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Chris W. Pehrson

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2007]

BRIGHT v. WESTMORELAND COUNTY: PUTTING THE KIBOSH ON STATE-CREATED DANGER CLAIMS ALLEGING STATE ACTOR INACTION

I. Introduction

When state actors unjustifiably delay in timely revoking the probation of a known sex-offender, can a party hold the state constitutionally liable if the state’s inaction foreseeably could be linked to the tragic homicide of an eight-year-old girl?1 In general, the Supreme Court’s decision in DeShaney v. Winnebago County Department of Social Services2 established that a party cannot hold a state constitutionally liable for its failure to protect its citizens from private violence.3 Nevertheless, a number of federal courts have recognized a corollary to this general principle called the state-created danger doctrine.4 The state-created danger doctrine holds that when

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1. See Bright v. Westmoreland County, 443 F.3d 276, 279 (3d Cir. 2006) (referring to plaintiff’s complaint alleging that “the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations . . . constituted” basis for state constitutional liability).


4. See, e.g., Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006) (citing Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989)) (recognizing circuit’s adoption of “danger creation liability”); Pena v. DePrisco, 432 F.3d 98, 107-10 (2d Cir. 2005) (explaining circuit’s adoption of state-created danger doctrine in Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993)); Forrester v. Bass, 397 F.3d 1047, 1057-59 (8th Cir. 2005) (discussing circuit’s application of state-created danger doctrine); Butera v. District of Columbia, 235 F.3d 637, 647-51 (D.C. Cir. 2001) (explaining circuit’s acceptance of doctrine); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) (signaling adoption of “state-created danger theory” of liability); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995) (“A state also may be liable for an individual’s safety under a “danger creation” theory if it created the danger that harmed that individual—that is, provided that the other elements of a [Section] 1983 claim have been satisfied.”); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) (“[W]e find that plaintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that they otherwise would have been.”); cf. Wyke v. Polk County Sch. Bd., 129 F.3d 560, 567 (11th Cir. 1997) (noting that DeShaney can be read to support existence of state-created danger doctrine). But see Rios v. City of Del Rio, 444 F.3d 417, 422 (5th Cir. 2006) (commenting that Fifth Circuit has never adopted doctrine), cert. denied, 127 S. Ct. 181 (2006); Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 80 (1st Cir. 2005) (noting that First Circuit has recognized doctrine but has never adopted it);
a state's actions exacerbate the likelihood that a private citizen will harm a plaintiff, the plaintiff may hold the state liable despite the fact that the plaintiff's injuries were the direct result of violence committed by a private citizen.\textsuperscript{5}

In \textit{Bright v. Westmoreland County},\textsuperscript{6} the Third Circuit Court of Appeals recently delved into its state-created danger jurisprudence to clarify whether a state actor's failure to act can give rise to liability based on a state-created danger theory.\textsuperscript{7} The Third Circuit's previous opinion in \textit{Morse v. Lower Merion School District}\textsuperscript{8} indicated that a state actor's omission, which foreseeably put a plaintiff at risk from third-party violence, might be sufficient to establish such a claim.\textsuperscript{9} Morse, however, stood in stark contrast to earlier precedent clearly requiring that the state conduct be affirmative in nature.\textsuperscript{10} The \textit{Bright} court resolved this inconsistency by holding

Pinder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995) (en banc) (declining to find DeShaney's principles applicable to plaintiff's claim of state-created danger).

5. \textit{See Kalstrom}, 136 F.3d at 1066 (“Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.” (citing Sargi v. Kent City Bd. of Educ., 70 F.3d 907, 913 (6th Cir. 1995)); \textit{see also} Pelliccotti, supra note 3, § 2[3] at 52-53 (citing \textit{Kalstrom}, 136 F.3d at 1066) (discussing criteria for liability under state-created danger doctrine).

6. 443 F.3d 276 (3d Cir. 2006).

7. \textit{See Sarah E. Ricks, Brightening the Court's Dark Corners: Clearing Up State-created Danger Doctrine, 3rd Circuit Remains in Step with Non-Precedential Opinions, PA. L. WRK., Aug. 21, 2006, at 12 (acknowledging that \textit{Bright} was first precedential Third Circuit opinion to clarify that affirmative state conduct was necessary to satisfy elements of state-created danger doctrine).

8. 132 F.3d 902 (3d Cir. 1997).

9. \textit{Compare Bright}, 443 F.3d at 288-89 (Nygaard, J., dissenting) (arguing that prior precedent did not establish that fourth element of state-created danger test required state actor to act “affirmatively”); \textit{with Bright}, 443 F.3d at 288 n.7 (explaining that Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995), resolved question by requiring affirmative act to satisfy fourth prong of state-created danger test); \textit{see also} Steven P. Bann, Morse v. Lower Merion School District Et Al., No. 96-2134: Recovery Under State-created Danger Theory Requires Foreseeability, Awareness and Action, N.J.L.J., Feb. 9, 1998, at 66 (describing requirement for fourth element of test as “the dispositive factor appears to be whether the state has in some way placed plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission”); Christina M. Madden, Note, Signs of Danger—The Third Circuit Emphasizes Foreseeability as the Crucial Element in the “State-created Danger” Theory: Morse v. Lower Merion School District, 43 VILL. L. REV. 947, 970 (1998) (concluding that decision in Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997) “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’”); Ricks, supra note 7 (explaining that Morse decision “appeared to remove the requirement of affirmative government conduct”).

10. \textit{See D.R. v. Middle Bucks Area Vo. Tech. Sch.}, 972 F.2d 1364, 1374 (3d Cir. 1992) (stating that “[l]iability under the state-created danger theory is predicated upon the states’ affirmative acts which work to plaintiffs’ detriments in terms of exposure to danger”); \textit{see also} Bright, 443 F.3d at 282 n.6 (“If there was any inconsistency in the holdings of our prior cases regarding the fourth element of a state-created danger claim, the controlling precedent would be our en banc decision in
that "[a] substantive due process claim based on the state-created danger theory must allege affirmative misuse of state authority."11 This approach is consistent with DeShaney's emphasis on affirmative state conduct but deviates from the result reached by the Ninth Circuit in Kennedy v. City of Ridgefield,12 which allowed state actor liability under a similar set of circumstances to those in Bright.13 In contrast with the Third Circuit's holding in Bright, Kennedy illustrates the problem courts have in consistently applying the doctrine and represents a challenge to a unified approach to the doctrine across the circuits.14

This Casebrief analyzes the requirements for a state-created danger claim after Bright and contrasts the Third Circuit's approach with that

[D.R.],") (emphasis omitted). In D.R., the plaintiff parents brought suit against the school district for failing to prevent or investigate students who sexually molested and tormented other students in class and on school property. See D.R., 972 F.2d at 1366 (describing background of case). In denying the plaintiff's state-created danger claims, the Third Circuit refused to hold school officials liable for failing to investigate the allegations and for failing to report the abuse to the plaintiff's parents. See id. at 1375-76 (holding that school officials were not liable under state-created danger theory). Specifically, the Third Circuit held:

We readily acknowledge the apparent indefensible passivity of at least some school defendants under the circumstances. Accepting the allegations as true, viz., that one school defendant was advised of the misconduct and apparently did not investigate, they show nonfeasance but they do not rise to the level of a constitutional violation.

Id. at 1376 (explaining court's decision); see also Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (requiring finding that "state actors used their authority to create an opportunity that otherwise would not have existed" in order to sustain state-created danger claim). The court in Bright interpreted Mark's language to mean that the fourth element required affirmative state action and that a failure to perform a duty did not constitute "us[ing] their authority." See Bright, 443 F.3d at 282 n.6 (perceiving no conflict between D.R. and Mark).


12. 439 F.3d 1055 (9th Cir. 2006).

13. See Kennedy v. City of Ridgefield, 439 F.3d 1055, 1067 (9th Cir. 2006) (holding that police officer's failure to warn plaintiff before speaking to subject of plaintiff's complaint constituted grounds for state-created danger claim because increased risk of harm to plaintiff and her family); see also Civil Rights—Immunity: Officer Caused State-Created Danger In Notifying Suspect Before Warning Accuser, 74 U.S.L.W. 1533, Mar. 14, 2006 [hereinafter Officer Caused State-Created Danger] (describing Ninth Circuit opinion in Kennedy sustaining state-created danger claim based on police officer's failure to timely warn and protect citizen from private violence as "at odds" with Bright).

