THE INCONSISTINCIES OF THE STATE-CREATED DANGER DOCTRINE: WHAT ARE THEY AND HOW DO WE FIX THEM?

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INTRODUCTION

Imagine it is winter and you have been kicked out of a restaurant in the middle of the night because you're drunk and refuse to leave. The police show up and you explain that you are trying to go home but do not have a ride. The police agree to drive you part of the way there so you do not have to walk in the frigid temperature. However, during the ride the officers state they cannot drive you to your home because it is too far outside their patrolling location, so they drop you off on a dark road and advise you to walk toward some nearby lights to ask for directions. Those officers knowingly left you in the cold and, ultimately, you die of hypothermia. It seems obvious that the officers were in the wrong and should be held liable. However, in cases like this, courts often rule that the officers are immune from liability.

In general, the state-created danger doctrine holds government actors liable in situations where they cause danger or aid in furthering an already present danger from a private third party.[1] This doctrine is premised on holding government actors responsible because, had they not engaged in the conduct at issue, the plaintiff would not have been exposed to danger.[2] When you first encounter the facets of the state-created danger doctrine, it may appear intuitive. However, as we will explore in greater detail, this doctrine has many tests, resulting in a muddied and confusing area of law.

The purpose of this Note is to demonstrate how varying tests for the state-created danger doctrine differ, even if the tests have the same elements. There is no uniformity in the process of analyzing the factors, which leads to confusion in the law. This doctrine is one that applies to every citizen because we all encounter state actors every day, whether it be a teacher, police officer, corrections officer, or other type of state actor. Since this doctrine can affect anybody, the confusion

* I'd like to thank D. Benjamin Barros, my faculty advisor, for his mentorship and guidance throughout this process and my entire law school experience thus far. Also, many thanks are due to my community who has supported me through my entire schooling career namely, my parents, siblings, friends, and boyfriend.

1. *See Legal Doctrine of State-Created Danger and Police Liability*, HG.ORG LEGAL RES., https://www.hg.org/legal-articles/legal-doctrine-of-state-created-danger-and-police-liability-38300 (last visited Aug. 7, 2023).

2. *Id.*

surrounding its applicability is not an issue that can be ignored. Ultimately, the United States Supreme Court needs to weigh in on the state-created danger doctrine and formally establish a test to guide proper, uniform application.

I. THE STATE-CREATED DANGER

A. How the State-Created Danger Doctrine was Created

The Due Process Clause of the Fourteenth Amendment provides, "[n]o State shall … deprive any person of life, liberty, or property, without due process of law[.]"[3] In general, there is no violation of the Fourteenth Amendment's Due Process Clause if there is failure by the State to protect a person against private violence.[4] Rather, the language from the Due Process Clause serves as a limitation on the State's ability to act.[5] The Due Process Clause's "language cannot fairly be extended to impose an affirmative obligation on the State."[6] The "guarantee" of rights provided by the Due Process Clause "does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."[7] Therefore, a plaintiff generally cannot bring a suit under the Fourteenth Amendment Due Process Clause because there is no affirmative duty for the State to provide protection from private third parties.[8] A § 1983 claim arises under 42 U.S.C § 1983, and to prevail on a claim, "a plaintiff must show that 'the challenged conduct [is] attributable to a person acting under color of state law' and that 'the conduct must have worked a denial of rights secured by the Constitution or by federal law.'"[9] Section 1983 does not provide a "'source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"[10]

However, the U.S. Supreme Court has stated there are "limited circumstances" in which liability can be imposed on the state and, thus, an affirmative duty to protect people from the dangers of private harm is created.[11]

In *DeShaney v. Winnebago County Department of Social Services*, the Court refused to expand the Due Process Clause of the Fourteenth Amendment to create a duty in order to impose liability on state actors after an infant boy was left severely disabled following many instances of physical abuse from his father, all of which state actors were aware.[12] Joshua, an infant boy, had been beaten multiple times by his father.[13] During two specific instances, Joshua was hospitalized, child

3. U.S. CONST. amend. XIV, § 1.

4. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196-97 (1989).

5. *Id.* at 195.

6. *Id.*

7. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

8. *See* U.S. CONST. amend. XIV, § 1. *See also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

9. Freeman v. Town of Hudson, 714 F.3d 29, 37 (1st Cir. 2013) (quoting Soto v. Flores, 103 F.3d 1056, 1061 (1st Cir. 1997)).

10. Graham v. Connor, 490 U.S. 386, 394 (1989).

11. *DeShaney*, 489 U.S. 189, 198 (1989).

12. *Id.* at 191-92.

13. *Id.*

protective services and other state actors became involved, but Joshua was only ever temporarily removed from the reach of his father.[14] Both of those times, child protective services placed Joshua back in the custody of his abusive father.[15] As part of their analysis, though, the Court discussed two instances in which liability could be imposed on a state actor when harm to a person was done by a private individual.[16] These two instances, special custodial relationship[17] and danger creation theory,[18] could trigger a duty to protect.[19]

First, if a special custodial relationship exists between an individual and the State, there may be an affirmative duty for the State to provide protection.[20] For this exception, the precedent is limited to instances where the State holds citizens against their will because only then is the State affirmatively restraining the citizen from caring for themselves.[21] The second exception, the danger creation theory, is less clearly explained, arising from the Court stating:

> 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 … [the State] placed him in no worse position than that in which he would have been had it not acted at all[.][22]

From these words, the Court—seemingly inadvertently—established a precedent that government officials only have a constitutional duty to protect when they, through their own affirmative actions, create or further a danger.[23]

In response to *DeShaney*, lower courts have frequently discussed whether liability under 42 U.S.C. § 1983[24] can be created when a state actor affirmatively acts and, as a result, places an individual in a position of danger or furthers their

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14. *Id.* at 191-92.

15. *Id.*

16. *Id.* at 197-201.

17. *See id.* at 197.

18. *See id.* at 197-201.

19. *See generally* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 535 (July 2008) ("Although *DeShaney* severely restricts due process by protecting only those whom the state actually takes into custody or those whose situation has been rendered more dangerous by government intervention, *DeShaney* does not affect claims of harm that are more directly attributable to government misconduct.").

20. *See DeShaney*, 489 U.S. at 195.

21. *Id.* at 198.

22. *Id.* at 201.

23. *Id.* ("While the State may have been aware of the dangers … it played no part in their creation, nor did it do anything to render [Joshua] any more vulnerable to [the harms].").

