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Opening the Snake Pit: Arming Teachers in the War against School Violence and the Government-Created Risk Doctrine

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Opening the “Snake Pit”: Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine

DANIELLE WEATHERBY

In the aftermath of the horrific school shooting at Sandy Hook Elementary School in Newtown, Connecticut, parents, students, and school administrators began to fear the unthinkable—that a violent, ruthless criminal could invade their school campuses and randomly target innocent youth. Even though statistics show that violent crime in elementary and secondary schools is on the decline, trepidation and anxiety on school campuses across the country is at an all-time high.

In response to this perceived threat, in 2013, lawmakers in over thirty states proposed bills that, if passed, would authorize school officials to carry weapons on their persons during the school day. Currently, at least eleven states have adopted this “armed-teachers” approach in fighting the war against school violence.

This Article explores the potential § 1983 liability that the armed-teachers approach could create. Historically, § 1983 shields public schools from liability for the injuries resulting from the unforeseeable, violent acts of third parties. But when schools themselves invite the risk onto campus, they become vulnerable, throwing schoolchildren into the “snake pit” of danger and exposing themselves to liability under the government-created risk doctrine. Walking the reader through the elements of a state-created danger claim brought by a plaintiff whose injury or death was proximately caused by the armed-teachers approach, this Article examines the inherent risk involved in bringing firearms into schools, especially when guarded by inadequately trained, or in some cases untrained, teachers.

Furthermore, where school districts adopt armed-teachers policies and fail to adequately train or supervise those teachers serving as quasi-security guards pursuant to their policy, they expose themselves to Monell liability. Most districts that have adopted this approach have done so for fiscal reasons, but because the cost of hiring security is lower than the cost of the risk of injury and resultant damages incurred by the school, the money-saving justification is foolhardy and, at best, illogical.

Finally, this Article cautions that schools must not lose sight of the appropriate role and function of our schoolteachers. With education reform and teacher effectiveness at the crux of a national debate, schools should be wary of muddying the role of our educators. Instead, schools should allow teachers to focus on educating and leave the patrol-work to the properly trained experts.

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Opening the “Snake Pit”: Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine

DANIELLE WEATHERBY*

I. INTRODUCTION

Noah Pozner, age six, “had a huge heart[,] . . . was . . . a little bit rambunctious, [had] lots of spirit, . . . [and] was really the light of the room.”¹ Grace McDonnell, age seven, had just celebrated her birthday by blowing out the candles on “a purple cake with a turquoise peace sign and polka dots.”² Grace “was all about peace and gentleness and kindness.”³ Chase Kowalski, age seven, loved baseball and the Cub Scouts and had just asked Santa Claus for his missing two front teeth for Christmas.⁴ Ben Wheeler, age seven, “loved The Beatles, lighthouses and the No. 7 train to Sunnyside, Queens.”⁵ He “was an irrepressibly bright and spirited boy whose love of fun and excitement at the wonders of life and the world could rarely be contained.”⁶

On December 14, 2012, Noah, Grace, Chase, and Ben, along with sixteen of their peers and six educators, lost their young lives when the unthinkable happened at Sandy Hook Elementary School in Newtown, Connecticut.⁷ Within the span of approximately six horrific minutes, a lone shooter, armed with semiautomatic pistols and an assault rifle, entered the school and turned an entire nation upside-down.⁸

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¹ *Remembering the Sandy Hook Elementary Victims*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-victims/> [<http://perma.cc/7WMA-58HM>] (last visited Aug. 12, 2015).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1.

⁸ *Id.*; George Colli, *Sandy Hook: The First 15 Minutes*, NBC CONN. (Aug. 26, 2013), <http://www.nbcconnecticut.com/troubleshooters/Sandy-Hook-The-First-15-Minutes-221260161.html> [<http://perma.cc/FHP2-KXS7>].

The 2012 Sandy Hook massacre is the latest in a litany of horrifying school shootings,⁹ including Columbine¹⁰ and the Virginia Tech¹¹ tragedies. Recently, it seems that law enforcement officials are intervening on a weekly, and sometimes even a daily, basis, preventing perpetrators from inflicting violence on school campuses.¹²

⁹ On October 1, 1997, sixteen-year-old Luke Woodham killed two students and wounded seven in Pearl, Mississippi. *Timeline of Worldwide School and Mass Shootings: Gun-Related Tragedies in the U.S. and Around the World*, INFOPLEASE, <http://www.infoplease.com/ipa/A0777958.html#ixzz2vJeylayE> [<http://perma.cc/X4XM-4XUD>]. On December 15, 1997, fourteen-year-old Colt Todd wounded two students when he shot at students in the parking lot in Stamps, Arkansas. *Id.* On March 24, 1998, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden killed four students and one teacher and injured ten others outside Westside Middle School in Jonesboro, Arkansas. *Id.* On May 21, 1998, fifteen-year-old Kip Kinkel killed two students and wounded twenty-two others in the cafeteria of his Springfield, Oregon high school. *Id.* On February 29, 2000, a six-year-old shot young classmate Kayla Rolland dead with a .32-caliber handgun at Buell Elementary School near Flint, Michigan. *Id.* On March 21, 2005, sixteen-year-old Jeff Weise killed a teacher, security guard, five students, and finally himself at his Red Lake, Minnesota middle school. *Id.* On September 27, 2006, six students were held hostage at the Platte Canyon High School in Bailey, Colorado before one of the students was killed by the perpetrator. *Id.* On October 3, 2006, thirty-two-year-old Carl Charles Roberts IV killed five girls and himself and injured five other girls at West Nickel Mines Amish School in Nickel Mines, Pennsylvania. *Id.* On February 14, 2008, former Northern Illinois graduate student Stephen Kazmierczak shot and killed five students and wounded seventeen more in a classroom on the Northern Illinois University campus. *Id.* On January 5, 2011, two people were killed and two injured during a shooting at Millard South High School in Omaha, Nebraska. *Id.* On February 27, 2012, a former student killed three students and injured six at Chardon High School in Chardon, Ohio. *Id.*

¹⁰ On April 20, 1999, in the small town of Littleton, Colorado, two high school seniors, Dylan Klebold and Eric Harris, entered Columbine High School with guns, bombs, and knives during the middle of the day and brutally murdered twelve students and a teacher. *Columbine High School Shootings*, HISTORY, <http://www.history.com/topics/columbine-high-school-shootings> [<http://perma.cc/KY7R-A63F>] (last visited Sept. 12, 2015).

¹¹ On April 16, 2007, Seung-Hui Cho, a senior at Virginia Polytechnic Institute in Blacksburg, Virginia, shot and killed thirty-two people on the campus before taking his own life. *Virginia Tech Shootings Fast Facts*, CNN, <http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/> [<http://perma.cc/ZE68-R7FB>] (last updated Apr. 13, 2015).

¹² See, e.g., *Documents: Concerned Citizen Halted Teen's Plan to Attack School*, DODGE CITY DAILY GLOBE (May 3, 2014), <http://www.dodgeglobe.com/article/20140503/News/140509748> [<http://perma.cc/BL53-C3FA>] (summarizing events that led to law enforcement officers' arresting a seventeen-year-old Minnesota boy who outlined in a 180-page journal his plans to kill his family, set a fire to divert first responders, and then go to his school with bombs and guns and "kill as many students as he could"); Chuck Hickey & Kent Erdahl, *3 Weld Central High School Students Arrested After Alleged Threat*, FOX31 (May 13, 2014), <http://kdvr.com/2014/05/13/two-weld-central-high-school-students-arrested-after-alleged-threat/> [<http://perma.cc/8GAL-XMBK>] (discussing the arrest of three high school students after an alleged threat was made at Weld Central High School in Keenesburg, Colorado); Michelle McConnaha, *Hamilton High Student Charged with Graduation Shooting Threat*, MISSOULIAN (June 4, 2014), http://missoulian.com/news/local/hamilton-high-student-charged-with-graduation-shooting-threat/article_dfe0ca84-eb79-11e3-808a-001a4bcf887a.html [<http://perma.cc/FF2H-N9PN>] (describing facts that led to the arrest of eighteen-year-old Adam Michael Chambers for plotting to shoot students with an assault rifle at graduation); Gamaliel Ortiz, *Arrests Made in Gun-Related Threats Against Whitney, Rocklin High Schools*, KCRA.COM (May 30, 2014), <http://www.kcra.com/news/local-news/news-sacramento/arrests-made-in-gunrelated-threats-against-whitney-rocklin-high-schools/26244398#!UY4Jc> [<http://perma.cc/L7N8-VQST>] (detailing events that

With children as targets and school campuses seemingly vulnerable to attack, parents, teachers, and administrators face difficult, perhaps unanswerable, questions. At what point did school campuses become battlegrounds, where schoolchildren go to learn in an environment permeated with fear and terror? Do schools have a legal duty to protect students from the random, unforeseeable violent acts of third parties? What measures should schools take to anticipate and prevent these unthinkable acts? Should teachers and school administrators actively participate in schools' efforts to guard and protect the children in their custody by carrying weapons on their persons during the school day? Are teachers the appropriate individuals to assume the role of security guards, and are they adequately trained to use a weapon effectively during a fast-paced, traumatic, live-shooter event?

Schools have responded to these questions by implementing a variety of measures to improve school safety. Safety measures on K-12 campuses include the use of metal detectors, the presence of security guards, rules and regulations regarding student conduct and dress, profiling of potentially violent students, anti-bullying instructional programs, and counseling and mediation.¹³

Despite the use of these broad measures, the National Rifle Association and conservative-minded lawmakers insist that representatives of every school in the country should be armed with guns in anticipation of an attack.¹⁴ Consistent with this line of thinking, several states have adopted a radical approach to protecting students from the unforeseeable, violent crimes of third parties by arming teachers and school administrators with handguns during the school day.¹⁵

led to arrest of an eighteen-year old and two minors on suspicion of gun-related violence targeted at two high schools in Sacramento, California).

¹³ See SIMONE ROBERS ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2012, at 168 (2013) (detailing various safety measures used by schools from 1999–2010).

¹⁴ See Thomas Christoph Keller, Comment, *ABC's and AR-15's: Arming Arkansas's Teachers*, 67 ARK. L. REV. 687, 687 (2014) (quoting the infamous proclamation made by NRA CEO Wayne LaPierre in the wake of the Sandy Hook massacre that "[t]he only thing that stops a bad guy with a gun is a good guy with a gun").

¹⁵ See, e.g., ALA. CODE § 45-30-103 (Westlaw through 2015 amendments); ARK. CODE ANN. § 17-40-102 (West, Westlaw through 2015 Reg. Sess.); KAN. STAT. ANN. § 75-7c10 (West, Westlaw through 2015 legislation); S.D. CODIFIED LAWS § 13-64-1 (Westlaw through 2015 Reg. Sess.); TENN. CODE ANN. § 49-6-815 (West, Westlaw through 2015 1st Reg. Sess.); TEX. EDUC. CODE ANN. § 37.0811 (West, Westlaw through Ch. 46 of 2015 Reg. Sess.); S.B. 164, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (enacted). In addition, some institutions of higher learning are allowing students to bring firearms to campus. E.g., Ian Millhiser, *Five Pennsylvania State Schools Now Allowing Students to Bring Guns on Campus*, THINKPROGRESS (May 14, 2013, 5:50 PM), <http://thinkprogress.org/justice/2013/05/14/2011711/five-pennsylvania-state-schools-now-allowing-students-to-bring-guns-on-campus/> [<http://perma.cc/JY4R-4SFH>] (reporting that in Pennsylvania, five state colleges and universities have authorized students to carry guns on campus).

To date, no school utilizing this strategy has faced a live-shooter situation. However, research and anecdotal evidence suggest that equipping teachers and school administrators with guns increases the risk of harm to students; studies testing the efficacy of police training to prepare officers for live-shooter situations demonstrate that even the best training produces high rates of misfiring and bystander injuries.¹⁶ In light of this evidence, it is readily apparent that teachers would be much less effective than police officers in wielding guns during a live-shooter situation. A recent training exercise in Arkansas during which a pro-gun senator accidentally shot an actor posing as a teacher with a rubber bullet illustrates that arming the untrained actually increases the likelihood of harm during a live-shooter event.¹⁷

This Article posits that while arming teachers may appear to be cost effective and gives the perception of greater safety, it actually creates a greater risk of foreseeable harm to students and exposes schools to legal liability. Generally, schools owe no legal duty to protect students from violence caused by third parties.¹⁸ However, this strict no-duty rule has exceptions. Arming teachers constitutes a government-created danger and pierces the no-duty rule. While schools, as government entities, and teachers acting within the scope of their official duties are shielded from liability based on common-law negligence, they can be held legally liable for civil rights violations.¹⁹ The “armed teachers” model generates a government-created risk, exposing schools to liability under 42 U.S.C. § 1983 and ultimately frustrating its essential purpose: protecting children and limiting school district liability.

This Article proceeds in four parts. Part II summarizes school districts’ varying responses to the rising threats of violence in the elementary and secondary school setting. Part III first presents an overview of the current legal landscape governing school district liability, cautioning districts that courts have limited schools’ immunity to those situations in which the risk involved was unforeseeable and outside the school’s direct control. It then introduces two exceptions to the general no-duty rule: (1) where injury is

¹⁶ See *infra* notes 130–34 and accompanying text.

¹⁷ Beth Stebner, *Arkansas State Senator Fires Back at Claims He Accidentally Shot Teacher in Simulated School Shooting Exercise*, N.Y. DAILY NEWS (Aug. 29, 2013, 2:57 PM), <http://www.nydailynews.com/news/politics/state-sen-fires-back-claims-shot-teacher-simulated-shooting-article-1.1440705>; Igor Volsky, *Oops: Senator Who Advocates Arming Teachers Accidentally Shoots Teacher with Rubber Bullet*, THINKPROGRESS (Aug. 29, 2013, 12:14 PM), <http://thinkprogress.org/justice/2013/08/29/2550001/oops-senator-advocates-arming-teacher-accidentally-shoots-teacher-rubber-bullet> [<http://perma.cc/8G6V-4PKG>].

¹⁸ See, e.g., *Morrow v. Balaski*, 719 F.3d 160, 167, 170 (3d Cir. 2013) (explaining that public schools have a constitutional duty to protect students from harm caused by third parties only if there is a “special relationship” between the school and the student and citing case law from other circuits holding that there is generally no such relationship).

¹⁹ 42 U.S.C. § 1983 (2012).

caused by a government-created danger, and (2) where a municipality failed to adequately train its employees after implementing a policy that clearly necessitates proper training. Part IV analyzes the potential for teacher liability when a gun-related injury or death is proximately caused by the armed-teachers approach. It concludes that armed-teacher victims, under the government-created risk doctrine, will be able to proceed at least beyond the motion-to-dismiss stage, exposing teachers to § 1983 liability. Part V then analyzes a school district's potential *Monell* liability, predicated upon the district's adoption of an armed-teachers policy without providing adequate training to its employees.

In conclusion, this Article suggests a roadmap for combating school violence and cautions schools to be wary of muddying the role of our schoolteachers. With education reform and teacher effectiveness at the crux of a national debate, this Article advises schools to allow teachers to focus on educating, and leave the patrol-work to the properly-trained experts.

II. SCHOOL DISTRICTS' RESPONSES TO THREATS OF VIOLENCE ON CAMPUS

In the wake of the last few decades, during which horrific tragedies like Columbine, Virginia Tech, and Sandy Hook became a real peril to schoolchildren across the country, parents of primary and secondary schoolchildren began to perceive,²⁰ justifiably or not,²¹ a heightened threat

²⁰ See, e.g., EDWARD GAUGHAN ET AL., *LETHAL VIOLENCE IN SCHOOLS: A NATIONAL STUDY 2* (2001), http://www.alfred.edu/teenviolence/docs/lethal_violence_in_schools.pdf [<http://perma.cc/4R3R-463C>] (indicating that more than 75% of secondary schoolchildren believe that a school shooting could occur in their community); Lydia Saad, *Parents' Fear for Children's Safety at School Rises Slightly*, GALLUP (Dec. 28, 2012), <http://www.gallup.com/poll/159584/parents-fear-children-safety-school-rises-slightly.aspx> (indicating that more than 50% of parents of primary and secondary schoolchildren believe that a school shooting is "very or somewhat likely" to occur in their community); *School Violence, Gun-Related Injuries in Top 10 Child Health Concerns in U.S.*, 22 C.S. MOTT CHILD. HOSP. NAT'L POLL ON CHILD. HEALTH I (2014), http://mottnpch.org/sites/default/files/documents/081114_top10.pdf [<http://perma.cc/GG9K-A3AM>] (finding that school violence and gun-related injuries were fifth and ninth, respectively, in the national top ten child health concerns list).

²¹ See DIANNA A. DRYSDALE ET AL., *CAMPUS ATTACKS: TARGETED VIOLENCE AFFECTING INSTITUTIONS OF HIGHER EDUCATION 11* (2010), <http://www2.ed.gov/admins/lead/safety/campus-attacks.pdf> [<http://perma.cc/3RJB-37RQ>] (analyzing the circumstances and potential reasons for the increase in violence over the last two decades on college campuses and noting that the spike could be caused by increased enrollment, media coverage, and digital reporting). *But see* NAT'L CTR. FOR EDUC. STATISTICS & BUREAU OF JUSTICE STATISTICS, *INDICATORS OF SCHOOL CRIME AND SAFETY 2001*, at iii (2001), <http://nces.ed.gov/pubs2002/2002113a.pdf> [<http://perma.cc/Q9H6-VGFU>] (indicating a decrease in violent crime in schools); Todd A. DeMitchell, *Locked Down and Armed: Security Responses to Violence in Our Schools*, 13 CONN. PUB. INT. L.J. 275, 278 (2014) ("[S]chool-associated violent deaths are rare and declining.").

of violence on campus.²² In response to this perceived threat, lawmakers, school administrators, and parent advocacy groups have implemented various approaches to minimize the risk.

Aimed at preventing the most extreme forms of violence, among the most commonplace safety measures used in schools today are weapons deterrence²³ and the use of campus security and police officers.²⁴ In the 2009–2010 school year, 84% of high schools, 73% of middle schools, and 51% of primary schools reported that they used security cameras to monitor their schools.²⁵ In addition, schools commonly use metal detectors and conduct searches on student lockers and bags, especially in large urban middle and high schools.²⁶

School districts and local law enforcement are increasingly teaming up to ensure that more campuses have a security-guard presence. According to the National Center on Education Statistics, 43% of schools reported the presence of one or more security guards, security personnel, School Resource Officers (SROs), or sworn law enforcement officers at their schools at least once a week during the school year.²⁷ Of that 43%, 12% of primary schools, 25% of all combined K-12 schools, 51% of middle schools, and 63% of high schools reported that their security officers routinely carried a firearm at school.²⁸

President Barack Obama has allotted millions of dollars nationwide to fund more SROs in schools that opt to utilize them.²⁹ This executive

²² *School Violence, Gun-Related Injuries Among Top 10 Child Health Concerns in U.S.*, *supra* note 20.

²³ In 1990, Congress passed the Gun-Free School Zones Act, which made it unlawful for “any individual knowingly to possess a firearm” in a school zone. 18 U.S.C. § 922(q)(1)(A) (1998 ed., Supp. V.). After facing a constitutional challenge in the U.S. Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), where the Court held that the law exceeded Congress’ authority under the Commerce Clause, *id.* at 551, the law was amended to forbid the possession in a school zone of a firearm that “has moved in or that otherwise affects” interstate commerce. 18 U.S.C. § 922(q)(2)(A) (2012). The law does not appear to prohibit school districts from allowing teachers or other school officials to carry or discharge firearms on campus pursuant to a district-sanctioned security program. At the state level, “almost all states and D.C. prohibit guns in K-12 schools, but only 39 states and D.C. apply this prohibition to people who have been granted a permit to carry a concealed weapon.” *Guns in Schools Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Nov. 1, 2013), http://smartgunlaws.org/guns-in-schools-policy-summary/#footnote_29_5686 [<http://perma.cc/5CUF-6L5R>].

²⁴ ROBERS ET AL., *supra* note 13, at 86–88 (noting that 43% of K-12 and 28% of primary schools reported the presence of one or more security staff at their school at least once a week in 2009–2010).

²⁵ *Id.* at 84.

²⁶ *Id.* at 86.

²⁷ *Id.*

²⁸ *Id.* at 88.

²⁹ See Evan Perez & Bryan Koenig, *Obama Admin Funding Cops in Schools*, CNN (Sept. 27, 2013, 4:31 PM), <http://politicalticker.blogs.cnn.com/2013/09/27/obama-admin-borrows-a-page-from-the-nra-funding-cops-in-schools/> [<http://perma.cc/5RXL-LH7V>] (explaining that the Community Oriented Policing Services grants, about \$125 million over a three-year period and announced annually by the Justice Department, will be given priority to place armed police officers in schools); *see also*

support follows the trend initiated by former President Bill Clinton in 1999 when he introduced the Safe Schools/Healthy Students Initiative and provided federal funding to over fifty communities for anti-violence programming.³⁰ In 2000, former President Clinton bolstered the use of campus officers by providing more than \$60 million to support 452 officers nationwide as part of the Justice Department’s COPS in Schools program.³¹

With a rising number of schools utilizing SROs on campus, skeptics and critics on both sides of the “guns-in-school” debate are passionately voicing their concerns. Advocates of placing armed representatives on K-12 campuses urge either for a larger presence or a more aggressive role, outraged that shootings are still occurring at schools, while opponents argue that the presence of SROs is unnecessary, ineffective, or overly burdensome and expensive.³² In fact, opponents point to the fact that Columbine high school employed an armed security officer on April 20, 1999.³³ Although community resource officer Neil Gardner engaged in a shootout with perpetrator Eric Harris, the exchange of gunfire did not deter Harris from entering the school building and continuing on with his killing spree.³⁴

Wherever one’s position lies with respect to the use of security measures in K-12 schools, most can agree that armed security officers, if used, should be properly trained and well-prepared to respond to another Columbine- or Sandy Hook-like event. Several organizations have created training programs for school security, including programs designed to simulate a live-shooter situation.³⁵ Still, in an effort to cut costs, many

DeMitchell, *supra* note 21, at 283 (summarizing the executive response to the shooting at Sandy Hook Elementary School).

