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Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory

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I. INTRODUCTION

"The king can do no wrong."—William Blackstone[1]

"It is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals." —Abraham Lincoln[2]

On October 20, 1980, as Barbara Piotrowski left a donut shop, a man hired by her ex-boyfriend to kill her shot her four times in the chest.[3] Within twenty-four hours, the Houston Police Department ("HPD") arrested the gunman and his driver and obtained

1. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238 (1765).
2. Marshall Miller, *Police Brutality*, 17 YALE L. & POL. REV. 149, 149 (1998).
3. Brief for Appellant at 6-7, Piotrowski v. City of Houston (1999). Piotrowski survived the attack and, though now partially paralyzed, was able to file a lawsuit.

their confessions.[4] Piotrowski's millionaire ex-boyfriend moved to England and was never arrested nor brought to trial.[5]

Fifteen years later, Piotrowski sued the City of Houston under 42 U.S.C. § 1983 for depriving her of her constitutional right to life and liberty and equal protection.[6] She based her lawsuit primarily on information that a month before the shooting, an HPD officer received a tip from a man who claimed he was offered money to kill Piotrowski, chop up her body, and dump it in the Gulf of Mexico.[7] Exactly what HPD did with the tip is unclear.[8] What they did not do was explicitly warn Piotrowski[9] or furnish her with police protection.[10] Piotrowski further claimed that HPD colluded with her ex-boyfriend both before and after the shooting by harassing her and protecting him.[11] Specifically, she alleged that two or three HPD officers worked for her ex-boyfriend on their off-duty hours, helping him remove from her apartment all its contents, ransacking her house on another occasion, and possibly providing the gunman with a copy of her mug shot.[12] HPD pointed out that Piotrowski's allegations relied solely upon the conduct of a few isolated officers who moonlighted as security guards for her ex-boyfriend's friend.[13]

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4. *Id.* at 7.

5. Brief for Appellee at 15.

6. Brief for Appellant at 6. Piotrowski explained that she waited so long to file her lawsuit because the HPD "code of silence" concealed police involvement in the shooting, thus delaying her awareness of the involvement. Brief for Appellee at 2. The City of Houston points out that Piotrowski knew the information earlier and even included it in her book, *Sleeping with the Devil*, published in 1991. Brief for Appellant at 11.

7. *See* DALLAS MORNING NEWS, May 11, 1998, at 12A. The tip came from Rick Waring, who told HPD officer John Liles that he had been solicited to kill Piotrowski for $10,000. Brief for Appellant at 8.

8. Officer Liles claims he took the tip seriously, reported it to his supervisor, and filed a report with the homicide division. The report has never been found. The officer in charge of the Piotrowski shooting investigation did not become aware of the tip until the morning after the shooting when Liles informed him. *Id.* at 8-9.

9. Brief for Appellee at 11-12. There is also evidence that Liles, the HPD officer, told Waring not to warn Piotrowski because the matter "was in police hands now." *Id.* at 11. The City countered that Piotrowski was well aware of the danger because she was familiar with the violence and anger directed toward her by her ex-boyfriend. Brief for Appellant at 30-31.

10. Brief for Appellee at 14.

11. *Id.* at 2.

12. *Id.* at 7, 8, 10. It is unclear whether the police actually gave Piotrowski's photograph to the gunman. Piotrowski argued that because her mugshot was found with the gunman, then the photo "could only have come from the police." There were, however, no further facts to support this claim. *Id.* at 10-12.

13. The HPD argued that the officers working for her ex-boyfriend's friend did so completely on their own. The HPD admitted that this activity violated HPD policy because the officers never obtained the requisite approval. Brief for Appellant at 24-25. Moreover, HPD claimed it followed protocol at all times and would have done "everything possible" to prevent Piotrowski's harm had the tip not been misplaced prior to the shooting. *See id.* at 9-10.

Nevertheless, after a jury verdict in Piotrowski's favor, a federal judge ordered the City to pay her $18.1 million.[14]

In one respect, the decision against the City of Houston seems fair. If the police department affirmatively aided in the tragedy that befell Ms. Piotrowski, then it certainly violated 42 U.S.C. § 1983, which provides tort-like remedies for persons deprived of their constitutional rights "under color of state law."[15] On the other hand, if the police department was simply negligent because it failed to follow the requisite procedures regarding the tip, then the department is protected by sovereign immunity.[16] When stated this way, distinguishing between the two possibilities may seem rather easy. Nonetheless, the situation in *Piotrowski* illustrates a growing trend in federal courts of finding state officials and municipalities[17] liable for violating 42 U.S.C. § 1983 under a novel theory called "state-created danger."

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14. Piotrowski v. City of Houston, No. Civ.A. 95-4046, 1998 WL 268827, at *1 (S.D. Tex. May 5, 1998). The judge reduced the award from over $21 million to $18 million because the judge decided that the plaintiff had duplicated some of her claims. *See* DALLAS MORNING NEWS, May 11, 1998, at 12A. The City has appealed the decision; oral argument was held December 6, 1999, before the Fifth Circuit Court of Appeals.

15. The Civil Rights Act, 42 U.S.C § 1983 (1994 & Supp. 1998); *see also infra* note 29 and accompanying text.

16. If the police were only negligent, then Piotrowski cannot sue under § 1983 for a Due Process Clause violation. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) (holding that the Due Process Clause is not implicated by a state official's *negligent* act, which causes unintended loss of or injury to life, liberty, or property). Instead, she would have to sue under a state tort claim, but sovereign immunity prevents a plaintiff from suing the government in tort without the government's consent. *See infra* note 27 (explaining that sovereign immunity is a judicial doctrine barring suits against the government for torts committed by its agents unless waived by legislative enactment).

17. The proper defendant in a § 1983 case is a government employee or a municipality. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that a municipality is a "person" for the purposes of § 1983 liability). To state a claim against a municipality, however, the plaintiff has the additional burden of showing that the government official acted pursuant to an official "policy or custom." *See id.* (rejecting a respondeat superior theory as a basis for holding cities liable); *see also* Bryan County v. Brown, 520 U.S. 397, 403-04 (1997) (noting that the "policy or custom" requirement ensures that municipal liability arises only for deprivations resulting from decisions of duly authorized legislative bodies or other officials whose acts may be fairly said to constitute those of the municipality). Though the Supreme Court has never explicitly held that state agencies or counties are proper defendants, lower courts often treat these entities as "municipalities." *See, e.g.*, Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906-07 (3d Cir. 1997) (ignoring the question of proper defendant and addressing the liability of school district under the state-created danger theory); Ross v. Lake County, 910 F.2d 1422, 1429 (7th Cir. 1990) (requiring plaintiff to show that a deputy was following a Lake County policy or custom). The Supreme Court has held that a plaintiff may never sue the State itself. Will v. Michigan Dep't of Police, 491 U.S. 58, 64-66 (1989) (section 1983 construed to exclude actions against "States"). Thus, for the purposes of this Note, the defendant will be generically termed "government," which includes both government officials and municipalities but does not include the State.

The state-created danger theory arises when a state actor creates the dangerous circumstances that allow some private party or other force to deprive a citizen of her constitutional rights.[18] Even though there is an intervening, non-governmental actor, courts hold the government liable since it created the situation in which the injury occurred.[19] Because the Supreme Court has never explicitly or clearly addressed the theory,[20] the federal circuits apply it unevenly and erratically.[21] Some circuits have not recognized the theory at all,[22] and others are requiring different levels of culpability and action by the municipality or state actor with varying requirements placed on the plaintiff.[23]

This Note argues for a unitary and restrictive standard with which courts should judge these claims. A court today faces an incredible task of sorting among other circuits' tests and standards in analyzing a state-created danger case. Moreover, because many courts employ generous and unrestrained tests, a court is quite likely to impose liability on the government, effectively replacing state tort law with § 1983 and allowing the judiciary to second-guess legislative decisions. Part II, after examining the historical context in which the theory has arisen, will set out the circuits' varying standards and illustrate their inconsistencies and problems. In Part III, this Note presents a more workable, narrow test

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18. Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993). Thus, even though a private actor directly and affirmatively causes the injury to the citizen, the government may be held liable. *Id.* at 1126-27; *see also* Christina M. Madden, *Signs of Danger—The Third Circuit Emphasizes Foreseeability as the Crucial Element in the "State-Created Danger" Theory:* Morse v. Lower Merion School District, 43 VILL. L. REV. 947, 948-49 (1998) (recognizing that, pursuant to the "state-created danger" theory, states can be held liable even if the State did not directly deprive the person of his constitutional rights).

19. *E.g.*, Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (flag-burners alleging that the police created the danger by assuring "skinheads" they would not intervene if the "skinheads" wanted to attack the flagburners); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (plaintiff alleging that a police chief created the danger because he prevented other police from protecting her from her abusive husband); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (1989) (finding that prison officials created the danger to a town clerk when they left her alone with violent criminals working in city hall). For example, Piotrowski might allege that the HPD created the situation in which the gunman shot her.

20. The Supreme Court mentioned the theory in dicta in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced . . . it played no part in their creation, nor did it do anything to render him more vulnerable to them.").

21. *See* discussion *infra* Part II.C.

22. *See* Pinder v. Johnson, 54 F.3d 1169, 1175-76 n.* (4th Cir. 1995) ("[I]t is not strictly accurate to suggest, as [the Plaintiff] does, that 'creation of risk' is a second exception to the rule of *DeShaney*."). The First, Fifth, and the District of Columbia Circuits have not yet recognized the theory. *See infra* notes 70-77 and accompanying text.

23. *See* discussion *infra* Part II.C.

that all courts should adopt and apply. An illustration follows that applies the test to the facts of *Piotrowski v. City of Houston*. Part IV concludes that the proposed test is the best, most logical analysis of these claims based on the historical context of § 1983, the Supreme Court's reasons for mentioning the state-created danger theory in dicta, and the need for freedom in government decision-making. Specifically, Part IV asserts that a more restrictive test is imperative because imposing liability may deter government officials from taking risks and executing their functions for the public's greatest benefit.

II. THE DEVELOPMENT OF THE STATE-CREATED DANGER THEORY

A. The History Of Government Liability Under 42 U.S.C. § 1983

The Fourteenth Amendment forbids a State from depriving "any person of life, liberty, or property, without due process of law."[24] This Due Process Clause was created as the analogue to the Magna Carta and was "intended to secure the individual from the arbitrary exercise of the powers of government."[25] Over time the role of government increased and expanded, and with it the potential for abuse of power.[26] Despite sovereign immunity granted to governments in many common law tort actions,[27] Congress, in reaction to increasing abuses, created a constitutional tort remedy for violations of the Fourteenth Amendment: the Civil Rights Act of 1871.[28]

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24. U.S. CONST. amend. XIV, § 1.

25. Daniels v. Williams, 474 U.S. 327, 331 (1986); *see also* Edwin Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911).

26. *See* Harvard L. Rev. Ass'n, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2009 (1998).