14. For a discussion and analysis of the facts and holding in Kennedy, see infra notes 137-59 and accompanying text.
taken by the Ninth Circuit.\textsuperscript{15} Part II traces the development of substantive due process claims based on the state-created danger doctrine in the federal courts.\textsuperscript{16} Part III focuses on the development of the doctrine in the Third Circuit with particular emphasis on the origins of the conflict raised in \textit{Bright}.\textsuperscript{17} Part IV discusses the factual background of \textit{Bright}.\textsuperscript{18} Part V analyzes the Third Circuit’s decision in \textit{Bright} and its impact on the state-created danger doctrine intra-circuit.\textsuperscript{19} Part VI discusses the impact of \textit{Bright} on litigants in the Third Circuit.\textsuperscript{20} Part VII contrasts \textit{Bright} with the Ninth Circuit’s decision in \textit{Kennedy}.\textsuperscript{21} Lastly, Part VIII concludes by suggesting that the decision in \textit{Bright} is more consistent with Supreme Court precedent than \textit{Kennedy} and is more likely to endure Supreme Court scrutiny should the Court desire to unify the circuits’ various approaches to the doctrine.\textsuperscript{22}

\section{II. 42 U.S.C. § 1983: The Civil Rights Hook for Snake Pit Claims}

Most federal courts recognize that the Due Process Clause of the Fourteenth Amendment does not impose a constitutional duty on the states to protect their citizens from acts of private violence.\textsuperscript{23} The situation is much different, however, where the state “puts [persons] in a position of danger from private persons and then fails to protect [them].”\textsuperscript{24} As Judge Posner espoused in his much quoted opinion in \textit{Bowers v. De Vito},\textsuperscript{25} when the state creates the danger of private violence, the state can-

\begin{itemize}
  \item For a comparison of the Ninth Circuit’s approach to state-created danger in \textit{Kennedy} with the Third Circuit’s approach in \textit{Bright}, see \textit{infra} notes 85-136 and accompanying text.
  \item For a historical analysis of the state-created danger doctrine in the federal courts, see \textit{infra} notes 25-43 and accompanying text.
  \item For an explanation of the development of the state-created danger doctrine in the Third Circuit, see \textit{infra} notes 44-71 and accompanying text.
  \item For a discussion of the factual background of \textit{Bright}, see \textit{infra} notes 72-85 and accompanying text.
  \item For an analysis of the holding in \textit{Bright} and its application to the state-created danger doctrine in the Third Circuit, see \textit{infra} notes 86-127 and accompanying text.
  \item For a discussion of the impact that \textit{Bright} will have on litigants in the Third Circuit, see \textit{infra} notes 128-36 and accompanying text.
  \item For a comparison of the Third Circuit’s approach in \textit{Bright} with the Ninth Circuit’s approach in \textit{Kennedy}, see \textit{infra} notes 157-59 and accompanying text.
  \item For an explanation why \textit{Bright} is more likely to withstand United States Supreme Court review than \textit{Kennedy}, see \textit{infra} notes 160-69 and accompanying text.
  \item See Pellicciotti, \textit{supra} note 3, at 37 ("[A]s a general rule, the failure of the state to protect a person against private violence does not amount to a violation of the Fourteenth Amendment’s Due Process Clause.").
  \item See \textit{Bowers v. De Vito}, 686 F.2d 616, 618 (7th Cir. 1982) (quoting Judge Posner regarding Seventh Circuit’s recognition of existence of liability for state-created danger).
  \item 686 F.2d 616 (7th Cir. 1982).
\end{itemize}
not argue "its role was merely passive; it is as much an active tortfeasor as if it had thrown [the person] into a snake pit."\(^{26}\)

In response to these so-called "snake pit" scenarios, a majority of the federal circuit courts have recognized that a plaintiff has a right to recover damages under the state-created danger theory of liability.\(^{27}\) This theory of liability utilizes 42 U.S.C. § 1983\(^{28}\) as its "vehicle" for recovery by permitting plaintiffs to bring a substantive due process claim against state actors for the deprivation of a constitutional right.\(^{29}\) The Supreme Court has never formally addressed the viability of this theory of liability.\(^{30}\) Nonetheless, the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuit Courts of Appeals all have formally adopted some form of the doc-

\(^{26}\) See Bowers, 686 F.2d at 618 (explaining rationale for state-created danger theory of liability). Judge Posner's reference to the "snake pit" has led commentators to refer to state-created danger cases as "snake pit cases." See David Pruessner, The Forgotten Foundation of State-Created Danger Claims, 20 REV. LITIG. 357, 360 (2001) (discussing origin of term "snake pit cases").

\(^{27}\) See Pellicciotti, supra note 3, at 37 ("[A] line of lower court decisions have concluded that liability under 42 U.S.C.A. § 1983 can be established when the state affirmatively puts a person in a position of danger that the person would not otherwise have been in."). For a survey of the federal circuits' respective stances on the state-created danger doctrine, see supra note 4.

\(^{28}\) 42 U.S.C. § 1983 (1996) provides a civil remedy for the deprivation of a Constitutional right:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


\(^{29}\) See Madden, supra note 9, at 951 ("[S]ection 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."); accord Pruessner, supra note 26, at 357 ("State-created danger theory is a theory of recovery for civil rights violations under 42 U.S.C. § 1983."). One commentator noted that "Section 1983 is the codification of a portion of the original Ku Klux Klan Act of 1871." See id. at 375 (discussing history of Code section). Congress passed Section 1983 to prevent local state officials, who "tolerated and sometimes acted in complicity with the Klan," from enabling or assisting the Klan in depriving African-Americans of their constitutional rights. See id. at 375-76 (discussing congressional purpose behind enactment of 18 U.S.C. § 1883).

\(^{30}\) See Kennedy v. City of Ridgefield, 439 F.3d 1055, 1074 (9th Cir. 2006) (stating that "[t]he Supreme Court has yet to recognize the state-created danger doctrine"); see also Pruessner, supra note 26, at 358 (noting that Supreme Court has "never directly approved of" state-created danger doctrine).
Such a distributed approach to the theory's development has led to significant variation among the courts that recognize the concept.32

Although the Supreme Court has never directly addressed the state-created danger theory of liability, most courts and commentators consider DeShaney v. Winnebago County Social Services Department to be the formal genesis of the doctrine.33 In DeShaney, the mother of four-year-old Joshua DeShaney brought suit against state authorities for failing to prevent the victim's father from beating and injuring him.34 Although the state once before had temporarily removed Joshua from his father's home and had ongoing knowledge of his father's persistent abuse, state authorities declined to intervene further or remove Joshua from the home.35 As a result of the state's inaction, Joshua's father beat him so severely that he suffered irreversible brain damage.36

In ruling that DeShaney did not have an actionable claim, the Supreme Court concluded that the Fourteenth Amendment is "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security."37 Under this interpretation, the Court reasoned, the state does not have an affirmative duty to protect citizens from each other.38 Despite having knowledge of the potential perils Joshua faced,
the state was not responsible because "it played no part in their creation, nor did anything to render him more vulnerable to them." 39

Emphasizing this language in DeShaney, lower courts have concluded that the converse principle must be true: when the state plays some part in creating a danger or through its conduct increases the risk of harm to a citizen from private violence, the Fourteenth Amendment imposes liability on the state. 40 Generally, state-created danger claims do not apply to situations involving "a mere failure to protect." 41 Instead, courts ordinarily require some type of affirmative state misconduct. 42 Presently, though, the circuits disagree on the type and degree of affirmative conduct necessary to support a state-created danger claim. 43

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39. See DeShaney, 489 U.S. at 201 (discussing rationale for not holding state liable for parent's violence against minor child despite state knowledge of potential for such danger). The DeShaney Court distinguished the situation in DeShaney from one where a duty of care would exist by focusing on the fact that Joshua's injuries occurred while he was in his father's custody rather than under state care. See id. at 201-02 (explaining state's lack of physical control over Joshua barred finding state liable under custodial theory of liability).

40. See DeShaney, 489 U.S. at 201 (describing rationale for not holding state liable for parent's violence against minor child despite state knowledge of potential for such danger). The DeShaney Court based its finding that there could be no state liability on the fact that, ultimately, the state's actions "placed [Joshua] in no worse position than that in which he would have been had it not acted at all." See id. (explaining that state cannot be held liable where state did not increase or cause risk of harm). The Third Circuit interpreted DeShaney to support the proposition that "the Due Process Clause proscribes only state action" and that "liability under the state created-danger theory [can only] be predicated upon the state's affirmative acts." See Bright v. Westmoreland County, 445 F.3d 276, 282 n.6 (3d Cir. 2006) (quoting D.R. v. Middle Bucks Area Vo. Tech. Sch., 972 F.2d 1364, 1374 (3d Cir. 1992)) (emphasis added). But see DeShaney, 489 U.S. at 212 (Brennan, J., dissenting) (stating that "[m]y disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action").

41. See Pellicciotti, supra note 3, § 2[a] at 51 (noting that "a number of lower courts would seize upon" the language in DeShaney "as support for the application of the state-created danger theory").

42. See Pellicciotti, supra note 3, § 2[a] at 51 (quoting Soto v. Flores, 103 F.3d 1056, 1063 (1st Cir. 1997)) (stating that state's failure to protect generally not enough to invoke state-created danger doctrine); see also Finder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995) (en banc) (finding that failure to protect victim from domestic violence not sufficient for state-created danger); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) ("Inaction by the state in the face of a known danger is not enough to trigger the obligation . . . .").

43. See Kennedy v. City of Ridgefield, 439 F.3d 1055, 1074 (9th Cir. 2006) (Bybee, J., dissenting) (noting that circuit courts differ on "role that causation principles should play in the analysis of state-created danger claims").
III. DEVELOPMENT OF THE STATE-CREATED DANGER DOCTRINE IN THE THIRD CIRCUIT

The Third Circuit is among the majority of the federal courts that formally recognize the viability of the state-created danger doctrine. In formulating its approach, the Third Circuit has settled on a strict four-part test. The test requires the plaintiff to establish that: (1) the harm was a “foreseeable and fairly direct” result of the state’s actions; (2) the “state actor’s degree of culpability shocks the conscience”; (3) the plaintiff was a foreseeable victim or “a member of a discrete class imperiled by the state’s acts;” and (4) the “state actor affirmatively used [his or her power] in a way that created[d] a danger . . . or that rendered the citizen more vulnerable to danger than had the state not acted at all.” Prior to the court’s decision in Bright, however, there was room for academic debate as to what type of affirmative state conduct qualified under the fourth prong of this test.

The Third Circuit was reluctant to adopt the concept of state-created danger in the first cases to reach the court following DeShaney. In those early cases, the court frequently discussed the application of the doctrine, but ultimately found the facts of each case to be inconsistent with a state-created danger claim. Although still declining to find any state liability, the court took its most significant step towards its eventual adoption of the doctrine in Mark v. Borough of Hatboro. Notably, the Mark court identi-

44. See Pruessner, supra note 26, at 365 (noting that Third Circuit is among eight circuits that accept state-created danger theory). For a discussion of the circuits that currently recognize the state-created danger doctrine, see supra note 4.


