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Shockingly Confusing: Why A Shocks the Conscience Test Should be Adopted as a Uniform Test for State-Created Danger Claims

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I. INTRODUCTION

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Imagine a state trooper stranding an intoxicated woman on the streets of a high crime area and then that woman getting hurt or a police chief interfering with protective services being provided to a victim of domestic violence because the abuser was a friend, and the victim and her child being killed.[1] Would those state actors be held constitutionally liable for the injuries sustained by the victims? The Supreme Court has said that a state is not constitutionally liable for failing to protect its citizens from harm at the hands of private actors.[2] However, when the state's actions (or inactions) exacerbated the likelihood that the plaintiff could be harmed by a private citizen, liability may attach.[3] This exception to the general no-duty to protect rule is known as the state-created

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[1] *See* Wood v. Ostrander, 879 F.2d, 583, 589–590 (9th Cir. 1989); Freeman v. Ferguson, 911 F.2d 52, 53 (8th Cir. 1990).

[2] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989) ("[N]othing in the language of the Due Process Clause itself, requires the State to protect the life, liberty and property of its citizens against invasions by private actors").

[3] *See* Chris W. Pehrson, *Issues in the Third Circuit: Bright v. Westmoreland County: Putting the Kisbosh on State-Created Danger Claims Alleging State Actor Inaction*, 52 VILL. L. REV. 1043, 1044 (2007); *See* 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 which either create or increase the risk that an individual will be exposed to private acts of violence." (citing Sargi v. Kent City Bd. Of Educ., 70 F.3d 907, 913 (6th Cir. 1995))).

danger doctrine[4] and is recognized in every circuit except the Fifth Circuit Court of Appeals.[5] When it applies, plaintiffs can bring 42 U.S.C. §1983 suits[6] against state actors and recover for violations of their constitutional rights under the Due Process Clause of the Fourteenth Amendment.[7]

The state-created danger doctrine allows for state liability even when the plaintiff's injuries were a direct result of the conduct of a private citizen.[8] For example, suppose that John Doe reported to Jane Doe, a police officer, that Jim Doe, a private citizen with a propensity violence, had committed a crime. The police arrest Jim Doe and take him into custody. Suppose further that Jim Doe vowed that after his release he would beat up the supposed "snitch"[9] who disclosed his lawbreaking to the cops. Nevertheless, officer Jane Doe revealed to Jim Doe that information from John Doe led to their arrest. Jane Doe could be held liable if Jim Doe carried out his threat and harmed John Doe.[10]

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[4] Erwin Chemrinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 8-9 (2014) (noting that "[q]uickly following DeShaney, there were a series of cases from the circuits that created liability for state-created dangers");*See generlly* Irish v. Fowler, 979 F.3d 65 (1st Cir. 2020); Okin v. Vill. Of Cornwall-On-Hudson Police Dep't, 577 F.3d 415 (2d. Cir. 2009); Sauers v. Borough of Nesquehoning, 905 F.3d 711 (3d Cir. 2018); Callahan v. N.C. Dep't of Pub. Safety, 18 F.4th 142, (4th Cir. 2021); Est. of Romain v. City of Grosse Pointe Farms, 935 F.3d 485 (6th Cir. 2019); Est. of Her v. Hoeppner, 939 F.3d 872, (7th Cir. 2019); Villanueva v. City of Scottsbluff, 779 F.3d 507 (8th Cir. 2015); Kennedy v. City of Ridgefield, 439 F.3d 1055 (9th Cir. 2006); Est. of B.I.C. v. Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014); White v. Lemacks, 183 F.3d 1253 (11th Cir. 1999); Butera v. District of Columbia, 344 U.S. App. D.C. 265, 245 F.3d 637 (2001).

[5] Fisher v. Moore, 73 F.4th 367, 372 (5th Cir. 2023)

[6] 42 U.S.C. §1983 reads "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 State 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." This statute allows for citizens to bring civil suits against state actors for constitutional violations.

[7] *See* Susanah M. Mead*, Evolution of the "Species of Tort Liability" Created by 42 U.S.C. Section 1983: Can Constitutional Tort be Saved from Extinction?,* 55 FORDHAM L. REV. 1, 27 (1986) ("Much of the conduct that would give rise to the state tort actions has a deleterious effect on life, liberty or property, so it is possible to cast almost any tortious injury to life, liberty or property in fourteenth Amendment terms if the requisite state action exists").

[8] *Id.*

[9] A snitch is negative term used to refer to a person who informs on another person.

[10] *See generally*, Kennedy v. City of Ridgefield, 439 F.3d (9th Cir. 2006).

Most circuit's recognize some version of the state-created danger doctrine's, but the Supreme Court has never directly addressed the propriety of the exception.[11] So the law at the lower federal courts is disuniform, with most circuits developing their own test for determining the viability of state-created danger claims.[12] The Fifth Circuit is an outlier, however, and has refused to adopt any version of the state-created danger doctrine, even in cases where it seems particularly fitting, such as in *Fisher v. Moore*.[13]

Fisher involved a middle school girl with severe mental and physical disabilities who was supposed to be under constant supervision while in school due to her history of leaving her classroom.[14] Another male student at the school suffered from severe behavioral problems that caused him to be violent towards other students and staff members.[15] This propensity for violence also required him to be under constant supervision by school staff.[16] Despite the supervision requirements, both students ended up wandering the hallways alone, and the male student sexually assaulted the female student in one of the school bathrooms.[17] Despite the school's knowledge of the first incident and both the student's histories, both students were again left unsupervised, and the male student sexually assaulted the female student a second time.[18]

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[11] David Pruessner, *The Forgotten Foundation of State-Created Danger Claims,* 20 REV. LITIG. 357, 358 (2001) (identifying that the "United States Supreme Court has never directly approved of the state-created danger theory or recovery"); Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 236 (2006).
[12] *See infra* Part III.
[13] *See e.g.* Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (recognizing that "recent decisions have consistently confirmed '[t]he Fifth Circuit has not adopted the state-created danger theory of liability'" (quoting Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010)); Fisher v. Moore, 73 F.4th 367, 375 (5th Cir. 2023)
[14] *Id.* at 369-70.
[15] *Id*. at 370.
[16] *Id.*
[17] *Id.*
[18] *Fisher,* 73 F.4th at 370.

The female student's mother filed a Section 1983 suit on behalf of her daughter against the school district and individual school-officials under the theory that the defendants "created or increased the danger" to the female student and "acted with deliberate indifference" in violation of her Fourteenth Amendment Due Process Clause rights.[19] The defendants moved to dismiss the Section 1983 claim and the District Court denied the motion.[20] In response, the individual defendants filed an interlocutory appeal.[21] In reviewing the interlocutory appeal, the Fifth Circuit found for the defendants and granted their motion for dismissal.[22] The court reasoned that "the Fifth Circuit has never recognized th[e] 'state-created-danger' exception.'"[23] The court acknowledged that every other circuit had adopted some form of the state-created danger doctrine, but was not persuaded to adopt and apply the state-created danger doctrine to the facts of this case.[24]

Furthermore, the court made sure not to "categorically rule[] out the doctrine" and instead stated it had "merely declined to adopt this particular theory of constitutional liability."[25] The dissent pointed out that the Fifth Circuit's "indecision is a disservice to injured plaintiffs who are forced to litigate in endless uncertainty about their federal rights" and acknowledged how "if this circuit is inclined to disagree with all others, then our delay is blocking percolation, which 'allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.'"[26]

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[19] *Id.* at 370–371.
[20] *Id.* at 371.
[21] *Id.*
[22] *Id.*
[23] *Fisher*, 73 F.4th. at 372.
[24] *Id*. at 373.
[25] *Id.* at 372.
[26] *Id.* at 376 (Higginson and Douglas, J. dissenting) (quoting California v. Carney, 471 U.S. 386, 400 n.11 (1985)).