27. *See id.* ("Sovereign immunity . . . has been widely criticized, but is nevertheless firmly rooted in American legal doctrine."). Sovereign immunity is the judicial doctrine that prevents bringing suit against the State without its consent. BLACK'S LAW DICTIONARY 1396 (6th ed. 1998). The doctrine essentially bars suits against the government for the torts of its agents or employees unless waived by legislative enactment. *Id.*

28. The Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1982)); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes A Distorted Picture*, 65 N.C. L. REV. 517, 517 (1987). Congress created Section 1 of the Civil Rights Act, now codified as 42 U.S.C. § 1983, to curb abuse by officials in southern states who were colluding with the Ku Klux Klan against black citizens. *See* Patricia A. Burton & Michael T. Burke, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON. L. REV. 511, 513 (1989). The authors identify the three main purposes of the legislation: First, to "override certain kinds of state laws"; second, to provide redress where "state law was inadequate to provide such a remedy"; and third, to provide

Section I of the Act, now codified as 42 U.S.C. § 1983, holds anyone liable who "under color of state law subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution."[29] In order to state a § 1983 claim, the Supreme Court requires a plaintiff to show two essential elements: (1) a person acting under color of state law committed the action complained of; and (2) this action deprived a person of any rights, privileges, or immunities secured by the Constitution or laws of the United States.[30] The Court has held that a person acts "under color of" state law by using power obtained by virtue of the person's authority under the law.[31] The Court has defined "person" to include state employees as well as municipalities.[32] The Court, however, has struggled to define the term "deprivation;" that is, it is uncertain how much a state actor or municipality must do in order to "deprive" citizens of their rights and incur liability under § 1983.

B. The Definition of "Deprivation" Under 42 U.S.C. § 1983

The question of what constitutes "deprivation" is the focus of any state-created danger case. Clearly, a government official incurs § 1983 liability when he acts directly and immediately on citizens to deprive them of their constitutional rights.[33] In a state-created danger case, however, the question is much more difficult: Has a state

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a "federal remedy where state remedies, although adequate in theory, were not available in practice." *Id.*; *see also* Mead, *supra*, at 518 n.6 (setting forth a letter written to Congress by President Grant urging the adoption of the Civil Rights Act to combat the organized violence of the Ku Klux Klan and local officials in the South).

29. Civil Rights Act, 42 U.S.C. § 1983 (1994 & Supp. 1998). The statute provides:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United 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.

30. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds, by* Daniels v. Williams, 474 U.S. 327 (1986).

31. United States v. Classic, 313 U.S. 299, 326 (1941); *see also* Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney*?*, 65 N.Y.U. L. REV. 1280, 1284 (1990) (asserting that when a State acts, as when it issues a protective order, the State should be held to have assumed an affirmative duty that can give rise to liability).

32. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691-94 (1978); *see also supra* note 17 (stating that the proper defendant in a § 1983 case is a state employee or a municipality and not the State). Determining the proper defendant, however, is not the purpose of this Note; thus, any reference to "government" includes both state officials and municipalities but not the State itself.

33. For example, when a prison official beats a prisoner, the official has directly caused the harm to the prisoner and will be found liable under § 1983. *See, e.g.*, Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996).

official "deprived" a citizen of any constitutional rights when the official increases the danger to the citizen, but some other person or force brings about the citizen's harm? For example, in *Martinez v. California*, state officials unlawfully released a disturbed sex offender who, five months later, murdered a fifteen-year-old girl.[34] The Court held that although the officials wrongfully released the killer, the act was not a deprivation of the victim's life "within the meaning of the Fourteenth Amendment."[35] In defining "deprivation," the Court focused on causation and stated that the girl's death was "too remote a consequence" of the State's action to hold the officials liable under § 1983.[36]

Two years after *Martinez*, the Seventh Circuit wrestled with the deprivation requirement and recognized a novel theory; when a state actor puts a person in a position of danger from private actors and then fails to protect the person, the government is "as much an active tortfeasor as if it had thrown [the person] into a snake pit."[37] The court acknowledged that the Fourteenth Amendment does not require the government to protect its citizens or provide services; thus, merely failing to protect a person in danger does not lead to § 1983 liability.[38] Nonetheless, the court stated that if the government first acts in a way that creates or increases the danger that leads to a person's injury, and fails to protect the person, then the government is liable under § 1983.[39]

Although the Supreme Court has never explicitly adopted this "snake pit" theory, it implicitly affirmed it seven years later in dicta in *DeShaney v. Winnebago County Department of Social Services*.[40] The Court in *DeShaney* first affirmed that a government is not liable under § 1983 for simply failing to protect its citizens from other private actors.[41] The Court made clear that nothing in the Due Process Clause itself places an affirmative obligation on the

34. Martinez v. California, 444 U.S. 277, 279-80 (1980). The release was unlawful because the convicted offender had not been recommended for parole.

35. *Id.* at 284-85.

36. *Id.* at 285.

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

38. *Id.*

39. *Id.* Judge Posner pointed out that "the line between action and inaction, between inflicting and failing to prevent the infliction of harm" is tenuous. *Id.* Yet, when a court can discern that the government acted in a way that eventually brought harm to the plaintiff, the plaintiff should recover. *Id.*

40. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

41. *Id.* at 197 ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

government to ensure that its citizens enjoy their rights.[42] Thus, the Department of Social Services ("DSS") was not liable for failing to protect Joshua DeShaney because it returned Joshua to the custody of his father, a known child abuser, who later beat him into unconsciousness.[43] The Court concluded, however, that the government *could* be liable under § 1983, even when there is an intervening, third-party act, if the government takes a person into custody and holds her there against her will.[44] In this "special relationship" situation, the government assumes a duty to provide the person with safety and protection.[45] Because Joshua was not in the government's custody, but in the custody of his father, the Court held that the DSS was not liable under the "special relationship" theory.[46] Finally, in passing, the Court also noted that the DSS was not liable because it "played no part in the creation" of Joshua's danger, nor did it do anything to render Joshua any more vulnerable to the danger.[47]

After *DeShaney*, lower courts were left wondering whether a § 1983 action could be brought in cases in which some other actor besides the government was the cause of the plaintiff's harm. Specifically, the question of whether the government sufficiently "deprived" a citizen of any rights when there was an intervening actor remained unresolved. Courts soon inferred two separate theories from *DeShaney* that could provide recovery to a plaintiff in such a case. First, *DeShaney* made clear that one way a plaintiff may recover is by showing that the government created a "special relationship" with her in which the government so restrained her liberty that she was unable to care for herself.[48] Under this theory, the government has a duty to protect the plaintiff against constitutional interferences by private parties; the duty arises from the government's affirmative act of incarceration that now limits the

42. *Id.* at 195.

43. *Id.* at 191-94. Joshua began his life in the custody of his father, was temporarily taken into DSS custody after showing signs of abuse, but was returned to his father a short time later by DSS when his father agreed to cooperate with caseworkers. *Id.*

44. *Id.* at 200.

45. *Id.*

46. *Id.* at 201.

47. *Id. But see id.* at 205, 212 (Brennan, J., dissenting) (focusing on the action the DSS took with respect to Joshua—releasing him into his father's custody—and then arguing that the majority's opinion "construes the Due Process Clause to permit a State to displace private sources of protection, and then . . . to turn away from the harm that it has promised to try to prevent").

48. *Id.* at 200.

plaintiff's ability to protect herself.[49] By narrowly defining the "special relationship" theory, the Court in *DeShaney* effectively limited a plaintiff's recovery under the theory to situations in which she is confined against her will in a prison or mental hospital, and a private actor injures her.[50] The second method of finding the government liable even when there is an intervening, private actor arises from the Court's statement that the DSS was not liable because it did not "create Joshua's danger."[51] Courts soon called this second method of recovery the "state-created danger" theory.[52]

C. Lower Courts' Development of the State-Created Danger Theory

1. The Theory Recognized

The rather nebulous "creation of danger" dicta from *DeShaney* became the seed from which the lower courts have sown and harvested the state-created danger theory. Specifically, courts soon after *DeShaney* announced that if the government takes an affirmative act, which increases the individual's risk of danger beyond what it would have been absent state action, then the government is liable.[53] Courts reached this conclusion by focusing on the dictum in *DeShaney*, in which the majority stated that the DSS did not create the danger to Joshua because it placed him "in no worse position than that in which he would have been had [the government] not acted at all."[54] Thus, immediately after *DeShaney*, most courts never questioned the validity of the state-created danger theory and instead assumed that it was the second well established method of finding that the government has "deprived" a citizen of her rights even though there was an intervening, private actor.[55]

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49. *See id.*; *see also* Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that prison official may be liable for "deliberate indifference" if he is subjectively aware of substantial risk of harm to an inmate and fails to take reasonable measures to prevent the harm).

50. *See* Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 143 (1991).

51. Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995) (noting that the "danger creation theory" is the second exception to the *DeShaney* rule).

52. *See infra* notes 63-69 (listing cases in which various lower courts have adopted the state-created danger theory).

53. *E.g.*, 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); Cornelius v. Town of Highland Lake, 880 F.2d 348, 355-56 (11th Cir. 1989).

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

55. *E.g.*, L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992) (noting that the general rule of *DeShaney* has two exceptions, one of which is the "danger creation" exception); *Freeman*, 911

Accordingly, these courts hold state officials and municipalities liable when the officials create situations in which some other person or force brings about the plaintiff's harm. Though there is no typical state-created danger case, a paradigmatic set of facts has arisen in several circuits; a police officer arrests the driver of a car and leaves the car's passengers to fend for themselves in a dangerous situation.[56] In one case, police officers arrested a sober driver and left behind her drunken passenger, who took the wheel and became involved in a wreck that injured other motorists.[57] The injured motorists sued the officers under § 1983.[58] Even though the court recognized that the officers had no duty to protect the motorists from drunk drivers, the officers' action of taking the sober driver from the car created the danger that resulted in the plaintiffs' injuries.[59] Thus, the court found that the plaintiffs' allegations sufficiently stated a claim that the officers had "deprived" them of their constitutional rights.[60]

Currently, several federal circuits recognize the state-created danger theory as a viable method of finding that the government has "deprived" a citizen of her constitutional rights.[61] The Second,[62] Third,[63] Sixth,[64] Seventh,[65] Eighth,[66] Ninth,[67] Tenth,[68] and

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F.2d at 55 (stating that it is "clear" that at some point an official's actions in creating the danger lead to a constitutional duty to protect the plaintiff); Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990) (holding the County liable for preventing bystanders from rescuing a drowning boy and stating, "[t]his is not a case like *DeShaney*").

56. *See, e.g.*, Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) (holding that plaintiffs stated a valid claim under the state-created danger theory when they alleged that police officers arrested a sober driver and left in the vehicle her intoxicated passengers, who then attempted to drive and injured the plaintiffs); Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992) (noting the state-created danger theory is a second exception to the rule of *DeShaney* but refusing to hold an officer liable for arresting the designated driver of intoxicated passengers later involved in wreck); White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (finding that young plaintiffs properly stated a claim when they alleged the police violated their constitutional rights for arresting their uncle, who had been driving them, and left them on a busy highway to fend for themselves).

57. *Reed*, 986 F.2d at 1123-24. There was some dispute as to whether the driver was sober or drunk. If she was sober, the court said, then the plaintiffs sufficiently stated a claim that the officers had created the dangerous situation by removing the sober driver and leaving a drunk passenger in her place at the wheel. *Id.* at 1125-26.

58. *Id.*

59. *Id.* at 1125.

60. *Id.* at 1127.

61. *E.g.*, 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); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (11th Cir. 1989).

62. *Dwares*, 985 F.2d at 99 (finding that plaintiffs properly stated a claim when they alleged that police officers conspired with "skinheads" to permit them to beat up flagburners and therefore assisted in creating the plaintiffs' danger).

63. *E.g.*, Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907-08 (3d Cir. 1997) (reminding the parties that the court has "adopted the 'state-created danger' theory" but refusing to hold

Eleventh[69] Circuits have accepted the theory and have held various state actors and municipalities liable as a result.

There are, however, four circuits that have not yet recognized the state-created danger theory.[70] The First Circuit implicitly

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school officials liable for leaving open a rear entrance to the school through which a private actor entered and shot a teacher); Kneipp v. Tedder, 95 F.3d 1199, 1208-09 (3d Cir. 1996) (finding plaintiff's allegations that policemen arrested her companion and left her alone at night, intoxicated, to walk home in the cold stated a claim under the state-created danger theory); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373-74 (3d Cir. 1992) (acknowledging the state-created danger theory as a viable mechanism to find liability but finding its requirements unsatisfied in a situation in which school officials failed to protect students from sexual harassment by other students).

