Signs of Danger - The Third Circuit Emphasizes Foreseeability as the Crucial Element in the State-Created Danger Theory: Morse v. Lower Merion School District

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SIGN OFS DANGER—THE THIRD CIRCUIT EMPHASIZES FORESEEABILITY AS THE CRUCIAL ELEMENT IN THE "STATE-CREATED DANGER" THEORY: MORSE v. LOWER MERION SCHOOL DISTRICT

I. INTRODUCTION

According to the philosopher Alan Gewirth, "A duty is a requirement that some action be performed or not be performed; in the latter, negative case, the requirement constitutes a prohibition." Traditionally, the United States Constitution has been regarded as imposing negative duties on the states; that is, the states are prohibited from depriving persons of their constitutionally guaranteed rights. The Constitution does not, how-

1. Alan Gewirth, Are There Any Absolute Rights?, in THEORIES OF RIGHTS 91-109 (Jeremy Waldron, ed. 1984). The right to life, granted by the Constitution, imposes the negative duty to refrain from killing a person without justification. See id. (stating that "[a] right is fulfilled when the correlative duty is carried out, i.e. when the required action is performed or the prohibited action is not performed"); see also Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 32 (1913) ("A duty or a legal obligation is that which one ought or ought not to do. Duty and right are correlative terms. When a right is invaded, a duty is violated."); (quoting Lake Shore & M.S.R. Co. v. Kurtz, 37 N.E. 303, 304 (1894)).

2. See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989) (noting that Due Process Clause imposes negative duties on states). According to the Court in DeShaney:

[Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbs the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id.; see Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that although states may not prohibit abortions, there is no affirmative duty to provide funding for this procedure); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding that state has no affirmative duty to provide adequate housing); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (stating that Fourteenth Amendment was adopted “at the height of laissez-faire thinking” and “sought to protect Americans from oppression by state government, not to secure them basic governmental services”); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (describing Constitution as “charter of negative liberties”); see also Sheldon Nahmod, Symposium: Section 1983 Discourse: The Move From Constitution to Tort, 77 GEO. L.J. 1719, 1747-48 (1989) [hereinafter Nahmod, Section 1983 Discourse] ("By analogy to the tort doctrine that strangers ordinarily owe no Good Samaritan affirmative duties to one another, tort rhetoric makes it easier for courts to treat the Constitution as a charter of negative liberties, a position the Supreme Court has in fact recently taken."); Deborah Astram Colson, Note, Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983, 30 HARV. C.R.-C.L. L. REV. 169, 173 (1995) (noting tradition in federal courts of treating Constitution as charter of negative liberties); Adam Michael Greenfield, Note, Annie Get Your Gun ‘Cause Help Ain’t Comin’: The Need for Constitutional Protection from Peer Abuse in Public Schools, 43 DUKE L.J. 588, 599 (1993) (noting that DeShaney is consistent with reading of Due
ever, impose corresponding affirmative duties on a state to secure these rights for its citizens or to protect its citizens from violations of their rights by third parties.3

There are several exceptions, however, where courts have imposed an affirmative duty on a state to protect the constitutional rights of its citizens.4 One such exception applies when a state creates a dangerous situation that leads to a violation of a person's constitutional rights to life or personal security.5 For example, even if the state did not directly deprive


3. See DeShaney, 489 U.S. at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."). But see Eaton & Wells, supra note 2, at 107 (noting that DeShaney poses question of whether Constitution is merely charter of negative liberties or whether it also provides positive rights to governmental assistance). Professors Eaton and Wells comment that "[t]he affirmative duty problem has long fascinated courts and commentators, because it raises perplexing philosophical questions about liberty, utility, and moral responsibility." Id. at 108.

4. See Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995) ("While state actors are generally only liable under the Due Process Clause for their own acts and not for private violence, there are two recognized exceptions to this rule: (1) the special relationship doctrine; and (2) the 'danger creation' theory."); Karen M. Blum, DeShaney, Creation of Danger and Culpability, 27 Loy. L.A. L. Rev. 435, 461 (1994) (same).

5. See Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (holding that state's affirmative duty to protect arises under Due Process Clause when state places individuals in dangerous positions that they would not have otherwise faced); Bowers, 686 F.2d at 618 (stating that "if the state puts a man in a position of
the person of his or her constitutional rights, a number of courts have found sufficient reason to impose an affirmative duty on the state because it created the circumstances under which the violation occurred. This imputation of liability is commonly referred to as the "state-created danger" theory.

The United States Court of Appeals for the Third Circuit adopted the state-created danger theory in 1996 when it decided *Kneipp v. Tedder*. In *Kneipp*, the court held that the theory was a viable mechanism for bringing a claim under 42 U.S.C. § 1983. Only a year later, the Third Circuit con-

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6. See *Pinder v. Johnson*, 54 F.3d 1169, 1180 (4th Cir. 1995) (noting that *DeShaney* decision did not obliterate state's duty to protect individuals where state affirmatively acted to create dangerous situation or render individuals more susceptible to danger); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993) ("*DeShaney*... leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger."); *Bowers*, 686 F.2d at 618 (noting that state has obligation to protect when it creates danger that harms people); see also *Ashley Smith, Comment, Students Hurting Students: Who Will Pay?*, 34 Hous. L. Rev. 579, 606 (1997) ("If the state creates the dangerous situation that results in the victim's harm, and the harm would not otherwise have occurred, then it is just that the state be deemed responsible and compensate the victim."); *Robert D. Tennyson, Note, Recent Development: Leffall v. Dallas Independent School District: The Fifth Circuit Finds Few Duties in the Public Schools*, 69 Tul. L. Rev. 1061, 1066 (1995) (noting that courts have held *DeShaney* to provide for implied duty where state created dangerous situation); *Watkinson, supra* note 5, at 1280 (stating that invocation of state-created danger theory is limited to situations where state actors create danger by affirmative actions).

7. See *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996) (noting that state-created danger theory had been utilized by several other courts of appeals); see also *Uhrig*, 64 F.3d at 572 (referring to "danger-creation" theory).

8. 95 F.3d 1199 (3d Cir. 1996).

9. See id. at 1205 (stating that viability of state-created danger theory had previously been considered in Third Circuit, however, before *Kneipp*, court had never been presented with appropriate set of factual circumstances to invoke theory); see also *Joseph A. Slobodzian, Police Liability Suit Is Revived*, PHILA. INQUIRER, Sept. 26, 1996, at B1. ("In a ruling that creates new grounds for civil-rights suits... the [Third Circuit] has revived a lawsuit by the parents of a Philadelphia woman who passed out on a frigid night and suffered severe brain damage after police stopped her for drunkenness and then let her walk home."). One commentator noted that, ironically, under the state-created danger theory, the police may have an affirmative duty to a person regardless of whether they decide to take the person into custody or not. See id. (noting that although police officers have been sued for years by people they arrest, this ruling ironically exposes them to suit by people they do not arrest). For an in-depth discussion of 42 U.S.C. § 1983, see *infra* notes 18-27 and accompanying text.
fronted the issue again in *Morse v. Lower Merion School District*. Using the test adopted in *Kneipp*, the court held that the plaintiff did not meet the requirements of the state-created danger theory.\(^\text{11}\)

This Casebrief examines the differences between the two cases and provides a guide for attorneys who are contemplating or bringing section 1983 actions in the Third Circuit.\(^\text{12}\) Part II discusses the birth of the state-created danger theory in the Supreme Court and its evolution in the lower federal courts, including the Third Circuit.\(^\text{13}\) Next, Part III discusses the factual background and the Third Circuit’s analysis in the *Morse* case.\(^\text{14}\) In addition, Part III describes the test employed by the Third Circuit in state-created danger cases.\(^\text{15}\) Part IV analyzes the differences between the two most recent Third Circuit decisions in this area, *Kneipp* and *Morse*.\(^\text{16}\) Finally, Part V discusses how a practitioner should approach this issue in the Third Circuit.\(^\text{17}\)

II. **Background: The Origin of the State-Created Danger Theory of Liability Under Section 1983**

A. **Section 1983**

Section 1983 permits parties to sue persons or entities “acting under color of state law” for the violation of their federal constitutional or statutory rights.\(^\text{18}\) By itself, section 1983 does not create any substantive

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10. 132 F.3d 902 (3d Cir. 1997).
11. See id. at 916. (holding that plaintiff failed to meet state-created danger theory test, as adopted in *Kneipp*, which requires that state actor willfully create dangerous situation that leads to direct harm to foreseeable plaintiff).
12. For a comparison of *Kneipp* and *Morse*, see infra notes 84-103 and accompanying text.
13. For a background discussion of section 1983 actions utilizing the state-created danger theory in the Supreme Court and the lower federal courts, see infra notes 28-68 and accompanying text.
14. For a discussion of the Third Circuit’s opinion in *Morse*, see infra notes 69-83 and accompanying text.
15. For a discussion of the Third Circuit’s application of the *Kneipp* test to the facts in *Morse*, see infra notes 75-83 and accompanying text.
16. For a discussion of how *Kneipp* and *Morse* are distinguishable, see infra notes 84-103 and accompanying text.
17. For a practitioner’s guide to bringing a section 1983 action under the state-created danger theory, see infra notes 104-10 and accompanying text.
18. See Parrat v. Taylor, 451 U.S. 527, 535 (1981) (stating that one of two essential elements in section 1983 actions is “whether the conduct complained of was committed by a person acting under color of state law”), overruled by Daniels v. Williams, 474 U.S. 527 (1986); Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989) (stating that to bring action under section 1983, plaintiff must demonstrate (1) that defendant was acting under color of state law and (2) that defendant’s conduct deprived plaintiff of federal constitutional or statutory right); see also Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 1.03 (3d ed. 1991) [hereinafter Nahmod, Civil Rights] (noting that “[section] 1983 was designed both to prevent the states from violating the Fourteenth Amendment and certain federal statutes and to compensate injured plain-
rights. Instead, section 1983 serves as a vehicle through which plaintiffs can obtain relief for violations of their substantive rights provided by either the Constitution or federal statutes. Potential defendants in section 1983 suits include municipalities, counties and individuals who are acting under governmental authority. The state itself, however, cannot be a defendant.

