

NOTE

A DUTY TO PROTECT: WHY GUN-FREE ZONES CREATE A SPECIAL RELATIONSHIP BETWEEN THE GOVERNMENT AND VICTIMS OF SCHOOL SHOOTINGS

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INTRODUCTION

On April 20, 1999, Eric Harris and Dylan Klebold went on a killing spree at Columbine High School.¹ Although police officers, sheriff's deputies, and SWAT-team members quickly arrived at the scene of the shooting, none of them entered the building for twenty minutes.² A 911 dispatcher instructed students to remain in the library instead of evacuating through an exterior entrance.³ Then, although the dispatcher could hear through the open line the shooters entering the library and committing one murder after another, a dozen officers stationed near the exit made no effort to enter the building, walk fifteen steps, and confront the murderers.⁴ The two shooters—the only armed individuals in the building—managed to kill ten students while the police stood idle.⁵

By 12:30 P.M., the police learned that the shooters had committed suicide.⁶ By this time, at least two people had called 911 and informed police of the exact location where a science teacher, David Sanders, lay seriously wounded.⁷ A student placed a sign in the window, stating, "One bleeding to death."⁸ At 1:10 P.M., the first SWAT team entered the building, but the command post never told them about Sanders' location and condition—despite the post continuing to reassure those accompanying Sanders that help was on the way.⁹ SWAT officers did not reach Sanders until 2:42 P.M. and a paramedic did not arrive for another forty-two minutes.¹⁰ By that time, Sanders—the last wounded person reached by police despite being the only one known to require emergency medical treatment—had finally bled to death.¹¹

This sort of tragedy caused by inaction by public officials is not an isolated incident. In the wake of the fatal shooting of an unarmed civil-

¹ David Kohn, *What Really Happened at Columbine?*, CBS NEWS (Apr. 17, 2001), <http://www.cbsnews.com/news/what-really-happened-at-columbine/>.

² David Kopel, *The Police Stood Idle*, DAVEKOPEL.ORG (Apr. 20, 2000), <http://www.davekopel.org/2A/OpEds/THE-POLICE-STOOD-IDLE.htm>.

³ *Schnurr v. Bd. of Cty. Comm'rs*, 189 F. Supp. 2d 1105, 1117 (D. Colo. 2001).

⁴ Kopel, *supra* note 2.

⁵ *Id.*

⁶ *Sanders v. Bd. of Cty. Comm'rs*, 192 F. Supp. 2d 1094, 1102 (D. Colo. 2001).

⁷ *Id.*

⁸ Kohn, *supra* note 1.

⁹ *See id.*; *Sanders*, 192 F. Supp. 2d at 1103.

¹⁰ Kohn, *supra* note 1.

¹¹ *Sanders*, 192 F. Supp. 2d at 1103.

ian in Ferguson, Mississippi, much critical attention has been focused on overly aggressive police behavior causing tragedies.¹² However, there are still many examples of public officials not doing enough to prevent such tragedies.¹³ Even though protecting the public is supposed to be the police's reason to exist, the current legal framework does not properly incentivize officers to do more to save lives because they are protected from liability for negligence by what is known as the public duty doctrine.¹⁴ Under the public duty doctrine, a state and its officials have no duty to provide public services to particular citizens unless those citizens can claim a "special relationship" with the state—a requirement that citizens can only meet if they prove both "(1) a direct or continuing contact between the injured party and a governmental agency or official, and (2) a justifiable reliance on the part of the injured party."¹⁵

This Note will argue that in states that employ the public duty doctrine, courts should automatically presume that a special relationship exists to protect citizens from violent criminal acts in gun-free zones such as schools, or else legislatures should statutorily impose on officers an affirmative duty to aid in areas where the legislature has prohibited firearms. It will focus on negligence committed by state and local officers—not federal employees whose common law torts can be remedied only by bringing a claim under the Federal Tort Claims Act.¹⁶ Part I will discuss the background of the public duty doctrine and its interaction with immunity doctrines. Part II will argue that courts should presume that a special relationship exists when officers initiate a rescue in a gun-free zone such as a school. Part III will argue that legislatures should enact legislation that imposes on officers an affirmative duty to aid in such zones and that waives any sovereign immunity to such claims that the state may currently enjoy.

¹² See, e.g., Conor Friedersdorf, *The Killing of Kajieme Powell and How It Divides Americans*, THE ATLANTIC (Aug. 21, 2014), <http://www.theatlantic.com/national/archive/2014/08/the-killing-of-kajieme-powell/378899/> (summarizing critical reactions to footage of officers shooting mentally disturbed civilian); Rand Paul, *We Must Demilitarize the Police*, TIME (Aug. 14, 2014), <http://time.com/3111474/rand-paul-ferguson-police/> (arguing that "there should be a difference between a police response and a military response").

¹³ See, e.g., *Allison Gas Turbine Div. of General Motors Corp. v. District of Columbia*, 642 A.2d 841, 842 (D.C. 1994) (harbor patrol officers refused help from private citizens with scuba gear, allowing passengers of downed helicopter to drown before harbor patrol divers arrived); *Rennix v. Jackson*, 990 N.Y.S.2d 439 (N.Y. Sup. Ct. 2014) (emergency medical technician (EMT) worker on lunch break failed to assist victim who died of asthma attack).

¹⁴ See *Allen v. District of Columbia*, 100 A.3d 63, 78 (D.C. 2014) (using doctrine to bar allegations that EMTs negligently failed to properly evaluate victim's condition).

¹⁵ *Allen*, 100 A.3d at 70 (citing *Klahr v. District of Columbia*, 576 A.2d 718, 720 (D.C. 1990)).

¹⁶ See Cassandra Cole, *A Review of State Sovereign Immunity Statutes and the Management of Liability Risks by States*, 32 J. INS. REG. 45 (2013).

I. HOW THE PUBLIC DUTY DOCTRINE WORKS

A. *History and Operation of the Doctrine in Common Law Cases*

Traditional tort principles impose a duty on individuals to exercise reasonable care when they initiate a rescue of another.¹⁷ Of course, rescuing civilians is part of the job description for many state agents such as police, firefighters, and EMTs.¹⁸ But some courts have expressed concern that allowing injured parties to sue for negligence when officials fail to protect them would require courts and juries to second-guess the adequacy of public officials' performance in office.¹⁹ Furthermore, these courts are concerned with imposing overwhelming liability on government agencies with limited resources.²⁰ Therefore, to ensure that public officials do not assume greater duties by virtue of becoming officials, state courts have recognized, separate from sovereign immunity, a protection for state and local governments from tort liability when agents negligently perform acts within the scope of their public duties.²¹ This protection attaches at the duty stage of tort analysis and bars injured civilians from recovering damages.²² This protection is known as the public duty doctrine, and is recognized as a defense to tort claims in many states.²³

For example, in 1981, the District of Columbia Court of Appeals launched the development of the public duty doctrine in the District of Columbia in the case of *Warren v. District of Columbia*.²⁴ In *Warren*, three women accused the Metropolitan Police Department of negligently

¹⁷ See RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

¹⁸ See *What Police and Detectives Do*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/Protective-Service/Police-and-detectives.htm#tab-2> (last visited Nov. 16, 2014); *What Firefighters Do*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/protective-service/firefighters.htm#tab-2> (last visited Nov. 16, 2014); *What EMTs and Paramedics Do*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/healthcare/emts-and-paramedics.htm#tab-2> (last visited Nov. 16, 2014).

¹⁹ *E.g.*, *Warren v. District of Columbia*, 444 A.2d 1, 8 (D.C. 1981).

²⁰ *E.g.*, *Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991); *Riss v. New York*, 240 N.E.2d 860, 860–61 (N.Y. 1968).

²¹ See *Allen v. District of Columbia*, 100 A.3d 63, 78 (D.C. 2014) (Easterly, J., dissenting) (explaining how the court in *Warren* applied a public duty analysis separate from sovereign immunity); *Warren*, 444 A.2d at 8 (explaining how officers do not assume a greater duty to others).

²² See *Allen*, 100 A.3d at 78 (Easterly, J., dissenting) (summarizing the history of the public duty doctrine in the District of Columbia).

