
THE STATE-CREATED DANGER DOCTRINE

*Erwin Chemerinsky**

There is no series of cases that are more consistently depressing than the state-created danger decisions. The litigation typically arises because of a terrible tragedy. A suit is brought against the government and its officials on the grounds that if they had intervened they could have stopped or prevented the tragedy. Yet, the government almost always prevails. I will discuss some of the more recent state-created danger cases decided by courts throughout the country.

I. THE UNITED STATES SUPREME COURT'S STATE-CREATED DANGER DECISIONS

The context for state-created danger case law arose from Supreme Court decisions which held that the government has no duty to protect people from privately inflicted harms. The most important of these decisions was *DeShaney v. Winnebago County Department of Social Services*.¹

* Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science, Duke Law School. This Article is based on a transcript of remarks from the Practising Law Institute's Twenty-Third Annual Section 1983 Civil Rights Litigation program in New York, New York.

¹ 489 U.S. 189 (1989).

A. DeShaney v. Winnebago County Department of Social Services

Joshua DeShaney was a four-year-old boy who was severely beaten by his father and suffered irreversible brain damage. Joshua's guardian sued the Department of Social Services, arguing that it failed to respond to child abuse complaints over a two-year period, which cost Joshua his liberty without due process.

The Supreme Court, in an opinion by Chief Justice Rehnquist, ruled against Joshua, holding that the government does not have a duty to protect people from privately inflicted harms.² Chief Justice Rehnquist explained that the Constitution typically provides negative liberties and does not impose affirmative duties on the government.³ For instance, the Constitution provides that the government cannot infringe upon the right to freedom of speech under the First Amendment,⁴ and the government cannot deny life, liberty, or property without due process of law under the Fourteenth Amendment.⁵ The Constitution does not impose affirmative duties on the government, such as the duty to protect people from privately

² *Id.* at 202.

³ *Id.* at 195 (“[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.”).

⁴ U.S. CONST. amend. I states in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press”

⁵ U.S. CONST. amend. XIV states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

inflicted harms.⁶ Thus, there was no duty on the part of the government to protect Joshua from his father.⁷

Justice Blackmun wrote a powerful dissent. He lamented “[p]oor Joshua,” whose only opportunity for protection was from the Winnebago County Department of Social Services, who had notice of his abuse but did nothing, leaving him vulnerable to child abuse.⁸

Although the Court denied the existence of any general government duty, Chief Justice Rehnquist’s majority opinion identified specific areas where the government would have a duty to provide protection. First, a government has a duty to protect a person if he or she is physically in government custody.⁹ Obviously, if an individual is in government custody, he has no ability to protect himself and the government has the duty to provide protection.¹⁰ Second, a government must provide protection if the government is responsible for creating the danger.¹¹

It is this latter language that has given rise to the state-created danger line of cases in the seventeen years since the *DeShaney* decision. Notably, some circuits, like the Fourth and Fifth Circuits, tend to combine the two exceptions in *DeShaney*.¹² The Fifth Circuit

⁶ *DeShaney*, 489 U.S. at 200.

⁷ *Id.* at 202.

⁸ *Id.* at 212.

⁹ *Id.* at 199-200 (explaining that when a state takes a person into its custody and holds him against his will, the United States Constitution imposes upon it a corresponding duty to assume some responsibility for their safety and general well-being).

¹⁰ *Id.* at 200.

¹¹ *DeShaney*, 489 U.S. at 200.

¹² *See, e.g.*, *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) (explaining that if the Fifth Circuit acknowledged the state-created danger theory, then the plaintiff would have to show that the defendant acted with deliberate indifference, meaning “that the state actor both knew of and disregarded an excessive risk to the victim’s health and safety”);

held for example, that there must be a special relationship between the individual and the government *and also* a state-created danger for a government duty to arise.¹³ Yet, the Second Circuit has rejected that combination and provides two separate exceptions: first if the individual in custody has a special relationship with the government, *or* second, if there is a state-created danger.¹⁴

B. Town of Castle Rock v. Gonzales

There has only been one Supreme Court case following the *DeShaney* decision, the case of *Town of Castle Rock v. Gonzales*.¹⁵ Again, similar to *DeShaney*, *Gonzales* involved tragic facts.

In *Gonzales*, a woman obtained a restraining order against her estranged husband because she proved to the court that there was reason to believe that her husband could become violent. The restraining order limited the amount of time that he could spend with her three daughters. One night she discovered that her three daughters were missing. She immediately suspected that her husband had taken them in violation of the restraining order's terms.

