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Constitutional Law—Dangers of the Substantive Due Process State-Created Danger Exception— Irish v. Fowler, 979 F.3d 65 (1st Cir. 2020)

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CONSTITUTIONAL LAW—DANGERS OF THE SUBSTANTIVE DUE PROCESS STATE-CREATED DANGER EXCEPTION—*IRISH V. FOWLER*, 979 F.3D 65 (1ST CIR. 2020)

When an individual is deprived of life, liberty, or property by the state without due process of law, he or she may bring a cause of action against the state agent ("State Actor") that caused the deprivation under 42 U.S.C. § 1983.[1] While State Actors are generally not liable for failing to protect an individual from the deprivation of life, liberty, or property by a private actor, this rule is subject to a few exceptions.[2] In *Irish v. Fowler*,[3] the United States Court of Appeals for the First Circuit considered, as an issue of first impression, whether State Actors can be held liable for failing to protect an individual from a third party when the State's actions resulted in the deprivation of that individual's due process rights.[4] The court ulti-

[1] *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . subjects . . . any citizen . . . 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 . . . ."); Matthew D. Barrett, Note, *Failing To Provide Police Protection: Breeding A Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations under Section 1983*, 37 VAL. U. L. REV. 177, 180 (2002) (noting § 1983 allows action against State for constitutional violations); *see also* Jeremy Daniel Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 170 (2001) (highlighting § 1983 overrides sovereign immunity).

[2] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); Kernodle, *supra* note 1, at 180 (recognizing "government cannot be held liable for failing to protect an individual against private violence" under Due Process Clause); Barrett, *supra* note 1, at 187 (outlining two exceptions to general rule). "First, liability can be imposed on state actor when an actual custodial relationship exists between a plaintiff and a state actor, also known as a 'special relationship.' Second, liability can be imposed based on the state-created danger theory." Barrett, *supra* note 1, at 187.

[3] 979 F.3d 65 (1st Cir. 2020).

[4] *See id.* at 67 (addressing whether State Actors can violate plaintiffs' due process rights under state-created danger theory). After the court announced its adoption of the state-created danger theory, it considered whether (1) a jury could conclude that the defendants violated plaintiffs' substantive due process rights; (2) the defendants' conduct shocked the conscience; and (3) whether the defendants were protected by qualified immunity. *Id.* at 72, 75-76. Because the defendants moved for summary judgment, plaintiffs were required to "present 'enough competent evidence' to enable a factfinder to decide in its favor on the disputed claims." Carroll v. Xerox Corp., 294 F.3d 231, 237 (1st Cir. 2002) (quoting Goldman v. First Nat'l Bank of Bos., 985 F.2d 1113, 1116 (1st Cir. 1993)). However, even if the court determined that plaintiffs met their evidentiary burden, the motion may still be granted in defendants' favor on the basis of qualified

mately held that state officials were liable for constitutional violations under the state-created danger theory and that their conduct was not justified by qualified immunity.[5]

On July 15, 2015, plaintiff, Brittany Irish ("Irish"), reported to police that she was kidnapped and repeatedly raped the previous night by her ex-boyfriend, Anthony Lord ("Lord").[6] The case was assigned to defendants, Detective Perkins and Detective Fowler, who were told that Lord was a registered sex offender.[7] After receiving Irish's statement, which also reported Lord's alleged threat to cut her from ear to ear, the detectives met with Irish, who explained she was "scared that Anthony Lord would become terribly violent if he knew [Irish] went to the police."[8] Later that evening, the detectives found evidence corroborating Irish's allegations.[9] The next day, the detectives called Lord to obtain his statement; when Lord did not answer, Detective Perkins left a voicemail.[10]

immunity. Febus-Rodriquez v. Betancourt-Lebron, 14 F.3d 87, 91 (1st Cir. 1994); *see also* Soto v. Flores, 103 F.3d 1056, 1064 (1st Cir. 1997) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.") (quoting Davis v. Scherer, 468 U.S. 183, 194 (1984)).

[5] *See Irish*, 979 F.3d at 67-68 (outlining holding of court). Since plaintiffs produced triable issues of fact as to whether they suffered a constitutional violation due to the defendants' conduct, the court determined that the state-created danger theory was clearly established case law, and then reversed the district court's grant of summary judgment on the basis of qualified immunity. *Id.* at 67-68, 80.

[6] *See id.* at 68 (explaining event). When Irish contacted Bangor Police Department (BPD), they referred her to Maine State Police (MSP). *Id.* The court noted that its description of the facts of the case was supplemented with facts in *Irish v. Maine*, 849 F.3d 521 (1st Cir. 2017), and the district court's statement of facts. *Id.*; *see also* Irish v. Maine, 849 F.3d 521, 523 (1st Cir. 2017) (detailing complaint, procedural history, and holding); Irish v. Fowler, 436 F. Supp. 3d 362, 364 (D. Me. 2020) (summarizing procedural history and holding).

