Penn State Law Review

Volume 120 | Issue 3 Article 6

1-1-2016

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Christopher Eisenhauer

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Christopher M. Eisenhauer*

Abstract

The state-created danger doctrine provides the basis for a potential claim when a state actor creates a danger that results in an injury to the plaintiff. The doctrine may be interpreted as an exception to the general rule that a state has no duty to protect one private citizen from another. Because the U.S. Supreme Court has not addressed the issue, many variations of the state-created danger doctrine exist across the federal circuits. The resulting lack of uniformity has led to inconsistent results, promoting unfairness for litigants throughout the country.

This Comment explores the history, objectives, and current approaches to the state-created danger doctrine. This Comment also examines the public policy considerations with which the federal circuits seem to struggle. A recent case involving police action demonstrates the perils of inconsistency and the need for balance to further the interests of the public. Finally, this Comment recommends a simplified uniform test to restore uniformity to the federal circuits.

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I. INTRODUCTION

The state-created danger doctrine, implicated in a substantive due process claim under 42 U.S.C. § 1983[1] of the Fourteenth Amendment,[2] has no national standard.[3] The doctrine bloomed from a few lines of dicta in a 1989 U.S. Supreme Court case, *DeShaney v. Winnebago*.[4] Interpreted by many courts as an exception to the general no-duty rule for state actors, the doctrine allows for the possibility of holding the state responsible for creating or increasing a danger to an individual.[5]

Since 1989, each federal circuit court of appeals has developed its own interpretation and implementation of the doctrine.[6] The circuits' often contradictory decisions and tests make understanding and applying

1. 42 U.S.C. § 1983 (2006). Section 1983 provides private citizens with a remedy for constitutional rights violations by individuals acting under the authority of state law. *See* Conti, *Arming Teachers and School Personnel: The Potential for Civil Liability for School Districts*, 86 PA. B. ASS'N Q. 1, 7 (2015).

2. U.S. CONST. amend. XIV.

3. DAVID W. LEE, HANDBOOK OF SECTION 1983 LITIGATION 2014, at 65 (2014).

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

5. *Id.*

6. MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 3-305 (2014).

the doctrine difficult.[7] These different tests offer conflicting guidance to actors in the public arena.[8]

Applying the state-created danger doctrine to police activity presents additional problems due to competing policy considerations.[9] Police officers, regularly operating in tense and dangerous circumstances, rightfully must be allowed to do their jobs without hesitating to calculate the likelihood of litigation.[10] Also vital, however, is that citizens must possess a mechanism to hold the powerful state responsible for flagrant and glaring abuses that could become worse and more prevalent if left completely unchecked.[11]

The state-created danger doctrine must be standardized and simplified in order to be more easily understood and more consistently applied, especially in the context of police action.[12] Part II of this Comment will provide an overview of the state-created danger doctrine and examine a contemporary case, *Vaughn v. City of Chicago*,[13] as an example of the issues involved in applying the state-created danger doctrine to police action. Part III will examine how each federal circuit has approached the state-created danger doctrine, highlighting how each circuit has wrestled with the doctrine resulting in a lack of uniformity across the circuits. Part IV will analyze the doctrine in the context of police action, using *Vaughn*[14] as a case study. Finally, Part V will propose a simplified, flexible, federal test that seeks a balance between: (1) protection from mistreatment and overzealousness, and (2) successfully maintaining public safety.

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7. *See* discussion *infra* Part III.

8. *See* discussion *infra* Part IV.B.

9. *See* discussion *infra* Part IV.C.

10. *See* Patrick Jonsson, *How Police Can Get it Right*, CHRISTIAN SCI. MONITOR (Feb. 8, 2015), www.csmonitor.com/ usa/society/2015/0208/how-police-can-get-it-right. Concerns about second-guessing can have a direct impact on police action. The Atlanta Police Chief, George Turner, cited an instance where an officer hesitated before shooting a knife-wielding attacker because the officer was thinking about recent protests in Ferguson, Missouri. *Id. See infra* note 212. "Where to strike the balance between using potentially lethal force and holding back is something that beat cops and chiefs are struggling with across the country in the wake of the most searing debate over police tactics in a half century." Jonsson, *supra.*

11. *See* Bryan Caplan, *The Totalitarian Threat, in* GLOBAL CATASTROPHIC RISKS 504, 504 (Nick Bostrom et al. eds., 2008) (explaining that unchecked police control and terror is a common and necessary characteristic of totalitarian regimes).

12. *See infra* Parts IV.B. and IV.C.

13. *See generally* Vaughn v. City of Chicago, No. 14-C-47, 2015 U.S. Dist. LEXIS 78951 (N.D. Ill. June 18, 2015).

14. *Id.*

II. BACKGROUND

While each federal circuit has addressed the state-created danger doctrine in some form, substantive differences exist in the elements that a plaintiff must prove to assert the doctrine.[15] The circuits resort to a similar toolbox of terms but apply them in different combinations.[16] Common elements include: (1) behavior elements, such as affirmative acts,[17] visibly overt behavior,[18] and deliberate indifference;[19] (2) qualitative elements, such as danger[20] and a shock to the conscience;[21] and (3) additional elements, such as a hyper-pressurized environment,[22] a special relationship,[23] foreseeability,[24] and a misuse of state authority.[25]

Ironically, the possibility of liability for a state-created danger emerged from a case that was instrumental in thoroughly limiting state responsibility for private violence.[26] Seizing on a few words buried deep in the opinion, plaintiffs across the nation assert the viability of state-created danger as an exception to state immunity.[27] *DeShaney v. Winnebago County Department of Social Services* is the seminal case regarding state-created danger theory, and this case planted the seed for each circuit's interpretation of the doctrine.[28]

A. DeShaney and the State-Created Danger Doctrine

In 1989, the U.S. Supreme Court in *DeShaney v. Winnebago County Department of Social Services* held that states generally have no constitutional duty to protect citizens from private violence.[29] The Court,

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15. SCHWARTZ & KIRKLIN, *supra* note 6.

16. *Id.*

17. Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

18. *Dwares*, 985 F.2d at 99-100.

19. Foy v. City of Berea, 58 F.3d 227, 232 (6th Cir. 1995).

20. Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003).

21. Forrester v. Bass, 397 F.3d 1047, 1058-59 (8th Cir. 2005).

22. Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999).

23. Pena v. DePrisco, 432 F.3d 98, 109 (2d Cir. 2005).

24. Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir. 1995).

25. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 915 (3d Cir. 1997).

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

27. *See generally* Vaughn v. City of Chicago, No. 14-C-47, 2014 U.S. Dist. LEXIS 107952 (N.D. Ill. Aug. 5, 2014), *dismissed on summary judgment*, Vaughn v. City of Chicago, No. 14-C-47, 2015 U.S. Dist. LEXIS 78951 (N.D. Ill. June 18, 2015).

28. *DeShaney*, 489 U.S. at 201.

