SAFARI INTO THE SNAKE PIT: THE STATE-CREATED DANGER DOCTRINE

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INTRODUCTION

In 1989, in DeShaney v. Winnebago County Department of Social Services, a divided Supreme Court announced a substantive due process doctrine purporting (once again) to separate the realm of federal constitutional injury from the state law field of private tort law, to differentiate governmental action from inaction, to distinguish negative constitutional liberties from affirmative duties, and to underline the boundary between the public and the private world. The Court ruled 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 invasion by private actors." Because the Constitution does not impose an affirmative obligation for

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2 For earlier expressions of concern about drawing the line between constitutional and ordinary torts so as to avoid making the Constitution "a font of tort law," see Parratt v. Taylor, 451 U.S. 527, 544 (1981) (citing Paul v. Davis, 424 U.S. 693, 701 (1976)).
3 See, e.g., DeShaney, 489 U.S. at 195–96, 201. For my critique of DeShaney's constitutional analysis, see generally Laura Oren, The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context, 68 N.C. L. Rev. 659 (1990) [hereinafter Oren, State's Failure].
4 DeShaney, 489 U.S. at 195. DeShaney's substantive due process limitations should be distinguished from, although they are related to, the "state action" doctrine of the Fourteenth Amendment. In 1883, the Court invalidated the Civil Rights Act of 1875, which prohibited private discrimination in public accommodations, such as inns and transportation, on the grounds that the Fourteenth Amendment encompassed only "state action" and, therefore, did not allow Congress to reach the conduct of private parties. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

As a result of this ruling, modern civil rights statutes that reach private conduct have been sustained on the basis of congressional commerce or spending powers rather than the Fourteenth Amendment. See Nicholas J. Johnson, Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments, 57 OHIO ST. L.J. 1555, 1598 (1996) (citing GERALD GUNThER, CONSTITUTIONAL LAW 145–51 (12th ed. 1991) (explaining that the difficulty of regulating
“governmental aid,” the State’s inaction in the face of threatened harm from another source generally does not violate the strictures of the Due Process Clause. Thus, the Court insisted that there was no abuse of government power in Wisconsin’s failure to save a young child who was in the state’s child protection system from his father’s violence.6

Chief Justice Rehnquist’s opinion, however, introduced two caveats into its polarized schematic. The first is the so-called “special relationship” exception to the rule of no entitlement to governmental protection.7 Thus, the government may acquire affirmative constitutional duties of protection under certain limited circumstances: “[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”8 The Court cited examples of incarceration or involuntary civil commitment “or other similar restraint of personal liberty.”9

The second implicit exception to the no-duty rule arises from the following language 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. 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 at all; the State does not become the permanent guarantor of an individual’s safety by

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private action through the Fourteenth Amendment was the primary reason behind grounding the Civil Rights Act of 1964 on the Commerce Clause). In United States v. Morrison, 529 U.S. 598 (2000), the Court reaffirmed the nineteenth-century state action ruling and held that neither the Commerce Clause nor the Fourteenth Amendment gives Congress the power to create a civil rights action for domestic violence.

The defendants in DeShaney were state actors whose conduct was, therefore, encompassed within the Fourteenth Amendment. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (holding that a defendant may be a state actor because he is a state official). The state actors were accused, however, of inaction in the face of a private party’s brutality. Thus, the issue became whether the state actors owed the boy any affirmative duties of protection against his father’s predations. See DeShaney, 489 U.S. at 200.

5 DeShaney, 489 U.S. at 195–96.
6 Id. at 191.
7 Id. at 199–200.
8 Id.
9 Id. at 200. The majority expressly reserved the issue of whether or not foster care constituted the kind of “custody” that would satisfy the new test. See id. at 201 n.9.
having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.\(^{10}\)

These words were the genesis of what is called the state-created danger doctrine, which is the subject of this Article.\(^{11}\)

In the years since 1989, most of the circuits have accepted the state-created danger doctrine in fact situations as diverse as the police intervening to arrest a driver and then abandoning his passenger, a young woman who was subsequently raped, in a high crime area;\(^{12}\) or school officials suspending a suicidal special educational student and driving him home in the middle of the day without informing his parents.\(^{13}\) In expressing their understanding of the state-created danger doctrine, many courts of appeals echo the words of a Seventh Circuit opinion written before *DeShaney*.\(^{14}\) Anticipating the *DeShaney* approach, in *Bowers v. DeVito*,\(^{15}\) Judge Posner contrasted the Constitution as “a charter of negative liberties,” which “tells the state to let people alone,” to any claim that the Constitution contains affirmative duties “to provide services, even so elementary a service as maintaining law and order.”\(^{16}\) However, even with this view, he conceded that a different result is obtained where the state crossed the line from inaction to action:

> 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 that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.\(^{17}\)

\(^{10}\) *Id.* at 201 (emphasis added).

\(^{11}\) *See* Uhlig v. Harder, 64 F.3d 567, 572 n.7 (10th Cir. 1995) (noting that *DeShaney* “planted the seed” for the state-created danger doctrine).

\(^{12}\) Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989).

\(^{13}\) Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253 (10th Cir. 1998). *But see* Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701 (7th Cir. 2002) (holding that the suicide of student suspended for having cigarettes does not invoke the state-created danger doctrine).

\(^{14}\) *See*, e.g., Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); Kneipp v. Tedder, 95 F.3d 1199, 1207 (3d Cir. 1996); Uhlig v. Harder, 64 F.3d 567, 572 n.6 (10th Cir. 1995); Pinder v. Johnson, 54 F.3d 1169, 1180 (4th Cir. 1995); Cornelius v. Town of Highland Lake, 880 F.2d 348, 354 (11th Cir. 1989).

\(^{15}\) 686 F.2d 616 (7th Cir. 1982).

\(^{16}\) *Id.* at 618. For the line of cases rejecting claims of social justice for the poor to fill basic needs, see Oren, *State’s Failure*, supra note 3, at 693 n.258.

\(^{17}\) *Bowers*, 686 F.2d at 618.
Since 1989, the search for (non-"custodial") constitutional liability for the State’s failure to protect someone from injury by third parties has been a safari into this “snake pit.” Liability under the Due Process Clause of the Fourteenth Amendment will attach only if the State can be said to have crossed the putative line between action and inaction by creating the danger or substantially increasing it. Moreover, taking their cues from subsequent Supreme Court decisions on other related points, the circuits have held that the journey into the snake pit also requires an extremely high level of culpability to be actionable. No matter how it is defined, “deliberate indifference” is the minimum standard required. It is a degree of responsibility that assumes different content in different contexts, and which, therefore, may or may not, equate with conscience-shocking conduct.\textsuperscript{18}

\section*{I. AFFIRMATIVE DUTIES BEFORE \textit{DeShaney}}

The Court first recognized limited affirmative constitutional duties to protect individuals from harm in the context of various kinds of “special relationships.” These responsibilities were derived from either the Eighth Amendment or the Due Process Clause of the Fourteenth and were identified in \textit{Estelle v. Gamble},\textsuperscript{19} \textit{Martinez v. California},\textsuperscript{20} and \textit{Youngberg v. Romeo}.\textsuperscript{21} In \textit{Estelle}, the Court acknowledged that state inaction, through conscious indifference to the serious medical needs of an inmate, could violate the Eighth Amendment.\textsuperscript{22} Dicta in \textit{Martinez} suggested that facts that overcame that case’s proximate cause and special relationship problems might state a Due Process Claim.\textsuperscript{23} Finally, in \textit{Youngberg}, the Court recognized a due process right of an involuntarily committed man, who had the intelligence of a very young child, to safety and protection from assaults by other patients and from his own self-destructive acts.\textsuperscript{24} Each of these decisions provided some basis for concluding that under appropriate circumstances, the Constitution could be violated by inaction, and not just by aggressive state action.

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 52–53 and accompanying text.
\item 429 U.S. 97 (1976).
\item 444 U.S. 277 (1980).
\item 457 U.S. 307 (1982).
\item \textit{Estelle}, 429 U.S. at 106.
\item \textit{Martinez}, 444 U.S. at 285.
\item \textit{Youngberg}, 457 U.S. at 309, 316.
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II. THE ROAD TO THE SNAKE PIT: DeSHANEY LIMITS "SPECIAL RELATIONSHIPS"

Despite the compelling facts of the DeShaney case,25 the majority used it to announce a very rigorous and ideological view of affirmative duties under the Constitution. The Court insisted that because Joshua's father injured him while the child was in "the free world," the Department of Social Services' knowledge of the specific danger to that particular child and promises made to protect him did not create any state duties.26 The normative rule was that the Constitution promised that the State itself should not deprive anyone of life, liberty, or property without due process of law, but that it "confer[red] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."27

Chief Justice Rehnquist's opinion for the Court rejected the notion that a constitutionally-based "special relationship" arose out of the knowledge of four year-old Joshua DeShaney's peril or the State's specific undertaking to keep him safe, as some pre-DeShaney circuits had concluded from the dicta in Martinez.28

25 A four-year-old boy was beaten into a permanent coma by his father. The State's child protection service had learned about possible abuse by his custodial father when the boy was just two years old. The first file was closed without action, but in 1983, Joshua was seen in the hospital emergency room where doctors identified him as a victim of child abuse. He was taken into temporary legal custody while the complaint was investigated, but the Department of Social Services returned him to his father, simultaneously entering into an agreement for the child's monitoring and protection. Unfortunately, the Department did nothing to enforce the agreement and took no action as, over the next fourteenth months, the child was repeatedly brought to hospital emergency rooms for suspected traumatic injuries. The caseworker failed to see the child as required, but she did document in the case file her belief that he was in serious danger. Finally, the cumulative effect of the abuse produced permanent brain damage. See Oren, State's Failure, supra note 3, at 660–62.

26 DeShaney, 489 U.S. at 201.


28 DeShaney, 489 U.S. at 197 n.4 (citing Balisteri v. Pacifica Police Dep't, 855 F.2d 1421, 1426 (9th Cir. 1988); Estate of Bailey v. County of York, 768 F.2d 503, 510–11 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185, 190–94 n.11 (4th Cir. 1984), cert. denied, 470...
Rather, the only kind of special relationship that triggered affirmative duties was one in which the State takes someone into "custody," thereby depriving him of liberty and the ability to protect himself, as was the case of the inmate in *Estelle* and the developmentally disabled man in *Youngberg*. By contrast, Chief Justice Rehnquist repeatedly emphasized that Joshua was in his father's custody when he was beaten into permanent brain damage. He was in the "free world" where no governmental responsibilities accrue, even in the face of awareness of a clear danger to a specific person. Awareness of the danger might well trigger a state common law tort responsibility, but the majority insisted that this had nothing to do with the criteria for federal substantive due process rights. "The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." Such omissions, however, failed to provide the basis for the "Court's expansion of the Due Process Clause."

U.S. 1052 (1985)). The Court reiterated later in the opinion that its own definition of "special relationships" for constitutional purposes was not defined by state tort law developments under that heading. *DeShaney*, 489 U.S. at 201–02 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)) ("[O]ne who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion."); see also W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984) (discussing special relationships which may give rise to affirmative duties to act under the common law of tort). Cf. Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) (reversing the manslaughter conviction of a woman accused of failing to provide the necessities of food to an infant due to faulty jury instructions). In *Jones*, the court discussed the distinctions between commissions and omissions in criminal law and when affirmative duties may arise. The court noted that the failure to act generally did not violate criminal law, but it did identify exceptions to the general rule:

> There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable:
> first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.


29 *DeShaney*, 489 U.S. at 199–200.
30 *Id.* at 201–02.
31 *Id.* at 203.
32 *Id.* The majority's depiction of the state actors as purely passive is misleading, at best. Justice Brennan, for example, observed in his dissent that the state in fact had "acted" in many ways, most importantly in monopolizing all sources of relief for children subjected to parental abuse. The child welfare system funneled all aid through its exclusive institutions.
By contrast to the many words devoted to action versus inaction, negative liberties versus affirmative duties, and the significance of "custody," neither the Court nor the dissenting opinions in *DeShaney* paid much attention to the other pathway to state responsibility; that is, the snake pit argument that might be made where a State can be said to have created the danger in the first place or to have made things worse for the person it failed to protect.\textsuperscript{33} In dissent, Justice Brennan suggested that "[c]onceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs."\textsuperscript{34} The majority's dicta recognized the state-created danger caveat by negative implication; it emphasized that "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."\textsuperscript{35} In Chief Justice Rehnquist's view, that inaction even extended to the decision to return the boy to his father's custody. Since he had started there, he ended up in no worse position than he would have been in if the state had never intervened at all. Moreover, since the Court found no liability under any constitutional theory, it refrained from addressing the state-of-mind question: what mens rea is necessary to violate the Due Process Clause?\textsuperscript{36}

### III. STATE-CREATED DANGER AFTER *DESCHANey*: THE SNAKE PIT IN THE CIRCUITS

Inevitably, the outcome of the *DeShaney* decision was to squeeze off new avenues of the "special relationship" doctrine and, therefore, the decision turned...
attention to the possibilities of “state-created danger.” 37 Under the new, “custodial” version of special relationships, very few relationships qualified outside of the obvious contexts of incarceration or civil commitment. 38 For example, despite the legal compulsion to attend school, courts generally have rejected the idea that children in public schools are in “custody” for purposes of creating affirmative duties. 39 Even injury inflicted on children in foster care, which the DeShaney Court did not rule out as satisfying the “custody” test for special relationships, 40 is problematic in the lower courts. 41 Thus, after 1989, the action in the inaction arena

37 The specific term, “state-created danger,” seems to have come into currency with D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (finding no state-created danger when public high school students were allegedly molested by other students).

38 See, e.g., Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 700 (9th Cir. 1990) (recognizing that DeShaney “limited the circumstances giving rise to a special relationship”).

39 See, e.g., Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 708 n.6 (7th Cir. 2002) (collecting cases); cf. Stoneking v. Bradford Area Sch. Dist. (Stoneking II), 882 F.2d 720, 724–25 (3d Cir. 1989). On remand from the Supreme Court to be considered in light of DeShaney, the Third Circuit concluded in Stoneking II that the question of “custody” was irrelevant where sexual abuse was inflicted on a student by a state-actor teacher rather than by a third party.