[7] *See Irish*, 979 F.3d at 68 (noting defendants were made aware of Lord's sex offender status). At the time, it was custom practice to check the sex offender registry and run a criminal background check once police were made aware that the person they were investigating was a sex offender. *Id.*

[8] *See id.* (detailing Irish meeting with detectives).

[9] *See id.* (explaining corroborating evidence). When Irish first contacted the police on July 15, she reported specific information about where she was raped. *Id.* Later that evening, the detectives obtained corroborating evidence connecting Lord to the location of the alleged rape. *Id.*

[10] *See id.* at 69 ("Detective Perkins called Lord while Detective Fowler listened.") When Lord did not answer, Detective Perkins left a voicemail, identifying himself as a detective. *Id.* Prior to the voicemail, Irish submitted a second written statement to the detectives, which said:

> Lord had threatened to 'cut [her] from ear to ear,' to abduct Irish's children, to abduct and 'torture' Hewitt to find out 'the truth' about what was happening between Irish and Hewitt, to kill Hewitt if Hewitt was romantically involved with Irish, and to weigh down and throw Irish into a lake. *Id.* at 68. Despite these threats and Lord's status as a registered sex offender, the detectives did not "check the sex offender registry to find Lord's address or run a criminal background check." *Id.* at 69.

Approximately an hour and forty-five minutes after Detective Perkins left the voicemail, the detectives "received notice of a 'possible suspicious' fire in Benedicta, the town where the detectives" found evidence corroborating the allegations against Lord.[11] Irish notified the detectives that it was her parents' barn that was on fire, and reported that earlier that evening "someone had heard Lord say . . . 'I am going to kill a fucker.'"[12] The detectives then began their search for Lord, notifying other state officials to "use caution" if they were to find him.[13] Soon after the detectives arrived to the barn fire, Irish received a call from her brother who informed her that Lord was "irate" after receiving the voicemail from Detective Perkins and said that "someone's gonna die tonight."[14] Irish relayed this information to the detectives and asked for protection, but the detectives left the scene.[15] About an hour later, the detectives requested a criminal background check on Lord and learned of his criminal record.[16]

After receiving no response from the detectives regarding her requests for protection, Irish called them a third time and was told no protection could be provided because law enforcement lacked "the manpower."[17] Between 3:00 A.M. and 4:00 A.M., when all police resources left the area, Lord stole a truck, drove to the Irish's, and went on a shooting rampage.[18]

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[11] *See id.* at 68 (noting Lord's potential connection to fire).

[12] *See Irish*, 979 F.3d at 69 (detailing Irish's conversation with detectives). Irish also "told the detectives that she was afraid for her children's safety, planned to stay at her mother's home in Benedicta, and would meet the detectives there." *Id.*

[13] *See id.* (highlighting "use caution" warning). Detective Perkins notified officers "that Lord could be dangerous and to take precautions." *Id.*

[14] *See id.* (outlining events that occurred when detectives arrived). Detective Perkins learned of the suspicious fire at 8:05 PM and began the search for Lord at 10:05 PM. *Id.* The detectives arrived at the barn fire around 10:36 PM. *Id.*

[15] *See id.* at 69-70 (highlighting Irish's conversation with detectives and request for protection). Even though Irish requested protection, the officers left the scene. *Id.*

[16] *See id.* at 70 (noting detectives requested Lord's background check at 11:38 PM). The criminal background check occurred hours after learning Lord was a sex offender, which was against standard practice. *Id.* at 69-70. If the detectives followed procedure and ran a background check as soon as they learned about Lord's sex offender status, they would have discovered that Lord was on probation and had a lengthy record of sexual and domestic violence. *Id.* at 69.

[17] *See Irish*, 979 F.3d at 70 (detailing Irish's requests for protection). About an hour after Irish made her second request for protection, Detective Perkins relayed the information to his superior. *Id.* Detective Perkins did not inform Irish that her request for protection was denied until she called again around 2:00 A.M. *Id.* at 70-71. Around 3:00 A.M. or 4:00 A.M., Irish's mother contacted the MSP's hotline explaining her desire to drive to and sleep in the MSP parking lot with Irish and Hewitt for protection. *Id.* An MSP employee advised them not to come, so they stayed in Irish's parents' home. *Id.* at 71.