²³ See, *e.g.*, *Stevenson v. City of Doraville*, 726 S.E.2d 726, 728–29 (Ga. 2012) (using public duty doctrine to bar claim against officer for failing to redirect traffic from victim's disabled vehicle); *Wood v. Guilford County*, 558 S.E.2d 490, 494–97 (N.C. 2002) (using public duty doctrine to bar claim against county for failing to provide security at courthouse adequate to prevent assault); *White v. Beasley*, 552 N.W.2d 1, 3 (Mich. 1996) (holding that the public duty doctrine applies in Michigan to insulate officers from tort liability for failure to provide police protection).

²⁴ *Allen*, 100 A.3d at 78 (Easterly, J., dissenting).

failing to protect them from intruders in their home.²⁵ When two of the women heard the screams of the third on the floor below, they called the police to report a burglary in progress.²⁶ The police arrived and knocked on the front door, but left when they received no answer, and did so without checking the back entrance.²⁷ The women again called the police and were told that help was on the way, but the call was never dispatched to any officers.²⁸ Believing the police may be in the house, the two women called out to the third, alerting the two intruders to their presence.²⁹ As a result, the three victims were held captive for fourteen hours, raped, robbed, and beaten.³⁰ The court held that the public duty doctrine shielded the District from liability, stating that:

[W]hen a municipality or other governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community. Dereliction in the performance of police duties may, therefore, be redressed only in the context of a public prosecution and not in a private suit for money damages.³¹

Therefore, the D.C. court adopted the rule that both police officers and the government entities employing them “are not generally liable to victims of criminal acts for failure to provide adequate police protection.”³²

However, courts also recognize an exception to the public duty doctrine when the government has a “special relationship” with the plaintiff.³³ Indeed, traditional tort principles acknowledge that an individual has a duty to protect someone when they have a “special relation” with that person.³⁴ If a plaintiff proves that a special relationship exists, then a court will hold that the government’s general duty transforms into a specific duty to use reasonable care to protect the individual plaintiff, reopening the government to liability.³⁵

²⁵ *Warren*, 444 A.2d at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 4–5 (internal citations omitted).

³² *See id.* at 4.

³³ *See id.* at 5–6 (citing other state courts holding that a general duty may become a specific duty when a special relationship exists).

³⁴ *See* RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965).

³⁵ *See Schuster v. New York*, 5 N.Y.2d 75, 80–81 (N.Y. 1958) (holding that government owed special duty to protect informant).

Although different states vary as to the elements necessary to prove that a special relationship exists,³⁶ a plaintiff must usually prove that there was “direct contact or continuing contact with the government agency or official” and that the plaintiff exercised “justifiable reliance.”³⁷ To show a direct or continuing contact, a plaintiff must do more than simply emerge to the special attention of the government; the type of contact must be different than that with the general public.³⁸ To show justifiable reliance, a “plaintiff must specifically act, or refrain from acting, in such a way as to exhibit particular reliance upon the actions of the police.”³⁹ This is a high standard to meet,⁴⁰ and indeed, the court in *Warren* held that the plaintiffs—despite their individual calls for help—failed to establish a special relationship and therefore could not recover damages.⁴¹ However, if a plaintiff does establish a special relationship, then the government may be liable for standard negligence claims.

B. Comparison to 42 U.S.C. § 1983 Claims

Often, instead of bringing common law tort claims, plaintiffs will sue law enforcement for their failure to protect as a deprivation of life or liberty without due process of law, under 42 U.S.C. § 1983.⁴² Presumably, plaintiffs bring these claims instead because 42 U.S.C. § 1983 al-

³⁶ See Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 § 2[b] (2001). Compare *Cuffy v. New York*, 505 N.E.2d 937, 940 (N.Y. 1987) (internal citations omitted) (“The elements of this ‘special relationship’ are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.”), with *Doe v. Calumet City*, 641 N.E.2d 498, 504 (Ill. 1994) (“(1) The municipality must be uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) there must be specific acts or omissions on the part of the municipality; (3) the specific acts must be affirmative or willful in nature; and (4) the injury must occur while the plaintiff is under the direct and immediate control of municipal employees or agents.”).

³⁷ See, e.g., *Platt v. District of Columbia*, 467 A.2d 149, 151 (D.C. 1983).

³⁸ Compare *Hines v. District of Columbia*, 580 A.2d 133, 136 (D.C. 1990) (holding that 911 calls do not help establish special relationship), with *Powell v. District of Columbia*, 602 A.2d 1123, 1130–31 (D.C. 1992) (holding that personal transaction in which government undertook to issue correct license plates and registration was a direct contact).

³⁹ *Morgan v. District of Columbia*, 468 A.2d 1306, 1315 (D.C. 1983) (internal citations omitted).

⁴⁰ See *infra* text accompanying note 117 for traditional examples of relationships that qualify for special duties.

⁴¹ See *Warren*, 444 A.2d at 9.

⁴² See, e.g., *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989) (bringing claim against social workers for failure to protect from child abuse); *Jackson v. Joilet*, 715 F.2d 1200, 1201 (7th Cir. 1983) (bringing claim against officer for failure to save occupants of burning automobile); *Sanders v. Bd. of Cty. Comm’rs*, 192 F. Supp. 2d 1094, 1103–04 (D. Colo. 2001) (bringing claim against police at Columbine for failing to rescue David Sanders).

lows for recovery of attorneys' fees.⁴³ However, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that, similar to the common law public duty doctrine, there is no constitutional duty to provide essential services unless the Due Process Clause imposes a special duty on the state to assume responsibility for an individual's safety.⁴⁴ In addition, the burden for proving that a state has a special duty seems to be higher for § 1983 claims, requiring a plaintiff to show that the state affirmatively acted to restrain the plaintiff's ability to act "through incarceration, institutionalization, or other similar restraint of personal liberty."⁴⁵

In *DeShaney*, the Court held that no such special duty existed even though social service employees, acting as state agents, knew that the four-year-old victim faced a special danger of abuse by his father, visited the victim monthly, proclaimed that they would protect the victim, and yet allowed the victim to remain in his father's custody, resulting in brain damage so severe that the victim was expected to spend the rest of his life confined to a mental institution.⁴⁶

It would seem easier for this plaintiff to recover on a claim for common law negligence because these facts would likely satisfy the special relationship exception to the public duty doctrine. There was almost certainly a direct contact on behalf of the government because agents regularly made special visits to the victim and made specific attempts to protect him, such as making recommendations that he enroll in preschool and that his father attend counseling.⁴⁷ Although justifiable reliance may be harder to prove, the fact that the state took the victim into custody in the past and the fact that the victim was too young to defend himself may have shown reliance on the state.⁴⁸ Indeed, the Court admitted that the state may have "acquired a duty under state tort law to provide [the victim] with adequate protection."⁴⁹ Therefore, a common law negligence claim alleging a special relationship exception to the public duty doctrine may more likely support recovery in such cases.

Indeed, in addition to a higher burden for proving a special relationship, the Supreme Court has held that plaintiffs making § 1983 claims alleging violations of substantive due process must prove that a defendant's conduct was not merely negligent but "shocks the conscience."⁵⁰ And the "sort of official action most likely to rise to the conscience-

⁴³ See 42 U.S.C. § 1988(b) (2012).

⁴⁴ See *DeShaney*, 489 U.S. at 199–200.

⁴⁵ See *id.* at 200.

⁴⁶ *DeShaney*, 489 U.S. at 192–93, 197–98.

⁴⁷ See *id.* at 192.

⁴⁸ See *id.*

⁴⁹ *Id.* at 201–02.

⁵⁰ *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

shocking level” is “conduct intended to injure in some way unjustifiable by any government interest.”⁵¹

The Court has not laid down a specific test to determine what shocks the conscience because “substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.”⁵² In some cases, such as those involving Eighth Amendment claims of cruel and unusual punishment, it may “suffice for . . . liability that prison officials were deliberately indifferent to the medical needs of their prisoners.”⁵³ However, “[d]eliberate indifference that shocks in one environment may not be so patently egregious in another,” and thus injuries following from actions that fall between negligence and intentional conduct are closer calls.⁵⁴

But it remains clear that liability requires more than negligence, and this is therefore a higher standard than would be required in common law tort claims. Although the Supreme Court has been reluctant to treat the Fourteenth Amendment as a “font of tort law,” states may still “provide victims with personally enforceable remedies,”⁵⁵ and therefore state courts and legislatures should act to ensure that victims in such tragic cases are not barred from recovery.

