SYNCING STRATEGIES: THE CALL FOR CONSISTENCY IN STATE-CREATED DANGER CLAIMS INVOLVING MINOR STUDENTS WITH DISABILITIES

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ABSTRACT

Under 42 U.S.C. § 1983 ("§ 1983"), United States citizens may bring claims for deprivation of their Due Process rights in violation of the Fourteenth Amendment. Customarily, plaintiffs cannot make assertions against government officials for private acts. However, the Supreme Court, in dicta, articulated a narrow exception—an official cannot be liable for private acts unless the official knowingly created or worsened the danger to the plaintiff. After the Court's ruling in DeShaney v. Winnebago*, many circuits adopted what is now known as the "state-created danger" doctrine. While most circuits recognize this exception, the Supreme Court's refusal to rule on the issue allows for inconsistent state-created danger tests between circuits as well as unpredictable applications by the courts.*

This Note will analyze the Supreme Court's ruling in DeShaney *and examine the distinctive sister circuits' state-created danger elements. This Note will reason that the United States Courts of Appeals, to safeguard disabled schoolchildren's needs, must assume a consistent state-created danger test. Specifically, this Note will encourage a uniform doctrine since (1) state remedies may be inadequate, and (2) the number of students*

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with disabilities, together with the shocking rates of victimization against disabled schoolchildren, call for federal opportunity and regularity under § 1983. Ultimately, this Note will propose a consistent state-created danger framework.

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I. INTRODUCTION

In 2019, M.F., a student who suffered from severe mental and physical disabilities, attended James Bowie Middle School ("James Bowie").[1] M.F. was approximately thirteen years old, yet her cognitive ability was equivalent to a four- or five-year-old.[2] M.F. had an Individualized Education Program ("IEP")[3] with James Bowie, which stated that M.F. was "to be escorted *at all times* in the middle school."[4]

R.R., another minor student at James Bowie, was also subject to an IEP, which required teachers to escort him throughout the school.[5] Teachers knew R.R. to be verbally and physically violent.[6] Unfortunately, against both students' IEPs, M.F. and R.R. were permitted to wander the halls alone, which resulted in R.R. and M.F. in the boys' restroom together.[7] An altercation ensued, in which R.R. sexually abused and assaulted M.F.[8] At such point, the complaint alleges that James Bowie and M.F.'s teachers were on notice that R.R. posed a danger to M.F.[9] However, two months later, Jodi Moore and Amna Bilal, M.F.'s and R.R.'s teachers, allowed M.F. and R.R. to leave the classroom at the same time unattended.[10] Again, R.R. sexually abused and assaulted M.F. while she was in the bathroom.[11]

On behalf of M.F., Denise Fisher sued Moore, Bilal, and other third parties under 42 U.S.C. § 1983, alleging that they deprived M.F. of her Fourteenth Amendment rights.[12] However, Fisher faced an impossible

1. Fisher v. Moore, 73 F.4th 367, 369 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024).
2. *Id.*
3. An Individualized Education Program, also known as an IEP, is granted to those who require special education services. Colleen O'Shea, *Individualized Education Programs (IEPs)*, KIDSHEALTH, https://kidshealth.org/en/parents/iep.html (last visited Mar. 28, 2025) ("Students who are eligible for special education services need an IEP. While there are many reasons that students could be eligible, some common conditions include: attention deficit hyperactivity disorder (ADHD), autism, cognitive challenges, developmental delays, emotional disorders, hearing problems, learning problems, physical disabilities, speech or language impairment, [and] vision problems."); *see also Fisher*, 73 F.4th at 369.
4. *Fisher*, 73 F.4th at 370 (emphasis added).
5. *Id.*
6. *Id.*
7. *Id.*
8. *See id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 370–71.

feat. She filed her claim in the Fifth Circuit—one that does not accept the state-created danger doctrine as an exception to qualified immunity.[13] Fisher may have prevailed in a different jurisdiction.[14] However, even then, jurisdiction plays a role in the likelihood of success.[15]

This Note will address whether the circuit courts' variability in state-created danger frameworks, including the Fifth Circuit's outright denial, requires uniformity to protect disabled schoolchildren from state officials whose acts perpetuate harm by a private party. Part II of this Note will consider § 1983's background, the Fourteenth Amendment's origination, and officials' ability to use qualified immunity to evade liability. Part III will examine *DeShaney v. Winnebago*, wherein the state-created danger exception was inadvertently born, along with an in-depth analysis of the essential state-created danger elements. Part IV will address the need for a stable state-created danger test, particularly concerning disabled schoolchildren. Lastly, Part V will offer a well-defined test to prevent divergent conclusions in cases with comparable facts.

II. THE FOURTEENTH AMENDMENT, 42 U.S.C. § 1983, AND QUALIFIED IMMUNITY

The history and relationship surrounding the Fourteenth Amendment, § 1983, and qualified immunity underscores the complex legal landscape surrounding civil rights violations in the United States. In the mid-to-late nineteenth century, the United States was in a period of significant reform.[16] While multiple social justice movements were at the forefront of society, slavery abolition took precedence.[17] The government's attention to eliminating slavery led to the creation of the Thirteenth, Fourteenth, and Fifteenth Amendments.[18] The Fourteenth Amendment attempted to establish citizenship and civil liberties under

13. *Id.* at 370–72.

14. *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1173 (2005).

15. *See id.* at 1173–74.

16. *19th Century Reform Movements*, TRUTH-TELLING: FRANCES WILLARD & IDA B. WELLS, https://scalar.usc.edu/works/willard-and-wells/19th-century-reform-movements (last visited Mar. 28, 2025).

17. *Id.* ("In the years immediately preceding the Civil War, the abolition movement took center stage and was the main focus of reform work.").

18. *See id.* ("[T]he 13th, 14th, and 15th amendments abolished slavery, guaranteed citizenship for black men, and prohibited denying citizens the right to vote on the basis of race, color, or previous condition of servitude.").

the Constitution for recently freed slaves.[19] The government created legislation to permit individuals to bring claims against the state should officials violate these rights.[20] However, government officials had, and continue to have, strong protections against these assertions—namely, qualified immunity.[21]

A. The Connection Between the Fourteenth Amendment and 42 U.S.C. § 1983

The Fourteenth Amendment and § 1983's connection lies in the latter's function to enforce one's constitutional rights against a state or local official who violates them under the color of law. Shortly following the Emancipation Proclamation of 1863, Congress passed the Fourteenth Amendment.[22] The Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law; nor deny[ing] to any person within its jurisdiction the equal protection of the laws."[23] Legislators, by way of the Fourteenth Amendment, intended to grant citizenship and protect the civil liberties of recently freed slaves[24] and provide an avenue to hold states accountable for violating these rights.[25] Regardless, immense racism persisted.[26]

19. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE [hereinafter *Landmark Legislation*], https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm (last visited Mar. 28, 2025). While the United States aimed to give black Americans these liberties, the courts quickly adopted limitations to these promised protections. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (finding the Louisiana 1890 Separate Car Act, see 1890 La. Acts 152, did not violate the Fourteenth Amendment since a statute that separates races in interstate commerce does not abridge the rights granted by the same).

20. *See The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (last visited Mar. 28, 2025).

21. *See Qualified Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity (last visited Mar. 28, 2025); Saucier v. Katz, 533 U.S. 194, 209 (2001) (holding officer was entitled to qualified immunity where the officer had a duty to protect the Vice President), *rev'g* Katz v. United States, 262 F.3d 897 (9th Cir. 2001); Pearson v. Callahan, 555 U.S. 223, 243–44 (2009) (finding qualified immunity applied where the officer's conduct did not violate a constitutional right).

22. *June 13, 1866: 14th Amendment Passed*, ZINN EDUC. PROJECT [hereinafter *14th Amendment Passed*], https://www.zinnedproject.org/news/tdih/fourteenth-amendment-passed/ (last visited Mar. 28, 2025). The Senate passed the Fourteenth Amendment on June 8, 1866, and ratified it on July 9, 1868. *Landmark Legislation*, *supra* note 19.

23. U.S. CONST. amend. XIV, § 1.

24. *14th Amendment Passed*, *supra* note 22.

25. *See Landmark Legislation*, *supra* note 19.