40 See, e.g., Hernandez v. Tex. Dep’t of Protective & Regulatory Svcs., 380 F.3d 872, 882–883 (5th Cir. 2004) (holding that state defendants were not liable under “special relationship” theory for fatal injury to baby in state-licensed foster care because they did not act with “deliberate indifference”); see also Burton v. Richmond, 370 F.3d 723 (8th Cir. 2004) (distinguishing custodial relationship in state initiated foster care from state ratification of arrangements made by relatives of the child). Foster care remains very dangerous for the children the state places there for their own safety. See Laura Oren, DeShaney’s Unfinished
shifted to state-created danger claims. The more successful factual situations from the plaintiff’s perspective ranged from failure to protect from domestic violence;\textsuperscript{42} to police abandonment of intoxicated victims who later suffered harm;\textsuperscript{43} to mishandling of police/citizen standoffs;\textsuperscript{44} to the public identification of a police informant who was consequently murdered;\textsuperscript{45} to a prison nurse raped and terrorized by an inmate;\textsuperscript{46} to an incident in which police called to the scene of a medical emergency cancelled the paramedics and left the victim locked in his house;\textsuperscript{47} to a suicidal special education student sent home alone in the middle of the day without parental notification.\textsuperscript{48} For every case that survived a dismissal or motion for summary judgment in the courts of appeals, however, many more failed. For example, \textit{DeShaney} seems to have sealed the fate of children’s protection claims against child welfare systems.\textsuperscript{49}

Although every circuit, except for the fifth,\textsuperscript{50} has embraced the concept of state-created danger, they also have imposed progressively more stringent standards to sustain such claims. This development was influenced in part by post-\textit{DeShaney} substantive due process cases in which the Supreme Court required proof of

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\textit{Business: The Foster Child’s Due Process Right to Safety}, 69 N.C. L. REV. 113, 114 & n.2 (1990); see also Polly Ross Hughes, \textit{No Quick Fix for Abuse Crisis: A Committee Issues 200 Pages of Advice and Calls for More Oversight of Foster Care}, HOUS. CHRON., Dec. 7, 2004, at B1 (noting the rediscovered scandal in the Texas system and quoting comptroller Carole Keeton Strayhorn as “calling for major changes to protect children in the foster care system from abuse and neglect while in state care”). For a critique of the involuntary versus “voluntary” placement distinction, see Oren, supra, at 117 n. 22, 133–42.
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\textsuperscript{42} Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990); \textit{cf.} Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004) (en banc), \textit{cert. granted}, 125 S. Ct. 417 (2004) (recognizing \textit{procedural} due process claim for failure to enforce protective order by arresting father who kidnaped and subsequently murdered his three children).

\textsuperscript{43} Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996).

\textsuperscript{44} Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003).

\textsuperscript{45} Monfils v. Taylor, 165 F.3d 511 (7th Cir. 1998).

\textsuperscript{46} L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992).

\textsuperscript{47} Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997).

\textsuperscript{48} Armijo v. Wagon Mound Pub. Schs, 159 F.3d 1253 (10th Cir. 1998).

\textsuperscript{49} See, \textit{e.g.}, Powell v. Ga. Dep’t of Human Res., 114 F.3d 1074 (11th Cir. 1997) (affirming dismissal of claim against state welfare agencies and workers based on allowing baby to leave safety of home of aunt with temporary custody to return to mother’s home where child died).

\textsuperscript{50} \textit{But see infra} notes 332–68 and accompanying text (discussing \textit{Scanlan} v. Tex. A&M Univ., 343 F.3d 533 (5th Cir. 2003), which reversed district court dismissal of Texas A&M bonfire case for failure to state a claim and remanding for further proceedings); Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 249 (5th Cir. 2003) (calling into question circuit’s recognition of state-created danger doctrine even after \textit{Scanlan}); Davis v. Southerland, No. CIV.A.G-01-720, 2004 WL 1230278 (S.D. Tex. May 21, 2004) (dismissing on the basis of qualified immunity because assuming that after \textit{Scanlan} there is a state-created danger theory in the Fifth Circuit, it was not clearly established at the time of the bonfire events).
difficult state-of-mind elements. Some courts of appeals subsequently incorporated these high mens rea elements in the state-created danger context. Virtually all the courts assumed that "deliberate indifference" was the minimum mental state in state-created danger cases. After the decisions in 1992 in *Collins v. City of Harker Heights* and 1998 in *County of Sacramento v. Lewis,* however, some of them also asked if the conduct "shocked the conscience" sufficiently to state a due process violation.

**A. The Early Explorers: Circuits That Recognized the Danger Doctrine Before 1996**

There are three underlying issues in any state-created danger case: (1) has the victim suffered an invasion of a "liberty interest"; (2) has the state created or caused the danger that inflicted the loss; and (3) has the state official who threw someone into the snake pit acted with the requisite degree of culpability? The first issue has not been a problem in the state-created danger cases, as the injuries claimed typically involve loss of life or bodily integrity. DeShaney's dicta, however, made the second issue critical to the danger doctrine. Outside of custodial special relationships, there seemed to be only one other way that the State could acquire affirmative duties to protect someone from injury by a third party: by causing the dangerous situation in the first place (or increasing the victim's vulnerability). It is not surprising, therefore, that the first circuit to adopt the state-

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52 503 U.S. 115 (1992) (denying relief to widow of state worker killed after being ordered to enter unsafe sewer pipe).

53 523 U.S. 833 (1998) (holding that a high-speed police chase resulting in suspect's death is not a due process violation without proof of intent to injure).

54 See, e.g., *Wood v. Ostrander*, 879 F.2d 583, 591 n.8 ("[Plaintiff] has shown sufficient facts which, if proven at trial, establish a violation of her right to personal security, a liberty interest protected by the fourteenth amendment.").

55 See, e.g., *id.* at 588; *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (concluding that actions of prison officials placed prison nurse in danger of being raped by assigning violent sex offender inmate to work with her alone in the clinic); *Penilla v. City of Huntington Park*, 11 F.3d 707, 710 (9th Cir. 1997) (finding that police officers who went to home and found victim in medical distress on his porch, cancelled the 911 call for the paramedics, dragged him inside an empty house and then locked the door and left him alone, all after determining he had serious medical needs, "took affirmative actions that significantly increased the risk facing" the victim).

56 See, e.g., *Wood*, 879 F.2d at 587.

created danger theory after DeShaney focused on factual disputes surrounding the state's alleged creation of the danger. The Ninth Circuit was the first court of appeals to confirm the state-created danger theory after the Supreme Court decision in DeShaney. In 1989, in Wood v. Ostrander, the court of appeals reversed a summary judgment dismissal in a state-created danger case. The plaintiff was a passenger in a car that was impounded when its driver was arrested for intoxication. The plaintiff alleged that the night was cold and dark, and that the trooper abandoned her at 2:30 a.m. in a high crime area. After refusing several rides, the woman, who was not dressed for the weather, reluctantly accepted one from an unknown man who raped her.

The Ninth Circuit held that the state-created danger theory requires that the defendant "affirmatively placed the plaintiff in a position of danger." In evaluating the requirement that the State cause the danger, the Ninth Circuit found that the facts in Wood were much like those in White v. Rochford, a Seventh Circuit decision which pre-dated DeShaney. In Rochford, three minor children were in a car with their uncle when police officers stopped them on a busy Chicago highway. The police arrested the uncle for drag-racing and, despite his pleas to take the children to safety or let him call their parents, left all three children in an abandoned vehicle by the side of the road. As a result, they had to walk over dangerous roads at night to find a telephone. Even after they contacted their mother, who had no car, the police refused to assist her in recovering the minors. Emotional and physical injuries led to the one-week hospitalization of the five-year-old. The Rochford court held that police officers may not "with constitutional impunity, abandon children and leave them in health-endangering situations after having arrested their custodian and thereby deprived them of adult protection."
In order to decide the qualified immunity defense issue in Wood, the Ninth Circuit evaluated the impact of the Seventh Circuit’s Rochford case and found that the latter had precedential effect. The Ninth Circuit also concluded that removing the car and abandoning the woman in a high-crime area fit Judge Posner’s description of throwing someone into the snake pit.

The Eleventh Circuit joined the expedition into the snake pit early on, with its decision in Cornelius v. Town of Highland Lake. Harriet Cornelius was abducted from the town hall where she was employed as a clerk and terrorized for three days by prison inmates who were assigned to work in the community. She sued a number of defendants, including her employers and prison officials who knew of the violent background of the inmates, but who nonetheless assigned them to the outside work squad. The court of appeals held that the employee alleged a state-created danger claim. It reasoned that town officials increased the plaintiff’s vulnerability by controlling her work conditions, and that prison officials affirmatively acted together with them in the community work program, with a consequence that Cornelius was placed “in a position of danger distinct from that facing the public at large.” In other words, the combined actions of the defendants “significantly increased both the risk of harm to the plaintiff, and the opportunity for the inmates to commit the harm.”

The Cornelius reasoning, however, later suffered a number of blows in the Eleventh Circuit, and was finally declared “dead and buried” in White v.

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65 Wood, 879 F.2d at 594–95. The significance of this precedential effect is that it defeats a qualified immunity defense. Id. at 596. For a discussion of special problems associated with that defense, see infra Part VII.

66 Wood, 879 F.2d at 594. The Wood majority glossed over the third element in state-created danger claims, mens rea, and focused chiefly on factual disputes about causation. Id. at 590. The dissent, however, thought that the requisite degree of culpability was more of an issue. Id. at 601 (Carroll, J., dissenting).


68 Id. at 349.

69 Id. at 351.

70 Id. at 354–56. The Eleventh Circuit had previously rejected a special relationship claim in Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983). Cornelius, 880 F.2d at 353.

71 Cornelius, 880 F.2d at 357.

72 Id.

73 See White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999) (citing Mitchell v. Duval County Sch. Bd., 107 F.3d 837, 838–39 & n.3 (11th Cir. 1997)); Hamilton v. Cannon, 80 F.3d 1525, 1531 n.6 (11th Cir. 1996); Lovins v. Lee, 53 F.3d 1208, 1211 (11th Cir. 1995); Wooten v. Campbell, 49 F.3d 696, 700 n.4 (11th Cir. 1995); Wright v. Lovin, 32 F.3d 538, 541 n.1 (11th Cir. 1994).
Lemacks. The Eleventh Circuit did not repudiate the state-created danger doctrine, or the kind of causation analysis that requires state actors to affirmatively create the danger or increase the victim’s vulnerability. Rather, the court decided that state employees, like the town hall clerk in Cornelius and prison nurses in Lemacks, could not benefit from the doctrine under the same terms as other victims. The Eleventh Circuit made it clear that it would be very difficult indeed to find that situations involving workplace safety crossed the constitutional line. There were two reasons for this reluctance. First, it was a question of philosophy. Local officials should not be on the hook for decisions that may place employees at risk:

[Decisions] concerning the allocation of resources to individual programs, . . . and to particular aspects of those programs such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions. Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

Second, because of this concern for the protection of local decision making, in order to be found constitutionally liable at any time, officials would have to exhibit a very high and unusual degree of culpability. For the Lemacks court, this hurdle is the only way to distinguish between ordinary state tort law claims and a true due process violation: “[W]hen someone not in custody is harmed because too few resources were devoted to their safety and protection, that harm will seldom, if ever, be cognizable under the Due Process Clause.”

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74 183 F.3d 1253, 1259 (11th Cir. 1999).
75 Id. at 1254.
76 Id. at 1257 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128–29 (1992)).
77 Id. at 1258.
78 Id. The Eleventh Circuit subsequently has taken this sentiment beyond state employees’ work conditions to apply to a school situation where the injury was not even inflicted at the hands of a third party. In Nix v. Franklin County Sch. Dist., 311 F.3d 1373 (11th Cir. 2002), a teacher instructed students to hold on to a live wire during a science experiment. He informed his high school students that if they accidently touched the exposed part of the wire, they might die. Then he turned up the power, turned his head away from the class, and then turned back again to find a student gasping for breath. In denying relief to the parents of the deceased student, the court characterized its precedents as “explicit in stating that ‘deliberate indifference’ is insufficient to constitute a due-process violation in a non-custodial setting.” Id. at 1377; see also Waddell v. Henry County Sheriff’s Office, 329 F.3d 1300 (11th Cir. 2003). In Waddell, an inmate was released and recruited as a confidential informant, despite his long history of substance abuse and drunk driving, and then provided with a car which
The 1992 Supreme Court decision in *Collins v. Harker Heights* contributed to the Eleventh Circuit's *Lemacks*-ian version of state-created danger. *Collins* also involved workplace safety of a state employee. The Eleventh Circuit viewed it as support for a ruling that local officials, who offer less protection to their employees because of necessary decisions about allocating scarce resources, should not suffer constitutional liability unless the local officials' actions truly shocked the conscience. Even "deliberate indifference" did not meet this high standard in the "context of routine decisions about employee or workplace safety."

The Eighth Circuit joined the expedition into the snake pit a year after the ruling in *DeShaney*. The court moved cautiously at first, observing that "it is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect." Nonetheless, the plaintiffs in *Freeman v. Ferguson* were allowed to amend a complaint alleging that the police chief's personal relationship with the estranged husband (and father) of the two victims led him to interfere actively with the enforcement of a restraining order, rendering the two women more vulnerable to the continuing threats, which culminated in their deaths.

Subsequently, the Eighth Circuit grappled further with the question of what it takes to find that state actors affirmatively placed someone in danger. In two split en banc decisions the court found the factual allegations wanting. *Gregory v. City of Rogers*, involved officers who stopped a man (who was a "designated driver")

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he drove while drunk, crashing and killing an innocent bystander:  

In *White v. Lemacks* we concluded, however, that the "special relationship" and "special danger" doctrines were superceded by the standard employed by the Supreme Court in *Collins*. Thus, conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense.  

*Id.* at 1305 (citations omitted). The court continued: "But even conduct by a government actor that would amount to an intentional tort under state law will rise to the level of a substantive due process violation only if it also 'shocks the conscience.'" *Id.* (citations omitted). The *Waddell* court questioned whether deliberate indifference would satisfy the standard, as opposed to either "deliberate indifference to a substantial certainty of serious injury," or a finding that the official acted "maliciously and sadistically for the very purpose of creating a serious injury." *Id.* at 1306 n.5.