Even though the plaintiff in *Fisher* was denied recovery for the injuries she sustained due to the school and its employee's misconduct, it is unclear if her claim would have been successful in all the circuits that have adopted the state-created danger doctrine. The different tests adopted across the circuits vary dramatically in broadness, applicability, and utilization of subjective versus objective elements, among other differences.[27] This is problematic because it creates uncertainty and inequality for litigants when attempting to utilize the state-created danger doctrine.[28] This uncertainty and inequality manifests through factually similar cases getting different treatment in different circuits and a lack of clarity of what rights litigants actually possess.

There is a potential solution to this uncertainty and inequality, however. One element that appears in a majority of the state-created danger doctrine tests is an inquiry into whether the state actor's misconduct "shocks the conscience".[29] The Supreme Court has defined conscience-shocking as something landing in the "middle range, following from something more than negligence but 'less than intentional conduct."[30] The Court has also determined that whether something is conscience-shocking depends on "(1) whether the state actor has time to deliberate and (2) whether the state actor must weigh interests that compete with the plaintiff's."[31] Two circuits have adopted a shocks the conscience test for their state-created danger doctrine tests. The Eleventh Circuit laid out their test in *White v. Lemacks*, which states that "state and local government officials violate the substantive due process rights of individuals not in custody only

[27] Chemrinksy, *supra* note 2 at 8–9.
[28] Pehrson, *supra* note 3 at 1068.
[29] Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: a Proposed Uniform Test*, 120 PENN. ST. L.REV. 893, 896 (2016).
[30] Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit,* 81 WASH. L. REV. 217, 240 (2006); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (finding "[l]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process" so negligence does not shock the conscience).
[31] *Id.*

when those officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense.'"[32] The D.C. Circuit adopted a shocks the conscience test in *Butera v. District of Columbia* which states "to assert a substantive due process violation . . . the plaintiff must . . . show that the District of Columbia's conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'"[33]

This Comment demonstrates why the state-created danger doctrine is necessary and should be adopted universally across all circuits. More specifically, the Supreme Court should resolve the circuit split on the state-created danger doctrine and adopt a "shocks the conscious" test like those adopted in the Eleventh and D.C. circuits. It proceeds in five parts. Part II explains the history of Section 1983 claims and the state-created danger doctrine and its evolution. Part III identifies the different state-created danger tests developed among the circuits and the reasoning why some circuits did not adapt a test. Part IV explains why having such a difference in tests among the circuits is problematic and why it is important for the Supreme Court to address the disuniformity among the circuits specifically regarding qualified immunity. Finally, Part V demonstrates why a test based on harm and shocking the conscience similar to those utilized in the 11th Circuit and the D.C. Circuit should be universally adopted.

II. HISTORICAL BACKGROUND

A. Section 1983 as Tool to Vindicate Constitutional Violations by State Actors

42 U.S.C. Section 1983 allows citizens who have had their constitutional rights violated by state actors to sue the actors and the localities that employ them in federal court.[34] It provides:

[32] White v. Lemacks, 183 F.3d 1253 at 1259
[33] Butera v. District of Columbia, 235 F.3d 637,651 (D.C. Cir. 2001).
[34] *See* Town of Castle Rock v. Gonzalez, 545 U.S. 748, 755 (2005) ("In 42 U.S.C. Section 1983, Congress has created a federal cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'")

> 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 State 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.[35]

Section 1983 arose in the context of Ku Klux Klan violence. Congressman who spoke at the session of Congress during which the Ku Klux Klan Act was discussed referred to the violence going on at the time as "whippings and lynchings and banishment [that] had been visited upon unoffending American citizens."[36] They acknowledged that "[m]en were murdered, houses were burned, women were outraged, men were scrouged".[37] Congress thus passed the Ku Klux Klan Act of 1871 to address rampant violence surrounding the white supremacist movement following the Civil War and the states' unwillingness to rein in such atrocities,[38] and their complicity in proliferating it. It "was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand . . . The State, from lack of power or inclination, practically denied the equal protection of law to these persons."[39] The Act had three main aims. The first was to override state laws that endanger the rights and privileges of citizens of the United States.[40] The second was to "provide[] a remedy where state law was inadequate." [41] The third aim, which is most relevant in the context of this Comment, "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[42] Section 1 of the Ku Klux Klan

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[35] 42 U.S.C. Section 1983
[36] *See, e.g*., Cong. Globe, 42d Cong., 1st Sess., App. 374.
[37] *Id*. at 428.
[38] *See* Ku Klux Klan Act of 1871 ch. 22, 17 State, 13 (1871); Scott Michelman, *Happy 150th Anniversary, Section 1983!* ACLU D.C. (Sept. 22, 2023, 3:05 PM) https://bit.ly/3enZmsT (explaining that Section 1 of the Ku Klux Klan Act of 1871 is "known today as 42 U.S.C. Section 1983"); [38] *See* Monroe v. Pape, 365 U.S. 167, 175 (1961).
[39] *Id.*
[40] *See Monroe* at 173 (identifying the first aim of the Ku Klux Klan Act was to "override certain kinds of state laws" but "emphasized that it was irrelevant because there were no such laws").
[41] *Id*.
[42] *Id*. at 174.

Act was designed to reinforce Fourteenth Amendment protections and to fill in any gaps left in the Thirteenth Amendment, through creating a federal cause of action against state actors who failed to perform their duty to the public to enforce state law or who violated someone's constitutional rights in another way.[43]

Up until the 1960s, when the landmark case *Monroe v. Pape* was decided, there was very little litigation under Section 1983 because the Court had adapted a narrow interpretation of the meaning of "under color of law."[44] Originally, the "under color of law" requirement was interpreted as only encompassing lawful, authorized acts of state actors.[45] However, in *United States v. Classic*, the Supreme Court expanded the definition of "under color to "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[46] The Court reaffirmed this definition in *Screws v. United States* where it was decided that "under color of law" included only action taken by state actors pursuant to state law.[47]

Monroe revived Section 1983 as a cause of action that could be used to hold state officials accountable when their actions deprive a citizen of constitutional rights.[48] The *Monroe* Court relied

[43] *Monroe,* 365 U.S. at 180.
[44] Brad Reid, *A Legal Overview of Section 1983 Civil Rights Litigation*, HUFFPOST (Apr. 14, 2017, 11:12 AM), https://www.huffpost.com/entry/a-legal-overview-of-section-1983-civil-rights-litigation_b_58f0e17ee4b048372700d793; *see also* Mead, *supra* note 5 at 9 n.42 (acknowledging that in 1960 before Monroe was decided, only 280 Section 1983 claims were brought but by 1980 the amount had increased to 3,587).
[45] Thayer v. City of Boston, 26 Mass. (19 Pick.) 511, 515 (1837). The Supreme Court has relied on Thayer in deciding other Section 1983 cases such as Monell v. Owen City of independence and Chief Justice Rehnquist referred to Thayer as a "famous case." Oklahoma City v. Tuttle, 471 U.S. 808, 819 n.5 (1985).
[46] United States v. Classic*,* 313 U.S. 299, 326 (1941).
[47] *Screws v. United States*, 325 U.S. 91, 110-13 (1945).
[48] *See Monroe*, 365 U.S. at 172 (holding city of Chicago police officers could be sued as state actors acting under the color of state law even though they acted without authorization); *see also* Giuliano, *supra* note 44, at 935.