³⁰ Press Release, U.S. Dep’t of Justice, Clinton Administration Launches \$300 Million Program for Safe Schools (Apr. 1, 1999), <http://www.justice.gov/archive/opa/pr/1999/April/114ag.htm> [<http://perma.cc/9P78-4MJM>].

³¹ Lawrence L. Knutson, *Clinton Pledges Funds to Add Police to Schools*, L.A. TIMES (Apr. 16, 2000), <http://articles.latimes.com/2000/apr/16/news/mn-20323> [<http://perma.cc/XNB3-7WRP>].

³² Compare William J. Bennett, *The Case for Gun Rights Is Stronger than You Think*, CNN (Dec. 19, 2012, 3:54 PM), <http://www.cnn.com/2012/12/19/opinion/bennett-gun-rights> [<http://perma.cc/HUC9-8L7P>] (arguing that firearms are the best defense against an armed attacker), with LZ Granderson, *Teachers with Guns Is a Crazy Idea*, CNN (Dec. 19, 2012, 3:57 PM), <http://www.cnn.com/2012/12/19/opinion/granderson-guns-in-schools/index.html?iref=allsearch> [<http://perma.cc/XNQ6-FE4K>] (“[W]hen it comes to our schools, we don’t need guns at all.”), and *School Resource Officers Are a Waste of Resources, Says New Report*, JUSTICE POL’Y INST. (Nov. 15, 2011), <http://www.justicepolicy.org/news/3178> [<http://perma.cc/H2FN-DT9X>] (“[H]aving school resource officers . . . and other police in schools causes more harm than good.”).

³³ Amanda Terkel, *Columbine High School Had Armed Guard During Massacre in 1999*, HUFFINGTON POST (Dec. 21, 2012), http://www.huffingtonpost.com/2012/12/21/columbine-armed-guard_n_2347096.html [<http://perma.cc/MCY7-H65E>].

³⁴ *Id.*

³⁵ See, e.g., TACTICAL DEFENSE INST., http://tdiohio.com/home_page/ [<http://perma.cc/BB57-2VZ9>] (last visited Sept. 19, 2015). The Tactical Defense Institute, a West Union, Ohio organization

states have passed legislation or are interpreting existing legislation to allow teachers and administrators to carry guns on campus during the school day.³⁶ In 2013, more than thirty state legislatures introduced bills that would permit school officials to carry guns on public or private school campuses.³⁷

Among others, states like Arkansas,³⁸ Kansas,³⁹ Colorado,⁴⁰ South Dakota,⁴¹ Tennessee,⁴² Texas,⁴³ and Utah⁴⁴ authorize schools to allow teachers and other personnel to carry firearms on campus during the school day. Notably, these laws indicate a vast disparity regarding the amount of required training for teachers participating in armed-teachers programs. For example, Kansas law leaves it up to a governing school body, such as a school board, to prescribe any training requirements, while the Tennessee law requires all teachers participating in such a program to complete a forty-hour training program.⁴⁵ The Georgia “guns-everywhere” law allows boards of education to adopt an armed-teachers policy, but it does not set forth a minimum number of training hours for participating teachers and school staff.⁴⁶ Utah is one of the only states that authorizes individuals who hold concealed carry permits to carry licensed, concealed weapons onto public school campuses without exception.⁴⁷ Utah teachers do not have any

training civilians and law enforcement and military personnel, offers the recently created “Armed Teacher Training Program,” a three-day program that trains civilians and officers on how to respond to school shootings. *Armed Teacher Training Program*, TACTICAL DEFENSE INST., <http://tdiohio.com/active-killer-shooter-leciv/> [<http://perma.cc/948B-T3W6>] (last visited Sept. 19, 2015); *see also* Joshua Jamerson, *Teachers Pack Heat at Gun School*, COLUMBUS DISPATCH (Mar. 28, 2013), <http://www.dispatch.com/content/stories/local/2013/03/27/Teachers-learn-to-shoot-in-the-classroom.html> [<http://perma.cc/YX27-LE6N>] (describing the above-mentioned program).

³⁶ *See, e.g.*, Keller, *supra* note 14, at 688–89 (recounting the efforts of some school districts in Arkansas to lawfully arm public school employees).

³⁷ COUNCIL OF STATE GOV'TS JUSTICE CTR., ARMING TEACHERS AND K-12 SCHOOL STAFF: A SNAPSHOT OF LEGISLATIVE ACTION 1 (2014), <http://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-Arming-Staff-Brief.pdf> [<http://perma.cc/8RUV-QD6J>].

³⁸ ARK. CODE ANN. § 17-40-102(10), (19) (West, Westlaw through 2015 Reg. Sess.); S.B. 164, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (enacted).

³⁹ KAN. STAT. ANN. § 75-7c10(d) (West, Westlaw through 2015 legislation).

⁴⁰ Nick McGurk, *Rural Colo. School Allowing Teachers to Carry Handguns*, USA TODAY (Oct. 31, 2013, 9:01 PM), <http://www.usatoday.com/story/news/nation/2013/10/31/colorado-teachers-guns-schools/3323807> [<http://perma.cc/5CUX-HGYM>].

⁴¹ S.D. CODIFIED LAWS § 13-64-1 (Westlaw through 2015 Reg. Sess.).

⁴² TENN. CODE ANN. § 49-6-815 (1), (2) (West, Westlaw through 2015 1st Reg. Sess.).

⁴³ TEX. EDUC. CODE ANN. § 37.0811(c) (West, Westlaw through Ch. 46 of 2015 Reg. Sess.).

⁴⁴ UTAH CODE ANN. § 76-10-505.5 (West, Westlaw through 2015 Gen. Sess.).

⁴⁵ KAN. STAT. ANN. § 75-7c10(d) (West, Westlaw through 2015 legislation); TENN. CODE ANN. § 49-6-815(a)(3) (West, Westlaw through 2015 1st Reg. Sess.).

⁴⁶ Safe Carry Protection Act, § 16-11-130.1(b), 2014 Ga. Laws 599, 616.

⁴⁷ UTAH CODE ANN. § 76-10-505.5(4)(a) (West, Westlaw through 2015 Gen. Sess.).

specific requirements other than those required to obtain concealed carry permits.⁴⁸

III. PROTECTING THE HERD: SCOPE AND LIMITATIONS OF SCHOOL DISTRICTS’ LEGAL DUTY TO PROTECT

When a child falls victim to a shooting on a public school campus, her parents and survivors have few legal remedies. Generally, schools and teachers cannot be sued in their official capacities for negligence unless sovereign immunity is waived.⁴⁹ Injured parties may, however, bring a federal cause of action against a school district, as an arm of the government, under 42 U.S.C. § 1983.⁵⁰ That section provides an avenue through which a plaintiff can sue a state entity in federal court for the deprivation of her constitutional rights.⁵¹ Section 1983 holds liable anyone acting under color of state law who “subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws.”⁵² A § 1983 claimant must satisfy two elements: (1) she was “deprived of an existing federal right,” and (2) “the deprivation occurred under color of state law.”⁵³

With respect to gun-related injuries, the constitutional right implicated in § 1983 actions is the Fourteenth Amendment’s substantive due process right.⁵⁴ The touchstone of due process is protection against government power arbitrarily and oppressively exercised.⁵⁵

⁴⁸ *Id.* Please see the Appendix for a more detailed overview of state laws that currently allow teachers to “pack heat” during the school day.

⁴⁹ Many states statutorily bar suits against municipalities. Plaintiffs seeking to recover against a school district based on a state law negligence theory should check to see if their jurisdiction provides sovereign immunity to school districts.

⁵⁰ 42 U.S.C. § 1983 (2012); see also Susan S. Bendlin, *Shootings on Campus: Successful § 1983 Suits Against the School?*, 62 *DRAKE L. REV.* 41, 49–50 (2013) (“The specific constitutional right implicated in school shooting claims is a Fourteenth Amendment substantive due process right.”).

⁵¹ 42 U.S.C. § 1983; see also Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 *HARV. C.R.-C.L. L. REV.* 169, 171 (1995) (explaining the monetary advantages to bringing a § 1983 claim).

⁵² 42 U.S.C. § 1983.

⁵³ Colson, *supra* note 51, at 172.

⁵⁴ *Id.*; see also, e.g., *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 722 (3d Cir. 1989) (involving a suit against a school district under § 1983 and the Due Process Clause, U.S. CONST. amend. XIV, § 1, for the molestation of a student); *Finch v. Texarkana Sch. Dist. No. 7*, 557 F. Supp. 2d 976, 980 (W.D. Ark. 2008) (involving a suit against a school district under § 1983 and the Due Process Clause for sexual assault); *Maxwell ex rel. Maxwell v. Sch. Dist. of City of Phila.*, 53 F. Supp. 2d 787, 790 (E.D. Pa. 1999) (involving a suit against a school district under § 1983 claiming a deprivation of due process rights for incidents of rape that occurred at school).

⁵⁵ *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Miller v. City of Philadelphia*, 174 F.3d 368, 374 (3d Cir. 1999).

The Due Process Clause provides that no state entity may “deprive any person of life, liberty, or property, without due process of law.”⁵⁶ School shooting victims advance the theory that they have been deprived of “life” or “liberty” due to the school’s failure to protect them from the violent acts of third parties.⁵⁷ But, the U.S. Supreme Court, which has “traditionally interpreted the Constitution as a ‘charter of negative liberties,’ setting forth restrictions on government power rather than imposing even the most minimal affirmative duties,”⁵⁸ has explained that the purpose of the Due Process Clause is to “protect the people from the State, not to ensure that the State protected them from each other.”⁵⁹

Indeed, the Due Process Clause “forbids the state *itself* to deprive individuals of life, liberty, or property without ‘due process of law.’”⁶⁰ Generally, however, a state entity has no affirmative duty to protect “against invasions of private actors.”⁶¹ As Justice Rehnquist best explained, “our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”⁶²

While it is well-established that a state actor does not have an affirmative duty to protect its students,⁶³ courts have recognized two exceptions to this rule: (1) the special relationship theory⁶⁴ and (2) the state-created danger doctrine.⁶⁵ Moreover, school districts may also find themselves exposed to *Monell* liability for adopting an armed-teacher policy.⁶⁶ In determining whether a district is liable under *Monell*, courts ask whether the underlying constitutional violation was ratified by some

⁵⁶ U.S. CONST. amend. XIV, § 1.

⁵⁷ *Id.*; see also Bendlin, *supra* note 50, at 43–44.

⁵⁸ Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 204 (2006) (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).

⁵⁹ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989).

⁶⁰ *Id.* at 195 (emphasis added).

⁶¹ *Id.*; *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir. 2008) (quoting *DeShaney*, 489 U.S. at 195); *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006) (quoting *DeShaney*, 489 U.S. at 195).

⁶² *DeShaney*, 489 U.S. at 196.

⁶³ *Id.*; cf. Lisa E. Heinzerling, Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986) (advancing the argument that the “no affirmative duty to protect” approach is misguided); Steven F. Huefner, *Affirmative Duties in the Public Schools After Deshaney*, 90 COLUM. L. REV. 1940 (1990).

⁶⁴ *DeShaney*, 489 U.S. at 197–98 (noting petitioner’s advancement of the special relationship theory but declining to accept it).

⁶⁵ *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373–74 (3d Cir. 1992) (recognizing the state-created danger doctrine but declining to adopt it in this case).

⁶⁶ See *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978) (holding that municipalities can be named as defendants in a § 1983 lawsuit).

municipally established policy, practice, or custom.⁶⁷ Each of these exceptions provides a likely avenue of recovery to victims of school shootings that are proximately caused by the armed-teachers approach.

IV. TEACHER “STATE ACTOR” LIABILITY UNDER 42 U.S.C. § 1983

School shooting victims may bring a § 1983 action against both an individual teacher (the “state actor”) whose actions proximately caused their injuries and the school district itself, which may have proximately caused their injuries because of a school-created policy or practice. Consequently, both individual actors and the school district are vulnerable to liability for any injuries proximately caused by the armed-teachers approach.

A. *School-Student: A Special Relationship?*

According to public opinion, many American citizens believe that schools should protect schoolchildren from violence on campus. This general consensus is reflected in the stance adopted by the U.S. Department of Education⁶⁸ and the Obama Administration.⁶⁹ This widely held opinion is based, in part, on the unique relationship between parents, schools, and the state that mandates, through compulsory education laws, that children attend elementary and secondary schools.⁷⁰ The argument follows that because the state mandates that children attend school and parents entrust their children to schools during the day, the student-school relationship is custodial in nature, giving rise to a duty to protect children during the school day.⁷¹ To date, however, the Supreme Court has veered from its no-government-duty rule only under exceptional circumstances.

⁶⁷ *Id.* at 694.

⁶⁸ *Working to Keep Schools and Communities Safe*, U.S. DEP’T OF EDUC., <http://www.ed.gov/school-safety> [<http://perma.cc/TWZ2-8Q4S>] (last visited Sept. 19, 2015) (“Ensuring that schools are sanctuaries for teaching and learning—and free of crime and violence—is a priority for President Obama, the administration, and the entire nation.”).

⁶⁹ *See* THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT’S PLAN TO OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 10 (2013), http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf [<https://perma.cc/2AMT-DJGR>] (stating that the government, along with the cooperation of schools, “need to make our schools safer, not only by enhancing their physical security and making sure they are prepared to respond to emergencies like a mass shooting, but also by creating safer and more nurturing school climates that help prevent school violence”).

⁷⁰ NAT’L CONFERENCE OF STATE LEGISLATURES, COMPULSORY SCHOOL REQUIREMENTS, <http://www.ncsl.org/print/educ/compulsoryschagechart.pdf> [<http://perma.cc/6STD-3JF5>] (last visited Sept. 19, 2015).

⁷¹ *See* Ali Davison, Note, *Shackled and Chained in the Schoolyard: A New Approach to Schools’ Section 1983 Liability Under the Special Relationship Test*, 19 CARDOZO J.L. & GENDER 273, 290 (2012) (“The special relationship exception is intended to induce the state to protect those who are made vulnerable by restraints imposed by the state itself. When states use compulsory schooling laws to mandate that children are to be separated from their primary caregivers during the school day, this

In the landmark case *DeShaney v. Winnebago County Department of Social Services*,⁷² the Supreme Court held that a special relationship exists, imposing an affirmative duty to protect, only when a state entity confines a person in its custody against her will, rendering that person unable to care for herself.⁷³ Consequently, state entities have an affirmative duty to protect people who are incarcerated or institutionalized, as they are officially considered to be in the custody of the state and unable to care for themselves.⁷⁴ Some courts have also imposed an affirmative duty arising out of a special relationship on state entities that foster children.⁷⁵

Although the Supreme Court has declined to acknowledge a “special relationship” between a school and its students, it has yet to decide whether compulsory education laws impose a duty on schools to protect children during the school day.⁷⁶ Several circuit courts have considered whether state compulsory attendance laws create a special relationship between public schools and their students, and those circuits generally have held that forced school attendance does not create a custodial relationship establishing an affirmative duty upon the school to protect its students because schools are not responsible for students’ “basic needs.”⁷⁷

limits the liberties of individuals who are *already* particularly vulnerable members of society.” (footnote omitted); *see also* Bendlin, *supra* note 50, at 52–54 (discussing the “special relationship exception” at length and explaining that “when the state affirmatively restrains an individual’s freedom to act on his or her own behalf, a special relationship is created and the state owes the restrained individual a constitutional duty of care and protection”).

⁷² 489 U.S. 189 (1989).

⁷³ *Id.* at 199–200.

⁷⁴ *Id.* at 198–99 (citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976)); *see also* *Youngberg v. Romeo*, 457 U.S. 307, 318–19 (1982) (recognizing the substantive due process component of the Fourteenth Amendment to include the responsibility of states to ensure the “reasonable safety” of institutionalized mental patients); Bendlin, *supra* note 50, at 52–53 (discussing the “special relationship exception” in the context of incarceration, institutionalization, and “other similar restraints of personal liberty” (quoting *DeShaney*, 489 U.S. at 200)).

⁷⁵ *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (noting that “some courts have imposed a constitutional duty to protect foster children by analogy to involuntarily institutionalized individuals” and citing such cases).

⁷⁶ *See* Bendlin, *supra* note 50, at 54 (“[T]he Supreme Court has not specifically addressed whether a special relationship under the Due Process Clause exists between a student and a public school.”).

⁷⁷ *E.g.*, *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 994 (10th Cir. 1994) (explaining that this court has “clearly held compulsory school attendance laws do not spawn an affirmative duty to protect,” even when danger may be “foreseeab[le]”); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (“Public school attendance does not render a child’s guardians unable to care for the child’s basic needs.”); *Middle Bucks*, 972 F.2d at 1372 (holding that requiring a high school student to attend class did not prevent her from being able to meet her “basic human needs,” and thus no special relationship existed); *Maldonado v. Josey*, 975 F.2d 727, 732–33 (10th Cir. 1992) (“Compulsory attendance laws do not alter the fact that parents retain ultimate responsibility for their child’s food, shelter, clothing, medical care, and reasonable safety.”); *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272–73 (7th Cir. 1990) (holding that compulsory school attendance does not restrict a child from meeting his or her “basic human needs,” and thus a school district has no affirmative duty to protect schoolchildren).

In *Morrow v. Balaski*,⁷⁸ the U.S. Court of Appeals for the Third Circuit held that a school had no duty arising out of a special relationship to protect two students from verbal and physical assault inflicted upon them by another student.⁷⁹ The court clarified its holding in *D.R. v. Middle Bucks Area Vocational Technical School*,⁸⁰ in which it recognized a difference between the type of custody that the state possesses over involuntarily committed patients or incarcerated prisoners and that which it possesses over schoolchildren.⁸¹ Despite the fact that the Supreme Court in *Vernonia School District 47J*⁸² recognized that children were "committed to the temporary custody of the State"⁸³ for the purposes of upholding random drug testing of student athletes, the Third Circuit explained that schoolchildren are never in the full custody of the school because they remain "primarily dependent on their parents."⁸⁴

The Third Circuit's staunch position with respect to the special relationship rule has come under significant criticism. Commentators have condemned this approach, arguing that the student-school relationship is inherently "special" because of the requirement that children attend school.⁸⁵ Nonetheless, since attendance at school neither relieves parents of the ability to take care of their children's basic needs nor confines children against their will, no special relationship exists giving rise to a school's affirmative duty to protect. Consequently, victims of school shootings will

⁷⁸ 719 F.3d 160 (3d Cir. 2013).

⁷⁹ *Id.* at 171.

⁸⁰ 972 F.2d 1364 (3d Cir. 1992) (en banc).

⁸¹ *Id.* at 1371–72.

⁸² 515 U.S. 646 (1995).

⁸³ *Id.* at 654. The Court did admonish, "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.'" *Id.* at 655.

⁸⁴ *Morrow v. Balaski*, 719 F.3d 160, 173 (3d Cir. 2013).

⁸⁵ See Aviel, *supra* note 58, at 227 ("While Scalia attempted to forestall the natural conclusion that the responsibility would 'as a general matter' give rise to a constitutional duty to protect as contemplated by *DeShaney*, the caveat was limited to a subordinate clause, unsupported by a reference to other case law or factual findings and utterly at odds with the rest of the Court's analysis" (footnote omitted)); Colson, *supra* note 51, at 193 ("[T]he Supreme Court has explicitly acknowledged children's dependency on school officials for protection, and it has allowed schools to relax individual students' rights in order to protect the student body as a whole."); Davison, *supra* note 71, at 290 (criticizing the fact that there has been some inconsistency in Supreme Court precedent concerning the presence of a custodial relationship between schools and students); *cf.* Recent Case, *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992), 106 HARV. L. REV. 1224, 1228 (1993) (noting that other decisions regarding the constitutional rights of students have relaxed these rights in order to allow school officials to promote safety); Michael Gilbert, Comment, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471, 501 (1993) ("[T]he idea of foregoing the categorical 'special relationship' doctrine in favor of a more direct inquiry into vulnerability and access to assistance is well-supported in literature and case law.").

not find solace in the special-relationship exception to the general no-duty rule.

