

**REVIVING *DESHANEY*: STATE-CREATED DANGERS AND
DUE PROCESS FIRST PRINCIPLES**

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ABSTRACT

*Decades have passed since the Supreme Court held in *DeShaney v. Winnebago County* that the Due Process Clause confers no affirmative right to state protection and therefore does not mandate police or other state services. Meanwhile, federal circuit courts have been at work steadily eroding that holding through something called the state-created danger doctrine. The doctrine imposes due process liability for the “conscience-shocking” mistakes of government employees, even when those employees have done nothing to coerce another person and thus have not used the power of government in any way. The doctrine goes further to punish governments for the failure to use coercive police power when that failure results in a third-party causing harm. The consequence of these applications is a national tort-like regime that incentivizes more aggressive policing and other state interventions under the guise of enforcing the Due Process Clause, all in stark contravention of *DeShaney*’s central rationale. Yet despite increasingly frequent certiorari petitions on the issue, the Supreme Court has consistently passed on the opportunity to endorse the state-created doctrine or decide how it should apply. And none of the sparse scholarly commentary on the doctrine has attempted systematically to analyze its constitutional underpinnings and proper scope.*

*This Article conducts that analysis from a textual and historical perspective. It shows first how the state-created danger doctrine has fundamentally diverged from *DeShaney* and the negative-rights model of American constitutional law. The Article then proposes to reform the doctrine consistently with*

* J.D., Berkeley Law School. I would like to thank Professor Robert Williams for his significant generosity in helping me navigate this undertaking. I am also deeply grateful to Sean Rodriguez for his steadfast support, in this and so many other things.

DeShaney and due process first principles by tying violations to bona fide deprivations of liberty—i.e., harmful exercises of coercive state power—rather than the “conscience-shocking” torts of government employees. So reformed, the doctrine would ensure recovery for those illegitimately harmed by the state while avoiding the many evils, including the significant damage to federalism and separation of powers principles, the current regime has wrought.

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I. INTRODUCTION

The role of government in Americans' lives has been expanding since the country's founding. No longer confined to the basic function of protecting life and property, government today is involved in everything from education and healthcare to hockey games and music festivals.¹ Like private actors, the people in government providing these services make mistakes that sometimes cause harm. But unlike private actors, the erring government employees may find themselves subject to a federal civil rights suit. The source of these suits is something called the state-created danger doctrine.

The state-created danger doctrine does not enjoy Supreme Court provenance; it is a creation of the intermediate federal circuit courts.² To apply it, these courts ask whether a person who has been harmed can trace any part of the harm to the conduct of a government actor. If so, and if that government actor can be said to have exhibited some heightened level of culpability that "shocks the conscience"—like deliberate indifference to another's safety—the courts will hold that the state created a danger in violation of the substantive due process right to bodily integrity.

The courts will find this violation of due process even where the culpable state actor was not undertaking a traditional government function and did not use the coercive power of the state in any way. In fact, courts will find such a due process violation for the government's decision *not* to use coercive force under some circumstances. Thus, for example, state-created danger liability may be imposed on a supervisor for assigning unduly dangerous tasks to government employees, or on a city police chief for directing subordinates not to arrest a dangerous suspect.³ So long as the relevant state actor is operating within the scope of his government employment at the time of his misfeasance, the state-created danger doctrine holds that the resulting harm is a deprivation of constitutional rights.

The state-created danger doctrine as formulated by these courts fundamentally misconceives the Fourteenth Amendment's Due Process Clause and is irreconcilable with the negative-rights model of American

1. See *Tennessee v. Lane*, 541 U.S. 509, 530 (2004) (noting "hockey rinks" as a facility government regularly operates); *id.* at 550 (Rehnquist, C.J., dissenting) (noting "amusement park[s]" and "sports stadium[s]" among other facilities government regularly operates); see also *infra* note 25 (discussing the multifarious activities in which government today is involved).

2. *Infra* Part III.

3. See *infra* Sections III.C–D.

constitutional law, elucidated most prominently in the Supreme Court's *DeShaney v. Winnebago County*.⁴ We did not bloody our national soil with a civil war to provide a vehicle for what ultimately amounts to glorified tort claims against government workers and bureaucrats. We did so to ensure that the singular power of government would never again be used to oppress the American people.⁵ The current state-created danger doctrine unmoors the Due Process Clause it purports to enforce from these constitutional underpinnings. It converts the clause's liberty guarantee from a venerable right to be free from government oppression into a costly and ineffective tort-law surrogate—and one that promotes, rather than prevents, incursions on individual autonomy. The result is doctrinal incoherence and less functional government.

The courts—more particularly, the Supreme Court, which despite increasingly frequent certiorari petitions has so far declined to weigh in on the validity or scope of the state-created danger doctrine⁶—should reverse this course. The basic premise of the state-created danger doctrine is sound. The Constitution prohibits the government from inflicting harm on a person except in a narrow set of circumstances. But the relevant due process inquiry is not, as the lower courts state it, simply whether any particular state actor has caused a private injury. It is

4. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–97 (1989).

5. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (“[H]istory reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was ‘intended to secure the individual’ [not from ordinary torts but from] . . . governmental power[s] . . . being ‘used for purposes of oppression.’”) (internal citations omitted) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884); and *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)).

6. In 2020 alone, the Supreme Court received, and denied, petitions for certiorari in seven cases squarely presenting questions regarding the validity and proper application of the state-created danger doctrine. See *Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 895 (2020) (mem.); *Anderson v. City of Minneapolis*, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (mem.); *Cancino v. Cameron County*, 794 F. App'x 414 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2752 (2020) (mem.); *Cook v. Hopkins*, 795 F. App'x 906 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2643 (2020) (mem.); *Robinson v. Lioi*, 930 F.3d 307 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1118 (2020) (mem.); *Estate of Her v. Hoepfner*, 939 F.3d 872 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 1121 (2020) (mem.); *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 905 (2020) (mem.). The Court's 2021 docket looks to be continuing the trend. See, e.g., *Robinson v. Webster County*, 825 F. App'x 192 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1450 (2021) (mem.); *J.P. ex rel. Villanueva v. Alameda County*, 803 F. App'x 106 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1514 (2021) (mem.); *Irish v. Fowler*, 979 F.3d 65 (1st Cir. 2020), *cert. denied*, *Fowler v. Irish*, No. 20-1392, 2021 WL 4507655 (U.S. Oct. 4, 2021); *First Midwest Bank v. Chicago*, 988 F.3d 978 (7th Cir. 2021), *cert. denied*, No. 21-414, 2021 WL 4733651 (U.S. Oct. 12, 2021); *Momox-Caselis v. Donohue*, 987 F.3d 835 (9th Cir. 2021), *cert. denied*, No. 21-389, 2021 WL 4822712 (U.S. Oct. 18, 2021); see also 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 3-244 (4th ed. 2010) (“*DeShaney* issues will simply not go away.”).

whether state action as such—i.e., the exercise of *coercive governmental power*—has constrained a person’s actions in a way that has caused her illegitimate harm. Only then can it properly be said that the state has deprived the person of liberty without due process of law.

This deprivation of liberty will not be present in every case where a state actor causes a person harm, because state actors’ misfeasance often does not involve a deprivation of liberty through the exercise of coercive governmental power. If a mailman with the United States Post Office barrels down a residential street at sixty miles per hour and strikes an innocent pedestrian, he has surely committed a tort under state law. But he has just as assuredly not committed a violation of our nation’s founding charter.⁷ At the same time, when the state’s *coercive power* *does* result in a person’s harm—as it would, for example, if a police officer ordered a person to walk into oncoming traffic—it should not matter whether the particular government actor inflicting the harm exhibited deliberate indifference (or some other heightened *mens rea*) as opposed to mere negligence. The government in such a case has still deprived the victim of liberty without due process and therefore violated the Constitution.

A properly conceived state-created danger doctrine would reflect these basic due process principles by assigning liability to bona fide state *action* rather than tortious state *actors*. And reforming the doctrine to that effect would accomplish several important and related goals. It would reduce the incentive for government (especially the police) to intervene more aggressively in citizens’ everyday lives so as to avoid liability for the failure to protect from third-party dangers. It would eliminate the costs society bears defending the many tort claims currently brought under the guise of civil rights suits. It would stop the damage to separation of powers and federalism principles that results from the federal judiciary superimposing a national tort standard on the states. It would promote fairness to victims by removing the bar to recovery for those harmed by government coercion who cannot prove the necessary mental state by the relevant state actor. Most fundamentally, by refocusing the due process inquiry on state action as such, it would bring clarity and coherence to a critical area of constitutional law.

This Article examines the origins of the state-created danger doctrine, outlines the ways it has come to depart from basic constitutional principles, and proposes how to reform it so that it harmonizes with those

7. *But see* Dean *ex rel.* Harkness v. McKinney, 976 F.3d 407, 415–21 (4th Cir. 2020) (holding, anomalously and over a dissent, that a county sheriff’s deputy violated substantive due process when he unintentionally collided with and injured another motorist because the deputy’s conduct suggested deliberate indifference).

principles. I begin in Part II by discussing the Supreme Court's important *DeShaney* decision and how the negative-rights model of American constitutional law it reaffirmed precludes due process liability based on the state's failure to ensure a person's well-being. I discuss in Part III the advent and evolution of the state-created danger doctrine in the federal circuit courts, canvassing the three major types of government activities that have given rise to due process claims under the doctrine: the state as law-enforcer, the state as employer, and the state as service-provider. In Part IV, I demonstrate how the state-created danger doctrine of the circuit courts misapplies due process principles and fundamentally diverges from the negative-rights model of our Constitution.

Part V outlines how to reform the doctrine to focus on state deprivations of liberty and thus function as a proper enforcement of the Due Process Clause. Specifically, claims under the state-created danger doctrine should consist of three simple elements, which together would limit due process liability to actual state deprivations of liberty and ensure it extends to all such arbitrary deprivations regardless of a particular actor's "deliberate indifference" or other mental state. These elements are: (1) a person acting under color of law uses or invokes force to constrain private action (2) in a way that exposes another to a danger (3) that would not have existed but for state action. I conclude in Part VI by canvassing the significant harms of the current state-created danger doctrine and corollary benefits my proposed reform would engender.

II. *DESHANEY* AND THE NEGATIVE-RIGHTS MODEL OF AMERICAN CONSTITUTIONAL LAW

In *DeShaney v. Winnebago County*, the Supreme Court held that the government cannot violate the Fourteenth Amendment's Due Process Clause by failing to protect a person from harm at the hands of a third party.⁸ The Court's holding arose amid an "undeniably tragic" set of facts.⁹ Joshua, a young child, had been repeatedly beaten by his father.¹⁰ County social service workers temporarily removed Joshua after one such episode only to return him to his father's custody shortly thereafter.¹¹ The social workers then allowed Joshua to remain with his father despite clear signs that the abuse was ongoing.¹² When, after months of inaction from the social workers, the father beat Joshua so

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

9. *Id.* at 191.

10. *See id.* at 192–93.

11. *Id.* at 192.

12. *Id.* at 192–93.

severely he suffered brain damage, Joshua's mother sued the social services agency.¹³ She argued that the social workers' gross negligence in failing to recognize and act on the dangers the father posed was so conscience-shocking that it violated due process.¹⁴

In a terse opinion characteristic of the authoring Chief Justice Rehnquist, the Court rejected the mother's due process claim.¹⁵ Joshua's injuries stemmed not from the state but from his father, the Court held, and the Constitution does not "require[] the State to protect the life, liberty, and property of its citizens against invasion by private actors."¹⁶ The social workers' failure to protect Joshua from his father's violence may have constituted a tort under state law, the Court noted, but it left him no worse off than he would have been without state action in the "free world."¹⁷ The Due Process Clause could therefore have no valid application, even in the face of stomach-churning facts.

DeShaney has engendered volumes of commentary among legal thinkers, almost all of it stridently negative.¹⁸ Yet despite the hostility it has drawn from much of the academy, *DeShaney's* holding follows inexorably from our Constitution's basic structure. Among the core precepts of the Enlightenment Era philosophy that gave rise to the American founding is that all human beings have the inherent right to pursue their own destinies—that is, the right to life, liberty, and the pursuit of happiness.¹⁹ One cannot claim simultaneously with that right

13. *Id.* at 193.

14. *Id.* at 197.

15. *Id.* at 195, 202.

16. *Id.* at 195.

17. *Id.* at 201–02.

18. See, e.g., Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513, 1514 (1989) ("Chief Justice Rehnquist's opinion for the majority in *DeShaney* is an abomination."); Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1078 (1990) ("The glaring failures of the *DeShaney* opinion invite attack."); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney Is Still Wrong and Castle Rock Is More of the Same*, 16 TEMP. POL. & C.R. L. REV. 47, 61–63 (2006) (criticizing *DeShaney* as "wrong" and a "distortion" of constitutional principles); Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, a Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 545 (2009) (characterizing the *DeShaney* Court's analysis as "factually and legally invalid"); see also Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983, 985 n.15 (1996) ("The *DeShaney* holding has engendered a scholarly response that is impassioned and unequivocally negative . . . Indeed, I have not found a single article purporting to offer a positive rationale for nonliability.").

19. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also THE VIRGINIA DECLARATION OF RIGHTS § 1 (1776) (setting forth among its foundational principles that "all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or

a companion right to coerced assistance from others.²⁰ To do so is to assert a contradiction. We either have the inalienable right to apply our bodies and minds to our own advancement, or we have the right to the products of other people's minds and bodies by virtue of their shared humanity with us. We cannot have both.²¹

The later-adopted Fourteenth Amendment is consistent with this axiom. It guarantees not positive rights—i.e., the right to coerce one person or group of persons to provide something for another—but negative liberties.²² State governments are never told what they must do. They are told only what they may not do.²³

This is sufficiently self-evident from the structure and text of the Constitution²⁴ that most of our nation's history passed without it even

divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety"). The Virginia Declaration of Rights immediately preceded and was almost certainly at the forefront of Thomas Jefferson's mind when drafting the Declaration of Independence for the Second Continental Congress. *See, e.g., The Virginia Declaration of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights> (last visited Nov. 19, 2021).

20. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 134–48 (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690) (providing broadly that property comes from the application of human effort and labor and that the "end of law" and government is "not to abolish or restrain" but to "enlarge freedom," including the freedom of a person to "dispose and order as he lists his person, actions, possessions, and his whole property"); Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in *Papers of Thomas Jefferson*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-5212> (last visited Nov. 19, 2021) (explaining that the Declaration of Independence was a distillation of principles set forth by Locke and other foundational thinkers on government); *see also* THE FEDERALIST NO. 10 (James Madison) (writing about the evils of faction, including that "a number of citizens . . . who are united and actuated by some common impulse of passion" may use government power to act "adverse[] to the rights of other citizens," especially in regard to the "unequal distribution of property").

21. *See* James Madison, *Property*, NAT'L GAZETTE, March 27, 1792, at 174 ("Government is instituted to protect property of every [s]ort; as well that which lies in the various rights of individuals, as that which the term particularly expre[ss]es. This being the end of government, that alone is a *ju[s]t* government, which *impartially* [s]ecures to every man, whatever is his *own* . . . [It] is not a *ju[s]t* government, nor is property [s]ecure under it, where the property which a man has in his personal [s]afety and per[s]onal liberty, is violated by arbitrary [s]eizures of one cla[s]s of citizens for the [s]ervice of the re[s]t.").

22. *See, e.g., Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

23. *See id.* ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.").

