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Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983

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Notes

FAILING TO PROVIDE POLICE PROTECTION: BREEDING A VIABLE AND CONSISTENT "STATE-CREATED DANGER" ANALYSIS FOR ESTABLISHING CONSTITUTIONAL VIOLATIONS UNDER SECTION 1983

"Sheriffs, having eyes to see, see not; judges having ears to hear, hear not . . . ."[1]

I. INTRODUCTION

In certain limited circumstances, a state actor can be found to have a constitutional duty to protect citizens from injuries inflicted by private persons.[2] To illustrate such circumstances, consider the following two hypothetical situations. First, a delusional crack addict known as "MC" had been terrorizing a neighborhood through vandalism and random physical beatings.[3] In the course of his terrorism, MC often carried a loaded handgun and threatened residents with it. Local law enforcement was well aware of MC's dangerous propensities. Unfortunately, so was Mary Wells. Mary was a resident of this neighborhood and often found herself terrorized and threatened by MC. Mary had notified the police of this menace during four separate 911 calls over the course of three months.

Although Mary always gave the responding police officers the location of MC's hideout, a well-known crack house down the block, the officers would always refuse to look into the matter. Instead, the responding officers would routinely state, "We don't have time to babysit you–you won't get hurt or shot by MC." The officers never exited their squad cars during their brief, five-minute visits. Tragically, MC shot Mary shortly after the fourth 911 call she had placed for police assistance.

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1 CONG. GLOBE, 42d Cong., 1st Sess. 447 (1871).

2 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

3 This first scenario is loosely based upon *Walker v. City of Gary*, a pending § 1983 civil rights suit in the Lake Superior Court, located in Lake County, Gary, Indiana.

In another matter, Robert and Michelle Jones were driving home from a New Year's Eve party through a dangerous part of the city.[4] Robert had consumed large quantities of alcoholic beverages earlier that evening. A police officer pulled the vehicle over and eventually arrested Robert for driving under the influence of alcohol. As a result, Robert became belligerent, and the officer took Robert to the police station to be processed. The officer also had Robert's vehicle towed away. Before leaving, the officer told Michelle that she would be picked up by another officer within the hour. However, no such officer showed up, and Michelle was brutally raped by a roving street gang twenty minutes later.

Can the police officers in these two hypotheticals be held liable for the injuries inflicted by the respective third parties? Ultimately, the answer to this question depends on the interpretation of the United States Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*.[5] In *DeShaney*, the Court hinted in dicta that a constitutional claim may exist under § 1983 for the failure of a state actor to protect an individual from the violence of a third party.[6] After *DeShaney* was handed down, the federal circuit courts termed this concept the "state-created danger" theory.[7] Although *DeShaney* is credited with developing the danger creation concept, the case gives slight shrift to such an analysis.[8] Currently, there is a lack of uniformity among the federal circuits as to the legitimacy and contours of this theory.[9]

This Note critically analyzes the current status of the state-created danger theory, focusing on the debilitating effects of the intercircuit and intracircuit conflicts surrounding it.[10] Part II presents a brief background

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4 This scenario is based upon similar facts found in *Hillard v. City & County of Denver*, 930 F.2d 1516 (10th Cir. 1991).

5 489 U.S. 189 (1989).

6 *Id.* at 201. The soon to be created "state-created danger" theory emanates from the following dicta in *DeShaney*: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* Therefore, if a state actor played a role in the creation of the danger, he or she may face liability under § 1983. *Id.*

7 *See infra* Part III (discussing treatment of the state-created danger concept by the federal circuit courts).

8 *See infra* Part IV (analyzing the various intercircuit and intracircuit inconsistencies surrounding the state-created danger concept).

9 *See infra* Parts III, IV (illustrating the lack of uniformity within the circuits).

10 See *infra* Part IV for a critical analysis of the state-created danger concept.

examining the theory of government liability under § 1983.[11] Part III presents a sampling of how the federal circuit courts have generally treated the state-created danger concept in various factual scenarios.[12] Part IV makes a critical analysis of the various tests by exposing some of the more prominent intercircuit and intracircuit inconsistencies surrounding the theory.[13] To unify the conflicting state-created danger tests, Part V of this Note proposes a model judicial test that is consistent with § 1983's legislative history, prior Supreme Court precedent, and circuit caselaw.[14] Significantly, the model judicial test should resolve the varying degrees of inconsistencies among the federal circuits and offers an expansive approach to the state-created danger concept.[15] Finally, Part V will recommend that the Supreme Court revisit *DeShaney* and set the contours of the rights within the state-created danger concept.[16]

II. THE STATE-CREATED DANGER THEORY SEEDS ARE PLANTED

A. *The Theory of Government Liability Under § 1983*

The Fourteenth Amendment[17] and 42 U.S.C. § 1983[18] impose liability when a person deprives another of a constitutional right while acting

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11 *See infra* Part II (discussing § 1983's legislative history and *DeShaney*).

12 *See* discussion *infra* Part III. This Part discusses the federal circuits that recognize the state-created danger theory as a viable legal claim and those circuits that refuse to accept the theory.

13 *See* discussion *infra* Part IV. Based on *DeShaney*'s famous dicta, this Part will demonstrate that the conflicting tests produce vast distortions within § 1983 jurisprudence.

14 *See* discussion *infra* Part V.B. By way of preview, the model test provides a single, uniform framework for addressing whether a state actor can be held liable under the state-created danger theory.

15 *See infra* Part V.D (discussing the implications of the suggested expansive approach to state-created danger claims).

16 *See infra* Part V (discussing the recommended approach to state-created danger claims).

17 U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws.

Id.; *see also* 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:16 (West 2000). Professors Bodensteiner and Levinson have commented on the substantive component of the Due Process Clause of the Fourteenth Amendment:

> Although literally the clause appears to provide only "procedural" protection, the Supreme Court has long recognized that the clause contains a substantive element as well. There are three aspects to

"under color of a [state] statute, ordinance, regulation, custom or usage."[19] In order to state a valid claim under § 1983, an injured party must prove: (1) deprivation of a right secured by the United States Constitution; (2) deprivation by a party acting "under color" of state law; and (3) state action.[20] However, § 1983's statutory scheme does not create any *per se* substantive rights.[21] Rather, § 1983 acts as a conduit through which injured persons can seek relief for violations of their substantive rights guaranteed under the United States Constitution or federal statutes.[22]

> substantive due process. First, it protects the enumerated rights (Bill of Rights) from State interference. Second, it provides the source for protecting certain, unenumerated, nontextual yet fundamental rights from interference by government absent compelling justification. Third, it more generally prohibits arbitrary abuses of government power even in the absence of a fundamental right.

BODENSTEINER & LEVINSON, *supra*.

18 42 U.S.C. § 1983 (2001). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

19 *Id.*

20 *Id.*

21 *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979).

22 *See* BODENSTEINER & LEVINSON, *supra* note 17, § 1:01. Professors Bodensteiner and Levinson make the following observation:

> Section 1983 does not provide substantive rights. Rather, it provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Therefore, plaintiffs suing under Section 1983 must point to another source, either the United States Constitution or federal statutes, for the substantive rights they seek to enforce.

Id.; Steven H. Steinglass, *An Introduction to State Court § 1983 Litigation, in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 89 (Mary Massaron Ross ed., 1998) ("Courts and litigants often assert that defendants have or alleged to have 'violated § 1983.' There is no such thing as 'violations of § 1983,' however, and it is a misnomer to make such references."); Christina M. Madden, *Signs of Danger–The Third Circuit Emphasizes Foreseeability As the Crucial Element In the "State-Created Danger" Theory:* Morse v. Lower

It is important to note that the essence of the present-day § 1983 has a solid historical foundation.[23] The Forty-Second Congress enacted § 1983 as part of the Civil Rights Act of 1871, which was passed along with the adoption of the Fourteenth Amendment.[24] The Act, popularly known as the "Ku Klux Klan Act," was enacted primarily as a reaction to the growing terrorism of the Ku Klux Klan in the post-Civil War South.[25] Although the Act was partially intended to prevent malicious behavior committed by the Ku Klux Klan and its sympathizers, Congress' more important concern was providing a specific federal remedy for the unauthorized conduct of state officials who frequently failed or refused to protect the federal rights of blacks in the post-Civil War South.[26]

Congressional debates over the Act's bill clearly disclose that Congress was concerned with the *inaction* of state and local governments and that Congress sought to enact a bill of broad scope to cope with the problem of the nonadministration of law.[27] These extensive and

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Merion School District, 43 VILL. L. REV. 947, 951 (1998) ("[S]ection 1983 serves as a vehicle through which plaintiffs can obtain relief for violations of their substantive rights provided by either the Constitution or federal statutes.").

23 See *infra* notes 24-36 and accompanying text for a historical account of § 1983.

24 *See* Monroe v. Pape, 365 U.S. 167, 173-76 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (reviewing the legislative history of the Civil Rights Act of 1871).

25 *See Monell*, 436 U.S. at 667 (stating that the suppression of Ku Klux Klan terrorism was the subject of almost all congressional debate); *see also* Ashley Smith, *Students Hurting Students: Who Will Pay?*, 34 HOUS. L. REV. 579, 584-85 (1997). Smith notes the following two goals of the Civil Rights Act of 1871:

> Congress had two objectives in mind when it passed the Civil Rights Act of 1871, § 1983's predecessor: First, to provide a mechanism for the enforcement of the Fourteenth Amendment against the state; and second, to suppress the violent action of the Ku Klux Klan. One of the Act's purposes, then, is to provide litigants a federal remedy for violations of their constitutional rights where state law, though adequate in theory, is not available in actual practice.

Smith, *supra*.

26 Owens v. Okure, 488 U.S. 235, 250 (1989); *see also* William W. Watkinson, Note, *Shades of* DeShaney: *Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1243 (1995). Watkinson argues that although the Act's language was broad, "it was originally interpreted narrowly as a remedy for a specific problem, namely 'the mistreatment of Southern blacks during Reconstruction.'" Watkinson, *supra*.

27 *See generally* United States v. Classic, 313 U.S. 299, 326 (1941) (recognizing that the Civil Rights Act of 1871 was more than a simple remedy; rather, it was a sweeping measure aimed at redressing, inter alia, state "misuse of power"); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *In Context*, 68 N.C. L. REV. 689 (1990). Oren comments on the circumstances surrounding the enactment of the Act by stating that "[p]rominent scholars and historians of the Reconstruction era also would agree that

emotional debates were extremely passionate and emphasized the failure to protect individuals' civil rights.[28] For example, Representative Perry cried, "Sheriffs, having eyes to see, see not; judges having ears, hear not . . . ."[29]

Unfortunately, section 1 of the Act, now codified as the present-day § 1983, did little more than add civil remedies and penalties to the criminal penalties already in place by the earlier 1866 Civil Rights Act.[30] For decades later, the spirit of what is currently § 1983 was largely ignored through various restrictive judicial interpretations of the Fourteenth Amendment.[31] It was not until 1961 that the Supreme Court,

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Congress and the courts were concerned about serious problems of private coercion, intimidation, and violence directed against citizens." Oren, *supra*.

[28] *See* Webster v. City of Houston, 689 F.2d 1220, 1233-34 (5th Cir. 1982).

[29] CONG. GLOBE, 42d Cong., 1st Sess. 447 (1871); *see also Monroe*, 365 U.S. at 175-76. The Court emphasized that "[w]hile one main scourge of the evil-perhaps the leading one-was the Ku Klux Klan, the remedy created [in § 1983] was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe*, 365 U.S. at 175-76 (footnotes omitted).

[30] *See* Steinglass, *supra* note 22, at 85-86 (discussing the history of § 1983).

[31] *See* RICHARD S. VACCA & H.C. HUDGINS, JR., LIABILITY OF SCHOOL OFFICIALS AND ADMINISTRATORS FOR CIVIL RIGHTS TORTS 13 (1982). It has been noted that "[f]or more than seventy-five years, however, § 1983 was used very little, and lay virtually dormant in the United States Code." *Id.* Indeed, "[f]or many years, the Civil Rights Act of 1871 was largely ignored; but, almost a century later, in 1961, the *Monroe v. Pape* decision initiated what has resulted in two decades of increasing litigation against governmental officials and governmental agencies." *Id.* at xi; Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 TEMP. POL. & CIV. RTS. L. REV. 311, 317-18 (1995) (noting that the "post Civil War Supreme Court eviscerated the various Civil Rights Acts by narrowly interpreting the authority granted Congress by the Fourteenth Amendment," and recognizing that § 1983 "lay dormant for nearly a century, until the landmark decision in Monroe v. Pape, in which the Supreme Court held that the statute covered unauthorized as well as authorized actions by state officials") (footnotes omitted); Michael G. Collins, *Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1498 (1989). Collins argues

> It is no secret that § 1983 was almost dead on arrival. It served as the litigational vehicle for only a smattering of constitutional cases in its first fifty years .... Shortly after Congress enacted § 1983, the Supreme Court in the Slaughter-House Cases, all but read the privileges or immunities clause out of the Fourteenth Amendment.

Collins, *supra*. *But see* United States v. Mosley, 238 U.S. 383, 388 (1915). Writing for the majority, Justice Holmes recognized that the intent of § 1983 was not restricted to the terrorism created by the Klan. *Id.* Justice Holmes commented on section 6 of the Enforcement Act of 1870 in words relating to § 1983:

> Just as the Fourteenth Amendment . . . was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, [§ 1983] had a general scope and used general words that have become the most important

in *Monroe v. Pape*,[32] reevaluated its prior restrictive interpretations of § 1983 and recognized the original intent behind the statute.[33] In addition, the Court's subsequent opinion in *Monell v. Department of Social Services*[34] emphasized that § 1983 claims should receive a broad interpretation in favor of plaintiffs bringing such actions.[35] Nonetheless,

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> now that the Ku Klux Klan have passed away .... *We cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [Section 1983] most reasonably affords.*

Id. (emphasis added). *See generally* Steinglass, *supra* note 22, at 85-86. Steinglass states that "[b]efore *Monroe*, § 1983 suits against state and local governmental defendants were reluctantly rare because of the narrow construction given to § 1983 itself and because of the existence of few constitutional limitations on the States." *Id.*

[32] 365 U.S. 167, 191 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[33] *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 48-49 (1983). According to Schuck,

> In upholding Monroe's right to sue the policemen under § 1983, the Court ensured that § 1983 would develop into a remedy of awesome power .... *Monroe v. Pape* was rightly perceived as a watershed decision, establishing § 1983 as a potent remedy that citizens could invoke affirmatively against official misconduct without the State's help or indeed in the face of its opposition. It swiftly became the legal bulwark of the ripening civil rights movement; only two years after the decision, § 1983 litigation had grown by over 60 percent .... It was in 1980, however, that the scope of § 1983 reached its zenith.

Id.; Stephen Faberman, Note, *The Lessons of* DeShaney: *Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97, 100 (1993) (stating that *Monroe v. Pape* "dramatically increased the applicability of Section 1983").

[34] 436 U.S. 658, 684-85 (1978).

[35] *Id.* at 685. The Court emphasized that "[i]n both Houses, statements of the supporters of § 1 [of the Civil Rights Act of 1871] corroborated that Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights." *Id.*; *see also* Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987), *in* A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 186, 189 (Sheldon H. Nahmod ed., 1993) ("The language of the provision, meanwhile, requires that it be applied *broadly*.") (emphasis added); Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 N.W. U. L. REV. 277 (1965), *in* A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 4, 5 (Sheldon H. Nahmod ed., 1993) ("It is obvious from the words spoken on both sides [of the debate surrounding the enactment of the Civil Rights Act of 1871] that the framers contemplated a bill of great scope."); David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 379 (2001) (recognizing that in *Monell*, the Court explicitly stated that "§ 1983 is to be broadly construed because Congress intended an aggressive defense of constitutional liberties").

Nichol also suggests that "[t]he legislative history of the Civil Rights Act demands that the statute be read to penetrate traditional concepts of state sovereignty." Nichol, *supra*; *see also* Cantwell, *supra* note 31, at 318-19. Cantwell makes the following observation regarding the historical construction of § 1983:

> Critics also contended that an expansive construction of § 1983 would offend federalism by intruding upon the sovereignty of the state-an

since *Monell*, the Court once again narrowed § 1983's scope and application.[36]

Against this background, a legal concept, coined as the "state-created danger" theory, would soon take root.[37] Unfortunately, the facts and circumstances that spawned this § 1983 concept were no less tragic than the unwillingness or inability of state officials to control the widespread racial violence in the post-Civil War era.[38]

B. *The Seed Is Planted:* DeShaney v. Winnebago County Department of Social Services

A § 1983 substantive due process claim against a state actor for failure to protect a person from violence at the hands of private third parties may exist under certain narrow circumstances.[39] In 1989, the Supreme Court addressed whether a duty is owed by governmental

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> argument that was first raised during the floor debates in the Forty-Second Congress. Now, as then, the answer is that federalism itself was irrevocably transformed by the Fourteenth Amendment, and that § 1983 was intended "to interpose the federal courts between states and the people, as guardians of the people's federal rights."

Cantwell, *supra* note 31, at 318-19.

[36] *See* Ivan E. Bodensteiner, *Limiting Federal Restrictions On State and Local Government*, 33 VAL. U. L. REV. 33 (1998). In his article, Professor Bodensteiner discusses the narrowing of § 1983's application and argues that *Monroe v. Pape* "gave reason for optimism that [this] provision[] could live up to [its] promise and provide meaningful protection for civil rights." *Id.* However, Professor Bodensteiner argues that "the Court has gradually eroded them to the point where much of the promise now has a hollow ring for many victims of official lawlessness." *Id.*; Collins, *supra* note 31, at 1537. The Court's current treatment of § 1983 claims is restrictive. Collins, *supra* note 31, at 1537. Indeed, it has been noted:

> The honeymoon between the Court and § 1983, however, did not last long. As the Court's composition shifted in the 1970s, so did its attitude toward the statute and the individual rights it safeguarded. Doctrines of equitable restraint, abstention, preclusion, and personal and sovereign immunity all made resort to federal trial court more difficult in § 1983 actions. In addition, the Court showed its restlessness with *Monroe*'s state action holding that permitted litigants to attack exercises of power that state or local law had not affirmatively authorized.

Id. (footnotes omitted).

[37] See generally *infra* Part III for a survey of the different state-created danger tests.

[38] See *supra* notes 24-36 and accompanying text for a historical discussion of § 1983's impact after the Civil War.

