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ABSTRACT

Domestic violence is a societal ill that has plagued the United States for decades. By definition, domestic violence is inflicted by "private actors," or those not acting in an official or governmental capacity. In the 1989 case of *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that government officials have no constitutional obligation to protect citizens from violence or injury inflicted by private actors. Significantly, however, the opinion's dicta provided two exceptions.

One of those exceptions became known as the "state-created danger doctrine." Under this doctrine, individuals can hold state actors legally accountable for creating dangerous conditions that allowed a private party to harm them. Since *DeShaney*, eleven circuit courts of appeals have adopted the state-created danger doctrine. Notably, eight of those circuits have applied the doctrine to domestic violence cases. In these circuits, the state-created danger doctrine provides domestic violence victims judicial recourse when state action either caused or exacerbated their risk of injury.

But the state-created danger doctrine is not universally followed. Today, the Fifth Circuit stands alone as the only circuit to refuse consistently to adopt the state-created danger doctrine. The Fifth Circuit's obstinacy deprives domestic violence victims within the jurisdiction's ambit judicial recourse that those in virtually every other circuit enjoy. Indeed, the devastating effects of the Fifth Circuit's refusal to recognize the state-created danger doctrine became clear in 2020 when the court decided *Robinson v. Webster County*.

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The *Robinson* case not only highlights the unjust results of denying Fifth Circuit domestic violence victims access to the doctrine but also represents a crucial missed opportunity for the Fifth Circuit to finally join its sister circuits in recognizing the doctrine's validity.

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I. INTRODUCTION

Domestic violence and emotional abuse plagued Felicia Robinson's marriage with her husband, Daren Patterson.[1] When the Webster County Sherriff's Department arrested and detained Patterson in May 2018 for assaulting a police officer, a reasonable person would presume that Patterson would have been incapable of continuing his pattern of abuse

1. *See* Jeff Martin, *Wife Doused in Acid: Sheriff Let Abusive Husband Out of Jail Repeatedly, Lawsuit Says*, CLARION LEDGER (June 21, 2019, 2:29 PM), https://bit.ly/3tYGQjH.

while in custody.[2] However, while Patterson was detained, Webster County Sheriff Tim Mitchell decided to appoint Patterson as a trusty of the jail.[3]

Because Patterson was a jail trusty, Sheriff Mitchell granted him a "weekend jail pass" on September 1, 2018.[4] That weekend, Patterson assaulted Robinson and attempted to run over her with his car.[5] Although Sheriff Mitchell knew of this violent episode, he continued to grant Patterson weekend furloughs.[6] Ultimately, when Sherriff Mitchell furloughed Patterson two months later, Patterson's abuse reached a tragic and senseless crescendo.[7]

On the evening of November 2, 2018, "Patterson threw a beer can at [Robinson], punched her in the face, and threatened to burn down her home."[8] Later that same evening, the physical and verbal abuse continued, causing Robinson to fear for her life.[9] In desperation, Robinson called Dispatcher Santana Townsend of the Webster County Sheriff's Department to request law enforcement assistance.[10] But instead of dispatching law enforcement, Townsend instructed Robinson to give Patterson the phone to speak with another jail trusty, which only enraged Patterson further.[11] The horrific abuse continued when Patterson threw Robinson to the ground, punched her repeatedly, and doused her nearly naked body with "Liquid Fire," a sulfuric-acid-based drain cleaner.[12] Fortunately, Robinson survived Patterson's maniacal attack but suffered severe burns and incurred nearly $1 million in medical expenses.[13]

Robinson sued Sheriff Mitchell, Dispatcher Townsend, and Webster County in the District Court for the Northern District of Mississippi to redress the injuries she suffered.[14] Robinson sought relief under 42 U.S.C § 1983, a federal statute that allows citizens to recover damages from

2. *See* Robinson v. Webster Cnty., No. 1:19-CV-121, 2020 U.S. Dist. LEXIS 42168, at *2 (N.D. Miss. Mar. 11, 2020).

3. *See id.* Jail trusties are appointed by the jail staff and perform numerous duties without pay in exchange for certain privileges like smoke breaks or occasional weekend furloughs. *See* Mallory McGowin, *What it Means to Be a Jail Trustee*, KRCG (Sept. 12, 2007, 2:38 PM), https://bit.ly/3IaGeeZ.

4. *Robinson*, 2020 U.S. Dist. LEXIS 42168, at *3.

5. *See id.*

6. *See id.*

7. *See id.* at *3–4.

8. *Id.* at *3.

9. *See id.* at *4.

10. *See id.*

11. *See id.*

12. *Id.*

13. *See* Martin, *supra* note 1.

14. *See Robinson*, 2020 U.S. Dist. LEXIS 42168, at *2.

state actors who violate their constitutional rights.[15] More specifically, Robinson alleged a violation of the state-created danger doctrine, a subspecies of a § 1983 claim under which state actors may be liable for creating or exacerbating the danger a citizen faces from injury inflicted by a third party.[16]

However, the circuit courts disagree as to the viability of the state-created danger doctrine.[17] Mississippi, where Robinson brought suit, falls under the jurisdiction of the Fifth Circuit Court of Appeals—the only circuit to consistently refuse to recognize the state-created danger doctrine.[18] Because of this refusal, the District Court dismissed Robinson's lawsuit, denying her any legal recourse for the injuries she suffered as a result of Patterson's domestic abuse.[19]

This Comment outlines the circuit split surrounding the state-created danger doctrine's viability and takes the position that the Fifth Circuit should join its sister circuits in recognizing the doctrine.[20] Part II of this Comment examines the history and evolution of the state-created danger doctrine and its adoption by the circuit courts of appeals.[21] Part II then analyzes the doctrine's application to domestic violence cases, and concludes with a specific focus on the Fifth Circuit's refusal to recognize the doctrine.[22] Finally, Part III explains why the *Robinson* case represented a critical missed opportunity for the Fifth Circuit to finally adopt the state-created danger doctrine and advances the theory that the adoption would align with both Fifth Circuit precedent and sound public policy.[23]

II. BACKGROUND

To fully understand the state-created danger doctrine, it is necessary to understand the context in which the doctrine arose both generally and within each circuit. An overview of 42 U.S.C. § 1983, an examination of the evolution of the state-created danger doctrine, and a breakdown of the circuit split surrounding the application of this theory of liability all provide crucial perspective to fully grasp the doctrine and its far-reaching

15. *See id.* at *6; *see also* Brad Reid, *A Legal Overview of Section 1983 Civil Rights Litigation*, HUFFPOST (Apr. 14, 2017, 11:12 AM), https://bit.ly/30ayNmW.

16. *See infra* Section II.B.1.

17. *See infra* Sections II.B.2.a–c.

18. *See infra* Section II.B.2.c.

19. *See Robinson*, 2020 U.S. Dist. LEXIS 42168, at *29; Robinson v. Webster Cnty., 825 F. App'x 192, 196 (5th Cir. 2020).

20. *See infra* Part III.

21. *See infra* Part II.

22. *See infra* Part II.

23. *See infra* Part III.

implications.[24] Through this lens, the negative consequences of the Fifth Circuit's refusal to adopt the state-created danger doctrine, especially in the context of domestic violence victims, become increasingly clear.[25]

A. An Overview of 42 U.S.C. § 1983

The state-created danger doctrine arises under 42 U.S.C. § 1983.[26] At its core, § 1983 creates a federal cause of action for citizens who have had their constitutional rights infringed by state actors.[27] In pertinent part, the text of § 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[28]

The passage of the Ku Klux Klan Act ("KKK Act") in 1871 laid the foundation for what would become § 1983.[29] However, § 1983 did not become the primary statutory vehicle for holding state actors liable for violations of a citizen's constitutional and civil rights until decades after the KKK Act's enactment.[30]

1. Origins: The Ku Klux Klan Act of 1871

What came to be codified as § 1983 originated as Section 1 of the KKK Act.[31] The KKK Act served as one of three "Enforcement Acts"[32]

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24. *See infra* Sections II.A–B.

25. *See infra* Part III.

26. *See, e.g.*, Soto v. Flores, 103 F.3d 1056, 1065 (1st Cir. 1997) ("[C]ircuit courts of appeals have recognized that state-created dangers may, in proper circumstances, give rise to constitutional claims under section 1983").

27. *See* Town of Castle Rock v. Gonzalez, 545 U.S. 748, 755 (2005) ("In 42 U.S.C. § 1983, Congress has created a federal cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'").

28. 42 U.S.C. § 1983.

29. *See* Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU D.C. (Apr. 20, 2021, 4:15 PM), https://bit.ly/3enZmsT (explaining that Section 1 of the Ku Klux Klan Act of 1871 is "known today as 42 U.S.C. § 1983").

30. *See* Reid, *supra* note 15 (explaining that very little § 1983 litigation occurred until the 1960s, at which point the statute became a tool by which "governmental employees [could] be sued for acts that violate the Constitution or statutes").

31. *See* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978) ("Section 1 [of the Act], now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment.").

32. *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://bit.ly/3sBalYi (last visited Dec. 26, 2021).

passed as part of a congressional initiative to address the widespread violence incited by post-civil-war white supremacist movements.[33] Importantly, Congress intended Section 1 to fortify the protections provided by the newly ratified Fourteenth Amendment.[34]

While the KKK Act was passed in response to racially motivated violence incited by the Ku Klux Klan,[35] the remedy created in Section 1 did not provide for recourse against the Klan itself or similar private actors.[36] Instead, Section 1 provided a remedy against state officials who failed to protect their citizens through the enforcement of state law.[37] Section 1 of the KKK Act therefore aimed to reinforce the protections of the Fourteenth Amendment by creating a federal cause of action against state actors who abdicated their duty to enforce applicable state law or otherwise violated a citizen's constitutional rights.[38]

Though § 1983 has its origins in the KKK Act of 1871,[39] the newly created cause of action remained "largely dormant" throughout the ensuing decades.[40] In fact, it was not until 1961 that § 1983 became a

33. *See Protecting Life and Property: Passing the Ku Klux Klan Act*, U.S. NAT'L PARK SERV., https://bit.ly/3BA1yY4 (Sept. 6, 2021).

34. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961) (explaining that Section 1 "was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment"); *see also* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.").

35. The Ku Klux Klan was founded in 1865 as "a vehicle for white southern resistance to the Republican Party's Reconstruction-era policies aimed at establishing political and economic equality for Black Americans." *Ku Klux Klan*, HISTORY.COM (Apr. 20, 2021), https://bit.ly/3qeJoZl. Throughout the late nineteenth century, the Klan waged a campaign of racially motivated intimidation and violence. *See id.* Although the Ku Klux Klan still exists today, both its membership and activity have significantly declined. *See id.*

36. *See Monroe*, 365 U.S. at 175–76.

37. *See id.* at 176 (explaining that Section 1 created a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law").

38. *See id.* at 180. The Court explained:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id.

39. *See* Michelman, *supra* note 29.

40. Sheldon Nahmod, *Section 1983 is Born: The Interlocking Supreme Court Stories of* Tenney *and* Monroe, 17 LEWIS & CLARK L. REV. 1019, 1021 (2013) (noting that this dormancy was caused by "restrictive interpretations of state action and the Fourteenth Amendment").

safeguard to protect citizens from constitutional violations by state actors.[41]

2. Evolution: The Supreme Court's Interpretation and Application of § 1983

The Supreme Court's 1961 decision in *Monroe v. Pape* is viewed as the catalyst for the modern understanding of § 1983.[42] In *Monroe*, 13 Chicago police officers detained and interrogated the plaintiffs for ten hours after conducting a warrantless search of the plaintiffs' home.[43] The plaintiffs then sued the city of Chicago and the individual officers under § 1983,[44] alleging that the home invasion and illicit search "constituted a deprivation of their 'rights, privileges, or immunities secured by the Constitution'" within the meaning of § 1983.[45]

Consequently, the Court addressed for the first time the question of whether Congress, in enacting § 1983, "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[46] In concluding that Congress intended § 1983 to provide citizens a remedy against state officials, the Court opined that § 1983 remains an available federal remedy regardless of any corresponding state law remedy.[47] Thus, *Monroe* established § 1983 as an independent federal cause of action used to hold state officials accountable when their actions result in a deprivation of a citizen's constitutional rights.[48] However, *Monroe* represents only the beginning of § 1983's evolution.

Seventeen years later, in *Monell v. Department of Social Services*, the Supreme Court expanded the scope of § 1983 liability.[49] In *Monell*, the plaintiffs, a class of female employees of the New York City Department of Social Services ("Department"), sued the Department

41. *See* Michael C. Fayz, *Civil Rights*, 1995 DET. C.L. REV. 343, 364 (1995) (providing that the "modern prominence of Section 1983 as a principal means of redressing civil rights violations was initiated by the Warren Court's determination in the *Monroe* decision").

42. *See* Monroe v. Pape, 365 U.S. 167 (1961); *see also, e.g.*, Pitts v. Cnty. of Kern, 17 Cal. 4th 340, 348 (1998) (explaining that § 1983 gained "modern vitality in *Monroe v. Pape*").

43. *See Monroe*, 365 U.S. at 169.

44. At the time of *Monroe*'s decision in 1961, § 1983 was denominated as R.S. § 1979. *See id.*

45. *Id.* at 170.

46. *Id.* at 172.

47. *See id.* at 183 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

48. *See, e.g.*, West v. Atkins, 487 U.S. 42, 49–50 (1988) ("It is firmly established that a defendant in a § 1983 suit acts under the color of state law when he abuses the position given to him by the State." (citing *Monroe*, 365 U.S. at 172)).

49. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

under § 1983, alleging that its official policies mandated unlawful forced leave for pregnant employees.[50] Importantly, the plaintiffs named both the city of New York and the Department as defendants, along with several individual employees.[51]

Although the *Monroe* Court initially held that only individual state actors could be found liable under § 1983,[52] *Monell* reversed course and held to the contrary, overturning the *Monroe* decision in part by concluding that the legislative history of § 1983 offers "no justification for excluding municipalities from the 'persons' covered by [the statute]."[53] In reaching this conclusion, the Court reasoned that Congress intended § 1983 "to give a broad remedy for violations of federally protected civil rights."[54] In addition, because municipalities could create the harms that § 1983 is meant to remedy, the Court concluded that both municipalities and natural persons can be found liable under § 1983.[55] Together, the *Monroe* and *Monell* decisions combined to propel the evolution of § 1983.[56] Indeed, the number of § 1983 cases has dramatically increased since *Monroe*, and § 1983 cases continue to occupy large portions of federal courts' dockets.[57]

The current framework of a federal court's § 1983 analysis derives from the Supreme Court's decision in *American Manufacturers Mutual Insurance Company v. Sullivan*.[58] In *Sullivan*, like *Monell*, a class of employees brought suit under § 1983 against several private insurance

50. *See id.* at 660–61. More specifically, the *Monell* plaintiffs alleged that "the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." *Id.* at 661.

51. *See id.*

52. *See* Monroe v. Pape, 365 U.S. 167, 191 (1961) ("[W]e cannot believe that the word 'person' was used in this particular Act to include [municipalities].").

53. *Monell*, 436 U.S. at 701.

54. *Id.* at 685.

55. *See id.* at 685–86.

56. *See* Lauren Madison, *Substantive Due Process as Recourse for Flint Water Crisis Plaintiffs*, 64 WAYNE L. REV. 531, 541 (2019) (recognizing that "the decisions in *Monell* and *Monroe* rendered § 1983 a significant tool in the civil rights litigant's toolbox," and led to an increase in § 1983 claims filed in federal court).

57. *See* Susanah M. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 9 n.42 (1986) (noting that only 280 cases were brought under § 1983 in 1960, before *Monroe*, and that the amount of § 1983 cases increased to 3,587 by 1970); *see also* Theodore Eisenburg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 4 (2015) ("Section 1983 cases . . . numerically dominate the civil rights case docket in federal court."). Notably, however, § 1983 plaintiffs "fare poorly compared to non-civil-rights plaintiffs." *Id.* at 7 (explaining that § 1983 claims "have plaintiff trial win rates of 30 percent or less, which is lower than the rates for most classes of civil litigation").

58. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

companies that provided workers' compensation coverage.[59] The employees alleged that an employment policy violated their Fourteenth Amendment rights by withholding workers' compensation benefits.[60]

The Court held that the private insurance companies could not be sued under § 1983 because the companies' withholding of payments was "not fairly attributable to the State."[61] In so holding, the Court explicitly outlined the contours of a successful § 1983 claim, stating that a plaintiff must establish (1) "that they were deprived of a right secured by the Constitution or laws of the United States"; and (2) "that the alleged deprivation was committed under color of state law."[62] The Court further explained that "the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'"[63] Today, federal courts frequently cite *Sullivan*'s elements as the framework for addressing the validity of § 1983 claims.[64]

How state officials violate citizens' constitutional rights under § 1983 often varies,[65] but one of the most common ways a state official could be liable under § 1983 is by violating the Due Process Clause of the Fourteenth Amendment.[66] Indeed, the state-created danger doctrine itself arose out of a § 1983 claim involving an alleged due process violation.[67]

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59. *See id.* at 47–48.

60. *See id.* at 48.

61. *Id.* at 58 ("Respondents have therefore failed to satisfy an essential element of their § 1983 claim.").

62. *Id.* at 49–50.

63. *Id.* at 50 (quoting Blum v. Yaretsky, 457 U.S. 991, 1002 (1982).

64. *See, e.g.*, Gritton v. Disponett, 332 F. App'x 232, 237 (6th Cir. 2009) (utilizing the *Sullivan* elements to address a § 1983 claim); Ijemba v. Litchman, 127 F. App'x 5, 6–7 (2d Cir. 2005) (same); Martin v. Holloway, No. 19-17070, 2020 U.S. Dist. LEXIS 196330, at *6 (D.N.J. Oct. 22, 2020) (same); Holt v. Entzel, No. 3:19-CV-181, 2021 U.S. Dist. LEXIS 113355, at *3 (N.D.W. Va. Apr. 15, 2021) (same).

65. *See, e.g.*, Manuel v. City of Joliet, 580 U.S. 357 (2017) (involving a § 1983 for unlawful detention in violation of the Fourth Amendment); West v. Atkins, 487 U.S. 42 (1988) (involving a § 1983 claim arising out of failure to provide adequate medical care to prisoners in violation of the Eighth Amendment); Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (involving a § 1983 claim brought against police officers for an allegedly retaliatory arrest in violation of plaintiff's First Amendment rights).

66. *See* Mead, *supra* note 57, at 27 (explaining that "[m]uch of the conduct that would give rise to the state tort actions has a deleterious effect on life, liberty or property, so it is possible to cast almost any tortious injury to life, liberty or property in [F]ourteenth [A]mendment terms if the requisite state action exists").

67. *See* Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1215 (E.D. Pa. 1997) (providing that "[t]he explanatory language of *DeShaney*," a case in which the plaintiff claimed a violation of Due Process under § 1983, "spawned the state-created danger theory").

B. The State-Created Danger Doctrine

Before examining the circuit split surrounding the viability of the state-created danger doctrine, it is first necessary to understand the seminal case that laid the doctrine's foundation.[68] Although the Supreme Court created the state-created danger doctrine in 1989, the circuit courts' interpretations of this theory of liability throughout the following decades outlined the doctrine's framework.[69]

1. Inception: *DeShaney v. Winnebago County Department of Social Services*

The state-created danger doctrine's inception can be traced back to a few lines of dicta in a 1989 Supreme Court decision, which ultimately held that the government has no duty to protect individuals from harm inflicted by private actors.[70] *DeShaney v. Winnebago County Department of Social Services* arose from tragic circumstances.[71] Joshua DeShaney, a four-year-old boy, endured consistent physical abuse from his father.[72] The Winnebago County Department of Social Services ("DSS") became aware of the abuse two years prior when Joshua's mother filed a police report.[73] Later, when Joshua checked into a hospital with multiple bruises and abrasions, the examining physician notified DSS of her belief that the injuries resulted from child abuse.[74] Although DSS convened a "Child Protection Team" to discuss the situation,[75] the team determined that it lacked the evidence required to retain Joshua in the court's custody.[76] Even after three additional suspicious hospitalizations, DSS found the evidence insufficient to remove Joshua from the home, which required Joshua to remain in his father's custody.[77]

After this two-year period of consistent complaints, hospitalizations, and minimal DSS action, the abuse culminated when Joshua's father beat

68. *See infra* Section II.B.1.

