Snake Pit or Prudent Safe School Policy?
The State-Created Dangers Doctrine Applied to Public Schools

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Prepared for the 2018
Education Law Association 64th Annual Conference

Cleveland, Ohio
November 9, 2018

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The State-Created Dangers Doctrine Applied to Public Schools

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As the eminent constitutional law scholar, Erwin Chemerinsky, said in 2007: 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."

Little has changed in the eleven years following Dean Chemerinsky’s comments, especially as it regards children in public schools. The events that give rise to state-created dangers actions are almost always heart-wrenching; children almost always have suffered some of the most grievous traumas imaginable, including horrific examples of rape and death. And, as Dean Chemerinsky observes, the defendants – government actors who may be at least somewhat responsible due to acts or omissions – almost always win.

The courts themselves are often keenly aware of the unfortunate circumstances, but finding legal recompense is often difficult. As Judge Moore of the Sixth Circuit remarked in a case involving the fatal shooting of a six-year old girl by one of her classmates in an unsupervised classroom:

Jane Doe’s senseless death was an undeniable tragedy, and we offer our most heartfelt condolences to those who knew and loved Jane. Judges and lawyers, like other humans, are moved by natural sympathy in a case like

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this to find a way for [Jane] and [her] mother to receive adequate compensation for the grievous harm inflicted upon them. But our sympathy is an insufficient basis for approving a recovery based on a theory inconsistent with law.³

One method of constitutional recourse, although difficult, has developed in the U.S. Circuit Courts of Appeal. The concept of state-created danger arises from a special understanding of the federal law, Civil Action for Deprivation of Rights, better known as § 1983 actions.⁴ § 1983 actions rely upon opening lines of the statute:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁵

The Act itself is silent with regards to vicarious liability, a legal concept that allows a person or entity who owes a duty to the injured party and who has failed to exercise reasonable care to prevent or promptly correct tortious behavior of the tortfeasor to be held liable. Some jurists, however, have read § 1983 to provide grounds for liability actions when government and state actors act or fail to act in such a manner that allows or encourages the tortious behavior of another.

An early expression of a state-created danger theory was advanced by the esteemed Seventh Circuit Court of Appeals Judge Richard Posner in 1982.⁶ The case at bar involved a man convicted of aggravated battery with a knife and committed as a schizophrenic in remission. Soon after being released from custody, he murdered

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³ McQueen v. Beecher Cnty. Sch., 433 F.3d 460 at 472 (6th Cir. 2006).
⁴ 42 U.S.C.A § 1983. Originally known at the “Anti-Ku Klux Klan Act,” § 1983 was passed by the United States Congress and signed into law by President Ulysses S. Grant in 1871. To date, it has been cited in more than 400,000 judicial decisions.
⁶ Bowers v. Devita, 686 F.2d 616 at 618 (7th Cir. 1982).
another young woman with a knife. Of this crime, he was found to be not guilty by reason of insanity, and again released from custody after five years. Shortly after his release, he murdered yet another woman with a knife.

The plaintiffs charged that the state had violated the victim’s constitutional due process rights by failing to protect the victim from a person it knew to be violent and unstable. In the instant case, the Seventh Circuit found that the defendant state actors did not place the victim in danger; the state merely failed to protect her. However, Judge Posner did opine that the separation of “action and inaction, between inflicting and failing to prevent the infliction of harm” is far from clear. In fact, according to Judge Posner, “If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.” Judge Posner’s words are frequently cited as the foundation for the doctrine of state-created danger.

The U.S. Supreme Court, however, has never expressly embraced the doctrine. It has held consistently that government has no obligation to protect persons from harm inflicted by others, finding specifically in DeShaney v. Winnebago Cty. Dep’t of Soc. Services that “[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.” However, the 6-3 majority opinion left open two narrow exceptions, the second of which may have been unintentional. The first, sometimes called the “special relationship” condition, envisions a situation in which the individual harmed is in custodial care of the state, especially if that custodial care is one to which the individual has not consented. In the words of the Court, “It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect

7 Id. at 618.
8 Id.
9 DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189 at 195, 109 S. Ct. 998 at 1003 (1989). This case has been cited in more than 5,400 subsequent cases, most recently in the dissent of Chief Justice Roberts in Obergefell v. Hodges, 135 S. Ct. 2584, 2620, 192 L. Ed. 2d 609 (2015): “Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196, 109 S.Ct. 998(1989).”
It is a somewhat open question as to whether “particular individuals” may include students in public schools who are at school in part because of compulsory education laws. For example, within the Eleventh Circuit, in the U.S. District Court for Middle Florida, “special relationships” have been defined to include a school and a minor student;\(^\text{11}\) in the District Court for Northern Alabama, mere compulsory school attendance laws do not create such a special relationship.\(^\text{12}\) Given a trio of \textit{en banc} decisions in the Fifth Circuit, it appears that under no circumstances would public school students be recognized as a \textit{DeShaney} “particular person.”\(^\text{13}\)

A second exception, although never expressly recognized by the Supreme Court, seems to suggest that the state could be held liable if the actions which led to the individual’s injury were created by or substantially contributed to a danger that did not exist before the state intervened. The precise words of the Court, “[while] the State may have been aware of the dangers . . . it played no part in their creation, nor did it do anything to render [the injured party] more vulnerable to them,”\(^\text{14}\) perhaps infer in the negative that if the state \textit{did} play a role in creating the danger or \textit{did} render the injured party more vulnerable to the danger, the state would be exposed to liability.