C. *Interaction with Qualified and Sovereign Immunity Doctrines*

The public duty doctrine is a defense separate from qualified and sovereign immunity. However, in order to understand how a plaintiff can prevail in a suit against a state or municipal government or its agents, it is necessary to understand how immunity doctrines operate. If the defendants in failure to protect cases were immune from suit anyway, then the public duty doctrine would be a superfluous defense.

1. Qualified Immunity

Qualified immunity is a defense that individual officials can raise when they are sued in their personal capacities.⁵⁶ There are state and federal variants. In states that recognize a “qualified immunity” defense, the standard is generally that officials performing discretionary acts will be immune from liability as long as the official’s conduct “is not willful,

⁵¹ *Id.* at 849.

⁵² *Lewis*, 523 U.S. at 850.

⁵³ *Id.*

⁵⁴ *Id.* at 849–50.

⁵⁵ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

⁵⁶ *See Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (recognizing qualified immunity for public officers from damages liability under § 1983).

malicious or intended to cause harm.”⁵⁷ Generally, discretionary acts require personal deliberation and judgment, while ministerial acts merely require the execution of a specific duty.⁵⁸ For immunity purposes, courts typically hold that traditional police activities are discretionary.⁵⁹ Additionally, the conduct standard clearly excludes negligence as a basis for liability. Therefore, in these states, claims against police officers in their individual capacities for negligent failures to protect would likely fail.

However, other states, such as California, hold that “qualified immunity” is a doctrine of federal common law that applies only in § 1983 claims and not in state law claims.⁶⁰ In the § 1983 cases where it applies, qualified immunity bars liability as long as an official’s conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁶¹ Because *DeShaney* held that officials have no constitutional duty to protect individuals from private violence,⁶² qualified immunity likely bars personal liability in negligent failure to protect claims.⁶³ Therefore, plaintiffs alleging a failure to protect—and successfully circumventing the public duty bar—seem more likely to ultimately recover against individual officers on state tort law claims as long as the state does not recognize a qualified immunity defense.

2. Sovereign Immunity

Sovereign immunity is a common law doctrine that makes states immune to lawsuits.⁶⁴ In many states, municipalities enjoy the same sovereign immunity as the state when tortious conduct arises from gov-

⁵⁷ See *Trimble v. City of Denver*, 697 P.2d 716, 729 (Colo. 1985) (recognizing that “a majority of states have adopted a general rule holding that an official performing discretionary acts within the scope of his office enjoys only qualified immunity”).

⁵⁸ *E.g.*, *Miree v. United States*, 490 F. Supp. 768, 774–75 (N.D. Ga. 1980) (holding that airport manager’s failure to disperse or kill birds at airport was ministerial action because decision to correct bird problem had already been made, the time for exercising personal judgment had passed, and he was not free to disregard this decision).

⁵⁹ 1 ISIDORE SILVER, *POLICE CIVIL LIABILITY* § 8.10[2] (Matthew Bender rev. ed., 2015).

⁶⁰ See *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) (citing and applying California law to reverse dismissal of state claims because qualified immunity did not apply to state law claims and no state statutory immunities existed to shield defendants).

⁶¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁶² *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196–97 (1989).

⁶³ *Compare* *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990) (holding that recklessness is sufficient mental state for constitutional violation and that jury could find recklessness where plaintiff alleged that deputy ordered civilians to cease efforts to rescue boy drowning in lake), *with* *Jackson v. Joilet*, 715 F.2d 1200, 1202, 1204–05 (7th Cir. 1983) (holding that negligence does not support cause of action under § 1983 and that officer’s failure to rescue victims from car crash was at worst grossly negligent and not actionable).

⁶⁴ 26 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES* § 131.01[1] (Matthew Bender rev. ed., 2014).

ernmental, as opposed to proprietary, functions.⁶⁵ A state has immunity for the torts of its agencies and employees; these agencies and employees also have immunity against tort claims if sued in their official capacities.⁶⁶ Because a state is liable for the torts of its agents and employees, plaintiffs can succeed on such claims if a state constitutional provision exists, there is statutory consent to suit, or the state judiciary has abrogated or limited the state's common law immunity.⁶⁷ In many states, common law sovereign immunity has been abrogated or limited by judicial decision.⁶⁸ However, the result has often been that state legislatures reenact the doctrine by statute but allow for certain exceptions for specific types of suit.⁶⁹

Therefore, whether or not a plaintiff can seek relief from a state will depend on the specific state's torts claim act.⁷⁰ These range from statutes making the state liable from all tortious conduct to the same extent a private person would, such as Washington's,⁷¹ to ones with few, limited exceptions—usually for motor vehicle incidents—such as Missouri's.⁷² The viability of failure to protect claims will likely depend on whether or not a state's torts claims act allows for suits for injuries resulting from officers' omissions.

In those states that have waived immunity, the only thing standing between a plaintiff and recovery for negligent failures to protect is the public duty doctrine. While Part II of this Note will argue that courts in all states should recognize a special relationship exception to the public duty doctrine regardless of immunity, Part III will argue that legislatures in states that have not waived sovereign immunity from such suits should both impose an affirmative duty for officers to act and waive immunity from liability in such suits.

⁶⁵ See, e.g., *Vikings Utilities Corp. v. Onslow Water & Sewer Auth.*, 755 S.E.2d 62, 64 (N.C. Ct. App. 2014) (holding that North Carolina municipality is “immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity”) (quoting *Evans ex rel. Horton v. Housing Auth.*, S.E.2d 668, 670 (N.C. 2004)) (internal quotation marks omitted); *Phelps v. City of Kansas*, 371 S.W.3d 909, 912 (Mo. Ct. App. 2012) (citing Missouri statute retaining sovereign immunity for municipalities in all but four situations); *Brooks ex rel. Wright v. Housing Auth. of Baltimore City*, 984 A.2d 836, 848 (Md. 2009) (holding that Maryland General Assembly waived housing authority's immunity).

⁶⁶ FRUMER & FRIEDMAN, *supra* note 64, § 131.01[2].

⁶⁷ See *id.*

⁶⁸ *Id.* § 131.02[1].

⁶⁹ *Id.*

⁷⁰ See Cole, *supra* note 16 (explaining that some states' tort claims acts retain sovereign immunity with specific exceptions that allow suits while others presume that immunity is waived with exceptions that prevent waiver); FRUMER & FRIEDMAN, *supra* note 64, § 131.02[1], tbl.131-1 (listing relevant statutes of all 50 states).

⁷¹ WASH. REV. CODE ANN. § 4.92.090 (LexisNexis 2014).

⁷² MO. REV. STAT. § 537.600 (2013).

II. WHY COURTS SHOULD PRESUME A SPECIAL RELATIONSHIP TO PROTECT AGAINST VIOLENT CRIMINAL ACTS IN GUN-FREE ZONES

In most cases, this combination of the public duty doctrine and immunity is beneficial. It helps ensure that public officials are not automatically tagged with liability, which may deter them “from lawful conduct that advances the public good.”⁷³ However, the doctrine becomes inflexible and suspect when the government obtains a monopoly on protecting the public in a clearly defined area. When the government creates such an area through its policies, courts should recognize that a special relationship exists in which the government owes a duty to replace the self-protection that it has denied private citizens.

A. *Cases in the Aftermath of Columbine*

After the tragic events at Columbine, families of the victims looked to bring suit against anyone who could possibly be held liable. Families sued the parents of the shooters,⁷⁴ the individuals who sold guns to the shooters,⁷⁵ law enforcement officers,⁷⁶ school officials,⁷⁷ and even violent video game manufacturers by alleging that their products had influenced the shooters and thereby caused the shootings.⁷⁸ The district court dismissed the claims against the school officials⁷⁹ and video game manufacturers,⁸⁰ and the plaintiffs reached a settlement agreement with both the parents of the shooters and the friends who helped the shooters obtain the guns.⁸¹ The settlement was for \$2.53 million and was split between approximately thirty-six families.⁸² The families of six other victims reached a settlement with the gun sellers.⁸³ As for law enforcement, the court in *Schnurr v. Board of County Commissioners* dismissed the stu-

⁷³ Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236 (2006).