69. *See infra* Section II.B.2.

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

71. *See* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 1 (2014) (recognizing that there "is no series of cases that are more consistently depressing than state-created danger decisions," and that *DeShaney* is "the most important of these decisions"); *see also DeShaney*, 489 U.S. at 191 ("The facts of this case are undeniably tragic.").

72. *See DeShaney*, 489 U.S. at 193.

73. *See id.* at 192.

74. *See id.*

75. The Child Protection Team included "a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel." *Id.*

76. *See id.*

77. *See id.* at 192–93.

him so severely that he fell into a life-threatening coma and suffered permanent brain damage.[78] After this final beating, Joshua's mother sued DSS under § 1983, alleging that DSS's failure to intervene deprived Joshua of his liberty without due process in violation of the Fourteenth Amendment.[79] The Court explained that it granted certiorari "[b]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local government entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights."[80]

The Court ultimately held that DSS did not violate Joshua's Fourteenth Amendment rights.[81] In so holding, the Court concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[82] Therefore, because Joshua's father—a private actor—caused the injuries at issue, the State had no constitutional duty to protect Joshua.[83]

Notably, the Court recognized two circumstances in which the State might have a duty to provide protection.[84] First, the Court noted that a duty to protect could arise for individuals in the government's physical custody.[85] For example, the State's failure to provide food, clothing, or medical care to someone wholly in state custody would violate the State's duty to afford protection to its citizens.[86]

The Court identified a second circumstance where the State may have a duty to provide protection, which planted the seed for the state-created danger doctrine.[87] In explaining why the circumstances of *DeShaney* created no governmental duty to provide protection, the Court stated the following:

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78. *See id.* at 193.

79. *See id.*; *see also* Ingraham v. Wright, 430 U.S. 651, 673 (1977) (recognizing that a fundamental liberty protected by the Fourteenth Amendment is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security").

80. *DeShaney*, 489 U.S. at 194.

81. *See id.* at 202.

82. *Id.* at 197.

83. *See id.* at 201.

84. *See id.* at 198 ("It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.").

85. *See id.* at 199–200 ("[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.").

86. *See id.* at 200 ("When a person is institutionalized – and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist." (quoting Youngberg v. Romeo, 457 U.S. 307, 317 (1982))).

87. *See* Robinson v. Lioi, 536 F. App'x 340, 343 (4th Cir. 2013) (pointing to the second circumstance identified by the *DeShaney* Court and providing that "[t]his language in *DeShaney* is commonly acknowledged as the genesis of the state-created danger doctrine").

> 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 . . . .[88]

Through this language, the Court implied that the government could be found liable if it created the danger which resulted in injury at the hands of a private actor.[89] However, because the *DeShaney* Court failed to specify the type of state conduct that might give rise to liability under the state-created danger theory, the circuit courts of appeals were tasked with outlining the contours of this newly–formulated theory of liability.[90]

2. Circuit Court Adoption of the State-Created Danger Doctrine

Four months after *DeShaney*, the circuit courts of appeals began recognizing the state-created danger doctrine.[91] Scholars consider the Ninth Circuit's decision in *Wood v. Ostrander* to be among the first cases to hold a state actor liable under the state-created danger doctrine.[92]

In *Wood*, a Washington state trooper conducted a traffic stop at 2:30 a.m. on a male driver and his female passenger, Plaintiff Wood.[93] After determining that the driver was intoxicated, the trooper arrested him, took his keys, and ordered the vehicle's impoundment.[94] But instead of taking Wood to the station or driving her home, the trooper left her stranded on the side of the road in a high-crime area.[95] Left to her own

88. *DeShaney*, 489 U.S. at 201 (emphasis added).

89. Interestingly, seven years before the Supreme Court's *DeShaney* decision, the Seventh Circuit had floated a theory of state-created danger liability. *See* Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982). The court noted the following in dicta:

> 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.

Id. While *Bowers* may represent an early inclination of the possibility of a state-created danger theory of liability, it was not until after *DeShaney* that a state actor was found liable under this theory. *See* Wood v. Ostrander, 879 F.2d 583, 587–90 (9th Cir. 1989).

90. *See* Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 PENN ST. L. REV. 893, 897 (2016) (noting the *DeShaney* Court's failure to offer guidance and explaining how "[t]hat vacuum has allowed the circuits to develop their own state-created danger doctrines").

91. *See Wood*, 879 F.2d at 589–90.

92. *See id.*; *see also* Chemerinsky, *supra* note 71, at 8–9 (observing that "[q]uickly following *DeShaney*, there were a series of cases from the circuits that created liability for state-created dangers," and recognizing *Wood* as "one of the initial cases that created liability for state-created dangers").

93. *See Wood*, 879 F.2d at 586.

94. *See id.*

95. *See id.*

devices, Wood accepted a ride from a stranger who drove her to a secluded area and raped her.[96]

Wood sued the trooper under § 1983, claiming that the trooper leaving her on the side of the road violated her Fourteenth Amendment right to personal security by acting with deliberate indifference towards her safety.[97] The Ninth Circuit concluded that Wood "raised a triable issue of fact as to whether [the Trooper's] conduct 'affirmatively placed [Wood] in a position of danger.'"[98] To support this holding, the Ninth Circuit pointed to the exception in *DeShaney*'s dicta.[99] Thus, for the first time, a circuit court recognized *DeShaney* as endorsing the state-created danger doctrine as a theory of liability.[100] While the Ninth Circuit in *Wood* was the first circuit to recognize *DeShaney*'s state-created danger theory of liability, its recognition was certainly not an aberration.[101]

In fact, to date, 11 circuits have recognized the state-created danger doctrine.[102] Of those 11, eight circuits have applied the state-created danger doctrine to cases of domestic violence.[103] Significantly, however, the Fifth Circuit stands alone as the only circuit that refuses to adopt the doctrine, despite having ample opportunities to do so.[104]

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96. *See id.*

97. *See id.* at 588. Moreover, the Supreme Court has recognized that "[a]mong the historic liberties so protected [by the Fourteenth Amendment is] a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977).

98. *Wood*, 879 F.2d at 589–90 (quoting Ketchum v. Cnty. of Alameda, 811 F.2d 1243, 1247 (9th Cir. 1987)).

99. *See id.* at 590 (distinguishing *DeShaney* as a "situation where [the] state 'played no part' in creating the dangers that minor child faced by remaining in his father's custody 'nor did [the state] do anything to render [the child] any more vulnerable to them.'" (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989))).

100. *See id.*

101. *See* Chemerinsky, *supra* note 71, at 8 (explaining that *Wood* is only the first of a "series of cases from the circuits that created liability for state-created dangers").

102. *See* Irish v. Fowler, 979 F.3d 65, 67 (1st Cir. 2020); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993); Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996); Robinson v. Lioi, 536 F. App'x 340, 344 (4th Cir. 2013); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); Stevens v. Umsted, 131 F.3d 697, 704–05 (7th Cir. 1997); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Cornelius v. Town of Highland Lake, 880 F.2d 348, 359 (11th Cir. 1989); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001).

103. *See Irish*, 979 F.3d at 67; Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 429 (2d Cir. 2009); Burella v. City of Philadelphia, 501 F.3d 134, 146–47 (3d Cir. 2007); *Robinson*, 536 F. App'x at 344; Caldwell v. City of Louisville, 120 F. App'x 566, 573–76 (6th Cir. 2004); Wilson-Trattner v. Campbell, 863 F.3d 589, 593–96 (7th Cir. 2017); *Freeman*, 911 F.2d at 55; Martinez v. City of Clovis, 943 F.3d 1260, 1274 (9th Cir. 2019).

104. *See, e.g.*, Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (providing that "recent decisions have consistently confirmed '[t]he Fifth Circuit has not

a. Circuits That Have Adopted the Doctrine and Applied It to Domestic Violence Cases

In the decades since *DeShaney*, eight circuit courts of appeals have adopted the state-created danger doctrine and applied its framework to cases involving domestic violence.[105] By applying the state-created danger doctrine to domestic violence cases, these eight circuits afford legal recourse to domestic violence victims whose injuries were caused by state action that created or increased the danger to the victim.[106]

The Eighth Circuit adopted the state-created danger doctrine in *Freeman v. Ferguson* and simultaneously became the first circuit to recognize the doctrine as a viable theory of liability in a case involving domestic violence.[107] In *Freeman*, the plaintiff brought suit against her municipality's police department and several individual police officers under § 1983.[108] Specifically, the plaintiff alleged that the department's failure to enforce a restraining order against her daughter's estranged husband led to her daughter's murder.[109] Although the district court initially dismissed the plaintiff's claim, the Eighth Circuit reversed, holding that the plaintiff should be afforded the opportunity to "amend her complaint to conform with the rule of law established by *DeShaney*."[110]

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adopted the state-created danger theory of liability'" (quoting Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010))).

105. *See Irish*, 979 F.3d at 67; *Okin*, 577 F.3d at 429; *Burella*, 501 F.3d at 146–47; *Robinson*, 536 F. App'x at 344; *Caldwell*, 120 F. App'x at 573–76; *Campbell*, 863 F.3d at 593–96; *Freeman*, 911 F.2d at 55; *Martinez*, 943 F.3d at 1274. *But see* White v. Lemacks, 183 F.3d 1253, 1258 (11th Cir. 1999) (providing that the Supreme Court's standard, in *Collins v. City of Harker Heights*, that "government officials violate the substantive due process rights of a person not in custody only by conduct 'that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense'" is the applicable standard for § 1983 Due Process claims moving forward (quoting Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992))); *see also* Hawkins v. Eslinger, 2007 U.S. Dist. LEXIS 69682, *9–12 (M.D. Fla. Sept. 20, 2007) (illustrating that lower courts within the Eleventh Circuit continue to apply the *Collins* standard to find state actors liable under § 1983 in domestic violence cases in place of the state-created danger doctrine).