64. *E.g.*, Kallstrom v. City of Columbus, 136 F.3d 1055, 1067 (6th Cir. 1998) (holding that the City placed undercover police officers and their families in "special danger" by releasing their personnel files such that officers could maintain a § 1983 action).

65. *E.g.*, Monfils v. Taylor, 165 F.3d 511, 517-18 (7th Cir. 1998) (holding a policeman liable for revealing the identity of an informant who was later beaten and killed); *Reed*, 986 F.2d at 1125-26 (holding that plaintiffs stated a valid claim under the state-created danger theory when they alleged that police officers arrested a sober driver and left her intoxicated passengers in the vehicle, who then attempted to drive and injured the plaintiffs); Ross v. United States, 910 F.2d 1422, 1424-25 (7th Cir. 1990) (finding deputy liable for preventing the private rescue of a drowning boy); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (discussing the origin of the state-created danger theory in the context of the government throwing a plaintiff into a "snake pit" but not finding liability since the plaintiff alleged that the government merely failed to protect her); White v. Rochford, 592 F.2d 381, 382-83 (7th Cir. 1979) (finding the young plaintiffs properly stated a claim when they alleged the police violated their constitutional rights for arresting their uncle, who had been driving them, and left them on a busy highway to fend for themselves).

66. *E.g.*, Greer v. Shoop, 141 F.3d 824, 827 (8th Cir. 1998) (acknowledging the validity of the state-created danger theory but refusing to hold parole officers liable for failing to warn decedent that the parolee placed in her home was infected with HIV); Doe v. Wright 82 F.3d 265, 268-69 (8th Cir. 1996) (analyzing a § 1983 claim under the state-created danger theory but refusing to hold a sheriff and police department liable for failing to protect plaintiff from the sexual harassment of one of its officers); Gregory v. City of Rogers, 974 F.2d 1006, 1010-12 (8th Cir. 1992) (noting the state-created danger theory is a second exception to the rule of *DeShaney* but refusing to hold an officer liable for arresting the designated driver of intoxicated passengers later involved in a wreck).

67. *E.g.*, Huffman v. County of Los Angeles, 147 F.3d 1054, 1058-61 (9th Cir. 1998) (reasserting the state-created danger exception to *DeShaney* but refusing to hold liable an off-duty policeman involved in a barroom brawl); L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992) (requiring plaintiff to show that fellow prison employee created the dangerous conditions in which she was injured by an inmate in order to recover under § 1983).

68. *E.g.*, Armijo v. Wagon Mound Pub. Sch. Dist., 159 F.3d 1253, 1262-63 (10th Cir. 1998) (emphasizing the validity of the state-created danger theory and then setting out a five-part test to apply in such cases); Uhlrig v. Harder, 64 F.3d 567, 571 (10th Cir. 1995) (recognizing the "danger creation" theory as the second exception to *DeShaney*).

69. Cornelius v. Town of Highland Lake, 880 F.2d 348, 356-57 (11th Cir. 1989) (reversing a grant of summary judgment for defendants and remanding to the lower court to determine whether prison officials were aware that a town clerk faced a special danger from work squad inmates). *But see* White v. Lemacks, 183 F.3d 1253, 1256-57 (11th Cir. 1999) (noting that *Cornelius* would not have survived the "shock the conscience" standard promulgated by *Collins v. City of Harker Heights*, 503 U.S. 115 (1992)).

questioned whether the state-created danger theory should exist as a method of finding state action.[71] One First Circuit court noted that not every negligent or even reckless state act that makes a citizen more vulnerable to danger should be a constitutional violation.[72] It opined that such a theory should be used cautiously, and then decided to reach the merits on other grounds.[73] The Fourth Circuit explicitly rejected a state-created danger claim in *Pinder v. Johnson* by noting that it is not a "second exception" to the rule of *DeShaney*.[74] Instead, the court noted that state-created danger is simply an alternative way of finding liability when a state officer directly causes harm to the plaintiff.[75] Thus, in *Pinder*, a police officer was not liable when he promised to detain a man overnight who had threatened to kill his ex-girlfriend and her children but then released the man hours early.[76] The *Pinder* court held that the government does not "create a danger" every time it takes some action that makes injury at the hands of a third party more likely.[77]

2. Lower Courts' Tests in Applying the State-Created Danger Theory

Those circuits that recognize the state-created danger theory as a method of finding that the government deprived a plaintiff of her constitutional rights when some intervening source caused the

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70. The First, Fourth, Fifth, and the District of Columbia Circuits have not yet recognized the theory. The First and Fourth Circuits have done so explicitly, in *Soto v. Flores*, 103 F.3d 1056, 1064-65 (1st Cir. 1997), and *Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995). The Fifth and District of Columbia Circuits have not yet spoken on the issue.

71. *Soto*, 103 F.3d at 1064-65 ("We cannot extract a clearly established right from a somewhat confusing body of caselaw.").

72. *Id.*

73. *Id.*; *see also* Souza v. Pina, 53 F.3d 423, 427 (1st Cir. 1995) ("Absent the kind of custodial relationship apparently contemplated by the Court, the Due Process Clause does not require the State to protect citizens from 'private violence' in whatever form, including suicide. To be sure, the complaint alleges numerous acts by appellants that undoubtedly rendered [the plaintiff] more vulnerable . . . . However, these are not the kind of 'affirmative acts' by the State that would give rise to a constitutional duty to protect.").

74. *Pinder*, 54 F.3d at 1176 n.* ("[I]t is not strictly accurate to suggest, as [plaintiff] does, that 'creation of risk' is a second exception to the rule of *DeShaney*."). Instead, the court noted, the "creation of danger" dicta of *DeShaney* more likely refers to those situations in which a state actor "*directly* caused harm to the plaintiff." *Id.* (emphasis in original).

75. *Pinder*, 54 F.3d at 1176 n.*.

76. The officer's promise caused the ex-girlfriend to go on to work that night, leaving her children unprotected. After being released, the man returned to the house, set it on fire, and killed the three children. *Id.* at 1172.

77. The court pointed out that the real "affirmative act" in *Pinder* was committed by the released ex-boyfriend and not the officer who had promised to detain him. It did not matter, the court stated, that the ex-girlfriend had relied on the officer's promises. *Id.* at 1175.

plaintiff's harm employ various tests with often inconsistent factors and results.[78] Courts typically consider five factors in determining whether the plaintiff has properly alleged the state-created danger theory: (1) whether the act was directed toward a specific plaintiff or the public at large; (2) whether the government acted affirmatively or simply failed to act; (3) whether the government's act caused the harm; (4) whether the government completely removed all of the plaintiff's protection; and (5) whether the government acted with the requisite culpability.[79] Adding to the confusion, however, few courts consider all five factors,[80] and even worse, no circuit agrees with any other as to what the five are or how they should be evaluated.[81] Consequently, lower courts do not employ a unified standard in determining how and when a state actor has sufficiently created the danger in which a plaintiff is harmed and fulfilled the "deprivation" requirement for § 1983 liability. The result is a series of state-created danger cases that demand a unified, restrictive test based on inconsistent standards.

The following Section lists the factors that courts often consider and includes a discussion of how the circuits struggle to define and agree upon an appropriate analysis.

a. Specific Plaintiff or Public at Large

In order to impose liability, several circuits require that the government's act create the danger for a specific plaintiff, as opposed to creating the danger for the general public.[82] The require-

78. The Seventh Circuit, for example, once intimated that the government must have cut off all avenues by which the plaintiff may have helped herself. *See* Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990). However, eight years later, the court stated that there is "no absolute requirement" that all avenues of self-help be restricted. Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998).

79. *See* Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1264 (10th Cir. 1998) (giving a complete list of the five factors).

80. *E.g.*, Huffman v. County of Los Angeles, 147 F.3d 1054, 1061 (9th Cir. 1998) (discussing four elements); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066-67 (6th Cir. 1998) (discussing, at most, three elements); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997) (discussing only four elements to the test).

81. The Third and Tenth Circuits, for example, set out multi-part tests that are similar but not quite the same. *Compare* Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996) (stating a four-step test), *with Armijo*, 159 F.3d at 1264 (stating a five-step test). Moreover, other circuits discuss two or three of the factors but never explicitly set out a "test" for lower courts to follow. *E.g.*, *Monfils*, 165 F.3d at 516 ("[L]iability exists when the [S]tate affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.") (internal quotations omitted).

82. *E.g.*, *Armijo*, 159 F.3d at 1264 (discussing whether the plaintiff was a member of a "limited and specifically definable group"); Greer v. Shoop, 141 F.3d 824, 827 (8th Cir. 1998)

ment arises in part from two Supreme Court cases. In *Martinez*, the Supreme Court refused to hold officials liable for prematurely releasing a prisoner who then killed a young girl, because the parole board "was not aware that [the girl], as distinguished from the public at large, faced any special danger."[83] In *DeShaney*, young Joshua was a "discrete, individual plaintiff;" therefore, some courts have required the act to be directed toward an individual plaintiff like Joshua in order to impose liability.[84] Further, some courts state that allowing liability when officials directed their acts toward the public at large rather than toward a specific plaintiff expands the scope of the state-created danger theory beyond "any reasonable limit."[85]

The Seventh Circuit, however, has held that such a requirement is not necessary.[86] In *Reed v. Gardner*, the court announced that when the government creates an egregious danger, it does not need to know who in particular will be hurt.[87] The *Reed* court refused to dismiss a § 1983 action against police officers who arrested a designated driver and left behind her intoxicated passenger who later drove the car into the plaintiff's car, killing the plaintiff's wife and unborn son.[88] Certainly, in arresting the designated driver, the officers did not act toward the plaintiff's family specifically, but the court found that because "some dangers are so evident . . . that state actors can be held accountable by any injured party" even though the specific-plaintiff requirement is not met.[89] The Ninth Circuit later intimated that the specific plaintiff requirement might

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("[A]n individual's constitutional due process rights may be implicated when . . . the [S]tate affirmatively places a particular individual in a position of danger.") (internal quotations omitted); Davis v. Fulton County, 90 F.3d 1346, 1351 (8th Cir. 1996) ("For such a duty to arise, the actions of the [S]tate must create a unique risk of harm to the plaintiff that is greater than the risk faced by the general public.").

83. Martinez v. California, 444 U.S. 277, 285 (1980).

84. Although the Court in *DeShaney* did not hold the DSS liable, the Court did intimate that the DSS would have been liable had it made Joshua more vulnerable. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989). For this reason, lower courts have cited *DeShaney* as precedent in requiring the victim to be a "discrete, individual plaintiff" like Joshua. *See also Morse*, 132 F.3d at 910, 913-14 (noting that the school district could not have foreseen the injury).

85. *E.g., Armijo*, 159 F.3d at 1262 ("[W]e must bear in mind . . . the need for restraining and defining the scope of substantive due process claims . . . ."); *Morse*, 132 F.3d at 913 n.12; Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir. 1995) ("When the alleged unlawful act is a policy directed at the public at large . . . the rationale behind the [danger creation] rule disappears.").

86. Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993).

87. *Id.*

88. *Id.* at 1123.