29. *Id.* at 195 ("But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

however, conceded that certain individuals, like incarcerated prisoners and involuntarily committed mental patients, are awarded a duty of protection by the state through a special relationship when they are in custody.[30] In addition to imposing a duty to certain individuals in custody, the *DeShaney* Court may have identified a possible second exemption from the no-duty rule: the "state-created danger doctrine."[31] This doctrine is more enigmatic, based on dicta offered by the Court when explaining the main holding:

> [w]hile the State may have been aware of the dangers that [the victim] faced in the free world, [the State] played no part in their creation [of the dangers], nor did it do anything to render [the victim] any more vulnerable to harm. . . . [I]t placed [the victim] in no worse position than that in which [the victim] would have been had it not acted at all. . . .[32]

While seeming to offer the possibility of a duty of protection in state-created danger situations, the *DeShaney* Court's dicta failed to offer specific instances of state actors playing a part in the creation of a danger or rendering a victim more vulnerable to harm.[33] That vacuum has allowed the circuits to develop their own state-created danger doctrines.[34]

B. Vaughn and the Complications of Police Action

The state-created danger doctrine of *DeShaney* was applied to police action in *Vaughn v. City of Chicago*.[35]

Plaintiff Albert Vaughn, Sr. sued the City of Chicago and four of its police officers on behalf of his deceased son, Albert Vaughn, Jr., who had been ordered at gunpoint by Chicago City police to drop a stick the son held during a street tiff.[36] The son complied, but retrieved the stick after a rival group member verbally threatened him.[37] Officers ordered the son to drop the stick again, and he again complied.[38] An assailant then came forward and beat the son to death with a baseball bat as the police watched, allegedly doing nothing to protect Vaughn, Jr.[39]

The District Court, in denying a motion to dismiss filed by the City and the police officers, applied the Seventh Circuit's three-element test

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30. *Id.* at 198–99.
31. *Id.* at 201.
32. *Id.* at 201.
33. *Id.*
34. SCHWARTZ & KIRKLIN, *supra* note 6.
35. Vaughn v. City of Chicago, No. 14-C-47, 2015 U.S. Dist. LEXIS 78951, at *10 (N.D. Ill. June 18, 2015).
36. *Vaughn*, 2014 U.S. Dist. LEXIS 107952, at *2.
37. *Id.*
38. *Id.*
39. *Id.* at 3.

for a state-created danger: an affirmative act, proximate cause, and shocking the conscience.[40] After applying the test, plaintiff's action was permitted to proceed.[41] The public policy implications of applying the state-created danger doctrine to police action like that in *Vaughn* will be examined below,[42] after a circuit-by-circuit analysis of the doctrine that demonstrates a confusing lack of uniformity.[43]

III. CONSTRUCTION BY THE CIRCUITS

A. The First Circuit

Although the First Circuit has not expressly rejected the state-created danger doctrine, it has not yet applied the doctrine and appears wary of doing so.[44] After the *DeShaney* decision, the First Circuit began distancing itself from the doctrine.[45] Referencing the *DeShaney* Court's dicta regarding state-created dangers used by other circuits to support their state-created danger doctrines,[46] the First Circuit decided that an affirmative act by the state, even an act with deliberate indifference that played a "causal role in the harm," should not rise to the level of a constitutional violation but be deemed tortious in nature only.[47] Four years later, the Circuit again dismissed the "deliberate indifference" standard as insufficient but hinted at adopting a "shocks the conscience" standard for creation-of-danger cases in the future.[48] Nonetheless, the Circuit once again declined to apply the doctrine.[49]

In recent years the First Circuit has solidified its earlier position, acknowledging that it has examined the state-created danger doctrine but

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40. *Id.* at *4 (explaining that the state-created danger doctrine has three elements centered around an affirmative act, proximate cause, and shocking the conscience).

41. *Id.*

42. *See* discussion *infra* Part IV.C.

43. *See* discussion *infra* Part III.

44. *See generally* Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987 (1st Cir. 1992); Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996); Rivera v. Rhode Island, 402 F.3d 27 (1st Cir. 2005). *See also* Milenaa Shtelmakher, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations*, 43 LOY. L.A. L. REV. 1533, 1540 (2010).

45. *Monahan*, 961 F.2d at 987.

46. *Id.* (quoting *DeShaney*, 489 U.S. at 201) (stating that "while the state may have been aware of the dangers that [plaintiff] faced in the free world, it played no part in their creation nor did it do anything to render him more vulnerable to them").

47. *Id.* at 993.

48. *Evans*, 100 F.3d at 1037–38.

49. *See id.* at 1038 (explaining that "having clarified the applicable legal standard, we need not tarry. The evidence of record here . . . does not satisfy the 'shock the conscience' test").

has never found the doctrine actionable.[50] The Circuit left open the option of applying the doctrine, referencing the extreme example of police handing a murderer a gun and telling the murderer to shoot the victim.[51] Despite this, the First Circuit maintained that mere allegations of "state actions which render the individual more vulnerable to harm, under a theory of state created danger, cannot be used as an end run around *DeShaney*'s core holding"[52] of non-liability.

B. The Second Circuit

In contrast to the First Circuit's wariness, the Second Circuit was one of the first circuits to embrace the state-created danger doctrine.[53] The Second Circuit concentrated on affirmative actions by state actors that create or increase the risk of a danger to the victim.[54] The Second Circuit does not define "affirmative action" but seems to require more than visibly overt behavior.[55]

By 2009, the Second Circuit had acknowledged a spectrum of affirmative conduct that included both implicit and explicit conduct.[56] The Second Circuit held that even government officials' *inaction* may rise to the affirmative conduct level if continuous and persistent, "even if there is no explicit approval or encouragement."[57] Interpreting *DeShaney*, the Second Circuit rejected the "special relationship"

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50. Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005).

51. *Id.* at 34 (referencing Hemphill v. Schott, 141 F.3d 412, 418–19 (2d Cir. 1998)).

52. *Id.* at 38.

53. Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (referencing the Eighth Circuit and its decision in Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990)).

54. *Id.*

55. *Id.* at 99–100 (finding the complaint adequately alleged that police officers "conspired with the 'skinheads' to permit the latter to beat up flag burners with relative impunity, assuring the 'skinheads' that unless they got totally out of control they should not be impeded or arrested"). *See generally* Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993). *But see* Pitchell v. Callan, 13 F.3d 545, 549 (2d Cir. 1994) (finding no assumption of automatic duty status at direct verbal threat to life).

56. *See* Okin v. Vill. of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 434–35 (2d Cir. 2009) (holding that "affirmative police conduct runs along the spectrum of explicit and implicit actions" and "the state-created danger theory . . . prohibit[s] . . . affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages *intentional* violence against the victim . . ."); *see also* Hemphill v. Schott, 141 F.3d 412, 418 (2d Cir. 1998) (finding handing over a gun without saying anything implicitly communicated the use of the gun would be officially sanctioned by police).

57. *Okin*, 577 F.3d at 428 (citing *Dwares*, 985 F.2d at 99 and Pena v. DePrisco, 432 F.3d 98, 111 (2d Cir. 2005)).

condition as a requirement for liability, treating state-created dangers and special relationships as separate liability theories.[58]

C. *The Third Circuit*

By 1995, the Third Circuit had not yet decided whether it would recognize the state-created danger theory and continued its practice of calling such claims "plaintiff's theories."[59] However, the Third Circuit began extensive "observation" of other circuit cases and standards, remarking in detail about particular commonalities.[60] Merely a year later, the Third Circuit recognized the doctrine and categorized the language observed in other circuit cases into formal legal elements.[61] The formal elements the Third Circuit identified were: (1) foreseeability; (2) shocking the conscience; (3) relationships; and (4) the affirmative use of authority.[62] These elements would become more refined and detailed as the Third Circuit attempted to further define them.[63]

In particular, the third and fourth elements, relationships and use of authority, have been repeatedly reexamined, rephrased, and rewritten.[64] Conversely, the first two elements, foreseeability and shocking the

58. *Pena*, 432 F.3d at 109 (citing Ying Jing Gan v. City of N.Y., 996 F.2d 522, 533 (2d Cir. 1993)).

59. Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (stating that "[f]or our part, we have yet to decide definitively whether the state-created danger theory is a viable mechanism for finding a constitutional injury . . . we have found language in the cases supporting and opposing the existence of a state-created danger theory. Perhaps at some point we will have to harmonize our cases. But we have not reached that day. . ."). *See generally* D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992); Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990).

60. *Mark*, 51 F.3d at 1153 (remarking that "cases like these have four things in common . . . ." and noting that "the cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state . . . leaving a discrete plaintiff vulnerable to foreseeable injury").

61. Kneipp v. Tedder, 95 F.3d 1199, 1208–11 (3d Cir. 1996).

62. *Id.*

63. *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997); Estate of Smith v. Marasco, 430 F.3d 140, 153 (3d Cir. 2005); Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003); Kaucher v. Cty. of Bucks, 455 F.3d 418, 431 (3d Cir. 2006). *Compare Morse*, 132 F.3d at 908 (listing "(3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur"), *with Kaucher*, 455 F.3d at 431 (listing "(3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all").