The text of 42 U.S.C. § 1983 provides in pertinent part that:

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


19. See Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (stating that section 1983 is remedy for deprivation of constitutional rights); Cornelius v. Town of Highland Lake, 880 F.2d 348, 352 (11th Cir. 1989) (finding that section 1983 by itself does not create any substantive rights, but instead provides remedies for deprivations of rights created by Constitution or federal laws). But see Charles F. Abernathy, Symposium: Section 1983 and Constitutional Torts, 77 Geo. L.J. 1441, 1441 (1989) (stating that this procedural vehicle has altered substantive constitutional rights). According to Professor Abernathy, “Section 1983 has not merely served as a vehicle for enforcing constitutional law, it has led to the making of a new constitutional law as the Court has adjusted constitutional norms to permit their enforcement . . . .” Id.

20. See Greenfield, supra note 2, at 593 (stating that statute is solely vehicle for enforcement of rights established by Constitution or federal laws and provides no substantive rights by itself); Watkinson, supra note 5, at 1245 (stating that section 1983 “creates a vehicle whereby independent violations of statutory or constitutional law can be redressed”). Although section 1983 does not explicitly provide any substantive rights, it has been described as a sword or, alternatively, the means through which the Fourteenth Amendment is transformed from a shield into a sword. See Marshall S. Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U. L. Rev. 277, 322 (1965) (referring to section 1983 as “statutory sword” to protect violations of “constitutional shield”); Nancy L. Harris, Casebrief, Third Circuit Review: Civil Rights—Third Circuit Narrows Scope of Public School District § 1983 Liability for the Sexual Abuse of Students: D.R. v. Middle Bucks Area Vocational Technical School (1992), 38 Vill. L. Rev. 1100, 1103 (1993) (referring to description of section 1983 as statute that transforms Fourteenth Amendment from shield into sword).

21. See Monell v. Department of Soc. Servs., 436 U.S. 658, 691 (1978) (holding that municipalities may be defendants under section 1983, but only if municipality directly causes constitutional violation through its policies or customs because respondeat superior theory is not available in this type of case); NAHMOD, Civil Rights, supra note 18, § 1.06 (stating that in certain situations, cities, counties and other local government entities are amenable to suit as “persons” under section 1983).

22. See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 64 (1989) (holding that states and their agencies are not “persons” that can be sued under section 1983).
Interestingly, some commentators have likened section 1983 cases to “constitutional tort claims.”23 Although there are significant differences between section 1983 analysis and standard tort principles, some similarities do exist.24 As in standard tort claims, for example, the existence of a legal duty is crucial to establishing constitutional liability in section 1983 cases.25 For years, courts have recognized that, while a state may not deprive persons of their constitutional rights, a state generally has no affirmative duty to actively secure these rights for every person.26 It has

23. See Nahmod, Section 1983 Discourse, supra note 2, at 1719 (noting that, in section 1983 cases, Supreme Court has shifted from using constitutional rhetoric to expressing tort rhetoric); see also Monell, 436 U.S. at 691 (using term “constitutional tort”); Imbler v. Pachtman, 442 U.S. 409, 417 (1976) (stating that section 1983 “creates a species of tort liability”); Monroe v. Pape, 365 U.S. 167, 171 (1961) (advising that section 1983 should be considered in context of tort liability in which people are responsible for natural consequences of their actions), overruled by Monell, 436 U.S. at 658; Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982) (referring to section 1983 as tort statute). But see Estelle v. Gamble, 429 U.S. 97, 107 (1976) (distinguishing between tort and constitutional claims by stating that medical malpractice may initiate tort claims, but not necessarily constitutional claims); Gregory v. City of Rogers, 974 F.2d 1006, 1009 (8th Cir. 1992) (“Many harms, though caused by a state actor, do not fall within the scope of section 1983, for section 1983 does not turn the Fourteenth Amendment into a font of tort law that supersedes the tort systems already available under individual state laws.”). Because this Casebrief focuses narrowly on the Third Circuit, the question of whether the Supreme Court employs constitutional rhetoric or tort principles in its section 1983 cases will not be discussed, nor will the correctness of either approach be analyzed. For a detailed discussion and analysis of these issues, see Nahmod, Section 1983 Discourse, supra note 2.

24. See Harris, supra note 20, at 1105 (“Section 1983 is often referred to as having created a ‘constitutional tort’ claim because it incorporates both constitutional and tort law principles.”). If a plaintiff can state a claim under section 1983, there are several advantages to be gained that are not available in ordinary tort suits. See id. (noting that recovery of attorneys’ fees, wide range of rights that may be litigated, increase in number of potential defendants, generous federal law standards for assessing damages and circumvention of state law immunity are all potential advantages gained by suing under section 1983).

25. See Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (holding that if state “has no federal constitutional duty to provide . . . protection its failure to do so is not actionable under section 1983”); cf. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 558 (5th ed. 1984) (“[I]t should be recognized that ‘duty’ is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”).

26. See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 196 (1989) (stating that constitutional due process clauses do not bestow affirmative rights to governmental assistance); Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that although state may not abridge women’s constitutional right to have abortions, there is no obligation on state’s part to fund abortions); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding that Constitution does not create affirmative duty on state’s part to provide housing); Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983) (“[A]s currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise.”); Bowers, 686 F.2d at 618 (stating that normally, Constitution only imposes negative duties).
gradually become apparent, however, that there are instances in which a state owes an affirmative duty to protect its citizens from violations of their constitutional rights by a state actor or even private persons.27

B. The Supreme Court’s Creation of the State-Created Danger Theory

One instance in which a state has an affirmative duty to protect a person’s constitutional rights is when a state places the person into custody or involuntary confinement, thereby limiting his or her own ability to protect these rights.28 In *Martinez v. California*,29 the United States Supreme Court first addressed the issue of whether a state owes an affirmative duty to a person *not* in its custody.30 In *Martinez*, a convicted sex offender murdered a fifteen-year-old girl five months after his release on parole.31 The plaintiffs, the victim’s parents, filed suit under section 1983 alleging that the parole board violated the victim’s constitutional rights by releasing the parolee with knowledge of his likelihood for recidivism.32

The Court acknowledged that the board’s decision to release the parolee could be characterized as an action.33 The Court held, however, that the murder did not constitute action for which the board could be held liable under section 1983 because the parolee was not acting as the

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27. See *DeShaney*, 489 U.S. at 198-200 (holding that affirmative duty to protect exists only in custody situations or, alternatively, when state creates danger that causes harm); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (holding that state owes affirmative duty to those involuntarily confined in mental institution); *Estelle*, 429 U.S. at 103 (holding that state has affirmative duty to protect prisoners by virtue of their custody situation).

28. See *Youngberg*, 457 U.S. at 315-16 (finding that person involuntarily confined to mental institution is owed affirmative duty of protection by state due to custodial nature of situation); *Estelle*, 429 U.S. at 103-04 (finding that prisoners’ abilities to protect their own rights are sufficiently curtailed so as to impose affirmative duty on states to protect their rights while in custody). For a discussion of what constitutes custody and how the courts view schools in this regard, see infra note 53 and accompanying text.


30. See Mary Morrissey, Comment, *Constitutional Law—Public Schools Have No Duty to Prevent Students from Infringing on Other Students’ Constitutional Rights*— D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993), 27 *SUFFOLK U. L. REV.* 231, 231 n.1 (1993) (noting that *Martinez* was first case to suggest that failure to protect persons may give rise to section 1983 liability).

31. See *Martinez*, 444 U.S. at 279. In *Martinez*, the parolee had been sentenced to a term of one to twenty years with the recommendation that he not be paroled. See id. Nevertheless, five years after he was incarcerated, the parole board decided to release him under his mother’s supervision even though the board was fully aware of the parolee’s history, propensities and his likelihood for recidivism. See id.

32. See id. at 279-80 (noting that complaint alleged that board’s decision to release prisoner directly caused victim’s murder).

33. See id. at 284-85 (stating that decision to release parolee from prison constituted action).
board's agent. In addition, the Court noted that the connection between the parolee's release and the murder was too attenuated because the parole board was not aware of any danger to the specific victim. The Court stated that its holding did not mean that a parole board or officer could never be held liable under section 1983 for the release of a parolee, but that in this case, the consequences of the release were too remote to invoke liability. Following this decision, numerous courts of appeals interpreted Martinez to stand for the proposition that once a state actor learns of a danger to a specific victim and conveys a willingness to assist that victim, a special relationship is created whereby that state actor accepts an affirmative duty to protect the victim.

