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An Unattainable Standard: Analyzing the Fourth Circuit's Approach to the State-Created Danger Doctrine

Elizabeth G. Poole

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Generally, a state does not have a duty to protect citizens from third-party harm. However, the state-created danger doctrine operates as an exception, imposing liability where the state's conduct created the danger that harmed the victim. Circuits differ in their interpretation of the doctrine, and the Fourth Circuit's approach is among the narrowest, requiring that the victim was in government custody at the time of the harm, and that the state acted affirmatively to create the danger. In Callahan v. North Carolina Department of Public Safety, *the Fourth Circuit reaffirmed its high bar for plaintiffs in state-created danger cases. After a prison guard was killed by an inmate, the court held that the plaintiff failed to state a claim that state prison officials created the danger to the prison guard by failing to adequately staff the unit and train the guards. This Recent Development argues that the Fourth Circuit's special relationship requirement and its emphasis on the affirmative nature of the state actor's conduct fail to serve the countervailing interests underlying the state-created doctrine: holding state actors accountable, while also affording them enough flexibility to effectively do their jobs. By imposing an excessively high standard for state-created danger liability, the Fourth Circuit fails to appropriately balance these interests, sacrificing the former for the sake of the latter.*

INTRODUCTION

Consider the following scenarios: (1) a state prison guard is working in an understaffed unit when she is killed by an inmate known to have been experiencing homicidal thoughts;[1] and (2) a nurse employed by a state prison is raped and terrorized by an inmate serving time for violent sexual assault.[2] In the context of state liability for placing victims in harm's way, is there a meaningful distinction between these scenarios? Yes, but not for the reasons articulated by the Fourth Circuit in *Callahan v. North Carolina Department of Public Safety*.[3] After the Supreme Court ambiguously articulated the state-created danger doctrine in *DeShaney v. Winnebago County Department of Social Services*,[4] circuit courts were left with broad discretion to interpret that

1. *See* Callahan v. N.C. Dep't of Pub. Safety, 18 F.4th 142, 144–48 (4th Cir. 2021) (discussing whether such facts give rise to state liability).

2. *See* L.W. v. Grubbs, 974 F.2d 119, 121–23 (9th Cir. 1992) (analyzing whether the plaintiff successfully stated a claim against the prison officials supervising the nurse).

3. 18 F.4th 142 (4th Cir. 2021).

4. 489 U.S. 189 (1989).

doctrine.[5] Whereas most circuits have interpreted the doctrine broadly, the Fourth Circuit's interpretation has been excessively narrow, resulting in seemingly antithetical results.

This Recent Development is divided into four parts. Part I discusses the origins of the state-created danger doctrine in the Supreme Court decision *DeShaney*. Part II examines the Fourth Circuit's interpretation of the doctrine. Part III discusses the Fourth Circuit's holding in *Callahan*. Part IV analyzes other circuits' approaches to the state-created danger doctrine and suggests an approach that will enable plaintiffs to prevail on meritorious claims without eclipsing the general no-duty for third-party harm rule.

I. THE ORIGIN OF THE STATE-CREATED DANGER DOCTRINE: *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*

The state-created danger doctrine originated in dicta in the Supreme Court's holding in *DeShaney*.[6] There, a father brutally beat his four-year-old son, inflicting permanent brain damage.[7] Despite receiving numerous complaints about the abuse, the Department of Social Services failed to remove the child from the father's custody.[8] The child's guardian sued under 42 U.S.C. § 1983, alleging that the social services department violated the child's Fourteenth Amendment substantive due process rights.[9] The Supreme Court in *DeShaney* held that the Due Process Clause does not impose a duty upon states to protect citizens from private actors.[10]

However, the Court carved out an exception for certain citizens in the custody of the government (the special relationship exception), such as "incarcerated prisoners and involuntarily committed mental patients"[11] to whom the state owes a duty of protection.[12] Additionally, the Court identified another possible exception in dicta: even if the State was aware of the danger to the victim, so long as the State did not create or increase this danger, the State did not owe a duty to this victim.[13] This language laid the foundation for the state-created danger doctrine, spawning varying approaches among the circuits.

5. *Id.* at 201.

6. *See id.*; Christopher M. Eisenhauer, Comment, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 PENN ST. L. REV. 893, 897–908 (2016) (surveying various circuits' approaches to the state-created danger doctrine).

7. *DeShaney*, 489 U.S. at 189.

8. *Id.* at 191.

9. *Id.* at 189–90; *see infra* Section III.B.

10. *DeShaney*, 489 U.S. at 195.

11. Eisenhauer, *supra* note 6, at 897.

12. *DeShaney*, 489 U.S. at 198–99.

13. *Id.* at 201 (explaining that "[w]hile the State may have been aware of the dangers" facing the victim in the outside world, the State "played no part in their creation, nor did it do anything to render [the victim] any more vulnerable to [harm]" and that the State "placed [the victim] in no worse position than that in which [the victim] would have been had it not acted at all . . . .").