[18] *See id.* (describing Lord's conduct). A Maine resident called the police between 4:00 A.M. and 4:40 A.M., reporting that someone "attacked him with a hammer and stole his truck and guns." *Id.* The resident reported that the incident occurred in Silver Ridge, Maine, which is

Nine hours later, the police apprehended Lord after he killed Irish's boyfriend, shot Irish's mom, and abducted Irish.[19] Irish and her mother brought a § 1983 action against the detectives, claiming a Substantive Due Process violation.[20] The United States District Court for the District of Maine granted summary judgment on the basis of qualified immunity and the plaintiffs appealed.[21] Upon review, the First Circuit "affirm[ed] the district court's holding that a jury could find that the officers violated the plaintiffs' substantive due process rights [and] reverse[d] the grant of defendants' summary judgment motion on qualified immunity grounds."[22]

Congress enacted 42 U.S.C. § 1983 to allow individuals to bring suit against a State Actor when the State Actor deprives a person of life, liberty, or property without the due process of law.[23] In order to recover for a substantive due process violation under § 1983, the plaintiff must "first, show a deprivation of a property interest in life, liberty, or property" and subsequently "show that the deprivation of this protected right was caused by government conduct."[24] The Supreme Court of the United States, in *DeShaney v. Winnebago County Department. of Social Services*,[25] held that a substantive due process violation does not arise when the State fails to protect individuals from violence by private actors because the State does not cause the deprivation.[26] The Court explained that the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected [the people] from each other."[27] Since *DeShaney*,

twelve minutes from Irish's parents' home. *Id.* Lord drove the truck straight to the Irish family home and opened fire. *Id.*

[19] *See id.* (noting result of Lord's conduct and length of time before Lord was apprehended).

[20] *See id.* at 67-68 (outlining complaint). "The plaintiffs seek relief based on the state-created danger doctrine. The plaintiffs argue that the detectives created and enhanced the danger and then failed to protect them in the face of Lord's escalating threats." *Id.* at 68.

[21] *See id.* (explaining procedural history). On a prior appeal, the First Circuit "had earlier vacated the dismissal of these claims for failure to state a claim." *Id.* After the remand, the detectives moved for summary judgment, which the district court granted. *Id.*

[22] *See Irish*, 979 F.3d at 68 (stating holding of case).

[23] *See* 42 U.S.C. § 1983 (establishing constitutional remedy for violations of Fourteenth Amendment); U.S. CONST. amend. XIV, § 1 (declaring right to due process for deprivations of "life, liberty, or property" caused by State); *see also* Kernodle, *supra* note 1, at 170 (explaining State Actor liable under § 1983 for depriving citizens of their rights).

[24] *See* Rivera v. Rhode Island, 402 F.3d 27, 33-34 (1st Cir. 2005) (outlining requirements to assert substantive due process claim).

[25] 489 U.S. 189 (1989).

[26] *See id.* at 197 ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.")

[27] *See id.* at 195 (explaining scope of Due Process Clause). The Court noted that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security[.]" *Id.* at 195-96.

lower courts have recognized two departures from this general rule.[28] One of these recognized exceptions is the state-created danger theory, which provides for a cause of action if the State creates or enhances some danger to an individual and then fails to protect the individual from harm subsequently caused by a third party.[29]

Although many circuits have adopted the state-created danger theory, there are still some that have not.[30] Because the Supreme Court has never explicitly endorsed or applied the state-created danger theory, its scope remains unclear, resulting in the creation of varied frameworks across circuit courts.[31] Despite this ambiguity, circuits agree that when the

[28] *See* Kernodle, *supra* note 1, at 173-74 (outlining two theories when State Actor has duty to protect individual against private actor). Following the Supreme Court's decision in *DeShaney*, federal circuit courts recognized two exceptions to *DeShaney's* canonical rule that the Due Process Clause does not create an affirmative duty to protect individuals from private third parties. *Id.* at 173. First, liability can be imposed on a State Actor when an actual custodial relationship exists between a plaintiff and the State Actor, also known as a "special relationship." *Id.* Second, liability can be imposed based on the state-created danger theory. *Id.*; *see also* Barrett, *supra* note 1, at 187 (explaining two exceptions derived from *DeShaney*). The *DeShaney* Court said in dicta that the state "played no part in [the danger's] creation, nor did it do anything to render [the plaintiff] any more vulnerable to them." *DeShaney*, 489 U.S. at 201. Courts have used this language to find liability when the State fails to protect an individual from a third party after the State created or caused danger to that individual. Joseph M. Pellicciotti, Annotation, *"State-created danger," or Similar Theory, as Basis for Civil Rights Action under 42 U.S.C.A. § 1983,* 159 A.L.R. Fed. 37 (2000) (explaining courts inference of state-created danger theory from language in *DeShaney*).

[29] *See* 18A Eugene McQuillin, *The Law of Municipal Corporations* § 53:278 (3d. ed.) (recognizing and outlining state-created danger theory exception); *see also* Rivera v. Rhode Island, 402 F.3d 27, 34-35 (1st. Cir. 2005) ("The Supreme Court [in *DeShaney*] also suggested, but never expressly recognized, the possibility that when the state creates the danger to an individual, an affirmative duty to protect might arise . . . .")