34. See id. (stating that, although decision to release parolee from prison constituted action by state, action of parolee five months after release does not come within definition of state action). The Court in Martinez carefully distinguished between “duty” and “deprivation” by stating that, regardless of whether the parole board could be considered to have a “duty” as a matter of tort law, the board “did not ‘deprive’ [the victim] of life within the meaning of the Fourteenth Amendment.” Id. at 285. There seems to be little difference, however, in the Court’s distinction between “duty” and “deprivation” and Alan Gewirth’s distinction between “affirmative duties” and “negative duties.” See Gewirth, supra note 1, at 93 (noting that negative duties are prohibitions on certain conduct).

35. See Martinez, 444 U.S. at 285 (noting that parole board was not aware of special danger to victim as distinguished from general public and therefore causal link between board’s action and danger created was too attenuated to impose liability).

36. See id. (“We need not and do not decide that a parole officer could never be deemed to ‘deprive’ someone of life by action taken in connection with the release of a prisoner on parole.”); Eaton & Wells, supra note 2, at 153 (noting that Supreme Court has not closed door on liability where state official is responsible for victim’s harm at hands of third party). According to Professors Eaton and Wells:

Martinez clearly curbs the ability of courts to impose constitutional tort liability on officials whose decisions facilitate private wrongs. It would be a mistake, however, to treat Martinez as a blanket rejection of all constitutional claims arising from fact patterns where a private actor is the immediate source of danger. The Court itself cautioned against such a broad reading of the case, and lower federal courts sometimes have encountered circumstances warranting the imposition of liability. The crucial factor distinguishing these cases from Martinez is the extent of the state’s contribution to the plaintiff’s peril.

Id. (footnote omitted).

37. See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 197-98 n.4 (1989) (noting formation of “special relationship” theory in lower federal courts). The DeShaney Court recognized that several courts of appeals had interpreted Martinez to mean that a special relationship arose between a state actor and a victim once the state actor learned of a specified danger to the victim and demonstrated a willingness to protect the victim. See id. (noting that this special relationship was held to give rise to affirmative duty, enforceable through Fourteenth Amendment’s Due Process Clause, to adequately protect victim against danger); see also Greenfield, supra note 2, at 598 n.46 (“Several courts of appeals subsequently interpreted [the language in Martinez] to mean that once the state learns of a danger to an identified victim and indicates a willingness to provide protection, a special relationship is created that gives rise to an affirmative duty.”). Actually, in the years between Martinez and DeShaney, a circuit split developed over
In *DeShaney v. Winnebago County Department of Social Services,* 38 the plaintiffs attempted to utilize this special relationship theory in a suit against a state agency for failing to prevent the abuse of a child who was in his father’s custody. 39 The plaintiffs posited that because the agency knew about the abuse and took steps to intervene, a special relationship existed, thereby creating a duty on the agency’s part to protect the child. 40 The United States Supreme Court disagreed and held that the theory was inapplicable in this context because a special relationship exists only when a

whether a state’s awareness of harm to a particular person could give rise to an affirmative duty on the state’s part to protect that individual, outside of a custodial setting. Compare Commonwealth Bank & Trust Co. v. Russell, 825 F.2d 12, 14-16 (3d Cir. 1987) (“It is clear... that [section] 1983 is not limited to cases of direct harm inflicted by state officials. This is suggested by the distinction made in *Martinez* between that victim there and those who the authorities knew face a ‘special danger.’”), *and* Carlson v. Conkin, 813 F.2d 769, 772 (6th Cir. 1987) (following other circuits that held that due process violation might exist if special relationship existed between criminal and victim or victim and state), *and* Ketchum v. Alameda County, 811 F.2d 1243, 1247 (9th Cir. 1987) (“The prevailing rule in the circuits is that citizens have no constitutional right to be protected by the state from attack by private third parties, absent some special relationship between the state and the victim or the criminal and the victim that distinguishes the victim from the general public.”), *and* Janan v. Trammell, 785 F.2d 557, 560 (6th Cir. 1986) (noting that other circuits have held that absent special relationship between criminal and victim or victim and state, no due process violation can occur), *and* Estate of Bailey by Oare v. County of York, 768 F.2d 503, 510-11 (3d Cir. 1985) (finding affirmative duty on state’s part where protective agency knew of abuse to specific child and attempted to intervene, but failed to protect child), overruled by *DeShaney,* 489 U.S. at 189, *and* Jensen v. Conrad, 747 F.2d 185, 190-94 & n.11 (4th Cir. 1984) (stating that special relationship may exist where state agency knew of abuse to particular child), *and* Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) (stating that “duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons”), *and* Humann v. Wilson, 696 F.2d 783, 784 (10th Cir. 1983) (finding no section 1983 liability because state action was too remote from crime due to lack of special relationship), *with* Wideman v. Shallowford Community Hosp. Inc., 826 F.2d 1030, 1034-37 (11th Cir. 1987) (holding that special relationship is not created outside of custody situation), *and* Harpole v. Arkansas Dept. of Human Servs., 820 F.2d 923, 926-27 (8th Cir. 1987) (holding that special relationship theory does not extend beyond “prison-like” environments), *and* DeShaney v. Winnebago County Dep’t of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987) (stating that there is “no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of ‘special relationship’”), aff’d, 489 U.S. 189 (1989), *and* Estate of Gilmore v. Buckley, 787 F.2d 714, 720-23 (1st Cir. 1986) (finding that, although state defendants knew of danger to victim, special relationship should not be extended beyond custodial setting absent mandate by Supreme Court or Congress).


39. See id. at 193 (stating that petitioner’s complaint alleged that respondents violated victim’s due process rights by failing to protect him from his father’s abuse, which they knew or should have known about).

40. See id. at 197 (“Petitioners argue that such a ‘special relationship’ existed here because the State knew that Joshua faced a special danger of abuse at his father’s hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger.”).
person is in a state's custody. The Court added in dicta, however, that had the state created the danger that harmed the plaintiff, there would have been a corresponding duty for the state to protect him. This dicta has been recognized by lower courts as creating a theory under which non-custodial plaintiffs can demonstrate a violation of their constitutional rights, namely, the state-created danger theory.43

C. The Lower Federal Courts' Interpretation of the State-Created Danger Theory

Although the lower courts that have addressed the issue have found the state-created danger theory to be a viable mechanism under which to bring a section 1983 claim, the Supreme Court's lack of clarity on this issue has led to some differences in the application of the theory among the circuits.44 While all circuit courts apply a standard of culpability

41. See id. at 199-200 (stating that Constitution imposes affirmative duty on state to protect safety and well-being of those persons that state takes into custody against their will); see also Shapiro, supra note 5, at 912 n.114 (noting that special relationship theory is basically limited to custody situations after DeShaney); Daniel J. Glivar, Note, Failure to Protect Witnesses: Are Prosecutors Liable?, 66 NOTRE DAME L. REV. 1111, 1118 (1991) (noting that “absent a custodial relationship, courts generally decline to apply special relationship doctrine”).

42. See DeShaney, 489 U.S. at 201 (“While the State may have been aware of the dangers that [the victim] 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.”); see also Eaton & Wells, supra note 2, at 107 (describing DeShaney as “the Supreme Court's first major effort to define the scope of state and local governments' affirmative obligations under the fourteenth amendment”).

43. See Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996) (noting that other circuits had utilized state-created danger theory in noncustodial situations based on DeShaney); Uhlrig v. Harder, 64 F.3d 567, 572 n.7 (10th Cir. 1995) (“The Supreme Court planted the seed for such a 'creation of danger' theory in explaining the case of Joshua DeShaney.”); see also Blum, supra note 4, at 435-36 (“[A] number of lower federal courts confronting the question have interpreted DeShaney to recognize a duty to protect outside the contexts of imprisonment and involuntary confinement in public institutions.”). See generally Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (interpreting Constitution prior to DeShaney holding, to provide affirmative duty in cases where state creates danger); White v. Rochford, 592 F.2d 381, 384-85 (7th Cir. 1979) (finding liability under section 1983 prior to DeShaney based on state creation of danger in case where police arrested driver of car, leaving three small children alone in car on busy highway).

44. See Blum, supra note 4, at 435 (“In the five years since the Supreme Court's decision in [DeShaney] a clear consensus has yet to emerge on the criteria for defining the circumstances that give rise to a constitutional duty of the state to provide protection to persons from acts of private violence.”). Professor Blum observed that “[t]he lower courts are obviously struggling to formulate a coherent theory for applying the 'in custody' and 'state-created danger' exceptions to DeShaney's no-affirmative-duty rule.” Id. at 471; see Eaton & Wells, supra note 2, at 110 (noting that “the Court's discussion in DeShaney of the level of state involvement needed to trigger imposition of an affirmative duty is itself ambivalent and unhelpful because it moves from one possible standard to another and then another without ever choosing among them”). Professors Eaton and Wells describe the decision in DeShaney in the following manner:

At one point the focus is on “involuntary confinement”; at another it is on whether the plaintiff's situation is “analogous to incarceration or institu-
greater than negligence, as required in section 1983 cases, the exact labeling of this standard varies from gross negligence, to recklessness, to deliberate or willful indifference.\textsuperscript{45} Also, some courts require that in addition

tionalization”; and at yet another it is on whether the victim is left in a “worse position than that in which he would have been had [the official] not acted at all.” This panoply of approaches reveals the substantial uncertainty that remains in this area of the law, and thus highlights the need for developing a coherent framework for analyzing affirmative duty cases. \textit{Id.} (alteration in original) (footnotes omitted) (quoting \textit{DeShaney}, 489 U.S. at 199-201 & n.9).