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80 *Lemacks*, 183 F.3d at 1258.  
81 *Id.*  
82 *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).  
83 *Id.* at 54.  
84 S.S. v. McMullen, 225 F.3d 960 (8th Cir. 2000); *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992).  
85 974 F.2d 1006 (8th Cir. 1992).
for the evening) for running a red light.\textsuperscript{86} An officer, the designated driver, and his passengers went to the police station, to check out a minor outstanding warrant on the driver.\textsuperscript{87} The driver left his keys in the ignition and his friends waiting in the car.\textsuperscript{88} Approximately thirty minutes later one of the two intoxicated passengers drove away and had a single-car accident, killing himself and injuring the passenger.\textsuperscript{89} A split court of appeals determined that these allegations failed to state a constitutional claim because it could not be said that the police created the danger or made the victims more vulnerable.\textsuperscript{90} Instead, all responsibility for the precarious situation was laid at the feet of the designated driver who could have made other arrangements for the safety of his intoxicated friends or confiscated the car keys.\textsuperscript{91} The dissent, on the other hand, thought it was a closer fact question.\textsuperscript{92} The dissenting judges were troubled by the question of how obvious it was that the driver was designated and that his friends were drunk and should not be left to their own devices.\textsuperscript{93}

In S.S. v. McMullen,\textsuperscript{94} the en banc Eighth Circuit split again over how much affirmative action it takes for state actors to become responsible for a danger posed by a third person. In a case all too similar to DeShaney, the Missouri Division of Family Services returned a child to her father’s custody even though they knew of his close ties to a known pedophile who subsequently assaulted the child and about the father’s unconventional ideas about child rearing.\textsuperscript{95} Even though two and a half

\textsuperscript{86} Id. at 1007.
\textsuperscript{87} Id. at 1008.
\textsuperscript{88} Id. at 1012.
\textsuperscript{89} Id. at 1008.
\textsuperscript{90} Id. at 1011-12.
\textsuperscript{91} Id. at 1012. The car was sitting on a well-lit street in front of a police station, and its occupants had not been abandoned in a high crime area as was the case in Rochford. Regardless of any factual disputes about the knowledge the police possessed concerning the inebriation of the friends, the majority concluded that the officers did not affirmatively act to endanger them.
\textsuperscript{92} Id. at 1015 (Heaney, J., dissenting).
\textsuperscript{93} Id. at 1014. The dissent questioned the decision, especially because of a police dispatch that announced that a car had driven off and the driver was probably intoxicated. The dissenting judges believed that a reasonable factfinder could conclude “that Officers Howell and Pollock deliberately left Gregory and Fields to their own devices in Gregory’s car, recklessly disregarding the grave risk that they would injure themselves as a result of driving while intoxicated.” They continued: “[I]t was foreseeable that Gregory had the keys to his own car,” yet the police did nothing to stop them from driving away in that condition. Indeed, the officers even told the drunks that they were “free to go.” Id. at 1015. A jury might find the facts unsympathetic, or the record might not be developed sufficiently, but the dissent thought that Gregory should survive summary judgment. Id.
\textsuperscript{94} 225 F.3d at 962.
\textsuperscript{95} Id. at 962, 965. Indeed, this same pedophile had previously personally called the social services office to complain about his contact with the child being limited while she was in state custody! Id. at 965.
years had gone by in the safety of state custody, the majority insisted that the child’s return to her father created “no greater risk of abuse than the one that she would have faced had she never been taken from her father in the first place.”96 The dissenting judges, however, disagreed, arguing that such a custody transfer fell on the other side of DeShaney’s “inaction line.”97 They rejected the majority’s distinction between “exposing the child to new dangers and returning her to old ones.”98 Rather, the dissent would have focused on whether or not the state created the dangerous condition, in this case by handing her over from their own safe custody to the clearly dangerous mercies of her father and his friend.99

Factual distinctions clearly can make all the difference in the world of state-created danger claims. The Seventh Circuit’s drunk-driver-replaces-designated-driver case yielded the opposite result than the Eighth Circuit reached in Gregory. In Reed v. Gardner,100 the Seventh Circuit distinguished Gregory and officially joined the expedition into the snake pit.101 Police officers arrested the driver of a car, leaving behind the keys and an allegedly clearly intoxicated passenger, who then took the wheel in the stead of the sober driver.102 Two hours later the substitute driver, who was being pursued at high speed by a deputy sheriff, caused a head-on collision which decimated a family of innocent bystanders.103 These facts were enough for a snake-pit claim. While “[p]olice officers who remove sober drivers and leave behind drunk passengers with keys may be said to create a danger or at least render others on the road more vulnerable,”104 change the facts and you change the results: Swapping one drunk driver for another who was also intoxicated; or failing to remove the first drunk driver; or leaving behind an apparently sober adult, would not trigger liability.105 The Seventh Circuit emphasized that the police have no responsibility to maximize road safety by searching for extra keys or ferrying stranded passengers who may be inconvenienced, but who are not in a place of danger.106 Only by recklessly removing a safe driver and leaving the car keys with the dangerously intoxicated passenger, did the police cross the constitutional line.107

96 Id. at 963.
97 Id. at 967 (Gibson, J., dissenting).
98 Id. at 968.
99 Id.
100 986 F.2d 1122, 1125 (7th Cir. 1993), cert. denied, 510 U.S. 947 (1993).
101 Id. at 1125.
102 Id. at 1124.
103 Id. at 1123–24.
104 Id. at 1125.
105 Id. at 1127.
106 Id.
107 Id. Although the police have only limited responsibilities to protect others from drunken drivers under the Fourteenth Amendment, ironically, the Supreme Court affords the societal problem of driving under the influence constitutional significance under the Fourth
Changing the facts changes the results in other contexts as well. For example, police informants who became victims fared differently even in the same circuit. On the one hand, a paid informant for a drug squad, who was shot and seriously wounded after he was endangered by being seen in the company of police officers, failed to state a claim.\footnote{108} The Seventh Circuit was unsympathetic to Dykema, a man who was experienced in drug transactions, who could quit at any time, and who knew the dangers his cooperation might bring.\footnote{109} Consequently, the drug task force was not responsible if another criminal shot him.\footnote{110}

An anonymous informant, however, merited more sympathy from a jury and from the Seventh Circuit on appeal. \textit{Monfils v. Taylor}\footnote{111} is unusual because instead of the more typical posture of an appeal from a successful motion to dismiss or a motion for summary judgment, this was a decision upholding part of a jury verdict.\footnote{112} Indeed, the decision was doubly strange, because the court declined to send the case back for a new jury decision, even though it reversed the verdict against the City, and technically, no jury question specifically asked about the Chief Amendment. In \textit{Mich. Dep't of State Police v. Sitz}, 496 U.S. 444 (1990), the Court ruled that the “special needs” doctrine applies to police sobriety checkpoints. \textit{Id.} at 449–50. As a result, the ordinary Fourth Amendment analysis is displaced by a balancing test which weighs the governmental need for the intrusion against the degree of intrusion on the citizen. \textit{Id.} at 449. Chief Justice Rehnquist’s opinion for the Court contended:

\begin{quote}
No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation’s roads are legion. The anecdotal is confirmed by the statistical. “Drunk drivers cause an annual death toll of 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.” For decades, this Court has “repeatedly lamented the tragedy.”
\end{quote}

\textit{Id.} at 451 (citations and footnotes omitted).

To the extent that the dreadful statistics improved in the 1980s, the Court attributed that to police use of sobriety checkpoints, at which they stopped drivers randomly. \textit{Id.} at 451 n.\* . Weighing the scale of the problem against what the Court considered a limited intrusion on the Fourth Amendment, it allowed police to stop motorists without even a minimum reasonable suspicion (much less probable cause). \textit{Id.} at 455.

It is certainly ironic that society’s great interest in preventing injury from drunk driving justifies stopping motorists without reasonable suspicion, but at the same time imposes very limited duties on police who exercise that state authority to stop a car and who then actually find a drunken motorist. Apparently, as a matter of due process, the police are free either to arrest the drunks, or let them drive off to the peril of themselves and others on the road.

\footnote{108} Dykema v. Skoumal, 261 F.3d 701, 707 (7th Cir. 2001).

\footnote{109} \textit{Id.} at 706.

\footnote{110} \textit{Id.} at 707.

\footnote{111} 165 F.3d 511 (7th Cir. 1998), \textit{cert. denied}, 528 U.S. 810 (1999).

\footnote{112} \textit{Id.} at 520.
Deputy’s individual liability. Nonetheless, the Seventh Circuit concluded that, in effect, the jury had found the Chief Deputy responsible for a state-created danger violation of due process through the jury’s answer to the municipal liability question.

Workmates murdered the informant in *Monfils* after the police released a tape of his tip regarding employee theft. Despite numerous desperate pleas to keep his identity confidential because of his fear for his safety, and their promises to the contrary, the police released the tape to the subject of the tip who was “crazy and a biker type.” The Seventh Circuit rejected a defense argument that this conduct would satisfy the state-created danger requirement only if the police also cut off the victim from all other avenues of self-help. Instead, it reaffirmed that the issue was “what actions did the . . . officials affirmatively take, and what dangers would [the victim] otherwise have faced?”

By contrast to its unusual ruling in *Monfils*, however, the Seventh Circuit rarely found the requisite “affirmative act” which magically invoked the Due Process Clause under the state-created danger doctrine. In the original home of the snake

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113 *Id.* at 518.
114 *Id.* at 519–20.
115 *Id.* at 515 (quoting plaintiff).
116 *Id.* at 517.
117 *Id.* (quoting *Wallace v. Adkins*, 115 F.3d 427, 430 (7th Cir. 1997)). By contrast, the Eighth Circuit showed little constitutional sympathy for a cooperating witness who was murdered by gang members. Prison authorities had released a letter that jeopardized the life of the former gang member who had become a cooperating witness. See *Gatlin v. Green*, 362 F.3d 1089 (8th Cir. 2004). The court wrote:

Gatlin made a courageous decision to leave the MC gang, to cooperate with police, and to start a new life. By cooperating with police in exchange for a reduced sentence and a chance to relocate, Gatlin knowingly assumed a considerable risk that MC gang members would eventually discover his cooperation and seek to avenge him. Gatlin was a twenty-five year MC gang veteran. He could evaluate better than anyone the deadly risk inherent in cooperating with police.

*Id.* at 1093. The police apparently provided Gatlin with the means to hide in another jurisdiction, but he was killed on home ground. *Id.*

118 Students, for example, lost their state-created danger arguments routinely. In *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701 (7th Cir.), *cert. denied*, 537 U.S. 1047 (2002), a thirteen-year-old suspended from school for possessing cigarettes, was sent home in the middle of the school day, where she committed suicide. *Id.* at 704. The court of appeals held that the suspension was not an affirmative action which caused or increased the danger to the already fragile girl, even if school officials knew about the risk that she faced. *Id.* at 710. The no-duty rule even extended to state actors who failed to prevent a sexual assault on a disabled residential student because they merely did nothing in the face of knowledge of the assaults! *Stevens v. Umsted*, 131 F.3d 697, 704–06 (7th Cir. 1997). Even callously failing to punish the perpetrators of sexual orientation harassment was not enough to lift a claim from the inaction/no action to the creating a risk of harm or exacerbating it/action level. *Nabozny v.*
pit, the court reiterated how limited a caveat this doctrine was. The starting point, of course, was the *Bowers* and *DeShaney* theme of "negative" versus "positive liberties." Judge Posner elaborated the theory further in a later case involving foster children. Claims for "positive" constitutional liberties, as in *DeShaney*, will fail, he wrote. On the other hand, sometimes the state becomes "a doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to lions." Then, the claim becomes one of "negative liberties" which are constitutionally guaranteed against infringement. The Due Process Clause does not command the state to act in the face of even the most obvious and easily avertable harm or in light of its own promises. Mere inaction is not actionable. But, Judge Posner argued, "[t]he state, having saved a man from a lynch mob, cannot then lynch him, on the ground that he will be no worse off than if he had not been saved." As a number of circuits adopted the state-created danger doctrine before 1996, they struggled with a kind of constitutional causation. They operated on the assumption that even the most callous "inaction" in the face of danger does not "cause" the harm. After all, the Constitution does not guarantee anyone governmental aid. However, as the Seventh Circuit first noted many years before *DeShaney*, and the courts of appeals repeated many times in state-created danger cases following *DeShaney*, "the line between action and inaction, between inflicting and failing to prevent the infliction of harm," is not always clear:

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

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119 *See supra* notes 15–16 and accompanying text.
120 K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990).
121 *Id.* at 848–49.
122 *Id.* at 849.
123 *Id.* at 848.
124 *Id.* at 849.
that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into the snake pit.\textsuperscript{126}

The difficulty inhered in finding the right set of facts that crossed the line and transformed a passive observer into an active participant who fairly could be said to have "caused" the peril.

IV. THE MAP-MAKERS: THE CIRCUITS DEVELOP TESTS AFTER 1996

By 1996, eight circuits had recognized the state-created danger exception to \textit{DeShaney}'s no responsibility rule.\textsuperscript{127} Virtually contemporaneously, in 1995 and 1996, two circuits formulated multi-part versions of the state-created danger theory, thereby drawing their own road maps.\textsuperscript{128} These tests, of course, showcased the essential \textit{constitutional} requirement of affirmative causation that is at the heart of the state-created danger doctrine. Strangely, however, they also seemed to contain elements reminiscent of pre-\textit{DeShaney} tort-law derived "special relationships" and of ordinary proximate cause.

The Third Circuit adopted the state-created danger doctrine in 1996, in \textit{Kneipp} v. \textit{Tedder}, a case involving a highly inebriated woman whom the police stopped and separated from her husband.\textsuperscript{129} After the drunk and staggering woman was alone, the police sent her on her way in the cold, whereupon she fell down an embankment in the dark, ultimately suffering exposure, hypothermia, and brain damage.\textsuperscript{130} Her case survived in the Third Circuit. In its roadmap to the snake pit, adopted in \textit{Kneipp}, the court of appeals relied on "four common elements":

(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state

\textsuperscript{126} \textit{Id.}


\textsuperscript{128} \textit{Kneipp}, 95 F.3d at 1208 (finding four "common elements" in doctrine); \textit{Uhlig}, 64 F.3d at 574 (adopting five-part formulation of state-created danger).

\textsuperscript{129} 95 F.3d at 1201.

\textsuperscript{130} \textit{Id.} at 1203.
and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.\textsuperscript{131}

The Tenth Circuit had recognized the doctrine in the 1995 case, \textit{Uhlrig v. Harder.}\textsuperscript{132} \textit{Uhlrig} was an unsuccessful claim on behalf of a therapist in a state mental hospital, who was murdered on the job after the elimination of a special unit for the criminally insane and the resulting transfer of the perpetrator into the general hospital population.\textsuperscript{133} The Tenth Circuit's roadmap included five "concepts" necessary to establish a state-created danger claim:

> [The p]laintiff must demonstrate that (1) [the victim] was a member of a limited and specifically definable group; (2) Defendants' conduct put [the victim] and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.\textsuperscript{134}

There are two truisms in the law of § 1983: The first is that the statute must "be read against the background of tort liability that makes [someone] responsible for the natural consequences of his [or her] actions."\textsuperscript{135} The second proposition, however, is that § 1983 does not make the Constitution into a font of tort law.\textsuperscript{136} The Third and Tenth Circuit "tests" should be deconstructed with the above precepts in mind.