on *Classic* and *Screws* to conclude that parties do not need to seek a state remedy before seeking a federal remedy under Section 1983 because the remedies are supplemental.[49]

Cases such as *American Manufacturers Mutual Insurance Company v. Sullivan* subsequently developed the framework for a successful Section 1983 claims. It requires a plaintiff to (1) establish "that they were deprived of a right secured by the Constitution or laws of the United States" and (2) "that the alleged deprivation was committed under color of state law."[50] But this decision did not apply to private conduct.[51] Section 1983 claims cover a multitude of constitutional violations[52], but one of their more common uses if for violations of constitutional rights under the Due Process Clause of the Fourteenth Amendment.[53]

While *Monroe* led to an explosion in Section 1983 litigation, the Court shortly thereafter created rigid immunity doctrines for government actors, including Section 1983 defendants, which substantially limited government liability, as is the status quo today.[54] Particularly noteworthy in this regard is qualified immunity. Qualified immunity shields public officials from liability under Section 1983 "insofar as their conduct does not violate clearly established statutory or

[49] *Id,* at 188.
[50] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 58, 49-50 (1999); *see* Max Giuliano, State-Created Danger: The Fifth Circuit's Refusal to Address the Problem and Its Devastating Effect on Domestic Violence Victims, 127 PENN ST. L. REV. 929, 937 (Summer. 2023).
[51] *Id*.
[52] *See*, *e.g*., Manuel v. City of Joliet, 580 U.S. 357 (2017) (evaluating a Section 1983 claim for Fourth Amendment violation due to unlawful detention); Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (evaluating a Section 1983 claim for First Amendment violation due to retaliatory arrest); West v. Atkins, 487 U.S. 42 (1988) (evaluating Section 1983 claim for violation of Eighth Amendment due to providing inadequate medical care to incarcerated individuals).
[53] *See* Mead, *supra* note 5 at 27 (1986) ("Much of the conduct that would give rise to the state tort actions has a deleterious effect on life, liberty or property, so it is possible to cast almost any tortious injury to life, liberty or property in fourteenth Amendment terms if the requisite state action exists").
[54] *See* Stump v. Sparkman 435 U.S. 349 355 (1978) (implementing judicial immunity; Imbler v. Pachman 424 U.S. 409, 422 (1976) (implementing prosecutorial immunity; Pierson v. Ray 386 U.S. 547, 555 (1967) (implemented qualified immunity).

constitutional rights of which a reasonable person would have known."[55] The Supreme Court created the doctrine in *Pierson v. Ray*[56] and it has strengthened over time.[57]

In *Pierson*, the plaintiffs were arrested for attempting to use segregated facilities at a bus terminal then convicted and sentenced to jail time and a fine.[58] On appeal, one of the plaintiffs was acquitted and the charges were dropped against the other which prompted the plaintiffs to bring a Section 1983 and a common law claim of false arrest against the judge and the arresting officers.[59] The Court of Appeals held that police officers were immune under common law because they acted with good faith and probable cause.[60] The Supreme Court held that the "good faith and probable cause" defense that was in applicable in some state tort law context was also applicable to Section 1983 claims.[61] The Court came to this conclusion by reasoning that the "prevailing view" at common law was that police officers facing tort liability could utilize "a good faith and probable cause" defense and since some states had this common law defense, Congress meant for this defense to apply to Section 1983 claims.[62]

Qualified immunity then developed into its modern form in *Harlow v. Fitzgerald* where the Court changed the qualified immunity defense from a subjective "good faith" affirmative defense to an "objective standard which granted immunity to "government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory

[55] Harlow v. Fitzgerald, 457 U.S. 800, 102 (1982).
[56] *Pierson*, 386 U.S. at 555.
[57] Mead*, supra* note 5 at 7 (noting Section 1983 plaintiffs "fare poorly compared to non-civil-rights plaintiffs and Section 1983 claims "have plaintiff trial winds of 30 percent or less, which is lower than the rates for most classes of civil litigation").
[58] *Pierson,* 386 U.S at 552–53.
[59] *Id.* at 553.
[60] *Id*. at 555.
[61] *Id.* at 557.
[62] *Id*. at 555.

or constitutional rights of which a reasonable person would have known."[63] Then in *Pearson v. Callahan* the Court decided that the two prongs of qualified immunity, a "clearly established statutory or constitutional right of which a reasonable person would have known,"[64] could be decided in any order.[65] Considering qualified immunity is a defense against Section 1983 claims and the state-created danger exception allows for Section 1983 claims to be brought in the applicable contexts, both concepts are very much related.

Since the state-created danger doctrine is relatively new, state actors often argue that the constitutional duty to not engage in affirmative acts that would endanger people and render them more vulnerable to injury at the hands of a private third party was not clearly established at the time of relevant conduct.[66] Even so, many Section 1983 claims are still brought under a state-created danger doctrine theory.

B. History of the State-Created Danger Exception

The state-created danger doctrine originated in what is known as the "snake pit cases," the first of which was *Bowers v. DeVito.* [67] In that case, the court stated that, "[i]f the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."[68] These cases established a body of law that imposed liability on state actors who put

[63] *Harlow*, 457 U.S. at 814–16.
[64] *Id*. at 802 (1982).
[65] Pearson v. Callahan, 555 U.S. 223, 236 (2008).
[66] "State-created danger," or similar theory, as basis for civil rights action under 42 U.S.C.A. Section 1983, 159 A.L.R. Fed. 37; *See* Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997) (granting defendants qualified immunity protection because "[t]he history of the state-created danger theory . . ., is an uneven one" and "[t]he distinction between affirmatively rendering citizens more vulnerable to harm and simply failing to protect them has been blurred").