24. But *see* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2308–18 (1990), for a well-articulated opposing view. Like most scholarly works finding some undefined set of positive rights in the Constitution's guarantee of negative liberties, Professor Bandes' analysis depends largely on her rejection of the notion that the courts "should enforce only those values that are clearly stated in the text of the Constitution," along with what is, in my view, a serious misconception of the constitutional provisions requiring government officials to take certain actions before government may

having to be said—at least by the judicial actors interpreting and applying constitutional law. But the significant expansion of government following the Industrial Revolution and Great Depression precipitated some tension with this and other fundamental constitutional truths. With the government's greater involvement in American life came greater reliance on it. The popular mind began to conceive of government not as a mere guarantor of property and contract rights but as a vehicle for structuring society in a more egalitarian way. And the more previously private functions and services government took over, the more this popular conception grew. Thus, expansions begot more expansions in a one-way upward trajectory. The result is that today, there is very little in the human domain that is untouched by government.²⁵

It is hard to maintain the philosophical premise of purely negative rights when legislatures are enacting entitlements with ever more regularity, and despite their distinctive role in our tripartite system, judges have not always proved up to the task. Especially by the 1970s, a small but growing number of jurists signaled an increased willingness to construe constitutional rights as progressive guarantees to basic state services.²⁶

DeShaney sought to put an end to this incipient constitutional restructuring. Despite the grisly facts before it, the Court resoundingly reaffirmed the negative-rights model of constitutional law. It did not matter that the county social services workers in the case had once taken custody of Joshua, or that their actions in leaving him in his father's

properly *constrain* liberty as “affirmatively” phrased “constitutional rights.” See *id.* at 2309–12, 2312 n.212 (citing U.S. CONST. art. I, §§ 2, 9; *id.* art. II, § 1; *id.* amends. V–VII).

25. To name only broad categories, the services commonly provided by governments at every level in the United States today include police and fire protection, public education, roads and highways, air transportation, utility and water services, healthcare and hospitals, libraries, liquor stores, housing, food and drink services, and a wide variety of general recreational activities. See U.S. CENSUS BUREAU, 2017 STATE & LOCAL GOVERNMENT FINANCE TABLES (2017), <https://www.census.gov/data/tables/2017/econ/gov-finances/summary-tables.html>. The latter category encompasses the full spectrum of “parks, playgrounds, athletic facilities, amphitheatres, museums, zoos, and the like.” *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974).

26. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 518–21, 520 n.14 (1970) (Marshall, J., dissenting) (suggesting a constitutional right to basic subsistence welfare); *Serrano v. Priest*, 487 P.2d 1241, 1244–50 (Cal. 1971) (finding a fundamental right to state-provided education); *Lindsey v. Normet*, 405 U.S. 56, 82 (1972) (Douglas, J., dissenting) (suggesting a constitutional right to state housing protections); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113–16 (1973) (Marshall, J., dissenting) (opining that there is a fundamental constitutional right to state-provided education); see also *Gary B. v. Whitmer*, 957 F.3d 616, 659 (6th Cir. 2020) (holding, in vacated opinion, that there is a fundamental due process right to a “basic minimum education”), *reh’g en banc granted, vacated*, 958 F.3d 1216 (6th Cir. 2020).

custody afterward suggested rank callousness.²⁷ No exercise of government power had placed the child in harm's way, so it was nonsensical to say that the government had deprived him of liberty in violation of due process.²⁸ The context as well as the language of *DeShaney* left no doubt that, at least as a matter of constitutional law, the basic Lockean premise that there is no such thing as a "right" to the products of another's labor²⁹ was intact.³⁰ The message to lower courts was clear: the Due Process Clause can never serve as the source of a constitutional claim where an abuse of governmental power was not the source of the claimed injury.³¹

Alas, the message has proved elusive.

27. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200–01 (1989).

28. *See id.*

29. LOCKE, *supra* note 20, at 134.

30. For that is the nature of right asserted by the plaintiff in *DeShaney* and under any other "positive-rights" conception of constitutional law: the right to use the coercive apparatus of government forcibly to tax or otherwise compel some citizens to fund protective (and other) services for the benefit of others. Few if any would dispute that the state *should* use its taxing and spending prerogatives to provide such basic services as police protection—indeed, it is perhaps government's foremost duty to do so. But to claim that a government should provide a particular service is very different from the claim that any individual has an enforceable constitutional right to that service. This is the core insight of the natural-law philosophy espoused by Locke and other Enlightenment thinkers and enshrined in the Constitution: the rights to liberty and property, meaning the products of one's physical and intellectual faculties, are self-evident and innate—they cannot arise from or depend on government because they exist independently of government. *See, e.g.*, FREDERIC BASTIAT, *THE LAW* 1–3 (Dean Russel trans., Found. for Econ. Educ., 2d ed. 1998) (1850) ("Life, faculties, production—in other words, individuality, liberty, property—this is man . . . [T]hese [features of the individual] precede all human legislation, and are superior to it. Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.").

31. *DeShaney*, 489 U.S. at 200. The Court made this clear again over fifteen years later when it extended its *DeShaney* holding to the procedural due process context in *Town of Castle Rock v. Gonzales*, holding specifically that the Due Process Clause does not oblige the state to provide police protection under the theory that a person acquires a cognizable property interest in police services by obtaining a restraining order. 545 U.S. 748, 760–61 (2005).

III. EVOLUTION OF THE STATE-CREATED DANGER DOCTRINE FROM
PROTECTION AGAINST GOVERNMENT COERCION TO TORT-LAW
SURROGATE

A. *The Current Doctrine Among the Federal Circuit Courts*

In 1998, Washington resident Kimberly Kennedy reported to her local police department that a neighbor had molested her daughter.³² The neighbor was a thirteen-year-old boy named Michael who had a history of violent episodes.³³ Kennedy was aware of Michael's troubling past, so she asked the police officer to whom she had reported the molestation to notify her before he told Michael about the charge.³⁴ The officer, whose name was Noel Shields, assured Kennedy he would do so.³⁵

Officer Shields did not follow through on his assurance. Without telling Kennedy, he visited Michael's household as part of his investigation and revealed the molestation allegations to Michael and his family.³⁶ But Officer Shields then promptly drove to the Kennedy house to tell them that Michael now knew about the allegation.³⁷ He said officers would be patrolling the area to keep an eye out.³⁸ Nevertheless, Michael was able to break into the Kennedy home that night. He shot Kennedy and her husband while they slept.³⁹ Kennedy sued Officer Shields and his city employer, and the Ninth Circuit held in *Kennedy v. City of Ridgefield* that Officer Shields violated her substantive due process rights by failing to protect her from Michael's violent attack and could thus be held individually liable for her injuries.⁴⁰

Of course, Officer Shields did not himself harm Kennedy; her neighbor did. Officer Shields could perhaps have better protected her from the obvious risk of violence the neighbor posed, but *DeShaney* made clear almost twenty years before that such a failure to protect could never violate the Constitution, even under circumstances suggesting inexcusable carelessness.⁴¹ So how could the Ninth Circuit have upheld Kennedy's due process claim?

32. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1057 (9th Cir. 2006).

33. *Id.*

34. *Id.* 1057–58.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1061–63, 1067.

41. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 197 (1989).

The state-created danger doctrine provides the answer. Canvassing Ninth Circuit case law on the issue, the *Kennedy* panel wrote that the state-created danger doctrine constituted an exception to *DeShaney's* general “no duty to protect” rule.⁴² *DeShaney*, the court reasoned, prohibits due process liability for a failure to protect only when there has been no harm-causing affirmative act by a government official.⁴³ But where there has been such an affirmative act, the court concluded, *DeShaney* has no application.⁴⁴ Instead, the general substantive due process rule prohibiting conscience-shocking state action can apply to impose on the government a duty of affirmative protection.⁴⁵

Thus, the court held, the state-created danger doctrine allows liability for the failure to protect where the plaintiff can show that a state actor (1) undertook some affirmative act that exposed her to risk and (2) exhibited “deliberate indifference to [a] known or obvious danger” in so doing.⁴⁶ Applying these two elements to Kennedy’s claim, the court concluded that Officer Shields undertook an affirmative act by disclosing Kenney’s allegation to Michael, and that his doing so before Kennedy “had the opportunity to protect [herself] from [Michael’s] violent response” evinced deliberate indifference to Kennedy’s safety.⁴⁷ The court therefore held that the officer had violated Kennedy’s substantive due process rights.⁴⁸

There is much to digest in the *Kennedy* court’s decision. For one thing, it seems doubtful that Officer Shields’s conduct exposed Kennedy to a risk she would not already have faced in the “free world.”⁴⁹ As Judge Bybee pointed out in his dissent from the panel decision, there is always the possibility when reporting a crime that the criminal will retaliate.⁵⁰ The violent Michael would inevitably have learned of the allegation against him at some point—certainly when he was charged with the

42. *Kennedy*, 439 F.3d at 1061–62.

43. *Id.* at 1061.

44. *Id.*

45. *See id.*

46. *Id.* at 1062 (alteration in original) (quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)).

47. *Id.* at 1063–65. The court was reviewing a denial of summary judgment and so came to its conclusions by resolving disputed facts against the defendant-officer. *See id.* The same is true of other courts to find due process violations under a state-created danger theory—almost all have arrived at their conclusions based on disputed facts or allegations before trial, so their holdings should not be understood as definitive indications of the defendant-officials’ liability. *See, e.g.*, *Ross v. United States*, 910 F.2d 1422, 1424 (7th Cir. 1990) (“[I]t should be remembered that none of the actors in [the case accused of misconduct] have had their day in court to disprove the plaintiff’s claims.”).

48. *Id.* at 1067.

49. *See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989).

50. *See Kennedy*, 439 F.3d at 1077, 1081–82 (Bybee, J., dissenting).

reported crime, if not before—and Officer Shields told Kennedy that he had disclosed it about fifteen minutes after the fact, which was well before Michael attacked her.⁵¹ The panel majority’s conclusion that it would have made a meaningful difference if Officer Shields had followed through on his assurance to notify Kennedy of his disclosure before the event (rather than shortly after) somewhat strains credulity.

But there is a more fundamental issue. Even assuming the *Kennedy* majority’s premise that Officer Shields’s conduct was a necessary link in the causal chain leading to Michael’s assault, it is nonetheless clear that the assault did not result from a deprivation of liberty through the exercise of *state*—i.e., *governmental*—power. Officer Shields did not invoke his authority as a police officer somehow to compel Michael’s attack on Kennedy. He did not force Kennedy or Michael into physical proximity with one another or limit Kennedy’s ability to be elsewhere. His transgression was simply to disclose facts, which is something any non-state-actor—a friend, neighbor, or even random bystander aware of the molestation charge—could have done to the same effect.

But the question whether the relevant danger to Kennedy resulted from an exercise of delegated state power was immaterial to the court’s analysis. Regardless of the *way* Officer Shields might have exposed Kennedy to the risk of Michael’s violence, it mattered only that he did so while in his role as an agent of the state.⁵² Under the Ninth Circuit’s state-created danger doctrine, the fact that the officer was acting within the scope of his government employment at the time of the alleged misfeasance was sufficient by itself to trigger a mandatory duty to protect, and to subject the officer to substantive due process liability for his failure to do so.⁵³

It is much the same outside the Ninth Circuit. Although the Supreme Court has never endorsed the state-created danger doctrine, every circuit but the Fifth has recognized its validity or adopted it in some form.⁵⁴ The

51. *Id.* at 1075–76.

52. *Id.* at 1062 (majority opinion) (writing that it was “clearly establish[ed]” under circuit case law that “state *actors* may be held liable” for danger-causing decisions if they act with the requisite level of culpability) (emphasis added).

53. *See id.*

54. *See Irish v. Fowler*, 979 F.3d 65, 75 (1st Cir. 2020) (holding, despite prior precedent casting doubt on the proposition, *Vélez-Díaz v. Vega-Irizarry*, 421 F.3d 71, 79 (1st Cir. 2005), that the state-created danger doctrine was clearly established in the First Circuit), *cert. denied*, *Fowler v. Irish*, No. 20-1392, 2021 WL 4507655 (U.S. Oct. 4, 2021); *Okin v. Vill. of Cornwall-On-Hudson Police Dep’t*, 577 F.3d 415, 427–31 (2d Cir. 2009) (recognizing that under the circuit’s “state-created danger doctrine,” “state actors may be liable” for due process violations “if they affirmatively created or enhanced the danger of private violence” to a person); *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 242 (3d Cir. 2016) (finding a “state-created danger” exception to the general rule that the Due Process Clause imposes no duty

circuits vary in their formulation of the particular elements necessary for a state-created danger claim,⁵⁵ but none explicitly requires a deprivation of liberty through the exercise of coercive governmental power to find due process liability.⁵⁶ Rather, as in the Ninth Circuit, any state employee committing any affirmative act can be liable under the state-created

on states to protect their citizens” and stating elements for such claims); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015) (recognizing the possibility of liability under a “state-created danger theory” where a plaintiff shows “that [a] state actor created or increased the risk of private danger . . . through affirmative acts”); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (recognizing a “state-created danger theory” that creates liability “upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence”); *Robinson v. Township of Redford*, 48 F. App’x 925, 929 (6th Cir. 2002) (clarifying standard governing state-created danger claims); *Doe v. Village of Arlington Heights*, 782 F.3d 911, 916 (7th Cir. 2015) (recognizing a “state-created danger exception” to the *DeShaney* rule prohibiting liability based on state omissions); *Montgomery v. City of Ames*, 829 F.3d 968, 972 (8th Cir. 2016) (affirming the validity of the “theory” that the state “owes a duty to protect a citizen ‘when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced’”); *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1260, 1262–63 (10th Cir. 1998) (recognizing the “‘danger creation’ theory” of due process, which “provides that a state may [] be liable for an individual’s safety ‘if it created the danger that harmed [an] individual,’” and explaining the circuit’s five-part test under the theory); *Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837, 838 (11th Cir. 1997) (stating that circuit precedent holds “that a state has a duty to protect an individual from third parties when the state’s actions place [the] individual in ‘special danger’”); *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (“We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection . . . from third-party violence when [government] officials affirmatively act to increase or create the danger that ultimately results in the individual’s harm.”). For representative Fifth Circuit decisions declining to adopt the doctrine, see *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 865 (5th Cir. 2012) (en banc) (“We decline to use this en banc opportunity to adopt the state-created danger theory in this case.”) and *Chavis v. Borden*, 621 F. App’x 283, 286 (5th Cir. 2015) (per curiam) (“Unlike our sister Circuits, we have repeatedly declined to decide whether [a state-created danger theory of due process] is viable in the Fifth Circuit.”). I exclude from this survey the Federal Circuit, which has not had occasion to consider the issue since its jurisdictional parameters generally exclude civil rights cases from the docket. See 28 U.S.C. § 1295.

55. See generally Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1 (2007) (summarizing remarks from a seminar about the circuit courts’ different approaches to the doctrine).

56. See *supra* note 54. Several panel decisions from the Seventh Circuit, however, come close to limiting the state-created danger doctrine according to whether there has been a deprivation of liberty through the exercise of bona fide state power. See, e.g., *Nelson v. City of Chicago*, 992 F.3d 599, 605 (7th Cir. 2021). Most of these have been penned by Judge Frank Easterbrook, whose lucid writings on general constitutional principles this author has found refreshingly felicitous in conducting research for this Article, and many are discussed in detail below. See, e.g., *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986); *Paine v. Cason*, 678 F.3d 500, 510 (7th Cir. 2012); *Weiland v. Loomis*, 938 F.3d 917, 919 (7th Cir. 2019); see also *infra* Section III.C.

danger doctrine so long as that act foreseeably causes harm under circumstances that can be said to shock the conscience.⁵⁷

This current version of the state-created danger doctrine has its roots in a handful of substantive due process decisions among the circuit courts primarily involving law-enforcement misconduct. The doctrine then expanded, slowly at first but then with increasing momentum, to apply in a number of distinct contexts involving state agents acting in their capacity as employers or service providers of some kind. Despite the significant conceptual and epistemological difference between activities by the state when functioning as law enforcer and such actions by the state as employer or service provider, the transition of the state-created danger doctrine from one context to the others occurred automatically and often without meaningful judicial reflection, such that today any government activity can give rise to a state-created danger claim.

