role in educating students for citizenship. Although it has

88. *Id.* at 637, 642.

89. *Id.*

90. 441 U.S. 68 (1979).

91. *Id.* at 78.

92. 457 U.S. 853 (1982).

93. *Id.* at 855–56.

94. *Id.* at 872.

95. *Id.* at 864–65 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

96. 478 U.S. 675, 685 (1986).

97. *Id.* at 681.

98. *Id.* at 685.

99. *Id.* at 681–82.

acknowledged that schools' functions are "highly discretionary,"¹⁰⁰ it has still identified, with some specificity, what it understands schools' functions to involve. In several cases, the Court has stated that schools have a role in teaching students morals, values, and behavioral norms.

In at least three First Amendment cases, *Ambach*, *Pico*, and *Fraser*, the Court identifies these roles for schools.¹⁰¹ In *Ambach*, the Court said that schools are "a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment" to support its conclusion that school teachers could be required to be citizens.¹⁰² In *Pico*, the Court said that schools are to "transmit community values" and they have an "interest in promoting respect for authority and traditional values be they social, moral, or political."¹⁰³ That did not mean, however, that schools could suppress ideas without violating the First Amendment.¹⁰⁴

The Court got even more specific in its pronouncements regarding schools' functions in *Fraser*, stating schools teach "fundamental values of 'habits and manners of civility[,]'" and these "must, of course, include tolerance of divergent political and religious views . . . [and] consideration of the sensibilities of others."¹⁰⁵ It also stated that society has an interest in having schools teach "the boundaries of socially appropriate behavior."¹⁰⁶ Consequently, the public school was justified in the suppression of a student's lewd speech.¹⁰⁷

The Court has also identified these roles for schools outside of its First Amendment cases. In *Vernonia School District 47J v. Acton*,¹⁰⁸ a Fourth Amendment case, the Court considered whether mandatory drug testing for student athletes violated students' rights to be free from unreasonable searches.¹⁰⁹ In deciding such searches did not violate the reasonableness requirement of the Fourth Amendment, the Court quoted *Fraser*, saying that it is "the power and indeed the duty [of schools] to inculcate the habits and manners of civility."¹¹⁰ This duty is part of the heightened degree of supervision schools have over students that justified the drug testing at issue.¹¹¹

100. *Barnette*, 319 U.S. at 637.

101. *See supra* text accompanying notes 91–99.

102. 441 U.S. 68, 77 (1979) (quoting *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954)).

103. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (quoting Brief for Petitioners at 10, *Pico*, 457 U.S. 853 (No. 80-243)).

104. *Id.*

105. 478 U.S. at 675, 681 (1986).

106. *Id.*

107. *Id.* at 685.

108. 515 U.S. 646 (1995).

109. *Id.* at 648.

110. *Id.* at 655 (quoting *Fraser*, 478 U.S. at 681).

111. *Id.*

3. *The Public Schools' Disciplinary Role*

As part, perhaps, of teaching these values and behavioral norms, the Court has also implicitly and explicitly stated that schools' role includes disciplining students. The Court has done so implicitly when affirming schools' imposition of discipline that also constitutes the suppression of speech, as in *Fraser*.¹¹² By affirming the imposition of discipline, the Court in essence is acknowledging the appropriateness of disciplinary function more generally by schools.

The Court has also explicitly identified this disciplinary role for schools in cases like *Tinker v. Des Moines Independent Community School District*¹¹³ and *Board of Education of District 92 of Pottawatomie County v. Earls*.¹¹⁴ In *Tinker*, the Court's task was to decide whether suspending students for wearing black armbands to school in protest of the Vietnam War violated their First Amendment rights.¹¹⁵ Although the Court concluded that the suspensions did violate the students' First Amendment rights, the Court also repeatedly stated that some speech could be suppressed if it "materially and substantially disrupt[ed] the work and discipline of the school."¹¹⁶ In other words, discipline in school is flatly identified as one of the functions of school; indeed, one so crucial that its disruption could justify infringement on students' First Amendment rights. In *Earls*, the Court was deciding whether a school's drug testing requirement for all extracurricular activities was proper under the Fourth Amendment.¹¹⁷ In deciding it was, the Court again drew on its understanding of schools' role. It stated: "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline"¹¹⁸ Whether explicit or implicit, though, the role is identified across cases over many decades as squarely one of schools'.

4. *The Public Schools' Custodial Role and Role in Protecting the Health and Safety of Children*

Finally, the Court has said that schools have both a custodial role with respect to children and a role in maintaining their health and safety.¹¹⁹ The Court discussed this custodial role in *Vernonia School District 47J v. Acton* when it concluded that the drug testing of student athletes does not violate

112. 478 U.S. at 685.

113. 393 U.S. 503 (1969).

114. 536 U.S. 822 (2002).

115. 393 U.S. at 504–05.

116. *Id.* at 511, 513.

117. 536 U.S. at 827.

118. *Id.* at 830 (emphasis added).

119. *See infra* notes 120–121 and accompanying text.

the Fourth Amendment. The Court noted that schools' authority over students was not identical to that of parents, whose authority is not subject to constitutional strictures, but the Court nonetheless said that schools have a "custodial and tutelary [role], permitting a degree of supervision and control that could not be exercised over free adults."¹²⁰ Identifying this role then helped to justify the search of students at issue in the case. More specifically, the Court said that the "'reasonableness' inquiry [required under the Fourth Amendment] cannot disregard the schools' custodial and tutelary responsibility for children."¹²¹

This custodial role includes some caretaking responsibilities, as the Court identified in *Earls*. There, the Court again noted that the schools have this custodial responsibility and, as such, are responsible for maintaining the "discipline, health, and safety" of students.¹²² Indeed, these caretaking roles are so significant that they serve as the basis for limiting students' privacy interests in school.¹²³

C. *The Same or Similar Roles, but Different Constitutional Significance*

All of the roles identified for families and schools, then, involve a significant amount of overlap. In addition, the core function of those overlapping roles is caretaking of children.¹²⁴ It is caretaking work because it involves meeting the needs of children that they cannot meet themselves.¹²⁵ Children cannot independently educate themselves for citizenship, teach themselves morals and values, discipline themselves, or maintain their health and safety. They need others to do that for them. In identifying these roles for both families and the public schools, Supreme Court doctrine reflects that the Court sees both families and schools as being involved in these caretaking roles.

At the same time, as much as these roles are similar or, at least on a practical level, the same, the Court treats them very differently in terms of their constitutional significance. Families' roles with respect to their children represent the embodiment of Fourteenth Amendment liberty interests. They

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

121. *Id.* at 656. That said, the Court in *Acton* also noted in dicta that as much as schools have this custodial role, it does not result in schools also having "such a degree of control over children as to give rise to a constitutional 'duty to protect.'" *Id.* at 655 (quoting *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

122. *Earls*, 536 U.S. at 830. The Court quoted *Acton* when it stated, "Central . . . is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* at 830 (quoting *Acton*, 515 U.S. at 654).

123. *Id.* at 830–31.

124. *See supra* notes 37, 41 and accompanying text.

125. *Id.*

also implicate, among other things, First Amendment free exercise interests. In *Meyer*, the Court said, “[w]ithout doubt, [the liberty guaranteed under the Fourteenth Amendment denotes] . . . the right [to] . . . bring up children.”¹²⁶ Similarly, in *Pierce*, the Court said the education statute in question was unconstitutional because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹²⁷ In *Yoder*, the Court identified as among the “fundamental rights and interests . . . the traditional interest of parents with respect to the religious upbringing of their children.”¹²⁸ With respect to the public schools, however, the Court has pointedly concluded that their roles are not infused with the same constitutional significance. In *New Jersey v. T.L.O.*,¹²⁹ the Court dispensed with the notion that the public schools’ authority is *in loco parentis* and therefore imbued with the protections of the Fourteenth Amendment or free from the strictures of the First or the Fourth.¹³⁰ It said that idea “is in tension with contemporary reality and the teachings of this Court.”¹³¹ The roles of families and schools, then, are similar or the same, but also not.

II. THE FAMILIES’ AND PUBLIC SCHOOLS’ DISSIMILAR DEGREES OF RESPONSIBILITY FOR HARMS TO CHILDREN

The constitutional significance of the families’ roles might suggest that families enjoy greater protection from interference in carrying out their caretaking responsibilities than schools.¹³² The opposite, however, is true. When children are harmed in the care of their families, families can and readily do face significant responsibility on an institutional level. That is, consequences inure not just to the individual who caused the harm but also to the family as a whole. This institutional responsibility includes that the family structure can be altered. In cases of child abuse and neglect, this structural alteration occurs when a child is removed from the family.¹³³ This family responsibility is relatively easy to impose. The legal threshold for investigation of abuse and neglect in the majority of states is very low, sometimes requiring nothing more than a mere suspicion of some harm to or neglect of the child; in application, the factual allegations required to support the imposition of liability can also be relatively insignificant.¹³⁴ By contrast, imposing liability for

126. 262 U.S. 390, 399 (1923).

127. 268 U.S. 510, 534–35 (1925).

128. 406 U.S. 205, 214 (1972).

129. 469 U.S. 325 (1985).

130. *Id.* at 336.

131. *Id.*

132. *See supra* note 47 and accompanying text.

133. *See infra* note 141 and accompanying text.

134. *See infra* notes 145–146 and accompanying text.

harm to children on the public schools as institutions—that is, holding the public schools and not just individual staff liable—requires overcoming substantial obstacles. Schools’ liability could be imposed by the assertion of a number of different claims. For all such claims, though, the threshold legal standards are high, and the facts that have to be alleged to support them are extreme.

A. The Ease of Imposing Responsibility on the Family for Harms to Children

All states have a system for imposing responsibility on families when children are harmed in their care. These systems, embodied in child abuse and neglect laws, all provide mechanisms for reporting, investigating, and adjudicating allegations of abuse or neglect of children.¹³⁵ Although many child welfare laws allow for the investigation of abuse and neglect perpetrated by non-family members, the thrust of the laws and the child welfare systems they establish is to protect children from harms resulting from abuse or neglect by family members.¹³⁶

1. A Broad, Low Threshold for Family Responsibility

As Doriane Lambelet Coleman has pointed out, child welfare laws have intentionally broad, low legal standards for what constitutes abuse and neglect because the goal of the laws is to cast a wide net to root out any possible abuse or neglect.¹³⁷ For example, the definition of “abuse” can simply mean

135. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2014, at viii (2014), <http://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf#page=10> [hereinafter CHILD MALTREATMENT].

136. This focus on families is reflected in the statistics on the relationship between maltreated children and the perpetrators of that maltreatment. In federal fiscal year (“FFY”) 2014, 91.6% of children who were victims of abuse were maltreated by parents. *Id.* at 26. Of course, this need for protection from harms to children by family members exists. In FFY 2014, the United States Department of Health and Human Services Children’s Bureau estimated that 1580 children nationally died of abuse or neglect. *Id.* at 51. It is also worth noting, though, that as much as this need for protection exists, so too does bias exist in the system, as even the federal government has acknowledged. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 1 (Nov. 2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf#page=1&view=Introduction [hereinafter RACIAL DISPROPORTIONALITY] (acknowledging the racial bias and class bias in the child welfare system). Scholars have also pointed out this bias. *E.g.*, Coleman, *supra* note 9, at 417 (arguing that the child welfare system does more harm than good in its attempts to help children); Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 940 (2013) (arguing that race, among other things, serves as a heuristic in child welfare cases).

137. Coleman, *supra* note 9, at 428 (“The first feature of the prevailing strategy involves, at least in principle, taking no chances and casting the widest net possible in identifying the cases that will be investigated. This objective is accomplished through broad legal definitions of abuse and

“the infliction or allowing of physical injury”¹³⁸ or “any willful act . . . that results in any physical, mental, or sexual injury or harm.”¹³⁹ Indeed, in all but twelve states, the abuse—or neglect—need not be of any particular degree.¹⁴⁰ Because these definitions do not require any degree of harm, any amount of physical injury or neglect can suffice to meet this definition and lead to families’ involvement in the child welfare system.

The system for discovering child abuse and neglect is multi-step; the first step is reporting mere suspicions of abuse and neglect.¹⁴¹ While continued involvement in the child welfare system after an initial report requires that the state meet a higher burden of proof, the substantive definition of abuse and neglect remains the same at each step.¹⁴² So, while the state may need to marshal more evidence of abuse or neglect later in the child welfare

neglect, and screening criteria that are nearly as broad. It also involves statutory or regulatory provisions that mandate the investigation of all screened-in reports, and related provisions that allow state officials to go to court to compel compliance with the investigations.”).

138. ARIZ. REV. STAT. ANN. § 8-201(2) (2014).

139. FLA. STAT. ANN. § 39.01(2) (West 2010).

140. Those twelve states are Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Nebraska, New Jersey, New Mexico, New York, North Carolina, and Texas. IDAHO CODE ANN. § 16-1602 (2009); 325 ILL. COMP. STAT. ANN. 5/3 (West 2008); IND. CODE ANN. § 31-34-1-1 (LexisNexis 2013); KY. REV. STAT. ANN. § 600.020 (West 2016); LA. CHILD. CODE ANN. art. 603(2) (2014); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2008); NEB. REV. STAT. § 28-710 (2008); N.J. STAT. ANN. § 9:6–8.9 (West 2013); N.M. STAT. ANN. § 32A-4-2 (LexisNexis 2009); N.Y. FAM. CT. ACT § 1012 (McKinney 2010); N.C. GEN. STAT. ANN. § 7B-101 (West 2015); TEX. FAM. CODE ANN. § 261.001 (West 2014). North Carolina, though, only imposes a particularized degree of harm for abuse, but it does not impose one for neglect. N.C. GEN. STAT. ANN. § 7B-101 (West 2015). Doriane Lambelet Coleman notes that these definitions are “typically vague and overbroad, often purposefully so.” See Coleman, *supra* note 9, at 428.