She called the police and the police said that there was nothing they could do to help her. Colorado law required that the police enforce the terms of restraining orders in domestic violence cases.¹⁶ In fact, the order that she received had mandatory language

Pinder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995).

¹³ *Beltran*, 367 F.3d at 307.

¹⁴ *See, e.g.*, *Pena v. Deprisco*, 432 F.3d 98, 109 (2d Cir. 2005). The Second Circuit stated: "We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability." *Id.*

¹⁵ 125 S. Ct. 2796 (2005).

¹⁶ COLO. REV. STAT. § 18-6-803.5 (a)-(b) (2002) (amended 2003) provides in pertinent

printed on its back, which required that the police were obligated to enforce its terms. That night she repeatedly called and visited the police, but the police said there was nothing they could do to help her. At one point, she had a cell phone conversation with her estranged husband. She learned that, indeed, he did have the girls and they were at an amusement park. She called the police and told them where he was, that he was violating the restraining order, and she wanted her children returned. Again, the police refused. Later that night he killed the three girls and died in a shootout with the police.

She sued, but under *DeShaney*, the police had no duty to protect the girls from the privately inflicted harm imposed by the father.¹⁷ The Tenth Circuit, in an en banc opinion written by Judge Stephanie Seymour, characterized this as a procedural due process case and not a substantive due process case.¹⁸ The Tenth Circuit explained that the holding in *DeShaney* concerned substantive due process and whether the government had taken away Joshua's liberty without an adequate justification.¹⁹ Unlike *DeShaney*, however,

part:

A peace officer shall use every reasonable means to enforce a restraining order. (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that: (1) The restrained person has violated or attempted to violate any provision of a restraining order

¹⁷ *DeShaney*, 489 U.S. at 195.

¹⁸ *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1099-1100 (10th Cir. 2004) (en banc) (noting the claim falls outside the bounds set by *DeShaney* and establishing review of the procedural due process claims, rather than the substantive claims).

¹⁹ *Id.* at 1099. “*DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens an entitlement to receive protective services in accordance with the terms of the statute” *Id.*

Gonzales posed a procedural due process issue.²⁰ Judge Seymour explained that Colorado, by writing its law in mandatory terms, had created a property interest.²¹ The Tenth Circuit held that the woman stated a procedural due process claim, although *DeShaney* would bar a substantive due process claim, because she was deprived of her property right without due process.²²

The Supreme Court, in a 7-to-2 decision, reversed the Tenth Circuit.²³ Justice Scalia wrote the opinion for the Court, with only Justices Stevens and Ginsburg dissenting. Justice Scalia's majority opinion questioned whether any property interest existed.²⁴ Justice Scalia explained that no law, even if it is written in mandatory terms, like Colorado's law, creates an "entitlement" because law enforcement officers always have discretion as to how to enforce any law.²⁵ Without an entitlement, there is no property right and without a property interest, there cannot be a due process violation.²⁶

Essentially, after *Gonzales* it does not matter if the plaintiff characterizes the claim as substantive due process or procedural due process. It is irrelevant as to whether the law is written in mandatory

²⁰ *Id.* at 1100. "Rather, we must determine whether the [S]tate of Colorado created in Ms. Gonzales an entitlement that cannot be taken away from her without procedural due process, and if so, whether the officers' arbitrary denial of that entitlement was procedurally unfair." *Id.*

²¹ *Id.* at 1101, n.5. "[T]he court-issued restraining order, which specifically dictated that its terms must be enforced, and the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim." *Id.*

²² *Id.* at 1109.

²³ *Gonzales*, 125 S. Ct. at 2810-11.

²⁴ *Id.* at 2803-04.

²⁵ *Id.* at 2805-06 ("A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.").

²⁶ *Id.* at 2809-10.

or discretionary terms. Generally, the government has no duty to protect people from privately inflicted harms.

II. STATE-CREATED DANGER CASES THROUGHOUT THE COUNTRY

How might it be argued that there is a state-created danger to fit within the exception to *DeShaney*? I should point out, before I begin discussing the state-created danger cases, that there is still the possibility of state tort law claims. Indeed, Justice Scalia, at the end of his opinion in *Gonzales*, explained that states could create tort law claims for state-created dangers.²⁷ But, I want to focus on when a due process claim for a state-danger exists.

A. Cases Finding That a State-Created Danger May Create Government Liability

I will start with a series of cases that initially articulated and explicated the idea that the government can be held liable under the Due Process Clause for a state-created danger. The government won the first of these cases, but what is striking about the other cases in this category is that the government lost. Thus, plaintiffs usually use the latter cases, where the government lost, as their touchstone to show there can be government liability for state-created dangers.