26. *See The Enforcement Acts of 1870 and 1871*, *supra* note 20.

In April 1871, the House approved the third enforcement act, also known as the "Ku Klux Klan Act," which guarded the civil and political rights generated by the Fourteenth Amendment and made it a federal crime to deny "any of the rights, privileges, or immunities, or protection, named in the Constitution."[27] This act eventually became known as § 1983.[28]

While § 1983[29] originated in the late nineteenth century,[30] the Supreme Court did not consider its significance until 1961 in *Monroe v. Pape*.[31] In *Monroe*, thirteen Chicago police officers broke into Monroe's home, ransacked each room, detained Monroe, and prevented him from speaking with a Magistrate or his family, all while there was no warrant for his arrest.[32] Subsequently, Monroe sued under § 1983, alleging a due process violation.[33] Defendants argued that the plaintiff did not bring forth a viable cause of action under § 1983 or the Constitution, and therefore, the claim should be dismissed.[34] In an 8-1 decision, the Court held that the plaintiff did bring forth proper suit under § 1983, but only as to the police officers, not the city.[35]

The Court distilled its opinion into three key points. First, it explained that while Congress enacted § 1983 in 1871 "because of the conditions that existed in the South," § 1983 nonetheless applies to all states due to its general verbiage.[36] In fact, § 1983 indisputably "afford[ed] a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . . ."[37] Justice Douglas also considered § 1983's plain text,

27. *The Ku Klux Klan Act of 1871*, HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ (last visited Mar. 28, 2025).

28. *See* Sheldon Nahmod, *Section 1983 is Born: The Interlocking Supreme Court Stories of* Tenney *and* Monroe, 17 LEWIS & CLARK L. REV. 1019, 1021 (2014); 42 U.S.C. § 1983.

29. Section 1983 states "Every person who . . . [deprives another] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

30. Nahmod, *supra* note 28, at 1021. Section 1983 claims continue to be the primary means of bringing forth constitutional violation claims in federal court. *Id.* at 1021–22.

31. *Id.* at 1022. *See generally* Monroe v. Pape, 365 U.S. 167 (1961) (holding there is broad scope in application of § 1983 claims, but § 1983 cannot apply to municipalities), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (finding municipalities can be held liable under § 1983).

32. *Monroe*, 365 U.S. at 169.

33. *Id.* at 170.

34. *Id.*

35. *Id.* at 192.

36. *Id.* at 183.

37. *Id.* at 180.

finding the term "wilfully [sic]" was not present in § 1983,[38] and therefore, there was "no specific intent requirement" for liability.[39] Lastly, the term "persons" under § 1983 was not broad enough to encompass municipalities.[40] The *Monroe* Court, in its much-awaited ruling, imparted clarity on § 1983's broad scope and one's ability to bring a federal claim against individuals working for a state or local agency.[41]

B. The Government's Shield from 42 U.S.C. § 1983 Claims: Qualified Immunity

Qualified immunity shields government officials from lawsuits unless they violate a "clearly established" statutory or constitutional right,[42] a standard closely tied to § 1983 claims. It is a common defense in § 1983 litigation.[43] Courts determine if a right was "clearly established" by assessing whether a reasonable person would have known their actions violated the individual's constitutional rights[44] based on the legal standards at the *time of the alleged violation*, not when the case is heard.[45]

Pearson v. Callahan serves as a pertinent example. Respondent filed suit under § 1983 against police officers who searched his home without a warrant, leading to his arrest for the sale of methamphetamine.[46] The officers argued a qualified immunity defense.[47] However, the Court of Appeals, following *Saucier* precedent, held that petitioners were not entitled to immunity since (1) the respondent had sufficient facts to allege a violation of his constitutional right,[48] and (2) the right was "clearly

38. *Id.* at 187.
39. *Id.*; Nahmod, *supra* note 28, at 1057.
40. *Monroe*, 365 U.S. at 191.
41. *See id.*
42. *Qualified Immunity*, *supra* note 21.
43. *Id.*
44. *Id.*; Saucier v. Katz, 533 U.S. 194, 202 (2001) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *see also* Wilson v. Layne, 526 U.S. 603, 614–15 (1999).
45. *See Saucier*, 533 U.S. at 200.
46. Pearson v. Callahan, 555 U.S. 223, 227 (2009). Respondent freely invited the officers into his home to make the narcotics transaction. *Id.* at 230. However, respondent was not aware that the officers were in fact law enforcement. *See id.*
47. *See id.*
48. Respondent argued a Fourth Amendment violation, such that the officers' conduct constituted an unreasonable search and seizure. *Id.* at 227, 229.

established."[49] Upon review, Justice Alito wrote for the majority, holding that the *Saucier* procedure "should not be regarded as an inflexible requirement;" therefore, lower courts are permitted to use their discretion in deciding whether the *Saucier* procedure should apply to the case at hand.[50] Thus, in the instant case, petitioners are entitled to qualified immunity.[51]

The majority's decision in *Pearson* broadened the scope of qualified immunity as a legal defense.[52] And state officials have used qualified immunity to evade liability for decades.[53]

III. THE STATE-CREATED DANGER DOCTRINE

In light of § 1983 claims, courts eventually faced a new question: Can individuals bring claims against state or local officials for private acts committed against them? The original case responding to this inquiry, *DeShaney v. Winnebago*, aimed to deliver an unambiguous answer to the above question.[54] The resolution, while on its face, appears well-defined, evolved over decades, and eventually created an inconsistent array of frameworks between circuits.[55] These disarrayed tests created what is now known as the state-created danger doctrine.

49. *Id.* at 227, 230. The two-prong test articulated above is known as the *Saucier* procedure. *See Saucier*, 533 U.S. at 201. Unless there was an established right at the time of the violation, defendants are entitled to qualified immunity. *Id.* at 202 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This analysis was mandatory. *See id.* at 201.

50. *Pearson*, 555 U.S. at 227, 236. Multiple justices have criticized the *Saucier* methodology. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now."); Bunting v. Mellen, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring) ("The two-part test today's decision imposes holds large potential to confuse.").

51. *Pearson*, 555 U.S. at 227.

52. *Pearson*, 555 U.S. at 245 (holding petitioners are entitled to qualified immunity where right is not clearly established).

53. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 813–20 (1982) (determining petitioners are entitled to qualified immunity rather than absolute immunity); Ashcroft v. Al-Kidd, 563 U.S. 731, 743–44 (2011) (finding government official's conduct did not violate clearly established law, and therefore, was entitled to qualified immunity).

54. *See generally* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189 (1989).

55. *See generally* Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 PENN ST. L. REV. 893 (2016); Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) (rejecting deliberate indifference and adopting "shocks the conscience" test); Dwares v. City of New York 985 F.2d 94 (2d Cir. 1993) (providing no

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

In 1989, the Supreme Court faced a set of devastating facts. Joshua DeShaney[56] was a child of divorced parents.[57] His father, Randy DeShaney, had custody of Joshua.[58] In 1982, Mr. DeShaney's then-wife reported him to law enforcement for hitting Joshua—which the Department of Social Services ("DSS") investigated and closed out.[59] A year later, Joshua was hospitalized for "multiple bruises and abrasions," and the hospital sought temporary custody of Joshua.[60] A "Child Protection Team"[61] determined there was insufficient evidence to remove Joshua from Mr. DeShaney's custody.[62] Over the next half a year, Joshua's case worker visited the DeShaney's, where the case worker observed that Joshua had injuries on his head.[63] Despite the numerous hospitalizations and observations, DSS did not investigate the matter further.[64] Tragically, in March 1984, Mr. DeShaney beat Joshua into a coma, which, upon further testing, revealed that Joshua suffered severe

definition for what constitutes affirmative action); Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) (articulating concrete elements for state-created danger test); Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995) (imposing special relationship prerequisite while not entirely recognizing state-created danger as exception to qualified immunity); Fisher v. Moore, 73 F.4th 367 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024) (denying to accept state-created danger); Cartwright v. City of Marine City, 336 F.3d 487 (6th Cir. 2003) (requiring a special danger to meet the elements of state-created danger); Slade v. Bd. of Sch. Dirs., 702 F.3d 1027 (7th Cir. 2012) (keeping state-created danger elements "simple" while finding the "shocks the conscience test" and "affirmative acts" overly complicating); Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) (finding that state-created danger can apply in non-custodial settings); Lawrence v. United States, 340 F.3d 952 (9th Cir. 2003) (adopting deliberate indifference as requisite culpability rather than shocks the conscience); Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) (requiring conscience shocking conduct); Gish v. Thomas, 516 F.3d 952 (11th Cir. 2008) (creating a subjective and objective standard when applying facts to state-created danger elements); Butera v. District of Columbia, 235 F.3d 637 (D.C. Cir. 2001) (finding there is a "lack of clarity [which exists] in the law of the circuits").