[67] Pruessner, *supra* note 6 at 359.
[68] Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

people in dangerous situations when the state actors actively created or increased the danger.[69] Proponents of this liability scheme thought that the "snakes pit" cases did not go far enough, so they wanted "to impose on the state a duty to rescue a person from any snake pit, even when the state played no active role in creating the danger."[70] Some cases adopted this theory and found that state actors had a general duty to protect.[71]

The Supreme Court dispelled any notion of a general duty to protect in *DeShaney v. Winnebago County Dep't of Social Services,* but left the door open to what has now evolved into the modern state-created danger doctrine.[72] *Deshaney* concerned a young boy whose father had beaten him to the point of causing permanent brain damage.[73] The child as a result was confined to an institution for the rest of his life.[74] The victim's mother brought a Section 1983 claim against social workers and other local officials who knew of the father's abuse and still allowed the boy to live with him.[75] She asserted "that their failure to act deprived him his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[76] The United States District Court for the Eastern District of Wisconsin granted summary judgement in favor of the defendants.[77] On appeal, the Seventh Circuit affirmed the holding that the plaintiffs had not made an actionable Section 1983 claim because "the Due Process Clause of the Fourteenth

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[69] Pruessner, *supra* note 6 at 360; *See* Escamilla v. City of Santa Ana, 796 F.2d 266, 269 (9th Cir. 1986); Walker v. Walker v. Rowe, 791 F.2d 507, 511 (7th Cir. 1986); and Karen M. Blum, Local Government Liability Under Section 1983, 595 Pract. Law Inst. PLI/Lit 61, 253 (1998).
[70] Pruessner, *supra* note 6 at 360; *See generally* Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985); Lisa E. Heinzerling, *Actionable Inaction: Section 1983 Liability for Failure to Act,* 53 U. CHI. L. REV. 1048 (1986).
[71] *Estate of Bailey*, 768 F.2d at 510-11.
[72] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs. 489 U.S. 189, 201 (1989); Giuliano, *supra* note 44, at 938; *See also* Collier by Collier v. William Penn School Dist., 956 F.Supp. 1209, 117 Ed. Law Rep. (E.D. Pa. 1998) rev'd, 191 F.3d 444 (3d Cir. 1999) ("The explanatory language of DeShaney spawned the state-created danger doctrine.").
[73] *Id*. at 191–92.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 191.
[77] *DeShaney*, 489 U.S. at 193.

Amendment does not require a state or local government entity to protect its citizens from 'private violence, or other mishaps not attributable to the conduct of its employees'" and because "the causal connection between respondents' conduct and Joshua's injuries was too attenuated to establish a deprivation of constitutional rights actionable under Section 1983."[78] The Supreme Court granted certiorari because lower courts took inconsistent approaches in determining if and when a failure by state or local government entities or agents to adequately protect an individual violates that individual's constitutional due process rights.[79] Some circuits found that there was never such a duty to protect,[80] while others acknowledged the duty but disagreed on the requisite state of mind to constitute a constitutional violation[81], and some did not answer the question at all.[82]

The Court ultimately held that "nothing in the language of the Due Process Clause itself, requires the State to protect the life, liberty and property of its citizens against invasions by private actors."[83] The conclusion was that the language of the Fourteenth Amendment could not be interpreted to impose an affirmative obligation on the state or the government to protect individuals from third parties.[84] The Court reasoned that there is no requirement in the language of the Due Process Clause itself that imposes a duty on the state to protect the life, liberty and property of

[78] *Id.* at 193-94.
[79] *Id*. at 194.
[80] Archie v. Racine, 847 F.2d 1211, 1220 (7th Cir. 1988) (holding that a dispatcher's negligence in failing to send an emergency squad did not violate the decedent's due process rights because the city had no duty to provide such services to decedent)
[81] Washington v. District of Columbia, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (holding recklessness or deliberate indifference were necessary and sufficient for constitutional liability); Bass v. Jackson, 790 F.2d 260 (holding that gross negligence was sufficient for constitutional liability); Colburn v. Upper Darby Township, (holding gross negligence was sufficient for constitutional liability over strong dissent); Jones v. Sherill 827 F.2d 1102, 1006 (6th Cir. 1987) (holding gross negligence sufficient for constitutional liability); Vinson v. Campbell Cnty. Fiscal Court, 820 F.2d 194, 199-200 (6th Cir. 1987) (holding gross negligence sufficient for constitutional liability).
[82] Jackson v. Procunier, 789 F.2d 307, 312 (5th Cir. 1986) (reserving the question).
[83] *DeShaney*, 489 U.S. at 195-96
[84] Garrett M. Smith, *DeShaney v. Winnebago County: The Narrowing Scope of Constitutional Torts*, 49 MD. L. REV. 484, 484 (1990); *Id*.

citizens by private actors and is framed as limiting the State's power to act rather than guaranteeing minimum levels of security and safety or putting an affirmative obligation on the State to prevent harms by private actors.[85]

Although the Court denied relief for the mother and son, in its denial of the existence of a duty to protect them from a private citizen, it left the door open for exceptions to this rule.[86] The Court stated

> While the State might 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. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.[87]

This excerpt established a new substantive due process right known as the state-created danger doctrine. Since the Court said that the State "played no part in the [dangers'] creation, nor did it to anything to render him any more vulnerable to them," circuit courts have interpreted that to mean if the State had created the danger, it would have been possible for Joshua to recover.[88]

Following *DeShaney*, circuit courts began to recognize the state-created danger doctrine and developed their own tests and interpretations of the doctrine.[89] These tests vary greatly in the elements utilized, a subject I turn to next.[90]

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[85] *DeShaney*, 489 U.S. at 195-96.
[86] *Id.* at 198 ("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.")
[87] *Id.* at 201.
[88] *Id.*
[89] Chemrinsky, *supra*, note 2 at 8-9 (2014); *see also* Giuliano, *supra* note 44, at 940.
[90] *Id.*

III. THE MULTITUDE OF STATE-CREATED DANGER TESTS

One of the first circuits to recognize the doctrine following *DeShaney* was the Ninth Circuit in *Wood v. Ostrander*.[91] There the court concluded that the plaintiff "raised a triable issue of fact as to whether [the Trooper's] conduct 'affirmatively placed [plaintiff] in a position of danger" when he stranded an intoxicated woman on the streets of a high crime area.[92] Since then, all but one of the circuit courts have recognized the state-created danger doctrine.[93] The Fifth Circuit is the only circuit that has refused to adopt the doctrine in any context.[94]

A. The State-Created Danger Doctrine Tests Throughout the Circuits

The First Circuit's test sets forth four requirements: (1) the State affirmatively act to create or enhance the danger to the plaintiff; (2) the plaintiff be specifically in danger; (3) the State caused the harm; and (4) the State's conduct shocks the conscience.[95] The First Circuit also links the level of culpability based on the amount of time that the State has to act.[96] The Second Circuit applies the exception when state actors engage in affirmative conduct that enhances or creates danger to the plaintiff.[97] The Second Circuit may interpret the State's sustained inaction as affirmative conduct.[98]

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[91] Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989).
[92] *Id*.
[93] Giuliano, *supra* note 44, at 941.
[94] *Id*., *see e.g*. Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (recognizing that "recent decisions have consistently confirmed '[t]he Fifth Circuit has not adopted the state-created danger theory of liability'" (quoting Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010)).
[95] Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020).
[96] *Id*.
[97] Okin v. Vill. Of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 428, 431 (2d. Cir. 2009).
[98] *Id*.