106. *See* Atinuke O. Awoyomi, *The State-Created Danger Doctrine in Domestic Violence Cases: Do We Have a Solution in* Okin v. Village of Cornwall-on-Hudson Police Department*?*, 20 COLUM. J. GENDER & L. 1, 3 (2011) ("Under the [state-created danger] doctrine, a domestic violence victim may assert a claim against a perpetrator by showing that a state agent, such as a police officer, acting under color of law, increased her danger by condoning the perpetrator's violent actions.").

107. *See* Freeman v. Ferguson, 911 F.2d 52, 54–55 (8th Cir. 1990).

108. *See id.* at 53.

109. *See id.* More specifically, the plaintiff alleged violations of her Fourth, Fifth, and Fourteenth Amendment rights. *See id.*

110. *Id.* at 54.

In so holding, the court recognized, for the first time, that *DeShaney* altered the framework for addressing domestic violence claims brought under § 1983.[111] Elaborating on *DeShaney*'s new framework, the court adopted the state-created danger doctrine, stating "that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken *affirmative action* which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been absent state action."[112] Although it took the Eighth Circuit only one year to apply the state-created danger doctrine to a domestic violence case, 14 years passed before another circuit followed suit.[113]

After the Sixth Circuit adopted the state-created danger doctrine in 1998,[114] the court applied the doctrine to a domestic violence case six years later in *Caldwell v. City of Louisville*.[115] The plaintiff in *Caldwell*, a mother whose daughter was strangled to death by the daughter's boyfriend, sued the city of Louisville under § 1983, alleging that the city's inadequate warrant processing system contributed to her daughter's death.[116] The court applied the state-created danger doctrine, noting that state action that "substantially increased the likelihood" of private harm to the victim is sufficient to satisfy a state-created danger claim.[117] Accordingly, the court held the city's police department liable because it "undertook some affirmative conduct which ultimately increased [the daughter's] risks of harm" from her abusive boyfriend.[118]

111. *See id.* (explaining that *DeShaney* "substantially altered the framework upon which cases such as that at bar are to be considered").

112. *Id.* at 55 (emphasis added). The court further noted that "[a]ppellant's allegations indicate that in this case the state may have increased the dangers faced by the [plaintiff's daughter] to such a level." *Id.* Notably, the Eighth Circuit's emphasis on affirmative state action to satisfy a state-created danger claim echoes the Ninth Circuit's decision in *Wood*, which similarly framed the state-created danger inquiry as whether the plaintiff was "deprived . . . of a liberty interest protected by the Constitution by *affirmatively placing* her in danger." Wood v. Ostrander, 879 F.2d 583, 596 (9th Cir. 1989) (emphasis added).

113. *See* Caldwell v. City of Louisville, 120 F. App'x 566, 573–76 (6th Cir. 2004).

114. *See* Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) (holding that a state actor may be found liable under § 1983 if the actor "must have known or clearly should have known that its actions specifically endangered an individual").

115. *See Caldwell*, 120 F. App'x at 573.

116. *See id.* at 567–68.

117. *Id.* at 573 (quoting *Kallstrom*, 136 F.3d at 1067).

118. *Id.* For example, one Louisville Police Officer refused to act upon a warrant for the abusive boyfriend's arrest, resulting in a six–day delay in the warrant's execution while the daughter faced a "substantial risk of serious harm." *Id.* at 575.

Five years after *Caldwell*, the Second Circuit applied the state-created danger doctrine to a domestic violence case.[119]

The Second Circuit originally adopted the state-created danger doctrine in 1993,[120] and applied the doctrine to a domestic violence case 16 years later in *Okin v. Village of Cornwall-on-Hudson Police Department*.[121] In *Okin*, the plaintiff alleged that police officers colluded with her boyfriend by failing to acknowledge or investigate her multiple complaints of domestic abuse.[122] Additionally, the plaintiff alleged that the officers failed to take sufficient action after her boyfriend admitted his abusive tendencies to the officers.[123] The Second Circuit held that there was a genuine issue of material fact as to whether the officers' conduct "implicitly but affirmatively encouraged" the boyfriend's domestic violence.[124]

The court recognized that "repeated, sustained inaction by government officials, in the face of potential acts of violence" may rise to the level of affirmative conduct necessary to satisfy a state-created danger claim.[125] Therefore, the court concluded that the officers' repeated refusal to address the plaintiff's complaints of domestic violence, their expressions of camaraderie with the abusive boyfriend, and their displays of contempt for the plaintiff "could be viewed as ratcheting up the threat of danger" to the plaintiff.[126] Thus, the court found that the circumstances could give rise to state liability.[127]

In *Robinson v. Lioi*, the Fourth Circuit, like the Eighth Circuit, simultaneously adopted the state-created danger doctrine while applying it to a case involving domestic violence.[128] In *Lioi*, the plaintiff's husband stabbed her to death after the plaintiff obtained a protective order against him.[129] Several weeks before the attack, the plaintiff had filed assault charges against her husband, but the police never executed

119. *See* Okin v. Village of Cornwall–on–Hudson Police Dep't, 577 F.3d 415, 428 (2d Cir. 2009).

120. *See* Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (holding that state actors could be liable under § 1983 if they "in some way had assisted in creating or increasing the danger to the victim").

121. *See Okin*, 577 F.3d at 428.

122. *See id.* at 427.

123. *See id.* at 427 (noting that the officers still failed to report the plaintiff's complaints accurately or provide her reasonable police protection even after the boyfriend told the Police Chief that "he smacked Okin around and could not help himself from behaving in this manner").

124. *Id.* at 430.

125. *Id.* at 428 (providing that this may be the case "even if there is no explicit approval or encouragement").

126. *Id.* at 430.

127. *See id.*

128. *See* Robinson v. Lioi, 536 F. App'x 340, 345 (4th Cir. 2013).

129. *See id.* at 341.

the husband's arrest warrant.[130] When the plaintiff's estate discovered text messages between a police officer and the husband in which the officer warned the husband of the impending arrest and provided advice on avoiding capture, the estate brought a § 1983 claim against the officer and the police department.[131] The plaintiff alleged that the police officer's departure from normal procedure in serving the arrest warrant enabled the abusive husband to kill his wife.[132] The Fourth Circuit held the officer liable under the state-created danger doctrine, concluding that the officer's actions "directly caus[ed] harm" to the plaintiff because he had "affirmatively act[ed] to interfere with execution of the warrant."[133] Within the last three years, two more circuit courts of appeal have applied the state-created danger doctrine to cases involving domestic violence.[134]

As previously discussed, although the Ninth Circuit adopted the state-created danger doctrine in *Wood*,[135] it took until 2019 for the court to apply the doctrine to a domestic violence case in *Martinez v. City of Clovis*.[136] In *Martinez*, the plaintiff brought suit under § 1983, alleging that the city and several police officers violated her due process rights by placing her at a greater risk of future domestic abuse at the hands of her boyfriend.[137]

Using the state-created danger theory, the court ultimately ruled in the defendant's favor, reasoning that precedent did not "clearly establish[]" the plaintiff's due process rights.[138] Therefore, the court concluded that qualified immunity[139] shielded the officers from liability.[140] The court recognized, however, that "a reasonable jury could find that [the officers] violated [the plaintiff's] due process right to liberty by affirmatively increasing the known and obvious danger" she

130. *See id.*

131. *See id.* at 341–42.

132. *See id*. at 342.

133. *Id.* at 345 (quoting Pinder v. Johnson, 54 F.3d 1169, 1177 (4th Cir. 1995)). The court went on to confirm its adoption of the state-created danger doctrine, stating that "the right to be free from state-created danger has been clearly established in this circuit." *Id.* at 346.

134. *See* Martinez v. City of Clovis, 943 F.3d 1260, 1274 (9th Cir. 2019) (applying the state-created danger doctrine); Irish v. Fowler, 979 F.3d 65, 67 (1st Cir. 2020) (same).

135. *See* Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989).

136. *See Martinez*, 943 F.3d at 1274.

137. *See id.* at 1265–66.

138. *Id.* at 1277.

139. *See id.* at 1270 (explaining that the "doctrine of qualified immunity protects government officials 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" (quoting Reese v. Cnty. Of Sacramento, 888 F.3d 1030, 1037 (9th Cir. 2018))).

140. *See id.*

faced.[141] Thus, the state-created danger doctrine now applies to domestic violence cases within the Ninth Circuit.[142]

The First Circuit became the most recent circuit court of appeals to both adopt the state-created danger doctrine and apply it to a domestic violence case in *Irish v. Fowler*.[143] In *Irish*, the plaintiff informed the police that her abusive ex–boyfriend, Anthony Lord, kidnapped, repeatedly raped, and threatened her the previous night.[144] Detectives were aware that the plaintiff feared further violence if Lord was notified of her contact with the police.[145] But rather than attempting to physically apprehend Lord, detectives left a voicemail on Lord's phone requesting a statement.[146] The next day, Lord murdered the plaintiff's new boyfriend, shot the plaintiff's mother, and again abducted and raped the plaintiff.[147]

The plaintiff then sued the police department under § 1983, alleging that the detective's voicemail triggered Lord's rampage and thus placed her at a greater risk of harm from domestic abuse.[148] The First Circuit, recognizing the widespread acceptance of the state-created danger doctrine in other circuits, adopted the doctrine and applied it to the case.[149] Because the detective effectively alerted Lord to the plaintiff's contact with police despite knowing Lord's violent propensity, the court held that a reasonable jury could conclude that the detective's actions "g[a]ve rise to a constitutional violation under the state-created danger doctrine."[150] Thus, the First Circuit became the sixth circuit court of appeals to find a state actor liable under the state-created danger doctrine in a domestic violence case.[151]

Moreover, two circuit courts of appeals—the Third Circuit and the Seventh Circuit—have recognized the state-created danger doctrine and

141. *Id.* at 1274.