B. *Opening the “Snake Pit.”*⁸⁶ *The State-Created Danger Doctrine*

After the Newtown, Connecticut school shooting, Arkansas Senator Jeremy Hutchinson passionately spearheaded the advocacy effort to arm Arkansas teachers with guns.⁸⁷ However, after participating in an “active shooter” simulation in Clarksville, Arkansas, during which he mistook “a teacher who was confronting a . . . ‘bad guy’” as being the perpetrator and shot the teacher with a rubber bullet,⁸⁸ Hutchinson called the incident “utterly ridiculous” and confessed that his position on arming teachers with guns had shifted.⁸⁹ Now recognizing how chaotic even a shooting simulation can be, Hutchinson confessed that the exercise “opened [his] eyes,”⁹⁰ and that his “position now is that schools must have control over security systems. It’s a complex issue—*police* need training, and it needs to be continual.”⁹¹

Hutchinson and other avid supporters of the armed-teachers approach have changed their tunes after opening their eyes to the potential risks posed by allowing minimally trained, or in some cases untrained, teachers and administrators to carry firearms on school campuses.⁹² When a school or its agents knowingly and voluntarily bring a danger onto campus and put students at greater risk, even supporters of the armed-teachers approach can agree that the school’s voluntary invitation of danger should trigger a duty to protect students from any potential injuries resulting from that danger. Although courts have not extended the special relationship exception to the no-duty rule in school settings, there is a second exception

⁸⁶ The Seventh Circuit famously stated, in referring to the state-created danger doctrine, that “[i]f the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.” *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

⁸⁷ Beth Stebner, *Arkansas State Senator Fires Back at Claims He Accidentally Shot Teacher in Simulated School Shooting Exercise*, N.Y. DAILY NEWS (Aug. 29, 2013), <http://www.nydailynews.com/news/politics/state-sen-fires-back-claims-shot-teacher-simulated-shooting-article-1.1440705>; Igor Volsky, *Oops: Senator Who Advocates Arming Teachers Accidentally Shoots Teacher with Rubber Bullet*, THINKPROGRESS (Aug. 29, 2013), <http://thinkprogress.org/justice/2013/08/29/2550001/oops-senator-advocates-arming-teacher-accidentally-shoots-teacher-rubber-bullet/> [<http://perma.cc/WFV6-FLP9>].

⁸⁸ Volsky, *supra* note 87.

⁸⁹ Stebner, *supra* note 87.

⁹⁰ *Id.*

⁹¹ *Id.* (emphasis added).

⁹² See, e.g., Chelsea B. Sheasley, *Guns in Schools: Arkansas District Will Arm 20 Teachers and Staff*, CHRISTIAN SCI. MONITOR (July 30, 2013), <http://www.csmonitor.com/USA/USA-Update/2013/0730/Guns-in-schools-Arkansas-district-will-arm-20-teachers-and-staff> [<http://perma.cc/8NM6-FM85>] (illustrating how twelve Kansas school districts withdrew support for a proposal to arm teachers after their insurer informed the districts that they would be uninsurable, citing too much risk).

that would impose a duty on school districts to protect students from violence.

The state-created danger exception opens a school and its agents up to liability by recognizing an inherent affirmative duty to protect students from harms that are brought onto campus by the school itself or its employees.⁹³ Originally drawn from language in *Deshaney*,⁹⁴ and now recognized in most of the circuits,⁹⁵ the state-created danger theory applies when a plaintiff establishes the following four elements:⁹⁶ (1) a state actor performs an affirmative act that creates or increases the risk of injury to the

⁹³ See *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1373–74 (3d Cir. 1992) (“Liability under the state-created danger theory is predicated upon the states’ affirmative acts which work to plaintiffs’ detriments in terms of exposure to danger.”); see also *Gremo v. Karlin*, 363 F. Supp. 2d 771, 782 (E.D. Pa. 2005) (“The rule that the state has no responsibility to protect its citizens from the violent acts of private parties finds a second exception when a state actor creates a danger that harms an individual or renders him or her more vulnerable to that danger.”).

⁹⁴ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201–02 (1989).

⁹⁵ Almost all of the eleven circuits have expressly recognized the state-created danger exception, with the First and Fourth Circuits applying it on a case-by-case basis. The Fifth Circuit has consistently side-stepped the question of whether to adopt it. Note, however, the Fifth Circuit is not opposed to adopting the doctrine. See *Estate of C.A. v. Castro*, 547 F. App’x 621, 626–27 (5th Cir. 2013) (“[T]he district court did not hold that the state-created danger doctrine was ‘not viable’ in the Fifth Circuit. Rather, it evaluated the doctrine, noted that the circuit has yet to adopt the theory, and concluded that ‘the present case would not appear to provide the right vehicle for the Fifth Circuit to adopt the state-created danger doctrine’ because ‘[t]he plaintiffs would fail to satisfy one or more of the necessary elements suggested in *Covington*.’ We agree.” (alterations in original)); *Doe ex rel. Magee v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 864 (5th Cir. 2012) (stating that the court “declin[ed] to use [the] en banc opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory”). Notably, the Fifth Circuit in *Morris v. Dearborne*, 181 F.3d 657, 663–64, 672 (5th Cir. 1999), in which a teacher falsely authored a report that a four-year-old student was sexually molested, serving as the basis for removing the child from his family home, held that a § 1983 claim could survive based on a state actor’s conduct that subjected the child to the deprivation of rights. Without invoking the state-created danger exception, the court explained:

The district court . . . stated that direct participation is not necessary for liability under § 1983. Any official who “causes” a citizen to be deprived of her constitutional rights can also be held liable. The district court held that the requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights. . . . We agree with the district court that in order to establish Dearborne’s liability, the Plaintiffs must prove that she set in motion events that would foreseeably cause the deprivation of Plaintiff’s constitutional rights.

Id. at 672.

⁹⁶ Some circuits articulate the elements differently. See Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1, 15–18 (2007) (explaining how the test for state-created danger varies in certain jurisdictions). For purposes of this Article’s analysis, the four elements outlined above generally represent the main inquiries involved in any circuit premised upon the state-created danger doctrine. The last element, discussed in depth in Part IV.B.4, *infra*, has been interpreted more leniently in some circuits. See, e.g., *Walker v. Detroit Pub. Sch. Dist.*, 535 F. App’x 461, 464 (6th Cir. 2013) (articulating the final element of a state-created danger claim as requiring that “the state knew or should have know that its actions specifically endangered the plaintiff”).

plaintiff; (2) the plaintiff is a member of a discrete class of persons, as opposed to the public at large; (3) the defendant's affirmative act is the proximate cause of the plaintiff's harm, and the harm ultimately caused was reasonably foreseeable and fairly direct; and (4) the act "shocks the conscience" of the court.⁹⁷

Much of the case law providing context for the state-created danger exception in the school setting comes out of the Third and Tenth Circuits.⁹⁸ In the seminal Tenth Circuit case, *Armijo ex rel. Chavez v. Wagon Mound*

⁹⁷ See *Willhauck v. Town of Mansfield*, 164 F. Supp. 2d 127, 134–35 (D. Mass. 2001) (outlining the First Circuit elements as: (1) a state actor performs an affirmative act increasing the risk of harm, and (2) the act shocks the conscience); *Santucci v. Newark Valley Sch. Dist.*, No. 3:05-CV-0971, 2005 WL 2739104, at *5 (N.D.N.Y. Oct. 24, 2005) (outlining the Second Circuit elements as follows: (1) "the [state] actor must have acted affirmatively;" (2) "there must be evidence that the state actor had culpable knowledge of the danger;" (3) "there must be evidence that the state actor's conduct caused the injury;" and (4) "there must be evidence that the state actor's conduct was so egregious or outrageous that it is conscience-shocking"); *Morrow v. Balaski*, 719 F.3d 160, 177 (3d Cir. 2013) (outlining the Third Circuit elements as: (1) "the harm ultimately caused was foreseeable and fairly direct;" (2) "a state actor acted with a degree of culpability that shocks the conscience;" (3) "a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general;" and (4) "a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all"); *Carroll K. v. Fayette Cnty. Bd. of Educ.*, 19 F. Supp. 2d 618, 624 (S.D.W. Va. 1998) (looking to the elements that the Third Circuit adopted because the Fourth Circuit has not articulated its own test); *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003) (outlining the Sixth Circuit elements as: (1) "an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party;" (2) "a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large;" and (3) "the state knew or should have known that its actions specifically endangered the plaintiff"); *King ex rel. King v. East St. Louis Sch. Dist.* 189, 496 F.3d 812, 817–18 (7th Cir. 2007) (outlining the Seventh Circuit elements as: (1) "the state, by its affirmative acts, must create or increase a danger faced by an individual;" (2) "the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual;" and (3) "the state's failure to protect the individual must shock the conscience"); *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004) (outlining the Eighth Circuit elements as: (1) the plaintiff must be a member of a "limited, precisely definable group;" (2) the state's conduct must have placed plaintiff "at significant risk of serious, immediate, and proximate harm;" (3) the risk must have been obvious or known to the state; (4) the state must have "acted recklessly in conscious disregard of the risk;" and (5) "in total, [the state's] conduct shocks the conscience"); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062–64 (9th Cir. 2006) (outlining the Ninth Circuit elements as: (1) the state must have affirmatively created a danger; and (2) the state must have exhibited deliberate indifference to a danger that was known or obvious); *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1264 (10th Cir. 1998) (outlining the Tenth Circuit elements as: (1) the plaintiff was "a member of a limited and specifically definable group;" (2) the state's conduct must have placed plaintiff "at substantial risk of serious, immediate and proximate harm;" (3) the risk must have been obvious or known to the state; (4) the state must have "acted recklessly in conscious disregard of the risk;" (5) in total, the state's conduct shocks the conscience; and (6) the actors must have affirmatively acted to increase the risk of harm to the plaintiff).

⁹⁸ *E.g.*, *Sanford v. Stiles*, 456 F.3d 298, 301–02 (3d Cir. 2006); *Armijo ex rel. Chavez v. Wagon Mound Public Schs.*, 159 F.3d 1253 (10th Cir. 1998).

Public Schools,⁹⁹ the family of a sixteen-year-old, mentally ill special education student (Armijo), who committed suicide, sued Wagon Mound Public Schools alleging that the school deprived him of substantive due process.¹⁰⁰ After Armijo threatened physical harm to a teacher, he was suspended.¹⁰¹ The principal directed the school guidance counselor, who was aware of Armijo's suicide risk, to drive Armijo home without notifying his parents.¹⁰² Armijo's parents returned home hours later to find their son lying dead in the bedroom from a self-inflicted gunshot wound to the chest.¹⁰³ In considering whether the school's actions in sending a mentally ill student home without notifying the parents constituted a "state-created danger," the court explained that:

The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's [acts] to occur.¹⁰⁴

Where the proof showed that school officials knew Armijo was depressed and suicidal, and that he had access to firearms at home, the facts were sufficient to survive summary judgment on Armijo's state-created danger claim.¹⁰⁵

1. *Affirmative Act that Creates or Increases the Risk to the Plaintiff*

Many of the school district cases in which plaintiffs have raised the state-created danger exception have been dismissed for want of affirmative danger-creating action.¹⁰⁶ Finding an actor liable under the state-created

⁹⁹ 159 F.3d 1253 (10th Cir. 1998).

¹⁰⁰ *Id.* at 1256.

¹⁰¹ *Id.* at 1256–57.

¹⁰² *Id.* at 1257.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1263 (citations omitted) (quoting *Johnson v. Dallas Ind. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994)) (internal quotation marks omitted); *see also* *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993) (holding that plaintiffs "may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been"); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (explaining that *DeShaney* "establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.").

¹⁰⁵ *Armijo*, 159 F.3d at 1264.

¹⁰⁶ *See, e.g.*, *Sanford v. Stiles*, 456 F.3d 298, 301–02, 312 (3d Cir. 2006) (per curiam) (finding no

danger theory is based on “affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.”¹⁰⁷ Stated differently, the plaintiff must “allege affirmative acts that were the ‘but for cause’ of the risks they faced,” and mere “failures to act cannot form the basis of a valid § 1983 claim.”¹⁰⁸

In the school context, the concept is the same. Consequently, courts have overwhelmingly held that a school district’s failure, either to carry out its disciplinary policy or to intervene in student conduct that poses a risk to others, constitutes merely passive inaction and does not satisfy the “affirmative act” requirement.¹⁰⁹ In this vein, in *Walker v. Detroit Public School District*,¹¹⁰ the Sixth Circuit Court of Appeals dismissed a shooting victim’s state-created danger claim against a school district premised upon the district’s merger of two schools with a known history of gang-related violence.¹¹¹ The court explained that the merging of the two schools was not an affirmative act because “chronic gang-related violence was present both before and after the merger.”¹¹² Ultimately, neither the merger of the

state-created danger in student suicide case where counselor did not detect signs of suicidal ideation and, thus, there was no creation of any danger in releasing student); *Wyke v. Polk Cnty Sch. Bd.*, 129 F.3d 560, 569–70 (11th Cir. 1997) (finding no state-created danger despite the fact that school officials were aware of thirteen-year-old boy’s recent suicide attempts because the school did nothing affirmative to heighten the boy’s suicide risk); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1121 (E.D. Cal. 2011) (finding no state-created danger where thirteen-year-old homosexual student committed suicide after enduring two years of bullying and physical assault because the complained-of conduct constituted school inaction (failure to intervene), not affirmative action).

¹⁰⁷ *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998).

¹⁰⁸ *Bennett ex rel. Irvine v. City of Philadelphia*, 499 F.3d 281, 287–88 (3d Cir. 2007); *see also*, *e.g.*, *Ye v. United States*, 484 F.3d 634, 641–42 (3d Cir. 2007) (holding that government-employed physician’s assurance that a cardiac patient was “fine,” without rendering more advanced treatment, did not constitute an affirmative act that gave rise to a claim for a constitutional deprivation, even if the facts supported a state law medical malpractice claim); *Jones v. Reynolds*, 438 F.3d 685, 691 (6th Cir. 2006) (holding that a police officer’s observation and subsequent failure to intervene in a dangerous drag race on a public street did not constitute an “affirmative act” increasing any risk to a spectator); *Stover v. Camp*, 181 F. App’x 305, 308 (3d Cir. 2006) (holding that an injured driver’s state-created danger claim could not prevail against the township for failing to make an intersection where multiple accidents had occurred safer because no affirmative action was pled); *Rivera v. Rhode Island*, 402 F.3d 27, 30, 38 (1st Cir. 2005) (holding that the state’s inaction, even despite its promise to protect a witness in exchange for her testimony in a murder trial, was not an affirmative act that satisfied a state-created danger claim).

¹⁰⁹ *See, e.g.*, *Morrow v. Balaski*, 719 F.3d 160, 178 (3d Cir. 2013) (holding that the school’s failure to expel a student-bully—instead suspending her—did not enhance or exacerbate the danger caused to two other student victims); *see also* *Robinson v. Sch. Dist. of Phila.*, No. 13-6632, 2014 WL 3304143, at *1–2 (E.D. Pa. July 8, 2014) (holding that a school district’s failure to prevent excessive bullying did not amount to affirmative action such that the elements of a state-created danger claim could be satisfied); *Thomas v. East Orange Bd. of Educ.*, 998 F. Supp. 2d 338, 353–54 (D.N.J. 2014) (holding that school district’s failure to prevent excessive bullying did not amount to affirmative action in satisfaction of the state-created danger claim).

¹¹⁰ 535 F. App’x 461 (6th Cir. 2013).

¹¹¹ *Id.* at 466.

¹¹² *Id.*

schools nor the school’s failure to intervene in the gang violence constituted an affirmative act that created or increased the risk of harm to the plaintiff.¹¹³

Similarly, in *Morrow v. Balaski*,¹¹⁴ where school officials told parents of two female students that were harassed and physically assaulted by a third female student that they could not guarantee the girls’ safety, the court declined to find any affirmative act sufficient to satisfy a state-created danger claim.¹¹⁵ After a physical altercation between one of the daughters and the attacker, the school suspended both students and allowed them to return after they served the duration of their suspensions.¹¹⁶ The court rejected the Plaintiffs’ argument that the act of allowing the attacker to return to school was an “affirmative act” sufficient to create a risk, explaining that the “[c]omplaint simply attempt[ed] to redefine clearly passive inaction as affirmative acts.”¹¹⁷

But, in recognizing that the “line between action and inaction is not always easily drawn,”¹¹⁸ the Third Circuit in *Middle Bucks* explained that “[i]f the state puts a man in a position of danger from private persons and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.”¹¹⁹ Therefore, the threshold inquiry requires a difficult parsing out of action from inaction. “Rather than focusing on the often metaphysical question of whether [officials’] behavior amounts to affirmative conduct or not, we have focused on whether [the victim] was safer before the state action than he was after it.”¹²⁰ Furthermore, the Third Circuit has emphasized, “it is *the misuse of state authority, rather than a failure to use it*, that can violate the Due Process Clause.”¹²¹

A state-created danger claim premised upon the armed-teachers approach undoubtedly satisfies the affirmative act requirement. Unlike in *Walker* and *Morrow*, where the complained-of actions resulted in a student environment with the same amount of risk or danger as before the complained-of conduct,¹²² the implementation of the armed-teachers approach actually invites a new danger onto campus. Instead of preserving

¹¹³ *Id.*

¹¹⁴ 719 F.3d 160 (3d. Cir. 2013).

¹¹⁵ *Id.* at 178.

¹¹⁶ *Id.* at 164.

¹¹⁷ *Id.* at 178.

¹¹⁸ *Id.* at 177.

¹¹⁹ *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1374 (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).

¹²⁰ *Walker v. Detroit Public School Dist.*, 535 F. App’x 461, 464–65 (6th Cir. 2013) (quoting *Koulta v. Merciez*, 477 F.3d 442, 445–46 (6th Cir. 2007)).

¹²¹ *Phillips v. County of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008) (emphasis in original) (quoting *Bright v. Westmoreland County*, 443 F.3d 276, 282 (3d Cir. 2006)).

¹²² *Walker*, 535 F. App’x at 466; *Morrow*, 719 F.3d at 178.

the status quo, as the school actors did in *Walker* and *Morrow*, the armed-teachers approach creates and enhances a new risk to students.

Under the state-created danger doctrine, “liability exists when the state affirmatively places a particular individual in a position of danger the individual would not have otherwise faced.”¹²³ When minimally-trained teachers bring firearms onto K-12 campuses, they are placing students in a position of danger the students would not otherwise have faced.

The current guns-in-school debate has focused primarily on the correlation between the presence of guns on school campuses and the overall rate of school crimes. While the statistical data supports both sides’ positions,¹²⁴ there is ample data evidencing the fact that the presence and use of guns (as opposed to other forms of weapons), because of their inherently dangerous and deadly nature, results in both higher incidences of injuries and in injuries that are more severe.¹²⁵ The armed-teachers approach increases incidences of gun-related injuries and death by inviting onto campus three main threats: (a) a higher risk of misfires and stray bullets due to inadequately-trained, or in some cases untrained, teachers;

¹²³ *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998) (quoting *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993)).

¹²⁴ See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 3 (3d ed. 2010) (referencing a survey that found “about 95 percent of the time that people use guns defensively, they merely have to brandish a weapon to break off an attack”); William Alan Bartley & Mark A. Cohen, *The Effect of Concealed Weapons Laws: An Extreme Bound Analysis*, 36 *ECON. INQUIRY* 258, 259 (1998) (“[W]e find strong support for the hypothesis that the right-to-carry laws are associated with a decrease in the trend in violent crime rates.”); John R. Lott, Jr. & David B. Mustard, *Crimes, Deterrence, and Right-to-Carry Concealed Handguns*, 26 *J. LEGAL STUD.* 1, 2 (1997) (noting that one study suggests that overall defensive gun use saves lives (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 *J. CRIM. L. & CRIMINOLOGY* 150 (1995))); Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness*, 44 *J.L. & ECON.* 799, 812 (2001) (concluding that additional analyses of the Lott and Mustard data confirm that the “[p]assage of a right-to-carry concealed weapons law tends to reduce violent crime.”). But see Ian Ayres & John J. Donahue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *STAN. L. REV.* 1193, 1201 (2003) (“[T]he statistical evidence that these laws have reduced crime is limited, sporadic, and extraordinarily fragile.”); Mark Duggan, *More Guns, More Crime*, 109 *J. POL. ECON.* 1086, 1087–88 (2001) (“[C]hanges in homicide and gun ownership are significantly positively related.”); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 *INT’L REV. L. & ECON.* 239, 239 (1998) (finding that statistics “suggest that shall-issue laws have resulted, if anything, in an increase in adult homicide rates.”).

¹²⁵ Carl W. Chamberlin, *Johnny Can’t Read ‘Cause Jane’s Got a Gun: The Effects of Guns in Schools, and Options After Lopez*, 8 *CORNELL J.L. & PUB. POL’Y* 281, 287 n.49 (1999) (finding that guns are two to five times more lethal than knives (citing JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* 198 (1983))); see also U.S. DEP’T OF JUSTICE, *CRIME IN THE UNITED STATES* 7 (1964), <https://archive.org/stream/uniformcrimerepo1963unit#page/6/mode/2up> (finding, based on an examination of all assaults in 1963, that guns are “seven times more lethal than all other weapons combined.”); Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 *AM. J. EPIDEMIOLOGY* 929, 935 (2004) (“The findings of this study add to the body of research showing an association between guns in the home and risk of a violent death.”).

(b) a school official’s impulsive, irrational misuse of a weapon; and (c) the risk of gun-related accidents as a result of greater gun accessibility in the school building.

a. Scenario A: A Higher Risk of Misfires and Stray Bullets Due to Inadequately-Trained Teachers

Opponents of the armed-teachers approach express concern that armed-teacher laws and school district policies currently do not mandate sufficient firearms, trauma response, and other relevant training for teachers carrying firearms on campus.¹²⁶ Without adequate training, the argument goes, there is a greater probability that gun-related accidents will occur, resulting in a higher risk of bystander injury and death.