Eleven of the twelve federal circuit courts of appeal have accepted to some degree the theory of state-created danger, albeit as noted the theory has not been expressly endorsed or rejected by the Supreme Court, to allow plaintiffs to prevail on liability claims against government agencies and state actors if the plaintiff can establish that the injuries giving rise to the liability claim were caused by government action that created the

\(^{10}\) \textit{Id.} at 198. The specific example used by the court was an involuntarily committed mental health patient.


\(^{12}\) \textit{Hill v. Madison County School Board}, 957 F.Supp.2d 1320 (N.D.Ala. 2013); affirmed in part, reversed in part, 797 F.3d 948 (11th Cir. 2015). No mention was made of compulsory school attendance laws in the appellate decision.


\(^{14}\) \textit{Id.} at 201.
dangerous environment in the first place. Only the Fifth Circuit Court of Appeals has expressly rejected the state-created danger theory.

Recent high-profile events ranging from school shootings to tragic results from cyberbullying have increased pressure on public schools to do more to protect children; depending upon how the state-created danger is applied, an unintended result of more extreme efforts to protect students could instead increase the exposure for creating a danger not previously present. Both the exceptions to the DeShaney ruling are worth considering when school officials introduce drastic means whose purpose is to protect students but whose results may in fact cause them harm. A particular example would be the arming of teachers or other lightly-trained individuals in public schools for the purpose of preventing school shootings such as happened in Columbine High School in Colorado, Sandy Hook Elementary School in Connecticut, and Marjorie Stoneman Douglas High School in Florida. Some authorities have even suggested that students themselves be allowed to bring guns to campuses of both public K-12 schools and public universities. If students or bystanders are harmed by the mishandling of firearms by state actors, by others who are at best only minimally trained in their use, or by students themselves, has the state created a danger that did not previously exist? Has the arming of civilians altered the status quo negatively, albeit unintentionally, affirmatively using governmental authority in a way that created a danger to persons or that rendered persons more vulnerable to danger than had the state not acted at all? This paper will examine in some detail leading and recent cases involving the theory of state-created danger, particularly

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15 See, for example, Butera v. District of Columbia, 235 F.3d 637, 648–51 (D.C.Cir.2001); Velez-Diaz v. Vega-Inizarry, 421 F.3d 71 at 80 (1st Cir. 2005) (“This court has, to date, discussed the state created danger theory, but never found it actionable on the facts alleged.”); Pena v. DePrisco, 432 F.3d 98, (2d Cir. 2005); Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir.1996); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066–67 (6th Cir.1998); Reed v. Gardner, 986 F.2d 1122, 1125–26 (7th Cir.1993), cert. denied, 510 U.S. 947, 114 S.Ct. 389, (1993); Freeman v. Ferguson, 911 F.2d 52 at 55 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341 (1989); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir.1995), cert. denied, 516 U.S. 1118, 116 S.Ct. 924, (1996); Wyke v. Polk County School Board, 129 F.3d 560 at 567 (11th Cir.1998);

16 Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 852–53 (5th Cir. 2012). It should be noted that Doe was an en banc decision and is discussed in detail below. See also Beltran v. City of El Paso, 367 F.3d 299 (5th Cir. 2004). “This court has consistently refused to recognize a ‘state-created danger’ theory of § 1983 liability even where the question of the theory’s viability has been squarely presented.” Id. at 307.
those with a public school element, followed by a discussion and analysis of the questions above.

**Current “State-Created Danger” Decisions**

When does the government place a person in a position of danger that might rise to a state-created danger? As explained by the United States Second Circuit Court of Appeals, “various courts the term ‘state created danger’ can refer to a wide range of disparate fact patterns. For example, some courts have used the ‘state created danger' label to describe the state's duty to protect a person from private violence when the state itself has placed that person at risk.”

Other courts have established that a special relationship must exist between the government and the injured individual (a patient in a mental facility placed there against their will, for example). The U.S. Fifth Circuit Court of Appeals has made as a prerequisite to a § 1983 action the existence of “special relationships described by the Supreme Court [in DeShaney], which are limited to cases concerning ‘incarceration, institutionalization, or other similar restraint of personal liberty,’” and has flatly rejected the second exception of state created danger theory of liability.

The most vigorous denial of the existence of a state-created danger comes from the Fifth Circuit, best illustrated in a 2012 decision in Doe v. Covington County School District. The facts in the case are unimaginably horrific; the Fifth Circuit summarized them as follows:

During the 2007–2008 school year, Jane Doe (“Jane”) attended an elementary school in Covington County, Mississippi. She was nine years old at the time. At some point during the school year, Jane's guardians filled out a “Permission to Check–Out Form,” on which they listed the names of the individuals with exclusive permission to “check out” Jane from school

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17 Pena v. DePrisco, 432 F.3d 98 at 108 (2d Cir. 2005).
19 Id.
20 675 F.3d 849, (5th Cir. 2012). It should be noted that Doe was an en banc decision.
during the school day. On six separate occasions between September 2007 and January 2008, school employees allowed a man named Tommy Keyes ("Keyes"), who allegedly bore no relation to Jane and was not listed on her check-out form, to take Jane from school. On these occasions, Keyes took Jane from school without the knowledge or consent of her parents or guardians, sexually molested her, and subsequently returned her to school. On the first five occasions, Keyes signed out Jane as her father. On the final occasion, he signed her out as her mother. The complaint alleges that Keyes was able to gain access to Jane because the policy promulgated by the various school officials permitted school employees to release Jane to Keyes without first verifying Keyes's identification or whether he was among those people listed on her "Permission to Check–Out Form." The complaint contends that this policy created a danger to students and the implementation and execution of the policy constituted deliberate indifference towards the rights and safety of those students, including Jane. This policy is alleged to be the direct and proximate cause of Jane's injury.\(^{21}\)