⁷⁴ See *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004) (recounting the details behind the settlement between the families and the parents of the shooters).

⁷⁵ *Ireland v. Jefferson Cty. Sheriff's Dep't*, 193 F. Supp. 2d 1201, 1214–15 (D. Colo. 2002).

⁷⁶ *Id.* at 1211; *Sanders v. Bd. of Cty. Comm'rs*, 192 F. Supp. 2d 1094, 1103–04 (D. Colo. 2001); *Schnurr v. Bd. of Cty. Comm'rs*, 189 F. Supp. 2d 1105, 1118 (D. Colo. 2001).

⁷⁷ *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1136 (D. Colo. 2001).

⁷⁸ See *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1268–69 (D. Colo. 2002).

⁷⁹ *Castaldo*, 192 F. Supp. 2d at 1175.

⁸⁰ *Acclaim Entm't, Inc.*, 188 F. Supp. 2d at 1281–82.

⁸¹ *Columbine: Families Agree to Settle Suit with Gun Supplier*, CJONLINE.COM (May 8, 2001), http://cjonline.com/stories/050801/new_columbine.shtml.

⁸² See *id.* (“about three dozen families”); Jay Stapleton, *Post-Shooting Lawsuits Are Hard to Win*, CONN. LAW TRIBUNE (Dec. 21, 2012), <http://www.ctlawtribune.com/id=1202582406025/PostShooting-Lawsuits-Are-Hard-To-Win> (“\$2.53 million”).

⁸³ *Columbine Families Settle Lawsuits over Sales of Killers' Guns*, CHICAGO TRIBUNE, Feb. 2, 2003, at 12.

dents' claims against the officers,⁸⁴ but the same court in *Sanders v. Board of County Commissioners* allowed the claim of the daughter of Mr. Sanders to proceed against the officers.⁸⁵ This section will compare *Sanders* with *Schnurr* and summarize the roles that the public duty and immunity doctrines played in each.

In *Sanders*, the plaintiff sued under § 1983 instead of under state tort law.⁸⁶ Even though § 1983 claims have higher standards, the court held that a special relationship existed and denied defendants' motions to dismiss on all claims.⁸⁷ The court held that the defendants entered a special relationship with Mr. Sanders because the actions of the defendants amounted to "restraint" as contemplated by *DeShaney*.⁸⁸ The court noted that the commanders directed the dispatchers to continue to assure the callers in the room with Mr. Sanders that help was "on the way" and to order all of the occupants not to leave the room to seek aid or rescue because it would draw the attention of the attackers.⁸⁹

The court placed special focus on the fact that the defendants knew that this information was false because the defendants had prohibited rescue personnel from entering the school and knew that the shooters had already committed suicide.⁹⁰ Because the court found that the defendants "created a prolonged involuntary confinement" and "acted affirmatively to restrain the freedom of the occupants," it held that the defendants entered into a special relationship "giving rise to a constitutional duty to protect and provide care."⁹¹ Furthermore, the court denied qualified immunity to the defendants because the court held that the special relationship doctrine was sufficiently established at the time so that reasonable officers "would have understood that their actions violated Mr. Sanders' constitutional right to substantive due process."⁹²

After the court denied the motions to dismiss and allowed the case to move forward, the plaintiff eventually obtained a settlement for \$1.5 million—a relatively large amount, considering that approximately thirty-six families had to split the \$2.53 million settlement obtained from

⁸⁴ *Schnurr v. Bd. of Cty. Comm'rs*, 189 F. Supp. 2d 1105, 1144 (D. Colo. 2001).

⁸⁵ 192 F. Supp. 2d 1094 (D. Colo. 2001).

⁸⁶ *Id.* at 1103–04.

⁸⁷ *Id.* at 1117, 1124. The court also held that *DeShaney*'s second exception to the general rule against a constitutional duty to protect—the state-created danger doctrine—was satisfied. *See id.* at 1109, 1117.

⁸⁸ *Id.* at 1117.

⁸⁹ *Id.*

⁹⁰ *See id.* at 1117–18 ("[The court] may consider allegations of false promises of aid in support of Claim Two.") (emphasis in original).

⁹¹ *Id.* at 1118–19.

⁹² *Id.* at 1124.

the parents and friends of the shooters.⁹³ This difference was likely because the plaintiff had already won on the motion to dismiss and gained additional leverage. Therefore, finding a special relationship can potentially have a very large effect on victim compensation.

In *Schnurr*, the students sued officers on both § 1983 grounds and state tort law grounds.⁹⁴ The court dismissed the § 1983 claims, finding no special relationship under *DeShaney* because the defendants' "restraint" of the students in the library was not similar to incarceration, and because the decisions to not enter the building and to tell students to remain in the library was not "conscience shocking in a constitutional sense."⁹⁵ Furthermore, even if the defendants had violated the rights of the plaintiffs, the court held that qualified immunity would protect them because the contours of the special relationship exception were not clear and would not have provided "notice to reasonable officers" that their actions created a relationship.⁹⁶

Under state tort law, however, the court concluded that a special relationship did exist.⁹⁷ To establish a special relationship under Colorado law, the plaintiffs needed only to prove that "officers' actions created reasonable reliance on the part of the victims that the police would assist or protect them."⁹⁸ The court found that the defendants "induced the reliance" of the victims by telling them to remain in the library and that help was on the way.⁹⁹

However, even though the court found a special relationship, the court still dismissed the state law claims for two reasons. First, the court held that the plaintiffs' claim was barred by the Colorado Governmental Immunity Act (CGIA).¹⁰⁰ Although the court noted that the actions of the defendants may have constituted negligence, or even gross negligence,¹⁰¹ the CGIA bars claims against public employees unless their conduct was "willful and wanton."¹⁰² Therefore, unlike the failed qualified immunity defense in *Sanders*, the officers here were protected by the state's decision to grant them immunity from their own negligence.

Second, the court applied Colorado law and examined an additional four factors to determine whether a duty existed.¹⁰³ This practice con-

⁹³ *Columbine High School Shootings Fast Facts*, CNN (Apr. 18, 2014), <http://edition.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/index.html>.

⁹⁴ *Schnurr v. Bd. of Cty. Comm'rs*, 189 F. Supp. 2d 1105, 1118 (D. Colo. 2001).

⁹⁵ *Id.* at 1133–34.

⁹⁶ *Id.* at 1137.

⁹⁷ *Id.* at 1141.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1140.

¹⁰¹ *Id.*

¹⁰² COLO. REV. STAT. § 24-10-118(2)(a) (2014).

¹⁰³ *Schnurr*, 189 F. Supp. 2d at 1142.

trasts with that of approximately twenty-five states that find a duty whenever a special relationship exists.¹⁰⁴ Although the court found that the foreseeability of the harm and the small burden in guarding against it weighed in favor of imposing a duty on the defendants, the court decided not to impose a duty because it determined that the high social utility of providing emergency services would be diminished.¹⁰⁵ Therefore, because of these two idiosyncrasies of state law, the families of the students—unlike the daughter of Mr. Sanders—were unable to ultimately recover against the law enforcement officers responsible for protecting the community.

B. Courts Should Presume that a Duty to Protect Civilians Exists Within Gun-Free Zones

The concept that disarmament should create a duty to protect those who are disarmed is not a new one. In 1968, Judge Keating, dissenting in *Riss v. New York*, argued that liability should be imposed for the negligent failure to provide police protection.¹⁰⁶ He pointed out that the city's position denying liability was difficult to understand given that the victim, in compliance with the law, "did not carry any weapon for self-defense" and was thereby "required to rely for protection on the City of New York," which then "denie[d] all responsibility to her."¹⁰⁷ Lance Stell, reacting to cases such as *Warren*, has argued that, "[w]hen the state disables civilians' carrying handguns for personal defense but refuses to acknowledge incurring a special duty of care to protect those it disables, it demotes them from full citizenship, commits a serious injustice and diminishes the state's legitimacy."¹⁰⁸

However, Stell was writing in 2006 before the Supreme Court decided *District of Columbia v. Heller* in 2008.¹⁰⁹ In *Heller*, the Court declared that the Second Amendment protects an individual right to possess firearms—at least within one's home.¹¹⁰ However, the Court qualified this right by noting that its opinion should not "cast doubt on longstanding prohibitions on the possession of firearms . . . forbidding

¹⁰⁴ See Eaton, *supra* note 36, at 4 (listing cases for twenty-five states recognizing an exception "where there has been created a special relationship between a municipality and an individual, and thus a special duty of protection") (internal quotation marks omitted).