When analyzing states’ mandatory training requirements, both the quantity and the quality of the training are important. Of the states with statutory authorization of the armed-teachers approach, some of them require minimal or even no training.¹²⁷ Those that do require training do not necessarily require simulated live-shooter training or training that will prepare teachers who otherwise have no law enforcement experience to respond during a traumatic live-shooter event in a safe manner.¹²⁸

Short of adopting inhumane and risky research methods, it is impossible to obtain reliable data on the effectiveness of an armed teacher’s response during a live-shooter event. Nonetheless, the overwhelming body of research indicating a high correlation between

¹²⁶ See PEW RESEARCH CTR., IN GUN CONTROL DEBATE, SEVERAL OPTIONS DRAW MAJORITY SUPPORT 1 (2013), <http://www.people-press.org/files/legacy-pdf/01-14-13%20Gun%20Policy%20Release.pdf> [<http://perma.cc/H2SR-FLTP>] (finding that 57% of the 1502 Americans surveyed are against the idea of arming teachers); WINTHROP UNIV., FEBRUARY 2013 WINTHROP POLL tbl. 39 (2013), <http://www.winthrop.edu/uploadedFiles/wupoll/February2013WinthropPollMethodologyandResults.pdf> [<http://perma.cc/PC45-6GEA>] (finding that two-thirds of the 1038 South Carolinians surveyed are opposed to arming teachers in schools); see also, e.g., David Beem, *Back to School: Lock and Load*, HUFFINGTON POST (Aug. 16, 2013), http://www.huffingtonpost.com/david-beem/back-to-school_b_3762195.html [<http://perma.cc/4YDF-JKNT>] (“[C]onsider what happens to [the odds of school violence] when you add *more* guns. For starters, there’s the increased potential for accidents. Even experienced gun safety instructors make mistakes”); Tim Walker, *Arming Educators—A Bad Idea that Hasn’t Gone Away*, NEATODAY (Jan. 16, 2014, 12:49 PM), <http://neatoday.org/2014/01/16/arming-educators-a-bad-idea-that-hasnt-gone-away/> [<http://perma.cc/D4L5-XZSS>] (remarking upon a school board hearing in Idaho that took up the issue of whether to arm school employees as highly concerned with “[t]he potential for an accident or a misjudgement”).

¹²⁷ See, e.g., KAN. STAT. ANN. § 75-7c04(b) (West, Westlaw through 2015 1st Reg. Sess.) (requiring only eight hours of firearms training); UTAH CODE ANN. § 76-10-505.5 (West, Westlaw through 2014 Gen. Sess.) (requiring no training).

¹²⁸ See, e.g., ALA. CODE § 45-30-103(d) (Westlaw through Mar. 1, 2015) (“[A] volunteer shall receive any training deemed necessary by the sheriff”); ARK. CODE ANN. § 17-40-102(21) (West, Westlaw through 2015 Reg. Sess.) (providing definition of “[p]rivate security officer”); 2014 GA. CODE ANN. § 16-11-130.1(b)(1) (West, Westlaw through 2015 Reg. Sess.) (“[T]raining shall at a minimum include training on judgment pistol shooting, marksmanship, and a review of current laws relating to the use of force for the defense of self and others”).

extensive field experience/training and a law enforcement officer's effectiveness in responding to a live-shooter event is instructive.¹²⁹

i. Potential for Misfiring

Despite undergoing extensive training, there remains a high rate of shooting inaccuracy amongst police officers in live-shooter events—with the percentage of missed shots ranging between 52%¹³⁰ and 82%.¹³¹ In yet another study, the International Association of Chiefs of Police examined all shooting incidents in thirty-five American cities from 1987–1996 to determine police accuracy rates.¹³² The study revealed that 65% of police officers' shots missed their intended target.¹³³ Of course, as the rate of shooting inaccuracy increases, so does the rate of bystander injuries and deaths as people are caught in the crossfire.¹³⁴

Where the rate of shooting error for police officers is between 52%–82%, imagine the rate of error for gun-toting teachers with much less or no training at all.¹³⁵ Indeed, there is a high probability that the misfiring rate

¹²⁹ See, e.g., Michael T. Charles & Anne G. Copay, *Acquisition of Marksmanship and Gun Handling Skills Through Basic Law Enforcement Training in an American Police Department*, 5 INT'L J. POLICE SCI. & MGMT. 16, 29 (2003) (concluding that “students significantly improved their marksmanship and gun handling skills as a result of the firearms course”).

¹³⁰ *Id.* at 17. This Illinois study showed that from 1995 to 1997, the State of Illinois studied a group of 216 police recruits (185 males, 31 females) with little to no firearm experience or training. *Id.* at 16. The recruits were administered a firearms pre-test in areas of marksmanship and gun handling, fifty hours of firearms training, and then a firearms post-test in the same areas. *Id.* at 17, 20. In the pre-test, the recruits performed poorly in both marksmanship and gun handling. *Id.* at 22. After the training, however, the recruits scored significantly higher on their post-test. *Id.* at 21. In that same time frame, a review of a sample of police officers' shooting statistics in the line of duty showed that 52% of all total shots missed the intended target, while 34% resulted in injury of the target, and 14% of shots resulted in death of the target. *Id.* at 17. Moreover, from 1987–1996, 696 police officers were feloniously killed in the United States, and 91.5% of those officers were killed by firearms. *Id.* at 16–17.

¹³¹ BERNARD D. ROSTKER ET AL., RAND CTR. ON QUALITY POLICING, EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 14 (2008), http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf [<http://perma.cc/8HDW-53A3>].

¹³² Charles & Copay, *supra* note 129, at 16–17.

¹³³ *Id.* at 17.

¹³⁴ See generally Garen J. Wintemute et al., *Epidemiology and Clinical Aspects of Stray Bullet Shootings in the United States*, 73 J. TRAUMA & ACUTE CARE SURGERY 215, 219 (2012) (discussing stray bullet shooting victims). In New York alone, the total number of bystander shooting incidents doubled between 1983 and 1988—with the number of bystanders killed tripling and the number of bystanders injured quintupling during the same period. Paul J. Arougheti, *Imposing Homicide Liability on Gun Battle Participants for the Deaths of Innocent Bystanders*, 27 COLUM. J.L. & SOC. PROBS. 467, 470 (1994). “Bystanders accounted for approximately nine percent of all shooting victims in New York in 1991, and about six percent in both 1992 and 1993.” *Id.* More recently, nine bystanders were wounded by shots fired by police officers during a confrontation with a lone gunman in New York. *NYPD: 9 Shooting Bystander Victims Hit by Police Gunfire*, FOX NEWS (Aug. 25, 2012), <http://www.foxnews.com/us/2012/08/25/nypd-shooting-bystander-victims-hit-by-police-gunfire/> [<http://perma.cc/LC6V-52MY>].

¹³⁵ See *supra* text accompanying notes 16–17 (discussing the likelihood that teachers would

for armed teachers is even greater than the 52%–82% rate for trained officers. This is especially true if the required training for armed teachers does not include exercises with moving targets and reality-based simulations.

ii. Ability to Translate Learned Skill into Action

Even when teachers receive training in an effort to reduce shooting inaccuracy, it remains questionable whether full-time teachers serving as part-time security guards can safely translate skills learned during training into action during an actual live-shooter event. A Michigan study examined the inherent benefit of reality-based training in preparing armed officers to respond more effectively in live-shooter situations.¹³⁶ Specifically, it considered which of two widely used shooting stances officers employed after receiving extensive training at the firing range in one particular stance.¹³⁷ The study revealed that officers used a different stance than the one they were taught to use at the firing range.¹³⁸ These results indicate that even the vast majority of highly trained police officers abandon learned skills and knowledge when involved in a live-shooter situation.¹³⁹

perform worse than trained police officers in an active-shooter situation). The training requirements for federal and state law enforcement officers provides guidance in determining what is a reasonable amount of training required before teachers are allowed to carry arms in schools. Federal agents serving in the Bureau of Alcohol, Tobacco, Firearms and Explosives are required to complete 100 hours of firearms training. *Training for ATFE Agents*, FEDERALLAWENFORCEMENT.ORG, <http://www.federallawenforcement.org/atf/atf-training/> [<http://perma.cc/7ZNC-Z8HX>] (last visited June 27, 2015). United States Air Marshals are required to complete 155 hours of firearms training. *Training for the Federal Air Marshal Service*, FEDERALLAWENFORCEMENT.ORG, <http://www.federallawenforcement.org/air-marshall/air-marshall-training/> [<http://perma.cc/T6ZU-F7T4>] (last visited June 27, 2015). United States Immigration and Customs Enforcement agents must complete a twenty-two-week training program, including firearms training. *Training for Immigration and Customs Enforcement Agents*, FEDERALLAWENFORCEMENT.ORG, <http://www.federallawenforcement.org/ice/ice-training/> [<http://perma.cc/P5KB-6B3J>] (last visited June 27, 2015). Secret Service agents must complete twenty-eight weeks of general training, including live-fire training and other firearms training programs. *Training for Secret Service Agents*, FEDERALLAWENFORCEMENT.ORG, <http://www.federallawenforcement.org/secret-service/secret-service-training/> [<http://perma.cc/M2AE-EZJV>] (last visited June 27, 2015). United States Marshals must complete 17.5 weeks of general training, including firearms training. *Basic Training Academy*, U.S. MARSHALS SERV., <http://www.usmarshals.gov/careers/trainingacademy.html> [<http://perma.cc/GF3R-PGLL>] (last visited Oct. 8, 2015).

¹³⁶ See JOHN A. SEIBEL, REALITY-BASED TRAINING: SKILL DEVELOPMENT IN SURVIVAL STRESS RESPONSES 8–9 (n.d.), <http://www.emich.edu/cerns/downloads/papers/PoliceStaff/Training/REALITY-BASED%20TRAINING--Skill%20Development%20in%20Survival%20Stress%20Responses.pdf> [<http://perma.cc/N9EW-JCXY>] (explaining the Westmoreland study).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

iii. Need for Better Training: Quantity and Quality

To be adequately prepared to respond during a live-shooter event, first responders must understand much more than how to point and shoot in static situations.¹⁴⁰ First responders must also understand when it is appropriate to pull the trigger and when they should stand down, how to minimize the natural bodily psychosomatic responses that occur during a traumatic event, and how to safely ensure that no innocent bystanders are injured in the crossfire.¹⁴¹ None of these essential skills are taught in a basic firearms handling course or even during shooting rounds at a firing range.¹⁴²

One study indicated that the human body's fight-or-flight response provides another obstacle to first responders during a live-shooter event.¹⁴³ An analysis of World War II and FBI studies demonstrates that humans possess a natural resistance to killing other humans.¹⁴⁴ The body's natural "fight or flight" response endangers even the most highly trained police officers. Indeed, in 1998–2000, out of 148 police officers killed in the line of duty, 84.5% of them never fired a shot at their killer.¹⁴⁵ To combat this problem, military and law enforcement organizations have begun to incentivize good marksmanship scores in training.¹⁴⁶

"No matter how well we are trained to a stimulus/response; [sic] our brains are hardwired to override those trained responses by a more

¹⁴⁰ See, e.g., DEP'T OF HOMELAND SEC., FIRST RESPONDER GUIDE FOR IMPROVING SURVIVABILITY IN IMPROVISED EXPLOSIVE DEVICE AND/OR ACTIVE SHOOTER INCIDENTS (2015), <http://www.dhs.gov/sites/default/files/publications/First%20Responder%20Guidance%20June%202015%20FINAL%202.pdf> [<http://perma.cc/3H8Q-YP3T>]; POLICE EXEC. RESEARCH FORUM, THE POLICE RESPONSE TO ACTIVE SHOOTER INCIDENTS 3–6 (2014), http://www.policeforum.org/assets/docs/Critical_Issues_Series/the%20police%20response%20to%20active%20shooter%20incidents%202014.pdf [<http://perma.cc/4XDW-4WAF>] (discussing the numerous obstacles involved in responding to a live-shooter event, including gaining entry to a building in which a live shooter has sought protection, coordinating medical care, and using techniques to disable a live shooter outdoors).

¹⁴¹ *Id.*

¹⁴² See, e.g., COLO. REV. STAT. ANN. § 18-12-203(h) (West, Westlaw through 2015 1st Reg. Sess.) (providing that although one must obtain a training certificate from a handgun training course in order to obtain a permit, "the applicant shall have discretion in selecting which handgun training class to complete").

¹⁴³ See *Active Shooter Training and the OODALoop Theory*, CGPGMG (Nov. 23, 2014), <http://cgpgmg.com/active-shooter-training-and-the-oodaloop-theory/> [<http://perma.cc/X8Y5-PB8W>] (explaining that, at the time he starts shooting, an active shooter is already three steps ahead of potential victims in the "Observing, Orienting, Deciding, Acting" Loop, and thus the shooter does not have to initially deal with the fight-or-flight reaction, putting him at a major strategic advantage).

¹⁴⁴ See SEIBEL, *supra* note 136, at 10 (discussing research noting that, during WWII, only 15%–20% of American riflemen fired upon exposed enemy soldiers with their individual weapons).

¹⁴⁵ *Id.* at 11.

¹⁴⁶ *Id.* at 10–11. Perhaps, schools using armed teachers should provide a similar incentive system for teachers with good marksmanship. Teachers are already evaluated on their teaching effectiveness, so if schools ask teachers to assume an additional role as a security guard, where the stakes are so high, they should also be evaluated on their effectiveness as a security guard.

powerful 'instinctual' response in survival skills."¹⁴⁷ When exposed to trauma, the human body, as a visceral response to the fear of death, becomes "the most clumsiest."¹⁴⁸ It releases anxiety hormones, including adrenaline, and the heart rate rapidly increases, decreasing the body's ability to successfully carry out both complex and fine motor skills, like unlocking and loading a gun and pointing and shooting.¹⁴⁹ Indeed, when the heart rate rises to over 145 beats per minute (BPM), the body's ability to successfully perform any task, including critical survival skills requiring good hand-eye coordination and the ability to rely on small muscles or a series of muscles, decreases exponentially.¹⁵⁰ Similarly, when the sympathetic nervous system is activated, it sends the heart rate from its normal 60–80 BPM to well over 200 BPM within seconds.¹⁵¹ At "a heart rate over 175 BPM . . . [even the well-trained] officer may experience . . . irrational behavior such as 'freezing in place,' becoming submissive, or passive."¹⁵²

Police officers and experienced security guards, who are in the field on a daily basis and whose training is of a greater quantity and quality than that of armed teachers, are better able to manage the body's natural responses to trauma because they have more routine exposure to high trauma events. But when the body's natural "fight or flight" response is activated, even trained police officers can abandon their training. It is therefore unlikely that inadequately trained (or, in some cases, untrained) teachers will effectively respond during a live-shooter event simply because they are carrying a firearm. To the contrary, the statistics demonstrate that arming teachers will make schools more dangerous.

The collective research indicates that, without receiving comprehensive training and experience in each of the aforementioned categories, gun-toting teachers bring a new danger onto campus. But state laws that authorize armed-teacher policies generally do not dictate training of sufficient quantity and quality. In fact, some states do not even specify a minimum number of training hours,¹⁵³ and those states that do require only minimal training in basic gun handling and fixed-target shooting.¹⁵⁴

¹⁴⁷ *Id.* at 14.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.* at 6, 16.

¹⁵⁰ *Id.* at 16.

¹⁵¹ *Id.* at 17.

¹⁵² *Id.* at 21.

¹⁵³ *See, e.g.*, OR. REV. STAT. ANN. § 166.370 (West, Westlaw through 2015 Reg. Sess.) (stating the requirements for individuals who can possess firearms on school property).

¹⁵⁴ *See, e.g.*, COLO. REV. STAT. ANN. § 18-12-203 (West, Westlaw through 2015 1st Reg. Sess.) (stating that the only training required to obtain a concealed carry permit is a training certificate from a handgun training class obtained within the ten years preceding submittal of the application).

The potential for accidental shootings by teachers on school campuses is a real threat and has occurred tragically in recent incidents in New York and Ohio.¹⁵⁵ Where professionally trained police officers are effective only 18%–48% of the time, it follows that minimally trained teachers with guns will be less effective, putting students at a higher risk of injury from a misfired bullet.

b. Scenario B: Misuse of Guns

Not only may teachers accidentally shoot students due to a lack of appropriate training and experience, but there is also at least a slight risk that they may misuse a weapon in a moment of frustration or rage.¹⁵⁶ In 2010, a University of Alabama biology professor brought a gun to campus. The professor shot and killed three faculty members and injured three

¹⁵⁵ See Kieran Crowley, *Packin' Prof Pulls a 'Plax'*, N.Y. POST (Nov. 18, 2011), <http://nypost.com/2011/11/18/packin-prof-pulls-a-plax/> [<http://perma.cc/9U5Y-44EL>] (reporting that a former New York City law enforcement officer and criminal justice professor at Long Island University stepped out of a classroom to secure his gun when he accidentally discharged the firearm and shot himself in the leg); Mary Beth Lane, *Instructor Shoots Student in Gun-Safety Class*, COLUMBUS DISPATCH (Aug. 13, 2013, 6:03 AM), <http://www.dispatch.com/content/stories/public/2013/08/12/concealed-carry-accidental-shooting.html> [<http://perma.cc/3EZ2-AZNU>] (reporting that an instructor for a gun safety class discharged his gun and shot a twenty-six-year-old student in the arm). It was later revealed that several years prior to this incident, the instructor accidentally shot a friend of his daughter while the children were on a haunted hayride. Mary Beth Lane, *Accidental Shooting Was Not First for Firearms Instructor*, COLUMBUS DISPATCH (Aug. 22, 2013, 7:07 AM), <http://www.dispatch.com/content/stories/public/2013/08/21/accidental-shooting-was-not-first-for-firearm-instructor.html> [<http://perma.cc/4HPV-YNFP>]. He claimed that he wanted to create a “scary effect” by firing the weapon into the air and thought the gun was loaded with blanks. *Id.*

¹⁵⁶ See Thomas Barrabi, *Texas Teacher Punches Student, 12-Year-Old Reginald Wells, After Beaumont Middle Schooler Made Joke About Favorite Football Team, Report Says*, INT'L BUS. TIMES (Nov. 15, 2013, 9:10 AM), <http://www.ibtimes.com/texas-teacher-punches-student-12-year-old-reginald-wells-after-beaumont-middle-schooler-made-joke> [<http://perma.cc/XU49-8C5X>] (reporting that a Texas middle school teacher punched one of his students in the face for making a joke about his favorite football team); Liz Crawford, *Guilford County Teacher Resigns After Allegedly Hitting a Student*, WFMYNEWS (May 21, 2014, 7:41 AM), <http://www.wfmynews2.com/story/news/local/2014/05/20/guilford-county-schools-teacher-resigns-after-allegedly-hitting-student/9349073/> [<http://perma.cc/R6M5-ETCV>] (reporting that a math teacher hit an eighth grade student on the head with his knuckles and then shoved him into a locker and allegedly tried to choke the student); Tara Herrschaft, *Teacher May be Fired for Hitting a Student*, WAFB (Oct. 30, 2012, 9:37 PM), <http://www.wafb.com/story/19904833/teacher-may-be-fired-for-hitting-a-student> (reporting that a Georgia schoolteacher may be fired for hitting a student); Rebecca Klein, *Teacher Fired After Using Broom to Break Up Violent Fight*, HUFFINGTON POST (May 8, 2014, 10:59 AM), http://www.huffingtonpost.com/2014/05/07/detroit-teacher-broom-fight_n_5283324.html [<http://perma.cc/EQ64-L9AA>] (reporting that a Michigan teacher was fired after a cell phone video showed her hitting students with a broom in an effort to break up a fight); John Luciew, *Teacher Fired for Allegedly Ordering Six Older Students to Beat Up 7th-Grader Who Sassed Her*, PENNLIVE (Apr. 15, 2014, 9:18 AM), http://www.pennlive.com/midstate/index.ssf/2014/04/teacher_fired_for_allegedly_en.html [<http://perma.cc/N6P5-3HRD>] (reporting that a Florida middle school teacher lost her job after instructing some older students to attack a younger student who disrespected her in class).

others during a faculty meeting.¹⁵⁷ In 2012, a Florida Spanish teacher who was fired earlier in the day returned to school with a gun and shot and killed the headmistress and then himself.¹⁵⁸ In November 2013, a substitute teacher at Cheyenne Middle School in Oklahoma interrupted students during an online test and shouted to the students who were not paying attention, "[i]f you don't stop going to that website, I will shoot you and tell your parents you died by natural causes."¹⁵⁹ Similarly, in Utah,¹⁶⁰ New Jersey,¹⁶¹ and Tennessee,¹⁶² teachers at junior high schools have threatened to shoot students, teachers, and staff.

Further, the United States Department of Education has studied the frequency of the use of corporal punishment in K-12 schools. According to a study conducted by the Department, in the 2006–2007 academic year, a total of 268,684 students were subjected to corporal punishment.¹⁶³ At least 33,039 of those students were classified as disabled under the Individuals with Disabilities Education Act or section 504 of the Rehabilitation Act.¹⁶⁴

¹⁵⁷ Eric Schultz, *Ex-Professor Guilty of Killing Alabama Colleagues*, USA TODAY (Sept. 11, 2012, 4:53 PM), <http://usatoday30.usatoday.com/news/nation/story/2012/09/11/ex-professor-guilty-of-killing-alabama-colleagues/57749884/1> [<http://perma.cc/4BDT-4R6T>].

¹⁵⁸ Fla. School Murder-Suicide Shooter Identified as Fired Spanish Teacher Shane Schumerth, CBS NEWS (Mar. 7, 2012, 1:11 PM), <http://www.cbsnews.com/news/fla-school-murder-suicide-shooter-identified-as-fired-spanish-teacher-shane-schumerth/> [<http://perma.cc/8VJL-XW87>].