[30] *See* Kernodle, *supra* note 1, at 175-76 (distinguishing circuit stances on state-created danger theory). The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. circuits have adopted the doctrine; *see also, e.g.,* Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 427-28 (2d Cir. 2009); Sanford v. Stiles, 456 F.3d 298, 304-05 (3d Cir. 2006); Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015); Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ., 954 F.3d 925, 932 (6th Cir. 2020); D.S. v. E. Porter Cnty. Sch. Corp., 799 F.3d 793, 798 (7th Cir. 2015); Fields v. Abbott, 652 F.3d 886, 890-91 (8th Cir. 2011); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1066 (9th Cir. 2006); Est. of B.I.C. v. Gillen, 710 F.3d 1168, 1173 (10th Cir. 2013); Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001). The Fifth and Eleventh Circuits have not recognized the state-created danger doctrine. Cook v. Hopkins, No. 19-10217, 2019 U.S. App. LEXIS 33713, at *13 (5th Cir. Nov. 8, 2019); Vaughn v. City of Athens, No. 05-12954, 2006 WL 1029167, at *1 n.1 (11th Cir. Apr. 20, 2006). *But see* Est. of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 1003 (5th Cir. 2014) (noting case "does not sustain a state-created danger claim, even assuming that theory's validity"); Waddell v. Hendry Cnty. Sheriff's Off., 329 F.3d 1300, 1305-06 (11th Cir. 2003) (recognizing recovery under § 1983 for government conduct that is "arbitrary or conscience shocking").

[31] See Milena Shtelmakher, Note, Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations, 43 LOY L.A. L. REV. 1533, 1540 (2010) (explaining lack of Su-

state violates an individual's constitutional rights under the doctrine, then § 1983 permits recovery; however, State Actors may be protected from civil liability if they are entitled to qualified immunity.[32] The doctrine of qualified immunity shields government officials sued in their individual capacities from civil liability unless the State Actors (1) violated a federal or constitutional right; and (2) the unlawfulness of their conduct was "clearly established at the time."[33] Qualified immunity shields State Actors from liability in jurisdictions that have not recognized the state-created danger doctrine because failing to protect an individual from a third party is not considered a constitutional violation.[34] Qualified immunity also protects State Actors from liability in jurisdictions that have adopted the doctrine because the ambiguity surrounding the doctrine has caused courts to conclude that the unlawfulness of their conduct was not clearly established at the time.[35]

While, prior to 2020, the First Circuit had not recognized the state-created danger doctrine, it considered its scope in precedent cases.[36] In *Rivera v. Rhode Island*[37], the court discussed the doctrine, but ultimately ruled that the exception was inapplicable as law enforcement's conduct of identifying the plaintiff as a witness and taking her witness statement in a murder investigation did not trigger a duty to protect under the state-created danger theory.[38] The *Rivera* court examined its prior case law on the state-

preme Court doctrinal guidance has caused inconsistent circuit applications); see also Kernodle, *supra* note 1, at 169 ("Because the Supreme Court has never explicitly or clearly addressed the theory, the federal circuits apply it unevenly and erratically.")

[32] *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . subjects . . . any citizen . . . 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 . . . ."); Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses* § 3.09 (4th ed.) (highlighting uncertainty regarding state-created danger theory causes qualified immunity protection); 1 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 3:61 (4th ed.) (explaining courts avoid finding liability under state-created danger theory by finding qualified immunity).

[33] See Stacey Haws Felkner, Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers, 59 Am. Jur. Proof of Facts 3d 291, § 1 (2000) (outlining qualified immunity standard).

[34] *See* Cook v. Hopkins, No. 19-10217, 2019 U.S. App. LEXIS 33713, at *13 (5th Cir. Nov. 8, 2019) (failing to find liability under state-created danger theory); Vaughn v. City of Athens, No. 05-12954, 2006 WL 1029167, at *1 n.1 (11th Cir. Apr. 20, 2006) (rejecting liability under state-created danger theory).

[35] *See* Nahmod, *supra* note 32 ("[S]ome courts avoid the [state-created danger] issue by finding no clearly settled law for qualified immunity purposes.")

[36] *See* Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005) (outlining cases within circuit that have discussed state-created danger theory).

[37] 402 F.3d 27 (1st Cir. 2005).

[38] *See id.* at 37-38 ("[R]endering a person more vulnerable to risk does not create a constitutional duty to protect.") The *Rivera* court referenced *DeShaney* in its opinion, explaining that "a state's affirmative constitutional duty to protect an individual from private violence arises where

created danger doctrine and reiterated that the State's action must create or enhance danger to the individual, as well as "shock the conscience."[39] Though the *Rivera* court's framework for the state-created danger doctrine differs from those applied by other circuits, central similarities have emerged among them.[40] The core elements required to prevail on a state-created danger claim are: (1) that a state official affirmatively acted to create or enhance harm to the plaintiff; (2) that the potential harm was specific to the plaintiff; (3) that the act caused harm to the plaintiff; and (4) that the act was highly culpable.[41] Despite the common features among these circuits, courts remain split as to whether the doctrine is valid and whether it is "clearly established law."[42]

there is some deprivation of liberty by State Actors." *Id.* at 38. Although the state's action "render[ed] the individual more vulnerable to harm," it did not cause a deprivation; thus, the state did not have a duty to protect. *Id.*

[39] *See id.* at 34-36 (discussing scope of state-created danger doctrine).

