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The Court's One-Way Street: *L.S. ex rel. Hernandez v. Peterson*'s Missed Opportunity to Expand Children's Constitutional Rights

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Introduction

After the massacre at Marjory Stoneman Douglas High School in Parkland, Florida, fifteen students who were present at the school shooting filed a civil rights action in U.S. district court.[1] This case—*L.S. ex rel. Hernandez v. Peterson*—provided an opportunity for the court to expand children's constitutional rights by finding that students have a right to protection while on school grounds.[2] Instead, a district court in Florida—later affirmed by the Eleventh Circuit[3]—held that schools have no duty to protect their students, thereby restricting children's rights and leaving students impacted by gun violence on school grounds with limited constitutional protections.[4] By disregarding the plaintiffs' vulnerable positions as *children*—who are beyond their parents' safety nets and unable to protect themselves—the *Hernandez* courts failed to expand protections where they are so desperately needed.

Children's constitutional rights are often minimized to avoid unreasonable interference with the liberty interests of parents and guardians in directing the upbringing of their children.[5] Similarly, the State is allowed to control children's conduct, thereby restricting their

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1. *See* L.S. *ex rel.* Hernandez v. Peterson (*Hernandez I*), No. 18-CV-61577, 2018 WL 6573124 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020).

2. *See id.*

3. *See* L.S. *ex rel.* Hernandez v. Peterson (*Hernandez II*), 982 F.3d 1323 (11th Cir. 2020).

4. *Hernandez I*, 2018 WL 6573124, at *3.

5. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (enjoining officials from enforcing an act that required children to attend public schools as it interfered with parents' rights to control their children's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a Nebraska statute prohibiting the teaching of languages other than English violated constitutional Due Process in part because it interfered with parents' rights to control their children's education).

rights, to further its interest in the welfare of children.[6] However, at times when parents do not have the power to protect their children—such as when children are at school—the State's interest in child welfare should expand to compensate for this increased vulnerability.[7] Expanding and solidifying children's constitutional rights can serve as a necessary defense against governmental practices that place them at risk of danger from which neither they nor their parents can provide safeguards.

This Article argues that the courts should have used *Hernandez I* and *II* to expand children's substantive Due Process rights under the Fourteenth Amendment. *Hernandez I* and *II* provided the opportunity for the courts to mandate that schools have a duty to protect, and it was a violation of children's constitutional rights to rule otherwise. Part I analyzes the facts and procedural history in *Hernandez I* and *II* to emphasize the numerous governmental blunders that occurred during the school shooting, which highlights why a heightened standard of review is a necessity in the case. Part I also considers the disappointing holdings of the district court in *Hernandez I* and the Eleventh Circuit in *Hernandez II*, which failed to advance children's rights by expanding substantive Due Process protections when given the opportunity. This part then dives deeper into the case law cited by *Hernandez I* and *II* and highlights what the courts *should have* held. Part II discusses the judiciary's pattern of restricting children's constitutional rights and the opportunities that exist for these rights to be broadened—though these are rarely pursued. Part III concludes with a proposed child-centric framework and heightened standard of review that must be adopted. This framework would ensure the subjective characteristics of children—like their vulnerability while on school property—are considered, and greater protections provided. If children's constitutional rights can be restricted to safeguard them, these rights must also be expanded in situations where children require greater constitutional protections.

I. Missteps and Blunders in *Hernandez*

A. Overview

On February 14, 2018, Nikolas Cruz entered his former high school, Marjory Stoneman Douglas, in Parkland, Florida (Parkland).[8] Cruz

6. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (reaffirming states' power to enforce child labor laws, even over the religious objections of parents).

7. State *ex rel.* T.L.O., 428 A.2d 1327, 1333 (Juv. & Dom. Rel. Ct. 1980) ("[P]ublic school officials are to be considered governmental officers."), *vacated*, 448 A.2d 493 (N.J. Super. Ct. App. Div. 1982), *rev'd sub nom.* State *ex rel.* T.L.O. v. Engrud, 463 A.2d 934 (N.J. 1983), *rev'd sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

8. *Hernandez I*, 2018 WL 6573124, at *1.

carried a duffel bag and backpack filled with magazines and a legally purchased AR-15 semi-automatic rifle.[9] After proceeding to the 1200 building, Cruz began a six-minute rampage that ended with seventeen students and school staff dead, and seventeen others injured.[10]

School staff were warned that Cruz was a risk to student safety following his expulsion for "disciplinary reasons" in 2017.[11] Andrew Medina, a school monitor, recognized Cruz as a danger and considered calling a "Code Red"—the procedure which would have ensured safety protocols had gone into effect—to warn students and staff members after seeing him on campus prior to the shooting.[12] However, Medina "only radioed a colleague to report a suspicious person entering the school grounds with a backpack."[13] After the shooting began, Medina still failed to initiate a Code Red, as he did not see a gun when Cruz entered the school.[14] In fact, Cruz killed more than eleven individuals before any emergency code was issued.[15]

Scot Peterson, a trained law enforcement school resource officer, did not enter the school building even while children and teachers were inside being shot at by Cruz.[16] Peterson was consequently accused of retreating while victims remained under attack.[17] He was ultimately arrested and charged with neglect of a child, culpable negligence, and perjury.[18] Similarly, Police Captain Jan Jordan, the commander of the scene, was accused of repeatedly "prevent[ing] emergency responders from entering the 1200 building to confront Cruz or render aid to victims."[19] Captain Jordan resigned in the months following the shooting.[20]

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9. *Teen Gunman Kills 17, Injures 17 at Parkland, Florida High School*, A&E TELEVISION NETWORKS (Feb. 6, 2019) [hereinafter *Teen Gunman Kills 17*] https://www.history.com/this-day-in-history/parkland-marjory-stoneman-douglas-school-shooting [https://perma.cc/LC8P-WU4H].

10. *Hernandez I*, 2018 WL 6573124, at *1.

11. *Teen Gunman Kills 17*, *supra* note 9.

12. *Id.*; *see also* Tonya Alanez, Paula McMahon & Anne Geggis, *"That's crazy boy." School Watchman Recognized but Didn't Stop Shooter Before Parkland Massacre*, SUN SENTINEL (June 1, 2018), https://www.sun-sentinel.com/news/crime/fl-florida-school-shooting-campus-monitor-20180619-htmlstory.html [https://perma.cc/976F-N7KZ].

13. *Hernandez I*, 2018 WL 6573124, at *1.

14. *Id.*

15. *Teen Gunman Kills 17*, *supra* note 9.

16. *Hernandez I*, 2018 WL 6573124, at *1.

17. *Teen Gunman Kills 17*, *supra* note 9.

18. *Id.*

19. *Hernandez I*, 2018 WL 6573124, at *1.