46. See Affirmative Misuse of State Power, supra note 11 (quoting Bright, 443 F.3d at 281) (paraphrasing Third Circuit four-part test).

47. See supra note 9 (describing debate over action/inaction distinction necessary to satisfy fourth element of Kneipp test following Third Circuit’s decision in Morse).

48. See, e.g., Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (discussing previous decisions not to adopt state-created danger theory and concluding that theory is not applicable to facts of case); D.R. v. Middle Bucks Area Vo. Tech. Sch., 972 F.2d 1364, 1373-74 (3d Cir. 1992) (en banc) (finding that state-created danger doctrine recognized by other circuits requires evidence of “states’ affirmative acts which work to plaintiffs’ detriments in terms of exposure to danger” and that this element was lacking in facts of case); Brown v. Grabowski, 922 F.2d 1097, 1113-17 (3d Cir. 1990) (declining to apply state-created danger theory of liability recognized by Ninth and Eleventh Circuits to facts of case); see also Madden, supra note 9, at 959-63 (discussing Third Circuit’s reticence to formally adopt theory of state-created danger liability following DeShaney).

49. See Mark, 51 F.3d at 1152 (characterizing Third Circuit’s prior cases as intentionally avoiding question of whether doctrine is viable intra-circuit); accord Madden, supra note 9, at 959-63 (explaining that Third Circuit avoided ruling on viability of state-created danger claim in series of post-DeShaney cases by finding facts of cases did not satisfy requirements for claim).

50. 51 F.3d 1137 (3d Cir. 1995).
fried the four common elements that constitute a valid state-created danger claim.\(^{51}\)

In *Kneipp v. Tedder*,\(^{52}\) the Third Circuit officially recognized the viability of the state-create danger doctrine and adopted the four *Mark* factors as the circuit's formal state-created danger test.\(^{53}\) *Kneipp* involved an appeal from a dismissal of a state-created danger claim.\(^{54}\) The suit alleged that the police had briefly detained Samantha and Joseph Kneipp after observing Samantha drunk on a public street.\(^{55}\) After allowing Joseph to return home, police decided not to arrest Samantha and subsequently released her to continue walking home alone.\(^{56}\) Police later discovered her

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51. See Madden, supra note 9, at 962-63 (explaining significance of *Mark* and noting that *Mark* court "again declined to address the theory's viability"). In *Mark*, the plaintiff asserted a substantive due process violation based on a volunteer fire department's failure to adequately screen its members for "tendencies towards arson." See *Mark*, 51 F.3d at 1138-40 (discussing background and substance of complaint). The complaint alleged that the failure to uncover the firefighter's mental instability set off the chain of events that culminated in his burning of the plaintiff's business. See id. at 1140 (explaining basis for 42 U.S.C. § 1983 claim). The Third Circuit ultimately declined to find the facts of the case consistent with the state-created danger theory of liability because the plaintiff was not a member of a discrete class of foreseeable victims and the state conduct at issue did not satisfy the deliberate indifference standard. See id. at 1153-55 (detailing reasons why court found facts inconsistent with state-created danger theory of liability). Nevertheless, the court identified four necessary components for a meritorious claim. See id. at 1152-53 (listing four components of state-created danger claim and describing reasons for finding plaintiff's allegations insufficient for Section 1983 claim).

52. 95 F.3d 1199 (3d Cir. 1996).


54. See *Kneipp*, 95 F.3d at 1204 (describing lower court ruling granting summary judgment for defendant on grounds that plaintiff "had failed to prove a constitutional violation under either the 'special relationship' test or the state-created danger theory").

55. See id. at 1201 (explaining that police officer stopped Kneipps for causing public disturbance and describing Samantha's condition as "visibly intoxicated," smelling of urine and experiencing difficulties with walking).

56. See id. at 1209 (asserting that police conduct put Samantha Kneipp at greater risk of harm than if police had not acted at all). After stopping Joseph and Samantha Kneipp on the street for making a public disturbance, police let Joseph return home but held Samantha for further questioning. See id. at 1201-02 (describing circumstances surrounding police detention). Assuming police would take care of his highly intoxicated wife, Joseph left her to their care, but the officers later released Samantha to walk home alone. See id. at 1202 (explaining
unconscious and lying at the bottom of an embankment.\textsuperscript{57} "[A]s a result of her exposure to the cold," Samantha suffered irreversible brain damage.\textsuperscript{58} Overturning the districts court’s dismissal of the suit, the court found sufficient grounds to establish a prima facie state-created danger claim because the police officers’ actions led Joseph to leave his wife in their care and ultimately resulted in foreseeable injury to Samantha.\textsuperscript{59}

After \textit{Kneipp}, the Third Circuit proceeded to inject confusion into the area of state-created danger liability by inconsistently modifying the four elements of the original \textit{Kneipp} test.\textsuperscript{60} In particular, the court appeared to significantly expand the doctrine’s application a few years later in \textit{Morse v. Lower Merion School District}\textsuperscript{61} when it interpreted the test’s fourth element to require the court to ask whether the state actor’s conduct foreseeably put the plaintiff in danger, rather than whether the conduct was an act or omission.\textsuperscript{62} After the tragic murder of a school teacher in her classroom, the victim’s husband brought suit based on the school district’s failure to enforce the school’s security policy.\textsuperscript{63} Despite regulations requiring that all side and back exits of the school be locked, workmen had propped open a back door through which an individual accessed the school and committed the murder.\textsuperscript{64} Although the court ultimately found the harm too attenuated from the state’s conduct to be actionable, when discussing

\begin{itemize}
  \item Joseph’s reason for leaving his wife and officers’ subsequent decision to let Samantha return home by herself.
  \item \textsuperscript{57} See id. at 1203 (recounting that police found Samantha Kneipp lying "unconscious at the bottom of an embankment").
  \item \textsuperscript{58} See id. (concluding that Samantha’s brain damage resulted from lying unconscious in cold weather, the effects of which led to hypothermia and "caused a condition known as anoxia").
  \item \textsuperscript{59} See id. at 1209-11 (holding that police decision to release Samantha to walk home alone put her at greater risk than if they had allowed her to continue home with her husband).
  \item \textsuperscript{60} See Ricks, supra note 53, at 238 (arguing that Third Circuit has confused doctrine by creating: "(1) inconsistent mental culpability standards; (2) inconsistent analysis of derivative claims by family members; (3) inconsistent state action requirements; and (4) inconsistent municipal liability standards"); \textit{see also} Rivas v. City of Passaic, 365 F.3d 181, 202-03 (3d Cir. 2004) (Ambro, J., concurring in part) (concluding that in light of "substantial modifications to the \textit{Kneipp} test, . . . continuing to cite the \textit{Kneipp} test as 'good law' . . . minimizes the extent to which the law of state-created danger in our Circuit has changed").
  \item \textsuperscript{61} 132 F.3d 902 (3d Cir. 1997).
  \item \textsuperscript{62} Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 915 (3d Cir. 1997) ("[T]he 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."); \textit{see also} Ricks, supra note 53, at 257-58 (explaining ramifications of court’s decision in Morse).
  \item \textsuperscript{63} See Morse, 132 F.3d at 904 (3d Cir. 1997) (explaining that killer entered school through back door that contractors had propped open in violation of school policy requiring door remain locked).
  \item \textsuperscript{64} See id. (describing basis for school district’s substantive due process violation under 42 U.S.C. § 1983).
\end{itemize}
the fourth element of the test, the court downplayed the requirement that the state actor's conduct be affirmative in nature.\textsuperscript{65} The court's choice of language concerning the action-inaction distinction represented a significant modification of the fourth prong of the \textit{Kneipp} test.\textsuperscript{66} As one commentator observed, the court "appeared to remove the requirement of affirmative government conduct, to collapse the state action prong into the foreseeability of the harm, and to suggest that, where the harm suffered by the plaintiff was foreseeable, an omission by the state would satisfy the plaintiff's burden."\textsuperscript{67}

The Third Circuit attempted to resolve the apparent conflict between \textit{Morse} and earlier precedent in \textit{Estate of Henderson v. City of Philadelphia},\textsuperscript{68} an unreported, non-precedential opinion that declared the operative language in \textit{Morse} to be dicta.\textsuperscript{69} Nonetheless, many courts and litigants were unfamiliar with \textit{Estate of Henderson} because, before 2002, the Third Circuit did not make such opinions "available in electronic form."\textsuperscript{70} Until the court formally clarified its position in \textit{Bright}, at least one commentator speculated that the lower courts' and litigants' erroneous reliance on \textit{Morse}'s apparent abandonment of the action-inaction distinction "encourage[ed] litigation . . . [and] imped[ed] settlements" intra-circuit.\textsuperscript{71}

\textsuperscript{65} See id. at 915-16 (explaining that "the dispositive factor . . . [is] whether the state has . . . 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" when evaluating fourth requirement for claim, and holding that Morse's complaint did not meet fourth prong of \textit{Kneipp} test). The court's opinion in \textit{Morse} expressed a preference for a more holistic causation analysis, noting that "the line between an affirmative act and an omission is difficult to draw." See id. at 914-15. (citing lower court opinion for same proposition, Morse v. Lower Merion Sch. Dist., No. CIV.A. 96-CV-4576, 1996 WL 677514, at *6 n.11 (E.D. Pa. Nov. 20, 1996)).