B. Early Cases: The Doctrine as a Limitation on the State's Power as Law Enforcer

The logical starting point of this evolution is the Seventh Circuit's 1979 decision in *White v. Rochford*.⁵⁸ In that case, a police officer arrested a man for drag racing on a busy street at night.⁵⁹ The man had three young children with him at the time and asked the officer to take them somewhere they could contact another adult.⁶⁰ The officer declined and left the children in the car on the side of the road.⁶¹ The children subsequently wandered the streets of Chicago in the cold before a

57. Although the Fourth Circuit has explicitly recognized the state-created danger doctrine, it has only ever upheld a state-created danger claim in one unpublished decision involving a law enforcement officer's improper interference with execution of a warrant. See *Robinson v. Lioi*, 536 F. App'x 340, 343–44 (4th Cir. 2013). The court's description of the elements necessary for a state-created danger claim does not suggest any limitation based on the particular role of the state actor who is alleged to have caused injury. See *Doe*, 795 F.3d at 438–39. But the language the court has used in assessing such claims suggests that it takes a limited view of them. *Id.*; see also *Pinder v. Johnson*, 54 F.3d 1169, 1176–77 (4th Cir. 1995) (characterizing the state-created danger doctrine as unclear and suggesting skepticism about application of the doctrine except where the state has taken a “large[]” and “direct role” in creating the alleged harm); *Graves v. Lioi*, 930 F.3d 307, 333–34, 339 (4th Cir. 2019) (Gregory, J., dissenting) (accusing the majority of “abandon[ing]” its holding in *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013) by rejecting due process liability under a state-created danger theory). It is therefore an open question whether the Fourth Circuit would apply the state-created danger doctrine outside the law enforcement context.

58. 592 F.2d 381 (7th Cir. 1979).

59. *Id.* at 382.

60. *Id.*

61. *Id.*

neighbor picked them up.⁶² One of the three was asthmatic and had to be hospitalized for a week afterward.⁶³

The court held that the arresting police officer “indisputably” violated due process.⁶⁴ Significantly, although the particular misconduct giving rise to the plaintiffs’ injury involved a police officer exercising his authority to coerce or constrain physical action—a prime example of misused governmental power—the court did not clearly predicate its holding on that element of the case. Instead, the court reviewed a number of decisions discussing the still evolving fundamental-rights jurisprudence of the time and held that by “refus[ing] . . . to lend aid to children endangered by the performance of official duty,” the officer transgressed the substantive due process right to be free from “undue incursions on personal security” or conscience-shocking state behavior.⁶⁵ In other words, it was not so much that the police officer used delegated state power to deprive the children of the safety their adult companion provided that gave rise to due process liability. It was more that the officers engaged in “conduct so clearly deserving of universal reprobation” that justice required a constitutional remedy.⁶⁶

Ten years later, the Ninth Circuit reached the same conclusion in its first state-created danger case, *Wood v. Ostrander*,⁶⁷ published immediately in the wake of the Supreme Court’s *DeShaney* decision. The Ninth Circuit held in *Wood* that a police officer violated due process when he arrested a driver and left the passenger stranded in a high-crime area, after which the passenger accepted a ride from a stranger who later raped her.⁶⁸ *Wood* followed similar decisions involving law enforcement misconduct in the Sixth and Eleventh Circuits.⁶⁹ One, *Nishiyama v. Dickson County*, involved the unusual scenario of a police officer who permitted a private person—a local jail inmate, no less—to use his marked patrol car, effectively delegating the man his law-enforcement prerogatives.⁷⁰ When the man used this delegated power to pull a woman over so he could “beat her to death,” the Sixth Circuit found state liability for violating the victim’s due process rights.⁷¹ In the other case, *Cornelius*

62. *Id.*

63. *Id.*

64. *Id.* at 383.

65. *Id.*

66. *Id.* at 386.

67. 879 F.2d 583, 589–90 (9th Cir. 1989).

68. *Id.* at 586, 590.

69. See *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989).

70. *Nishiyama*, 814 F.2d at 279.

71. *Id.* at 279, 283.

v. Town of Highland Lake, the Eleventh Circuit held that state correctional officials violated due process by forcing contact between a woman and prison inmates who abducted her.⁷²

It is no coincidence that these and other early instantiations of the state-created danger doctrine involved injuries resulting from state law enforcement officers invoking their prerogative to use force or coercion.⁷³ Although the language the courts employed in the decisions was often far from pellucid, each involved the state “depriv[ing] [the affected plaintiffs] of liberty . . . without due process of law” by using coercive state power to constrain private action in a way that caused them harm.⁷⁴ And in no context is the exercise of coercive state power more apparent than when the state acts as law enforcer.

C. Expansion of the Doctrine to Actions by the State as Employer

1. Initial Cases and Circuit Divergence

But the courts did not confine this evolving due process theory to cases involving police force. Not long after these forerunner state-created danger decisions, the Ninth Circuit extended the doctrine beyond the law-enforcement context in *L.W. v. Grubbs*.⁷⁵ There, a juvenile detention facility assigned one of its inmates with known violent tendencies to work in the facility’s medical clinic at a time when he would be alone with a female nurse.⁷⁶ The inmate assaulted and raped the nurse one night, and the nurse sued the supervisors responsible for the inmate’s placement at the clinic.⁷⁷

The court held that the supervisors violated the nurse’s substantive due process rights under the state-created danger doctrine.⁷⁸ With

72. *Cornelius*, 880 F.2d at 356–57, 359.

73. See *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990) (holding that the sheriff violated due process under the state-created danger doctrine by ordering a halt to private rescue efforts that might have saved a drowning child); *Stemler v. City of Florence*, 126 F.3d 856, 860, 867–68 (6th Cir. 1997) (holding that police officers violated due process by forcing a woman to get in a car with a drunk driver who had abused her, after which the man continued to beat her); *Kneipp v. Tedder*, 95 F.3d 1199, 1201–03, 1213–14 (3d Cir. 1996) (finding, in the first Third Circuit case explicitly to adopt the state-created danger doctrine, a due process violation where police officers stopped a car and left its passenger, a severely drunk woman, to walk home alone, on which walk she fell down an embankment and seriously injured herself).

74. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

75. 974 F.2d 119, 120–22 (9th Cir. 1992).

76. *Id.* at 120.

77. *Id.*

78. *Id.* at 122.

reference to both the *DeShaney* decision—then only a few years old—and its own precedent in *Wood v. Ostrander*, the court started from the premise that the *DeShaney* rule prohibiting liability for the state’s failure to protect from a third-party’s assault did not apply where a state actor created the risk of that assault.⁷⁹ The court then identified several “affirmative” acts supervisors in the case had taken that exposed the nurse to danger, including affirmatively assigning the inmate to work at the same facility knowing of his violent past and hiring the nurse without warning her of the danger her assignment might pose.⁸⁰ Hence, the court reasoned, “like the [police] officer in *Wood*, [the supervisors] used their authority as state correctional officers to create an opportunity” for the nurse’s assault and could be held constitutionally liable as a result.⁸¹

Of course, the facility supervisors did not “use[] their authority as state correctional officers” over the victimized nurse at all, because they had no such authority. The nurse was not an inmate at the facility obliged to obey their commands on threat of force, nor could the supervisors have lawfully coerced her presence at the place where her attacker was confined. Rather, the nurse was at the correctional facility because she had contracted with the state to provide services there, and she followed directions from her supervisors because she wanted to preserve that contract. In no sense, then, could the facility supervisors’ assignment of employment tasks be analogized to the police actions that created the relevant danger in *Wood* or any other case where state officers clothed with coercive state power applied that power in a way that caused the particular injury at issue.⁸² Unlike in those law-enforcement contexts, the *Grubbs* court’s due process theory makes sense only insofar as the state can be said to deprive a person of liberty by offering her a dangerous job.⁸³

79. *Id.* at 121 (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197, 201 (1989) and *Wood v. Ostrander*, 879 F.2d 583, 588–90 (9th Cir. 1989)).

80. *Id.* The court also found it relevant that the supervisors had “knowledge that” the inmate “was not qualified to serve [in his assignment at the facility] as a cart boy” and would be alone with the nurse as part of his duties there. *Id.*

81. *Id.* at 121–22.

82. *See Wood*, 879 F.2d at 586, 590.

83. Although the court thought it pertinent that the state employer failed to warn the nurse about the violent past of the juvenile inmate who attacked her, the government no more coerces or constrains private action when it offers a job without disclosing potential dangers than it coerces or constrains private action when it offers a job while making those disclosures. *Grubbs*, 974 F.2d at 121. Such an omission may constitute negligence or fraudulent misrepresentation, but it is by definition not a state deprivation of liberty. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 284 (AM. L. INST. 1965); RESTATEMENT (SECOND) OF TORTS § 557A (AM. L. INST. 1977). For further discussion about the distinction between this type of potentially tortious misconduct by state actors and state coercion that deprives a person of liberty, see *infra* Section IV.A–B.

Nevertheless, the Ninth Circuit did not hesitate to reaffirm *Grubbs* in the recent case of *Pauluk v. Savage*.⁸⁴ There, a county health district employee was exposed to toxic mold as part of his work duties.⁸⁵ When the man later died as a result, his widow sued the county and two of its employees, alleging that their decision to assign the man to an office with known mold problems violated due process.⁸⁶ The Ninth Circuit agreed.⁸⁷ Applying the state-created danger doctrine, the court held that the supervising employees engaged in “affirmative’ conduct” to endanger the man by assigning him to the moldy office and that the supervisors were deliberately indifferent to the man’s safety given their knowledge of mold problems with the office in the past.⁸⁸

Contrasted with the Ninth Circuit’s uncritical extension of the state-created danger doctrine to the employment context are the decisions in *McClary v. O’Hare*⁸⁹ and *Walker v. Rowe*.⁹⁰ In *McClary*, the Second Circuit affirmed dismissal of the claim that a county highway department violated due process by hiring an employee who killed another employee through negligent operation of a construction crane.⁹¹ Even if a department supervisor intentionally cut corners in his hiring decisions and thereby created an unsafe workplace, the court noted that the supervisor simply abused the “authority that he held as an employer,” not his authority “as a *state official*.”⁹² Since no state agent inflicted harm through an abuse of government power, the court held that the Due Process Clause had no application.⁹³

Similarly, the Seventh Circuit in *Walker* held that state correctional officials did not violate due process by assigning prison guards to a facility the officials knew to be dangerous given its lack of structural safeguards.⁹⁴ Regardless of whether the officials exhibited “deliberate indifference” in hiring the guards, those officials did nothing to “force[] them to be guards” at the prison in the first place.⁹⁵ The guards

84. 836 F.3d 1117, 1124 (9th Cir. 2016).

85. *Id.* at 1119–20.

86. *Id.* at 1120.

87. *Id.* at 1121.

88. *Id.* at 1125.

89. 786 F.2d 83 (2d Cir. 1986).

90. 791 F.2d 507 (7th Cir. 1986).

91. *McClary*, 786 F.2d at 84–85, 89.

92. *Id.* at 89; *see also id.* at 89 n.6 (distinguishing conduct that is “uniquely governmental in character” and involves “abuses of *governmental* authority” from the general conduct of government actors in their role as employers).

93. *Id.* at 89.

94. *Walker*, 791 F.2d at 508–12.

95. *Id.* at 511. The court here approvingly cited the Second Circuit’s *McClary* decision in support of the proposition that “even ‘deliberate’ exposure of public employees to ‘high

voluntarily took their positions and “were free to quit whenever they pleased.”⁹⁶ The court concluded that it was therefore impossible to say that the state had “deprived” the guards of liberty in violation of due process.⁹⁷

The Supreme Court later cited *Walker* approvingly in a decision rejecting a due process claim based on workplace hazards, published as *Collins v. City of Harker Heights*.⁹⁸ But despite the Court’s rejection of the plaintiff’s workplace due process theory, several circuit courts have relied on *Collins* to support exactly the opposite holding: that the Due Process Clause creates liability for government workplace dangers that result from the deliberate indifference of supervising employees.⁹⁹ The Court in *Collins* also discussed the concept of governmental power and its application to § 1983 claims generally.¹⁰⁰ It is therefore worthwhile briefly to examine *Collins* in more detail.

2. *Collins v. City of Harker Heights*

The plaintiff in *Collins* was the widow of a city sanitation employee who died while performing dangerous work in a sewer line as part of his

risk’ does not violate the constitution because it is not an abuse of governmental power ‘We do not think that improper actions taken by employers violate an employee’s [constitutional] rights simply because the employer is a government official.’” *Id.* at 511 n.2 (alteration in original) (quoting *McClary*, 786 F.2d at 89).

96. *Id.* at 511.

97. *Id.* at 508, 510–11. Notably, though, at least one subsequent Seventh Circuit panel has deviated from the rationale of *Walker* in its application of the state-created danger doctrine. In *Monfils v. Taylor*, 165 F.3d 511, 518 (7th Cir. 1998), the court held that a police detective “clearly created a danger” in violation of due process when, after assuring an informant working with the police that he would not release audio revealing the informant’s identity, the detective allowed it to be released anyway. *Id.* at 514–15. But just as no one forced the plaintiffs in *Walker* to be prison guards, no one forced the plaintiff in *Monfils* to work as an informant—the informant volunteered to do the work. *Id.* at 514. So as irresponsible, and perhaps tortious, as the *Monfils* detective was in failing to ensure that audio identifying the informant would be kept safe from release, it is inconsistent with *Walker* to hold that the detective violated due process with that conduct. See *Sandage v. Bd. of Comm’rs of Vanderburgh Cnty.*, 548 F.3d 595, 599 (7th Cir. 2008) (casting doubt on *Monfils* because it “may well have been superseded by [the Supreme Court’s decision in] *Castle Rock*,” which rejected the notion of a due process right to protection based on the “promise” to protect that a restraining order represents (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)); see also *supra* note 31.

98. 503 U.S. 115, 128, 130 (1992).

99. See, e.g., *Pauluk v. Savage*, 836 F.3d 1117, 1123–24 (9th Cir. 2016); see also *infra* note 156.

100. *Collins*, 503 U.S. at 119–21.

duties.¹⁰¹ The widow brought a § 1983 *Monell*¹⁰² claim against the city, alleging “deliberate indifference” to the employee’s safety in violation of due process because the city “customarily failed to train or warn its employees about known hazards in the workplace.”¹⁰³ Both the district court and the Fifth Circuit rejected the claim, but on different grounds.¹⁰⁴ The district court ruled that the widow failed to allege a due process violation.¹⁰⁵ The Fifth Circuit affirmed, but it held that it was unnecessary to decide whether the city violated due process because under its precedents, any plaintiff alleging a § 1983 claim had to demonstrate an “abuse of government power . . . separate from the constitutional deprivation element” of that claim, which the employee’s widow had not done.¹⁰⁶

The Supreme Court in turn affirmed, but in so doing explicitly rejected the Fifth Circuit’s statement of the elements necessary for a § 1983 claim.¹⁰⁷ “Our cases,” the Court observed, “do not support the [Fifth Circuit’s] reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation.”¹⁰⁸ Citing recent precedents where government employers had unconstitutionally discriminated against employees based on sex or retaliated against them for political speech, the Court concluded that the “employment relationship . . . is not of controlling significance” in deciding whether a plaintiff has stated a § 1983 claim.¹⁰⁹ Rather, the Court observed, “§ 1983 provides a cause of action for all citizens” whose constitutional rights have been violated.¹¹⁰

Critically, however, the Court went on to hold that the plaintiff did not allege a due process violation.¹¹¹ The Court characterized the plaintiff’s claim as “advanc[ing] two theories: that the Federal Constitution [requires] . . . the city to provide its employees with minimal levels of safety . . . in the workplace, or that the city’s ‘deliberate indifference’ to [the employee’s] safety was [conscience-shocking]

101. *Id.* at 117.

102. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694–95, 701 (1978) (permitting liability against municipalities and other local governmental entities for official policies that cause the violation of constitutional rights).

103. *Collins*, 503 U.S. at 117.

104. *Id.* at 118.

105. *Id.*

106. *See Collins v. City of Harker Heights*, 916 F.2d 284, 286–88 (5th Cir. 1990).

107. *Collins*, 503 U.S. at 119, 130.

108. *Id.* at 119.

109. *Id.*

110. *Id.* at 120.