1. *The Government Prevails: Bowers v. DeVito*

*Bowers v. DeVito*²⁸ is a Seventh Circuit opinion written by

²⁷ *Id.* at 2810. The Court's holding "does not mean States are powerless to provide victims with personally enforceable remedies." *Id.*

²⁸ 686 F.2d 616 (7th Cir. 1982).

Judge Posner. It was written before *DeShaney*, but it is still a widely cited opinion.

Bowers involved an attempt to impose liability on the police for the death of a mentally ill person who was in their custody. While the Seventh Circuit actually ruled in favor of the police, Judge Posner explained that the government could be held liable if a plaintiff could show that it created the danger that caused the injuries.²⁹ Judge Posner explained: “If the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.”³⁰

This “snake pit” language gets picked up by a lot of courts, particularly when a court wants to find that a state-created danger exists.³¹ Courts that did not want state-created danger liability often assert that the situation is not as grave as putting an individual in a snake pit.³²

2. *The Plaintiffs Prevail: Wood v. Ostrander, Davis v. Brady, Munger v. Town of Glasgow, and Currier v. Doran*

Quickly following *DeShaney*, there were a series of cases from the circuits that created liability for state-created dangers.

²⁹ *Id.* at 618 (explaining that if a state places the plaintiff in direct danger and fails to protect the plaintiff, a state may be held liable).

³⁰ *Id.*

³¹ *See, e.g.,* *Ryan v. Burlington County*, 674 F. Supp. 464, 485 (D.N.J. 1987) (“[D]efendants . . . helped create the ‘snake pit’ into which plaintiff was put against his will.”).

³² *See, e.g.,* *Escamilla v. Santa Ana*, 796 F.2d 266, 269 (9th Cir. 1986) (holding that the State, through its police department, did not create a snake pit scenario).

*Wood v. Ostrander*³³ is a very important case in this regard, as many consider it to be one of the initial cases that created liability for state-created dangers.

In *Wood*, police officers stopped a drunk driver. The police brought the driver into custody and took his keys. The driver had a female passenger, but the police did not give her the keys. The police did not take her with them to the station house—they just left her on the side of the road, in what was described as a high crime area. Subsequently, she was raped. She sued the police officers, asserting that they were responsible for the state-created danger. The Ninth Circuit, ruling in favor of the plaintiff, held that there were triable issues of fact concerning whether the officer's conduct affirmatively placed the victim in danger and whether the officer had knowledge of the danger.³⁴

*Davis v. Brady*³⁵ also involved police stopping a drunk driver. Here, too, the police took away the driver's keys, but the police did not take driver into custody. They left him on the side of the road in a dark area. The motorist, who was intoxicated, collided with another vehicle, suffered terrible injuries and then sued. And the court, like the Ninth Circuit in *Wood*, held it was the government that put this person in danger and the government should be held liable.³⁶

In *Munger v. City of Glasgow*,³⁷ police were called to a bar when there was a dispute. The police, in the context of the bar

³³ 879 F.2d 583 (9th Cir. 1989).

³⁴ *Id.* at 590.

³⁵ 143 F.3d 1021 (6th Cir. 1998).

³⁶ *Id.* at 1027.

³⁷ 227 F.3d 1082 (9th Cir. 2000).

dispute, kicked a man out of the bar and took away his keys. It was a cold night. He was dressed just in jeans and a T-shirt. They would not let him back in the bar or in his car. The man died of hypothermia. The court, like the earlier two cases I just mentioned, said it was the government that created the danger.³⁸ Hence, *Munger* fits within the *DeShaney* exception, and the government was responsible for depriving his life without due process.

One of the best cases for plaintiffs is *Currier v. Doran*.³⁹ In *Currier*, a social worker transferred custody of a child from the mother to the father. The father subsequently killed the child. A suit was brought and the issue was whether the social worker could be held liable for state-created danger.

The Tenth Circuit, finding the social worker liable, held that the child “would not have been exposed to the dangers from their father but for the affirmative acts of the state [social worker]; the same cannot be said for Joshua in *DeShaney*.”⁴⁰ This standard is a tremendously pro-plaintiff standard because one can argue that in all of these cases, the act of the government official is the “but for” cause. For instance, but for the Department of Social Services failing to protect Joshua DeShaney, he would not have suffered brain damage. Also, but for the police failing to protect the children in *Gonzales*, the children would likely be alive.