64. *See Morse*, 132 F.3d at 908; *Schieber*, 320 F.3d at 418.

conscience, have largely remained intact.[65] The Third Circuit is clear that threats to the general population alone do not trigger applying the doctrine.[66] Yet the Third Circuit struggled with whether a class of plaintiffs or a specific person was required to meet the special relationship element, ultimately referring back to the foreseeability element.[67]

As to the fourth element, affirmative use of authority, the Third Circuit has wrestled with precisely defining affirmative conduct.[68] The Circuit originally treated foreseeability as important in determining whether an omission can be characterized as an affirmative act.[69] More recently, it required a "misuse of state authority, rather than a failure [to act]" along with establishing direct causation as more important than foreseeability.[70]

The Third Circuit has a unique angle to its state-created danger doctrine.[71] It recognizes a concept of a "hyperpressurized environment" for situations such as high-speed chases or prison riots.[72] In these situations, liability attaches only when a plaintiff shows that the harm was intentionally caused.[73] Unlike circuits that reject the doctrine or call it an exception, the Third Circuit has labeled the state-created danger doctrine "a complement to the *DeShaney* holding."[74]

D. The Fourth Circuit

In the Fourth Circuit, however, *DeShaney* requires that a plaintiff be in actual state custody, such as institutionalization or incarceration, before he or she can assert any due process claim involving an affirmative duty of the state.[75] Such a requirement decisively curbs any

65. *See Morse*, 132 F.3d at 908; *Schieber*, 320 F.3d at 418.

66. *Morse*, 132 F.3d at 913–14.

67. *Id.* at 914.

68. *Id.* at 915-16.

69. *Id.*

70. *Compare id.* at 915 (explaining "[t]hus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission"), *and Smith*, 318 F.3d at 507, *with Kaucher*, 445 F.3d at 432–33 (emphasizing use over failure to use).

71. *Smith*, 430 F.3d at 153.

72. *Id.*

73. *Id.*

74. Burella v. City of Philadelphia, 501 F.3d 134, 146 (3d Cir. 2007) (citing Bright v. Westmoreland Cty., 443 F.3d 276, 281 (3d Cir. 2006)).

75. Piechowicz v. United States, 885 F.2d 1207, 1215 (4th Cir. 1989); Rowland v. Perry, 41 F.3d 167, 174–75 (4th Cir. 1994); Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995); Waybright v. Frederick Cty., 528 F.3d 199, 207 (4th Cir. 2008).

operative state-created danger theory. It instead imposes a special relationship prerequisite.[76]

The Fourth Circuit opined that a right to affirmative protection would be poor public policy.[77] Finding such a right could result in potentially endless liability each time the state did anything that may be interpreted as affirmatively making a danger or injury more likely.[78] The Fourth Circuit declared that "[it] makes sense" to look at *DeShaney* as a "bright-line decision, in which the Court saw in the admittedly sympathetic case the first step o[f] a long, litigious journey."[79] As a result, the Fourth Circuit has actively avoided applying the state-created danger doctrine by continually differentiating the facts of each case.[80] Therefore, whether the Circuit actually recognizes the state-created danger doctrine is unclear.[81]

E. The Fifth Circuit

In the early 1990s, the Fifth Circuit seemed to be a potential enthusiastic supporter of the state-created danger doctrine, stating explicitly that a victim need not be in state custody for the doctrine to apply.[82] As time went by, however, the Fifth Circuit became less keen about the doctrine.[83] The Fifth Circuit noted that it had not yet officially adopted the doctrine, while calling an appellant's effort at arguing the theory a "semantic dodge" and an "attempt to escape *DeShaney*'s holding."[84]

For years, the Fifth Circuit vacillated on whether to adopt the doctrine.[85] Finally, in 2004, the Circuit all but rejected the doctrine.[86]

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76. *Id.*

77. *Pinder*, 54 F.3d at 1176.

78. *Id.*

79. *Id.* at 1178.

80. *Id.*

81. *See id.* at 1177 (explaining that "these cases involve a wholly different paradigm than that presented here . . . these cases stand for the proposition that state actors may not disclaim liability when they themselves throw others to the lions"); *see also Waybright*, 528 F.3d at 208 (explaining that "[t]he practical consequences would be immense; by finding a state-created danger here we might well inject federal authority into public school . . .").

82. Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994).

83. *See generally* Saenz v. Heldenfels Bros., Inc., 183 F.3d 389 (5th Cir. 1999); McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002); Beltran v. City of El Paso, 367 F.3d 299 (5th Cir. 2004).

84. *Saenz*, 183 F.3d at 392.

85. *McClendon*, 305 F.3d at 325 (citing Walton v. Alexander, 44 F.3d 1297, 1299 (5th Cir. 1995); Piotrowski v. City of Houston, 237 F.3d 567, 584 (5th Cir. 2001); Randolph v. Cervantes, 130 F.3d 727, 731 (5th Cir. 1997)). *See also* Scanlan v. Texas A & M Univ., 343 F.3d 533 (5th Cir. 2003).

The Fifth Circuit noted that it "consistently refused to recognize a 'state-created danger' theory" and that it would not do so then.[87]

F. The Sixth Circuit

The Sixth Circuit requires a plaintiff to prove a "special danger" when asserting the state-created danger exception.[88] A special danger occurs when a state actor puts an individual victim, as compared to the general public, at risk through some affirmative conduct.[89] From the beginning, the Circuit focused on the issue of vulnerability, requiring that the state conduct directly increase the individual's vulnerability to danger through deliberate indifference.[90]

The Sixth Circuit uses the U.S. Supreme Court's definition for deliberate indifference in its standard.[91] Thus, deliberate indifference is "more than mere negligence" but "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[92] In recent decisions, the Circuit has also equated deliberate indifference with subjective recklessness.[93]

There is, however, a lack of consistency within the Sixth Circuit itself. At least one case breaks the Sixth Circuit's standard into three separate elements.[94] The Circuit has also recently suggested that some type of interaction between the state and the victim is required before its

86. *Beltran*, 367 F.3d at 307.

87. *Id.*

88. Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003); Jones v. Union Cty., Tenn., 296 F.3d 417, 430 (6th Cir. 2002) (citing Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998)).

89. *Jones*, 296 F.3d at 428–30; *Kallstrom*, 136 F.3d at 1066–67.

90. *See* Gazette v. City of Pontiac, 41 F.3d 1061, 1065 (6th Cir. 1994); Davis v. Brady, 143 F.3d 1021, 1025–26 (6th Cir. 1998); Bukowski v. City of Akron, 326 F.3d 702, 708–09 (6th Cir. 2003).

91. Foy v. City of Berea, 58 F.3d 227, 232 (6th Cir. 1995) (quoting Farmer v. Brennan, 511 U.S. 825 (1970)).

92. *Id.*

93. *See* McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 469 (6th Cir. 2006) (explaining subjective recklessness as being both aware of facts from which an inference could be drawn and actually drawing that inference).

94. Cartwright v. City of Marine City, 336 F.3d 487, 493 (citing Kallstrom v. City of Columbus 136 F.3d 1055, 1066 (6th Cir. 1998). The three elements outlined by the court include: "(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff").

standard can be met.[95] Depending on how "interaction" is interpreted, this prerequisite could rigorously limit state-created danger claims in the Sixth Circuit going forward.