II. THE DEVELOPMENT OF THE FOURTH CIRCUIT'S STATE-CREATED DANGER DOCTRINE

The Fourth Circuit has narrowly construed the state-created danger doctrine by limiting the universe of potential plaintiffs to those in government custody at the time of the harm and by imposing an affirmative act requirement. In *Piechowicz v. United States*,[14] the Fourth Circuit articulated its interpretation of *DeShaney*, combining the two exceptions identified by the Supreme Court (the special relationship exception and the state-created danger exception).[15] Specifically, the Fourth Circuit held that "Fifth Amendment substantive due process protects the liberty interests only of persons affirmatively restrained by the United States from acting on their own behalf."[16] Applying this standard, the court held that the government did not create the danger—and thus was not liable—for the murder of a government witness in a federal trial by a contract killer hired by the defendant.[17]

In *Rowland v. Perry*,[18] the Fourth Circuit again cited *DeShaney* for its proposition that government custody is a prerequisite to a state-created danger duty.[19] Finding that the plaintiff's fifteen-minute police detention did not establish the necessary special relationship, the court found no due process violation for injuries plaintiff allegedly suffered at the hands of the arresting officer.[20] Against this backdrop, the Fourth Circuit decided *Pinder v. Johnson*[21] in 1995.[22]

A. Pinder v. Johnson*: The Fourth Circuit's Interpretation of* DeShaney

The Fourth Circuit's decision in *Pinder* revealed that the state-created danger exception is extremely narrow and that the bar for proving an affirmative act and a special relationship is exceedingly high. In *Pinder*, the Fourth Circuit first addressed the state-created danger doctrine,[23] noting that it "has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause."[24] In *Pinder*, the plaintiff called the police after her former boyfriend broke into her home, was abusive and

14. 885 F.2d 1207 (4th Cir. 1989).
15. *Id.* at 1214–15.
16. *Id.* at 1215; *see* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 3–4 (2007).
17. 885 F.2d at 1214–15.
18. 41 F.3d 167 (4th Cir. 1994).
19. *Id.* at 174.
20. *Id.* at 175.
21. 54 F.3d 1169 (4th Cir. 1995).
22. *Id.* at 1169.
23. *Id.* at 1174.
24. *Id.* at 1175.

violent toward her, and threatened her and her children.[25] The responding officer assured the plaintiff that her former boyfriend would be charged with assault and "locked up overnight."[26] With these assurances, plaintiff returned to work for the night and left her children at home.[27] Plaintiff's former boyfriend was released from custody later that same night.[28] He returned to plaintiff's home and set her house on fire, killing her three children who were at home sleeping.[29]

Despite the compelling facts, the Fourth Circuit again denied that an affirmative duty existed because "[t]here was no custodial relationship [between the government defendants and] the plaintiffs."[30] The court rejected plaintiff's contention that the officer's promise that her former boyfriend would be detained overnight created a "special relationship" sufficient to give rise to a duty of protection, citing *DeShaney*'s refusal to recognize a duty based solely on "an official's awareness of a specific risk or from promises of aid."[31] The court likewise rejected plaintiff's attempt to characterize the officer's action as affirmative misconduct—rather than a failure to act.[32] Plaintiff argued that the official created the danger by making assurances to her and failing to detain plaintiff's former boyfriend overnight.[33] However, as *DeShaney* illustrated, "the state did not 'create' the danger, it simply failed to provide adequate protection from it."[34] In *DeShaney* and *Pinder*, the state actors' alleged malfeasance was "that they stood by and did nothing when suspicious circumstances dictated a more active role for them."[35] Warning of a "slippery slope of liability,"[36] the court reasoned that "[i]t 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"; otherwise, the court explained, the state would be liable "for every crime committed by . . . [released] prisoners."[37] Accordingly, the Fourth Circuit held that a more direct connection is required between the state's action and plaintiff's injury.[38]

25. *Id.* at 1172.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1175.
31. *Id.*; DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).
32. *Pinder*, 54 F.3d at 1175.
33. *Id.*
34. *Id.*
35. *Id.* (quoting *DeShaney*, 489 U.S. at 203).
36. *Id.* at 1178.
37. *Id.* at 1175.
38. *See id.* at 1176.

B. Pinder*'s Progeny: The Harsh Results of the Fourth Circuit's Narrow State-Created Danger Doctrine*

Following its decision in *Pinder*, the Fourth Circuit continued to reject plaintiffs' state-created danger claims.[39] For example, in *Doe v. Rosa*,[40] the court affirmed summary judgment for military-school officials who, plaintiff alleged, failed to investigate and covered up sexual misconduct complaints campers made against camp counselors.[41] Justifying another harsh result of its unyielding interpretation of *DeShaney*, the court emphasized that permitting "continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger."[42] According to the Fourth Circuit, a "downstream, but-for connection" between the state's alleged misconduct and the alleged harm "stretches the 'affirmative acts' concept too far" to establish a state-created danger theory.