89. *Id.* at 1127.

not be necessary but left the resolution of the question "for another day."[90]

b. Affirmative Act

For the government to be liable under the state-created danger theory, almost all courts require that the official act affirmatively as opposed to refusing to act.[91] This requirement arises from *DeShaney's* holding that the Due Process Clause does not require the government to provide any services; therefore, the government cannot be held liable for failing to protect an individual against private violence.[92] The distinction between action and inaction, however, can become a verbal tug-of-war in almost any case, because at some point in the story, the government almost always acts affirmatively in some way.[93] Even in *DeShaney*, the majority and dissent disagreed on whether the DSS's act was affirmative.[94] The dissent argued that the Court should "focus on the action that [the DSS] *has* taken with respect to Joshua" and find that the affirmative act was returning Joshua to his father.[95] The majority, however, construed the DSS's act as an omission and implied that Joshua's father committed the real affirmative act.[96]

Not surprisingly, lower courts' analyses in distinguishing an act from an omission are as conflicting and confusing as the major-

90. Huffman v. County of Los Angeles, 147 F.3d 1054, 1061 n.4 (9th Cir. 1998) ("Our sister circuits disagree as to whether the danger-creation exception applies only when the danger created . . . is directed toward a particular plaintiff . . . [or] the general public.").

91. *E.g.*, Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) (clarifying that the State may not have an affirmative duty to protect citizens for causing or increasing risks through affirmative acts); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1375 (3d Cir. 1992) ("Liability under the state-created danger theory is predicated upon the [S]tate's affirmative acts which work to plaintiff's detriment in terms of exposure to danger.").

92. In the "special relationship" theory, the second theory enunciated in *DeShaney*, the government is liable for the harm to a plaintiff who is in the government's custody. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989). The affirmative act requirement under this theory is satisfied when the government takes the plaintiff into custody. *Id.* For the state-created danger theory, however, the affirmative act is not as clear. Seemingly, the Court would require some act by the government in order to find liability and would not allow liability for an omission. *Id.* at 201.

93. *Id.* at 203-05 (Brennan, J., dissenting) (analyzing prior cases in light of the affirmative act requirement and stating, "I am unable to see . . . a neat and decisive line between action and inaction").

94. *Id.* at 203, 208 (Brennan, J., dissenting).

95. *Id.* at 205 (Brennan, J., dissenting) (emphasis in original).

96. *Id.* at 202 (stating that because the DSS had no constitutional duty to protect Joshua from his father, its failure to do so did not constitute a due process violation).

ity and dissent in *DeShaney*.[97] In two similar cases of domestic abuse occurring after the police released incarcerated men who were estranged from their families, the courts reached different outcomes based on whether the police had acted affirmatively in some way or merely failed to act.[98] In *Freeman v. Ferguson*, the court found that the plaintiff's original complaint did not state a claim, because she had merely alleged that the police failed to protect her from her estranged husband.[99] Her amended pleadings did state a claim, however, because she alleged that the police chief interfered with other officers in their desire to protect her.[100] In *Pinder v. Johnson*, the police promised the plaintiff that her ex-boyfriend would be detained overnight yet released him almost immediately, allowing him to return to the plaintiff's trailer and burn it down with her children inside.[101] Yet, the *Pinder* court held that the officers' conduct was merely an omission and not a valid § 1983 claim, even though the plaintiff had emphasized in her complaint the police officer's affirmative acts, including his assurances to the plaintiff that the ex-boyfriend would not be released and the subsequent release of her ex-boyfriend.[102] The court refused to hold the officer liable because "no amount of semantics" could disguise the fact that the ex-boyfriend and not the police committed the real act.[103] The *Pinder* dissent, however, focused on the officer's act of inducing the plaintiff to return to work and not to remain at home to protect her children as affirmatively creating the danger in which the plaintiff was injured.[104] Thus, despite the *Pinder* majority's desire to see the affirmative act requirement in a neat framework,[105] the semantic dispute remains unresolved.

At least one court has opted to ignore the action versus inaction distinction. In *White v. Rochford*, in which police left children

97. White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979) (hesitating to base police officers' liability on the "tenuous metaphysical construct which differentiates sins of omission [from] commission" when the officers arrested the children's uncle, who had been their driver, and left them alone in an abandoned car on a busy freeway).

98. *Compare* Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (finding plaintiff would state a claim if she alleged that the police chief affirmatively increased the decedent's risk of being attacked by her estranged husband); *with* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (finding that the only affirmative act was that committed by the plaintiff's ex-boyfriend).

99. *Freeman*, 911 F.2d at 55.

100. *Id.* Plaintiff's amended complaint alleged that her husband was a good friend of the police chief, who directed other officers not to stop the husband's abusive behavior. *Id.*

101. *Pinder*, 54 F.3d at 1172.

102. *Id.* at 1175.

103. *Id.*

104. *Pinder*, 54 F.3d at 1180-81 (Russell, J., dissenting).

105. *Id.* at 1176 n*.

stranded on a highway after arresting their uncle, the court refused to base the City's liability on the "tenuous metaphysical construct which differentiates sins of omission and commission."[106] In concluding that the officers did indeed "act," the court noted that there was little difference in affirmatively dumping the children out on the highway and failing to take care of them knowing they were stranded there.[107]

Thus, the affirmative action requirement from *DeShaney* has resulted in most courts acknowledging its existence but struggling incessantly in its application.

c. Causation

At some point in each state-created danger case, the court discusses causation; that is, each court requires that the government's act be the cause of the plaintiff's injury, even though a third party intervened, in order for the government to be found liable.[108] Courts are generally mindful of the causation requirement simply because a § 1983 suit is quite similar to a basic tort suit.[109] Yet, the circuits do not seem to agree on what exactly a plaintiff must show in order to prove causation.

Some lower courts speak of a plaintiff's harm as being "too remote" from the government's act to meet the causation requirement.[110] The genesis of this requirement is the Supreme Court's *Martinez* opinion.[111] The Supreme Court held that the young girl's death was too remote from the parole board's act of wrongly releasing the killer some five months earlier.[112] Similarly, and perhaps redundantly,[113] courts often require the government's act to be

106. White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979).

107. *Id.* The dissent argued that the real affirmative act was the uncle's illegal drag-racing that caused the children to be stranded, but the majority found that the officers had acted affirmatively by removing the driver from the car. *Id.* at 386.

108. *E.g.*, Armijo v. Wagon Mound Pub. Sch. Dist., 159 F.3d 1253, 1262 (10th Cir. 1998).

109. Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997) (comparing and discussing § 1983 causation with ordinary tort law causation).

110. *E.g., id.*; Doe v. Wright, 82 F.3d 265, 268 (8th Cir. 1996) (holding that the government's action was "too remote" to create a § 1983 claim).

111. Martinez v. California, 444 U.S. 277, 284-85 (1980).

112. *Id.* at 284. Following *Martinez*, the First Circuit dismissed a claim against police officers for failing to detain the victim's brother, who stabbed the victim two weeks after his release. *Rodriguez-Cirilo*, 115 F.3d at 52. The court explained that the brother's stabbing was "too remote" from the wrongful release to impose liability on the officers. *Id.*

113. *Id.* ("The remoteness in time of the harm in this case precludes a finding of proximate causation.").

the "proximate cause" of the plaintiff's harm.[114] Most likely, the difference between "too remote" and "proximate cause" is minor, if it exists at all, because the analysis is generally the same—whether a tort-like analysis would find the government's act to be the cause of the plaintiff's injury.[115]

Other courts avoid terms like "proximate" and "remote" and vaguely imply a causation requirement by demanding that the government's act create the danger or increase the victim's vulnerability to danger.[116] In other words, the government's act must be the but-for cause that put the plaintiff in a position of danger she would not otherwise have faced.[117] Part of the confusion about causation derives from *DeShaney*, which never explicitly stated how large a role the state actor must play in the creation of the danger or vulnerability.[118] *DeShaney*, however, made one thing clear: the official's act must in some way place the plaintiff in a worse position than one which she would have occupied had the official not acted at all.[119] For Joshua DeShaney, it meant that the DSS's act of returning him to his abusive father was in no way the cause of his beating, because Joshua would have suffered the same fate had the DSS never taken Joshua away from his father in the first place.[120]

Thus, many courts appear to engage only in a but-for causation analysis and merely require that the government's act in some way create or increase the plaintiff's danger. For example, in *Reed*, liability turned on whether a car's driver, whom police officers arrested, was drunk or sober.[121] If the driver were already drunk, the court said, the officer's action of arresting her and leaving the in-

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114. *E.g.*, Huffman v. County of Los Angeles, 147 F.3d 1054, 1059 (9th Cir. 1998) ("[T]he policy must be the proximate cause of the § 1983 injury"); Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1262 (10th Cir. 1998) ("Defendant's conduct put Plaintiff at substantial risk of serious, immediate, and proximate harm . . . .").

115. Pinder v. Johnson, 54 F.3d 1169, 1180-81 (4th Cir. 1995) (Russell, J., dissenting). A tort-like analysis of proximate cause would require the plaintiff's injury to be a foreseeable consequence of the government's act. *Compare Huffman*, 147 F.3d at 1059 (discussing "proximate" causation in terms of "foreseeability"), *with Rodriguez-Cirilo*, 115 F.3d at 52 (stating that the cause is "remote" even if the officers had "some indication" of the later third party act).

116. *E.g.*, 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). *But see* L.W. v. Grubbs, 974 F.2d 119, 122 (9th Cir. 1992) (stating that the government's act must have created the danger and not simply rendered the plaintiff more vulnerable to an already-existing one).

117. *See infra* notes 118-26 and accompanying text. "But-for" causation employs a test that asks whether the plaintiff would not have suffered any wrong "but for" the defendant's act. BLACK'S LAW DICTIONARY 200 (6th ed. 1998).

118. Carlton v. Cleburne County, 93 F.3d 505, 508 (8th Cir. 1996).

119. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 200 (1989).

120. *Id.* at 201.

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

toxicated passengers did not place the by-stander plaintiffs in a position of danger they would not have otherwise faced.[122] If, however, the driver were sober, then the arrest did cause the accident because it would never have occurred had the officers not acted.[123] Another court refused to find police officers liable when they failed to assist a drunken man lying next to the road.[124] The officer's act, said the court, did not create the danger by which the man was injured because he was already drunk.[125] Accordingly, under this but-for causation analysis, a court will not find the government liable if the official's act did little more than allow a plaintiff to be injured by an already-existing danger.[126]

d. Removing All Protection

A fourth element that courts consider is whether or not the government's act removed all of the plaintiffs' protection, including their self-protection.[127] Particularly, some courts require the plaintiff to show that when the government created the dangerous situation, it removed all of her sources of private aid.[128] Courts often analogize from *DeShaney's* "special relationship" theory, in which the government is liable only for injury that the plaintiff in the gov-

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122. *Id.* The original driver was arrested for driving while intoxicated. *Id.* at 1124. It was not clear, however, if she was actually intoxicated or was only presumed to be. *Id.* The court decided to pursue the § 1983 analysis under both hypotheticals. *Id.* That is, the court first assumed the truth of the plaintiffs' allegations—that the first driver was sober—and analyzed causation. *Id.* Then, because the defendants on remand would likely offer proof of the driver's intoxication, the court also addressed whether arresting an intoxicated driver and leaving an equally-intoxicated passenger affected the analysis. *Id.*

123. *Id.* at 1126.

124. Rogers v. City of Port Huron, 833 F. Supp. 1212, 1218-19 (E.D. Mich. 1993). *But see* Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (finding officers increased plaintiff's danger by leaving her in an intoxicated state to walk home on a cold night alone after arresting the plaintiff's sober friend).

125. *Rogers*, 833 F. Supp. at 1219.