\textsuperscript{45} See Cornelius v. Town of Highland Lake, 880 F.2d 348, 352 (11th Cir. 1989) (noting that plaintiff asserted right not to be injured by state’s gross negligence and deliberate indifference, but not discussing which level of culpability was required); Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989) (holding that “deliberate indifference” standard of culpability is required for section 1983 claims). In \textit{Wood}, a state trooper stopped a car that was being driven with its high beams activated. \textit{See id.} at 586. After arresting the driver for drunk driving, the trooper left the female passenger, the plaintiff, alone in a high-crime area at 2:30 in the morning to find her own way home. \textit{See id.} The plaintiff started to walk the five miles to her home, but eventually accepted a ride from a stranger who drove her to a secluded place and raped her. \textit{See id.} The district court granted the defendant’s summary judgment motion on the basis that, although his conduct amounted to more than mere negligence, he was entitled to good faith qualified immunity and owed the plaintiff no “affirmative constitutional duty of protection.” \textit{Id.} The United States Court of Appeals for the Ninth Circuit reversed the lower court’s decision in regard to the defendant’s qualified immunity. \textit{See id.} at 596. In doing so, the court stated that the previous standard of culpability in the circuit had been gross negligence, but in light of the Supreme Court’s decision in \textit{City of Canton v. Harris}, 489 U.S. 378 (1989), the standard of culpability should be heightened to “deliberate indifference.” \textit{See id.} at 588 (noting that Canton cast doubt on sufficiency of gross negligence as requisite level of fault in section 1983 cases); \textit{see also Uhlrig}, 64 F.3d at 571 (“In order to prevail on their substantive due process claim, Plaintiffs must demonstrate that the state acted in a manner that ‘shock[s] the conscience.’”). In \textit{Uhlrig}, the plaintiff was a music therapist who worked in a state hospital. \textit{See id.} at 570. Due to budgetary constraints, the hospital closed its Adult Forensic Ward that housed high-risk patients and placed these patients in other units with the general hospital population. \textit{See id.} One of the patients who was displaced when the Adult Forensic Ward was closed had a history of violence that included the rape of a female patient after he had been removed from the special unit. \textit{See id.} Nevertheless, this patient remained in the general patient population and eventually killed the patient. \textit{See id.} at 571. In denying the plaintiff’s claim, the court stated that to sustain a section 1983 claim, the plaintiff must demonstrate that the state acted in such a way as to “shock the conscience,” which she failed to do. \textit{Id.} at 572. Although the Third Circuit applies the “willful disregard” standard in due process cases predicated on the state-created danger theory, the court applies the “shocks the conscience” standard in cases of high-speed police chases. \textit{See Fagan v. City of Vineland}, 22 F.3d 1296, 1306 (3d Cir. 1994) (stating that in light of Supreme Court’s decision in \textit{Collins v. City of Harker Heights}, 503 U.S. 115 (1992), “the reckless indifference of government employees is an insufficient basis upon which to ground their liability for a police pursuit under the Due Process Clause”); Blum, supra note 4, at 471-72 (“The Supreme Court has not definitively established the level of culpability that is required to make out a substantive due process claim based on a failure to protect. . . . Multiple standards, including gross negligence, recklessness, deliberate indifference, and conscience-shocking conduct, have been articulated by the lower federal courts.”); \textit{see also Eaton & Wells, supra} note 2, at 110 (“We contend that it is appropriate to recognize
to a danger created by a state, there must be some connection or relationship between either the state and the victim, or the state and the third party who causes the harm.\footnote{46} In addition, most circuit courts indicate that there must be an affirmative act on the state’s part that creates the danger resulting in the harm.\footnote{47}

an affirmative constitutional duty only when government inaction can be characterized as an ‘abuse of power.’ ”); Watkinson, \textit{supra} note 5, at 1245 (noting that more than mere negligence is required to establish liability under section 1983).

46. \textit{See Cornelius,} 880 F.2d at 354 (“In addition to the special relationship approach, a plaintiff may also show a duty on the state’s part under [section] 1983 by establishing that the plaintiff, as opposed to the general public, faced a special danger.”). \textit{In Cornelius,} the United States Court of Appeals for the Eleventh Circuit used what it called a “special relationship/special danger” analysis. \textit{See id.} (noting that other circuits have followed same reasoning in section 1983 cases to determine whether plaintiffs’ constitutional rights were violated). \textit{In Cornelius,} town officials enlisted the service of local prison inmates to do work around the community. \textit{See id.} at 349. The inmates selected for the work were supposed to be nonviolent property offenders, but prisoners with serious criminal histories participated in the program, allegedly, on a regular basis and with the official’s knowledge. \textit{See id.} at 349-50. On one of these occasions, two prisoners kidnapped the plaintiff, who was the town clerk, and held her hostage for three days. \textit{See id.} at 350. The Eleventh Circuit held that the plaintiff had a viable claim under section 1983 because “the defendants did indeed create the dangerous situation of the inmates’ presence in the community by establishing the work squad and assigning the inmates to work around the town hall.” \textit{Id.} at 356; \textit{see Uhbrig,} 64 F.3d at 574 (holding that plaintiff must be “a member of a limited and specifically definable group”). \textit{But see Reed v. Gardner,} 986 F.2d 1122, 1127 (7th Cir. 1993) (“When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party.”).

47. \textit{See Reed,} 986 F.2d at 1125 (“Inaction by the state in the face of a known danger is not enough to trigger the obligation; according to \textit{DeShaney,} the state must have limited in some way the liberty of a citizen to act on his own behalf.”); \textit{Sinthasomphone v. City of Milwaukee,} 974 F.2d 1006, 1011 (8th Cir. 1992) (concluding that even if defendant knew that plaintiffs were intoxicated, defendant did not affirmatively place them in dangerous position); \textit{Freeman v. Ferguson,} 911 F.2d 52, 55 (8th Cir. 1990) (“It is not clear, under \textit{DeShaney,} how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty.”); \textit{Ross v. United} States, 910 F.2d 1422, 1431 (7th Cir. 1990) (noting that “the government’s failure to provide services that would have saved a person from injury [would not] be a constitutionally cognizable claim,” but “cutting off private sources of rescue without providing a meaningful alternative [would be]”); \textit{Sinthasomphone v. City of Milwaukee,} 785 F. Supp. 1343, 1349 (E.D. Wis. 1992) (“In a constitutional setting that distinguishes sharply between action and inaction, one’s characterization of the misconduct alleged under § 1983 may effectively decide the case.”). \textit{In Sinthasomphone,} a fourteen-year-old victim was murdered by Jeffrey Dahmer after police found him on the street naked and bloody and returned him to Dahmer’s apartment from which he had just escaped. \textit{See id.} at 1346. Two witnesses on the scene, who had called the police, told the police that this was a child who had been drugged and abused by Dahmer and was in need of protection. \textit{See id.} Nevertheless, the police turned the victim over to Dahmer, who claimed they were lovers, and told the witnesses that they would be arrested if they interfered further. \textit{See id.} The judge found that the complaint stated a cognizable claim under section 1983 because it alleged that the
D. The Third Circuit's Adoption of the State-Created Danger Theory

In a series of cases decided after DeShaney, the Third Circuit acknowledged that other circuits had interpreted DeShaney as providing for a state-created danger theory of liability under section 1983.48 The Third Circuit, however, declined to rule on the theory's viability because the particular facts of each case before it were not sufficient to invoke the theory.49 For example, the court in Brown v. Grabowski50 declined to rule on the merit of the state-created danger theory in the context of a domestic violence case that resulted in the death of the abuse victim.51 In a more recent case, police did more than just fail to protect the victim, they affirmatively acted by delivering the victim back into Dahmer's custody and preventing private citizens from intervening. See id. at 1349-50 (noting also that "special relationship" was formed when police took victim temporarily into custody before returning him to Dahmer's apartment).

48. See Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (noting that several courts had interpreted language in DeShaney as providing for state-created danger theory); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373 (3d Cir. 1992) (same); Brown v. Grabowski, 922 F.2d 1097, 1114-15 (3d Cir. 1990) (same).

49. See Mark, 51 F.3d at 1152 (noting that Third Circuit had yet to decide whether state-created danger theory was viable mechanism for redress of constitutional injuries because, while previous cases had been analyzed under theory, none had set of facts that met all elements of theory); D.R., 972 F.2d at 1373 (acknowledging that plaintiff's claim was based on state-created danger theory, but declining to determine validity of theory); Brown, 922 F.2d at 1114-16 (same).

50. 922 F.2d 1097 (3d Cir. 1990).

51. See id. at 1101 ("The facts of this case, which are essentially uncontested, chronicle with numbing detail the disturbing inaction on the part of [the local Police Department that led to this tragedy."). In Brown, the administrator of the deceased victim's estate brought a civil rights action under section 1983 against the Roselle Police Department and individual detectives. See id. at 1103. The victim first contacted the police after she was kidnapped by her estranged boyfriend and held for three days during which time she was sexually and physically assaulted. See id. at 1102. After taking a formal statement from the victim, the detectives handling the case told her to return in two days at which time charges would be filed. See id. They did not inform her of her right to obtain a restraining order, as required by state statute, and no attempt was made to arrest the abuser. See id. Two days later, as the victim left her house to return to the police station, her estranged boyfriend abducted her and placed her in the trunk of her car where she froze to death. See id. at 1103.