G. *The Seventh Circuit*

After *DeShaney*, the Seventh Circuit approached the state-created danger doctrine with caution.[96] Still, its early decisions acknowledge the viability of such a doctrine.[97] While initially hesitant to find liability in noncustodial situations, in 1993 the Seventh Circuit expressed approval of looking to "reasonable action based on the specific circumstances" of an incident.[98]

To this day, the idea of sensibleness and simplicity is prominent in the Seventh Circuit's characterization of its state-created danger doctrine.[99] The Seventh Circuit contends that it applies a "simple formula" as compared to "the tendency of some courts to 'complexify' [the] analysis in this class of cases needlessly . . . ."[100] The Seventh Circuit has criticized phrases such as "shocks the conscience" and "affirmative acts" as unhelpful and confusing.[101]

Despite its criticisms, however, the Seventh Circuit still uses these same terms in its own doctrine. The Circuit continues to apply this elements test:

(1) the state by its affirmative acts must create or increase a danger faced by an individual; (2) the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual; and (3) the state's failure to protect the individual must shock the conscience.[102]

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95. *See* Jones v. Reynolds, 438 F.3d 685, 693–94 (6th Cir. 2006) (noting that police "never had any interaction with [the plaintiff]," and in fact "the officers never met [the plaintiff]").

96. *See* Ross v. United States, 910 F.2d 1422, 1428 (7th Cir. 1990) (holding that "we need do no more than cite the line of precedent from the Supreme Court and this court, holding that the government's failure to provide essential services does not violate the Constitution. *See DeShaney*. . . ."); Losinski v. Cty. of Trempealeau, 946 F.2d 544, 551 (7th Cir. 1991) (claiming "*DeShaney* compels our conclusion . . . ").

97. *See Losinski*, 946 F.2d at 550 (permitting "*DeShaney* provides some support for [the plaintiff's] view by basing the 'special relationship' exception in part on the state's role in increasing a citizen's risk of harm").

98. Reed v. Gardner, 986 F.2d 1122, 1126–27 (7th Cir. 1993).

99. *See* Slade v. Bd. of Sch. Dirs. of Milwaukee, 702 F.3d 1027, 1033 (7th Cir. 2012).

100. *Id.* at 1033.

101. *Id.*

102. King ex rel. King v. East St. Louis Sch. Dist., 496 F.3d 812, 817–18 (7th Cir. 2007).

The Circuit treats an affirmative act as something other than state inaction.[103] Creating or substantially contributing to the creation of a danger or rendering a victim more vulnerable to a danger than he or she otherwise would have been may create state liability.[104] The Seventh Circuit does not require all avenues of self-help or aid to be cut off by state actors for liability to attach.[105] No requirement exists for a special relationship and state-created danger liability is not characterized as an exception to *DeShaney*.[106]

H. The Eighth Circuit

Acknowledging the state-created danger doctrine in the early 1990s, the Eighth Circuit took the next step when it plainly stated that the doctrine may apply in non-custodial settings.[107] The Eighth Circuit's standard requires affirmative action by the state that increased an individual's danger of, or his vulnerability to, the violence he faced beyond what it would have been without the state action.[108] The Eighth Circuit emphasized the requirement of placing a specific victim in a dangerous position that the victim would not have otherwise encountered without the affirmative state action.[109]

While quickly setting up its itemized tests and components for the doctrine and holding that *DeShaney* clearly creates a constitutional duty to protect, the Eighth Circuit was careful to acknowledge that *DeShaney* was far from clear.[110] The Circuit has since found that the wrongdoer's state of mind is relevant in determining whether the state is liable.[111] It has also embraced the following elements in its doctrine:

(1) [The] plaintiffs are members of a limited, precisely definable group; (2) the state's conduct put victims at significant risk of serious, immediate, and proximate harm; (3) the risk was obvious or known to

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103. Stevens v. Umsted, 131 F.3d 697, 705 (7th Cir. 1997); Hernandez v. City of Goshen, 324 F.3d 535, 538 (7th Cir. 2003).

104. Dykema v. Skoumal, 261 F.3d 701, 705 (7th Cir. 2001) (citing Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993)).

105. Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998).

106. Paine v. Cason, 678 F.3d 500, 510 (7th Cir. 2012).

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

108. *Id.*

109. *See* Wells v. Walker, 852 F.2d 368, 370 (8th Cir. 1988); *Freeman*, 911 F.2d at 55; Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992).

110. *Freeman*, 911 F.2d at 55 (stating that "[i]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty").

111. Hart v. City of Little Rock, 432 F.3d 801, 805 (8th Cir. 2005) (citing S.S. v. McMullen, 225 F.3d 960, 962 (8th Cir. 2000)).

the state; (4) the state acted recklessly in conscious disregard of the risk; and (5) in total, the state's conduct shocks the conscience.[112]

Of the five foregoing elements, the "conscience-shocking" element is particularly important as it is explained in great detail through the case law.[113] To prove this element, a plaintiff must prove that the state actor's action was "so egregious [and] so outrageous[] that it . . . shock[ed] the contemporary conscience."[114]

I. The Ninth Circuit

In the Ninth Circuit, the state-created danger doctrine may apply when the government affirmatively places a victim in danger and the victim is more vulnerable due to the government's act.[115] State liability for an action that exacerbated or created a danger had been comprehensively addressed pre-*DeShaney*, and these older examinations continue to play a role in the development of the Circuit's state-created danger doctrine.[116] When the state itself puts someone in danger, an obligation to protect may result, even in non-custodial settings.[117]

While the Ninth Circuit uses the familiar "affirmative conduct" and "deliberate indifference" elements, it does not require the state's conduct to shock the conscience.[118] To allege liability based on the state-created danger theory, the Circuit requires the state: (1) acted affirmatively; (2) with deliberate indifference; (3) in creating a foreseeable injury to the plaintiff.[119] What constitutes an inherent danger has sometimes been labeled as common sense.[120]

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112. *Hart*, 432 F.3d at 805 (citing Avalos v. City of Glenwood, 382 F.3d 792, 798 (8th Cir. 2004) (citing Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995))).

113. *See* Forrester v. Bass, 397 F.3d 1047, 1058 (8th Cir. 2005) (citing Burton v. Richmond, 370 F.3d 723, 727 (8th Cir. 2004)).

114. *Hart*, 432 F.3d at 805 (citing Hawkins v. Holloway, 316 F.3d 777, 780 (8th Cir. 2003)).

115. Wang v. Reno, 81 F.3d 808, 819 (9th Cir. 1996); Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000).

116. *See* Wood v. Ostrander, 879 F.2d 583, 594 (9th Cir. 1989) (citing Escamilla v. City of Santa Ana, 796 F.2d 266, 269 (9th Cir. 1986)).

117. Escamilla v. City of Santa Ana, 796 F.2d 266, 269 (9th Cir. 1986); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992).

118. Penilla v. City of Huntington Park, 115 F.3d 707, 710 (9th Cir. 1997); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1064–65 (9th Cir. 2006).

119. Lawrence v. United States, 340 F.3d 952, 957 (9th Cir. 2003) (citing Huffman v. Cty. of Los Angeles, 147 F.3d 1054, 1061 (9th Cir. 1998) and Van Ort v. Estate of Stanewich, 92 F.3d 831, 836–37 (9th Cir. 1996)).

120. Lewis v. Sacramento Cty., 98 F.3d 434, 441 (9th Cir. 1996) (citing *Wood*, 879 F.2d at 590)).

J. The Tenth Circuit

The Tenth Circuit characterizes two exceptions to the general rule that the *DeShaney* Court established—the special relationship doctrine and the danger creation theory.[121] For danger creation liability to apply, an actual intent to harm or expose the victim to risk without regard to the consequences is required.[122] The Tenth Circuit uses a six-part test to determine if actual intent to harm existed:

(1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) [the] plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.[123]

The Tenth Circuit has purposefully kept the standard for shocking the conscience vague, choosing not to define what "shocks the conscience."[124] The Tenth Circuit has only stated that § 1983 claims should not replace state tort law and that a "need for restraint" exists in defining the scope of substantive due process claims.[125] Changing the status quo is another referenced idea.[126] The Tenth Circuit often contrasts facts where the status quo has changed with the facts from *DeShaney*, finding *DeShaney*'s main holding of no-duty inapplicable in such situations.[127] Interestingly, this Circuit has also distinctively found that the U.S. Supreme Court did not decide whether a state could warrant its citizens protective services as an entitlement property right, as "*DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract. . . ."[128]

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121. Christiansen v. City of Tulsa, 332 F.3d 1270, 1279–80 (10th Cir. 2003) (citing Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1260 (10th Cir. 1998)(quoting Liebson v. N.M. Corr. Dep't, 73 F.3d 274, 276 (10th Cir. 1996))).