111. *Id.* at 125.

government action.”¹¹² The Court concluded that neither theory was constitutionally cognizable.¹¹³

Echoing *McClary* and *Walker*, the Court held that the first theory failed because the plaintiff could not show “that the city deprived [her deceased husband] of his liberty when it made, and he voluntarily accepted, an offer of employment.”¹¹⁴ The second failed because a city’s alleged failure to train or warn employees about workplace risks of harm constituted only an omission in the nature of tort and thus could not “properly be characterized” under the rubric of “conscience shocking” state action.¹¹⁵ The Court here emphasized that “state law, rather than the Federal Constitution, generally governs the substance of the employment relationship.”¹¹⁶ The Court concluded by summarizing its holding: “[T]he Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city’s alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense.”¹¹⁷

3. The Circuit Courts’ Application of the State-Created Danger Doctrine in the Government Employment Context after *Collins*

The federal circuit courts have split on the import of *Collins*. In *Pauluk v. Savage*, for example, the Ninth Circuit recognized the tension between its application of the state-created danger doctrine to government employment decisions and the Supreme Court’s *Collins* holding.¹¹⁸ The *Pauluk* court nevertheless held that “*Collins* does not bar . . . due process claim[s]” by government employees predicated on workplace hazards.¹¹⁹ In the Ninth Circuit’s view, *Collins*’s rejection of a “due process claim to a safe workplace” was merely an application of the “general rule” that omissions cannot create due process liability.¹²⁰ Thus,

112. *Id.* at 126.

113. *Id.* at 128.

114. *Id.* at 127–28.

115. *Id.* at 128. It is here that the Court cited the Seventh Circuit’s *Walker* decision favorably. *See id.* (citing *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986)).

116. *Id.*; *see also id.* at 129 (“The Due Process Clause ‘is not a guarantee against incorrect or ill-advised personnel decisions.’” (quoting *Bishop v. Wood*, 426 U.S. 341, 350 (1976))).

117. *Id.* at 130.

118. 836 F.3d 1117, 1118 (9th Cir. 2016) (characterizing the state-created danger doctrine and the *Collins* decision “declining to find a general due process right to a safe workplace” as “the intersection of two lines of authority”).

119. *Id.* at 1119.

120. *Id.* at 1123.

Collins did not affect the outcome of due process claims when exceptions to the rule, such as the state-created danger doctrine, applied.¹²¹

The court found support for this conclusion in dicta from the *Collins* opinion.¹²² Specifically, while describing the plaintiff's due process theory, the *Collins* Court noted the absence of any allegation that a state agent "deliberately harmed [the plaintiff's] husband," or "even . . . that [her husband's] supervisor instructed him to go into the sewer" with the knowledge that he would be injured.¹²³ Citing this language, the *Pauluk* court reasoned that since *Collins* did not involve any allegation of an affirmative act by a government supervisor, it cast no doubt on the viability of state-created danger claims that *do* allege an affirmative act by an employer—including the claim before it, which involved the allegation that certain government supervisors affirmatively assigned the plaintiff's husband to offices with toxic mold.¹²⁴

The Third Circuit similarly held in *Eddy v. Virgin Islands Water and Power Authority* that *Collins* does not preclude substantive due process claims based on government employment decisions that result in workplace hazards.¹²⁵ *Collins* did not involve allegations of "conscience shocking" employer behavior, the *Eddy* court surmised, but if it had, the court saw nothing in *Collins* to suggest that the employee "would not have stated a substantive due process claim."¹²⁶ In other words, according to the *Eddy* court, had the employer's actions in *Collins* crossed some line separating behavior that is merely bad from behavior that is *so bad* as to "shock the conscience," the decision would have come out differently.¹²⁷ The Third Circuit therefore reaffirmed prior precedent establishing the viability of state-created danger claims based on the actions of the government as an employer.¹²⁸

These courts' analyses are dubious. Although *Collins* did not consider the state-created danger doctrine and so did not speak directly to the

121. *See id.* at 1123–24.

122. *See id.* at 1123.

123. *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (alteration in original)).

124. *Id.* at 1123–24.

125. 256 F.3d 204, 212–13 (3d Cir. 2001), *rev'd on other grounds*, 369 F.3d 227 (3d Cir. 2004).

126. *See id.* ("Unlike the defendants, we do not read . . . *Collins* to mean that the plaintiff in that case would not have stated a substantive due process claim if she had alleged conduct on the part of the city that satisfied the demanding shocks the conscience test. Rather, we understand *Collins* to mean that the allegations in that case did not rise to the conscience-shocking level and that the Due Process Clause does not reach a public employer's ordinary breach of its duty of care relative to its employees.").

127. *See id.*

128. *See id.*

propriety of applying the doctrine in the employment context, *Pauluk* and *Eddy* cannot be reconciled with *Collins*'s central rationale. If, as *Collins* held, "the Due Process Clause does not" require governments to provide "minimal levels of safety and security in the workplace,"¹²⁹ it follows necessarily that government agents cannot be constitutionally liable for assigning employees to unsafe tasks within that workplace.

This does not change because, as the *Pauluk* court emphasized and as will be true in every such case, a government supervisor at some level "affirmatively" made the dangerous assignment.¹³⁰ A city must act through its agents; one such agent necessarily assigned the *Collins* employee to the particular job with "known hazards" that resulted in his demise.¹³¹ And although the *Collins* Court mentioned in dicta the absence of an allegation that any particular city agent deliberately endangered the employee, that allegation could not logically have made a difference to the Court's holding that the city did not "deprive[] [the employee] of his liberty when it made, and he voluntarily accepted, an offer of employment."¹³² Rather, as Chief Judge Easterbrook observed with respect to *Collins* in the Seventh Circuit's *Witkowski v. Milwaukee County*, "the point of . . . *Collins*" is that allegations of deliberate harm by a government supervisor do not make a difference in the employment context, because such allegations do not change the fact that a government employee is a "volunteer rather than a conscript."¹³³ "The state did not force [the employee] into a position of danger" in the first place, so no deliberate act by a government supervisor could have deprived the employee of his liberty.¹³⁴

The Third Circuit's reading of *Collins* fares no better. Citing *Collins*'s statement that a city's failure to warn or train about workplace hazards is *not* "an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense,"¹³⁵ the Third Circuit in *Eddy* held that a government employer's conduct *can* violate due process if a reviewing judge finds that it *is* conscience-shocking.¹³⁶ But the *Collins* Court's discussion of the "shocks the conscience" standard in the

129. *Collins v. City of Harker Heights*, 503 U.S. 115, 130 (1992).

130. *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

131. *See Collins*, 503 U.S. at 117.

132. *Id.* at 125, 128.

133. *See* 480 F.3d 511, 513 (7th Cir. 2007).

134. *Id.*

135. *Collins*, 503 U.S. at 128.

136. *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 212–13 (3d Cir. 2001), *rev'd on other grounds*, 369 F.3d 227 (3d Cir. 2004) (citing the quoted passage from *Collins* to hold that an employee states a due process claim for workplace hazards if she alleges "conduct on the part of" the government employer bad enough that it "shocks the conscience" (citing *Collins*, 503 U.S. at 128)).

passage *Eddy* cited concerned liability for *omissions by a municipality*, not individual state actors.¹³⁷ Specifically, the Court was analyzing a *Monell*—i.e., municipal liability—claim¹³⁸ against the city for the “fail[ure] to train or warn its employees.”¹³⁹ That particular species of *Monell* claim allows liability against a city for the constitutional violations of its agents on the theory that the city’s failure to adopt a necessary training program, despite notice that such training is necessary to prevent its agents from committing ongoing constitutional violations, is tantamount to an official government policy to cause those constitutional violations.¹⁴⁰ But even under this *Monell* theory, a plaintiff can only hold a city liable for its failure to train if the plaintiff first shows that there was in fact a constitutional violation caused by the city’s lack of training.¹⁴¹ And as *DeShaney* makes clear, there can never be such a predicate constitutional violation based on a state actor’s omissions, no matter how conscience-shocking they may be to a reviewing judge.¹⁴²

All of which is to say that *Collins*’s refusal to characterize the city’s alleged omissions as conscience-shocking for *Monell* purposes could not have been endorsing a due process theory in which some harm-causing omissions by particular state actors violate the Constitution if they are shocking enough. To do so would be *sub silentio* to overrule *DeShaney*. Rather, as the Fourth Circuit later explained in *Slaughter v. Mayor of Baltimore*, the import of the Court’s holding in *Collins* is that a government employer’s “deliberate indifference” causing workplace

137. See *Collins*, 503 U.S. at 128.

138. See *id.* at 120.

139. *Id.* at 117, 126 n.9 (recounting the plaintiff’s theory as being that the “city’s policy and custom of not training its employees and not warning them of the danger allegedly caused Collins’ death and thus deprived him” of due process).

140. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

141. See *id.* at 60–61 (requiring the plaintiff to prove that a city’s “deliberate indifference” in failing to train caused a constitutional violation); *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (holding that there can be no *Monell* liability absent proof that a state actor violated the plaintiff’s constitutional rights).

142. See *DeShaney, v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197–98 (1989) (rejecting the argument that the state’s “failure to discharge [its] duty” to protect Joshua from his father’s abuse “was an abuse of governmental power that [] ‘shock[ed] the conscience” because due process never created such a duty to protect in the first place); see also 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:62 (4th ed. 2010) (“*City of Canton*’s presumed affirmative constitutional duty on the part of local governments to prevent their police officers from depriving citizens . . . of their constitutional rights is a duty to train those over whom the local government has control and responsibility. This is markedly different from *DeShaney*-like situations where the alleged affirmative duty is premised on a claimed failure to act on the part of local governments (and their officials and employees) to protect citizens from harm caused by private persons over whom these potential defendants have no control and responsibility.”).

dangers is *as a categorical matter* “not ‘arbitrary, or conscience shocking, in a constitutional sense’ and would not support a substantive due process violation” because it involves only “a voluntary employment relationship.”¹⁴³

In accord with the Fourth and Seventh Circuits’ decisions in *Slaughter* and *Witkowski*—and in contrast with the Ninth and Third Circuits’ reading of *Collins* in *Pauluk* and *Eddy*—is the D.C. Circuit’s 2019 holding in *In re United States Office of Personnel Management Data Security Breach Litigation*.¹⁴⁴ The court there considered the claim by federal employees that their government employer compromised their safety by permitting a data breach that released a large volume of sensitive information about them.¹⁴⁵ The employees argued that the government’s handling of their personal data was so reckless as to “shock the conscience” in violation of due process.¹⁴⁶ The court rejected the employees’ due process claim.¹⁴⁷

“True,” the court observed, “reckless or deliberate indifference” may constitute conscience-shocking conduct and thus violate due process under some circumstances.¹⁴⁸ “But the conscience’s susceptibility to shock varies radically with whether the government has previously taken an ‘affirmative act of restraining the individual’s freedom to act on his own behalf’”¹⁴⁹ And, the court held with citation to *Collins*, the government does not take such an affirmative “restraining” act simply by offering someone a job.¹⁵⁰ On the contrary, as “the [*Collins*] Court reasoned,” a government employee cannot “maintain that the

143. 682 F.3d 317, 322 (4th Cir. 2012) (quoting *Collins*, 503 U.S. at 128) (holding that a city fire department did not violate due process under the state-created danger doctrine when its alleged deliberate indifference caused firefighters to die in a “live burn exercise”); see also *Witkowski v. Milwaukee County*, 480 F.3d 511, 512–13 (7th Cir. 2007) (stating employee’s allegation that supervisors “acted intentionally, recklessly, or with deliberate indifference” did not distinguish *Collins*, as the plaintiff there also “alleged that the city deliberately failed to train the workers in safe procedures”).

144. 928 F.3d 42, 75 (D.C. Cir. 2019).

145. *Id.* at 71.

146. *Id.* at 74 (quoting *Smith v. District of Columbia*, 413 F.3d 86, 93 (D.C. Cir. 2005)). Because the plaintiffs challenged the actions of the federal government, their due process claim arose under the Fifth Amendment rather than the Fourteenth. See *id.*

147. *Id.*

148. *Id.* (quoting Reply Brief for Appellants-Plaintiffs at 13, *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019) (No. 17-5217)).

149. *Id.* (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

150. See *id.* at 74–75.

government deprived [him] of his liberty . . . when it made, and he voluntarily accepted, an offer of employment.”¹⁵¹

“Like the sanitation worker in *Collins*,” the federal employees in *In re U.S. Office* “voluntarily’ sought and ‘accepted’ an ‘offer of [government] employment.”¹⁵² So regardless of any allegation about conscience-shocking behavior, they could not state a due process claim.¹⁵³ Because the government did not “compel [the employees] to seek government employment,” the D.C. Circuit concluded, *Collins* instructs that there was “no triggering deprivation of liberty or property to speak of,” and the government could not have violated the Due Process Clause by failing “to protect [the employees] from the risks associated with” their jobs.¹⁵⁴

Ultimately, *Collins* stands for the basic proposition that hazards in the government workplace are not the concern of substantive due process. The Court rightly rejected the Fifth Circuit’s anomalous rule requiring plaintiffs to prove an abuse of government power separate and apart from proof of a constitutional violation in every § 1983 case. But it also rightly held that the government cannot violate due process simply by exposing a person to a hazardous workplace as part of a voluntary employment relationship. Although the Court did not consider the state-created danger doctrine specifically, the reasoning underlying its decision coheres with the principle established in *Walker, McClary*, and *In re U.S. Office* that employment decisions cannot constitute deprivations of liberty given the absence of government coercion.¹⁵⁵

Nevertheless, other circuits—including the Sixth, Eighth, and Tenth Circuits—have, often with citation to *Collins*, echoed the Ninth and Third Circuits in permitting due process claims under a state-created danger theory based on the employment decisions of government actors.¹⁵⁶

151. *Id.* at 75 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)) (alteration in original).

152. *Id.* (quoting *Collins*, 503 U.S. at 128).

153. *Id.*

154. *Id.* (citing *Collins*, 503 U.S. at 127).

155. See also *Nelson v. City of Chicago*, 992 F.3d 599, 605 (7th Cir. 2021) (“[The] state-created-danger doctrine does not apply to a public employee who has agreed to do dangerous work, whether the dangers are posed by animate or inanimate causes.”).

156. See, e.g., *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067–68 (6th Cir. 1998) (holding that a city police department created danger to some of its police officers in violation of due process by releasing their identity to the public); *Ruge v. City of Bellevue*, 892 F.2d 738, 739, 741 (8th Cir. 1989) (holding, before *Collins*, that the state violated substantive due process by requiring employees to work in ditches without proper safeguards); *Sherwood v. Oklahoma County*, 42 F. App’x 353, 356, 360 (10th Cir. 2002) (holding that a county created danger in violation of due process by requiring its employee to oversee the painting of vehicles with noxious paint, causing him to become sick); *Liebson v. N.M. Corr. Dept.*, 73 F.3d 274, 276 (10th Cir. 1996) (suggesting that state-created danger liability would be appropriate for employer’s decision to assign librarian to a correctional

D. Broad Application of the Doctrine to the Actions of the State as Service Provider Generally

What began as a slow trickle of decisions applying the state-created danger doctrine in the absence of government force has since become a steady stream. Courts have found due process liability in an ever-expanding number of circumstances where the government is acting not as coercive law-enforcer but as a provider of some service. The breadth of these applications is limited only by the number of services the government provides. Paramedics,¹⁵⁷ teachers,¹⁵⁸ and other school personnel,¹⁵⁹ social workers,¹⁶⁰ city emergency workers and state environmental or healthcare officials¹⁶¹—all have been sued successfully

facility without a guard, which led to her being assaulted, if such conduct “shock[ed] the conscience,” but finding that it was not conscience-shocking on the facts alleged); *see also* *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) (holding that law-enforcement officials created danger in violation of due process when they used man as undercover operative in dangerous operation where he was killed); *Kedra v. Schroeter*, 876 F.3d 424, 432 (3d Cir. 2017) (holding that police firearms instructor “clearly” violated police recruit’s due process rights by firing a gun at him during training without realizing it was loaded). *But see* *Speakman v. Williams*, 841 F. App’x 382, 386 (3d Cir. 2021) (three-judge panel straining to distinguish and limit the Third Circuit’s state-created danger precedents in *Kedra* and *Eddy*).