20. Jamiel Lynch, *Police Captain in Charge During Parkland Shooting Resigns from Department*, CNN (Nov. 20, 2018), https://www.cnn.com/2018/11/20/us/parkland-shooting-captain-resigns/index.html [https://perma.cc/4UHU-Z8VW].

Fifteen students who were present during the Parkland school shooting brought suit against Andrew Medina, Scot Peterson, Captain Jordan, as well as Superintendent Robert Runcie, Sheriff Scott Israel, and Broward County.[21] The students alleged psychological injuries and argued "that Israel, Runcie, and the County either have a policy of allowing 'killers to walk through a school killing people without being stopped,'" or that their training for individuals expected to respond to such situations—including Medina, Peterson, and Jordan—was so inadequate they should be liable for violations of the plaintiffs' substantive Due Process rights under the Fourteenth Amendment.[22] Specifically, the plaintiffs claimed their "clearly established right to be [free] from deliberate indifference to substantial known risks and threats of injury" was violated when the defendants failed to protect them from Cruz.[23] Several other claims were also asserted, including one by plaintiff T.M., who argued his Fourth Amendment right to be free from unreasonable search and seizure was violated when he was detained in the school office, had his backpack searched, and had his personal belongings seized on the morning of the shooting.[24] In response, the defendants filed motions to dismiss for reasons including failure to state a claim, qualified immunity, lack of standing, and the complaint being a "shotgun pleading."[25] Notably, the defendants argued that "Plaintiffs' Due Process claim fails because there is no constitutional duty to protect students from harm inflicted by third parties."[26]

The district court held that no Fourteenth Amendment violations occurred, granting the motions to dismiss filed by Medina, Runcie, Israel, Jordan, and the County, and granting in part and denying in part the motion to dismiss filed by Peterson.[27] The district court held that,

> [I]n the context of substantive Due Process, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted

21. *Hernandez I*, 2018 WL 6573124, at *1.

22. *Id.*

23. *Id.* at *3.

24. *Id.* at *2.

25. *Id.* at *2. See Joseph Fabush, *11th Circuit Clarifies How Not to Write a Shotgun Complaint*, FINDLAW, https://www.findlaw.com/legalblogs/eleventh-circuit/11th-circuit-clarifies-how-not-to-write-a-shotgun-complaint/ [https://perma.cc/8757-UKR6] (Aug. 10, 2021), for an explanation of shotgun pleading in the Eleventh Circuit. Plaintiffs had incorporated two claims of constitutional violation into a single count of the complaint. *Hernandez I*, 2018 WL 6573124, at *2.

26. *Hernandez I*, 2018 WL 6573124, at *3.

27. *Id.* at *11.

by *other means*."[28]

Therefore, even if the defendants had "intentionally disregarded warnings about Cruz, plaintiffs' § 1983 claim fails because they [could not] assert the violation of a constitutional right."[29] The district court went on to state that, "[e]ven in the face of such a senseless tragedy, this Court must respect and adhere to the caution against expanding substantive Due Process outside the realm of its proper application," citing the Supreme Court's warning to avoid traversing into the "unchartered area [that is] scarce and open-ended."[30] However, the district court could not hold that plaintiff T.M.'s search and seizure was justified or reasonable under the circumstances, thereby rejecting Peterson's claim of qualified immunity.[31]

The district court reiterated that, "[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights are different in public schools than elsewhere; the reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[32] Moreover, the district court held, in general, "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety . . . [and] [s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."[33] In other words, although students possess constitutional rights while they are on school property, these rights are restricted with the intent of protecting these children and providing more avenues of control to school officials. However, these protections and responsibilities lapse when students are put at risk of a known threat by a third party, providing no duty to school officials, and thereby unduly restricting children's constitutional rights.

On appeal, the Eleventh Circuit acknowledged that substantive Due Process is a legal concept "untethered from the text of the Constitution"[34] and capable of expansion, but noted that the Supreme Court has warned against using the Fourteenth Amendment to support "novel" federal

28. *Id.* at *5 (emphasis added) (citing DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 200 (1989)).

29. *Id.*

30. *Id.* (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

31. *Id.* at *8.

32. *Id.* at *6 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829–30 (2002)).

33. *Id.* at *7 (citing *Earls*, 536 U.S. at 830–31).

34. *Hernandez II*, 982 F.3d 1323, 1329 (11th Cir. 2020) (quoting Echols v. Lawton, 913 F.3d 1313, 1326 (11th Cir. 2019)).

cases.[35] This is especially relevant when considering that the Fourteenth Amendment—and the Constitution as a whole—make no explicit reference to children, leaving its application in these scenarios entirely up to the court.[36] The Eleventh Circuit recognized that substantive Due Process claims have been expanded to protect children from "intentional, obviously excessive corporal punishment" in schools and could also include "non-custodial claim[s] of deliberate indifference."[37] However, the court found the students' claims to be lacking and dismissed the appeal.[38] Rather than choosing to expand constitutional protections to children under the control of school officials, the Eleventh Circuit reaffirmed that children's rights are a one-way street, capable only of restriction, not expansion.[39]

On appeal from a motion to dismiss, the Eleventh Circuit had to accept the students' factual allegations in the *Hernandez I* complaint as true.[40] The court therefore accepted the fact that there were many "government blunders" before and during the shooting.[41] In addition to the facts above, the court acknowledged that the Broward County Sheriff's Office failed to act on the "many dozens of calls" it received warning of Cruz's dangerous propensities.[42] It also acknowledged that the defendants were aware of Parkland's inadequate security and made no effort to improve it.[43] Moreover, Peterson, who was "in charge of school security, was nicknamed 'Rod'—short for 'retired on duty'—for his 'lackadaisical'" approach to policing and student safety.[44] Despite this, the Eleventh Circuit rejected the students' argument that the school's conduct was not only incompetent, but also unconstitutional.[45] The court ultimately held that "students were not in a custodial relationship with the officials and [had] failed to allege conduct by the officials that [was] 'arbitrary' or 'shock[ed] the conscience.'"[46]

35. *Id.* (citing Neal *ex rel*. Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074 (11th Cir. 2000)).
36. *See* U.S. CONST. amend. XIV.
37. *Hernandez II*, 982 F.3d at 1331.
38. *Id.* at 1333.
39. *See id.*
40. *Id.* at 1327.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 1326–27.
46. *Id.*