24. A § 1983 claim gives citizens the ability to sue government entities for violating their civil liberties. Section 1983 does not create any rights, but it does, however, remedy violations of protected rights. To make a § 1983 claim, someone must allege (1) an actor was acting under the color of state law, and (2) the act deprives the plaintiff of a constitutionally protected right. *See What Are the Elements of a Section 1983 Claim?*, THOMSON REUTERS (June 13, 2022), https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/. *See also* Brad Reid, *A Legal Overview of Section 1983 Civil Rights Litigation*, HUFF POST (Apr. 14, 2017, 11:12 AM), https://www.huffpost.com/entry/a-legal-overview-of-section-1983-civil-rights-litigation_b_58f0e17ee4b048372700d793.

likelihood of experiencing a danger that otherwise would not exist if not for the state's action.[25] This second instance is now known as the state-created danger doctrine, an exception to the general rule of no liability.[26] Although this exception is frequently litigated, successful claims remain the minority of cases.[27]

B. The State-Created Danger Doctrine is a Judicially Created Doctrine

The state-created danger doctrine is judicially created and most of the discussion of the doctrine is done among the circuit courts and lower courts.[28] Circuits have taken the language from *DeShaney* to create circuit-specific tests for the doctrine.[29] It is important to note, however, that even though the theory of state-created danger arose from *DeShaney*, the U.S. Supreme Court has yet to clearly articulate a test for—or substantially recognize—the doctrine.[30] Unlike the first exception provided in *DeShaney*,[31] the state-created danger doctrine was given no substance for the circuits to form a test.[32] Rather, circuit courts have taken their own liberties in interpreting the language of the U.S. Supreme Court's dicta.[33]

II. DIFFERING TESTS AMONG THE CIRCUITS CREATES VAGUENESS AND DIFFICULTY IN THE APPLICABILITY AND SUCCESS OF THE STATE-CREATED DANGER DOCTRINE

Although the U.S. Supreme Court has not provided much guidance on the state-created danger doctrine, the circuits have analyzed the test, even if they have not yet applied it to a case.[34] Since there is no guidance for what an elemental test for a state-created danger claim *should* be, there are multiple, impactful differences in the tests applied by the circuits.[35] With each circuit having a different test, it begs the question: is one test superior that should be applied uniformly across all jurisdictions? Before a uniform test can be decided upon, it is important to explore the various tests ranging across the circuits.

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

26. *Legal Doctrine of State-Created Danger and Police Liability*, HG.ORG LEGAL RESOURCES, https://www.hg.org/legal-articles/legal-doctrine-of-state-created-danger-and-police-liability-38300 (last visited Aug. 7, 2023).

27. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 1 (2007) https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1418&context=lawreview.

28. *Id.* at 7.

29. *See* Pellicciotti, *supra* note 25.

30. Chemerinsky, *supra* note 27, at 3.

31. The first exception being the special/custodial relationship exception. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

32. *See generally DeShaney*, 489 U.S. 189.

33. Chemerinsky, *supra* note 27, at 15.

34. *Id.*

35. *See Id.* (stating that "[v]arying Circuits have adopted different formulations; not every circuit has announced a multi-part test, but some circuits have done so."). *See also* Pellicciotti, *supra* note 25, at § 2[a] (explaining that "[t]he precise framework for liability under the state-created danger theory varies among the circuits.").

A. The Basic Differences of State-Created Danger Tests

Before examining each circuit's individual test, there are some elementary differences that can be shown just by the complexity of the tests, such as the number of elements. For example, the Tenth Circuit requires the plaintiff to first prove two preconditions: (1) the state made an affirmative action and (2) that affirmative action resulted in private, third-party violence that injured the plaintiff.[36] If those are met, the plaintiff is then required to show:

> (1) [T]he charged state … actor[] created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant['s] conduct put plaintiff as substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.[37]

In total, there are eight elements required for the state-created danger to be raised in the Tenth Circuit.[38] Contrast these eight elements with the mere two required to make a state-created danger claim in the Ninth Circuit: (1) affirmative conduct from the state placing the plaintiff in danger, and (2) state acts with a level of indifference to the known danger.[39] While those are two extremes on the spectrum of tests for the doctrine, other circuits' tests fall somewhere in the middle.

The Sixth Circuit has developed a circuit-wide test consisting of three elements:

> (1) [A]n affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.[40]

But, along with those three elements, some courts in the Sixth Circuit have required the plaintiff to additionally show the "government's conduct shocks the conscience."[41] So, some courts of the Sixth Circuit have incorporated an additional, fourth element to the test that other courts in the jurisdiction do not require.[42]

Upon review, it seems as though most of the circuits have different variations of the state-created danger test, with the First Circuit having four elements,[43] the

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36. Estate of Reat v. Rodriguez, 824 F.3d 960, 965 (10th Cir. 2016).
37. *Id.*
38. *Id.*
39. Davis v. Wash. State Dep't of Soc. & Health Servs., 773 F. App'x 367, 369 (9th Cir. 2019).
40. Estate of Romain v. City of Grosse Pointe Farms, 935 F.3d 485, 491-92 (6th Cir. 2019).
41. *Id.* at 492.
42. *Id.*
43. Welch v. City of Biddeford Police Dep't, 12 F.4th 70, 75 (1st Cir. 2021) ("[A] plaintiff may make out a due process claim under the state-created danger doctrine by showing (1) that a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff; (2) that the act or acts

Eighth Circuit having five elements,[44] and the Second Circuit only having two elements.[45] These multi-prong tests, such as the test used in the Tenth Circuit, seem to render the state-created danger doctrine nearly impossible to successfully raise. Despite the number of elements or prongs used in each individual test, there are certain elements that are not fully discussed in the courts' analyses, and even if they are discussed, there are conflicting definitions and applications across circuits.

The rest of this Note serves to show the impossibly high and massively confusing standard that is "shocking the conscience;"[46] the differences in who can raise a state-created danger claim; what kinds of actions give rise to such a claim; and the reasons there should be one uniform test ruled on by the U.S. Supreme Court.

B. Circuit Survey of All the Tests

In the previous section, examples of varying tests from circuit courts were given to show how different these tests can be. While every test does not vastly differ, there are more differences than similarities amongst all the tests. Below are the tests from each of the circuits, along with a chart provided for convenience. Just to reiterate, the language from *DeShaney*, the only U.S. Supreme Court case which circuit courts have based their tests upon, is:

> 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 … [the State] placed him in no worse position than that in which he would have been had it not acted at all.[47]

These few sentences have created a clear divide among the circuits as to their meaning and application—as evidenced by the nearly eleven different tests.[48]

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created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public; (3) that the act or acts caused the plaintiff's harm; and (4) that the state actor's conduct, when viewed in total, shocks the conscience.").

44. Gladden v. Richbourg, 759 F.3d 960, 965-66 (8th Cir. 2014) ("[A] plaintiff must prove (1) that he was a member of a limited, precisely definable group … ; (2) that the defendants' conduct put the plaintiff at a significant risk of serious, immediate, and proximate harm; (3) that the risk was obvious or known to the defendants; (4) that the defendants acted recklessly in conscious disregard of the risk; and (5) that, in total, the defendants' conduct shocks the conscience.").