Despite the fact that all of the other eleven circuits have recognized a theory of state-created danger, the Fifth Circuit adhered to its long-held rejection of such a theory:

We decline to use this en banc opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory. Although we have not recognized the theory, we have stated the elements that such a cause of action would require. The Scanlan panel explained that the state-created danger theory requires "a plaintiff [to] show [1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] that the defendants acted with deliberate indifference to the plight of the plaintiff." Scanlan, 343 F.3d at 537–38. To establish deliberate indifference for purposes of state-created danger, the plaintiff must show that "[t]he environment created by the state actors must be

\(^{21}\) *Id.* at 852–53
dangerous; they must know it is dangerous; and ... they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.\(^\text{22}\)

Without a state-created danger theory, the Fifth Circuit limits assigning any liability to a government actor for any action involving a third party's behavior to the only clear exception by the U.S. Supreme Court: “the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”\(^\text{23}\) Given the long history of the Fifth Circuit’s understanding of “particular individuals” as only those who have had their liberties restricted by state action – incarcerated prisoners, institutionalized mental health patients, or children placed in foster care – it is unsurprising that the Fifth Circuit does not allow any recognition of school children as being included in the class of “particular individuals”:

We reaffirm, then, decades of binding precedent: a public school does not have a DeShaney special relationship with its students requiring the school to ensure the students' safety from private actors. Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody. See DeShaney, 489 U.S. at 199–200, 109 S.Ct. 998; Griffith, 899 F.2d at 1439. Without a special relationship, a public school has no constitutional duty to ensure that its students are safe from private violence.\(^\text{24}\) (Emphasis in original)

In the Fifth Circuit, at least, a nine-year-old female student who was released six separate times over a four-month during the school day to an unauthorized male who bore no relationship to the child, who was not listed as a person given permission by the child’s parents to take her from school, who on one occasion signed out the child posing as her mother, who then proceeded to molest, rape, and sodomize the nine-year-old girl

\(^{22}\) Id. at 865.

\(^{23}\) DeShaney, 489 U.S. 189 at 198, 109 S. Ct. 998.

\(^{24}\) Id. at 857–58.
before returning her to school, has no expectation that the United States Constitution provides her any protection or recourse.

Standing in stark contrast to the Fifth Circuit is the U.S. Third Circuit Court of Appeals, which found as early as 1996 that “we hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983.”

In a 2016 decision, *L.R. v. School District of Philadelphia*, the Third Circuit reiterated its understanding of DeShaney to allow a state-created danger doctrine. The facts in *L.R.*, tragic and disturbing as in *Doe*, are well summarized by the court:

On an ordinary school day in January 2013, Christina Regusters entered W.C. Bryant Elementary School in Philadelphia, Pennsylvania, where Jane was enrolled as a kindergarten student. Regusters proceeded directly to Jane’s classroom, where she encountered Defendant Reginald Littlejohn, Jane’s teacher. Per Philadelphia School District policy, Littlejohn asked Regusters to produce identification and verification that Jane had permission to leave school. Regusters failed to do so. Despite this failure, Littlejohn allowed Jane to leave his classroom with Regusters. Later that day, Regusters sexually assaulted Jane off school premises, causing her significant physical and emotional injuries.

Jane was found the next day in an empty playground during the early morning hours by a sanitation worker who, luckily, heard Jane’s cries. Jane’s mother brought state-created danger claims against the school district and the teacher. The teacher sought qualified immunity, the U.S. District Court for the Eastern District of Pennsylvania denied it, and the teacher appealed to the Third Circuit.

The Third Circuit affirmed the District Court’s denial of qualified immunity. In the court’s words, “we conclude that it is shocking to the conscience that a kindergarten teacher would allow a child in his care to leave his classroom with a complete stranger.”

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25 *Kneipp v. Tedder*, 95 F.3d 1199 at 1211 (3rd Cir. 1996).
26 836 F.3d 235 (3rd Cir. 2016).
27 *Id.* at 239-40.
28 *Id.* at 239.
The Third Circuit began its analysis by clarifying a four-part test to determine a state-created danger exception to the general rule in *DeShaney* that the government is not obligated by the Due Process Clause to protect persons from harm a non-state actor. According to the Third Circuit, a state-created danger exists when

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 the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
4. a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.²⁹

In the instant case, starting with the fourth prong, the Third Circuit decided that failure to act can indeed be construed as an affirmative action. After noting that “virtually any action may be characterized as a failure to take some alternative action,”³⁰ the Third Circuit wrote:

> Defendants attempt to reframe Littlejohn’s alleged actions as inactions, or failures. They argue that Littlejohn’s *failure* to follow School District policy, *failure* to obtain proper identification from Regusters, and *failure* to obtain verification from Regusters that Jane had been permitted to leave school are not *affirmative* acts. This strategy is unavailing. (Emphasis in original)

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²⁹ *Id.* at 242, citing *Bright v. Westmoreland County*, 443 F.3d 276 (3rd Cir. 2006). Other circuits have constructed similar tests. For example, the 10th Circuit uses similar but slightly different language: “(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) defendants’ conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.” *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001).