\textsuperscript{66} See Madden, supra note 9, at 970 (explaining how Morse expanded fourth element of \textit{Kneipp} test); see also Ricks, supra note 53, at 258 (discussing effect of "prcedential decision" in \textit{Morse} on fourth prong of test); Ricks, supra note 7 (same).

\textsuperscript{67} See Ricks, supra note 53, at 258 (describing effect of court's decision in \textit{Morse} on four-part state-created danger doctrine in Third Circuit).


\textsuperscript{69} See Ricks, supra note 53, at 258-59 (discussing Third Circuit issuance of unpublished, non-precedential opinion); see also Ricks, supra note 7 (summarizing problems with issuance of unreported opinion). \textit{Estate of Henderson} treated Morse's language "as dicta" indicating that "inaction could be culpable in the face of foreseeable harm." See Ricks, supra note 52, at 258 (citing \textit{Estate of Henderson}, No. 98-3861, 1999 U.S. Dist. LEXIS 10367, at *14).

\textsuperscript{70} See Ricks, supra note 53, at 261 (explaining that until 2002, unpublished, non-precedential opinions from Third Circuit were unavailable electronically).

\textsuperscript{71} See Ricks, supra note 53, at 261 (theorizing that \textit{Morse} had adverse impact on courts and litigants who relied on opinion to make Section 1983 claim over more appropriate state-law claims); see also Bright v. Westmoreland County, 443 F.3d 276, 289 (3d Cir. 2006) (Nygaard, J., dissenting) (arguing, despite holding to contrary, that Morse "rejected the affirmative act/omission inquiry"), cert. denied,
IV. Bright v. Westmoreland: Factual Background

Like many state-created danger doctrine cases, the story behind Bright is tragic, amplified by the fact that the events that transpired were preventable. On May 4, 2001, a state probation officer observed Charles Koschalk, a convicted sex-offender, having prohibited contact with John Bright's twelve-year-old daughter. The probation officer reported the violation, but county bureaucracy delayed officials from taking any action until June 27th, when the District Attorney filed a petition to revoke Koschalk's probation. In the interim, John Bright had taken action of his own by contacting the Police Department for the City of Monessen, Pennsylvania, and requesting that police arrest Koschalk for the violation. Police assured Bright "that immediate action would be taken," but they ultimately failed to fulfill their promise. By mid-July, Koschalk began to worry that his illicit relationship with his twelve-year-old victim was coming

127 S. Ct. 1483 (2007); Matthew D. Barrett, Failing to Provide Police Protection: Breeding a Viable and Consistent “State-Created Danger” Analysis for Establishing Constitutional Violations Under Section 1983, 37 Val. U. L. Rev. 177, 201-02 (2002) (citing Morse as precedential authority for proposition that inactive state conduct can produce liability where harm is foreseeable); Ricks, supra note 7 (hypothesizing that Third Circuit's "doctrinal inconsistency... may have led plaintiffs and defendants to value cases differently").

72. See generally Cindi Lash & Johnna A. Pro, 'Failed by the System;' Mayor, Others Asking How Girl's Killing Could Have Been Avoided, Pittsburgh Post-Gazette, July 20, 2001, at A1 (highlighting failure of child-welfare agency to protect eight-year-old victim and her sister); Johnna A. Pro & Cindy Lash, Monessen Girl Found Dead; Man, 34, Who had Relationship with Her 12-Year-Old Sister and Often Visited Her Home, is Charged in Killing 8-Year-Old, Pittsburgh Post-Gazette, July 19, 2001, at A1 (detailing investigation leading up to arrest of Charles Koschalk for murder of eight-year-old victim); Jonathan D. Silver & Johnna A. Pro, Brights had Trouble in Calif.; Allegations of Abuse Leveled in 1990s Against Parents of Murdered Monessen Girl, Pittsburgh Post-Gazette, Aug. 9, 2001, at A1 (reporting that family had been investigated multiple times by California child-welfare agencies but children were never removed from home); Paula Reed Ward, Lawsuit Says Girls Murder Was Preventable, Pittsburgh Post-Gazette, Oct. 20, 2005, at B4 (reporting that basis for lawsuit was state's creation of danger by warning Koschalk of impending arrest without taking him into custody for probation violation).

73. See Bright, 443 F.3d at 278 (noting that probation officer observed Charles Koschalk with twelve-year-old girl, "unsupervised, at the Target Store in Greensburg" in violation of terms of his probation).

74. See id. at 278-79 (detailing events from time probation officer filed report to time district attorney filed petition to revoke Koschalk's probation). The County Court Administrator's Office subsequently scheduled the hearing on the Petition for Revocation for August 28, 2001. See id. (providing procedural timeline of events surrounding county's attempt to revoke Koschalk's probation). Koschalk killed Annette Bright, Bright's eight-year-old daughter, on July 15, 2001. See id. (recounting that Koschalk killed eight-year-old girl before date of probation hearing).

75. See id. at 279 (explaining that father called police to ask them to arrest Koschalk).

76. See id. (noting that, although police promised to arrest Koschalk, police took no further action).
to an end. Allegedly in retaliation for Bright’s role in reporting him, Koschalk kidnapped and killed Bright’s other eight-year-old daughter. Police subsequently apprehended Koschalk, who confessed and pled guilty to first degree murder.

Bright brought suit under 42 U.S.C. § 1983, alleging, among other things, that the state’s ten-week delay “in processing the revocation petition” and failure to arrest Koschalk, despite knowing he had violated the conditions of his probation, equated to a state-created danger. After considering the defendants’ Rule 12(b)(6) motion, the district court dismissed the Section 1983 claims on the grounds that the defendants had not affirmatively misused their authority in such a way as to increase the risk of harm to the plaintiff. Appealing this decision to the Third Circuit, Bright argued that the totality of the state’s actions, both its omissions and affirmative acts, “‘emboldened Koschalk” to carry out the murder and constituted sufficient grounds for a Section 1983 claim.

77. See Letters OK’d as Evidence, PITTSBURGH POST-GAZETTE, Aug. 30, 2002, at B10 (explaining Koschalk’s motive for killing eight-year-old victim was to prevent her sister from ending illegal relationship with him). According to prosecutors, “Koschalk, 36, wrote the letters to Annette’s older sister, Marcia, then 12. In them, Koschalk threatened to kill a member of the Bright family because Marcia wanted to end her affair with him . . . .” Id. (describing Koschalk’s motive for murder).

78. See Bright, 443 F.3d at 279 (explaining Koschalk’s reason for kidnapping and murdering Annette Bright). For a discussion of Koschalk’s reported reason for killing Annette Bright, see supra note 77.

79. See Pro & Lash, Monessen Girl Found Dead, supra note 71, at A1 (reporting that Koschalk confessed to shooting and burying body of Annette Bright); Westmoreland Cleared of Blame in Girl’s Death, PITTSBURGH TRIBUNE REVIEW, Apr. 5, 2006 (explaining that authorities dropped rape charge in exchange for Koschalk’s plea of guilty to murder).

80. See Bright, 443 F.3d at 279 (detailing plaintiff’s state-created danger claim).

81. See id. at 279 (paraphrasing district court opinion that granted dismissal of state-created danger claim because state actors did not cause or increase risk of harm to Bright). The District Court also dismissed the plaintiff’s “state law claims against the state-actor defendants,” ruling that the Pennsylvania Political Subdivision Tort Claims Act, 42 PA. CONS. STAT. §§ 8541-42 (2007) provided the defendants immunity from civil action. See id. (discussing basis for dismissal of state law claims). The trial court also declined “to exercise supplemental jurisdiction over the state law claims against Koschalk.” See id. at 279-80 (summarizing disposition of claims requiring court to exercise supplemental jurisdiction).

82. See id. at 279 (describing plaintiff’s state-created danger theory); see also Affirmative Misuse of State Power, supra note 11, at 1615 (explaining plaintiff’s “emboldenment” theory); Petition for Writ of Certiorari at *9, *13, Bright v. Westmoreland County, 443 F.3d 276 (3d Cir. 2006) (No. 06-563), 2006 WL 3024301 (contending that Morse supports plaintiff’s emboldenment argument), cert. denied, 127 S. Ct. 1483 (2007). In the petition for the writ of certiorari, Bright argued:

In the instant case, counsel for the Petitioner expresses a belief, based on a reasoned and studied professional judgment, that the Panel’s decision in Bright v. Westmoreland County et al., 443 F.3d 276 (3d Cir. Pa. 2006), is contrary to decisions of the United States Court of Appeals for the Third Circuit, as well as among other circuits, and involves one or more questions of exceptional importance, to wit: whether this Court should clarify the distinction between the affirmative acts and omissions
Rejecting Bright’s argument, the Third Circuit looked to the Supreme Court’s language in *DeShaney* when it explained that the existence of a valid state-created danger requires evidence of a state actor’s affirmative misconduct.83 This misconduct must create a risk of harm that otherwise would not have existed.84 Among the reasons given for denying Bright’s claims, the court opined that the state actors were not liable because their failure to arrest Koschalk was an omission, not an affirmative act.85

V. AFFIRMATIVE MISCONDUCT: BRIGHT RENOVATES THE KNEIPP TEST

The Third Circuit’s decision in *Bright* is significant because it formally clarifies intra-circuit the elements necessary to successfully plead a state-created danger claim.86 In *Bright*, the court reaffirmed its preference for the four-part analysis of state-created claims formally adopted in *Kneipp*, but significantly updated the test to reflect past modifications of the doctrine—specifically, the court required proof of a foreseeable and fairly direct harm, culpability that “shocks the conscience,” a foreseeable victim or

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of state actors under the various state-created danger tests arising as exceptions to *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989), and further address the viability of the emboldenment theory of liability under the same.