157. *See, e.g.*, *Rivas v. City of Passaic*, 365 F.3d 181, 184–87, 196–98 (3d Cir. 2004) (holding that emergency medical technicians could have created danger in violation of due process by calling police for support and allegedly misrepresenting that the patient assaulted one of them because a police officer later allegedly used excessive force); *see* *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 58–59 (3d Cir. 2002) (holding that paramedics violated due process for harming a man while administering treatment).

158. *See, e.g.*, *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 240, 244 (3d Cir. 2016) (holding that teacher violated due process under state-created danger doctrine by letting a student leave with someone who later sexually assaulted her).

159. *See, e.g.*, *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1256–57, 1264 (10th Cir. 1998) (holding that school principal and counselor created danger to a student in violation of due process by suspending him and sending him home, where he later committed suicide).

160. *See, e.g.*, *Lipman v. Budish*, 974 F.3d 726, 730–31, 746 (6th Cir. 2020) (holding social worker liable under the state-created danger doctrine because her decision to interview a child in the presence of her potentially abusive foster parents “increased her risk of further abuse.”); *Briggs v. Johnson*, 274 F. App’x 730, 735 (10th Cir. 2008) (holding a social worker liable under the state-created danger doctrine because she “discouraged” a person from making reports of abuse); *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012) (finding social workers liable under the doctrine because they placed children in unsafe homes); *Nicini v. Morra*, 212 F.3d 798, 809 (3d Cir. 2000) (en banc) (holding that due process liability may be based on social workers having “acquiesced in” a foster child’s decision to go to a certain home, which turned out to be dangerous).

161. *Guertin v. Michigan*, 912 F.3d 907, 926–30 (6th Cir. 2019) (holding that state and city officials violated substantive due process by virtue of their various roles in the infamous decision to switch the water supply in Flint, Michigan to an unsafe source while representing to the public that it was safe).

under the theory that they violated due process because their decisions while employed by the state have led to some harm.

One context in which courts have frequently found due process liability under a state-created danger theory is where police officers decline to provide protective services or do something to prevent such services being rendered. Although these scenarios involve law enforcement officers, they do not involve applications of coercive state power. On the contrary, they are examples of the state *refraining* from using government power under circumstances where the plaintiff believes the state should have exercised it. The fallacy of finding a deprivation of liberty on the theory that the state has improperly abstained from using government force would seem apparent, yet courts will so find if they believe a particular state *actor* unjustifiably prevented or interfered with the government providing police protection.

Several decisions illustrate the approach. In the early case of *Freeman v. Ferguson*, police officers failed to prevent a man from killing two people.¹⁶² The plaintiff alleged that the local police chief was a friend of the killer and had directed subordinate officers not to take action against him leading up to the murder.¹⁶³ The Eighth Circuit held that the police chief violated due process because, as a “state actor,” he “interfere[d] with the protective services which would have otherwise been available in the community.”¹⁶⁴ The Fourth Circuit came to the same conclusion in the unpublished *Robinson v. Lioi*, finding due process liability under a state-created danger theory where a police officer prevented the execution and service of an arrest warrant on a man who later killed someone.¹⁶⁵

In the Second Circuit’s *Dwares v. City of New York*, police officers told counter-demonstrators (a group of skinheads) at a rally that the officers would not arrest them “unless they got totally out of control.”¹⁶⁶ Citing the Eighth Circuit’s *Freeman* decision, the court held that the officers

162. 911 F.2d 52, 53–54 (8th Cir. 1990).

163. *Id.* at 54.

164. *Id.*

165. 536 F. App’x 340, 344 (4th Cir. 2013). As mentioned above, see *supra* note 57, *Robinson* is the only Fourth Circuit decision ever to find liability under the state-created danger doctrine. A later panel of the same court all but repudiated it when it returned on appeal from summary judgment six years later. See *Graves v. Lioi*, 930 F.3d 307, 333–34 (4th Cir. 2019), *cert. denied sub nom.*, *Robinson v. Lioi*, 140 S. Ct. 1118 (2020) (mem.); *id.* at 339 (Gregory, C.J., dissenting) (“I take issue with the majority’s easy disregard of our prior opinion in this case.”). The Fourth Circuit’s half-hearted attempt to distinguish the original, unpublished *Robinson* decision leaves open the question whether and to what extent the court would adopt *Robinson*’s rationale in a published, precedential opinion. See *id.* at 333; see also *Doe v. Rosa*, 795 F.3d 429, 440 (4th Cir. 2015).

166. 985 F.2d 94, 99 (2d Cir. 1993).

“surely” violated due process because their “assurances” of non-intervention increased the likelihood of assaults.¹⁶⁷ In *Pena v. DePrisco*, the Second Circuit held that police officers violated due process by implicitly sanctioning another officer’s decision to drink and drive while off duty.¹⁶⁸ “[W]hen . . . state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in [dangerous] misconduct,” the court concluded, “those officials can be held liable . . . for injury caused by the misconduct under *Dwares*.”¹⁶⁹

The Ninth Circuit recently took a variation of this theme to its extreme in *Martinez v. City of Clovis*.¹⁷⁰ There, a police officer at the scene of reported domestic violence made “positive remarks” about the man suspected of the abuse.¹⁷¹ The officer knew the abuser’s family and said they were “good people.”¹⁷² Another officer told the man that the victim of his abuse was not “the right girl” for him.¹⁷³ The man assaulted the victim after these interactions.¹⁷⁴ The court held that both police officers violated due process under the state-created danger doctrine because they failed to protect the victim after their remarks “provoked” or “emboldened” the abuser to continue his violent assaults.¹⁷⁵ The Second Circuit reached a similar decision in *Okin v. Village of Cornwall-on-Hudson Police Department*, holding that police officers violated due

167. *Id.* (citing *Freeman*, 911 F.2d 52) (“It requires no stretch to infer that” police officers’ “assuring the ‘skinheads’ that” they would not be arrested “unless they got totally out of control . . . would have increased the likelihood that the ‘skinheads’ would assault demonstrators.”).

168. 432 F.3d 98, 110–11 (2d Cir. 2005).

169. *Id.* at 111 (citing *Dwares*, 985 F.2d 94). The Second Circuit is not alone in relying on its *Dwares* precedent to find state-created danger liability based on the theory that a state actor’s words or other release of information might encourage harmful private conduct. *Dwares* citations are ubiquitous among other circuits to endorse the theory. *See, e.g.*, *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006); *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *see also Meeker v. Edmundson*, 415 F.3d 317, 322–23, 322 n.1 (4th Cir. 2005) (without explicitly invoking or referencing state-created danger doctrine, holding that high school students stated a due process claim against high school wrestling coach on the theory that the coach violated their right to bodily integrity by encouraging other students to beat them). *But see Jones v. Reynolds*, 438 F.3d 685, 695–96 (6th Cir. 2006) (referencing *Dwares* in holding that police officers did not violate due process under the state-created danger doctrine by encouraging a dangerous drag race that resulted in bystander being struck by a car and dying).

170. 943 F.3d 1260 (9th Cir. 2019).

171. *Id.* at 1273.

172. *Id.*

173. *Id.* at 1272.

174. *Id.* at 1269.

175. *Id.* at 1272–74, 1276–77.

process by “implicitly but affirmatively encouraging or condoning” a man’s domestic violence.¹⁷⁶

The state-created danger doctrine that emerges from these precedents is functionally indistinguishable from state tort law. Its potential applications abound. An employee at the county fair operates a carnival game a little too recklessly; a municipal golf-course instructor is particularly lazy in his lessons and someone injures himself or others during gameplay as a result; a police department announces that its officers will decline to pull speeders over unless they exceed the speed limit by at least ten miles per hour. In each case, the state-created danger doctrine will be lurking in the background as a possible platform from which to allege due process liability against the government employee involved. So long as a person negatively affected can demonstrate that the employee crossed some amorphous line separating general negligence from “conscience shocking” indifference, the courts will convert what would in any other circumstance be a simple tort into a violation of our nation’s founding charter.¹⁷⁷

IV. THE CURRENT STATE-CREATED DANGER DOCTRINE CLASHES WITH *DESHANEY* AND MISAPPLIES DUE PROCESS PRINCIPLES

The circuit courts’ transformation of the Due Process Clause from a protection against government oppression into a vehicle for tort claims against bad state actors contravenes *DeShaney* and the constitutional principles it represents. The premise of the state-created danger doctrine is sound: state infliction of arbitrary harm effects a deprivation of liberty in violation of due process. But the circuit courts’ current state-created danger doctrine has stretched that premise beyond the breaking point.

Recall that, variations in formula aside, the doctrine has two common elements across all the circuits to adopt it: (1) a government employee must undertake an affirmative act that exposes someone to a foreseeable risk of harm; and (2) the employee’s conduct must shock the conscience, which means that it reflects a level of culpability somewhere above mere

176. 577 F.3d 415, 429–30 (2d Cir. 2009) (police officers clearly violated due process under the state-created danger doctrine when they “discussed sports” and “expressed camaraderie” with a domestic abuser in response to the victim’s report of the abuse).

177. *Cf. Daniels v. Williams*, 474 U.S. 327, 332 (1986) (exhorting courts applying the Due Process Clause to “bear in mind Chief Justice Marshall’s admonition that ‘we must never forget, that it is a *constitution* we are expounding,’” and that the Constitution “deals with the large concerns of the governors and the governed,” not the basic rules of liability among people living together in society) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)).

negligence.¹⁷⁸ Neither of these elements distinguishes the doctrine from general tort law, and neither is a proper basis for due process liability.

A. *Exposure to Danger by a State Actor Does Not Implicate Due Process in the Absence of Government Coercion*

As to the first element, affirmative action by a state agent is a necessary, but not a sufficient, condition to find a deprivation of liberty in the constitutional sense. Every act of government is accomplished through a human agent. As with all humans, government agents sometimes affirmatively act in ways that cause harm to others. But not every such harm-causing act is a deprivation of liberty by the state. That constitutional deprivation can occur only when the harm results from the state acting qua state—i.e., the government using its exclusive sovereign prerogative to coerce or restrain action through the threat or application of physical force.

DeShaney rests on exactly this proposition. The social workers in that case undertook a number of affirmative acts in their roles as state agents managing the case of young Joshua. At least one such act demonstrably exposed Joshua to danger: that of taking him from the temporary custody of a local hospital and entering into an agreement with his abusive father wherein the state would return him to the hell of his father's home.¹⁷⁹ The social workers also "affirmatively" visited the *DeShaney* home several times without taking action to remove Joshua despite

178. The circuit courts vary somewhat in their statements of the culpability necessary to give rise to a state-created danger claim. Most have determined after the Supreme Court's *City of Canton v. Harris*, 489 U.S. 378 (1989), that "gross negligence" is not sufficient and therefore require "reckless[ness]" or "deliberate indifference" to a known or obvious risk. See, e.g., *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (applying a "deliberate indifference" standard after concluding that gross negligence is not enough); *Sanford v. Stiles*, 456 F.3d 298, 310 (3d Cir. 2006) (per curiam) ("[W]e hold that in a state-created danger case, when a state actor is not confronted with a 'hyperpressurized environment' but nonetheless does not have the luxury of proceeding in a deliberate fashion, the relevant question is whether the officer consciously disregarded a great risk of harm. . . . [A]ctual knowledge of the risk may not be necessary where the risk is 'obvious.'"); *Okin*, 577 F.3d at 432 (reaffirming the Second Circuit's standard that "deliberate indifference is the requisite state of mind for showing that defendants' conduct shocks the conscience"); *Robinson v. Township of Redford*, 48 F. App'x 925, 929 (6th Cir. 2002) (stating Sixth Circuit standard as "deliberate indifference or recklessness toward human life"); *Sherwood v. Oklahoma County*, 42 F. App'x 353, 358–60 (10th Cir. 2002) (describing Tenth Circuit's standard as requiring the showing that a defendant was "recklessly indifferent to the serious consequences" of his actions); *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010) (suggesting that "deliberate indifference" is the minimum showing necessary to establish a due process violation).

179. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 192 (1989).

unmistakable signs that he was being abused,¹⁸⁰ which could certainly be said to have emboldened Joshua's father to continue the abuse without fear of consequence.¹⁸¹

Regardless, the social workers did not use *state power* to inflict any harm on Joshua. If anything, it was the social workers' callous *refusal* to use state power that partially led to Joshua's ultimate injuries. That is why the Court rejected Joshua's due process claim. Drawing on cases involving state incarceration, the Court made clear that the only relevant "affirmative act" in the due process analysis is "when the State by the affirmative exercise of its power . . . *restrains an individual's liberty*."¹⁸² Thus, rather than focusing on any particular "affirmative" act the social workers took, the Court looked to the status quo Joshua faced before state action—a dangerous household involving an abusive father—and asked whether the state used its power to expose him to a danger not already present in that status quo.¹⁸³ Because the answer was no, the Due Process Clause was inapplicable.¹⁸⁴

180. *See id.* at 192–93. It is worthwhile recounting some of the facts from *DeShaney* to show just how obvious it was that Joshua was still being abused, and how clearly the social workers' conduct signaled implicit acquiescence to that abuse. To wit: a month after Joshua was returned to his father's custody, "emergency room personnel called the [social worker] handling Joshua's case to report that he had once again been treated for suspicious injuries," after which the social worker "concluded that there was no basis for action." *Id.* at 192. "For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head" and found out he was not enrolled in school, after which she still took no action. *Id.* at 192–93. Shortly after that, the "emergency room notified [the social worker] that Joshua had been treated once again for injuries that they believed to be caused by child abuse." *Id.* at 193. No action. *Id.* Finally, on the social worker's "next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still [the social worker] took no action." *Id.*

181. *Cf. Lipman v. Budish*, 974 F.3d 726, 735, 746–47 (6th Cir. 2020) (finding that social worker's decision to interview child in front of potentially abusive foster parents was an "affirmative act" that could have encouraged the foster parents to retaliate and thus could constitute a due process violation under the state-created danger doctrine); *Martinez v. City of Clovis*, 943 F.3d 1260, 1273 (9th Cir. 2019) (finding that police officers engaged in affirmative acts by making comments that would embolden domestic abuser); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (finding that police officers affirmatively acted by making statements that encouraged rally demonstrators to become violent).

182. *DeShaney*, 489 U.S. at 199–200 (emphasis added).

183. *See id.* at 201 (examining dangers Joshua faced in the "free world," and comparing his situation after state action to that status quo).

184. *See id.*; *see also In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 74–75 (D.C. Cir. 2019) (per curiam) (holding that "[a]bsent" a government act "restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or similar restraint of personal liberty"—there can be no due process violation, and that the "lack of compulsion makes all the difference") (quoting *DeShaney*, 489 U.S. at 200).

Cases before and after *DeShaney* sound the same theme. The purpose of “the Due Process Clause,” wrote the Court in *Daniels v. Williams*, is “to secure the individual from the arbitrary exercise of *the powers of government*,” not to “supplant traditional tort law in laying down rules of conduct [that] regulate liability for injuries that attend living together in society.”¹⁸⁵ Or as the First Circuit put it, “where the state’s coercive power is not involved, there can be no *constitutional* (as opposed to tort) right” to state aid.¹⁸⁶ To allow constitutional liability simply based on the tortious conduct of state actors would be to “trivialize the centuries-old principle of due process of law.”¹⁸⁷ Due process liberty claims must accordingly be limited to cases involving government officials who abuse their power by using “it as an instrument of oppression.”¹⁸⁸

DeShaney and these companion cases illustrate a basic constitutional and epistemological axiom: government power means *the use of physical coercion by claim of juridical right*. What distinguishes the government from any other actor in society is that the government has the sole prerogative legitimately to initiate physical force. That is what makes a law a law: government may use force to exact compliance with it. Thus, the exercise of state power will always mean the use of physical coercion, whether actual or potential.

Distinct from such exercises of governmental power are the general activities we often denote broadly as “state action” simply because the people performing them are government agents. This state-actor-focused species of “state action” can describe everything from a law-enforcement arrest and prosecution to a postal worker’s delivery of mail, or a municipal librarian’s facilitation of book checkouts. It *can* involve the exercise of governmental power, but it need not. The possibility of coercion through the use of legitimate force is what makes the difference.