56. At the time of the incident at issue, Joshua was a mere four years old. *DeShaney*, 489 U.S. at 193.

57. *Id.* at 191.

58. *Id.*

59. *Id.* at 192.

60. *Id.*

61. According to the facts in *DeShaney*, Joshua's "Child Protection Team" consisted of a pediatrician, psychologist, police detective, lawyer, several DSS case workers, and hospital personnel. *Id.*

62. *Id.*

63. *Id.* at 192–93.

64. *Id.*

brain damage.[65] Joshua spent the rest of his life in an institution for the disabled.[66]

In response to DSS's failure to intervene, Joshua's mother, on his behalf, sued Winnebago County, DSS, and multiple DSS officials under § 1983, claiming a violation of Joshua's Fourteenth Amendment rights.[67] However, the district court and the circuit court agreed that Joshua did not have a viable claim under § 1983 since the governmental entities did not have a duty to "protect its citizens from 'private violence, or other mishaps not attributable to the conduct of its employees.'"[68] The Supreme Court matched the lower courts' reasonings.[69]

In its logic, the majority found no affirmative obligation for state or local agencies to protect individuals from private acts.[70] While there may be some instances where the State acquires this responsibility, wherein a special relationship lies, the facts before the Court did not rise to the level of control required to form such a connection.[71] Moreover, the majority underscores that the State may have had a duty to protect Joshua under state tort law,[72] suggesting that Joshua should have pursued legal action in state court under common law principles. This opinion faced harsh opposition. Justice Brennan, writing for the dissent, stated children like Joshua are worse off using programs like DSS when the individuals employed by them fail to do their jobs.[73]

However, while the Court opined that there are very limited circumstances in which the state can be liable for private acts, it left the

65. *Id.* at 193.

66. *See id.*

67. *Id.*

68. *Id.* at 193–94 (quoting DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987)).

69. *Id.* at 194.

70. *Id.* at 195.

71. *See id.* at 198–99; *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (finding where a prisoner "is unable 'by reason of the deprivation of his liberty [to] care for himself,' it is only 'just' that the State be required to care for him"); Youngberg v. Romeo, 457 U.S. 307, 314–25 (1982) (holding, where an individual is involuntarily committed to a mental facility, the State has a duty to ensure "reasonable safety").

72. *DeShaney*, 489 U.S. at 201–02. Individuals may pursue tort liability claims instead of federal claims, but this does not, and should not, automatically invalidate federal claims. As Justice Douglas clarified in *Monroe*, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). While plaintiffs can file common law tort claims, it remains crucial that federal claims proceed because (1) they offer an alternative when state law proves inadequate, and (2) they allow courts to address potential constitutional violations, thereby deterring future misconduct. *See, e.g.*, *id.*

73. *DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting).

door open for interpretation.[74] Chief Justice Rehnquist stated, "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them*."[75] That is, the state did nothing to create or worsen the danger Joshua faced, leaving him in the same position he was in before his interactions with DSS.[76] In this single line of dicta, Justice Rehnquist provided a subtle escape for courts to formulate a doctrine where, had the state affirmatively acted, causing harm to a plaintiff or substantially worsening the danger to a plaintiff, they may be held liable under § 1983 for private acts.[77]

B. The Evolution of the State-Created Danger Doctrine

Following the Court's ruling in *DeShaney*, many circuits analyzed Justice Rehnquist's dicta and gradually developed the state-created danger exception.[78] Eventually, judicial circuits, except the Fifth,[79] devised some form of this doctrine within its jurisdiction.[80] Appellate courts introduced distinct multi-part tests,[81] incorporating similar elements, such as affirmative state action and a requisite degree of culpability.[82] However, courts have inconsistently applied these analogous elements.[83]

1. The Creation of State-Created Danger Following *DeShaney*

Within a few years of the *DeShaney* opinion, appellate courts built upon the dicta articulated by the Supreme Court.[84] The Ninth, Eleventh, Eighth, and Seventh Circuits were some of the first to recognize some

74. *See id.* at 201.
75. *Id.* (emphasis added); Oren, *supra* note 14, at 1171.
76. Oren, *supra* note 14, at 1171.
77. *See id.*; *DeShaney*, 489 U.S. at 201.
78. *See* Oren, *supra* note 14, at 1174–84.
79. *See, e.g.*, Fisher v. Moore, 73 F.4th 367, 369 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024); Scanlan v. Tex. A&M Univ., 343 F.3d 533, 537 (2003); Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 249 (2003).
80. Oren, *supra* note 14, at 1173.
81. Erwin Chemerinsky, *State-Created Danger Decisions*, 23 TOURO L. REV. 1, 15 (2007).
82. *See* Oren, *supra* note 14, at 1184–85.
83. *See supra* note 55 and accompanying text; *see also* discussion *infra* Sections III.B.1, III.B.2, and III.B.3.
84. *See* Oren, *supra* note 14, at 1174.

form of state-created danger in cases before it.[85] Generally, these circuits assumed that state-created danger was applicable in situations where three elements were met: (1) an invasion of "liberty interest," (2) the state official created or caused danger, and (3) the state official acted with deliberate indifference.[86] These circuits, while the first to grapple with this newly introduced theory, offered a requirement that the defendant affirmatively place the victim in danger.[87]

Eventually, in 1995 and 1996, the Third and Tenth Circuits were the first to articulate multi-step analyses concerning state-created danger claims.[88] The following table offers a side-by-side categorization of each circuit's elements:

85. *See id.* at 1175; Wood v. Ostrander, 897 F.2d 583, 596 (9th Cir. 1989) (requiring that state affirmatively place plaintiff in danger); Cornelius v. Town of Highland Lake, 880 F.2d 348, 357 (11th Cir. 1989) (finding that officials placed plaintiff in danger outside of the public at large), *rev'd sub nom.* White v. Lemacks, 183 F.3d 1253, 1259 (1999); Freeman v. Ferguson, 911 F.2d 52, 54 (8th Cir. 1990) (allowing complaint to be amended to allege police chief's relationship with estranged husband rendered plaintiffs more vulnerable); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993), *cert denied*, 510 U.S. 947 (1993) (finding where police officers who leave drunk passengers in a car with keys may have placed plaintiffs in vulnerable position).

86. Deliberate indifference is defined as an "official [who] knows of and disregards an excessive risk . . . ; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he also must draw the inference." Martin A. Schwartz, *Supreme Court Defines "Deliberate Indifference,"* 1994–1995 SUP. CT. PREVIEW, 159, 159 (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)); *see also* Oren, *supra* note 14, at 1174.

87. *See* Oren, *supra* note 14, at 1184–85.

88. *Id.*

Table 1. Third and Tenth Circuit State-Created Danger Claim

Court	Plaintiff Qualifications	Foreseeability	Culpability	Conduct
Third Circuit[89]	"[T]here existed some relationship between the state and the plaintiff."	"[T]he harm ultimately caused was foreseeable and fairly direct."	"[T]he state actor acted in willful disregard for the safety of the plaintiff."	"[T]he state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."
Tenth Circuit[90]	"[The victim] was a member of a limited and specifically definable group."	"[T]he risk was obvious or known."	"[D]efenda-nts acted recklessly in conscious disregard of that risk; and . . . such conduct, when viewed in total, is conscience shocking."	"[D]efenda-nts' conduct put [the victim] . . . at substantial risk of serious, immediate and proximate harm."

While each circuit's elements on its face are comparable, the two tests exemplify each of its intricacies. To illustrate, the Tenth Circuit requires conscience-shocking conduct, while the Third Circuit involves an akin

89. Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (finding appellants alleged facts raising genuine issue of material fact that state officials violated their rights under state-created danger).

90. Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (dismissing action on summary judgment where plaintiff failed to raise issue of material fact as to whether defendant recklessly created a danger).

level of culpability to deliberate indifference.[91] The principal notion—while most circuits accept the state-created danger doctrine,[92] each has its tailored version and application,[93] significantly complicating legal claims. While a plaintiff in one circuit may succeed on a state-created danger case, it may be defunct in another.[94]

2. Deliberate Indifference: Interpretations Across Circuits

Courts' inconsistent applications of deliberate indifference, the required degree of culpability in some jurisdictions,[95] expose how cases with seemingly foreseeable outcomes improperly deviate from such obvious conclusions. For example, in *Kennedy v. City of Ridgefield*, the Ninth Circuit found that government officials affirmatively acted with deliberate indifference when following a report by the plaintiff, officers went to her neighbor's house and explicitly informed the thirteen-year-old neighbor that the plaintiff reported he sexually abused her nine-year-old daughter.[96] The thirteen-year-old subsequently went over and shot the plaintiff.[97] Contrastingly, in *Tanner v. County of Lenawee*, the Sixth Circuit dismissed the plaintiff's claim under state-created danger where officers responded to a domestic dispute and blocked the offender (husband) in the driveway while the husband was leaving the scene.[98] Upon arriving, one of the two officers, Officer Hunt, testified he identified

91. *Id.*; *Kneipp*, 95 F.3d at 1208. The "shocks the conscience test" is viewed as questionable in the legal industry. *See generally* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307 (2010); Matthew D. Umhofer, *Confusing Pursuits:* Sacramento v. Lewis *and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437 (2001).

92. Oren, *supra* note 14, at 1173.

93. *See supra* note 55 and accompanying text.

94. *Compare* Lawrence v. United States, 340 F.3d 952 (9th Cir. 2003) (applying a "deliberate indifference" standard and affirming summary judgment for the defendants), *with* Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) (providing no definition for what constitutes affirmative action and vacating dismissal of the plaintiff's complaint). The acknowledgment of the circuits' disarrayed tests exposes the lack of direction by the Supreme Court thus far. The particulars of each circuits' rendition of state-created danger are exceptionally complex, and while this Note assumes a discussion of the topic, it will not examine all the distinguishing characteristics of each. Rather, this Note will call attention to the fact that circuits differ in tests and application for the purposes of argument.

95. *See, e.g.*, *Kneipp*, 95 F.3d at 1208; *supra* notes 89–90 and accompanying text.

96. Kennedy v. City of Ridgefield, 439 F.3d 1055, 1057–59, 1066–67 (9th Cir. 2006). Burns, the thirteen-year-old, was known to have extremely violent tendencies. *Id.* at 1057–58; *see also* Chemerinsky, *supra* note 81, at 18.

97. *Kennedy*, 439 F.3d at 1058; Chemerinsky, *supra* note 81, at 18.

98. Tanner v. County of Lenawee, 452 F.3d 472, 474–77 (6th Cir. 2006); Chemerinsky, *supra* note 81, at 23.

the husband as the offender.[99] The husband then re-entered the home and killed the individuals inside.[100] The court reasoned that the acts by the officers did not display deliberate indifference.[101]

This poses the question—when do affirmative acts meet the requisite degree of culpability for state-created danger? The Ninth and Sixth Circuits took divergent positions.[102] However, should the conclusions not, at a minimum, be consistent?

A reasonable officer is likely aware that a domestic abuser poses a life-threatening risk, more so than a thirteen-year-old. Oddly enough, and in stark opposition to Officer Hunt's deposition testimony, the Sixth Circuit advanced there was no evidence that the officers knew or should have known that obstructing the abuser endangered plaintiffs.[103] Not only did Officer Hunt testify he identified the offender,[104] but it is also common knowledge that the most precarious time for a victim is during the separation of victim and abuser.[105] Consequently, it is foreseeable, particularly as law enforcement, that keeping the offender on the premises could result in a deadly outcome. The contrasting results amongst the Ninth and Sixth Circuits imply that deliberate indifference is subject to skewed interpretation.[106]

3. Affirmative Act: The Third Circuit's Status Quo Approach

Adding further complexity, another crucial element of state-created danger, affirmative action, is also subject to disagreeing opinions across the circuits. The Second Circuit provided judgment on whether omissions qualify under state-created danger.[107] The court held that officials were

99. *Tanner*, 452 F.3d at 475.
100. *Id.* at 474.
101. *See id.* at 478–79.
102. *Compare Kennedy*, 439 F.3d at 1067, *with Tanner*, 452 F.3d at 479–80.
103. *See Tanner*, 452 F.3d at 475, 479–80.
104. *Id.* at 475.
105. *Why People Stay*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/support-others/why-people-stay-in-an-abusive-relationship/ (last visited Mar. 28, 2025) ("[L]eaving is often the most dangerous period of time for survivors of abuse.").
106. To be clear, this Note does not presume that any and all acts or omissions by state officials should qualify under state-create danger. Rather, courts should analyze each claim on a case-by-case basis, and such an act or omission must be a constitutional violation under the Fourteenth Amendment. However, cases with egregious facts, such as homicide, sexual assault, and physical abuse, should be given proper deference by the courts.
107. Pena v. DePrisco, 432 F.3d 98, 110–15 (2d Cir. 2005). Courts have criticized *Pena* since its decision. *See, e.g.*, Doe v. Round Valley Unified Sch. Dist., 873 F. Supp. 2d 1124, 1135 n.3 (D. Ariz. 2012).

not liable when police officers did nothing to stop a fellow officer, not on duty, from drinking and driving, ultimately killing three people.[108] Judge Sack opined that there must be a delineation between action and inaction,[109] and therefore, the officers in the case before the court could not be liable under state-created danger based on a "fail[ure] to intercede."[110]

The Third Circuit eventually faced a state-created danger claim in the context of grade schools in *L.R. v. Sch. Dist. of Phila.*[111] Its approach concerning affirmative acts is noteworthy. In the winter of 2013, a teacher, Reginald Littlejohn, worked for the Philadelphia School District.[112] During school hours, Littlejohn allowed a kindergarten student, Jane Doe, to leave with an adult who did not identify themself.[113] Shortly thereafter, the unidentified adult sexually abused the five-year-old student.[114] The parents of the student brought suit under § 1983, and in response, Littlejohn claimed qualified immunity.[115] The court looked at state-created danger under the most recent multi-part test articulated in its jurisdiction.[116]

The Third Circuit clarifies it is challenging to draw the line between an affirmative act and failure to act, which clearly opposes the opinion articulated by the Second Circuit.[117] Interestingly enough, the court in *L.R.* maintains that "virtually any action may be characterized as a failure to take some alternative action."[118] Instead, the court assumes a new analysis in lieu of such a black-and-white stance adopted by the Second Circuit.[119] Rather than distinguishing between an affirmative act versus an omission, the court proposes considering "the 'status quo' of the

108. *Pena*, 432 F.3d at 102–05.
109. *Id.* at 109.
110. *Id.* at 110.
111. 836 F.3d 235, 239 (3d Cir. 2016) (holding grade schoolteacher was not entitled to qualified immunity where teacher allowed student to leave classroom with unidentified adult).
112. *Id.* at 239–40.
113. *Id.* at 239.
114. *Id.*
115. *Id.* at 240.
116. *Id.* at 242. Note that the Third Circuit's requisite level of culpability was replaced from willful disregard to conscience shocking over the years. *See* Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996). This change in culpability further establishes the inconsistencies within the circuits themselves.
117. *See* Pena v. DePrisco, 432 F.3d 98, 110–15 (2d Cir. 2005).
118. *L.R.*, 836 F.3d at 242–43 (rejecting Defendant's argument that Littlejohn's failure to follow policy, identify the adult, and obtain verification are not affirmative acts).
119. *See id.* at 243.

environment" prior to the harm suffered by the plaintiff.[120] The main question is: "whether the state actor's exercise of authority resulted in a departure from that status quo[?]"[121] This question hinges on the precise language employed by Justice Rehnquist in *DeShaney*: "to render [plaintiff] any more vulnerable to" harm.[122] The Third Circuit contends that if a state official did indeed play a role in altering the status quo, then the official engaged in affirmative action; if not, then it did not meet the standard.[123] This interpretation aligns directly with the Supreme Court's dicta.