For the exception to apply in the Third Circuit there must be (1) a relationship between the State and the plaintiff; (2) state actors must have affirmatively used government authority to create the danger in question; (3) the ultimate injury must be fairly direct and foreseeable and (4) the state actor's conduct must shock the conscience.[99] The Fourth Circuit requires affirmative state action that creates or increases the risk of harm to the plaintiff and conduct by state actors that shocks the conscience.[100] The Fifth Circuit at one point laid out a test and identified what would constitute a successful case[101], but has yet to grant the exception.[102]

The Sixth Circuit applies the exception when (1) the plaintiff is specifically in danger; (2) state actors act affirmatively to create or increase the danger; and (3) the State knew of or should have known about the danger to plaintiff.[103] The Seventh Circuit utilizes a test the considers if (1) state actors acted affirmatively to create or increase danger; (2) the State has failed to protect the plaintiff and it was the cause of the plaintiff's injury; and (3) the state actor's conduct shocks the conscience.[104]

The Eighth Circuit's test applies the exception when (1) the plaintiff belongs to a definable and limited group; (2) the plaintiff is put at a significant risk of harm from state

[99] Sauers v. Borough of Nesquehoning, 905 F.3d 711, 717 (3d Cir. 2018).
[100] Callahan v. N.C. Dep't of Pub. Safety, 18 F.4th 142, 146, 149 n.5 (4th Cir. 2021).
[101] Johnson v. Dallas Independent School District, 38 F. 3d 198 ? (5th Cir. 1994) The Court determined that a plaintiff could prevail if they showed that "[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and … they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." The Court also determined that a successful case requires a showing of "the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off protentional sources of private aid."
[102] *Fisher*, 73 F.4th at 375.
[103] Est. of Romain v. City of Grosse Pointe Farms, 935 F.3d 485, 491-91 (6th Cir. 2019).
[104] Est. of Her v. Hoeppner, 939 F.3d 872, 876 (7th Cir. 2019).

actor conduct; (3) the risk of harm is known or obvious; (4) the state actor consciously and recklessly disregarded the risk; and (5) the state actor's conduct shocks the conscience.[105]

The Ninth Circuit requires (1) the plaintiff to be exposed to danger because of a state actor's affirmative actions; (2) the plaintiff's injury to be foreseeable; and (3) deliberate indifference by the State.[106] Notably, the Ninth Circuit does not have a shocks the conscience requirement.[107]

The Tenth Circuit's test requires (1) that plaintiff is part of a limited and definable group; (2) state actors created or increased danger to the plaintiff; (3) state actors put the plaintiff at a substantial risk or serious proximate harm; (4) the risk was obvious; (5) the state actors acted with conscious disregard and (6) the State's conduct shocks the conscience.[108] The plaintiff must also demonstrate that the defendants "created the danger or increased the plaintiff's vulnerability to danger in some way."[109]

The Eleventh Circuit recognizes a substantive due process violation when the State's conduct is "arbitrary or conscience shocking."[110] The D.C. Circuit applies the exception when the affirmative conduct of state actors leads to harm and shocks the conscience.[111]

B. Common Elements in State-Created Danger Doctrine Tests

[105] Villanueva v. City of Scottsbluff, 779 F.3d 507, 512 (8th Cir. 2015).
[106] *See* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1064-65 (9th Cir. 2006).
[107] *Id*.
[108] Est. of B.I.C. v. Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014).
[109] Armijo By and Through Chavez v. Wagon Mound Public Schools, 159 F.3d 1253, ? (10th Cir. 1998).
[110] White v. Lemacks, 183 F.3d 1253, 1258 (11th Cir. 1999).
[111] Butera v. District of Columbia, 344 U.S. App. D.C. 265, 245 F.3d 637 (2001).

Although the tests differ significantly across the circuit courts, there are common elements that appear throughout.[112] The common elements can be categorized into three different types: behavioral elements, qualitative elements and miscellaneous elements.[113] Behavioral elements involve the behavior of the state actor. In other words, what did the government actor do or fail to do? They can be further broken down into affirmative acts[114], visibly overt behavior[115] and deliberate indifference.[116] Qualitative elements that are to be weighed by the court and are more dependent on the facts of each case can be broken down into danger[117] and shocks the conscience.[118] Miscellaneous elements that are included in multiple different circuits' tests but do not fit within the other categories can be broken down into hyper-pressurized environment[119], special relationship[120], foreseeability[121] and misuse of state authority.[122] [*It would be helpful and an important contribution to identify whether there are any trends that can be observed. For example, Coastal circuits tend to focus on behavioral aspect, etc.]*

IV. THE ISSUES RESULTING FROM INCONSISTENT STATE-CREATED DANGER TESTS AND BENEFITS OF UTILIZING A UNIFORM TEST

A. Citizens Have Different Constitutional Rights in Different Circuits

[112] Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: a Proposed Uniform Test,* 120 PENN. ST. L.REV. 893, 896 (2016).
[113] *Id.*
[114] Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).
[115] Dwares, 985 F.2d at 99-100.
[116] Foy v. City of Berea, 58 F.3d 227, 232 (6th Cir. 1995).
[117] Cartwright v. City of Marine City, 33 F.3d 487, 493 (6th Cir. 2003).
[118] Forrester v. Bass, 397 F.3d 1047, 1058-59 (8th Cir. 2005).
[119] Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999).
[120] Pena v. DePrisco, 432 F.3d 98, 109 (2d Cir. 2005).
[121] Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir. 1995).
[122] Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 915 (3d Cir. 1997).

The state-created danger exception is considered to be a substantive due process constitutional right. Constitutional rights should not differ from state to state.[123] A plaintiff injured in a less stringent state could recover from being injured by a state actor in one state, but if they sustained the same injuries from the same state actors in another state they would likely not be able to.[124] Since some circuits do not recognize the exception at all, some people are prevented entirely from exercising a substantive due process right others have access to.

This is particularly so in the Fifth Circuit, which has refused to adopt the state-created danger doctrine, [125] as *Scanlan v. Texas A&M University* illustrates. [126] The case involved a bonfire collapsing at a university-sponsored event and injured students.[127] The court acknowledged that the plaintiffs "had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur"[128] and concluded that "the plaintiffs stated a [Section] 1983 claim under the state-created danger theory"[129] but on remand refused to adopt the doctrine and granted qualified immunity to the university.[130] If this had happened in other circuits, the

[123] *See* U.S. CONST. amend. VIX Section2 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").
[124] *Compare* Bright v. Westmoreland, 443 F.3d 276, 278, (3d Cir. 2006) *with Kennedy*, 439 F.3d.
[125] *See*, *e.g.*, Doe v. Columbia-Brazoria Indep. Sch. Dist., 855 F.3d 681, 688 (5th Cir. 2017) ("Panels [in this circuit]have 'repeatedly noted' the unavailability of the [state-created danger] theory." (quoting Estate of Lance v. Lewisville Indep. Sch. Dist. F.3d, 982 1002 (5th Cir. 2014))).
[126] Scanlan v. Tex. A&M Univ., 343 F.3d 533, 535 (5th Cir. 2003);
[127] Scanlan v. Tex. A&M Univ., 343 F.3d 533, 535 (5th Cir. 2003);
[128] *Id.* at 538.
[129] *Id*.
[130] *See* Davis v. Sutherland, No. G-01-720, 2004 U.S. Dist. LEXIS 27716, at *20 (S.D. Tex. May 20, 2004) (finding that "the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities," and ultimately concluding that "Defendants are entitled to qualified immunity from Plaintiff's Section 1983 claims").

plaintiffs likely would have had a better chance at success and recovery, especially since the court specifically noted the that commonly used elements in Section 1983 tests were met. Citizens have a federal right to bring Section 1983 claims against state actors who violated their constitutional rights.