For example, in \textit{Kneipp}, the Third Circuit described the "relationship" of the police to the inebriated woman (the test's third "common element") as one in which the officer used his power as a police officer to send her home alone in bitter

\textsuperscript{131} \textit{Id.} at 1208.
\textsuperscript{132} 64 F.3d 567 (10th Cir. 1995).
\textsuperscript{133} \textit{Id.} at 570–71.
\textsuperscript{134} \textit{Id.} at 574. As recently as 2004, an Eighth Circuit case relied upon the \textit{Uhlrig} test to reject a claim by a minor who was shot by the stepfather of the state's confidential informant. Avalos v. City of Glenwood, 382 F.3d 792, 799 (8th Cir. 2004).
\textsuperscript{136} Monroe v. Pape, 365 U.S. 167, 187 (1961) (upholding cause of action against Chicago police officers, but not against the city of Chicago, for violating plaintiff's Fourteenth Amendment rights, under § 1979, derived from § 1 of the 1871 "Ku Klux Klan Act").
Described that way, this element properly reflects the constitutional requirement that an official of the state put someone in harm’s way using state-granted authority. However, in subsequent cases, the court mistakenly reduced this prong to a Martinez-like foreseeable plaintiff issue. The same “foreseeable plaintiff” element, moreover, appears in the Tenth Circuit’s five-part test in Uhlrig (i.e., that the victim must be a “member of a limited and specifically definable group”). Given DeShaney’s repudiation of Martinez’s “special relationship” dicta, the Third and Tenth Circuits erred in emphasizing a “foreseeable” class of victim, because such an element does not make constitutional sense. In Martinez, Justice Stevens opined that the parole board had no reason to suspect that the murder victim, as distinguished from the public at large, was at risk. Furthermore, the deadly attack was more than five months after the release of the parolee. Implicitly, this comment suggested the converse — that an assault right after the release, visited on a predictable victim, might change the result by creating duties through a “special relationship.” Indeed, before DeShaney, a number of courts of appeals followed the Martinez lead in deriving affirmative constitutional duties in this manner. However, DeShaney repudiated that notion and made it crystal clear that federal “special relationships” were strictly a function of “custody.” Therefore, it is puzzling to see the explicitly rejected version of “special relationships” engrafted onto post-DeShaney state-created danger doctrine.

Similarly, the foreseeable and direct risk of harm criteria in the two circuits do not seem constitutionally based. The Kneipp court’s requirement that “the harm ultimately caused was foreseeable and fairly direct” on the one hand echoes the

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138 Kneipp, 95 F.3d at 1209 (finding that the officer exercised sufficient control over the victim to meet the relationship prong). The court’s analysis, however, is somewhat undercut by a footnote, which apparently considers the relationship element to incorporate a tort-based foreseeable victim approach. Id. at 1290 n.22.

139 See also Smith v. Marasco, 318 F.3d 497, 509 (3d Cir. 2003) (concluding that the relationship test was met where, as in Kneipp, the defendants exercised sufficient control over the plaintiff using their power as police officers).

140 See Rivas v. City of Passaic, 365 F.3d 181, 197 (3d Cir. 2004) (observing that the relationship element “contemplates a degree of contact such that the plaintiff was a foreseeable victim of the defendant’s acts in a tort sense”); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citing Martinez v. California, 444 U.S. 277 (1980), for the “relationship” or foreseeable victim element).

141 Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).


146 Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1998).
rejected constitutional reasoning of *Martinez*, but on the other, it is merely an obvious statement of any tort liability. Just like Mrs. Palsgraf taught us in the first year of law school,\(^{147}\) if any injury is too remote or attenuated, there is no legal causation, even if the damage would not have occurred but for the initial conduct. That cliché applies to any claim of constitutional harm remediable through § 1983, but it does not explain how to identify the affirmative duty that is central to state-created danger doctrine.

The Tenth Circuit’s requirement in *Uhlrig* that the state actors put the members of a particular group at “substantial risk of serious, immediate, and proximate harm,”\(^ {148}\) subsumes the same special relationship and proximate cause concepts discussed above. The emphasis on members of an identifiable group at risk of “immediate and proximate harm”\(^ {149}\) sounds like an attempt to distinguish actionable circumstances from the parolee in *Martinez*, who did not target a foreseeable plaintiff or even act until a number of months after his release. As in the Third Circuit, this guidepost is misleading and does not mark the road to constitutional duties.

V. CONSTITUTIONAL MAP-MAKING REVISITED

In order to separate the highways from the byways en route to the snake pit, the focus has to be on constitutional duty. As a result, properly construed, the Third Circuit’s “common element” number four (“the state actors used their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur”),\(^ {150}\) is a main road, because it is but another way of saying that there is no due process violation unless the State crosses the inaction line and affirmatively puts someone in danger. As developed since *DeShaney*, this constitutional element may be broken down into its constituent parts: (1) Did state officials exercise authority or power; (2) in such a way that they put someone in a worse position than they would otherwise have occupied?

In addition, two other constitutional elements may be teased out of the circuit tests. In *Uhlrig*, the Tenth Circuit suggested that in order to be actionable, the state’s conduct must produce a “substantial risk of serious, immediate, and proximate harm.”\(^ {151}\) This apparently separate component is unique to that circuit. Rightly or wrongly included, however, it at least sounds constitutional rather than tort-like. The last element that may be derived from the circuit tests is the state

\(^{147}\) Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (dismissing complaint by railroad passenger injured on platform by explosion after other passenger, who was being helped aboard train by conductor, dropped package of fireworks).

\(^{148}\) *Uhlrig* v. Harder, 65 F.3d 567, 574 (10th Cir. 1995).

\(^{149}\) Id.

\(^{150}\) *Kneipp*, 95 F.3d at 1208 (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995)).

\(^{151}\) *Uhlrig*, 64 F.3d at 574.
of mind required to violate the substantive right. The circuits express this component differently. They may require “deliberate indifference,”\textsuperscript{152} “willful disregard for the safety of the plaintiff,”\textsuperscript{153} or “reckless” action in “conscious disregard of [the] risk,” that, when viewed in total, shocks the conscience.\textsuperscript{154} In light of the Supreme Court’s 1992 and 1998 due process holdings in \textit{Collins v. City of Harker Heights}\textsuperscript{155} and \textit{County of Sacramento v. Lewis}\textsuperscript{156} the appropriate mental state has become a critical issue for state-created danger doctrine.

In rejecting Martinez’s version of “special relationships,” while preserving the \textit{Estelle} and \textit{Youngberg} version of affirmative duties, the \textit{DeShaney} Court in effect affirmed that responsibilities arise under the Constitution because the State is exercising power, even if passively. Exercise of state power, therefore, should be the salient issue, rather than any merely tort-based concern such as “knowledge” or “foreseeability.” Mixed in with the unfortunate detours, the essential elements of the state power highway appeared on the Third Circuit’s road map. The fourth “common element” of \textit{Kneipp} was that “state actors \textit{used their authority} to create an opportunity that otherwise would not have existed for the third party’s crime to occur.”\textsuperscript{157} The Third Circuit’s explanation of the “relationship between the state and the plaintiff”\textsuperscript{158} prong in \textit{Kneipp}, moreover, also appropriately emphasized the fact that the police exercised power over the inebriated woman by stopping her, separating her from her husband, and then sending her into the cruel dangers of the night. In 2003, in \textit{Smith v. Marasco},\textsuperscript{159} the court reiterated that insight. Rather than focusing on whether this was a foreseeable victim, as in some intervening cases, the court of appeals opined that the “relationship between the plaintiff and the state” requirement was met because the police officers who engaged in a stand-off, keeping the victim in the woods, away from his home and his medicines, exerted sufficient control over him.\textsuperscript{160}

The “state control over the plaintiff” criterion makes constitutional sense and can be applied in other fact situations as well. For example, the Tenth Circuit case, \textit{Armijo v. Wagon Mound Public Schools},\textsuperscript{161} involved the suicide of a special education student. The court recognized a special danger claim in this case, which was a

\textsuperscript{152} See, \textit{e.g.}, L.W. \textit{v. Grubbs}, 974 F.2d 119, 122–23 (9th Cir. 1992).
\textsuperscript{153} See, \textit{e.g.}, \textit{Kneipp}, 95 F.3d at 1208 (quoting \textit{Mark}, 51 F.3d at 1152).
\textsuperscript{154} See, \textit{e.g.}, \textit{Uhlrig}, 64 F.3d at 574.
\textsuperscript{155} 503 U.S. 115 (1992) (§ 1983 does not provide a remedy for city employee who was injured while working).
\textsuperscript{156} 523 U.S. 833 (1998) (§ 1983 does not provide a remedy for passenger killed during high-speed police chase).
\textsuperscript{157} 95 F.3d at 1208 (quoting \textit{Mark}, 51 F.3d at 152) (emphasis added).
\textsuperscript{158} \textit{Id}.
\textsuperscript{159} 318 F.3d 497, 509 (3d Cir. 2003).
\textsuperscript{160} \textit{Id}.
\textsuperscript{161} 159 F.3d 1253 (10th Cir. 1998).
strikingly different result than the one reached in another school suicide case in the Seventh Circuit.\(^{162}\) In the Seventh Circuit case, the Martin girl was a thirteen-year-old who was suspended from school for possessing cigarettes and sent home, where she committed suicide.\(^{163}\) In the Tenth Circuit case, by contrast, school officials suspended the Armijo boy, who was a special education student, and drove him to his empty home in violation of school policy. They failed to notify his parents, and instructed the police to detain him if he attempted to return to school.\(^{164}\)

Let us be very careful in making distinctions here: these cases are in two different circuits. Moreover, I would not want to argue that they are both decided correctly or that a high degree of state control that approaches “custody” is necessary for state-created danger. However, there is more evidence of the exercise of state power in the Armijo case than in Martin. State officials exercised a significant, but not all-encompassing, degree of state authority in Armijo, which created the danger facing the student and rendered him more vulnerable. It is a clear conclusion to be drawn from DeShaney’s rationale: the state actors may have known about Joshua’s danger, but they did not put him in danger in the first place or render him more vulnerable to the peril. It is compatible with the original snake pit case, in which Judge Posner explained that the line between inaction and action is not always so easy to draw and that the state cannot put someone in a position of danger from private persons and then refuse to protect him. Under such circumstances, the State “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.”\(^{165}\)

The third element that may be teased out of the circuit tests relates to the severity of the injury or the seriousness of the risk of harm. The Tenth Circuit required Uhlrig to demonstrate, in addition to other criteria, that the defendants’ “conduct put [him] and the other members of that group at substantial risk of serious, immediate, and proximate harm.”\(^{166}\) Setting aside the Martinez-like features of this formulation that have been discussed above, that still leaves the questions of whether the substantiality of the risk or the seriousness of the harm play a role in stating a constitutional violation. If so, do they count as a separate requisite, or do they slide into the final element — state of mind?

There is some indirect support for reasoning that the risks entailed must reach a sufficiently serious level to trigger constitutional duties. Other claims based on affirmative duties, in one way or another, do incorporate such a standard. DeShaney explained that Estelle established that under the Eighth Amendment,

\(^{162}\) Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701 (7th Cir. 2002).

\(^{163}\) Id. at 704–05; see supra note 118.

\(^{164}\) Armijo, 159 F.3d at 1257.

\(^{165}\) Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

\(^{166}\) Uhlrig, 64 F.3d at 574.
states were obligated to provide “adequate medical care” for convicted inmates. The Court ruled that the Due Process Clause imposes a responsibility on the state “to provide involuntarily committed mental patients with such services as are necessary to ensure their ‘reasonable safety’ from themselves and others.” Consequently, civil committees are entitled to “adequate food, clothing, shelter and medical care.” In Youngberg, the Court did not define the outer limits of the substantive right. It was clear, however, that the interest extended at least to safety and freedom from unnecessary bodily restraint.

The Supreme Court has also acknowledged that due process guarantees extend to suspects in police custody, who merit at least the same protection and medical care as convicted prisoners. Lower courts further assume that the deliberate indifference to “serious medical needs” standard of the Eighth Amendment is at least a minimum guarantee in cases of juvenile detainees or others who are not being “punished” and, therefore, do not qualify for the Eighth Amendment standard per se.

If “serious” is a constitutional modifier in these other affirmative duty cases, arguably it might be applicable to state-created danger cases. If so, however, courts should bear in mind the variety of harms that have been considered “serious” in those other settings and should evaluate whether or not different constitutional

167 DeShaney, 489 U.S. at 198.
168 Id. at 198–99 & n.5; cf. Hudson v. McMillian, 503 U.S. 1 (1992) (recognizing that an inmate may have a valid excessive force claim against prison guards even though the inmate suffered only minor injuries including bruises, swelling, loosened teeth, and a cracked dental plate). The Court ruled that excessive use of force on an inmate violates the Eighth Amendment, even if the inmate does not actually suffer “significant” injury (as the Fifth Circuit had required). The Court explained that the degree of the injury might signify how unnecessary and wanton the excessive force was, but that it is not a separate objective requirement. The Court’s Eighth Amendment reasoning was that the malicious infliction of pain will always violate contemporary standards of decency, although every push or shove inside prison will not give rise to a federal cause of action. Id. at 9. In Justice Blackmun’s concurrence, he criticized the argument made by the Attorneys-General of a number of states, including Texas, that the serious injury requirement was necessary to curb prison lawsuits. Id. at 15 (Blackmun, J., concurring) (“This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions.”).
170 DeShaney, 489 U.S. at 199 (discussing the Court’s holding in Youngberg).
171 Youngberg, 457 U.S. at 315.
172 Id. at 316–19.
bases make a difference. For example, the Eighth Amendment prohibits deliberate indifference to serious known medical needs. Courts have found a variety of harms to constitute "serious medical needs": for example, asthma with intermittent breathing problems, coughing, wheezing, and hyperventilating; a leg injury which was deteriorating, caused pain, and made it difficult to walk; and a one-and-a-half inch cut over the eye which had been allowed to bleed unattended for over two hours. On the other hand, "pseudofolliculitis," which is aggravated by the prison's shaving requirement, does not rise to the level of serious medical need; nor does moderately high blood pressure or an old shoulder injury that does not affect the inmate's range of motion.

In a 1993 case, *Helling v. McKinney*, the Supreme Court was asked to rule on an inmate's secondhand smoke exposure claim under the Eighth Amendment. The Court held that it was not necessary to wait for a tragic incident to occur if there was sufficient likelihood of its eventual occurrence or of its magnitude. In other words, the "serious" medical need did not have to be a current one, and therefore, exposure to a five-pack a day cigarette smoker might suffice. Prison officials were not free to ignore evidence of something that might not be a medical problem now, but was likely to produce one in the future.

The *Helling* Court also explained how the nature of the Eighth Amendment guarantee shaped the seriousness inquiry. The Eighth Amendment contains an objective component that asks whether the conditions of confinement offend contemporary standards of decency. Answering the objective question requires a two-fold inquiry. First, how serious was the potential harm and the likelihood that the smoke exposure would produce it? Second, does society consider the risk so grave that a decent community would never expose anyone unwillingly to it? In other words, because the Eighth Amendment is all about contemporary standards of decency, "seriousness" is judged both factually and in the context of what society believes is an acceptable or unacceptable "punishment."