By its very terms, the liberty guarantee of the Due Process Clause is concerned not with state agents’ actions generally but with exercises of state *power* specifically, because only the exercise of state power can infringe a person’s liberty.¹⁸⁹ Stated simply, the antithesis of liberty is

185. 474 U.S. 327, 331–32 (1986) (emphasis added).

186. *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 992 n.5 (1st Cir. 1992).

187. *Daniels*, 474 U.S. at 332.

188. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *DeShaney*, 489 U.S. at 196).

189. By contrast, the state can violate other constitutional rights—such as the First Amendment right to free speech or the Fourteenth Amendment right to equal protection under the law—without the application or invocation of coercive governmental power against the affected individual. See *Collins v. City of Harker Heights*, 503 U.S. 115, 119–20 (1992) (observing that the First Amendment, and the Equal Protection and Due Process Clauses, would protect employees from retaliation based on speech or discrimination based on gender); see also *Witkowski v. Milwaukee County*, 480 F.3d 511, 513 (7th Cir. 2007)

the use of restraining force, so only the use or threatened use of force under color of law can effect a state deprivation of liberty. If the state has not used force or the threat of force against you, the state cannot have deprived you of your liberty in any coherent sense.¹⁹⁰

The “affirmative act” element of the circuit courts’ state-created danger doctrine does not account for this critical distinction. Take our introductory case of *Kennedy v. City of Ridgefield*, where the Ninth Circuit permitted liability against a police officer because he told a teenager that his neighbor accused him of sexual abuse, after which the teenager broke into his neighbor’s home and shot her.¹⁹¹ Although the court there began its discussion by pointing out that a plaintiff must show harmful “state action” to establish a state-created danger claim, the court went on to pose the relevant question as simply “whether . . . *any affirmative actions by [Officer] Shields* placed Kennedy in danger that she otherwise would not have faced.”¹⁹² But whether some “affirmative actions” by the police officer might have put Kennedy in danger is a different question from whether “state action,” properly understood, deprived Kennedy of liberty. And in asking the wrong question, the court arrived at the wrong answer.

Nothing even resembling state action deprived Kennedy of her liberty. Like the social workers in *DeShaney*, Officer Shields may have undertaken an “affirmative act” in his role as a state agent when he revealed Kennedy’s allegation to her violent neighbor during his police investigation.¹⁹³ But Shields did not affirmatively bring about any state deprivation of liberty because he used no state power to restrain Kennedy’s (or anyone else’s) conduct in any way. Even if Kennedy was worse off as a result of what Shields did because his disclosure made it more likely the neighbor would assault her, it was not *government*

(“This is not to say that public employees are beyond the Constitution’s protection. Suppose . . . [a county employer] exposed [a person] to extra risks because he had campaigned against the County’s political leaders or because of his race. Such allegations would state a legally sufficient claim under the first amendment or the equal protection clause of the fourteenth.” (citing *Collins*, 503 U.S. at 119–20)). The difference is that those other constitutional rights restrict government action generally, whereas the Due Process Clause is directed only at governmental deprivations of life, liberty, and property. See U.S. CONST. amend. XIV.

190. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989); *Monahan*, 961 F.2d at 990–91, 992 n.5, 995 (rejecting a due process claim based on mental patient’s allegation that worker at state mental health facility where the patient had “voluntarily committed himself” caused him to self-injure because even if the worker “acted with ‘deliberate indifference’ to” the patient’s needs, the state did not use its “coercive power” and so did not undertake any action “restraining his liberty”).

191. 439 F.3d 1055 (9th Cir. 2006).

192. *Id.* at 1061–63 (emphasis added).

193. See *id.* at 1063.

coercion that increased the likelihood of that assault. It was her proximity to a violent neighbor whom she wanted police to investigate, perhaps aided by the careless conduct of a particular state actor involved in providing that investigative service.¹⁹⁴ That carelessness may have constituted a tort under state law, but it surely did not amount to a state deprivation of liberty under the Due Process Clause.

The same is true in the many other modern state-created danger cases involving the government acting in its capacity as service provider. When the state elects to provide police or other protective services, it can never violate due process by withholding or ineffectively administering those services in particular instances—even if the only reason for its withholding the services is the improper conduct of a state actor. When a sheriff calls off law enforcement efforts directed at a friend,¹⁹⁵ or a police officer interferes with the execution of a warrant,¹⁹⁶ the involved actors have prevented the state from fulfilling a critical function and are worthy of condemnation for their misconduct. And again, they may be liable in tort under their respective jurisdictions' laws.¹⁹⁷ But to characterize the state's *failure* to restrain a person's physical actions as a deprivation of liberty is to postulate a contradiction.

Likewise, a government employer who directs an employee to do something dangerous as part of her duties may be committing a state-law violation. The employer's supervision might be negligent, or if the employer conceals material facts to induce the employee's performance of the dangerous task, the employing agency might be liable for fraud or breach of contract.¹⁹⁸ But there is no circumstance under which the state deprives a person of liberty without due process simply because its agents enter into an employment contract with a person and "affirmatively" assign him to complete tasks in the performance of that contract.¹⁹⁹ That

194. *See id.* at 1058–59.

195. *See, e.g.,* *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990).

196. *See, e.g.,* *Robinson v. Lioi*, 536 F. App'x 340, 344 (4th Cir. 2013).

197. What is more, insofar as a police officer's failure to protect a person (particularly a domestic violence victim) reflects a lack of evenhandedness in enforcing the law, that failure can constitute a violation of the Equal Protection Clause. *See, e.g.,* *Dalton v. Reynolds*, 2 F.4th 1300, 1303 (10th Cir. 2021) (holding that domestic violence victim's equal protection rights were violated when police officers declined to enforce the law as they ordinarily would against the victim's abuser, who was a fellow police officer); *id.* at 1310 ("[A]lthough there is no general constitutional right to police protection, the state may not discriminate in providing such protection." (quoting *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988))).

198. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965); RESTATEMENT (SECOND) OF TORTS § 557A (AM. L. INST. 1977).

199. *See* *Collins v. City of Harker Heights*, 503 U.S. 115, 127–28 (1992) (holding that a city could not have "deprived [a man] of his liberty when it made, and he voluntarily accepted, an offer of employment," regardless of whether the city's failure to warn or train

circumstance can never give rise to a due process violation because it will never involve the threat or application of physical coercion by government.

The “affirmative act” element of the modern state-created danger doctrine is untethered from the Due Process Clause it is meant to enforce. It does not require a governmental deprivation of liberty and so is not a valid predicate for due process liability.

B. The “Shocks the Conscience” Standard Does Not Inform Whether the State Has Created a Danger by Constraining Individual Liberty and Does Not Distinguish the State-Created Danger Doctrine from General Tort Law

Foreshadowing its later *Mapp v. Ohio* decision incorporating the Fourth Amendment’s exclusionary rule against the states,²⁰⁰ the Supreme Court held in *Rochin v. California* that due process prohibited a man’s conviction based on evidence police officers had obtained through conduct that “shock[ed] the conscience.”²⁰¹ The precise nature of that due process guarantee was necessarily “vague” and flexible, the Court wrote, but the officers transgressed it when they illegally broke into the man’s home and forcibly extracted his stomach’s contents to obtain evidence of his guilt.²⁰²

The Supreme Court and lower courts have since repeatedly relied on *Rochin*’s “shocks the conscience” standard as a benchmark for deciding when judicial intervention is necessary to curtail arbitrary government

him regarding workplace dangers resulted in his harm); *Walker v. Rowe*, 791 F.2d 507, 510–11 (7th Cir. 1986) (holding that “the due process clause does not assure safe working conditions for public employees” because “[t]he constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment”); *McClary v. O’Hare*, 786 F.2d 83, 89 (2d Cir. 1986) (holding that the “Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer”); *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 75 (D.C. Cir. 2019) (per curiam) (holding that plaintiffs failed to state a due process claim because there is “no constitutional governmental duty to ‘provide [the public-employee plaintiffs] with certain minimal levels of safety and security’” (quoting *Collins*, 503 U.S. at 127) (alteration in original)). *But see* *Pauluk v. Savage*, 836 F.3d 1117, 1118–19, 1121 (9th Cir. 2016) (holding government supervisor liable for assigning employee to office with mold problems that caused health complications); *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 207, 212–13 (3d Cir. 2001), *rev’d on other grounds*, 369 F.3d 227 (3d Cir. 2004) (holding government supervisors liable for requiring an employee to replace a high voltage switch without providing necessary training and equipment).

200. 367 U.S. 643, 655 (1961).

201. 342 U.S. 165, 172, 174 (1952).

202. *Id.* at 172.

action.²⁰³ In the state-created danger context, the circuit courts have incorporated the standard as the means of differentiating between actions by state agents that are merely tortious and those that violate substantive due process.²⁰⁴ The court's opinion in *Butera v. District of Columbia*—the D.C. Circuit's first case explicitly to adopt the state-created danger doctrine—is representative of this approach.²⁰⁵

In *Butera*, a civilian agreed to work with law enforcement officers in an undercover capacity to help investigate a murder.²⁰⁶ The officers sent the civilian into a dangerous situation, and he was killed.²⁰⁷ The civilian's mother brought a civil rights action, alleging that the officers acted recklessly in sending her son to his death.²⁰⁸ The jury was none too pleased with the officers' conduct; it found them constitutionally liable and assessed nearly \$100 million in damages.²⁰⁹

On appeal, the D.C. Circuit affirmed that the state-created danger doctrine was a valid theory of due process liability.²¹⁰ Distilling case law from other circuits, the court summarized the doctrine as providing that a person “can assert a substantive due process right to protection by the [state] from third-party violence when [state] officials affirmatively act to increase or create the danger that ultimately results in the individual's harm.”²¹¹ But this liability is limited to those situations involving conduct “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”²¹² The court explained: “This stringent [shocks the conscience] requirement exists to differentiate substantive due process, which is intended only to protect against arbitrary government action, from local tort law.”²¹³ Applying the standard, the court found that the officers may have violated their “duty to protect” the undercover civilian by putting him in danger under circumstances that

203. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (observing that since its decision in *Rochin*, the Court has “repeatedly adhered to” its “shocks the conscience” benchmark to determine when there has been an unconstitutional abuse of government power).

204. See, e.g., *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

205. *Id.*

206. *Id.* at 641–42.

207. *Id.* at 642–43.

208. *Id.* at 640–41.

209. *Id.* at 641.

210. *Id.* at 651.

211. *Id.*

212. *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8).

213. *Id.*

evinced deliberate indifference to his safety and therefore shocked the conscience.²¹⁴

In reasoning that mirrors *Butera's*, many other courts have likewise concluded that the “shocks the conscience” standard—rather than the presence or absence of state coercion—functions to distinguish general torts from substantive due process violations, thus allowing these courts to apply the state-created danger doctrine without, as they see it, contravening the Supreme Court’s many warnings against constitutionalizing state tort law.²¹⁵

These courts are correct in observing that the Supreme Court has invoked the “shocks the conscience” standard in rejecting the notion that the Due Process Clause incorporates basic tort law.²¹⁶ But rather than suggesting that tort violations transmute into due process violations whenever a reviewing court deems them outrageous enough, the better reading of the Court’s “shocks the conscience” case law is that there are certain *categories* of government action that implicate substantive due process, and tort-law violations by state employees are not among

214. *Id.* at 652. The court did not reach a final conclusion about application of the state-created danger doctrine to the case before it because it held that the contours of the doctrine were not sufficiently defined at the time of the potential violation to overcome the police officers’ defense of qualified immunity. *Id.* at 654. And it is unclear whether *Butera's* analysis of the state-created danger doctrine survived *In re U.S. Office of Personnel Management Data Security Breach Litigation*, discussed *supra* in Section III.C.3, which held that government workplace dangers cannot give rise to due process claims given the voluntary nature of the employment relationship. 928 F.3d 42, 74–75 (D.C. Cir. 2019); see also *Fraternal Ord. of Police Dep’t of Corr. Lab. Comm. v. Williams*, 375 F.3d 1141, 1146–1147 (D.C. Cir. 2004) (rejecting jail guards’ due process claim under the state-created danger doctrine because “[t]heir decision to work as guards [was] voluntary,” and noting that *Butera* reserved the question “whether the possibly voluntary nature of [undercover police operative’s] conduct would relieve or [absolve the government] of constitutional liability” (quoting *Butera*, 235 F.3d at 651 n.16) (alteration in original)); cf. *Summar v. Bennett*, 157 F.3d 1054, 1059 n.2 (6th Cir. 1998) (declining to find due process liability for police officer for disclosing the identity of a confidential informant who was later killed because the deceased’s decision to work as a confidential informant was “voluntary”).

215. See, e.g., *Guertin v. Michigan*, 912 F.3d 907, 923 (6th Cir. 2019) (“[T]he shocks-the-conscience test is the way in which courts prevent transforming run-of-the-mill tort claims into violations of constitutional guarantees.”); *Fagan v. City of Vineland*, 22 F.3d 1296, 1305 (3d Cir. 1994) (holding that the “shocks the conscience” standard is necessary lest the court “constitutionalize an otherwise ordinary state-law tort”); *Waybright v. Frederick County*, 528 F.3d 199, 205 (4th Cir. 2008) (stating that “[t]he presumption” that conduct amounts to a tort rather than a due process violation “is rebuttable” and can be “overcome by showing governmental conduct” that “shocks the conscience”); *Uhrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995) (holding that the shock the conscience standard distinguishes a substantive due process violation from “an ordinary tort”); *Waddell v. Hendry Cnty. Sheriff’s Off.*, 329 F.3d 1300, 1305 (11th Cir. 2003); *Hart v. City of Little Rock*, 432 F.3d 801, 805–06 (8th Cir. 2005).

216. See *County of Sacramento v. Lewis*, 523 U.S. 833, 848–49.

them.²¹⁷ Only instances of intentionally applied governmental power—or, as the Court put it in *Daniels*, “deliberate decisions of government officials to deprive a person of” liberty²¹⁸—are. In other words, the meaningful distinction is not between ordinary torts and egregious torts. It is between tort law generally and the very different category of “governmental power . . . ‘used for purposes of oppression.’”²¹⁹

The culpability of the particular government actor who has committed a tort does not inform the question whether that actor has used “governmental power . . . for purposes of oppression.”²²⁰ It simply informs which tort the actor has committed. That is, the difference between a state employee who deliberately (or even shockingly) harms another and one who carelessly does so is not the difference between tort law and substantive due process. It is the difference between an intentional tort and an unintentional one; for example, fraud or battery versus negligence.²²¹ And if the offending conduct is bad or “shocking” enough, it may mean the difference between the assessment of punitive damages or not—again a principle of basic tort law.²²² These concepts have no bearing on the distinct question whether the state itself has deprived a person of liberty in violation of the Fourteenth Amendment. Far from “differentiat[ing] substantive due process” violations from torts,²²³ then, the circuits’ use of the “deliberate indifference” standard simply converts a subset of the latter into the former.

217. See, e.g., *id.* (holding that the “shocks the conscience” standard of substantive due process is “most probably” applicable only to “conduct intended to injure in some way unjustifiable by any government interest”).

218. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis omitted).

219. *Id.* (quoting *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)).

220. See *id.*

221. See RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977); RESTATEMENT (FIRST) OF TORTS § 13 (AM. L. INST. 1934); RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965); cf. *Williams v. Berney*, 519 F.3d 1216, 1224–25 (10th Cir. 2008) (holding that a government licensing inspector’s “spontaneous” attack on a person during his inspection “obviously . . . was reckless and caused serious harm,” but it did not constitute a due process violation by *the state* because the inspector “had no authority to use force and did not abuse his official position to further his attack,” and that “[w]hile deplorable, this assault is not obviously distinguishable from an ordinary tort in myriad situations”).

222. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (“Punitive damages have long been a part of traditional state tort law.”).

223. *Butera v. District of Columbia*, 235 F.3d 637, 651–52 (D.C. Cir. 2001).

V. REVIVING *DESHANEY*: REFORMING THE STATE-CREATED DANGER DOCTRINE TO FOCUS ON COERCIVE STATE ACTION RATHER THAN TORTIOUS STATE ACTORS

So should there be a due process doctrine that addresses government-created harms? And if so, what should it look like?