B. Treating Children like Adults: Applying the Adult Doctrine

Children in school are not in a custodial relationship with the State.[47] Ordinarily, in the public school system, there are no custodial relationships even if officials are aware of "potential dangers or have expressed an intent to provide aid on school grounds."[48] The Eleventh Circuit in *Hernandez II* acknowledged that *Hasenfus v. LaJeunesse*—a case involving a fourteen-year-old's suicide attempt on school property—leaves open the matter that, while schools do not have a general duty to protect students, a specific duty to protect may exist in "narrow circumstances."[49] However, the court simultaneously argued that *Nix v. Franklin County School District* forecloses this argument.[50] The facts of *Nix* vary substantially from the facts of *Hernandez I* and *II*: in *Nix*, the parents of a high school student who died from electrical shock during a voltage-reading demonstration in electromechanical class brought an action against the school district, teacher, principal, and superintendent, alleging violations of their son's Due Process rights.[51] The *Nix* court ultimately determined that the school teacher had repeatedly warned students of the dangers associated with touching live wires and held that the teacher's alleged "deliberate indifference" in this situation did not "shock the conscience."[52]

The Eleventh Circuit's application of *Nix* in *Hernandez II* did not tell the whole story. In *Nix*, the Eleventh Circuit had stated its "holding is a narrow one; it would not necessarily control, say, a similar accident in a 4th-grade classroom, or even other types of seriously harmful behavior occurring in a high-school class."[53] The *Nix* court made clear that the conscience-shocking standard is context-specific; when a government official's acts "fall between the poles of negligence and malign intent," which includes acts that are reckless or grossly negligent, the court must make a "closer call" to determine if the act, considering the totality of the circumstances at the time of the act and without the benefit of hindsight, shocks the conscience.[54] The Eleventh Circuit in *Hernandez II* quoted an excerpt from *Nix* stating "that deliberate indifference is insufficient to constitute a due-process violation in a non-custodial setting."[55] However,

47. *See id.* at 1329 (citing Nix v. Franklin Cnty. Sch. Dist., 311 F.3d 1373, 1378 (11th Cir. 2002)).
48. *Id.* (citing Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 569–70 (11th Cir. 1997)).
49. *Id.* at 1329–30 (citing Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999)).
50. *Id.* at 1330 (citing *Nix*, 311 F.3d at 1378).
51. *Nix*, 311 F.3d at 1374–75.
52. *Id.* at 1378.
53. *Id.* at 1378–79.
54. *Id.* at 1376–77.
55. *Hernandez II*, 982 F.3d at 1330 (quoting *Nix*, 311 F.3d at 1377).

the *Nix* court had been describing case law rejecting deliberate indifference in "claims of government employees arising out of unsafe working conditions" inherent to the employee's job.[56] The *Nix* court then described prior cases that decided whether acts of school officials against high school and college students shocked the conscience and gave rise to a constitutional violation.[57] Since *Hernandez II* did not involve the limited context of a government employee injured by unsafe conditions inherent in a job, nor were the students accidentally harmed when an experiment in their high-school science class went wrong, *Nix* did not require dismissal of the Parkland students' claim at the pleading stage.[58]

The Eleventh Circuit in *Hernandez II* repeatedly applied case law that had been decided on facts relating to adult plaintiffs,[59] yet disregarded cases involving child plaintiffs that were potential avenues for the expansion or alteration of children's constitutional rights.[60] The court also disregarded its own previous holdings that could have supported an expansion of rights. For example, *White v. Lemacks* was a case brought by adult plaintiffs who were attacked and brutally beaten by an inmate while working as nurses in a jail infirmary.[61] The plaintiffs brought suit against a sheriff and a deputy, as well as Clayton County, Georgia, for substantive Due Process violations under the Fourteenth Amendment.[62] Here, the Eleventh Circuit held that the arbitrary or conscience-shocking standard had not been met and, thus, plaintiffs had failed to allege a violation of substantive Due Process.[63] The court in *White* stated that a person not in custody who is harmed because too few resources were devoted to their safety and protection seldom, if ever, has a cognizable claim under the Due Process Clause.[64] Nonetheless, it still left the door open for narrow exceptions to be carved—an opportunity that both the district court and the Eleventh Circuit in *Hernandez I* and *II* failed to probe. By citing *White* in *Hernandez II*, the Eleventh Circuit

56. *Nix*, 311 F.3d at 1377.

57. *Id.*

58. *Id.*

59. *See Hernandez II*, 982 F.3d at 1329–31.

60. *See, e.g.*, Doe v. N.Y.C. Dep't of Soc. Servs, 649 F.2d 134, 141 (2d Cir. 1981) (finding that a governmental custodian's inaction in failing to investigate or remove a child plaintiff who alleged abuse in her foster home could have violated the child's constitutional rights); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987) (finding that governmental custodian's failure to act to protect or prevent child abuse in foster placement could constitute a constitutional violation).

61. White v. Lemacks, 183 F.3d 1253, 1254 (11th Cir. 1999).

62. *Id.* at 1254–55.

63. *Id.* at 1259.

64. *Id.* at 1258.

therefore acknowledged that even if it could contemplate exceptions, it did not see a reason to do so.[65]

C. Treating Children as Adults: The Failure to Subjectivize Children and Expand Their Rights

The courts in *Hernandez I* and *II* failed to recognize that the inaction of state officials can be just as harmful as action. Instead of relying on better-reasoned dissents that subjectivize the children at issue, they continued to apply precedent that denies children the rights that they so desperately need to stay safe in the school context.

For instance, the district court in *Hernandez I* relied heavily on *DeShaney v. Winnebago County Department of Social Services* to justify its holding that the constitutional rights of the Parkland students were not violated.[66] The action in *DeShaney* was brought on behalf of a child plaintiff who was regularly beaten by his father.[67] The defendants were "social workers and other local officials who received complaints that the child was abused by his father" and had reason to believe the allegations were true, but who nonetheless did not act to remove the petitioner from his father's custody.[68] Ultimately, the child was so viciously beaten that he fell into a life-threatening coma and suffered severe, life-long brain damage.[69] The complaint alleged that respondents had deprived the plaintiff of his liberty without Due Process—in violation of his rights under the Fourteenth Amendment—by failing to protect him against a risk of violence at his father's hands of which they knew or should have known.[70] The Supreme Court affirmed summary judgment for the defendants, reasoning that the plaintiff's father, not the State, caused the plaintiff's injury and that no duty exists for state actors to prevent such harm.[71] According to the Supreme Court, the purpose of the Due Process Clause of the Fourteenth Amendment is to protect the people from the State, not to ensure the State protects people from each other.[72]

The *DeShaney* majority argued that there was no "special relationship" created or assumed by the State that would give rise to an affirmative duty to the petitioner.[73] The Court distinguished cases in

65. *Hernandez II*, 982 F.3d at 1330.

66. *Hernandez I*, No. 18-CV-61577, 2018 WL 6573124, at *4–5 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020); *see* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

67. *DeShaney*, 489 U.S. at 189.

68. *Id.*

69. *Id.* at 191–93.

70. *Id.* at 193.

71. *Id.* at 195–96.