Many of the state-created danger cases involve serious harms, such as death in a standoff that blocked access to help and medicines, suicide, brain damage

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175 See *Farrow v. West*, 320 F.3d 1235, 1243 & n.14 (11th Cir. 2003) (collecting cases).
176 *Id.*; cf. *Smith v. Carpenter*, 316 F.3d 178 (2d Cir. 2003) (directing the jury to focus on the harm from the brief interruption in HIV medicine, and not on the seriousness of the underlying HIV condition itself).
178 *Id.* at 34.
179 *Id.* at 35.
180 *Id.* at 33.
181 *Id.* at 35.
from exposure, rape in a high crime neighborhood, murder by an estranged husband whose police buddies were directed not to interfere, and severe injury in an automobile collision with a drunk driver. The snake pit language itself carries the overtone of risk of significant harm.

On the other hand, death or severe injury should not be an absolute prerequisite for state-created danger. White v. Rochford, an archetypical and influential early case, involved serious injury to children whom police abandoned when they arrested and removed their uncle from his car. No one should have to endure such trauma before state officials are held accountable for throwing them into the snake pit. The degree of control exerted by the state also should count if seriousness is to be weighed. Constitutional duties should balance against state power. Logically, a degree of control which approaches Estelle and Youngberg should trigger a broader right to protection from third party harm than one where the state’s authority is less encompassing. In other words, the greater the state control, the broader the state responsibility, even for less serious risks and injuries.

VI. NAVIGATING THE ROUTE IN THE RIGHT FRAME OF MIND: STATE OF MIND AND THE CONSTITUTION

Ever since the Court recognized the dilemma created by its 1981 ruling in Parratt v. Taylor, it has been groping for an adequate state-of-mind requirement in cases involving the Due Process Clause of the Fourteenth Amendment. Parratt created a state-of-mind problem because it did not effectively satisfy the need to prevent the Constitution from becoming a “font of tort law.” Prison officials in Parratt misplaced an inmate’s hobby kit, which arrived while he was in administrative segregation. The Court held that the claimant was “deprived” of a

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184 Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996).
185 Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989).
186 Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990).
187 Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993).
188 592 F.2d 381 (7th Cir. 1979).
189 See supra notes 62–64 and accompanying text. There was physical as well as psychological harm to the children in Rochford. The Tenth Circuit decided a case in which the allegations were of psychological harm alone. See Abeyta v. Chama Valley Indep. Sch. Dist. No. 19, 77 F.3d 1253, 1254 (10th Cir. 1996) (twelve-year-old alleging harm from teacher calling student “a prostitute” over period of weeks in front of class). The court held that the teacher had not created a hostile environment that was severe enough to constitute a substantive due process violation. Although not ruling the possibility out, it questioned whether even extreme verbal harassment could ever be severe enough to shock the conscience. Id. at 1257–58. The Abeyta opinion noted that Rochford conceded it might be a closer question if the only harm to the children was psychological. Abeyta, 77 F.3d at 1257.
191 Id. at 530.
“property interest” in the hobby kit “under color of state law” within the meaning of § 1983. The Court found that the federal statutory remedy incorporated no state-of-mind requirement at all. Without more, this holding raised the specter that any tort committed by a state official would become a federal case. The Court’s solution was to rule that when the loss was inflicted by “random and unauthorized” conduct, procedural due process could be satisfied by a post-deprivation remedy. The existence of an “adequate state remedy,” typically state tort law, therefore was expected to cut off the kind of trivial, ordinary tort law claims that threatened to turn the Constitution into a font of tort law.

Justice Powell warned in his concurrence, however, that the Court was making a mistake. Many states limited their waivers of sovereign tort immunity and therefore would not offer an adequate post-deprivation remedy. Under such circumstances, the Court’s solution would fail to prevent ordinary torts committed by state actors from becoming due process complaints. Instead of what he saw as a narrow procedural approach, Justice Powell would have ruled that a negligent deprivation of a property interest does not “work[] a deprivation in the constitutional sense.” He explained that every constitutional provision contains its own state-of-mind requirement, regardless of the absence of any such element in the statutory remedy for violations of federal rights. The Due Process Clause simply could not be violated by mere negligence.

Justice Powell’s warning proved to be prophetic. As a result, a mere five years later, when the Court heard two cases in which there were no adequate state remedies for deprivations of liberty interests, it decided that the proper way to control the flood of prison litigation was by following Powell’s advice. In Daniels v. Williams and Davidson v. Cannon, the Court held that negligent acts could never violate the Due Process Clause, either in its procedural or in its substantive

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192 Id. at 536–37.
193 Id. at 534.
194 Id. at 541–42.
195 In subsequent cases, the “adequate state remedy” doctrine was clearly limited to procedural due process only, although it applied equally to intentional or other deprivations of either liberty or property. See, e.g., Zinermon v. Burch, 494 U.S. 113 (1990) (adequate state remedy doctrine not applicable to substantive claims); Hudson v. Palmer, 468 U.S. 517 (1984) (intentional deprivation of property).
196 Parratt, 451 U.S. at 546 (Powell, J., concurring).
197 Id. at 550–51 (Powell, J., concurring).
198 Id. at 548.
199 Id.
201 474 U.S. 344 (1986) (denying recovery to inmate whose due process complaint was based on failure to prevent assault by other inmates).
aspect. The Court, however, left unsettled the issue of just what state of mind beyond negligence, but perhaps less than intent, might state a claim under this constitutional provision.

The state-created danger cases arose after 1986 in this unsettled environment. In 1989, DeShaney explained its philosophy of the limited scope of “affirmative duties” in general. The analysis provided a basis for assuming that like “special relationship” (custodial) cases, state-created danger claims would not prevail unless they established “deliberate indifference” at a minimum. At virtually the same time, moreover, the Court decided a §1983 municipal liability case, City of Canton v. Harris which adopted the “deliberate indifference” standard in a different context, albeit one involving inaction as well. Inevitably, this coincidence influenced the substantive analysis too. Two more Supreme Court cases followed that further shaped the state-created danger state-of-mind discussion in the circuits. Collins v. Harker Heights in 1992, and especially County of Sacramento v. Lewis in 1998, raised the substantive due process ante by dismissing claims of deliberate indifference where the conduct was not arbitrary and “conscience-shocking” as well.

In narrowing the “special relationship” brand of affirmative duties to a question of custody, the DeShaney Court implicitly embraced the “deliberate indifference” standard of Estelle. Because the case turned on the majority’s finding that there was no affirmative duty to Joshua at all, however, there was no need to address the question of the appropriate state of mind. Within a week, the Court issued an opinion on another issue that nonetheless thereafter influenced state-created danger cases. City of Canton v. Harris was a §1983 municipal liability case. The plaintiffs sought to hold the city responsible for failing to train its jail officers to

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202 Daniels, 474 U. S. at 328; Davidson, 474 U. S. at 348.
203 Daniels, 474 U. S. at 334 n.3 (acknowledging that the Court had no occasion to rule on whether something less than intentional conduct, such as recklessness or “gross negligence” will trigger due process protections); see also County of Sacramento v. Lewis, 523 U. S. 833 (1998). The Court decided that for high-speed police chases only an intent to injure would sufficiently shock the conscience and state a substantive due process violation. However, the opinion also admonished courts to evaluate each different context separately for the requisite culpability that shocks the conscience. Id. at 850–51.
207 For cases that followed, see, for example, Ewolski v. City of Brunswick, 287 F. 3d 492, 510 (6th Cir. 2002); Butera v. District of Columbia, 235 F. 3d 637, 651 (D.C. Cir. 2001); S.S. v. McMullen, 225 F. 3d 960, 964 (8th Cir. 2000) (en banc); White v. Lemacks, 183 F. 3d 1253, 1258 (11th Cir. 1999); Armijo v. Wagon Mound Pub. Sch., 159 F. 3d 1253, 1262 (10th Cir. 1998).
209 Id. at 202 n.10.
evaluate an arrestee’s need for medical attention. In *Harris*, jail officials failed to obtain medical assistance for an incoherent and slumping arrestee. When released, she was taken by an ambulance, provided by her family, to a hospital where she was diagnosed as suffering from severe emotional problems and where she remained in treatment for one week. Clearly, the arrestee possessed the underlying constitutional right to treatment for known serious medical needs. At the Supreme Court level, however, this was a purely statutory case, which raised the issue of under what circumstances could the municipal defendant be held liable for its inaction in failing to train its officers to recognize a medical problem. Although unlike *DeShaney*, *Harris* raised no questions about the nature and content of the Due Process Clause, it shared a feature with the former case because it was about inaction. This was not a question of municipal action, for example, where the city had a “custom or policy” of denying teachers the right to their jobs after the fifth month of their pregnancy, or of authorizing its agents to break into a doctor’s back office in order to serve capiases. Rather, this was an inaction situation in which the city had allegedly failed to train its officers, thereby causing them to violate the constitutional right to medical treatment while in custody.

The *Harris* Court concluded that it was possible to base municipal liability on a “failure to train,” but only under limited circumstances. It held “that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” The deliberate indifference standard represented a safeguard against too easily finding municipal liability under a statute that had been interpreted to impose liability only if the city was the “moving force” behind the violation. In order to preserve that principle, the Court decided to require that municipal decision makers actually made a deliberate or conscious “choice” not to train their agents. The Court observed that this standard had nothing to do with “the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation.” The requisite deliberate indifference would not be easy to find. No liability attached to the city, unless “in

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211 *Id.* at 382.
212 *Id.* at 381.
213 See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243–45 (1983) (recognizing that a detainee has right to medical care under Due Process Clause which is at least equivalent to the rights of convicted prisoners under the Eighth Amendment).
214 *Harris*, 489 U.S. at 389.
217 *Harris*, 489 U.S. at 387.
218 *Id.* at 388.
219 *Id.* at 389.
220 *Id.* at 388 n.8.
light of the duties assigned . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need," and the lack of training also actually causes injury. The majority emphasized the need for high standards for fault and causation, for fear that otherwise municipal liability would skyrocket.

Although not a constitutional content case, Harris inevitably fed the unease about “inaction” claims and promoted the notion that requiring high degrees of fault and causation might be a solution. When the Court did address substantive rights, it found that even the allegation of “deliberate indifference” may not by itself state a constitutional claim in all circumstances. In Collins v. City of Harker Heights a city employee died from sewer gases after he was ordered to enter the line to unstop it. The Court interpreted his survivor’s suit to allege either that the city had a constitutional duty to provide its employees with a safe working environment, or that “the city’s ‘deliberate indifference’ to [the employee’s] safety was arbitrary government action that must ‘shock the conscience’ of federal judges.” The Court emphatically rejected these contentions, concluding that the duty to protect in prior cases grew out of DeShaney-type obligations to those whom the state had deprived of their liberty, such as pretrial detainees, mental institution patients, convicted felons, or persons under arrest. By contrast, an employee who voluntarily accepted work from the city was not in the same situation. Furthermore, any omission to warn or train resembled a state tort claim rather than an arbitrary or conscience-shocking constitutional violation. Collins influenced subsequent state-created danger cases, overlaying deliberate indifference with additional requirements smacking of egregiousness and arbitrariness.

221 Id. at 390. The example offered implied a tough standard: city policymakers who “know to a moral certainty that their police officers will be required to arrest fleeing felons,” and who provide them with firearms to do this job, must train the officers in the use of those weapons. Id. at 390 n.10.

222 Id. at 391-92.

223 See, e.g., Brown v. Pa. Dep’t of Health Emergency Med. Serv. Training Inst., 318 F.3d 473, 479 (3d Cir. 2003) (citing both constitutional and municipal liability decisions for their constitutional conclusion about state of mind). Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989), noted that Harris expressly reserved the question of minimum state of mind for the underlying constitutional violation. Nonetheless, the court found that the municipal liability decision “calls into question our statements . . . that a showing of gross negligence will suffice to establish the requisite level of fault in a section 1983 action against an individual state actor.” Id. (emphasis added).


225 Id. at 126.

226 Id. at 126–28.

227 See, e.g., Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir. 1995) (concluding that Collins underscores that a substantive due process violation must be more than an ordinary tort);
The Court ratcheted up the state-of-mind stakes still further in a police chase decision, *County of Sacramento v. Lewis.* A sixteen-year-old boy was killed when he was thrown from the passenger seat of a motorcycle leading the police on a high-speed chase through residential neighborhoods. A police car hit him while still traveling at a speed of forty miles-per-hour. His parents and his estate brought a substantive due process claim, alleging that the boy had been deprived of his right to life. The Ninth Circuit held that "deliberate indifference to or reckless disregard for, a person's right to life and personal security" was enough to state this claim, but the Supreme Court reversed. The Court emphasized that due process was mostly a guarantee against arbitrary and abusive government power. Justice Souter explained that ever since *Rochin v. California,* "we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." This admittedly imprecise standard was not subject to "mechanical application." In fact, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." Justice Souter was not prepared to say whether something more than negligence, but less than intentional conduct, "such as recklessness or gross negligence" can ever reach the "point of conscience-shocking." Therefore, the Court held that the circumstances must be analyzed before deciding whether there was a due process violation. Each situation is different, such as with a custodial prisoner, mental patient, or in a prison riot; accordingly, the conduct that rises to the level of conscience-shocking will vary. In this police chase scenario, the Court granted extreme latitude to state officials. Under these difficult circumstances, which demanded split-second decision making, just as in prison riots, the police did not violate substantive due process through conscience-shocking conduct unless they were motivated by an actual purpose to do harm.

Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994) (re-examining the Court's deliberate indifference standard in light of *Collins*, and finding that the conduct must shock the conscience).

229 *Id.* at 836-37.
230 *Id.* at 838-40.
231 *Id.* at 845-46.
233 *Lewis*, 523 U.S. at 846.
234 *Id.* at 850.
235 *Id.*
236 *Id.* at 849.
237 *Id.* at 850-51.
238 *Id.* at 853-54. Contrast the results in *Lewis* to *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, police officers shot an unarmed teenager who was fleeing a burglary of an unoccupied house. *Garner*, 471 U.S. at 3-4. The Court held that the shooting was a "seizure" within the meaning of the Fourth Amendment. *Id.* at 7. Consequently, it applied the Fourth Amendment "reasonableness standard" and found that, under these circumstances, the use
The state-created danger cases drew two lessons from Lewis. Although the courts did not conclude that the police chase standard (intent to do harm) applied in other situations, the courts overlaid “shocks the conscience” onto existing tests. At the same time, they also took note of Justice Souter’s observation that what shocks the conscience in one context, does not necessarily shock it in another.239 Souter conceded in Lewis that “the measure of what is conscience-shocking is no

of force to stop the fleeing suspect was unreasonable:

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Id. at 3.