As noted by Judge Nygaard’s dissent, and further posited by Appellant here, the Third Circuit made it clear in *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902 (3d Cir. 1997), that when addressing the question of whether a state actor has used their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur, “[t]he 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 omission.”

*Id.* at *11-13* (quoting *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 915 (3d Cir. 1997)).

83. See *Bright*, 443 F.3d at 282 n.6 (explaining that *DeShaney* interprets Due Process Clause to require affirmative state conduct to sustain a valid state-created danger claim).

84. See *id.* (requiring that state’s affirmative conduct also increase risk of harm).

85. See *id.* at 283-84 (concluding that state cannot “create danger” invoking “substantive due process liability by failing to more expeditiously seek someone’s detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer’s probation.”); accord *Affirmative Misuse of State Power, supra* note 11, at 1614 (explaining that police conduct in *Bright* “involve[d] failure to use state authority, rather than affirmative misuse of it . . . and thus fails to state substantive due process claim under state-created danger theory”).

86. See *Ricks, supra* note 7 (crediting *Bright* with clarifying state-created danger doctrine in Third Circuit).
membership in a discrete class of victims and affirmative causation. The court's holding in Bright echoes its non-precedential opinion in Estate of Henderson by explicitly refuting the suggestion in Morse that a state actor's omission, which resulted in foreseeable injury, could form the basis for a state-created danger claim. Bright unequivocally requires that a plaintiff establish affirmative misconduct on the part of a state actor to satisfy the fourth prong of the revised circuit test.

A. Harm Foreseeable and Fairly Direct

To understand the first element of the test, it is helpful to compare the court's decision in Kneipp, where the plaintiff successfully pled a state-created danger claim, with the court's decision in Morse, where the plaintiff did not meet the court's requirements. In Kneipp, the plaintiff satisfied the burden of persuasion by introducing medical testimony showing that the victim's impairment made it significantly more likely that she would "fall and injure herself if left unescorted than someone who was not inebriated." Given that the harm which befell the victim was a foreseeable and direct result of permitting the intoxicated woman to walk home alone, the court concluded that the plaintiff had satisfied this element of the test.

In contrast, the court in Morse found that the plaintiff did not meet the burden of persuasion because the school could not have foreseen that an unsecured door would lead to the murder of a school teacher. In

87. Bright, 443 F.3d at 281 (listing four elements of Third Circuit state-created danger doctrine). For an analysis of the four-part test used by the Third Circuit in Bright, see infra notes 88-127 and accompanying text.

88. See Ricks, supra note 7 (explaining that Bright agrees with Estate of Henderson and clarifying that language in Morse that implies omissions could constitute state-created dangers "is dicta") (emphasis added).

89. See Ye v. United States, 484 F.3d 634, 638 (3d Cir. 2007) (explaining that Bright recognized that "an affirmative act, rather than inaction" on part of state is necessary to satisfy fourth part of circuit state-created danger test); see also Ricks, supra note 7 (noting that Third Circuit "has clarified in Bright that state-created danger requires affirmative state conduct"); Affirmative Misuse of State Power, supra note 11, at 1614 (concluding that Bright requires plaintiff to allege "affirmative misuse of state authority" rather than "mere failure to use authority").

90. Compare Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (finding facts of case satisfied first element of test), with Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908-10 (3d Cir. 1997) (finding facts did not meet requirements for first part of test); see also Madden, supra note 9, at 967-68 (contrasting Kneipp with Morse to explain first element of test).

91. See Kneipp, 95 F.3d at 1208 (stating that expert witness testimony, which concluded that Samantha's blood alcohol level was .25 percent, made her injuries foreseeable to police).

92. See id. at 1208 (asserting that facts of case support conclusion that "a reasonable jury could find that the harm likely to befall Samantha if separated from Joseph while in a highly intoxicated state in cold weather was indeed foreseeable").

93. See Morse, 132 F.3d at 908 (stating holding with respect to first element of test).
reaching this conclusion, the court placed significant weight on the fact that the murder was random, the school did not have knowledge of a specific or general threat of violence to its teachers and the school’s conduct ultimately was not the “catalyst for the attack.” Morse and Kneipp suggest that the court’s inquiry under the first element will be heavily fact-specific and not likely to encompass situations which involve random violence or a causal chain of events that exceeds the realm of practical possibilities. Ultimately, to fulfill the foreseeability inquiry, a plaintiff must show that the resulting harm was a likely consequence of the state actor’s conduct.

B. Culpability: “Shocks the Conscience”

The second element of the court’s analysis in Bright concerns the state actor’s culpability and differs from the original Kneipp test by requiring the plaintiff to satisfy the “shocks the conscience” standard. Under the traditional Kneipp test, the plaintiff only had to establish that the state actor acted with “willful disregard.” Previous to Bright, the Third Circuit changed the standard to reflect the Supreme Court’s decision in County of Sacramento v. Lewis, holding that “generally, in a due process challenge to executive action,” the government’s conduct must “‘shock the contemporary conscience.’” The plaintiff in Lewis sustained injuries while at

94. See id. at 908-10 (summarizing reasons for ruling plaintiff did not meet first element of test).
95. See, e.g., Rivas v. City of Passaic, 365 F.3d 181, 194-95 (3d Cir. 2004) (sustaining first element of test based on finding that it was foreseeable to paramedics with special training that restraining patient experiencing seizure could be harmful); Estate of Smith v. Marasco, 318 F.3d 497, 507-08 (3d Cir. 2003) (concluding that police’s knowledge of plaintiff’s special “mental and physical condition[s]” made it foreseeable that raiding home would cause him to flee and suffer heart-attack in nearby woods).
96. For a discussion of the court’s treatment of the first element of the state-created danger test, see supra notes 90-96 and accompanying text.
97. See Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006) (stating that second element of state-created danger test requires proof that state actor “acted with a degree of culpability that shocks the conscience”); see also Rivas, 365 F.3d at 202 (Ambro, J., concurring in part) (noting that Kneipp test for culpability has changed from “willful disregard” to “shocks the conscience” standard).
98. See Rivas, 365 F.3d at 202 (Ambro, J., concurring in part) (noting that Lewis changed the standard established in Kneipp from willful disregard to shocks the conscience); see also Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (explaining that deliberate indifference standard is satisfied when “‘defendants . . . have been at least deliberately indifferent to the plight of the plaintiff’” (quoting Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994))).
100. See Sanford v. Stiles, 456 F.3d 298, 305 (3d Cir. 2006) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)). The Supreme Court considered Lewis in order to address variation among the circuits as to the degree of culpability required in a substantive due process claim. See Lewis, 523 U.S. at 839 (explaining that Court “granted certiorari to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case” (citation omitted)); see also Sanford, 456 F.3d at 305 (discussing fact that Supreme Court heard Lewis in order to resolve
tempting to elude police by leading them on a high-speed chase.\textsuperscript{101} In that scenario, the Supreme Court explained that the state actor must deliberately intend to harm the plaintiff for a claim to be actionable.\textsuperscript{102} The Supreme Court acknowledged, however, that the level of state conduct needed to "shock the conscience" depends on the particular circumstances of each case.\textsuperscript{103}

Based on the Supreme Court's guidance in \textit{Lewis}, the Third Circuit's "shocks the conscience" standard is a continuum of conduct, ranging from deliberate intent to willful disregard.\textsuperscript{104} Whether conduct shocks the conscience primarily depends on the amount of time the state actor had for deliberation and the circumstances that existed at the time the state actor took action.\textsuperscript{105} At one end of the continuum are "hyperpressurized environments," situations where the state actor is typically called upon to make

\textsuperscript{101} See \textit{Lewis}, 523 U.S. at 836-37 (recounting that after police observed plaintiff speeding on motorcycle and attempted to pull him over, plaintiff led police on high-speed chase ending in crash that killed plaintiff).

\textsuperscript{102} See id. at 854 (holding that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment"); see also \textit{Sanford}, 456 F.3d at 305 (paraphrasing Supreme Court's holding in \textit{Lewis}).

\textsuperscript{103} See \textit{Lewis}, 523 U.S. at 850 (explaining that, in different contexts, level of action needed to shock conscience will vary); see also \textit{Sanford}, 456 F.3d at 305-06 (noting that \textit{Lewis} employed flexible approach to categorizing conduct as "shocking the conscience"). In \textit{Lewis}, the Court reasoned that "deliberate indifference" in the context of custodial detention may be enough to "shock conscience" when prisoners depend on the state for their care, but the higher standard of intent to harm must be proved when state actors have to act quickly and decisively. See \textit{Lewis}, 523 U.S. at 851-54 (providing examples of different circumstances where level of culpability required to "shock the conscience" differs).

\textsuperscript{104} See \textit{Sanford}, 456 F.3d at 309-10 (explaining three categories of culpability capable of "shocking the conscience").

\textsuperscript{105} See id. at 309 (summarizing Third Circuit's approach to determining culpability requirement). In \textit{Sanford}, the court explained:

[1]In any state-created danger case, the state actor's behavior must always shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible. In some circumstances, deliberate indifference will be sufficient. In others, it will not.

\textit{Id.} at 310 (explaining that level of culpability is proportional to state actor's time for deliberation).
In these situations, the court requires a showing of "deliberate intent to harm." In the middle of the continuum, the court uses an intermediate standard encompassing conduct that involves deliberation somewhere between "a 'split second' decision" and an "unhurried judgment." This category connotes some degree of urgency and pressure to make a decision. For conduct in this intermediate category to shock the conscience, the plaintiff must show that the state actor "disregard[ed] a great risk of serious harm."