72. *See id.*

73. *Id.* at 197.

which a special relationship giving rise to an affirmative duty was found in the context of incarcerated prisoners and involuntarily committed mental patients.[74] One such case was *Youngberg v. Romeo*, in which the thirty-three-year-old plaintiff was admitted to a state facility for care, where he was injured at least sixty-three times both by other residents and through his own violence.[75] The Court found that he had "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests" under the Due Process Clause.[76] In *DeShaney*, the Court found substantive Due Process "requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others," and this duty arose from the committed individual's dependence on the State.[77] The *DeShaney* majority used *Youngberg* to summarize that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."[78] However, the *DeShaney* Court's reliance on *Youngberg* appears misplaced, as the plaintiff in *Youngberg* did not challenge his *commitment* to the hospital—the State's affirmative act of restraint.[79] Rather, the plaintiff "argue[d] that he ha[d] a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights by *failing to provide* constitutionally required conditions of confinement."[80] It was the State's *inaction*, not its affirmative action, that formed the basis of Youngberg's complaint.

Rather than relying on the *DeShaney* majority to justify rejecting the Parkland students' action, the district court in *Hernandez I* should have considered Justice Brennan's dissent to understand why greater protections for children are so desperately needed. In *DeShaney*, Justice Brennan disagreed with the majority for "its failure to see that inaction can be every bit as abusive of power as action, [and] that oppression can result when a State undertakes a vital duty and then ignores it."[81] Similar to *DeShaney*, *Hernandez I* is first and foremost about inaction and the

74. *Id.* at 202–03.
75. Youngberg v. Romeo, 457 U.S. 307, 309–10 (1982).
76. *Id.* at 324.
77. *DeShaney*, 489 U.S. at 199 (summarizing the holding of *Youngberg*, 457 U.S. 307).
78. *Id.* at 200 (citing *Youngberg*, 457 U.S. at 314–25).
79. *Id.* at 206 (Brennan, J., dissenting).
80. *Id.* (alteration and emphasis in original).
81. *See id.* at 212.

failure for state officials to protect the Parkland students.[82] The district court, however, improperly rejected this characterization—failing to grasp how inaction can be just as abusive of power as action—and instead focused exclusively on whether defendants had a constitutional duty to protect the Parkland students.[83] The Eleventh Circuit similarly focused on whether officials *acted* with deliberate indifference, failing to see that it was their unreasonable *inaction* that denied the children's rights.[84]

Similar to individuals being civilly committed and removed from outside aid sources like in *Youngberg*, the fact that Parkland officials separated students from sources of aid and then failed to replace these safeguards makes the defendants in *Hernandez* culpable.[85] Justice Brennan's dissent in *DeShaney* recognized that "'the State's knowledge of [an] individual's predicament [and] its expressions of intent to help him' can amount to a 'limitation . . . on his freedom to act on his own behalf' or to obtain help from others."[86] Moreover, Justice Brennan's dissent interpreted *Youngberg* "to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."[87]

Applied to the facts of *Hernandez*, Parkland, like other public schools, prevents outside aid while simultaneously failing to provide aid itself.[88] Take, for example, the inability for students to hire private security companies or have their parent or guardian by their side during school hours. Students are not provided the ability to make private decisions concerning their safety in the public school context, thereby leaving the duty of protection resting solely on the limited, and often insufficient, resources provided by the school.[89] As such, if a school takes

82. *Hernandez I*, No. 18-CV-61577, 2018 WL 6573124, at *1 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020) (summarizing plaintiffs' complaints about school officials' inaction on the day of the shooting).

83. *Id.* at *4 ("Plaintiffs frame their claim as arising from the actions, or inactions, of defendants. However, viewed properly, the claim arises from the actions of Cruz, a third party, and not a state actor. Thus, the critical question the Court analyzes is whether defendants had a constitutional duty to protect Plaintiffs from the actions of Cruz.").

84. *Hernandez II*, 982 F.3d 1323, 1330–32 (11th Cir. 2020). The Eleventh Circuit did not cite *DeShaney* in its opinion.

85. *See Hernandez I*, 2018 WL 6573124, at *5.

86. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 207 (1989) (Brennan, J., dissenting).

87. *Id.*

88. *See Hernandez I*, 2018 WL 6573124, at *1 (detailing the failures of the defendants in securing the school or protecting the children).

89. For example, schools may not have adequate active-shooter plans, sufficient funding to implement security upgrades, or crisis assessment/prevention programs. It must also be acknowledged that greater school security measures do not necessarily increase student safety. *See*, *e.g.*, Everytown Research & Policy, *How to Stop Shootings and Gun*

steps to protect the welfare of children—such as restricting their constitutional rights—in order to address their status as a vulnerable population unable to adequately protect themselves, the school should be held liable for its failure to act in instances where the school's protections were, alas, *insufficient*.

Schools cannot take steps to further the protection of children and then suddenly decide these protections end at an arbitrarily constructed point.[90] Nor should a court decide the *Hernandez* defendants are not liable simply because they were not the ones who pulled the trigger and ended so many lives on February 14, 2018.[91] In this case, their inaction was "every bit as abusive of power as action."[92] As Justice Brennan forewarned, the holding affirmed in *Hernandez II* "construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent" and interprets—incorrectly—the Constitution as being "indifferent to such indifference."[93] As soon as school officials saw Cruz on campus and recognized a danger existed, this recognition should have triggered a fundamental duty to protect the students who were at risk.[94] The Eleventh Circuit and district court "fail[ed] to recognize this duty because it attempt[ed] to draw a sharp and rigid line between action and inaction."[95] The courts in *Hernandez* should have instead considered the subjective characteristics of the Parkland case and utilized the Due

Violence in Schools: A Plan to Keep Students Safe, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Aug. 19, 2022), https://everytownresearch.org/report/how-to-stop-shootings-and-gun-violence-in-schools/ [https://perma.cc/QP3L-VMKR] (detailing measures that could prevent gun violence in schools); Katie Reilly, *Schools Are Spending Billions on Safety Measures to Stop Mass Shootings. It's Not Clear They Work*, TIME (June 16, 2022), https://time.com/6187656/school-safety-mass-shootings/ [https://perma.cc/WFD9-JKRU] (reporting on studies indicating that visible security measures and school resource officers do not ensure children's safety and may actually have negative impacts); Jolie McCullough & Kate McGee, *Texas Already "Hardened" Schools. It Didn't Save Uvalde*, TEX. TRIB. (May 27, 2022), https://www.texastribune.org/2022/05/26/texas-uvalde-shooting-harden-schools/ [https://perma.cc/R3XB-XC6G] (noting that increased security in schools has not been shown to prevent violence and can be detrimental to students). This reality reiterates that schools may not be capable of adequately protecting students, necessitating the need for increased legal protections.

90. *See DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting).