The plaintiff argued that the defendants violated the victim's constitutional rights by failing to assist her in gaining access to the civil courts. See id. The Third Circuit held, however, that "[t]he due process clause of the fourteenth amendment imposes upon state actors an obligation to refrain from preventing individuals from obtaining access to the civil courts" and "only when the state has custody of an individual must its actors . . . provide assistance in gaining access to the courts." Id. at 1113. In acknowledging the plaintiff's analogy to Cornelius and Wood, the court held that the "[p]laintiff has provided no evidence to show . . . that either defendant affirmatively barred the door to the civil courts to [the victim], that he otherwise limited her freedom to act on her own behalf, or that he created or exacerbated the danger that [the abuser] posed to her." Id. at 1116; cf. Hymson v. City of Chester, 864 F.2d 1026, 1027 (3d Cir. 1988) (acknowledging "growing trend of reliance on 42 U.S.C. § 1983 to bring an action against the police alleging that the policies used in handling domestic abuse cases violate the equal protec-
D.R. v. Middle Bucks Area Vocational Technical School, the court again held that the plaintiffs, students who were sexually abused during school hours, did not satisfy the requirements of the state-created danger theory.

In order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that the plaintiff engaged in custom or use of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the police or custom.

Id. at 1031; see Coffman v. Wilson Police, 739 F. Supp. 257, 264 (E.D. Pa. 1990) (holding that, in domestic violence cases, protective orders issued by state court pursuant to authority under state law create constitutionally protected property interest in police protection). In Coffman, the plaintiff did not utilize the state-created danger theory, but posited that defendants deprived her of “entitlement to police protection under the Protection From Abuse Act and therefore violated her rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” Id. at 260. After obtaining a restraining order against her ex-husband, the victim continued to be harassed and threatened. See id. at 259-60. Although the victim complained to the police and filed a contempt petition, nothing was done and she was eventually shot by her ex-husband. See id. at 260. The district court held that the plaintiff could not have sustained her claim under either the relationship or state-created danger theory, but that this was “a different source of due process protection” and that “property interests created by state law were protectable by the Due Process Clause.” Id. at 263. The court held that the court order granting the restraining order created a property interest in which the plaintiff had a legitimate claim of entitlement warranting due process protection. See id. at 264. Compare Pinder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995) (finding that police officer’s assurances to domestic violence victim that her ex-boyfriend would remain in jail and that it was safe for her to go to work did not amount to affirmative action; therefore, state was not liable when victim’s ex-boyfriend was released that night and burned down her house, killing her children), and Losinki v. County of Trempealeau, 946 F.2d 544, 550-51 (7th Cir. 1991) (holding that liability under state-created danger theory did not attach in case where domestic violence victim was accompanied by police officer for protection while she went to her house to retrieve her belongings and was shot by her husband while doing so), and Brown, 922 F.2d at 1116 (holding that domestic violence victim failed to meet state-created danger theory requirements), and Balistreri v. Pacifica Police Dept., 901 F.2d 696, 700 (9th Cir. 1990) (rejecting due process claim based on failure to enforce restraining order in domestic violence case because there was no allegation that state actors had affirmatively placed abuse victim in danger), with Freeman, 911 F.2d at 55 (recognizing state-created danger theory in domestic violence case where victim had restraining order against her estranged husband, but police chief, who was friend of ex-husband, told police officers not to respond to reports that victim was being harassed and threatened).

52. 972 F.2d 1364 (3d Cir. 1992).

53. See id. at 1376 (holding that student plaintiffs failed to show that their school had violated their constitutional rights by creating or exacerbating risk of harm caused by fellow students). The Third Circuit first analyzed the issue of affirmative duties to school children in the companion cases Stoneking v. Bradford Area School District, 856 F.2d 594 (3d Cir. 1988) [hereinafter Stoneking I], vacated sub nom. Smith v. Stoneking, 489 U.S. 1062 (1989), and Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989) [hereinafter Stoneking II]. In these cases, a female high school student was sexually abused and forced to engage in sexual acts
by the high school band director. See Stoneking I, 856 F.2d at 595. Although the principal of the school was made aware of this and other incidents involving the band director and other female students, no action was taken. See id.

In Stoneking I, the court stated that because of state truancy laws, students are in a sense forced to go to school creating a "functional custody" situation. See id. at 601-03 ("There is thus an adequate basis from the Pennsylvania child abuse reporting and in loco parentis statutes, coupled with the broad common law duty owed by school officials to students, to conclude there was a desire on the part of the state to provide affirmative protection to students."). Based on the Supreme Court's holding in Martinez v. California, 444 U.S. 277 (1980), the Third Circuit held that because this particular victim was distinguishable from the public-at-large, a special relationship existed between her and the school officials. See Stoneking I, 856 F.2d at 600-01. This, coupled with the functional custodial setting, gave rise to an affirmative duty on the part of the school officials to protect the student. See id. at 601.

The Supreme Court later vacated Stoneking I and remanded the case for further consideration in light of its then recent decision in DeShaney. See Stoneking II, 882 F.2d at 721. On remand, the Third Circuit concluded that:

In light of the Supreme Court's discussion in DeShaney distinguishing between affirmative duties of care and protection imposed by a state on its agents and constitutional duties to protect, we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as the basis of a duty to protect students from harm occurring as a result of a third person.

Id. at 723. The court debated whether the functional custody situation was still viable after DeShaney, but finally decided not to rely on this as a basis for affirmative duties because "the uncertainty of the law in this respect may [have] cause[d] further delay." Id. at 724. Instead, the court based its holding on the policy adopted by the school officials:

Thus, to the extent that the Supreme Court's remand of this case in light of DeShaney required us to consider whether Stoneking still may maintain a viable section 1983 claim if there is no predicate duty by defendants to protect her, we hold that she may because she has also alleged that defendants, with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused her constitutional harm.

Id. at 725.

In D.R., the plaintiffs were female students who were physically and sexually assaulted by male classmates. See D.R., 972 F.2d at 1366. Although school officials were advised of this conduct, nothing was done to address the situation. See id. In their complaint, plaintiffs alleged liability based on the existence of a special custodial relationship between the victims and defendants and, alternatively, because the defendants "create[d] a danger that resulted in a violation of plaintiffs' constitutional rights under the Fourteenth Amendment." Id. at 1368.

The court resolved the question left open by Stoneking II as to whether a school environment could be considered a custodial setting sufficient to trigger an affirmative duty, concluding that it was not. See id. at 1370-71. The court contrasted the school setting with the prison and institutional settings on the basis that the latter two provided "full time severe and continuous state restriction." Id. at 1371. In contrast to prison and institutional settings, parents have the option of sending their children to private or public schools, and children leave the school every day and are in contact with countless people on the "outside" from whom they can obtain assistance. See id.

Using the state-created danger theory, the plaintiffs claimed that the school officials placed the classroom under the supervision of an incompetent student teacher and failed to investigate the situation and report the abuse to parents. See id. at 1373. The court concluded that "[a]s in Brown, however, the facts alleged in
Therefore, the court did not address the theory’s viability in that case either.\(^5^4\)

Although the Third Circuit analyzed the state-created danger theory more closely in *Mark v. Borough of Hatboro*,\(^5^5\) it again declined to address the theory’s viability.\(^5^6\) The plaintiff in *Mark* alleged that the local fire company’s policy of not screening its applicant pool for potential arsonists led to a violation of his constitutional rights when his business was burned down by a firefighter.\(^5^7\) The Third Circuit reviewed cases that centered around the state-created danger theory and identified four elements that are required to prove a constitutional violation under the theory: 1) foreseeable and fairly direct harm to the victim; 2) willful disregard of the harm on the state’s part; 3) a relationship between the state and the victim; and 4) use of state authority to create the dangerous situation that led to the victim’s harm.\(^5^8\) The court did not rule on the viability of the theory itself, however, because it found that the plaintiff failed to satisfy these

plaintiffs’ amended complaints differ in important respects from those in the state-created danger line of cases.” *Id.* at 1374. In finding the theory inapplicable, the court seemed to emphasize the absence of any affirmative acts on the state’s part; however, it relied more on the fact that the harm was not a foreseeable outcome of the state’s act or omissions. *See id.* (“The school defendants’ ‘acts’... may have created a recognizable risk that plaintiffs would receive little education in that class, and perhaps, physical injury due to the roughhousing. Plaintiffs did not suffer harm, however, from that kind of foreseeable risk.”); Blum, *supra* note 4, at 459-60 (“The court’s conclusion that no duty to protect existed in *D.R.*... appeared to rest not on the lack of the defendants’ affirmative acts, but rather on the perceived unrelatedness between the defendants’ acts and the plaintiffs’ harm.”); *see also* Doe v. Methacton Sch. Dist., 880 F. Supp. 380, 386 (E.D. Pa. 1995) (dismissing state-created danger claim on basis that, although all young girls in school district were foreseeable victims of pedophile teacher, this was not sufficiently specific).

54. *See D.R.*, 972 F.2d at 1373-76 (reviewing state-created danger cases from other circuits, but failing to explicitly adopt theory as mechanism for proving liability in Third Circuit); *see also* Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (“In [D.R.], while we analyzed the plaintiffs’ claims under the state-created danger theory, we consistently referred to the claim as ‘plaintiffs’ theory,’ only going so far as to acknowledge that other courts have recognized the theory.”).

55. 51 F.3d 1137 (3d Cir. 1995).

56. *See id.* at 1152 (examining cases from other circuits that adopted state-created danger theory and enumerating four common elements present in each case).

57. *See id.* at 1139-40 (noting that complaint contended that fire company should have screened applicant pool for arsonists).