> Even if there exists a special relationship between the state and the individual or the state plays a role in the creation or enhancement of the danger . . . there is a further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation: the state actions must shock the conscience of the court.

Id. at 35 (citing Hasenfus v. LaJeunesse, 175 F.3d 68, 73 (1st Cir. 1999)). The court noted its past discussions of the theory and considered persuasive authority referenced under its prior case law. *Id.* at 35-36 (highlighting past discussions in First Circuit); *see also* Soto v. Flores, 103 F.3d 1056, 1063-64 (1st Cir. 1997) (citing other circuits' discussions on state-created danger theory); Hasenfus, 175 F.3d at 72, 74 n.3 (observing other circuits and noting potential due process violation under state-created danger theory).

[40] *See* Michael E. Withey & Karen Koehler, *Cause of Action for State-Created Danger Under 42 U.S.C.A. § 1983*, 21 CAUSES OF ACTION 2D 175, § 5 (2003) (explaining overlapping similarities between different circuits' tests); Veronica Zhang, Note, *Throwing the Defendant into the Snake Pit: Applying a State-Created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. REV. 2131, 2152-56 (2011) (noting overlap of elements between multiple tests); *see also* Lauren Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine,* 13 WM. & MARY BILL RTS. J. 1165, 1168 (2005) (identifying state-created danger claim requires "high level of culpability").

[41] *See* Ryan Avery, Note, *Fair Shake or an Offer They Can't Refuse? The Protection of Cooperating Alien Witnesses Under United States Law*, 33 SUFFOLK TRANSNAT'L L. REV. 347, 365-66 (2010) ("Although U.S. circuit courts have applied different tests to evaluate state-created danger claims, the four-element test set forth [by the Third Circuit] appears to incorporate all of the jurisdictional rules crafted to date."); Sanford v. Stiles, 456 F.3d 298, 304-05 (3d Cir. 2006) (modifying four elements of state-created danger test of Third Circuit). *But see* Daniel J. Moore, Comment, *Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels*, 80 TEMP. L. REV. 295, 300-01 (2007) ("[T]he state-created danger exception remains a viable theory in most jurisdictions. Nevertheless, it is difficult to synthesize a single interjurisdictional standard for applying the state-created danger exception, which leads to some variation among the circuits.")

[42] *See* McQuillin, *supra* note 29 ("It has yet to be decided definitively whether a state-created danger theory is a viable mechanism for finding a constitutional injury"); Felkner, *supra* note 33 (outlining cases that grant qualified immunity when considering state-created danger theory).

In *Irish v. Fowler*, the First Circuit considered whether State Actors can be held liable for a substantive due process violation under the state-created danger doctrine, and if so, whether the State Actors can claim immunity based on an argument that the doctrine was not "clearly established at the time" of the violation.[43] As an issue of first impression, the court adopted the state-created danger doctrine, which recognizes that State Actors may be liable for failing to protect victims against private conduct when the State Actor's action enhanced the danger to the victim and such conduct caused a deprivation of life, liberty, or property.[44] In its reasoning, the court looked to the history of the doctrine and noted that the Supreme Court in *DeShaney* "*suggested* that when the state creates the danger to an individual, an affirmative duty to protect might arise."[45] The court then looked to the nine circuits that have recognized the doctrine and identified the common elements required to assert a viable state-created danger substantive due process claim.[46] Specifically, the court recognized that these circuits require that "the defendant affirmatively acted to create or exacerbate a danger to a specific individual or class of people . . . . [And] the defendant's acts be highly culpable and go beyond mere negligence."[47] After considering the scope of the theory, the court acknowledged that it has "repeatedly outlined the core elements of the state-created danger doctrine," but despite its past discussions, had not found it applicable to the facts of a specific case until now.[48]

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[43] *See Irish,* 979 F.3d 65, 72, 75 (1st Cir. 2020) (noting issues before court). The district court granted the defendants' motion for summary judgement on the basis of qualified immunity, and the plaintiffs appealed. *Id.* at 72. Qualified immunity shields State Actors from liability unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *Id.* at 76 (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)). Because a qualified immunity analysis requires a constitutional violation, the court first addressed whether there was a substantive due process violation based on the state-created danger doctrine. *Id.* at 75-76.

[44] *See id.* at 67 ("Under the state-created danger substantive due process doctrine, officers may be held liable for failing to protect plaintiffs from danger created or enhanced by their affirmative acts. In doing so, we for the first time join nine other circuits in holding such a theory of substantive due process liability is viable.")