[39] *See* Cantwell, *supra* note 31, at 330 ("Since the mid-1970s the Supreme Court has steadily moved to narrow the availability of § 1983, first by examining the nature and delineating the boundaries of substantive due process . . . and then by defining the level of government awareness required to trigger a constitutional 'deprivation.'").

entities and their employees to protect persons from injuries caused by private third parties.[40]

In *DeShaney*, four-year old Joshua DeShaney and his mother brought a § 1983 action against the Winnebago County Department of Social Services ("DSS") for placing Joshua in his father's care.[41] The complaint alleged that the DSS had deprived Joshua of due process of law by failing to intervene and to protect him from violence perpetrated against him by his father.[42] However, the Supreme Court rejected Joshua's claim and affirmed the Seventh Circuit's holding.[43]

In a 6-3 decision, the Court's opinion by Chief Justice Rehnquist held that the DSS's failure to provide Joshua with adequate protection against his father's child abuse did not violate Joshua's rights under the substantive component of the Due Process Clause.[44] The Court noted the tragedy inherent in the case but held that there is no substantive due process right to protection from violence perpetrated by private actors.[45] The Court reasoned that the Due Process Clause acts as a limitation on state powers, not as a limitation on individual or private action.[46]

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40 *See generally* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

41 *Id.* at 191-92. In *DeShaney*, the DSS received numerous complaints that Joshua was being abused by his father. *Id.* at 192. The DSS took various steps to protect Joshua but did not remove him from his father's custody. *Id.* In fact, the DSS obtained a court order placing Joshua in the temporary custody of a hospital after the beatings. *Id.* However, the DSS later released Joshua into his father's custody. *Id.* at 192-93. During the time Joshua was in his father's custody, caseworkers made monthly visits to the DeShaney home and observed suspicious injuries on Joshua's body. *Id.* at 193. Finally, the father beat Joshua so severely that he suffered extensive and permanent brain damage. *Id.*

42 *Id.* Joshua's mother brought suit against the DSS under § 1983, claiming that Joshua was denied liberty without due process of law because the DSS failed to intervene and protect him from his father's abuse. *Id.* However, the district court granted summary judgment for the DSS. *Id.* The Seventh Circuit affirmed the district court's decision, holding that local government does not have a duty to protect people from violence committed by private actors. *Id.* Joshua's mother appealed to the United States Supreme Court, and the Court granted certiorari. *Id.* at 194.

43 *Id.*

44 *Id.* at 195, 197.

45 *Id.* at 197 ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

46 *Id.* at 195. The Court maintained that "[t]he [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* Therefore, the Court concluded that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows

In addition, the Court rejected Joshua's argument that the State acquired an affirmative duty to protect him from danger based on the fact that it apparently had knowledge of his father's abusive tendencies.[47] The Court emphasized that no duty of protection arises unless "the state takes a person into its custody and holds him there against his will."[48] However, the Court stated that "it is true that in certain limited circumstances, the Constitution imposes upon the state affirmative duties of care and protection with respect to particular individuals."[49] The Court expanded on its statement by proclaiming that "the affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[50] Since Joshua was not in state custody, the Court held that the DSS was not liable for failing to intervene on his behalf.[51]

Justice Brennan, joined by Justice Marshall, wrote a powerful dissenting opinion.[52] Unlike the majority, which stressed that only affirmative action by the state could be abusive, Justice Brennan reasoned that inaction by the state could be just as abusive and oppressive.[53] Justice Brennan openly criticized the majority for making an action-inaction distinction when deciding whether the Constitution imposes an obligation upon the state to protect an individual from the

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that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196-97.

47 *Id.* at 198.

48 *Id.* at 199-200.

49 *Id.* at 198.

50 *Id.* at 200.

51 *Id.* at 201. The Court stated that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua." *Id.*

52 *Id.* at 203 (Brennan, J., dissenting); *see also* Breaden Douthett, Comment, *The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in* DeShaney v. Winnebago County Department of Social Services, 52 OHIO ST. L.J. 643, 645 (1991). Douthett observes that Justice Brennan "forcefully illustrated in his dissent that the line between action and inaction [often will become] cloud[ed]." Douthett, *supra.*

53 *DeShaney*, 489 U.S. at 212. Justice Brennan stated that his "disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it." *Id.*; *see also* Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1529-30 (1989). Soifer observes that "the Court's response in *DeShaney* is all too reminiscent of that moment in the first year of law school when a student learns that there is no legal duty to rescue a baby drowning." Soifer, *supra.*

harm of a third party.[54] In short, Justice Brennan suggested that the majority should have first focused on "the action that [the state] had taken with respect to Joshua and children like him, rather than on the action that the state failed to take."[55]

III. THE STATE-CREATED DANGER THEORY TAKES ROOT IN THE FEDERAL CIRCUIT COURTS

Following the Supreme Court's decision in *DeShaney*, the federal circuit courts recognized two exceptions to *DeShaney*'s canonical rule that the Due Process Clause does not create an affirmative duty for state actors to protect individuals from private third parties.[56] First, liability can be imposed on a state actor when an actual custodial relationship exists between a plaintiff and a state actor, also known as a "special relationship."[57] Second, liability can be imposed based on the state-created danger theory.[58]

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[54] *DeShaney*, 489 U.S. at 206. Justice Brennan stated that he was "unable to see . . . a neat and decisive divide between action and inaction." *Id.*

[55] *Id.* at 205. In addition, Justice Blackmun filed a separate dissenting opinion. *Id.* at 212. Justice Blackmun's dissent criticized the majority for using "sterile formalism" in deciding such a tragic case. *Id.* Justice Blackmun stated that he would "adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging." *Id.* at 213. Indeed, Justice Blackmun's brief and overly compassionate dissent all but eulogized Joshua's unfortunate situation. *Id.*; *see also* Jodie Stern, Comment, *Young Lives Betrayed:* DeShaney v. Winnebago County Department of Social Services, 25 NEW ENG. L. REV. 1251, 1276-77 (1991). Stern makes the following observation with regard to Justice Brennan's dissent in *DeShaney*:

> Justice Brennan began his dissent by chiding the Majority for its proclamation that the Constitution does not generally impose an obligation upon the government to safeguard positive as well as negative liberties .... It was Justice Brennan's view that by overemphasizing the action/inaction distinction, the Court failed to give enough consideration to the effect of the State's actual intervention into Joshua DeShaney's life.

Stern, *supra.*

[56] *See supra* note 46 and accompanying text (discussing the Supreme Court's reasoning in *DeShaney*).

[57] *See, e.g.*, Walton v. Alexander, 44 F.3d 1297, 1299 (5th Cir. 1995). The court noted that the "special relationship" exception "only arises when a person is involuntarily confined or otherwise restrained against his will pursuant to a governmental order or by the affirmative exercise of state power." *Id.*; Taylor v. Garwood, 98 F. Supp. 2d 672, 675 (E.D. Pa. 2000). The court made the following observation regarding the "special relationship" exception:

> [G]overnment actors may be liable "when the State takes a person into its custody and holds him there against his will." The creation of this "special relationship" imposes upon the government a constitutional

This Note focuses on the state-created danger exception to *DeShaney*'s general rule and not the special relationship exception.[59] That is, if a state actor plays a role in the creation of a danger inflicted upon a plaintiff, then the state actor may incur liability under § 1983.[60] The following subsections illustrate how the federal circuits have struggled to define and add substance to the state-created danger concept in various factual scenarios or have rejected the concept altogether.

A. *Federal Circuits Which Have Recognized the State-Created Danger Theory as a Viable Claim*

Currently, all of the circuits, except the First and Fourth, have recognized the legitimacy of the state-created danger concept.[61] However, each of the circuits applies a different test when confronted with a state-created danger claim.[62] The following is a survey of the more prominent cases addressing the theory within the circuits accepting the state-created danger concept. The circuits are arranged in three general categories based on the overall structure of their respective state-created danger tests: (1) a test structure borrowed almost verbatim from the *DeShaney* opinion; (2) cryptic, single-sentence tests which are ill-defined in scope; and (3) elaborate and well-defined, enumerated tests. The various intercircuit and intracircuit conflicts among the three test structures are addressed in Part IV.B-C.[63]

1. The Eleventh Circuit: A Verbatim Adoption of *DeShaney*'s Clouded Dicta

The contours of the Eleventh Circuit's state-created danger test are not clearly defined and seem to be the most ambiguous of all of the

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> "duty to assume some responsibility for [the] safety and general well-being" of the person whose liberty has been restrained.

Taylor, 98 F. Supp. 2d at 675 (citations omitted).

58 *See, e.g.*, Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997).

59 See *supra* note 6 for the specific language upon which the state-created danger concept is based.

60 See *supra* note 6 for the specific language upon which the state-created danger concept is based.

61 *See generally infra* Part III.B (discussing the First and Fourth Circuit's treatment of the state-created danger concept).

62 See generally this part, Part III.A, for a survey of the circuits recognizing the legitimacy of the state-created danger theory.

63 *See generally infra* Part IV.B-C (discussing the various intercircuit and intracircuit conflicts).

federal circuits that have adopted the theory as a viable constitutional claim.[64] In fact, most of the Eleventh Circuit's test, as illustrated in *Wyke v. Polk County School Board*[65] and *Powell v. Georgia Department of Human Resources*,[66] is taken almost verbatim from *DeShaney*'s ambiguous language. As such, the Eleventh Circuit will find liability under the state-created danger theory when the "state affirmatively acts to restrain an individual's freedom to act on his own behalf, either 'through incarceration, institutionalization, or other similar restraint of personal liberty.'"[67] In addition, the Eleventh Circuit states that an affirmative duty to protect an individual from the violence of a third party "arises from the limitations the state places on an individual's ability to act on his own behalf, not from the state's knowledge of the individual's predicament or from its expressions of intent to help him."[68]

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[64] *See infra* notes 65-68 and accompanying text (discussing the Eleventh Circuit's treatment of the state-created danger concept).

[65] 129 F.3d 560, 569 (11th Cir. 1997).

[66] 114 F.3d 1074, 1079 (11th Cir. 1997).

[67] *Wyke*, 129 F.3d at 569 (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).

[68] *Id.* at 570 (quoting *DeShaney*, 489 U.S. at 200). In *Wyke*, a junior high school student attempted to commit suicide on two different occasions during school hours. *Id.* at 563. School officials were well aware of the suicide attempts but took no action to seek counseling for the student before he ultimately killed himself. *Id.* The mother of the student phoned the Dean regarding the suicide attempts, and the Dean said he "would take care of it." *Id.* at 564. Following this phone conversation, the Dean summoned the student to his office and read a Bible verse in an attempt to help the student. *Id.* The Dean decided not to contact a licensed counselor since such a matter would involve too much "red tape." *Id.* Subsequent to this meeting, the Vice Principal had been told by a custodian that an unidentified male student had been "talking about killing himself." *Id.* However, the Vice Principal did not pay any attention to the comment. *Id.* The following day, the student committed suicide. *Id.* The court in *Wyke* initially recognized the legitimacy of the state-created danger theory as a viable legal theory but held that the plaintiff failed to satisfy its requirements. *Id.* at 570. The court reasoned that the school did not make the student more vulnerable to harm by allegedly cutting off private sources of aid. *Id.* at 569. Although the court noted that *DeShaney* "may have left the door open for [the] argument," the facts of this case did not create a situation where the school had an affirmative duty to protect the student. *Id.* The court further reasoned that in order for the school to have incurred a duty to protect the student, the Dean must have done more than tell the student's parent that he would "take care of it." *Id.* at 570. Thus, the court maintained that school officials could not have affirmatively prevented the student's mother from protecting her son by mere words alone. *Id.* Flushed against this reasoning, the court in *Wyke* did not find any state liability under the state-created danger theory. *Id.*

2. The Second, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits: Cryptic, Single-Sentence Tests Which Are Ill-Defined In Scope

a. The Second Circuit

The Second Circuit embraced the state-created danger theory as a viable § 1983 claim in *Dwares v. City of New York*[69] and found liability "where [state officials] in some way [have] assisted in creating or increasing the danger to the victim."[70] Following *Dwares*, the Second Circuit attempted to establish contours around its state-created danger analysis.[71] In *Cook v. Groton*,[72] the court emphasized that there must be a "causal relationship" between a state actor's alleged actions and the creation of or increased danger.[73] In addition, the Second Circuit's opinion in *Robertson v. Arlington Central School District*[74] stated that a state actor must specifically be placed on notice or warned of the alleged danger under the state-created danger theory before liability can be imposed.[75]

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69 985 F.2d 94 (2d Cir. 1993).

70 *Id.* at 99. In *Dwares*, the plaintiff attended a flag-burning rally. *Id.* at 96. Although the plaintiff did not physically participate in the flag desecration, he voiced his support for those who did. *Id.* During the rally, a group of "skinheads," who were well-known to the local police department, physically attacked and beat the plaintiff. *Id.* This brutal act occurred in the presence of police officers who made no attempt to intervene. *Id.* The plaintiff brought a § 1983 claim against the city and the individual officers who were present. *Id.* at 97. The plaintiff argued that the defendants' inaction deprived him of due process under the Fourteenth Amendment. *Id.* The court held that the police officers violated the plaintiff's due process rights by intentionally allowing the plaintiff to become more vulnerable to assault in their presence by not interfering with the attack. *Id.* at 99. The court stated that the "complaint in the present case was unlike that in *DeShaney* because it went well beyond allegations that the defendant officers merely stood by and did nothing, and that circumstances were merely suspicious." *Id.*; *see also* Cantwell, *supra* note 31, at 337. Cantwell states that the court in *Dwares* observed that "the police's behavior increased if not created the likelihood of Dwares being assaulted by the skinheads." Cantwell, *supra* note 31, at 337.

71 Cook v. Groton, No. 97-73070, 1997 WL 722936, at *2 (2d Cir. Nov. 19, 1997).

72 *Id.*

73 *Id.* The court maintained that "[t]he lack of any causal relationship between the alleged acts of the officers and [plaintiff's] injuries is, therefore, fatal to her claim." *Id.*

74 No. 00-7170, 2000 WL 1370273 (2d Cir. Sept. 19, 2000).

75 *Id.* at *2. The court reasoned that "[a]bsent such notice, defendants [i.e., the state actors] cannot be held liable under *Dwares* for having 'assisted in creating or increasing the danger.'" *Id.*

c. The Seventh Circuit

The Seventh Circuit states that liability under the state-created danger theory exists when the state "creates, or substantially contributes to the creation of a danger or renders citizens more vulnerable to a danger [than] they would otherwise have been."[82] However, for many years, the contours of this test have been subjected to considerable litigation.[83] The Seventh Circuit acknowledged the viability of the present-day state-created danger theory and began to set its boundaries nearly ten years before *DeShaney* in *White v. Rochford*.[84] Following *White*,

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[82] Dykema v. Skoumal, 261 F.3d 701, 705 (7th Cir. 2001); Monfils v. Taylor, 165 F.3d 511, 518 (7th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993).

[83] *See infra* notes 84-106 and accompanying text (discussing the Seventh Circuit's treatment of the state-created danger concept).

[84] 592 F.2d 381 (7th Cir. 1979). In *White*, police officers arrested a driver for drag racing on the Chicago Skyway. *Id.* at 382. The driver, who was the uncle of the three children riding with him, pleaded with the police officers to transport the children to the police station or to a phone booth in order to contact their parents. *Id.* However, the police officers refused the uncle's requests. *Id.* The police officers left the children in the abandoned car on the roadside in the frigid night. *Id.* Due to the cold night air, the children left the vehicle and crossed eight lanes of traffic in search of a phone booth. *Id.* Upon discovery of a phone booth, the children placed a call to their mother. *Id.* However, their mother did not have access to a vehicle and requested police assistance. *Id.* Consequently, the children were picked up by a neighbor. *Id.* The Seventh Circuit, then, reversed the district court's granting of the defendants' motion to dismiss on what could have been termed state-created danger grounds. *Id.* The court in *White* recognized the state-created danger theory by stating:

> [T]he issue before this court is whether the unjustified and arbitrary refusal of police officers to lend aid to children endangered by the performance of official duty violates the constitution where that refusal ultimately results in physical and emotional injury to the children. We hold that such conduct indisputably breaches the Due Process Clause.

Id. at 383. The court further reasoned that the officers "could not avoid knowing that, absent their assistance, the three children would be subjected to exposure to cold weather and danger from traffic." *Id.* at 385. In addition, the court stated that such "indifference in the face of known dangers certainly must constitute gross negligence." *Id.* Thus, the plurality opinion in *White* found the officers liable under § 1983. *Id.* at 386. However, the court refused to distinguish whether a state actor has to act "affirmatively" as opposed to refusing to act in the face of such danger. *Id.* at 385. The court reasoned that making the action-inaction distinction would amount to a "tenuous metaphysical construct which differentiates sins of omission and commission." *Id.* at 384; *see also* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The court in *Bowers* recognized that the line between an affirmative act and an omission is difficult to draw:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the State puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say

the Seventh Circuit continued to construct the parameters of its state-created danger analysis in *Archie v. City of Racine*.[85] In *Archie*, the Seventh Circuit recognized that a government official could, if the circumstances were right, be held responsible for creating a danger in a noncustodial setting.[86] Thus, the court in *Archie* stated that when a state actor affirmatively places a person in danger, the state actor must protect such a person "to the extent of ameliorating the incremental risk."[87]

After *DeShaney* was handed down in 1989, the Seventh Circuit continued to refine its state-created danger analysis.[88] In *Losinski v. County of Trempealeau*,[89] the court emphasized the requirement of an "affirmative act" by the state actor before liability can be imposed under the theory.[90] Next, in *Reed v. Gardner*,[91] the Seventh Circuit stated that

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> that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snakepit.

Bowers, 686 F.2d at 618; Cantwell, *supra* note 31, at 332 (recognizing that the "Seventh Circuit, even prior to *DeShaney*, had rejected § 1983 suits in which the gravamen of the complaint was government inaction"); Jeremy D. Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 181-82 (2001) (arguing that *White* opted to ignore the "action verses inaction distinction"). It should be noted that the term "state-created danger" was not used by pre-*DeShaney* decisions. The pre-*DeShaney* decisions are commonly referred to as "snake-pit cases," based on a famous quote from the Seventh Circuit's opinion in *Bowers*. "'If the State puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much a tortfeasor as if it had thrown him into a snake pit.'" Pruessner, *supra* note 35, at 359 (citing *Bowers*, 686 F.2d at 618). However, the concept behind the pre-*DeShaney* claims were basically the same as post-*DeShaney* claims despite the semantics of the title adopted by the post-*DeShaney* decisions. *Id.* at 364.

85 847 F.2d 1211 (7th Cir. 1988).