In looking at the facts presented, the court articulates the status quo as the following: the setting is a kindergarten class, where teachers are to supervise their students ("gatekeeper").[124] Movement is restricted, and wandering is not permitted.[125] In other words, Jane Doe was safe unless Littlejohn allowed her to leave.[126] In *DeShaney*, the state actors did not remove Joshua from living with his father.[127] Still, the lack of removal did not alter the status quo (Joshua's subjection to abuse by Mr. DeShaney).[128] In comparison, Littlejohn allowed Jane Doe to leave the classroom with an unidentified adult, ultimately altering the status quo from security to exposure.[129] Therefore, Littlejohn's conduct is distinguishable from that of *DeShaney*.[130]

4. Application of Status Quo to Other Circuits' Rulings

We now revisit *Kennedy* and *Tanner* to critically examine the facts through the "status quo" lens. Doing so provides clarity on the circuits' opposing conclusions. In *Kennedy*, the plaintiff was safely in her home.[131] It was not until the officer told the thirteen-year-old and his family about the plaintiff's report of sexual abuse that the plaintiff was in danger.[132] The official's act, and only his act, concluded in a departure from the status quo of the plaintiff. In *Tanner*, before the police arrived at the

120. *Id.*
121. *Id.*
122. *See* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 201 (1989).
123. *See L.R.*, 836 F.3d at 243.
124. *Id.*
125. *Id.*
126. *Id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. *Id.* at 243–44.
131. Kennedy v. City of Ridgefield, 439 F.3d 1055, 1058 (9th Cir. 2006).
132. *See id.*

scene, the plaintiff was subject to grave danger since the offender was still present on the premises.[133] The officer's act of obstructing the offender from leaving[134] did not alter the plaintiff's status quo. Therefore, according to the Third Circuit's approach, the officers in *Kennedy* affirmatively placed the plaintiff in harm, while the officials in *Tanner* did not. Rather than the court dismissing the plaintiff's claim for lacking the requisite degree of culpability, it follows that *Tanner* was not suitable under state-created danger due to the unwavering state of affairs.

Applying the "status quo" principle to the facts presented in *Fisher*, it becomes evident that the case before the court provided sufficient grounds to adopt the state-created danger doctrine. This brings us once again to the question posed by the Third Circuit: "[Did] the state actor's exercise of authority result[] in a departure from that status quo[?]"[135] The state before R.R. sexually abused M.F. was the following: M.F. "had the cognitive ability of a . . . five-year-old."[136] In essence, the same age as Jane Doe. According to M.F.'s IEP, teachers had to supervise her outside the classroom.[137] R.R., who was notoriously known for being physically violent and abusive, also required supervision.[138]

It is anticipated that the state actor would contend that the teacher's failure to supervise M.F. upon her departure from the classroom constitutes an omission rather than an affirmative act, thereby rendering the state-created danger doctrine inapplicable. However, when analyzed through the lens of the Third Circuit's reasoning, this argument falters. The teachers, serving as M.F.'s gatekeepers, permitted her to leave the classroom, thereby exposing her to danger.[139] Prior to leaving the classroom, M.F. was in a safe and secure environment.[140] After being permitted to leave, M.F. was exposed to danger by R.R., who was still present at school and continued to pose a risk to M.F.[141] The set of facts before the Fifth Circuit in *Fisher* are analogous to the facts presented in *L.R.*[142] Both present instances where teachers used their authority to permit a student to leave the safety of their classroom, and, in doing so,

133. Tanner v. County of Lenawee, 452 F.3d 472, 474–75 (6th Cir. 2006).
134. *Id.* at 475.
135. L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 243 (3d Cir. 2016).
136. Fisher v. Moore, 73 F.4th 367, 369 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024).
137. *Id.* at 370.
138. *Id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.* at 369; L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 243 (3d Cir. 2016).

allowed the student to fall into a scenario of grave danger, ultimately causing harm to the student. The only difference: the Fifth Circuit refuses to accept the state-created danger doctrine.[143]

IV. STUDENTS WITH DISABILITIES REQUIRE THE STATE-CREATED DANGER EXCEPTION

The demand to ensure a safe and inclusive environment for all students, particularly those with disabilities, like M.F. and Jane Doe, has become a pressing concern. While common law negligence is a traditional avenue for addressing safety concerns in schools, its efficacy is not always sufficient to meet the unique challenges faced by students with cognitive or physical impairments.[144] The sheer prevalence of disabled students within the public school systems further underscores the need for an alternative approach.[145] Moreover, statistical evidence indicates that students with disabilities are disproportionately vulnerable to victimization, necessitating federal recourse.[146] As a result, circuit courts must adopt a uniform state-created danger framework to provide plaintiffs, particularly disabled schoolchildren, with consistent rulings.

A. State Court Does Not Always Provide Sufficient Recourse in the Legal System

While states allow plaintiffs to bring negligence claims against state or local officials,[147] it is foolhardy to assume this option negates the need for consistency in federal court. Yet, we have seen the Supreme Court utilize this very reason to deny a potential state-created danger claim.[148] This viewpoint is misguided and naïve at best. Whether a common law negligence claim will be successful depends on many factors, including

143. *See Fisher*, 73 F.4th at 367.

144. *See* Ralph D. Mawdsley, *Standard of Care for Students with Disabilities: The Intersection of Liability Under the IDEA and Tort Theories*, 2 BYU EDUC. & L.J. 359, 368–69 (2010); Brandy B. v. Eden Cent. Sch. Dist., 934 N.E.2d 304, 307 (N.Y. 2010) ("[W]ithout evidence of any prior conduct similar to the unanticipated injury-causing act, this claim for negligent supervision must fail . . . . [B]ecause defendants demonstrated that they had no specific knowledge or notice of any similar conduct which caused the injury and plaintiff presented no triable issue of fact, the courts below properly granted them summary judgment.").

145. *See* discussion *infra* Section IV.B.

146. *See* discussion *infra* Section IV.B.

147. *See, e.g.*, N.J. STAT. ANN. § 2A:15-5.1 (West 2024); N.Y. C.P.L.R. 1412 (McKinney 1975).

148. *See* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 201–02 (1989).

immunity statutes in the state and potential statutory caps on damages.[149] These two considerations alone are sufficient to call for uniformity in the circuits, as a plaintiff bringing a claim in state court may either (1) be barred from doing so or (2) be successful in their claim but be unable to recover for the damages endured.

Setting these obstacles aside, we now evaluate a case in which the court reached an improper conclusion in its adjudication. In *Brandy B.*, Robert, a student at Stanley G. Falk School, had a history of aggression, violent threats, and poor peer relations.[150] Following multiple positive reports regarding Robert in his IEP, Robert had "inappropriate interactions" with another student, Brenna, on the bus.[151] Brenna's mother told the bus driver that Brenna and Robert should not sit together.[152] Shortly thereafter, Robert exposed himself to Brenna "and forced her to touch him."[153] The Court of Appeals provided a short opinion, holding that the school did not have adequate notice of Robert's act and, therefore, could not be liable.[154]

The dissent articulates a compelling argument, which is adopted here. Judge Ciparick reasoned that the pivotal question of whether the district or official is negligent is whether the circumstance at issue would "put a 'reasonable person on notice to protect against the injury-causing act.'"[155] Robert's record of inappropriate sexual conduct, in conjunction with the request that he be separated from a female student, undeniably

149. *See* Mawdesley, *supra* note 144, at 368–69.

150. Brandy B. v. Eden Cent. Sch. Dist., 934 N.E.2d 304, 305 (N.Y. 2010). To bring a successful claim of negligence against a state official or school district for a third-party act, plaintiff must show that there was "sufficient[] specific knowledge or notice of the dangerous conduct which caused injury." *Id.* at 306 (quoting Mirand v. City of New York, 637 N.E.2d 263, 266 (N.Y. 1994) (citing Bertola v. Bd. of Educ., 1 A.D.2d 973 (N.Y. App. Div. 1956))). "[U]nanticipated third-party acts" are not sufficient to give rise to a successful claim. *Id.* Expressed differently, the district and state officials either knew or should have known there was a risk toward the plaintiff bringing suit.

151. *Id.* at 301.