Again, in *Graves v. Lioi*,[43] the court affirmed dismissal for failure to state a claim of a state-created danger after police's failure to enforce a warrant allowed a man, accused of assaulting his wife, to delay his self-surrender for a few days, during which time the man stabbed his wife to death.[44] Faced once more with compelling facts, the court explained that "[b]ecause the evidence concerning [the government's conduct] does not support [plaintiff's] characterization of them as 'affirmative acts' creating or increasing a risk to [the victim], the record does not support a claim under the state-created danger doctrine."[45]

III. *CALLAHAN V. NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY*

The Fourth Circuit has never recognized a meritorious state-created danger claim in a published opinion.[46] Following its reasoning in *Pinder* and its progeny, the Fourth Circuit in *Callahan* once again dismissed plaintiff's 42 U.S.C. § 1983 substantive due process claim, reiterating that the state-created danger doctrine is to be narrowly construed.[47]

39. *Id.*
40. 795 F.3d 429 (4th Cir. 2015).
41. *Id.* at 432–36.
42. *Id.* at 439.
43. 930 F.3d 307 (4th Cir. 2019).
44. *Id.* at 311–14.
45. *Id.* at 331.
46. Callahan v. N.C. Dep't of Pub. Safety, 18 F.4th 142, 147 (4th Cir. 2021).
47. *Id.* at 147–49.

A. *Plaintiff's State-Created Danger Claim*

Like many state-created danger cases heard by the Fourth Circuit, *Callahan* presented tragic, sympathetic facts.[48] The decedent, Sergeant Callahan, was a shift supervisor at Bertie Correctional Institution ("BCI").[49] Callahan oversaw a custody unit occupied by Craig Wissink, a convicted murderer serving a life sentence.[50] In April 2017, Sergeant Callahan wrote a disciplinary report documenting Wissink's refusal to comply with a direct order.[51] Later that day, Wissink started a fire in a trash can in his custody unit.[52] After Sergeant Callahan put out the fire with a fire extinguisher, Wissink threw boiling liquid in her face.[53] Sergeant Callahan subsequently fell to the ground, at which point "Wissink grabbed the fire extinguisher from her and repeatedly beat her with it."[54] Sergeant Callahan died from the injuries she sustained during this gruesome attack.[55]

Plaintiff, Sergeant Callahan's father, sued six individual defendants employed by the prison for violation of his daughter's Fourteenth Amendment substantive due process rights under 42 U.S.C. § 1983.[56] Plaintiff alleged that a week prior to the attack, Wissink warned BCI officials that he was experiencing homicidal thoughts and needed mental health treatment.[57] However, BCI officials failed to address Wissink's warning and Wissink remained in medium custody, according to plaintiff.[58] Plaintiff further alleged that only three officers were on duty in Sergeant Callahan's unit the day of Sergeant Callahan's attack despite BCI's policy requiring four officers per shift.[59] Finally, plaintiff alleged that Sergeant Callahan was the only fully trained officer of the three officers on duty.[60]

48. *Id.* at 144–45; *see* Piechowicz v. United States, 885 F.2d 1207, 1209–10 (4th Cir. 1989) (holding that there was no state-created danger where a witness in a federal trial and his relative were murdered by a contract killer); Rowland v. Perry, 41 F.3d 167, 171–72 (4th Cir. 1994) (holding that there was no state-created danger where the plaintiff suffered a permanent disability as a result of a physical altercation with a police officer); Pinder v. Johnson, 54 F.3d 1169, 1172–75 (4th Cir. 1995) (finding no state-created danger where a police officer assured plaintiff that her abusive former boyfriend would be incarcerated overnight and the boyfriend was released and set fire to plaintiff's house, killing her children).

49. *Callahan*, 18 F.4th at 144.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

Given these alleged facts, plaintiff asserted that "[d]efendant's actions in placing Sergeant Callahan in a dangerous situation with inadequate staffing based on lack of trained and experienced officers to support her consciously disregarded a substantial and great risk of serious harm which was obvious, apparent, and grave."[61] Plaintiff further alleged that "[d]efendants were also aware of, or should have been aware of, the imminent threat posed by Inmate Wissink."[62] The district court dismissed plaintiff's complaint for failure to state a claim based on the existence of a state-created danger, holding that plaintiff "failed to allege how the individual defendants created or substantially enhanced the danger which resulted in Sgt. Callahan's death."[63]