³⁸ *Id.* at 1087.

³⁹ 242 F.3d 905 (10th Cir. 2001).

⁴⁰ *Id.* at 918.

B. Requirements for Establishing a State-Created Danger

While courts recognize state-created dangers, the theories often differ, which immediately leads to the question: What is sufficient to show state-created danger and liability under due process? First, it is necessary to note that negligence is not sufficient for state-created danger liability. The Supreme Court is clear that negligence is not sufficient for due process claims, as the Court held in *Daniels v. Williams*,⁴¹ and its companion case, *Davidson v. Cannon*.⁴²

Daniels, while decided before *DeShaney*, seems to be a state-created danger case. *Daniels* involved a prisoner who slipped on a pillow that had been negligently left on a prison step. The prisoner sued and said that the government's negligence had deprived him of his body safety and liberty without due process. The Supreme Court ruled against the prisoner, holding that the government was merely negligent, which was not sufficient to create a due process claim.⁴³

Davidson had even more egregious facts than *Daniels*. A prisoner was threatened by another inmate. The prisoner told the warden, but the warden ignored the note that he received and went on a three-day holiday. The threatened prisoner was then savagely attacked. Subsequently, he sued. The prisoner could not recover under New Jersey tort law and could only sue under the United States

⁴¹ 474 U.S. 327 (1986).

⁴² 474 U.S. 344 (1986).

⁴³ *Daniels*, 474 U.S. at 335-36.

Constitution.⁴⁴ Again, the Supreme Court held that the prisoner merely alleged negligence on the part of the warden, which was not enough to establish a due process claim.⁴⁵

Immediately after these decisions, courts around the country held that negligence and gross negligence are not enough for due process claims, but deliberate indifference and recklessness are sufficient.⁴⁶

**1. *Deliberate Indifference in Emergency
Circumstances: Sacramento County v. Lewis***

Nevertheless, in *County of Sacramento v. Lewis*,⁴⁷ the Supreme Court created an exception for due process claims arising out of emergency situations. If the deliberate indifference or recklessness occurred during an emergency, the government can only be held liable if its conduct “shocks the conscience.”⁴⁸

In *Lewis*, a high-speed police chase ended, as they so often do, tragically. A teenage boy, who was a passenger on a motorcycle, died as a result of the high-speed chase. The Ninth Circuit found that the government could be held liable if it could be shown that its officers’ conduct was deliberately indifferent, that it was reckless.⁴⁹ That was in accord with some weight of authority across the country;

⁴⁴ *Davidson*, 474 U.S. at 346-47.

⁴⁵ *Id.* at 347-48.

⁴⁶ *See Bergquist v. Cochise County*, 806 F.2d 1364, 1370 (9th Cir. 1986) (remanding case so the district court could consider the appropriate degree of negligence); *see also Brown v. District of Columbia*, 638 F. Supp. 1479, 1487 (D.D.C. 1986) (finding a valid complaint where police acted wantonly and maliciously).

⁴⁷ 523 U.S. 833 (1998).

⁴⁸ *Id.* at 846.

⁴⁹ *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996).

yet there remained a circuit split.⁵⁰ The Supreme Court reversed, holding that in an emergency situation, like a high speed chase, the government can be held liable only if its officers' behavior "shocks the conscience."⁵¹ In an opinion written by Justice Souter, the Court held that conduct "shocks the conscience" if the plaintiff demonstrates that the officers acted with the intent of causing the harm to the victim.⁵²

Unfortunately, the standard articulated by the Court in *Lewis* is a very difficult standard to meet. Very few cases in the eight years since *Lewis* have found that a plaintiff satisfied this rigorous standard.

2. Deliberate Indifference in Non-Emergency Circumstances

In the non-emergency context, the lower courts have consistently held that deliberate indifference or recklessness is sufficient to show liability if there is a state-created danger.⁵³

For instance, in *Mark v. Borough of Hatboro*,⁵⁴ a volunteer

⁵⁰ Similar to the Ninth Circuit, the Sixth, Seventh, and Eleventh Circuits adopted the "deliberate indifference" or "reckless disregard" standards. See *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995); *Magdziak v. Byrd*, 96 F.3d 1045 (7th Cir. 1996); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). Yet, some circuits adopted a "shocks the conscience" standard. See *Williams v. Denver*, 99 F.3d 1009, 1014-15 (10th Cir. 1997); *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-07 (3d Cir. 1994) (en banc); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986).

⁵¹ *Lewis*, 523 U.S. at 846.

⁵² *Id.* at 849 ("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.").