141. CHILD MALTREATMENT, *supra* note 135, at 7–8 (“For FFY 2014, a nationally estimated 2.2 million reports (screened-in referrals) received dispositions. This is an 8.3 percent increase from the 2010 national estimate of 2.0 million reports that received dispositions.”). Even in early stages of investigations, families face the risk of structural alteration and institutional-level responsibility. Consider, for instance, New York, where a child can be removed from their parent without consent or court process upon reasonable cause to believe the child is in imminent danger. N.Y. SOC. SERV. LAW § 417(1)(a) (McKinney 2010). However, if the cause is not reasonable, the child is still removed from the parent’s care, thus altering the structure of the family at least temporarily. As at least one scholar has pointed out that even the risk of such removals, let alone the actual removals, however temporary, causes harm to families. Doriane Lambelet Coleman has described the harms that arise to even young children from the intrusiveness of the investigation and the potential for removal from the home. See Coleman, *supra* note 9, at 511–22. Matthew Fraidin also cites the work of Dr. Joseph Doyle on the outcomes of children in foster care, which include increased interaction with the juvenile justice system, teen pregnancy, and difficulty finding employment. Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 25–26 (2010).

142. See Coleman *supra* note 9, at 429 (“In part because the definitions of abuse and neglect are so broad, and because anyone is permitted to make a report, including those with no training in identifying maltreatment, most states have procedures to ‘screen in’ reports that conform to their official interpretations, and correspondingly to ‘screen out’ nonconforming reports. This process serves to ensure, to the extent possible, that the state conducts formal investigations only in circumstances where legally relevant conditions exist.”).

process to meet the higher standards of proof, in most states, the evidence still only needs to prove that some abuse or neglect happened, not that it was particularly severe.¹⁴³ Families face the risk of involvement in the child welfare system, and therefore the risk of institutional responsibility based on allegations and proof of some abuse or neglect, potentially no matter the severity.

2. *The Low Threshold in Application*

Of course, that families face a large theoretical risk of institutional responsibility does not mean that risk will be realized through abuse or neglect investigation or prosecution.¹⁴⁴ The child welfare statistics, however, suggest many families do face this consequence. In Federal Fiscal Year (“FFY”) 2014, approximately twenty-three percent of children for whom states received reports of abuse and neglect were removed from the home and placed in foster care.¹⁴⁵

The reasons for this degree of family responsibility are not just that a great deal of child maltreatment happens, though of course it does happen.¹⁴⁶ The reasons include that the child welfare system has been willing to find the removal of children from families appropriate even when allegations arguably do not justify it.¹⁴⁷ Recall, for example, *In re L.Z.*, the case discussed briefly in the Introduction.¹⁴⁸ In that case, L.Z., a toddler, was removed from the family, and his mother’s rights were permanently terminated after Child

143. See *infra* note 163 and accompanying text.

144. However, even the possibility of such structural changes by way of an investigation can result in significant stress and other psychological repercussions. Gupta-Kagan, *supra* note 9, at 914 (noting that child welfare “investigations are invasive of the right to family integrity and cause significant anxiety and other emotional distress”).

145. CHILD MALTREATMENT, *supra* note 135, at 78. And certainly a system that allows for more than 1500 deaths per year while also causing harm to the children they do take into custody is one fraught with problems. *Id.* at 52. Among these problems is the vast disproportionality of cases involving children of color and children who are low-income. RACIAL DISPROPORTIONALITY, *supra* note 136; Coleman, *supra* note 9, at 441 n.67. The procedural safeguards in place to protect against these problems, as Clare Huntington has pointed out, are far from sufficient. As Huntington points out, they are too little too late. The assistance of counsel, for example, if provided, is not provided until after a child has been removed from the home. Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 658 (2006).

146. In FFY 2014, approximately one-fifth of the reports of child abuse and neglect were substantiated. CHILD MALTREATMENT, *supra* note 135, at x.

147. Josh Gupta-Kagan cites the statistic that 26.8% of children who are removed from the home are returned in six months as persuasive evidence of these unnecessary removals. See Gupta-Kagan, *supra* note 9, at 916. He has also pointed out the problems attendant to this over-inclusiveness. Among them is that it strains the system to the point of being nearly incapable of protecting children who truly do need it. *Id.* at 912–13.

148. 111 A.3d 1164 (Pa. 2015).

Protective Services (CPS) became involved with the family.¹⁴⁹ CPS involvement occurred as the result of harms to L.Z. that CPS attributed to his aunt, with whom L.Z. and his mother lived.¹⁵⁰ L.Z.'s mother left him in his aunt's care for two days, and when she returned to him, he had a cut on his penis as well as a bruise on his cheeks, diaper rash, and a yeast infection.¹⁵¹ Although CPS attributed these harms to the aunt, his mother nonetheless lost custody of him. In other words, the mother and son experienced a significant change to their family structure for injuries that the mother did not inflict.¹⁵²

In another case, *In Re Adam B.*,¹⁵³ a mother, Alma B., lost custody of her three boys for arguably inadequate reasons.¹⁵⁴ Alma B. lost custody of her oldest child, Joshua, because she could not get him to take his psychiatric medications and did not ensure he attended all of his outpatient mental health therapy sessions.¹⁵⁵ She lost custody of her younger son, Isaiah, because he received a burn, possibly from a space heater, and she did not seek medical treatment immediately.¹⁵⁶ In addition, the lower court made a finding that she could not protect Isaiah from Joshua.¹⁵⁷ Alma lost custody of her third son, Adam, because of "anticipatory neglect," meaning that the court concluded that there was a probability he would be neglected because his brothers had been neglected.¹⁵⁸ Although evidence indicated that Alma B. also missed three voluntary parenting classes and seemed agitated and anxious at the hospital when doctors, suspecting abuse, questioned her, these and other allegations in the case do not unquestionably lead to the conclusion that Alma B. should have lost custody of her children.¹⁵⁹

Another reading of her case is that she was struggling with the difficult task of parenting—as a single parent—a child with a significant psychiatric disorder, which could explain why she could not get him to all of his therapy sessions and to take all of his medicine. That, in turn, could also explain why

149. *Id.* at 1167–69.

150. *Id.* at 1167–68.

151. *Id.*

152. *Id.* One issue before the court was whether the mother had to be physically present at the time the injuries occurred in order to be presumed to have abused her child. *Id.* at 1175–76. The court concluded she did not. It said that even if the parent was not present at the time of the abuse, the parent could nonetheless be found to have abused or neglected her child "due to his or her failure to provide protection for the child." *Id.* at 1184. In so holding, the court specifically noted that the mother had failed to provide evidence that she had "no reason to fear leaving Child with Aunt." *Id.* at 1186. Thus, its interpretation of the relevant statute allows for parents who do not abuse their children to be held responsible if they cannot prove a negative.

153. 53 N.E.3d 134 (Ill. App. Ct. 2016).

154. *Id.*

155. *Id.* at 140–42.

156. *Id.* at 141–42.

157. *Id.* at 144.

158. *Id.* at 145.

159. *Id.* at 137.

Joshua may himself have burned Isaiah. While Alma missed parenting classes, she missed them during the time when she was also dealing with Joshua's psychiatric hospitalization. Further, while Alma seemed agitated when questioned by doctors about possible abuse, that reaction is hardly irrational when a mother is being questioned in such a way. Reading the facts in this way suggests that Alma B. needed support, not that she needed to lose her children. Indeed, the social worker who worked most closely with the family testified:

that she observed Alma B.'s interactions with the children from March of 2014 through July of 2014 and that they were appropriate; that during this time, the children never stated that they felt unsafe in Alma B.'s care, nor did they show any signs of abuse or neglect; that they appeared well nourished, clean and appropriately dressed; and that she observed Alma B. redirecting Joshua when he would misbehave and she saw Alma B. engage with her children.¹⁶⁰

That the child welfare system chose the narrative that left her family structurally altered evidences the readiness with which it will impose institutional responsibility on the family for harms to children.

This readiness to remove children from families is also reflected in cases where parents are working with the child welfare system to address causes and effects of suspected child abuse and neglect. In *In re Katie S.*,¹⁶¹ a case involving neglect, a mother lost parental rights even though she was actively trying to better her ability to parent.¹⁶² She lost custody of her two children, Katie S. and David S., who were five and sixteen months, respectively, at the time the case was brought.¹⁶³ To be sure, the allegations support a finding of neglect.¹⁶⁴ The mother acknowledged that she did not feed her children regularly and she sometimes left them unsupervised.¹⁶⁵ However, a counselor who was working with the mother testified that she was dutifully attending counseling sessions and sincerely trying to get her children back.¹⁶⁶ Yet instead of letting the mother continue to make these efforts to see if she could learn to improve herself and her parenting, the West Virginia Supreme Court terminated her parental rights.¹⁶⁷ It also did so only approximately seven months after the case began, giving her less than a full year to try to learn to

160. *Id.* at 138–39.

161. 479 S.E.2d 589 (W.Va. 1996).

162. *Id.* at 594–95.

163. *Id.* at 593.

164. *Id.* at 594.

165. *Id.*

166. *Id.* at 599.

167. *Id.* at 601.

be a better parent.¹⁶⁸ The court removed the mother's children and undermined her efforts, demonstrating the legal system's willingness to hold families responsible for harms to children.

*Greene v. Camreta*¹⁶⁹ is a similar case involving a mother who lost custody of her children despite evidence that she was working cooperatively with the child welfare system.¹⁷⁰ The difference in *Greene* was that she was not accused of any abuse or neglect.¹⁷¹ In *Greene*, Sarah Greene temporarily lost custody of her two daughters, S.G. and K.G., because of allegations that Sarah's husband and the girls' father, Nimrod Greene, had sexually abused an unrelated boy and S.G.¹⁷² Although she successfully raised constitutional challenges to the temporary loss of custody, her case shows again how easy it is to hold families responsible for harms to children despite evidence that one parent has caused no harm or has worked to ameliorate the harm.¹⁷³

Cases of domestic violence also serve as examples of this readiness to impose family responsibility. In these cases, the family is sometimes held responsible not only for harms parents did not impose but from which they also suffered.¹⁷⁴ For example, in *In re N.P.*,¹⁷⁵ B.P., a mother and survivor of domestic violence, lost custody of her two daughters, N.P. and I.P.¹⁷⁶ B.P. was abused by her husband, M.P.¹⁷⁷ Related to that, the family underwent several household moves, and B.P. consequently suffered "battered women's syndrome."¹⁷⁸ Both N.P. and I.P. witnessed that abuse, and they therefore suffered depressive disorder and posttraumatic stress disorder.¹⁷⁹ As a result,

168. *Id.* at 598.

169. 588 F.3d 1011 (9th Cir. 2009).

170. *Id.*

171. *Id.* at 1019–20. The mother, Sarah Greene, submitted an affidavit in which she stated that she had told the case worker investigating suspected abuse that she would comply with a Department of Human Services safety plan. That plan called for ensuring that Sarah's husband would not have contact with her daughters and for the girls to be evaluated for sexual abuse. *Id.* at 1018, 1035.

172. *Id.* at 1016, 1020.

173. *Id.* at 1035–36.

174. A number of scholars have written about the problems of removing children from the custody of their mothers because they have witnessed their mothers' abuse. *E.g.*, Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 655 (2004–2005) (arguing that the legal system needs to better tailor its responses to child witnesses of domestic violence to better address the problem and protect children); Thomas L. Hafemeister, *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 925 (2011) (calling for a more flexible response, including in the child welfare system, to intimate partner violence).

175. 882 A.2d 241 (D.C. 2005).

176. *Id.* at 243–44.

177. *Id.* at 244.

178. *Id.* at 245–46.

179. *Id.* at 245.

B.P. lost custody of her children because of the harms imposed by her husband.¹⁸⁰

While these cases discuss the imposition of family responsibility by way of removing a child from the family and thus altering the family structure as a whole, that is not the only way to impose responsibility on the family as an institution in cases of child abuse or neglect. Such responsibility can also be imposed when the adjudicatory process requires a parent to be placed on a central child abuse and neglect registry.¹⁸¹ Inclusion on these registries can affect job prospects and thus the economic stability of the whole family.¹⁸² Further, when the parent must comply with a safety plan, the plan's strictures can affect the whole family.¹⁸³ Removal of the child from the home, then, is simply the most obvious way of imposing responsibility on the family as a whole for harms to children.

The intent of the foregoing discussion is neither to say that children should never be removed from the home nor that any child should have to suffer any harm, whether or not severe. It is to say, though, that these legal standards, cases, and statistics reflect the relative ease with which the family can be held responsible as an institution for harms to children even when the parents have not themselves imposed the harm, are working to improve their parenting, or themselves suffer from the harm that results in family liability.

B. The Relative Difficulty of Imposing Responsibility on Schools for Harms to Children

By contrast, when children are harmed in school because of the actions of school officials or others, imposing responsibility on the public schools is an altogether different matter. A number of claims could potentially be made against the school to hold it as an entity, as opposed to any individual actor, responsible for such harms. None, however, are easy to make. The threshold legal standards are high, and, in application, the facts that have to be alleged to satisfy those standards are extreme.¹⁸⁴ That is not to say that students have

180. *Id.* at 251. While B.P. surely needed assistance to help extricate herself from her marriage and take care of her children, the state effectively revictimized her by permanently altering her whole family structure. G. Kristian Miccio, for example, critiqued a child welfare system that allows for this treatment of women experiencing domestic violence and their children in this way as penalizing the women while simultaneously failing to help the children. G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 91 (1999).

181. Josh Gupta-Kagan offers a thoughtful discussion on the problems associated with these central registries and safety plans. *See* Gupta-Kagan, *supra* note 9, at 900–05.

182. *Id.* at 900.

183. *Id.*

184. That is not to say that an individual who actually caused the harm cannot be held responsible for something when they harm children. Indeed, they can. For example, Kathleen Garrett, the teacher discussed *infra*, was found guilty of child maltreatment in a related criminal matter. T.W.

no hope of succeeding against schools; they do.¹⁸⁵ It is to say, though, that claims against schools are hard to make, especially as compared to the relative ease with which families as a whole face repercussions for harms to children. The cases below demonstrate that even when children suffer significant harms in school, attempts to hold the schools responsible are fraught with challenges. Children who are harmed in school have to fashion a claim out of law that has, quite simply, developed in such a way that schools as institutions are protected from being held responsible for it.¹⁸⁶

1. Substantive Due Process Claims for Physical and Emotional Harm in School

When a child is injured in school as the result of harms perpetrated by school staff, a child can try to hold the school responsible by alleging a violation of their Fourteenth Amendment liberty interests in “personal privacy and bodily security.”¹⁸⁷ The standard for establishing this violation is high. The test has three or four parts, depending on the federal circuit in which the case is brought. All courts will balance three factors: 1) the need for force; 2) the relationship between the need and the amount of force used; and 3) the severity of the injury.¹⁸⁸ The requirement of a severe injury alone makes the

ex rel. Wilson v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 599 (11th Cir. 2010); *infra* notes 191–204. However, holding schools responsible is difficult. When schools have a lesser degree of responsibility on an institutional level, it leaves children vulnerable to harm in school. *See infra* Part III.B.2.