In light of the Court’s stated preference for a more particularized constitutional provision over a generic due process claim, see Graham v. Connor, 490 U.S. 386, 395 (1989), the “seizure” argument was raised in Lewis, but to no avail. Lewis, 523 U.S. at 842–43. The Lewis Court found that there is a Fourth Amendment seizure only when there is “a governmental termination of freedom of movement through means intentionally applied.” Id. at 844. Shooting to stop a fleeing suspect on foot is a “seizure,” but crashing into a fleeing car, or the passenger on a motorcycle, thus effectively stopping them, is not. Even “deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender” will not satisfy the heightened substantive due process standard of intent to injure. Id. at 836. As a result, the passenger in Lewis had no remedy for death by a wild police chase.

In a variation on the themes of automobiles and shootings, a newspaper analysis of citizen deaths and injuries in shootings in Harris County, Texas, revealed that deputies shot twenty-two shoplifters, speeders, innocent people, and others “by firing on vehicles in violation of the deputies’ own training.” Lise Olsen & Roma Khanna, Deputies Shot 22 in Cars from ’99 to ’04, HOUS. CHRON., June 6, 2004, at A1, available at LEXIS, News Library. In at least seven of the cases, “the deputies deliberately placed themselves in danger by stepping in front of a suspect’s car or truck and then firing in self-defense.” Id. The investigation also showed that deputies frequently fired after deliberately blocking the paths of cars whose drivers had committed minor property crimes, such as stealing from parked cars. Id. Three shootings involving more serious crimes involved authorization to end a police chase with the use of lethal force. Id. Even by the flawed reasoning of Lewis, these automobile-related shootings should be evaluated under the Fourth Amendment reasonableness test, rather than the Fourteenth’s “shock the conscience” standard.

239 See, e.g., Rivas v. City of Passaic, 355 F.3d 181, 202–03 (3d Cir. 2004) (Ambro, J., concurring in part) (reevaluating the Kneipp state-created danger test in light of Lewis); Waddell v. Hendry County Sheriff’s Office, 329 F.3d 1300, 1305–06 (11th Cir. 2003) (observing that a plaintiff injured in a non-custodial setting must show deliberate indifference at the very least although it may not be conscience-shocking enough); S.S. v. McMullen, 225 F.3d 960, 964 (8th Cir. 2000) (surmising that deliberate indifference may shock the conscience in some situations, but not under these circumstances).
calibrated yard stick." While only a level of behavior that was egregious and outrageous, "shocks the conscience," everything depended on context: "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." This particularized analysis led the Court in *Lewis* to conclude that deliberate indifference was an adequate standard for failure to protect someone in custody, but that a prison riot or a high-speed police chase required heightened degrees of culpability.

At its extreme, the *Lewis* holding virtually cut off state-created danger claims arising out of police chases. In 2001, the Eighth Circuit decided *Helseth v. Burch*, a case in which innocent bystanders were killed by a drunken driver fleeing in an extended police chase. Several squad cars pursued at a speed of eighty to one-hundred miles-per-hour, over an extended time and route, until the drunken driver crashed into the truck of a third party, leaving one passenger dead and rendering the truck's driver a quadriplegic, while seriously injuring three juveniles in the pursued car.

*Helseth* revolved entirely around "the proper culpability standard." It overruled a distinction that an earlier panel decision made between types of high-speed police chases. In *Lewis*, the Supreme Court emphasized the importance of giving maximum latitude to police officers in an emergency situation where they had no opportunity to actually "deliberate" before making a decision to engage in a chase. The Eighth Circuit in *Feist v. Simonson* had seized on this rationale to make a distinction between sudden chases, where there was no opportunity to "deliberate" and situations in which the pursuit goes on long enough that there should be some opportunity to reflect about the risks entailed. Sitting en banc, however, the court of appeals reconciled all police chases under a single standard. *Helseth*’s gloss on *Lewis* was that the intent-to-injure standard applied regardless of any other factor, such as "the length of the pursuit, the officer’s training and experience, the severity of the suspect’s misconduct, or the perceived danger to the public in continuing the pursuit."
Helseth demonstrates how culpability can become the single determinant of a state-created danger case. Based on Justice Souter's admonitions about variability, however, Lewis does not transform the danger doctrine entirely. Outside of the emergent police chase (or ordinary workplace safety), the analysis properly centers on the constitutional heart of the theory. That core is located in the question of whether the defendant has used the authority of the state to put someone in a worse position than they otherwise would occupy, and consequently owes them an affirmative duty of protection. It is true that like any other provision of the Constitution, the Due Process Clause incorporates its own state-of-mind requirement. The Court, moreover, clearly intends to limit protection even from conduct animated by deliberate indifference to circumstances where the government action can be said to be arbitrary and therefore conscience-shocking. The rhetorical point is that the cause of action is to be saved for truly egregious trips into the snake pit; however, this should not be taken as an excuse to reduce further the narrow applications of an already stingy doctrine.

VII. SPECIAL PROBLEMS: QUALIFIED IMMUNITY AND MUNICIPAL LIABILITY

Like all constitutional claims, state-created danger due process actions must be brought through the § 1983 remedy. While the underlying constitutional violation must be established to prevail, in addition, the statute has its own elements. For example, individual officials enjoy a defense of "qualified immunity" that the Court has read into the statute.249 This defense protects officials from liability, and even from litigation, unless they violate a law that was "clearly-established" at the time of their conduct.250 Municipalities, on the other hand, cannot claim any such immunity defense.251 However, they are not liable simply because they employ a constitutional tortfeasor; instead, government "policy or custom" must be the "moving force" behind the constitutional violation.252 This is not easy to establish, especially when the claim is based on governmental "inaction" rather than "action." State-created danger cases raise difficult questions for the defense of qualified immunity and for the proof of municipal liability. In particular, this Article focuses on two special problems: (1) the effect of changing constitutional standards on the qualified immunity defense; and (2) the significance of disparate liability findings for the city and its officials.


251 Owen v. City of Independence, 445 U.S. 622, 638 (1980) (noting that a municipality has no immunity and may not assert the good faith of its officers as a defense).

The special problem for qualified immunity relates to the second of a two-part analysis of that defense. Ever since Siegert v. Gilley, the first step is to determine if a constitutional right has been violated at all. This Article has addressed that substantive issue. If the allegations do state a constitutional violation, however, then the court continues and inquires whether such a right was "clearly established" at the time of the conduct in question. As an offshoot of the latter step, the court also determines whether a reasonable person in the state officer’s position would have been aware of the "clearly-established law." Unless a plaintiff can overcome all aspects of the defense, the official is immunized from further litigation and from paying compensatory damages.

As the courts of appeals accepted and then refined the state created danger doctrine, the questions of just what law is "clearly-established," and when, arose. Qualified immunity law requires that the legal principle go beyond a bare level of generality and be established with a certain degree of specificity. On the other hand, in Hope v. Pelzer, the Supreme Court recently admonished jurists not to demand too much particularity or factual similarity between precedent and the case at bar. Justice Stevens opined that the purpose of qualified immunity was to put officers "on notice their conduct is unlawful." This “fair warning” requirement may be satisfied “even in novel factual circumstances.” The Supreme Court has also rejected a version of “clearly-established law,” which would depend only on its own decisions or a controlling precedent in the same circuit in which the case

255 See supra Parts III–VI.
256 Saucier, 533 U.S. at 201.
257 Anderson v. Creighton, 483 U.S. 635, 644 (1987) (requiring objective reasonableness for qualified immunity even in Fourth Amendment “unreasonable” search case); Mitchell v. Forsyth, 472 U.S. 511, 517 (1985) (explaining that the law has to be clear enough that a reasonable officer would understand that the disputed conduct violates a right) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); id. at 818 (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known.”).
258 Harlow, 457 U.S. at 817–18 (reasoning that officials should be able to avoid the costs of suit and discovery if their conduct was objectively reasonable).
259 Anderson, 483 U.S. at 639–40.
261 Id. at 741.
262 Id. at 739 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).
263 Id. at 741.
arose. Law that is supported by a consensus of the circuits also may be deemed "clearly-established."\(^{264}\)

We have seen that various courts have "refined" or added elements to previously existing tests. For example, in 1996, the Third Circuit articulated a four-part test for state-created danger in *Kneipp v. Tedder*.\(^{265}\) Without abandoning that formula, the court of appeals subsequently modified some of its elements and suggested that after *Lewis*, all substantive due process violations had to "shock [] the conscience."\(^{266}\) What is the effect of such shifts in doctrine on the qualified immunity defense? Some circuits show little concern about "refinements" of the state-created danger doctrine. The Tenth Circuit, for example, explained in *Currier v. Doran*\(^{267}\) that its decision to deny qualified immunity to one of the defendants would not be "altered to the extent that some of [its] pre 1995 cases can be interpreted to not require 'conscience-shocking' behavior."\(^{268}\) In part, the court of appeals rationalized its conclusion by citing a 1992 Supreme Court case, *Collins v. Harker Heights*,\(^{269}\) which already demanded that the conscience be shocked in a worker safety substantive due process case. The court cited *Collins* as controlling precedent and a case "on point" for the case before it.\(^{270}\) The court’s second justification for dismissing the defense was even more interesting: "In addition, the shock the conscience requirement is an additional hurdle for plaintiffs attempting to prove liability."\(^{271}\) Therefore, the defendants could not claim that they had no fair notice of a standard that was even more generous to them than that which may have applied before the "shock the conscience" element became

\(^{264}\) See *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (en banc) (per curiam) (*McClendon II*), cert. denied, 537 U.S. 1232 (2003) (grudgingly concluding from *Wilson v. Layne*, 526 U.S. 603, 617 (1999) that the Fifth Circuit was required to consider controlling precedent from the Supreme Court or its own circuit, but also "a consensus of cases of persuasive authority" in applying qualified immunity to a state-created danger lawsuit).

\(^{265}\) 95 F.3d 1199, 1208 (3d Cir. 1996).

\(^{266}\) See *Estate of Smith v. Marasco*, 318 F.3d 497, 507 (3d Cir. 2003) (noting that the Third Circuit "refined the third and fourth prongs of the state-created danger test" in *Morse v. Lower Merion School District*, 132 F.3d 902 (3d Cir. 1997), and the Supreme Court held in *Lewis* that liability for a police chase attached only if the conduct "shocked the conscience," 523 U.S. 833, 834 (1998), a standard which *Miller v. City of Philadelphia*, 174 F.3d 368, 374–75 (3d Cir. 1999), suggested might apply to all substantive due process cases).

\(^{267}\) 242 F.3d 905, 924 (10th Cir. 2001).

\(^{268}\) *Id.* at 924 n.8.


\(^{270}\) *Currier*, 905 F.3d at 924 n.8.

\(^{271}\) *Id.*
“clearly-established.” In other words, defendants could not complain of a change that worked to their advantage.

If, as this Article suggests, the courts of appeals ignore the byways and focus on the highways along the route into the snake pit, the “fair notice” reasoning of the Tenth Circuit should prevail. Differences that do not place a more onerous burden on defendants do not deprive them of fair notice of the illegality of their conduct. Therefore, defendants should not enjoy a windfall defense from the refinement of standards that are already widely accepted in the circuits.

The second special problem concerns municipal liability and the possibility of disparate results in proof of liability against the individual officers and the government. As in any § 1983 case, the separate municipal liability standard applied in state-created danger scenarios may lead to disparate, but not necessarily inconsistent, results: individuals may be liable, but there is no proof that the city was the “moving force” behind the violation; or the municipality may be liable, while the officials are shielded by qualified immunity. Because the standard for municipal liability is so difficult, it is not surprising that a city may escape liability even though the individual officers are found guilty. For example, Monfils v. Taylor involved a confidential informant who was gruesomely murdered after police officials released a tape with his voice on it to the violent subject of the tip. Monfils’s frantic calls to prevent this occurrence, and the promises made to him, fell by the wayside as “the left hand did not know—or much care—what the right hand was doing.” The Seventh Circuit upheld a jury verdict against the deputy who released the tape, but it found insufficient evidence that the city had “ratified” his action. The court of appeals therefore nullified the municipal liability part of the jury’s verdict.

Kallstrom v. City of Columbus, on the other hand, was a pure municipal liability case. Apparently believing it was obligated to do so, the City released to defense counsel for a drug-related gang detailed personal information from the personnel files of a number of undercover police officers. Among other rulings, the Sixth Circuit found liability under the state-created danger theory. Because

272 Id.; see also Malik v. Brown, 71 F.3d 724 (9th Cir. 1995); Marsh v. Arn, 937 F.2d 1056, 1066 (6th Cir. 1991) (rejecting defendants’ argument that the law was not clearly established at the time of the violation because a subsequent higher standard of liability “does not preclude a finding that defendants were on notice” that their conduct was “actionable” at the time of the original, easier, test); Brown v. Glossip, 878 F.2d 871 (5th Cir. 1989).

273 165 F.3d 511 (7th Cir. 1998).

274 Id. at 513.

275 Id. at 517–18.

276 Id. at 518.

277 136 F.3d 1055 (6th Cir. 1998).

278 Id. at 1059.

279 Id. at 1067.
the lawsuit was against the City, there was no discussion of qualified immunity or "clearly-established" law. The only issue was whether the release, putting the officers in the way of danger from the gang members, was a constitutional violation.\(^{280}\)

Where a municipality is "held independently liable for a substantive due process violation," even though "none of its employees are liable,"\(^{281}\) there might be a City of Los Angeles v. Heller\(^{282}\) problem.\(^{283}\) That case involved a jury verdict for a city police officer who was accused of using excessive force during an arrest, and against the municipality.\(^{284}\) In a summary disposition, the Court dismissed the idea that the disparity was a product of qualified immunity for the individual officer.\(^{285}\) Instead, it explained that there was an inconsistency because the jury believed that the plaintiff did not suffer a constitutional injury at all (hence, the individual officer's verdict), while at the same time holding the city liable: "[The city was] sued only because they were thought legally responsible for [the officer's] actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that [the city] could be liable ...."\(^{286}\) The opinion went on to state, that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."\(^{287}\) In other words, in the absence of the kind of excessive force that violated the Constitution, the imperfections in the city's regulations caused no harm.\(^{288}\)

\(^{280}\) Id. at 1059.

\(^{281}\) Brown v. Pennsylvania, 318 F.3d 473, 482 (3d Cir. 2003).

\(^{282}\) 475 U.S. 796 (1986) (per curiam).

\(^{283}\) But see Kneipp v. Tedder, 95 F.3d at 1213 ("The precedent in [the Third Circuit] requires the district court to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer.").