¹⁵⁹ Michael Seiden, *Edmund Substitute Teacher Accused of Threatening to Kill Students*, KOCO.COM (Nov. 8, 2013, 8:25 PM), <http://www.koco.com/news/oklahomanews/edmond-substitute-teacher-accused-of-threatening-to-kill-students/22880522> [<http://perma.cc/M3D5-YMZ8>].

¹⁶⁰ *Teacher Threatens to Bring Gun to School*, KSL.COM (May 27, 2004, 2:17 PM), <http://www.ksl.com/?nid=148&sid=84553> [<http://perma.cc/8GCA-HB8Z>].

¹⁶¹ Jon Offredo, *Lawrence Middle School Spanish Teacher Is Accused of Threatening to Shoot Students in Kneecaps, Police Say*, NJ.COM (Oct. 30, 2013, 10:17 PM), http://www.nj.com/mercer/index.ssf/2013/10/lawrence_teacher_accused_of_threatening_to_shoot_middle_school_students_in_kneecaps_police_say.html [<http://perma.cc/6VDB-2N2H>].

¹⁶² See Howard Portnoy, *Teacher Reportedly Threatens Student with Fake Gun*, LIBERTY UNYIELDING (Jan. 10, 2014, 4:32 PM), <http://libertyunyielding.com/2014/01/10/teaching-reportedly-threatens-student-fake-gun/> [<http://perma.cc/A5UW-2UUQ>] (reporting that in a moment of exasperation, a high school math teacher pointed an imaginary gun at a student and stated, "I wish this was real").

¹⁶³ See *2006 National and State Estimations*, U.S. DEP'T OF EDUC., http://ocrdata.ed.gov/StateNationalEstimations/Projections_2006 (follow "National Total" hyperlink) (last visited July 30, 2015) (showing the national estimated total number of students who experienced corporal punishment in 2006, which also includes students with disabilities).

¹⁶⁴ *Id.*; see also Mileka Lincoln, *Teacher's Aide Investigated for Stabbing Student with Pencil*, HAW. NEWS NOW (Feb. 13, 2014, 12:36 AM), <http://www.hawaiinewsnow.com/story/24710523/teachers-aide-investigated-for-stabbing-student-with-pencil> (reporting that in Hawaii, a teacher's aide stabbed a special education student with a pencil); *Teacher Slams Student's Face into Desk & Throws Him Against the Wall*, REPORTERGARY.COM (May 29, 2013), <http://reportergary.com/2013/05/teacher-slams-students-face-into-desk-throws-him-against-the-wall/> [<http://perma.cc/QDV4-9N6S>] (reporting that a Minnesota teacher grabbed a student involved in a physical altercation with another student, slammed his face into a desk, and shoved him against a wall); Paul Thompson, *Teacher 'Threw Autistic Elementary Student into Wall' After He Hit and Pinched Her*, DAILYMAIL.COM (Feb. 25, 2013, 4:51 PM), <http://www.dailymail.co.uk/news/article-2284418/Jacqueline-Zuniga-Lake-County-Florida-teach>

Teachers today are overworked, and their patience is already running low.¹⁶⁵ Teachers juggle disruptive students, interpersonal student issues caused by bullying and harassment occurring both in school and on social media,¹⁶⁶ and numerous socio-economic, political, and other systemic obstacles, making it difficult for students to meet academic benchmarks upon which teachers are evaluated.¹⁶⁷ Thus, the classroom can be a highly stressful environment. While the potential that a disgruntled teacher would aim and fire a gun at a problem student is relatively low, it is conceivable that a teacher could, in a fit of rage, misuse an available weapon.¹⁶⁸ Introducing another dangerous variable into an already-stressful environment invites an unnecessary government-created risk, altering the status quo and opening the school and its employees up to potentially avoidable liability.

c. Scenario C: Gun Accessibility to Children and the Risk of Gun-Related Accidents

Another known risk invited onto campus by the armed-teacher approach is the accessibility of inherently dangerous weapons to children, resulting in a higher probability that gun-related accidents could occur. A teacher or administrator, who may be inadequately trained in gun handling,

er-arrested-throwing-autistic-boy-wall.html (reporting that a Florida teacher's aide lost her temper and picked up an autistic child by his arm and leg, hurling him against the classroom wall, bruising his head, and causing him to lie motionless for thirty seconds after telling the student, "You hit me, I hit you"); Bill Turque, *Student Injured by Chair-Wielding Sub*, WASH. POST (May 18, 2010, 4:53 PM), http://voices.washingtonpost.com/dcschools/2010/05/student_injured_by_chair-wield.html [http://perma.cc/2J2Q-3JEB] (reporting that a substitute teacher in Washington, D.C. threw a chair at a student, fracturing the student's ankle, after the student denied the accusation that he threw jellybeans at the teacher); Michael Walsh, *Kindergarten Teacher Caught on Camera Grabbing 6-Year-Old's Face*, N.Y. DAILY NEWS (May 14, 2014, 2:02 PM), <http://www.nydailynews.com/news/national/kindergarten-teacher-caught-camera-grabbing-6-year-old-face-article-1.1792044> [http://perma.cc/X4XT-3LH7] (reporting that an Ohio teacher grabbed a six-year-old kindergarten student, "pinning him against the wall and clutching his face").

¹⁶⁵ See Lyndsey Layton, *Is the Classroom a Stressful Place? Thousands of Teachers Say Yes*, WASH. POST (May 12, 2015), https://www.washingtonpost.com/local/education/is-the-classroom-a-stressful-place-thousands-of-teachers-say-yes/2015/05/12/829f56d8-f81b-11e4-9030-b4732caefe81_story.html [https://perma.cc/PP7C-ZHZZ] (discussing a study finding that "[s]even out of every 10 respondent[] [teachers] said they 'often' felt their work is stressful and nearly eight out of 10 indicated they recently felt physically and mentally exhausted at the end of the work day").

¹⁶⁶ See Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 99 (2015).

¹⁶⁷ Helen F. Ladd, *Education and Poverty: Confronting the Evidence* 9–10, 14–16 (Duke Univ. Sanford Sch. of Pub. Pol'y, Working Paper SAN11-01, 2011), <http://files.eric.ed.gov/fulltext/ED536952.pdf> [http://perma.cc/NUL7-XUXJ].

¹⁶⁸ See Jennifer Frederick, *Do As I Say, Not As I Do: Why Teachers Should Not Be Allowed to Carry Guns on School Property*, 28 J.L. & EDUC. 139, 143 (1999) (stating that if teachers were allowed to carry guns, "schools may run the risk of quick-tempered or trigger-happy teachers taking inappropriate action in the heat of the moment").

storage, or safety, has the potential to inadvertently leave a loaded gun in an area accessible to children, resulting in the unthinkable.¹⁶⁹

The headlines all too often remind us of the inherent danger of storing firearms in areas that are accessible to children.¹⁷⁰ A recent *New York Times* review of hundreds of child firearm deaths revealed that "accidental shootings occurred roughly twice as often as the records indicate."¹⁷¹ In fact, "more than half of the 259 accidental firearm deaths of children under the age of 15 identified by The Times in eight states where records were available" were also not reported as accidents.¹⁷² Therefore, the risk of accidental killings may be even higher than reflected in the statistics surrounding the debate over how to protect children from guns.¹⁷³

Moreover, studies have identified a positive association between the presence of guns in the home and the risk of unintentional gun-related injuries and deaths among children and adults.¹⁷⁴ These studies foreshadow

¹⁶⁹ See, e.g., Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1202 (2000) (arguing that unsafe firearms storage creates the risk that unauthorized users will gain access to guns, thereby increasing the risk of accidental shootings, adolescent suicides, and criminal misuse of stolen guns); Matt Sledge, *Arming Teachers, School Cops Could Cause More Harm than Good, Experts Say*, HUFFINGTON POST (Dec. 20, 2012, 4:56 PM), http://www.huffingtonpost.com/2012/12/18/arming-teachers-cops-sandy-hook_n_2325727.html [<http://perma.cc/6HEE-G7ER>] (discussing criticisms of the movement to place armed police officers in schools).

¹⁷⁰ Antwan Harris, *Child Accidentally Shot by Sibling, Killed on Tinsley Place*, WRCBTV.COM (July 14, 2010, 10:56 AM), <http://www.wrcbtv.com/story/12792260/update-child-accidentally-shot-by-sibling-killed-on-tinsley-place> (reporting that a two-year-old girl died after her sibling accidentally shot her in the chest while playing with a loaded handgun obtained from her parent's bedroom); Pilar Pedraza, *Funeral Services Set for Toddler Accidentally Shot & Killed*, EYEWITNESS NEWS 12 (May 6, 2014, 10:38 AM), <http://www.kwch.com/news/local-news/police-investigating-possible-shooting-involving-child/25719386> [<http://perma.cc/W7VH-MEFU>] (reporting that a four-year-old accidentally killed his nineteen-month-old brother after he got hold of a loaded handgun in a nightstand drawer); Sam Stein, *100 Children Died in Unintentional Shootings in Year After Newtown*, HUFFINGTON POST (June 25, 2014, 6:59 PM), http://www.huffingtonpost.com/2014/06/25/child-shooting-deaths-everytown_n_5527932.html [<http://perma.cc/2R9N-EC2U>]; see also Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. TIMES (Sept. 28, 2013), http://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html?pagewanted=all&_r=0 (reporting on the devastating incidents of accidental deaths caused by the accessibility of guns in America).

¹⁷¹ Luo & McIntire, *supra* note 170.

¹⁷² *Id.* For example, the article describes the gun deaths of three-year-old Lucas Heagren, eleven-year-old Cassie Culpepper, and eleven-year-old Alex Whitfield, who were all accidentally shot by other children who gained access to firearms. *Id.* However, all three of these incidents were not recorded as accidents. *Id.*

¹⁷³ *Id.*

¹⁷⁴ See, e.g., John R. Martin et al., *Accidental Firearm Fatalities Among New Mexico Children*, 20 ANNALS OF EMERGENCY MED. 58, 59–60 (1991) (finding that the twenty-five unintentional firearm fatalities identified in the study occurred most frequently among children playing with loaded guns obtained from a residence); Douglas J. Wiebe, *Firearms in U.S. Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713 (2003) ("[T]he relative risk of death by an unintentional shooting, comparing subjects living in homes with and without at least one gun, was 3.7.").

the potential for an increase in gun-related injuries to students should teachers be allowed to carry guns in school, especially given the propensity for even trained security officers to misplace their guns.¹⁷⁵

For these reasons, the creation and implementation of a policy allowing teachers to carry firearms on a public school campus is an affirmative act, distinguishable from passive inaction, which alters the status quo and heightens the risk that a student will suffer a gun-related injury on campus.¹⁷⁶ Schools utilizing the armed-teachers approach are therefore throwing students into the “snake pit” and opening themselves up to unnecessary liability.

2. *Plaintiff Is a Member of a Discrete Class*

The second element of a state-created danger claim requires that the plaintiff be a member of a limited and specifically identifiable group.¹⁷⁷ In other words, “the state’s actions [must] place the victim specifically at risk, as distinguished from a risk that affects the public at large.”¹⁷⁸

In *McQueen v. Beecher Community Schools*,¹⁷⁹ five children were left in a classroom with an armed classmate.¹⁸⁰ The court held that the five children were especially at risk, as the shooter was “much more likely to shoot the students in his immediate physical presence than a member of the general public.”¹⁸¹ The *McQueen* court rejected the counterarguments that (1) the perpetrator could have walked out of the classroom and fired at

¹⁷⁵ See *Elementary School Guard Asked to Not Come Back After 5th-Grader Takes Gun from His Holster*, FOX NEWS (May 13, 2015), <http://www.foxnews.com/us/2015/05/13/elementary-school-guard-asked-to-not-come-back-after-5th-grader-takes-gun-from/> [<http://perma.cc/YSSV-59MR>]; *Holyoke Officer Punished for Misplacing Gun*, ASSOCIATED PRESS (Feb. 13, 2014, 11:00 AM), http://www.apnewsarchive.com/2014/Holyoke_officer_punished_for_misplacing_gun/id-e50f6e6b3b3a4cbb59ee74b706d6980 [<http://perma.cc/R5EW-528V>]; *Marion High SRO Suspended After Losing Gun*, WBTW NEWS 13 (Oct. 6, 2010, 1:26 PM), <http://www.wbtw.com/story/21042925/marion-high-sro-suspended-after-losing-gun>; Vignesh Ramachandran, *School Security Guard in Michigan Leaves Gun in Bathroom, Officials Say*, NBC NEWS (Jan. 18, 2015, 6:10 PM), http://usnews.nbcnews.com/_news/2013/01/18/16590086-school-security-guard-in-michigan-leaves-gun-in-bathroom-official-s-say [<http://perma.cc/MK8Q-33PA>]; *School Guard Loses Gun; Policy Reviewed*, REGISTER-GUARD (Sept. 21, 2011), <http://projects.registerguard.com/turin/2011/sep/21/school-guard-loses-gun-policy-reviewed/> [<http://perma.cc/VV6T-RBDP>].

¹⁷⁶ See *supra* Part IV.B.1.

¹⁷⁷ See *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1172 (D. Colo. 2001) (stating that in order for plaintiffs to successfully plead a state-created danger claim, they must prove that the victims of the shooting—Columbine High School students—were members of a limited and specifically identifiable group).

¹⁷⁸ See *Jones v. Reynolds*, 438 F.3d 685, 696 (6th Cir. 2006) (stating that to satisfy the second element of the state-created danger doctrine, the state’s actions must place the plaintiff “specifically at risk, as distinguished from a risk that affects the public at large” (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998))).

¹⁷⁹ 433 F.3d 460 (6th Cir. 2006).

¹⁸⁰ *Id.* at 468.

¹⁸¹ *Id.*

students in the hallways, and (2) that the general public was also at risk because the shooter could have walked off school property, or because shots fired within the school could have passed through walls and windows and injured someone outside.¹⁸² With regard to the first counterargument, the court stated that even "if the relevant group [of plaintiffs] included everyone in the school, the special danger requirement still would be satisfied" because the shooter "was much more likely to shoot the students in his immediate physical presence than a member of the general public."¹⁸³ Further, while recognizing the possibility that a member of the public could be injured, the court rejected the second counterargument and held that the risks faced by the public were collateral to and smaller than the risks faced by the five students in the classroom.¹⁸⁴

When a teacher brings a gun to school pursuant to an armed-teachers policy, the school environment is altered and students are placed at an increased risk of harm. Because this risk includes misfiring during a live-shooter event or injury caused by a misplaced gun on campus, the class of potential plaintiffs undoubtedly includes those students of the particular school at which the armed-teacher works. When weapons are brought onto campus, a student's mere physical presence on campus automatically classifies her as a member of a limited and specifically identifiable group that is placed at a higher risk than that faced by members of the public at large. As such, a student at a school with an armed-teachers policy would certainly satisfy the "discrete class" element of the state-created danger doctrine.

3. *Proximate Cause and Foreseeability*

The third element of a constitutional claim predicated on a state-created danger theory requires that the state actor's affirmative act be the proximate cause of the plaintiff's harm.¹⁸⁵ Determining whether an act was the proximate cause of the plaintiff's harm is based on the foreseeability of the plaintiff's injury.¹⁸⁶ An injury is foreseeable when an actor is aware "of a risk of harm to an individual or class of individuals such that the actor is on notice that his or her act or failure to act significantly enhances that risk of harm."¹⁸⁷ In *Sciotto v. Marple Newton School District*,¹⁸⁸ where a high school invited onto campus heavier and more experienced alumni wrestlers

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ King v. E. St. Louis Sch. Dist. 189, 496 F.3d 812, 817–18 (7th Cir. 2007).

¹⁸⁶ See Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (finding proximate cause where police officer put plaintiff in danger of foreseeable injury by sending plaintiff home unescorted in a visibly intoxicated state in cold weather).

¹⁸⁷ Gremo v. Karlin, 363 F. Supp. 2d 771, 784 (E.D. Pa. 2005).

¹⁸⁸ 81 F. Supp. 2d 559 (E.D. Pa. 1999).

to “live wrestle” student wrestlers, the court held that a reasonable jury could find that injury was foreseeable.¹⁸⁹ The record revealed that parents had expressed safety concerns and that an expert testified that the situation was an “accident waiting to happen.”¹⁹⁰

Similarly, in *Hillard v. Lampeter-Strasburg School District*,¹⁹¹ the court held that a student’s brain injuries sustained during a physical education class exercise called “Fly on the Wall” were reasonably foreseeable.¹⁹² Fly on the Wall required a student “fly” to stand on a chair against the wall while other students taped her to the wall with duct tape.¹⁹³ Plaintiff volunteered to be a fly, and, while standing on the chair against the wall, lost her footing, fell to the floor, and hit her head.¹⁹⁴ She suffered temporal and occipital bone fractures, had two brain surgeries, and was on life support for seven days.¹⁹⁵ In determining that the injury was foreseeable, the court relied on the fact that the risks associated with the Fly on the Wall exercise had been previously reported to the school by a former student who choked during the exercise a year earlier.¹⁹⁶ Since it was reasonable to conclude that taping a person to a wall above a concrete floor could result in injury, the court found that proximate cause was easily established.¹⁹⁷

In the absence of actual notice, injuries may be reasonably foreseeable based on a totality of the circumstances analysis.¹⁹⁸ In *Kneipp v. Tedder*,¹⁹⁹ four police officers stopped a husband and wife for causing a disturbance in the street.²⁰⁰ After questioning the couple and observing that the wife was so intoxicated that she could not walk without support, the police released the husband so that he could go home and relieve the babysitter.²⁰¹

¹⁸⁹ *Id.* at 564–65.

¹⁹⁰ *Id.*

¹⁹¹ No. Civ. A. 03-2198, 2004 WL 1091050 (E.D. Pa. May 13, 2014).

¹⁹² *Id.* at *3.

¹⁹³ *Id.* at *1.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *3.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* (concluding that a jury could find that the superintendent and school district should have known that a certain physical education activity created a foreseeable risk of injury where parents had made earlier complaints about the activity restricting their child’s breathing); *Sciotto v. Marple Newton Sch. Dist.*, 81 F. Supp. 2d 559, 564–65 (E.D. Pa. 1999) (concluding that a jury could find that a wrestling coach and athletic director should have known that the practice of inviting older alumni wrestlers to wrestle high school students created a foreseeable risk of injury where expert opined about dangerousness of such practice, parents had complained about such practice, and relevant rules addressed such practice).

¹⁹⁹ 95 F.3d 1199 (3d Cir. 1996).

²⁰⁰ *Id.* at 1201.

²⁰¹ *Id.* at 1201–02.

Subsequently, the police sent the wife home alone without an escort.²⁰² Two hours later, she was found at the bottom of an embankment where she had suffered hypothermia and severe brain damage.²⁰³

In concluding that the wife's injuries were reasonably foreseeable, the court considered the totality of the circumstances.²⁰⁴ In particular, the court emphasized the fact that the wife's blood alcohol level was 0.25%, that it was a particularly cold evening, and that the husband testified that he had to assist his wife and even carry her at times because she could not support herself.²⁰⁵ Based on these facts, the court concluded that a jury could find that the wife's injuries were more likely to occur because of the police officers' actions in sending an obviously-intoxicated woman home alone.²⁰⁶

The hallmark of a § 1983 claim turns on whether the events that caused the plaintiff's injuries were reasonably foreseeable in light of the defendant's actions.²⁰⁷ "[T]he requisite causal chain can occur through the 'setting in motion [of] a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'"²⁰⁸ Each foreseeability analysis turns on the unique facts and circumstances of that particular case.²⁰⁹

When teachers bring firearms onto K-12 school campuses, there are many potential ways in which students could suffer harm. First, an inadequately trained teacher could accidentally shoot a student.²¹⁰ When teachers are armed and ready to respond to a live-shooter event, there is the potential that they may be more likely to engage an active shooter when an adequately-trained law enforcement officer would otherwise not.²¹¹ In that case, students are more likely to become caught in the crossfire, dodging not only one shooter's stray bullets, but those of potentially two or more

²⁰² *Id.* at 1202.

²⁰³ *Id.* at 1203.

²⁰⁴ *Id.* at 1208, 1211.

²⁰⁵ *Id.* at 1208.

²⁰⁶ *Id.*

²⁰⁷ See *Gremo v. Karlin*, 363 F. Supp. 2d 771, 784 (E.D. Pa. 2005) ("[A] harm is foreseeable when a state actor has actual awareness, based on concrete information, of a risk of harm to an individual or class of individuals such that the actor is on notice that his or her act or failure to act significantly enhances that risk of harm.").

²⁰⁸ *Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

²⁰⁹ See, e.g., *Semler v. Psychiatric Inst. of Wash., D.C.*, 538 F.2d 121, 124-25 (4th Cir. 1976) (analyzing foreseeability of danger created by releasing a psychiatric patient from an institution through the particular facts of the patient's background and medical history).

²¹⁰ See *supra* Part IV(B)(1)(a)(i) (discussing data indicating greater likelihood of shooting inaccuracy during a live-shooter event).

²¹¹ See *supra* Part IV(B)(1)(a)(iii) (discussing literature indicating the difficulty a first-time responder in a live-shooter event would encounter in trying to quell the body's natural "flight or fight" response so as to respond effectively in the situation).

inadequately trained teachers. There is also the potential that a teacher could misuse a firearm in a moment of rage.²¹² Finally, the mere presence of additional firearms on campus, especially when in the possession of untrained teachers, increases the accessibility of weapons to students. With guns easily accessible, a number of unthinkable hypotheticals could place schoolchildren in unnecessary danger.²¹³

In light of the data linking improper gun use to gun-related accidents and deaths,²¹⁴ school officials should—at the very least—be on constructive notice of the enhanced risk of the armed-teacher approach. Moreover, school districts attempting to implement this approach have been met with significant resistance. Superintendents,²¹⁵ law enforcement officers,²¹⁶ educators,²¹⁷ and even the President of National School Safety and Security Services²¹⁸ oppose the armed-teachers approach and have expressed impassioned pleas to states and local school boards considering

²¹² See *supra* notes 156–62 and accompanying text (compiling instances in which teachers threatened violence or use of firearms against fellow faculty or students or actually committed violence or used firearms to harm other faculty or students on school grounds).