142. *See id.* at 1276 ("Although the application of the state-created danger doctrine to this context was not apparent to every reasonable officer at the time the conduct occurred, we now establish the contours of the due process protections afforded victims of domestic violence in situations like this one."). The Ninth Circuit held that

> the state-created danger doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity . . . . Going forward, the law in this circuit will be clearly established that such conduct is unconstitutional.

Id. at 1276–77.

143. *See* Irish v. Fowler, 979 F.3d 65, 67 (1st Cir. 2020).

144. *See id.* at 68.

145. *See id.* at 69.

146. *See id.*

147. *See id.* at 67.

148. *See id.* at 67–68.

149. *See id.* at 67.

150. *Id.* at 79.

151. *See id.*

applied it to domestic violence cases, but have neglected to find a state actor liable.[152] However, because these circuits have recognized the state-created danger doctrine's applicability in the domestic violence context, district courts within both circuits continue to use the doctrine to find state actors liable in domestic violence cases.[153] Still, two remaining circuit courts of appeals have recognized the state-created danger doctrine but have failed to apply the doctrine to any case involving domestic violence.[154]

b. Circuits That Have Adopted the Doctrine but Have Not Applied It to Domestic Violence Cases

Two circuit courts of appeals, the Tenth Circuit and the D.C. Circuit, have adopted the state-created danger doctrine but have not applied the doctrine to domestic violence cases.[155] The Tenth Circuit adopted the state-created danger doctrine in *Uhlrig v. Harder*, holding that a state actor "may be liable for an individual's safety under a 'danger creation' theory if it created the danger that harmed the individual."[156] Six years later, the D.C. Circuit followed suit and adopted the state-created danger doctrine in *Butera v. District of Columbia*.[157] In *Butera*,

152. *See* Kneipp v. Tedder, 95 F.3d 1199, 1210–11 (3d Cir. 1996) (adopting the state-created danger doctrine); Burella v. City of Philadelphia, 501 F.3d 134, 146 (3d Cir. 2007) (holding that the plaintiff's state-created danger claim failed because she did not "allege any facts that would show that the officers *affirmatively* exercised their authority in a way that rendered her more vulnerable to her husband's abuse"); *see also* Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982) (recognizing the state-created danger theory of liability); Wilson-Trattner v. Campbell, 863 F.3d 589, 595–96 (7th Cir. 2017) (holding that the plaintiff's state-created danger claim failed because there was no evidence that the police officers' actions either created or exacerbated the plaintiff's danger of domestic abuse at the hands of her boyfriend).

153. *See, e.g.*, Seidle v. Neptune Twp., Civil Action No. 17-4428, 2021 U.S. Dist. LEXIS 83929, at *34 (D.N.J. May 1, 2021) (holding that "in light of [defendant's] alleged history of domestic violence, excessive force complaints, and psychological issues, Plaintiff's allegation that the Prosecutor Defendants placed [plaintiff] in a worse position than if they had not acted to rearm [defendant] is plausible"); Parker v. City of Quincy, No. 16-cv-03064, 2017 U.S. Dist. LEXIS 48330, at *25 (C.D. Ill. Mar. 30, 2017) (holding that the plaintiff's claims that a detective arrested her abusive boyfriend without checking his record and assured the plaintiff of her safety, only for the boyfriend to stab the girlfriend 34 times after his release from jail, were "sufficient to state a § 1983 claim under the 'state-created danger' exception").

154. *See* Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001).

155. *See Uhlrig*, 64 F.3d at 572; *Butera*, 235 F.3d at 651.

156. *Uhlrig*, 64 F.3d at 572. The court further explained that "*DeShaney* . . . leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger. This state-created danger doctrine necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *Id.* at 572 n.6 (quoting Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 995 (10th Cir. 1994)).

157. *See Butera*, 235 F.3d at 651.

the court "join[ed] the other circuits in holding that [a § 1983 claim against a state actor can proceed] when [state] officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."[158] With the addition of the Tenth Circuit and the D.C. Circuit, a total of 11 circuit courts of appeals have recognized the state-created danger doctrine.[159] At the time of this writing, eight circuits have applied the state-created danger doctrine to domestic violence cases.[160] The Fifth Circuit stands alone as the only circuit to consistently refuse to adopt the state-created danger doctrine.[161]

c. The Fifth Circuit's Refusal to Both Adopt the Doctrine and Apply It to Domestic Violence Cases

In stark contrast to the circuits previously discussed, the Fifth Circuit—for decades—has declined to adopt the state-created danger doctrine despite having numerous opportunities to do so.[162] The Fifth Circuit's first opportunity to adopt the state-created danger doctrine presented itself five years after *DeShaney* in *Leffal v. Dallas Independent School District*.[163] In *Leffal*, the plaintiff's son was shot and killed at a school-sponsored dance.[164] The plaintiff sued the school district under § 1983, alleging that it affirmatively acted to place her son in danger by sponsoring the dance.[165]

The Fifth Circuit began its analysis by noting a fact that remains unique to the circuit's progeny 28 years later: "We have found no cases in our circuit permitting § 1983 recovery for a substantive due process violation predicated on a state-created danger theory . . . ."[166] Moreover, the court expressed skepticism regarding whether the passage from *DeShaney* relied upon by other circuits to legitimize the state-created

158. *Id.* The court also noted that the "development of the State endangerment concept by the circuit court of appeals is consistent with the notion, implied in *DeShaney*, that something less than physical custody may suffice to present a substantive due process claim." *Id.*

159. *See* cases cited *supra* note 102.

160. *See* cases cited *supra* note 103.

161. *See, e.g.*, Dixon v. Alcorn Cnty. Sch. Dist., 499 F. App'x 364, 366 (5th Cir. 2012) (providing that "this Court has consistently refused to adopt the state-created danger theory").

162. *See, e.g.*, Doe v. Columbia-Brazoria Indep. Sch. Dist., 855 F.3d 681, 688 (5th Cir. 2017) ("Panels [in this circuit] have 'repeatedly noted' the unavailability of the [state-created danger] theory." (quoting Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 1002 (5th Cir. 2014))).

163. *See* Lefall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 532 (5th Cir. 1994).

164. *See id.* at 523.

165. *See id.* (alleging, more specifically, that "at the time of the incident in question it was well-known that students . . . often carried and fired dangerous weapons on school property").

166. *Id.* at 530.

danger theory had been properly interpreted.[167] Consequently, the court declined to find the school district liable under the state-created danger doctrine.[168] The Fifth Circuit continued to cast doubt on whether *DeShaney* created an exception for state-created dangers at all, despite the steady pattern of other circuits recognizing and adopting the doctrine.[169] However, in two related cases, the Fifth Circuit appeared to shift its position and signal its recognition of the state-created danger doctrine as a viable theory of liability.[170]

The Fifth Circuit's positional shift first appeared in *Scanlan v. Texas A&M University*.[171] The *Scanlan* plaintiffs, Texas A&M students who were injured or killed when a bonfire collapsed at a university-sponsored event, sued the university under § 1983 alleging that it placed the plaintiffs in danger by holding the event and constructing the bonfire.[172] The court determined that the plaintiffs "had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur."[173] The court therefore concluded that "the plaintiffs stated a [§] 1983 claim under the state-created danger theory."[174] However, on remand, the district court refused to adopt the doctrine and granted the university qualified immunity.[175]

167. *See id.* (opining that "it could be argued that the passage from *DeShaney* quoted above was meant only to describe the kind of circumstances giving rise to a 'special relationship' between state and individual").

168. *See id.* at 532.

169. *See* Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010) (acknowledging that "[a] number of courts have interpreted *DeShaney* to allow a second exception to the rule against state liability for violence committed by private actors in situations where 'the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury,'" but reiterating that "[t]he Fifth Circuit has not adopted the 'state-created danger' theory of liability"); *see also supra* Section II.B.2.a (describing the pattern of circuit courts adopting the state-created danger doctrine).

170. *See* Scanlan v. Tex. A&M Univ., 343 F.3d 533, 538 (5th Cir. 2003); Breen v. Tex. A&M Univ., 485 F.3d 325, 336 (5th Cir. 2007).

171. *See Scanlan*, 343 F.3d at 538.

172. *See id.* at 535; *see also 12 Die While Building a Bonfire at Texas A&M University*, HISTORY.COM (Nov. 13, 2009), https://bit.ly/3zmRUI1 (describing in greater detail the events that led to the bonfire collapse).

173. *Scanlan*, 343 F.3d at 538.

174. *Id.*

175. *See* Davis v. Sutherland, No. G-01-720, 2004 U.S. Dist. LEXIS 27716, at *20 (S.D. Tex. May 20, 2004) (determining that "the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities," and subsequently concluding that "Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims").

A subsequent appeal once again asked the Fifth Circuit to adopt the state-created danger doctrine in *Breen v. Texas A&M University*.[176] There, the court noted that *Scanlan* represented the first instance in which the Fifth Circuit "was squarely faced with complaints that sufficiently alleged the elements of a state-created danger claim."[177] And because *Scanlan* held that the district court erred in dismissing the plaintiffs' § 1983 claims, the Fifth Circuit concluded that *Scanlan* "necessarily recognized that the state-created danger theory is a valid legal theory."[178] Although *Scanlan* and *Breen* appeared to signal the Fifth Circuit's adoption of the state-created danger doctrine, later decisions proved otherwise.[179]

Finally, in the 2012 case of *Doe v. Covington County School District*, the Fifth Circuit, sitting en banc,[180] explicitly repudiated the notion that *Scanlan* represented the state-created danger doctrine's adoption.[181] In *Doe*, the court analyzed whether a school district can be held liable under § 1983 for repeatedly releasing a student into the custody of a man who sexually abused the student.[182] In finding for the school district, the court addressed the plaintiff's argument that *Scanlan* and *Breen* combined to represent the Fifth Circuit's adoption of the state-created danger doctrine.[183] In response, the Fifth Circuit bluntly stated that "[d]espite the potential confusion created by *Scanlan* and *Breen*, recent decisions have consistently confirmed that '[t]he Fifth Circuit has not adopted the "state-created danger" theory of liability.'"[184] Furthermore, the court declined to use the en banc opportunity presented by *Doe* to formally adopt the state-created danger doctrine because "the

176. *See* Breen v. Tex. A&M Univ., 485 F.3d 325, 335 (5th Cir. 2007) (explaining that "the question naturally arises whether *Scanlan* constitutes recognition, approval, and adoption for use by this court of the state-created danger theory").