B. *The Fourth Circuit's Analysis*

The Due Process Clause of the Fourteenth Amendment protects individuals from any state action that "deprive[s] any person of life, liberty or property, without due process of law."[64] Section 1983 of Title 42 of the United States Code holds state actors who cause the "deprivation of any rights, privileges, or immunities secured by the Constitution" liable in federal court.[65] Noting that "both the Supreme Court and this Circuit have warned against 'constitutionalizing' state tort law through the Due Process Clause," the *Callahan* court began its analysis emphasizing the "well-settled limits on substantive due process claims."[66] Relying on *DeShaney*, the Fourth Circuit explained the general rule that the Due Process Clause does not hold the state liable for third-party conduct.[67] However, the court noted that the state-created danger doctrine is an exception to the general no-duty rule for third-party conduct.[68] The court further explained that the state-created danger doctrine is only applicable if: "(1) the state actor directly 'created or increased the risk' of the harm to the victim and (2) 'did so directly through affirmative acts.'"[69] Citing its initial interpretation of the doctrine in *Pinder*, the court again emphasized the narrow scope of the exception, noting "[i]t 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. If so, the state would be liable for every crime committed by the prisoners it released."[70] The court cited its own precedent to support the requirement that "the state

61. *Id.* at 148.
62. *Id.*
63. *Id.* at 145.
64. U.S. CONST. amend. XIV, § 1; *Callahan*, 18 F.4th at 145.
65. 42 U.S.C. § 1983; *Callahan*, 18 F.4th at 145.
66. *Callahan*, 18 F.4th at 156.
67. *Id.* at 146.
68. *Id.* at 146.
69. *Id.* (quoting Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015)).
70. *Id.* at 147 (quoting Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995)).

must create the direct danger that causes the injury or death" for a plaintiff to prevail on a state-created danger claim.[71]

Despite plaintiff's contention that defendants were aware of the risks, "had an affirmative duty to avoid them, and instead affirmatively acted to keep Inmate Wissink [in Callahan's unit] while assigning too few and untrained staff," the court rejected plaintiff's attempts to recharacterize defendants' failure to protect against a danger as an affirmative act.[72]

Instead, the court limited its analysis to the "critical questions" in a state-created danger case: "What is the pertinent danger, and did the state create it?"[73] The court succinctly addressed these questions: "[T]he danger was Wissink, and none of the defendants created the danger."[74] Analogizing the present case to its previous decisions, the court noted defendants' lack of "immediate interactions" with plaintiff that were required in *Doe*[75] and the lack of a direct causal relationship between the defendants' conduct and plaintiff's injury as required by *Graves*.[76] Finding that plaintiff alleged too remote a causal connection between the BCI employee-defendants' alleged acts and Callahan's death, the Fourth Circuit held that its "precedent is clear: [plaintiff's] allegations do not plausibly state a claim for a state-created danger."[77] Acknowledging the "tragic circumstances" giving rise to plaintiff's claim, the Fourth Circuit nevertheless concluded that to recognize the allegations before it as supporting a plausible due process claim would "constitutionalize a state tort claim."[78]

IV. DIFFERING CIRCUIT APPROACHES TO THE STATE-CREATED DANGER DOCTRINE

The Fourth Circuit's approach fails to effectively address the competing public policy interests at stake in state-created danger cases, resulting in one of the harshest interpretations of *DeShaney*.[79] While the Fourth Circuit has not

71. *Id.* at 148.

72. *Id.*

73. *Id.*

74. *Id.*

75. Doe v. Rosa, 795 F.3d 429, 432–37, 441 (4th Cir. 2015) (holding that military-school officials, accused of failing to investigate complaints of sexual misconduct that campers made against camp counselors, did not create the danger facing the sexual misconduct victims).

76. Graves v. Lioi, 930 F.3d 307, 311–14, 323 (4th Cir. 2019) (holding that police's failure to enforce a warrant for a man who subsequently stabbed his wife to death did not create the danger to the victim); *Callahan*, 18 F.4th at 148.

77. *Callahan*, 18 F.4th at 148–49.

78. *Id.* at 149.

79. Recent Case, *Constitutional Law—Substantive Due Process—Fourth Circuit Holds Police Officer Not Liable for Exposing Children to Harm That Culminated in Their Murder*, 109 HARV. L. REV. 524, 526–27 (1995) ("The Fourth Circuit's decision in *Pinder* is a product of both a misunderstanding of the plaintiffs' case and an insufficiently nuanced reading of *DeShaney* and its progeny. A more exacting

accepted the cogency of the state-created danger doctrine as articulated in *DeShaney*—instead conceptualizing it as an element of the special relationship exception[80]—the majority of circuits recognize the state-created danger doctrine, employing a variety of tests to assess the validity of such claims.[81]

Many circuits employ multipart tests,[82] a representative sample of which are included in this part. The Sixth Circuit applies a three-part test that requires a plaintiff to show:

> (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.[83]

Similarly, the Ninth Circuit test includes the following elements: (1) an affirmative act, (2) taken with deliberate indifference, (3) that created a foreseeable injury to the plaintiff.[84] By contrast, the Eighth Circuit relies on a more exacting five-part test that requires plaintiffs to prove:

> (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 conscious disregard of the risk, and (5) in total, [the government's] conduct shocks the conscience.[85]

analysis would have concluded that Pinder's due process claims fit into a well-established body of law that recognizes a state's affirmative duty to compensate for the enhanced vulnerability to a discrete harm that state action can create."); Eisenhauer, *supra* note 6, at 902 ("[T]he Fourth Circuit has actively avoided applying the state-created danger doctrine by continually differentiating the facts of each case."); Matthew D. Barrett, Note, *Failing To Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 205 (2002) (noting that the "Fourth Circuit[] ha[s] not recognized the state-created danger theory as a legitimate legal claim").