45. Corr. Officers' Benevolent Ass'n v. City of New York, 415 F. Supp. 464, 469 (S.D.N.Y. 2019) ("The state-created danger exception applies where (1) a 'government official takes an affirmative act that creates an opportunity for a third party to harm a victim (or increases the risk of such harm)' … and (2) the government action shocks the contemporary conscience.").

46. Wilson v. Warren Cnty., 830 F.3d 464, 470 (7th Cir. 2016).

47. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

48. Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 210-11 (2002) (noting the disparity between circuit courts' approaches to state-created danger doctrine).

1. First Circuit Test

The First Circuit requires the plaintiff to establish: (1) a state actor or actors created or enhanced a danger to the plaintiff; (2) the acts created or enhanced a danger that was specific to the plaintiff and separate to a danger to the public; (3) the act itself caused the harm to plaintiff; and (4) the act was conscience shocking.[49]

2. Second Circuit Test

Second Circuit courts have described two variations of a similar test with one explaining state actor liability for actions "physically undertaken by private actors in violation of the plaintiff's liberty or property rights if the state actor directed or aided and abetted the violation."[50] Also, courts have used an elements test: (1) a government official doing an affirmative action that creates an opportunity or increases an opportunity for a third party to harm the plaintiff; and (2) the government action is conscience shocking.[51]

3. Third Circuit Test

Courts in the Third Circuit use a four element test: (1) the harm was foreseeable and direct; (2) the state actor acted in a way that shocks the conscience; (3) the relationship between the plaintiff and state was one where "'the plaintiff was a foreseeable victim of the defendant's acts,' or a 'member of a discrete class of persons subjected to the potential harm brought about by the state's actions,' as opposed to a member of the public in general;"[52] and (4) the state actor affirmatively used their authority so that it created a danger to the plaintiff in a way where there would be no danger had the state not acted.[53]

4. Fourth Circuit Test

The Fourth Circuit keeps it simple: requiring that "the plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission."[54]

5. Fifth Circuit Test

Fifth Circuits courts, while never adopting the doctrine, have laid out requirements for the state-created danger doctrine: the plaintiff must show the state

49. Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020).

50. Romero v. City of New York, 839 F. Supp. 2d 588, 619 (E.D.N.Y. 2012).

51. Corr. Officers' Benevolent Ass'n. v. City of New York, 415 F. Supp. 3d 464, 469 (S.D.N.Y. 2019).

52. Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006) (internal citations omitted).

53. *Id.*

54. *See, e.g.*, Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015).

actors increased the risk of danger and that they acted with indifference.[55] Also in the Fifth Circuit, in more recent cases, courts have spontaneously added the requirement that the state actors *know* there would be an actual victim and that they were creating danger for that specific person.[56]

6. Sixth Circuit Test

To properly raise a claim for state-created danger in the Sixth Circuit, a plaintiff must prove:

> (1) [A]n affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state actor knew or should have known that its actions specifically endangered the plaintiff.[57]

7. Seventh Circuit Test

In the Seventh Circuit, a plaintiff must prove: (1) the state created or increased a danger to the plaintiff; (2) the "state's failure to protect plaintiff was a proximate cause of his injuries;"[58] and (3) the state's failure to protect is conscience shocking.[59]

8. Eighth Circuit Test

Eighth Circuit courts require:

> (1) [The plaintiff be] a member of "a limited, precisely definable group," (2) that the [state actor's] conduct put [the plaintiff] at a "significant risk of serious, immediate, and proximate harm," (3) that the risk was "obviously or known" to the [state actor], (4) that the [state actor] "acted recklessly in conscious disregard of the risk," and (5) that in total, the [state actor's] conduct "shocks the conscious."[60]

9. Ninth Circuit Test

The Ninth Circuit requires (1) "affirmative conduct" that places plaintiff in a worse-off situation than they would be in had the state not acted; (2) the affirmative action created "an actual, particularized danger;" (3) the resulting harm was

55. *See* Piotrowski v. City of Houston, 237 F.3d 567, 584 (5th Cir. 2001).
56. *See* Cancino v. Cameron Cnty., 794 F. App'x 414, 417 (5th Cir. 2019).
57. *See* Lipman v. Budish, 974 F.3d 726, 744 (6th Cir. 2020).
58. Wilson v. Warren Cnty., 830 F.3d 464, 469-70 (7th Cir. 2016).
59. *Id.* at 470.
60. Fields v. Abbott, 652 F.3d 886, 891 (8th Cir. 2011).

foreseeable; and (4) the state acted with "deliberate indifference" to the "known or obvious risk."[61]

10. Tenth Circuit Test

The Tenth Circuit has included two preconditions that must be met before the state-created danger doctrine can apply.[62] Those preconditions are: (1) an "affirmative action" by the "state actor;" and (2) the "action led to the private violence that injured the plaintiff."[63] If those two conditions are met, then the actual test can be applied. The elements for the Tenth Circuit are: (1) the state actor created or increased the plaintiff's vulnerability to the danger; (2) plaintiff was a member of a "limited and specifically definable group;"[64] (3) the actor's conduct put the plaintiff at risk of immediate and proximate harm; (4) "the risk was obvious or known;" (5) the state "acted recklessly in conscious disregard" for the known risk; and (6) the action is "conscience shocking."[65]

11. Eleventh Circuit Test

The Eleventh Circuit has also kept their test simple, requiring the State to have created or enhanced a danger, making the plaintiff more susceptible to the harm.[66]

61. Pauluk v. Savage, 836 F.3d 1117, 1124-25 (9th Cir. 2016).
62. *See* Estate of Reat v. Rodriguez, 824 F.3d 960, 965 (10th Cir. 2016).
63. *Id.* (citing Estate of B.I.C. v. Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014)).
64. *Id.*
65. *Id.*
66. *See* Hill v. Madison Cnty. Sch. Bd., 957 F. Supp. 2d 1320, 1340-41 (11th Cir. 2013).

Circuit	Test
First Circuit	(1) Affirmative action by State that created danger to plaintiff (2) Action created danger specific to plaintiff and distinct from public (3) The action caused plaintiff's harm (4) Conscience shocking
Second Circuit	State may be liable when action phys-ically undertaken by private actors in violation of plaintiff's liberty or property rights IF the state actor directed or aided and abetted the violation. ALSO: (1) Affirmative action by State that created opportunity for a third party to harm plaintiff (2) Conscience shocking
Third Circuit	(1) Foreseeable and direct harm (2) Conscience shocking (3) Plaintiff was a foreseeable victim from the action, *or* a member of a discrete class of persons distinct from public (4) State affirmatively used authority in a way that created a danger
Fourth Circuit	(1) State created or increased risk of private danger (2) Created danger through affirmati-ve acts
Fifth Circuit	(1) State created or increased risk of danger to plaintiff (2) Acted with deliberate indifference (3) State knew plaintiff specifically would suffer the harm
Sixth Circuit	(1) Affirmative action that created or increased risk to plaintiff (2) Special danger to plaintiff distinct from danger to public (3) State knew or should have known its actions specifically endangered the plaintiff
Seventh Circuit	(1) State created or increased a danger to plaintiff (2) State's failure to protect was prox-imate cause of plaintiff's injuries (3) Conscience shocking