[45] *Id.* at 73 (emphasis added) (recognizing Supreme Court "suggested" state-created danger doctrine).

[46] *See id.* (identifying circuits that adopted state-created danger doctrine).

[47] *Id.* at 73-74 (describing circuits uniformly required doctrinal elements). Additionally, the court indicated that "most circuits require that the defendant's actions 'shock the conscience.'" *Id.* at 74 n.4.

[48] *See Irish,* 979 F.3d at 75, 78 (distinguishing case from precedent). "This case presents different facts that require us to recognize the state-created danger doctrine . . . ." *Id.* at 75. The court pieced together its state-created danger discussions from precedent and noted that the "core elements" outlined in its prior case law "have been articulated in other circuits." *Id.* at 74. Relying on dicta, the court identified the following as core elements to the state-created danger doctrine: (1) there must be affirmative action that increases danger of third-party harm to an individ-

In recognizing the state-created danger doctrine, the First Circuit formally defined "the necessary components" for a viable claim and considered whether the detectives were protected by qualified immunity.[49] The court agreed with the district court's conclusion that a jury could find that a substantive due process violation occurred, and thus focused on whether the state-created danger law was "clearly established" at the time of the violation.[50] To determine whether the law was "clearly established," the court relied on "a robust 'consensus of cases of persuasive authority'" and concluded that the State Actors were not shielded from liability because "[t]he widespread acceptance of the state-created danger theory . . . was sufficient to clearly establish that a state official may incur a duty to protect a plaintiff where the official creates or exacerbates a danger to the plaintiff."[51] The court noted that a majority of circuits had accepted the theory, providing "notice to every reasonable officer" that such conduct would be unlawful.[52] The court also noted specific First Circuit case law that should have warned the officers that they could be held liable under the state-created danger doctrine.[53] The court therefore concluded that the de-

ual; (2) the State Actor must create the harm towards the plaintiff; (3) the plaintiff cannot "voluntarily" assume the risk of the danger; (4) the danger the State Actor creates must be specific to the plaintiff; (5) the State Actor's conduct must cause injury to the plaintiff; and (6) the State Actor's action must "shock the conscience." *Id.*

[49] *See id.* at 75 (stating "necessary components" to assert viable state-created danger claim). After establishing the state-created danger test, the First Circuit applied it to determine whether Irish properly asserted a substantive due process claim under the state-created danger framework, and if so, whether the detectives are protected by qualified immunity. *Id.* at 75-76.

[50] *See id.* at 76 (noting qualified immunity defense dependent on "clearly established prong"). The court further explained:

> The test to determine whether a right is clearly established asks whether the precedent is "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply" and whether "[t]he rule's contours [were] so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Id. (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)).

[51] *Id.* at 77 (explaining why state-created danger theory was "clearly established"). Defendants' argued that the law was not "clearly established" because "this circuit to date has not recognized the state-created danger doctrine," but the court rejected this. *Id.* The court explained that "clearly established law can be dictated by controlling authority or a robust consensus of persuasive authority." *Id.* at 76. Furthermore, the court explained that a "robust consensus" among the circuits "does not require the express agreement of every circuit." *Id.* at 76.

[52] *Id.* at 76 (outlining how "clearly established" standard determines liability). The court explained that when an officer violates proper police procedure, as the detectives did here, it supports the argument that "a reasonable officer in [the officer's] circumstance would have believed that his conduct violated the Constitution." *Id.* at 77 (citing Stamps v. Town of Framingham, 813 F.3d 27, 32 n.4 (1st. Cir. 2016)).

[53] *See Irish,* 979 F.3d at 78 (explaining "Rivera was a critical warrant bell that officers could be held liable under the state-created danger doctrine.")

tectives were not protected by qualified immunity, as reasonable officers would have been aware that affirmative actions that increase or enhance danger to an individual are unlawful.[54]

The ambiguity surrounding the state-created danger doctrine led the First Circuit to adopt the theory as valid without accurately considering the scope of the doctrine.[55] Despite this uncertainty, the court properly pointed to suggestive language in *DeShaney* and the general acceptance by sister circuits as justification for its adoption.[56] However, when discussing the contours of the doctrine, the court did not properly consider the varied and erratic applications of its sister circuits.[57] Each of the nine circuits that have adopted the doctrine maintains a different test; therefore, what constitutes "state-created danger" in one circuit is different in another.[58] Never-

[54] *See id.* at 77-78 (outlining reasons why state-created danger doctrine was clearly established). The court distinguished this case from its precedent case, *Soto v. Flores*, 103 F.3d 1056 (1st. Cir. 1997), which "concluded that the state-created danger doctrine was not clearly established." *Id.*; *Soto*, 103 F.3d at 1065. The court explained why the *Soto* court decided that the doctrine was not clearly established: (1) prior to *Soto*, the court never discussed the doctrine; and (2) the history of the doctrine, in terms of other circuits, was "uneven." *Irish*, 979 F.3d at 77. The court distinguished *Soto* from the case at bar by explaining that, prior to the incident, the court had discussed the doctrine numerous times and that the doctrine was more developed at the time of the detectives' conduct in 2015. *Irish*, 979 F.3d at 77-78.