91. *See Hernandez II*, 982 F.3d 1323, 1331 (11th Cir. 2020) (finding the students failed to state a claim for relief because they did not allege "any official acted with the purpose of causing harm").

92. *See DeShaney*, 489 U.S. at 211–12 (Brennan, J., dissenting).

93. *See id.* at 212.

94. *Id.*

95. *Id.* at 213.

Process Clause of the Fourteenth Amendment to establish greater protections for children.[96]

The district court and Eleventh Circuit overlooked the many opportunities to expand children's Due Process rights under the Fourteenth Amendment in *Hernandez*. The Eleventh Circuit acknowledged that Due Process rights are "untethered from the text of the Constitution," and capable of expansion, but failed to utilize their power to expand it.[97] Moreover, because children are not explicitly mentioned in the Constitution, it is up to the courts and legislature to decide when to expand or restrict their rights. The Parkland shooting requires greater protections to be afforded to children, and *Hernandez II* emphasizes that the Eleventh Circuit had the power to mandate that a duty is owed to students. By holding otherwise, the Eleventh Circuit ignored the students' status as *children* and the unique needs their status entails. Courts must acknowledge that justice requires the expansion of children's rights in situations where neither they nor their parents can provide adequate safeguards, and mandate that school settings are one such circumstance where this need exists.

II. The Judicial Pattern of Restricting Children's Rights Under the Idea of "Protection"

Courts have repeatedly emphasized the importance of children's education, so much so that they have made the rare decision to expand children's rights in this area in comparison to those of adults. For example, as the landmark case involving children's education, *Brown v. Board of Education of Topeka*, stated, education is a "principal instrument in awakening the child to cultural values, in preparing [them] for later professional training, and in helping [them] to adjust normally to [their] environment."[98] *Brown* emphasized that, without education, "it is doubtful that any child may reasonably be expected to succeed in life."[99] *Plyler v. Doe*, another monumental children's right case, reiterated that "[p]ublic education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic,

96. *See id.* (opining that when faced with the choice to read precedential cases on the Fourteenth Amendment broadly or narrowly, the better interpretation is one that conforms with the "dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging").

97. *Hernandez II*, 982 F.3d at 1329 (citing Echols v. Lawton, 913 F.3d 1313, 1326 (11th Cir. 2019)).

98. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 493 (1954), *enforced*, 349 U.S. 294 (1955).

99. *Id.*

intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement."[100]

The Supreme Court has emphasized that "education is perhaps the most important function of state and local governments."[101] However, this acknowledgement begs a critical question—if education is so important for a child's future, why did the courts in *Hernandez* fail to take action and ensure children are sufficiently protected to *have* a future? On February 14, 2018, fourteen students were attending Parkland to obtain an education, in line with the compulsory public school attendance laws, and they had their futures cut short.[102] Just as children's rights are not a one-way street, neither is education—if children are required to attend school, they must also receive expanded constitutional protections while they are there.[103]

A. Restrictions on Fourth Amendment Rights

Children's rights are commonly constrained while on school property to both protect them and further governmental control. For example, in *New Jersey v. T.L.O.*, the Supreme Court established that children's Fourth Amendment rights are restricted while on school grounds.[104] Here, the Court held no constitutional violation had occurred after a student's purse was searched by school officials without the student's consent or a search warrant.[105] The Court reasoned that, although schoolchildren have "legitimate expectations of privacy," a balance must be struck between the student's constitutional rights "and the school's equally legitimate need to maintain an [orderly] environment."[106] To find this balance, the Court held that restrictions normally placed upon state authorities must be eased in the school context.[107] Specifically, *T.L.O.* held "that school officials need not obtain a warrant before searching a student who is under their *authority*."[108] Thus,

100. Plyler v. Doe, 457 U.S. 202, 203 (1982).

101. *Id.* at 222; *see also id.* at 222–23 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

102. *See Hernandez II*, 982 F.3d 1323 (11th Cir. 2020); FLA. STAT. § 1003.21 (noting that Florida requires children between the ages of six and sixteen to attend school).

103. *See Plyler*, 457 U.S. at 221 (noting that though it is societally important, "[p]ublic education is not a 'right' granted to individuals by the Constitution," and is instead created by the state for the purposes of substantive Due Process).

104. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (holding that searches of property in public schools need not be based on probable cause but rather a mere reasonableness standard).

105. *Id.* at 327–28.

106. *Id.* at 340.

107. *Id.*

108. *Id.* (emphasis added).

the Court ultimately determined that children's Fourth Amendment rights must be restricted compared to those of adults to preserve school control and protect other students.[109]

Several states have also restricted student's rights by allowing school officials to conduct nonconsensual and warrantless locker searches.[110] In *People v. Overton*, the New York Court of Appeals held that students retain "exclusive possession of [their] locker only vis-a-vis other students," not school officials.[111] Moreover, the court broadly held that school officials have both a right and a *duty* to inspect student lockers.[112] The United States Court of Appeals for the Tenth Circuit reiterated this right, holding in *Zamora v. Pomeroy* that the use of police dogs and subsequent warrantless search of a student's locker was constitutional.[113] The Tenth Circuit reasoned that schools retain control of lockers and can search them under "reasonable" suspicion without violating students' Fourth Amendment rights.[114]

B. Restrictions on First Amendment Rights

Children's First Amendment rights are also restricted in comparison to adults' First Amendment rights. In *Bethel School District No. 403 v. Fraser*, a student brought suit against his school after he was disciplined for the language he used in his nomination speech at a student assembly.[115] The district court held that the school's sanctions violated the First Amendment, "that the school's disruptive-conduct rule [was] unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment."[116] However, the Supreme Court disagreed, holding that while adults making what the speaker considers a political point cannot be prohibited from using an offensive form of expression, it does not follow that the same latitude must be permitted to children in a public school.[117] The Supreme Court held it is appropriate for a public school to protect minors by limiting their exposure to "vulgar and offensive spoken language," even if it is done at the expense of children's constitutional rights.[118]

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109. *See id.* at 325–26.
110. *See* People v. Overton, 24 N.Y.2d 522 (1969).
111. *Id.* at 524.
112. *Id.*
113. *See* Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).
114. *Id.* at 670.
115. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
116. *Id.* at 679.
117. *Id.* at 682.
118. *Id.* at 683–86.

Similarly, in *Hazelwood School District v. Kuhlmeier*, student members of the school's newspaper brought suit against the school district and school officials for an alleged violation of their First Amendment rights.[119] In *Hazelwood*, the students had written articles discussing students' experiences with pregnancy and the impact of divorce on students at the school.[120] The principal rejected these stories, arguing the articles' "references to sexual activity and birth control were inappropriate for some of the younger students," and parents should be able to respond to the comments on divorce before publication.[121] Accordingly, these articles were deleted.[122] The Supreme Court rejected the students' claim, holding that First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings,"[123] and must be "applied in light of the *special characteristics* of the school environment."[124] Further, the Supreme Court repeated that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[125]

These cases reiterate that children's rights can be restricted in comparison to the rights of adults if the restrictions are made with the intent to protect them.