The answer to the first question is certainly yes. It is axiomatic that the Constitution prohibits the government from interfering with a person's autonomy by arbitrarily causing harm. This is not an exception to the principle of negative liberties, as the circuits often say, but a logical extension of it.²²⁴ The theory of our Constitution, and of the Due Process Clause, is that people are innately free and possess the right to self-destiny.²²⁵ So when any person or group of persons uses government power to interfere with that right by harming another outside the context of the legal system—i.e., outside established civil or criminal legal processes—it necessarily violates the Fourteenth Amendment. *DeShaney* recognized as much by negative implication when, in explaining why the plaintiff could not predicate a due process claim on the state's failure to protect a child from danger, the Court pointed out that the state did not "do anything to render [the child] any more vulnerable to" that danger.²²⁶

The circuit courts have been right to recognize in this language from *DeShaney* the theoretical foundation for a state-created danger doctrine.²²⁷ Where they have erred is in their formulation of that doctrine. Faithful adherence to constitutional first principles requires

224. See *Paine v. Cason*, 678 F.3d 500, 510 (7th Cir. 2012) ("[I]t is misleading to treat [the state-created danger doctrine] as an 'exception' to *DeShaney*. As we've mentioned, *DeShaney* rests on the understanding that the due process clause establishes a right to be let alone, not a right to be assisted. State actors who needlessly *create* risks of harm violate the due process clause by depriving persons of life, liberty, or property without process . . ."); *Pinder v. Johnson*, 54 F.3d 1169, 1176 n.* (4th Cir. 1995) ("[I]t is not strictly accurate to suggest, as [the plaintiff] does, that 'creation of risk' is [an] . . . exception to the rule of *DeShaney*. Rather, 'creation' of a danger implicates the alternate framework of § 1983 liability wherein a plaintiff alleges that some conduct by an officer *directly* caused harm to the plaintiff.").

225. See *supra* notes 19–21 and accompanying text.

226. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989).

227. See, e.g., *Butera*, 235 F.3d at 648–49 (cataloguing the circuit court decisions that have "relied on [*DeShaney*'s 'render more vulnerable'] passage . . . to acknowledge that there may be possible constitutional liability" for state-created dangers); *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996) ("Several of our sister courts of appeals have cited [the 'render more vulnerable'] comment by the [*DeShaney*] Court as support for utilizing a state-created danger theory to establish a constitutional claim . . ."); *Johnson v. City of Philadelphia*, 975 F.3d 394, 398 (3d Cir. 2020) ("From those simple words—'played no part in their creation' and 'render him any more vulnerable'—sprang a considerable expansion of the law.").

refocusing the due process inquiry to turn on those actions by the *state* that deprive a person of liberty, not those by state *actors* that merely cause some harm. The “shocks the conscience,” “deliberate indifference,” and similar substantive due process standards do not advance this inquiry. Whatever the utility of those concepts in situations where the state has already legitimately exercised coercive power in some way, such as by incarceration,²²⁸ they have no bearing on the antecedent and distinct question whether the state has used its power to restrain liberty and thereby caused harm.²²⁹

Properly conceived, then, the due process inquiry should be simply whether the exercise of *coercive government power* has exposed a person to a danger she would not otherwise have faced. Broken down into elements, the state-created danger doctrine should thus consist of the following: (1) a person acting under color of law uses or invokes force to constrain private action (2) in a way that exposes another to a danger (3) that would not have existed but for state action. Only if all these elements are met can it be said that state action has deprived a person of liberty in violation of due process. So only by satisfying them could a plaintiff establish liability under a doctrinally sound state-created danger claim.

As should be clear by now, many cases where the circuit courts have found liability under the state-created danger doctrine would come out differently under the first element of this reformulation. There would be no due process liability, for example, in cases where a police official or some other state agent *prevented* the application of coercive government power—like when one police officer prevents another from arresting someone—even where that application of state power might have

228. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (holding that the state violates the Eighth Amendment when officials act with deliberate indifference to a known risk in denying medical services to prisoners); *Farmer v. Brennan*, 511 U.S. 825, 834, 839 (1994) (clarifying that the deliberate indifference standard in “prison-condition” cases requires conscious disregard of known risks).

229. See *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1330 (11th Cir. 2020) (“We doubt that deliberate indifference can ever be ‘arbitrary’ or ‘conscience shocking’ in a non-custodial setting.”); *In re U.S. Off. Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 74 (D.C. Cir. 2019) (observing that “a prisoner who has ‘already been deprived of [his] liberty,’ for example, has a plausible claim to affirmative governmental protection,” while someone not so deprived does not (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992))); cf. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (“Unlike a violation of the Cruel and Unusual Punishments Clause [of the Eighth Amendment], an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official’s acts (or omissions) have subjected [a person who has not been incarcerated following conviction] to a substantial risk of harm.”).

forestalled some harm.²³⁰ Nor would the plaintiff be able to satisfy the first element of the reformed doctrine in cases where liability was predicated on a state actor's mere words under the theory that those words might have encouraged a third party's misconduct.²³¹ And, certainly, a plaintiff could never make out a state-created danger claim based on the allegation that his state employer assigned him to a dangerous task as part of a voluntary employment relationship.²³² The doctrine would not permit liability in these circumstances because none involves the use or threatened use of coercive government power.

The third element of this reformulated state-created danger doctrine—that a plaintiff show the relevant danger would not have existed but for state action—would also preclude liability in some of the cases where the circuit courts have found it. On this there will often be overlap with the first element, but not always.

For example, the police officer in the Second Circuit's *Dwares* case did not use coercive governmental power when he told protesters that police would not intervene in fights except in extreme situations, so the due process claim there would fail under the first element of a coercion-focused state-created danger doctrine.²³³ But suppose the police officers at the rally had done something careless that made a clash between protesters more likely. Even if that careless decision involved some invocation of state power after the man had already inserted himself in the midst of the hostile crowd—say, because the officers prohibited the plaintiff from walking in a particular direction²³⁴—a separate problem is

230. See, e.g., *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); cf. *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005); *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013).

231. See, e.g., *Rivas v. City of Passaic*, 365 F.3d 181, 196 (3d Cir. 2004); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062–63 (9th Cir. 2006); *Martinez v. City of Clovis*, 943 F.3d 1260, 1271–72 (9th Cir. 2019); *Dwares v. City of New York*, 985 F.2d 94, 98–99 (2d Cir. 1993); *Briggs v. Johnson*, 274 F. App'x 730, 735 (10th Cir. 2008); cf. *Nicini v. Morra*, 212 F.3d 798, 809, 811–12 (3d Cir. 2000) (finding that social workers could be subject to a due process claim where their words suggested acquiescence in a foster child's decision to go to a dangerous home).

232. Cf. *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016); *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 207 (3d Cir. 2001), *rev'd on other grounds*, 369 F.3d 227 (3d Cir. 2004); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998); *Ruge v. City of Bellevue*, 892 F.2d 738, 739, 741 (8th Cir. 1989).

233. See *Dwares*, 985 F.2d at 99.

234. This is precisely the scenario that was presented in the Ninth Circuit's *Hernandez v. City of San Jose*, 897 F.3d 1125 (9th Cir. 2018). [Disclosure: I represented the City of San Jose and related defendants before the Ninth Circuit in *Hernandez*.] The plaintiffs there attended a rally for then-candidate Donald Trump and claimed that protesters assaulted them because police officers limited them to a single exit when the rally ended. *Id.* at 1129–30. The Ninth Circuit held that the Trump rally attendees adequately pleaded a claim under the state-created danger doctrine because the police officers' decision to limit where they could exit "required" the attendees to walk in the direction of protesters. *See id.* at

that the man whom protesters assaulted faced the exact same danger before state action as after: i.e., a crowd of hostile protesters who might harm him. Had the state never gotten involved by providing police services, that danger would not only have still existed but would likely have been worse. A person who walks into a snake pit is in danger of being bitten by snakes regardless of whether the state sends incompetent snake handlers in there with him.²³⁵ So in addition to the absence of applied state power, the fact that state action could not have made the *Dwares* plaintiff any worse off than he would have been in the “free world”²³⁶ should likewise have precluded the finding that the state deprived him of liberty in violation of due process.²³⁷

At the same time, many circuit court decisions upholding state-created danger claims would survive under the reformed doctrine. The passengers whom police officers denied the safety of a car or a companion in *White*,²³⁸ *Wood*,²³⁹ and *Kneipp*²⁴⁰ would easily establish the three elements for state liability. So would those plaintiffs who sued the state agents in *Ross* for prohibiting private rescue efforts that would have saved a drowning boy,²⁴¹ or the police officers in *Stemler* for forcing a woman to get in a car with a drunk driver who abused her.²⁴² In each of these cases, coercive state action created a danger that would not

1133, 1137. But, as in *Dwares*, the rally attendees faced the danger of confronting protesters before the state became involved by providing police services, so the state could not have created that danger by allegedly bad crowd-control decisions after the rally attendees already placed themselves in the hostile protesters’ midst.

235. Cf. *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986) (“The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten.”).

236. *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989).

237. Cf. *Wilson v. Gregory*, 3 F.4th 844, 858 (6th Cir. 2021) (“The key [state-created danger] question . . . is ‘not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it.’” (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003))); *Jones v. Reynolds*, 438 F.3d 685, 694, 696 (6th Cir. 2006) (holding under the state-created danger doctrine that police officers did not violate the due process rights of a spectator killed by a car during an illegal drag race by betting on and playing rap music to encourage the race, in part because “the officers played no role” in the killed spectator’s “decision to attend the drag race” in the first place, which made it “even more difficult to say that the ‘state’ ha[d] ‘created’ the ‘danger’ to [the spectator] by its affirmative acts”). *But see Hernandez*, 897 F.3d at 1134 (“Being attacked by anti-Trump protesters was only a possibility when the Attendees arrived at the Rally. The Officers greatly increased that risk of violence when they shepherded and directed the Attendees towards the unruly mob waiting outside the Convention Center.”).

238. *White v. Rochford*, 592 F.2d 381, 382–83 (7th Cir. 1979).

239. *Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989).

240. *Kneipp v. Tedder*, 95 F.3d 1199, 1201–03 (3d Cir. 1996).

241. *Ross v. United States*, 910 F.2d 1422, 1424–25 (7th Cir. 1990).

242. *Stemler v. City of Florence*, 126 F.3d 856, 860–63 (6th Cir. 1997).

otherwise have existed, and the state defendants should have been held liable as a result.²⁴³

What's more, there are some situations in which a reformed state-created danger doctrine focused on coercive state action would permit liability where the current doctrine does not. Just as a showing of "deliberate indifference" or some other heightened culpability should not *create* due process liability where there is no coercive state action, a failure to prove that mental state should not *preclude* liability when there is. So, whereas the circuit courts currently would deny a plaintiff recovery for failure to establish "deliberate indifference" or some similar mental culpability requirement, a plaintiff under the reformed state-created danger doctrine would face no such hurdle to recovery if she could show that intentionally applied coercive state action exposed her to a harm that would not otherwise have existed.

For instance, police officers in *Munger v. City of Glasgow Police Department* forcibly ejected a man from a bar to walk home in subfreezing temperatures, causing him to die of cold.²⁴⁴ The plaintiffs in the case were able to demonstrate that the officers exhibited deliberate indifference in so doing,²⁴⁵ but what if they had no such evidence? What constitutionally significant difference should it have made if the police officers were unaware of the freezing temperatures outside when they forcibly sent the man to his death? Would it have been any less a deprivation of the man's fundamental liberty interest in life if the officers had been merely careless rather than deliberately indifferent in coercing him to face fatal weather?

It would seem clearly not. Regardless of the level of care the officers in the case exercised, they intentionally applied state power in a way that exposed a person to harm outside any legal process. It is that general intent by the officers to use state power, rather than any specific intent or knowledge regarding the particular harm that will result from its exercise, that should have informed whether they violated due process.²⁴⁶ It is, in other words, the intentional application of state power alone that

243. All of these cases relied on disputed facts or allegations to find due process liability. See *White*, 592 F.2d at 382; *Wood*, 879 F.2d at 586–87; *Kneipp*, 95 F.3d at 1201; *Ross*, 910 F.2d at 1424; *Stemler*, 126 F.3d at 874. Like the courts, my conclusion that the relevant state actors violated due process assumes resolution of the allegations and disputes in the plaintiffs' favor. See *Ross*, 910 F.2d at 1424.

244. 227 F.3d 1082, 1084–85 (9th Cir. 2000).

245. *Id.* at 1087–88.

246. *Cf. Kingsley v. Hendrickson*, 576 U.S. 389, 395–97 (2015) (stating that police officers violate due process when they use excessive force on pretrial detainees regardless of awareness that their force was too much, because they acted deliberately in applying physical force through state power to begin with).

tells the court whether there has been a “deliberate decision[] [by] government officials to deprive a person of” liberty.²⁴⁷

Nor is it merely a hypothetical possibility that a court would deny liability for a harmful deprivation of liberty based on an insufficiently culpable mental state. The Eleventh Circuit did just that in the recent *Waldron v. Spicher*.²⁴⁸ There, a sheriff’s deputy arrived at the scene of two bystanders performing CPR on a dying man.²⁴⁹ The deputy ordered them to stop—he believed the man was already dead—but one protested that the man was still alive and had a “weak” heartbeat.²⁵⁰ The deputy nevertheless stuck with his initial order, and the bystanders discontinued CPR efforts.²⁵¹ When an ambulance arrived later, paramedics hooked the man up to a monitor, which revealed a slight heartbeat “inconsistent with death.”²⁵² The paramedics thus “recontinued CPR” before taking the man to the hospital, where he died a week later.²⁵³

When the man’s representatives later sued under the theory that the police officer’s order halting CPR efforts caused his death, a district court denied the deputy qualified immunity, holding that he violated a clearly established right.²⁵⁴ The Eleventh Circuit vacated the district court’s decision.²⁵⁵ It held that the deputy did not violate due process unless he “acted with a level of culpability more than reckless interference with bystanders’ attempted rescue efforts”—in other words, unless he acted with the intent to harm—which was a higher standard than what the district court applied.²⁵⁶ In so holding, the court relied on an analogous Eleventh Circuit precedent finding that police officers did not violate a clearly established due process right when they stopped a bystander from administering life-saving CPR to a drowning young girl, in part because their conduct was merely “reckless.”²⁵⁷ Thus, based solely on the

247. *Daniels v. Williams*, 474 U.S. 327, 331 (stating the standard for proper application of the Due Process Clause).

248. 954 F.3d. 1297, 1312 (11th Cir. 2020).

249. *Id.* at 1301–02.

250. *Id.*

251. *Id.* at 1302.

252. *Id.*

253. *Id.*

254. *See id.* at 1303.

255. *Id.* at 1312.

256. *Id.* at 1308, 1311.

257. *See id.* at 1305–10 (citing *Hamilton ex rel. Hamilton v. Cannon*, 80 F.3d 1525, 1527–32 (11th Cir. 1996)). It warrants mentioning that the man who died following the deputy’s decision to stop CPR in *Waldron* was attempting suicide by hanging himself when the deputy first came upon him. *Id.* at 1301. It was unclear how long the man had been asphyxiated and thus whether CPR efforts would have saved him had the deputy not interrupted them. *Id.* at 1301, 1303. To the extent these facts suggest that government

plaintiffs' failure to prove a sufficiently culpable mental state, the court held in both cases that the state's deprivation of liberty did not violate due process.²⁵⁸

By allowing the state to escape liability even where there has been the intentional application of state power, standards such as "deliberate indifference," "shocks the conscience," and "intent to harm" improperly foreclose due process recovery in situations where there has been a true deprivation of liberty by the state. They have no place in a properly formulated state-created danger doctrine, which should impose due process liability when—but only when—the application of government power causes harm outside the established legal system, regardless of how culpable the state actor responsible for that application of government power might have been.

VI. THE IMPORTANCE OF A REFORMED STATE-CREATED DANGER DOCTRINE BASED ON DUE PROCESS FIRST PRINCIPLES

The harms of the current state-created doctrine in its departure from the negative-rights model of constitutional law are manifold. Perhaps chief among them is that by reading into the Fourteenth Amendment a tort-law duty of state protection whenever a government agent acts or fails to act in a way a court deems sufficiently wrong, the current doctrine incentivizes more aggressive state intervention in everyday life.