185. For example, in *Hill v. Cundiff*, a student, Doe, was raped by another student after school administrators had her act as bait to catch another student in the act of sexual harassment. 797 F.3d 948, 955–56 (11th Cir. 2015). Doe brought Title IX, equal protection, and state tort claims against the school board and individual school administrators. *Id.* at 966. The Eleventh Circuit concluded the grant of summary judgment in favor of the defendants on the Title IX claim and some of the tort claims was in error, though it affirmed the grant of summary judgment on the equal protection and some other state tort claims. *Id.* at 984–86. Likewise, in *Neal ex rel. Neal v. Fulton County Board of Education*, a high school teacher allegedly hit a student, Durante Neal, with a metal weight lock in the eye, and as a result, Neal lost his eye. 229 F.3d 1069, 1071 (11th Cir. 2000). Neal brought substantive due process and tort claims against the school board and individual school staff. *Id.* The Eleventh Circuit overturned the district court’s dismissal of the substantive due process claims, concluding that such actions stated a claim for a violation of the Fourteenth Amendment. *Id.* Students do have viable claims involving harms suffered in school against the schools as institutions, but when they do, the facts involve extreme circumstances such as rape-baiting and the loss of an eye.

186. *Infra* note 188–189 and accompanying text.

187. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (determining a school’s use of corporal punishment could violate the Fourteenth Amendment, stating “the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience”).

188. *T.W.*, 610 F.3d at 599. Some courts will also look at the pedagogical reason more deeply and inquire as to whether it “was applied in a good faith effort to maintain or restore discipline or

standard high and purposefully so. It explicitly and pointedly serves to protect public schools from liability except in cases of “only the most egregious official conduct [that] can be said to be ‘arbitrary in the constitutional sense.’”¹⁸⁹

Even if a child has suffered severe injuries that could support a substantive due process claim, many of these claims still fail in application. One reason they tend to fail in application is because the courts have been willing to excuse the acts of many school officials if a pedagogical or disciplinary reason—any plausible pedagogical or disciplinary reason—is asserted to satisfy the first prong of the test that inquires into the need for force.¹⁹⁰

*T.W. ex rel. Wilson v. School Board of Seminole County*¹⁹¹ offers an example of how courts will strain to find a pedagogical justification to relieve schools of liability.¹⁹² *T.W.* involved a child, T.W., with pervasive development delay, depression, and anxiety,¹⁹³ who suffered because of treatment by his teacher, Kathleen Garrett.¹⁹⁴ Among other things, Garrett taunted T.W., “pick[ing] and nag[ging him] . . . until he would just get to the point where he just couldn’t take it anymore” and would act out.¹⁹⁵ Then, Garrett would physically restrain him, one time in such a way that it could have caused asphyxiation.¹⁹⁶ In addition, on one occasion she tripped him.¹⁹⁷ As a result, T.W.’s extant disabilities grew more severe, and he developed a new disability, post traumatic stress disorder.¹⁹⁸ The school district could have prevented this harm because the school district had received reports that Garrett had mistreated other students.¹⁹⁹ The school district did not remove her from

maliciously and sadistically for the very purpose of causing harm.” *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 173 (3d Cir. 2001) (quoting *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988)).

189. *T.W.*, 610 F.3d at 598 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998)).

190. *See infra* notes 203, 210 and accompanying text. In addition, even plaintiffs who can allege a very severe injury will have a hard time satisfying a court that their injury is of constitutional magnitude if it is emotional or psychological harm. As courts have noted, “Plaintiffs have not fared well where psychological damage forms either the sole basis of or is an element of the plaintiff’s substantive due process claim.” *T.W.*, 610 F.3d at 601 (quoting *Dockery v. Barnett*, 167 F. Supp. 2d 597, 603 (S.D.N.Y. 2001)). For a discussion of how and why emotional harm on its own does not support substantive due process claims of students, as well as for examples of other cases in which a substantive due process claim alleging severe harm was overcome by a pedagogical reason offered by the school for abuse, see Suski, *Dark Sarcasm*, *supra* note 38.

191. 610 F.3d 588 (11th Cir. 2010).

192. *Id.*

193. *Id.* at 593.

194. *Id.* at 594–96.

195. *Id.* at 594.

196. *Id.* at 594–96.

197. *Id.* at 596.

198. *Id.* at 596, 601.

199. *Id.* at 594.

working with children, though.²⁰⁰ Instead, it transferred her to the school T.W. attended and did not inform the principal of that school of the complaints against her, leaving her free to mistreat children.²⁰¹

Even though the school district was therefore complicit in allowing T.W.'s harm to happen, T.W.'s substantive due process claim against the public schools failed.²⁰² The Eleventh Circuit concluded that "[t]he evidence establishes that Garrett's use of force against T.W. 'is capable of being construed as an attempt' to restore order, maintain discipline, or protect T.W. from self-injurious behavior."²⁰³ Consequently, it affirmed the lower court's order of summary judgment in favor of the school board.²⁰⁴ That Garrett manufactured the disciplinary reason by instigating T.W.'s behavior was seemingly of no moment. That a manufactured disciplinary justification for harm suffices to relieve the public schools of responsibility for the harm shows the difficulty of imposing responsibility on the public schools.

Pedagogical as well as disciplinary goals excused the harm to children in *Domingo v. Kowalski*.²⁰⁵ Like *T.W.*, that case involved students with special needs who brought a substantive due process claim against their teacher, Marsha Kowalski, and the school district because of injuries she caused them.²⁰⁶ The allegations of mistreatment included that Kowalski "grabb[ed] a . . . student's face, squeez[ed] his or her cheeks, and point[ed] the student's face toward [her]."²⁰⁷ Kowalski also left a student, who could not independently get on and off a toilet, on the toilet for more than a quarter of the day.²⁰⁸ She also left another student strapped to a gurney in the hallway outside the classroom with a bandana in his mouth.²⁰⁹ Despite this treatment, the students did not succeed on their substantive due process claims because the district court found Kowalski had a "legitimate educational goal of toilet-training and legitimate disciplinary goal of maintaining order and focus in her classroom" that justified her actions.²¹⁰ As in *T.W.*, therefore, *Domingo*

200. *Id.*

201. *Id.*

202. *Id.* at 605.

203. *Id.* at 600 (quoting *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 174 (3d Cir. 2001)).

204. *Id.* at 605.

205. 810 F.3d 403 (6th Cir. 2016).

206. *Id.* at 406.

207. *Id.* at 407–08.

208. *Id.* at 407.

209. *Id.*

210. *Id.* at 411. The Sixth Circuit found this pedagogical justification even after applying the fourth factor that considers more deeply whether that justification was a good-faith one. The court stated,

shows how even abuse of children in school by teachers will not give rise to the public schools' responsibility if the schools can point to some remotely plausible pedagogical reason for the abuse.²¹¹ The stated pedagogical or disciplinary reason justifies the means, seemingly almost no matter how harsh the means.

2. *Claims of Student-on-Student Sexual Harassment in Violation of Title IX*

Just as children are sexually abused at home, they are also sexually abused at school, both by other students and by teachers. When they are, they can bring claims alleging sexual harassment in violation of Title IX of the Civil Rights Act to hold the school responsible for the harassment. Title IX provides: "No 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"²¹² As with substantive due process claims, though, the threshold standard for making out claims alleging such discrimination is high; in application, the public schools' actions in failing to address the harassment must be egregious in order for a claim to succeed.²¹³

The Supreme Court both recognized the validity of Title IX claims for student-on-student harassment and set the high standard for these claims in *Davis v. Monroe County Board of Education*.²¹⁴ In *Davis*, the Court concluded that when one student sexually harasses another student, a school could be held responsible if it was "deliberately indifferent to known acts of student-on-student sexual harassment" and the harassing student was "under the school's disciplinary authority."²¹⁵ However, to satisfy the deliberate indifference standard, a school need "merely respond to known peer harassment in a manner that is not clearly unreasonable."²¹⁶ To avoid liability, then,

Taking all facts in the light most favorable to Appellants, Kowalski used inappropriate instructional and disciplinary methods. However, as was the conduct of the special-education teacher whose inappropriate techniques were examined by the Eleventh Circuit in *T.W.*, Kowalski's educational and disciplinary techniques, though certainly questionable, were utilized for a proper educational purpose.

Id. at 412.

211. *Id.* The term "abuse" is appropriate here because Kowalski, like Garrett in *T.W.*, faced child abuse charges. Kowalski entered into a consent agreement without admitting guilt. *Id.* at 409.

212. 20 U.S.C. § 1681(a) (2012).

213. Catharine MacKinnon has critiqued this standard for failing to meet its promise of sex equality in education. Catharine MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038 (2016).

214. 526 U.S. 629 (1999).

215. *Id.* at 646–47.

216. *Id.* at 649.

the school has to do something in response.²¹⁷ The response can be somewhat or even largely unreasonable. As long as the school's response was not clearly unreasonable, though, the school will meet the *Davis* standard.

Consequently, in application, that standard has meant that almost any action by the schools will suffice to relieve them of responsibility for harm to children because of student-on-student sexual harassment. For example, in *Doe v. Board of Education of Prince George's County*,²¹⁸ an elementary-school-aged boy, J.D., was subjected to repeated instances of sexual harassment by another boy at his school, and the school was aware of the harassment.²¹⁹ The school was not held responsible for allowing it to continue, though, because it responded to the reports of the sexual harassment, however ineffectually.²²⁰ The harassing behaviors J.D. was subjected to all involved another boy, M.O. M.O., among other things, exposed his genitals to J.D. in the classroom library, called J.D. "gay," and climbed into the bathroom stall J.D. was using while M.O. was partially nude with his pants around his ankles.²²¹ The harassment began in J.D.'s fourth-grade year and continued into his fifth-grade year.²²² In response, the school moved J.D. and M.O.'s desks apart, gave M.O. an in-school suspension, later warned M.O. that his behavior could lead to a suspension, and gave J.D. a student escort to the bathroom.²²³ These interventions not only did not stop the abuse, but the bathroom escort also exacerbated J.D.'s harm because it resulted in other students making "horrible jokes" about J.D.²²⁴ Moreover, despite knowing about the problems with M.O.'s harassment of J.D. in fourth grade, the school again placed them in the same classroom for fifth grade, thus more readily exposing J.D. to further abuse by M.O.²²⁵ Still, the school's responses to J.D.'s harassment sufficed to defeat his sexual harassment claim against the school.²²⁶

Similarly, in *Porto v. Town of Tewksbury*,²²⁷ the public school was not held responsible for the sexual harassment of one student by another student because it also did something—again something ineffective, but something nonetheless—to address the harassing behavior.²²⁸ In *Porto*, a student, R.C.,

217. *Id.*

218. 605 F. App'x 159 (4th Cir. 2015 (per curiam)).

219. *Id.*

220. *Id.*

221. *Id.* at 161–63.

222. *Id.*

223. *Id.* The school also implemented a sign in/out sheet for the bathroom, but that proved unworkable and was abandoned in less than a week. *Id.* at 163.

224. *Id.* at 163.

225. *Id.* at 162. The action surprised his teacher because she knew of, and knew the school administration knew of M.O.'s harassment of J.D. in fourth grade. *Id.*

226. *Id.* at 170.

227. 488 F.3d 67 (1st Cir. 2007).

228. *Id.* at 73–76.

sexually harassed another, S.C., over a period of a year, culminating in a sexual encounter in the school bathroom.²²⁹ S.C.'s mother reported a number of these incidents to the school.²³⁰ The school responded by putting the boys on different buses, separating them, having the guidance counselor instruct them the behavior was inappropriate, and giving R.C. detention.²³¹ The harassment did not stop. As a result of the harassment, S.C. suffered emotional and psychological harm requiring an inpatient stay at a mental health facility and attempted suicide.²³² Despite this harm and the school's ineffectual responses, S.C.'s Title IX claim against the school failed.²³³ The claim failed because the school did respond to the harassment.²³⁴ The court concluded that although the school's response was ineffective in that the harassment continued, that did not make it unreasonable.²³⁵ Therefore, it met the *Davis* deliberate indifference standard.²³⁶

That said, courts have concluded that schools need not remedy the sexual harassment in responding to it.²³⁷ They have good reasons for granting this leeway to schools. An honest effort by a school to truly address the sexual harassment of one student by another could still result in continued sexual harassment. An honest effort to address sexual harassment, though, is quite different from a half-hearted attempt to halt harm to students or interventions that cause more harm. Yet, even when schools make half-hearted or counterproductive efforts, the courts do not hold them liable under Title IX.

3. *Claims of Teacher-on-Student Sexual Harassment in Violation of Title IX*

As with sexual harassment claims for student-on-student abuse, the standard for holding the school responsible for teacher-on-student sexual harassment involves overcoming a high bar. To make out a claim for teacher-on-student sexual harassment, a student has to show that a school official with the "authority to take corrective action" has actual notice of the sexual

229. *Id.* at 70–71.

230. *Id.* at 70.

231. *Id.* at 70–71.

232. *Id.* at 71.

233. *Id.* at 76.

234. *Id.*

235. *Id.* at 74.