C. Expanding Substantive Due Process Rights Using the State-Created Danger Doctrine

Multiple circuit courts have held that schools can suspend students without many provisional safeguards, like notices or hearings, without violating the students' constitutional rights.[126] These holdings place another restriction on children's rights in comparison to the general Due

119. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

120. *Id.* at 263.

121. *Id.* at 263–64.

122. *Id.* at 264.

123. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

124. *Id.* (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

125. *Id.* (citations omitted) (quoting *Bethel Sch. Dist.*, 478 U.S. at 685).

126. *See, e.g.*, Jahn v. Farnsworth, 617 F. App'x. 453, 461–62 (6th Cir. 2015) (holding that the suspension of a child without notifying parents did not violate Due Process rights); Breeding *ex rel.* C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996) (holding that verbal discussion with grandparents and student was sufficient Due Process for suspension); Palmer *ex rel.* Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989) (holding that student was not entitled as a matter of Due Process to notice of charge behind suspension); Farrell v. Joel, 437 F.2d 160, 163 (2d Cir. 1971) (holding that student was not entitled to any notice of suspension). Similarly, the Fifth Circuit in *Sweet v. Childs* held children's rights can be restricted through suspensions without first providing minimal Due Process, if the suspensions are utilized to preserve school order and protect other students. Sweet v. Childs, 518 F.2d 320, 321 (5th Cir. 1975).

Process standard afforded to adults, in which notice and an opportunity to be heard are essential components.[127] In *Goss v. Lopez*, the Supreme Court held that students facing temporary suspension from public school were entitled to protection under the Due Process Clause only in connection with suspensions of up to ten days.[128] These cases highlight that, while children's rights are not entirely diminished by state authority, their Due Process rights are nonetheless limited in regard to suspensions.

However, courts can hold parties accountable when suspensions increase a risk of harm to students. The ability to expand constitutional barriers was reiterated by the Tenth Circuit in *Chavez ex rel. Armijo v. Wagon Mound Public Schools*.[129] Here, a special education student attending a public school was suspended and driven home—without parental notification and in violation of school disciplinary policy—where he later died by suicide.[130] The Tenth Circuit rejected the defendants' qualified immunity claims, holding that although state actors are not normally responsible for actions of third parties, there are exceptions.[131]

The two exceptions identified by the Tenth Circuit are the "special relationship doctrine" and the "state-created danger theory."[132] The first exception "exists when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual."[133] The danger creation theory, on the other hand, "provides that a state may also be liable for an individual's safety 'if it created the danger that harmed the individual.'"[134] Utilizing the second exception—the danger creation theory—the Tenth Circuit held the student's Due Process rights under the Fourteenth Amendment had been violated because he was part of a protected group; the school placed him at substantial risk of immediate and proximate harm; the risk was obvious or known; the school acted recklessly in conscious disregard of that risk; and the conduct was viewed, in total, as conscience-shocking.[135]

Armijo clearly establishes that while courts generally provide decreased Due Process rights to children in schools, they can find a special relationship or state-created danger doctrine applies, and thus, require greater Due Process and hold schools liable for increasing the risk

127. *See* sources cited *supra* note 126.

128. Goss v. Lopez, 419 U.S. 565, 583–94 (1975).

129. Chavez *ex rel*. Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253 (10th Cir. 1998).

130. *Id.* at 1253.

131. *Id.* at 1260.

132. *See id.* (internal quotations omitted) (quoting Liebson v. N.M. Corr. Dep't, 73 F.3d 274, 276 (10th Cir. 1996)).

133. *Id.* (internal quotations omitted) (quoting *Liebson*, 73 F.3d at 276).

134. *Id.*

135. *Id.* at 1263–64.

of harm to students.[136] Under these doctrines, schools have a duty to protect students in situations involving a known risk and, although this expansion of children's rights is rare, it is completely appropriate in certain situations.[137] Comparisons can be drawn readily between *Hernandez* and *Armijo*. Notably, the *Armijo* court held that the school in question had "some knowledge" that the student was "suicidal and distraught;" that the decision to suspend the student placed him at "substantial risk of serious, immediate and proximate harm;" and that this decision caused him to "become distraught and to threaten violence."[138] In finding this, the *Armijo* court rejected the principal and counselor's motion for summary judgment, as a trier of fact could reasonably find both parties increased the risk of harm to the student.[139] The courts could have applied this doctrine in *Hernandez* and found that the Parkland defendants' decision to suspend Cruz; failure to call some type of Code Red when danger was perceived; knowledge of the dozens of calls received that warned of Cruz's dangerous propensities; and utter lack of adequate security similarly increased the plaintiffs' risk of harm by consciously disregarding the risk Cruz posed to Parkland students and staff.[140]

Countless instances exist where children's constitutional rights are restricted in comparison to those of adults, especially while on school grounds. However, if we accept a court's ability to expand Due Process rights under the Fourteenth Amendment—especially in the educational context—combined with the importance placed upon education, it becomes clear why it was wrong for the district court and Eleventh Circuit to rule that no constitutional avenue exists for the affected students in *Hernandez*. As the dissent in *T.L.O.* stated, the existence of a special relationship between school authorities and students is demonstrated by the tradeoff between restricting children's rights for more expanded school control.[141] A standard of reasonableness must be created to fit this special relationship.

The courts in *Hernandez* failed to provide the same constitutional rights to students placed at a significant risk on school property as is provided to "an out-of-school juvenile suspected of a violation of law, or

136. *Id.* at 1264.

137. *See id.* at 1262–63.

138. *Id.* at 1264.

139. *Id.*

140. *See Hernandez I*, No. 18-CV-61577, 2018 WL 6573124, at *1 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020) (describing school officials' "numerous shortcomings in the official response to the shooting").

141. State *ex rel.* T.L.O., 448 A.2d 493, 493–94 (N.J. Super. Ct. App. Div. 1982) (Joelson, J.A.D., dissenting), *rev'd sub nom.* State *ex rel.* T.L.O. v. Engrud, 463 A.2d 934 (N.J. 1983), *rev'd sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

even to an adult suspected of the most heinous crime."[142] By effectively disregarding the Due Process Clause, the Eleventh Circuit applied the "diminished standard of reasonableness in such a way as to render the protection of the Fourth Amendment virtually unavailable to juveniles in public schools."[143] The plaintiffs in *Hernandez* are legally required to attend school until the age of sixteen and lack the agency to register in a private school, where they are more often granted greater protection.[144] These children do not have the capacity to protect themselves, are separated from their parent's safety net, and are already subjected to restricted constitutional rights in order to further state control—including lessened First, Fourth, and Fourteenth Amendment rights.