¹⁰⁵ See *Schnurr*, 189 F. Supp. 2d at 1142–43 (weighing the four factors of foreseeability, social utility of defendant's conduct, magnitude of burden, and practical consequences of imposing duty).

¹⁰⁶ 240 N.E.2d 860, 867 (Keating, J., dissenting).

¹⁰⁷ *Id.* at 862 (Keating, J., dissenting).

¹⁰⁸ Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 265, 277 (2006).

¹⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹⁰ *Id.* at 635. The Supreme Court later confirmed that this right applies to both the federal government and the states. *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

the carrying of firearms in sensitive places such as schools and government buildings.”¹¹¹ Because civilians can no longer be disarmed by law within their homes, the Court’s decision seems to have weakened a disarmament argument for finding a special duty to protect civilians—at least in cases such as *Warren* which take place inside the home.¹¹² But, following this logic, it would also appear that a disarmament argument could still apply to protect civilians affected by the remaining legal gun bans: those within schools and government buildings.¹¹³

Therefore, this section will first argue that gun-free zones create conditions that should automatically satisfy the most common elements of the common law special relationship test. It will then argue that, even in jurisdictions that require more than a special relationship to create a duty, other common factors also suggest that courts should find a special duty to protect civilians in gun-free zones.

1. Special Relationship Test

Different states use different tests to determine the existence of a special relationship. The court in *Schnurr* applied Colorado law and determined that it needed to find only one of two alternative elements: “custody or control” or “reasonable reliance.”¹¹⁴ In *Allen v. District of Columbia*, the most recent case in the *Warren* line of cases in D.C., the court required the plaintiff to prove both “a direct or continuing contact” (analogous to *Schnurr*’s “custody or control”) and “a justifiable reliance” (analogous to *Schnurr*’s “reasonable reliance”).¹¹⁵ In any case, when a criminal initiates a shooting in a gun-free school zone, both of these elements should be automatically satisfied.

¹¹¹ *Heller*, 554 U.S. at 626.

¹¹² This has not stopped gun-rights activists from citing *Warren* to support arguments to expand gun rights further. They argue that because police have no duty to protect, citizens should be armed. See Brief of Pink Pistols as Amicus Curiae in Support of Plaintiffs-Appellants-Cross-Appellees, *Nojay v. Cuomo*, 2014 U.S. 2nd Cir. Briefs LEXIS 445, 15 (May 6, 2014) (No. 14-0036-cv(L)) (arguing that New York’s ban of large capacity magazines and assault weapons is unconstitutional, and citing *Warren* as evidence that “no citizen enjoys a constitutional right to police protection,” and thus it is no answer to say that “because the police are well-armed, citizens need not be”). This Note’s argument is related: as long as citizens are disarmed, there should be a duty.

¹¹³ This logic would not necessarily extend to create a duty owed to classes of citizens falling with *Heller*’s longstanding prohibition exception: “felons and the mentally ill.” *Id.* That is because person-specific gun restrictions would not give officers adequate notice of who is reliant on them and because disarmed individuals would not be reliant exclusively on the government—they could rely on other armed private citizens to protect them.

¹¹⁴ *Schnurr v. Bd. of Cty. Comm’rs*, 189 F. Supp. 2d 1105, 1140–41 (D. Colo. 2001).

¹¹⁵ 100 A.3d 63, 78 (D.C. 2014).

a. Justifiable Reliance

To the extent that certain states require victims to take action in reliance,¹¹⁶ their tests do not advance the policies that a special relationship test should serve. Traditional examples of special relationships are parent and child, teacher and student, and jailer and prisoner.¹¹⁷ None of these examples require the controlling party to affirmatively act to induce reliance; the determinative element according to the Restatement (Second) of Torts is simply that the party “is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive him of his normal power of self-protection.”¹¹⁸

Therefore, although direct contact should be still required to establish custody, the proper test should not require affirmative action to establish reliance; the fact that the victim has been rendered reliant on state actors should be sufficient. Indeed, in *Archie v. City of Racine*, the Seventh Circuit stated the similar proposition that “[w]hen a state cuts off sources of private aid, it must provide replacement protection.”¹¹⁹ Therefore, if the state fails to provide adequate replacement protection, it makes sense to hold the state liable specifically because of the victim’s reliance on the state in general.

By prohibiting guns within an entire area, the state renders civilians reliant on the state for protection in all shooter situations because firearms are the only means reasonably capable of defending against other firearms. Although plaintiffs at home like in *Warren* can no longer claim that the state rendered them defenseless, victims at schools can make this claim. In public schools, any guards stationed there will be police officers or state contractors, so the only agents capable of protecting students will be agents of the state. In private schools, the reliance argument would still apply if no private armed guards are allowed.¹²⁰ Then state emergency responders would be the only means of protection in lethal violence cases.

¹¹⁶ See, e.g., *id.* at 73–74 (requiring plaintiff to show that he acted in a different way because of the presence of emergency medical technicians).

¹¹⁷ See RESTATEMENT (SECOND) OF TORTS § 314B(1) (AM. LAW. INST. 1965) (“master is subject to liability”); RESTATEMENT (SECOND) OF TORTS § 320 cmt. a (AM. LAW. INST. 1965) (applicable to “jailer” and “teacher”).

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 320 (AM. LAW. INST. 1965).

¹¹⁹ *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988).

¹²⁰ For an example of an ordinance banning all guns on school property, see WOODBURY, MINN., CODE OF ORDINANCES § 13-5(g) (2014) (making no exception for private security guards). If a state does allow private schools to hire armed guards, as Virginia does, then courts do not need to automatically find a special relationship in those schools because they are not completely reliant on the state for protection. See VA. CODE ANN. § 18.2-308.1(C) (2015) (making exception to gun-free law for an “armed security officer . . . hired by a private or religious school”).

Although officers may not “voluntarily” render students reliant on them, the Restatement imposes a duty on them whenever they are “required by law” to take custody under circumstances depriving them of their ability to protect themselves. The students in gun-free zones are deprived of their ability to defend themselves, and the officers are required by law to respond to the emergency. Therefore, because students rely on law enforcement officers for protection in all situations involving lethal criminal violence, courts should presume that victims are “reliant” on the officers who respond to aid them.

b. Direct and Continuing Contact

Although this analysis applies to special relationships in common law—and not constitutional—claims, the Supreme Court’s description of state power in public schools proves helpful in guiding this analysis. In *Vernonia School District 47J v. Acton*, the Court noted that a state’s power over public school children “is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”¹²¹ Even though the issue in *Vernonia* was whether a school drug testing policy violated students’ Fourth Amendment rights—and not whether the state had a constitutional duty to protect students—the Court was careful to point out that it did not “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.”¹²²

Admittedly, the degree of control within schools may not be sufficient to establish a constitutional duty under the *DeShaney* test requiring “incarceration, institutionalization, or other similar restraint of personal liberty.”¹²³ Nevertheless, it should be sufficient to meet a common law standard of direct and continuing contact with the government—especially if courts consider the following combination of factors: compulsory education laws that force students to attend school, gun bans that disarm the adults who can protect them, and the affirmative actions of officers who undertake to protect them in an emergency.

In § 1983 claims, courts have typically held that compulsory education laws alone are not sufficient to establish a special relationship. For example, in *D.R. v. Middle Bucks Area Vocational Technical School*, the Third Circuit held that a school’s physical authority over students did not “create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*.”¹²⁴ The court distinguished school-

¹²¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

¹²² *Id.* at 648, 655 (internal quotation marks omitted).