236. *Id.*

237. *E.g.*, *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000). In *Vance*, the Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment for the children/appellees. *Id.* at 256. Although the Court stated that schools do not have to remedy the sexual harassment, they need to still do something that is not clearly unreasonable. *Id.* at 260. In *Vance*, the school principal did nothing in response to at least three instances of sexual harassment. *Id.* at 262. It is not impossible, then, for a school to be held responsible for student-on-student sexual harassment. If they do nothing at all in response, that can lead to liability. *Id.* at 264.

harassment and “fails adequately to respond.”²³⁸ Failing to adequately respond means “the response must amount to deliberate indifference.”²³⁹ So the factors are very similar to student-on-student sexual harassment claims, and as such, the standard offers a similarly high bar to school responsibility.²⁴⁰

The Supreme Court laid out the standard for public school liability in cases of teacher-on-student sexual harassment in *Gebser v. Lago Vista Independent School District*.²⁴¹ There, although the Court found school liability possible if the actual notice-deliberate-indifference standard is met, it also concluded that the facts of that case did not meet the standard because the school did not have actual notice of the sexual harassment.²⁴² In *Gebser*, a student, A. Gebser, was sexually harassed repeatedly over a two-year period by a teacher. More specifically, the teacher engaged in a sexual relationship with the student during her freshman and sophomore years in high school.²⁴³ The harassment did not result in school responsibility, however, because Gebser failed to explicitly tell any school official with authority that she was having a sexual relationship with the teacher.²⁴⁴ The school did know the teacher was making inappropriate comments toward students, but because Gebser did not explicitly tell the school of the sexual relationship, the court concluded that the school lacked actual knowledge of the facts constituting sexual harassment.²⁴⁵ Thus, as Justice Stevens noted in his dissent, the *Gebser* standard protects schools from liability for harm to students even when the perpetrator of the harm was a school official and “the activity was subsidized, in part, with federal moneys.”²⁴⁶ The standard, then, is high indeed.

In applying this standard, subsequent student claims have failed when the students cannot show that the school’s notice of the harassment effectively amounted to direct knowledge of it. For example, in *J.F.K. v. Troup County School District*,²⁴⁷ a forty-five-year-old teacher, Elizabeth Gaddy, engaged in a sexual relationship over approximately a ten-month period with O.K.K., a twelve-year-old boy in her homeroom.²⁴⁸ While school officials were not directly informed that the sexual relationship itself was occurring,

238. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

239. *Id.*

240. *See supra* notes 215–216 and accompanying text.

241. 524 U.S. 274 (1998).

242. *Id.* at 292–93.

243. *Id.* at 277–78.

244. *Id.* at 278.

245. *Id.* at 278, 292.

246. *Id.* at 298 (Stevens, J., dissenting).

247. 678 F.3d 1254 (11th Cir. 2012).

248. *Id.* at 1256.

the principal of the school and the superintendent of the school district were informed repeatedly of inappropriate behavior directed at O.K.K. by Gaddy.²⁴⁹ The principal was informed, among other things, that Gaddy had leg-to-leg contact under a blanket on a sofa at her home with O.K.K., that she bought O.K.K. and no other students expensive gifts, and that she contacted O.K.K. excessively by text.²⁵⁰ Additionally, O.K.K.'s parents, two other parents, and two teachers at the school alerted the principal to the questionable behavior.²⁵¹ In response, the school banned Gaddy from the eighth-grade hall at the school.²⁵² Despite this behavior, which six adults, two of whom were teachers at the school, found concerning and the school's near total lack of response, the court found the school did not have actual knowledge of the sexual relationship and therefore the sexual harassment.²⁵³ It found that the school lacked actual notice because it lacked direct knowledge of anything other than inappropriate behavior.²⁵⁴ As a result, the school faced no responsibility for the harm.²⁵⁵

Similarly, in *Bostic v. Smyrna School District*,²⁵⁶ another school official, John Smith, engaged in a sexual relationship with a student, J. Bostic, who was a sophomore in the high school where Smith coached.²⁵⁷ The principal of the school was informed by two teachers, one of whom was Smith's wife, and Bostic's father that Smith's behavior toward Bostic was inappropriate and concerning.²⁵⁸ The principal was told that Smith and Bostic were seen alone in a parked car together at night.²⁵⁹ The principal was also told that Smith and Bostic were seen standing so closely together in the hallway at school that the observing teacher thought that they were two students.²⁶⁰ In addition, Smith's wife found them alone together in her classroom.²⁶¹ When the sexual relationship between Smith and Bostic was discovered, Bostic and her parents sued Smith and the school under Title IX.²⁶² The case was heard by a jury, but because the jury had to find actual knowledge of the sexual relationship and not just evidence of a likely one, the school district was not

249. *Id.* at 1261.

250. *Id.*

251. *Id.* at 1257–58.

252. *Id.* at 1259.

253. *Id.* at 1261.

254. *Id.*

255. *Id.*

256. 418 F.3d 355 (3d Cir. 2005).

257. *Id.* at 357.

258. *Id.* at 357–58.

259. *Id.* at 357.

260. *Id.* at 358.

261. *Id.*

262. *Id.* at 357.

found liable.²⁶³ Seemingly nothing short of direct knowledge, therefore, will suffice to hold schools responsible for teacher-on-student sexual harassment. Ample reason to suspect and investigate teacher-on-student sexual harassment has not been sufficient.

4. Bullying

As has been widely reported, students also are harmed, and sometimes die, as the result of bullying in school.²⁶⁴ Students who seek to hold the school responsible in some way for the harms resulting from bullying, though, have anything but an easy task before them. Although all fifty states have anti-bullying laws in place, none create a right of action if the schools fail to follow them or take any steps to address bullying.²⁶⁵ On their own, then, the anti-bullying laws provide no way for the schools to be held responsible for harms to children because of bullying in schools. The threshold for making out a bullying case on its own is not just high; it does not exist.

To make a claim against a school for failing to address bullying, therefore, a student who has been harmed by bullying must bring the claim under another law. Primarily, these are claims that the bullying amounts to a violation of the student's liberty interests under the Fourteenth Amendment or claims that it constitutes unlawful harassment.²⁶⁶ Unsurprisingly, given the difficulties previously discussed with bringing these claims against schools, the cases alleging bullying violated the Fourteenth Amendment or laws prohibiting harassment also have generally not been successful.

263. *Id.* at 358.

264. Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES (Sept. 13, 2013), http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html?_r=0 (reporting on the suicide death of R.A.S., a twelve-year-old Florida girl, in 2013 after being bullied by other students in her school); Trevon Milliard, *Father: White Middle School Student's Suicide Related to Bullying*, LAS VEGAS REV. J. (Feb. 28, 2014), <https://www.reviewjournal.com/news/father-white-middle-school-students-suicide-related-to-bullying/> (reporting the suicide death of H.L., a thirteen-year-old Nevada girl, after she suffered through bullying in school and named the bullying as the cause of her death in her suicide note); Yanan Wang, *After Years of Alleged Bullying, an Ohio Teen Killed Herself. Is Her School District Responsible?*, WASH. POST (May 23, 2016), <http://www.washingtonpost.com/news/morning-mix/wp/2016/05/23/after-years-of-alleged-bullying-an-ohio-teen-killed-herself-is-her-school-district-responsible/> (reporting on the suicide death of E.O., a thirteen-year-old Ohio girl, in 2014 after enduring years of bullying in school).

265. See generally Suski, *Beyond the Schoolhouse Gates*, *supra* note 38 (discussing the bullying laws' intrusions into student privacy with lack of any attendant right of action for the students).

266. Students can also potentially make a few other claims, such as a claim under the Individuals with Disabilities Education Act. CATHERINE E. LHAMON, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: RESPONDING TO BULLYING OF STUDENTS WITH DISABILITIES (Oct. 21, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

For example, in *Morrow v. Balaski*,²⁶⁷ Emily and Brittany Morrow and their parents brought an action against a school for allowing Emily and Brittany to be bullied.²⁶⁸ They alleged the bullying violated their Fourteenth Amendment liberty interests because the school failed to protect them from it.²⁶⁹ While the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*²⁷⁰ concluded that the Due Process Clause of the Fourteenth Amendment does not impose any general duty on the state to protect individuals,²⁷¹ it has also recognized limited circumstances in which such a duty does exist.²⁷² The Court has found that the state has a duty to protect, or care for, prison inmates and persons involuntarily confined to mental health facilities because they cannot meet their own needs.²⁷³ In application, this standard has meant that children arguing that a school had a duty to protect them must successfully analogize to prisoners or persons committed to mental health facilities.²⁷⁴ The Morrrows' claim failed because the Court of Appeals for the Third Circuit found no such fitting analogy. Relying on Supreme Court dicta in *Vernonia School District 47J v. Acton*,²⁷⁵ where the Court said, "we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect[,]'" the *Morrow* court consequently concluded that schools have no duty to protect students from private actors.²⁷⁶ As a result, the public school was absolved of any responsibility for the harm Emily and

267. 719 F.3d 160 (3d Cir. 2013).

268. *Id.* at 164–65.

269. *Id.* at 166.

270. 489 U.S. 189 (1989).

271. *Id.* at 203.

272. *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."); *Estelle v. Gamble* 429 U.S. 97, 103 (1976) (stating the "government's obligation to provide medical care for those whom it is punishing by incarceration" and noting that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.>").

273. *Id.*

274. *See infra* notes 391–400 and accompanying text. In *DeShaney*, the Court noted that those cases in which it found such a duty, *Estelle v. Gamble* and *Youngberg v. Romeo*, "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199–200. Thus, students have to successfully show that they have been taken into custody in ways at least similar to that of mental health patients and prisoners in order to support their argument that schools have a duty to protect them.

275. 515 U.S. 646 (1995).

276. 719 F.3d 160, 169–70 (3d Cir. 2013) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

Brittany suffered by being “verbally, physically and—no doubt—emotionally tormented by a fellow student[,]” even though all they did to address it was “suggest[] that the Morrrows consider moving to a different school.”²⁷⁷

The same kind of challenges plagued the Fourteenth Amendment and Title IX sexual harassment claims of another student in *Morgan v. Town of Lexington*.²⁷⁸ There, the bullied student’s claims were based on both the Fourteenth Amendment and Title IX.²⁷⁹ The student in *Morgan*, R.M., suffered repeated physical and verbal bullying in school.²⁸⁰ Among other things, students at his school pulled him to the ground and “beat him, repeatedly kicking and punching him in the head and stomach.”²⁸¹ He was called “‘Mandex Man,’ ‘thunder thighs,’ and ‘hungry hippo’ . . . [and] was ‘pushed, tripped, punched or verbally assaulted while walking in school hallways.’”²⁸² He “was also ‘table topped,’ in which ‘one person gets down on all fours behind the victim to push the victim behind the knees, and then one or two other individuals push the victim so that the victim falls backwards.’”²⁸³ As a result, R.M. experienced anxiety leading him to miss 112 days of school.²⁸⁴ Although the school knew of all of the bullying, in part because some of it had been captured on video, it did little more than promise to investigate in response.²⁸⁵ Christine Morgan, R.M.’s mother, argued that the school’s failure to respond to the bullying created the danger and therefore violated R.M.’s Fourteenth Amendment rights.²⁸⁶ The court, however, decided that the school’s failure to respond did not create the danger because its inaction did not affirmatively cause the harm.²⁸⁷ R.M.’s Fourteenth Amendment claim consequently failed.²⁸⁸ R.M.’s Title IX claim met the same fate because the court concluded that sexual harassment was only one form and not the primary form of harassment.²⁸⁹ The court said that R.M. endured “undifferentiated bullying” that was not so rooted in sexual harassment as to give rise to a claim of sex discrimination.²⁹⁰ Thus, even when the schools do nothing in the face of known, severe bullying, they lack responsibility for the consequent harm to the victims of the bullying.

277. *Id.* at 166.

278. 823 F.3d 737 (1st Cir. 2016).

279. *Id.* at 739–40.

280. *Id.* at 740–41.

281. *Id.* at 740.

282. *Id.*

283. *Id.*

284. *Id.* at 741.

285. *Id.*

286. *Id.* at 744.

287. *Id.*

288. *Id.*

289. *Id.* at 745–46.

290. *Id.* at 745.

5. Tort Claims

Students who have been harmed in school in any of the above discussed ways or in others ways can also bring an action in tort against the school itself in addition to or in lieu of any action against an individual actor. As with substantive due process, Title IX, and bullying-related claims, though, these common law claims are not easy to make. They do at times succeed, but student claimants have to overcome the obstacles of immunity and causation in order to do so.²⁹¹

When teachers or other school staff members cause harm to students, schools as entities can be protected from liability by laws granting them immunity.²⁹² Schools enjoy immunity from liability for actions of staff who are exercising discretionary functions.²⁹³ While what counts as “discretionary” varies by jurisdiction, it has shielded schools from liability for harms to children caused by other staff, other students, and themselves.²⁹⁴

Where immunity does not bar children’s claims against the school entity, they can sue the schools in tort under theories of *respondeat superior* and negligent supervision.²⁹⁵ For *respondeat superior* claims, a child must show the staff member’s actions for which the school is allegedly responsible were within the scope of employment.²⁹⁶ This requirement poses a not insig-

291. E.g., Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 627 (2012) (noting in addressing claims for bullying “[e]ven when conduct by a school official satisfies the elements of a common law cause of action, various forms of immunity from tort liability often serve as shields to school districts.”); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 410 (2012) (noting, in discussing potential tort claims, a bullied student could make a claim despite causation and immunity hurdles, but stating, “the prognosis is . . . dim” for redress); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004) (providing a comprehensive analysis of how tort serves as a limited recourse and means of redress for bullying). *J.W. v. Birmingham Board of Education* serves as a recent example of the difficulty of bringing such claims against schools and individual school employees. In that case, students in Birmingham City Schools in Alabama brought an action against the School Board and Birmingham Police Department for using a chemical spray against them as a “standard response even for the non-threatening infraction that is universal to all teenagers—i.e., backtalking and challenging authority” in a “cavalier” way and causing them “severe pain.” 143 F. Supp. 3d 1118, 1126 (N.D. Ala. 2015). While the plaintiffs prevailed on some of their constitutional claims, they lost their tort claims because of qualified immunity. *Id.* at 1158–59. Reflecting on the case, Jerri Katzerman, class counsel for the plaintiffs and former Deputy Legal Director of the Southern Poverty Law Center, called the tort claims and the legal battle over qualified immunity “kind of a pain.” E-mail from Jerri Katzerman, Deputy Legal Dir., S. Poverty Law Ctr., to Emily Suski, Assistant Professor of Law, Univ. S.C. Sch. of Law (Jan. 12, 2017, 17:02 EST) (on file with author).

292. JAMES A. RAPP, EDUCATION LAW § 12.07(1) (2016).

293. *Id.* § 12.07(4)(c).

294. *Id.* § 12.07(3).

295. *Id.* § 12.14(4)–(5).