86 *Id.* at 1222 ("The State may take custody of a person, or propel him into danger, without formal imprisonment or civil commitment. We have suggested that if the government hurls a person into a snake pit it may not disclaim responsibility for his safety.").

87 *Id.* at 1223.

88 *See generally* Losinski v. County of Trempealeau, 946 F.2d 544 (7th Cir. 1991).

89 *Id.*

90 *Id.* at 551. In *Losinski*, a deputy sheriff escorted a woman to her estranged husband's residence in an attempt to retrieve certain items of personal property. *Id.* at 547. After arriving at the residence, the woman and her estranged husband began to fight. *Id.* Consequently, the estranged husband fatally shot the woman. *Id.* at 548. During the entire episode, the deputy sheriff stood by and did not intervene. *Id.* The Seventh Circuit held that the deputy sheriff did not create or enhance the danger to the woman. *Id.* at 550. According to the court in *Losinski*, the woman had obtained the State's assistance in the face of a known danger. *Id.* at 554. As such, the court reasoned that there was "no evidence that the state acted to create the danger." *Id.* at 550. The court maintained that "[a]lthough the state walked with [the woman] as she approached the 'lion's den,' it did not force her to

liability under the theory could be imposed even if the plaintiff is not in actual state custody.[92] However, the court in *Reed* initially stated that it was hesitant to review the claim outside of the context of official state custody.[93] Nonetheless, the court stated that the case was distinguishable from those cases in which state actors had no part in creating a danger but did nothing when "suspicious circumstances dictated a more active role for them."[94] Accordingly, the Seventh Circuit in *Reed* concluded that liability under the theory can be found in noncustodial contexts.[95]

The court in *Reed* further maintained that *DeShaney* and its progeny do not create an affirmative obligation for the police to protect citizens from drunk drivers.[96] But the court stated that, although the police "did not create the danger by buying [the intoxicated passenger] drinks and providing him with a car, they did take action under color of state law which rendered [the deceased victims] and the other motorists [on the highway] vulnerable to a dangerous driver."[97] In addition, the *Reed* court stated that liability can be found when a state actor's behavior creates a danger for a specific plaintiff or the general public.[98]

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proceed," nor did the deputy sheriff do anything to amplify the danger when he arrived with the woman at the residence. *Id.* Thus, the lack of an "affirmative" act by the deputy sheriff precluded liability under the state-created danger theory. *Id.*; *see also* Wallace v. Adkins, 115 F.3d 427, 430 (7th Cir. 1997). The court in *Wallace* held that an order requiring a prison guard to remain at an especially dangerous post, while at the same time offering him false assurances that he would be protected, qualified as an affirmative act for purposes of the state-created danger claim. *Wallace*, 115 F.3d at 430.

91 986 F.2d 1122 (7th Cir. 1993).

92 *Id.* at 1126. In *Reed*, state police arrested the driver of a car but left the car and the keys with an intoxicated passenger. *Id.* at 1123-24. The passenger drove the vehicle and subsequently caused an accident killing two people. *Id.* at 1123. The decedents' estate brought suit against various law enforcement bodies for constitutional violations based on the state-created danger theory. *Id.* at 1124. The court in *Reed* held that plaintiffs could assert their claim against the police officers. *Id.* at 1126.

93 *Id.* ("While we have been hesitant to find section 1983 liability outside the custodial setting, we find that plaintiffs . . . may state claims for civil rights violations . . . .") (citations omitted).

94 *Id.* at 1125 (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989)).

95 *Id.* at 1127.

96 *Id.* The court stated that, "[t]aken to an extreme, police officers could watch drunk drivers stumble to their cars and drive off, weaving across the road, without incurring Section 1983 liability." *Id.*

97 *Id.*

98 *Id.* The court stated that "when the police create a specific danger, they need not know who in particular will be hurt." *Id.*; *see also* Kernodle, *supra* note 84, at 179 (citing

Significantly, the court emphasized that in some circumstances, a danger can clearly be obvious.[99] Therefore, the lack of contact between a state actor and a plaintiff will not be fatal to a state-created danger claim.[100]

Finally, in *Monfils v. Taylor*,[101] the Seventh Circuit held that a police officer could be held liable under the state-created danger theory by releasing a tape of an informant's anonymous call reporting a dangerous crime.[102] The informant's voice was recognized by the perpetrators of the crime, and the informant was murdered.[103] Under the state-created danger theory, the court held that there was sufficient evidence for a jury to conclude that the police officer placed the informant in a position of danger greater than he would have faced otherwise.[104] In addition, the court further defined the parameters of the state-created danger theory by commenting on whether a state actor must cut off all avenues of a plaintiff's self-help before liability is found.[105] The court emphasized that "there is no absolute requirement that all avenues of self-help be restricted."[106]

d. The Eighth Circuit

Like the Seventh Circuit, which recognized the essence of the present state-created danger theory long before the Supreme Court's decision in *DeShaney*, the Eighth Circuit also recognized the state-created danger

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Reed v. Gardner and stating that "when the government creates an egregious danger, it does not need to know who in particular will be hurt").

99 *Reed*, 986 F.2d at 1127. The court noted that "[s]ome dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party." *Id.*

100 *Id.* at 1126-27. The court further reasoned that a state actor's "lack of direct contact with the [plaintiff] does not necessarily preclude this action against them." *Id.*

101 165 F.3d 511 (7th Cir. 1998).

102 *Id.* at 513.

103 *Id.* at 514-15.

104 *Id.* at 520.

105 *Id.* at 516. The court stated that "a State can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid." *Id.* at 517. *But cf.* Estate of Stevens v. City of Green Bay, 105 F.3d 1169, 1177 (7th Cir. 1997) (stating that alternative avenues of aid must be cut off before liability will be imposed under the state-created danger theory).

106 *Monfils*, 165 F.3d at 517; *see also* Kernodle, *supra* note 84, at 185 (recognizing that "the Seventh Circuit held the City liable for releasing the identity of a police informant who was later killed, even though the informant had other ways to protect himself against his assailants").

concept before *DeShaney* was decided.[107] Following the Supreme Court's *DeShaney* decision, the Eighth Circuit began to construct a more particularized state-created danger analysis in *Freeman v. Ferguson*.[108] In *Freeman*, the Eighth Circuit set forth the following test: "The possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been absent state action."[109]

After announcing the test in *Freeman*, the Eighth Circuit attempted to further qualify its state-created danger analysis.[110] In *Carlton v. Cleburne County*,[111] the Eighth Circuit recognized that the lack of actual "custody" of a plaintiff was not fatal to a state-created danger claim.[112] However, the court in *Carlton* stressed that affirmative action on the part of the state actor is required.[113] Finally, the court stated that "mere knowledge of danger to the individual does not create an affirmative duty to protect."[114]

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[107] *See* Wells v. Walker, 852 F.2d 368, 369 (8th Cir. 1988). The Eighth Circuit has been very forthcoming in expressing its frustration with regards to defining a workable state-created danger analysis. *See, e.g.*, Greer v. Shoop, 141 F.3d 824, 828 (8th Cir. 1998) ("[W]e are not convinced that the law was so clearly established in 1991 that a reasonable official under these factual circumstances would have known that his or her actions were violative of [plaintiff's] constitutional rights."); Carlton v. Cleburne County, Arkansas, 93 F.3d 505, 508 (8th Cir. 1996) ("'[I]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability . . . .'") (citations omitted); Davis v. Fulton County, Arkansas, 90 F.3d 1346, 1351 (8th Cir. 1996) ("There is no bright line test for when state action can give rise to a particular duty to protect . . . ."); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) ("The law is not entirely established as to the extent to which the government must increase the danger of private violence before it assumes a corresponding duty to protect.") (citations omitted). Thus, the Eighth Circuit is representative of the confusion that the circuit courts have faced in their quest to interpret the ambiguous principles that *DeShaney* set forth. Karen M. Blum, DeShaney: *Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 478-79 (1994) (noting that "the lower court opinions in this area reflect a sense of confusion and a need for guidlines and principles beyond the foundation poured in *DeShaney*").

[108] 911 F.2d at 55.

[109] *Id.*

[110] *See generally Carlton*, 93 F.3d at 508-09.

[111] *Id.* at 505.

[112] *Id.* at 508.

[113] *Id.* (recognizing that "affirmative conduct by government officials directly responsible for placing particular individuals in a position of danger" is required under the state-created danger theory).

[114] *Id.*

Next, in *Davis v. Fulton County*,[115] the Eighth Circuit stated that, in order for a duty to protect to arise, plaintiffs must show that the danger they face as a result of the state actor is greater than that faced by the general public.[116] Finally, in *S.S. v. McMullen*,[117] the Eighth Circuit stated that a state-created danger claim must meet the "shocks the conscience" standard.[118] In addition, the court in *McMullen* seemed to have added an additional element of intent to its analysis.[119] Specifically, the court stated that whether a state actor has affirmatively placed someone in a position of danger depends "on his or her state of mind."[120] However, the court never explained the exact scope of this additional consideration.[121]

e. The Ninth Circuit

The Ninth Circuit recognized the state-created danger theory as a viable constitutional claim in *Wood v. Ostrander*,[122] approximately four months after *DeShaney* was handed down.[123] After years of refinement,

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115 90 F.3d 1346 (8th Cir. 1996).

116 *Id.* at 1351. "[T]he actions of the state must create a unique risk of harm to the plaintiff that is greater than the general public." *Id.*

117 225 F.3d 960 (8th Cir. 2000).

118 *Id.* at 964; *see also* Recent Case, *Constitutional Law-Substantive Due Process-Eighth Circuit Denies Liability for Returning Child in State Custody to Parent Despite Known Potential for Abuse*, 114 HARV. L. REV. 1653, 1655 (2001). Indeed, constitutional commentators have noted that the "shocks the conscience" requirement is essential to a state-created danger claim, as *S.S. v. McMullen* also recognized:

> [E]ven if the defendants [i.e., the state actors] had affirmatively endangered S.S., the alleged state action did not "shock the conscience," as required to support the claim of a substantive due process violation. Although the court agreed that the abuse itself shocked the conscience, it held that the appropriate focus of the inquiry is not on the abusive acts, but on the acts of the state, which did not rise to the level of shocking.

Recent Case, *supra* (footnotes omitted).

119 *McMullen*, 225 F.3d at 962.

120 *Id.*; *see also* Recent Case, *supra* note 118, at 1659 (criticizing the court's opinion by stating that "[t]he court unnecessarily stretched the holding of *DeShaney* and provided too broad a shield to protect social workers from the consequences of their child-welfare decisions").

121 *McMullen*, 225 F.3d at 961.

122 879 F.2d 583 (9th Cir. 1989).

123 *Id.* at 595 (noting that *DeShaney* was decided on February 22, 1989, and *Wood* was decided on June 27, 1989). The Ninth Circuit recognized that the state-created danger theory had been a viable claim as far back as 1984–approximately five years before *DeShaney* was decided. *Id.* The court in *Wood* noted that the state-created danger theory was "clearly established by September 1984." *Id.* The court in *Wood* extracted support for

the Ninth Circuit employs the following test to determine constitutional liability under the state-created danger theory: "The plaintiff must demonstrate, at the very least, that the State acted affirmatively . . . and with deliberate indifference . . . in creating a foreseeable danger to the plaintiff . . . leading to the deprivation of the plaintiff's constitutional rights."[124]

The Ninth Circuit applied the above test in *Huffman v. County of Los Angeles*.[125] In *Huffman*, the plaintiffs' son was fatally shot by an off-duty deputy sheriff during a bar room fight.[126] Both were highly intoxicated.[127] The plaintiffs' son instigated a physical fight with the deputy sheriff outside the bar.[128] In response to this attack, the deputy sheriff fatally shot plaintiffs' son.[129] At no time did the deputy sheriff ever reveal to the plaintiffs' son that he was a law enforcement officer.[130]

The *Huffman* court held that the sheriff's department did not violate the plaintiffs' son's substantive due process rights.[131] The court cited to prior Ninth Circuit caselaw that placed emphasis on the "causal relationship" that a plaintiff must establish between a state actor's

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the state-created danger theory from the Seventh Circuit's opinion in *White v. Rochford*. *Id.* at 592-93. Following the Ninth Circuit's decision in *Wood*, the Ninth Circuit set forth various parameters around its state-created danger analysis in *L.W. v. Grubbs*. 92 F.3d 894 (9th Cir. 1996). In *Grubbs*, the court attempted to define the level of culpability a state actor must exhibit. *Id.* at 899-900. The court reasoned that "deliberate indifference" is the level of culpability which a state actor must exhibit. *Id.* In addition to culpability, the Ninth Circuit examined foreseeability in *Van Ort v. Estate of Stanewich*. 92 F.3d 831, 836-37 (9th Cir. 1996). The court in *Van Ort* held that "[p]ointing to a municipal policy action or inaction as a 'but-for' cause is not enough to prove a causal connection . . . . Rather, the policy must be the proximate cause of the section 1983 injury." *Id.* at 837 (citations omitted). The court also noted that a state actor's "private acts" amount to "intervening" and "unforeseeable" acts that will break the causal relationship. *Id.* at 837-42; *see also* Smith, *supra* note 25, at 597. Smith recognizes that "[t]he first [Ninth Circuit opinion] to generally apply the theory of state-created danger was *Wood v. Ostrander*." Smith, *supra* note 25, at 597.

124 Huffman v. County of Los Angeles, 147 F.3d 1054, 1061 (9th Cir. 1998) (citations omitted).

125 *Id.* at 1058-61.

126 *Id.* at 1056.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at 1056-57.

131 *Id.* at 1061. The court noted that the theory "does not create a broad rule that makes state officials liable under the Fourteenth Amendment whenever they increase the risk of some harm to members of the public." *Id.*

conduct and the violation of a plaintiff's rights.[132] Based on Ninth Circuit precedent, the court viewed the deputy sheriff's "private acts" as an intervening force that severed the causal connection with the sheriff's department.[133] Therefore, liability under the state-created danger theory could not be obtained.[134]

f. The D.C. Circuit

The D.C. Circuit recently joined the majority of circuits recognizing the state-created danger concept in *Butera v. District of Columbia*.[135] In acknowledging the validity of the state-created danger concept, the D.C. Circuit set forth the following test to determine whether constitutional liability should be imposed on a state actor: "An individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when the District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."[136] In addition, the D.C. Circuit requires that a plaintiff "show that the [state actor's] conduct [is] so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[137]

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132 *Id.* at 1059-60. The court reasoned that the sheriff's department "could not 'reasonably have foreseen' [the deputy sheriff's] lethal 'private acts'" when it allegedly required him to carry a gun off duty. *Id.* at 1060 (citations omitted). *See generally* L.W. v. Grubbs, 92 F.3d 894, 899-90 (9th Cir. 1996); Van Ort v. Estate of Stonewitch, 92 F.3d 831, 836-37 (9th Cir. 1996).

133 *Huffman*, 147 F.3d at 1059.

134 *Id.* at 1061. The court reasoned that "[w]hether or not the County's failure specifically to prohibit deputies from carrying guns while drinking was bad policy, it did not violate [plaintiff's] rights under the Fourteenth Amendment, because the County could not have foreseen [the state actor's] actions." *Id.*

135 235 F.3d 637 (D.C. Cir. 2001) (joining the majority of federal circuits recognizing the state-created danger theory on January 9, 2001).

136 *Id.* at 651.

137 *Id.* In *Butera*, the mother of a deceased, undercover police operative brought a civil rights suit against the police department and four police officers. *Id.* at 640. The deceased operative's estate alleged that various police officers had failed to protect him from harm after leaving him alone during an undercover drug purchase. *Id.* at 642. The informant had been beaten to death by three unidentified individuals. *Id.* at 643. The deceased's estate based its suit on the state-created danger theory. *Id.* The court in *Butera* stated that it had never before relied on *DeShaney*'s language in recognizing the state-created danger theory as other federal circuits have done. *Id.* at 644-45. Although the D.C. Circuit had never been presented with a state-created danger claim before *Butera*, the D.C. Circuit had addressed *DeShaney*'s "special relationship" custody exception. *Id.* at 650. Significantly, the court engaged in a comprehensive analysis of how the various federal circuits have treated the state-created danger concept. *Id.* at 648-55. After this analysis, the court in

3. The Third, Fifth, and Tenth Circuits: Elaborate and Well-Defined, Enumerated Tests

a. The Third Circuit

The Third Circuit adopted the state-created danger theory of liability in *Kneipp v. Tedder*.[138] The Third Circuit created an elaborate four-part test for analyzing claims under this theory: (1) whether the harm ultimately caused was foreseeable and fairly direct; (2) whether a state actor acted in willful disregard for the safety of the plaintiff; (3) whether there existed some relationship between the state and plaintiff; and (4) whether a state actor used his or her authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.[139]

Butera stated that most of the other circuits have held that the primary consideration in determining liability under the theory was whether the state had engaged in *affirmative conduct* that increased or created danger resulting in harm to the individual. *Id.* at 650. The *Butera* court then announced that it would join the majority of the federal circuits recognizing the state-created danger theory as a viable constitutional claim. *Id.* at 651. Although the court recognized the theory as a viable claim, the court reasoned that the claim was "not clearly established" at the time of the particular lawsuit at bar. *Id.* at 652. The court stressed that the contours of the theory have been inconsistent among the various circuits which have adopted it. *Id.* at 653. The court in *Butera* concluded that although all of the various federal circuit tests have required affirmative conduct by a state actor, "the circuits have adopted different nexus requirements" and have "employed differing degrees of specificity in defining actionable conduct." *Id.* at 654. Against these principles, the court held that the deceased's estate could not prevail on the state-created danger theory. *Id.* The court stated, "[w]e hold that law in this circuit was insufficiently clear in December 1997 to alert the District of Columbia and its police officers to possible constitutional liability . . . for their conduct." *Id.*

138 95 F.3d 1199 (3d Cir. 1996).