¹²³ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

¹²⁴ *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992).

ing from custody by focusing on the fact that the “state did nothing to restrict [the victim’s] liberty after school hours and thus did not deny her meaningful access to sources of help.”¹²⁵ The *D.R.* case involved male students who molested a female victim “on a regular basis” for four months.¹²⁶ The court noted that during this time, the victim could have sought help from “persons unrelated to the state”¹²⁷ and her parents could have legally withdrawn the victim for safety reasons.¹²⁸

However, during an emergency situation like Columbine, neither students nor teachers have access to outside help from non-state actors. Once inside a classroom, it may be impossible to safely escape. And, while a passing armed civilian may wish to enter the school and intervene, the relevant state law would likely prevent the civilian from doing so legally.¹²⁹ Therefore, the justifications given for denying a duty to protect students from criminal acts in the *D.R.* context do not necessarily extend to situations where disarmament is relevant to defending against the criminal action or to state law standards for finding a duty to protect.

Indeed, in state tort law contexts specifically, at least one court has recognized a special relationship between schools and students, “resulting in the imposition of an affirmative duty to take all reasonable steps to protect its students.”¹³⁰ The California state court in *M.W. v. Panama Buena Vista Union School District* recognized that this duty “arises, in part, based on the compulsory nature of education” and held the school district liable for failing to prevent sexual assault among students.¹³¹ It is sensible to conclude that, at least in public schools, compulsory education laws alone should always create direct and continuing contact with students, if not reliance.

But the argument for recognizing a direct contact becomes even stronger when the state’s compulsory education laws are combined with gun bans around the private school and state agents respond to the emergency and undertake specific efforts to rescue the victims. Although students are not forced to attend a state-run school, they are similarly compelled into a custodial relationship with adults who the state has disarmed. The direct contact is not between a school district and the stu-

¹²⁵ *Id.*

¹²⁶ *Id.* at 1366.

¹²⁷ *Id.* at 1372.

¹²⁸ *See id.* at 1371 (“[A] parent is justified in withdrawing his child from a school where the health and welfare of the child is threatened.”) (quoting *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 751 (Pa. 1972)).

¹²⁹ *See* VA. CODE ANN. § 18.2-308.1 (2015) (prohibiting possession of firearms on school property and listing exceptions, but providing no exception for private civilians in emergency response).

¹³⁰ *M.W. v. Panama Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d 673, 679 (Cal. Ct. App. 2003).

¹³¹ *Id.*

dent, but should run between the state and the student. Of course, the state cannot be sued in tort for negligently enacting a law.¹³² However, the state can be liable as employer, in accordance with its state tort claims act, when its employees commit negligence.¹³³

Therefore, once officers initiate a rescue, the contact with the state itself should be complete. In accordance with tort principles, if the officers were private actors, once they undertake to render services, they must exercise reasonable care.¹³⁴ Once their actions are directed towards protecting civilians within the area, a direct contact should form. Although the public duty doctrine exists to protect officers from incurring liability in such situations where their job requires them to initiate rescues, the requirement of reliance should accomplish that goal. As stated previously, situations in gun-free zones differ from other police responses because disarmament creates reliance on the state for protection. Therefore, the response directed at students who the state has already put into this dangerous situation should establish direct contact with at least the state, if not the officers themselves.

c. Extending Special Relationship to Officers

Having established that students have, through legislation, school policy, and actions of officers, had direct contact with and reliance on the state, the state should be amenable to suit for the negligence of its agents. The only remaining question is whether the officers themselves can be sued individually. In other words, can the actions of the state's agents combine with the state's actions in creating a dangerous environment through compulsory education and gun bans to establish a link between the student and officer? In cases like *Schnurr*, courts considered whether the individual officers had contact or created reliance, but did not consider whether laws that created contact or reliance extended to officers.¹³⁵ The officers themselves did not have continuous contact with the students like the state had through the school, and the officers did not create the conditions that rendered the students reliant. However, it is not unprecedented for courts to acknowledge that agents can be negligent

¹³² Again, this is because the states have sovereign immunity against suits unless waived in a state torts claim act, which would not include negligently passing a law exposing civilians to danger. *See, e.g.*, NEB. REV. STAT. § 81-8, 215 (2014) (holding state liable in same manner and same extent private individual would be, but private individuals have no legislative authority).

¹³³ *See id.* § 81-8, 209 (allowing the state to be liable for torts committed by its "officers, agents, or employees" to the extent provided by Nebraska's state tort claims act).

¹³⁴ *See* RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

¹³⁵ *See Schnurr v. Bd. of Cty. Comm'rs*, 189 F. Supp. 2d 1105, 1141 (D. Colo. 2001) (concluding that the sheriff defendants' actions induced reliance and concluding without analysis that they lacked custody or control).

for failing to warn others of dangerous conditions created by their principals.¹³⁶

Therefore, when officers make affirmative efforts to aid civilians already reliant on them for help, like the victims in *Schnurr* and *Sanders*, they should be liable for any negligence they commit. To hold otherwise would allow states to eliminate liability by having the school create the contact, the legislature create the reliance, and the officer commit the negligence. Victims should not have to meet such an onerous burden to establish that officers upon whom they rely during emergencies have a duty to protect them from harm.

2. Other Factors

To the extent that the court in *Schnurr* considered extra factors at all, this practice should not be standard among courts determining whether state agents have a duty to protect. The court in *Schnurr* adopted its factors from *Solano v. Goff*,¹³⁷ which in turn cites *Davenport v. Community Corrections*¹³⁸ as the source of the factors.¹³⁹ Yet the court in *Davenport* was considering imposing a new, common-law duty on a private corporation operating a corrections facility—not a state agent whose job is to protect civilians.¹⁴⁰ Indeed, in a comment note, the American Law Reports even describes these factors as influencing the duty of a “private person for failure to protect.”¹⁴¹ However, the one factor that may be appropriate to consider when determining the duty of a state agent, foreseeability, still points towards liability. The factor of social utility is more appropriate to leave to the legislature, especially since officers also have an immunity defense and the legislature is capable of revoking that immunity if it so decides. And the factors of the magnitude of the burden and the practical consequences of imposing a duty should instead be analyzed when considering what sort of behavior constitutes a breach of the duty.

¹³⁶ See *Demoranville v. Rose*, No. CV-10-178, 2012 Me. Super. LEXIS 64, at *9–11 (Super. Ct. Me. Apr. 27, 2012) (acknowledging that agent could have committed tort by failing to warn victim of hole in principal’s porch).

¹³⁷ *Solano v. Goff*, 985 P.2d 53, 54 (Colo. App. 1999).

¹³⁸ *Davenport v. Cmty. Corrs.*, 962 P.2d 963, 967–68 (Colo. 1998).

¹³⁹ *Schnurr*, 189 F. Supp. 2d at 1142.

¹⁴⁰ *Davenport*, 962 P.2d at 965.

¹⁴¹ See E.L. Kellet, Annotation, *Private Person’s Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619, [1], [2] (2014) (listing “foreseeability,” “inability to comply,” “economics,” and “social utility”).

a. Foreseeability

Foreseeability is based on “common sense perceptions of the risks.”¹⁴² As the defendants in *Schnurr* admitted, “there was a foreseeable risk of harm” to the victims.¹⁴³ Indeed, it is difficult to see how harm to disarmed civilians during a school shooting would not be foreseeable. If officers do not act, then civilians will continue to be harmed. Defendants could try to argue that they should not have a duty to protect individuals who they do not know exist, unlike the victim in *Sanders* about whose condition the officers knew.¹⁴⁴ However, at least one court has found that argument unavailing specifically in a school context. In *District of Columbia v. Doe*, the D.C. Court of Appeals held that a school could be found liable for the rape of a student because the harm to students in general from intruders was foreseeable.¹⁴⁵ This view makes sense because defendants should not need to know which individual is harmed as long as they know that someone will be harmed. Therefore, the fact that officers could owe a duty to multiple unknown students should not diminish the effect of foreseeability on the imposition of a duty.

b. Social Utility of Defendants’ Conduct

The court in *Schnurr* placed a very high value on the social utility of the officers’ “function and purpose.”¹⁴⁶ Indeed, even though the court acknowledged that the foreseeability of the harm and the small burden in providing accurate information to the students weighed in favor of imposing a duty, the court decided against finding a duty for fear of creating a “disincentive to provide emergency law enforcement services.”¹⁴⁷ The court did not explain how the “spectre of personal liability”¹⁴⁸ would cause public officials to cease providing a necessary public service or act differently when responding to an emergency situation where lives are at risk. While this line of reasoning may be appropriate in the private sector where entrepreneurs may decide against doing business, the court does not account for several factors that distinguish state actors.