122. *Christiansen*, 322 F.3d at 1281.

123. *Armijo*, 159 F.3d at 1263; Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001); *Christiansen*, 322 F.3d at 1281 (citing Gonzales v. City of Castle Rock, 307 F.3d 1258, 1263 (10th Cir. 2002)). *See also* Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995).

124. *Armijo*, 159 F.3d at 1263 (quoting *Uhlrig*, 64 F.3d at 572).

125. *Id.*

126. *Currier*, 242 F.3d at 923 (citing Medina v. City & Cty. of Denver, 960 F.2d 1493, 1497 (10th Cir. 1992)).

127. *See id.* at 919 (explaining that "when the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability").

128. *Gonzales*, 366 F.3d at 1099.

K. *The Eleventh Circuit*

The Eleventh Circuit uses both a subjective test and an objective test in evaluating state-created danger claims.[129] For the subjective assessment, a plaintiff must show that a state actor had subjective knowledge of a risk of serious harm, yet disregarded it with "deliberate indifference."[130] Deliberate indifference is defined as ignoring a strong likelihood, as opposed to a mere possibility, that harm could occur.[131] The objective assessment asks whether a reasonable official would recognize that he or she was "violating the Constitution even without case law on point."[132]

L. *The D.C. Circuit*

The D.C. Circuit was the last circuit to address the state-created danger doctrine.[133] In 2001, the Circuit took the opportunity to address the state-created danger doctrine in *Butera v. District of Columbia*.[134] In *Butera*, the D.C. Circuit examined other circuits' tests and reasonings.[135] In its analysis, the D.C. Circuit concluded that a "lack of clarity [exists] in the law of the circuits" and that while the various tests focus on affirmative conduct, "they are inconsistent in their elaborations of the concept."[136] Accordingly, the D.C. Circuit declined to apply the state-created danger doctrine.[137] Nationwide, questions remain as to its proper reach.

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129. *See* Gish v. Thomas, 516 F.3d 952, 954 (11th Cir. 2008) (citing Snow ex. rel. Snow v. City of Citronelle, 420 F.3d 1262, 1268 (11th Cir. 2005) (quoting Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., 402 F.3d 1092, 1115 (11th Cir. 2005))); Lewis v. City of West Palm Beach, 561 F.3d 1288, 1292 (11th Cir. 2009) (citing Priester v. City of Riviera Beach, 208 F.3d 919, 926–27 (11th Cir. 2000)).

130. *Gish*, 516 F.3d at 954 (quoting *Cook*, 402 F.3d at 1115) (quoting Cagle v. Sutherland, 334 F.3d 980, 986 (11th Cir. 2003))).

131. *Id.*

132. *See Lewis*, 561 F.3d at 1292 (quoting Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997)) (explaining that "to come within this narrow exclusion, a 'plaintiff must show that the official's conduct was so far beyond the hazy border between excessive and acceptable force that the official had to know he was violating the Constitution even without case law on point'").

133. Butera v. District of Columbia, 235 F.3d 637, 648 (D.C. Cir. 2001).

134. *Id.*

135. *Id.* at 650 ("Regardless of the conduct at issue, however, the circuits have held that a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual.").

136. *Id.* at 654.

137. *Id.* at 662.

IV. ANALYSIS

The foregoing discussion demonstrates the lack of a uniform state-created danger test. That lacking uniformity offers conflicting guidance for state actors and the public. The absence of consistency potentially allows for behavior in one circuit to be actionable while being acceptable in another circuit. Thus, a uniform standard for the state-created danger doctrine is desirable. To achieve proper harmony, the state-created danger doctrine must also balance public policy considerations. The *Vaughn* facts provide a case study in police action that highlights the importance of meshing a court-created test with critical policy considerations.

A. Vaughn v. City of Chicago

On August 5, 2014, the U.S. District Court for the Northern District of Illinois denied a motion to dismiss filed by the City of Chicago and four of its police officers, finding a sufficiently alleged state-created danger claim.[138] Plaintiff and defendants described two very different sets of circumstances in *Vaughn*.[139] It is useful to consider how dramatically the two recitations of facts differed. That difference demonstrates that any state-created danger test must be adaptable to various factual situations.

1. The Scene of the Alleged Conduct

On April 5, 2008 at approximately 11:00 p.m., Albert Vaughn, Jr. was in the vicinity of 7033 S. Throop in Chicago, Illinois.[140] An altercation between a group of young people was taking place in the

138. Vaughn v. City of Chicago, No. 14-C-47, 2014 U.S. Dist. LEXIS 107952, at *1 (N.D. Ill. Aug. 5, 2014). The *Vaughn* court curiously "took no position" on plaintiff's side argument that Vaughn Jr. had a clearly established Second Amendment right to have a stick for self-defense during an altercation in a public street. Such a Second Amendment claim raises other important issues. *See* Bob Adelmann, *Chicago's Gun Laws Prevent Poor From Defending Themselves*, NEW AMERICAN (Sept. 30, 2014), http://www. thenewamerican.com/usnews/crime/item/19219-chicago-s-gun-laws-prevent-poor-from-defending-themselves/.

139. *Compare infra* Part IV.A.3, *with* Part IV.A.2. The factual recitation here relies on the conflicting accounts by the plaintiffs and defendants in their competing motion to dismiss filings. The purpose is to highlight the difficulty in applying current state-created danger tests to competing interpretations of a similar factual situation. The court subsequently rendered a summary judgment opinion in Vaughn v. City of Chicago, No. 14-C-47, 2015 U.S. Dist. LEXIS 78951 (N.D. Ill. June 18, 2015), which is examined in Part V.B. below.

140. Third Amended Complaint at 11, *Vaughn*, 2014 U.S. Dist. LEXIS 107952 (Jan. 3, 2014) (No. 14-C-47).

street.[141] Due to the altercation, several Chicago police officers, including the defendants, were dispatched to the scene.[142] At some point during the altercation, an assailant beat Albert Vaughn, Jr. to death with a baseball bat.[143]

2. The Defendants' Facts

Defendant officers alleged they were responding to a battery in progress, and when they arrived on the scene, dozens of individuals were fighting each other in the street.[144] Finding someone bleeding and lying in the street and realizing they needed more help dealing with the chaos, the two original officers radioed for backup and called for an ambulance.[145] Four more officers responded to a call for assistance with a riot or mob in progress.[146]

Decedent Vaughn, Jr., younger brother Alvin, and a friend, having previously departed, returned to the scene where the police and the crowd had gathered.[147] The three males held sticks with nails attached to the ends to protect themselves following an earlier fight.[148] When they approached the officers, one officer drew his weapon and directed them to drop the sticks, which they all did.[149] For the next 10 to 15 minutes, the Vaughn group exchanged verbal arguments with others across the street as more than ten police officers stood between the two factions.[150] An officer witnessed Vaughn, Jr.'s eventual assailant exit from a house on the corner.[151] Later, that assailant silently ran up to Vaughn, Jr. from behind an ambulance and hit him on the head twice with a baseball bat.[152] At that time, defendant officers were within 20 to 50 feet of the unexpected incident, which transpired in a matter of seconds.[153] The

141. *Id.* at 12.
142. *Id.* at 13.
143. *Vaughn*, 2014 U.S. Dist. LEXIS 107952, at *3.
144. Defendants' Memorandum of Law in Support of their Joint Motion for Summary Judgment at 2-3, *Vaughn,* 2014 U.S. Dist. LEXIS 107952 (Dec. 31, 2014) (No. 14-C-47) [hereinafter Defs.' Mem. Of Law in Supp. of Mot. for Summ. J.].
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 3.
150. *Id.*
151. *Id.* at 4.
152. *Id.*
153. *Id.*

officers immediately began chasing the assailant and apprehended him.[154]