152. *Id.*

153. *Id.*

154. *Id.* at 302.

155. *Id.* at 303 (Ciparick, J., dissenting) (citing Mirand v. City of New York, 637 N.E.2d 263 (N.Y. 1994)); *see, e.g.*, Doe v. Fulton Sch. Dist., 35 A.D.3d 1194, 1195 (N.Y. App. Div. 2006) ("[A] jury could find that [the alleged sexual assault] was a reasonably foreseeable consequence of the District's failure to provide adequate supervision . . . even in the absence of notice of a prior sexual assault."); Doe v. Bd. of Educ., 9 A.D.3d 588, 590 (N.Y. App. Div. 2004) (finding sufficient circumstances "to put defendants on notice of a potentially harmful situation" where "the instances of inappropriate touching occurred on multiple occasions in two different locations over a period of time").

raised red flags.[156] Therefore, there was sufficient notice to the district to hold it liable for Robert's act.[157] This rationale is logical. Otherwise, in any instance where school officials are aware of someone's violent history, have notice of unusual behavior by that person, and fail to take action against it, they are free of liability.

It has long been held that the *purpose* of § 1983 is to provide United States citizens recourse in federal courts because "state laws might not be enforced."[158] And unfortunately, we see precisely what Justice Douglas forewarned the public about here. This is the exact reason why plaintiffs, especially in the context of disabled schoolchildren, require a consistent multi-part test for state-created danger. Not only has state remedy proven somewhat unreliable, but the lack of guidance from the Supreme Court and consistency in multi-step tests allows for unpredictable decisions across circuits, complicating the validity of state-created danger claims. Students with disabilities should not face such a burden, particularly given the unique challenges they face on a day-to-day basis.

B. Disabled Children Comprise a Large Portion of School Systems and Are at Greater Risk of Victimization

The number of impaired schoolchildren highlights the need for a reliable state-created danger test and application. During the 2021–22 school year, approximately 7.3 million disabled students enrolled in public schools throughout the United States,[159] which was approximately 15% of the total number of learners enrolled in that school year.[160] Expressed differently, approximately two out of every ten students enrolled in public schools in the United States had a disability.

Between 2000–22, all but twelve states saw an increase in the number of disabled students enrolled in public schools.[161] New York saw an 18% increase, California at 21%, and Texas at 29%.[162] As recent as 2022, New York City public schools enrolled approximately 484,000

156. *See Brandy B.*, 934 N.E.2d at 307–09 (Ciparick, J., dissenting).
157. *See id.*
158. Monroe v. Pape, 365 U.S. 167, 180 (1961).
159. Katherine Schaeffer, *What Federal Education Data Shows About Students with Disabilities in the U.S.*, PEW RSCH. CTR. (July 24, 2023), https://www.pewresearch.org/short-reads/2023/07/24/what-federal-education-data-shows-about-students-with-disabilities-in-the-us.
160. *Id.*
161. *Id.*
162. *Id.*

students with disabilities, including but not limited to students with autism, intellectual disability, and deafness.[163] In 2020, when student enrollment declined due to COVID-19,[164] 13% of California's students were enrolled in special education.[165] Los Angeles County had 13.5% of its students enrolled in special education.[166] 8.25% of the Houston Independent School District's population had a special education designation.[167]

While the percentage of students who have a special education designation in Houston is lower than the national average,[168] this can be attributed to Texas's failure to adhere to federal laws to provide students with disabilities with special education services.[169] Yet, despite this failure, Texas has still seen the most significant upward increase of students with disabilities since 2000 in comparison to New York and California.[170] And, with such an upward increase, Texas, located in the Fifth Circuit, currently offers no federal recourse under the state-created danger theory.[171]

At first glance, the numbers and percentages may seem small relative to the total student population. However, dismissing the need for a consistent state-created danger doctrine based on the number of disabled students is misguided. It is essential to recognize that not all students with disabilities receive services documented under the Individuals with Disabilities Education Act (IDEA).[172] Take the state of

163. *Number of New York State Children and Youth with Disabilities Receiving Special Education Program and Services*, NYSED, https://www.p12.nysed.gov/sedcar/goal2data.htm (last visited Mar. 28, 2025).

164. Eloise Burtis & Sofoklis Goulas, *Declining School Enrollment Since the Pandemic*, BROOKINGS INST. (Oct. 12, 2023), https://www.brookings.edu/articles/declining-school-enrollment-since-the-pandemic.

165. *Special Education Enrollment*, KIDSDATA, https://www.kidsdata.org/topic/95/special-education/table#fmt=1146 (last visited Mar. 28, 2025).

166. *Id.*

167. HOUSTON INDEPENDENT SCHOOL DISTRICT, 2020-2021 FACTS AND FIGURES 1 (2021).

168. *Id.*

169. *See* Elizabeth Lewis, *Federal Findings on Special Education in Texas Should Be a Call to Change*, UTNEWS (Feb. 5, 2018), https://news.utexas.edu/2018/02/05/special-education-in-texas-needs-to-be-changed/. It is reasonable to assume had Texas followed protocol over the last decade, the percentage of students with disabilities reported, including Houston, would be even greater. *See id.*

170. *See* Schaeffer, *supra* note 159.

171. *See generally* Fisher v. Moore, 73 F.4th 367 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024).

172. *See* Jillian Jorgensen, *Report: Nearly 10,000 Preschoolers with Disabilities Did Not Get Services Last Year*, NY1 (June 6, 2023, 6:00 AM), https://ny1.com/nyc/all-

Texas, where administrations have not followed protocol for decades, as a prime example.[173] This does not apply to Texas alone.[174] Other factors among states, such as language barriers, prohibit schools from adequately identifying and enrolling children with disabilities.[175] It is certainly sensible to assume that not all disabled students receive assistance across other states, thus adversely influencing statistics.

Even if this reason is not adequate on its own, the number of students with disabilities enrolled in public schools, combined with the statistics on the victimization of disabled schoolchildren, clearly demonstrates the need for a uniform adoption of this exception across all circuits. Examining the data from 2012, between 15% to 23% of elementary school students experienced some form of "bully victimization,"[176] while 20% to 28% of secondary school students experienced the same.[177] Out of ten students, two to three will experience some form of aggressive act at school. In 2022, about 19% of students reported being bullied in some form.[178]

boroughs/education/2023/06/05/report—nearly-10-000-disable-students-did-not-get-services ("Nearly ten thousand preschoolers with disabilities went without the services they were legally entitled to last school year . . . .").

173. Lewis, *supra* note 169.

174. *See Report: Many States Not Meeting IDEA Requirements*, LAW OFF. OF MEAGAN NUÑEZ (July 22, 2020) (emphasis added), https://www.sdspecialattorney.com/blog/2020/07/report-many-states-not-meeting-idea-requirements/ ("The findings of [the U.S. Department of Education Report] mean that 27 states—including California—are not doing everything they should under IDEA, and they require assistance to do so. This could mean that public schools require assistance in fulfilling their responsibilities and upholding the six pillars of IDEA, which include: 1. Ensuring students receive a free and appropriate education; 2. *Providing proper evaluation of students with disabilities*; 3. *Establishing [IEPs]*; 4. Providing the least restrictive environment for children to learn; 5. Protecting parents' rights . . . ; and 6. Establishing IDEA's safeguards . . . .").

175. *See Special Education: Varied State Criteria May Contribute to Differences in Percentages of Children Served*, GOV'T ACCOUNTABILITY OFF. (Apr. 11, 2019), https://www.gao.gov/products/gao-19-348 ("Challenges with identifying and evaluating children can also affect enrollment rates—for example, when children don't speak English, school districts don't always have staff that can evaluate them in their first language.").

176. Bully victimization is defined as "repeated exposure to aggressive acts over time intended to cause physical harm, psychological distress, or humiliation." Jamilia J. Blake et al., *National Prevalence Rates of Bully Victimization Among Students with Disabilities in the United States*, 27 TEX. A&M U. 210, 210 (2012).