However, not all vulnerabilities can be mitigated by restricting children's constitutional rights—some require an expansion of rights when children are less able than adults to protect themselves. The Parkland case did not involve vulgar speeches,[145] unwarranted locker searches,[146] or overly detailed newspaper articles that required paternalistic restrictions by school officials.[147] Rather, this case involved a dangerous former student and negligent school security which placed students at risk of a threat from which only the school could offer protection.[148] The Eleventh Circuit in *Hernandez II* should have recognized that the same special relationship present in *T.L.O.* also existed in Parkland and taken the opportunity to expand children's substantive Due Process protections to ensure that students are protected from gun violence while on school property in the future.

III. The Need for a Child-Centric Framework and Heightened Standard of Review to Abolish the One-Way Street

As illustrated by the Parkland tragedy and case law cited above, children desperately need a child-centric framework and heightened standard of review to expand their constitutional protections while on school property.[149] A heightened standard of review is required for adults

142. *See id.* at 494.

143. *Id.*; *see Hernandez II*, 982 F.3d 1323, 1333 (11th Cir. 2020) (affirming the dismissal of the student's complaint and effectively disregarding the Due Process Clause).

144. *See* M. Danish Shakeel & Corey DeAngelis, *Can Private Schools Improve School Climate? Evidence from a Nationally Representative Sample*, 12 J. SCH. CHOICE 426 (2018).

145. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–86 (1986).

146. *See* People v. Overton, 24 N.Y.2d 522, 524 (1969).

147. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263–64 (1988).

148. *Teen Gunman Kills 17*, *supra* note 9.

149. Intermediate scrutiny, for example, is a heightened standard of review applied to classifications on the basis of gender. *See, e.g.*, Harrison v. Kernan 971 F.3d 1069 (9th Cir.

based on race[150] or gender,[151] for example, but one is sorely missing to fit the specific needs of children in the public school system who lack the agency to protect themselves. A child-centric framework that subjectivizes children and scrutinizes State action towards them separately from adults could expand constitutional avenues in specific situations by establishing a duty to protect. As *Plyler v. Doe* rightfully held, the Government cannot impose life-long hardship on children for matters beyond their control while relegating them to an underclass without special constitutional sensitivity and a heightened standard of review.[152] In stark contrast, in affirming the dismissal of the plaintiffs' claims in *Hernandez II*, students present at the Parkland shooting were relegated to an underclass from which the defendants cannot absolve themselves—an underclass the Eleventh Circuit cannot rightfully ignore.

Courts often overlook children's unique concerns and base their decisions on the characteristics, social constructions, or controversies of adults.[153] By applying the same arbitrary or conscious-shocking standard to cases involving either adults or children, courts create the misperception that children require no greater protections than adults. This approach directly contradicts holdings in cases discussed above involving child plaintiffs in which their rights are restricted explicitly because children require greater protections than adults. As discussed earlier, the Eleventh Circuit emphasized in *Nix* that the arbitrary or conscious-shocking standard is case-specific and must be analyzed subjectively.[154] If the Eleventh Circuit in *Hernandez II* had analyzed the plaintiffs as *children*, it could have recognized that schools represent a unique setting which requires an expansion of children's rights and

2020). Since gender is viewed as immutable, like an individual's age or status as a minor, this could be an adequate standard of review for cases involving children. Moreover, *Plyler*, a children's education case, applied intermediate scrutiny. Plyler v. Doe, 457 U.S. 202, 218 (1982). Alternatively, an entirely new heightened standard of review could be created for children, centered around their subjective qualities and greater need for protection.

150. The Court applies the strict scrutiny standard of review for race-based classifications. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications are "constitutional only if they are narrowly tailored measures that further compelling governmental interests").

151. The Court applies the intermediate scrutiny standard of review for gender-based classifications. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (internal citations omitted) (requiring classifications based on gender to serve "important governmental objectives," and for the classification to be "substantially related to the achievement of those objectives").

152. *Plyler*, 457 U.S. at 226.

153. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20–23 (1973) (relying on case law involving indigent adult plaintiffs in holding that public-school financing system challenged in a class action brought on behalf of school children did not violate the Fourteenth Amendment).

154. Nix v. Franklin Cnty. Sch. Dist., 311 F.3d 1373, 1376–78 (11th Cir. 2002); *see also* discussion *supra* Section I.B.

heightened standard of review. By refusing to do so, the arbitrary and conscience shocking standard was incorrectly applied. This failure underscores the need for a new, child-centric standard.

A. Reworking the State-Created Danger Doctrine: Proposals and Issues

Although sparse scholarship exists in this area of constitutional law, there are some existing proposals to reformulate the state-created danger doctrine. One such proposal argues that the existing standard punishes governments for their failure to use coercive police power when that failure results in a third-party causing harm.[155] This proposal argues that these applications create "a national tort-like regime that incentivizes more aggressive policing and other state interventions under the guise of enforcing the Due Process Clause."[156] To combat this situation, the proposal suggests reworking the state-created danger doctrine to reflect the following: "(1) a person acting under color of law uses or invokes force to constrain private action (2) in a way that exposes another to a danger (3) that would not have existed but for state action."[157] This proposal shifts the application solely to cases in which coercive government power exposes a person to danger that they would not otherwise face.[158] Moreover, it suggests a shift away from aggressive state intervention in everyday life by lessening the State's duty to provide affirmative protection.[159] If this alternative state-created danger doctrine is applied to the facts in *Hernandez*, it is possible that the school would be deemed liable because (1) it restricted students' ability to act on a foreseeable danger in a place where they were legally required to be (2) which resulted in students' exposure to a school shooting, (3) a danger that would not have existed but for the school's dismissal of countless warnings and failure to adequately protect the children. However, this proposed doctrine fails to take a subjective view of children as a protected class, like the conscience-shocking standard, and ultimately has the capacity to be incorrectly applied to cases involving children.

The proposed state-created danger doctrine may be useful in certain cases, as it "remov[es] the bar to recovery for those harmed by government coercion who cannot prove the necessary mental state of the relevant state actor,"[160] but it misses the mark for child-centered cases.

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155. *See* Matthew Pritchard, *Reviving DeShaney: State-Created Dangers and Due Process First Principles*, 74 RUTGERS U.L. REV. 161 (2021).

156. *Id.* at 161.

157. *Id.* at 202.

158. *See id.*

159. *Id.* at 172.

160. *Id.* at 165.