⁵³ See *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3rd Cir. 1995); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994); *Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987).

⁵⁴ *Mark*, 51 F.3d 1137.

firefighter for Enterprise Fire Company committed arson, which caused terrible damage. A suit was brought against Enterprise Fire Company, alleging that it knew the volunteer firefighter had problems and still put him in a position where he could create danger. While the Court rejected that the government was liable, it quite clearly stated that if the government were to be held liable, the plaintiff must show that the government acted with deliberate indifference.⁵⁵

To show how difficult it is to meet the standard of deliberate indifference, I want to point to a very famous case from the Fourth Circuit, *Pinder v. Johnson*.⁵⁶ It, too, had very tragic facts. In *Pinder*, a woman was threatened by her ex-boyfriend. She called the police. The police came and arrested the ex-boyfriend. The woman asked whether the police would take her ex-boyfriend to the station house and lock him up. The woman explained that she would not return to work if he was merely released because she thought he would endanger her children. The officer said she could return to work because he would lock up the ex-boyfriend and keep him locked up. She asked again and once more, she was assured by the officer that the police were going to keep the man locked up. The officer took the man to the station, but released him immediately. Then, the ex-boyfriend returned to the house and burned it down, killing the three children who were inside. The issue was whether the plaintiff

⁵⁵ See *id.* at 1153 (“The cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury.”).

⁵⁶ 54 F.3d 1169 (4th Cir. 1995).

satisfied the requirements for a state-created danger.

The Fourth Circuit ruled against the plaintiff, holding that the requirements for state-created danger were not satisfied.⁵⁷ The Fourth Circuit emphasized that there can only be state-created danger if there is some form of special relationship between the government and the individual, and no such relationship existed in *Pinder*.⁵⁸ The court held that the actions of the police officer did not meet the requirements for state-created danger.⁵⁹

C. The Test for State-Created Dangers in Various Jurisdictions

After reviewing the above cases, one must wonder, what is the test for state-created dangers? Notably, there are no Supreme Court cases on the subject—as neither *DeShaney* nor *Castle Rock* articulates a test with regard to state-created dangers. Varying circuits have adopted different formulations; not every circuit has announced a multi-part test, but some circuits have done so.⁶⁰

*Jones v. Reynolds*⁶¹ involved individuals engaging in drag racing on the street. The police knew about it, they did not do anything to stop it, and an accident happened; people died as a result. Here, the Sixth Circuit rejected liability, but articulated a three-part test.⁶² The court explained that, a plaintiff may assert a state-created

⁵⁷ See *id.* at 1175 (“There was no custodial relationship with the plaintiffs in this case.”).

⁵⁸ *Id.* (“It cannot be that the state commits an affirmative act or creates a danger every time it does anything that makes injury at the hands of a third party more likely.” (quotations omitted)).

⁵⁹ *Id.* at 1175-76.

⁶⁰ See *infra* Part III.C.

⁶¹ 438 F.3d 685 (6th Cir. 2006).

⁶² *Id.* at 690-91 (quotations omitted).

danger claim if:

“(1) [A]n affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.”⁶³

I find it easy to understand why the first and third requirements are necessary because those requirements seem to be derived from the principles articulated by the Court in *DeShaney*. I am more skeptical about the second requirement. Why is it necessary for the plaintiff to specifically be in danger, compared to the general public? If the police create the danger and they know that someone will be hurt, why does the specific person or persons have to be identified? Nevertheless, this is the test articulated by the Sixth Circuit.

The Eighth Circuit enunciated a five-part test in *Hart v. City of Little Rock*,⁶⁴ a case where the government released personnel files of some of its employees. The employees subsequently sued and argued they were put in danger through the records release. *Hart*’s five-part test requires that the plaintiff prove the following:

1) they were members of a limited, precisely definable group, 2) [the government’s] conduct put them at significant risk of serious, immediate, and proximate harm, 3) the risk was obvious or known to [the government], 4) [the government] acted recklessly in

⁶³ *Id.* (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003)).

⁶⁴ 432 F.3d 801 (8th Cir. 2005).

conscious disregard of the risk, and 5) in total, [the government's] conduct shocks the conscience.⁶⁵

Again, I see why some of those are components are necessary, but wonder about the others. Why must the plaintiffs be members of a limited, precisely definable group? Why, for example, is it necessary that the government's conduct "shocks the conscience"? "Shocks the conscience" seems to be reserved for the emergency situation. Yet, releasing personnel files is certainly not an emergency situation.