The defendant officers argued that they did not create the danger Vaughn, Jr. faced because he was already involved with the street altercation before police arrived and that he returned to the altercation voluntarily.[155] The defendants noted that the officers did not bring Vaughn, Jr. to the altercation, but Vaughn, Jr. was already present when the officers arrived.[156] The officers claimed that because Vaughn, Jr. was "already in great danger" when they reached the scene, their actions did not increase the danger to Vaughn, Jr. enough for them to be held liable under the state-created danger doctrine.[157] Defendants also asserted that even if they did increase the danger to Vaughn, Jr., he had alternative options, such as running away, and was not rendered completely helpless.[158] The defendant officers maintained that the attack on Vaughn, Jr. was due to private violence.[159] As such, the officers should not be held responsible.[160] Moreover, the officers' conduct did not shock the conscience and amounted to mere negligence at most.[161]

3. The Plaintiff's Facts

Contrastingly, plaintiff Vaughn, Sr. alleged that no altercation was in progress when officers arrived and that no riot-like atmosphere existed when the police officers ordered his son, Vaughn, Jr., to drop his stick.[162] There was, however, continued tension and Vaughn, Jr. wished to protect himself.[163] One policeman at the scene drew his gun and pointed it directly at plaintiff's son.[164] Vaughn, Jr. immediately complied with the officers' orders to drop the stick he held as protection for himself and his younger brother.[165] When a man whom Vaughn, Jr. did not know began

154. Defs.' Mem. Of Law in Supp. of Mot. for Summ. J., *supra* note 144, at 4. The assailant eventually pled guilty to first-degree murder of Vaughn, Jr. *Id.* at 4–5

155. Defendants' Motion to Dismiss at 7, *Vaughn*, 2014 U.S. Dist. LEXIS 107952 (May 14, 2014) (No. 14-C-47).

156. *Id.*

157. *Id.*

158. *Id.* at 9.

159. *Id.*

160. Plaintiff's Response to Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint at 9, *Vaughn*, 2014 U.S. Dist. LEXIS 107952 (July 10, 2014) (No. 14-C-47).

161. *Id.* at 10.

162. *Id.*

163. *Id.*

164. *Id.*

165. Third Amended Complaint, *supra* note 140, at 3.

yelling obscenities directly at him, Vaughn, Jr. retrieved the stick.[166] He immediately dropped it again when police ordered him to do so.[167] Plaintiff father further alleged that the unknown obscenity-yelling man then began to approach his son, as officers stood within a few feet.[168] According to plaintiff Vaughn, Sr., each officer observed the man carrying a metallic bat, but none of the officers told the man to drop the bat.[169]

All of the officers stood and watched, without intervening, as Vaughn, Jr. was hit in the head twice, rendering him motionless on the pavement.[170] Vaughn, Sr. alleged the officers observed the assailant run away from the scene.[171] Vaughn, Jr. was taken to the hospital where he was pronounced dead.[172] Plaintiff Vaughn, Sr. asserted that defendant officers were being sued for greatly increasing the danger Vaughn, Jr. faced.[173] Vaughn, Jr. had no injuries prior to the officers' actions, which actions Vaughn, Sr. claimed had rendered his son helpless in the hostile environment in which he was killed.[174]

B. *Difficulty of Applying Current Standards for the State-Created Danger Doctrine*

Applying the various state-created danger doctrines promulgated by the circuit courts to any particular fact situation is challenging. Facts like those in *Vaughn* provide a valuable case study of this difficulty. The general difficulties and the *Vaughn*-specific issues are both reviewed below.

1. General Difficulties

There are several fundamental complications with applying the state created danger doctrine to any set of facts. First, as noted above, reconciling initial perceptions of all sides and settling on the facts and circumstances can be difficult.[175] Second, not all circuits recognize the

166. *Id.*
167. *Id.*
168. *Id.* at 4.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. Plaintiff's Response to Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint, *supra* note 160, at 4.
174. *Id.*
175. *See* Malcolm Gladwell, *Seven Seconds in the Bronx: The Delicate Art of Mind Reading,* in BLINK: THE POWER OF THINKING WITHOUT THINKING 189, 189 (2005). Gladwell describes a situation where police mistook an innocent man, essentially star-

state-created danger doctrine.[176] Third, of those that do recognize the doctrine, no two circuits apply the same test to determine state liability.[177] The complications do not end here.

Language within circuits often seems puzzling and paradoxical. For example, the Seventh Circuit's test uses terms that some courts in the Circuit have called unhelpful, while continuing to use a test centered on these very same terms.[178] The Third Circuit has its own elements test, but in defining the individual elements, the Circuit circles back to the first element, without explaining why.[179] The Tenth Circuit constructed a six-element test but chose not to define one of the elements.[180] The Tenth Circuit instead discussed restraint in applying the doctrine entirely.[181] Circuits that have never applied the doctrine and that are blatantly skeptical or even hostile towards it stop short of actually rejecting the doctrine.[182] Circuits that claim to recognize the doctrine often find ways to avoid applying it.[183] Perhaps the Eighth Circuit came

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gazing on his porch in a poor neighborhood, for an at-large criminal. *Id.* at 190. The police shot and killed the man after observing him reach for something black in his pocket. *Id.* at 192. The policemen said during their trial that they thought it was a gun. *Id.* It was in fact the man's wallet. *Id.* The man, on the other hand, mistakenly thought he was going to be robbed by the plain-clothed police officers, who had been driving an unmarked car. *Id.* at 196. The victim's voluntary acquiescence in "the robbery" was misinterpreted as hostile gunplay. *Id.* Gladwell highlights how split-second decision-making is difficult when it is impossible to accurately process every fact and how we often base our decisions on body language and implicit assumptions. *Id.* at 197.

176. *See generally* Veronica Zhang, Comment, *Throwing the Defendant Into the Snake Pit: Applying a State-created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. REV. 2150 (2011).

177. *Id.*

178. *See* King ex rel. King v. East St. Louis Sch. Dist. 496 F.3d 812 (7th Cir. 2007) (applying the elements); Vaughn v. City of Chicago, No. 14-C-47, 2014 U.S. Dist. LEXIS 107952, at *5 (N.D. Ill. Aug. 5, 2014) (criticizing the elements' terms as unhelpful before applying the elements).

179. *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 914 (3d Cir. 1997) (referring to foreseeability, the first element, when explaining relationship, the second element).

180. Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1263 (10th Cir. 1998) (quoting Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995)) (choosing not to define what shocks the conscience).

181. *Id.*

182. *See generally* Rivera v. Rhode Island, 402 F.3d 27 (1st Cir. 2005); Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995); Beltran v. City of El Paso, 367 F.3d 299 (5th Cir. 2004).

183. Often conduct is found in a conclusory manner not to have arisen to deliberate indifference or a similar standard but was one of mere negligence. Frequently an act is not found to be affirmative or it did not sufficiently shock the conscience. *See* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 26, 50 (2007) (explaining that few cases exist in which a plaintiff has actually been able to succeed and that the plaintiff "really must show" that the official acted with deliberate indifference).

closest to what is likely the truth about what actually drives these decisions when it acknowledged that *DeShaney* was not clear.[184]

2. Difficulties in Applying the State-Created Danger Doctrine to *Vaughn*

In addition to the general difficulty in applying the state created danger doctrine, a case like *Vaughn* demonstrates specific complexity. In determining whether to grant the defendants' motion to dismiss, the *Vaughn* Court applied the Seventh Circuit's three-element test: an affirmative act, proximate cause, and shocking the conscience.[185] While the elements seem clear enough, applying them to the facts of *Vaughn* is difficult.