139 *Id.* at 1208. In *Kneipp*, a husband and wife were stopped and questioned by police nearly one-third of a block from their home while walking back from a tavern. *Id.* at 1201. The wife was visibly intoxicated and smelled of urine. *Id.* Police permitted the husband to leave in order to check on the babysitter who was at their home. *Id.* at 1202. As the husband left, the wife was leaning against the police car in an effort to maintain her balance. *Id.* Later, during the trial, the husband testified that he believed that the police would not leave his wife alone in such a condition. *Id.* However, the police left the wife at the conclusion of their questioning. *Id.* As a result, the wife sustained hypothermia and suffered permanent brain damage after she fell into an embankment and was exposed to the frigid night air for several hours. *Id.* at 1203. The husband and wife brought a civil rights suit under § 1983 against the city and the police officers who conducted the questioning. *Id.* The plaintiffs argued that the police knew of the wife's intoxicated condition and assumed responsibility to protect her when her husband left the scene. *Id.* at 1202. As such, the plaintiffs argued that the police increased the risk that the wife might be injured when they abandoned her. *Id.* The court held that the "state-created danger"

Following *Kneipp*, the Third Circuit applied its four-part test again in *Morse v. Lower Merion School District*.[140] However, in *Morse*, the Third Circuit held that a daycare teacher who was killed while teaching failed to meet the requirements of the state-created danger theory.[141] The court reasoned that the state actors could not have foreseen that allowing construction workers to use an unlocked back door at the daycare would result in the "murderous act of a mentally unstable third party."[142]

Essentially, the Third Circuit in *Morse* attempted to clarify its state-created danger analysis as originally announced in *Kneipp*.[143] The court stated that "foreseeability" is the most important factor in *Kneipp*'s four-part test.[144] The court also qualified the third prong of its test by stating that a state actor must have actual knowledge that a specific individual or class of individuals is faced with harm.[145] Finally, the court

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theory was a viable mechanism for establishing a constitutional violation under § 1983. *Id.* at 1211. After discussing the historical treatment of the state-created danger concept, the *Kneipp* court applied its four-part test along with a "deliberate indifference" standard. *Id.* at 1208. The court declined to distinguish terms such as "deliberate indifference," "reckless indifference," "gross negligence," or "reckless disregard" in the context of a substantive due process claim. *Id.* The court reasoned the wife's injuries were foreseeable due to her visibly intoxicated state. *Id.* In addition, the court in *Kneipp* reasoned that the police acted in willful disregard for the wife's safety since they knew she was intoxicated. *Id.* The court further maintained that a relationship between the wife and the police existed since the police exerted sufficient control over her by not allowing her to leave. *Id.* at 1209. Finally, the court stated that the police made the wife more vulnerable to harm when they sent her home unescorted. *Id.* Therefore, the court found that there was enough evidence to raise a triable issue of fact as to whether the police officers affirmatively placed the wife in danger. *Id.* at 1211.

140 132 F.3d 902, 902-16 (3d Cir. 1997).

141 *Id.* at 916. The plaintiff's wife was shot by a mental patient while teaching at a state-owned daycare facility. *Id.* at 904. The school had a policy that all side and back doors were to be locked at all times. *Id.* However, the mental patient entered the school through an unlocked back entrance after a construction crew had propped the door open while working on an outside swimming pool. *Id.*

142 *Id.* at 908.

143 *See* Madden, *supra* note 22, at 971 (comparing and contrasting the holdings in *Kneipp* and *Morse*).

144 *Morse*, 132 F.3d at 912; *see also* Madden, *supra* note 22, at 966-67. Madden comments on the court's treatment of foreseeability by noting that "the court [in *Morse*] seemingly eliminates the need to characterize the state's conduct as an act as opposed to an omission. The court noted that it is not clear whether the [state-created danger] theory mandates an affirmative act and, if so, what constitutes an affirmative act." *Id.* Madden further notes that "[t]he relationship requirement is not merely an extension of the direct causal requirement, but instead ensures that the defendant had sufficient contact with the victim so as to make the harm resulting from his or her actions foreseeable." *Id.* at 969.

145 *Morse*, 132 F.3d at 914. The court made the following observation:

emphasized that whether a state actor's conduct in creating the peril can be characterized as an "omission" or an "affirmative act" may not be relevant.[146] The court continued to cast doubt on the requirement of an "affirmative act" when it stated that "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission."[147] In other words, if state actors–through action or inaction–used their authority in some manner to create a foreseeable opportunity for a third party to inflict harm, then liability will follow.[148]

b. The Fifth Circuit

The Fifth Circuit is the most recent of the federal circuits to recognize the state-created danger theory as a viable legal claim.[149] Until recently, the Fifth Circuit had a notorious reputation and history of avoiding the issue by deciding such cases on other grounds.[150] The Fifth Circuit questioned whether the Supreme Court intended their comments in

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> The state-created danger theory of liability under § 1983 always requires that a specific individual has been placed in harms way. Although it is appropriate to draw lines here, there would appear to be no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability.

Id.

146 *Id.* The court in *Morse* stated that whether affirmative acts are required under the state-created danger theory is "less than clear" and that the "line between an affirmative act and an omission is difficult to draw." *Id.*

147 *Id.* at 915; *see also* Madden, *supra* note 22, at 970 (discussing the court's treatment of the action-inaction distinction).

148 *Morse*, 132 F.3d at 915. The court reasoned that whether state actors "used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur" should be the focus rather than inquiring into the action-inaction distinction. *Id.*; *see also* Madden, *supra* note 22, at 970. Madden emphasizes that "[t]he court in *Morse* expounded on this element of the test by noting that the state action does not necessarily have to be an 'act,' but instead may be characterized as an 'omission.' The important factor is whether the state created the opportunity for a foreseeable harm to occur." Madden, *supra* note 22, at 970.

149 McClendon v. City of Columbia, 258 F.3d 432 (5th Cir. 2001). The Fifth Circuit officially recognized the state-created danger theory on July 26, 2001. *Id.* The court announced, "[w]e have not heretofore explicitly adopted and enforced this theory. We do so now." *Id.* at 436.

150 *See generally* Randolph v. Cervantes, 130 F.3d 727 (5th Cir. 1997); Piotrowski v. City of Houston, 51 F.3d 512 (5th Cir. 1995); LeFall v. Dallas Indep. Sch. Dist., 28 F.3d 521 (5th Cir. 1994); Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992); *see also* Pruessner, *supra* note 35, at 371 (discussing Fifth Circuit cases that refused to recognize the state-created danger theory as settled law).

DeShaney to carve out an area of liability under § 1983.[151] The Fifth Circuit interpreted the language in *DeShaney* as nothing more than a contextual observation by the Supreme Court.[152] In *McClendon v. City of Columbia*,[153] the Fifth Circuit set forth the following test: (1) whether a state actor increased the danger to a plaintiff and (2) whether a state actor acted with deliberate indifference.[154]

In addition, the court in *McClendon* hinted that courts should also consider the following factors: (1) whether a state actor acted with "affirmative conduct" and had "knowledge" of the peril and (2) whether a "causal connection" existed between a state actor's behavior and a victim's ultimate injury.[155] However, the court did not expressly state that these factors must always be satisfied when engaging in the state-created danger analysis.[156]

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151 *See LeFall*, 28 F.3d at 530-31.

152 *Id.*; *see also* Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997). The court in *Doe* recognized that the Fifth Circuit "[has] never sustained liability on state-created danger grounds." *Doe*, 113 F.3d at 1415.

153 *McClendon*, 258 F.3d at 432.

154 *Id.* at 435. A plaintiff must establish that the state actor acted with deliberate indifference by the following standard:

> "[T]he environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff."

Id. at 436 (alteration in original) (citations omitted). In *McClendon*, the plaintiff was shot by a police informant during an argument. *Id.* at 434. The gun utilized in the shooting had been loaned to the informant by the police for the informant's own personal protection. *Id.* At the time of the loan, the police were aware of the possibility of violence erupting between the plaintiff and the informant. *Id.* As such, the plaintiff argued that he was deprived of his substantive due process rights since the police "knowingly and affirmatively created a dangerous situation by providing [the informant] with a gun when [the police were] aware that violence was likely to erupt between them." *Id.* at 435. The court in *McClendon* initially announced its recognition and approval of the state-created danger theory as a viable claim. *Id.* at 436. The court held that a reasonable trier of fact could find that the police had created a danger that the informant would shoot the plaintiff and, therefore, contributed to such an opportunity. *Id.* at 438. After applying the state-created danger analysis, the court emphasized that the most important consideration that courts must examine is whether the state actually created the danger or at least made the victim more vulnerable to it in some manner. *Id.* at 437.

155 *Id.* at 437-38.

156 *Id.*

c. The Tenth Circuit

The Tenth Circuit's state-created danger analysis is the most elaborate of all of the federal circuits that have adopted the theory. In *Uhlrig v. Harder*,[157] the Tenth Circuit set forth five elements to be met before a plaintiff can prevail under the state-created danger theory: (1) whether the plaintiff was a member of a limited and specifically definable group; (2) whether the state actor's conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm; (3) whether the risk was obvious or known; (4) whether the state actor acted recklessly in conscious disregard of that risk; and (5) whether such conduct, when viewed in total, shocks the conscious.[158] Moreover, in *Armijo v. Wagon Mound Public Schools*,[159] the Tenth Circuit added a sixth element to the *Uhlrig*'s five-part analysis: A plaintiff must show "that the charged individual defendant actors created the danger or increased the plaintiff's vulnerability to the danger in some way."[160]

In *Armijo*, the Tenth Circuit applied its elaborate six-part test in a case involving a suspended, suicidal special-education student.[161] As an initial matter, the court recognized that the state-created danger concept was clearly established law well before the student committed suicide.[162] Significantly, the court in *Armijo* stated that the key to state-created danger claims is the degree of the state actor's "culpable knowledge" and "conduct in affirmatively placing an individual in a position of danger."[163]

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157 64 F.3d 567 (10th Cir. 1995).

158 *Id.* at 574.

159 159 F.3d 1253 (10th Cir. 1998).

160 *Id.* at 1263; *see also* Eckert v. Town of Silverthorne, No. 00-1030, 2001 WL 856426, at *7 (10th Cir. July 9, 2001); Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001) (recognizing the six-part test under *Uhlrig* and *Armijo*).

161 *Armijo*, 159 F.3d at 1256. Before the student was suspended, school officials were well aware of his ongoing low self-esteem and suicidal tendencies. *Id.* On the day of the suicide, a school official violated school policy by dropping the special-education student off at his home without first checking to see whether his parents were there. *Id.* at 1257. The student then gained access to a rifle and fatally shot himself in the chest. *Id.* The parents of the student brought suit against the school for violating their son's civil rights under § 1983 and the state-created danger theory. *Id.*

162 *Id.* at 1262.

163 *Id.* at 1263. The court stated that "the environment created by the state actors must be dangerous; and, to be liable, they must have used an opportunity that would not otherwise have existed for the third party's [acts] to occur." *Id.* Applying the state-created danger theory, the court held that (1) the student was "a member of a limited and specifically

B. *Federal Circuits That Have Not Recognized the State-Created Danger Theory as a Viable Claim*

The First and Fourth Circuits have not recognized the state-created danger theory as a legitimate legal claim.[164] The sweeping consequences of this nonrecognition are illustrated below.

1. The First Circuit: Slouching Towards Rejection With Some Hesitation

The First Circuit has not officially accepted the state-created danger theory as a viable constitutional claim.[165] With great frustration, the First Circuit seemingly rejected the theory in *Monahan v. Dorchester Counseling Center, Inc.*[166] but later questioned whether it had made the correct choice in subsequent judicial decisions.[167]

In *Monahan*, the court felt that state-created danger claims were really state tort claims in disguise.[168] The court recognized that, even if a plaintiff is rendered more vulnerable to danger as in *DeShaney*, "this is not the kind of 'affirmative act' on part of the state which would give rise to a *constitutional* rather than a tort duty to protect [the plaintiff]."[169] The court in *Monahan* stated that, even if a state actor's actions of failing to protect a person were "negligent or even willfully indifferent or reckless," such actions cannot "take on the added character of violations of the Federal Constitution."[170] The court stated that the state-created danger theory would, in effect, "convert most torts by state actors into

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definable group"–namely, students who have expressed threats of suicide; (2) the school officials' conduct placed the student at "substantial risk of serious, immediate and proximate harm by suspending him from school, which caused him to become distraught and to threaten violence" and by leaving him home alone; (3) the school officials knew of the student's suicidal tendencies and of his access to the firearm; (4) the school officials acted "recklessly in conscious disregard of the risk for suicide" when they took this action; (5) the sum total of the school officials' conduct was "conscious-shocking;" and (6) all of these facts as a whole strongly "increased the risk" to the special education student. *Id.* at 1264. Thus, the school could not escape liability under the state-created danger theory. *Id.*

164 *See infra generally* this Part, Part III.B (discussing the First and Fourth Circuits' treatment of the state-created danger concept).

165 *See infra* notes 166-181 and accompanying text (discussing the First Circuit's treatment of the state-created danger concept).

166 961 F.2d 987, 991 (1st Cir. 1992). The court stated that "Monahan's remedies, like those of most others in similar situations, lie in the arena of tort, not constitutional law." *Id.*

167 *See* Pruessner, *supra* note 35, at 367-69 (discussing the First Circuit's treatment of the state-created danger theory).

168 *Monahan*, 961 F.2d at 991.

169 *Id.* at 993.

170 *Id.*

constitutional violations."[171] According to the court, *DeShaney* clearly prohibited such a claim under § 1983 jurisprudence.[172]

Following *Monahan*, the First Circuit continued to struggle with the question of whether it should adopt the state-created danger theory, and in *Soto v. Flores*,[173] it reflected upon its decision in *Monahan*.[174] The court stated that "where the ultimate harm is caused by a third party, courts must be careful to distinguish between conventional torts and constitutional violations, as well as between state inaction and action."[175] Thus, the court concluded that "the state-created danger theory is a difficult question" and avoided the issue completely by resolving the case on other grounds.[176]

Likewise, in *Rodriguez-Cirilo v. Garcia*,[177] the First Circuit once again ducked the state-created danger issue.[178] The court in *Garcia* continued to struggle with the ambiguities of the theory.[179] A concurring opinion in *Garcia* stated that it would be unfortunate if "instead of relying on state legislatures and courts to provide legal means to redress matters of this nature, federal courts transform conduct that is at most tortious into constitutional causes of action."[180] Thus, the First Circuit has not

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171 *Id.* The court emphasized that the plaintiff's remedies "lie in the arena of tort, not constitutional law." *Id.* at 991; *see also* Faberman, *supra* note 33, at 138 ("Not every tort committed by a state actor can be remedied by the Constitution.").

172 *Monahan*, 961 F.2d at 993 (noting that *DeShaney* clearly contemplated "something more when it referred to 'render[ing a party] more vulnerable to [a danger']").

173 103 F.3d 1056 (1st Cir. 1997).

174 *Id.* at 1062-64.

175 *Id.* at 1064. *See also* BODENSTEINER & LEVINSON, *supra* note 17, at 396-97. Professors Bodensteiner and Levinson argue that "[t]here remains, however, much disagreement in the lower courts as to when government abuse of power is sufficiently egregious to state a substantive due process violation, rather than merely an ordinary common-law tort." *Id.*

176 *Soto*, 103 F.3d at 1064 (reasoning that because "we find that this claim may be resolved on immunity grounds, we choose not to reach this question").

177 115 F.3d 50 (1st Cir. 1997).

178 *Id.*

179 *Id.* at 51. The court vented its frustration with the state-created danger theory by stating,

> We therefore do not reach the nettlesome legal question of whether, in light of *DeShaney* . . . , a police officer's knowing refusal to carry out the express terms of a non-discretionary detention order can be deemed "an affirmative act," that, by increasing the risk of private harm to those sought to be protected by the order, may trigger due process concerns.

Id.

180 *Id.* at 57 (Campbell, J., concurring).

endorsed the state-created danger theory as a viable constitutional claim.[181]

2. The Fourth Circuit: Absolute Rejection

Unlike the First Circuit, which seemed to question whether it should recognize the state-created danger theory as a viable claim before side-stepping the issue, the Fourth Circuit explicitly rejected the theory in *Pinder v. Johnson*.[182] Thus, the Fourth Circuit's position, as adopted in *Pinder*, has been viewed as a controversial matter.[183]

In *Pinder*, the plaintiff contacted the police after a former boyfriend broke into her home and threatened her and her children.[184] In response, a police officer arrived and arrested the ex-boyfriend.[185] The plaintiff feared for her life and for the lives of her children and asked the officer whether she could safely leave her home for work in the upcoming hours.[186] The police officer told the plaintiff that her ex-boyfriend would be locked in jail overnight.[187] Based on this assurance, the plaintiff left her children alone and went to work.[188] Nonetheless, the plaintiff's ex-boyfriend was immediately released on his own recognizance and was ordered to stay away from the plaintiff and her children.[189] The ex-

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181 *See supra* this Part, Part III.B.1 (discussing the First Circuit's treatment of the state-created danger theory).

182 54 F.3d 1169 (4th Cir. 1995); *see also* Kernodle, *supra* note 84, at 172 (discussing the Fourth Circuit's treatment of the state-created danger theory).

183 *See* Pruessner, *supra* note 35, at 369 (observing the controversial nature of *Pinder v. Johnson*); Recent Case, *Constitutional Law-Substantive Due Process-Fourth Circuit Holds Police Officer Not Liable for Exposing Children to Harm That Culminated In Their Murder*, 109 HARV. L. REV. 524, 526-29 (1995). The following criticism of *Pinder v. Johnson* has been noted:

> The Fourth Circuit's decision in *Pinder* is a product of both a misunderstanding of the plaintiff's case and an insufficiently nuanced reading of *DeShaney* and its progeny. A more exacting analysis would have concluded that Pinder's due process claims do fit into a well established body of law .... Thus, although the court was arguably justified in holding that qualified immunity shielded [Officer] Johnson from liability, it should not have rejected the substance of Pinder's claims in as sweeping manner as it did.

Id. at 526-27.

184 54 F.3d at 1172.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

boyfriend returned to the plaintiff's home and set it on fire.[190] Tragically, the plaintiff's children were burned alive as they slept in their beds.[191]

The Fourth Circuit in *Pinder* held that *DeShaney* did not create a duty for state actors to protect individuals from the harm of third parties.[192] The court vehemently stated that "[i]t cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely."[193] For example, the court reasoned that a state could become liable for "every crime committed by ... prisoners [who are] released" into society.[194] Therefore, the court in *Pinder* warned district courts to resist the temptation to artfully recharacterize inaction as action.[195]

Moreover, the court in *Pinder* explicitly maintained that *DeShaney* did not create a duty to protect outside of the custodial context.[196] The

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190 *Id.*

191 *Id.* Following these tragic events, the plaintiff brought suit against the police officer and police department under § 1983 and the state-created danger theory. *Id.* The plaintiff argued that the police officer deprived her and her children of their constitutional rights when the police officer allegedly failed to take affirmative action to protect them from her violent ex-boyfriend. *Id.* The defendants moved for summary judgment, but the district court denied the motion. *Id.*

192 *Id.* at 1176. The court stated,

> Given the principles laid down by *DeShaney*, it can hardly be said that [the state actor] was faced with a clearly established duty to protect Pinder or her children .... Indeed, it can be argued that *DeShaney* established exactly the opposite, i.e., that no such affirmative duty existed because neither Pinder nor her children were confined by the state.