The *Mark* case, which I mentioned earlier, articulated a four-part test.⁶⁶ In *Marks*, the court explained that:

Cases like these have four things in common: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.⁶⁷

Again, I see why some of those are components, but why must there be some relationship between the state and the plaintiff?

Additionally, I previously mentioned that the Fourth and Fifth Circuits hold that there must a special relationship between the plaintiff and the government, combining the two exceptions from *DeShaney*.⁶⁸ The Second Circuit, however, rejected this and said

⁶⁵ *Id.* at 805 (citations omitted).

⁶⁶ *Mark*, 51 F.3d at 1152.

⁶⁷ *Id.*

⁶⁸ *See supra* notes 12-13 and accompanying text.

there are two exceptions to *DeShaney*: one, where there is somebody with a special relationship with the government, the other where there is a state-created danger.⁶⁹

III. THE APPLICATION OF THE STATE-CREATED DANGER DOCTRINE

Let me discuss the application of the state-created danger doctrine in recent decisions.

A. *Kennedy v. City of Ridgefield*

The first case is *Kennedy v. City of Ridgefield*,⁷⁰ which again involved tragic facts. In *Kennedy*, a mother complained to the police that her ten-year-old daughter had been sexually abused by a thirteen-year-old neighbor. The police went and told the thirteen-year-old and his parents of the accusation against him and who had made it. The thirteen-year-old got a gun, went to the house of those who had made the accusations against him and shot the parents. The father was killed, the mother was severely wounded. The issue for the court was: is this enough to create government liability?

In a rare decision, compared to other recent cases, the Ninth Circuit found the government liable and determined that a state-created danger existed.⁷¹ The Ninth Circuit determined that the government officials were deliberately indifferent to the harms that the girl and her family could suffer, that the government officials'

⁶⁹ See *supra* note 14 and accompanying text.

⁷⁰ 439 F.3d 1055 (9th Cir. 2006).

⁷¹ *Id.* at 1067.

deliberate indifference put them in danger, and that the injuries were caused by the government's deliberate indifference.⁷² The Ninth Circuit expressly analogized its decision to *L. W. v. Grubbs*.⁷³ There was strong dissent from the denial of en banc review where eight of the judges on the Ninth Circuit, generally the more conservative judges, said it was inappropriate to create liability in *Kennedy* because it would stretch state-created danger in a way that would “open[] floodgates” to claims against state and local governments.⁷⁴

B. McQueen v. Beecher Community Schools

*McQueen v. Beecher Community Schools*⁷⁵ was yet another case with quite tragic facts. In *McQueen*, a first grader in a public school committed relatively minor acts of violence against other children—poking them with sticks and exhibiting bullying behavior. One day, the teacher exited the classroom and left six kids alone. The bullying first grader, who had brought a gun to school, shot and killed another student. The question was whether or not the teacher could be held liable, whether she was deliberately indifferent in leaving the six children alone in the classroom.

The Sixth Circuit held that the teacher was not deliberately indifferent because she was just down the hall and the violence was

⁷² *Id.* at 1065.

⁷³ 974 F.2d 119, 121-22 (9th Cir. 1992) (holding the State liable for the sexual assault of a nurse working at a medium security government facility when she was assigned to work alone with sex offenders). See *Kennedy*, 439 F.3d at 1066-67. (“[T]his case is not ‘meaningfully distinguishable’ from *Grubbs*.”).

⁷⁴ *Kennedy v. City of Ridgefield*, 440 F.3d 1091, 1092 (9th Cir. 2006) (Tallman, J., dissenting).

⁷⁵ 433 F.3d 460 (6th Cir. 2006).

not foreseeable.⁷⁶ Again, the facts were tragic, but the government could not be held liable.⁷⁷

C. **Pena v. DePrisco**

The leading case from the Second Circuit is *Pena v. DePrisco*.⁷⁸ In *Pena*, the police department knew an officer had a serious drinking problem when he was first hired. Subsequently, the officer, who was off-duty at the time, became severely intoxicated. He was on a twelve-hour drinking binge and his colleagues, who accompanied him that day, did nothing to stop him nor did they keep him from driving. In fact, the plaintiffs alleged that the officers encouraged his behavior, getting him more drinks, chauffeuring him around, and the like.

While severely intoxicated, the officer drove. He went through several red lights and hit a group of pedestrians. He killed three people, including a pregnant woman. A suit was brought against the other officers, alleging that they were responsible for the danger. There were two theories that were advanced. One theory was that the officers did nothing to stop their fellow officer from driving while intoxicated. The other was that the officers encouraged and facilitated his behavior in buying him drinks and chauffeuring him around.