Eighth Circuit	(1) Plaintiff was member of limited and precisely definable group (2) State's conduct put plaintiff at risk of serious, immediate, and proximate harm (3) Risk was obvious and known to the state (4) State acted recklessly in conscious disregard of the risk (5) Conscience shocking
Ninth Circuit	(1) Affirmative action that placed plaintiff in danger (2) Affirmative action created an act-ual and particularized danger to plaintiff (3) Harm was foreseeable (4) State acted with deliberate indiff-erence to the known and obvious risk
Tenth Circuit	Preconditions: (1) Affirmative action by state actor (2) Affirmative action led to private violence injuring the plaintiff Elements: (1) State created or increased the plaintiff's vulnerability to the danger (2) Plaintiff was a member of a limited and specifically definable group (3) State's conduct put plaintiff at risk of immediate and proximate harm (4) Risk of harm was obvious or known (5) Conscience shocking
Eleventh Circuit	(1) State created or enhanced a danger (2) Action made plaintiff more susceptible to the harm

III. INCONSISTENCIES IN THE ELEMENTS ACROSS THE CIRCUITS

As evidenced in the above section, the lack of guidance from the U.S. Supreme Court on a test for the state-created danger doctrine has resulted in many variations of the test across circuits. It is common for circuits to have similar elements for their respective tests, but word them differently, or have elements and not provide any explanation of the applicability in the decision and even have entirely different elements altogether. Below, some of the elements among the circuits are discussed, and examples are given showing the confusion and lack of explanation of the elements.

A. "Shocks the Conscience" is Too Limiting of a Factor and Provides No Uniform Analysis

One element that is common among the state-created danger tests is the requirement for plaintiffs to show the state actor's conduct is "conscience shocking,"[67] or "shocks the conscience."[68] This standard was developed by the U.S. Supreme Court in 1952, well before the state-created danger doctrine, in *Rochin v. California*.[69] In the majority opinion, Justice Felix Frankfurter described that the officers violated the plaintiff's substantive due process by performing conduct that "shocks the conscience."[70] Conscience shocking conduct is further described as being "bound to offend even hardened sensibilities."[71] However, in his concurring opinion, Justice Black criticized Justice Frankfurter's application of substantive due process, stating that using the conscience shocking standard lacks uniformity and allows justices and judges to use their own subjective beliefs to form their opinion of what "offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"[72] In fact, since the creation of the test, it has been highly criticized for "permitting judges to assert their subjective views on what constitutes 'shocking.'"[73] Considering that judges were not present when the actions they are examining occurred, it seems nonsensical for their beliefs to be the deciding factor on whether conduct was conscience shocking or not.

1. Difference in Application of "Conscience Shocking" Among the Circuits

Although "conscience shocking" is a common element to see in multi-prong tests across various circuits, the definition and application of it shares no commonality.[74] For example, the Third Circuit court requires "a degree of culpability that shocks the conscience," along with three other elements, to successfully make a state-created danger claim.[75] However, under the conscience shocking element, the court must determine the "actor's opportunity to deliberate before taking action."[76] In an emergency situation, under this variation of the test, a state actor needs to have "intend[ed] to cause harm" for their conduct to be

67. *E.g.*, Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999); Irish v. Maine, 849 F.3d 521, 526 (1st Cir. 2017).

68. *E.g.*, J.M. v. York Sch. Dep't, 365 F. Supp. 3d 132, 147 (D. Me. 2019).

69. *See* Rochin v. California, 342 U.S. 165, 172 (1952).

70. *Id.*

71. *Id.*

72. *Id.* at 175; Rosalie Berger Levison, *Time to Bury the Shocks the Conscience Test*, CHAPMAN L. REV. (Apr. 13, 2010, 9:20 PM), https://www.chapman.edu/law/_files/publications/CLR-13-rosalie-berger-levinson.pdf.

73. *Shock-the-Conscience Test*, JRANK, https://law.jrank.org/pages/10268/Shock-Conscience-Test.html (last visited Aug. 8, 2023).

74. *See, e.g.*, Johnson v. City of Philadelphia, 975 F.3d 394, 400-01 (3d Cir. 2020); Welch v. City of Biddeford Police Dep't, 12 F.4th 70, 75 (1st Cir. 2021); Rivera v. Rhode Island, 402 F.3d 27, 36-37 (1st Cir. 2005).

75. *Johnson*, 975 F.3d at 400 (citing Sauers v. Borough of Nesquehoning, 905 F.3d 711, 717 (3d Cir. 2018)).

76. *Id.* at 401 (quoting Kedra v. Schroeter, 876 F.3d 424, 437 (3d Cir. 2017)).

worthy of even conducting a conscience shocking analysis.[77] If the actor had more time to act, then a plaintiff needs to show a "disregard [for] a great risk of serious harm."[78] When an actor is able to make an "unhurried judgment," a plaintiff need only support that the actor acted with a "mental state of 'deliberate indifference.'"[79]

The unrealistic applicability of this standard is apparent, and the court even acknowledges this.[80] By taking a seemingly "subjective intent" approach, the test imposes onto courts another level of analysis by requiring a determination of the actor's state of mind at the time of conduct.[81] This could also create potential issues for the state actors themselves. It's possible that, for example, a veteran police officer might respond differently in an emergency situation compared to a rookie officer—would a court then be required to determine whether the specific actions taken by the particular officer were reasonable given the circumstances? If so, then is "reasonable" based on a standard that is different for veteran officers than that for rookie officers? How is this standard determined, and what is the line that distinguishes the two? While this idea seems abstract in this concept, there are instances where courts denied a finding of state-created danger because a reasonable state actor in the defendant's position would not have perceived the conduct to be conscience shocking.[82]

Requiring conduct to "shock the conscience" is often the most limiting element that can be present in a multi-factor analysis of the doctrine because it is difficult for a plaintiff to successfully prove.[83] Due to its high threshold to satisfy, this element is often the decisive factor.[84]

In fact, some courts are limited by the standard of "conscience shocking" even when it is not included as an element in their state-created danger test.[85] In *Estate of Romain v. City of Grosse Pointe Farms*, the Sixth Circuit specifically acknowledged the high standard of the state-created danger doctrine.[86] However, it stated that along with the three standard elements, "some of [their] cases have recognized an 'additional element'" requiring the plaintiffs to show the government's conduct shocks the conscience.[87] That is, only sometimes do courts in the Sixth Circuit use this element. Due to the already high and demanding

77. *Id.*

78. *Id.*

79. *Id.* (internal citations omitted).

80. *Id.* (regarding the complicated "conscience shocking" standard, the court recognizes "[the standard] offers little light," and "is not one that can be applied by a computer.") (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

81. *See Subjective Intent: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/subjective-intent (last visited Aug. 8, 2023).