³⁰ *Id.* at 240.
Instead of trying to choose between defining an action versus an inaction, the court suggests “a way to think about how to determine whether this element has been satisfied, [that] helps to clarify whether the state actor’s conduct ‘created a danger or rendered the citizen more vulnerable to danger than had the state not acted at all.’”31 The suggestion that first evaluating the “‘status quo’ of the environment before the alleged act or omission occurred, and then asking whether the state actor’s exercise of authority resulted in a departure from that status quo”32 provides a clearer path through the thicket of when doing nothing is akin to causing harm.

The Third Circuit had no difficulty in distinguishing the action of the kindergarten teacher from the state actors in DeShaney whose inaction of failing to remove a small boy (Joshua) from his dangerous father after having previously removing Joshua led to severe injuries to the boy. In fact, the Third Circuit quoted the DeShaney court directly to support its content of the status quo argument: “That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.”33 Said another way, the Third Circuit found specific U.S. Supreme Court language in DeShaney to provide precedent for its status quo test.

The Third Circuit then took pains to distinguish L.R. from its previous decision in Morrow v. Balaski.34 In Morrow, the Third Circuit failed to find a state-created danger when a student who had previously been suspended from school for bullying was allowed to reenter school. School policy required that the student be expelled, but the school suspended the student instead. After reentering the school, the student bullied two other students whose parents brought suit seeking a § 1983 action based on a state created danger. The Third Circuit dismissed the claim, holding that “the school’s failure to enforce its own disciplinary policy was not equivalent to an ‘affirmative act’”35 in that allowing the

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31 Id., quoting its prior ruling in Bright v. Westmorland County, 443 F.3d 276 at 281 (3rd Cir. 2006).
32 Id. at 243.
33 Id. at 243, quoting DeShaney, 489 U.S. at 201, 109 S.Ct. 998.
34 719 F.3d 160 (3rd Cir. 2013).
35 L.R. at 243.
student to return to school was simply a maintenance of the status quo and “insufficient to create liability.”

The Third Circuit found the facts in *L.R.* much different; the teacher’s action was far from maintaining the status quo. Jane was safe in the teacher’s classroom from the malevolence of Regusters; when the teacher allowed Jane to go with Regusters, the court found that he had affirmatively misused his authority as a teacher and placed Jane in great danger. The teacher did not know, of course, what Regusters had planned, but that was no matter to the Third Circuit: “When Littlejohn surrendered that responsibility by releasing Jane to an unidentified adult, thereby terminating her access to the school's care, he affirmatively misused his authority.”

Regarding the first three elements of a state created danger established by the Third Circuit (the harm must be foreseeable and fairly direct; a state actor must act in a manner that shocks the conscience; and the plaintiff must have a relationship to the state that is not common to members of the general public), the court found that 1) releasing a young child to a stranger inherently involved risk of harm that was foreseeable not only by an experienced teacher but as a matter of common sense; 2) releasing a five-year-old to a stranger who failed to produce identification or verification of her right to have access to the child even after the teacher had asked for both rises to conscience-shocking behavior; and 3) Jane was clearly a child owed a special duty by her kindergarten teacher to keep her safe from a total stranger who suddenly shows up at her classroom.

One cannot help but wonder if the parents of the Jane Doe of Pennsylvania in the Third Circuit’s jurisdiction would have experienced the same relief if she had lived instead in the Jane Doe of Mississippi in the Fifth Circuit’s jurisdiction.

Less than a year after its *L.R.* decision, the Third Circuit had an additional opportunity to consider a state-created danger claim. In *Mann v. Palmerton Area Sch. Dist.*, a football player suffered an extraordinarily hard hit in practice and, according to

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36 *Id.* at 244.
37 *Id.*
38 872 F.3d 165 (3d Cir. 2017), as amended (Sept. 22, 2017).
many present, immediately exhibited concussion-like symptoms. The head coach, who had received training on recognizing concussions, talked to the player briefly, then sent him back into practice. A short while later, the player once again took a strong hit to his head and was removed from the practice. Later, he was diagnosed as having a traumatic brain injury. The parents brought suit, alleging that the coach had created an unreasonable risk of danger to their child by not removing him immediately from practice following the first hit.

The Third Circuit examined the case against its four-pronged standard. Based on the coach’s testimony that he was trained both on the signs of concussions and to err on the side of caution when it a player was exhibiting concussion-like symptoms, the Third Circuit concluded that sufficient evidence existed to support a jury finding that the injury suffered by the player was both foreseeable and fairly direct given that the coach did not remove the player following his first hit. Regarding the second element, the court found that the coach’s behavior of returning the player to practice who was exhibiting concussion-like symptoms rose to a degree that shocked the conscience and that the coach was deliberately indifferent to the exposure to harm created by the boy being returned to practice. The third element, that of a relationship of protection by the coach, was easily satisfied; a coach’s primary responsibility is to keep his or her players reasonably safe from harm. On the final element, that of affirmative action that made the player more susceptible to harm, the court found that a reasonable jury could conclude that the coach used his authority to subject the injured player to additional harm when he returned him to practice.

Although the Third Circuit found the factual situation in Mann to meet all the criteria for a state-created danger, the court believed that the constitutional duty of the coach to the athlete was not sufficiently clear on the date of the occurrence such that qualified immunity would be abrogated. Thus, although the court found all the elements necessary for a state-created danger case to made, the coach’s protection of qualified immunity cloaked him from such a finding.

Two years before the Mann case, the Third Circuit had been presented with another school-related athletic injury that ended sadly in the death of a fifteen-year old
male student who suffered a rare form of suffocation termed “secondary drowning.”