177. *Id.* The court provided the previously recited elements of a state-created danger claim: "(1) the defendant's actions created or increased the danger to the plaintiff; and (2) the defendant acted with deliberate indifference toward the plaintiff." *Id.* at 334–35.

178. *Id.* at 335.

179. *See, e.g.*, Beltran v. City of El Paso, 367 F.3d 299, 307 (5th Cir. 2004) (asserting that the Fifth Circuit has "consistently refused to recognize a 'state-created danger' theory" despite the *Scanlan* decision's apparent recognition of the theory); Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 249 n.5 (5th Cir. 2003) (explaining that "[d]espite remanding that case to the district court for further proceedings, we did not recognize the state created danger theory [in *Scanlan*]").

180. The phrase "en banc" is French for "on the bench." *En banc*, BLACK'S LAW DICTIONARY (11th ed. 2019). When a court sits en banc, "all judges [are] present and participating[.]" *Id.*

181. *See* Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012).

182. *See id.* at 853.

183. *See id.* at 864.

184. *Id.* at 865 (quoting Kovacic v. Villarreal, 628 F.3d 209, 214 (5th Cir. 2010)).

allegations would not support such a theory."[185] Since *Doe*, the Fifth Circuit has remained steadfast in its refusal to adopt the state-created danger doctrine and has reaffirmed this position as recently as two years ago.[186]

The Fifth Circuit's refusal to adopt the state-created danger doctrine consequently bars any district court within the circuit from recognizing the doctrine, even if its application might otherwise be warranted.[187] In fact, district courts within the Fifth Circuit have explicitly recognized that the facts of a particular case may be sufficient to allege a state-created danger claim but then ultimately foreclosed the possibility of relief because of Fifth Circuit precedent.[188] Indeed, *Robinson v. Webster County* represents an example of a district court within the Fifth Circuit acknowledging the sufficiency of a state-created danger claim only to dismiss the claim due to Fifth Circuit precedent.[189]

Though the tragic facts of *Robinson* appear in this Comment's Introduction,[190] the crux of Robinson's allegations warrants repetition. Because jail personnel knew of her abusive husband's propensity for violence, Robinson alleged in her complaint that the jail's decision to furlough her husband and the Dispatcher's failure to dispatch law enforcement to Robinson's home upon request created the danger that led to her injuries.[191]

The district court began its analysis of Robinson's state-created danger claim by acknowledging that "although the state-created danger theory is recognized by most circuits across the country, it has never been recognized as a viable theory for recovery in the Fifth Circuit."[192] However, while it foreclosed the claim, the court noted that Robinson's allegations "appear to fall squarely within the parameters of the state-created danger theory."[193] Nonetheless, the district court concluded that

185. *Id.* at 865.

186. *See* Keller v. Fleming, 952 F.3d 216, 227 (5th Cir. 2020) (providing that "the Fifth Circuit has never recognized this 'state-created-danger' exception").

187. *See, e.g.*, Robinson v. Webster Cnty., No. 1:19-CV-121, 2020 U.S. Dist. LEXIS 42168, at *28–29 (N.D. Miss. Mar. 11, 2020) (explaining that "this [c]ourt is duty bound to follow Fifth Circuit precedent" in declining to apply the state-created danger doctrine, although the alleged facts of the case could constitute a state-created danger claim).

188. *See, e.g.*, I.M. v. Houston Indep. Sch. Dist., No. H-20-3453, 2021 U.S. Dist. LEXIS 104254, at *8 (S.D. Tex. June 3, 2021) (providing that the facts alleged by the plaintiff "may be sufficient to allege a state-created-danger exception" to *DeShaney*'s holding, "but the Fifth Circuit has repeatedly declined to recognize that exception").

189. *See Robinson*, 2020 U.S. Dist. LEXIS 42168, at *28–29.

190. *See supra* Part I.

191. *See Robinson*, 2020 U.S. Dist. LEXIS 42168, at *28.

192. *Id.*

193. *Id.* (explaining that Robinson's allegations supported the conclusion that state action "arguably created or at least exacerbated the potential for private violence").

Robinson's state-created-danger claim failed as a matter of law because the court was "duty bound to follow Fifth Circuit precedent."[194] In her complaint, Robinson recognized that the Fifth Circuit had not adopted the state-created danger doctrine but argued that the facts of her case "should be persuasive enough for the Court of Appeals to adopt this cause of action."[195]

On appeal, the Fifth Circuit remained unpersuaded and again refused to adopt the state-created danger doctrine.[196] Although the court acknowledged the "unsettling" nature of Robinson's claims, it noted that "the relevant precedent is clear and requires our affirmance."[197] Thus, while dedicating only one paragraph to Robinson's state-created danger claim, the Fifth Circuit bluntly concluded that "[t]he district court correctly declined to stray from circuit precedent[,] [a]nd we decline as well."[198]

Because of the circuit split created by the Fifth Circuit's refusal to adopt the state-created danger doctrine, the availability of judicial recourse for victims of domestic violence whose susceptibility to abuse was created or exacerbated by state action depends upon the jurisdiction in which the abuse occurred.[199] *Robinson* not only exemplifies the denial of judicial recourse to victims of domestic violence within the Fifth Circuit but also represents a crucial missed opportunity for the Fifth Circuit to finally join its sister circuits in adopting the state-created danger doctrine.

III. ANALYSIS

Nearly every circuit court of appeals has adopted the state-created danger doctrine,[200] and most circuits have applied the doctrine to domestic violence cases.[201] While the Fifth Circuit has not yet recognized the state-created danger doctrine,[202] *Robinson* presented an opportunity for the court to rehear the case en banc and finally adopt the doctrine.[203] The Fifth Circuit should have reheard *Robinson* en banc and formally

194. *Id.* at *29.
195. *Id.* at *28.
196. *See* Robinson v. Webster Cnty., 825 F. App'x 192, 196 (5th Cir. 2020).
197. *Id.* at 193.
198. *Id.* at 196.
199. *See, e.g.*, *Robinson*, 2020 U.S. Dist. LEXIS 42168, at *28–29 (implying that Robinson's claim would likely succeed if she had brought her state-created danger claim in a circuit that recognized the validity of the doctrine).
200. *See supra* Section II.B.2.
201. *See supra* Section II.B.2.a.
202. *See supra* Section II.B.2.c.
203. *See* Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (recognizing the case as an "en banc opportunity" to adopt the state-created danger doctrine).

adopted the state-created danger doctrine because (1) doing so would have aligned with the Fifth Circuit's own state-created danger precedent;[204] (2) Robinson's state-created danger claim satisfied the elements previously provided by the Fifth Circuit;[205] and (3) sound public policy requires that victims of domestic violence within the Fifth Circuit be afforded judicial recourse when state actors create or exacerbate the danger of domestic abuse.[206]

A. Consistency with Fifth Circuit Precedent

The Fifth Circuit's refusal to adopt the state-created danger doctrine has, in large part, been predicated on the notion that the facts of a given case did not warrant the doctrine's adoption.[207] It follows that the Fifth Circuit's precedent indicates that the court would be willing to adopt the state-created danger doctrine if presented with a case that pleads a colorable state-created danger claim.[208]

Indeed, in *Doe v. Covington County School District*, the Fifth Circuit, sitting en banc, explicitly acknowledged its ability to adopt the state-created danger doctrine.[209] Although *Doe*'s holding ultimately declined to adopt the state-created danger doctrine,[210] *Doe*'s reasoning implies that a sufficiently pled state-created danger claim, like Robinson's, would merit the doctrine's adoption.[211]

The Fifth Circuit justified its holding in *Doe* by asserting that "*even if we were to embrace the state-created danger theory*, the [plaintiff's] claim would necessarily fail."[212] By using this language, the court

204. *See infra* Section III.A.

205. *See infra* Section III.B.

206. *See infra* Section III.C.

207. *See, e.g.*, Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 530–31 (5th Cir. 1994) (explaining that "we may assume without deciding that our court would recognize the state-created danger theory," but ultimately concluding that the facts of the case were "not enough to show that the state increased the danger of harm from third persons").

208. *See, e.g.*, Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (declining to adopt the state-created danger doctrine "because the allegations would not support such a theory").

209. *See id.* (describing the case at bar as an "en banc opportunity to adopt the state-created danger theory"). The Federal Rules of Appellate Procedure provide that "[a] majority of circuit judges who are in regular active service" may order a case to be "reheard by the court of appeals en banc." FED. R. APP. P. 35(a). Although an en banc rehearing is generally disfavored, the Rule states that a rehearing may be warranted where "the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a)(2).

210. *See Doe*, 675 F.3d at 870 (asserting that the state-created danger theory does not provide a viable basis for recovery on the facts of the case).

211. *See id.* at 865–66 (reasoning that the claim failed as a matter of law because the plaintiff's state-created danger claim did not satisfy the requisite elements previously articulated by the court).