82. *See* Estate of Smith v. Marasco, 430 F.3d 140, 154 (3d Cir. 2005) (awarding officers qualified immunity from the state-created danger claim because the plaintiffs did not show that "a reasonable officer in the position of [the officers] would have understood [their] conduct to be 'conscious-shocking.'").

83. *See id.* at 153.

84. *See id.*

85. *See* Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003); Estate of Romain v. City of Grosse Pointe Farms, 935 F.3d 485, 492 (6th Cir. 2019).

86. *Estate of Romain*, 935 F.3d at 492.

87. *Id.* (quoting Schroder v. City of Ford Thomas, 412 F.3d 724, 730 (6th Cir. 2005)).

standard,[88] and with the additional feat of showing conscience shocking acts, the Sixth Circuit admits to commonly rejecting claims of state-created danger.[89] How can an element, that is not even an element which has not been formally adopted by the Sixth Circuit's test, nonetheless be the main reason claims are rejected? In the circuits that have the conscience shocking standard, there is variability in how it is applied. This variability adds to the inconsistencies of the state-created danger doctrine across the circuit courts.

2. How the Differing Analyses and Applications of "Conscience Shocking" Affect the Applicability of the State-Created Danger Doctrine

In *Currier v. Doran*, the Tenth Circuit discussed and analyzed, specifically, whether the actions present could be considered conscious shocking.[90] This case involved abuse of two young children by their father and how multiple social workers for a department in New Mexico dealt with and assisted those children.[91] There were multiple incidences where the social workers could see the bruises and abrasions on the children, and the children even told the workers their father did it. Despite this, the children were repeatedly placed back in their father's care.[92] Not only were the children continually placed back into their father's care, but the social workers also told the mother to cease making claims of abuse, and one specific agent ruled the marks on the bodies of the children were not results of physical abuse.[93] Following the final time the children were placed back in their father's care, the father poured boiling water on the son's back, which led to his death a few days later.[94] The Tenth Circuit ultimately decided that the conduct of each of the named defendants—including the social workers—could be viewed as conscience shocking, but that such a finding requires viewing the facts in light of all the circumstances surrounding the case.[95] While the court did not provide a description for what is conscience shocking, it did provide that certain conduct could be conscience shocking "depending on context[.]"[96]

An additional case from the Tenth Circuit is *Ruiz v. McDonnell*, another tragic instance involving the death of a child; but with a different outcome than *Currier*, all because the court used a different description for what is conscience shocking.[97] In this instance, the court described the standard for an action to be

88. *See* Jones v. Reynolds, 438 F.3d 685, 690-98 (6th Cir. 2006).

89. *See, e.g.*, *Estate of Romain*, 935 F.3d at 492; McQueen v. Beecher Cnty. Sch., 433 F.3d 460, 465 (6th Cir. 2006).

90. Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001).

91. *Id.* at 909-11.

92. *Id.* at 909-10.

93. *Id.* at 910.

94. *Id.*

95. *Id.* at 920.

96. *Id.*

97. *See generally* Ruiz v. McDonnell, 299 F.3d 1173, 1183-84 (10th Cir. 2002) (explaining that the Tenth Circuit did not believe the failure of a government agency to adequately investigate a daycare which ultimately resulted in the death of one of the attending children did not reach the high threshold of shocking the conscience.).

conscience shocking as one that demonstrated a "degree of outrageousness and magnitude of potential or actual harm that is truly conscience shocking."[98] Further, in order to be considered conscience shocking, the consciences of federal judges must be shocked.[99] Keep in mind, neither of these standards were discussed in the *Currier* case.[100] Even if the holding in *Currier* is not far-reaching enough, and the facts are too distinguished, why was the same standard for culpability not applied in both? Why must we rely on federal judges to decide whether an action is conscience shocking?

B. Affirmative Action Requirement

The Fourth Circuit has taken a very limited approach to what constitutes affirmative action.[101] In *Callahan v. N.C. Department of Public Safety*, the Fourth Circuit provides a discussion about the high bar required for a plaintiff to successfully allege a state actor participated in an affirmative action.[102] Plaintiff in this case, the father of a deceased supervisor of a corrections institution, alleged the prison managers and employees violated his daughter's substantive due process rights in that the defendants' actions constituted a state-created danger.[103] The decedent was murdered by a prisoner who previously told prison officials of his struggle with mental health and homicidal thoughts.[104] Further, the decedent was the only fully trained officer on duty during the incident.[105] The court held an action is only an affirmative action under the state-created danger doctrine if it is within the context of the "immediate interactions between the [state actor] and the plaintiff."[106] Explicitly, the court stated a "continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger."[107] Due to this very limited interpretation of "affirmative action," the plaintiff in this case was unable to successfully make a claim for state-created danger.[108]

Along with courts limiting the actions that constitute an affirmative action, courts also struggle to articulate a clear standard for determining the distinction between an affirmative act and a failure to act.[109] While the difference between action and inaction may seem obvious, if there are instances where a court has to decide if a failure to act is really an act, then the distinction between the two should

98. *Id.* at 1184 (quoting Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995)).
99. *Id.*
100. *Currier*, 242 F.3d at 920.
101. *See* Callahan v. N.C. Dep't of Pub. Safety, 18 F.4th 142, 147 (4th Cir. 2021).
102. *Id.*
103. *Id.* at 144.
104. *Id.*
105. *Id.*
106. *Id.* at 147 (quoting Doe v. Rosa, 795 F.3d 429, 441 (4th Cir. 2015)).
107. *Id.* (quoting *Doe*, 795 F.3d at 439) ("A 'downstream, but-for connection' between the state's conduct and the alleged harm 'stretches the "affirmative acts" concept too far' to support a state-created danger claim.").
108. *Id.* at 147-49.
109. Johnson v. City of Philadelphia, 975 F.3d 394, 400-01 (3d Cir. 2020).

be void and have no bearing on the outcome in a state-created danger case. Even when an action so obviously seems to be an affirmative act, courts might find none.

In *Bukowski v. City of Akron*, Lisa Bukowski ("Lisa") a nineteen year old woman with a mental disability, went missing, and with the help of her parents, officers were able to track her down at the house of thirty-nine-year-old Leslie Hall.[110] Hall lured Lisa to his home after claiming online to be a fellow teenager with a disability.[111] Once Lisa was picked-up and interviewed by the police, she asked to be returned to Hall's residence. The police agreed to return Lisa to Hall's residence despite knowing the situation and being aware of her mental deficiencies.[112] Lisa was repeatedly sexually assaulted by Hall.[113] Although the police drove Lisa to the residence which resulted in her being assaulted, the action was not found affirmative because "[t]he officials arguably did nothing to increase [Lisa's] vulnerability to danger."[114] The court reasoned that there was not an affirmative act because all the police did was return Lisa to a situation of preexisting danger.[115] However, this is a preexisting danger of which the police *should have* foreseen because of Lisa's disability.