\(^{284}\) Heller, 475 U.S. at 798.

\(^{285}\) Id.

\(^{286}\) Id. at 799.

\(^{287}\) Id.

\(^{288}\) The dissent, however, complained that there was no inconsistency between the jury's finding that the officer had carefully followed departmental policy, and its condemnation of the city's policy of "escalating" force to effect an arrest (culminating in a choke hold). Id. at 802 (Stevens, J., dissenting). The officer's use of force may not have been "unreasonable 'in the light of all the surrounding circumstances,'" precisely because those circumstances included his adherence to departmental policy. Id. at 803. On the other hand, a jury could find the city liable for its "escalating force" policy without being guilty of inconsistency in this bifurcated trial. Id. at 804. Justice Stevens opined:

[I]f the Court's unprecedented, ill-considered, and far-reaching decision happens to be correct, defendants as a class have been presented
**Heller** must first be distinguished from a situation in which the only reason for the disparate conclusions is the defense of qualified immunity. Municipalities may be liable because they do not share the individual defense of qualified immunity, while the officers who violated the Constitution before the law became "clearly established," may go free. The harder question, however, arises when there is some other "failure of proof" against the individual officer, for example, on the state-of-mind prong. The circuits are split about the meaning and scope of **Heller**. In *Fagan v. City of Vineland (Fagan I)*, the court of appeals held that, despite **Heller**’s Fourth Amendment ruling, in substantive due process cases "a

with a tactical weapon of great value. By persuading trial judges to bifurcate trials in which both the principal and its agents are named as defendants, and to require the jury to bring in its verdict on the individual claim first, they may obtain the benefit of whatever intangible factors have prompted juries to bring in a multitude of inconsistent verdicts in past years; defendants will no longer have to abide the mechanisms that courts have used to mitigate and resolve apparent inconsistencies. Perhaps that is an appropriate response to the current widespread concern about the potential liabilities of our municipalities, but I doubt it. *Id.* at 807–08 (footnote omitted).

This was not an issue in **Heller** because the individual official’s defense was never submitted to the jury. *Id.* at 798.

See, e.g., *Brown v. Lyford*, 243 F.3d 185, 191 n.18 (5th Cir. 2001) (distinguishing **Heller** from situation in which qualified immunity protects the individual officer, but does not apply to the city).

See, e.g., *Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002). **Fairley** recognized that disparate results between individual and municipal liability may occur either where "the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof." *Id.* at 917 n.4. See also *Barrett v. Orange County Human Rights Comm’n*, 194 F.3d 341, 350 (2d Cir. 1999); *Cannon v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994) ("Supervisory liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury."); *Cannon v. Taylor*, 782 F.2d 947, 951 (11th Cir. 1986) (considering municipal liability for failure to train after individual defendant officer found not liable because merely negligent). In *Barrett*, no one acted alone to violate rights, but the court recognized that "the combined acts or omissions of several employees acting under a governmental policy or custom may violate" the Constitution. *Id.* (quoting *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985)). Accordingly, the Second Circuit agreed with its sister circuits that a municipality may be liable even if individual officers are not liable, so long as the injuries complained of are not attributable solely to the actions of named individual defendants.


22 F.3d 1283 (3d Cir.), *reh’g granted*, 22 F.3d 1296 (3d Cir. 1994) (en banc) (*Fagan II*).
municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution."

While *Fagan* itself is flawed, its point, nonetheless, is a good one when properly applied. The *Fagan* court was prepared to hold the municipality liable for the disastrous police chase because "its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty." The court opined that the claim against the city was independent of a claim against the officer, who could only be liable if his conduct "shock[ed] the conscience." The problem with that analysis is that after *Lewis* it may be assumed that somewhere, somehow, some conduct or policy has to shock the conscience. Moreover, for a police chase case like *Fagan*, *Lewis* allows the police great latitude and requires proof of an actual intent to injure. What does this mean for a *Heller* problem? If the individual officer only acts with deliberate indifference and not with an intent to injure, how can the city's deliberate indifference to the need to train that officer in proper police chase procedure provide the missing element of intent?

Outside of the high-speed chase context, however, disparities between individual and municipal liability results raise fewer problems. The Supreme Court also held in *Lewis* that what constitutes shocking, arbitrary government behavior varies by the context. As the Court stated, "Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . ." The converse clearly is true as well; the *Lewis* Court held that the circumstances must be analyzed before deciding whether there is a due process violation. It may be that in a context where something less than an intent to injure shocks the conscience, the policymakers' deliberate indifference and failure to train will suffice, even if the individual officer was merely negligent, or grossly negligent, or even following the existing policy of the municipality.

In her analysis of *Heller* and state-of-mind issues, Professor Kritchevsky cogently argues that there must be room for finding municipal liability even where no individual defendant has the state of mind required for the constitutional violation. To do otherwise, she observes, is to ignore the worst kind of systemic

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294 Id. at 1294.
295 Id. at 1292.
296 Id. *Fagan II* conceded that the "shock the conscience" standard applied to individual liability after *Collins v. Harker Heights*, 503 U.S. 115 (1992), which redefined or at least clarified "the relevant inquiry when plaintiffs rely on substantive due process as the basis of the constitutional tort." *Fagan II*, 22 F.3d at 1303.
298 Id. at 850–51.
governmental abuses which may occur where "[a] culpable policymaking official [makes] a policy that is carried into effect by lower-ranking personnel who act blamelessly."300 She proposed that a municipality should be held liable even if the official lacks the necessary mental state if the policy makers can be said to have the requisite "degree of culpability."301 In other words, the constitutional element will be satisfied so long as the moving force behind the injury meets the standard.

Application of this municipal liability analysis to the state-created danger case of Kallstrom v. City of Columbus302 illustrates the soundness of Kritchevsky's argument. The city's policy of releasing identifying information was arbitrary government behavior that "shocked the conscience," regardless of the mental state of the individual officers who complied with that policy. The individual defendants were not mentioned in the Third Circuit's decision. The irrelevance of any potential disparity between their mental states and the culpability of the city was merely implicit in that case, which only concerned the liability of the city.

Consider also a hypothetical based on White v. Rochford:303 What if a city's police department totally failed to train their officers on the protocol for handling children left alone on the roadside in cars whose drivers were arrested? Surely, the need for such training is every bit as obvious as the need to teach police officers how to use weapons in effecting an arrest.304 If that failure to train caused a police officer to abandon children whom he had thrown into the snake pit, and the minors were seriously injured as a consequence, I would argue that the whole chain of events satisfies the constitutional test. The police exercised their authority to remove the driver and placed the children in a peril that they otherwise would not have faced; if serious injury resulted, and even if the individual officer was so untrained that he was merely negligent in not making arrangements for the children, the municipality's failure to train him for this obvious and foreseeable circumstance was not only deliberately indifferent, but under those circumstances, it "shocks the conscience" and constitutes the kind of arbitrary government conduct actionable under the Due Process Clause of the Fourteenth Amendment.

300 Id.
301 Id. at 470.
302 136 F.3d 1055 (6th Cir. 1998).
303 592 F.2d 381 (7th Cir. 1979).

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed the officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious" that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Id. at 390 n.10 (citation omitted).
CONCLUSION: PASSING THE SMELL TEST FOR A CONSTITUTIONAL VIOLATION

While every other circuit has made some kind of peace with the state-created danger doctrine, the Fifth Circuit continues to dither. It has taken advantage of the differences or “refinements” in the circuit tests for state-created danger to avoid any ruling on whether, for purposes of qualified immunity that doctrine is “clearly-established” by overwhelming precedent in sister courts. Consequently, the Fifth Circuit faces the Texas A&M bonfire cases with little or nothing settled.

In 2002, the Fifth Circuit decided McClendon v. City of Columbia (McClendon II). In its rehearing en banc, it reversed the panel’s opinion by the late Judge Politz, which explicitly accepted the state-created danger doctrine. The unsuccessful plaintiff was a man who had been shot by a police informant, with the gun loaned to the assailant by a City of Columbia police detective, for the purpose

305 See Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001); Kallstrom, 136 F.3d at 1066–67; Frances-Colon v. Ramirez, 107 F.3d 62 (1st Cir. 1997); Kneipp v. Tedder, 95 F.3d 1199, 1201, 1208 (3d Cir. 1996); Uhlig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995), cert. denied, 516 U.S. 1118 (1996); Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir.) (en banc), cert. denied, 516 U.S. 994 (1995); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir.), cert. denied, 510 U.S. 947 (1993); Dwares v. City of New York, 985 F.2d 94, 98–99 (2d Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 54–55 (8th Cir. 1990); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (11th Cir. 1989), cert. denied, 494 U.S. 1066 (1990), and overruled on other grounds, White v. Lemacks, 183 F.3d 1253 (11th Cir. 1999); Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1990), cert. denied, 408 U.S. 938 (1990). No circuit has rejected the doctrine, even if the case at bar failed to meet the standard.

306 See Beltran v. City of El Paso, 367 F.3d 299 (5th Cir. 2004) (finding it unnecessary to reach state-created danger theory because pleading in mishandling of 9-1-1 call alleged no more than negligence); Priester v. Lowndes County, 354 F.3d 414, 422 (5th Cir. 2004) (not reaching state-created danger issue because waived on appeal); Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244 (5th Cir. 2003) (involving a middle school child killed in gang-related fight school officials failed to break up); Scanlan v. Tex. A&M Univ., 343 F.3d 533 (5th Cir. 2003) (acknowledging that the court of appeals has never recognized the state-created danger doctrine, but reversing dismissal and remanding to district court for further proceedings); McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308 (5th Cir. 2002) (concluding that conduct did not amount to deliberate indifference where bus driver who transported special education students with behavioral problems was severely injured in an assault); Morin v. Moore, 309 F.3d 316 (5th Cir. 2002) (finding no evidence defendant put victims in more dangerous position).

307 See infra notes 331–32 and accompanying text.

308 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam) (McClendon II) (vacating panel decision and finding detective was entitled to qualified immunity), cert. denied, 537 U.S. 1232 (2003).

309 Id. at 319. The vacated decision had expressly embraced the state-created danger theory. McClendon v. City of Columbia, 258 F.3d 432, 441–43 (5th Cir. 2001) (McClendon I), vacated & reh’g en banc granted, 285 F.3d 1078 (5th Cir. 2002).
of the informant’s using it to “protect” himself from the ultimate victim. While reversing the panel, McClendon nonetheless declined to settle the state-created danger theory issue. In the end, it was not clear whether the Fifth Circuit was tempted to reject the doctrine out of hand, or whether it simply wanted to “duck the issue” yet again.

The McClendon court chose to emphasize differences rather than similarities although it made the following concession:

[M]any of our sister circuits have read [DeShaney’s] language to suggest that state officials can have a duty to protect an individual from injuries inflicted by a third party if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual’s injury.

The majority noted that the cases arose in a “variety of factual contexts” and reflected “a variety of tests” designed to satisfy the standard.

These dissimilarities allowed the Fifth Circuit two bites at the apple of the qualified immunity defense. First, the court of appeals found no constitutional violation. According to the court, the allegations about the detective’s loan of his gun to the informant amounted to no more than mere negligence. Far from being sufficient to violate substantive due process rights, “at a minimum,” the standard required to find a violation is “deliberate indifference,” even assuming the state-created danger doctrine to be a viable theory at all.

Judge Parker dissented, asking, “What does the majority think Loftin intended to do with the gun provided to him by Detective Carney — place it on his wall as a souvenir?” He answered, “Of course not, gang members who ask for guns typically have violent intentions as any competent police officer knows.” To the dissent, giving a police gun to an informant was much worse than “inadvisable.”

310 McClendon II, 305 F.3d at 319.
311 Id. at 334 (Parker, J., dissenting). Judge Parker and his fellow dissenters observed, “Over the last ten years, at least seven state-created danger cases have arrived in our Circuit, but we have never taken a position on whether the state-created danger theory is a valid one, choosing instead to duck the issue.” Id.
312 Id. at 324.
313 Id. at 324–25.
315 McClendon II, 305 F.3d at 326.
316 Id. at 339 (Parker, J., dissenting).
317 Id.
318 Id. at 340 (quoting majority).
indeed, it was "criminal." He thought that a rational jury could well find culpability way beyond negligence.

The Fifth Circuit rejected McClendon's claim on a second basis too: "Even if we were to find . . . a viable constitutional claim under current law . . . [the detective's] conduct was not objectively unreasonable in light of clearly established law at the time of his actions." The Fifth Circuit had to acknowledge two difficulties in their position. The first was that a law may be considered "clearly established" even without a Supreme Court decision or controlling precedent in the litigant's own circuit. Second, the court conceded that the six circuits that had considered the issue by the time of this conduct had recognized the DeShaney state-created danger exception (and none had rejected it). Nonetheless, the majority insisted that the trend in its sister circuits did not constitute a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." Instead of consensus, the Fifth Circuit saw disagreements about "the specific nature of that right," noting that other courts "disagreed as to the appropriate mental state required to hold a state actor liable for harms inflicted by third parties." Some circuits adopted "deliberate indifference," one embraced "a slightly different 'gross negligence' test," and still another "hinted that intent to injure might be required." Even though these standards all demanded more than simple negligence, the Fifth Circuit emphasized the distinctions rather than the similarities. Moreover, the McClendon majority found the factual dissimilarities among the cases "significant." In spite of the Supreme Court's recent reminder in Hope v. Pelzer that a novel factual situation does not defeat a claim of "clearly established law," the Fifth Circuit found that their new circumstances made a difference.  

319 Id. In his separate dissent, Judge Wiener noted that he was equally unbelieving that the majority could characterize the facts as nothing more than negligence. Rather, he saw evidence of recklessness and deliberate indifference to the constitutional right to inviolate bodily integrity. In fact, Judge Wiener doubted that this was a state-created danger case at all, and thought that it implicated instead the long-established right to bodily integrity, raising only a causation question about the link between the arming and the injury. Id. at 342–43 (Wiener, J., dissenting).

320 Id. at 327.
321 Id. at 329.
322 Id. at 330.
323 Id. at 329 (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).
324 Id. at 331.
325 Id. (quoting L.W. v. Grubbs, 974 F.2d 119, 122–23 (9th Cir. 1992)).
326 Id. (quoting Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987)).
327 Id. (quoting Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993)).
328 Id. at 332.
330 McClendon II, 305 F.3d at 332.
The Fifth Circuit’s particularly narrow reading in *McClendon* of clearly established law may keep litigants at a stalemate. Unless, and until, the Supreme Court makes its pronouncement or the other circuits shake down to a remarkable degree of uniformity, each new case will face the same barrier: We do not say whether the doctrine exists, and even if it does, our not saying makes it not clearly established law.