296. *Id.* § 12.14(4)(b).

nificant challenge because a school can argue that intentionally harming students by excessive discipline and assault are not within the scope of employment.²⁹⁷ However, even when the actions of the school staff are outside the scope of employment, schools can still be held liable for negligent supervision. These negligent supervision claims require “standards of knowledge [that] are significant and . . . a foreseeable risk of harm.”²⁹⁸ These requirements offer substantial defensive fodder to school districts that can doom claims.²⁹⁹

Similarly, when children are hurt by other children or themselves in school, schools can be held responsible for negligent supervision of the students.³⁰⁰ However, these claims also are far from sure winners. While the school district does have a duty of reasonable care, it extends only to foreseeable risks of harm where increased supervision would have prevented the harm.³⁰¹ These constraints do not serve as a bar to every claim, but they can prove a significant hurdle.³⁰²

C. Comparing the Responsibilities of Families and Schools for Harms to Children

These Fourteenth Amendment, Title IX, bullying, and tort cases on their own demonstrate the challenges that lie before children who seek to hold the public schools responsible for harms they have suffered. Comparing the public schools’ lack of liability with the relative ease of imposing it on the family sets this difficulty in stark relief. Schools are not held responsible for harms to children in school, but families are held responsible for the same or less severe harm. For example, in *Domingo v. Kowalski* and *In re L.Z.*, both children had their cheeks squeezed by an adult.³⁰³ In *Domingo*, though, the school faced no responsibility for the very same harm that caused the mother to lose custody of her child permanently, even though she did not cause the harm.³⁰⁴

297. *E.g.*, *John Doe 1 v. Bd. of Educ. of Greenport Union Free Sch. Dist.*, 955 N.Y.S.2d 600, 602 (N.Y. 2012) (noting school was not responsible in tort when a teacher’s aide engaged in a sexual relationship with a student because, among other things, it was outside the scope of employment). *But see* *Booth v. Orleans Parish Sch. Bd.*, 2009–1505 (La. App. 4 Cir. 9/22/10); 49 So. 3d 919, 921–22 (stating that school board could be liable for janitor’s assault of student).

298. RAPP, *supra* note 292, § 12.14(5)(b)(iii).

299. *See supra* notes 296–298 and accompanying text.

300. RAPP, *supra* note 292, § 12.12(2).

301. *Id.*

302. *E.g.*, *Conklin v. Saugerties Cent. Sch. Dist.*, 966 N.Y.S.2d 575 (N.Y. App. Div. 2013) (finding school district not liable for assault of plaintiff by another student where school knew fight had been threatened because school engaged in some interventions with the students and could not have anticipated the fight would nonetheless occur).

303. *See supra* notes 147–152, 205–210 and accompanying text.

304. *See supra* notes 147–152, 205–210 and accompanying text.

Similarly, when family members do not impose the harm on children, the family can still be held responsible for it, but when schools or school staff do cause the harm, the school is not held responsible. In *Greene v. Camreta*, Sarah Greene, who was not accused of any abuse or neglect, tried to mitigate any potential harm to her children by cooperating fully in an investigation into whether her husband abused her daughter.³⁰⁵ Yet she temporarily lost custody of her daughter.³⁰⁶ By contrast, in *T.W.*, the public school teacher, Kathleen Garrett, caused such harm to T.W. that not only did his extant disabilities worsen, but he also developed a new psychological disorder.³⁰⁷ In *Doe*, the way the school responded to the student sexual harassment exacerbated the harm to the student.³⁰⁸ In neither case, though, did the school bear responsibility for the harm.³⁰⁹

Additionally, when families make efforts to address harm to children, the family is still held responsible when the efforts were not fully effective, but when school staff or administrators make half-hearted, ineffective efforts to address harm to children, the schools are absolved of responsibility by virtue of those efforts. In *In re Katie S.*, Katie S.'s sincere efforts to reunite with her children were cut off prematurely, and her rights to her children were permanently terminated.³¹⁰ In *In re N.P.*, the mother, M.P., lost custody of her children, even though her ability to protect them from any harm resulting from her husband's domestic violence was hampered by that domestic violence.³¹¹ Conversely, in the Title IX cases *Porto, J.F.K.*, and *Bostic*, the public schools either did nothing or nothing effective in the face of reports of sexual harassment.³¹² Yet they faced no responsibility for the harm that resulted to the children in those cases.³¹³

Finally, when families fail to protect their children from harm by another child in the family, the result can be liability, but schools are not held responsible for such failures to protect children for harms by other children. For example, in *In Re Adam B.*, Alma B. lost custody of her older son, who had a psychiatric disorder, because she could not always get him to take his medication, and she lost custody of her younger son because she could not protect him from her older son.³¹⁴ Yet in the above-referenced sexual harassment cases, perhaps most egregiously *J.F.K.*, where the school did very

305. See *supra* notes 169–173 and accompanying text.

306. See *supra* notes 169–173 and accompanying text.

307. See *supra* notes 191–204 and accompanying text.

308. See *supra* notes 218–226 and accompanying text.

309. See *supra* notes 191–204, 218–226 and accompanying text.

310. See *supra* notes 161–168 and accompanying text.

311. See *supra* notes 180 and accompanying text.

312. See *supra* notes 228–236, 247–263 and accompanying text.

313. See *supra* notes 228–236, 247–263 and accompanying text.

314. See *supra* notes 153–160 and accompanying text.

little to protect the student from the sexual advances and harassment of a teacher, the school is not held responsible.³¹⁵

With all that said, it must also be acknowledged that the child welfare system, under which families are more easily held responsible for harms to children, has a set of policy goals that are very different than those that underlie any individual claims a student might bring against a school for harms suffered there. The child welfare system exists to protect children from future harm while claims against schools serve as remedies for past harms.³¹⁶ So the imposition of responsibility on families may seem to serve child welfare policy goals in a way that holding schools as institutions responsible for harms to children does not serve a remedial policy goal. That is, removing a child from the home arguably is the best means of ensuring a child who has been harmed by a family member will not be so harmed again because the family member no longer has access to the child. In contrast, holding public schools institutionally responsible for harms to children does not as obviously serve as a remedy for past harms. Because the remedy for past harms is damages, it arguably does not matter who pays those damages—the school or the individual perpetrator of the harm—as long as the damages get paid.

That argument, however, belies the practical and symbolic significance of holding a school district responsible for past harms. On a practical level, a school district simply may have more money than any individual, so recovery for past harms may be more likely if the school itself is responsible. While that would without question be a draw on the public fisc, that is true of any claim against a school, including claims for race discrimination. Further, the alternative to drawing on the public fisc is potentially denying children who have been harmed, abused even, a remedy when the individual defendant cannot pay.

Second, and perhaps more significantly, holding a school accountable for harms suffered there sends a symbolic remedial message of accountability on a system-wide level. It can also do more to remedy the harm than holding only the individual who imposed it responsible, because it can force recognition and remediation of any system-level failures that contributed to the harm. Arguably, that could, though, have the perverse effect of schools imposing more stringent tactics and harsh discipline to guard against liability instead of more meaningfully responding to harms. While a risk, that is far from the

315. See *supra* notes 228–236, 247–263 and accompanying text.

316. At the federal level, the Adoption and Safe Families Act prioritizes the “protection of children over the support of families.” Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reproductics*, 54 EMORY L.J. 1343, 1351 (2005).

necessary outcome of liability. As police liability cases, among others, have shown, liability can and often does lead to positive reforms.³¹⁷

III. THE PRIVACY OF THE PUBLIC SCHOOLS

That the public schools have notably less responsibility than families for harms to children means that the public schools face far less scrutiny than families for their decisions affecting whether children are harmed in their care. This relative lack of scrutiny means the public schools not only enjoy a measure of privacy but also more privacy than the family does in this respect. This public school privacy leaves children in school vulnerable to harm. It is also not the only form public school privacy takes. Public school privacy also takes the form of the private, traditionally deemed caretaking activities that public schools do. To explain these privacies and the related vulnerability it causes children in school, the concepts of privacy invoked here warrant some description.

A. *Privacy: Its Contours and Myths*

The notion of privacy generally, as feminist scholars who have critiqued it note, means a freedom from regulation and intrusion into decision-making.³¹⁸ This freedom from regulation leaves the individual or entities autonomous and able to act without another questioning those acts.³¹⁹ The concept of privacy is situated in opposition to that which is public, or regulated by outside authorities.³²⁰ Because in liberal political theory the concept of privacy is used to limit the government actions and intrusion on individuals and individual decision-making, this notion of freedom from public intervention

317. *E.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861–65 (2001) (pointing out the “fault-fixing” effects of police liability).

318. EICHNER, *supra* note 16, at 34 (“The conceptual demarcation between the public and private realms bolsters the idea that the state should not properly concern itself with caretaking and human development.”); FINEMAN, *supra* note 10, at 294 (“I distinguish family or entity privacy from constitutional or individual privacy. . . . Family privacy attaches to the entity of the family, not to the individuals who compose it. Historically, this has meant that, in certain situations, the doctrine operates to shield the family unit from state interference, even when the request for intervention comes from one of the family members.”).

319. FINEMAN, *supra* note 10, at 19–20 (“[O]ur particular constitutional ordering also implies that freedom from external rules and regulations generated by government is inherent in individual autonomy. Autonomy is synonymous with a concept of self-governance, and is characterized by self-sufficiency and independence, individual qualities that are seen as prerequisites for individual freedom of will and action.”).

320. *See id.* at 150. Fineman describes the work of Olsen and others to expose the myth of the public/private divide and notes that “public” has been thought of as that which is regulated and “private” as unregulated. *Id.* Frances Olsen described “public” as potentially unconstitutional, but “private” actions as not. Olsen, *supra* note 10, at 320–21. Private actions are shielded from such regulation. *Id.*

inherent in the concept of privacy typically means freedom from state regulation of individuals or entities.³²¹

Privacy has another dimension as well. Privacy also means “personal and domestic, as opposed to commercial; of the family rather than of the marketplace; home rather than work.”³²² Frances Olsen described privacy in this way more than thirty years ago, and the definitions still hold resonance and, of course, relate closely to the notion of privacy that involves freedom from regulation and intrusion.³²³

321. EICHNER, *supra* note 16, at 25 (discussing John Rawls’s conceptualization of privacy and family, saying “he conceived of families as possessing an internal realm that is and should be left immune from the power of the state, and which operates in some natural, pre-political way that would be adulterated if the state were to intercede”); FINEMAN, *supra* note 10, at 296–97 (explaining entity privacy as “[w]hat was shielded from state intervention and control was not only specific, weighty, intimate decisions, such as the decision to beget or bear a child, but also mundane, day-to-day family interactions”); Dailey, *supra* note 10, at 968–69 (“The traditional history of this transition to the private family is mirrored in the rise of the constitutional doctrine of family privacy. Although the family finds no express protection in the Constitution, the Supreme Court has established a strong tradition of constitutional protection for ‘the sanctity of the family’ under the Due Process Clause of the Fourteenth Amendment. The Court has interpreted the constitutional guarantee of ‘liberty’ in that clause as recognizing a ‘private realm of family life which the state cannot enter.’ This constitutional connection between liberty and privacy derives from one of the central tenets in liberal political theory: the distinction between the public and private spheres of human life. Liberal theory conceives of the world as divided between the public sphere of state regulation and the private sphere of individual freedom. Under liberalism, the state’s limited function ‘is to guarantee to all individuals an equal opportunity for moral development and self-fulfillment.’ Although the state may act to safeguard the principles of individual autonomy and freedom, it must nevertheless ‘refrain from intervention in the “private” lives of individuals and from imposing moral values that would threaten individual autonomy.’” (footnotes omitted) (first quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); then quoting *Prince v. Massachusetts* 321 U.S. 158, 166 (1944); then quoting ALLISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 35 (1988); and then quoting *id.*)); Olsen, *supra* note 10, at 320 (“[P]rivacy’ may be invoked as a right which itself provides a substantive limit on state action permitted by the constitution.”).

322. Olsen, *supra* note 10, at 322. Exploring the definition of privacy to also discuss its critiques, Olsen writes, “The so-called first wave of American feminism in the nineteenth century focused much attention upon women’s exclusion from public life, challenging the particular divide between public and private life. . . . The so-called second wave of feminism is sometimes said to have focused primary attention upon the public/private distinction.” *Id.* at 322 (footnote omitted).

323. Indeed, as recently as 2015, in *Obergefell v. Hodges*, the Supreme Court relied on these notions of domestic, family, and personal privacy to support the notion that the right to marry includes the right of same-sex couples to marry. 135 S. Ct. 2584, 2599 (2015). The Court explained,

Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”

Id. (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)).

1. Entity and Individual Privacy

Entities and individuals both enjoy privacy.³²⁴ Entity privacy is the notion that the guarantees of freedom from governmental intrusion inure not just to individuals but also to certain spheres or zones.³²⁵ These zones include, for example, the home, where the state cannot search without certain justification or a warrant.³²⁶ The family, significantly for the purposes here, comprises another such sphere.³²⁷ In cases like *Griswold v. Connecticut*,³²⁸ the Supreme Court has been unequivocal about the existence of family entity privacy.³²⁹ In *Griswold*, where the Court concluded married couples have a right to contraceptives, it said that there exists a “private realm of family life which the state cannot enter.”³³⁰ In *Prince v. Massachusetts*, the Court indicated that the privacy of families includes the privacy surrounding decisions regarding the caretaking of children.³³¹ There the Court said that the “custody, care and nurture” of children reside first in the parents and also that “in recognition of this, . . . [the Court’s previous decisions, including *Meyer v. Nebraska* and *Pierce v. Society of Sisters*] have respected the private realm of family life which the state cannot enter.”³³²

The notion of individual privacy is embedded in doctrine, including the Bill of Rights, though none of the privacy rights are explicitly identified

324. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (recognizing zones of privacy afforded entities, such as homes and the marital relationship). The Court explained:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. . . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.

Id. (quoting U.S. Const. amend. III).

325. *Id.*; see also FINEMAN, *supra* note 10, at 294 (“Family privacy is a common-law concept that is not individualized, but founded on the nature of the protected relationship.”); Dailey, *supra* note 10, at 972 (“With the recognition of parental rights in *Meyer* and *Pierce*, the Court brought the domestic sphere within the protective scope of the Constitution, thereby establishing limits to the power of the state to regulate within this sphere. The domestic sphere, like the economic marketplace, was ‘privatized’ in the sense that it, too, became a realm of negative liberty whose members had a claim to freedom from state intervention.”).