²¹³ See *supra* note 170 (compiling tragic news stories concerning the accidental deaths of young children due to negligent storage of firearms).

²¹⁴ See *supra* Part IV(B)(1) (discussing studies and anecdotal evidence linking accidental gun injuries and death to misuse of firearms and increased accessibility of guns to children).

²¹⁵ Kevin R. Jenkins, *Area Superintendents Against Arming Teachers*, DAILY J. ONLINE (Jan. 23, 2013, 5:24 AM), http://dailyjournalonline.com/news/local/area-superintendents-against-arming-teachers/article_2f89a0d6-654f-11e2-9096-0019bb2963f4.html [http://perma.cc/JY23-9L2G] (reporting that prior to the consideration of Missouri House Bill 70 that would authorize teachers to carry firearms on campus, Dr. Desi Mayberry, a Missouri superintendent, expressed concern “about arming people with no training . . . [as] [t]he potential for an accident involving a student would be something we’d want to avoid”); *id.* (reporting that another Missouri superintendent stated: “I see more potential negatives than positives in this. There is a greater chance of accidental shootings. With more guns, the chance goes way up”); *id.* (reporting that another superintendent stated: “We’re very concerned about the training of any teacher who would be carrying a gun on school grounds. We’re also concerned about accidental shootings”).

²¹⁶ James Pinkerton, *Teachers as First Line of Defense?; Many in Law Enforcement See It as a Dangerous Idea*, HOUSTON CHRON., Jan. 21, 2013, at A1 (reporting that the Houston Police Chief expressed concern that “[i]f we give teachers handguns, are we going to give them bulletproof vests to go with them, are we going to give them ballistic helmets? I just don’t think it’s a good idea”); *id.* (reporting that the Pasadena Police Chief was concerned “about accidents that could occur when children are around firearms” and said that “there are more downsides than pluses”).

²¹⁷ See Laura Zuckerman, *Utah Teachers Get Free Gun Training in Response to Newtown Shooting*, REUTERS (Dec. 27, 2012, 9:52 PM), <http://www.reuters.com/article/2012/12/28/us-usa-guns-teachers-idUSBRE8BR02N20121228> [http://perma.cc/PY9D-ADZG] (discussing how one teacher feels it would pose a safety risk if “a disgruntled student could overpower [her] and take [the gun]”).

²¹⁸ See *Arming Teachers and School Staff*, NAT’L SCH. SAFETY & SEC. SERVS. (July 24, 2015), <http://www.schoolsecurity.org/trends/arming-teachers-and-school-staff/> [http://perma.cc/N8X7-H7F8] (discussing the statements of Kenneth Trump, President of National School Safety and Security Services, who stated that “it is short-sighted for those supporting the idea to believe that educators who enter a profession to teach and serve a supportive, nurturing role with children could abruptly kick into the mindset to kill someone in a second’s notice. Police officers train their entire career and enter each traffic stop and individual encounter with a preparedness and life-safety mindset that is different from the professional training and mindset of educators”).

such an approach.²¹⁹ Voiced complaints, coupled with the data suggesting that armed-teachers will be ineffective during a live-shooter event, put schools “on actual notice” of the safety concerns inherent in the armed-teachers approach.²²⁰

In short, allowing K-12 teachers to carry firearms on campus without proper training is an “accident waiting to happen.”²²¹ In light of the overwhelming evidence supporting this opinion and the actual complaints and concerns voiced by opponents of such an approach, school districts and school employees implementing the armed-teachers approach should be deemed “on notice” of the multiple foreseeable risks to students. Where the risks associated with the armed-teacher approach are reasonably foreseeable and school districts have been put on actual notice of the potential harm, a plaintiff claiming liability against the school for injuries sustained as a result of the armed-teacher approach should easily satisfy the proximate cause element of a state-created danger claim.

4. *Defendant’s Conduct Shocks the Conscience*

The fourth and most challenging element of the state-created danger exception asks whether the state actor’s behavior shocks the conscience.²²² This element requires that an “official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”²²³ Furthermore, conduct that shocks the conscience in one environment “may not be so patently egregious in another, and [the Court’s] concern with preserving the

²¹⁹ Americans generally do not support the armed-teachers approach. See PEW RESEARCH CTR., IN GUN CONTROL DEBATE, SEVERAL OPTIONS DRAW MAJORITY SUPPORT 1 (2013), <http://www.people-press.org/files/legacy-pdf/01-14-13%20Gun%20Policy%20Release.pdf> [<http://perma.cc/CW23-EG5A>] (finding that 57% of the 1502 Americans surveyed are against the idea of arming teachers); WINTHROP UNIV., FEBRUARY 2013 WINTHROP POLL tbl. 39 (2013) (finding that two-thirds of the 1038 South Carolinians surveyed are opposed to arming teachers in schools).

²²⁰ *Arming Teachers and School Staff*, NAT’L SCH. SAFETY & SEC. SERVS. (July 24, 2015), <http://www.schoolsecurity.org/trends/arming-teachers-and-school-staff/> [<http://perma.cc/N8X7-H7F8>]; see also *Gremo v. Karlin*, 363 F. Supp. 2d 771, 784 (E.D. Pa. 2005) (“[A] harm is foreseeable when a state actor has actual awareness, based on concrete information, of a risk of harm to an individual or class of individuals such that the actor is on notice that his or her act or failure to act significantly enhances that risk of harm.”); *Sciotto v. Marple Newton Sch. Dist.*, 81 F. Supp. 2d 559, 565 (E.D. Pa. 1999) (“[A] reasonable jury could find—on the basis of expert observations on the dangerousness of the tradition of inviting alumni to wrestling practices, a prior injury under similar circumstances, parental complaints about the safety of the practice, and relevant rules governing high school athletics—that inviting older, heavier, more experienced alumni wrestlers to practice with the Marple Newtown High School wrestling squad and . . . to ‘live wrestle’ with younger, lighter, less experienced members of the high school team . . . created a foreseeable risk of injury, and that a reasonable wrestling coach and athletic director knowing of such a practice, could have foreseen an injury . . .”).

²²¹ *Sciotto*, 81 F. Supp. 2d at 564.

²²² *King v. E. St. Louis Sch. Dist.* 189, 496 F.3d 812, 818 (7th Cir. 2007).

²²³ *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. 2005) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)) (internal quotation marks omitted).

constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.”²²⁴

“[W]hat is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible.”²²⁵ Indeed, there is a continuum upon which the degree of culpability required for a state-created danger claim is measured.²²⁶ The level of culpability is inversely related to the amount of time the government actors had to respond to a particular incident. “The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases.”²²⁷ Historically, “[w]here state officials are asked to make split-second decisions in ‘a hyperpressurized environment,’ an intent to cause harm is usually required.”²²⁸ Conversely, “where officials are afforded the luxury of a greater degree of deliberation and have time to make ‘unhurried judgments,’” conduct demonstrating deliberate indifference is sufficient to establish conduct that shocks the conscience.²²⁹ Moreover, where the state actor is forced to “make something less exigent than a ‘split-second decision, but more urgent than an ‘unhurried judgment,’” the court considers whether the defendant “disregarded a great risk of serious harm rather than a substantial risk.”²³⁰

Thus, in the Third Circuit, the three standards governing the shocks-the-conscience inquiry are: (1) deliberate indifference, where the state actor has ample time to deliberate; (2) gross negligence or arbitrariness that shocks the conscience—which requires that the state actor consciously disregard a great risk of serious harm—where the state actor must act within a matter of minutes or hours;²³¹ or (3) intent to cause harm, where the state actor makes a split-second decision.²³²

In unique situations where the government intervenes in anticipation of an emergency and, due to its intervention, creates a more dangerous situation, courts have been more willing to find that the behavior was conscience-shocking. For example, the U.S. District Court for the District of New Jersey in *Van Orden v. Borough of Woodstown*²³³ stated that the defendant borough’s actions could be considered conscience shocking

²²⁴ *County of Sacramento v. Estate of Lewis*, 523 U.S. 833, 850 (1998).

²²⁵ *Sanford v. Stiles*, 456 F.3d 298, 310 (3d Cir. 2006).

²²⁶ *Id.* at 310.

²²⁷ *Id.*

²²⁸ *Van Orden v. Borough of Woodstown*, 5 F. Supp. 3d 676, 683 (D.N.J. 2014) (quoting *Walter v. Pike County*, 544 F.3d 182, 192 (3d Cir. 2008)).

²²⁹ *Id.* at 683 (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 240 (3d Cir. 2008)).

²³⁰ *Phillips*, 515 F.3d at 241 (quoting *Sanford*, 456 F.3d at 306).

²³¹ *Id.*

²³² *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 469 (6th Cir. 2006).

²³³ 5 F. Supp. 3d 676 (D.N.J. 2014).

because it failed to close Route 40, a main road near a dam, after opening the dam's floodgates to control flood waters during Hurricane Irene.²³⁴ The plaintiff's daughter, whose home had lost power during the hurricane, was driving on Route 40 to escape from the storm when her car was "swept away by fast-moving water," resulting in her drowning.²³⁵ After finding that the defendants' affirmative acts—the opening of the floodgates, which caused Route 40 to become "inundated with raging flood waters"—was the but-for cause of the plaintiff's daughter's death, the court turned its attention to the conscience-shocking inquiry.²³⁶

Highlighting the Third Circuit's approach in developing varying degrees of culpability in light of the exigency of the situation, the *Van Orden* court rejected the Defendants' argument that the highest level of culpability should govern since, according to the Defendants, the decision to open the dam and the simultaneous failure to close Route 40 was in response to "an ever-changing emergency situation" and a "hyper-pressurized" situation.²³⁷ Instead, the court relied on facts from the record indicating that the "[d]efendants had at least several hours 'to prepare and/or implement a plan for dealing with the storm's potential effects,' before opening the floodgates 'later [t]hat evening'" and held that Plaintiff did not have to prove actual intent to harm.²³⁸ Ultimately, the court held that "[r]eleasing 'raging flood water' capable of enveloping roads and bridges and causing serious bodily injury or death, without taking safety measures to protect citizens, certainly could be considered conduct that shocks the conscience."²³⁹

Following the Third Circuit's analytical framework, a school shooting victim claiming that school actors are liable for the injuries under a state-created danger theory must first address whether a claim premised on a teacher's (1) misfiring, (2) misuse, or (3) misplacement of the gun resulted from a split-second decision.

Where the but-for cause of the plaintiff's injuries is the teacher's act of *misfiring* a gun, such a claim, without more, would probably not rise to the "conscience-shocking" level sufficient to hold individual actors liable, especially in circuits that differentiate between split-second decisions and decisions that allow for reasoned deliberation. A teacher's act of pulling the trigger (and missing due to inadequate training) is likely a split-second decision made during a traumatic event that will not satisfy the intent-to-harm standard, especially where the teacher's presumed intent in firing the

²³⁴ *Id.* at 684.

²³⁵ *Id.* at 679.

²³⁶ *Id.* at 682, 684.

²³⁷ *Id.* at 683–84.

²³⁸ *Id.*

²³⁹ *Id.* at 684.

weapon at an attacker was to protect her students. Ultimately, the analysis will depend on the number of students in the teacher's nearby vicinity, the teacher's experience level, and other contributing factors unique to the particular case.

To satisfy the conscience-shocking element in "settings [that] provide the opportunity for reflection and unhurried judgments," the appropriate standard is that of deliberate indifference.²⁴⁰ Where a teacher left six students in a classroom as punishment for not doing their work, the court held that "deliberate indifference is the appropriate standard because [the teacher] had the opportunity to reflect and to deliberate before deciding to leave [the children] unsupervised in the classroom[,] . . . [and] did not need to make a split-second decision that merits applying a higher standard."²⁴¹ Similarly, where the victim's injury is proximately caused by a teacher's *misplacement* of her gun, deliberate indifference would be the appropriate standard, as the misplacement was likely not a split-second decision made under stressful and chaotic circumstances.

In proving "deliberate indifference" based on a teacher's *misplacement* of a gun, a plaintiff must demonstrate that the official was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," and that the teacher drew the inference.²⁴² A teacher's act of leaving a gun in an accessible area in a school full of children probably constitutes deliberate indifference since the chance that a student could find the misplaced gun and actually injure herself or others is great.²⁴³

Finally, a plaintiff's claim premised upon a teacher's *misuse* of a gun would easily satisfy the shocks-the-conscience inquiry, even applying the burdensome split-second-decision standard of "intent to harm." Under any conceivable circumstance in which a teacher misused a weapon for punitive, intimidation, or other inappropriate purposes, the teacher undoubtedly had actual intent to harm.

"It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability."²⁴⁴ Generally, garden-

²⁴⁰ *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 469 (6th Cir. 2006) (alteration in original) (quoting *Bukowski v. City of Akron*, 326 F.3d 702, 710 (6th Cir. 2003)).

²⁴¹ *Id.*

²⁴² *Id.* (quoting *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 493 (6th Cir. 2002); *Cantrell v. Huckabee*, 433 F. App'x 488, 490 (8th Cir. 2011)).

²⁴³ See *Martin et al.*, *supra* note 174, at 58–61 (finding that the most frequent cause of unintentional gun-related fatalities of children age fourteen and below in New Mexico from 1984–1988 was playing with loaded guns found within their homes).

²⁴⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998).

variety negligence, without more, is not enough to shock the conscience.²⁴⁵ Instead, the shocks-the-conscience inquiry asks “whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning.”²⁴⁶

Where, pursuant to a school-created armed-teachers policy, a teacher’s *misplacement* or *misuse* of a firearm on a K-12 campus is an affirmative act and the proximate cause of a student’s gun-related injury, this act may very well be conscience shocking, and a plaintiff seeking to hold a teacher liable under the state-created danger theory will survive a motion to dismiss, exposing the teacher to potential liability. Ultimately, determining whether the plaintiff is likely to succeed on the merits is fact sensitive.

V. THE *MONELL* CLAIM: SCHOOL DISTRICT “MUNICIPAL” LIABILITY²⁴⁷

Generally, municipalities are not liable for the individual actions of their employees, even when those actions are unconstitutional.²⁴⁸ Most circuits will impose municipal liability under § 1983 only when some municipal policy or custom caused the underlying constitutional violation by state actors.²⁴⁹ Therefore, in determining whether schools are liable under a state-created danger theory, the complained-of conduct must have occurred pursuant to a school-established policy, practice, or custom, which essentially “ratifie[s]” the unconstitutional conduct of its employees.²⁵⁰ A § 1983 plaintiff must demonstrate “that defendants, with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the plaintiff] constitutional harm.”²⁵¹

²⁴⁵ *Kane v. Chester Cnty. Dep’t of Children, Youth & Families*, 10 F. Supp. 3d 671, 691 (E.D. Pa. 2014).

²⁴⁶ *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring).

²⁴⁷ *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978) (concluding that a municipality is an entity that may be sued under § 1983 “when execution of a government’s policy or custom . . . inflicts the injury”).

²⁴⁸ See Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, CONSTITUTION SOC’Y, http://www.constitution.org/brief/forsythe_42-1983.htm [<http://perma.cc/E7VD-7ZAN>] (last visited July 25, 2015) (“In order to hold a local government liable under [§] 1983, the Supreme Court has interpreted this causation element to require that the harm be the result of action on the part of the government entity that implemented or executed a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers, or the result of the entity’s custom.”).

²⁴⁹ *Kneipp v. Tedder*, 95 F.3d 1199, 1211–13 (3d Cir. 1996).

²⁵⁰ *Monell*, 436 U.S. at 694; *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 202 (3d Cir. 2000); *Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559, 574 (E.D. Pa. 1999) (citing *Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998)).

²⁵¹ *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989).

Plaintiffs seeking to hold both the individual state actor and the municipality liable must prove that the state actor's underlying constitutional violation occurred because the actors were behaving in accord with the municipality's policy.²⁵²

A. *Constitutional Violation by a State Employee*

The first part of a *Monell* claim considers whether a state actor violated the plaintiff's constitutional rights.²⁵³ An underlying constitutional violation by a state employee—here a teacher—is always a prerequisite to finding that a municipality is liable under a *Monell* theory.²⁵⁴

Notably, although a municipality's *Monell* liability under § 1983 is derivative in nature, and is therefore contingent upon an underlying constitutional violation of the plaintiff's rights,²⁵⁵ the plaintiff “[does not have to] obtain a *judgment* against the individual tortfeasors in order to establish the liability of the municipality.”²⁵⁶ As such, a school district may nonetheless incur *Monell* liability under § 1983 even if an individual teacher is absolved from individual liability.²⁵⁷ For example, where “individual defendants violated the plaintiff's rights but enjoy qualified immunity, or . . . the plaintiff's injuries are not solely attributable to the actions of the named individual defendants,” or the claims against the individual defendants are dismissed due to certain procedural defects or settled out of court, the municipality may still face *Monell* liability.²⁵⁸

The first element of a plaintiff's *Monell* claim is satisfied by the underlying constitutional violation discussed in Part IV above—that is, the deprivation of a school shooting victim's Fourteenth Amendment right to bodily integrity based on a government-created risk. The discussion now turns to the second element.

²⁵² *Sforza v. City of New York*, No. 07 Civ. 6122(DLC), 2009 WL 857496, at *10 (S.D.N.Y. Mar. 31, 2009).

²⁵³ *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 664 (1978) (quoting *Monroe v. Pape*, 365 U.S. 167, 190 (1961)).

²⁵⁴ *See id.* at 692 (“[Section 1983] plainly imposes liability on a government that, under color of some official policy, ‘causes’ an employee to violate another’s constitutional rights.”).

²⁵⁵ Karen M. Blum, *Making Out the Monell Claim Under Section 1983*, 25 *TOURO L. REV.* 829, 850 (2009).

²⁵⁶ *Askins v. Doe # 1*, 727 F.3d 248, 253 (2d Cir. 2013); *see also Curley v. Village of Suffern*, 268 F.3d 65, 71 (2d Cir. 2001) (stating that “a defendant municipality [will not be saved] from liability where an individual officer is found not liable because of qualified immunity,” with the underlying rationale being that “the municipality enjoys no qualified immunity shield”).

²⁵⁷ *Sforza*, 2009 WL 857496, at *10 (“[W]here claims against the individual officers have been dismissed without reaching their merits, it is still possible for a jury to find a constitutional violation for which a municipality may, [through] its policies, practices, or customs, be liable.”).

²⁵⁸ *McCoy v. City of New York*, No. CV 07-4143(RJD)(JO), 2008 WL 3884388, at *1 (E.D.N.Y. Aug. 13, 2008).

B. *Municipal Liability Based on a Failure to Adequately Train*

The second element of a *Monell* claim requires the plaintiff to prove that the municipality was somehow responsible for the underlying constitutional violation. A plaintiff can prove municipal liability under the policy, practice, or custom theory of liability in one of the following four ways: (1) the municipality officially adopted or promulgated a policy that is facially unconstitutional or unconstitutional as applied; (2) the municipality condoned an unconstitutional custom or practice; (3) the unconstitutional decisions were made by officials with final policymaking authority; or (4) the municipality failed to properly train or supervise its employees with respect to the implementation of a municipal policy.²⁵⁹ In order to show that a policy caused such harm, the policy must be the “moving force” of the deprivation of the plaintiff’s federal rights.²⁶⁰

With respect to the armed-teachers approach, plaintiffs are most likely to succeed under the fourth theory of liability. Pursuant to the “failure to train” theory, a school district will be held liable if its “failure to train amounts to deliberate indifference to the [constitutional] rights of persons with whom the [teachers] come into contact”²⁶¹ or if the district’s policy is “objectively deliberately indifferent to the likelihood [that] a particular constitutional violation would occur.”²⁶²

Plaintiffs can satisfy the “deliberate indifference” standard in one of two ways. First, where there is an obvious need to train, the district will be deemed to have actual notice, and its failure to train will constitute deliberate indifference the first time a constitutional violation occurs.²⁶³ Second, in cases where the need to train is not obvious, the district will be deemed to have constructive notice where there is a repeated pattern of constitutional violations arising from the policy.²⁶⁴

In determining deliberate indifference, the inquiry turns on the adequacy of the training program in relation to the particular task that the

²⁵⁹ See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (“We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”); *Wragg v. Village of Thornton*, 604 F.3d 464, 467 (7th Cir. 2010) (“To establish an official policy or custom, a plaintiff must show that his constitutional injury was caused ‘by (1) the enforcement of an express policy of the [village], (2) a widespread practice that is so permanent and well settled as to constitute a custom or usage with the force of law, or (3) a person with final policymaking authority.’” (quoting *Latuszkin v. City of Chicago*, 250 F.3d 502, 504 (7th Cir. 2001))); *Vesterhalt v. City of New York*, 667 F.2d 292, 301 (S.D.N.Y. 2009) (finding that a plaintiff must prove that the municipality adopted a policy that is unconstitutional to state a viable § 1983 claim).

²⁶⁰ *Bd. of the Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 400 (1997) (citing *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 694–95 (1978)).

²⁶¹ *Harris*, 489 U.S. at 388.