126. *E.g.*, Salas v. Carpenter, 980 F.2d 299, 309-310 (5th Cir. 1992) (holding the City not liable for declining assistance from a SWAT team and taking a hard line with a hostage taker); Jackson v. City of Joliet, 715 F.2d 1200, 1204-05 (7th Cir. 1983) (holding officers not liable because they "did not create but merely failed to avert danger" by not rescuing victims more promptly from a burning car).

127. *E.g.*, Gregory v. City of Rogers, 974 F.2d 1006, 1011 (8th Cir. 1992) (refusing to hold officers liable for leaving drunk passengers in their car, because the officers never fully prevented the designated driver from making "suitable arrangements" for the passengers); Ross v. United States, 910 F.2d 1422, 1430 (7th Cir. 1990) (finding that a deputy removed all aid to a drowning boy when the deputy prevented bystanders from entering the water and saving him).

128. *Ross*, 910 F.2d at 1430.

ernment's custody,[129] and demand the plaintiff in a state-created danger case allege a similar situation. That is, they require the plaintiff to show that the government's act cut off all her aid and effectively placed her in a helpless position as though she were in custody.[130] Several courts, however, do not discuss this requirement at all, and at least one court has explicitly held that the government need not remove all avenues of aid in order to find the state-created danger theory applicable.[131] In *Monfils v. Taylor*, the Seventh Circuit held the City liable for releasing the identity of a police informant who was later killed, even though the informant had other ways to protect himself against his assailants.[132]

e. Culpability

Finally, all courts require the state actor to have some level of culpability regarding his act that led to the plaintiff's harm in order for the government to be liable.[133] The Supreme Court clearly announced in *Daniels v. Williams* that the Due Process Clause is simply not implicated by an official's negligent act.[134] Further, the Court announced in *City of Canton v. Harris* that "deliberate indifference" is the standard necessary to establish § 1983 liability of a municipality.[135] In light of these holdings, most courts require a plaintiff to show that the government officer acted with deliberate indifference to a known or obvious danger.[136]

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129. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.").

130. *E.g.*, Pinder v. Johnson, 54 F.3d 1169, 1174-75 (4th Cir. 1995) (denying liability because "[Plaintiff] was never incarcerated, arrested, or otherwise restricted in any way"); *Gregory*, 974 F.2d at 1011 (pointing out that the officers' act of arresting the driver did not remove the passengers' protection since the driver was across the street in the police station); *Ross*, 910 F.2d at 1431 (quoting Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988)) ("When a State cuts off sources of private aid, it must provide replacement protection.").

131. Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998) ("In a claim such as this one based on state-created danger, there is no absolute requirement that all avenues of self-help be restricted.").

132. *Id.*

133. *E.g.*, Armijo v. Wagon Mound Pub. Sch. Dist., 159 F.3d 1253, 1262-63 (10th Cir. 1998); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997); Dwares v. City of New York, 985 F.2d 94, 99-100 (2d Cir. 1993).

134. Daniels v. Williams, 474 U.S. 327, 328 (1986).

135. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

136. *E.g.*, *Morse*, 132 F.3d at 910; Huffman v. County of Los Angeles, 147 F.3d 1054, 1059 (9th Cir. 1998) (holding it is not sufficient that state official was "grossly negligent"); Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989). *But see*, *Armijo*, 159 F.3d at 1261-62 (stating that the official must have acted "recklessly with conscious disregard" of the risk).

The definition of "deliberate indifference," however, varies among courts as well. The Third Circuit explained that there is little difference in the terms "deliberate indifference," "reckless disregard," or "reckless indifference," and stated that "willful disregard" fits also within the same category of mens rea.[137] Each standard requires that the official's act fall somewhere between intent and negligence.[138] Other circuits have defined "deliberate indifference" as "recklessness not in a tort-law sense but in the appreciably stricter criminal-law sense, requiring actual knowledge."[139]

Despite the pervasive "deliberate indifference" standard, a few circuits require different levels of culpability. The Sixth and Seventh Circuits have promulgated a level of culpability that rings of negligence.[140] In discussing whether the City was liable for releasing undercover officers' personal information, a Sixth Circuit court stated that the City "either knew or clearly should have known" that such an act would greatly increase the officers' risk of danger.[141] Perhaps in an attempt to raise the level of culpability beyond negligence, the Second Circuit has required that the state actor's culpability be as high as "intentional and malicious."[142] Finally, the Tenth Circuit has adopted a much higher standard, requiring § 1983 plaintiffs to show that the government acted in a manner that "shocks the conscience."[143] The requirement derives

137. "Willful disregard," the court noted, is not to imply that the act be intentional; rather, the act must have been made in light of a known or obvious risk. *Morse*, 132 F.3d at 910, n.10; *see also* Davis v. Fulton County, 90 F.3d 1346, 1353 (8th Cir. 1996) (stating that the plaintiff failed to make a "showing of recklessness or of deliberate intent").

138. The Third Circuit cited the willful indifference test of the *Restatement (Second) of Torts*, which requires that the actor "knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct." *Morse*, 132 F.3d at 910.

139. L.W. v. Grubbs, 92 F.3d 894, 899-900 (9th Cir. 1996); Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (the standard "requires the defendant to act recklessly in conscious disregard of a substantial risk of serious, immediate, and proximate harm . . . which occurs when the defendant recognizes the unreasonable risk and actually intends to expose the plaintiff to such risks"); Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992) (stating that a deliberate indifference standard requires the defendant to have had a culpable state of mind and intended wantonly to inflict pain).

140. Kallstrom v. City of Columbus, 136 F.3d 1055, 1067 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) ("[A] jury could reasonably draw the inference that police officers knew or should have known that car passengers were intoxicated"); *see also* White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979) (using a standard of gross negligence or reckless disregard for the safety of others).

141. *Kallstrom*, 136 F.3d at 1067.

142. *See* Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (citing to the plaintiff's complaint and ruling that such an allegation is sufficient).

143. *Uhlrig*, 64 F.3d at 571; *see also* Armijo v. Wagon Mound Pub. Sch. Dist., 159 F.3d 1253, 1261 (10th Cir. 1998); Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996).

from the Supreme Court's language in *Collins v. City of Harker Heights* in which the Court stated that the City's deliberate indifference to the plaintiff's safety must "shock the conscience of federal judges."[144] The Tenth Circuit has interpreted the substance of the requirement to mean that the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential harm that is "truly conscience shocking."[145]

III. A SINGLE RESTRICTIVE TEST TO CONFINE THE STATE-CREATED DANGER THEORY TO APPROPRIATE CASES

Because no two circuits employ the same test in analyzing state-created danger cases and because some circuits do not even have an established test, § 1983 plaintiffs confront an arduous task in simply filing their complaints. Moreover, many of the current standards expand § 1983 liability and allow federal judges to second-guess decisions better left to government actors.[146] In response to this confusion and uncertainty, this Note argues for a simple, restrictive five-part test that federal courts should require plaintiffs to meet in state-created danger cases: (1) the government acted affirmatively; (2) toward a specific plaintiff; (3) with deliberate indifference; (4) causing the harm; (5) in a way that shocks the conscience of the court.

A. The Recommended Test

1. Affirmative Act

First, a plaintiff must prove that the state official affirmatively acted rather than that the official simply failed to act.[147] In

144. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

145. *Seamons*, 84 F.3d at 1236 (quoting *Uhlrig*, 64 F.3d at 574). The plaintiff in *Seamons* was assaulted by various football teammates in the school locker room. *Id.* at 1230. The victim then reported the incident to school officials, including the coach, who dismissed him from the team for "betraying" the others. *Id.* The school district later responded to the whole incident by canceling the final game of the season. *Id.* Immediately following this response, the plaintiff alleged that he became subject to "a hostile environment" for being the "cause of the team's demise." *Id.* The plaintiff then sued, alleging that the school's impotent responses to his original complaint violated his constitutional rights under § 1983. The court disagreed, noting that the school's responses were, at most, merely negligent and did not rise to the level of § 1983 liability. *Id.* at 1230-31. The court noted in another case, *Uhlrig*, 64 F.3d at 574, that the "shocks the conscience" standard is not precisely defined but, at the least, requires a "high level of outrageousness." *Id.*

146. *See infra* Part IV.B.2.

147. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

DeShaney, the Supreme Court made clear that the Due Process Clause does not "impose an affirmative obligation on the State" to protect the lives, liberties, or properties of its people.[148] Therefore, even if the official refuses to provide protective services that could avert injuries, the government cannot be held liable under § 1983 because inaction simply does not state a valid claim.[149] Since *DeShaney*, judges have struggled with and commentators have criticized the action/inaction distinction, many noting that a different outcome could result depending on which point in the story the court focuses.[150]

Nevertheless, despite the difficulty in assessing the affirmative action requirement, *DeShaney* still stands; thus, courts should consider three points in analyzing whether the affirmative action requirement is met.[151] First, and most obvious, a court must require that the government have acted in some way.[152] This is not the end of the inquiry since it is true that inaction can be recharacterized as

148. *Id.* at 195-96. The Court has held that an affirmative duty to protect may arise when the government restrains a person from acting on his own behalf. *Id.* at 199-200.

149. *Id.* at 196-97. Such a holding is consistent with the Court's traditional concept of the Due Process Clause, which has long since been to view it as a charter of negative liberties. *See* Lindsey v. Normet, 405 U.S. 56, 74, 92 (1972). *But see* Lisa E. Heinzerling, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048, 1064-66 (1986) (arguing that when the government induces reliance, the case should be treated as an action case rather than an inaction one).

150. Even in *DeShaney*, for example, the majority characterized the case as one of inaction, because the DSS had no duty to protect young Joshua from his father. The dissent, on the other hand, focused on the DSS's act of returning Joshua to his father. *See DeShaney*, 489 U.S. at 195-96; *see also supra* notes 93-96 and accompanying text. The problem is not confined to the Supreme Court. Lower courts have struggled with the distinction. *Compare* Pinder v. Johnson, 54 F.3d 169, 175 (4th Cir. 1995) (holding that the police did not act affirmatively when they released a mother's estranged boyfriend who later killed her children, because the real affirmative act was that committed by boyfriend), *with Pinder*, 54 F.3d at 1180-81 (Russell, J., dissenting) (finding the release an affirmative act); *see also* Melinda J. Seeds, *Throwing Out the Baby with the Bathwater: The Fourth Circuit Rejects a State Duty of Affirmative Protection in* Pinder v. Johnson, 74 N.C. L. REV. 1719, 1750 (1996) (noting that various commentators have criticized "the vague distinction" between action and inaction); Julie Shapiro, *Snake Pits and Unseen Actors: Constitutional Liability of Indirect Harm*, 62 U. CIN. L. REV. 883, 916 (1994) (pointing out that Justices Brennan and Blackmun noted in *DeShaney* that there was no "real" difference between action and inaction cases).

151. It is well beyond the scope of this Note to explore all considerations in analyzing the action/inaction requirement. Most likely, a court will view a case as being one of "inaction," meaning the State failed to act, or one of "action," meaning the State affirmatively acted sufficient to find liability, based on the point in the story which the parties' skilled attorneys emphasize. *See* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) (initially viewing the plaintiff's claim as one of inaction, then shifting analysis to the action taken by the government and considering whether the government created the danger and could be liable under that theory); Shapiro, *supra* note 150, at 916.