The Eighth Circuit does not even have the requirement for a state actor to perform an affirmative action as one of its five elements.[116] At least, the case of *Gladden v. Richbourg* seems to suggest if affirmative action was a required element, it would have easily been satisfied.[117] Decedent, Bradley Gladden ("Gladden") died of hypothermia after an officer dropped him off, alone, in the middle of a winter night, while Gladden was intoxicated.[118] Officer Richbourg responded to a 911 call of an intoxicated man who had refused to leave a Waffle House.[119] When arriving on the scene, Gladden told Officer Richbourg he was looking for a ride to his sister's house and proceeded to ask the officer for a ride.[120] At this point, another officer had arrived for backup, Officer Imhoff.[121] Both officers informed Gladden they could give him a ride but could not drive him all the way to his sister's house because it was too far from where they were patrolling.[122] Officer Imhoff told Gladden that in order to call his sister, he would have to use the phone inside Waffle House; Gladden did not get the chance to call his sister to arrange for her to pick him up prior to Officer Richbourg giving Gladden a ride.[123] Officer Richbourg let Gladden out of his car at around 12:30 am

110. Bukowski v. City of Akron, 326 F.3d 702, 705 (6th Cir. 2003).
111. *Id.*
112. *Id.* at 706.
113. *Id.*
114. *Id.* at 709.
115. *Id.*
116. *See* Gladden v. Richbourg, 759 F.3d 960, 965-66 (8th Cir. 2014).
117. *Id.* at 964.
118. *Id.* at 961-64.
119. *Id.* at 962-63.
120. *Id.* at 962
121. *Id.*
122. *Id.* at 963.
123. *Id.*

on a road that was a few hundred feet away from a factory.[124] While Officer Richbourg could not direct Gladden in the desired direction, he informed Gladden that he should ask the guard station at the factory—which was out of sight—for directions.[125] Following that final interaction, the officer drove away.[126] Approximately ten hours later, Gladden's body was found, and it was determined he died of environmental hypothermia.[127]

Ultimately, the court ruled there was no constitutional violation under the state-created danger theory because Gladden "assume[d] a risk with state assistance[.]"[128] Aside from that statement emanating a victim-blaming mentality, it also seems to go entirely against the original sentence in *DeShaney* providing the foundation for the whole concept of this doctrine: the state *played part in and affirmatively made the victim more vulnerable to the danger*.[129] Regardless of affirmative duty not being a factor—this case seems precisely what the court in *DeShaney* would have meant by the State "play[ing] part in" creating a danger.[130] Had the officer (a state actor) not left Gladden, intoxicated, in the road, in the middle of the night, and in freezing temperatures, then there would be none of the dangers that ultimately resulted in Gladden's death.

Somewhere between the Fourth Circuit's difficult-to-achieve affirmative action requirement and the non-existent affirmative action requirement in the Eighth Circuit lies a middle ground. Some circuits include the requirement that a state actor merely increase the risk of harm a plaintiff faces.[131] For example, the Fifth Circuit's test only requires the showing that the state actor increased the danger to the plaintiff.[132] The Seventh Circuit, similarly, has no affirmative action requirement, only needing the plaintiff to show the state created *or increased* the danger.[133]

This requirement that some circuits have of an actor partaking in an affirmative act is yet another variably applied element of the state-created danger doctrine.

C. Vagueness as to Who is Protected Under the State-Created Danger Doctrine

One big contention among the tests in the circuits is who the plaintiff can be in a state-created danger claim. In the Sixth Circuit, the plaintiff must have experienced a special danger that placed the specific plaintiff at risk, not a danger presented to the entire public.[134] Distinguish this from the Eighth Circuit where a

124. *Id.*
125. *Id.*
126. Gladden v. Richbourg, 759 F.3d 960, 963 (8th Cir. 2014).
127. *Id.*
128. *Id.* at 966.
129. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989).
130. *Id.* at 197.
131. *See, e.g.*, Piotrowski v. City of Houston, 237 F.3d 567, 584 (5th Cir. 2001).
132. *Id.*
133. *See* Wilson v. Warren Cnty., 830 F.3d 464, 469-70 (7th Cir. 2016).
134. *See* Estate of Romain v. City of Grosse Pointe Farms, 935 F.3d 485, 493 (6th Cir. 2019).

plaintiff must show they are a member of a "limited, precisely definable group"[135] and simple "'membership in the general public' does not suffice" to meet the standard.[136] Note, these two tests are not only different in regard to who can be a plaintiff, but the test from the Sixth Circuit requires the *harm* be specific to the plaintiff, while the Eighth Circuit's test only puts a limit on what group the plaintiff belongs to with no mention of harm.

In *Jones v. Reynolds*, the Sixth Circuit's standard of who can be a plaintiff in a state-created danger claim is discussed.[137] Denise Jones, decedent, was killed by a rogue drag-racing car while she was a part of a large crowd watching the drag race take place.[138] The officers from the city where this drag race was taking place arrived at the scene prior to the race starting and "[n]ot only did they fail to stop the race … they also *expressly allowed* the participants to proceed with the race."[139] Ultimately, the Sixth Circuit held:

> Because the officers did not have custody of Denise Jones at the time of the accident, because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race.[140]

Only because the harm caused to the victim was not specific to her, did the state-created danger doctrine fail. While death may seem like a specific injury to a specific person, the court in *Jones v. Reynolds* did not think so. In the court's discussion of harm to a specific plaintiff, two examples were presented regarding when an officer's actions would increase harm to a specific plaintiff: an officer encouraging the rape of a victim or an officer encouraging a father to abuse his child.[141] Of course, the two examples given are not conclusive of all instances where an action from the state would specifically increase harm to a plaintiff.

In the Eighth Circuit, a plaintiff must be a member of a "limited, precisely definable group … [t]he general public is not a limited precisely definable group."[142] While that sounds simple enough, of course, the rulings on what is a precisely definable group serve nothing but confusion. In *Glasgow v. Nebraska Department of Corrections*, the state-created danger doctrine did not apply because plaintiff claimed the specific group he belonged to was any person in contact with a convicted murderer, but the court ruled that was the general public.[143] Even something that seemingly would be sufficient—being a business owner—is not considered being a member of a precisely definable group.[144] Judge Kelly from the Eighth Circuit, in a concurring opinion, made specific mention of the lack of

135. Kruger v. Nebraska, 820 F.3d 295, 303 (8th Cir. 2016).
136. *Id.*
137. Jones v. Reynolds, 438 F.3d 685, 696-97 (6th Cir. 2006).
138. *Id.* at 688-89.
139. *Id.* at 688 (emphasis added).
140. *Id.*
141. *Id.* at 696.
142. Glasgow v. Neb. Dep't of Corr., 819 F.3d 436, 442 (8th Cir. 2017).
143. *Id.*
144. *See* White v. City of Minneapolis, No. 21-cv-0371, 2021 WL 5964554, at *4-7 (D. Minn. Dec. 16, 2021).

consistency in whether a plaintiff is a member of a precisely definable group or a member of the general public, and he questioned whether the difference between the two groups was important.[145] If there are federal judges who are uncertain about a distinction between who is covered or not under a doctrine, how is it fair to expect the general population to understand?