58. *See id.* at 1152 (enumerating would-be factors in state-created danger theory test). The elements identified by the court were:

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

*Id.*
elements.\textsuperscript{59}

Three years later, in \textit{Kneipp}, the Third Circuit finally adopted the state-created danger theory as a viable mechanism for bringing claims under section 1983 after finding that the plaintiff satisfied all four elements of the test.\textsuperscript{60} In \textit{Kneipp}, the plaintiff was stopped by police as she walked home with her husband from a bar.\textsuperscript{61} The court found that she was visibly intoxicated and was relying on her husband’s assistance to get home safely.\textsuperscript{62} After interrogating both the plaintiff and her husband, the police allowed the plaintiff’s husband to go home first and then sent the plaintiff home alone.\textsuperscript{63} Although she was less than one block from her apartment, the plaintiff never made it home, but was found unconscious in a ditch a few hours later.\textsuperscript{64}

The court held that the plaintiff presented a prima facie case on which a jury could reasonably conclude that her constitutional rights had been violated.\textsuperscript{65} Unlike \textit{Mark}, this case presented a situation in which the risk of injury was to a discrete plaintiff, as opposed to the public-at-large.\textsuperscript{66}

\begin{itemize}
  \item \textit{See id.} (finding that municipality did not create danger posed by arsonist and that victim did not face any greater danger than public-at-large). The court stated:

  After undertaking a thorough review of our caselaw touching upon the underlying constitutional violation in a \textit{Monell/Collins} case, we have found language in the cases supporting and opposing the existence of a state-created danger theory. Perhaps at some point we will have to harmonize our cases. But we have not reached that day, because even assuming that a plaintiff can state a constitutional violation based on the state-created danger theory, there can be no liability in this case.

  \textit{Id.}

  \textit{60. See Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996)} (holding that state-created danger theory is viable mechanism for proving liability under section 1983 after concluding that plaintiff was foreseeable victim of danger created directly by state actors in willful disregard of plaintiff’s safety).

  \textit{61. See id.}

  \textit{62. See id.} (noting that plaintiff was unable to stand by herself during police interrogation and was leaning on police car). Both the plaintiff and her husband were intoxicated, but the plaintiff was extremely inebriated, smelled of urine and needed her husband’s assistance to walk. See \textit{id.}

  \textit{63. See id.} One of the defendant police officers who stopped the two for causing a disturbance admitted later that he knew they were both intoxicated. See \textit{id.} Nonetheless, the officer sent the plaintiff’s husband home first to relieve their babysitter and allowed the plaintiff to leave a little while later by herself. See \textit{id.} at 1202.

  \textit{64. See id.} As a result of her exposure to the cold, the plaintiff suffered hypothermia and anoxia (defined as lack of oxygen to the brain), which caused permanent brain damage. See \textit{id.} at 1203; see also Slobodzian, \textit{supra} note 9, at B1 (noting that Samantha Kneipp is now practically blind, speech-impaired, cannot walk or sit upright, has lost bladder and bowel control, is unable to swallow and is fed through tube inserted into her stomach).

  \textit{65. See Kneipp, 95 F.3d at 1201} (finding that plaintiff met elements of test). For a further discussion of how the plaintiff in \textit{Kneipp} met all of the elements of the state-created danger test, see \textit{infra} note 67 and accompanying text.

  \textit{66. See Kneipp, 95 F.3d at 1209} & n.22 (holding that relationship requirement of test was met because there was requisite contact between plaintiff and state actor

\end{itemize}
Applying the test set forth in *Mark*, the Third Circuit held that: 1) in the plaintiff’s intoxicated condition, it was foreseeable that harm would befall her if left to walk home unaccompanied; 2) the officer acted in willful disregard of the plaintiff’s safety because he knew that she was intoxicated and incapacitated, but he let her walk home unattended; 3) a relationship existed between the officer and the plaintiff in that the officer exercised sufficient control over the plaintiff by stopping her in the course of her journey home; and 4) this affirmative act of intervention on the officer’s part interrupted the assistance that the plaintiff was receiving from her husband, thereby increasing the risk of danger to her.67 While the *Kneipp* holding established the state-created danger theory as a basis for liability in the Third Circuit, the elements of the theory were not completely solidified at that time, as evidenced by the court’s further modification of the test in *Morse*.68

III. FACTS AND NARRATIVE ANALYSIS OF *MORSE V. LOWER MERION SCHOOL DISTRICT*

In *Morse*, the Third Circuit once again applied the test articulated in *Mark* and applied in *Kneipp*, but concluded that the plaintiff failed to state a claim based on a modified version of the test.69 In *Morse*, the suit was initiated by the murder of Diane Morse, a preschool teacher, who was shot and killed in front of her classroom of children by a neighborhood resident who had a history of mental illness.70 The perpetrator, Arcelia Stovall, gained access to the school through a back entrance that was left unlocked to facilitate construction work in progress around the school at the time of the incident.71 According to the complaint, the defendant

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67. See id. at 1208-09 (finding that plaintiff met elements of state-created danger test).

68. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997) (modifying elements of state-created danger theory as previously adopted in *Kneipp*).

69. See id. at 907 (holding that at least three out of four requirements of test were not met).

70. See id. at 904 (noting that woman who shot Diane Morse was subsequently convicted of her murder and placed in psychiatric hospital). The Ardmore Child Care Center where Diane Morse worked is owned and operated by the Daycare Association of Montgomery County and is located in a wing of Lower Merion High School. See id.

71. See id. On the day that Diane Morse was shot, and for several weeks prior, the back doors of the high school had been left unlocked and even propped open to facilitate construction that was going on around the school. See id. Unfortunately, this also facilitated the entry of Arcelia Stovall, who shot Diane Morse. See id.; see also Nancy Lawson et al., *Day-care Teacher Slain as Class Watches*, Phila. Inquirer, July 29, 1994, at A1 [hereinafter Lawson et al., *Teacher Slain*] (quoting relative of deceased who observed that “[a]ny stranger could come off the street at any time and walk through those hallways”); Julia C. Martinez, *Family of Slain Teacher Sues Over Open Door*, Phila. Inquirer, June 27, 1996, at B3 (“According to [Morse’s] suit, workers . . . were performing work inside or outside the school and
school district violated its own written policy that required that all side and
back entrances to the school remain locked.\textsuperscript{72} As a result, the plaintiff
alleged, the environment created by the defendants was dangerous and
was known by them to be dangerous, and it created the opportunity for
harm to occur to Diane Morse.\textsuperscript{73}

The United States District Court for the Eastern District of Penn-
sylvania, in dismissing the complaint, held that according to \textit{Kneipp} and
other cases predicated on section 1983: 1) failure to act or an omission will
not suffice, and the state must affirmatively act to create the danger; and
2) a plaintiff must allege that he or she faced a particular danger that
resulted in harm.\textsuperscript{74} The Third Circuit affirmed the dismissal of the com-
plaint, but disagreed with the district court’s analysis of the state-created
danger theory.\textsuperscript{75} Like the district court, the Third Circuit found that the
harm to the plaintiff was not a reasonably direct and foreseeable result of the
defendant’s actions.\textsuperscript{76} Because the harm was not foreseeable, the

\textsuperscript{72} See Morse, 132 F.3d at 904. \textit{But see} Jennifer Wing, Fatal Shooting Has Altered Montco Day Care’s Routine, \textit{Phila. Inquirer}, Mar. 30, 1995, at MD2 (quoting executive
director of Day Care Association of Montgomery County as saying, “We had
been an open building for 18 years. Nobody would have thought a situation like
that would have happened.”).

\textsuperscript{73} See Morse, 132 F.3d at 904 (discussing plaintiff’s allegations).

\textsuperscript{74} See id. at 906 (noting that district court dismissed complaint because plainti-
did not allege that victim faced particular danger distinct from others inside
school at time of incident); see also Mark v. Borough of Hatboro, 51 F.3d 1137,
1153 (3d Cir. 1995) (stating that plaintiff did not face danger greater than public-
at-large); Doe v. Methacton Sch. Dist., 880 F. Supp. 380, 386 (E.D. Pa. 1995) (dis-
missing state-created danger claim on basis that, although all young girls in school
district were foreseeable victims of pedophile teacher, this was not sufficiently
specific).

In dismissing the suit, the district judge in \textit{Morse} stated that “not maintaining
tight security or not detaining Stovall while she was loitering days earlier were fail-
ures to act by the school and day care, but they were not affirmative acts and therefore
not actionable by the section of the civil rights law under which the suit was
brought.” Julia C. Martínez, In Classroom Murder, Suit is Dismissed, \textit{Phila. Inquirer},

\textsuperscript{75} See Morse, 132 F.3d at 904 (analyzing relationship prong of state-created
danger theory somewhat differently than district court).

\textsuperscript{76} See id. at 908 (holding that “defendants . . . could not have foreseen that
allowing construction workers to use an unlocked back entrance for access to the
school building would result in the murderous act of a mentally unstable third
party, and that the tragic harm which ultimately befell Diane Morse was too attenu-
ated . . . to support liability”). The Third Circuit bolstered this conclusion by not-
ing that not only were the defendants unaware of Stovall’s violent propensities, but
there was “no allegation that defendants were aware of anyone posing a credible
threat of violence to persons inside the school building.” \textit{Id.} In addition, there
was not a direct causal link between the violent attack of the third party and the
defendant’s action. See id. at 909 (stating that, if there was any causation, it was too
attenuated); see also Wing, supra note 72, at MD2 (quoting executive director of
daycare association as saying, “You can only do so much without completely closing
the facility in . . . If someone is clearly intent on doing harm to another person,
court also found that the defendant had not acted in "willful disregard" of plaintiff's safety; thus, the second element of the test was not met.\footnote{77}

In its analysis, however, the court disagreed with the district court's interpretation of “discrete plaintiff” to mean a specific plaintiff.\footnote{78} Stressing that the crucial factor in the analysis is foreseeability, the court stated that the relationship element of the test does not require the state to know that it is creating a risk of danger to a specific plaintiff.\footnote{79} Instead, the court interpreted this element to mean that a state must create a dan-

and if they are as disturbed as this woman appears to have been, I don't know what measures could have been taken”).