152. *DeShaney*, 489 U.S. at 196.

action; therefore, courts should consider only those acts occurring in the context of immediate interactions between the state actor and the plaintiff.[153] Finally, a court must require that the government's act toward the plaintiff did more than simply return the plaintiff to a danger that already existed.[154]

2. Specific Plaintiff or Specific Group of Plaintiffs

A plaintiff must also show that the government directed its act toward a specific plaintiff or group of plaintiffs, rather than toward the public at large. The Supreme Court clearly enunciated such a requirement in *Martinez*, in which a parole board wrongfully released a prisoner, who later killed a young girl.[155] The Court refused to hold the parole board liable, because the board's act was not directed toward the victim specifically.[156] Further, only a specific-plaintiff requirement comports with the Supreme Court's announced culpability requirements, which demand that a plaintiff show that the official acted "deliberately indifferent in a way that shocks the conscience."[157] The only way a plaintiff could possibly meet this culpability element is by showing that the state official acted toward a specific plaintiff or group of plaintiffs.[158]

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153. *Pinder*, 54 F.3d at 1176 n.* (finding that the ex-boyfriend committed the affirmative act and not the officers who released him from jail). The immediacy of the interaction is relative, but a court should consider the remoteness in time between the government's act and its effect on the plaintiff. For an extensive evaluation of the action/inaction cases, *see* Shapiro, *supra* note 150, at 917-44. Professor Shapiro suggests five action/inaction categories in which any case could fit and then concludes that only two such categories would likely find success under § 1983 as true action cases.

154. *See, e.g.*, Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (requiring that the government's act created the danger or rendered the plaintiff more vulnerable to a danger rather than simply returning the plaintiff to one that already existed); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990). This final point is itself a step in the recommended test and will be analyzed more carefully *infra* Part III.A.4(b).

155. Martinez v. California, 444 U.S. 277 (1980).

156. *See id.* at 285. The Court also stated that the board's act was too remote from the victim's death to warrant liability. *Id.* at 284.

157. Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)). The "shocks the conscience" standard is discussed more fully, *infra* Part III.A.5.

158. For example, the court in *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995), required that the plaintiff allege a "constitutionally cognizable danger," which is one that "shocks the conscience" and requires a high degree of culpability. The only way such a level of culpability could be reached is if the government directed its act toward a specific plaintiff or group of plaintiffs. Similarly, the Court in *Daniels v. Williams*, 474 U.S. 327, 330-36 (1986), held that the Due Process Clause is not implicated by a negligent act, implying that a state actor must intend to harm a given plaintiff. The assumption underlying the intent requirement could be that the act must be directed at a specific plaintiff. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342-43 (Cal. 1976) (discussing the concept of foreseeability in the common law tort context in light of a

3. Culpability

Third, a plaintiff must prove that the state official acted with deliberate indifference. Though the Supreme Court has never explicitly enunciated a culpability standard for state-created danger cases, it has clearly rejected negligence as sufficient for stating a claim against actors in a due process context.[159] The Court has, however, used the "deliberate indifference" standard in two different contexts that are both closely related to state-created danger. First, the Court held that "deliberate indifference" is the necessary level of culpability to prove a cruel and unusual punishment claim, a claim often arising under the "special relationship" theory enunciated in *DeShaney*.[160] Second, the Court announced that the "deliberate indifference" standard is the level of culpability needed to find municipalities liable under § 1983.[161] The reason for this level of culpability, the Court stated, is to ensure that the government is the "moving force behind the constitutional violation."[162]

Thus, following the Supreme Court's lead, lower courts should require the plaintiff to show that the state actor or municipality acted with deliberate indifference to her rights.[163] Essentially, to meet the standard, the government official's actions must display a willingness to ignore a foreseeable danger or risk, evincing that the official acted even though he was substantially certain that a harm would occur.[164] Thus, a court should require the plain-

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"special relationship" between the plaintiff and defendant and implying that a harm is "foreseeable" only if the specific plaintiff is known).

159. *Daniels*, 474 U.S. at 328 ("[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."). With higher stakes available in § 1983 claims and without the protection of sovereign immunity, a higher level of culpability seems justified. *Id.* at 332 ("Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person.").

160. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

161. City of Canton v. Harris, 489 U.S. 378, 388 (1989); *see also* Bryan County v. Brown, 520 U.S. 397, 407 (1997) (holding that to prove a due process violation, a plaintiff must show that "the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences"). *But see Collins*, 503 U.S. at 115 (implying that conduct must "shock the conscience" in order to state a valid § 1983 claim). It seems more logical, however, that the "shocks the conscience" standard applies to a level of deference the judiciary should observe in evaluating a § 1983 claim and not the level of culpability the state actor evinced. *Id.* at 124 (noting the relevant consciences are those of federal judges).

162. *City of Canton*, 489 U.S. at 389.

163. *See* Karen M. Blum, DeShaney*: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 480 (1994) (arguing that in the state-created danger context, the appropriate culpability standard should be deliberate indifference).

164. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910 n.10 (3d Cir.1997) (discussing the particularities of the "deliberate indifference" standard); *see also* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (noting that an actor is "willfully indifferent" when he acts "knowing or hav-

tiff to show more than that the state official acted negligently, but less than that the official actually intended the harm to occur.[165]

4. Causation

As in ordinary tort law,[166] a plaintiff suing under the state-created danger theory must prove that the government's act caused her injury. In a state-created danger case, a private party or force intervened after the government's act; therefore, the issue of causation almost always becomes the focus of the court's analysis.[167] The plaintiff's final aim is to prove that the government's act created the danger in which she was injured or made her more vulnerable to an already-existing danger.[168] In considering this final aim, a court should break the causation analysis down into three steps.

a. Government's Act Did Not Return Plaintiff to Already-Existing Danger

The preliminary question a court must answer is whether the danger already existed. If the danger to the plaintiff already existed, and the official's act did not make matters worse, then the government is not liable.[169] In *DeShaney*, for example, Joshua's danger was his abusive father. The Court refused to hold the DSS liable because by returning Joshua to the hands of his father, the DSS "played no part in [the dangers'] creation, nor did it do anything to render him any more vulnerable to them."[170] Thus, a plaintiff does not state a claim when she alleges that the government released a person who then harmed the plaintiff, when the person's

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ing reason to know of facts which would lead a reasonable man to realize . . . that his conduct creates an unreasonable risk of physical harm to another"); *see also* Blum, *supra* note 163, at 480 ("Deliberate indifference would be established by showing that a defendant consciously acted or chose not to act with knowledge of the obvious consequences of this conduct.").

165. In the cruel and unusual punishment context, the Supreme Court described the "deliberate indifference" standard as one higher than mere negligence, one that "offends evolving standards of decency" and constitutes an "unnecessary and wanton infliction of pain" on the prisoner. *Estelle*, 429 U.S. at 106 n.14.

166. MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 282 (5th ed. 1992) (stating that a defendant does not have to compensate a plaintiff unless the defendant's negligent act caused the plaintiff's injury).

167. Martinez v. California, 444 U.S. 277 (1980) (focusing on a causation analysis in determining whether the State "deprived" the decedent of her constitutional rights); Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 479 (1982) (encouraging courts to focus on causation in the state-created danger context).

168. Nearly all courts agree to such an aim. *See supra* notes 116-20 and accompanying text.

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

170. *Id.*

intent to kill or injure already existed.[171] There are times, however, when the danger already exists, but the government is liable for making the dangerous situation worse.[172] For example, a plaintiff states a claim if she shows that the government interfered with private citizens who attempted to help her.[173] Therefore, if the danger to the plaintiff did not exist before the government's act, or the government acted in some way that rendered the plaintiff more vulnerable to the danger, then the court must move on to the next step in the causation analysis to determine whether the government is liable.[174]

b. Government's Act Was Not "Too Remote"

If the danger did not already exist or the government made the plaintiff more vulnerable to an already-existing danger, the plaintiff must then show that the government's act was the "proximate" cause of, or not "too remote" from, her injury.[175] The Supreme Court announced in *Martinez* that the plaintiff's injury must not be "too remote a consequence" from the government's act in order to find § 1983 liability.[176] As in the common law of tort, a court should analyze "proximate" or "remote" in terms of foreseeability.[177] While

171. *E.g., Martinez*, 444 U.S. at 283-85 (wrongly releasing parolee who then murdered victim does not state a claim); Pinder v. Johnson, 54 F.3d 1169, 1175-77 (1995) (releasing ex-boyfriend who then set fire to plaintiff's home killing her children does not state claim).

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

173. Ross v. Lake County, 910 F.2d 1422 (7th Cir. 1990) (validating a claim based on an official's interference with the private rescue of a drowning boy); Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992) (alleging that officers interference with private rescue of Jeffrey Dahmer's victim states valid claim).

174. Liability does not attach simply because the danger did not exist before the government's act. Arguably, the danger did not exist to the victim in *Martinez* before the parole board released the killer; however, the Supreme Court refused to hold the board liable in *Martinez* because its act was so far removed from the eventual harm that the Court found it did not create the danger, nor make the victim more vulnerable to it. *See* Martinez v. California, 444 U.S. 277, 284-85 (1980). Similarly, if the government's act rendered a plaintiff more vulnerable to an already-existing danger, then the court should move on to the next steps in the causation analysis to determine whether the government acted "too remotely" in relation to the plaintiff's harm to preclude liability.

175. A proper causation analysis includes first deciding that the danger did not already exist and then moving on to discuss proximate cause, effectively combining the holdings of *DeShaney* and *Martinez*.

176. *Martinez*, 444 U.S. at 285.

177. *E.g.*, Huffman v. County of Los Angeles, 147 F.3d 1054, 1059 (9th Cir. 1998) (explaining that "the deputy's intervening 'private acts' were 'unforeseeable' "); Van Ort v. Stanewich, 92 F.3d 831, 837 (9th Cir. 1996) ("the County could not reasonably have foreseen that Stanewich would become a free-lance criminal"); Dodd v. City of Norwich, 827 F.2d 1, 6 (2d Cir. 1987) ("policy [is] a proximate cause . . . if it were 'within the scope of the original risk' and therefore foreseeable"); *see also Martinez*, 444 U.S. at 285 (stating that since the final danger to the plaintiff

"foreseeability" is not completely concrete,[178] courts are familiar with the concept from common law tort and should apply a similar analysis. For example, a plaintiff's injury is foreseeable if the government actor expected both the type of harm and the manner in which it occurred.[179]

c. Government's Act Removed All Avenues of Protection

Finally, in proving causation a plaintiff must show that the government's act removed all of her avenues of protection. That is, the plaintiff must prove that the state actor prevented her from helping herself or stopped others from helping her. Two main reasons support such a strict requirement. First, this view greatly confines § 1983 liability because in many of the cases in which liability has been found, the official did not remove all of the plaintiff's protection.[180] Confining government liability is imperative in light of the serious stance the Supreme Court has taken against arbitrarily using § 1983 as a means of bypassing sovereign immunity and second-guessing government decisions and resource allocations.[181] Sec-

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occurred some five months after the government's act, no officer could be "aware" that the harm would have occurred).

178. Justice Andrews noted that proximate cause is a matter of "practical politics." Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 352 (N.Y. 1928) (Andrews, J., dissenting); *see also* Heinzerling, *supra* note 149, at 1058 (arguing that the "absence of foreseeable harm to a particular individual does not necessarily show a lack of proximate causation").

179. *See* FRANKLIN & RABIN, *supra* note 166, at 353; *see also* RESTATEMENT (SECOND) OF TORTS § 435 (1965) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm [to the act], it appears to the court highly extraordinary that it should have brought about the harm.").

180. For example, the police in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), assured a small crowd that they would not intervene if the crowd wished to attack nearby flagburners. *Dwares*, 985 F.2d at 96-97. If the court had required the flagburners to show the police removed all their protection, then the police would not have been liable. The police did not prevent the flagburners from protecting themselves—they did not confine them or prevent them from leaving the area or fending off the attack; nor did the police prevent others from doing so as well. *Id.* at 95-97. *Compare* Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (finding possible liability even though the police, in refusing to protect plaintiff from her husband, did not prevent her from leaving town, protecting herself, or calling on others to protect her), *with* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (noting that the government in no way incarcerated, institutionalized, or confined the plaintiff in a way that prevented her from protecting herself, and thus the government was not liable). A case properly considering this requirement is *Ross v. Lake County*, 910 F.2d 1422 (7th Cir. 1990), in which the deputy's acts removed all available help to a drowning boy, who was obviously unable to help himself. The cases in which the plaintiff was left alone intoxicated are much more difficult to analyze. It could be viewed, as by some courts, that by removing the intoxicated plaintiff's protection, the government removed all available avenues of aid. Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996).