326. *Griswold*, 381 U.S. at 484.

327. FINEMAN, *supra* note 10, at 59. Fineman notes that the family has been perceived as occupying a private sphere and embodying values and norms different than those entities in the public sphere. This leads to legal doctrine that leaves families as entities shielded from scrutiny. *Id.*

328. 381 U.S. 479 (1965).

329. *Id.* at 484 (“The Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’” (citation omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

330. *Id.* at 495 (Goldberg, J. concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

331. 321 U.S. at 158.

332. *Id.* at 166.

there.³³³ Instead, the Supreme Court has found that the constitutional rights of privacy derive from “penumbras, formed by emanations from those [explicit] guarantees” in the Bill of Rights.³³⁴ Consequently, in cases like *Eisenstadt v. Baird*,³³⁵ the Supreme Court has found that the penumbral rights of privacy guarantee specific individual freedoms such as, in that case, the individual right to access contraceptives.³³⁶ In *Eisenstadt*, the Court said, “[if] the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³³⁷ This individual right of privacy has also been extended to include, for example, the right to abortion.³³⁸ In *Roe v. Wade*,³³⁹ the Supreme Court concluded that this individual right to privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”³⁴⁰ The Supreme Court has also identified caretaking roles as private. In *Roe*, the Court identifies child-rearing activities and the education of children, all of which involve caretaking, as private.³⁴¹

333. FINEMAN, *supra* note 10, at 18–19 (“The specific provisions of the Bill of Rights restrain the government in regard to the individual, whose liberty and equality are thereby guaranteed.”); *see also* Dailey, *supra* note 10, at 958 (“Constitutional protection for the family need not derive solely, or even primarily, from a principle of negative liberty. Rather, constitutional protection of the family ought to reflect an understanding of the family’s distinct role as a vital intermediate institution serving the communal ends of political life. The family is deserving of constitutional protection because of its essential role in creating and maintaining our broader political order. In doctrinal terms, the Constitution should be read to prohibit state action that threatens to undermine the family’s place in the political structure otherwise established by that document.” (footnote omitted)); Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 57–58 (2006) (“The liberal theories articulated by John Locke significantly influenced American statesmen of the late-eighteenth century, and his ideas have been considered ‘the touchstone of all subsequent liberal thought.’ Locke’s theory of liberal democracy espouses radical individualism and a concomitant theory of the negative, limited state. These ideals together justify a state neutral about all but the thinnest conceptions of the human good.” (footnotes omitted) (quoting BRIAN R. NELSON, *WESTERN POLITICAL THOUGHT: FROM SOCRATES TO THE AGE OF IDEOLOGY* 208 (2d ed. 1996))).

334. *Griswold*, 381 U.S. at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

335. 405 U.S. 438 (1972).

336. *Id.*

337. *Id.* at 453.

338. Questions exist about whether the right should be rooted in the right of privacy or the Equal Protection Clause. FINEMAN, *supra* note 10, at 295.

339. 410 U.S. 113 (1973).

340. *Id.* at 153.

341. *Id.* at 152–53.

While the notions of family entity privacy and individual privacy are related, Martha Fineman has pointed out that family entity privacy is conceptually and analytically distinct from the notions of individual privacy.³⁴² Indeed, as Fineman notes, in *Griswold* the Court explains that family entity privacy is “older than the Bill of Rights—older than our political parties, older than our school system.”³⁴³ Recognizing the distinction between individual and entity privacy has significance, in part, because the privacy rights of individuals can collide with those of the entities in which they function.³⁴⁴

2. *Dismantling the Public/Private Divide and Piercing Family Entity Privacy*

As strong as these notions of privacy are in doctrine and history, feminist scholars have shown them to be constructs.³⁴⁵ In so identifying them,

342. FINEMAN, *supra* note 10, at 295–96 (“The notion of the private family predates, and is analytically separate from, the constitutional idea of individual privacy, although this new arena of privacy seems rooted in older notions about family relations.”).

343. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

344. See FINEMAN, *supra* note 10, at 21 (“There is . . . [an] autonomy of individuals *within* the family, for which feminists have fought by exposing domestic violence and child abuse. This way of thinking about autonomy separates out individuals from the family unit and asks that their interests be considered separately and protected even against other members of that family unit.”); *infra* Part IV.A.2.

345. EICHNER, *supra* note 16, at 5; FINEMAN, *supra* note 10, at 151–52. The myth that a stark dichotomy exists between the public and the private finds a home in, among other places, contemporary political theory, and it has been adhered to by courts. EICHNER, *supra* note 16, at 17. As Maxine Eichner notes in describing the ideas of political theorist John Rawls, “Some of the features of Rawls’s theory . . . have set the agenda for contemporary liberal democratic theory—its focus on justice defined in terms of liberty and equality, to the exclusion of other goods such as caretaking and human development.” *Id.* at 17–18. As such, Eichner explains, “Rawls conceptualized a world with a firm demarcation between the public and private realms,” with the family existing in the wholly private realm and the state in the wholly public realm. *Id.* at 25. The family, in this view, then assumes the caretaking role of children. Quoting Rawls, Eichner makes the point that under this conception, “a central role of the family is to arrange in a reasonable and effective way the raising of and caring for children, ensuring their moral development and education into the wider culture.” *Id.* at 23 (quoting John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 788 (1997)). Eichner points out that these theories and this sharp demarcation between family and state are evidenced in, for example, Title VII workplace sex discrimination and Pregnancy Discrimination Act cases. *Id.* at 30. Those cases, Eichner persuasively argues, mime the notion of a public/private divide because the decision to have children is squarely a private, individual decision, and the state has no obligation to support this decision by way of resources. *Id.* at 33. To underscore this point, Eichner quotes from one such Supreme Court case, *UAW v. Johnson Controls, Inc.*, where it states, “[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them.” *Id.* at 33–34 (quoting *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1990)). Significantly, this view is espoused in a case that found a violation of Title VII by the defendant company employer, Johnson Controls, for a policy that prohibited women from working in certain jobs unless they had documented their infertility. *Johnson Controls, Inc.*, 499 U.S. at 191–92. Eichner does not argue the case should have come out differently, but she does argue that Title VII forces a limited inquiry with its focus on justice and not also on caretaking interests.

feminists have exploded the myth that the divide between the private and the public exists, particularly with respect to the family.³⁴⁶ If a line between the public and private truly existed, then the family would not be regulated. Yet the family is very much regulated.³⁴⁷ As Maxine Eichner has noted, government policies regulate how much control parents have over their children.³⁴⁸ For example, compulsory school attendance laws require parents to send their children to school, with limited exceptions, regardless of whether parents want to send their children to school.³⁴⁹ Family leave policies and child support laws affect how and the degree to which parents can care for their children physically and financially.³⁵⁰ And, as Anne Dailey has pointed out, laws setting minimum ages to marry, regulating adoption, and establishing child custody all serve to reinforce particular government policies regarding families and children, and they limit family autonomy and privacy.³⁵¹ Child welfare laws too, of course, regulate the family.³⁵² The family entity, then, is far from private and autonomous.³⁵³

346. EICHNER, *supra* note 16, at 25 (“In today’s complex society, there is no way to separate out any ‘natural’ function of the family that somehow stands apart from state action. Instead, how families function is inextricably intertwined with both law and social policy.” (footnote omitted) (first quoting Martha Minow, *All in the Family and in All Families: Membership, Loving, and Owning*, in *SEX, PREFERENCE, AND FAMILY* 249 (David M. Estlund & Martha C. Nussbaum eds., 1997); then citing Olsen, *supra* note 11, at 836)); FINEMAN, *supra* note 10, at 151 (“Feminists have successfully deconstructed the public/private dichotomy in the context of the family.”).

347. EICHNER, *supra* note 16, at 55 (“The state is not only involved in determining what constitutes a family and when family relationships are dissolved, it is also involved directly and indirectly in a multitude of other ways.”); FINEMAN, *supra* note 10, at 151 (noting that the family is “highly regulated and controlled by the state”).

348. EICHNER, *supra* note 16, at 55 (“And there are many other ways that state regulation and public policy affect family life.”).

349. *Table 5.1*, *supra* note 39. As Eichner notes, the law also regulates families by, reinforce[ing] parents’ authority over children by subjecting the children to court supervision should they disobey their parents; by preventing other adults from caring for them; by allowing parents to have considerable power over whether children are institutionalized for mental-health reasons; and by child-labor laws that limit children’s ability to live independently.

EICHNER, *supra* note 16, at 55.

350. EICHNER, *supra* note 16, at 56 (“The scope of family-leave laws affects parents’ opportunities to stay home with their children.”).

351. Dailey, *supra* note 10, at 998–99.

352. *See supra* Part III.A.

353. Dailey, *supra* note 10, at 997–98 (“Social and legal historians . . . assert that beneath the ideology of family privacy lies a social and legal reality of family regulation. These theorists ask why it is that, despite a rhetoric of family privacy, ‘public involvement in the family seems to have grown substantially during the nineteenth and twentieth centuries.’ Their inquiry, although tentative and incomplete, is nevertheless rigorous enough to challenge two primary assumptions of the conventional theory: first, that the state is prohibited from interfering in family life; and second, that the private sphere is confined to domestic affairs of no political or civil significance.”) (footnote omitted) (quoting Lee E. Teitelbaum, *Family History and Family Law*, 1985 *WIS. L. REV.* 1135, 1137). Feminists have exposed the myth of the public/private divide in other contexts too. They have noted that “everything is public.” FINEMAN, *supra* note 10, at 150.

Feminist scholars have not just dismantled the myth of a public/private binary, but they have also pointed out the problems associated with this myth.³⁵⁴ Among other things, it serves to perpetuate the exploitation of and harm to women and children in the family.³⁵⁵ This myth does so by masking and subordinating individual privacy rights of women and children to those of the family entity.³⁵⁶ Regarding family privacy, Catharine MacKinnon has stated, “[T]he measure of the intimacy has been the measure of the oppression.”³⁵⁷ MacKinnon has argued that family entity privacy allows for male aggression and violence to be hidden.³⁵⁸ MacKinnon has been especially concerned with the way family privacy has trampled women’s rights and served to subordinate women.³⁵⁹ Family privacy, though, has also served to support harm to children.³⁶⁰ To the extent the family is private and cannot be intruded upon, then child abuse can happen.³⁶¹ Exploding the myth of family

354. That said, all feminist scholars have not by any means denied the value of privacy. To the contrary, even those who have critiqued notions of privacy, from Elizabeth Schneider to Martha Fineman to Maxine Eichner, also have acknowledged its value. Elizabeth Schneider has called for a more nuanced, affirmative embrace of notions of privacy that do not contribute to women’s subjugation. Schneider, *supra* note 11, at 974, 984–86. Martha Fineman has proposed rethinking “privacy in such a way as to confer autonomy on caretaking or dependency units. The beneficiary of this privacy is the unit, defined through its functioning, not its form.” Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1221 (1999). Maxine Eichner is explicit in stating that privacy deserves respect and sees the positive aspects of privacy for families regarding, for example, health care decisions. EICHNER, *supra* note 16, at 63–65. Eichner also, though, calls for recognition of the role the state should play in supporting the family as it cares for the dependency needs of others. *Id.* Michele Gilman has explained that feminists have explored the need to “coerce privacy to retain liberal values” for women at the same time as they need to recognize that privacy for some women, notably low-income women and women of color, has been “stolen.” Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L. F. 1, 23 (2008).

355. EICHNER, *supra* note 16, at 34 (“[D]ependency . . . [has been seen as] properly confined within families. . . . In this framework, we have far less difficulty conceiving of children as falling within a parent’s personal sphere of autonomy—and thus allowing parents the right to be free of interference in order to raise children as they see fit”); FINEMAN, *supra* note 10, at 152 (“[T]he private sphere is the location of [women’s] domination and subordination.”).

356. FINEMAN, *supra* note 10, at 299 (“[T]he idea of family privacy has been severely criticized by feminists: children’s rights proponents; and others concerned with the potential for physical, emotional, or psychological abuse of some family members by others. Family privacy has been charged with obscuring and fostering inequality and exploitation.”).

357. MACKINNON, *supra* note 10, at 191.

358. *Id.* at 190 (“The liberal ideal of the private holds that, so long as the public does not interfere, autonomous individuals interact freely and equally. . . . Injuries arise through violation of the private sphere, not within and by and because of it.”).

359. *Id.* at 190–91.

360. Fineman, *supra* note 354, at 1219 (“An additional source of criticism of traditional family privacy are those who focus on the rights of children. The tradition, in this regard, protects parental authority”). Therefore, harm to children can flow from the misuse of that authority. *Id.*

361. *E.g.*, Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 417 (1996) (“The idea that any public involvement in child protection, education, health

entity privacy paved the way for individual rights to be recognized within the family, including the rights of women and children to be free from family violence and harm.³⁶²

This work of feminist theorists has had practical effect. Breaking down the myth of a divide between the private family and that which is deemed public has served to better secure the individual rights of women and children. Highlighting the fallacies of the public/private divide has made way for intrusions into the purportedly private sphere of the family once deemed anathema.³⁶³ Domestic violence laws offer a prominent example of the effects of exposing the public/private divide as a mythical construct. Domestic violence, once treated as a private family matter, now is a criminal act that can result in state prosecution.³⁶⁴ In addition, although child abuse laws predate the work of feminist scholars, the notion that concepts of family privacy supersede the family's right to be free from harm is furthered by feminists' work regarding the falsehoods and fallacies of family entity privacy.³⁶⁵ One can question the state decision to intrude in a particular case of alleged child abuse and the interventions the state applies to address suspected child abuse, but the authority of the state to intervene in cases of suspected child abuse in general is not questioned on the basis of family privacy.³⁶⁶

B. How the Public Schools Have Privacy

Taking these notions of privacy and the construct of the public/private divide and applying them to the public schools reveals the ways that the public schools are private. It therefore also demonstrates that the notion that

and income support must inevitably erode the powers and unity of the family is not new The myth remains powerful that the allocation of rights and responsibilities among children and parents and the State is a zero sum game—with any gains for either children's rights or the State's interest coming at the expense of the traditional family.”).