Id. But see Jenna MacNaughton, *Positive Rights In Constitutional Law: No Need to Graft, Best Not Prune*, 3 U. PA. J. CONST. L. 750, 773 (2001). MacNaughton emphasizes that "the Fourth Circuit [in *Pinder*] seems to have chosen a mechanical application of *DeShaney*'s broad negative rights rule rather than to have sought to do justice to Pinder. This decision poignantly illustrates the injustice worked by the sweeping negative rights rule of *DeShaney*." *Id.*; Pruessner, *supra* note 35, at 370 ("The majority in *Pinder* was quickly criticized and questioned. The opinion seems to mischaracterize the case as a simple failure to protect due to a failure to jail the suspect. That mischaracterization forced the case into the *DeShaney* mold.").

193 *Pinder*, 54 F.3d at 1175.

194 *Id.*

195 *Id.* at 1176.

196 *Id.* The court reasoned that the "lack of any clearly established duty to protect individuals outside of the custodial context is also reflected in the law in the lower federal courts at the time of the events in question." *Id.* The court noted,

> There was no custodial relationship with the plaintiffs in this case. Neither Johnson nor any other state official had restrained Pinder's freedom to act on her own behalf. Pinder was never incarcerated,

court stated that mere awareness by a state actor, outside that of the penal/institutional context, cannot amount to constitutional liability.[197] The court noted that the federal circuit courts that have established an affirmative duty to protect involved situations where the state action "took a much larger and more direct role in 'creating' the danger itself."[198] Consequently, the court concluded that the plaintiff could not impose constitutional liability upon the police officer for his assurances of safety.[199] Holding otherwise, the court maintained, would be the "first step down the slippery slope of liability" since such a right could be triggered *every time* an individual is harmed by a third party.[200]

Nonetheless, four judges issued a stinging dissent.[201] The dissenting judges initially noted that, in *DeShaney*, the Supreme Court did not reject the state's clearly established duty to protect an individual from the harm of third parties.[202] The dissent stated that caselaw from other circuits clearly established the police officer's affirmative duty to protect the plaintiff and her children.[203] Against this backdrop, the dissent reasoned that the police officer knew the danger that the ex-boyfriend posed to the plaintiff and her children.[204] The dissent further reasoned that the police officer falsely represented that the ex-boyfriend would not

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> arrested, or otherwise restricted in any way. Without any such limitation imposed on her liberty, *DeShaney* indicates Pinder was due no affirmative constitutional duty of protection from the state . . . .

Id. at 1175.

197 *Id.* at 1176-77.

198 *Id.* at 1176. The court stated that "a promise of aid does not actually place a person in a dangerous position and then cut off all outside sources of assistance. Promises from state officials can be ignored if the situation seems dire enough." *Id.* at 1175. However, the court noted that, "[a]t some point on the spectrum between action and inaction, the state's conduct may implicate it in the harm caused, but no such point is reached here." *Id.*

199 *Id.* at 1179; *see also* Stevenson v. Martin County Bd. of Educ., No. 99-2685, 2001 WL 98358, at *6 (4th Cir. Feb. 6, 2001) (citing *Pinder v. Johnson* and noting that "the failure to protect by itself is not sufficient to trigger constitutional liability").

200 *Pinder*, 54 F.3d at 1178. After reviewing various sister-circuit courts, the court noted that the state-created danger theory was not a "clearly established" constitutional right. *Id.* at 1177-78.

201 *Id.* at 1179-82 (Russell, J., dissenting).

202 *Id.* at 1180 (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989)).

203 *Id.* at 1181; *see* Blum, *supra* note 107, at 468. Blum criticizes *Pinder v. Johnson*'s justifications for denying liability by noting that the Court had, in effect, "outlined the safeguards that were already in place to restrict the scope of liability for any breach of a substantive due process duty to provide protection in a non-custodial context." Blum, *supra* note 107, at 468.

204 *Pinder*, 54 F.3d at 1180-81.

be released from jail.[205] As a result, the police officer induced the plaintiff to return to work through a "false sense of security."[206] Therefore, the police officer had a duty to protect the plaintiff and her children since his actions created significant-but false-assurances of safety.[207] The *Pinder* dissent stands for the proposition that the police officer at least had a "duty to phone the [plaintiff] and warn her that [her ex-boyfriend] had been released from police custody."[208] Therefore, the police officer failed to properly protect the plaintiff.[209]

IV. THE ERRATIC GROWTH OF THE VARIOUS STATE-CREATED DANGER TESTS: AN ANALYSIS OF THE INCONSISTENT BREEDS

It is evident, on a most superficial view, that a vast amount of judicial inconsistency exists among the federal circuits with regard to the state-created danger theory.[210] Specifically, the conflicts surrounding the state-created danger concept exist on three distinct and prominent levels.[211] First, a split exists between the circuits recognizing the state-created danger theory as a viable claim and the circuits refusing to accept the state-created danger theory.[212] Second, contrary conclusions about the scope and application of the state-created danger concept exist among the circuits that recognize the theory.[213] Finally, intracircuit conflicts exist among several of the circuits recognizing the state-created danger theory.[214] Thus, given the wide gulf of disparity among the

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205 *Id.* at 1181.

206 *Id.*

207 *Id.*

208 *Id.* at 1181-82.

209 *Id.*

210 *See, e.g.*, Christopher Barr, *Constitutional Law-The Duty of Public Schools to Protect Students From Other Students Under 42 U.S.C. § 1983*-D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992) (*en banc*), *cert. denied*, 113 S.Ct. 1045 (1993), 66 TEMP. L. REV. 1063, 1066 (1993) (recognizing that the "lower courts have differed in their interpretations of *DeShaney*").

211 *See infra* this Part, Part IV (analyzing the various intercircuit and intracircuit inconsistencies).

212 *Compare* discussion *supra* Part III.A *with* Part III.B.

213 *See supra* Part III.A (analyzing the different state-created danger tests among the circuits recognizing the theory as a viable claim).

214 *See supra* Part III.A.2.a, c (discussing the Second and Seventh Circuit's treatment of the state-created danger theory).

circuits, confusion and unequal treatment of litigants living in different judicial districts inevitably occurs.[215]

A. *The Intercircuit Conflict Between the Circuits Recognizing the State-Created Danger Theory as a Viable Legal Claim and the Circuits Refusing to Accept the Theory*

The first level of judicial inconsistency surrounding the treatment of the state-created danger theory is, of course, the bright-line split between the circuits recognizing the theory as a viable legal claim and the circuits disfavoring it.[216] Presently, ten circuits recognize the legitimacy of the state-created danger theory while two circuits refuse to recognize the concept.[217] Given the wide amount of recognition the theory has received from the majority of the circuits accepting it, the underlying rationales of the two circuits rejecting the theory must be explored.

The views expressed by the First and Fourth Circuits explain that the state-created danger theory will not be recognized in their respective jurisdictions.[218] The First Circuit clearly states its conclusion that the state-created danger concept would "convert most torts by state actors into constitutional violations."[219] Likewise, the Fourth Circuit has focused on the possible ramifications of a state actor's "affirmative acts."[220] Extended to its logical conclusion, the Fourth Circuit maintains that the state-created danger theory would create a slippery slope of liability since a state could incur liability every time a prisoner is released into society.[221] Furthermore, the Fourth Circuit has stated that *DeShaney* precludes liability outside that of actual state custody.[222] Nonetheless, the views advanced by the First and Fourth Circuits are fundamentally flawed.

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215 *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1249 (1999) (commenting on the harmful effects of circuit splits).

216 *See supra* Part III.A-B (discussing the various positions the circuits have taken regarding the state-created danger theory).

217 *See supra* Part III.A-B (discussing the various positions the circuits have taken regarding the state-created danger theory).

218 *See supra* Part III.B (discussing the First and Fourth Circuits' views of the state-created danger concept).

219 Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 993 (1st Cir. 1992).

220 Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995).

221 *Id.*

222 *Id.* at 1176.

1. The First Circuit's Flawed Reasoning

The First Circuit's refusal to recognize the state-created danger theory is misplaced.[223] In evaluating the destructive force and effect of the First Circuit's views, one must recognize § 1983's legislative history, recent circuit caselaw, and the *DeShaney* opinion.[224] First, it is apparent that § 1983 was not enacted to make a broad transformation of every state tort into various constitutional torts.[225] Instead, § 1983 was enacted for a specific and limited purpose: to interpose federal protection against the deliberate inaction by state and local officials in the face of Ku Klux Klan terrorism.[226] Section 1983's protections should be equally applicable to the evils committed by present-day state and local officials as well.

Although the First Circuit is correct in stating that "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation," § 1983 was specifically enacted to impose liability on a state actor who deliberately refused to act in the presence of a known danger.[227] Therefore, § 1983 was enacted with a specific purpose in mind and will not, by definition, if properly applied, transform every tort claim into a constitutional violation.

Furthermore, the exclusionary breadth of the First Circuit's analysis is greatly undercut in light of the heightened culpability requirement built into all constitutional torts under substantive due process.[228] That

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223 Recent Case, *supra* note 183, at 527 (stating that the "Fourth Circuit confined the Due Process Clause to a restrictive interpretation that the language of *DeShaney* does not support").

224 *See generally supra* Parts II.A, III.

225 *See supra* notes 24-36 and accompanying text (analyzing the history of § 1983).

226 *See supra* notes 24-36 and accompanying text (analyzing the history of § 1983).

227 Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 57 (1st Cir. 1997) (Campell, J., concurring) (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989)).

228 *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (discussing the "deliberate indifference" standard); Karen M. Blum, *Affirmative Duties of Government After* DeShaney, *in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 203-04 (Mary Massaron Ross ed., 1998). According to Blum:

> The Supreme Court has not definitely established the level of culpability that is required to make out a substantive due process claim based on a failure to protect, but has held that something more than "mere negligence" must be shown .... Multiple standards, including gross negligence, recklessness, deliberate indifference,

is, a state actor's culpability must "shock the conscience" of the court.[229] Since all of the circuits recognizing the state-created danger theory employ the "shocks the conscience" standard, or a similar requirement, ordinary state torts and constitutional torts can be distinguished.[230] Inevitably, this heightened culpability requirement will filter out frivolous state-created danger claims brought by unscrupulous plaintiffs.

Finally, although the *DeShaney* opinion itself expressed concerns about turning every tort committed by a state actor into a constitutional violation, *DeShaney* makes clear that liability can be imposed in certain limited situations.[231] Although federalism concerns regarding state autonomy over tort policy are present, the sanctity of state tort law should not trump the remedial purpose of § 1983 when an individual's constitutional rights become an issue. Consideration of this fact compels the conclusion that the First Circuit's restrictive reading of *DeShaney* is incorrect.

2. The Fourth Circuit's Flawed Reasoning

Equally without merit is the Fourth Circuit's related argument that every act by a state actor, if extended to its logical conclusion, would create constitutional liability under the state-created danger theory.[232] The exclusionary breadth of this sweeping rationale is an effort to completely disregard the legislative history of § 1983 and *DeShaney*

> intent, and conscience-shocking conduct, have been articulated by the lower courts.

Blum, *supra.*

229 *See* Shapo, *supra* note 35, at 13. Shapo makes the following observation:

> Harking to [Section 1983's] legislative history, this standard would call for a brutality or arbitrariness which goes beyond the garden variety state tort action. In many of the post-*Monroe* decisions under Section 1983, this standard finds support in declaration that actionable conduct should be "reprehensible," or "callous and shocking," that "trivial violations" will not suffice, and even in some cases "bad motive may . . . become critical."

Id.

230 *See* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984), *in* A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 125, 134 (Sheldon H. Nahmod ed., 1993) ("Courts state that constitutional tort should be available not for every injury cognizable at common law, but only when there is an 'abuse' or 'misuse' of power, or when the governmental defendant's conduct was 'severe,' 'reprehensible,' or 'egregious.'").

231 *DeShaney*, 489 U.S. 189.

232 *See supra* Part III.B.2 (discussing the Fourth Circuit's treatment of the state-created danger theory).

altogether.[233] Again, nothing in § 1983's legislative history nor *DeShaney*'s plain language leads to such a restrictive conclusion.[234] The main objective of § 1983 is not to merely impose liability upon state actors but rather to afford individuals more protection in the face of foreseeable dangers. Thus, the essential premises underlying the Fourth Circuit's approach are at odds with § 1983's legislative history and the *DeShaney* opinion.[235]

Concomitantly inconsistent with *DeShaney* is the Fourth Circuit's assertion that a state actor's duty to provide protection exists only in actual custody.[236] Although actual control in custodial situations may be a relevant factor, some limitation on a person's ability to act, or a state actor's promises to act, should be the prerequisite for finding a custodial relationship. The Court in *DeShaney* never fashioned such a clear-cut, restrictive position concerning actual custody.[237] Rather, the Court in *DeShaney* articulated that some form of "limitation" be imposed on an individual by the state actor.[238] Accordingly, like the First Circuit, the Fourth Circuit's reasoning as to why the state-created danger theory should not be recognized is fundamentally flawed.

B. *The Intercircuit Conflicts Among the Ten Circuits Accepting the State-Created Danger Theory as a Viable Legal Claim*

The second level of judicial inconsistency surrounding the state-created danger concept involves the different tests adopted by the ten

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233 *See generally supra* Part II (discussing § 1983's legislative history and *DeShaney*).

234 *See* Pruessner, *supra* note 35, at 378. Pruessner recognizes that in light of "the statutory language and legislative history of § 1983" the Fourth Circuit in *Pinder v. Johnson* was mistaken in its approach and that such a result "would contradict the clear legislative history of the Ku Klux Klan Act of 1871." *Id.*

235 *See supra* Part III.B.2 (discussing the Fourth Circuit's treatment of the state-created danger theory).

236 *See* Recent Case, *supra* note 183, at 528-29. The following criticism of *Pinder* has been noted:

> [A]lthough the majority [in *Pinder v. Johnson*] emphasized that Pinder's children were not in State custody, *DeShaney* is not so narrow as to establish custody as the *sine qua non* of liability .... [T]he Fourth Circuit in *Pinder* should have held [the state actor] accountable for the fatal consequences of making a promise that he could not or would not keep.

Id.

237 *See infra* Part IV.B.2.c (analyzing the custody issue).

238 *See infra* Part IV.B.2.c (analyzing the custody issue).

circuits recognizing the theory's legitimacy.[239] The only consistency among the ten circuits is that each of them mechanically cite to *DeShaney*'s canonical dicta.[240] To illustrate, the most visible inconsistencies include: (1) whether the state-created danger concept is "clearly established" law; (2) the scope of the actual elements within each circuit's respective tests; (3) the special emphasis placed on different elements within each respective test; and (4) the infamous action-inaction distinction.[241]

1. The "Clearly Established" and "Not Clearly Established" Distinction

Although ten federal circuits have relied on *DeShaney*'s language in recognizing the state-created danger concept, not all of these circuits have recognized the theory as "clearly established" law at the time of deciding their respective judicial opinions.[242] Significantly, one of the ten circuits denied liability under the state-created danger theory on the basis that the law in this area was unsettled at the time–even though a vast majority of the other circuits recognized the state-created danger theory as established law.[243]

The Eighth and D.C. Circuits have expressly stated that the state-created danger theory is not "clearly established" law.[244] Although the D.C. Circuit acknowledged the theory's existence, it precluded liability based on the lack of any "clearly established" law.[245] The Sixth, Seventh, and Eleventh Circuits have avoided the position of stating that the theory is not "clearly established;" rather, these circuits merely note that

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239 *See supra* Part III.A (surveying the ten circuits accepting the state-created danger concept).

240 *See generally supra* Part III.

241 *See generally supra* Parts III, IV.

242 *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 615 (1999). It is worthy of note here to understand what constitutes a "clearly established" constitutional right. The contours of the constitutional right at issue must be "sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). A state actor may be able to raise the defense of qualified immunity if such a constitutional claim is "unclear." *Id.*

243 *See supra* Part III.A.2.f (discussing the D.C. Circuit's reasoning regarding the "clearly established" status of the state-created danger theory).

244 Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001) ("[C]onstitutional right to protection by the District of Columbia from third-party violence was not clearly established."); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) ("[T]he law is not entirely established as to the extent to which the government must increase the danger of private violence before it assumes a corresponding duty to protect.").

245 *Butera*, 235 F.3d at 654.

some of the theory's contours remain to be defined.[246] Finally, the Second Circuit hinted that a claim under the state-created danger concept may be brought, but it avoided the "clearly established" issue without supplying any further commentary.[247]

In sharp contrast, the Fifth and Third Circuits have stated that the state-created danger theory is constitutionally sound.[248] Significantly, the Ninth and Tenth Circuits have explicitly stated that the theory is "clearly established" law.[249] The Ninth and Tenth Circuit's conclusions seem to have been compelled by two separate considerations: the holdings of the pre-*DeShaney* cases and the extensive line of post-*DeShaney* caselaw that found liability under the theory.[250]

All ten circuits have embraced the state-created danger theory but maintain strikingly different viewpoints as to whether the theory has been "clearly established."[251] The views advanced by nearly all ten of these circuits offer convincing explanations for their respective positions

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[246] Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) ("In *DeShaney*, the Court left open the possibility that the state may be liable for private acts which violate constitutionally protected rights."); Wyke v. Polk County Sch. Bd., 129 F.3d 560, 567 (11th Cir. 1997) ("The language of *DeShaney* does indeed 'leave room' for state liability where the state creates a danger or renders an individual more vulnerable to it. Exactly what type of state action fits within that exception has been the subject of considerable debate since *DeShaney*.") (citations omitted); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) (stating that "*DeShaney* . . . leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger.").

[247] Cook v. Groton, No. 97-7307, 1997 WL 722936 (2d Cir. Nov. 19, 1997) ("Because of our disposition of this matter, we need not address whether the state-created danger theory was 'clearly established' in May 1991.").

[248] McClendon v. City of Columbia, 258 F.3d 432, 436 (5th Cir. 2001) ("[W]e have continued to recognize the existence of the theory and observed that other circuits have found this theory to be constitutionally sound."); Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (recognizing the establishment of the state-created danger theory by extracting "additional support . . . in the [other] courts of appeals' decisions previously cited").