During a required physical education class in swimming, the boy told his teacher his chest was hurting after he had been in the pool for several minutes and asked for permission to be stay out of the pool for the remainder of class. The teacher rejected the request; the boy went back into the water but remained in the shallow end. After changing clothes and moving to his English class, about an hour and a half after leaving the pool, the boy suddenly fell backward from his seat and began having a seizure. He was taken by ambulance to a hospital; he later died that day.

A medical report found that the boy died of a condition known as delayed or secondary drowning. Very rare, it is caused by a small amount of water being inhaled; the lungs begin to spasm, causing build-up of other fluids; somewhere from one to twenty-four hours later, the victim asphyxiates due to his lungs’ inability to oxygenate the blood.

Noting that “the state-created-danger analysis necessitates a fact-intensive inquiry,” the Third Circuit invoked instead the *Pearson v. Callahan* doctrine that allows courts to resolve qualified immunity claims by first determining whether or not the claims of the plaintiffs are clearly established violations of constitutional rights. The court concluded that it would be unreasonable to expect that the state would have an affirmative duty to minimize the risk of secondary drowning, a condition so rare that it composes less than 2% of drowning deaths. Said another way, the court did not believe “it would have been apparent to a reasonable gym teacher that failure to take action to assess a non-apparent condition that placed the student in mortal danger violated that student's constitutional right under the state-created-danger theory of liability.”

Three weeks after its decision in the *Mann* case, the Third Circuit had yet another opportunity to review state-created dangers. In *Gayemen v. Sch. Dist. of City of Allentown*, the plaintiff sought a § 1983 judgement based on a state-created danger

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40 Id. at 638.
42 Spady, 800 F.3d at 639.
43 712 F. App'x 218 (3d Cir. 2017).
exception when the school district when it failed to protect him from gang-related violence at school. Finding that the school district had done nothing to increase the danger to the plaintiff, the Third Circuit adhered to its status quo test affirming the lower court’s granting of summary judgement to the school district. The Third Circuit found no reason to address the other elements of the state-created danger doctrine because of the plaintiff’s failure to show that the school’s inaction affirmatively worsened the danger for the plaintiff.

This is not to imply that what amounts to affirmative action is easy to determine, even in the Third District. The U.S. District Court for Western District of Pennsylvania, a court under the jurisdiction of the Third Circuit Court, found in 2018 that a school’s failure to intervene in the bullying of a seventh grade student, even though the school district knew of the bullying, did not follow its policy regarding intervening in bullying and did not follow its policy requiring notification of the parents of the bullying, did not violate the status quo of the student.

Again, the facts of the case are heartbreaking. A seventh grade student, W.J.L., encountered “intense, persistent, malicious bullying from fellow students. The bullying involved “unwanted and unwarranted physical contact, persistent and pervasive ridicule, threats of violence, and statements that W.J.L. was ‘better off dead’ and should commit suicide.” Regrettably, W.J.L. took the advice to heart, and killed himself on May 18, 2017, after “a particularly brutal day of bullying at school.”

During the time that W.J.L. was being bullied, he asked a male teacher if he could leave the classroom and go to the guidance counselor’s office. The male teacher responded that W.J.L. “needed to stop being a baby.” Students, teachers, school administrators, and guidance counselors were all aware that W.J.L. was suffering from unrelenting bullying, but nothing was done. Contrary to school policy, school officials did not tell W.J.L.’s parents about the bullying. No disciplinary measures were taken against W.J.L.’s tormenters, perhaps because they were football players. W.J.L. was bullied at school, on his way home from school, and online.

45 Id.
46 Id.
W.J.L.’s father, as executor of the estate, (hereafter referred to as Lansberry) brought suit against the Altoona Area School District, alleging a Title IX violation and § 1983 state-created danger claim.

Regarding the Title IX violation, the court found that bullying did not, by itself, rise to sexual harassment. The court dismissed the Title IX claim subject to leave to amend.

Regarding the state-created danger claim, the court turned to the Third Circuit’s four part test; namely a state-created danger requires: 1) the harm must be foreseeable and fairly direct; 2) a state actor must act in a manner that shocks the conscience; 3) the plaintiff must have a relationship to the state that is not common to members of the general public; 4) and the state actor must use affirmatively his or her authority so that a danger is created to the plaintiff or causes the plaintiff to be more vulnerable to danger than had the state done nothing at all.\(^\text{47}\) The court focused on the fourth prong.

Lansberry claimed several specific affirmative uses of authority that created or increased the danger to his son: the school took no action despite the persistent and cruel bullying of W.J.L., the male teacher’s remark about stop being a baby and preventing W.J.L. from visiting the guidance counselor, and the school’s failure to inform W.J.L.’s parents of the bullying – a violation of the school’s own policy – exposed his son to increased danger and led or at least contributed to his son’s decision to commit suicide. The school district responded that none of Lansberry’s claims constituted an affirmative act.

Referring again to Third Circuit precedent, the district court found that “defendants are only liable for ‘misuse of state authority, rather than a failure to use it.’”\(^\text{48}\) Quoting the Third Circuit, the court found that it should “first evaluate the setting or the ‘status quo’ of the environment before the alleged act or omission occurred, and then to ask whether the state actor’s exercise of authority resulted in a departure from that status quo.”\(^\text{49}\) Part of that analysis is determining the difference between clearly passive acts and clearly affirmative acts. In the instant case, the court found that the inaction of the school officials,

\(^{47}\) Id. at 754, citing L.R. v. School District of Philadelphia, 836 F.3d 234 at 242 (3rd Cir. 2016).
\(^{48}\) Id. at 755.
despite the fact that it was aware of the bullying and violated its own policy to notify parents of bullying at school, was a passive rather than an affirmative act.