⁷⁶ *Id.* at 469-70 (refusing to characterize the teacher's walking out of the classroom as an affirmative act that created or increased the risk of danger to the plaintiff and finding no deliberate indifference, because the teacher could not have foreseen that the child would use a gun to kill a fellow student, if left unsupervised in the classroom).

⁷⁷ *See id.* at 471 (concluding that the school district could not be held liable since the teacher did not violate the child's constitutional rights).

⁷⁸ 432 F.3d 98 (2d Cir. 2005).

The Second Circuit, in an opinion by Judge Sack, held that a distinction must be drawn between government *inaction* which causes harm and government *action* which causes harm.⁷⁹ If it is just inaction on the part of the government, then under *DeShaney* there cannot be liability.⁸⁰ But if it is active, rather than passive conduct or an omission, then there can be a basis for liability.⁸¹ Essentially, the Second Circuit tried to create a bright line rule with regard to state-created dangers. The Second Circuit held that, with respect to not stopping the officer from driving while intoxicated, there can be no liability for a state-created danger because the officers had no duty to stop him from driving—such inaction is only an omission.⁸²

But as to the allegations that the officers encouraged and facilitated the intoxicated officer, that could be a basis for liability for state-created dangers.⁸³ Notably, the Second Circuit does not say that there is only liability as to harm to a specific identifiable group of plaintiffs. The three pedestrians killed here were just individuals who were tragically in the wrong place at the wrong time. Yet, the Second Circuit is willing to recognize a basis for liability for the officers as to these individuals.

In *Pena*, the Second Circuit's approach seemed different from

⁷⁹ *Id.* at 109 (distinguishing between state conduct that could be characterized as the active facilitation of private violence versus conduct that could be characterized as the passive facilitation of private violence).

⁸⁰ *Id.* at 107-08.

⁸¹ *Id.* at 110.

⁸² *Id.*

⁸³ *Pena*, 432 F.3d at 111-12 (finding that the police department implicitly encouraged the officer's misconduct by participating in and condoning his excessive drinking and equating the officers' "deliberate silence" with "explicit permission" thus rising to the level of a state-created danger).

the approach followed in other circuits. Yet, after finding that liability could exist for a state-created danger, the Second Circuit ruled in favor of the officers based on the doctrine of qualified immunity.⁸⁴ The Second Circuit explained it was a close question with regard to qualified immunity, but found qualified immunity applied because there was no clearly established law that the officers violated.⁸⁵

D. *Kaucher v. County of Bucks*

A more recent decision, decided in 2006, is *Kaucher v. County of Bucks*.⁸⁶ In *Kaucher*, a corrections officer received an antibiotic-resistant infection. As I am sure you know, many contagious antibiotic-resistant infections rapidly spread throughout corrections facilities. The correction officer asserted that the corrections facility was not taking the necessary steps to prevent the infection from being spread throughout the facility. Further, the officer argued that he received the infection because of the facility's deliberate indifference.

The Third Circuit ruled against the corrections officer, finding that a sufficient basis for a state-created danger did not exist.⁸⁷ The

⁸⁴ *Id.* at 114 (determining the officers' entitlement to the right of qualified immunity by considering whether under preexisting law a reasonable officer would have understood his conduct to be unlawful under the circumstances before the accident).

⁸⁵ *Id.* at 115.

⁸⁶ 455 F.3d 418 (3d Cir. 2006)

⁸⁷ In order to assert a successful claim for state-created danger in the Third Circuit, a plaintiff must satisfy four elements:

- (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts[;] . . . [and] (4)

court specifically focused on the lack of a showing of deliberate indifference to establish a state-created danger.⁸⁸

E. **Tanner v. County of Lenawee**

One more example of where the government prevailed was in the recent case of *Tanner v. County of Lenawee*.⁸⁹ It is interesting to note that many of these recent cases are from the Third and Sixth Circuits. In *Tanner*, the plaintiffs took in Cindy Baker, Mrs. Tanner's sister, because of an ongoing domestic dispute between Cindy and her husband. When the husband tried to force entry into the Tanner's home, the Tanners called the police for assistance. The husband was about to leave in his car when the police arrived. The police pinned the husband between the car and the house. Subsequently, the occupants of the house opened the door to see what happened. The husband went inside the house and killed the occupants. The issue was whether the police conduct was a basis for a state-created danger? The Sixth Circuit held there was no state-created danger, finding an insufficient showing of deliberate indifference.⁹⁰

If you look through all of the recent cases that I have

a state actor affirmatively used his or her authority in a way that created danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. at 431 (holding that plaintiff failed to satisfy the second and fourth requirements).