²⁶² Blum, *supra* note 255, at 843.

²⁶³ *Harris*, 489 U.S. at 390.

²⁶⁴ *Id.* at 396.

individual state actor must perform pursuant to the municipal policy.²⁶⁵ The plaintiff must generally prove that the inadequate training actually caused the underlying violation.²⁶⁶

In *Young v. City of Providence*,²⁶⁷ on-duty police officers accidentally shot an African American officer, who responded to an incident while off-duty, mistaking him for the perpetrator.²⁶⁸ Where the police department instituted an “always armed/always on duty” policy, the First Circuit held that a reasonable jury could find that there was an “obvious” need for the department to train police officers to properly identify other off-duty officers.²⁶⁹ Finding that the Department could be held liable for its failure to train, the court relied on ample evidence in the record revealing that it inadequately trained officers in identifying off-duty police officers.²⁷⁰ Similarly, in *Combs v. School District of Philadelphia*,²⁷¹ the court held that the plaintiff satisfied his burden at summary judgment of proving that the school had exhibited “deliberate indifference” to the risk to students by showing that there may have been insufficient training related to school procedure, which ultimately led to the student’s injury.²⁷²

The holdings of *Young* and *Combs* indicate that, due to the inherently dangerous nature of the armed-teachers approach, there is a need for school districts to properly train teachers so they are ready and able to use firearms appropriately, thereby minimizing the risk to student bystanders.²⁷³ The deliberate indifference standard is thus satisfied if a school district’s failure to properly train an armed teacher results in a student’s gun-related injury or death. As explained above, even the states that require the highest number of training hours for armed teachers probably fail to satisfy the proper training requirements under a *Monell* analysis.

A year after the 9/11 terrorist attacks, President Bush signed the Arming Pilots Against Terrorism Act (APAT Act).²⁷⁴ The APAT Act compels the Transportation Security Administration to arm and train any

²⁶⁵ *Id.* at 390; *see also* Cannon v. City of Philadelphia, 86 F. Supp. 2d 460, 472 (E.D. Pa. 2000) (discussing liability in relation to inadequate training).

²⁶⁶ *Harris*, 489 U.S. at 391.

²⁶⁷ 404 F.3d 4 (1st Cir. 2005).

²⁶⁸ *Id.* at 9.

²⁶⁹ *Id.* at 9–10.

²⁷⁰ *Id.* at 27–28.

²⁷¹ No. CIV.A.99-3812, 2000 WL 1611061 (E.D. Pa. Oct. 26, 2000).

²⁷² *Id.* at *3. The plaintiff in *Combs* alleged that the school failed to properly and promptly respond to an incident during which he was physically attacked by three other students. *Id.* at *1. The plaintiff suffered a broken jaw and psychological trauma as a result of the attack. *Id.*

²⁷³ *Id.* at *4.

²⁷⁴ *Where Are the Armed Pilots?*, WASH. TIMES (Dec. 11, 2003), <http://www.washingtontimes.com/news/2003/dec/11/20031211-085721-8712r/> [<http://perma.cc/83CW-LL5T>].

airline pilots who volunteer for the program.²⁷⁵ Once the pilots complete training and certification, they are known as “Federal Flight Deck Officers.”²⁷⁶

Pilots wishing to volunteer for the program must complete a cumbersome, thirteen-page application and submit to a three-hour written psychological exam probing into the pilot’s most private thoughts, feelings, opinions, and emotions.²⁷⁷ If a pilot passes the initial examination, she must report to a government psychologist for a one-on-one interview, which many pilots (both commercial and military) with top-secret security clearances fail to pass.²⁷⁸ Assuming the pilot passes the psychological screening, the pilot has to travel, at her own expense, to Artesia, New Mexico, where she would undergo an extensive training program.²⁷⁹ Even with the stringent requirements and built-in hurdles that pilots must overcome before becoming Federal Flight Deck Officers, the Transportation Security Administration still retains the power to revoke a pilot’s Airline Transport Pilot certificate if it deems her a security threat.²⁸⁰

Like pilots, teachers and school officials are entrusted with the safety of children and are expected to ensure a student’s safe passage throughout the school day. Despite this, most of the armed-teacher laws do not impose even minimal psychological evaluation on teachers seeking to carry firearms on campus.²⁸¹

When a student is injured in any of the scenarios posed in Part III above, the school district is vulnerable to liability for implementing an armed-teacher policy without providing adequate training or conducting psychological screenings of employees participating in the program. Like in *Young*, where the police department’s failure to train employees properly with respect to the “always armed/always on duty” policy constituted deliberate indifference to the likelihood of injury or death, a school district’s failure to properly train teachers to serve as armed security officers pursuant to an armed-teachers policy rises to the level of deliberate indifference.²⁸² Research indicates that even highly-trained police officers miss their intended target in a live-shooter situation 52%–88% of the

²⁷⁵ *Id.*

²⁷⁶ *Training*, TRANSP. SECURITY ADMIN., <https://www.tsa.gov/about-tsa/federal-flight-deck-officers> [<http://perma.cc/B52T-22L8>] (last visited Oct. 15, 2015).

²⁷⁷ *Where Are the Armed Pilots?*, *supra* note 274.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *See infra* Appendix.

²⁸² *See City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (“[W]hile claims such as respondent’s—alleging that the city’s failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city’s failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.”).

time.²⁸³ This level of shooting accuracy is undoubtedly much lower for inadequately trained and improperly screened teachers.

Thus, where the armed-teachers approach requires laypeople to carry firearms in anticipation of an attack, a school's deficiency in training its teachers to carry out the policy safely would be the "moving force" of a victim's injuries and would therefore be the primary cause of the deprivation of a student's right to bodily integrity.²⁸⁴ Accordingly, a plaintiff seeking to hold a school district liable for an injury or death proximately caused by a teacher's misfire or misuse of a firearm pursuant to a district's armed-teachers policy will be able to establish municipal liability under the state-established policy, practice, or custom theory of liability.

VI. CONCLUSION AND RECOMMENDATIONS

With the security trend in primary and secondary schools moving toward a "guns-blazing" approach, and at least a quarter of states allowing teachers and other school personnel to carry firearms on campus during the school day, are American students any safer? How can we be sure that teachers are effective in a live-shooter situation, especially when the minimal training requirements vary drastically by state and are, for the most part, negligible?²⁸⁵ Finally, how can we ask schoolteachers, who are already tasked with the difficult mission of educating our children, to assume the additional role of school security guard?

As politicians continue to rapidly push statutory authorizations of the armed-teachers approach through the legislative process, these questions will become even more critical. Before hastily adopting such laws, policymakers should take note of the overwhelming evidence demonstrating that, without adequate training, laypersons are not prepared to safely defend bystanders during a live-shooter event simply because they are armed. In fact, the armed-teacher approach actually elevates the risk to students during a live-shooter event. School districts authorizing teachers to carry firearms on campus without providing sufficient training

²⁸³ Charles & Copay, *supra* note 129, at 17.

²⁸⁴ Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 400 (1997) (quoting Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 694-95 (1978)); see Sciotto v. Marple Newtown Sch. Dist., 81 F. Supp. 2d 559, 571 (E.D. Pa. 1999) ("[A] substantive due process violation will be found where a school official affirmatively acts . . . [which] leads to an invasion of bodily integrity.").

²⁸⁵ See, e.g., Act of Apr. 22, 2014, § 16-11-127.1(c)(5), 2014 Ga. Laws 432, 434 (requiring only valid authorization by an authorized official for possession or use of a firearm as it relates to school safety); Safe Carry Protection Act, § 16-11-130.1(b), 2014 Ga. Laws 599, 616 (requiring general, non-specific, and non-uniform firearms training); KAN. STAT. ANN. § 75-7c04(a)-(b) (West, Westlaw through 2015 Reg. Sess.) (requiring only eight hours of firearms training); UTAH CODE ANN. § 76-10-505.5 (West, Westlaw through 2015 Gen. Sess.) (requiring no training—only authorization by an approved official).

are creating a new risk, dangling students above a figurative snake pit of danger.

When an armed-teacher's use of a firearm on school grounds is the proximate cause of a student's injury or death, that teacher, as a state actor, may be liable under the government-created risk doctrine. Similarly, after a school adopts a policy of arming teachers with guns and fails to adequately train them, it exposes itself to *Monell* liability for any injuries resulting from the implementation of such policy. Both of these theories of liability are viable because of the safety implications of a school's own invitation of an inherently dangerous activity onto campus.

Most states that have adopted the armed-teachers approach have invoked fiscal reasons as their justification.²⁸⁶ But, where the cost of hiring trained law enforcement or private security officers is relatively low compared to the potential cost to student lives placed in greater danger as a result of the armed-teachers approach, the money-saving justification invoked by most school districts is foolhardy and, at best, illogical.

Finally, schools must not lose sight of the appropriate role and function of teachers. With teacher effectiveness under a microscope and student success at the crux of a national debate,²⁸⁷ the armed-teachers approach unnecessarily muddies the already murky waters.

Teachers are already juggling more responsibilities than they can arguably handle effectively.²⁸⁸ One disgruntled teacher explained that "between planning lessons, grading papers, writing tests, coming up with activities, lunch duty, tutorials and juggling the requirements for [the school's] alternative certification program, [she is] stretched to the

²⁸⁶ See *supra* Part II.

²⁸⁷ See, e.g., Denise Smith Amos, *Teacher Effectiveness Scores Still Spark Controversy*, FLA. TIMES-UNION (Dec. 11, 2014), <http://jacksonville.com/news/metro/2014-12-11/story/teacher-effectiveness-scores-still-spark-controversy> [<http://perma.cc/TT92-546C>] (discussing the "Value Added Model," which scores teachers based on how well their students performed on state exams); Jon Campbell, *Teachers Question "Validity" of Evaluation Scores*, J. NEWS (Dec. 17, 2014), <http://www.lohud.com/story/politics-on-the-hudson/2014/12/16/teachers-question-validity-of-evaluation-scores/20501937/> [<http://perma.cc/PV9M-7XPL>] ("[T]eachers are getting good marks while less than 40 percent of grade 3–8 students were 'proficient' on their math and English exams last year."); Evan Grossman, *Report Finds Teachers Woefully Unprepared for Classroom Challenges*, DAILY SIGNAL (Dec. 16, 2014), <http://dailysignal.com/2014/12/16/report-finds-teachers-woefully-unprepared-classroom-challenges/> [<http://perma.cc/3886-APHD>] ("Atop a long list of findings, the report says most states haven't done enough to prepare new teachers for the higher standards their students are expected to achieve.").

²⁸⁸ See, e.g., Rachel Fairbank, *Staggering Workload Leads to Teacher Burnout*, CHRON. (Mar. 15, 2014), <http://www.chron.com/opinion/outlook/article/Fairbank-Staggering-workload-leads-to-teacher-5318650.php> [<http://perma.cc/3Z9V-FGXB>] (noting that with all of her duties, the author, a teacher, is "stretched to the limit"); Liz Riggs, *Why Do Teachers Quit?*, ATLANTIC (Oct. 18, 2013), <http://www.theatlantic.com/education/archive/2013/10/why-do-teachers-quit/280699/> [<http://perma.cc/UE4B-UZV7>] ("[M]any young teachers soon realize they must do overwhelming amounts of after-hours work. They pour out emotional energy into their work, which breeds quick exhaustion.").

limit.”²⁸⁹ “Research has shown that the most important school-based factor impacting a child’s academic success is the quality of her classroom teacher.”²⁹⁰ Despite this, states adopting the armed-teachers approach are expecting teachers to assume a dual role of both educator and armed security guard.²⁹¹

In comparison to the alternatives, the only benefit to the armed-teachers approach is that it may be cost-saving for many schools. But, where the stakes are so high, school districts seeking to increase the presence of armed guards on campus should hire current or former police officers or trained security guards, allowing teachers to focus on educating, and leaving the patrol work to the properly trained experts.

²⁸⁹ Fairbank, *supra* note 288.

²⁹⁰ *Teachers and Leaders: America’s Engineers of Learning and Growth*, U.S. DEP’T OF EDUC., <http://www.ed.gov/teachers-leaders> [<http://perma.cc/4DZT-FX85>] (last visited May 20, 2015).

²⁹¹ *See, e.g.*, Lisa Fingerroot & Chas Sisk, *Tenn. Schools Slow to Embrace Armed Teachers*, USA TODAY (June 2, 2013), <http://www.usatoday.com/story/news/nation/2013/06/02/tennessee-schools-armed-teachers/2383053/> [<http://perma.cc/QLL3-4G9Q>] (illustrating the reluctance of many school districts towards having a “police officer-turned-teacher or a volunteer with police experience” teaching in the school districts under the School Security Act); *Oklahoma House Approves Bill to Allow Armed Teachers in Schools*, FOX NEWS POL., (Mar. 13, 2015), <http://www.foxnews.com/politics/2013/03/13/oklahoma-house-approves-bill-to-allow-armed-teachers-in-schools/> [<http://perma.cc/3BUU-PPSH>] (explaining how the Special Reserve School Resource Officer Act “would give districts the option of paying for teachers to receive a minimum of 120 hours of specialized training in order to carry a firearm into the school”).

APPENDIX

1. *Alabama*

On May 28, 2013, the Alabama State Legislature passed the "Armed Teachers' Bill."²⁹² Instead of allowing all teachers in all districts throughout the state to carry firearms, the new Alabama law applies only to Franklin County, allowing teachers and staff to carry firearms at Franklin County public school campuses.²⁹³ Franklin County lies in Northwest Alabama and has approximately 31,000 residents.²⁹⁴ Franklin County School District Superintendent Gary Williams justified the adoption of the bill as a necessity since law enforcement takes more than twenty minutes to respond to certain rural schools in the district.²⁹⁵

Pursuant to the legislation, any Franklin County principal determining that "the safety of the students at the school is not adequately protected or that additional security is necessary to ensure the safety of the students or employees" may "request volunteers to serve on an emergency security force."²⁹⁶ Members of the security force must be current or retired school district employees or residents of the school district.²⁹⁷ The Franklin County sheriff reviews the list of volunteers for each school and then has the option to approve or deny each potential program participant.²⁹⁸ Next, the sheriff and administrative school personnel develop "a detailed crisis plan" and establish other rules governing key aspects of the plan, including the storage and carrying of weapons.²⁹⁹ Further, the firearms must be approved by the sheriff.³⁰⁰

²⁹² See ALA. CODE § 45-30-103(a), (c) (West, Westlaw through Mar. 1, 2015) ("Upon a determination by the principal of any Franklin County public K-12 school that the safety of the students at the school is not adequately protected or that additional security is necessary to ensure the safety of the students or employees, he or she may request volunteers to serve on an emergency security force for the school. Volunteers shall consist of current employees of the school, retired employees of the school, and residents of the school district. . . . Upon formation of an emergency security force, the sheriff, in conjunction with administrative school personnel, shall prepare a detailed crisis plan for the school that includes a comprehensive plan of action for the emergency security force to follow in the event the security of the school is compromised or the safety of students or employees is threatened. The plan shall also specify how and where weapons may be stored and carried by emergency security force members and circumstances under which certain weapons may be used.").

²⁹³ *Id.* § 45-30-103(a).

²⁹⁴ *Census 2010 Total Population of Franklin County, Alabama*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml [<http://perma.cc/FHE5-G9YQ>] (last visited May 20, 2015).

²⁹⁵ *Ala. District to Arm Teachers, Staff*, CAMPUS SAFETY MAG. (May 27, 2013), http://www.campusafetymagazine.com/article/ala-district-to-arm-teachers-staff/Gun_Rights [<http://perma.cc/QRW4-JPU2>].

²⁹⁶ ALA. CODE § 45-30-103(a) (West, Westlaw through Mar. 1, 2015).

²⁹⁷ *Id.*

²⁹⁸ *Id.* § 45-30-103(b).

²⁹⁹ *Id.* § 45-30-103(c).

³⁰⁰ *Id.*

Security force members are unpaid, but they may receive a “salary supplement” from the board of education for their service.³⁰¹ In addition, security force members may receive reimbursement for the “actual necessary expenses incurred in the discharge of [their] duties,” including any expenses related to weapon procurement and training.³⁰²

The legislation classifies members of the emergency security force as reserve deputy sheriffs.³⁰³ According to the law, members must participate in all training ordered by the sheriff.³⁰⁴ The Franklin County Sheriff’s Office indicates that reserve deputies are required to attend and qualify under the Alabama Peace Officers Standards and Training (APOST) guidelines.³⁰⁵ APOST requirements indicate that trainees are required to complete a modest forty-three hours of firearms training.³⁰⁶ The statute itself does not impose specific training obligations.

2. *Arkansas*

School districts in several states, including Arkansas and Colorado, have developed creative methods of circumventing state laws that prohibit guns on school campuses. Although Arkansas law prohibits all individuals from carrying firearms on any K-12 public or private school campus,³⁰⁷ there is a statutory loophole for “registered commissioned security guard[s].”³⁰⁸ Its provisions allow the Arkansas Board of Private Investigators and Private Security Agencies to license and designate individuals as “commissioned school security officer[s],”³⁰⁹ which the Act defines as “an individual who “[p]rovides security for the school; and . . . [h]as received an authorization issued by the director to carry a firearm in the course of his or her employment.”³¹⁰ As long as school districts hire “an individual in the capacity of a commissioned security officer or commissioned school security officer, the security department of the private business or school is not required to make application to the Department of Arkansas State Police for any license.”³¹¹

³⁰¹ *Id.* § 45-30-103(e).

³⁰² *Id.* § 45-30-103(e), (f).

³⁰³ *Id.* § 45-30-103(d).

³⁰⁴ *Id.*

³⁰⁵ *Reserves*, FRANKLIN CNTY. SHERIFF’S OFF., www.franklinsheriff.org/page.php?id=12&PHPS ESSID=6cbfa35ad08fe54472f94be801e44db9 [http://perma.cc/AZ4M-62AB] (last visited Sept. 22, 2015).

³⁰⁶ ALA. PEACE OFFICERS STANDARDS & TRAINING COMM’N ADMIN. CODE R. 650-X-4-.01(3)(e), www.apostc.state.al.us/Portals/0/APOSTC%20Rulebook.pdf [http://perma.cc/JP5Y-B5T7].

³⁰⁷ ARK. CODE ANN. § 5-73-119(b)(1)(A) (West, Westlaw through 2015 Reg. Sess.).

³⁰⁸ *Id.* § 5-73-119(e)(4).

³⁰⁹ *Id.* § 17-40-102(10).

³¹⁰ *Id.*

³¹¹ *Id.* § 17-40-103(b)(1). *But see* Keller, *supra* note 14, at 694–706 (providing an in-depth discussion of the Arkansas licensing scheme).

This body of law is relatively new and has been effective only since September 2015. Prior to that, school boards had to seek licenses from the Arkansas Board of Private Investigators and Private Security Agencies allowing them to designate teachers and staff as "private security officers" under the Act.³¹² The Board established the requisite training requirements for applicants to obtain a license.³¹³ The Board's policies required a meager ten hours of training.³¹⁴

Arkansas Attorney General Dustin McDaniel issued an advisory opinion stating that school district employees cannot be licensed as private "commissioned security guards" under state law.³¹⁵ As an initial response to the advisory opinion, the Board of Private Investigators and Private Security Agencies issued a temporary suspension of all school district licenses, but it later reinstated the licenses for a two-year period.³¹⁶

It remains to be seen whether the Private Security Agency, Private Investigator, and School Security Licensing and Credentialing Act will continue to be construed to allow licensure of public school districts as private security agencies.³¹⁷ Alternatively, Arkansas teachers and staff can carry firearms on campus if they participate in the 110 hours of training and become a "reserve deputy," an official law enforcement position.³¹⁸

As in other states, Arkansas' justification for this approach is fiscal in nature. "Without money to hire security guards for the five schools [school superintendent David Hopkins] oversees, giving teachers sixty hours of training and their own guns seemed like the only reasonable, economical way to protect the 2,500 public school students in this small town in the Ozark foothills."³¹⁹

³¹² Keller, *supra* note 14, at 694–706.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Ark. Att'y Gen., Op. No. 2013-091 (Aug. 1, 2013), <http://ag.arkansas.gov/opinions/docs/2013-091.html> [<http://perma.cc/9875-NRTM>].

³¹⁶ See ARK. BD. OF PRIVATE INVESTIGATORS & PRIVATE SEC. AGENCIES, MINUTES OF THE MEETING (Sept. 11, 2013), <http://arkansasalarm.org/wp-content/uploads/2014/12/2013-09.pdf> [<http://perma.cc/22T4-VECN>]; Evie Blad, *Board Reverses, OKs School-Staff Gunmen*, ARK. DEMOCRAT-GAZETTE (Sept. 12, 2013), <http://www.arkansasonline.com/news/2013/sep/12/board-reverses-oks-school-staff-gunmen-20130912/> [<http://perma.cc/R8SX-G7P3>].

³¹⁷ See generally Keller, *supra* note 14.

³¹⁸ See Brenda Bernet, *Teachers in 4 Districts Sign Up for Sheriff Reserve-Deputy Training*, ARK. DEMOCRAT-GAZETTE (Oct. 28, 2013), <http://www.arkansasonline.com/news/2013/oct/28/teachers-4-districts-sign-sheriff-reserve-20131028/>.

³¹⁹ Kim Severson, *Guns at School? If There's a Will, There Are Ways*, N.Y. TIMES (Sept. 27, 2013), <http://www.nytimes.com/2013/09/28/us/guns-at-school-if-theres-a-will-there-are-ways.html>.