This issue also arises when factually similar cases have different outcomes because they occurred in circuits with different tests. For example, in *Bright v. Westmoreland*, a state probation officer witnessed a known convicted sex offender interacting with a twelve-year-old girl, which the sex offender was prohibited from doing as a result of his conviction.[131] The probation officer reported the incident, but the District Attorney did not file a motion to revoke the sex-offender's probation until over a month later.[132] The girl's father took things into his own hands by calling the police and requesting that the sex-offender be arrested.[133] The police promised the father that they would take immediate action, but failed to do so.[134] In retaliation for the father reporting him, the sex-offender kidnapped and killed the father's other daughter, Annette. The sex-offender was arrested and confessed to first degree murder.[135]

The father brought a Section 1983 claim alleging the state's delay in processing the petition to revoke the sex-offender's probation and failure to arrest him equated to state-created danger because they knew he had violated the terms of his probation.[136] The district court dismissed the Section 1983 claims because the defendants did not affirmatively

[131] *See* Bright v. Westmoreland, 443 F.3d 276, 278, (3d Cir. 2006).
[132] *See id*. at 278-79.
[133] *See id*. at 279.
[134] *See id*.
[135] *See Bright*, 443 F.3d at 279.
[136] *Id*.

misuse their authority as to increase the plaintiff's risk of harm.[137] Plaintiffs appealed arguing that both the state's omissions and affirmative acts emboldened the defendant to murder and therefore were sufficient to satisfy a Section 1983 claim.[138] The Third Circuit upheld the district court's decision and relied on the Supreme Court's explanation in *DeShaney* that a successful state-created danger claim requires evidence that the state actor acted affirmatively.[139] The court reasoned that the police's failure to arrest the defendant was an omission rather than an affirmative act and therefore there was not state-created danger.[140] Furthermore, the court reasoned that the state actor's misconduct must have created a risk of harm that would not have otherwise existed and that was not the case here.[141]

Consider, in this context, *Kennedy v. City of Ridgefield*.[142] Like the tragic facts of *Bright*, *Kennedy* arose after the plaintiff filed a complaint against a boy in her neighborhood for sexually molesting her eight-year-old daughter and then asked the police to give her notice before contacting the molester's family.[143] When the plaintiff asked for updates on the investigation, a police investigator went to the attacker's home to determine if the Child Abuse and Intervention Center had spoken with the family.[144] The police officer promptly notified the plaintiff that he had met with the attacker's family and informed her that the

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[137] *Id*.
[138] *Id.*
[139] *Id*. at 282 n.6 (reasoning that *DeShaney* read the Due Process Clause to require affirmative state action to validate a state-created danger claim).
[140] *Bright*, 443 F.3d at 283-84 (stating that a state cannot "create danger" invoking "substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.")
[141] *Id*. at 282 n.6.
[142] *Kennedy*, 439 F.3d at 1057-58.
[143] *Id.* (describing why plaintiff filed the complaint against defendant and explaining her fear of retaliation from the defendant with a violent history).
[144] *See Id.*

neighborhood would be patrolled. However, she was upset that the officer had not informed her prior to meeting with the family out of fear of retaliation by the attacker.[145] The plaintiff then decided they would leave town the next day, but overnight the attacker broke into the plaintiff's home and shot the plaintiff and her husband, injuring the plaintiff and killing her husband.[146] The Ninth Circuit held that the plaintiff's state-created danger claim was enough to defeat a motion for summary judgement.[147] The court analyzed the causation standard and looked at whether "the state actor . . . created the particularized risk that the plaintiff might suffer such an injury."[148] In applying the standard the court determined that when the officer decided to notify the attacker's family of the complaint without giving prior notice to the plaintiff, he created a danger the plaintiff otherwise would not have faced and that the plaintiff would have had the opportunity to protect her family from the attacker's violent response to finding out about the complaint.[149]

The outcomes of *Kennedy* and *Bright* differ because *Kennedy* permits state actor liability in circumstances where it was denied in *Bright*.[150] The *Kennedy* court found that a police officer's unfulfilled promise to the plaintiff that her neighborhood would be patrolled, caused the plaintiff's family to remain in their home for one more night and

[145] *See id.*
[146] *See id*.
[147] *See Kennedy* at 1068.
[148] *See id.* at 1062 n.2.
[149] *See id*. at 1063 (reasoning that by notifying the attacker, the police officer "created 'an opportunity for [the attacker] to assault [the plaintiff's family] that otherwise would not have existed.'") (quoting L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992))).
[150] Pehrson, *supra* note 3 at 1066; *See* Lombardi v. Whitman, 485 F.3d 73, 80 n.4 (2d Cir. 1997) (identifying that Bright "rejected factually similar claim[] to one upheld in Kennedy); *Compare Kennedy*, 439 F.3d at 1062-63 (holding that a police officer's notification of a violent individual of a complaint made against him against the wishes of the victim and failure to increase neighborhood patrols constituted a valid state-created danger claim) with *Bright*, 443 F.3d at 283-84 (holding that a probation officer's confrontation with a know sex offender and the police's failure to arrest him as promised were not sufficient for a valid state-created danger claim).

ultimately determined that this was state actor misconduct.[151] Meanwhile, the *Bright* court rejected a similar argument that that family relied on promises from the police that they would arrest a known sex-offender who was assaulting their daughter because "no 'affirmative duty to protect arises . . . from the State's . . . expressions of intent to help an individual at risk."[152] Furthermore, the decisions differed in their treatment of direct causation.[153] The *Kennedy* court asserted that there can be state liability even when the state's conduct is not the primary cause for the plaintiff's harm.[154] In contrast, the *Bright* court determined that the actions of law enforcement in that case had not caused the injury or placed the plaintiff in any greater risk of harm than had already existed and therefore there was no state actor misconduct.[155]

That factually similar cases had such different outcomes highlights the inequities litigants face merely because they reside in different jurisdictions.[156] It is unjust that had the plaintiffs in *Bright* brought their case in the Ninth Circuit, they would have likely been successful. Or had the plaintiffs in *Kennedy* brought their case in the Third Circuit they

[151] *See Kennedy*, 439 F.3d at 1063 (determining a police officer's promise "misrepresented . . . the risk that the Kennedys faced . . . making them more vulnerable to the danger that he had already created"); *See also Lombardi*, 485 F.3d at 80-81 (determining that Kennedy "furnishes some support for the idea that a substantive due process violation can be made out when a private individual derives a false sense of security from an intentional misrepresentation by an executive official if foreseeable bodily harm directly results").
[152] *See Bright*, 443 F.3d (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).
[153] Pehrson, *supra* note 3 at 1067; *Compare Kennedy*, 439 F.3d at 1062 n.2 (defining the Ninth Circuit's causation test as requiring that a "state actor need only have created the particularized risk that plaintiff might suffer such injury"), with Kaucher v. County of Bucks, 455 F.3d 418, 432 (3d Cir. 2006) (identifying that the causation element of the state-created danger test requires a direct causal link and "is satisfied where the state's action was the 'but for cause' of the danger faced by the plaintiff").
[154] *See Kennedy*, 439 F.3d at 1063 (determining that law enforcement conduct "created an actual particularized danger the Kennedys would not otherwise have faced").
[155] *See Bright*, 443 F.3d at 284-85 (finding that law enforcement confrontation with the perpetrator ten weeks before the murder was not reasonably linked to the crime and that the plaintiffs were already in danger before state actors were involved).
[156] Pehrson, *supra* note 3 at110 at 1068.

would not have recovered.[157] Section 1983 claims were created to allow people to recover for violation of constitutional rights under the Due Process Clause of the Fourteenth Amendment.[158] A violation of the state-created danger doctrine is a violation of constitutional and federal statutory rights under Section 1983. The constitution protects all United States citizens equally, no matter what circuit they reside in and although state rights differ from state to state, federal rights do not. States can provide additional protections to its citizens that are greater than those provided by the Constitution, but the Constitution and federal statutory rights are the minimum required to be provided to citizens. It is true that the remedies people are afforded for constitutional violations do vary depending on the jurisdiction they reside in, and so the state-created danger exception regime is not unique in this regard. However, the state-created danger exception has received comparatively little attention at a time when attention on Section 1983 is surging.