[55] *See* Barrett, *supra* note 1, at 240 (explaining ambiguity of state-created danger doctrine); Withey & Koehler, *supra* note 40 (noting courts using *DeShaney* dicta to find liability under § 1983); Kernodle, *supra* note 1, at 175 (acknowledging majority of circuits have adopted state-created danger doctrine).

[56] *See* Kernodle, *supra* note 1, at 172-74 (highlighting how circuits used language in *DeShaney* to find liability); Barrett, *supra* note 1, at 215 ("The only consistency among the [nine] circuits is that each of them mechanically cite to *DeShaney*'s canonical dicta.")

[57] *See* Shtelmakher, *supra* note 31, at 1540 ("[E]ven though most circuits acknowledge the state-created danger doctrine, its scope and limitations are still ill-defined and its application is considerably inconsistent.") Although there are similarities among the elements of the state-created danger doctrine, "[t]here are substantive differences in the elements and burden of proof from one circuit to another." Withey & Koehler, *supra* note 40. For example, the Tenth Circuit utilizes a six-part test, which requires a showing of:

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

Est. of B.I.C. v. Gillen, 710 F.3d 1168, 1173 (10th Cir. 2013). Whereas the Fourth Circuit requires a plaintiff to "show that the State Actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission." Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015).

[58] *See* Kernodle, *supra* note 1, at 197 (noting lack of unified test causes various outcomes); Barrett, *supra* note 1, at 224-25 ("While all of these circuits cite the same language from *DeShaney*, the different key elements only amplify the confusion surrounding the proper parame-

theless, the court properly focused on the commonalities between the circuits and identified, at a minimum, that they hold a State Actor liable if the officer's affirmative act creates or enhances danger to the plaintiff and the act is highly culpable.[59] Thus, the court was correct in holding that a constitutional violation occurred under the state-created danger doctrine, as the facts indicate that the detectives' conduct meets the minimum threshold requirement among the circuits.[60]

While the First Circuit clearly outlined the requisite elements to assert a state-created danger claim, its application of the test contributed to the confusion surrounding the doctrine.[61] The First Circuit accepted the district court's reasoning regarding the substantive due process violation; however, the district court evaluated the plaintiff's state-created danger claim under the Third Circuit's test.[62] Despite this, the First Circuit still came to the correct conclusion because the core of the doctrine supports a finding of liability when the State Actors' actions cause or enhance danger to the plaintiff and such conduct is highly culpable.[63] While the court's dis-

ters of the state-created danger concept. From this, it is fairly inferable that different emphases from different tests can lead to inconsistent judicial results among the [nine] circuits.")

[59] *See* Kernodle, *supra* note 1, at 178 (outlining core elements); *see also* Oren, *supra* note 40, at 1168 ("No matter how it is defined, 'deliberate indifference' is the minimum standard required.") As of today, all circuits that adopted the state-created danger doctrine require an affirmative action by the state official. *See, e.g.*, Okin v. Vill. Of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 428 (2d. Cir. 2009); Sanford v. Stiles, 456 F.3d 298, 304-05 (3d. Cir. 2006); Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015); Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ., 954 F.3d 925, 932 (6th Cir. 2020); D.S. v. E. Porter Cty. Sch. Corp., 799 F.3d. 793, 798 (7th Cir. 2015); Field v. Abbott, 652 F.3d 886, 891 (8th Cir. 2011); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1066 (9th Cir. 2006); Est. of B.I.C. v. Gillen, 710 F.3d 1168, 1173 (10th Cir. 2013); Buetera v. District of Columbia, 235 F. 3d 637, 652 (D.C. Cir. 2001). Furthermore, all circuits "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." Kernodle, *supra* note 1, at 185 (noting different levels of culpability).

[60] *See* Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020) ("This case presents different facts that require us to recognize the state-created danger doctrine and conclude that a reasonable jury could find that a claim has been validly presented on this evidence."); Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005) (noting "affirmative act" and "high culpability" as requirements for state-created danger doctrine); sources cited *supra* note 59 (detailing minimum standard); Zhang *supra* note 40, at 2152-53 (highlighting commonalties of multiple tests). *But see* Kernodle, *supra* note 1, at 178 ("[Circuits] employ various tests with often inconsistent factors and results.")

[61] *See Irish,* 979 F.3d at 75 (outlining new test); *see also* Kernodle, *supra* note 1, at 178 (explaining circuits apply "various test with inconsistent factors and results").