80. *See supra* Part II.

81. Barrett, s*upra* note 79, at 188.

82. *See* Eisenhauer, *supra* note 6, at 898–908 (surveying the state-created danger tests employed by each circuit court).

83. Jones v. Reynolds, 438 F.3d 685, 690–91 (6th Cir. 2006) (quoting Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003)).

84. Lawrence v. United States, 340 F.3d 952, 957 (9th Cir. 2003); Eisenhauer, *supra* note 6, at 906.

85. Hart v. City of Little Rock, 432 F.3d 801, 805 (8th Cir. 2005) (quoting Avalos v. City of Glenwood, 382 F.3d 792, 798 (8th Cir. 2004)); Chemerinsky, *supra* note 16, at 16–17.

The inconsistency among the circuits "offers conflicting guidance for state actors and the public . . . potentially allow[ing] for behavior in one circuit to be actionable while being acceptable in another circuit."[86]

A. *Successful State-Created Danger Claims*

Despite the dearth of meritorious state-created danger claims in the Fourth Circuit, plaintiffs in other circuits have successfully pleaded such claims.[87] One of the first cases to find success, *Wood v. Ostrander*,[88] established liability for state-created danger.[89] There, the police arrested a drunk driver, impounded his car, and left the female passenger alone in a crime-ridden area in the middle of the night where she was subsequently raped.[90] The Ninth Circuit held that because the defendant arrested the driver of the vehicle the victim was riding in, impounded the driver's car, and apparently stranded the victim "in a high-crime area at 2:30 a.m.," such direct intervention distinguished the victim "from the general public and trigger[ed] a duty of the police to afford [the victim] some measure of peace and safety."[91] The court thus found that the plaintiff raised "at least a triable issue (if not an undisputed one) regarding [the defendant's] knowledge of the danger."[92] The court distinguished *DeShaney*, "where [the] state 'played no part' in creating the dangers that minor child faced by remaining in his father's custody 'nor did [the state] do anything to render [the child] any more vulnerable to them.'"[93] Ultimately, the court reversed the trial court's grant of summary judgment for the defendants and found that the plaintiff "raised a genuine factual dispute regarding whether [the defendant] deprived her of a liberty interest protected by the Constitution by affirmatively placing her in danger and then abandoning her."[94]

The Ninth Circuit again reversed a district court's dismissal of a state-created danger claim in *Munger v. City of Glasgow Police Department*,[95] where, like the victim in *Wood*, plaintiff was stranded outside by police officers and suffered harm as a result.[96] There, police responded to a bar fight and kicked the victim out of the bar and told him not to drive.[97] It was a cold night, the victim was

86. Eisenhauer, *supra* note 6, at 909.

87. *See* Chemerinsky, *supra* note 16, at 8–10 (summarizing state-created danger cases in which the plaintiffs prevailed).

88. 879 F.2d 583 (9th Cir. 1989).

89. *Id.* at 596; Chemerinsky, *supra* note 16, at 9.

90. *Wood*, 879 F.2d at 586.

91. *Id.* at 590.

92. *Id.* (noting that official crime reports revealed "that the area where [the victim] was stranded had the highest violent crime rate in the county").

93. *Id.* (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 190 (1989)).

94. *Id.* at 596.

95. 227 F.3d 1082 (9th Cir. 2000).

96. *Id.* at 1084–85, 1089–90.

97. *Id.* at 1084.

underdressed, and he died of hypothermia.[98] The court emphasized the officers' affirmative conduct—"[t]he officers here intervened to eject Munger from a bar and to prohibit him from getting in his truck. They stood by to watch him leave. They knew that he was impaired by alcohol, and that he was wearing insufficient clothing to survive in the bitter cold temperatures."[99]

In a case similar to *Wood* and *Munger*, the Sixth Circuit in *Davis v. Brady*[100] likewise found that the plaintiff had successfully stated a state-created danger claim where police pulled over a drunk driver, took the driver's keys, and left the driver on the side of the road at night where he was later hit by another car, suffering serious injuries.[101] Distinguishing these facts from those presented in *DeShaney*, the Sixth Circuit emphasized that "defendant officers in this case placed [the victim] in a more dangerous situation than he was prior to their interference, when they drove him outside the Flint city limits and abandoned him on a dark and dangerous highway in an unfamiliar area."[102] Taken together, these cases make clear that where government defendants actively remove a victim from one location and effectively strand them in another location that is known to be dangerous under the circumstances, plaintiffs can successfully assert state-created danger claims. Notably, these cases did not involve violence that occurred while the victim was in government custody (as the Fourth Circuit requires); rather, the extent to which the government-defendants actively increased the danger to the victims justified the courts' finding that the plaintiffs stated a valid claim.