Therefore, when there are a multitude of state-created danger tests throughout the different circuits which results in different requirements and different interpretations of what is necessary to make a successful state-created danger claim, the chance of a plaintiff's success depends on what circuit they file suit in which is inherently unconstitutional.[159]

B. Benefits of a Uniform Test

Since each circuit has independently created its own state-created danger doctrine tests based on limited guidance from *DeShaney*, the state-created danger doctrine has

[157] *See Lombardi*, 485 F.3d at 80 n.4 (pointing out that Bright and Kennedy reach opposing conclusions about whether a plaintiff can bring a due process claim based on promises of protection made by police that were not kept).
[158] *See* Mead, *supra* note 5 at 27.
[159] *See* Pehrson, *supra* note 3 at 1068.

developed differently across the circuits. Circuit courts and legal scholars have expressed frustration and dissatisfaction with the state-created danger doctrine as it stands today.[160]

Applying one uniform test will alleviate many of the issues and controversey surrounding the state-created danger doctrine. A uniform test would (1) "offer a cohesive, coherent standard for the state-created danger doctrine;" (2) "dramatically simplify the elements of the state-created danger doctrine so that it can be applied more consistently, regardless of the individual set of unique facts;" and (3) "delicately balance the interests of protecting the public from abuse with allowing the police and other state actors a necessary margin of latitude to perform certain essential public functions without losing considerable proficiency."[161]

It would also provide a strong counter to defendant state actors bringing qualified immunity defenses. Recall that qualified immunity protects state actors from Section 1983 liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[162] Since the state-created danger doctrine is relatively new and has not been addressed by the Supreme Court, it is easy for courts to determine that constitutional rights under the state-created danger doctrine are not clearly established. This happened in *Soto v. Flores*, where the Court of Appeals for the First Circuit granted state actor defendants qualified immunity because "[t]he history of the state-created danger theory, . . . is an uneven one," and "[t]he distinction between affirmatively rendering citizens more vulnerable to harm and simply

[160] Eisenhauer, *supra* note 97 at 918; *See* Slade v. Bd. Of Sch. Dirs. Of Milwaukee, 702 F.3d 1027, 1033 (7th Cir. 2012); Chemerinsky, *supra*, note 11.
[161] Eisenhauer, *supra*, note 97 at 918.
[162] *Harlow*, 457 U.S. at 818.

failing to protect them has been blurred."[163] The court also reasoned that "courts have sometimes found that a given action, while rendering the plaintiff more vulnerable to danger, did not amount to a constitutional violation, but instead should be viewed as a state law tort."[164]

This was also the case in *Fisher v. Moore*, the case identified at the beginning of this Comment, where the Fifth Circuit granted school officials qualified immunity because Fifth Circuit "precedent has repeatedly declined to adopt the state-created danger doctrine. And a right never established cannot be one that is clearly established."[165] If the Supreme Court were to decide on a uniform state-created danger test, it would help solidify constitutional rights under the state-created danger doctrine as clearly established and would allow for claims of qualified immunity to be defeated.

V. The Proper Test In All Circuits Is a Simple Shocks the Conscience Test

A. Narrowing In on the Shocks the Conscience Test

A "shocks the conscience" test is a spectrum of fault rather than a single standard.[166] This spectrum ranges from something more than mere negligence[167] to intent to harm.[168] This essentially means that under a shocks the conscience test, a defendant can be held liable for something slightly more than failing to fulfill a duty they owed to the plaintiff up to intending to cause injury to the plaintiff. The Supreme Court has stated that what

[163] *Soto,* 103 F.3d at 1065.
[164] *Id*.
[165] Fisher, 73 F.4th at 375.
[166] Ricks, *supra*, note 14 at 240.
[167] *Id*; County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (finding "[l]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process" so negligence does not shock the conscience).
[168] *Id* (finding that a state actor who "intended to injure in some unjustifiable by any government interest" would be found to shock the conscience).

constitutes conscience-shocking is in the "middle range, following from something more than negligence but 'less than intentional conduct'" [169] and depends on "(1) whether the state actor has time to deliberate and (2) whether the state actor must weigh interests that compete with the plaintiff's."[170] If a state actor was in a pressurized situation and had little time to reflect[171] or the state actor had to balance competing legitimate interests,[172] more culpability is needed to meet the shocks the conscience test.[173] The Supreme Court has further stated that it will only hold deliberate indifference shocks the conscience in cases involving medical care for incarcerated individuals.[174]

In *White v. Lemacks*, the Eleventh Circuit adopted a shocks the conscience test for state-created danger claims.[175] The court specifically stated that "state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense,' and that standard is to be narrowly interpreted and applied."[176]

In *Butera v. District of Columbia*, the D.C. Circuit Court of Appeals adopted a shocks the conscience test for state-created danger claims as well.[177] The court stated "to assert a substantive due process violation . . . the plaintiff must . . . show that the District of Columbia's conduct was 'so egregious, so outrageous, that it may fairly be said to

[169] *Id*.
[170] Ricks, *supra*, note 14 at 240.
[171] *Lewis,* 523 U.S. at 852–53.
[172] *Id*. at 850-54.
[173] Ricks, *supra* note 14 at 241.
[174] Lewis, 523 U.S. at 853.
[175] White v. Lemacks, 183 F.3d 1253 at 1259
[176] *Id*.
[177] Butera v. District of Columbia, 235 F.3d 637,651 (D.C. Cir. 2001).

shock the contemporary conscience" . . .This stringent requirement exists to differentiate substantive due process, which is intended only to protect against arbitrary government action, from local tort law."[178]

B. Broadness Helps Cabin Judicial Discretion to an Appropriate Level

The shocks the conscience test is a broad enough standard that it can encompass many different situations and fact patterns without being overinclusive in terms of allowing Section 1983 claims for situations that are more akin to simple torts. Most of the cases where the state-created danger exception has been invoked involves horrific facts and state actor oversight at multiple levels.