181. Collins v. City of Harker Heights, 503 U.S. 115, 128-29 (1992); *see also* discussion *infra* IV.B.

ond, courts should consider the state-created danger theory in conjunction with the special relationship theory because both derived from *DeShaney*.[182] In the special relationship theory, the government is liable only when it has incarcerated or otherwise restrained a person's liberty in such a way that she cannot care for herself.[183] In the same way, only when a state official creates a danger by removing all of a plaintiff's available aid, including methods of self-protection, should the government be liable under the state-created danger theory.[184]

5. The Overall Situation Shocks the Conscience of the Court

Finally, a plaintiff must show that the government's conduct is so egregious as to "shock the conscience of federal judges."[185] The Supreme Court announced this standard in order to avoid turning any ordinary tort into a substantive due process violation actionable under § 1983.[186] The "shocks the conscience" standard requires that the act be so "brutal and offensive that it did not comport with traditional ideas of fair play and decency" and thus violated substantive due process.[187] Such a requirement is inevitably highly subjective but would allow courts to defer to the decisions of government officials and properly confine § 1983 liability according to Supreme Court precedent and the principle of separation of powers.[188] Thus, a court adhering to the "shocks the conscience" standard would confine state-created danger cases to those situations in which the government acted without a valid reason in an egregious manner.[189]

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182. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197, 199-200 (1989).

183. *Id.* at 200.

184. Eaton & Wells, *supra* note 50, at 145 (noting that some courts ask whether the relationship between the government and the plaintiff "so resembled confinement in its effects on the plaintiff as to justify recognition of an affirmative duty by analogy to the confinement principle," a question likely acceptable to the Supreme Court).

185. *Collins*, 503 U.S. at 126; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) (quoting *Rochin v. California*, 342 U.S. 165, 172-73 (1952)).

186. *Lewis*, 523 U.S. at 847.

187. *Id.* (quoting Breithaupt v. Abram, 352 U.S. 432, 435 (1957)).

188. *Id.*; *see also infra* Part IV.B.1-2 (discussing Supreme Court reluctance regarding § 1983 liability, government freedom, and separation of powers).

189. Brief for City of Garland, et al., Amici Curiae, at 17-18, Piotrowski v. City of Houston (1999) (arguing that a "shocks the conscience" criterion would prevent liability in cases in which a government actor has "legitimate reasons" for acting).

B. Application of the Recommended Test to Facts of Piotrowski v. City of Houston

The simplicity and effectiveness of a unified, restrictive test can be seen in its application to the facts of *Piotrowski v. City of Houston*, in which Barbara Piotrowski sued the City for police officers' alleged involvement in her shooting by a private actor.[190] First, Piotrowski must prove the police affirmatively acted. Neither the police's failure to warn Piotrowski nor the police's failure to protect her constituted an affirmative act.[191] If, however, the police worked for Piotrowski's ex-boyfriend and supplied the gunman with her photograph, then a court should rightfully find the affirmative act requirement met.[192]

Second, Piotrowski must show that the police directed their affirmative acts toward her specifically. The alleged acts involved ransacking the plaintiff's apartment and providing the gunman with her photo; therefore, they were most certainly specifically directed toward her.

Third, Piotrowski must argue that the police acted with deliberate indifference; that is, the police officers, in acting toward her specifically, ignored a foreseeable danger or risk even though they were substantially certain that she would be harmed. Assuming the police officers were aware that Piotrowski's ex-boyfriend had hired a gunman to kill her, their acts clearly demonstrated deliberate indifference. If, however, the officers were unaware of any such risk to the plaintiff, a court should not find the culpability requirement met.

Piotrowski must next prove that the police's acts caused her injury. It is in this crucial step that Piotrowski's case would fail. First, the danger to her life existed despite the officers' acts because her ex-boyfriend had previously tried to have her killed.[193] Piotrow-

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190. *See supra* Introduction, Part I.

191. In this way, *Piotrowski* is similar to *DeShaney*. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196-97 (1989).

192. If such allegations are true, the police's acts of sabotaging plaintiff's car and apartment and providing the gunman with her mugshot are both (1) acts done in an immediate interaction between the plaintiff and police and (2) acts that rendered the plaintiff more vulnerable to the gunman's danger. Even though these acts would meet the first steps in the analysis, the City of Houston would not be liable because a city is liable for the acts of its employees only if the plaintiff can show the officers were following a city "policy or custom." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691-94 (1978); *see also supra* note 17 and accompanying text.

193. Not only had her ex-boyfriend beat her several times, but he had also offered other people money to kill her, chop up her body, and dump it in the Gulf of Mexico. *See supra* note 7 and accompanying text.

ski could argue that the police's acts of giving away her photograph[194] and aiding her ex-boyfriend by threatening her rendered her more vulnerable to the later attack.[195] The gunman, however, likely knew who Piotrowski was or, if not, could easily find an available photo of her; therefore, giving the photograph to the gunman was arguably not even a "but-for" cause of her eventual injury. Second, the police's acts were probably "too remote" from Piotrowski's injury, because they occurred several days before the actual shooting. Finally, the police officers' acts in no way removed all avenues of protection from Piotrowski. She was at all times aware of the violent tendencies of her ex-boyfriend and his desire to harm her;[196] the police did nothing to prevent her from protecting herself.[197] Certainly, the police's alleged acts did not create a situation analogous to Piotrowski's being incarcerated and unable to protect herself.[198] If, however, Piotrowski did prevail on the causation analysis, she must prove the overall actions of the police were conscience shocking. Failing to warn or protect a citizen against a private actor's harm does not rise to the level of a conscience-shocking situation.[199] Certainly, the harm that befell Ms. Piotrowski is brutal and detestable, but considering the acts of the Houston Police Department in light of budgetary, time, and manpower restraints should lead any judge to deny constitutional liability.[200]

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194. This act is hotly disputed. *See supra* note 12 (explaining that Piotrowski's only basis for such an allegation is that a mugshot was found on the gunman).

195. Such an argument would closely parallel the one made in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), in which officers' reassurances to skinheads that the police would not prevent an attack on flag-burners led to liability.

196. *See supra* note 9.

197. Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (the police's refusal to detain ex-boyfriend who later set home ablaze did not leave plaintiff without protection).

198. If, for example, the Houston police had actively prevented someone from warning an unknowing Piotrowski of her boyfriend's plans or had taken away Piotrowski's handgun or had arrested a bodyguard or had left her alone helpless in an area where the gunman was known to be waiting, then this element would arguably be met. As it is, however, Piotrowski was in the same position she would have been had the police not been involved at all.

199. Collins v. City of Harker Heights, 503 U.S. 115, 127-29 (1992) (holding that the City's failure to provide warnings about the dangers of manholes or properly train its employees did not rise to the level of conscience-shocking behavior when an employee died of asphyxia after entering a manhole to unstop a sewer line); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 189 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

200. Holding the City of Houston liable in this situation may mean liability for every police officer and department who neglects, for whatever reason, to warn a citizen of an impending harm by a third-party actor. *See infra* IV.B.2.

IV. SUPREME COURT PRECEDENT AND GOVERNMENT FREEDOM SUPPORT OF THE UNIFIED, NARROW APPROACH OF THE RECOMMENDED TEST

The miscellaneous tests currently employed by the circuits present an overwhelming array of standards dizzying to any potential § 1983 litigant or judge faced with a state-created danger case.[201] Moreover, since *DeShaney*, courts have expanded the state-created danger theory beyond any reasonable application by generalizing the plaintiff harmed,[202] loosening the causation requirement,[203] and lowering the culpability required of the state actor.[204] Both the lack of unity and the need for confinement demand that the Supreme Court clarify and create a unified standard that narrows the state-created danger theory to appropriate cases.

A. Need for Unity

Adopting the recommended test is essential because the test will provide a unified approach to all state-created danger cases. Currently, depending on the jurisdiction in which the plaintiff brings her § 1983 suit, a court will evaluate her claim under a unique test and likely arrive at a different conclusion than if she had brought the case in another court.[205] For example, two courts faced with almost identical facts reached different outcomes, expressly highlighting the need for a unified standard among circuits.[206] In each case, a police officer arrested a designated driver

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201. *E.g.*, Huffman v. County of Los Angeles, 147 F.3d 1054, 1059, 1061 (9th Cir. 1998) (discussing both the appropriate causation analysis required of a § 1983 suit as well as the disagreement among "sister circuits" as to whether the state action must be directed toward a particular plaintiff or the public at large).

202. *Supra* notes 82-85 and accompanying text.

203. *Supra* notes 110-26 and accompanying text.

204. *Supra* notes 140-41 and accompanying text.

205. *Compare* Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) (requiring the plaintiff to show that the danger was created for her specifically), *with* Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) (allowing plaintiff to prove that the entire public faced the danger). *Compare* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) ("the real 'affirmative act' here was committed by [third party] and not by Officer Johnson"), *with Pinder*, 54 F.3d at 1180-81 (Russell, J., dissenting) ("I cannot understand how the majority can . . . not conclude that Officer Johnson placed [plaintiff] and her children in a position of danger."), *and* White v. Rochford, 592 F.2d 381, 386 (7th Cir. 1979) (asserting that the police officers' act of arresting the driver and not the driver's act of drag-racing created the danger in which the plaintiffs were injured).

206. *Compare* Gregory v. City of Rogers, 974 F.2d 1006, 1009-10 (8th Cir. 1992) (en banc) (holding that officer who arrested a designated driver did not have a duty to protect the driver's

and left intoxicated passengers, who then took the wheel and caused an accident.[207] The Seventh Circuit stated that if the arrested driver were sober, then the officers created the dangerous situation that allowed the drunk passenger to injure the plaintiffs, and the officers should be liable.[208] The Eighth Circuit, however, announced that even though the arrested driver was sober, the officers did not have a duty to care for the intoxicated passengers left behind, and therefore the officers were not liable.[209] Thus, the Supreme Court should adopt the recommended test simply to help alleviate chaos among the circuits.[210]

B. Need for Confinement

In addition, the recommended test is crucial in confining liability under the state-created danger theory. Many of the circuits' current tests employ loose requirements that allow liability under questionable circumstances and have led to a deluge of lawsuits against cities and their employees.[211] By generalizing the plaintiff harmed,[212] lowering the standard of culpability to negligence,[213] and requiring only but-for causation,[214] courts have increased the probability of government liability.[215]

Eliminating the state-created danger theory altogether, however, is not a viable option. Even though the Fourth Circuit has

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intoxicated passengers), *with Reed*, 986 F.2d at 1126-27 (finding that the plaintiff stated a claim against officers who left intoxicated passengers after arresting their driver).

207. *Reed*, 986 F.2d at 1123; *Gregory*, 974 F.2d at 1006.

208. *Reed*, 986 F.2d at 1125, 1127-28.

209. *Gregory*, 974 F.2d at 1012.

210. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 194 (1989) (answering the question of when a government's failure to provide services violates a citizen's rights because of "the inconsistent approaches taken by the lower courts"); Daniels v. Williams, 474 U.S. 327, 329 (1986) (answering the question of when tortious conduct by state officials rises to the level of a constitutional tort because of "the inconsistent approaches taken by lower courts").