With respect to the first element, the *Vaughn* Court reasoned the state may have increased a danger of private violence by ordering Vaughn, Jr. to drop his stick, turning a potential danger into an actual danger.[186] The complaint plausibly alleged this, triggering a duty of protection.[187] In doing so, however, the Court noted the Seventh Circuit's criticizing the term "affirmative act" as unhelpful.[188] Several other circuits include the "affirmative act" element,[189] but in this case it is unclear which act caused the harm–ordering Vaughn Jr. to drop the stick or standing by while he was beaten. If it is the latter, arguably standing by was not an affirmative act. It could, however, be considered "deliberate indifference" in the Sixth or Eleventh Circuits.[190]

In considering the element of shocking the conscience, the *Vaughn* Court found that commanding someone to drop his or her mode of self-defense and then watching from a few feet away as he or she is struck to death with a bat could qualify.[191] However, under the defendants' factual recitation, contending a chaotic environment and victims lying bleeding in the streets, it seems reasonable to expect the officers to take action to assert control, including asking participants to drop potential weapons.

184. Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

185. Vaughn v. City of Chicago, No. 14-C-47, 2014 U.S. Dist. LEXIS 107952, at *4 (N.D. Ill. Aug. 5, 2014) (explaining that the state-created danger doctrine has three elements centered around an affirmative act, proximate cause, and shocking the conscience).

186. *Id.* at 5, 8.

187. *Id.*

188. *Id.* (citing Slade v. Bd. of Sch. Dirs. of Milwaukee, 702 F.3d 1027, 1030 (7th Cir. 2012)).

188. *See* discussion *supra* Parts III.B, III.H, III.I.

189. *See* discussion *supra* Parts III.F, III.K.

191. Vaughn v. City of Chicago, No. 14-C-47, 2014 U.S. Dist. LEXIS 107952, at *8 (N.D. Ill. Aug. 5, 2014).

Asking a riot participant to drop a weapon should not, in itself, be conscience shocking.

Lastly, in ruling on the motion to dismiss, the *Vaughn* Court found that the second element, proximate cause, was underdeveloped and waived by the defendants,[192] but the analysis in other circuits would include additional elements. The Third Circuit would consider foreseeability,[193] but in a chaotic situation like *Vaughn*, it is difficult to apply a foreseeability standard. The Fourth Circuit would require a custodial relationship,[194] which does not appear to be explicitly present in *Vaughn*, although the relationship between a commanding officer and citizen Vaughn, Jr. could be a "special relationship"[195] in the Second Circuit. In short, the law's current state in the circuits creates many questions and offers few answers.

C. *Public Policy*

In addition to the problems applying the existing tests, two significant but competing issues arise within the current state-created danger jurisprudence. These competing issues undoubtedly contribute to the challenge of determining the doctrine's proper interpretation and application. State actors, especially those such as police who regularly operate in tense and dangerous circumstances, rightfully must be allowed to do their jobs without hesitating to calculate the likelihood of litigation.[196] Most would concede that the average American local policeman tries to benefit society. Moreover, traditional police action as a whole within the United States rarely operates with complete and total cold-blooded delinquency.[197]

Nonetheless, tragedy can occur,[198] so it is vital that citizens possess a mechanism to hold the powerful state responsible for flagrant and glaring abuses. Such abuses could become worse and more prevalent if left completely unchecked.[199] Underestimating prevailing and latent law enforcement misconduct can easily occur given the public's inherent

192. *Id.* (citing Puffer v. Allstate Ins. Co., 675 F.3d 709, 718 (7th Cir. 2012)).

192. *See* discussion *supra* Part III.C.

193. *See* discussion *supra* Part III.D.

194. *See* discussion *supra* Part III.B.

195. *See* Jonsson, *supra* note 11.

197. Robert E. Worden & Robin L. Shephard, *Demeanor, Crime, and Police Behavior: A Reexamination of the Police Services Study Data*, 34 CRIMINOLOGY 83, 83-105 (1996) (finding that the use of force in American policing is relatively infrequent).

198. *See* Gladwell, *supra* note 175, at 192.

199. *See* Caplan, *supra* note 11, at 504 (showing that unchecked police control and terror is a common and necessary characteristic of totalitarian regimes).

trust.[200] With no guidance from the U.S. Supreme Court on state-created danger theory in 25 years, the circuit courts struggle with this tension.[201]

That tension arises acutely in the context of a police force. Of all occupations within the United States, police officers have one of the highest rates of illnesses and injuries.[202] The job is both mentally and physically demanding. Officers continuously encounter high-risk situations involving death and suffering, during which physical injury or loss of life is possible, whether from conflicts with criminals or pursuing vehicles.[203] While earning a relatively modest median pay of $27.40 per hour, police officers must be alert and ready to react to difficult situations throughout every moment of their shifts.[204] Police officers may be paralyzed in their decision-making if the law subjected them to a strict hindsight standard.[205] A too-tough liability standard, coupled with relatively modest pay and the job's inherent risks, could discourage many people from entering or remaining in the profession. Officer morale and job performance could drop for fear of overwhelming public condemnation.[206]

On the other hand, simply forgiving law enforcement officers regardless of their actions could pose large problems long-term. Absent sufficient citizen protection, arbitrarily using police power arises.[207] Abuses ranging from shakedowns to beatings to extrajudicial detentions often follow.[208] Of course the state-created danger doctrine is not the best or only mechanism blocking the advent of a dystopian America

200. Fifty-three percent of Americans stated they trusted the police "a great deal" or "quite a lot." *See Confidence in Institutions*, GALLUP (June 5-8, 2014), http://www.gallup. com/poll/1597/confidence-institutions.aspx.

201. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), was decided in 1989.

202. BUREAU OF LABOR STATISTICS, *Occupational Outlook Handbook: Police and Detectives*, U.S. DEP'T OF LABOR (Dec. 17, 2015), http://www.bls.gov/ooh /protective-service/police-and-detectives.htm.

203. *Id.*

204. *Id.*

203. Jonsson, *supra* note 11.

206. *See* Steve Hopkins, *Number of Arrests in New York Plummet Over Holidays as Suspicions Grow of an Organized "Go Slow" by Police Amid Plunging Morale*, DAILY MAIL (Jan. 6, 2015, 11:25 AM), http://www.dailymail.co.uk/news/article-2898848/Number-arrests-New-York-plummet-holiday-period-compared-year-suspicions-grow-organised-slow-police-amid-plunging-morale.html (revealing that police in New York City were being "very cautious" not to "enrage the public" and most police precincts' crime tallies were close to zero after weeks of protests against over-zealous policing).

207. Hank Johnson, *State Violence and Oppositional Protest in High-Capacity Authoritarian Regimes*, 6 INT'L J. CONFLICT & VIOLENCE 55, 61 (2012).

208. *Id.*

completely controlled by uniformed thugs.[209] Yet it would be naïve to dismiss concerns about surrendering to the state this kind of power in any form. It is significant that an infallible attitude within a police force is more characteristic of a despotic system than a republican one.[210]

Tactics used in Ferguson, Missouri and the ensuing manhunt following the Boston Marathon bombings established a national discussion about the appropriate boundaries of police action.[211] Many condemned what they interpreted as police overzealousness and militarization, while others focused on the difficulty and danger law enforcement faced in these particular situations.[212] Finding the right balance is the challenge.

As with most reasonable solutions, each of the two concerns must be taken into account to produce the best and fairest outcome. Clearly, this is the heart of the circuits' struggle. Notwithstanding the resulting confusingly worded tests, coupled with the sometimes even more confusing application of those tests, the courts are attempting to balance the two interests fairly. The circuits want to recognize the possibility of state-created danger, but do not want to find it too easily. To appropriately balance the competing interests at stake and eliminate the confusion surrounding the various state-created danger doctrines, a uniform test must be imposed.

209.Indeed, video-taping of police officer conduct is increasing, while remaining subject to uncertain standards of acceptability. *See* Gericke v. Begin, et al., 753 F.3d 1, 7-9 (1st Cir. 2014).