177. *Id.*

178. *Fast Facts: Bullying*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=719 (last visited Mar. 29, 2025) (finding among students ages twelve to eighteen, 13% reported being the subject of rumors, 12% reported being made fun of, called names, or insulted, 4% reported being excluded from activities on purpose, 5% reported being pushed, shoved, tripped, or spit on, 3% reported being

These alarming statistics apply to *all* students. Yet, when analyzing the statics concerning disabled schoolchildren, the likelihood of bully victimization increases drastically. Research showed that females who qualified for special education were almost *five times* more likely to be targets of bully victimization than females who did not.[179] Males were about three times more likely to face bully victimization.[180] The reason is that, traditionally, perpetrators view individuals with incapacities as unable to defend themselves.[181] This is even more prevalent for students who have "visibly symptomatic" disabilities, such as autism, learning incapacities, and intellectual disabilities.[182]

As the population of disabled students continues to grow and their vulnerability to victimization remains disproportionately high compared to their non-disabled peers, it is imperative that all circuits adopt a dependable and uniform state-created danger multi-part test. It has already been established that state recourse may fail,[183] and there are instances of extremely devastating claims being dismissed due to the wavering elements and opinions issued by federal courts.[184] Establishing clear standards for assessing state-created claims should result in reliable decisions that hold certain acts by state officials putting disabled

threatened with harm, 3% reported others tried to make them do things they did not want to do, and 1% reported their property was destroyed by others on purpose).

179. Blake et al., *supra* note 176, at 210 (citations omitted) (citing David B. Estell et al., *Students with Exceptionalities and the Peer Group Context of Bullying and Victimization in Late Elementary School*, 18 J. CHILD & FAM. STUD. 136 (2009); Chad Allen Rose et al., *Bullying and Victimization Rates Among Students in General and Special Education: A Comparative Analysis*, 29 EDUC. PSYCH. 761 (2009)) ("The risk and rate of bully victimization is not equal across student groups, with a number of studies indicating that students with disabilities are at greater risk for being victimized than their nondisabled peers.").

180. *Id.*

181. *Id.* (citations omitted) (citing Joan R. Petersilia, *Crime Victims with Developmental Disabilities: A Review Essay*, 28 CRIM. JUST. & BEHAV. 655 (2001); David Thompson et al., *Bullying of Children with Special Needs in Mainstream Schools*, 9 SUPPORT FOR LEARNING 103 (1994)) ("People with disabilities have long been seen by perpetrators of violence as unable to defend themselves or report abuse due to characteristics of their disability.").

182. *Id.* at 210–11 (citing David Finkelhor, *Developmental Victimology: The Comprehensive Study of Childhood Victimizations*, *in* VICTIMS OF CRIME 9 (Robert C. Davis et al. eds., 3d ed. 2007)) ("Finkelhor's . . . developmental victimology theory suggests that risk for violence, including bully perpetration, can be attributed to both contextual and individual characteristics that make some victims more susceptible to violence than others. It is plausible that higher bully victimization risk among students with disabilities is attributable, in part, to symptoms of their disabilities.").

183. *See supra* Section IV.A.

184. *See, e.g.*, Fisher v. Moore, 73 F.4th 367, 373–74 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 569 (2024); Tanner v. Cnty. of Lenawee, 452 F.3d 472, 481 (6th Cir. 2006).

schoolchildren at risk as unconstitutional, ultimately reducing its occurrences and fostering a safer and more inclusive educational environment—failure to implement such a test risks perpetuating systemic injustices.[185]

V. A CLEAR FRAMEWORK FOR THE CIRCUITS

Drawing upon the now well-defined issues and the need for federal redress, this Part devises a multi-part test to be accepted by the circuit courts either on appeal or decided en banc.[186] Not only will students with disabilities have additional legal recourse, which fosters safe school environments, but the adoption of the below test will eliminate jurisdictional favorability.[187] The following test is proposed:

1. There existed some relationship between plaintiff and state;
2. The harm to plaintiff was foreseeable;
3. The state actor's exercise of his/her authority altered the status quo; and
4. The state actor's exercise of authority, which satisfies prong two above, was done with deliberate indifference toward plaintiff's safety.

185. The sorts of claims discussed here must rise to a constitutional violation under § 1983. Therefore, adopting a consistent state-created danger multi-part test does not automatically render any harm by a private act permissible in federal court.

186. The position that the Supreme Court of the United States should decide the issue about state-created danger is impractical at this point in time. The Supreme Court declined to hear the issue on January 8, 2024. Fisher v. Moore, 144 S. Ct. 569 (2024), *denying cert. to* Fisher v. Moore, 73 F.4th 367 (5th Cir. 2023); Cnty. of Tulare v. Murguia, 144 S. Ct. 553 (2024), *denying cert. to* Murguia v. Langdon, 61 F.4th 1096 (9th Cir. 2023); County of Tulare, California v. Murguia, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/county-of-tulare-california-v-murguia/ (last visited Mar. 29, 2025).

187. A uniform state-created danger framework would decrease forum shopping, which is discouraged in the legal community. *See generally Forum Shopping*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_shopping (last visited Mar. 29, 2025) ("While forum shopping is still permitted under limited circumstances, the practice is generally discouraged in the modern legal system due to the Erie Doctrine and other conflict of law rules.").

A. There Existed Some Relationship Between Plaintiff and State

To delineate the parameters of what constitutes "some relationship" between the plaintiff and the state, it is essential to establish both the "floor" and "ceiling" of this relationship.[188] Otherwise, if not fleshed out, the merest connection could be sufficient under this prong. State-created danger is not an exception wherein every single person can bring a constitutional claim against state actors for private acts. As a matter of public policy, liability extending to any plaintiff regardless of connection to the state would create undesirable consequences and, plainly put, deter state officials from taking part in their positions—rightfully so.[189]

"Some relationship" between plaintiff and state would not be one where there is complete state control.[190] For example, in *Estelle v. Gamble*, the plaintiff was confined to prison, and in *Youngberg v. Romeo*, the plaintiff was confined to a psychiatric hospital.[191] The Supreme Court found that these relationships, where the plaintiff is stripped of his decision-making and freedom, are suited for a "special relationship" exception, articulated in *DeShaney*.[192] Thus, in instances of complete state control, a plaintiff can bring their claim under a previously established exception.

Next, "some relationship" cannot be all-encompassing. Clear instances such as (1) private entities, (2) organizations that may contract with state or government agencies, and (3) actions toward the general public would not be sufficient to meet the relationship prong under state-

188. The Tenth Circuit articulates the clear distinction between "special relationship" and some relationship. While there can be some relationship for the purposes of state-created danger, a special relationship falls within the bounds of exception held by the *DeShaney* court. *See* Christiansen v. City of Tulsa, 332 F.3d 1270, 1279–80 (10th Cir. 2003) (quoting Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1260 (10th Cir. 1998)) ("[K]nown as the special relationship doctrine, [the exception] 'exists when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual.'").

189. *See* Eisenhauer, *supra* note 55, at 901–02 (citing Pinder v. Johnson, 54 F.3d 1169, 1176 (4th Cir. 1995)) ("The Fourth Circuit opined that a right to affirmative protection would be poor public policy.").

190. *See* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 205 (1989).

191. Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist . . . .").

192. *See DeShaney*, 489 U.S. at 205.

created danger.[193] In a hypothetical scenario where Employee A is employed by a government contracting agency—a private entity—it is evident that Employee A does not possess a sufficiently direct relationship with the government entity with which the agency is contracted. Although Employee A may produce work for the government agency, his employment is with the private company, not the government entity itself. Holding governmental officials accountable for actions affecting such employees, who maintain only a tenuous connection to the state, would result in an unwarranted expansion of constitutional liability for these officials.

This leaves us in between the spectrum. Instances such as (1) students enrolled in a public school and (2) seeking assistance from state officials may qualify as a relationship between the plaintiff and the state. Looking at school enrollment more closely, children are required to attend school.[194] Moreover, school officials stand in loco parentis to the student while the student is on school grounds.[195] Therefore, while students are not entirely stripped of their freedom and rights when entering school doors, there exists a measure of control by the state agency (school district), thereby establishing a relationship between student and state. It is precisely these scenarios that are within the purview of state-created danger.

B. The Harm to Plaintiff Was Foreseeable

Foreseeability is vital since an official cannot act with deliberate indifference without foreseeable harm. Foreseeability, a widely

193. *See, e.g.*, Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) (alteration in original) ("The claimants here were simply members of the general public, living in the free society, and having no special custodial or other relationship with the state. As in *Martinez*, . . . the state agent defendants here were 'unaware that the [claimants] as distinguished from the public at large faced any special danger.'" (quoting Martinez v. California, 444 U.S. 277, 285 (1980))).