[249] Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1262 (10th Cir. 1998) ("[W]e agree with the district court that the law was clearly established."); Wood v. Ostrander, 879 F.2d 583, 593 (9th Cir. 1989) (stating that "'an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result'" as other circuits and concluding that the law had been established by the Seventh Circuit's opinion in *White*).

[250] *See* discussion *supra* Part III.A; *see also* Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). The court held that "in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established." *Id.*

[251] *See generally supra* Part III.B.1 (discussing the treatment of the "clearly established" concept among the circuits).

on the issue.[252] Notwithstanding the First and Fourth Circuits, none of the circuits have explicitly rejected the state-created danger theory as a legitimate theory on which to base a § 1983 claim.[253]

Nonetheless, it is significant that no case before *DeShaney* contained the precise holding that due process mandates a duty of protection.[254] This would seem to imply that the state-created danger theory was not clearly established law prior to *DeShaney* and immediately afterwards. Yet, if such a level of specificity would be required to clearly establish the state-created danger theory as a legitimate claim, then the defense of qualified immunity would almost certainly be transformed into a defense of absolute immunity. The Supreme Court recognized that a law has to be only specific enough to be apparent to a reasonable person.[255] Certainly, the responsibility for keeping abreast of constitutional developments within the law should rest on the shoulders of state actors. Additionally, relying solely on intracircuit and Supreme Court cases to establish a law without examining other circuit caselaw is excessively formalistic.

Finally, the policy implications of recognizing the state-created danger concept as clearly established law are significant. By recognizing the state-created danger concept as clearly established law, both parties will receive benefits. A potential victim of harm benefits through enhanced police protection in any number of situations. The police will benefit since they will not have to always question the propriety of their action or inaction from situation to situation. Thus, the extensive landscape of the pre-*DeShaney* and post-*DeShaney* caselaw implicates that the state-created danger theory should be treated as clearly established law.[256]

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252 *See generally supra* Part III.A.

253 *See generally supra* Part III.A-B.

254 *See, e.g.*, Pinder v. Johnson, 54 F.3d 1169, 1176 (4th Cir. 1995) ("The lack of any clearly established duty to protect individuals outside of the custodial context is also reflected in the law in the lower federal courts . . . .").

255 *See supra* note 242 (discussing the requirements of a "clearly established right").

256 *See* discussion *supra* Part III.A.

2. Inconsistent Elements Within the Framework of the Different State-Created Danger Tests

The actual framework for determining liability under the state-created danger theory varies greatly among each of the ten circuits.[257] The tests announced range from adopting *DeShaney*'s language almost verbatim to elaborate and enumerated tests.[258] However, the ten circuits have employed conflicting elements within each of their respective tests.[259] The most notable areas of conflict center on the following: (1) whether a state actor creates a threat to a specific individual or the public at large; (2) whether a state actor must have actual knowledge that a dangerous environment exists; and (3) whether a plaintiff must be in state or a state actor's custody when injury occurs at the hands of a third party.[260]

a. The Specific Individual v. General Public Distinction

The state-created danger tests are inconsistent among the circuits as to whether a state actor must create danger to a specific individual or the general public. Of the ten circuits, the Third, Sixth, Eighth, and Tenth Circuits require that a specific individual be placed in danger.[261] In sharp contrast, the Seventh Circuit has explicitly stated that the specific individual-general public distinction should not be made.[262] Finally, the Second, Fifth, Ninth, and D.C. Circuits have remained silent on the

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257 Joseph M. Pellicciotti, J.D., Annotation, *"State-Created Danger," or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.A. § 1983*, 159 A.L.R. FED. 37, 53 (2000).

258 *See generally supra* Part III.A (discussing the various state-created danger tests).

259 *See generally supra* Part III.A (discussing the various state-created danger tests).

260 *See infra* Part IV.B.2.a-c.

261 Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1262 (10th Cir. 1998) (requiring plaintiff to demonstrate that "[plaintiff] was a member of a limited and specifically definable group"); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) ("The state must have known or clearly should have known that its actions specifically endangered an individual."); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 (3d Cir. 1997) ("[T]he state is not obligated to protect its citizens from the random, violent acts of private persons. But it does not appear this limitation necessarily restricts the scope of § 1983 to those instances where a specific individual is placed in danger."); Carlton v. Cleburne County, Arkansas, 93 F.3d 505, 508 (8th Cir. 1996) (recognizing that "conduct by government officials directly responsible for placing particular individuals in a position of danger" is necessary).

262 Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) ("When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party.").

issue.[263] Against this background, a state actor's liability may depend on whether the relevant circuit has made the specific individual-general public distinction.

The Seventh Circuit's position on refusing to make the specific individual-general public distinction appears to be the most consistent with the original intent behind § 1983.[264] As the Seventh Circuit indicated, if a state actor creates or disregards a specific danger, then that state actor should be held accountable by any injured party.[265] Certainly, the identity of a potential victim is not difficult to define when a danger has the potential to affect many people (e.g., failing to remove a known drunk driver from a highway or releasing a mentally ill patient into society). Such a requirement would obligate a state actor to take reasonable, preventive action to respond to a specific and known danger.

Additionally, a court should consider whether a danger poses an immediate harm. By requiring a danger to be immediate, the potential for state liability is narrowed since the danger would have a limited range in time and scope. As a result, a harm far too attenuated would not improperly inflict constitutional liability onto a state actor. At the same time, such a requirement would remain faithful to § 1983's intent and prior Supreme Court precedent by not necessarily requiring state actors to have direct contact with a plaintiff.

Yet, merely creating or disregarding a situation that exposes an individual or member of the general public to an obvious danger should not be enough. The danger should also be foreseeable, rather than requiring a foreseeable plaintiff. Although a state actor should have sufficient contact with the plaintiff before liability attaches, liability can be broadened to the general public if an obvious danger exists. Therefore, the individual-general public distinction should not be made; rather, courts should focus on whether a foreseeable danger exists.

b. A State Actor's Knowledge of the Dangerous Environment

Closely related to the specific individual-general public distinction is the question of whether a state actor must have actual knowledge of a

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263 *See* discussion *supra* Part III.A.2-3.

264 *See supra* notes 96-100 and accompanying text (discussing the Seventh Circuit's treatment of the specific individual-general public distinction).

265 *See supra* notes 96-100 and accompanying text (discussing the Seventh Circuit's treatment of the specific individual-general public distinction).

dangerous environment. In this context, the Second, Third, Fifth, Sixth, and Tenth Circuits have required a state actor to have actual knowledge or be placed on notice of a danger facing a plaintiff.[266] Additionally, the Seventh and Ninth Circuits do not require that a state actor have actual knowledge or notice of a dangerous environment.[267] Finally, the Eighth, Eleventh, and D.C. Circuits have not commented on this issue.[268]

Based on these holdings, it appears that a state actor should be required to have actual knowledge of a particular danger before liability attaches. Such a requirement balances the competing interests between a state actor and a plaintiff. On the one hand, requiring a state actor to have actual knowledge of a known danger prevents the government from becoming the target of potentially unlimited liability by unscrupulous plaintiffs. On the other hand, actual knowledge of a specific danger reinforces a state actor's responsibility to properly identify and respond to such harms. Such a conclusion is consistent with § 1983's spirit and intent.[269]

Nonetheless, a state actor's awareness of a victim's plight may not always be relevant to the state-created danger analysis. The *DeShaney* opinion itself explicitly rejected the requirement of actual knowledge by stating that it is not a state actor's knowledge of an individual's situation that gives rise to a duty to protect.[270] Even the Fourth Circuit, which refuses to accept the state-created danger concept as a legitimate theory, acknowledged that *DeShaney* refused to require a state actor to have

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266 McClendon v. City of Columbia, 258 F.3d 432, 436 (5th Cir. 2001) ("The environment created by the state actors must be dangerous; they must know it is dangerous."); Robertson v. Arlington Cent. Sch. Dist., 229 F.3d 1136, 1136 (2d Cir. 2000) ("Absent such notice, defendants cannot be held liable . . . for having 'assisted in creating or increasing danger.'"); *Kallstrom*, 136 F.3d at 1066 ("The State must have known or clearly should have known that its actions specifically endangered an individual."); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) ("[T]he harm ultimately caused was foreseeable and fairly direct."); Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (requiring plaintiff to demonstrate that "[t]he risk was obvious or known [by the state actor]").

267 Huffman v. County of Los Angeles, 147 F.3d 1054, 1059 (9th Cir. 1998) ("[State actor] acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to [the danger]."); *Reed*, 986 F.2d at 1127 (7th Cir. 1993) ("[State actors] need not know who in particular will be hurt.").

268 *See supra* Part III.A.1-3 (discussing the treatment of the knowledge issue in the Eighth, Eleventh, and D.C. Circuits).

269 See generally *supra* Part II for an overview of § 1983's legislative history.

270 *See supra* text accompanying note 50 (discussing *DeShaney*'s reasoning).

actual knowledge of a danger.[271] Instead, the focus should be on a state actor's action or inaction and the resulting effects on a plaintiff. This recognition is important because it essentially eliminates the specific individual-general public distinction as well. That is, if a state actor does not have knowledge of a specific danger, then it follows that the state actor need not know who in particular will be hurt. Thus, based on the circumstances, a court may not necessarily have to inquire as to whether a state actor has actual knowledge of a danger.

c. The Custody v. Non-Custody Distinction

Finally, there is intercircuit conflict as to whether a plaintiff bringing a state-created danger claim must be in actual custody of a state or a state actor. The Third, Fifth, Seventh, and Eighth Circuits have explicitly stated that actual custody is not required.[272] The D.C. Circuit stated that "something less than physical custody" may be adequate.[273] In stark contrast, the Eleventh Circuit stands alone in requiring actual custody to exist before liability under the theory can be imposed.[274] Finally, a number of circuits have not commented on whether actual custody by a state or a state actor is required before liability attaches.[275] Nonetheless,

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271 *See* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995). The Fourth Circuit in *Pinder* stated that *DeShaney* "rejected the idea that such a duty [to protect] can arise solely from an official's awareness of a specific risk." *Id.*

272 McClendon v. City of Columbia, 258 F.3d 432, 435 (5th Cir. 2001) (quoting Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994) ("We have recognized that, '[w]hen state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal State custody.'"); Kneipp v. Tedder, 95 F.3d 1199, 1207 (3d Cir. 1996) ("[W]e recognized that the state-created danger theory had been utilized . . . in non-custodial settings."); *Reed*, 986 F.2d at 1126 ("While we have been hesitant to find section 1983 liability outside the custodial setting, we find that plaintiffs . . . may state claims for civil rights violations . . . .") (citations omitted); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) ("This analysis establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting . . . .").

273 Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001).

274 Wyke v. Polk County Sch. Bd., 129 F.3d 560, 569 (11th Cir. 1997). The court noted,

> By mandating school attendance, the State simply does not restrict a student's liberty in the same sense that it does when it incarcerates prisoners or when it commits mental patients involuntarily. Absent that type of restraint, there can be no concomitant duty to provide for the student's "safety and general well-being."

Id.

275 The Second, Sixth, Ninth, and Tenth Circuits have not commented on this issue.

it is worthy to note that the silent circuits have found liability outside of state custody.[276]

The Eleventh Circuit's position is problematic in light of § 1983's legislative history, which does not require actual custody before liability is imposed.[277] While the Eleventh Circuit's position is flawed, the thread running through the other nine circuits offers persuasive guidance that liability under the theory can be found in noncustodial contexts.[278] Rather than subscribing to a narrow and formalistic definition of custody by looking only to the control itself, courts should eliminate the custody/non-custody distinction. Courts should not strictly look at the form of the relationship between a state actor and a plaintiff. Instead, courts should examine the extent to which a plaintiff has relied or become dependent on a state actor's protection.[279]

A person's reliance on a state actor's protection can be illustrated when a state actor promises to offer an individual help or gives an individual a false sense of security through action or inaction. A state actor's declarations of intent to aid a person may hinder such an individual's ability to act on his or her own behalf just as much as a physical constraint in actual custody can. Rather than examining custodial control itself, courts should look to the effects of the state actor-plaintiff relationship. That is, courts should consider the underlying dependency that mandates a state actor to respond to a danger instead of

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[276] See generally *supra* Part III for an account of the circuits' treatment of the custody issue.

[277] *See supra* Part II.A (discussing § 1983's legislative history).

[278] *See* Blum, *supra* note 228, at 164-65. Blum argues,

> Although *DeShaney* may be narrowly read to limit any affirmative duty to protect to situations which "the state takes a person into its custody and holds him there against his will," a number of lower federal courts confronting the question have interpreted *DeShaney* to recognize a duty to protect outside the contexts of imprisonment and involuntary confinement in public institutions.

Id. (footnote omitted); Gary M. Bishop, Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357, 1383 (1989) (recognizing that "the state's direct physical control over an individual should not be the only situation in which the state has a special duty to protect that individual," which is based on Justice Brennan's dissent in *DeShaney*).

[279] *See* Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After* DeShaney, 90 COLUM. L. REV. 1940, 1956 (1990). Huefner states that "[s]ome significant state limitation of an individual's freedom, or some state assumption of significant caretaking responsibility, seems to be a prerequisite for finding a relationship to be custodial." *Id.* Huefner further notes that "it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian." *Id.* at 1957.

a state actor's status as an actual custodian. This framework also comports with Justice Brennan's suggested analysis, which focuses on the nature of the relationship between a state actor and a plaintiff.[280] Therefore, physical restraint should not be a necessary component of custody under the state-created danger concept.

Although *DeShaney* plainly sought to circumvent a wholesale expansion of the duty to protect, *DeShaney*'s description of that duty accommodates and appears to contemplate enforcement of the duty in noncustodial settings.[281] As the Eighth Circuit[282] has pointed out, it is significant that the majority in *DeShaney* decided to review the state's actions in a noncustodial setting.[283] Interestingly, the *DeShaney* opinion expressly acknowledged, without deciding, that, if the state in that case had exercised its power and placed Joshua DeShaney into a foster home, that might constitute a custodial-type situation that could give rise to an affirmative duty on the state to protect Joshua.[284] Accordingly, courts

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280 *See supra* notes 52-55 and accompanying text (discussing Justice Brennan's dissent in *DeShaney*).

281 *See* Watkinson, *supra* note 26, at 1261 ("If the Supreme Court had intended custody to exist only when the individual was incarcerated or institutionalized, the Court would not have included the phrase 'other similar restraint' in its *DeShaney* opinion.").

282 Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990). The court noted,

> To date the Supreme Court has found such a situation only in a custodial setting. It is instructive, however, that in *DeShaney* the Court considered it necessary to review the State's actions with regard to Joshua's claim to determine whether the State had placed him in greater danger or made him more vulnerable, even though he was in a non-custodial setting. This analysis establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting . . . .

Id.

283 *See* Huefner, *supra* note 279, at 1958. Huefner comments on *DeShaney*'s treatment of the custody/non-custody issue by stating that, "[b]ecause the Court's discussion includes no recognition of non-custodial relationships, the decision aptly is characterized as emphasizing custody, but it should not be read as thereby excluding the possibility of any non-custodial analysis." *Id.*

284 *See* DeShaney v. Winnebago County Dep't Soc. Servs., 489 U.S. 189, 201 n.9 (1989). The Court made the following observation:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held . . . that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of

should not make the custody/non-custody distinction when analyzing state-created danger claims.

3. Circuits That Have Placed Special Emphasis On Single Elements Within Their Respective State-Created Danger Analyses

The inconsistencies stated in Part IV.B.2 illustrate the different treatment of common elements among the varying state-created danger tests.[285] Additionally, some circuits have placed special emphasis on certain elements not always recognized by other circuits.[286] Not one of these ten circuits share the same "key" element under their respective tests.[287]

Specifically, the Second Circuit's emphasis is grounded on the notion that "the lack of any causal relationship" between a state actor and a plaintiff's injuries will be "fatal" to a state-created danger claim.[288] The Third Circuit has placed great emphasis on its "foreseeability" element.[289] The Third Circuit has made the element absolutely dispositive.[290] Next, the Sixth Circuit appears to have placed special emphasis on requiring an anomalous "special danger" to be present.[291] The Tenth Circuit states that the "key" to the state-created danger concept "lies in the state actor's culpable knowledge and conduct in affirmatively placing an individual in a position of danger . . . ."[292] Finally, the D.C. Circuit states that the "key" requirement to impose liability under the theory is "affirmative conduct" by a state actor who is alleged to have increased or created the danger.[293] While all of these circuits cite the same language from DeShaney, the different key

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> their foster parents. We express no view on the validity of this analogy, however, as it is not before us in the present case.

Id. (citations omitted).

285 *See generally supra* Part III.A (analyzing the circuits that have accepted the state-created danger theory).

286 *See generally supra* Part III.A (analyzing the circuits that have accepted the state-created danger theory).

287 *See generally supra* Part III.A (discussing "key" elements within the various state-created danger tests).

288 Cook v. Groton, No. 97-7307, 1997 WL 722936, at *2 (2d Cir. Nov. 19, 1997).

289 Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 (3d Cir. 1997) (stating that the "primary focus when making this determination is foreseeability").

290 *Id.* at 914 (reasoning that the "ultimate test is one of foreseeability").

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

292 Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1263 (10th Cir. 1998) (quoting Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994)).

293 Butera v. District of Columbia, 235 F.3d 637, 650 (D.C. Cir. 2001).

elements only amplify the confusion surrounding the proper parameters of the state-created danger concept.[294] From this, it is fairly inferable that different emphases from different tests can lead to inconsistent judicial results among the ten circuits.[295] This is especially true if the key element is the single dispositive factor considered when deciding a state-created danger claim.[296]

4. The Action-Inaction Distinction

The final level of judicial inconsistency among the ten circuits recognizing the state-created danger concept involves the action-inaction distinction.[297] Although the *DeShaney* majority and nine of the ten circuits require affirmative action on the part of a state actor, such a conclusion is wholly inconsistent with § 1983's legislative history and prior Supreme Court precedent.[298]

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294 *See, e.g., supra* note 210 and accompanying text (recognizing the various interpretations among the circuits).

295 *See infra* note 341 and accompanying text (discussing the effects of inconsistent circuit caselaw).

296 *See infra* note 341 and accompanying text (discussing the effects of inconsistent circuit caselaw).