[62] *See Irish,* 979 F.3d at 75 (noting acceptance of district court's reasoning); Irish v. Fowler, 436 F. Supp. 3d 362, 413 n.148, 415 (D. Me. 2020) (describing and applying Third Circuit state-created danger test).

[63] *See* Shtelmakher, *supra* note 31, at 1540 (explaining circuits find liability "if the state itself played a role in creating or increasing the danger to a child, then the state could be liable for a substantive due process violation."); Kernodle, *supra* note 1, at 185 (noting high level of culpability required).

regard for the various circuit tests may be logical, its effect could lead to disparate results in determining whether the law was clearly established under a qualified immunity analysis.[64] Unlike many courts that have avoided state-created danger claims by granting qualified immunity on the basis that the doctrine was not "clearly established" at the time of the unlawful conduct, this court concluded that the state-created danger theory was "clearly established" among the circuits.[65] However, the court overlooked the variety among circuit tests when concluding that the doctrine was "clearly established," contributing to the ambiguity surrounding the doctrine.[66]

While it may appear that the court's reasoning as to the establishment of the state-created danger doctrine is flawed due to the differing standards among circuits, the suggestive language in *DeShaney* and the minimum requirements among these circuits indicate that State Actors may be liable if their affirmative action is highly culpable and such act creates or enhances danger to an individual.[67] The First Circuit attempted to clarify the doctrine by explaining the court's analysis of the doctrine.[68] However, the uncertainty surrounding the doctrine still remains, despite the court's decision to join the nine other circuits.[69] Without a uniform approach, the different tests among the courts will likely lead to inconsistent results and allow State Actors to evade liability stemming from substantive due process violations on the grounds that the doctrine is not "clearly estab-

[64] *See* Avery *supra* note 41, at 365-66 (identifying Third Circuit as universal test). Since the Third Circuit test and the First Circuit test are similar, it is likely that the First Circuit's reliance on the district court's analysis did not alter the analysis. *Irish,* 979 F.3d at 75 (outlining First Circuit approach); *see also* Sanford v. Stiles, 456 F.3d 298 (3d Cir. 2006) (detailing Third Circuit approach). However, the different tests among the circuits likely will have a substantial impact on the qualified immunity analysis because the differences may play into whether a court considers the doctrine to be "clearly established." Barrett, *supra* note 1, at 215 (explaining how different tests have affected "clearly established" prong in qualified immunity analysis).

[65] *See Irish,* 979 F.3d at 77 (concluding doctrine "clearly established"); *see also* Schwartz, *supra* note 32 ("[i]n several cases, uncertainties surrounding this doctrine and other aspects of *DeShaney* have led courts to conclude that even if the plaintiff's due process rights were violated, the defendant official is protected by qualified immunity because the defendant did not violate clearly established federal law.")

[66] *See Irish,* 979 F.3d at 77 (concluding persuasive authority sufficient to qualify doctrine as "clearly established"); *see also* Barrett, *supra* note 1, at 241 (explaining "many of the federal courts have amplified *DeShaney's* ambiguities" by lack of uniformity); *see also* sources cited *supra* note 56 and accompanying text (highlighting effect of different tests).

[67] *See* Barrett, *supra* note 1, at 214 ("[N]o clear constitutional standard exists for analyzing state-created danger claims under § 1983 jurisprudence.")

[68] *See* Rivera v. Rhode Island, 402 F.3d 27, 33-34 (1st Cir. 2005) (discussing state-created danger claim).

[69] *See* Kernodle, *supra* note 1, at 197-98 ("The miscellaneous tests currently employed by the circuits present an overwhelming array of standards dizzying to any potential § 1983 litigant or judge faced with state-created danger case.")

lished."[70] In order to uphold the protection guaranteed by the Due Process Clause, the Supreme Court should explicitly endorse the state-created danger doctrine; without the Supreme Court's direction, individuals may be stripped of their right to recover when State Actors violate their constitutional rights.[71]

The right to be free from State deprivation of life, liberty, or property is guaranteed by the Fourteenth Amendment of the Constitution, and this right should not be diminished because of ambiguity surrounding the state-created danger doctrine. Allowing circuit courts to create their own tests for state-created danger violations has created confusion among courts and deprived individuals of their right to recover for State Actors' unlawful conduct. Ultimately, the Supreme Court must intervene and provide additional guidance on the state-created danger doctrine. If the Court fails to address this issue, lower courts will continue to struggle with drawing a bright line on what constitutes state-created danger and whether it is justified by qualified immunity.

Bianca Tomassini

[70] *See supra* note 58 (describing effect of multiple tests); *see also* Kernodle, *supra* note 1, at 198 (explaining uniform test needed to "ensure greater governmental accountability while also confining recovery and protecting legislative decisions.")

[71] *See* Kernodle, *supra* note 1, at 197 (suggesting Supreme Court should step in and provide guidance); Barrett, *supra* note 1, at 241 (suggesting uniform test to uphold § 1983 jurisprudence).