210. Johnson, *supra* note 207, at 59.

211. John W. Whitehead, *From Boston to Ferguson: Have We Reached a Tipping Point in the Police State?*, LIBERTY BEACON (Sept. 27, 2014), http://www.thelibertybeacon.com /tag/boiling-frogs-post/.

212. The 2014 Ferguson unrest resulted after police shot an 18-year-old man six times, killing him. *See Ferguson Protests: What We Know About Michael Brown's Last Minutes*, BBC (Nov. 24, 2014, 10:30 PM), http://www.bbc.com/ news/world-us-canada-28841715. Circumstances were and remain disputed. *See id.* People protested and rioted. *See A Look at the Destruction After Ferguson Riots,* ABC NEWS (Nov. 25, 2014, 10:38 AM), http://abcnews.go.com/US/tour-destruction-ferguson-riots/story?id=27163962. Police responded with militarized force and imposed a curfew. *See Military Equipment For Local Police Questioned Amid Ferguson Violence*, WASH. TIMES (Aug. 17, 2014), http://www.washingtontimes.com/news/2014/aug/17/military-equipment-for-local-police-questioned-ami/?page=all; *see Timeline: Michael Brown Shooting in Ferguson, Mo.*, USA TODAY (Aug. 25, 2014, 6:54 PM), http://www.usatoday.com/ story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827. The 2013 Boston Marathon bombing led to an unparalleled manhunt for the suspect, during which law enforcement created a lockdown in Boston and ordered its 650,000 citizens to stay indoors. Joe Tanfani, Devin Kelly & Michael Muskal, *Boston Bombing [Update]: Door-to-door Manhunt Locks Down City*, LA TIMES (Apr. 19, 2013), http://articles.latimes.com/2013/apr/19/ nation/la-na-nn-boston-bombing-suspects-20130419.

V. A PROPOSED UNIFORM TEST

A. Goals and Elements

A uniform test should achieve three things. First, a uniform test should offer a cohesive, coherent standard for the state-created danger doctrine. Second, it should dramatically simplify the elements of the state-created danger doctrine so that it can be applied more consistently, regardless of the individual set of unique facts. Finally, a uniform test should delicately balance the interests of protecting the public from abuse with allowing the police and other state actors a necessary margin of latitude to perform certain essential public functions without losing considerable proficiency.

Circuit courts and legal scholars alike have expressed dissatisfaction with the current condition of the state-created danger doctrine, recognizing a need for simplification so it can be applied with consistency.[213] Of course, the danger of oversimplification always exists, and important distinctions could be missed. However, where the language of state-created danger is circular and adds nothing to interpretation or implementation, it becomes a hindrance and must be eliminated in favor of clarity.

The following uniform test addresses these three goals. To establish a state-created danger claim, a plaintiff should be required to make a showing that the state actor: (1) materially increased danger (2) in a way that would shock the conscience (3) of a reasonable person (4) in the same situation. That the doctrine is called the state-*created* danger doctrine should be sufficient to indicate and require that the state must have actually created or increased the danger in a meaningful way. Whether that increase resulted from an affirmative act[214] or deliberate indifference[215] is not important. Many of the circuits include the "shock the conscience" element[216] but, as *Vaughn* demonstrates, context is important. That context can be provided through the eyes of a reasonable person in the relevant situation. If these simple elements are met, the plaintiff has established a claim. Courts would no longer wrestle with affirmative acts, deliberate indifference, foreseeability,

213. *See* Slade v. Bd. of Sch. Dirs. of Milwaukee, 702 F.3d 1027, 1033 (7th Cir. 2012); Chemerinsky, *supra* note 183.

214. Dwares v. City of New York, 985 F.2d 94,99 (2d Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990).

215. Foy v. City of Berea, 58 F.3d 227, 232 (6th Cir. 1995).

216. Forrester v. Bass, 397 F.3d 1047, 1058 (8th Cir. 2005).

custody, or other special elements[217] that simply served as ornaments along a meandering and long path with no real end.

In this proposed test, the first element, the requirement of a state actor creating or increasing danger, brings the action within the state-created danger exception. The second element, conscience-shocking, is key because it sets a clear standard. The third element, a reasonable person standard, allows development of an objective body of law that could be applied to different factual situations. The fourth element, context of the specific situation, allows a public policy balance.[218]

To protect the public from inexcusable abuse at the hands of the state while simultaneously giving police and other state actors the needed latitude to perform their jobs effectively, the shocks the conscience standard is applied simply. Police work's nature in particular is often hurried and decisions must be made swiftly.[219] As a public safety matter, police cannot be afraid to act in tough situations. Yet when police or other state actors act in a deplorable manner, the public should not be denied every reasonable means to hold them responsible.

The shocks the conscience standard could protect both the public and the police. It puts the police on notice that even a single individual citizen can hold the police accountable, hopefully influencing law enforcement behavior for the better. The police must have certain leeway within a scope of acceptable behavior and practices to carry out their duties, but must not be allowed to cross the line into troublesome methods or roguery. The proposed standard would inform the public that they do not need to suffer clear mistreatment. The same standard would equally alert them not to file frivolous lawsuits. By simplifying the standard and pinpointing the circuits' and *DeShaney*'s core sentiments, the legal community and the public may better understand this little-known doctrine.

B. Applying the Uniform Test to the Vaughn Facts

After ruling in favor of plaintiffs in the motion to dismiss, the *Vaughn* court issued a summary judgment opinion in favor of

217. *See* discussion *supra* Part III.

218. *See* discussion *supra* Part IV.C.

219. This seems to be what the Third Circuit had in mind with its unique hyper-pressurized environment standard. In cases like high-speed chases, liability can only attach when the harmful conduct of the police was intentional. The problem with adopting this standard across the board, however, would be a tendency for the state to attempt to portray everything as hyper-pressurized to avoid liability. *See* Estate of Smith v. Marasco, 318 F.3d 497, 508 (3d. Cir. 2003).

defendants.[220] The court explained that "[t]he real question is whether Defendants failed to protect [plaintiff] in a way that shocks the conscience after disarming him in a dangerous environment."[221] This general formulation, while useful in the *Vaughn* situation, provides insufficient elemental guidance for other situations.

In essence, however, the court's formulation incorporates all four proposed elements. First, while the court does not make an express finding that a state actor created or increased the danger to plaintiff, the court suggested that police officers "disarm[ed] him in a dangerous environment."[222] Second, the court found that "no reasonable jury could find that Defendants' failure to protect [plaintiff] from an ambush shocked the conscience."[223] This finding incorporates the second proposed element, shocking the conscience, and the third element, a reasonable person test. Finally, the court found "Where, as here, police officers must make an 'instant judgment' about how to deploy their resources, 'even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates [due process concerns].'"[224] This finding employs the fourth proposed element, applying the context of the specific situation to allow a public policy balance.

In short, the proposed four element test yields the same result found by the *Vaughn* court while providing generally applicable elements useful in a variety of situations.

VI. CONCLUSION

Clouded, enormously complicated, endlessly circular, yet confined to a couple of sentences illustrating a mere afterthought in a first-year Torts textbook,[225] the state-created danger doctrine endures. Almost a quarter of a century after *DeShaney*, circuits continue to struggle with its proper meaning and appropriate function.[226] Behind the perplexing and divergent language, most circuit courts agree on punishing state-created danger while resisting a low standard, due to valid public policy concerns

220. Vaughn v. City of Chicago, No. 14-C-47, 2015 U.S. Dist. LEXIS 78951 (N.D. Ill. June 18, 2015).

221. *Id.* at 11.

222. *Id.*

223. *Id.* at 12.

224. *Id.* at 13 (citing Cty. of Sacramento v. Lewis, 523 U.S.833, 853 (1998)).

225. DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 512 (7th ed. 2013).

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

that are especially important in the context of police action. Standardization and simplification would doubtlessly help the courts with this dilemma. The uniform test proposed herein could do just that.

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