211. A recent article noted that cities in the Ninth Circuit have faced a "deluge of suits" as a result of the decision in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Further, the City of Honolulu has claimed that *Wood* has forced it into "sizable" settlements in three state-created danger suits involving domestic disputes that resulted from violations of court-imposed restraining orders. Nathan Koppel, *Cities Fear "State-Created Danger" Suits*, TEXAS LAWYER, Dec. 13, 1999, at 1, 19.

212. *Reed*, 986 F.2d at 1127.

213. Kallstrom v. City of Columbus, 136 F.3d 1055, 1066-67 (6th Cir. 1998).

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

215. The Texas Municipal League claims that a careless state-created danger test could lead to state liability when a dispatcher blunders a 911 call or a city fails to evacuate coastal residents during a hurricane. *See* Koppel, *supra* note 211, at 19.

called the theory "not a true exception to the rule of *DeShaney*,"[216] the theory is simply too well established to be completely abolished.[217] Moreover, the Supreme Court in *DeShaney* clearly intimated that if the government plays a part in the creation of the danger in which a plaintiff is injured, then liability should follow.[218] Even critics of the state-created danger theory cannot ignore this statement. In addition, when the government puts a person in a position of danger from private actors and then fails to protect the person, the government is justifiably "as much an active tortfeasor as if it had thrown [the person] into a snake pit."[219] On a policy level, allowing liability under the state-created danger theory encourages the government to act more carefully, causes the costs of a victim's injury to be spread out among all taxpayers, and creates a higher respect for a law that holds government actors accountable.[220]

Thus, the state-created danger theory is viable and necessary on some level. Yet, a look at the Supreme Court's view of § 1983 reveals a serious unwillingness to expand liability. Moreover, the need for governmental bodies to freely make decisions regarding resource allocation supports limiting liability. It is therefore critical that courts adopt the recommended test in order to ensure greater governmental accountability while also confining recovery and protecting legislative decisions.

1. Supreme Court Precedent Supports a Narrow Application of the State-Created Danger Theory

Although the Supreme Court has not explicitly addressed the state-created danger theory, its precedent indicates a hesitancy to allow recovery under § 1983 at all.[221] The Court has limited liability

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216. *Supra* notes 71-74; *see also* Pinder v. Johnson, 54 F.3d 1169, 1176 n.* (4th Cir. 1995) (dismissing claims against the government when a private party intervened to cause the harm).

217. *E.g., Kallstrom*, 136 F.3d at 1066; Monfils v. Taylor, 165 F.3d 511, 516-18 (7th Cir. 1998); Greer v. Shoop, 141 F.3d 824, 827 (8th Cir. 1998); Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996); Uhlrig v. Harder, 64 F.3d 567, 571-72 (10th Cir. 1995); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992).

218. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 197 (1989).

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

220. *See* Owen v. City of Independence, 445 U.S. 622, 650, 651 (1980) (holding that a damages remedy is a "vital component of any scheme for vindicating cherished constitutional guarantees"); *see also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26 (1970) (postulating that deterrence is a more important policy goal than compensation).

221. *See* Mead, *supra* note 28, at 519 n.8. Mead notes that Congress originally intended the Civil Rights Act, now 42 U.S.C. § 1983, to extend beyond the immediate problems—post-Civil War racial tensions—in the South to provide recovery for all people whose constitutional rights

under § 1983 in several ways: by rejecting negligence as a sufficient culpability standard for due process violations,[222] by denying claims against the government for failing to protect an individual against private violence,[223] by restricting suits against municipalities,[224] and by raising the level of culpability to "deliberate indifference"[225] with a consideration of whether the government's act "shocks the conscience."[226] Moreover, the Court has employed three basic principles in evaluating § 1983 claims:[227] (1) judicial self-restraint,[228] (2) the determination that § 1983 not replace state tort law,[229] and (3) the need for deference to local policymaking bodies in making decisions that affect public safety.[230] Thus, the Court would support a test that restricts liability under the state-created danger theory.

2. Government Freedom to Make Choices Requires Confining the State-Created Danger Theory

Moreover, government actors require freedom in allocating their resources, weighing safety considerations, and heeding the voices of the public at large.[231] Consequently, the state-created danger theory should be narrowly construed in order to avoid usurping state decisions and legislative choices.[232] In consideration of this aim, the Supreme Court has counseled lower courts to use caution in holding state actors liable under § 1983 and has reminded them that governmental decisions involve a "host of policy choices" that are best made by locally elected representatives and not by federal

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have been deprived by the government, but the Court has not followed Congress' suggestions. *Id.* at 518-19 n.7.

222. Daniels v. Williams, 474 U.S. 327, 328, 330 (1986) ("Not only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.' ") (quoting *Parratt v. Taylor*, 451 U.S. 527, 549 (1981)).

223. *DeShaney*, 489 U.S. at 197 (1989) ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

224. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (stating that municipalities cannot be liable under § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort"); *see also supra* note 17.

225. *E.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 123 (1992).

226. *Id.* at 126.

227. Uhlrig v. Harder, 64 F.3d 567, 573 (1995).

228. *Collins*, 503 U.S. at 125 ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.").

229. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989).

230. *Collins*, 503 U.S. at 128-29.

231. Harvard L. Rev. Ass'n, *supra* note 26, at 2014-15.

232. *Id.*

judges.[233] Congress did not intend for the Due Process Clause to be a guarantee against ill-advised personnel decisions.[234] Bowing to the words of the Court, a few federal courts have explicitly voiced concern that the judiciary could use § 1983, and particularly the state-created danger theory, to second-guess decisions better left to government actors.[235]

Expanding the state-created danger theory may deter government officials from taking risks and executing their functions for the public's greatest benefit.[236] Section 1983 liability often leads to enormous personal detriment for a government actor, including reputation harm, litigation expenses, and monetary damages.[237] While the prospect of liability encourages officials to act cautiously,[238] government officials are not rewarded for risk, as are private actors, so they are more likely to avoid any action that could possibly lead to personal or municipal liability.[239] Often, the course of action with the least amount of risk is a sub-optimal one; for example, a police officer may refuse to pursue a suspect in order to avoid injuring any potential bystanders and therefore incur § 1983 liability.[240] An expansion of § 1983 via the state-created danger theory forces a government actor to deliberate more about his own interests rather than the interests of the public at large.[241]

Perhaps most importantly, the principle of separation of powers cautions against expanding the state-created danger theory in a way that allows the judiciary to usurp legislative choices.[242] In several cases, for example, courts have essentially overruled police

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233. *Collins*, 503 U.S. at 128-29; Bishop v. Wood, 426 U.S. 341, 350 (1976).

234. *Collins*, 503 U.S. at 128-29.

235. Soto v. Flores, 103 F.3d 1056, 1064 (1st Cir. 1997) (noting that an expanded state-created danger theory could turn every negligent, or even willfully reckless, state action into a violation of the federal Constitution); Pinder v. Johnson, 54 F.3d 1169, 1178 (4th Cir. 1995) ("Broad affirmative duties thus provide a fertile bed for § 1983 litigation, and the resultant governmental liability would wholly defeat the purposes of qualified immunity.").

236. Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 482-83 (1997).

237. *See* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 276-77.

238. Harvard L. Rev. Ass'n, *supra* note 26, at 2014.

239. *Id.* at 2015.

240. *Id.* at 2015-16. For example, if the Court had held the DSS liable in *DeShaney*, then social workers today might choose not to act all in a Joshua-type situation rather than act incompletely and incur liability.

241. *Id.* at 2016.

242. Osborne M. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 122 (1968) (stating that the legislative branch is better suited to evaluate information and make policy decisions).

department policy by imposing a requirement that officers provide for the safety of an arrested person's companions.[243] These courts often do not realize that government agencies institute policies and plans after weighing the costs and benefits of alternative actions in light of what they believe is the desire of the electorate.[244] Without a doubt, making budgetary and resource allocation decisions has always been relegated to political bodies.[245] Such decisions require significant information gathering, balancing of competing interests, and listening to the voices of the people; thus, apolitical judicial entities are often ill-equipped to second-guess many of these decisions.[246] Courts that allow § 1983 recovery to plaintiffs based on what is essentially a legislative choice become mini-legislatures making decisions that are better left to the democratic process.[247] Consider, for example, those courts which have found state actors liable by removing the specific-plaintiff requirement. These courts hold that some state acts are so egregious that government actors should be held accountable even when the government directs the policy or act toward no specific victim but toward the public at large.[248] Such a view, however, greatly expands § 1983 liability, providing the judiciary with a tool that allows it to dismantle the most serious of legislative decisions: those made on a class-wide basis.[249] Many state activities and policies create at least some dan-

243. *E.g.*, Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996) (finding that plaintiff properly stated § 1983 claim against officers who arrested her friend and left her to walk home alone); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) (plaintiff properly stated § 1983 claim against officers who arrested a car's driver and left the drunk passengers alone).

244. Harvard L. Rev. Ass'n, *supra* note 26, at 2016; *see also* Brief for City of Garland, Texas, et al., Amici Curiae, at 7, Piotrowski v. City of Houston (1999) (pointing out that the government regularly "places persons in some degree of danger or another simply by the way it allocates its resources: a choice of police patrol routes, a decision concerning which crimes to investigate," etc.).

245. Barbara E. Armacost, *Affirmative Duties, Systematic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1003 (1996).

246. *Id.* Several commentators, however, strongly urge courts to continue expanding § 1983 liability because they believe there are a number of problems and inadequacies in leaving all decisions to the legislature. For example, administrative agencies often develop regulatory goals different from those set forth by the legislature. And agencies are often influenced by the lobbying of narrow groups of interested parties who do not represent the entire electorate. *E.g.*, Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078, 1103-04.

247. Berkovitz v. United States 486 U.S. 531, 536-37 (1988); Mann v. State, 70 Cal. App. 3d 773, 778 (Cal. Ct. App. 1977) (stating that government immunity "was designed to prevent political decisions of policy-making officials of government from being second-guessed by judges and juries").

248. *E.g.*, *Reed*, 986 F.2d at 1122.

249. Most government policies are made after weighing the costs and benefits to different groups in society. Deciding to patrol certain streets instead of other ones, for example, means

ger to the public, as is true of most any endeavor, but not all should result in constitutional tort liability.[250]

V. CONCLUSION

The Supreme Court's decision in *DeShaney* left open a tenuous but significant method of finding that the State deprived citizens of their constitutional rights, despite a private party's intervention. Ten years later, the theory continues to baffle and divide lower courts as they adjudicate state-created danger cases. The *Piotrowski* decision's $18.1 million verdict against a police department, who even arrested and imprisoned *Piotrowski*'s gunman, illustrates both the theory's importance and its odd results.

Section 1983 plaintiffs, lower court judges, and litigation-weary officials and municipalities are demanding some agreement and clarification among the state-created danger tests.[251] Considering the Supreme Court's extreme reluctance regarding § 1983 liability and the need for legislative freedom regarding resource allocation and decision-making, the recommended test set forth above is the most logical solution.

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providing protection to some citizens and not to others. Courts must require plaintiffs to show that the government directed its act toward them specifically as opposed to a large group of people; otherwise, a complaining plaintiff could effectively veto any government policy that could lead to harming a group of people. *See* Brief for City of Garland, Texas, et al., Amici Curiae, at 23, Piotrowski v. City of Houston (1999) (arguing that the Fifth Circuit should adopt a specific plaintiff requirement to "remove from liability governmental decisions made on a class-wide basis").

250. Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995) ("For the State to be liable under § 1983 for creating a special danger, a plaintiff must allege a constitutionally cognizable danger.").

251. *Supra* note 211.

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