297 *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 203 (3d ed. 1991). Professor Nahmod states that "[s]ome particularly troublesome substantive due process issues are arising with increasing frequency in the circuits." *Id.* Specifically, Professor Nahmod notes that "[t]hese cases involve the possible imposition of affirmative duties upon local governments and their employees to prevent harm and even to rescue." *Id. See generally* Colloquium, *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1561 (1993) (noting the general affect of the action-inaction distinction by stating that "the action/inaction dichotomy of *DeShaney* might well affect what conduct courts will consider to have created 'increased danger'"); Douthett, *supra* note 52, at 645 (noting that ever since *Monroe v. Pape* was handed down by the Supreme Court, "neglect, or inaction by State agencies has increasingly become a center of debate among the federal courts of appeals").

298 *See* BODENSTEINER & LEVINSON, *supra* note 17, at 403-11. Professors Bodensteiner and Levinson note that "many courts have expressed reluctance to impose damages on public officials for sins of omission . . . ." *Id.* at 403-04; Blum, *supra* note 228, at 211-12. Blum states that "[g]iven the variety and range of situations that may be covered by an affirmative duty theory under the Due Process Clause, it is not surprising that the lower court opinions in this area reflect a sense of confusion and a need for guidelines and principles beyond the foundations poured in *DeShaney*." Blum, *supra* note 228, at 211-12; Colloquium, *supra* note 297, *at* 1560 (recognizing that *DeShaney* "adhered to a supposed distinction between government action and inaction, with only the former being potentially subject to suit"); Eric W. Shulze & T.J. Martinez, *Into the Snakepit: Section 1983 Liability Under the State-Created Danger Theory for Acts of Private Violence at School*, 104 ED. LAW. REP. 539, 545 (1995) ("'Liability under the state-created danger theory is predicated upon the state's affirmative acts which work to plaintiffs' detriment in terms of exposure to danger.'"); Watkinson,

Presently, the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits require that the state actor take affirmative action to create the dangerous environment.[299] However, a few pre-*DeShaney* Seventh Circuit opinions refused to make the action-inaction distinction.[300] Yet, with debilitating ambiguity, the Seventh Circuit appears to have ignored its prior caselaw on this issue.[301]

In sharp contrast, the Third Circuit has expressly rejected affirmative action as an element under its state-created danger test.[302] The Third Circuit only requires that the dangerous environment be "foreseeable" by the state actor.[303] Significantly, the approach is understandable given § 1983's legislative history.[304] However, echoing the reasoning of the above circuits, it would appear that requiring affirmative action–as opposed to inaction–on the part of a state actor would be appropriate

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supra note 26, at 1280 ("It should be noted, however, that the state-created danger theory is limited to cases where state officials take affirmative actions that create or exacerbate danger to an individual.").

299 *See* McClendon v. City of Columbia, 258 F.3d 432, 437 (5th Cir. 2001) ("[T]he key element in the state-created danger theory is a determination that the state actor created the danger to the plaintiff .... [W]e found no sufficiently culpable affirmative conduct ...."); Butera v. District of Columbia, 235 F.3d 637, 650 (D.C. Cir. 2001) ("Absent such affirmative conduct by the State to endanger an individual, courts have rejected liability under a State endangerment concept."); Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1263 (10th Cir. 1998) ("The key to the state-created danger cases ... lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger...."); Huffman v. County of Los Angeles, 147 F.3d 1054, 1061 (9th Cir. 1998) ("[T]he danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively...."); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) ("Liability under the state-created-danger theory is predicated upon affirmative acts by the State...."); Wyke v. Polk County Sch. Bd., 129 F.3d 560, 569 (11th Cir. 1997) ("Those circumstances are present when the state affirmatively acts to restrain an individual's freedom to act on his own behalf...."); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) ("[S]tate action that creates, or substantially contributes to the creation of, a danger...."); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) ("We read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause...."); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) ("[A] constitutional duty to protect an individual against private violence may exist ... if the state has taken affirmative action....").

300 *See supra* Part III.A.2.c (discussing the action-inaction issue).

301 *See infra* Part IV.C (discussing the Seventh Circuit's inconsistent caselaw).

302 *See supra* Part III.A.3.a (discussing the Third Circuit's analysis).

303 *See supra* note 144 and accompanying text (discussing the Third Circuit's treatment of "foreseeability").

304 See generally *supra* Part II.A for a historical account of § 1983.

under the state-created danger theory.[305] This conclusion is not foreclosed by *DeShaney*'s ambiguous dicta.[306]

Nonetheless, making the action-inaction distinction ignores the straightforward and explicit command of § 1983's legislative history and prior Supreme Court precedent.[307] What is absent from *DeShaney* and its progenies' opinions is a discussion of § 1983's legislative history and Supreme Court precedent, which addresses the original intent of § 1983.[308] The legislative history of the Civil Rights Act of 1871 and prior Court precedent should not be so easily cabined.[309]

First, the spirit, intent, and purpose of § 1983's enactment was to combat law enforcement *inaction* in the face of Klan terrorism in the post-Civil War South.[310] It belies reality to contend that the evils springing from affirmative state action are any different from the evils springing from intentional state inaction.[311] The evils of inaction in the context of

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305 See generally *supra* Part II.A for a historical account of § 1983.

306 *But compare* Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1361-62 (1992) (commenting on *DeShaney* and suggesting that it could easily be argued that the DSS "'by the affirmative exercise of its power,' did in fact 'restrain' Joshua's 'liberty' while 'failing to provide for his basic human need[]' for 'reasonable safety'") (alteration in original).

307 See generally *supra* Part II.A for a historical account of § 1983.

308 *See also* Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078, 1082 (1990) (noting that the *DeShaney* "brief and formalistic opinion belies the difficulty of issues" contained with the case).

309 See generally *supra* Part II.A for a historical account of § 1983.

310 *See* Soifer, *supra* note 53, at 1524. Soifer sets forth the following with regard to the intent of § 1983:

> Section 1983 was primarily intended to interpose federal protection against unconstitutional state action, whether done by the state legislatures or by state judges or by executive branch officials .... [T]he relevant speeches in Congress and the historical context of the 1860s and early 1870s make clear that "deliberate inactivity" by state and local officials, in the face of brutal depredations, was a central concern of the post-Civil War period.

Id. (footnote omitted).

311 Although outside the scope of this Note, the "negative rights theory" should be briefly mentioned at this point. This theory interprets the Constitution as a document of negative rights. *See* BODENSTEINER & LEVINSON, *supra* note 17, at 457. Professors Bodensteiner and Levinson note that "[i]t is well-established that the Due Process Clause simply imposes limitations on government action, but does not mandate any type of affirmative obligations, i.e., the Constitution is a 'charter of negative rather than positive liberties.'" *Id.*; NAHMOD, *supra* note 297, at 205. Professor Nahmod argues that "[a]fter *DeShaney*, it is clear that the Court has adopted the view that the Constitution is 'a charter of negative liberties,' at least with regard to substantive due process." NAHMOD, *supra* note 297, at 205; *see also* MacNaughton, *supra* note 192, at 754. MacNaughton argues that state inaction,

post-Civil War Klan terrorism do not significantly differ from the numerous types of evils in the modern era.[312] The underpinnings of the Third Circuit and several pre-*DeShaney* Seventh Circuit approaches to the action-inaction distinction at least acknowledge the pitfalls of reading too much into the distinction.[313]

"even in the face of extreme injury or indifference by state actors, is not a morally culpable deprivation of liberty by the government," and, therefore, should not be the basis of a state-created danger claim. MacNaughton, *supra* note 192, at 754. Indeed, negative rights theorists often point to Judge Posner's Seventh Circuit language as found in *DeShaney* when explaining this theory: "The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services." DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987). However, succinctly put, such a theory is inherently flawed and should not have been used to prevent liability for intentional state inaction. *See generally* Archie v. City of Racine, 847 F.2d 1211, 1221 (7th Cir. 1988) (commenting that, even though the Seventh Circuit has championed the negative rights theory *per* Judge Posner, Judge Easterbrook noted that "[t]he Supreme Court sometimes uses the negative rights of the Constitution as the foundation for positive ones"); Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1306 (1995). Browne makes the following observation with regard to the action-inaction issue:

> [The] assumption that the government can deprive individuals of protected rights only by its actions does not take into account government's pervasive influence through regulatory action and inaction, its displacement of private remedies, and indeed, its monopolies over some avenues of relief .... In short, [the government] can harm by its ostensible omissions, as seriously as, and often more efficiently than, by its direct, tangible actions.

Brown, *supra* (alteration in original) (quoting Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2283-84 (1990)); *see also* MacNaughton, *supra* note 192, at 781; Soifer, *supra* note 53, at 1524 ("Posner's ahistorical fallacy is even less convincing about the immediate post-Civil War period .... Sponsors and supporters of these acts repeatedly emphasized the federal duty to provide protection when State officials invaded or failed to protect the full and equal rights of all citizens."). MacNaughton argues that the

> courts must abandon the negative rights rhetoric in order to provide a remedy to victims of administrative malfeasance or neglect .... The strict negative rights view is a type of legal fiction: It is an artificial structure, only loosely based on ethical and historical traditions, set up purely for the sake of convenience .... A semantic flick of the wrist transforms government neglect of civil rights into 'blameless' inaction.

MacNaughton, *supra* note 192, at 781.

312 *See supra* notes 24-36 and accompanying text (discussing the history of § 1983).

313 *See* Madden, *supra* note 22, at 970-71. Madden notes the following with regard to the Third Circuit's treatment of the action-inaction issue:

> Although it was not necessary for the *Morse* court to determine whether omissions are included in the fourth requirement of the state-created danger theory, this dicta is important because it allows a broader ranger of State conduct to be brought under scrutiny. No

A further impediment in making the action-inaction distinction lies in the brushing aside of the Supreme Court's decisions in *Monroe* and *Monell*.[314] Significantly, the cases emphasize the legislative history surrounding § 1983.[315] In addition, as the Court in *Monell* stated, a proper regard for § 1983's genesis requires that § 1983 be broadly construed because it was enacted as a remedial measure.[316] Yet, with sweeping consequences, the Court blatantly ignored its precedent when deciding *DeShaney*.[317]

Understood in this way, the action-inaction distinction is fundamentally flawed and bears no connection to § 1983's legislative history nor prior Supreme Court precedent.[318] An appropriate standard should not require a distinction to be made between a state actor's action or inaction.[319] In fact, situations could arise where a state actor's involvement, through action or inaction, could create a dependency that gives rise to further responsibility on the part of a state actor. As Justice Brennan stated in his dissent in *DeShaney*, intentional inaction by a state

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> longer does the State have to affirmatively act to create the danger; instead, inaction may be enough, as long as the omission was deliberate and the harm was foreseeable.

Id.

314 *See supra* notes 32-36 and accompanying text (discussing the effects of *Monroe* and *Monell*).

315 *See supra* notes 32-36 and accompanying text (discussing the effects of *Monroe* and *Monell*).

316 *See supra* note 35 and accompanying text (discussing *Monell*'s reasoning).

317 *See The Supreme Court, 1988 Term-Leading Cases*, 103 HARV. L. REV. 167, 173 (1989). It has been argued that the

> Court's endorsement [in *DeShaney*] of the arbitrary dichotomy between action and inaction obscured the very real impact that the DSS had on Joshua's life. Drawing a line between a set of "active" and "passive" government behaviors, and assigning constitutional protection accordingly, is a random exercise guided neither by legal directive nor by judicial precedent. Indeed, although the majority contended that the state "stood by and did nothing," it could just as easily have treated the agency's failure to protect Joshua as the active, if reckless, management of a case in which it was deeply involved.

Id. (footnotes omitted).

318 *See* Thomas A. Eaton & Michael L. Wells, *Government Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 109 n.9 (1991) (recognizing that "the distinction between acts and omissions often turns on how one poses the question").

319 *See supra* Part IV.B.4 (analyzing the action-inaction issue).

can be just as abusive and oppressive.[320] In short, the action-inaction distinction is a classic example of a distinction without a difference.

C. *The Intracircuit Conflict Within the Second and Seventh Circuits*

The final level of judicial inconsistency involving the state-created danger theory involves intracircuit conflict within the Second and Seventh Circuits.[321] The added variation of inconsistency only further complicates the differing elaborations of the theory among the ten circuits recognizing its legitimacy. Although not widespread among the ten circuits, it is troubling that the Second and Seventh Circuits have ignored their own precedent in the context of the state-created danger concept.[322] Curiously, the intracircuit conflict surrounds the previously discussed action-inaction distinction.[323]

The Second Circuit's opinion in *Dwares* stated that a state actor who "fails to act upon past violence" does not incur liability under the state-created danger theory.[324] This language seems to indicate the need for affirmative state action rather than inaction. However, in *Cook*, the Second Circuit made no mention of requiring affirmative action on the

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320 *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 204 (Brennan, J., dissenting). Justice Brennan believed that state inaction could be just as abusive as state action when he argued that "[i]n a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case." *Id.* Justice Brennan further argued that his "disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it." *Id.* at 212; *see also* Browne, *supra* note 311, at 1306 ("The holding of *DeShaney* seems so unjust because it allows the State to stand back and let its citizens be harmed or killed when the State is aware of the danger and could easily bring an end to it. *DeShaney* offends basic expectations of governmental protection."); Stern, *supra* note 55, at 1282. Regarding the action-inaction distinctions made by the *DeShaney* majority, Stern notes the following:

> If it is true that the due process clause was designed to prevent oppression, it is an affront to our basic notions of life and liberty to hold that a state which assumes responsibility for protecting an abused child, and then disclaims that responsibility after causing further harm, amounts to nothing less than an oppressive exercise of governmental power.

Stern, *supra* note 55, at 1282 (footnotes omitted).

321 *See supra* Part III.A.2.a, c (discussing the Second and Seventh Circuits' treatment of the state-created danger theory).

322 *See supra* Part III.A.2.a, c (discussing the Second and Seventh Circuits' treatment of the state-created danger theory).

323 *See supra* Part IV.B.4 (discussing the action-inaction issue).

324 *See supra* Part III.A.2.a (analyzing the Second Circuit's opinion in *Dwares*).

part of a state actor.[325] Rather, the court focused only on the "causal relationship" between a state actor and the ultimate harm suffered by a plaintiff.[326] It would appear that if the harm caused was a foreseeable and fairly direct result of a state actor's inactions, then liability could be imposed. Thus, "causal relationship" seems to imply that it might be possible to establish a chain of causation between a state actor's inaction and a danger. However, the Second Circuit left this riddle unanswered.

The Seventh Circuit also appears to have taken an inconsistent position on the action-inaction issue.[327] In *White*, a pre-*DeShaney* opinion, the Seventh Circuit explicitly refused to make the action-inaction distinction.[328] Likewise, in *Bowers*, another pre-*DeShaney* opinion, the Seventh Circuit pointed out that the line between an affirmative act and an omission is often difficult to draw.[329] However, in *Dykema*, *Monfils*, and *Reed*, all post-*DeShaney* opinions,[330] the Seventh Circuit speaks of affirmative state action rather than inaction.[331]

Against this background, it is fair to say that the Seventh Circuit has fashioned conflicting caselaw. Perhaps most troubling about the Seventh Circuit's post-*DeShaney* opinions is that they mechanically cite *White* and *Bowers* without taking into account the positions in *White* and *Bowers* on the action-inaction issue.[332] In his dissent, Justice Brennan even recognized that the majority's opinion in *DeShaney* was contrary to *White*.[333] Plainly, the Seventh Circuit brushed aside these prior holdings

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325 *See supra* Part III.A.2.a (analyzing the Second Circuit's opinion in *Cook*).

326 *See supra* Part III.A.2.a (analyzing the Second Circuit's opinion in *Cook*).

327 *See supra* note 84 and accompanying text (discussing the action-inaction issue in the Seventh Circuit).

328 *See supra* note 84 and accompanying text (discussing the Seventh Circuit's opinion in *White*).

329 *See supra* note 84 (discussing the Seventh Circuit's opinion in *Bowers*).

330 *See supra* Part III.A.2.c.

331 *See* Soifer, *supra* note 53, at 1528. Soifer criticizes *DeShaney* and post-*DeShaney* Seventh Circuit cases by stating that § 1983 was

> intended to afford broad protection from the Ku Klux Klan and from inaction by State officials in the face of Klan outrages [and] was clearly not limited to affirmative State action. Because Posner and Rehnquist dislike the implications of this Statute, however, they take it upon themselves to transform it to be true to the logical implications of what they think it should have said.

Id.

332 *See supra* note 84 (discussing the Seventh Circuit's opinions in *White* and *Bowers*).

333 *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 205 (1989) (Brennan, J., dissenting). Justice Brennan cited the Seventh Circuit's opinion in *White v. Rochford* and stated that "[c]ases from the lower courts also recognize that a State's actions

without directly overruling them.[334] Thus, seduced by *DeShaney*'s ambiguous dicta, it is constitutionally disingenuous for the Second and Seventh Circuits to ignore their precedents.[335]

The *DeShaney* opinion is, of course, the controlling authority for determining whether a § 1983 claim is stated under the substantive component of the Due Process Clause.[336] However, the state-created danger concept is based on a limited quote, in dicta, which was not decisive to the *DeShaney* opinion.[337] The Second and Seventh Circuits should have at least clarified their post-*DeShaney* holdings concerning the action-inaction issue, especially regarding the Seventh Circuit's treatment of its precedent.[338] To introduce such an arbitrary position without explanation hardly seems consonant with the policy of stare decisis. Accordingly, the various intercircuit and intracircuit inconsistencies illustrate why the following proposed judicial test is needed when courts analyze state-created danger claims.[339]

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can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant." *Id.* (citations omitted).

334 *See* Blum, *supra* note 107, at 464. Blum examines the vast inconsistencies within the Seventh Circuit and makes the following observation:

> The court's reasoning in *Reed* underscores the confusion endangered by any theory that turns "on the tenuous metaphysical construct which differentiates sins of omission and commission" .... Rather than focusing upon the affirmative nature of the conduct involved, the courts should ask whether the [state actor's] acts *or* omissions were the *cause* of the plaintiff's injuries, and if so, whether such acts or omissions reflected the requisite level of culpability to constitute a constitutional violation.

Id.

335 See *supra* Part III.A.2.a, c for the Second and Seventh Circuits' approaches to state-created danger claims.

336 *See generally supra* Part II.B (discussing *DeShaney*).

337 *See supra* note 6 (discussing *DeShaney*'s dicta, which forms the basis of the state-created danger concept).