362. FINEMAN, *supra* note 10, at 21 (“[T]he autonomy of individuals *within* the family, for which feminists have fought by exposing domestic violence and child abuse . . . asks that their interests be considered separately and protected even against other members of that family unit.”).

363. *See* Dailey, *supra* note 10, at 1016–17 (“At the same time that family privacy preserves a loving refuge of individual freedom, it also shields domestic abuse and inequality from public redress. It was in recognition of this oppressive aspect of family privacy that the constitutional principle of individual autonomy pierced the domestic sphere.”); *supra* note 10 and accompanying text.

364. Dailey, *supra* note 10, at 1016–17; *see also* AM. BAR ASS'N, COMM'N ON DOMESTIC & SERIAL VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES (2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummary-charts/2014%20Domestic%20Violence%20Arrest%20Policy%20Chart.authcheckdam.pdf (summarizing the domestic violence arrest laws in the fifty states and U.S. territories).

365. While domestic violence laws and child abuse laws represent steps forward in protecting women and children from harm and exploitation, the systems are by no means free from problems. Domestic violence laws certainly do not protect all women and can be misused. *See supra* note 180 and accompanying text. Child welfare systems suffer from endemic bias that affects low-income families and families of color. *See supra* notes 145, 147 and accompanying text.

366. *See supra* notes 145, 147 and accompanying text.

schools are strictly public is false, and so the public/private binary as it is considered with respect to public schools is also false. Finally, recognizing this false binary in the context of the public schools unmasks the problems with it. Most particularly, it reveals that children are vulnerable to harm in school.

1. Public Schools' Privacy

Public schools are private in both of the senses developed above. First, the public schools enjoy entity privacy because their decisions regarding whether harm to children has occurred in school are largely unregulated.³⁶⁷ Second, the public schools are private in the sense that they are responsible for caretaking tasks traditionally deemed domestic, or private.

To have entity privacy, a discrete sphere must be free from regulations regarding some decisions or actions.³⁶⁸ Obviously, public schools are entities. As such, public schools are discrete spheres, like families, within which decisions made could either be regulated or not. In this way, they are at least theoretically capable of enjoying entity privacy. To the extent the public schools' decisions are unregulated, therefore, they enjoy entity privacy.

As the foregoing discussion of schools' absence of responsibility for harms to children in their care demonstrates, schools' decisions that have an impact on harms to children are largely unregulated. They, therefore, have entity privacy with respect to those decisions. Admittedly, the courts do not say that the schools' decisions impacting harms to children in school are private, and therefore they will not hold them liable for the related, sometimes resulting, harm that happens to children. Instead, the lack of regulation happens under the guise of pedagogical or disciplinary justifications for the harm, as in the case of *T.W. or Domingo*.³⁶⁹ It also happens because courts do not interfere with school decision-making as long as they do not do something clearly unreasonable in response to harms, as in student-on-student sexual harassment cases.³⁷⁰ In addition, this lack of regulation is justified because the public schools lack direct knowledge of the harm, as in teacher-on-student sexual harassment, and excuse their decisions to do nothing in response to reasonable cause to suspect the harm.³⁷¹ Finally, when bullying occurs to students, the lack of regulation into school decision-making happens for all those reasons and because children have no actionable rights to be free from bullying in school.³⁷² No matter the stated reason, though, the

367. See *supra* Part III.B.

368. See *supra* notes 324–344 and accompanying text.

369. See *supra* notes 192–210 and accompanying text.

370. See *supra* notes 214–233 and accompanying text.

371. See *supra* notes 240–263 and accompanying text.

372. See *supra* notes 265–290 and accompanying text.

effect is still the same. Schools enjoy a lack of regulation and the privacy in these cases by way of a lack of interference with, and responsibility for, decisions that affect whether a harm has occurred to a student in school.

The second aspect of schools' privacy centers on schools' responsibility for caretaking tasks traditionally considered domestic and private.³⁷³ The Supreme Court has said that caretaking roles belong to the private family realm.³⁷⁴ Yet it has also identified public schools as having these same roles.³⁷⁵ As previously discussed, the public schools have a role in maintaining the health and safety of children.³⁷⁶ They have a role in teaching them morals.³⁷⁷ So, the public schools have responsibility for these traditionally deemed domestic, or private, activities, and this responsibility reveals another dimension of their privacy. The public schools then have a double layer of privacy. Their entity privacy protects them from scrutiny over these private caretaking activities.

One counterargument to the notion that the public schools enjoy entity privacy is that it simply overstates the matter. To be sure, the public schools are very much regulated and, as such, are not private. State legislatures have much control over the workings of the public schools, and Congress has hardly been hands-off in its approach to education policy.³⁷⁸ The Supreme Court also regulates schools when it accepts the call to decide the boundaries of student rights in relation to school authority.³⁷⁹ Yet while public schools operate under much regulation, they also have much discretion. Indeed, even during the process of regulation through Supreme Court decisions, the Court acknowledges the discretion the schools have.³⁸⁰ In this discretion is privacy.

373. See *supra* notes 322–323, 331–332 and accompanying text.

374. See *supra* notes 332–349 and accompanying text.

375. See *supra* Part I.B.

376. See *supra* notes 122–123 and accompanying text.

377. See *supra* notes 102–104 and accompanying text.

378. State legislatures regulate much of the workings of the public schools from their hours to their curriculum. See *supra* note 39 and accompanying text. Congress has passed comprehensive education laws governing student testing, achievement, and the education of students with disabilities. For example, the Every Student Succeeds Act requires that states accepting federal money for assistance educating disadvantaged students comply with certain evidenced-based curricular requirements as well as review requirements. 20 U.S.C. § 6303 (2012). Similarly, the Individuals with Disabilities Education Act requires states accepting federal assistance for the education of students with disabilities to comply with a detailed scheme with annual written planning for the needs of each child with a disability as well as with specific comprehensive evaluation and disciplinary protections. 20 U.S.C. § 1411, 1414 (2012).

379. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

380. For example, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, the Supreme Court said, “[t]he Court has long recognized that local school boards have broad discretion in the management of school affairs” but also went on to say, “[a]t the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives

Just as the notion that families have some degree of privacy does not negate their regulation and thus public nature, the regulation of schools does not negate their concomitant lack of regulation and entity privacy.³⁸¹

Another critique of the argument that the public schools are private is that individual privacy and family entity privacy is identified explicitly in doctrine, but no doctrine has yet explicitly called the public schools “private.”³⁸² This critique, however, elevates form over function. That courts do not specifically call the public schools private does not mean that they are not imbued with the features of privacy. No doctrine calls families public, but they nonetheless are highly regulated.³⁸³ Similarly, where the public schools have discretion and are unregulated, they have privacy.

A third possible critique is that although schools may do some of the kinds of caretaking that families do, families ultimately bear the most responsibility for the care of children.³⁸⁴ So, any caretaking that schools do constitutes too little of the overall proportion of caretaking to make them private. While it is true that families do more caretaking than schools, schools still do caretaking. They therefore are still doing work traditionally deemed to be within the private realm of the family.³⁸⁵

2. *The Problems with Public Schools’ Privacy*

As is the case with family entity privacy, public school entity privacy is problematic. First, because schools are state entities, the limits to public school liability mean that the state entity, as compared to the non-state entity, has more privacy with respect to decisions affecting harms to children. Families will more easily face intrusion into or regulation of their decision-making that affects whether children are harmed than will the public schools.³⁸⁶ Family entity privacy has been broken down, then, in a way that public school entity privacy has not. Public school entity privacy thus inverts perceived norms about the relative privacy of the family as compared to the state.³⁸⁷

of the First Amendment.” 457 U.S. 853, 863–64 (1982). As a result, the Court invalidated the decision of the school board in question to ban certain books from its libraries. *Id.* at 875.

381. As Frances Olsen noted, though focusing primarily on that deemed private, “all private action can be made to look public and vice versa.” Olsen, *supra* note 10, at 322.

382. Entity privacy, however, is not called “entity” privacy by the Court. It is just “privacy.” *E.g.*, *supra* notes 329–330 and accompanying text. And, while the Supreme Court has identified caretaking roles for the public schools of the sort traditionally deemed domestic and private, it has never called those roles of the schools private. *See supra* notes 321–322, 330–331 and accompanying text; *supra* Section III.B.

383. *See supra* notes 345–353 and accompanying text.

384. *See infra* note 405 and accompanying text.

385. *See supra* notes 322–323, 331–332 and accompanying text.

386. *See supra* notes 303–336 and accompanying text.

387. *See supra* notes 15–19 and accompanying text.

Second, public schools' privacy subordinates the individual rights of children to the privacy of the entity—the public schools. It reinforces the principle that the public schools need discretion, or to be unregulated and private, with respect to the decisions of the school about pedagogy or the proper ways to respond to harms to children over the children themselves. Moreover, it does so at times to such a degree that it undermines schools' own roles and responsibilities. For example, when children are so harmed in school that they miss significant amounts of school or drop out entirely, but schools have made only half-hearted attempts to address or prevent the harm, public schools' entity privacy shields them from responsibility for not fulfilling their educational and caretaking roles.³⁸⁸ Public schools' entity privacy not only protects their private caretaking decisions, as noted earlier, but it also allows schools to abandon them entirely with little or no liability.³⁸⁹

IV. PIERCING PUBLIC SCHOOLS' PRIVACY

Public schools can, therefore, evade responsibility for harms to children in a variety of ways depending on the claim and even when such evasion undermines their very roles and responsibilities.³⁹⁰ That raises a question about whether some alternative claim could be developed and recognized by courts that would work better to protect students. The recognition of schools' privacy, particularly their caretaking functions, offers a way to develop such a claim. It provides a theoretical basis for the development under the Fourteenth Amendment of an affirmative duty of schools to protect children from harm and children's right to be free from it. Thus, it provides a justification for imposing responsibility on public schools for harms to children in their care and rebalances the relationship between the privacy of schools and the rights of children, such that those rights are not subordinate. Just as recognizing the false construct of family privacy created an avenue for ending the subordination of the individual rights of women and children to be free from family violence, so too can recognition of the false construct of the public schools as fully public pave the way for recognizing children's rights in schools.

388. *E.g.*, *Morrow v. Balaski*, 719 F.3d 160 (3d Cir. 2013) (noting the Morrow sisters withdrew from public school and transferred to a private school as a result of the abuse they suffered); *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty.*, 610 F.3d 588 (11th Cir. 2010) (explaining T.W. dropped out of school as a result of his abuse).

389. *See supra* Part III.B.1.

390. *See supra* Part III.

A. *Dismantling the Public/Private Divide to Give Schools a Duty to Protect and Children a Right to Be Free from Harm*

Courts have long rejected the argument that the public schools have a duty to protect children under the Fourteenth Amendment, although not always without reservation.³⁹¹ The argument in support of the duty has been grounded in an analogy between mandatory school attendance laws and state confinement of adults in prisons and mental health facilities, where a state duty to protect has been recognized because of the special relationship between the state and the confined individuals.³⁹² Although these arguments have not found success in the school context, recognition of the relevance of public schools' caretaking roles in the Fourteenth Amendment context offers a new way to approach the claim and supports both a duty on the part of schools to protect students and their corollary right to it.³⁹³

In the school context, courts have rested their consistent refusal to find that schools have a Fourteenth Amendment duty to protect students on their readings of the Supreme Court's decisions in *Estelle v. Gamble*³⁹⁴ and *Youngberg v. Romeo*,³⁹⁵ where the Court found an affirmative state duty to protect prisoners and involuntarily institutionalized persons, and *Deshaney v. Winnebago County Department of Social Services*,³⁹⁶ where the Court found no duty on the part of the state to protect an individual from acts of private citizens.³⁹⁷ In the former cases, the Supreme Court found the state had a special relationship with the individuals giving rise to a duty to protect them because

391. For example, in *T.K. v. New York City Department of Education*, the federal district court in New York considered the duty to protect argument in the bullying context. 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011). Despite federal court decisions finding no such duty, it nonetheless said,

It is uncertain whether under the Due Process Clause, a public school has the duty to protect an elementary school student from bullying where truancy laws are in effect. This question need not be answered now since students have a right to be secure in school and schools have a duty to prevent students from harassment under IDEA and Title IX.

Id.

392. *See supra* note 274 and accompanying text.

393. At least seven federal courts of appeals have come to this conclusion. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011) (concluding that a school had no duty to protect a student with developmental disabilities from sexual encounters with another student in a bathroom, the Court noted "[a]t least seven circuits have held that compulsory school attendance alone is insufficient to invoke the special-relationship" doctrine giving rise to a duty to protect). The courts specify whether the duty to protect is a duty against harms from third parties or school staff to varying degrees. Sometimes it is both, as in *Graham v. Independent School District No. 1-89*, where the allegation included that the school had a duty to protect under the Fourteenth Amendment against actions of school staff and third parties. 22 F.3d 991, 993 (10th Cir. 1994).

394. 429 U.S. 97 (1976).

395. 457 U.S. 307 (1982).

396. 489 U.S. 189 (1989).

397. *Id.* at 195.

the state had restrained the liberty of the prisoners and institutionalized persons.³⁹⁸ In *DeShaney*, the court found no liberty restraint and, therefore, no state duty to protect the individual—in that case, a child.³⁹⁹ Cases applying these decisions in the school context have found that schools lack custody of students—that is, they have not restrained them—and therefore have no special relationship with the students giving rise to a duty to protect them.⁴⁰⁰

The case of *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical School*⁴⁰¹ is representative of these decisions.⁴⁰² In that case, female students brought an action against their school and the Penn Ridge, Pennsylvania School District alleging a Fourteenth Amendment violation because fellow students in a graphic arts class had repeatedly sexually, physically, and verbally assaulted them over a period of several months.⁴⁰³ In denying their claims, the Third Circuit found the school did not have a special relationship with the children, and therefore no duty existed under the Fourteenth Amendment to protect them from the harms they suffered.⁴⁰⁴ It outlined the meaning of special relationship as one of physical restraint or custody.⁴⁰⁵ It went even further and said that the “state’s duty to prisoners and involuntarily committed patients exists because of the full time severe and continuous state restriction of liberty in both environments.”⁴⁰⁶ While mandatory attendance laws require children to attend schools, the court reasoned that they can at-

398. See *supra* notes 274, 277.

399. *DeShaney*, 489 U.S. at 200–01. *DeShaney* involved the case of a young boy who was severely beaten by his father while in his custody, and the state, though aware of a history of abuse by the father, did not protect him from that abuse. *Id.* at 191–93. In deciding the state had no Fourteenth Amendment duty to protect the child, the Supreme Court said:

[I]t is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 200.