⁸⁸ *Id.* at 426-27 (finding no deliberate indifference where the defendants made a good faith effort to contain the spread of the infection and could not have reasonably known that the corrections officers faced a substantial risk of contracting MRSA infections).

⁸⁹ 452 F.3d 472 (6th Cir. 2006).

⁹⁰ *Id.* at 480 (finding no evidence that the police officers knew or should have known that their conduct specifically endangered the plaintiffs).

mentioned over the last several years, there are very few where the plaintiffs have been able to succeed. In order to succeed, the plaintiff really must show that the official was deliberately indifferent.

IV. CONCLUSION: THE IMPLICATIONS OF *DESHANEY* AND ITS PROGENY

PROF. SCHWARTZ: I read *DeShaney* as not recognizing the state-created danger doctrine, but only as creating an implication. Justice Rehnquist seems to indicate that the state did not engage in action to create the danger.⁹¹ The decision seemed to raise an implication that maybe the result would be different if the state had created the danger, but does not necessarily hold that the state will be liable when it creates the danger.

PROF. CHEMERINSKY: I agree, though I think it is just characterization. As previously stated, the holding of *DeShaney* was that the government was not liable for the injuries suffered by Joshua DeShaney. Some language in the decision recognizes or implies that there could be liability if a person who was in government custody or the state-created the danger.⁹² I don't think anything turns on "recognizes" or "implies" because the reality is that every single

⁹¹ *DeShaney*, 489 U.S. at 201 (concluding that the State's conduct in releasing the child into the custody of his abusive father did not create the danger posed by the child's father, nor did it make the child more vulnerable to this danger).

⁹² *Id.* at 200.

[I]t is the State's affirmative act of restraining and individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harm inflicted by other means.

Id.

circuit, as illustrated above, has recognized that at least in some circumstances, based on the language of *DeShaney*, there is a basis for state-created danger. While the tests employed by each circuit vary and whether state-created dangers are necessary or sufficient varies, I do think you can draw that out of *DeShaney*.

One could argue that the state-created a danger in *DeShaney* by taking DeShaney into its custody and then releasing him to the parent that wound up severely beating him. Yet, it is important to remember that this is an area where an incredibly fine line is drawn in many in cases, despite the tragic circumstances presented. Hence, to understand the state-created danger cases, one must understand the difference between an omission and commission; even in *DeShaney* the Court seems to be drawing this distinction.⁹³ The Court seemed to consider the government's conduct in *DeShaney* to be an omission because the state failed to protect Joshua DeShaney.

The dissent, conversely, would argue there was really a commission here; that this was a situation where the Department of Social Services did get involved and should have done much more.⁹⁴ How do you contrast that with *Wood*? I think across the circuits *Wood* is often regarded as the paradigm basis for state-created danger. There it was more like a commission because the government affirmatively left this woman on the side of the road and

⁹³ *Id.* at 203 (stating that the affirmative harm was created by the child's father not the State and concluding that the State's failure to protect Joshua, while regrettable, does not constitute a violation of the Due Process Clause).

⁹⁴ *Id.* at 210 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). "It simply belies reality . . . to contend that the State 'stood by and did nothing' with respect to Joshua. Through its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave

put her in danger.

The problem with this is that it is really characterization. If I am the plaintiff's lawyer, I am going to characterize all of this as being a commission, and if I am the defense lawyer, I am going to try to say all of this is an omission. In *Wood*, it was an omission by the police in not taking steps to protect the woman. In *DeShaney*, on the other hand, you can say it was a commission by the Department of Social Services. Characterization becomes enormously important when litigating the purposes.

Furthermore, it is striking here that circuits really do have quite different tests. There is a radical difference between the law in the Ninth Circuit in this area and the law in the Fifth Circuit.⁹⁵ There is a real difference between the tests articulated by the Sixth Circuit and Eighth Circuit.⁹⁶

One would think, given the large volume of litigation in this area and the splits among the circuits that the Supreme Court would have stepped in. When you have a Court dealing with only seventy cases a year, however, a longer time passes before the Court can step in and clarify a particular issue. And I think it is a scenario where we do need the Supreme Court. It is about due process, an area where we need a national, uniform set of rules.

danger." *Id.*

⁹⁵ See *supra* notes 12-13, 70-73 and accompanying text.

⁹⁶ See discussion *supra* Part II.C.