Although *Callahan* does not involve direct government intervention, in a fact pattern highly analogous to *Callahan*, the Ninth Circuit found that the supervisors of a nurse at a state prison were liable for the sexual assault of the employee-nurse by a sex-offender-inmate with whom she was left alone.[103] Explicitly rejecting that a special relationship between the government-defendant and the plaintiff is an element of the state-created danger doctrine, the Ninth Circuit in *L.W. v. Grubbs*[104] held that "because Defendants affirmatively created the dangerous situation which resulted in [the nurse's] assault, the district court erred in dismissing [plaintiff]'s claim for failure to allege a custodial relationship between her and the Defendants."[105] Analogizing the case to its earlier decision in *Wood*, the court found that the defendants' actions created the danger to plaintiff based on plaintiff's allegations that defendants assigned the inmate-assailant to work with the victim despite their

98. *Id.* at 1085.
99. *Id.* at 1089–90.
100. 143 F.3d 1021 (6th Cir. 1998).
101. *Id.* at 1023.
102. *Id.* at 1025.
103. L.W. v. Grubbs, 974 F.2d 119, 121–22 (9th Cir. 1992).
104. 974 F.2d 119 (9th Cir. 1992).
105. *Id.* at 122.

knowledge that: (1) the inmate was not qualified for the assigned role; (2) the inmate "had an extraordinary history of unrepentant violence against women and girls"; (3) the inmate "was likely to assault a female if left alone with her"; (4) the inmate would be alone with nurse-plaintiff during her shift; and (5) the nurse "would not be prepared to defend against or take steps to avert an attack because she had not been informed at hiring that she would be left alone with violent offenders."[106]

By not characterizing plaintiff's claim as "seeking to hold Defendants liable for [inmate]'s violent proclivities," but rather "for their acts that independently created the opportunity for and facilitated [inmate]'s assault on her,"[107] the Ninth Circuit reached a just outcome based on a reasonable interpretation of *DeShaney*. Given the extent of the defendants' knowledge of the dangers presented by the inmate and the defendants' direct role in assigning the nurse to work alone with the inmate,[108] the state's creation of danger is distinguishable from a case like *DeShaney*, where the defendant-social worker's failure to remove the victim despite knowledge of his father's violent behavior[109] did not independently create the opportunity for the father's assault on the victim—rather, the attack could have occurred regardless of the defendant's involvement because the child was already in the father's custody.[110]

In summary, the Ninth and Sixth Circuits employ similar multipart tests, recognizing state-created danger claims where the government's affirmative intervention increased the danger facing the victim and the defendant was aware of the circumstances that gave rise to this increased danger. In applying its test, the Ninth Circuit seemed to focus on the connection between the defendant's act and the danger, requiring plaintiffs to show that the government actor directly intervened, while the Sixth Circuit emphasized the extent to which the state actor's involvement increased the danger to the victim. By contrast, the affirmative nature of the defendant's conduct is not a component of the Eighth Circuit's approach. Instead, the Eighth Circuit considers additional elements, such as the egregiousness of the defendant's action and the defendant's state of mind.

B. *Proposal for a Fourth Circuit Multipart Test*

To mitigate the apparent unfairness resulting from the lack of uniformity among the circuits, this Recent Development posits that the Fourth Circuit should abandon the special relationship requirement for state-created danger claims and instead recognize the special relationship exception and the state-

106. *Id.* at 121.
107. *Id.* at 122.
108. *Id.* at 121.
109. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 189 (1989).
110. *Grubbs*, 974 F.2d at 121–22.

created danger exception as separate and distinct claims. Further, this Recent Development, inspired by Christopher Eisenhauer's proposed uniform state-created danger test, proposes that the Fourth Circuit adopt a test that requires a plaintiff to show: (1) state conduct that materially increased the danger to the victim, (2) the state knew or reasonably should have known that the act increased the danger to the victim, and (3) the state conduct shocks the conscience of a reasonable person.[111]

Ultimately, this test properly accounts for the countervailing interests at stake in these tragic cases. One such interest is embodied in the notion that "[s]tate actors, especially those such as police who regularly operate in tense and dangerous circumstances, rightfully must be allowed to do their jobs without hesitating to calculate the likelihood of litigation."[112] On the other hand, the doctrine must sufficiently empower citizens to "hold the powerful state responsible for flagrant and glaring abuses, . . . [which] could become worse and more prevalent if left completely unchecked."[113]