212. *Id.* at 866 (emphasis added).

implied that it would recognize the viability of a sufficiently pleaded state-created danger claim. *Doe*'s concurrence bolsters this conclusion by stating that the court would have allowed the claim to proceed if the complaint had alleged the requisite elements.[213] Therefore, the Fifth Circuit has implicitly acknowledged the possibility of adopting the state-created danger doctrine if presented with the right set of facts.[214]

To be sure, the Fifth Circuit's "even if" approach to state-created danger claims is not unique to *Doe*.[215] Numerous Fifth Circuit state-created danger cases contain the same mode of analysis.[216] Relying on the state-created danger elements initially articulated in *Scanlan*,[217] the Fifth Circuit has repeatedly thwarted appellants' attempts to persuade the court to adopt the state-created danger doctrine by concluding that the claim at issue was insufficient.[218] As other circuits have recognized, engaging in this type of analysis clearly implies that state-created danger liability is not entirely foreclosed because analyzing the merits suggests the insufficiency of the claim rather than the unavailability of the doctrine as a whole.[219]

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213. *See id.* at 871 (Higginson, J., concurring). The concurrence explained:

> If the complaint had asserted that the affirmative act of releasing [the plaintiff] to [the defendant] was a causal act of recklessness or deliberate indifference or intentionality that caused [the plaintiff] to be subjected to injury, and specifically to the deprivation of her right to bodily integrity, the complaint properly would proceed through discovery to trial.

Id.

214. *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1405 (5th Cir. 1996) (explaining that "we have yet to recognize this [state-created danger] theory of liability squarely," implying that the state-created danger theory is not entirely foreclosed).

215. *See, e.g.*, Hale v. Bexar Cnty., 342 F. App'x 921, 927 (5th Cir. 2009) (providing that "[e]ven if the state-created danger theory was explicitly recognized in this Circuit, it would not apply here" because the plaintiff's claim was insufficient).

216. *See* Randolph v. Cervantes, 130 F.3d 727, 731 (5th Cir. 1997) (reasoning that the plaintiff's allegations "will not trigger a duty under the state-created danger theory, even if we were to adopt such a theory"); Morin v. Moore, 309 F.3d 316, 323 (5th Cir. 2002) (holding that "[e]ven if we were to consider all of the [plaintiff's] allegations, they fail to satisfy the 'state-created-danger' theory" because the requisite elements of the claim were not established).

217. *See* Scanlan v. Tex. A&M Univ., 343 F.3d 533, 537–38 (5th Cir. 2003) ("[A] plaintiff must show the defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff.").

218. *See, e.g.*, Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 1002–03 (5th Cir. 2014) (applying *Scanlan*'s state-created danger elements to the plaintiff's claim, but concluding that the allegations did not satisfy those elements); Dixon v. Alcorn Cnty. Sch. Dist., 499 F. App'x 364, 366–68 (5th Cir. 2012) (same).

219. *See, e.g.*, Irish v. Fowler, 979 F.3d 65, 78 (1st Cir. 2020) (explaining that circuit precedent warned that a state actor's "affirmative act which enhanced a danger" would lead to liability under the state-created danger doctrine because "[t]his court did not simply dismiss [the plaintiff's] claim without analysis, as would have been

Conveniently, however, the Fifth Circuit deviated from its usual analysis of state-created danger claims in *Robinson*.[220] While the Fifth Circuit provided the state-created danger elements from *Scanlan* in a footnote,[221] the court did not apply the elements to the case's facts and simply declined to stray from circuit precedent.[222] Presumably, the reason for the Fifth Circuit's variance in analysis is simple: applying *Scanlan*'s state-created danger elements to the facts of *Robinson* leads to the undeniable conclusion that Robinson alleged a sufficient state-created danger claim.[223] Thus, the Fifth Circuit should have reheard *Robinson* en banc and recognized that Robinson's allegations constituted a cognizable state-created danger claim.

B. Robinson's State-Created Danger Claim Satisfies the Elements Previously Relied Upon by the Fifth Circuit

Throughout the Fifth Circuit's state-created danger precedent, the court has relied on essentially the same two elements to analyze the sufficiency of a state-created danger claim: (1) "the defendants used their authority to create a dangerous environment for the plaintiff;" and (2) "the defendants acted with deliberate indifference to the plight of the plaintiff."[224] Applying these elements to the facts of *Robinson*, the sufficiency of Robinson's state-created danger claim becomes clear.[225]

First, Robinson's allegations should satisfy the first element because Sheriff Mitchell, as the state actor, used his authority to create a dangerous environment for Robinson.[226] Mitchell exercised his state authority by appointing Patterson as a jail trusty and granting him weekend furloughs.[227] Mitchell's decision to grant Patterson weekend furloughs represents more than a mere failure to act in the face of private violence.[228] Rather, granting Patterson's furlough constitutes an

appropriate if the state-created danger doctrine could never apply to any set of facts in this circuit").

220. *See* Robinson v. Webster Cnty., 825 F. App'x 192, 196 (5th Cir. 2020).

221. *See id.* at 196 n.2.

222. *See id.* at 196. The Fifth Circuit abides by a rule of orderliness, meaning one panel cannot overturn the decision of another, and only the Fifth Circuit sitting en banc can reverse prior precedent. *See* Fed. Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1307 (5th Cir. 1993).

223. *See infra* Section III.B.

224. Scanlan v. Tex. A&M Univ., 343 F.3d 533, 537–38 (5th Cir. 2003).

225. *See supra* Section I.

226. *See* Robinson v. Webster Cnty., No. 1:19-CV-121, 2020 U.S. Dist. LEXIS 42168, at *28 (N.D. Miss. Mar. 11, 2020) (explaining that Sheriff Mitchell's decision to grant furlough to Patterson arguably created the potential for private violence against Robinson).

227. *See id.* at *2–3.

228. *See generally* Wilson-Trattner v. Campbell, 863 F.3d 589, 596 (7th Cir. 2017) (explaining, in the context of a domestic violence state-created danger case, that a state

affirmative act that created the opportunities for Patterson to inflict private violence upon Robinson.[229] Indeed, Mitchell's decision to furlough Patterson led to two concrete instances in which Patterson subjected Robinson to domestic violence.[230]

Additionally, the allegations in *Robinson* provide that Dispatcher Townsend's actions contributed to Robinson's susceptibility to Patterson's domestic abuse.[231] When Robinson called Townsend seeking law enforcement assistance to prevent Patterson's ongoing abuse, Townsend instead placed another jail trusty on the line to speak directly to Patterson in an attempt to alleviate the situation, which only caused Patterson to become "even more agitated."[232] Therefore, although Townsend's failure to dispatch law enforcement, by itself, may not rise to the level of affirmative action required for a cognizable state-created danger claim,[233] Townsend's decision to have Patterson speak to another jail trusty arguably exacerbated the obvious danger Robinson faced by agitating Patterson even further.[234] Thus, Robinson sufficiently alleged that both Sheriff Mitchell and Dispatcher Townsend "used their authority to create [the] dangerous environment" that led to Robinson's injuries.[235] Mitchell and Townsend's conduct in their official capacities as state actors therefore satisfies the first element.

Second, the facts of *Robinson* show that both Sheriff Mitchell and Dispatcher Townsend "acted with deliberate indifference to the plight

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actor's "mere . . . inaction in the face of private violence cannot support a substantive due process claim under *DeShaney*").

229. *See* Irish v. Fowler, 979 F.3d 65, 79 (1st Cir. 2020) (holding that a reasonable jury could conclude that a police officer's affirmative act of notifying the plaintiff's abusive boyfriend that he had been reported to the police, which caused the boyfriend to inflict private violence on the plaintiff, gave "rise to a constitutional violation under the state-created danger doctrine"); *see also* Doe v. Covington Cnty. Sch. Dist., 675 F.3d 849, 871 (5th Cir. 2012) (Higginson, J., concurring) (opining that "the complaint properly would [have] proceed[ed] to trial" had it alleged an "affirmative act" that "caused [the plaintiff] to be subjected to injury").

230. *See Robinson*, 2020 U.S. Dist. LEXIS 42168, at *3–5 (providing that Patterson, on his first weekend furlough, attempted to run Robinson over with his car after assaulting her, and, during another weekend furlough, Patterson repeatedly assaulted Robinson and attempted to burn her alive by pouring "Liquid Fire" over her body).

231. *See id.* at *4.

232. *Id.*

233. *See, e.g.*, Smith v. City of Youngstown, No. 4:20 CV 579, 2020 U.S. Dist. LEXIS 192933, at *10 (N.D. Ohio Oct. 19, 2020) (providing that the defendants' "fail[ure] to dispatch police officers to the residence" after receiving an emergency call was "not an affirmative act under the state created danger exception").

234. *See Irish*, 979 F.3d at 77 (providing that "a state official may incur a duty to protect a plaintiff where the official creates *or exacerbates* a danger to the plaintiff") (emphasis added); *see also* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) (explaining that state actors cannot be held liable when they did not "render [the plaintiff] any more vulnerable" to the danger in question).

235. Scanlan v. Tex. A&M Univ., 343 F.3d 533, 537 (5th Cir. 2003).

of' Robinson, which satisfies the second element of a cognizable state-created danger claim.[236] As the Fifth Circuit has explained, "[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.'"[237]

First, Robinson's bruises and significant burns resulting from Patterson's domestic abuse show that granting Patterson weekend furloughs created a dangerous environment.[238] Second, when Mitchell made the decision to grant Patterson furlough on the weekend Patterson abused Robinson, Mitchell knew that Patterson had previously abused Robinson while on furlough, and Mitchell was thus aware of Patterson's violent propensity.[239] Mitchell knew furloughing Patterson created near-certain danger to Robinson but nonetheless affirmatively acted to grant Patterson furlough again in defiance of this known risk.[240] Finally, Patterson would not have had the opportunity to repeatedly assault Robinson and create the dangerous environment Robinson faced but for Mitchell granting Patterson's furloughs.[241] If Patterson had remained in the custody of the Webster County Sheriff's Department, it would have been impossible for him to assault Robinson. Therefore, by furloughing Patterson, both the Webster County Sheriff's Department and Sheriff Mitchell "used their authority to create an opportunity that would not otherwise have existed" for Patterson to repeatedly abuse Robinson and cause her injury.[242] Applying the Fifth Circuit's usual state-created danger analysis under § 1983 to the facts of *Robinson*, the sufficiency of Robinson's state-created danger claim becomes clear.[243]

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236. *Id.* at 537–38.

237. Piotrowski v. City of Houston, 237 F.3d 567, 585 (5th Cir. 2001) (quoting Johnson v. Dall. Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994)).