The motive for Stovall’s action was not readily apparent to police and those who knew the two women, thus diminishing the argument that it should have been foreseen by the defendants. See Greg McCullough, Trial Ahead in Day-Care Shooting, PHILA. INQUIRER, Sept. 7, 1994, at B1 (noting that Stovall claimed to have acted out of revenge). In a sworn statement made by Stovall after the shooting, she told Sgt. Mark Keenan that she intended to kill Morse because Morse had beaten Stovall’s mother and injured her knee. See id. However, Stovall’s mother, who was later interviewed, said that this never happened. See id. (noting that defendant’s mother did not validate her daughter’s story). Also, although the two women lived within four blocks of each other, they had not been in contact for some time. See Nancy Lawson, Authorities Look for a Motive in Day-Care Shooting, PHILA. INQUIRER, July 30, 1994, at B1 [hereinafter Lawson, Authorities Look for Motive] (noting that, according to victim’s husband, victim had discontinued her friendship with Stovall years before “because [Stovall’s] imagination is just bizarre”). Morse’s husband “speculated that the seeds of the confrontation lay in an argument” the two women had 15 years before the shooting: “Trudy thought Diane was messing with a (boyfriend) of both of theirs, but Diane denied it all. . . . I guess Trudy just kept it in her mind all these years.” Lawson et al., Teacher Slain, supra note 71, at A1. According to the police, Stovall felt “like she was wronged over the last several years [prior to the shooting], but it’s been a one-sided feud.” Id.

Although everyone was shocked by the killing, Stovall’s mental illness was less of a surprise to members of the community where she lived. See id. (noting that Stovall was known for her “strange behavior,” including once trying to set someone on fire in neighborhood bar). Neighbors of Stovall, however, maintain that in the days before the shooting, Stovall was “playing ball in the street with her neighbor’s children, weeding her mother’s garden, and shopping at the local five and dime.” Lawson, Authorities Look for Motive, supra, at B1.

\footnote{77} See Morse, 132 F.3d at 909 (stating that deliberate indifference standard requires that danger or harm must at least be foreseeable); Kneipp v. Tedder, 95 F.3d 1199, 1208 n.21 (3d Cir. 1996) (stating that defendant must have known environment was dangerous); Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1995) (using deliberate indifference standard of culpability); Leffal v. Dallas Indep. Sch. Dist., 28 F.3d 521, 551 (5th Cir. 1994) (noting that degree of culpability is essential element to theory).

\footnote{78} See Morse, 132 F.3d at 913 (analyzing foreseeable plaintiff prong of state-created danger test differently than district court); Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) (finding that passengers of cars on highway at particular time constituted foreseeable class of victims for purpose of holding state liable for putting drunk driver behind wheel of car).

\footnote{79} See Morse, 132 F.3d at 912 (expanding relationship requirement to include class of persons, as opposed to just particular individuals, as long as harm to persons in class is foreseeable).
Finally, emphasizing the importance of foreseeability under the theory, the court seemingly eliminated the need to characterize the state's conduct as an act as opposed to an omission. The court noted that it is not clear whether the theory mandates an affirmative act and, if so, what constitutes an affirmative act. The court concluded that the dispositive factor is whether the defendant put the plaintiff in a foreseeably dangerous position rather than whether the action constituted an act as opposed to an omission.

IV. THE TEST: MEASURING THE DANGER, DETECTING THE SIGNS

A. Foreseeable and Fairly Direct Harm

In Kneipp, the court reasoned that the police officer knew the plaintiff was highly intoxicated and that it was a cold night and, therefore, the victim's accident was the foreseeable and direct result of the officer's interference with the victim's husband's attempt to get her home. By contrast, the plaintiffs in Morse did not allege that the defendant knew of the danger that Stovall posed to the victim, nor was the access to the school clearly the direct cause of Stovall's attack on Diane Morse. Thus,

80. See id. (noting that, under certain fact patterns, state-created danger could foreseeably cause harm to discrete group of persons, therefore making it appropriate to impose liability on state actors when harm befalls one or more members of group).

81. See id. at 914 (noting that what constitutes act in one situation is not characterized as act in different situation); see also DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting) (stating that "[i]n a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under 1983 may effectively decide the case"); Blum, supra note 4, at 464 (emphasizing "the confusion engendered by any theory that turns 'on the tenuous metaphysical construct which differentiates sins of omission and commission'") (quoting White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979)).

82. See Morse, 132 F.3d at 914 (stating that affirmative act may not be crucial element of test); see also Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (noting difficulty in distinguishing between act and omission for section 1983 purposes). Compare Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989) (finding that by arresting driver and leaving passenger to find her own way home, police officer affirmatively placed victim in danger), with Gregory v. City of Rogers, 974 F.2d 1006, 1011 (8th Cir. 1992) (finding that police did not affirmatively create danger in situation where driver was arrested and intoxicated passengers were left unattended in car outside and eventually drove away and were involved in accident).

83. See Morse, 132 F.3d at 915 (noting that issue of whether state-created danger theory requires affirmative act as opposed to omission was resolved in Mark v. Borough of Haboro, 51 F.3d 1137 (3d Cir. 1995)).

84. See Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (stating that, absent police intervention, it is conceivable that victim would have been safely escorted home by her husband).

85. See Morse, 132 F.3d at 908 (noting three reasons why attack on victim was not direct and foreseeable); Melissa Dribben, A Litigious Reply to Pupils' Pain, PHILA.
the court's analysis of the first element of the test is consistent in both cases.\textsuperscript{86} Because the facts in \textit{Morse} were sufficiently different, it enabled the court to draw a line between what is foreseeable for purposes of the state-created danger theory and what is not foreseeable.\textsuperscript{87}

\section*{B. Acting in Willful Disregard}

In \textit{Kneipp}, the Third Circuit employed a "willful disregard" standard for the culpability element of the test.\textsuperscript{88} The court declined to distinguish this term from the "deliberate indifference" terminology used by other courts, but elaborated by saying that because the officer knew the plaintiff was incapacitated, his actions amounted to willful disregard.\textsuperscript{89} In \textit{Morse}, the court did not define the standard with any more clarity, but stated that the actor must demonstrate a willingness to ignore a foreseeable risk to the victim.\textsuperscript{90} Therefore, the foreseeability factor appears in the second

\textit{Inquirer}, Apr. 3, 1995, at B1 ("[I]t's hard to believe that a locked door and a sign warning 'Visitors Must Go to the Office' would have deterred a woman such as Stovall... [P]olice say [Stovall] was motivated out of vengeance for a perceived slight during an argument she'd had with Morse 15 years earlier.").

\textsuperscript{86} \textit{Compare Kneipp}, 95 F.3d at 1208 (holding that plaintiff's injuries were foreseeable because police officer knew that she was intoxicated and incapacitated when he sent her home alone), \textit{with Morse}, 132 F.3d at 910 (holding that defendants did not know of violent propensities of third party).

\textsuperscript{87} \textit{See Morse}, 132 F.3d at 909 (noting that finding liability in this case under state-created danger theory would stretch concepts of foreseeability and causation too far). In \textit{Morse}, the harm was not foreseeable because the school district did not have any indication that Stovall was mentally ill or that she had any intention of harming Morse. \textit{See} McCullough, \textit{supra} note 76, at B1 (stating that police had difficulty discerning motivation for murder).

\textsuperscript{88} \textit{See Kneipp}, 95 F.3d at 1208 n.21 ("In the past, we have declined to distinguish terms such as 'deliberate indifference,' 'reckless indifference,' 'gross negligence,' or 'reckless disregard' in the context of a violation of substantive due process under the Fourteenth Amendment.") (citing Williams v. Borough of West Chester, 891 F.2d 458, 464 n.10 (3d Cir. 1989)). The \textit{Kneipp} court distinguished between the "willful disregard" standard employed in state-created danger cases and the "shocks the conscience" standard used by the Third Circuit to assess whether high-speed police chases violate victims' constitutional due process rights. \textit{See id.} at 1207 ("We believe that the... shocks the conscience standard is limited to police pursuit cases, and accordingly, we are not bound to follow that standard in the case before us.").

\textsuperscript{89} \textit{See id.} (noting that because police officer knew of victim's incapacity and harm was foreseeable, his actions amounted to willful disregard for her safety); \textit{see also} Barbara Kritchevsky, \textit{Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation}, 60 GEO. WASH. L. REV. 417, 470 n.279 (1992) (observing that there is apparently no real distinction among indifference, recklessness, wantonness and willfulness).