The Sixth, Eighth, and Ninth Circuit multipart tests reveal two important themes that address the first interest. First, with respect to mental state, each test involves some degree of knowledge or foreseeability on the part of the government actor.[114] Second, regarding the government-defendant's act, the Ninth and Sixth Circuits require an "affirmative act"[115] while the Eighth Circuit does not, instead requiring "conduct [that] shocks the conscience."[116] In order to adequately protect state actors' ability to work without fear of litigation, the Fourth Circuit should adopt a hybrid of the Sixth, Ninth, and Eighth Circuit tests, requiring either that the defendant have knowledge of the dangerous circumstances or that such danger be reasonably foreseeable. Imposing this knowledge or foreseeability requirement will insulate state actors from liability in situations where they are unaware of the dangers facing the victim and where the violence that befell the victim is not reasonably foreseeable to a person in defendant's position. When state actors are aware of reasonably foreseeable violence or danger to the victim, this test will incentivize them to act to reduce that danger, thus mitigating their own liability and potentially reducing third-party violence.

As for the countervailing interest—state accountability—the Fourth Circuit should abandon its enigmatic "affirmative act" requirement and instead

111. *See* Eisenhauer, *supra* note 6, at 918 (proposing a uniform test that would require a plaintiff to prove "that the state actor: (1) materially increased danger (2) in a way that would shock the conscience (3) of a reasonable person (4) in the same situation").

112. *Id.* at 915.

113. *Id.* at 918.

114. *See* Jones v. Reynolds, 438 F.3d 685, 690 (6th Cir. 2006); Lawrence v. United States, 340 F.3d 952, 956 (9th Cir. 2003); Hart v. City of Little Rock, 432 F.3d 801, 805 (8th Cir. 2005).

115. *Jones*, 483 F.3d at 690; *Lawrence*, 340 F.3d at 957.

116. *Hart*, 432 F.3d at 805.

adopt a modified version of the Eighth Circuit's approach, requiring government conduct that materially increases the danger to the victim and shocks the conscience of a reasonable person. Rather than focusing on the characterization of government conduct as an act of commission or an act of omission,[117] the Fourth Circuit should instead examine the extent to which the state conduct increased or created the danger to the victim and the extent to which the government's conduct "shocks the conscience."[118] Doing so would avoid the dilemma that the Fourth Circuit faced in *Callahan* in determining whether the defendants' conduct constituted a failure to protect or an affirmative act,[119] and instead would allow the court to make a qualitative judgment about the degree to which the defendant increased the likelihood that the violent outcome would occur. Additionally, the "shocks the conscience" requirement, though admittedly conceding significant discretion to the court,[120] is necessary to avoid government liability in situations where the government actors' conduct is negligible compared to that of others involved in creating the danger to the victim.

C. *Applying the Proposed Test to* Callahan

Although the outcome would be the same applying the proposed test to the facts of *Callahan*, it would rest on fairer reasoning. Moreover, this test reasonably distinguishes between *Callahan* and *Grubbs* (the Ninth Circuit case involving an inmate's rape of a prison nurse), thereby justifying their differing outcomes. The first proposed element, the existence of "state conduct that materially increased the danger to the victim," is ultimately dispositive. Defendants' failure to adequately staff the unit where the victim was working and failure to train the victim's fellow guards did not "materially increase the danger to the victim." Absent the alleged understaffing and inadequate training, the victim nonetheless faced a degree of danger by overseeing the unit where the inmate was housed. Although the danger facing the victim was likely exacerbated by the defendants' failure to properly staff the unit on the day of the attack, the outcome turns on the "materiality" of this increase—a factor that

117. *See* Callahan v. N.C. Dep't of Pub. Safety, 18 F.4th 142, 146 (4th Cir. 2021) (emphasizing that the government act must be "affirmative" and "direct").

118. *See* Eisenhauer, *supra* note 6, at 918 (proposing a test that includes a "shocks the conscience" analysis).

119. *See Callahan*, 18 F.4th at 148 (rejecting plaintiff's attempt to characterize defendant's failure to act as an affirmative act).

120. *See, e.g.*, Rosalie Berger Levinson, *Time To Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 334–35 (2010) (criticizing the subjectivity of the "shocks the conscience" test); *In re* Winship, 397 U.S. 358, 381–82 (1970) (Black, J., dissenting) (explaining how the "shocks the conscience" test gives the judiciary wide discretion); Griswold v. Connecticut, 381 U.S. 479, 511 n.4, 512 (1965) (Black, J., dissenting) (noting that the "shocks the conscience" test turns on judicial "appraisal of what laws are unwise or unnecessary").

weighs in favor of defendants. Because the victim worked in a dangerous setting, surrounded by convicted criminals with violent proclivities, the danger facing the victim on a daily basis was already significant. The victim assumed the risk of such an attack by accepting a position as a guard charged with overseeing violent criminals.