¹⁴² *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48 (Colo. 1987).

¹⁴³ *Schnurr*, 189 F. Supp. 2d at 1142.

¹⁴⁴ *See Sanders v. Bd. of Cty. Comm’rs*, 192 F. Supp. 2d 1094, 1103 (D. Colo. 2001) (referring to Mr. Sanders as “the only individual known to the Command Defendants to be in urgent need of emergency life-saving medical treatment”).

¹⁴⁵ *See District of Columbia v. Doe*, 524 A.2d 30, 33–34 (D.C. 1987) (“[O]fficials were on notice of the danger to students of assaultive criminal conduct by intruders.”).

¹⁴⁶ *Schnurr*, 189 F. Supp. 2d at 1142.

¹⁴⁷ *Id.* at 1142–43.

¹⁴⁸ *Id.* at 1143.

First, the legislature may grant immunity, as Colorado in fact did through the CGIA.¹⁴⁹ So the social utility of officers' conduct was a factor that the legislature had already considered and acted upon. Regardless of whether the court found a special relationship, the plaintiffs in *Schnurr* would have failed without new legislative action. Yet by continuing its analysis and recognizing social utility as a separate reason to reject finding a duty, the court created precedent that would bind it even if the legislature reconsiders the social utility of officers' actions and repeals immunity in the future. To the extent that legislatures are perfectly capable of weighing social utility when deciding whether to grant immunity, courts should not engage in the counterproductive exercise of acting as a second line of policymakers.

Second, according to a recent study by Joanna Schwartz, police officers are almost always indemnified and rarely have to worry about paying the cost in a civil suit.¹⁵⁰ In fact, “[b]etween 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor.”¹⁵¹ Although the study focused mostly on § 1983 claims and did not include negligence cases, it did include other state tort claims such as assault, and the “data suggests that the findings would be the same for all types of cases in which law enforcement officers are named as defendants.”¹⁵² Therefore, the “spectre of personal liability” would not affect officers’ actions as much as it would the government’s budget.

Third, even though governments routinely indemnify these officers, Schwartz suggests that governments still do not bother to “take decisive enough action to curb misconduct or manage their officers,” nor do they even consider “whether or how to reduce the police activities that prompt these suits.”¹⁵³ So it appears that most police officers and departments actually do not change their behavior based on lawsuits against them. Thus, even if courts do consider social utility independent of the legislature, they should conclude—as should the legislature—that it does not weigh against finding a duty.

Lastly, if the social utility of police protection is high enough to overcome such foreseeable harm and small burdens as in *Schnurr*, liabil-

¹⁴⁹ COLO. REV. STAT. § 24-10-118(2)(a) (2014).

¹⁵⁰ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (reporting that “[p]olice officers are virtually always indemnified” and providing statistics); see also Nancy Leong, *Police Don’t Pay*, JOTWELL (Nov. 7, 2013), <http://courtslaw.jotwell.com/police-dont-pay/> (interviewing officer who claimed that he “didn’t worry about section 1983 because an occasional lawsuit was par for the course”).

¹⁵¹ Schwartz, *supra* note 150, at 890.

¹⁵² *Id.* at 887 n.1.

¹⁵³ *Id.* at 891, 956.

ity would never attach in tort claims no matter how egregious the negligence. Clearly, social utility should not have such weight in protecting officers from their having to actually carry out their duty to protect.

c. Magnitude of Burden and Practical Consequences of Imposing a Duty

In *Schnurr*, the court held that the burden of complying with a potential duty was not great because it would amount to “provid[ing] accurate information to callers.”¹⁵⁴ The court also held that the practical consequences of complying with a duty would be severe because it would “render law enforcement officers insurers” for “the conduct of third parties.”¹⁵⁵ Both of these statements seem to rely on assumptions about what behavior police would exhibit if they knew they had a burden to protect, and about what behavior police would need to exhibit to avoid breaching that duty. Specifically, police would not become “insurers” unless the court assumed that police would often be found liable for any harm that occurred to victims to whom they owed a duty. However, the mere imposition of a duty does not result in liability. To avoid liability, police would only need to act with reasonable care under the circumstances.¹⁵⁶ Therefore, to determine whether it is “warranted”¹⁵⁷ to find a duty to protect, one should determine how a “reasonable” officer should be expected to perform in a stressful situation, what it actually takes to breach the duty, and whether that standard seems just.

Lisa McCabe has already proposed a “professional negligence model” which should be appropriate for courts to use in shooting scenarios and would not unduly burden officers:

The appropriate standard of care is that of a reasonable and competent officer acting in similar circumstances. The specific conduct of a reasonable police officer can be determined by examining police procedures, departmental rules, training manuals, written guidelines, internal regulations, and other official sources of law enforcement practices, as well as statutes, ordinances, and expert testimony.¹⁵⁸

¹⁵⁴ *Schnurr v. Bd. of Cnty. Comm’rs*, 189 F. Supp. 2d 1105, 1142–43 (D. Colo. 2001).

¹⁵⁵ *Id.* at 1143.

¹⁵⁶ See RESTATEMENT (SECOND) OF TORTS § 320 (AM. LAW INST. 1965) (imposing “duty to exercise reasonable care”).

¹⁵⁷ *Schnurr*, 189 F. Supp. 2d at 1143.

¹⁵⁸ Lisa McCabe, Comment, *Police Officers’ Duty to Rescue or Aid: Are They Only Good Samaritans?*, 72 CALIF. L. REV. 661, 681 (1984).

McCabe illustrates the standard by showing how the police officers in *Warren* could have demonstrated reasonable care by only slightly altering their conduct:

If, for example, the police hurried to the scene but arrived after the plaintiffs had been abducted, or made repeated attempts to locate the plaintiffs and enter the house but were unsuccessful, their actions would have sufficiently fulfilled their duty to rescue. The reasonable police officer standard would, after all, only require reasonable behavior, even if set by professional guidelines.¹⁵⁹

These “professional guidelines,” however, are not determinative. If they are “unacceptably low,” they can be countered by “judicial imperatives.”¹⁶⁰ For example, after the Columbine shooting, the LAPD SWAT team reviewed the actions of the Jefferson County team and “found that the officers had followed standard procedure.”¹⁶¹ Under this standard, a jury would likely accept this as sufficient evidence that the officers were not negligent. But as Judge Learned Hand pointed out, an industry “may never set its own tests,” so a jury may still find negligence if the officers failed to take “precautions so imperative that even their universal disregard will not excuse their omission.”¹⁶²

However, even if a jury did disregard the standards set by police procedures and found that it would have been a universal precaution for reasonable officers to carefully enter the building and slowly make their way to the library, the jury would also have to determine that doing so would have prevented the harm to the victims.¹⁶³ Therefore, this standard would not impose anything resembling strict liability on officers.

Indeed, the officer response to the shooting at Florida State University embodies this standard. Officers were first notified of an armed man outside the library at 12:25 AM.¹⁶⁴ They responded immediately and by 12:27 AM officers confronted the shooter and ordered him to put down his weapon.¹⁶⁵ When the shooter ignored these demands and opened fire

¹⁵⁹ *Id.* at 686.

¹⁶⁰ *Id.* at 682–83.

¹⁶¹ RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 232 (2013).

¹⁶² *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

¹⁶³ *See* RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST. 1965) (requiring conduct to be the “legal cause” of the plaintiff’s harm to make negligence actionable).

¹⁶⁴ Sean Rossman & Karl Etters, *Prompt Response, Alert System Stop FSU Shooter Myron May*, TALLAHASSEE DEMOCRAT (Nov. 22, 2014), <http://www.tallahassee.com/story/news/local/2014/11/22/prompt-response-alert-system-stop-fsu-shooter/19374031/>.