At the opposite end of the spectrum of culpable conduct are situations where the plaintiff was able to make an "unhurried" decision. For a claim to be actionable in this category, the plaintiff must prove that the state actor acted with "deliberate indifference." Interestingly, the Bright court never analyzed the state actors' culpability, but instead disposed of the case entirely on the basis of the fourth prong—affirmative conduct.

C. foreseeable Victim or Member of Discrete Class

The third element of the Bright test focuses on the relationship between the plaintiff and the state actor. The plaintiff can establish this element by showing that he or she was a "foreseeable' victim" or "a member of a discrete class of persons subjected to the potential harm brought under pressure in a matter of seconds or minutes. In these situations, the court requires a showing of "deliberate intent to harm." In the middle of the continuum, the court uses an intermediate standard encompassing conduct that involves deliberation somewhere between "a 'split second' decision" and an "unhurried judgment." This category connotes some degree of urgency and pressure to make a decision. For conduct in this intermediate category to shock the conscience, the plaintiff must show that the state actor "disregard[ed] a great risk of serious harm."

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106. See id. at 306, 309 (defining "hyperpressurized environment" and related culpability standard).

107. See id. at 309 (holding that showing of deliberate intent is ordinarily required in hyperpressurized environments).

108. See id. at 309-10 (describing intermediate level of culpable conduct).

109. See id. at 310 (explaining that "these are situations in which there is some urgency and only 'hurried deliberation' is practical").

110. See id. (modifying old culpability standard of "gross negligence or arbitrariness that indeed 'shocks the conscience'" to new standard announced in Ziccardi v. City of Phila., 288 F.3d 57, 66 (3d Cir. 2002)).

111. See id. at 309 (discussing culpability standard when state actor may undertake unhurried deliberation).

112. See id. (describing standard to apply in cases where state actor has sufficient time to make unhurried judgment). In Sanford, the court raised the issue as to whether deliberate indifference required proof that the state actor had "actual knowledge of a risk of harm" but declined to provide an answer. See id. (discussing "actual knowledge" requirement). The court hinted that it might be willing to entertain a claim where the risk of harm should have been so obvious to the state actor that it would not be necessary to prove the state actor had actual knowledge. See id. at 309 n.13 (discussing circuit split over requirement of actual knowledge to sustain showing of deliberate indifference and previous Third Circuit precedent not involving state-created danger claim but sustaining municipal liability for "constitutional violation" where "policy or custom . . . demonstrates indifference to a known or obvious consequence").

113. See generally Bright v. Westmoreland County, 443 F.3d 276 (3d Cir. 2006) (analyzing plaintiff's failure to satisfy fourth prong of test).

114. See id. at 281 (listing requirements for third prong of test).
about by the state’s actions.” The quintessential question that the court must answer when addressing this element is whether the state actor’s conduct foreseeably put the plaintiff, or a group of similarly situated people, including the plaintiff, in danger, or whether the risk was directed in a broader sense at the “public at large.” It is not enough that the state conduct generally endangered the public. To qualify under this prong, a plaintiff must show that the conduct at issue specifically put the plaintiff or an identifiable class of persons within the zone of danger.

D. Causation: Requirement of Affirmative Conduct

After Bright, to satisfy the fourth prong of the state-created danger test, the plaintiff must show affirmative state action and factual causation between the act and the resulting injuries. Under the fourth prong, the

115. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 n.12 (3d Cir. 1997) (explaining that for plaintiffs to satisfy this element they must show themselves to be foreseeable victim or members of discrete class of foreseeable victims).

116. See id. at 913 n.12 (concluding that Mark and Kneipp preclude possibility that general risk of harm to public at large is enough to support state-created danger claim); see also Commonwealth Bank and Trust Co. v. Russell, 825 F.2d 12, 16 (3d Cir. 1987) (defining foreseeable victims “as individuals who defendants knew ‘faced . . . special danger’” as opposed to members of general public (quoting Martinez v. California, 444 U.S. 277, 285 (1980))). Compare Mark v. Borough of Hatboro, 51 F.3d 1137, 1152-53 (3d Cir. 1995) (rejecting claim because fire department policy put public in general at risk), with Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (sustaining claim because police actions specifically put plaintiff in danger).

117. See Morse, 132 F.3d at 913 (explaining that “a threat to the general population” is not enough to qualify individual as foreseeable victim or class of identifiable potential victims).

118. See id. at 913 n.12 (“Where the state actor has allegedly created a danger towards the public generally, rather than an individual or group of individuals, holding a state actor liable for the injuries of foreseeable plaintiffs would expand the scope of the state-created danger theory beyond its useful and intended limits.”). The Third Circuit cites Reed v. Gardner as a state-created danger claim based on a foreseeable class of victims. See id. at 913 (citing Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993)) (noting that police conduct of leaving drunk passenger in car with keys foreseeably put other motorists as class in danger even if police could not identify future victims with particularity). Compare Reed, 986 F.2d at 1127 (“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.”), with Mark, 51 F.3d at 1152-53 (finding no liability because policy only put general public at risk).

119. See Kaucher v. County of Bucks, 455 F.3d 418, 432 (3d Cir. 2006) (describing requirement that plaintiff show affirmative misuse of state authority and “direct causal relationship between the affirmative act of the state and plaintiff’s harm”). In Kaucher, the plaintiff filed suit under Section 1983 after John Kaucher, a corrections officer, caught a Methicillin Resistant Staphylococcus aureus infection and passed the disease onto his wife. See id. at 422 (describing basis for suit). The Kauchers alleged their injuries were the result of a state-created danger because of the “unsanitary and dangerous” work environment in the prison. See id. at 420 (same). The court denied their claims, explaining that the state conduct at issue involved a failure to act and not affirmative misconduct on
court engages in a two-part analysis examining: (1) whether the state actor “exercise[d] authority or power” that (2) “rendered the [plaintiff] more vulnerable to danger than had the state not acted at all.” 120 The first part of the court’s analysis focuses on whether the state’s conduct can be characterized as affirmative action. 121 The second part of the inquiry asks whether the state’s conduct was the “but for” cause of the plaintiff’s injuries.122

Bright illustrates the court’s distinction between affirmative acts and omissions and its treatment of “but for” causation. 123 In Bright, where the court ultimately held the state conduct at issue to be a failure to protect rather than affirmative action, the plaintiff argued that the state engaged in an affirmative act when the parole officer confronted Koschalk with his child-victim, and that the state failed to act by not arresting him at that moment or in the ensuing weeks before the murder. 124 In rejecting these contentions, the court noted that while the initial confrontation with Koschalk was an affirmative state act, it was not the “but for” cause of the murder. 125 Recognizing the significant time delay between this encounter and the murder, the court concluded that the confrontation had not “placed [the Brights] in . . . [a] worse position than that in which they would have been had [the state] not acted at all.” 126 Instead, the court reasoned the murder “could reasonably be attributed to” the police’s fail-

the part of the state. See id. at 436 (holding that state failure to prevent spread of disease not actionable under state-created theory of liability).

120. See id. at 432 (quoting Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006)) (describing fourth prong of test); Oren, supra note 53, at 1187 (stating that fourth prong of Third Circuit Kniett test has two parts).

121. See Kaucher, 455 F.3d at 432 (defining first part of fourth prong of test as requiring “specific and deliberate exercise of state authority”). The court found that the Kauchers had not satisfied this element of the test, despite “fram[ing] their claim in terms of actions affirmatively creating dangerous conditions and affirmatively misrepresenting dangers,” because the state conduct at issue really amounted to the failure to take steps to prevent the spread of the disease rather than affirmative state misconduct. See id. at 433 (stating that Kauchers’ claims not sufficient because more appropriately viewed as alleging state “failures to take actions”).

122. See id. at 432 (explaining that second part of “the fourth element is satisfied where the state’s action was the ‘but for cause’ of the danger faced by the plaintiff”).

123. See Bright, 443 F.3d at 281 n.5 (discussing requirements for fourth prong of circuit state-created danger test). For a discussion of Bright’s treatment of the fourth prong of the test, see supra notes 119-27 and accompanying text.

124. See id. at 283 (paraphrasing plaintiff’s three arguments).

125. See id. at 285 (describing probation officer’s confrontation with Koschalk as “only affirmative exercise of state authority” and finding that confrontation did not cause injury to child).

126. See id. (explaining that confrontation did not place Bright family in greater danger because there was no “reasonabl[e] . . . connection between Officer Whalen’s accusing Koschalk of a probation violation and Koschalk’s decision to murder Annette ten weeks later” (quoting DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 201 (1989))).
ure to arrest Koschalk over a period of many weeks, and because this amounted to an omission, the court determined that the state was not constitutionally liable.  

VI. WHAT BRIGHT MEANS TO LITIGANTS IN THE THIRD CIRCUIT

Whether the conduct at issue is affirmative or not will likely become the dispositive issue under the fourth prong of the Bright test. As Judge Nygaard's dissent indicates, the distinction between action and inaction is often an exercise in line drawing. Bright illustrates this point by noting that actions that are capable of being characterized as affirmative conduct, such as police assurances of help, can just as easily be classified by the court as a failure to protect.