194. *Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, By State: 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp (last visited Mar. 29, 2025) (providing that some states require enrollment in school as young as five years old).

195. *See* Bill Nossen, *In Loco Parentis—What Does It Mean?*, N.J. PRINCIPALS & SUPERVISORS ASS'N (June 5, 2014), https://njpsa.org/loco-parentis-what-does-it-mean-0/ ("[T]he doctrine has been construed to mean that an administrator temporarily takes the place of the student's parents or guardian once the student is dropped off at the school-house door.").

understood legal theory,[196] is defined as "a [reasonable] person could or should [have] reasonably . . . foreseen the harms that resulted from their actions."[197] This naturally intertwines with the concept of deliberate indifference. To be deliberately indifferent, one must "*know[] of and disregard[]* an excessive risk."[198] Although an extensive analysis of foreseeability may not be necessary given its clarity, it is imperative to underscore its relevance and connection to the present discussion.

C. The State Actor's Exercise of Authority Altered the Status Quo

The status quo approach is not only optimal for explaining divergent conclusions for seemingly similar facts,[199] but it also provides an adaptable methodology, limiting the number of puzzling decisions. The circuits disagree on whether omissions are sufficient to meet state-created danger.[200] A bifurcated view on this issue (act versus omission) forces a court to limit its analyses to fit unique scenarios into one of two buckets. Rather, the Third Circuit's approach allows for flexibility and examination on a case-by-case basis.[201]

Take the following hypothetical: Student A, who has a history of physical and sexual violence, is enrolled at school. Student A has recently been in physical altercations with other students in his class. In accordance with the school principal's instruction, student B's teacher agrees to transfer student A into the class. Student A sexually assaults Student B. Under an affirmative act versus omission theory, the school principal may be liable, while the teacher may not. The principal affirmatively placed student A in student B's class despite knowing the potential danger. However, the teacher may not have affirmatively acted when they merely followed demand.

196. *See Foreseeability in Tort Law*, UOLLB, https://uollb.com/blog/law/foreseeability-in-tort-law (last visited Mar. 29, 2025) ("The concept of reasonable foreseeability focuses on what an ordinary, reasonable person in the defendant's position would have foreseen as potential risks or harm. It does not require absolute or precise foreseeability but rather what would be reasonably expected or anticipated by someone exercising reasonable care and caution.").

197. *Foreseeability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/foreseeability (last visited Mar. 29, 2025).

198. Schwartz, *supra* note 86, at 159 (emphasis added) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)); *see infra* Section V.D.

199. *See supra* Section III.B.4.

200. *See supra* Section III.B.3; Pena v. DePrisco, 432 F.3d 98, 110–15 (2d Cir. 2005).

201. *See* L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 243 (3d Cir. 2016) ("[W]hether the state actor's exercise of authority resulted in a departure from that status quo.").

Under the status quo approach,[202] the conclusion differs. The principal *and* schoolteacher may be liable, but only the teacher is liable if *he or she knew that student A posed a risk to the students*.[203] The principal's exercise of authority altered the status quo of student B. Prior to student A entering the class, student B was safe from the risk of sexual assault. After student A's transfer, the existing condition was no longer the same. And, if the teacher knew that student A transferred due to physical aggression, then he or she too altered the status quo by putting all students at risk of potential harm. However, if the teacher did not know, then the argument fails.

This fluid method not only facilitates the progression of claims that may have previously faltered under a rigid affirmative action versus omission framework, which is critical for individuals like disabled schoolchildren, but it also supplies both the plaintiff and defendant with clarity on how the court will examine the facts before it.

D. The State Actor's Exercise of Authority Was Done with Deliberate Indifference

Deliberate indifference is the proper standard for state-created danger to avoid inadvertently classifying negligence as a constitutional violation. Courts usually resort to conscience-shocking conduct when wavering on culpability.[204] However, not only has the legal community discouraged the conscience-shocking test,[205] but the test is fallacious in relation to state-created danger claims. Conscience-shocking conduct is defined as behavior that "seem[s] grossly unjust to [an] observer."[206] However, while there may be instances where an official's conduct may be conscience-shocking, it (1) may not have altered the status quo of one's circumstances, and (2) may not have been done with willful disregard to the plaintiff's safety.

202. *Id.*

203. While the status quo approach offers more flexibility than affirmative action versus omission, it is crucial to pair this with the deliberate indifference element proposed. Therefore, situations where a state official, inadvertently or unknowingly alters the status quo of plaintiff's environment would not qualify under state-created danger. Rather, the state official must alter the existing conditions knowing it poses a risk to plaintiff to have a viable claim under state-created danger.

204. *See, e.g.*, Uhlrig v. Harder, 64 F.3d 567, 572 (1995).

205. *See supra* note 91 and accompanying text.

206. *Shocks the Conscience*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/shocks_the_conscience (last visited Mar. 29, 2025).

In looking at the facts in *Estate of Saenz v. Bitterman*, we can see precisely how the two points articulated above are proper.[207] On March 28, 2019, Bitterman, a police officer, was responding to a call without his lights or sirens when he drove through an intersection.[208] The plaintiff, Maria de Refugio, was driving with her mother Eira Saenz, and hit Bitterman's car.[209] Ms. Saenz died as a result of the accident.[210] The court denied the defendant's motion to dismiss on the grounds that Bitterman's conduct was conscience-shocking.[211] There is no disagreement that Bitterman's behavior was deplorable. Nevertheless, while such conduct was inexcusable, it did not change the status quo of Saenz's environment, as she was at risk of an accident once she entered a vehicle that was on the road. Moreover, in disagreement with the court's opinion,[212] Bitterman's conduct does not amount to willful disregard. Bitterman could not have foreseen the killing of Sanez due to his lack of sirens and lights, and therefore, he could not have disregarded that risk.[213]

While it is imperative to have state-created danger available, it is equally important to specify the scope of conduct liable under the exception. If conscience-shocking conduct were the preferred requisite for state-created danger, courts might mistakenly categorize gross misconduct or negligence as a violation of one's constitutional right under § 1983, ultimately in opposition to public policy.[214] While some circuits may seek to use, or even equate, conscience-shocking conduct with deliberate indifference, it is essential to understand that the elements are not interchangeable for the reasons above. Therefore, to ensure that

207. *See* Estate of Saenz v. Bitterman, No. 20-cv-00848, 2020 U.S. Dist. LEXIS 124547, at *2–3 (D. Colo. July 15, 2020).

208. *Id.* at *2.

209. *Id.*

210. *Id.* at *3.

211. *Id.* at *15–16. Bitterman's conduct was sufficient to qualify as "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at *6 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).

212. *See id.* at *13–14 (opining had defendant Bitterman's conduct been done in responding to a non-emergent call, "it is plausible that [he] acted with deliberate indifference in causing the accident").

213. Moreover, the Supreme Court in *Lewis* found that absent an explicit intent to harm plaintiff during a high-speed chase, an officer cannot be held liable for a due process violation. *Lewis*, 523 U.S. at 854. ("Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983.").

214. Should the court broaden state officials' conduct to allow acts which do not foresee and disregard a risk to plaintiff, this could easily lead to a decrease in the number of people willing to work such positions or even the resignation of current employees, due to the heightened liability.

behavior that consciously disregards a risk to the plaintiff is liable under state-created danger, deliberate indifference must be the standard adopted by the courts.

VI. CONCLUSION

State-created danger is a crucial exception to qualified immunity, yet current applications and frameworks lack coherence.[215] Reliability in its use across all federal jurisdictions is essential for clarity and fairness for plaintiffs,[216] particularly students with disabilities who require additional safeguards in comparison to their non-disabled peers.[217] Addressing the lack of consistency and the Fifth Circuit's refusal to accept state-created danger altogether will hold certain acts by officials unconstitutional and prevent systemic injustice for disabled school children, all while strengthening individuals' fundamental rights to life and liberty under the Fourteenth Amendment.

215. *See supra* note 55 and accompanying text.
216. *See supra* Sections V.A, V.B, V.C, and V.D.
217. *See supra* Section IV.B.