In order to summarize, or attempt to summarize, this incoherent element, there are courts that specifically require a plaintiff to experience a particularized harm, with no requirement of belonging to a group.[146] Also, there are courts that make no mention of specific harm when discussing who can be a plaintiff, and *only* discuss the group (or lack thereof) to which the plaintiff belongs.[147] Finally, there are circuits that do not even include a requirement for who can be a plaintiff, with no analysis in any of the state-created danger cases because the claim is denied before the plaintiff can even be discussed.[148]

IV. THE UNITED STATES SUPREME COURT SHOULD MAKE A RULING AND CREATE A UNIFORM TEST FOR THE STATE-CREATED DANGER DOCTRINE

Judge Murphy from the Sixth Circuit wrote, in his very intuitive concurrence, criticisms of his circuit's own three-part test for the state-created danger doctrine.[149] Pointing to the dicta in *DeShaney* from which the doctrine was born, Judge Murphy argued the point of the Court—by stating in *DeShaney* that "the State … played no part in [the dangers'] creation, nor did it do anything to render him any more vulnerable"[150]—was to distinguish cases meant to protect in-custody individuals who are under state control.[151] Further, Judge Murphy provided criticism that there are limited guides for forming the tests for the doctrine, and there is a high level of "judicial self-restraint require[d]" in order to fully respect substantive due process principles.[152]

Instead of just relying on the circuit courts to implement proper judicial self-restraint, the U.S. Supreme Court should make a ruling on the state-created danger doctrine and establish a uniform test to be applied across all jurisdictions. While it may not have been the actual intention of the Court to create this exception to immunity for state actors when making its ruling in *DeShaney*, lower courts have

145. Kruger v. Nebraska, 820 F.3d 295, 306-08 (8th Cir. 2016) (Kelly, J., concurring).

146. *See* Estate of Romain v. City of Grosse Pointe Farms, 935 F.3d 485, 493 (6th Cir. 2019) (denying the application of the state-create danger doctrine because the plaintiffs could not show the harm caused was specific to the decedent. Under the 6th Circuit's test, the harm need only be specific to the plaintiff and "distinguished from a risk that affects the public at large." The plaintiff need not belong to any group of people.).

147. *See Kruger*, 820 F.3d at 303.

148. The Second, Fourth, Fifth, Seventh, and Eleventh Circuits are all missing any explanation of who can be a plaintiff in a state-created danger case.

149. *Estate of Romain*, 935 F.3d at 492-96 (Murphy, J., concurring).

150. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

151. *Estate of Romain*, 935 F.3d at 493-95 (Murphy, J. Concurring).

152. *Id.* at 494 (quoting Kerry v. Din, 576 U.S. 86, 93 (2015)).

interpreted the ruling as such and have applied it routinely since its inception in 1989.[153]

The previously expressed rift is commonly known as a "circuit split."[154] Cases resolving these splits of law among the federal circuits are a common type of case heard by the U.S. Supreme Court.[155] The presence of a circuit split lends to vague and disparate application of the law[156]—how is a citizen to know what constitutionally protected rights they have or do not have if courts have varied outcomes? Upon examination of the state-created danger doctrine, it seems as though "circuit split" is not an appropriate term; each circuit court of appeals has their own test for the state-created danger doctrine.[157] A more appropriate term would be "circuit chaos." While some of the circuits may come to similar outcomes, they reach the conclusions from vastly different avenues of analysis.[158]

Even if the Supreme Court were to determine that the varying tests do not constitute a proper circuit split, there are benefits to achieving uniformity in the law regardless. Since the Court created all the muddied confusion of the state-created danger doctrine with its *DeShaney* decision, it's only fair that they clear the waters and issue a decision that would be binding on all lower courts.[159] Achieving a uniformity in law, which may be understood to mean "being similar" to,[160] would better allow a plaintiff who wishes to raise the state-created danger doctrine to know or predict a potential outcome. Not only would a uniform rule be beneficial to plaintiffs, but it would also benefit state actors themselves. Just as non-state actors lack guidance, this doctrine "offers little help to public employees seeking to better discharge their duties, and does not tell them 'what to do, or avoid,

153. *See supra* Part I, Section A, pp. 2-4.

154. *See Circuit Split*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/circuit_split (last updated July 2022).

155. *See Types of Cases Heard by the Supreme Court*, COCKLE LEGAL BRIEFS: THE COCKLE BUR BLOG (Aug. 19, 2014), https://www.cocklelegalbriefs.com/blog/supreme-court/types-cases-heard-supreme-court/; Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 210-11 (2002) (noting the disparity between circuit courts' approaches to state-created danger doctrine).

156. Johnathon M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 996 (June 2020), https://www.californialawreview.org/print/iron-ing-out-circuit-splits-a-proposal-for-the-use-of-the-irons-procedure-to-prevent-and-resolve-circuit-splits-among-united-states-courts-of-appeals (last visited Aug. 8, 2023).

157. *See supra* Part II, pp. 10-12.

158. Take, for example, the difference of application of the term "shocks the conscience" as discussed above, *supra*, Part III, pp. 12-13. Some courts determine if conduct is conscience shocking by examining the amount of time an actor had to make a decision. *See* Welch v. City of Biddeford Police Dep't, 12 F.4th 70, 76 (1st Cir. 2021). *See also* Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020). Some courts analyze conduct and whether it is conscience shocking by determining if a reasonable officer in the same or similar circumstance would understand the conduct to be conscience shocking. *See* Estate of Smith v. Marasco, 430 F.3d 140, 149-54 (3d Cir. 2005).

159. *See* James R. Maxeiner, *Uniform Law and Its Impact on National Laws Limits and Possibilities*, REPS. TO THE INTERMEDIARY CONG. OF THE INT. ACAD. OF COMPAR. L. 18 (2009).

160. Camilla Baasch Andersen, *Defining Uniformity in Law*, 12 UNIF. L. REV. 5, 6-7 (2007).

in any situation.'"[161] Further, a uniform test should be present to avoid similar situations in different jurisdictions having different outcomes—with one circuit accepting the situation as acceptable while another circuit could find a potential cause of action. For example, in *Jones v. Reynolds*, where the court rejected the state-created danger doctrine because the harm to the decedent was not greater than the harm the other attendees faced.[162] If a case with the same exact facts was brought in a different circuit that does not have the particularized harm element, it is possible the doctrine would be successful.