The court noted sympathy for Lansberry and pointedly disapproved of the school district’s inaction, but found that the inactivity failed to rise to an affirmative act that increased the danger to W.J.L. Instead, the court, relying again on *L.R. v. School District of Philadelphia*, ruled that “failure to intervene to stop the bullying merely preserved the status quo,” that the teacher’s remark and denial to allow W.J.L. merely preserved the status quo of keeping W.J.L. in class and under his control, and that the school’s “violating its own policy of informing parents when their children suffer bullying” did not constitute affirmative action. Accordingly, the state-created danger claim was dismissed without leave to amend.

Similarly, across the state, the U.S. District Court for the Eastern District of Pennsylvania recently took up the matter of bullying, the results of which, gratefully, did not end in suicide. Nonetheless, the suffering endured by the child was severe – she was attacked and beaten – and her parents claimed that it was in due in part to the inaction on the part of school officials by not disciplining previous instances of bullying and by failing to intervene when the attack occurred; one school official was alleged to have encouraged the attack.

The court, however, could not reach the conclusion that the school had created a danger through its inaction. For the plaintiff’s argument to succeed, “she would need to allege facts that show an active effort on the part of the school to encourage bullying, and an effort to make the school a less safe place for the children. Short of such facts, H.J. [the plaintiff] cannot meet her burden of establishing a state-created danger.”

In contrast to the school bullying cases, in *Wion v. Rodland*, the U.S. District Court for the Western District of Pennsylvania considered the untimely death of an eleven-year old boy who was struck by a vehicle while crossing a state highway to reach

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50 *Id. at 756.*
51 *Id.*
his assigned bus stop. The mother of the deceased brought a state-created danger theory of liability, contending "that Noah's death was caused by the Defendants' decision to place his bus stop in a location that required him to cross a dangerous county road during hazardous conditions." The court agreed that summary judgement for the defendants was inappropriate. Because the school district's disregard of the obvious dangers of its placement of the bus stop, its behavior satisfied the conscience-shocking requirement. The district’s placement of the bus stop left the decedent with no option other than to cross a dangerous highway to get to and from the bus, an affirmative use of its authority that increased the danger to the decedent. The court, accordingly, refused to grant a summary judgement to the defendants on the state-created danger allegation.

In yet another recent case within the jurisdiction of the Third Circuit, the U.S. District Court for New Jersey found in favor of the state defendants in a state-created action claim. In Colombo v. Bd. of Educ. for Clifton Sch. Dist., a parent pled a state-created danger § 1983 claim, alleging a school's principal had sexually harassed her after he had granted her request not to suspend her son from school. Concurrent with the harassment of the mother was alleged conduct that her son was bullied and subject to other inappropriate behavior about which school officials did nothing. The mother alleged a nexus between her rejection of the sexual advances by the principal and the unequal treatment her son received from school staff.

The plaintiffs claimed that the school board knew of previous sexual harassment allegations against the principal when he was employed at another school in the district and hired him anyway, creating a risk that students may be victims of sexual harassment by him. Further, the plaintiffs alleged that the school board increased the danger by ignoring complaints of unprofessional behavior alleged against the principal. The District Court found that neither allegation amounted to a state-created danger. In the first instance, the hiring of the principal “was too attenuated to constitute a foreseeable or fairly direct consequence of hiring [the principal] with the harassment suffered by the

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54 Id. at 1.
56 Id. at 9.
plaintiff’s son. With regard to the second claim, the district’s ignoring complaints against the principal amounted to passive inaction, not the required affirmative use of its authority. In so doing, the district court found no state-created danger in the behavior of the defendants.

Similarly, in a 2018 case from the U.S. District Court for Kansas, a parent charged that his daughter was sexually assaulted at school by another student. Acknowledging the obvious trauma suffered by the daughter, the court nonetheless found that the plaintiff never alleges that any defendant acted affirmatively to create the danger or increase plaintiff’s vulnerability. Instead, it merely asserts that defendants “created ‘a dangerous situation or render[ed] more vulnerable to danger’ by failing to promptly and effectively address and remedy prior allegations of sexual misconduct against the perpetrator, thereby exposing to the sexual assault she endured.” Failing to act is not an affirmative act. So even if defendants failed to act in the fashion the Complaint alleges, that would not violate the Due Process Clause.57 (Emphasis in original)

In 2012, the U.S. District Court for Arizona reached a similar conclusion with similar facts.58 The seventeen-year old son of the school principal was indicted for sexually assaulting the plaintiffs’ fourteen-year old daughter and sexually assaulting at least two other girls as well. Based on the indictments, the plaintiffs alleged that the defendant principal (John Allen)

was aware of these incidents [from December 2009 and May 2010] and similar illegal and improper actions taken by his son, Rance. However, Defendant John Allen failed to take reasonable measures to protect female students at Round Valley High School from a known sexual predator. Instead, Defendant John Allen attempted to conceal these improper and

illegal actions and shield his son from disciplinary or protective actions he would have taken against any other student in similar situation.\textsuperscript{59}

The court, however, concluded that even if he knew that his son was sexually active, he could not foresee that his son posed a specific danger to the plaintiffs’ daughter. The court found that the principal’s failure to act does not support a constitutional violation. “By contrast, there is no ‘affirmative act’ when a government official allows a dangerous situation to develop or continue without intervention—even if the official affirmatively chooses not to intervene.”\textsuperscript{60}

Four years later, this same court had reason to revisit the concept of state-created danger when the parents of a special needs child alleged that the child “was subjected to undue harassment, bullying, and taunting for several months by both peers and school staff while attending school in the District. Plaintiffs allege the District and [the school resource officer] knew about the incidents, but failed to take adequate steps to remedy the situation.”\textsuperscript{61} The alleged bullying spanned a period of twenty months.