Legal scholars have noted that "[i]n areas of law where factual settings are diverse – due care, bad faith, unconscionability, reasonableness, duress, and proximate cause – which is perhaps the bulk of the law, the true content of law is known not by the verbal rule formulations but by the application of those verbal formulations."[179] This is particularly true in the context of the state-created danger doctrine because it is applicable to such factually complicated cases. For example, in *Murguia v. Langdon*, a father called the police after the mother of his children was clearly suffering from a mental health crisis.[180] She had a history of bizarre behavior that endangered her children and a criminal history of domestic violence and child endangerment.[181] The original responding officers allowed the mother to take her babies to church with a neighbor where the police were again called, but despite the mother's request for mental health assistance, officers took her

[178] *Id*. at 651.
[179] Richard B. Cappalli, THE COMMON LAW'S CASE AGAINST NON-PRECEDENTIAL OPINIONS, 76 S. Cal. L. Rev. 755, 768–69.
[180] Murguia v. Langdon, 61 F.4th 1096, 1101–02 (9th Cir. 2023).
[181] *Id.*

and the children to a women's shelter.[182] At the shelter, the mother continued to behave bizarrely and erratically which lead to police again being called two separate times.[183] An officer then drove the mother and the children to a motel where in the throes of her mental health crisis she drowned her babies.[184]

The Ninth Circuit ultimately vacated the dismissal of the plaintiff's Section 1983 claim, but in coming to this conclusion the court had to explain its reasoning in accordance with the Ninth Circuit's state-created danger doctrine test.[185] This involved the court going into a detailed analysis of whether the officers involved had the state of mind to satisfy the deliberate indifference standard, what specific knowledge they had of the situation and prior history of the plaintiff's behavior, and what constituted danger and whether it was enhanced by the actions of the officers.[186] This ultimately provided a lot of discretion for the judges in determining each factor of the Ninth Circuit's test, while also constraining their determinations to fit each element. A shocks the conscience test also avoids situations such as this, where courts have to determine the intent and states of mind of state actors while analyzing what amounts to creating a risk and increasing a risk and determining how the state actors created or increased a risk.[187]

While the shocks the conscience test is still a subjective test that provides judges a lot of discretion, it allows them to consider situations as a whole instead of having to perform a subjective analysis on multiple levels which provides judges with a little too

[182] *Id*. at 1103.
[183] *Id.* at 1104.
[184] *Murguia*, 61 F.4th at 1104.
[185] *Id.* at 1120
[186] *Id.* at 1104.
[187] *See generally id*.

much discretion and allows for inconsistent results to arise. Subjective determinations at multiple levels can limit the decisionmakers from seeing the bigger picture. While a shocks the conscience test is clearly still a very subjective test, it allows for a decisionmaker to take a step back and hold some defendants liable who clearly acted affirmatively in such a way that it contributed to the plaintiff's injury. For example, in the context of *Murguia*, it seems all of the law enforcement officials involved affirmatively acted in a way that contributed to the plaintiff's injury. It seems unfair that only some would be held liable due to such subjective factors as what their state of mind was at which precise moment and their knowledge of danger. Utilizing a broader shocks the conscience test allows for decisionmakers to split the liability in a more practical way. This holistic review allows judges to make decisions that more accurately reflect the situation rather than break it down piece by piece.

Again, many of these cases are factually complicated and involve multiple state actors. The state-created danger exception itself is incredibly fact-dependent because many of the tests contain elements such as a state actor's state of mind, environmental factors and relationships between state actors and the citizens who have been injured. More complicated tests with more elements may lead to inconsistent outcomes based on arbitrary factual differences. *Murguia* is again a good example of this because even though each of the officer's actions and decisions played a part in the tragic ending, only some of them were held to be accountable.[188] Furthermore, the reasons that the officers were found to be accountable or not were fairly arbitrary.[189] Utilizing a shocks the conscience test would

[188] *Murguia,* 61 F.4th at 112-1117.
[189] *Id.*

allow for all state actors involved and the state itself to be held responsible for their failure to protect the plaintiffs of these cases. Parsing through each and every action of every individual involved and attempting to identify their state of mind when each decision made and how it affected the victims in the situation seems arbitrary when it broken down to that point.

Relating this to the context of *Murguia*, all the officers and state actors that were involved in the ordeal played some role in allowing the sequence of events to unfold in the way it did.[190] However, only the plaintiff's claim against the officer that left the children with the mother in the hotel succeeded despite the fact that each state officer involved contributed to the danger of the situation in some way.[191] This type of analysis is confusing for potential plaintiffs and state actors alike because they will not be able to anticipate the outcome of cases involving the state-created danger doctrine. Although a shocks the conscience test is more subjective, it is easier to determine when a state actor has acted in a way that "shocks the conscience" than it is to make determinations about multiple, layered subjective elements such as acting with deliberate indifference or increasing or creating danger.

A shocks the conscience test still provides factfinders a lot of discretion in what they find to be "shocking" and potentially allows for a decisionmaker's worldview to influence the decision, but as stated above, a shocks the conscience test requires more than merely finding the conduct of state actor to be shocking. Decisionmakers have to balance many different factors such the amount of time a state actor had to deliberate, whether the

[190] *Id.*
[191] *Id*. at 1114–15.

state actor had to weigh interests that competed with the plaintiffs, if the state actor was in a pressurized situation, or if the state actor had to balance competing legitimate interests.[192] Furthermore, the two circuits that have adopted shocks the conscience tests for their state-created danger doctrines have included language restricting the scope of the test. The Eleventh Circuit specifically noted that the standard is to be interpreted and applied narrowly[193] and the D.C. Circuit noted the requirement was "stringent" and limited its use to differentiating substantive due process from local tort law.[194]

Supreme Court precedent additionally captures something similar to what is at the heart of the shocks the conscience test, namely that there are just some wrongs that our basic sensibilities tell us warrant redress. Although this case is about qualified immunity and is an outlier in the universe of qualified immunity decisions at that, *Hope v. Pelzer* seems to capture this sentiment. In *Hope* an incarcerated individual brought a Section 1983 suit for violation of his Eighth Amendment rights after prison guards put the incarcerated individual on a hitching post, made him take off his shirt and remain shirtless all day so that his skin would become sun-burned, only gave the incarcerated individual water once or twice within a seven hour period and was given no bathroom breaks.[195] Furthermore, the guards taunted the incarcerated individual about his thirst.[196] The Court did not grant qualified immunity because they held that defendants violated clearly established law.[197] The Court found the "obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional

[192] *Supra* Part V.
[193] *White*, 183 F.3d at 1259.
[194] *Butera*, 235 F.3d at 651.
[195] Hope v. Pelzer, 536 U.S. 730, 735-36 (2002).
[196] *Id*.
[197] *Id*. at 744.

protection against cruel and unusual punishment."[198] The idea behind *Hope* can be expanded to the state-created danger doctrine and the shocks the conscience test. The cases described throughout this Comment have demonstrated that there are some instances where state actor misconduct will so obviously lead to a plaintiff being injured by a third party that they are essentially on notice that they are violating that plaintiff's rights. Ultimately, applying a broader shocks the conscience test allows for elements to be considered in a more flexible way that provides for more consistency with a subjective test.

V. CONCLUSION

The state-created danger exception marks a rare expansion of plaintiff rights to pursue Section 1983 claims amidst the historical trend of restricting the ability to recover on Section 1983 claims, therefore it should be kept broad to capture the original nature of what Section 1983 claims were meant to provide to citizens and to encourage more progression in other areas of Section 1983 claims. The state-created danger doctrine allows for state liability even when the plaintiff's injuries were a direct result of the conduct of a private citizen.[199] Thus it is an important tool for plaintiffs injured by state actors to be able to recover for the harm they suffered. To make this tool more accessible and clear to plaintiffs and state actors alike, this comment has argued that a universal test should be adopted across all circuits and the Supreme court should decide on a test. Specifically, the Supreme Court should specifically adopt a shocks the conscience test for evaluating state-created danger doctrine claims.

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[198] *Id*. at 745.
[199] Mead*, supra* note 7 at 27.