400. See *supra* note 393 and accompanying text.

401. 972 F.2d 1364 (3d Cir. 1992).

402. *Id.* The dissent in *Middle Bucks* strongly denounced the majority’s conclusion regarding the Fourteenth Amendment duty to protect and its rationale, stating:

The majority’s restrictive view of the “special relationship” . . . is particularly troubling, not only because it is based on the erroneous premise that its decision is compelled by precedent but also because it is so sweeping that it is unlikely that any state-imposed restraint of personal liberty short of incarceration or involuntary commitment will trigger the duty to protect.

Id. at 1383 (Sloviter, J., dissenting) (quoting *id.* at 1367 (majority opinion)).

403. *Id.* at 1366.

404. *Id.* at 1372.

405. *Id.* at 1370–71.

406. *Id.* at 1371.

tend other schools, such as private schools, and so there is no physical custody—full time or otherwise.⁴⁰⁷ Thus, the public schools have not sufficiently restrained, or taken custody of, children to give rise to a duty to protect them.

However, *Middle Bucks* and similarly decided cases fail for at least two reasons. First, their conception of state restraint, or custody, belies the reality and nuance of schools' relationships with students. Because of mandatory attendance laws, students in school fall somewhere in the middle of the spectrum on which *Estelle-Youngberg* and *DeShaney* exist.⁴⁰⁸ To be sure, they are not so fully restrained that they never leave the school setting, as is the case with prisoners and institutionalized persons. They also, though, are not fully able to forego school; the idea of school shopping is simply not a realistic option for the majority of students in public schools.⁴⁰⁹ As the dissent in *Middle Bucks* points out, the "compulsory nature of public school attendance is not lessened by the fact that a few fortunate students have the option to attend private school or be educated at home."⁴¹⁰

Second, and relatedly, these cases ignore the balancing test in the *Youngberg* decision and the relevance of schools' private, caretaking functions to that test.⁴¹¹ In deciding that the state owes a duty of care to involuntarily institutionalized persons, *Youngberg* declared that the state "may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety."⁴¹² In other words, the Court concluded, "that the nature of the restrictions on an individual's liberty bear some relation to the State's asserted purpose for restraining his liberty" and must be balanced against it.⁴¹³

In the school context, courts have not engaged with the idea that schools' authority must be balanced against obligations arising from the state's purpose for restraining them by requiring students to go to school.⁴¹⁴ In failing to do so, they have also failed to acknowledge schools' caretaking

407. *Id.*

408. *Table 5.1, supra* note 39; *see also Middle Bucks*, 972 F.2d at 1383 (Sloviter, J., dissenting) (stating "[t]here is no doubt that this case falls between *DeShaney* and *Estelle/Youngberg*").

409. The majority of students in public school come from low-income families, who cannot afford to send their children to private schools or to homeschool them. S. EDUC. FOUND., RESEARCH BULLETIN, A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION'S PUBLIC SCHOOLS 2 (2015), <http://www.southerneducation.org/getattachment/4ac62e27-5260-47a5-9d02-14896ec3a531/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx>.

410. *Middle Bucks*, 972 F.2d at 1380 (Sloviter, J., dissenting).

411. *See Note, A Right to Learn? Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1335–37 (2007) [hereinafter *Right to Learn?*].

412. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

413. *See Right to Learn?*, *supra* note 411, at 1337.

414. *See supra* Part I.B.

roles in the context of considering schools' duties to students under the Fourteenth Amendment.⁴¹⁵ The purpose of schools is to, among other things, educate students, teach them morals and behavioral norms, and guard their safety in certain ways.⁴¹⁶ If the public schools are not carrying out those tasks, then they have restrained students' liberty to no end and violated their Fourteenth Amendment rights.⁴¹⁷ When requiring students to attend school, therefore, the Fourteenth Amendment imposes at least a limited duty on schools to protect against such harms that undermine these purposes. Protecting children in this way is also caretaking work. So, when a school fails to protect students from harms that undermine their other caretaking work, such as teaching students behavioral norms or guarding their health, then they have violated the Fourteenth Amendment.⁴¹⁸

The right of children to be free from harm should be a corollary to a schools' duty to protect children. If schools have a duty to protect children from harms that undermine the purposes of school, then children should have a right to be free from those harms in school as well. They have the right to at least the most elemental form of protection: freedom from harm.

The development of this duty and this right can be critiqued in at least two ways. First, it can be argued that the state's role in requiring students to attend school does not change the legal relationship between the school and the students into a formal custodial relationship. While legal custody does remain with the parent when children are in school, this critique ignores that some form of physical custody—a limited form but one that nonetheless gives rise to some duties—occurs when the state requires students to go to school. Indeed, parents cannot assert full control over their children while they are in school, as evidenced by, for example, school policies that limit parents' ability to physically access their children in school.⁴¹⁹ When parents' access is limited, their control and custody is changed in a very real,

415. Although, the Supreme Court has recognized these purposes in the context of affording schools deference to suppress students' rights under the First and Fourth Amendments. *See supra* Part I.B.

416. *See supra* Part I.B.

417. An analogous argument has been made in the context of students' right to an education more generally. *See Right to Learn?*, *supra* note 411, at 1337. There, the argument was "if a state restricts an individual's liberty for the express purpose of educating that individual and then fails to educate her, then the nature of the restraint bears no reasonable relation to the purpose of the restraint, and due process is violated." *Id.* Here, the argument is that schools' duty to protect is triggered not by a substantively inadequate education but by the schools' failure to protect from harms suffered in school that substantially harm or totally deprive children of the benefits of school. These benefits include the caretaking work schools do in teaching students morals, instilling behavioral norms, and guarding their health and safety. When schools fail to protect children in those ways, then they have restrained their liberty without much, or any, purpose.

418. *See supra* Part I.B.

419. For example, in California, parental visits to school must be coordinated through the school principal. CAL. SCH. BDS. ASS'N, CSBA SAMPLE BOARD POLICY: VISITORS/OUTSIDERS (2012),

practical way. Those changes, therefore, create obligations on the part of the school to pick up the mantle of those limitations on custody.

Second, establishing both a duty to protect on the part of public schools and the right of children to be free from harm in school may seem superfluous. Establishing the duty to protect alone might seem sufficient to give children an avenue for holding schools responsible on an institutional level when harms occur in schools. However, if schools have a duty to protect children, but children have no right to be free from harm, then the focus of any analysis of harm to children in school will fail to focus on the children. In the current analysis of any claim a child might bring against the school, the rights of children are subordinate.⁴²⁰ Recognizing children's rights more fully effects the rebalancing between school entity privacy and children's rights than simply recognizing a duty of schools to protect children on its own would do.

B. A Framework for Analyzing the Duty and the Right

Arguing for courts to recognize a Fourteenth Amendment duty on the part of public schools to protect children from harm and children's right to be free of it is one thing. Applying it is another matter. The application requires a framework for analysis. That framework must start with the question of what the duty entails and the degrees of harm from which children have a right to be free. Distinguishing the parental duty to protect their children from the "duty to protect" students during school is imperative.⁴²¹ As noted earlier, students in school fall into a relationship with the state that is between that of children in the care of their parents and that of the inmates and institutionalized persons in *Estelle/Youngberg*.⁴²² As such, the schools'

<http://www.csba.org/GovernanceAndPolicyResources/ConditionsOfChildren/SafeSupportiveSchoolEnvironment/~media/CSBA/Files/GovernanceResources/EducationIssues/ConditionsofChildren/SafeAndSupportiveSchoolEnv/SchoolSafetySampleBoardPolicies/AR1250VisitorsOutsiders.ashx>. Similarly, in Texas, the Texas Education Agency states, "[t]here is no express right to visit a school." Tex. Educ. Agency, *General Inquiry-General Questions FAQ*, http://tea.texas.gov/About_TEA/Contact_Us/General_Inquiry/General_Inquiry_-_General_Questions_FAQ/#visit.

420. See *supra* Part IV.B.2.

421. The family's duty to protect its children has long been recognized. For example, in *State v. Williquette*, the Wisconsin Supreme Court explained this duty and its source. 385 N.W.2d 145 (Wis. 1986). In *Williquette*, a mother challenged charges of child abuse because she did not commit the abuse. *Id.* at 148. The Wisconsin Supreme Court concluded that persons who knowingly permit the abuse of their children can be charged with child abuse. *Id.* at 147. To support this conclusion, the court discussed the legal duty of parents to protect their children stating: "It is the right and duty of parents . . . to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation." *Id.* at 152 (quoting *Cole v. Sears Roebuck & Co.*, 177 N.W. 2d 866, 869 (Wis. 1970)).

422. *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1384 (3d Cir. 1992) (Sloviter, J., dissenting). Moreover, parental duty is fraught with complications, as it has been enforced more with respect to women of color and low-income women than others. Michele

duty to protect should be lesser than that of parents or the state when it completely restricts the liberty of prisoners and institutionalized persons. It should be a duty to protect students while they are in school. Of course, schools would have no obligation to protect students from, for example, harms attendant to playing in the backyards of their homes.

In addition, this duty to protect is not against any and every harm a child might suffer in school. As the Supreme Court has repeatedly acknowledged, the Fourteenth Amendment is not a “font of tort law.”⁴²³ Schools must protect students from significant harm, as opposed to lesser degrees of harm, to prevent turning the Fourteenth Amendment into a font of tort law. Significant harm means harm more than the kinds of unintentional harm generally attendant to school attendance. It means harm that deprives students of the purpose for attending school—the kind of harm that results from intentional or reckless acts, which cause more suffering than would result from the harms generally attendant to school attendance. So, the harms in the case of *T.W.*, for example, which included the exacerbation of disabilities and the development of new disabilities, would meet this standard.⁴²⁴ None of those harms are of the sort that would be expected due to school attendance. They developed from intentional acts on the part of T.W.’s teacher.⁴²⁵ By contrast, in *Domingo*, the teacher pinched the student’s cheeks. While doing so was intentional, that harm alone would not satisfy this standard if it only amounted to bruising, which is the sort of harm that occurs in school regularly.⁴²⁶

In order to trigger the duty or to violate the rights of children, students not only have to be in school, but schools also have to have knowledge the harm is happening. More specifically, to trigger the duty, they must have a reasonable cause to suspect the harm. It need not be direct knowledge. The kinds of reports of harassment in *Bostic v. Smyrna School District*, for example, would suffice.⁴²⁷ There, the principal knew that the teacher, Smith, and student, Bostic, were seen standing so close together in the school hallway that it gave rise to suspicions about their relationship.⁴²⁸ The principal also

Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 513–16 (2013). As such, it serves as neither an ideal model nor a standard by which to develop a school duty to protect students under the Fourteenth Amendment. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1483–91 (2012).

423. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 476–77 (5th Cir. 1994) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

424. *See supra* note 198 and accompanying text.

425. Not only were the harms imposed on T.W. intentional, they reflected a possible sadistic disorder. *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty.*, 610 F.3d 588, 597 (11th Cir. 2010).

426. *See supra* note 207 and accompanying text.

427. 418 F.3d 355, 357–58 (3d Cir. 2005).

428. *Id.*

knew that Smith's wife had found them alone together in her classroom, causing Smith's wife to question the nature of their relationship.⁴²⁹ Such knowledge gives rise to a reasonable cause to suspect harm might be happening to a child.

Finally, if schools act reasonably in response to notice of the harm, then they will have complied with the duty and will not have violated children's rights. A reasonable response would be one calculated to address the cause of the harm so that it will not continue. It need not be a perfect response. This standard recognizes, therefore, that not all significant harm to children can be prevented. So, if the school district in *Bostic* had removed the teacher from any contact with the child and reported her to police for further investigation of the harassment reports, but the harassment continued, the school would not be held liable.⁴³⁰ In that case, the public school would have taken the steps possible to end the harassment.

Recognizing a duty of public schools to protect students from harm and their right to be free from it will, even under the framework outlined here, likely result in schools facing more liability for harms to children in their care. This framework, however, seeks to allay at least some concerns attendant to such increases in liability by both using familiar touchstones such as severe harm and notice and giving them depth by defining their meaning in this context. Still, under this framework, schools will face more liability. It will be, though, to the worthwhile end of reducing children's vulnerability to harm in school and privileging their rights over school privacy.

In sum, the schools should have a duty to protect against harm, meaning significant harm, to children in school, and children have a right to be free from harm. For schools to be liable for breaching their duty and violating children's rights in this context, the school must have knowledge of the harm, or reasonable basis for suspecting the harm is happening. In addition, schools must take reasonable steps to end the harm.

V. CONCLUSION

Just as exposing family privacy as a false construct was necessary for the individual rights of women and children to gain protection within that institution, so too does the privacy of the public schools need to be recognized for children to be better protected from harm there. This Article has attempted to set forth ways in which the public schools enjoy privacy. Specifically, it has argued that because public schools' decisions regarding harm to children in school are largely unregulated, this lack of regulation makes

429. *Id.* at 358.

430. *See supra* notes 257–263 and accompanying text.

schools private.⁴³¹ They also are private in that they do caretaking, which is work traditionally deemed domestic, or private.⁴³² Finally, this Article contends that schools are more private than the family because families can more easily be held responsible than public schools for harm to children in their care.⁴³³ This privacy of the public schools not only exists, but it also privileges school authority over student rights—at times to the point of undermining the very purpose of school.⁴³⁴

Recognizing this privacy, particularly by understanding caretaking of children as an element of it, however, also supports a theoretical argument for a Fourteenth Amendment duty of public schools to protect children from harm, and students' corollary right to be free from harm in school.⁴³⁵ Establishing this duty and corollary right would accomplish multiple ends. It would shift the balance in the current evaluation of children's claims against schools for harms suffered.⁴³⁶ It would also prioritize the rights of children, so they are not subordinated to the privacy of the public schools.⁴³⁷

431. *See supra* Part III.B.1.

432. *See supra* Part III.B.1.

433. *See supra* Part III.B.2.

434. *See supra* Part III.B.2.

435. *See supra* Part IV.A.

436. *See supra* Part IV.A.

437. *See supra* Part IV.A.