The Fifth Circuit’s next opportunity to settle the issue may come in the appeal of the Texas A&M bonfire cases. In the early morning of November 18, 1999, dozens of students were working to construct a bonfire “stack,” using thousands of logs that already reached fifty-five feet high and weighed millions of pounds, to be burned, as was the tradition of many years, on the night of the A&M-UT football game. Tragically, the stack collapsed, killing twelve people and injuring twenty-seven others. The bonfire is an old and revered tradition in Texas and the collapse was very traumatic for the school and for the community. As a result, the bonfire tragedy has been the subject of a blue-ribbon investigation convened by Texas A&M, which resulted in a report by the Special Commission.

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331 *See id.* at 333 (Jolly, J., concurring). Although concurring, Judge Jolly agreed with the part of Judge Parker’s dissent that criticized the majority for not reaching the specific contours of state-created danger causes of action and leaving it in doubt again. *Id.; see supra* note 311 and accompanying text (summarizing Judge Parker’s dissent).

332 Following *McClendon*, a panel hearing an appeal from the first dismissal of the Texas A&M bonfire cases concluded that although the Fifth Circuit had never explicitly adopted state-created danger doctrine, it had set out its elements in a 1994 case. *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 537 (5th Cir. 2003) (citing *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994)). These components were proof that the official used state authority “to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff.” *Id.* at 537–38. “[T]o establish deliberate indifference, . . . the ‘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.” *Id.* at 538 (quoting Piotrowski v. City of Houston, 237 F.3d 537, 585 (5th Cir. 2001)). The *Scanlan* court concluded that, construed in the light most favorable to the plaintiff, the facts pled were enough to preclude summary judgment. *Id.*

On the other hand, a subsequent panel interpreted *Scanlan* in a very limited sense. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 n.5 (5th Cir. 2003). *Rivera* explained that the remand in *Scanlan* did not mean that the Fifth Circuit had, at long last, finally embraced the state-created danger doctrine. *Id.* On remand from the Fifth Circuit decision in *Scanlan*, the district court observed that “[t]he Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory,” but also maintained that the new course set by *Scanlan* was repudiated in *Rivera*. *Davis v. Southerland*, No. Civ.A.G-01-720, 2004 WL 1230278, at *4 (S.D. Tex. May 21, 2004).

333 *Brief of Appellants, Scanlan, Breen, Kimmel and Davis* at 5, *Scanlan* (No. 02-41166).

334 *Id.* at 8.

335 *See SPECIAL COMMISSION ON THE 1999 TEXAS A&M BONFIRE, FINAL REPORT, http://
A number of lawsuits were brought on behalf of the victims, alleging, inter alia, state-created danger, but the district court judge twice dismissed the federal claims. Because of the intervening court of appeals ruling in *Scanlan v. Texas A&M*, which appeared to endorse the state-created danger theory, the dismissals rested on different grounds. On his second consideration, the judge assumed that state-created danger stated a claim in the Fifth Circuit. The bonfire trial court identified two basic criteria for this doctrine. First, the state actors had to increase the danger to the victims. Second, they had to do so while acting with deliberate indifference. Deliberate indifference is defined as "'a lesser form of intent' rather than a 'heightened form of negligence.'" This state of mind is shown by proof that the "environment created by the state actors [is] dangerous; they . . . know it is dangerous; and . . . they . . . used their authority to create an opportunity that would not otherwise have existed for the [third party's] crime to occur." In essence, the state actors have to put someone in danger and to strip them from their ability to defend themselves or to be rescued by others. Under the increased danger and deliberate indifference criteria, the district court now found that there were fact issues that precluded any dismissal as a matter of law. Despite the "fact questions" remaining, however, the defendants still prevailed on the second prong of qualified immunity. The district court found that whatever the status of the law today, it was not clearly-established in 1999. As a result, the A&M officials retained their qualified immunity and the lawsuits were dismissed once again.

The bonfire tragedy is a confounding test case for state-created danger in the Fifth Circuit. The scale of the tragedy and the symbolic significance of a revered tradition alone ensure interest. Narrated from one point of view, it resembles

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337 343 F.3d 533 (5th Cir. 2003).

338 *Davis*, 2004 WL 1230278, at *5.

339 *Id.* at *4.

340 *Id.* (quoting Lefall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994)).

341 *Id.* (quoting Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994)).

342 *Id.*

343 *Id.* at *1.

344 The tradition began in 1909 with the burning of a trash heap, and has continued and grown for 90 years until it has become "one of most cherished traditions" of Texas A&M, "uniting students, administrators, alumni and the surrounding community each September,
nothing so much as, at the worst, a tort with horrible consequences, but one which belongs conceptually on the other side of the federal constitutional line. The plaintiffs' account, however, is quite different and is touched with a much greater sense of abuse of government power.

In their first motions to dismiss, the court relied on a version of the facts reflected by the findings of the A&M-sponsored commission. According to the district court's first opinion, the investigatory commission's Final Report characterized the collapse as a "containment failure" in the first tier of logs caused by improper binding of the support wires and by "aggressive wedging of second tier logs into the first tier." The producing factors included "the absence of a pro-active risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology." The Final Report further indicated to the district court that "students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls." No single failure caused the collapse, but rather it was a culmination of "decisions and actions taken by both students and University officials over many, many years." This description of the tragedy sounds like an ordinary, if terrible, tort.

By contrast, counsel for the Scanlan, Breen, Kimmel, and Davis plaintiffs painted a more foreboding picture. Bonfire was a University-sponsored event that A&M had used as a recruiting and promotional tool over the years. The University controlled the location and existence of the Bonfire, and was fully cognizant that building the stack was an extremely dangerous activity, fraught with October and November." Five thousand students invested 125,000 hrs each fall to build it and 40,000–80,000 spectators watch it burn. Breen v. Tex. A&M Univ., 213 F. Supp. 2d 766, 769 (S.D. Tex. 2002).

The federal court had dismissed without prejudice the six supplemental state law negligence claims because of its dismissal of the federal claims, declining to exercise its jurisdiction under the circumstances. Id. at 777–78.

Id. at 769.

Id. at 771 (quoting FINAL REPORT).

Id. The Fifth Circuit subsequently criticized the district court for relying on the defendant-sponsored Final Report, which was outside of the record, for its own findings on a motion to dismiss, and reversed in part on that basis. Scanlan, 343 F.3d at 536–37.

Breen, 213 F. Supp. 2d at 771.

Id.

Id. There had been partial collapse in 1994 that failed to trigger a design re-evaluation, perhaps because it was seen to be caused by wet ground, and not by structural problems. Brief of Appellants at 18, Scanlan (No. 02-41166).

Id. at 5, 10. Texas A&M University trademarked the Bonfire logo, and received revenue from sales of t-shirts and memorabilia. Id.

Id. at 12–14.
potential liability for the University. The plaintiffs further contended that despite this control and knowledge, the University consciously and intentionally delegated responsibility for the dangerous activity to unqualified and unsupervised students, whom President Bowen testified were just “children in big bodies.” To make matters worse, one of the foremost engineering schools of the country allegedly deliberately chose to provide no supervision or engineering support for this massive undertaking, even though they knew they had responsibility for the safety of the students involved. The plaintiffs’ final contention was very serious; they alleged that the University sponsored and benefitted from Bonfire, but refused to supervise it properly for the simple purpose of evading potential liability. In other words, they were prepared to put students in the way of harm in order to gain a legal advantage if, and when, that harm occurred.

Counsel for the Self, Comstock, and other plaintiffs outlined the state-created danger doctrine, tracing it from its origins in DeShaney through its development in sister circuits and its treatment in the Fifth. From this review, the plaintiffs concluded that there were two elements to state-created danger: “(1) the state actors created or increased the danger to the plaintiff, and (2) the state actors acted with deliberate indifference.” Alternative formulations of the same test explained that the state actors must have culpable knowledge of the danger and must have used their authority to create that risk. As the Fifth Circuit observed in Johnson v.

Id. at 14–20.
Id. at 20–25.
Id. at 25.
Id. at 26–32.
Id. at 34–36.

Instead of doing what they were supposed to do, the A&M Officials knowingly and deliberately created a danger zone, actively encouraging students to enter — all the while making money on Bonfire and using it to promote A&M. They knew the danger but did not care — “it was the culture of Bonfire to let the students do it.” They justified turning a blind eye because it gave students “leadership experience.” Secretly they feared if they took control, A&M might become liable. So they callously let the children working on Bonfire come into harms’ [sic] way.

Id. at 52.

Consolidated Brief for Appellants in the Self, et al. Case (No. 02-41204) and in the Comstock, et al. Case (No. 02-41222) at 34–40, Scanlan (No. 02-41166) [hereinafter Consolidated Brief].

Id. at 40 (citing McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308, 313–14 (5th Cir. 2002); Morin v. Moore, 309 F.3d 316, 321–22 (5th Cir. 2002)).

Id. at 41. The appellants cited Johnson v. Dallas Independent School District, 38 F.3d 198, 201 (5th Cir. 1994), and the McKinney and Morin opinions, which “subsume[d]” the Johnson factors. Id.
Dallas Independent School District,363 "[T]he key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.'"364

In this Article, I have suggested that the state-created danger doctrine includes the following elements (which can be collapsed together as the Self, Consolidated Brief did, or teased out as stated here): (1) Did state officials exercise authority or power; (2) in such a way that they put someone in a worse position than they would otherwise have occupied; (3) risking and causing a significant harm; (4) with a degree of culpability (which might be deliberate indifference) amounting to conscience-shocking behavior in the factual context? As I noted, the first two properly constitute the heart of the state-created danger doctrine because they define the existence of an affirmative duty in exceptional circumstances. Significant harm may be collapsed into the state-of-mind inquiry, which has assumed new prominence in the last decade.

Do the Bonfire cases pass the smell test, i.e., are they of constitutional stature? Even giving credence to the plaintiffs' version of the facts as is required at an early stage of litigation, this is still a case on the cusp. The allegations (and the testimony to date) certainly indicate a very dangerous situation that was created by A&M officials with apparent awareness of the risks entailed and which in fact led to terrible injuries and loss of life. In this context, however, was their deliberate indifference the kind of conscience-shocking arbitrary government behavior that is subsumed under the Due Process Clause? Texas A&M officials exercised their authority to create danger in a somewhat different sense than in many of the other cases. Although Bonfire was a University-sponsored event built on University property with University money, and University officials selected the student "Redpots" (supervisors) who they put in charge despite their lack of qualifications,365 University officials technically did not send the students who participated up onto the stack. Allegedly, however, high-level officials did create the danger and then abandon the students to the danger, effectively cutting them off from other forms of professional aid.366 The student Redpots were put in charge and the faculty engineers were told to back off.367 If this was done with deliberate indifference to a high risk of serious harm368 because the University wanted to exploit Bonfire to build up the reputation and coffers of a state school, while avoiding potential

364  Id. at 201 (quoting Wideman v. Shallowford Cmty. Hosp., Inc., 826 F.2d 1030, 1035 (11th Cir. 1987)).
365  Brief of Appellants at 21–26, Scanlan (No. 02-41166).
366  Id. at 26–30.
367  Id. at 29–34.
368  Id. at 14–20.
liability for callous disregard of its students’ welfare, a court’s conscience might well be shocked.

The state-created danger cases demonstrate that substantive due process remains a disfavored doctrine. It will not be easy, nor should it be, to hold state officials responsible for incidents that look, smell, and feel like ordinary torts, committed by third parties but with some governmental involvement. By contrast, if appropriate inquiry is focused on elements which reflect the abuse of government power, there will be fewer twists and turns in the road into the substantive due process snake pit.

However, I still maintain that DeShaney, the case that started the lower courts along the state-created danger route, did involve an abuse of government power and was wrongly decided by the Supreme Court. For my critique of the decision, see Oren, State’s Failure, supra note 3.

The United States Supreme Court has granted certiorari in Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004) (en banc), cert. granted, 125 S. Ct. 417 (2004), in which a divided Tenth Circuit upheld a procedural due process claims against a police department which repeatedly failed to enforce a Protective Order. The mother of three young girls alleged that the department’s refusal to take action led to the death of the children whose safety was the subject of that order. In the first decision, a Tenth Circuit panel rejected a substantive due process claim based on a state-created danger theory. Gonzales v. City of Castle Rock, 307 F.3d 1258, 1263 (10th Cir. 2002). The court reasoned that the official inaction in this situation did not cross the line between merely failing to “decrease or eliminate a pre-existing danger” and “affirmative conduct that creates or enhances a danger,” a distinction they found both “subtle” and “critical under DeShaney and its progeny.” Id. The facts were as follows: Jessica Gonzales obtained a permanent restraining order against her estranged husband which excluded him from the family home and prohibited him “from molesting or disturbing the peace of Ms. Gonzales and their three daughters, ages ten, nine, and seven.” Id. at 1261. He was allowed visitation with his daughters every other weekend, and by agreement, for a mid-week dinner visit. On a Tuesday, however, he abducted the girls as they played outside their house without any notice or agreement with their mother. When she found that her children were gone, “she suspected that Simon, who had a history of suicidal threats and erratic behavior, had taken them.” Id. There followed an increasingly frantic ten-hour period, during which Jessica repeatedly requested the police department to honor the mandatory arrest policy incorporated in Colorado statute and in the protective order on file in the central registry (and available to the police department). Officials refused to act each and every time, even when she located Simon and the children for them.

[Finally] at 3:20 a.m., Simon Gonzales drove to the Castle Rock Police Station, got out of his truck, and opened fire with a semi-automatic handgun he had purchased shortly after abducting his daughters. He was shot dead at the scene. The police discovered the three girls, who had been murdered by Simon earlier that evening, in the cab of his truck.

Id. at 1262. The panel found that these circumstances squarely fit the DeShaney mold. Id. at 1262–63. The claim failed to satisfy the very first element of the danger creation test: “[T]he charged state entity and the charged individual actors created the danger or increased plaintiff’s vulnerability to the danger in some way.” Id. at 1263. Failing to enforce the
protective order, in their view, did not create or enhance the danger created by Simon's abduction of the girls. Id. Having disposed of the state-created danger claim, however, the panel went on to consider favorably the argument that Colorado law gave Ms. Gonzales a protected property interest in receiving the promised protective services. It is this claim which garnered the support of a majority of the divided Tenth Circuit, en banc, and which is under consideration in the Supreme Court.

While procedural due process is the only question ostensibly before the Court, it is ineluctably intertwined with the fate of the state-created danger doctrine. Indeed, the "questions presented" by the petitioners are all about whether or not the procedural due process claim is an end-run around DeShaney. See Petition for Writ of Certiorari at *i, Gonzales (No. 04-278). It is unclear how the Court will handle these contentions, and Castle Rock therefore is beyond the scope of the current Article.