338 See *supra* Part III.A.2.c for the Seventh Circuit's approach to state-created danger claims.

339 See *supra* Part III.A.2.c for the Seventh Circuit's approach to state-created danger claims.

V. A PROPOSED HYBRIDIZATION OF THE VARIOUS STATE-CREATED DANGER TESTS

This Part proposes a model judicial analysis for courts to apply when they evaluate state-created danger claims.[340] A uniform approach will eliminate the widespread and debilitating confusion that currently exists among the federal circuits.[341]

A. *Distortions of History and Precedent:* DeShaney *and the Recently Proposed Restrictive Approach to State-Created Danger Claims*

Currently, as illustrated in the *DeShaney* decision, the Supreme Court appears to favor a restrictive approach to the state-created danger theory.[342] In pursuit of this end, a comprehensive test has recently been proposed by a constitutional commentator in an attempt to unify the federal circuits.[343] The proposed test attempts to clarify the ambiguities within *DeShaney* and its progeny.[344] Like the current Court's approach, the recently proposed test argues for a very narrow and restrictive approach to state-created danger claims.[345]

Nonetheless, the test fails to provide a workable solution consistent with § 1983's legislative history, prior Supreme Court precedent, and the approach taken by a majority of the federal circuits. For example, the test imposes liability only when a state actor affirmatively acts rather than refusing to act.[346] The difficulty with this requirement is that it disavows the original intent of § 1983's legislative history and the

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340 See *infra* Part V.B for the proposed judicial test.

341 *See generally* Cross, *supra* note 215, at 1249. Indeed, circuit splits often lead to "confusion and unequal treatment of citizens living in different judicial districts." *Id.*; Arthur D. Hellman, *Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 700 (1995). When one circuit refuses to recognize and follow precedent of another circuit, then "disuniformity" within the federal law inevitably results. *Id.*

342 *See* Cantwell, *supra* note 31, at 344. Cantwell notes that the "current Court is far more likely to narrow the scope of the 'danger creation' exception." *Id.*

343 Kernodle, *supra* note 84, at 187-203.

344 *See generally supra* Parts II.B, III, IV.

345 Kernodle, *supra* note 84, at 197. The proposed test argues that "the lack of unity and the need for confinement demands that the Supreme Court clarify and create a unified standard that narrows the state-created danger theory to appropriate cases." *Id.* The proposed test sets forth the following elements: (1) affirmative act; (2) specific plaintiff or specific group of plaintiffs; (3) culpability; (4) causation; and (5) the overall situation shocks the conscience of the court. *Id.* at 187-94.

346 *Id.* at 187-88.

Court's holdings in *Monroe* and *Monell*.[347] The action-inaction distinction can be difficult to make under certain circumstances.[348] Also, this seemingly straight-forward inquiry has proved to be an enigma, resulting in sharp circuit conflict.[349]

Furthermore, the proposed judicial test requires that the state action be directed "toward a specific plaintiff or group of plaintiffs, rather than toward the public at large."[350] However, the difficulty with this requirement is that *DeShaney* never set forth such a restrictive distinction.[351] Significantly, as the Seventh Circuit reasoned in *Reed*, the controlling concern is that "[s]ome dangers are so evident, while their victims are so random, that state actors can be held accountable by *any* injured party."[352] In short, the thrust of the proposed test appears only to offer an illusionary remedy based on an irresistible urge to reinforce *DeShaney*'s ambigious dicta.[353] The practical effect of the proposal, therefore, is to leave the scope of the state-created danger issue just as clouded as *DeShaney* left it.

B. *The Proposed Hybridization: A Return to the Original Understanding of § 1983*

As Parts III and IV illustrate, the various circuit inconsistencies expose the Supreme Court's failure to adequately guide the lower courts on how to evaluate § 1983 claims.[354] The plain implication of § 1983's legislative history, prior Supreme Court precedent, and a majority of the circuits require that state-created danger claims be *broadly* construed.[355] Therefore, this Note proposes a unified and expansive approach to state-created danger claims. To establish a prima facie state-created danger

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347 *See generally supra* Parts II.A, IV.B.4 (discussing § 1983's legislative history and the Supreme Court's holdings in *Monroe* and *Monell*).

348 *See supra* Part IV.B.4 (analyzing the action-inaction issue).

349 *See supra* Part IV.B.4 (analyzing the action-inaction issue).

350 Kernodle, *supra* note 84, at 189.

351 *See supra* Part IV.B.2.a (discussing the specific individual-general public distinction).

352 *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993) (emphasis added); *see also supra* notes 92-100 and accompanying text (discussing the Seventh Circuit's opinion in *Reed*).

353 Kernodle, *supra* note 84, at 200 (stating that "the Court would support a test that restricts liability under the state-created danger theory").

354 See generally *supra* Parts III, IV for a complete discussion and analysis of the federal circuit courts' decisions regarding the state-created danger theory.

355 *See supra* notes 35-36 and accompanying text (discussing how constitutional commentators have argued for a broad interpretation of § 1983).

claim under this Note's proposed judicial test, the plaintiff must show that

(1) a state actor creates, increases, or disregards;

(2) a foreseeable or known danger;

(3) through action or inaction;

(4) to a specific individual or members of the general public;

(5) regardless of whether the injured plaintiff was in actual state custody; and

(6) the state actor's overall actions or inactions shock the conscience or were done with deliberate indifference to the plaintiff's safety.

First, element (1)'s "state actor" requirement is required by all of the circuits acknowledging the existence of the state-created danger concept; this requirement is mandated by § 1983's plain language.[356] Additionally, element (1) is satisfied not only when a state actor creates or increases a danger to a plaintiff, but also when a state actor disregards a danger.[357] Imposing liability on a state actor for disregarding a danger is consistent with the test's expansive approach to state-created danger claims. Intentionally disregarding a danger should not be treated any differently from a danger that is created or increased. Disregarding a danger is intimately related to elements (3) and (4). First, disregarding a danger can be characterized as either action or inaction under element (3). Also, disregarding a danger must be gauged against the culpability requirement under element (4).

Element (2) of the proposed test requires that the danger produced by a third party be "foreseeable" or "known" by a state actor. This element is not met unless a state actor has actual knowledge of the impending harm and a causal link can be traced to the ultimate harm.[358] However, the lack of actual knowledge may not always be fatal to a state-created danger claim.[359] Although the proposed model offers an expansive approach to state-created danger claims, element (2) is

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356 *See supra* note 18 (stating § 1983's text).

357 *See supra* Part III.A.3.c (recognizing the Tenth Circuit's requirement that a state actor act with "conscious disregard" of a danger).

358 *See supra* Part IV.B.2.b (analyzing a state actor's knowledge of a danger).

359 *See supra* Part IV.B.2.b (suggesting that actual knowledge may not always be required).

sufficiently narrow in scope so as not to demand that a state actor be expected to protect every potential harmful act caused by private parties.[360] This requirement is also consistent with § 1983's ultimate goal of deterring civil rights violations committed by state actors.[361] Concomitantly, this element essentially obliviates the oft-difficult action-inaction distinction as well.[362]

Specifically, element (3) expressly prohibits courts from making the superfluous and troublesome action-inaction distinction.[363] Element (3) acknowledges the concerns voiced by § 1983's legislative history, prior Supreme Court precedent, and various federal circuit courts.[364] That is, the harm resulting from a state actor's inaction can be just as harmful and appalling as an affirmative act.

Under element (3), a state actor is only liable if the state actor's acts or omissions increased the risk of injury beyond what it would have been had the state actor not intervened at all. Even though element (3) conflicts with the positions of a majority of the circuits recognizing the state-created danger theory, it promotes a more balanced approach. Rather than examining whether affirmative conduct occurred from the state actor's perspective, element (3) would require a court to examine the actions or inactions of a state actor through the lens of the plaintiff. For instance, a police officer's assurances of safety from a plaintiff's perspective could reasonably be construed as "action" rather than "inaction." Such assurances might enhance a plaintiff's feeling of invulnerability and alter his or her behavior in a manner that would result in an increased exposure to a danger. Therefore, element (3) recognizes the inherent difficulties and unfairness in making the action-inaction distinction.

Finally, element (3) is also rooted in § 1983's language of extending liability to any person who "subject[s], or causes[s] [a person] to be subjected" to constitutional violations.[365] By refusing to make the action-inaction distinction, element (3) answers the question as to *how* a state

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360 *See supra* Part IV.B.2.b (analyzing a state actor's knowledge of a danger).

361 *See generally supra* Part II.A (discussing § 1983's legislative history).

362 *See supra* Part IV.B.4 (analyzing the action-inaction issue).

363 *See supra* Part IV.B.4 (analyzing the action-inaction issue).

364 See generally *supra* Parts II.A, III, IV.B.4 for information concerning the treatment of the action-inaction issue by § 1983's legislative history, prior Supreme Court precedent, and the various federal circuits.

365 See *supra* note 18 for § 1983's text.

actor "causes [a person] to be subjected" to a constitutional deprivation.[366] Certainly, "subjecting" or "causing" can be interpreted to establish a possible causal link to state inaction. Also, this element incorporates the Seventh Circuit's observation in *White* by refusing to make the "tenuous metaphysical construct which differentiates sins of omission and commission."[367] In other words, making the distinction between action and inaction can be notoriously difficult for courts.

In a similar vein, element (4) does not require courts to make a distinction between a specific individual and members of the general public.[368] Like the action-inaction distinction, the line between a specific plaintiff and a member of the general public can often be unclear.[369] More importantly, a danger in some circumstances can be so obvious to a state actor that contact between the state actor and an injured plaintiff should not be required.[370]

Next, element (5) does not require that an injured plaintiff be in actual state custody before a state-created danger claim can be asserted.[371] With the exception of the Eleventh Circuit, this element is consistent with the other nine circuits that refuse to require a plaintiff to be in actual state custody before liability under the theory can be imposed.[372]

More importantly, the Court's decision in *DeShaney* should not be read as excluding the possibility of any noncustodial analysis.[373] Even though *DeShaney* includes some nonrecognition of noncustodial contexts, the Court's opinion on this issue is so ambiguous that it is impossible to tell whether the Court would reject all noncustodial relationships.[374] As such, this Note recognizes that the concept of "custody" within *DeShaney* is not so rigid as to be defined only in terms of a prison or mental facility.

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366 See *supra* note 18 for § 1983's text.

367 White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979); *see also supra* note 84 (discussing the Seventh Circuit's decision in *White*).

368 *See supra* Part IV.B.2.a (analyzing the specific individual-general public distinction).

369 *See supra* Part IV.B.2.a (analyzing the specific individual-general public distinction).

370 *See supra* Part IV.B.2.a (analyzing the specific individual-general public distinction).

371 *See supra* Part IV.B.2.c (discussing the custody issue).

372 *See supra* note 274 and accompanying text (discussing the Eleventh Circuit's treatment of the custody issue).

373 *See supra* notes 278, 283 and accompanying text (discussing *DeShaney*'s interpretation of custody).

374 *See supra* notes 278, 283 and accompanying text (discussing *DeShaney*'s interpretation of custody).

Theoretically, any inquiry into either custodial or noncustodial contexts would ask the same questions concerning the extent of the state's role in creating the danger.[375]

Finally, element (6) is required in varying degrees by all of the circuits recognizing the state-created danger theory.[376] Element (6)'s heightened culpability requirement prevents unscrupulous plaintiffs from transforming and elevating any garden variety tort into a constitutional tort under the theory.[377] As a result, this Note is respectful of *DeShaney*'s attempt to protect the government from unlimited liability under § 1983.[378] Such an expansion of government liability would most likely carry a heavy price. Therefore, element (6) attempts to strike a balance between the competing values involved when appraising government liability.

Additionally, fears that every tort would be transformed into a constitutional violation would be put to rest by the "shocks the conscience" or "deliberate indifference" standard.[379] This Note recognizes that lines can be drawn between negligent acts that are state tort violations and deliberate acts that may be brought under § 1983.[380] Therefore, to state a § 1983 claim, a plaintiff would have to demonstrate that a state actor not only knew of the likelihood that the plaintiff faced a danger but also that the state actor intentionally acted recklessly in preventing that danger.[381]

Accordingly, while the proposed test broadens the scope of the state-created danger concept, from another perspective, the scope is narrowed by the heightened culpability requirement.[382] The heightened culpability

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375 *See supra* Part IV.B.2.c (discussing the custody issue).

376 *See* Kernodle, *supra* note 84, at 185. Kernodle makes the following observation concerning the culpability requirement of state actors under the state-created danger theory:

> [A]ll courts require the state actor to have some level of culpability regarding his act that led to the plaintiff's harm in order for the government to be liable .... In light of these holdings, most courts require a plaintiff to show that the government official acted with deliberate indifference to a known or obvious danger.

Id.

377 *See supra* Part IV.A.1 (analyzing the heightened culpability standard).

378 *See supra* Part IV.A.1 (analyzing the heightened culpability standard).

379 *See supra* Part IV.A.1 (analyzing the heightened culpability standard).

380 *See supra* Part IV.A.1 (analyzing the heightened culpability standard).

381 *See supra* Part IV.A.1 (analyzing the heightened culpability standard).

382 *See supra* Part IV.A.1 (analyzing the heightened culpability standard).

standard should be able to satisfy the concerns of *DeShaney* and the First and Fourth Circuits by requiring that a state actor stop and think before acting in a manner that may lead to a loss of liberty. Protection against unlimited government liability does not require an extension of *DeShaney*'s restrictive language since the "shocks the conscience" or the "deliberate indifference" standards distinguish more clearly between state tort claims and wrongs reaching constitutional dimensions.

C. *Application of the Proposed Judicial Test*

Applying the proposed judicial test to the introductory hypotheticals of this Note[383] illustrates that both Mary and Michelle Jones would be successful in asserting a state-created danger claim against the respective state actors. First, the harm tragically experienced by Mary was a foreseeable consequence and directly related to the police officers' inaction in the face of a known danger. In fact, Mary might assert that the police officers' assurances that she would not get shot by MC were "action" rather than "inaction." Clearly, a causal connection exists between the officers' omissions and Mary's injuries. From Mary's point of view, she may have relied on the officers' statements and altered her behavior in such a way that exposed her to greater danger by increasing her exposure to MC's violent actions. Mary is also a specific individual with whom the state actors had sufficient contact–even though such a status is irrelevant under the proposed judicial test. In addition, the lack of official state custody is also irrelevant. Finally, the police officers intentionally failed to act in the face of danger, which can only be described as "deliberate indifference."

Next, in Michelle Jones' case, it was foreseeable that the police officer's act of abandoning Michelle in a threatening part of the city during a late hour would expose her to danger. Michelle is a specific individual who had sufficient contact with the police officer; however, the contact is irrelevant since the foreseeable danger was so obvious. Also, similar to Mary's situation, the lack of official state custody in Michelle's case is irrelevant. Under the lens of the proposed test, the extent of the state actor's involvement of disregarding the danger would be examined the same in either a noncustodial or custodial context. Finally, the police officer's actions rise to the extreme level of willfully disregarding Michelle's safety, which "shocks the conscience."

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383 See *supra* Part I for a factual description of the hypotheticals.

D. The Suggested Adoption and Implications of the Proposed Judicial Analysis

The failure of the Supreme Court to provide adequate guidance in *DeShaney* leaves unclear the proper approach to state-created danger claims. Federal circuit courts have struggled in their attempts to construct the appropriate parameters for such claims by extrapolating from the ambiguous language within the *DeShaney* decision. The Supreme Court in *DeShaney* denied § 1983 liability under the facts of that case, leaving open questions as to what facts would establish such a theory. As indicated, this Note sets aside the Court's decision in *DeShaney* and examines the scope of the problem from a fresh perspective. If, however, the Court did not intend for the language in *DeShaney* to be translated into a § 1983 theory of recovery, the Court should reconsider and embrace the interpretations that have been advanced by this Note and by many of the federal circuits.

Significantly, the proposed judicial test advanced by this Note rigidifies the constitutional framework and prevents the evolution of inconsistent tests within the federal circuits. This Note's recommended judicial test requires finer guidelines than the clouded dicta provided by *DeShaney*. Although the future trajectory of the Court's § 1983 jurisprudence indicates that the Court will probably continue to apply its restrictive approach, there is a wealth of authority supporting the expansive approach as set forth by this Note. Given the widespread circuit confusion, it makes sense to go back to the origins of § 1983 and the holdings in *Monroe* and *Monell*.

Furthermore, the utility of the proposed judicial test is not limited to § 1983 claims involving state actors who are police officers. The implications of the proposed judicial test can be projected into other areas of § 1983 jurisprudence. The explosive potential of the proposed judicial test would provide instructive guidance for the growing catalogue of different state-created danger situations. Although outside the scope of this Note, the potpourri of situations include: failing to provide a safe environment in the prison context;[384] domestic violence cases involving child abuse and battered spouses;[385] foster care

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[384] *See generally* Farmer v. Brennan, 511 U.S. 825 (1994) (discussing a prison guard's failure to protect a prisoner from the attack of other inmates).

[385] *See generally* Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988) (holding that the police had an unconstitutional policy for failing to provide more police protection to victims of domestic assaults).

matters;[386] internet supervision;[387] public housing and employment contexts;[388] and liability involving school officials.[389]

VI. CONCLUSION

As this Note demonstrates, no clear constitutional standard exists for analyzing state-created danger claims under § 1983 jurisprudence. The Supreme Court's current interpretation of § 1983 claims under the Fourteenth Amendment is exceedingly narrow. With debilitating ambiguity, the Court's decision in *DeShaney* leaves many unanswered questions within the law. By narrow judicial construction, many of the federal courts have amplified *DeShaney*'s ambiguities. Uniformity is needed to end the legal uncertainty and foster an approach to prevent further intercircuit and intracircuit conflict.

The proposed judicial test advanced by this Note attempts to strike a workable balance among § 1983's legislative history, prior Supreme Court precedent, and various circuit court caselaw. At the same time, the proposed judicial test prevents both the transformation of garden variety torts into constitutional torts and other abuses committed by unscrupulous plaintiffs. Significantly, the policies behind § 1983 mandate an expansive approach to state-created danger claims rather than a restrictive approach. Although the specific exigencies of post-Civil War Reconstruction no longer exist today, comparative evils are committed by present-day state actors and threaten our civil liberties in a variety of other forms.

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386 *See* Blum, *supra* note 228, at 167 ("Indeed, the lower federal courts that have ruled on this issue since *DeShaney* have uniformly recognized a constitutional right to protection from unnecessary harm on the part of foster children involuntarily placed by the state in a foster care situation.").

387 *See* Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001). The court held that "[a] library does not 'affirmatively plac[e]' minors in danger by allowing them unsupervised use of computers which are linked to the internet." *Id.*

388 *See* Blum, *supra* note 228, at 188 ("Courts have not been receptive to an affirmative duty under the Due Process Clause to protect persons living in public housing or those employed by a public employer.").

389 *See generally* VACCA & HUDGINS, *supra* note 31.

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