Consistent with its decision in sexual harassment case, the District Court ruled against the plaintiffs. Quoting its previous decision, once again the court found that simply because the “Defendants permitted a dangerous situation to develop or continue does not satisfy the “affirmative act” requirement of the state-created danger.”

Another tragic death was at the heart of a state-created danger claim arising in the U.S. Sixth Circuit Court of Appeals in 2006. On a winter morning, a six-year old student (hereafter called John Smith) brought a gun to Buell Elementary School in Michigan and fatally shot a female first-grade classmate.\textsuperscript{62} Prior to the shooting, the John Smith’s teacher had left him, the victim, and four other students behind in the classroom as punishment for not doing their work when the teacher took the other students to computer class. Thus, when John Smith shot the victim, the teacher was not in the room; there was no other adult supervision in the room.

\footnotesize{\textsuperscript{59} Id. at 1129.
\textsuperscript{60} Id. at 1133.
\textsuperscript{62} \textit{McQueen v. Beecher Cmty. Sch.}, 433 F.3d 460 (6th Cir. 2006).}
In the months before the shooting, John Smith had been involved in several other incidents of violence, including attacking students, beating them up, and stabbing them with pencils. Neither the principal nor the school district took substantive steps to protect the other students from John Smith’s violence.

In considering the claims of state-created danger, the Sixth Circuit reviewed its own adoption of the theory in *Kallstrom v. City of Columbus* and the three requirements it had established then: “an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability.” The court found that leaving students unsupervised was not an affirmative act that created or increased risk to the students sufficient to satisfy the first of the three requirements established in *Kallstrom*. Adopting in part the Third Circuit’s argument about affecting the status quo, the court found that the victim would have been in roughly the same danger even if an adult was present; the court found that the danger was that Smith possessed a gun and that danger was irrespective of whether or not a teacher was present. With regard to the previous misbehavior by John Smith, the Sixth Circuit used the words of District Court Judge Friedman:

> Although [the teacher] was aware of [Smith’s] disruptive and sometimes violent behavior, no reasonable fact finder could conclude that she knew [Smith] would use a gun to kill another student if left unsupervised for a few minutes. Plaintiff does not claim that [Smith] ever specifically threatened to kill or seriously injure decedent [Doe] or any other student. Nor does plaintiff claim that prior to February 29, 2000, [Smith] had ever brought a gun or other dangerous weapon to school. Absent such evidence, it is impossible to conclude that defendant was on notice of a substantial risk to the students left alone in the classroom.”

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63 136 F.3d 1055, 1066–67 (6th Cir.1998).
64 *Id.* at 1066-67.
65 *McQueen*, 433 F.3d at 469–70.
Discussion

We are left, then, with a cloudy crystal ball when it comes to predicting what future actions of school officials that result in unintentional injury to students will be actionable under a state-created danger claim. First, the U.S. Supreme Court has not definitively embraced the theory of state-created dangers, and the Supreme Court may be moving in a direction less friendly to plaintiffs of all kinds. However, all of the federal Circuit Courts of Appeals save for the Fifth District have accepted the doctrine. The Third Circuit has perhaps the richest trove of cases in which to search for guidance, and it has left us with two clear charts. A state-created danger exists when

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 the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
4. a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

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66 It could, perhaps, be argued that even the Fifth Circuit has acknowledged at least a path to a state-created danger claim. “[W]e have not recognized the theory, [but] we have stated the elements that such a cause of action would require. The Scanlan panel explained that the state-created danger theory requires “a plaintiff [to] show [1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] that the defendants acted with deliberate indifference to the plight of the plaintiff.” Scanlan, 343 F.3d at 537–38. To establish deliberate indifference for purposes of state-created danger, the plaintiff must show that “[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and ... they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.” Piotrowski v. City of Houston, 237 F.3d 567, 585 (5th Cir.2001) (citation and internal quotation marks omitted); see also McClendon, 305 F.3d at 326 n. 8 (“To act with deliberate indifference, a state actor must know of and disregard an excessive risk to the victim's health or safety.”) (Internal quotation marks and alterations omitted). Doe, 675 F.3d at 865.

67 L.R. 836 F.3d at 242, citing Bright v. Westmoreland County, 443 F.3d 276 (3rd Cir. 2006). As mentioned in a previous note, other circuits have constructed similar tests. For example, the 10th Circuit uses similar but slightly different language: “(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) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted
Additionally, the starting point of any determination regarding a state-created danger must be an analysis of the status quo. Said differently, had the state actor not acted as it did, would the status quo have provided a more secure and protected environment for the children under a school’s care?

Finally, the case law taken as a whole does not readily find inaction to be the same as action. A failure to act has rarely if ever been the basis for a successful state-created danger claim, even if the failure to act results in death or rape.

Throughout the tale of state-created danger claims, we see sadly certain recurring themes at least tangentially connected with school attendance: deaths, sexual assaults, bullying and harassment, severe life-long injuries. No one connected with schools wishes to see these things for children, and yet at times it seems impossible to stop them. Educators and political leaders alike are naturally inclined to try to solve problems. As a result, various suggestions such as increasing firearms at school, state monitoring of online behavior, reducing privacy rights of students at school ebb and flow. Each, however, has the unintended drawback that the solution may cause more problems than it solves.