This follows ineluctably from the imposition of affirmative state duties. When police officers and other state actors are told they violate due process in some circumstances by failing to protect from third-party harm, the natural response is more readily to apply state power against the possible sources of such harm in the effort to forestall it. The unspoken admonition of the courts finding due process violations because police officers failed to protect someone after their words or deeds suggested non-intervention is that the officers should have instead exercised state power to arrest, or to use other restraining force against,

coercion was not in fact the cause of the man's death, the Due Process Clause would not create liability for the deputy's actions. *See supra* Section V. But the Eleventh Circuit did not predicate its decision on the absence of state action or causation. *See Waldron*, 954 F.3d at 1311–12. Instead, the court relied entirely—and incorrectly—on the notion that the plaintiff could not prove a due process violation without showing that the deputy acted with an "intent to harm" the deceased. *Id.*

258. *See id.* at 1312; *Hamilton*, 80 F.3d at 1532; *cf. Fijalkowski v. Wheeler*, 801 F. App'x 906, 908–14 (4th Cir. 2020) (holding that police officers did not clearly violate due process by preventing lifeguard from saving a drowning man because they had a "rational reason"—i.e., the lifeguard's safety—for doing so, thus their conduct did not amount to "a patently arbitrary assertion of power").

the offending third party.²⁵⁹ And regardless of whether that was the better course for the officers in the particular cases before these courts, as a general matter incentivizing more aggressive police action will necessarily result in more law enforcement and other governmental abuses. Telling state agents that they are using the hammer of government power too sparingly cannot help but result in more aggressive use of that hammer—to the significant detriment of individual liberty. Explicitly tying the state-created danger doctrine to abuses of state power would eliminate this incentive and thereby end the perversity of a jurisprudence that promotes state incursions on liberty in the name of securing it.

Limiting application of the doctrine to bona fide abuses of state power would also reduce the enormous burden state and local governments must bear in defending against misplaced civil rights suits. Each dollar government spends in litigation is a dollar it must raise through taxing its citizens or reducing other services. Every state in the nation has government-tort procedures that broadly allow recovery for injuries caused by state employees.²⁶⁰ If any of the jurisdictions within these states wish to provide further compensation for injuries that result from the use of government services or from voluntary state employment, they may do so through legislative enactments. But in so doing their citizens will have decided, through their elected representatives, that the concomitant reduction to other government functions is worth it.²⁶¹

Which relates to another consequence of the contemporary state-created danger doctrine: the significant harm to separation-of-powers and federalism principles it has wrought. There is a reason the Supreme Court has repeatedly emphasized the danger of constitutionalizing tort law.²⁶² Tort law is fraught with the types of policy judgments and interest-balancing best suited to the elected branches of government. And few areas of law are more clearly the province of the separate

259. See *Martinez v. City of Clovis*, 943 F.3d 1260, 1274, 1276–77 (9th Cir. 2019); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Pena v. DePrisco*, 432 F.3d 98, 110–11 (2d Cir. 2005).

260. See 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* §§ 88–165 (2021).

261. See *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992) (“Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.”).

262. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998).

states.²⁶³ Decisions about whether and under what circumstances governments should provide compensation for the many activities they undertake depend on a number of considerations, and each of the states, as “laborator[ies] of democracy,”²⁶⁴ will have a different approach to these questions.

For example, every state in the nation has some version of a workers’ compensation regime as an alternative to cost-heavy litigation for workplace injuries.²⁶⁵ These systems reflect the states’ determination that a single-payer, no-fault-insurance setup is a superior method of ensuring recompense for workplace accidents as compared to the expensive option of ordinary tort lawsuits.²⁶⁶ But the state-created danger doctrine, at least as currently applied by many circuit courts, supplants these systems. It allows government workers to sue for workplace hazards whenever they can point to some particularly irresponsible “affirmative act[]” by a supervisor, thereby nullifying the states’ carefully crafted alternative to a fault-based regime.²⁶⁷ Again, different states or local governments may wish to expand their workers’ compensation systems to permit tort liability in particular cases. But it should be up to the states and local governments to make that decision via the ordinary legislative process, not the federal judiciary under the guise of enforcing the Fourteenth Amendment.

Similarly, questions regarding when (if ever) gratuitous efforts to help another person may result in liability, or when (if ever) an affirmative duty to protect another may arise, are hotly debated as a matter of tort policy. The “special relationship” and similar tort doctrines may create those duties and liabilities in some circumstances, depending on the extent to which a jurisdiction has adopted them.²⁶⁸ And good Samaritan laws refine the contours of these doctrines in different ways according to the judgment of the elected representatives who enact

263. See *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 639–40 (2013) (“In our federal system, there is no question that States possess the ‘traditional authority to provide tort remedies to their citizens’ as they see fit.” (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984))); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting) (observing that tort law is “within the scope of the States’ historic police powers”).

264. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2484 (2019) (Gorsuch, J., dissenting) (alteration in original) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

265. *Worker’s Compensation Laws by State*, FINDLAW, <https://www.findlaw.com/injury/workers-compensation/workers-compensation-laws-by-state.html> (last updated Sept. 30, 2019).

266. See 82 AM. JUR. 2D *Workers’ Compensation* § 7 (2021).

267. See, e.g., *Pauluk v. Savage*, 836 F.3d 1117, 1119, 1121 (9th Cir. 2016).

268. See RESTATEMENT (SECOND) OF TORTS §§ 314A, 322, 323 (AM. L. INST. 1965).

them.²⁶⁹ But as in the workplace context, the state-created danger doctrine decides these sensitive questions in one fell swoop for every jurisdiction that elects to provide some service to its citizens. The doctrine prescribes when government employees are liable for causing or failing to prevent injuries, irrespective of the legal rules that might otherwise prevail in each state, according to a judicially contrived standard of fault. This is highly inimical to American federalism.

An additional evil of the current state-created danger doctrine is its use of the infinitely malleable “shocks the conscience” standard as the lynchpin for government liability. Whether a particular government actor’s tort-like violation evinces deliberate indifference (as opposed to mere carelessness) or is bad enough to “shock the conscience” will differ from case to case and judge to judge. It is the antithesis of a predictable, neutrally applicable standard of liability.²⁷⁰ This too harms separation of powers. As with other such malleable standards, allowing the outcome of a given case to turn on the “conscience” of unelected judges arrogates to those judges virtually unfettered policymaking prerogatives.²⁷¹

Relatedly, insofar as liability under the “shocks the conscience” standard turns on the subjective state of mind of the government actor whose use of state power causes harm, it can be extraordinarily difficult for an injured plaintiff to prove. The resulting unfairness to those who may go without a remedy for government deprivations of liberty is unjustifiable. It should not matter whether a person harmed by state coercion can prove a state officer knew he was exposing the person to danger. The person’s liberty is no less compromised by virtue of the officer’s lack of knowledge or specific intent. When state agents use government power to cause someone to drown,²⁷² force a woman into contact with an abuser,²⁷³ or send someone to his death in the freezing cold,²⁷⁴ the state has deprived the affected person of his or her liberty without due process of law. But because every judge or jury will have a

269. See Danny R. Veilleux, Annotation, *Construction and Application of “Good Samaritan” Statutes*, 68 A.L.R. 4th 294 §§ 1(a), 2(a) (1989) (defining good Samaritan laws as “statutes granting immunity from civil liability to persons providing emergency care in order to encourage prompt assistance for injured parties”).

270. See *Johnson v. City of Philadelphia*, 975 F.3d 394, 399–401 (3d Cir. 2020) (criticizing the Third Circuit’s state-created danger doctrine and noting that the “shock[s] the conscience” standard “offers little light”).

271. See *County of Sacramento v. Lewis*, 523 U.S. 833, 861–65 (1998) (Scalia, J., concurring) (opining that the “shocks the conscience” test is inherently arbitrary and promotes “not judicial review but judicial governance”).

272. E.g., *Ross v. United States*, 910 F.2d 1422, 1424–25, 1431 (7th Cir. 1990); *Hamilton ex rel. Hamilton v. Cannon*, 80 F.3d 1525, 1527–28 (11th Cir. 1996).

273. *Stemler v. City of Florence*, 126 F.3d 856, 862, 867–68 (6th Cir. 1997).

274. *Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1084–85 (9th Cir. 2000).

different idea of how culpable the offending officer was in using state power to harm, the state deprivation of liberty may go unanswered in some cases.²⁷⁵ This is the inevitable result of a state-created danger doctrine based on a “shocks the conscience” standard rather than on the straightforward question of whether intentionally applied state power caused the relevant injury.

Ultimately, these various axes of harm converge on a common, baseline problem: the state-created danger doctrine as currently applied by the circuit courts is untethered from fundamental due process principles and, thus, is inherently incoherent and uncertain. As with most judicial forays into the realm of substantive due process, the courts’ formulation of the state-created danger doctrine has necessitated arbitrary line-drawing, along with the confusion and doctrinal messiness that come with it. The courts applying the doctrine have struggled with a lack of concrete rules to guide their actions, with the predictable result of inconsistent, even contradictory, outcomes. Sometimes government employment decisions exposing a person to risk violate due process;²⁷⁶ sometimes—even within the same circuit—they do not.²⁷⁷ Sometimes a social worker violates due process when she fails to ensure a child’s safety;²⁷⁸ sometimes not.²⁷⁹ Courts have sometimes found teachers liable for harms that befall their students;²⁸⁰ other times they have found the opposite.²⁸¹

Much of this confusion stems from the “inherent difficulty in drawing a line between an affirmative act and a failure to act” under an analysis

275. See, e.g., *Hamilton*, 80 F.3d at 1529–32; *Fijalkowski v. Wheeler*, 801 F. App’x 906, 908, 913–14 (4th Cir. 2020).

276. See, e.g., *L.W. v. Grubbs*, 974 F.2d 119, 120–23 (9th Cir. 1992); *Pauluk v. Savage*, 836 F.3d 1117, 1119, 1121 (9th Cir. 2016); *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 207, 213–14 (3d Cir. 2001), *rev’d on other grounds*, 369 F.3d 227 (3d Cir. 2004); *Sherwood v. Oklahoma County*, 42 F. App’x 353, 356, 360 (10th Cir. 2002).

277. See, e.g., *Figueroa v. United States*, 7 F.3d 1405, 1412 (9th Cir. 1993); *McClary v. O’Hare*, 786 F.2d 83, 84–85, 89 (2d Cir. 1986); *Monfils v. Taylor*, 165 F.3d 511, 513–15, 518 (7th Cir. 1998); *Walker v. Rowe*, 791 F.2d 507, 509–11 (7th Cir. 1986).

278. See, e.g., *Lipman v. Budish*, 974 F.3d 726, 730–31, 746–47, 754 (6th Cir. 2020); *Nicini v. Morra*, 212 F.3d 798, 809 (3d Cir. 2000); *Briggs v. Johnson*, 274 F. App’x 730, 735–37 (10th Cir. 2008).

279. See, e.g., *Waubanascum v. Shawano County*, 416 F.3d 658, 663, 669–71 (7th Cir. 2005); *J.R. v. Gloria*, 593 F.3d 73, 80–81 (1st Cir. 2010).

280. See, e.g., *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 239–40, 242 (3d Cir. 2016); *cf.*, e.g., *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1256, 1263–64 (10th Cir. 1998).

281. See, e.g., *McQueen v. Beecher Cnty. Schs.*, 433 F.3d 460, 462–63, 465–66 (6th Cir. 2006); *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 968, 976 (9th Cir. 2011); *cf.*, e.g., *Sanford v. Stiles*, 456 F.3d 298, 301, 305 (3d Cir. 2006) (*per curiam*); *King v. E. St. Louis Sch. Dist.*, 496 F.3d 812, 814–15, 819–20 (7th Cir. 2007); *Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 563–65, 569–70 (11th Cir. 1997).

that focuses on individual government employees rather than the action of the state qua state.²⁸² The Seventh Circuit in the seminal *White* decision went so far as to call the distinction between “sins of omission and commission” by individual state actors a “tenuous metaphysical construct.”²⁸³ And this difficulty arises before a court even has to get to the yet more metaphysical task of determining whether a government employee’s conduct was bad enough to “shock the conscience.”

A coercion-focused state-created danger doctrine is not infected with such uncertain line-drawing. For one thing, the right to be free from illegitimate government punishment follows from a straightforward application of basic procedural due process principles, which prohibit any interference with a person’s liberty (including by putting her in harm’s way) absent the notice provided in actual laws and a procedure for contesting the deprivation.²⁸⁴ There is accordingly no need to resort to nebulous substantive due process concepts to remedy arbitrary inflictions of harm through the exercise of state power.

Most important, a reformulated state-created danger doctrine based on due process first principles relies on a simple concept: the presence or absence of government coercion. There is no ambiguity in determining whether the state has issued a command (versus, say, a request to enter into a contract or an offer to provide some service). The state has either ordered something on pain of criminal or civil enforcement—and therefore infringed a person’s liberty—or it has not. It is a simple binary that will never depend on the vagaries of judicial conscience or disposition. By tethering the relevant action-versus-omission inquiry to

282. *L.R.*, 836 F.3d at 242.

283. *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979); *see also* *Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993) (observing that whether a claim alleges “acts of commission or omission” is a “difficult question”); *Jones v. Reynolds*, 438 F.3d 685, 692 (6th Cir. 2006) (“Whether the conduct of government officials in some cases should be treated as a failure to act or as action ‘may be a difficult question in the abstract’” (quoting *Bukowski v. City of Akron*, 326 F.3d 702, 709 (6th Cir. 2003))); *Bright v. Westmoreland County*, 443 F.3d 276, 282 (3d Cir. 2006) (observing that “the line between action and inaction may not always be clear”); *S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066, 1074 (8th Cir. 1999) (“[I]t is not always easy to distinguish cases in which the state has merely failed to protect its citizens from those in which it has affirmatively injured them.”); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 TEMP. POL. & C.R. L. REV. 47, 63 (2006) (criticizing “the artificiality of the action/inaction line” in state-created danger cases).

284. *See Paine v. Cason*, 678 F.3d 500, 510 (7th Cir. 2012) (en banc) (holding that “[t]here’s no need to hunt for ‘special relationships’” and similar substantive due process concepts when deciding state-created danger questions, because “[s]tate actors who needlessly *create* risks of harm violate the due process clause by depriving persons of life, liberty, or property without process”—after all, “no one offered [the harmed person in such a case] a hearing on the question whether” to inflict the harm).

state action as such, there is no danger that mere semantics or “metaphysical construct[s]”²⁸⁵ would determine the outcome. And there is no danger that a court might create an affirmative state duty to protect in contravention of *DeShaney* and the negative-rights model of American constitutional law. Such a reformed doctrine would uphold the fundamental constitutional principles that undergird our entire constitutional order and, by extension, ensure the integrity of the judicial process and constitutional adjudication in our federal system.

VII. CONCLUSION

Article III courts are not common-law courts.²⁸⁶ The federal judiciary is meant to be a neutral arbiter of a specifically delineated set of constitutional and statutory rights. The negative right to be free from government infliction of harm outside the ordinary legal process is one such right—it is, indeed, the core of due process. But the current state-created danger doctrine as applied by most courts does not protect that right. It instead superimposes a uniform tort regime across the whole of the country, and one that has no mooring to the Due Process Clause from which it derives.

After over thirty years of doctrinal disarray and inconsistent outcomes among the lower courts, the time has come for the Supreme Court to finish what it started in *DeShaney*. The government does not violate the Due Process Clause every time a state actor causes some harm. It does so only when the state applies coercive power to deprive a person of liberty outside an established legal process, regardless of how culpable the actor responsible for that deprivation might be. The Court should take the next opportunity finally to reform the state-created danger doctrine consistently with these fundamental principles so that it serves as a proper due-process enforcement mechanism and coheres with the venerable negative-rights model of our Constitution.

285. *White*, 592 F.2d at 384.

286. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981) (“Federal courts, unlike state courts, are not general common-law courts . . .”).