238. *See* Robinson v. Webster Cnty., No. 1:19-CV-121, 2020 U.S. Dist. LEXIS 42168, at *3–5 (N.D. Miss. Mar. 11, 2020) (describing in detail the gruesome injuries Robinson suffered and the "extensive medical treatment" she required).

239. *See id.* (providing that "Sheriff Mitchell was aware of th[e] incident" in which Patterson had attempted to run over Robinson with his car during his first weekend furlough and that Mitchell furloughed him anyway).

240. *See* Irish v. Fowler, 979 F.3d 65, 79 (1st Cir. 2020) (holding that a reasonable jury could conclude that an individual state actor's affirmative act of notifying the plaintiff's abusive boyfriend that she had reported him to the police, which caused the boyfriend to inflict private violence upon the plaintiff, constituted a constitutional violation under the state-created danger doctrine).

241. *See Robinson*, 2020 U.S. Dist. LEXIS 42168 at *3 (explaining that "Sheriff Mitchell again granted Patterson" furlough on the weekend he repeatedly assaulted Robinson).

242. Scanlan v. Texas A&M Univ., 343 F.3d 533, 538 (5th Cir. 2003).

243. *See Robinson*, 2020 U.S. Dist. LEXIS 42168, at *28–29 (providing that Robinson's claims "appear to fall squarely within the parameters of the state-created

Accordingly, the Fifth Circuit should have reheard *Robinson* en banc, joined its sister circuit courts of appeals in adopting the state-created danger doctrine, and recognized that *Robinson* "presents different facts that require [the court] to recognize the state-created danger doctrine and conclude that a reasonable jury could find that a claim has been validly presented on this evidence."[244] Adopting the state-created danger doctrine by rehearing *Robinson* would have been consistent with Fifth Circuit precedent and provided crucial judicial recourse for victims of domestic violence within the Fifth Circuit when state action caused or exacerbated the victim's injuries.[245]

C. Justice and Sound Public Policy Favor the Fifth Circuit Adopting the State-Created Danger Doctrine

The acute problem that domestic violence poses within the Fifth Circuit's jurisdiction further exacerbates the need for the court to adopt the state-created danger doctrine.[246] Domestic violence is an ever-prevalent societal ill that affects a substantial portion of the global population.[247] Across the United States, more than one in three women "have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime."[248] And domestic violence within the United States has continued to increase over time—the number of domestic violence victimizations rose 42% from 2016 to 2018.[249]

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danger theory" and "would likely be enough to survive judgment on the pleadings on the state-created danger theory").

244. *Irish*, 979 F.3d at 75.

245. *See* Awoyomi, *supra* note 106, at 46 (explaining that, "[c]onsidering the expenses of domestic violence and its effects on women's health," applying the state-created danger doctrine to cases of domestic violence "is advantageous to society as a whole").

246. *See generally* Motion for Leave to File and Brief of Network for Victim Recovery of DC as *Amicus Curiae* Supporting Petitioner at 14–22, Robinson v. Webster Cnty., 825 F. App'x 192 (5th Cir. 2020) (No. 20–634) (describing the acute problem of domestic violence in the states of Louisiana, Texas and Mississippi, and explaining that the state-created doctrine should be adopted to afford protection to victims of domestic violence within those states).

247. *See* Debra Varnado, *Domestic Violence, America's Dirty Little Secret*, CTR. FOR HEALTH JOURNALISM (Mar. 27, 2019), https://bit.ly/31CDUNS (explaining that "domestic violence, also known as intimate partner violence" is "pervasive [and] perpetrated on millions of individuals worldwide").

248. Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, NAT'L CTR. FOR INJ. PREVENTION AND CONTROL 2 (2011), https://bit.ly/3r06Bgr.

249. *See* Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization, 2018*, U.S. DEP'T OF JUST. 4 (2019), https://bit.ly/34o1tuQ (providing that the number of domestic violence victimizations in the U.S. rose from 1,068,120 in 2016 to 1,333,050 in 2018).

Significantly, however, the states within the Fifth Circuit's jurisdiction—Louisiana, Texas, and Mississippi[250]—have particularly high rates of domestic violence.[251] Louisiana, for example, has consistently experienced some of the highest rates of domestic violence–related killings in the country[252]: more than 5,000 women in Louisiana experience domestic violence each year.[253]

Domestic violence statistics in Texas are similarly alarming. For example, in 2019 alone, 200 women were killed by men in Texas, the most of any state.[254] Texas's domestic violence problem continues to fester, as 228 Texans were killed by intimate partners in 2020 alone.[255]

Finally, domestic violence poses a prevalent threat in Mississippi as well.[256] For instance, Mississippi's homicide rate for female victims who were killed by male offenders ranked 16th in the nation for 2018.[257] Further, between 2018 and 2019, Mississippi law enforcement issued 5,177 domestic abuse protection orders and received 9,756 domestic violence offense reports.[258] Indeed, Mississippi's Attorney General has even stated publicly that "domestic violence is a frequent occurrence" in the state.[259] Thus, because of the acute risk domestic violence poses to those within the Fifth Circuit's jurisdiction, the need for the Fifth Circuit to adopt the state-created danger doctrine is even more critical.

The Fifth Circuit's adoption of the state-created danger doctrine would ensure that domestic violence victims, like Robinson, are afforded

250. *See Fifth Circuit Court of Appeals*, LIB. OF CONG., https://bit.ly/3KCI4XT (last visited Jan. 25, 2022).

251. *See Domestic Violence by States 2021*, WORLD POPULATION REV., https://bit.ly/3q7fSnN (last visited Jan. 8, 2022) (providing that the percentages of women who suffer from domestic violence in their lifetime in the states of Mississippi, Louisiana and Texas are 39.7%, 35.9%, and 34.5% respectively).

252. *See* Jacqueline DeRobertis, *In Louisiana, Authorities Battle Domestic Violence Problem That's Worse Than Most Other States*, THE ADVOC. (Dec. 22, 2018), https://bit.ly/3uuR8X8 (explaining that "the problem of domestic violence is especially pervasive" in Louisiana, which was ranked second in the nation in 2016 for the rate of women killed by men).

253. *See 2015 Legislative Guide: Domestic Violence in Louisiana*, LA. COAL. AGAINST DOMESTIC VIOLENCE 2, https://bit.ly/3Gb6yEO (last visited Jan. 25, 2022).

254. *See Number of Women Murdered by Men in Single Offender/Single Victim Homicides in the United States in 2019, by State*, STATISTA, https://bit.ly/3rMl0NL (last visited Jan. 25, 2022).

255. *See 2020 Honoring Texas Victims*, TEX. COUNCIL ON FAM. VIOLENCE 1, https://bit.ly/3KLE5ID (last visited Jan. 25, 2022).

256. *See Mississippi*, DISARM DOMESTIC VIOLENCE, https://bit.ly/3IgKauI (last visited Feb. 22, 2022) (providing that "[o]ver 790,000 Mississippi residents experience intimate partner violence in their lifetimes").

257. *See When Men Murder Women: An Analysis of 2018 Homicide Data*, VIOLENCE POL'Y CTR. 9, https://bit.ly/3Ayz9C1 (last visited Jan. 25, 2022).

258. *See* Ray Van Dusen, *Domestic Violence Cases Dangerous for Law Enforcement*, MONROE J. (Oct. 24, 2019), https://bit.ly/3G6inLz.

259. *Id.*

the same civil remedies that are widely available in virtually every other circuit.[260] Application of the state-created danger doctrine within the Fifth Circuit would also promote state actor accountability and create an incentive for state actors to effectively handle domestic violence incidents.[261] Thus, rehearing *Robinson* en banc and formally adopting the state-created danger doctrine not only would have accorded with Fifth Circuit precedent but also would have promoted sound public policy.

IV. CONCLUSION

Domestic violence has afflicted the United States for decades, and the tragic story of Felicia Robinson represents an appalling example.[262] In virtually every jurisdiction throughout the country, domestic violence victims like Robinson can rely on the state-created danger doctrine to hold state actors accountable for creating or exacerbating the danger the victims faced.[263]

However, because Robinson's claim fell within the Fifth Circuit's jurisdiction—the only circuit to consistently refuse to adopt the state-created danger doctrine—her claim was dismissed, and the state actors who created the opportunities for her abuse were never held accountable.[264] Although the Fifth Circuit has yet to recognize the state-created danger doctrine, Robinson's case was a crucial—and missed—opportunity for the court to rehear the case en banc and finally recognize the doctrine's validity.[265]

Indeed, Robinson's allegations fall squarely within the doctrine's ambit, and the facts of her case satisfy the state-created danger elements previously espoused by the Fifth Circuit itself.[266] Further, the Fifth Circuit's adoption of the state-created danger doctrine would promote judicial uniformity and sound public policy.[267] Adopting the doctrine in *Robinson* not only would have aligned with Fifth Circuit precedent but also would have ensured state-actor accountability and incentivized the competent and effective handling of domestic violence disputes.[268] And the particular danger domestic violence poses to those within the Fifth

260. *See* Motion for Leave to File and Brief of Network for Victim Recovery of DC as *Amicus Curiae* Supporting Petitioner at 29–30, Robinson v. Webster Cnty., 825 F. App'x 192 (5th Cir. 2020) (No. 20–634).

261. *See id.* at 30.

262. *See supra* Part I.

263. *See supra* Section II.B.2.a.

264. *See supra* Section II.B.2.c. Interestingly, and perhaps unsurprisingly, Sheriff Mitchell "has since been arrested on unrelated corruption charges involving guns, drugs and sex with inmates." *See* Martin, *supra* note 1.

265. *See supra* Part III.

266. *See supra* Section III.B.

267. *See supra* Section III.C.

268. *See supra* Section III.C.

Circuit's jurisdiction only intensifies the need for the doctrine's adoption.[269] Therefore, the Fifth Circuit missed a compelling opportunity to embrace the state-created danger doctrine in *Robinson*. When faced with a similarly sufficient state-created danger claim in the future, the court should join its sister circuits in recognizing the doctrine and the crucial protection it provides to domestic violence victims.[270]

269. *See supra* Section III.C.
270. *See supra* Part III.