\textsuperscript{90} \textit{See Morse}, 132 F.3d at 910 (noting that defendant must be aware of foreseeable risk to meet culpability requirement). Actually, the court seemed to treat the terms "willful disregard" and "deliberate indifference" as synonymous, stating that the second prong of the test requires a determination that "the state actor acted with willful disregard for or deliberate indifference to plaintiff's safety." \textit{Id.}; \textit{see} Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994) (employing deliberate indifference standard of culpability); \textit{see also} Eaton & Wells, \textit{supra} note
element of the test as well, because it is foreseeability that elevates the culpability from mere negligence to a willful disregard for the victim’s welfare.91

C. Relationship Between State and Plaintiff: A Specific Plaintiff Versus a Class of Plaintiffs

As in the first two parts of the test, the element of foreseeability is crucial to the relationship requirement of the test.92 The relationship requirement is not merely an extension of the direct causal requirement, but instead ensures that the defendant had sufficient contact with the victim so as to make the harm resulting from his or her actions foreseeable.93

Based on the facts and language of Kneipp and Mark, the district court in Morse interpreted the relationship requirement to mean that the harm must be foreseeable to the specific victim.94 On appeal, however, the Third Circuit stated that this is not necessarily true because, under the state-created danger theory, there is apparently only a minor distinction, if any, between a discrete plaintiff and a discrete class of plaintiffs.95 The court, however, did not decide whether this element was met in Morse because the plaintiffs failed to demonstrate the other three requirements.96 Nevertheless, the court appeared to indicate its willingness to broaden the interpretation of foreseeable plaintiff to include classes of plaintiffs as long

91. See Morse, 132 F.3d at 910 (emphasizing foreseeability factor by adding that “the notion of deliberate indifference contemplates a danger that must at least be foreseeable”).

92. See Kneipp, 95 F.3d at 1209 n.22 (distinguishing relationship requirement of special relationship theory from that of state-created danger theory). In Kneipp, the court concluded that “[t]he relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of the defendant’s acts in a tort sense.” Id.

93. See Martinez v. California, 444 U.S. 277, 285 (1980) (emphasizing lack of foreseeability because plaintiff was indistinguishable from public-at-large).

94. See Morse, 132 F.3d at 904 (noting district court’s interpretation of relationship requirement).

95. See id. at 914 (stating that “there seems to be no principled distinction between a discrete plaintiff and a discrete class of plaintiffs”); see also Uhlig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (stating that plaintiff must be part of definable group); Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) (“When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party.”).

96. See Morse, 132 F.3d at 914 (noting that it was not easy question to determine if victim and all others present at high school were sufficiently discrete group to be considered foreseeable victims, but that it need not be decided because other elements of test were not satisfied).
as the foreseeability element is met.  

D. Creation of Danger

The Kneipp court concluded that a reasonable jury could find that, but for the intervention of the police who prevented the plaintiff’s husband from taking her home and the officer’s decision to send her home alone, the plaintiff would not have been harmed.  

Therefore, according to the court, it was the affirmative acts of the police that created the foreseeable harm.  

The Morse court expounded on this element of the test by noting that the state action does not necessarily have to be an “act,” but instead may be characterized as an “omission.”  

The important factor is whether the state created the opportunity for a foreseeable harm to occur.  

Although it was not necessary for the Morse court to determine whether omissions are included in the fourth requirement of the state-created danger theory, this dicta is important because it allows a broader range of state conduct to be brought under scrutiny.  

No longer does the state have to affirmatively act to create the danger; instead, inaction may be enough, as long as the omission was deliberate and the harm was foreseeable.

97. See id. (noting that law is not uniform on issue of whether discrete plaintiff may be discrete class of plaintiffs). Compare Uhlig, 64 F.3d at 574 (allowing for discrete class of plaintiffs in state-created danger cases), and Reed, 986 F.2d at 1127 (same), with Cornelius v. Town of Highland Lake, 880 F.2d 348, 354 (11th Cir. 1989) (requiring special relationship between state and victim in addition to creation of danger).

98. See Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (noting that victim was in worse position after police intervened and but for this action victim conceivably would have made it home with her husband’s assistance).

99. See id. (stating that affirmative acts of police officers increased danger or risk of injury to victim).

100. See Morse, 132 F.3d at 915 (“Thus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission.”).

101. See id. at 914 (“The ultimate test is one of foreseeability.”).

102. See id. at 915 (indicating that state actors can create dangerous situation through either acts or omissions).

103. See id. (noting that issue of whether act rather than omission is necessary was answered in Mark); see also Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (stating that state-created danger theory applies when states “use[ ] their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur”); Blum, supra note 4, at 435 (“[A] duty to protect should be recognized when the state, by affirmative acts or sins of omission, creates or enhances the risk of harm [and] less emphasis should be placed on the affirmative nature of the state’s acts, while rigorous scrutiny should be given to ... causation and culpability.”). Compare Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) (finding affirmative creation of danger where state actor arrested sober driver and allowed drunk passenger to get behind wheel), and Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989) (finding affirmative creation of danger where state actor arrested driver of car, had car impounded and left victim alone in high-
V. WHAT THE SIGNS MEAN

Essentially, the crucial element in a section 1983 case premised on the state-created danger theory is foreseeability. The Third Circuit has seemingly provided leeway to plaintiffs by broadening the definition of discrete plaintiff to include a discrete class of plaintiffs and by declining to distinguish conduct as either acts or omissions, however, this does not necessarily impose an increased obligation on states to protect their citizens' constitutional rights. No longer does a plaintiff have to artfully argue that state conduct constitutes an act as opposed to an omission, or to distinguish himself or herself as the specific target of the harm. The plaintiff must adequately illustrate, however, a causal link between state involvement and the resulting danger as well as the foreseeability of the harm, which is crucial in establishing each of the requirements.

Despite the Third Circuit's attempt to clarify the test, there is still room to draw fine lines and distinctions on the issue of foreseeability. This is evidenced by the fact that although the court professes to be in agreement with the other circuits as to the nature of the theory, cases with similar fact patterns have resulted in contradictory holdings. There-

104. See Morse, 132 F.3d at 914 (stating that “ultimate test is one of foreseeability”).
105. See id. at 913 (noting that state-created danger theory imposes no duty on states to protect general public); see also Eaton & Wells, supra note 2, at 142 (“Conditioning an affirmative duty on some threshold level of state involvement affords government the leeway to preserve its discretion in allocating resources, while still rendering it accountable for abusive inaction.”).
106. See Morse, 132 F.3d at 915 (stating that important element is foreseeability and distinction between act and omission is not crucial in determining whether state created danger); see also Sinhasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1347 (E.D. Wis. 1992) (“The legal difficulties posed by [state-created danger] cases are immediately apparent to anyone with even a passing familiarity with federal civil rights litigation. The genius of the . . . complaint in trying to avoid those difficulties is also apparent.”).
107. See Morse, 132 F.3d at 908 (stating that first element of state-created danger theory is that “the harm ultimately caused was a foreseeable and a fairly direct result of the state’s actions”); see also Blum, supra note 4, at 439 (suggesting that in state-created danger cases “less emphasis should be placed on the affirmative nature of the state’s acts while rigorous scrutiny should be given to the factors of causation and culpability. The latter factors better determine the ultimate finding of a breach of duty and the imposition of constitutional liability”) (footnotes omitted).
108. See Heather v. Indiana Area Sch. Dist., 985 F.2d 707, 715 (3d Cir. 1993) (Scirica, J., concurring) (recognizing that courts “must draw lines to refine the state action requirement and the special relationship of care developed in DeShaney”); Blum, supra note 4, at 471 (“A review of recent cases reveals the fine lines and distinctions courts are drawing.”).
109. Compare Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) (finding state-created danger where state actor arrested sober driver, allowing drunk passenger to drive car), and Cornelius v. Town of Highland Lake, 880 F.2d 348, 358 (11th Cir. 1989) (finding state-created danger when police allowed victim to drive car in drunk condition while he was again under the influence).
fore, in this fact-sensitive area, it may be most advantageous for practitioners to draw comparisons between their cases and those cases in which the theory was found to apply, and to distinguish their cases from those cases that were dismissed.110

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(11th Cir. 1989) (finding state-created danger where town enlisted dangerous prisoners to work around town hall and town clerk was kidnapped), with Uhlrig v. Harder, 64 F.3d 567, 575 (10th Cir. 1995) (finding no state-created danger where state actors placed dangerous patient in general hospital population and therapist was killed), and Gregory v. City of Rogers, 974 F.2d 1006, 1011-12 (8th Cir. 1992) (finding no state-created danger where state-actor required sober driver to go into police station, leaving two intoxicated drivers in running car).

110. See Eaton & Wells, supra note 2, at 159 ("Courts cannot, and in any event should not, avoid fact sensitive inquiries as to state involvement in individual cases."); see also Tennyson, supra note 6, at 1072 ("There is a hint that determinations of duty for the school system are fact-specific inquires. If this is so, lower courts still have a great deal of leniency and very little assistance in finding duties."). In addition to drawing comparisons, the practitioner should use other theories, such as special relationship, entitlement and equal protection. See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989) (leaving question open as to whether state child protective laws provide entitlement to protection); Hynson v. City of Chester, 864 F.2d 1026, 1031 (3d Cir. 1988) (setting forth test for equal protection claims in domestic violence cases); Coffman v. Wilson Police Dep’t, 739 F. Supp. 257, 264 (E.D. Pa. 1990) (finding that issuance of restraining order in domestic violence case gives rise to legitimate claim of entitlement); see also Blum, supra note 4, at 437 (stating that "plaintiffs unable to cast their cases in the relatively narrow substantive due process mold carved out by DeShaney have still succeeded by framing the case as a procedural due process or an equal protection claim") (footnotes omitted).