By formally clarifying its stance on the state-created danger doctrine, the Bright decision should reduce the number of state-created danger claims filed in the Third Circuit. The court's decision portends that, despite tragic circumstances like the situation in Bright, the court is not receptive to sustaining an action where the state action is loosely linked to the injury or reasonably susceptible of being characterized as an omission. Realistically, the Bright test imposes a significant burden on liti-

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127. See id. (discussing court's rejection of plaintiff's "emboldenment" theory based on state's confrontation with Koschalk and subsequent failure to take timely action). The court similarly rejected the claim that promises by police to arrest Koschalk amounted to an affirmative exercise of state authority or power. See id. at 284 (holding that liability cannot be based on police assurances of help). The court found the police conduct in question involved a failure to protect. See id. (stating that state does not have affirmative duty to protect citizens). The court found direct support for this argument in DeShaney which held that "no 'affirmative duty to protect arises . . . from the State's . . . expressions of intent to help.'" See id. (quoting DeShaney, 489 U.S. at 200). The state had not increased the risk of danger to the Brights, because its promises had not "restricted [the plaintiff's] freedom to act on his family's own behalf." See id. (explaining that state did not owe duty of care to Brights because state had not restricted their liberty by making false promises to arrest Koschalk). But see Kennedy v. City of Ridgefield, 439 F.3d 1055, 1063, 1078 (9th Cir. 2006) (finding that although not "an independent basis for a due process violation," officer's assurances of police protection increased risk of harm to Kennedy family),reh'g en banc denied, 440 F.3d 1091 (9th Cir. 2006).

128. See Bright, 443 F.3d at 289 (Nygaard, J., dissenting) (citing Bright, 443 F.3d at 281) (noting that "the majority signals its belief that the hallmark inquiry under the fourth element is whether the state's actions can be characterized as affirmative or not").

129. See id. at 292 (Nygaard, J., dissenting) (concluding that Bright requires courts to engage in "frustratingly murky distinction between affirmative action and omission").

130. See, e.g., id. at 283-84 (describing plaintiff's argument that officer's assurance was affirmative act and court's response that it amounted to failure to protect). For a discussion of the Bright court's treatment of the state's promise to protect the Bright family, see supra note 127.

131. Cf. Ricks, supra note 7 (hypothesizing that confusion over Third Circuit state-created doctrine led to "more litigation" and "fewer settlements").

132. See, e.g., Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997) (holding "that defendants, as a matter of law, could not have foreseen that
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ants attempting to avoid dismissal of their state-created danger claims.133 Bright's culpability requirement is the toughest of the four elements for a plaintiff to satisfy.134 Even so, the Third Circuit has similarly rejected a number of state-created danger claims under the fourth prong by categorizing the state’s conduct as a failure to act.135 Future litigants will need to have explicit evidence of affirmative state misconduct in order to overcome the court’s restrictive approach to the fourth prong of the Bright test.136

VII. KENNEDY v. CITY OF RIDGEFIELD: CONTRASTING STATE-CREATED DANGER APPROACHES IN THE THIRD AND NINTH CIRCUITS

Although factually similar to the circumstances in Bright, the Ninth Circuit in Kennedy v. City of Ridgefield137 applied its state-created danger doctrine to permit state actor liability in a situation where the plaintiffs had detrimentally relied on police assurances of protection.138 In Kennedy, the court allowed a Section 1983 substantive due process claim to proceed against a police officer who notified a minor boy that he was the

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 attenuated from defendants' actions to support liability."). For support for the conclusion that the Third Circuit will narrowly construe the state-created danger doctrine to prevent state liability for conduct that is “too attenuated” from the resulting injury or reasonably susceptible to being characterized as an omission, see supra notes 90-96 and 119-27 and accompanying text.

133. For a discussion of the modifications to the Kneipp test which made it harder for litigants to bring a valid civil action under the state-created danger theory of liability, see supra notes 86-127 and accompanying text.

134. See Sanford v. Stiles, 456 F.3d 298, 305 (5th Cir. 2006) (noting that “culpability requirement is often the most difficult element for a plaintiff to prove”).

135. See, e.g., id. at 311-12 (holding that failing to notify parents of child’s suicidal ideations does not satisfy fourth prong); Kaucher v. County of Bucks, 455 F.3d 418, 433 (3rd Cir. 2006) (determining that failure to take adequate medical precautions at prison not enough for prison guard’s state-created danger claim); Morse, 132 F.3d at 915-16 (denying claim for failure to prevent homicide of teacher on school grounds); D.R. v. Middle Bucks Area Vo. Tech. Sch., 972 F.2d 1364, 1374 (3d Cir. 1992) (finding failure to investigate allegations of sexual abuse insufficient); Brown v. Grabowski, 922 F.2d 1097, 1116 (3d Cir. 1990) (denying relief for failure to file criminal charges against victim’s abuser).

136. See, e.g., Kaucher, 455 F.3d at 432 (stating that “specific and deliberate exercise of state authority” is “necessary to satisfy the fourth element of the test” and “[t]here must be a direct causal relationship between the affirmative act of the state and plaintiff’s harm”). For support for the conclusion that plaintiffs will need strong evidence of affirmative state conduct and proof of direct causation to bring a valid state-created danger claim in the Third Circuit, see supra notes 119-27 and accompanying text.

137. 439 F.3d 1055 (9th Cir. 2006), reh’g en banc denied, 440 F.3d 1091, 1092 (9th Cir. 2006).

138. See Lombardi v. Whitman, 485 F.3d 73, 80 n.4 (2d Cir. 2007) (noting that Bright and Kennedy reach opposite conclusions about whether plaintiff can bring due process claim based on false police assurance of protection).
target of a sexual-assault investigation. This notification began a chain of events that culminated in the shooting of the complaining witness and the death of her husband.

Like *Bright*, *Kennedy* is a tragic story that began when the plaintiff, Kimberly Kennedy, filed a complaint against Michael Burns, a minor, for sexually molesting Kennedy’s eight-year-old daughter. Kennedy asked police to notify her before contacting the Burns family. Trying in good faith to answer Kennedy’s subsequent requests for an update on the investigation, a police investigator went to the Burns’s home to see whether the Child Abuse and Intervention Center (CAIC) had spoken with them. Although the officer notified Kennedy of the encounter fifteen minutes later, Kennedy was upset that the officer had not contacted her before meeting with the Burns. Out of concern for their safety, the Kennedys considered leaving their home that night but instead opted to remain and leave town the following day. Tragically, during the night, Michael Burns broke into their home and shot the couple, wounding Kimberly Kennedy and killing her husband.

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139. See *Kennedy*, 439 F.3d at 1068 (holding that police officer was not entitled to “summary judgment based on qualified immunity,” because plaintiff established valid prima facie state-created danger claim).

140. See id. (explaining that target of investigation shot plaintiff and her husband after officer notified him of complaint); see also *Police Officer is Not Entitled to Immunity Due to “State-Created Danger” Doctrine: Kennedy v. Ridgefield, City of, No. 03-035333 (9th Cir. June 23, 2005), MUN. LITIG. REP., July 31, 2005, at 17 (reporting that Ninth Circuit found officer liable for “increas[ing] and misrepresent[ing] the risk the plaintiff faced”).

141. See *Kennedy*, 439 F.3d at 1057-58 (describing reasons why plaintiff filed complaint against Michael Burns); see generally John Painter, Jr., *Detective Recounts Ridgefield Boy’s Story of Shooting*, OREGONIAN, Apr. 27, 1999, at E2 (recounting testimony from pre-trial hearing); John Painter, Jr. & Holley Gilbert Corum, *Young Murder Victim Had Only Minor Infractions On His Record*, OREGONIAN, Sept. 29, 1998, at B1 (commenting that authorities and school officials did not consider Michael Burns dangerous to community before shooting).

142. See *Kennedy*, 439 F.3d at 1057-58 (explaining that Kennedy feared retaliation from Michael Burns, who had history of violent behavior, and asked responding officer, Noel Shields, to notify her before speaking to Burns family).

143. See id. (describing officer’s reason for speaking to Burns before notifying Kennedy). Burns had not heard from Child Abuse and Intervention Center (CAIC) and was angry to learn of the charge from Officer Shields. See id. (detailing Burns’s reaction to allegation).

144. See id. (recounting Kennedy’s reaction to learning of notification). The police officer previously had promised to warn Kennedy before contacting the Burns family. See id. (describing officer’s promise). Although Kennedy was concerned for her safety, the officer assured her she would be safe and that police would patrol the neighborhood. See id. (describing officer’s promise to provide police protection).

145. See id. (explaining that Kennedys did not leave that night because Jay Kennedy attended hunting course and by time he learned of threat it was too late to leave, and that Kennedys believed police would provide adequate protection that night).

146. See id. (relating Michael Burns shooting of Kennedys in their home); see also Painter & Corum, *supra* note 141 (describing how Burns, who had brought
Based on these circumstances, the Ninth Circuit concluded that Kennedy’s state-created danger claim was sufficient to overcome a motion for summary judgment.147 In reaching this conclusion, the court addressed the causation component of the state-created danger doctrine by analyzing whether “the state actor . . . created the particularized risk that the plaintiff might suffer such injury.”148 Applying this standard, the court concluded that the officer’s decision to notify the Burns family of the complaint without warning Kimberly Kennedy beforehand “created a danger to Kennedy she otherwise would not have faced, i.e., that Michael Burns would be notified of the allegations before the Kennedys had the opportunity to protect themselves from his violent response to the news.”149

Kennedy conflicts with Bright because it permits state actor liability for claims remarkably similar to those denied in Bright.150 In particular, Kennedy found that the police officer’s unfulfilled promise to patrol the neighborhood induced the Kennedys to remain in their home and amounted to additional evidence of state actor misconduct.151 In contrast, Bright categorically rejected a similar argument.152 Quoting DeShaney, the Third Circuit specifically found that Bright’s claim that the family relied on the police’s promise to arrest Koschak was unpersuasive, because “no ‘affirm-

147. See Kennedy, 439 F.3d at 1068 (holding that Officer Shields was not entitled to “summary judgment based on qualified immunity” because plaintiff established valid prima facie state-created danger claim).

148. See id. at 1062 n.2 (describing Ninth Circuit’s causation test for claim of state-created danger).

149. See id. at 1063 (explaining that by notifying Burns, Officer Shields “created ‘an opportunity for [Burns] to assault [the Kennedys] that otherwise would not have existed’”) (quoting L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992))).