Beginning this academic year, legislation in Florida passed in reaction to the horror at Douglas High School in Parkland, Florida, requires each school to have an armed police officer or a similar armed security guard on duty full time. In talking to both police officials and principals, I sense real hesitation from both about the wisdom of the statute. The immediate problem is the resources needed. The police and sheriffs with whom I have spoken are deeply worried about finding the right human resources given the significant numbers involved. Some are truly frightened that the chances of hiring just one Wild Bill Hickok or malevolent malcontent greatly increase the risk to students and school personnel and do irreparable damage to faith in law enforcement. They also worry about the true ability to make a difference in an active shooter scenario. As the Sixth Circuit pointed out in the case dealing with the first grade student shooting and killing a

recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.” *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001).
classmate, a case decided before either the tragedies at Sandy Hook and Douglas High School,

The danger to Doe [the victim] was created by Smith's [the shooter's] possession of a gun and Doe's presence in the classroom with him. This danger existed irrespective of Judd's [the teacher's] location. If Judd had been in the room, there is no guarantee that, upon seeing the gun, she would have gotten to Smith in time to prevent the shooting; indeed, in a busy classroom, she may not have even noticed Smith's actions until the fatal moment. (Perhaps if Judd had been standing right next to Smith, she could have wrested the gun from him before he loaded and fired it. But there is no guarantee that Judd would have been so positioned if she had been in the room.) Also, there is no reason to believe that Judd's presence in the room would have discouraged Smith from drawing the weapon, as Smith's behavioral issues indicate that he did not shy away from misbehaving directly in Judd's view. Therefore . . . Doe would have faced the danger of Smith drawing his gun and firing at her even if Judd had not acted (i.e., if Judd had remained in the classroom at all relevant times). 68

Many in Florida law enforcement agencies believe that the Sixth Circuit is prescient in describing the potential futility of having armed guards in school.

Principals in Florida are worried about what to do with an armed guard for eight hours a day. Although School Resources Officers have been in Florida schools for decades, school districts usually assign them only to large high schools or high-crime middle schools. Elementary principals are especially worried that they simply do not have enough activity requiring police intervention to fill an eight-hour day.

Recently, a board of a large school system in Florida held an open hearing on the advisability of arming teachers. Most who spoke, spoke against, especially representatives of teacher groups. Particularly telling was an older gentleman from the New England area. He told the board that when he was in school, had he found out that a teacher had a gun, he would have resolved to find that gun simply for the thrill of the

68 McQueen v. Beecher Cmty. Sch., 433 F.3d 460 at 466 (6th Cir. 2006).
hunt. What he would have done with the gun, he did not know; his family did not own guns. He testified that he was more frightened by what he may have accidentally done with the gun and the real possibility that either he or someone else would have been hurt.

Thinking about the Third Circuit’s status quo test, a version of medicine’s first rule of “do no harm,” it is easy to speculate that increasing the number of guns at school would make everyone at the school less safe than if a school did nothing. For the other elements of the Third Circuit’s test, the foreseeable and fairly directness of harm resulting from increasing firearms on campus seems apparent. Perhaps less so is acting with a degree of culpability that shocks the conscience, but if a student comes into possession of a teacher’s loaded weapon and opens fire on others, a policy of arming teachers in retrospect may indeed appear shocking; and clearly the relationship between the state and its school children and school employees is such that schools should be protecting rather than exposing to the potential harm of scores of guns being added to a school environment.

The case law encourages us to do less rather than more. Even when inaction may have resulted in suicide, shootings, death, or sexual assault, the plaintiffs have a difficult mountain to climb when it comes to inaction that falls short of deliberate and callous indifference. The lesson seems to be that although heartbreaking things happen to children, educators will never be able to prevent all of them. From a legal perspective, perhaps the best we can do is make sure our actions do not increase dangers unwittingly while trying to find measures to protect students at school.
Table of Authorities

Beltran v. City of El Paso, 367 F.3d 299 (5th Cir. 2004).
Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982).
Bright v. Westmorland County, 443 F.3d 276 at 281 (3rd Cir. 2006).
Currier v. Doran, 242 F.3d 905 (10th Cir. 2001).
Doe v. Faerber, 446 F. Supp. 2d 1311 (M.D. Fla. 2006).
Doe v. Hillsboro Independent School District, 113 F.3d 1412 (5th Cir. 1997).
Freeman v. Ferguson, 911 F.2d 52 at 55 (8th Cir. 1990).
Gayemen v. Sch. Dist. of City of Allentown, 712 F. App'x 218 (3rd Cir. 2017).
Hill v. Madison County School Board, 957 F.Supp.2d 1320 (N.D.Ala. 2013); affirmed in part, reversed in part, 797 F.3d 948 (11th Cir. 2015).
Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir.1998).
Kneipp v. Tedder, 95 F.3d 1199 (3d Cir.1996).
McQueen v. Beecher Cmty. Sch., 433 F.3d 460 (6th Cir. 2006).
Morrow v. Balaski, 719 F.3d 160 (3rd Cir. 2013).
Pena v. DePrisco, 432 F.3d 98, (2d Cir. 2005).

Piotrowski v. City of Houston, 237 F.3d 567 (5th Cir. 2001).


Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633 (3d Cir. 2015).


Velez-Diaz v. Vega-Irizarry, 421 F.3d 71 (1st Cir. 2005).

Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995).


Wyke v. Polk County School Board, 129 F.3d 560 (11th Cir. 1998).