By contrast, if a nurse employed by the same prison suffered a similar attack, the outcome would be different under the proposed test. Because the nurse assumed a far lesser degree of risk than did the guard for the same facility—the former's role is completely unrelated to security, while the latter's duty is to prevent such violence—the prison's failure to adequately staff and train its guards would materially increase the danger facing the nurse. Ultimately, the materiality element largely turns on the amount of danger facing the victim before the incident occurred, since that baseline will determine how significantly that risk was impacted by the state's alleged conduct. Thus, this element insulates the government from liability where victims knowingly assumed a significant amount of risk (like the guard in *Callahan*), while protecting the most vulnerable victims from state-created dangers (like the nurse in *Grubbs*).

Next, the knowledge element would certainly be met in *Callahan* since the defendants knew that the inmate had a history of violence and the inmate's file revealed that the inmate was experiencing homicidal thoughts. Further, defendants were aware, or at least should have been aware, that the unit was understaffed and lacked adequately trained guards since they were in charge of overseeing the victim and her coworkers. Similarly, in *Grubbs*, the defendants' knowledge of the inmate's history of sexual assault towards women and the victim's inability to protect herself from such harm would clearly satisfy this element. The knowledge requirement serves to protect government defendants from liability in situations where they lacked notice of the danger facing the victim. Thus, the proposed test will only hold accountable those government actors who willfully or recklessly disregarded an opportunity to protect the victim from harm.

Finally, the "shocks the conscience" element would not be satisfied in *Callahan* because defendants' failure to staff the unit and train its guards does not shock the conscience of a reasonable person. While in hindsight this conduct becomes more egregious, the conduct must be considered in light of what the defendants knew at the time of the conduct, in isolation from the ultimate outcome. Thus, the ultimate inquiry is: absent any harm to victim, would a reasonable person's conscience be shocked by defendants' failure to adequately staff and train its guards? Ultimately, this element examines both (i) the feasibility of corrective action and (ii) the likelihood and magnitude of harm

that may result from a failure to take such corrective action.[121] Only where the burden of corrective action is exceedingly slight when compared to the likelihood and gravity of harm will the conduct "shock the conscience."[122]

In *Callahan*, the corrective action was not feasible given the limited resources available to the prison officials and the competing priorities facing these officials. The gravity of harm that could result from the alleged understaffing and inadequate training—a violent attack—was undoubtedly severe. The likelihood of such an attack was not negligible, given the inmate's violent history and recent homicidal thoughts, but also far from certain since no such attack had occurred before and because the victim was specially trained to oversee violent inmates.[123] However, the infeasibility of corrective action and the merely moderate likelihood of harm ultimately outweigh the magnitude of the potential harm. By contrast, if the prison officials had the resources and capacity to conduct training and staff the unit, but simply failed to do so, this element would be satisfied given the gravity of harm that could result from this failure and the ease with which the failure could have been corrected.

Although the gravity of the harm would be the same in *Grubbs*, the likelihood of such harm and the feasibility of precautionary measures would weigh in favor of the plaintiff. In *Grubbs*, the inmate was incarcerated for the very same crime he committed against the victim. Moreover, the victim, a woman, was particularly vulnerable to the harm since the inmate's previous sexual assaults all targeted women. Additionally, the victim, employed as a nurse, lacked the necessary training to defend herself against such an attack. Finally, defendants could have taken reasonable precautionary measures without undue burden. For example, the defendants could have assigned a male nurse to work with the inmate to mitigate the risk of a sexual assault. Unlike in *Callahan*, where the defendants failed to staff enough prison guards, here, the defendants did not staff any guards, leaving the nurse vulnerable to violent sexual assault.

Further, relevant public policy considerations (namely state accountability and state autonomy) should be taken into consideration. In both cases, the prison officials operate with limited resources in a dangerous setting. Imposing liability without considering the feasibility of corrective measures may unduly restrict such government actors' willingness to make difficult resource-allocation decisions in the future. To permit government officials to make

121. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (articulating the Learned Hand Formula, which holds that an actor is negligent if the burden of taking precautionary measures is outweighed by the probability of a loss multiplied by the magnitude of such a loss).

122. *See id.* This analysis represents a heightened version of the Learned Hand Formula. The burden of remedial measures must be extremely slight when compared to the likelihood and magnitude of the resulting harm in order to satisfy this element.

123. *Callahan*, 18 F.4th at 144.

difficult decisions with limited resources, this element must place significant weight on the feasibility of alternative measures/corrective action.

CONCLUSION

While the *Callahan* outcome is the same under this proposed test, it lends itself to far more consistent application than does the Fourth Circuit's current emphasis on the "affirmative" nature of the government act.[124] Further, this test accords with the majority of circuits' recognition that the state-created danger exception and the special relationship exception are distinct claims.[125] Ultimately, the proposed multipart test will provide the Fourth Circuit with the flexibility to meaningfully promote the public's interest in holding state actors accountable while acknowledging the need for state actors to make decisions without constant fear of litigation.

ELIZABETH G. POOLE[**]

124. *See supra* Section IV.B.

125. *See supra* Section IV.A.

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