A. Best Test for State-Created Danger

Ultimately, the best model for a uniform test for the state-created danger doctrine would be the Seventh Circuit's test, with one slight change to the final element.[163] The test from the Seventh Circuit seems to do the best to support the language that came directly from the *DeShaney* case.[164] Under this test, there is no requirement for affirmative action, instead, the state's action can be sufficient if it merely increased the risk to the plaintiff.[165] In a case decided prior to *DeShaney*, Judge Posner from the Seventh Circuit comments on action versus inaction,

> 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.[166]

This statement could be applicable whether the danger resulted from an affirmative action of a state actor or their failing to have acted. Thus, if the conduct of the actor resulted in the danger to the plaintiff, whether by action or inaction, and the actor did not protect the plaintiff, there should be the potential for liability.

Also under the Seventh Circuit's test is the requirement for proximate cause connecting the state actor's action and the harm caused to plaintiff.[167] Proximate cause is important in cases involving state-created danger because it calls for the connection between the state's action, or inaction, and the plaintiff's injury.[168] This element is necessary because it could prevent claims that are frivolous with too distant of a connection between the state actor's conduct and harm to plaintiff. Say, for example, a police officer stops a driver who was driving erratically, performs a field sobriety test, determines they are drunk, and instead of arresting the driver, the police officer tells the driver to call a friend to pick them up and drive them

161. Johnson v. City of Philadelphia, 975 F.3d 394, 400 (3d Cir. 2020) (quoting Weiland v. Loomis, 938 F.3d 917, 919 (7th Cir. 2019)).

162. Jones v. Reynolds, 438 F.3d 685, 696-97 (6th Cir. 2006).

163. Final element of the Seventh Circuit's test being the conscience shocking requirement, *supra* Part II, p. 10.

164. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196-97 (1989).

165. *See* Wilson v. Warren Cnty., 830 F.3d 464, 469-70 (7th Cir. 2016).

166. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

167. *Wilson*, 830 F.3d at 469-70.

168. *See Proximate Cause*, N.Y.C. BAR, https://www.nycbar.org/get-legal-help/article/personal-injury-and-accidents/proximate-cause/ (last visited Aug. 8, 2023).

home. On the way home, the friend and the driver get into a fatal car accident, killing the original person that was pulled over. Sure, had the police not instructed the driver to call a friend, the driver would likely have survived (i.e., the police officer's action created the danger). However, it cannot be said that the police officer's action is the proximate cause of the car crash; the state action is too far removed from the harm.

Finally, the Seventh Circuit's test provides the state's action must shock the conscience.[169] Continuing to have this standard affords protection to state actors by allowing them to properly do their jobs without constantly having the worry of liability. Further, this standard provides protection to citizens because it does hold state actors responsible when they act, or fail to act, in an egregious manner. One thing that should be added to this element to provide for a more uniform and predictable test is that it should be viewed in light of the circumstances of the specific case. Fact finders, whether it be a judge or a jury, should not be able to determine the outcome of the case based on if they *personally* feel an action is conscience shocking. Never should the standard be whether a state actor's conduct shocks the conscience of a federal judge, as the Tenth Circuit requires.[170] Instead, it should be conscience shocking in relation to the facts; more from a reasonable-person-in-that-situation standard.

B. Criticisms of Federalizing the State-Created Danger Doctrine

In the concurring opinion in *Doe v. South Carolina Department of Social Services*, Judge Wilkinson raises what would be the best argument for the Supreme Court to not make a ruling on the doctrine: the states may be in a better position to set the test for their own jurisdiction.[171] States and their citizens are unique. Each state has its own characteristics, and the argument could be made that the states and/or circuit courts would be better equipped to create their own test that would best fit the citizens in their jurisdictions.

An additional criticism of making a uniform test that would make claims of state-created danger more easily brought is the potential of increased liability for state actors. In a case where the state-created danger doctrine is recognized and accepted, the qualified immunity of the officer is not available, making the doctrine an exception to qualified immunity.[172] Limiting qualified immunity in such a way could hinder state actors, like police officers, from performing vital tasks due to the fear of exposing themselves to liability.[173]

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169. *Wilson*, 830 F.3d at 469-70.

170. *See* Ruiz v. McDonnell, 299 F.3d 1173, 1183 (10th Cir. 2002) (citing Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir. 1995)).

171. Doe v. South Carolina Dep't of Soc. Servs., 597 F.3d 163, 179-88 (4th Cir. 2010).

172. *See* Justin Wise, *1st Circ. Adopts 'Created Danger' Limit to Qualified Immunity*, LAW360 (Nov. 22, 2020, 8:02 PM), https://www.law360.com/articles/1330071/1st-circ-adopts-created-danger-limit-to-qualified-immunity.

173. *See* Joseph Fawbush, *Qualified Immunity: Both Sides of the Debate*, FINDLAW, https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html (last visited Aug. 28, 2023).

C. Resolving the Criticisms

The issue with allowing each circuit to create their own test, even if the courts believe the test is best suited to fit the demographics and characteristics of the jurisdiction, is still the confusion in the differing tests. If the Supreme Court handed down a decision that resulted in a uniform test for the doctrine, it would possibly provide an explanation of the elements.

While it is true that the state-created danger doctrine carves out an exception to qualified immunity, the impact is *de minimis*, as qualified immunity cases, more often than not, do not result in a case being dismissed.[174] This means, if the state-created danger doctrine is accepted in a court and precludes the application of qualified immunity, it should not matter because the success rate of qualified immunity is lower than what people may assume.[175] Simply put, the doctrine will not lead to greater liability for law enforcement officers. Furthermore, allowing law enforcement officers to make mistakes while avoiding liability is irrelevant in the context of state-created danger claims. The cases in which the doctrine is claimed do not involve minor mistakes by law enforcement officers or other state actors; they involve monumental missteps such as dropping an intoxicated man off in the freezing cold in the middle of the night in the middle of nowhere; placing a child back into the care of a severely abusive parent; or police failing, after promising, to protect a witness in a murder trial from the suspect, resulting in her murder.[176] Hence, the importance of having the shock the conscience standard. State actors would be able to act within a certain scope of appropriate actions, and if their actions reach beyond the scope, then liability is possible.

CONCLUSION

As evidenced by the cases above, instances in which a relevant issue for a state-created danger claim could arise at any moment and happen to any person. Being such a relevant issue, it is pertinent for the U.S. Supreme Court to make a ruling, create a uniform test, and resolve the "circuit chaos" that it created with *DeShaney*.

174. *See* Joanna C. Schwartz, *Qualified Immunity's Selection Effects,* 114 NW. UNIV. L. REV. 1101, 1103 (2020) (explaining a 2020 with 1,183 § 1983 claims where qualified immunity was raised, only 0.6% were dismissed following a motion to dismiss, and 2.6% were dismissed at summary judgment).

175. *See id.*

176. *See* Gladden v. Richbourg, 759 F.3d 960, 962-63 (8th Cir. 2014); Currier v. Doran, 242 F.3d 905, 909-11 (10th Cir. 2001); Rivera v. Rhode Island, 402 F.3d 27, 31-32 (1st Cir. 2005).