150. See Lombardi v. Whitman, 485 F.3d 73, 80 n.4 (2d Cir. 1997) (noting that Bright “rejected factually similar claim[ ]” to one sustained in Kennedy); see also Officer Caused State-Created Danger, supra note 13, at 1553 (describing holding in Bright as in conflict with Kennedy). Compare Kennedy, 439 F.3d at 1062-63 (holding that police officers’ failure to fulfill promises to notify plaintiff before contacting Burns and to increase patrols in neighborhood constituted state-created danger), with Bright v. Westmoreland County, 443 F.3d 276, 283-84 (3d Cir. 2006) (finding that probation officer’s confrontation with Koschak and police’s failure to follow through with promise to arrest him were not grounds for state-created danger claim).

151. See Kennedy, 439 F.3d at 1063 (finding police officer’s promise “misrepresent[ed] . . . the risk that the Kennedys faced . . . making them more vulnerable to the danger he had already created”); see also Lombardi, 485 F.3d at 80-81 (concluding that Kennedy “furnish[es] some support for the idea that a substantive due process violation can be made out when a private individual derives a false sense of security from an intentional misrepresentation by an executive official if foreseeable bodily harm directly results”).

152. See Bright v. Westmoreland County, 443 F.3d 276, 285 (3d Cir. 2005) (rejecting Bright’s claim that police officer’s promise to arrest Koschak constituted affirmative state misconduct).
ative duty to protect arises . . . from the State's . . . expressions of intent to help' an individual at risk.”

The Kennedy court also significantly departed from Bright's treatment of direct causation. This was strikingly evident in the Kennedy court's assertion that state liability can exist even where the state's conduct is not the cause-in-fact of the plaintiff's harm. Applying this standard, the Kennedy court found that the officer's action of notifying Burns was the factual cause of the Kennedys' injuries. On the other hand, the Bright court concluded that the probation officer's confrontation with Koschalk had not caused Annette's murder or placed the Brights in any greater jeopardy than had already existed. Echoing this sentiment, Kennedy's critics contend that the danger actually existed the moment Kennedy filed the complaint and generated the risk that "at some point . . . the police . . . [were] going to talk with Burns.” Ultimately advocating for the ap-

153. See id. (same) (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).

154. Compare Kennedy, 439 F.3d at 1062 n.2 (explaining that Ninth Circuit's test for causation requires that "state actor need only have created the particularized risk that plaintiff might suffer such injury"), with Kaucher v. County of Bucks, 455 F.3d 418, 492 (3d Cir. 2006) (explaining that causation element of state-created danger test depends on direct causal link and "is satisfied where the state's action was the 'but for cause' of the danger faced by the plaintiff"). For a discussion of the Ninth Circuit's departure from Bright's approach to direct causation, see supra notes 137-59.

155. See Kennedy, 439 F.3d at 1062 n.2 (disagreeing with dissent's argument that state actor must be factual cause of injury to plaintiff). Instead, the Ninth Circuit said it would be sufficient for a plaintiff to show that "the state actor need only have created the particularized risk that plaintiff might suffer such injury" to have a valid state-created danger claim. See id. (responding to dissent's argument).

156. See id. at 1065 (concluding that police officer's conduct "created an actual, particularized danger Kennedy would not otherwise have faced").

157. See Bright, 443 F.3d at 284-85 (reasoning that probation officer's confrontation with Koschalk ten weeks before murder was not reasonably linked to killing and that Brights were already in danger before state actor confronted him).

158. See Kennedy, 439 F.3d at 1076 (Bybee, J., dissenting) (urging that Kennedys created danger by reporting Burns to police and officer's actions did not place them in greater danger); see also Kennedy v. City of Ridgefield, 440 F.3d 1091, 1094 (9th Cir. 2006) (Tallman, J., dissenting) ("[R]etaliation from Burns against the complainant was a danger faced by the Kennedys in the 'free world.'"). The argument follows that given that the danger existed before the officer notified the Burns family, the fifteen minute delay in contacting the Kennedys did not realistically put them in greater danger. See Kennedy, 439 F.3d at 1076 (Bybee, J., dissenting) (noting that cause-in-fact of danger to Kennedys was her initial complaint). Kennedy's request for notification evinced that she was aware of the danger she faced at the time she filed the complaint. See id. (Bybee, J., dissenting) (citing Kennedy's request as evidence she knew danger had been created by filing complaint). The decision not to leave town the night Kennedy learned Burns had been contacted also showed that Kennedy did not think an attack was imminent or a foreseeable consequence of the notification. See id. at 1075 (Bybee, J., dissenting) (noting that Kennedys made conscious choice to remain home after being informed that Burns had been contacted); see also id. at 1077 n.7 (Bybee, J., dissenting) (explaining that officers notifying Burns fifteen minutes before notifying the Kennedys had no impact on foreseeability of attack on Kennedys); Painter &
proach taken in Bright, the dissent in Kennedy argued that the majority’s causation analysis was wrong because it imposed liability for conduct that, while negligent, was not the “but for” cause of the plaintiff’s injuries.\textsuperscript{159}

\section*{VIII. Conclusion: Bright’s Likely Longevity}

Despite the similarities between the state conduct at issue, Bright and Kennedy reach opposing conclusions of law.\textsuperscript{160} Such a result highlights the inequality and uncertainty litigants face when bringing state-created danger claims in different circuits.\textsuperscript{161} To date, the Supreme Court has not addressed whether DeShaney ultimately permits state-created danger liability.\textsuperscript{162} Although Bright and Kennedy represent a potential circuit split, the Supreme Court is likely to continue its hands-off approach to the doctrine and not grant review of either of these two cases.\textsuperscript{163}

In terms of future durability, Bright follows the Supreme Court’s preference for narrowly construing substantive due process claims more than Kennedy does.\textsuperscript{164} The Third Circuit’s four-part analysis imposes a significant burden on litigants to establish affirmative state conduct, direct causation, foreseeability and evidence of culpability beyond mere negligence in order to sustain a state-created danger claim.\textsuperscript{165} In contrast, Kennedy’s

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  \item Corum, supra note 141 (reporting that acquaintances of Michael Burns did not anticipate he would have attacked Kennedys).
  \item See Kennedy, 439 F.3d at 1077 (Bybee, J., dissenting) (concluding that Officer Shields was not “but for” cause of Kennedy’s injuries).
  \item See Lombardi v. Whitman, 485 F.3d 73, 80 n.4 (2d Cir. 2007) (noting that Bright and Kennedy reach opposite conclusions about whether plaintiff can bring due process claim based on erroneous police assurances of protection).
  \item See Barrett, supra note 71, at 210-11 (discussing disparity between circuit courts’ approaches to state-created danger doctrine and its deleterious impact on litigants).
  \item See Pruessner, supra note 26, at 358 (noting that “United States Supreme Court has never directly approved of the state-created danger theory of recovery”).
  \item See Kennedy, 439 F.3d at 1074 (stating that “[t]he Supreme Court has yet to recognize the state-created danger doctrine”). The Court already has denied review of the Bright’s petition for certiorari. See Bright v. Westmoreland County, 127 S. Ct. 1483 (2007).
  \item See Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”); accord Barrett, supra note 71, at 233, 241 (noting that “Supreme Court appears to favor a restrictive approach to the state-created danger theory” and that its “current interpretation of [Section] 1983 claims under the Fourteenth Amendment is exceedingly narrow”). But cf. Pruessner, supra note 26, at 979 (stating that Supreme Court in Monell v. Dep’t of Soc. Serv., 436 U.S. 658, 684-85 (1978), urged courts to interpret Section 1983 broadly).
  \item For a discussion of the modifications to the Kneipp test that made it harder for litigants to bring a valid civil action under the state-created danger theory of liability, see supra notes 86-136 and accompanying text.
\end{itemize}
more expansive causation and culpability standards potentially could increase state-created danger litigation.\textsuperscript{166}

From a policy standpoint, \textit{Kennedy}'s broad conceptualization of the doctrine would significantly increase state actors' liability and bears the risk of deterring state actors "from taking risks and executing their functions for the public good."\textsuperscript{167} \textit{Bright}, in contrast, limits state liability to situations where state actors affirmatively misuse their authority and consequently jeopardize the life of a citizen—arguably the type of state misconduct Congress originally intended Section 1983 to reach.\textsuperscript{168} In light of \textit{Bright}'s congruence with Supreme Court precedent and the policies it further, \textit{Bright} is more likely than \textit{Kennedy} to survive the future evolution of the doctrine because of its tendency to limit the class of substantive due process claims available to litigants and to insulate state actors from broad constitutional liability.\textsuperscript{169}

\textit{Chris W. Pehrson}

\textsuperscript{166} See \textit{Kennedy} v. City of Ridgefield, 440 F.3d 1091, 1091-92 (9th Cir. 2006) (Tallman, J., dissenting) (alleging that \textit{Kennedy} "expands the judge-made 'state-created danger' doctrine to impose impermissibly broad [Section 1983] civil rights liability" and predicting surge in potential litigation as a result).

\textsuperscript{167} See id. at 1095 (Tallman, J., dissenting) (discussing policy reasons for narrowly construing state-created danger claims).

\textsuperscript{168} See Pruessner, supra note 26, at 375 (explaining that Congress created Section 1983 to target state officials who intentionally abused their authority to facilitate Klu Klux Klan activities). For a discussion of the original congressional purpose behind the enactment of 18 U.S.C. § 1983, see supra note 28. For a discussion of \textit{Bright}'s effect on litigants in the Third Circuit, see supra notes 128-36 and accompanying text.