3. *Colorado*

Not long after the Colorado Legislature rejected two bills³²⁰ that would have authorized school districts to allow teachers and staff to carry guns on campus, some rural school districts found a clever way around Colorado's no-guns-on-campus restriction.³²¹ Under current Colorado law, school districts may allow only employees who are hired as security officers to carry concealed firearms on school campuses.³²² Despite this prohibition, at least one Colorado school district has hired teachers as security guards, requiring them to only take a refresher course twice a year and fire at least 100 rounds a month at the shooting range.³²³ The Dolores County School District hired two principals as security officers and entered into contracts with both of them, memorializing the agreed-upon \$1.00-per-year salary as compensation for their new roles.³²⁴

4. *Georgia*

Although Georgia has historically restricted the possession of firearms and other weapons on school grounds,³²⁵ Governor Nathan Deal recently signed the Safe Carry Protection Act of 2014, a pro-gun amendment to the State's criminal code, allowing certain individuals to carry firearms in areas otherwise legally designated as "school safety zones."³²⁶ The revised

³²⁰ See S.B. 13-009, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013) (allowing school districts to permit employees to carry concealed handguns on school grounds). An identical bill, H.B. 14-1157, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014), was introduced in the House.

³²¹ Greg Campbell, *Rural Colorado School Allows Teachers to Carry Concealed Weapons*, DAILY CALLER (Oct. 29, 2013), <http://dailycaller.com/2013/10/29/rural-colorado-school-allows-teachers-to-carry-concealed-weapons/> [<http://perma.cc/Y4RC-V8TE>].

³²² COLO. REV. STAT. ANN. § 18-12-214(3)(b) (West, Westlaw through July 1, 2015).

³²³ Campbell, *supra* note 321.

³²⁴ *Colo. School Districts Quietly Taking Up Arms While Gun Debate Rages in Denver*, DAILY CALLER (Feb. 18, 2013, 2:07 PM), <http://dailycaller.com/2013/02/18/colo-school-districts-quietly-taking-up-arms-while-gun-debate-rages-in-denver/> [<http://perma.cc/5Q4D-X5AY>]; *Rural Colorado School District Arms Administrators, Bypasses Colorado Gun Laws*, HUFFINGTON POST (May 6, 2013, 2:59 PM), http://www.huffingtonpost.com/2013/05/06/rural-colorado-school-dis_n_3224474.html [<http://perma.cc/Y6RS-KYGY>].

³²⁵ See, e.g., GA. CODE ANN. § 16-11-127.1(b)(1) (West, Westlaw through 2015 Reg. Sess.) (making it unlawful to "carry to or to possess . . . [a weapon or explosive] within a school safety zone").

³²⁶ Safe Carry Protection Act, § 1-6(c)(6), 2014 Ga. Laws 599, 606; see also Herbert Buchsbaum, *Amid Wave of Pro-Gun Legislation, Georgia Proposes Sweeping Law*, N.Y. TIMES (Mar. 24, 2014), <http://www.nytimes.com/2014/03/25/us/amid-wave-of-pro-gun-legislation-georgia-proposes-sweeping-law.html> (characterizing the breadth of the law as "breathhtaking"); Steve Osunsami, *Georgia Governor Signs Law Allowing Guns in Schools, Churches, Bars*, ABC NEWS (Apr. 23, 2014), <http://abcnews.go.com/blogs/headlines/2014/04/georgia-governor-signs-law-allowing-guns-in-schools-churches-bars/>. Governor Nathan Deal proudly announced, "As governor I signed every Second Amendment piece of legislation that has been placed on my desk and today I will put into law a gun bill that heralds self-defense, personal liberties and public safety." *Id.*

statute, dubbed by critics as the “guns everywhere” bill,³²⁷ took effect on July 1, 2014 and allows any “duly authorized official of a public or private elementary or secondary school or a public or private technical school, vocational school, college, university, or other institution of post-secondary education or a local board of education” to possess or use a firearm which would otherwise be prohibited by the Georgia Code within a school safety zone, at a school function, or on a bus or other transportation provided by a school.³²⁸ While the law does require boards of education to adopt a policy with specific provisions governing the training of personnel approved to carry weapons on campus, it fails to specify a minimum number of required training hours.³²⁹

5. *Indiana*

Indiana’s Governor recently signed legislation allowing individuals to store firearms in their vehicles on campus property.³³⁰ The legislation provides defenses to prosecution of gun-related offenses for storing firearms in a locked vehicle outside of plain sight.³³¹

While the legislation does not directly discuss the use of firearms on school property, in northeast Indiana, a sheriff offered to deputize teachers to carry handguns in their classrooms less than a week after the Newtown, Connecticut school shooting.³³² Although a generous community member donated \$27,000 in firearms and three Indiana school districts expressed a desire to participate in the sheriff’s plan, the effort was foiled when an insurance company stated that it would refuse to provide workers’ compensation coverage to schools with gun-carrying staff members.³³³

6. *Kansas*

On April 16, 2013, the Kansas Legislature passed a law that authorizes a public school district to allow any individual, school employee or

³²⁷ Osunsami, *supra* note 326. A spokesperson from Americans for Responsible Solutions, a fierce opponent of the bill, summarized it as follows: “Among its many extreme provisions, it allows guns in TSA lines at the country’s busiest airport, forces community school boards into bitter, divisive debates about whether they should allow guns in their children’s classrooms, and broadens the conceal carry eligibility to people who have previously committed crimes with guns.” Devon M. Sayers & Elliott C. McLaughlin, *Georgia Law Allows Guns in Some Schools, Bars, Churches*, CNN (Apr. 23, 2014), <http://www.cnn.com/2014/04/23/us/georgia-governor-signs-gun-bill/> [http://perma.cc/8MQM-WA6Y].

³²⁸ Safe Carry Protection Act, § 1-6(c)(6), 2014 Ga. Laws at 606.

³²⁹ *See id.* § 1-9(b), 2014 Ga. Laws at 616.

³³⁰ Act of Mar. 26, 2014, § 4(b)(5), 2014 Ind. Laws 1877, 1883.

³³¹ *Id.* § 5(b), 2014 Ind. Laws at 1884.

³³² Steven Yaccino, *Schools Seeking to Arm Employees Hit Hurdle on Insurance*, N.Y. TIMES (July 7, 2013), <http://www.nytimes.com/2013/07/08/us/schools-seeking-to-arm-employees-hit-hurdle-on-insurance.html>.

³³³ *Id.*

otherwise, to carry a concealed weapon on school district property.³³⁴ The law establishes no minimum standards for school district policies regarding the possession of firearms on school property other than the requirements for obtaining concealed carry licensure.³³⁵ In addition to other basic requirements, Kansas imposes modest training requirements for individuals to obtain a concealed carry permit; indeed, the statute only requires applicants for concealed carry licenses to complete an accredited eight-hour handgun safety course.³³⁶ The law does not specify additional firearm or other experiential training requirements.

Like the Indiana gun law, the new Kansas law may make it difficult for school districts to obtain insurance coverage. After the new regulations became law, EMC Insurance Company, the liability insurer for ninety percent of Kansas' school districts, cautioned that any districts in the state permitting employees to carry concealed handguns on school property would lose or be denied coverage.³³⁷

7. Oregon

In Oregon, state law permits individuals "authorized by the officer or agency that controls the public building to possess a firearm or dangerous weapon in that public building."³³⁸ The law has been in place for more than twenty years.³³⁹ Notwithstanding the state's expansive concealed carry laws, Oregon school districts may impose more limiting weapons restrictions on school staff, and many Oregon districts ban guns on campus grounds.³⁴⁰ During the state's last legislative session, a bill that would have prohibited all concealed weapons in schools failed in committee with meager support.³⁴¹

Nearly a year after the tragic shooting at Sandy Hook Elementary, at least one Oregon school district lifted a ban that prevented teachers with

³³⁴ Act of Apr. 16, 2013, § 9(d), 2013 Kan. Laws 551, 571.

³³⁵ *See id.*

³³⁶ KAN. STAT. ANN. § 75-7c04(b)(1) (West, Westlaw through 2015 Reg. Sess.).

³³⁷ Yaccino, *supra* note 332.

³³⁸ OR. REV. STAT. § 166.370(3)(h) (West, Westlaw through Oct. 5, 2015).

³³⁹ The specific provision has existed since 1979 and only has been amended once to include the language "or dangerous weapon." *See* Act of July 16, 1979, § 2, 1979 Or. Laws 489, 489.

³⁴⁰ *See, e.g.,* Kristina Chew, *Oregon Bans Guns on State University Campuses*, CARE2 (Mar. 4, 2012, 1:53 PM), <http://www.care2.com/causes/oregon-bans-guns-on-state-university-campuses.html> [<http://perma.cc/CU3A-WN5W>] (discussing the Oregon State Board of Higher Education's decision to ban guns on seven of its state university campuses).

³⁴¹ *See* Jeff Mapes, *Oregon Gun Bills in Serious Trouble as Courtney Keeps Them from Full Senate*, OREGONIAN (May 6, 2013), http://www.oregonlive.com/mapes/index.ssf/2013/05/oregon_gun_bills_in_serious_tr.html [<http://perma.cc/4E5E-UZ3E>] (explaining the decision by the Oregon Senate President to block four gun-control bills).

concealed weapon permits from possessing firearms on campus.³⁴² At the 4-1 vote, during which the St. Helens School Board received no feedback from teachers in the district about their opinions on the matter, the Board imposed no restrictions, training requirements, or policy guidelines on the seven schools within the district.³⁴³ Other school boards have considered following St. Helens' lead and lifting the concealed weapons ban on school campuses across Oregon.³⁴⁴

8. *South Dakota*

On March 8, 2013, the South Dakota Legislature passed a law that authorizes any school board to "create, establish, and supervise the arming of school employees, hired security personnel, or volunteers," to be known as "school sentinels."³⁴⁵ School district sentinel programs must be approved by the local law enforcement official with jurisdiction over the district.³⁴⁶

Sentinels must complete a training course "as defined by the Law Enforcement Officers Standards Commission."³⁴⁷ The South Dakota Division of Criminal Investigation has developed minimum standards for school sentinels.³⁴⁸ Minimum standards include "good moral character," an examination by a physician for ability to perform duties, and at least eighty hours of training with yearly renewal tests.³⁴⁹ Sentinels must also maintain their concealed carry licensure.³⁵⁰

The South Dakota law was enacted to ameliorate the economic burden of providing effective security in public schools. In South Dakota, bill sponsor Representative Scott Craig of Rapid City explained that rural districts do not have sufficient funding to support expenditures on full-time

³⁴² See Alexis Shaw, *Ore. School Board Votes to Allow Staff to Pack Heat at School*, ABC NEWS (Oct. 26, 2013), <http://abcnews.go.com/US/ore-school-board-votes-staff-pack-heat-school/story?id=20692287>.

³⁴³ *Id.*; see also ST. HELENS SCH. DIST. #502, BOARD OF DIRECTORS REGULAR MEETING MINUTES (Oct. 23, 2013), <http://www.sthelens.k12.or.us/cms/lib05/OR01000906/Centricity/Domain/706/RegularMeetingMinutes10.23.2013.pdf> [<http://perma.cc/AX5S-6F84>].

³⁴⁴ See, e.g., Michael Bamesberger, *Estacada School Board Discusses Allowing Staff, Teachers to Carry Concealed Weapons*, OREGONIAN (Nov. 22, 2013, 3:05 PM), http://www.oregonlive.com/clackamascounty/index.ssf/2013/11/estacada_school_board_opens_di.html [<http://perma.cc/HNK6-Y6AN>] (explaining that the Estacada School District and the Eagle Point School District are considering altering their weapons policies so that teachers and school staff may carry concealed weapons on campus).

³⁴⁵ Act of Mar. 8, 2013, § 1, 2013 S.D. Sess. Laws 210, 210.

³⁴⁶ *Id.* § 2, 2013 S.D. Sess. Laws at 210.

³⁴⁷ *Id.* § 3, 2013 S.D. Sess. Laws at 210.

³⁴⁸ S.D. DIV. OF CRIMINAL INVESTIGATION, SCHOOL SENTINEL 2-4, dci.sd.gov/LinkClick.aspx?fileticket=gG3T8Jzk7Ag%3D&tabid=555 [<http://perma.cc/MEK3-KV3U>] (last visited Aug. 13, 2015).

³⁴⁹ *Id.* at 2, 5.

³⁵⁰ Act of Mar. 8, 2013, § 5, 2013 S.D. Sess. Laws at 210.

law enforcement officers and, as a result, “they are interested in arming teachers or volunteers.”³⁵¹

9. *Tennessee*

Tennessee’s guns-in-schools law went into effect on July 1, 2013.³⁵² The law allows school employees and persons “assigned to a school in accordance with a memorandum of understanding between the chief of the appropriate law enforcement agency and the [school district]” to carry firearms on campus.³⁵³

Tennessee requires that individuals wishing to possess firearms on school property have a concealed carry license, receive written permission from both the “director of schools” and school principal, and be a “law enforcement officer, or have prior service as a law enforcement officer.”³⁵⁴ The law mandates forty hours of basic training in school policing.³⁵⁵

10. *Texas*

The Protection of Texas Children Act, the Texas guns-in-school legislation, went into effect on June 14, 2013.³⁵⁶ The law allows school districts to appoint “school marshals” that carry firearms according to the district’s written regulations and only at specific schools approved by the district.³⁵⁷

The law specifies several topics that must be included or addressed by districts in their written school policies. Applicants must be school employees holding concealed handgun licenses.³⁵⁸ In addition, district training programs are required to include eighty hours of instruction and psychological examinations.³⁵⁹ However, a marshal that has “regular, direct contact with students” may not carry a concealed handgun.³⁶⁰ Instead, the law requires the marshal to store the firearm “in a locked and secured safe within the marshal’s immediate reach when conducting the marshal’s primary duty.”³⁶¹ In addition, the law limits the presence of guns on campus by restricting the number of school marshals to one per every

³⁵¹ *South Dakota Governor Signs Bill Allowing Armed Teachers in the Classroom*, FOX NEWS (Mar. 8, 2013), <http://www.foxnews.com/politics/2013/03/08/sd-governor-signs-bill-allowing-teachers-to-be-armed/> [<http://perma.cc/3MQF-FRJY>].

³⁵² TENN. CODE ANN. § 49-6-815 (West, Westlaw through 2015 1st Reg. Sess.).

³⁵³ *Id.* § 49-6-815(a).

³⁵⁴ *Id.* § 49-6-815(b).

³⁵⁵ *Id.* § 49-6-815(b)(3).

³⁵⁶ Protection of Texas Children Act, 2013 Tex. Gen. Laws 1742, 1746.

³⁵⁷ *Id.* § 3, 2013 Tex. Gen. Laws at 1742–43.

³⁵⁸ *Id.* § 5, 2013 Tex. Gen. Laws at 1743.

³⁵⁹ *Id.* § 5, 2013 Tex. Gen. Laws at 1743–44.

³⁶⁰ *Id.* § 3, 2013 Tex. Gen. Laws at 1743.

³⁶¹ *Id.*

400 students.³⁶² Opponents of this approach worry about gun access and its potential to result in an increase of gun-related injuries and death on campus.³⁶³

11. *Utah*

Utah is one of the only states that authorizes individuals who hold concealed carry permits to carry licensed, concealed weapons onto public school campuses without exception.³⁶⁴ Thus, it is inferred that teachers who hold concealed carry licenses could do so. In order to be issued a license and be allowed to carry a concealed gun, an individual must, among other things, pass a background check and undergo the required training.³⁶⁵ Thus, in Utah, teachers who meet all of the statutory licensing requirements are eligible to obtain a license and carry a concealed gun into public schools. Because permit records are closed to the public,³⁶⁶ parents have no way of knowing which teachers carry weapons.

12. *Other States*

Numerous other states' laws require only school board approval, or sometimes even less stringent requirements, in order to arm district employees.³⁶⁷ Hawaii's and New Hampshire's silence on the issue of

³⁶² *Id.* § 3, 2013 Tex. Gen. Laws at 1742.

³⁶³ See David Conrads, *Texas School Marshals: Armed and Covert, but Will They Help?*, CHRISTIAN SCI. MONITOR (July 31, 2014), <http://www.csmonitor.com/USA/Education/2014/0731/Texas-school-marshals-Armed-and-covert-but-will-they-help> [<http://perma.cc/KE2R-GHLY>].

³⁶⁴ See UTAH CODE ANN. § 76-10-505.5(4)(a) (West, Westlaw through 2015 Gen. Sess.) (providing that the ban does not apply to those authorized to possess a firearm who have official permits as regulated by statute); *id.* § 76-10-505.5(4)(b) (West, Westlaw through 2015 Gen. Sess.) (providing an exemption from punishment for carrying a weapon on school grounds when the "possession is approved by the responsible school administrator").

³⁶⁵ See UTAH CODE ANN. § 53-5-704 (West, Westlaw through 2015 Gen. Sess.) (requiring a variety of identifying documents and training to obtain "general familiarity").

³⁶⁶ UTAH CODE ANN. § 53-5-708(1)(b), (c) (West, Westlaw through 2015 Gen. Sess.).

³⁶⁷ See, e.g., ALASKA STAT. ANN. § 11.61.210 (West, Westlaw through 2015 1st Reg. Sess.) (stating that a person commits a crime in the fourth degree if they possess a weapon without "the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer, within the buildings of, on the grounds of, or on the school parking lot of a public or private preschool, elementary, junior high, or secondary school"); CAL. PENAL CODE § 626.9 (West, Westlaw through 2015 Reg. Sess.) (allowing the possession of a firearm in a school zone with the permission of the school district superintendent or his designee); CONN. GEN. STAT. ANN. § 53a-217b (West, Westlaw through 2015 Reg. Sess. and June Spec. Sess.) (excepting from conviction those carrying weapons on school grounds when possessing the weapon as a part of a program approved by school officials); IDAHO CODE ANN. § 18-3302D(4)(b) (West, Westlaw through 2015 1st Reg. Sess. and 1st Ex. Sess.) (excepting from punishment those possessing weapons on school grounds "as an appropriate part of a program, an event, activity or other circumstance approved by the board of trustees or governing board"); IOWA CODE ANN. § 724.4B(2)(b) (West, Westlaw through 2015 Reg. Sess.) (excepting from punishment those carrying weapons on school grounds who have been "specifically authorized by the school" to do so); KY. REV. STAT. ANN. § 527.070(3)(f) (West, Westlaw

allowing district employees to carry concealed firearms has been interpreted to effectively allow the practice.³⁶⁸

At least nineteen states have recently proposed legislation regarding the possession of firearms by district employees on K-12 school campuses.³⁶⁹

through 2015 Reg. Sess.) (excepting “[a]ny other persons . . . who have been authorized to carry a firearm by the board of education or board of trustees of the public or private institution” from punishment); MASS. GEN. LAWS ANN. ch. 269, § 10(j) (West, Westlaw through Ch. 84 of 1st Annual Sess.) (excepting from punishment those with authorization from a school board or officer in charge to carry firearms on school grounds); MONT. CODE ANN. § 45-8-361(3)(b) (West, Westlaw through chapters effective July 1, 2015, 2015 Sess.) (“The trustees of a district may grant persons and entities advance permission to possess, carry, or store a weapon in a school building.”); N.J. STAT. ANN. § 2C:39-5 (West, Westlaw through 2015 legislation) (excepting those with permission from governing officer of institution from punishment when carrying weapons on school grounds); N.Y. PENAL LAW § 265.01-a (McKinney, Westlaw through Ch. 1–238 of L.2015) (excepting those with written authorization from an educational institution from penalty for carrying weapon on school grounds).

³⁶⁸ *Guns in Schools in Hawaii*, L. CTR. TO PREVENT GUN VIOLENCE (Jan. 2, 2012), <http://smartgunlaws.org/guns-in-schools-in-hawaii/> [<http://perma.cc/VR56-WP74>]; *Guns in Schools in New Hampshire*, L. CTR. TO PREVENT GUN VIOLENCE (Jan. 29, 2015), <http://smartgunlaws.org/guns-in-schools-in-new-hampshire/> [<http://perma.cc/S6T8-H76L>].

³⁶⁹ *See, e.g.*, H.B. 562, Gen. Assemb., Reg. Sess. (N.C. 2015); H.B. 2412, 51st Leg., 2d Reg. Sess. (Ariz. 2014); H.R. 1012, 89th Gen. Assemb., 1st Sess. (Ark. 2014); H.B. 753, 116th Leg., Reg. Sess. (Fla. 2014); H.B. 707, 40th Leg., Reg. Sess. (La. 2014); S.B. 656, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); H.B. 55, 28th Leg., 1st Sess. (Alaska 2013); H.B. 826, 152d Gen. Assemb. (Ga. 2013); H.B. 4376, 98th Gen. Assemb., 2d Reg. Sess. (Ill. 2013); H.F. 2284, 85th Gen. Assemb. (Iowa 2013); L.B. 879, 103d Leg., 2d Reg. Sess. (Neb. 2013); H.B. 454, 130th Gen. Assemb. (Ohio 2013); H.B. 2329, 54th Leg., 2d Reg. Sess. (Okla. 2013); S.B. 1193, 197th Gen. Assemb. (Pa. 2013); H.B. 3160, 2013-2014 Gen. Assemb., 120th Sess. (S.C. 2013); H.B. 1788, 63d Leg., Reg. Sess. (Wash. 2013); S.B. 539, 81st Leg., Reg. Sess. (W. Va. 2014); A.B. 118, 101st Leg., Reg. Sess. (Wis. 2013); S.F. 109, Budget Sess. (Wyo. 2014).