No equitable constitutional avenue is created simply by reworking an already existing standard without explicitly addressing the specific needs of children and the unique characteristics that differentiate them from adults. If a different framework is applied to children when determining whether their rights should be restricted—for example, their liberty interests weighed against a school's need for control—then an alternative framework must also be created for those instances where children require greater constitutional protections than adults. A child-centric framework formulated to address their unique needs, characteristics, social constructions, and controversies would serve as a necessary defense against governmental practices and implement the requisite safeguards.

B. A New "Authority" Standard to Establish Liability

The Supreme Court has recognized that the substantive Due Process framework is unrestricted by the text of the Constitution and capable of expansion when justice demands it.[161] A child-centric framework that modifies the arbitrary or conscience-shocking standard in school environments would enable more equitable treatment. Likewise, an alternative standard to the custodial relationship test can and should be established. Although it is well established that schoolchildren are not in a custodial relationship with the state, a court can still determine another relationship exists. For example, a court can establish when public school students are under the "authority" of school officials, the school officials have a duty to protect them from reasonably foreseeable dangers. Considering this "authority" standard is already utilized when determining whether children's rights can be restricted to further their protection on school grounds, it should be equally applicable to situations requiring the expansion of rights.[162]

Courts must acknowledge that the "special characteristics" of children that justify restricting their rights in the school environment also entitle them to special protections[163]—it's a two-way street. By creating an entirely new child-centric framework with a heightened standard of review, the Due Process Clause can be utilized to expand children's rights in specific instances without the risk of over-broadening the Constitution. In the context of *Hernandez*, a new framework would allow a court to reasonably determine that the plaintiffs were under the authority of

161. *See, e.g.*, Younberg v. Romeo, 457 U.S. 307, 320 (1982) ("In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" (internal quotations omitted)).

162. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 339–41 (1985).

163. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

school officials; a foreseeable danger existed and/or the school rendered the harm more likely to occur; and the school had an obligation to prevent harm and life-long hardship that was beyond the plaintiffs' control. This test is loosely based on Justice Brennan's dissent in *DeShaney*, which opined that liability should exist when: (1) the state renders a child more vulnerable to danger, or, (2) the state undertakes a vital duty and then fails to act or abandons the duty.[164] Justice Brennan's dissent, like this proposed framework, suggests removing the "rigid line between action and inaction" to emphasize that the failure to act can be every bit as abusive as the former action.[165] By recognizing that the "Constitution *is* indifferent to such indifference," this proposed child-centric framework establishes why liability should follow when a state "displace[s] private sources of protection and then, at the critical moment . . . shrug[s] its shoulders and turn[s] away from the harm that it has promised to try to prevent."[166] The *Hernandez* plaintiffs deserved more from the defendants, the court, and the Constitution.

The courts in *Hernandez* had ample opportunity to use the suit brought about by this tragic event as the impetus to establish a duty for school officials to protect children who are unable to protect themselves. *Hernandez II* was a missed opportunity for the Eleventh Circuit to establish a heightened standard of review that is not based on race or gender—but rather, one that is solely constructed for children in the public school system who lack the agency to protect themselves. Children's constitutional rights are repeatedly restricted in comparison to those of adults because of the rationale that children require greater protections and greater controls, as demonstrated in the context of First Amendment and Fourth Amendment rights.[167] However, just as courts can restrict rights, they also have the capacity to expand them. The Eleventh Circuit in *Hernandez II* failed to view the plaintiffs as children and acknowledge that, just as children's rights can be restricted to protect them, these rights must also be expanded in situations where children require greater protections in comparison to adults. Children require safeguards in schools, and it is within the Court's power to expand substantive Due Process under the Fourteenth Amendment to establish that school officials have an obligation to protect them on school property.

164. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 210–212 (1989) (Brennan, J., dissenting).

165. *Id.* at 212.

166. *Id.* (emphasis added).

167. *See supra* Sections II.A–B.

Conclusion

The Parkland tragedy provided an opportunity to expand children's constitutional rights by establishing schools have a duty to protect students from dangers existing on school property. The district court and Eleventh Circuit, however, dismissed this opportunity and left students affected by school gun violence without a constitutional avenue for relief.[168] Children's constitutional rights are often minimized to avoid unreasonable interference with the liberty interests of their parents and guardians to direct the upbringing of their children as they choose.[169] However, at times when parents do not have the power to protect their children, the State's interest in child welfare should expand to compensate for children's increased vulnerability. Expanding and solidifying children's constitutional rights can serve as a necessary defense against governmental practices that place them at risk of a danger from which neither they nor their parents can provide safeguards.

As the *Hernandez* facts demonstrate, numerous governmental blunders put the Parkland students at danger of something from which only the school could protect them.[170] The Due Process Clause of the Fourteenth Amendment provides courts with the ability to expand protections if justice so requires. Here, the courts should have recognized that both the Constitution and case law allow for an expansion of rights by establishing that the defendants owed the plaintiffs a duty, which was violated. In comparison to those of adults, children's rights are consistently restricted in order to protect them and further state control.[171] These restrictions, in addition to the importance placed on education by the courts, demonstrate that children have unique legal needs that distinguish them from adults. Courts must acknowledge that routes to establish greater protections for children are not a one-way street; sometimes protecting children requires the expansion of rights. The public school environment is one situation where children lack the means to protect themselves and require expanded constitutional rights to offset this vulnerability.

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168. *See Hernandez I*, No. 18-CV-61577, 2018 WL 6573124 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020).

169. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (affirming an order enjoining officials from enforcing an act requiring children to attend public schools and thus interfering with parents' rights to control their children's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a Nebraska statute prohibiting the teaching of languages other than English violated constitutional Due Process, in part by interfering with parents' rights to control their children's education).

170. *See Hernandez I*, 2018 WL 6573124, at *1 (describing school officials' "numerous shortcomings in the official response to the shooting").

171. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–86 (1986); People v. Overton, 24 N.Y.2d 522, 524 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263–64 (1988).

By establishing a child-centric framework and heightened standard of review based upon the subjective qualities of children, substantive Due Process can be utilized to expand children's rights while attending public schools. A new framework would allow courts to reasonably determine that, when students are under the authority of school officials and a foreseeable danger exists and/or the school renders the harm more likely to occur, the school has an obligation to prevent harm and life-long hardship existing beyond the students' control. The Constitution should not be indifferent to indifference; if a school takes steps to protect children, it cannot exile compassion and arbitrarily decide when its duty to protect ceases—especially when it is the only entity capable of establishing adequate protection.[172] As such, it was a violation for the district court and the Eleventh Circuit in *Hernandez* to disregard children's desperate calls for greater protections.[173] Courts must consider children as *children* to appreciate their distinct needs and recognize the same opportunity exists to extend constitutional protections as to restrict them, especially in situations where the protection of children is paramount.

172. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

173. *See, e.g.*, *Hernandez I*, 2018 WL 6573124, at *1.