¹⁶⁵ *See id.*; Meg Wagner et al., *Florida State University Grad Myron May, Who Injured 3 in Shooting at College Library, Was in ‘State of Crisis’: Cops*, DAILY NEWS (Nov. 20, 2014),

on the officers, the officers shot and killed the shooter.¹⁶⁶ Although the shooter did manage to hit three civilians, approximately 500 other potential victims escaped safely.¹⁶⁷ This is exactly how officers should respond when unarmed civilians are in danger and the officers are the only individuals capable of stopping an armed criminal. For trained professionals, this duty is not unreasonably high to comply with. And, because the officers acted reasonably, they would not be liable for the three victims they could not save.

Of course, it is possible that even in a Columbine scenario where the police fail to confront the shooters as more victims are killed, the police would be able to prove that their decisions were reasonable. They could present evidence that they lacked adequate information, had reason to believe that they would endanger students such as in a hostage situation, or were following procedures that worked successfully in other shootings across the country. However, by refusing to find a duty, courts prevent the claim from ever reaching this stage and give victims no chance to recover even if the officers did act unreasonably and fail to protect them.

III. WHY LEGISLATURES SHOULD IMPOSE A DUTY AND WAIVE IMMUNITY

Whether or not courts decide to find that police officers take on a special duty when they respond to school shootings, legislatures should act to impose one. Legislatures can do this by imposing a duty on officers in gun-free zones, similar to how Vermont has imposed on all citizens a duty to provide “reasonable assistance” when another is in danger.¹⁶⁸ They can also waive immunity in state tort claims acts. For example, New Mexico’s torts claims act can be reformed to include in its immunity exemptions a negligent failure to protect from firearm violence in gun-free zones.¹⁶⁹ They should do this for the reasons previously mentioned in Part II and also for two additional, basic policy reasons: victim compensation and fairness.

<http://www.nydailynews.com/news/crime/alleged-gunman-florida-state-campus-opens-fire-article-1.2017192>.

¹⁶⁶ Wagner et al., *supra* note 165.

¹⁶⁷ See Rossman & Etters, *supra* note 164.

¹⁶⁸ VT. STAT. ANN. tit. 12, § 519 (2015).

¹⁶⁹ See N.M. STAT. ANN. § 41-4-12 (LexisNexis 2014) (waiving immunity for liability for various torts and violations of constitutional rights when committed by officers but not for negligently failing to protect).

A. *Allowing Negligence Suits Will Promote Victim Compensation*

When school shootings occur, victims or their families go on a search for liability.¹⁷⁰ Often, the shooter commits suicide or is killed in a standoff with police, so families cannot even achieve justice through conviction.¹⁷¹ Naturally, if the deceased shooters had no assets, the families cannot recover from them. The state, having disarmed the citizenry, should bear the cost instead of having it all fall on the victims who have done nothing wrong.

Indeed, victims rely on the police to capture criminals alive so that they can see justice done and recover from them. Although victims have an incentive to capture the criminal so that they can recover, the police lack that incentive when they have no liability for any increased damage that the criminal causes during their delay. For example, in *Williams v. State of California*, a piece of a heated brake drum from a passing truck flew into the victim's windshield, struck her in the face and caused her to stop.¹⁷² Police arrived but negligently failed to conduct a proper investigation.¹⁷³ The victim was unable to recover against the truck driver because the police had let the driver escape. Therefore, she asserted that they "destroy[ed] any opportunity on [her] part to recover compensation."¹⁷⁴ The court found no special relationship because the plaintiff did not refrain from "conducting an investigation of her own" in reliance on officers' promises to do so.¹⁷⁵ But of course she did not conduct an investigation—she had just been struck in the face with a heated brake drum and her windshield was broken. And the officers who responded were the only people she could rely on to catch the person responsible. Liability would solve this misalignment of interests by incentivizing action.

Of course, it is possible to over-incentivize action in various ways. First, individual officers may become inclined to be hastier in acting, afraid that not acting will expose them to liability. Of course, if states continue to indemnify officers, then they likely should not have to worry actually paying a judgment—the victim will always recover from the state.¹⁷⁶ But the prospect of being hauled into court for a trial or having to face punishment at work for costing money to the state should provide

¹⁷⁰ See *supra* notes 74–78 and accompanying text.

¹⁷¹ See *Columbine High School Shootings Fast Facts*, *supra* note 93 (Columbine shooters killed themselves); Wagner et al., *supra* note 165 (Florida State University shooter killed by police).

¹⁷² *Williams v. State of California*, 664 P.2d 137, 138 (Cal. 1983).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 142.

¹⁷⁶ See *supra* notes 150–52 and accompanying text.

enough of an incentive to err on the side of acting to protect others than acting to protect oneself.

Second, imposing liability may affect the behavior of municipalities and departments. Some may argue that by imposing a duty, legislatures will encourage municipalities to install metal detectors and other excessive security features in schools to lower the chances of a shooting occurring and avoiding liability for not protecting students. However, schools have already begun initiating such policies even without such a duty.¹⁷⁷ And with a duty, the state will still not be liable as long as it takes reasonable security measures; it does not need to create an enclave of totalitarianism within each school. Ultimately, concerns about how much security should be provided within schools can be solved by local politics. Indeed, in New York City, parents and advocates provided significant resistance to the idea of the NYPD taking over responsibility for school security,¹⁷⁸ suggesting that this issue would not go unaddressed.

B. Out of Fairness, a Monopoly on Lethal Force Should Require the Government to Take Responsibility

Finally, fairness dictates that an organization that has a monopoly should take on extra responsibility for the quality of its services because consumers have no alternatives. At common law, companies that acquired monopoly status would acquire a “duty to serve.”¹⁷⁹ Because entities with monopoly power take “such affirmative steps through [their] exclusive control of access to necessary goods and services,” courts would limit their rights to exclude customers—thus imposing a duty on them.¹⁸⁰ Likewise, as the government becomes the sole source of protection in an area, citizens become reliant on it, and its duties should expand to include personal liability. This is especially true in schools because truancy laws require children to attend.¹⁸¹ Therefore, to the extent that government disallows alternatives and takes on the responsibility of protecting children, it should perform the job reasonably well or be liable if it fails. If the government allows private alternatives, as Virginia has by

¹⁷⁷ See Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1385 (2012) (discussing Mayor Bloomberg’s program “subjecting all middle and high school students to roving metal detector searches”).

¹⁷⁸ See *id.* at 1382 (recounting how “[p]arents, teachers, and community members packed the hearing room to criticize the proposed transfer”).

¹⁷⁹ Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1995 (1989).

¹⁸⁰ *Id.* at 2010–11.

¹⁸¹ Karl F. Dean, *Criminalization of Truancy*, 34 NEW ENG. L. REV. 589, 591–92 (1999) (discussing a trend toward incarceration of students for truancy).

allowing private armed guards in schools,¹⁸² then it would be relieved of this duty.

CONCLUSION

In conclusion, there are currently too many barriers to recovery under tort law for victims of school shootings when officers negligently fail to protect them. Although common sense would suggest that police have a duty to protect the public, the public duty doctrine protects officers from liability unless they have taken such affirmative actions as required under the current test to create a special relationship. The public duty doctrine makes sense to the extent that it prevents imposing an impossible task on law enforcement to save everyone. However, its application should not be so rigid when civilians are left defenseless. If courts account for the reliance created by gun prohibitions within school zones, they should automatically find a special relationship and thus a duty to protect the defenseless civilians within these zones. The social utility of police protection does not weaken the argument for finding a duty because police officers are rarely forced to pay, and officers and governments have not been so adversely affected by other lawsuits that they have been forced to change their behavior.

Finally, the immunities that some jurisdictions still maintain for officers who act negligently should be waived for the same reasons that courts should find that a special duty exists. By maintaining immunity, these states would prevent recovery even if a court follows the analysis proposed in Part II. Therefore, immunity presents an unnecessary and unfair obstacle for plaintiffs harmed by police negligence—especially when plaintiffs are rendered reliant on the police for aid, police officers take affirmative actions to aid, the harm is foreseeable, officers are indemnified by the state, and the magnitude of the burden to act reasonably is not high. Waiving immunity would promote fairness because of the government's monopoly on force and would ensure victim compensation. Officers should not be subject to strict liability, but when their negligence causes harm, the burden should not fall on victims who have been rendered reliant on the state for protection.

¹⁸² See *supra* note 120.