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The Law's Role in Ending the Suicide Crisis: Liability for Suicide Under the State-Created Danger Doctrine

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THE LAW'S ROLE IN ENDING THE SUICIDE CRISIS: LIABILITY FOR SUICIDE UNDER THE STATE-CREATED DANGER DOCTRINE

*Brittany White**

ABSTRACT

The mounting prevalence of suicides in the United States has translated into a full-fledged, nationwide suicide crisis, impacting the lives of far too many. Even if an individual is fortunate enough never to have directly endured the tragedy of losing a loved one to suicide, they have certainly been exposed to this crisis through ever-frequent media reports of suicides. Given the widespread and detrimental nature of this crisis, it is imperative that prompt action is taken by individuals and institutions across a multitude of disciplines, the law notwithstanding. Indeed, the force of law itself implies that certain faculties possessed by courts can be uniquely conducive to the fundamental goal of suicide prevention. Specifically, courts hold the power to impose liability upon individuals for their actionable wrongdoing; when imposed, the threat of future liability is thereby realized, which presumably operates to deter future instances of similar misconduct. However, where the threat of liability is far-fetched, the law's deterrence value is likewise diminished. As such, only a legitimate threat of liability will produce the necessary incentives for individuals to prevent suicides and suicide-inducing conduct.

The law's state-created danger doctrine is critical because it supplies a legal basis for imposing liability upon governmental actors for certain instances of suicide. This Comment thus seeks to resolve a circuit split concerning the doctrine's applicability to suicide. It suggests the manner in which courts should treat state-created danger claims involving suicides in light of both the doctrine's history and modern psychiatric understandings of suicide. Ultimately, this Comment argues that where the requisite elements of a state-created danger claim have been satisfied, courts must not decline to find liability simply because the harm that ensued from the state-created danger was that of suicide rather than some harm inflicted by a third party.

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I. INTRODUCTION

A. Suicide: A Public Health Crisis

SUICIDE is the second leading cause of death in the United States for persons between the ages of ten and thirty-four.[1] It is the tenth leading cause of death among people of all ages in the United States[2] with approximately one suicide occurring every eleven minutes.[3] And globally, every forty seconds someone dies by way of their own hand.[4] Suicide is an undeniable public health crisis, and it is one that is only growing worse.[5] Between 1999 and 2018, the overall suicide rate in the United States increased by 35%.[6] Perhaps even more alarmingly, the suicide death rate for those aged ten to twenty-four increased by 57% from 2007 to 2018.[7] In 2019, for every adult who died by suicide in the United States, approximately thirty-one attempted suicide, amounting to an estimated 1.4 million suicide attempts per year.[8]

Two categories of persons in particular exhibit unsettling suicide rates—inmates and students. As a group, incarcerated individuals display higher suicide rates than their non-incarcerated counterparts.[9] Statistics show that from 2001 to 2018, the number of inmates in state prisons who committed suicide increased by 85%.[10] In 2018, the Bureau of Justice Statistics reported the highest number of state prisoner suicides in all its eighteen years of collecting "mortality data."[11] In the jail setting, suicide has remained the single leading cause of death—it accounts for almost

1. *See* Holly Hedegaard, Sally C. Curtin & Margaret Warner, Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Health Stat. Data Brief No. 398, Suicide Mortality in the United States, 1999–2019, at 1 (2021), https://www.cdc.gov/nchs/data/databriefs/db398-H.pdf [https://perma.cc/7TTR-V4CE].

2. *Id.* (reporting data from 2019).

3. *Preventing Suicide*, Ctrs. for Disease Control & Prevention (Apr. 2022), https://www.cdc.gov/suicide/pdf/NCIPC-Suicide-FactSheet.pdf [https://perma.cc/Z47Q-VWMM].

4. Saeed Ahmed & Cornel N. Stanciu, *Addiction and Suicide: An Unmet Public Health Crisis*, Am. J. Psychiatry Residents' J. 3, 3 (2017).

5. *See id.*; *see also Preventing Suicide*, *supra* note 3.

6. *See* Hedegaard et al., *supra* note 1, at 6.

7. Sally C. Curtin, State Suicide Rates Among Adolescents and Young Adults Aged 10–24: United States, 2000–2018, Nat'l Vital Stat. Reps., Sept. 11, 2020, at 1, 4.

8. Asha Z. Ivey-Stephenson, Alex E. Crosby, Jennifer M. Hoenig, Shiromani Gyawali, Eunice Park-Lee & Sarra L. Hedden, *Suicidal Thoughts and Behaviors Among Adults Aged = 18 Years—United States, 2015–2019*, 71 Morbidity & Mortality Wkly. Rep. 1, 2, 5 (2022).

9. *See* Kristiana J. Dixon, Allison M. Ertl, Rachel A. Leavitt, Kameron J. Sheats, Katherine A. Fowler & Shane P.D. Jack, *Suicides Among Incarcerated Persons in 18 U.S. States: Findings From the National Violent Death Reporting System, 2003–2014*, 26 J. Corr. Health Care 279, 279 (2020).

10. *See* Elizabeth Ann Carson, U.S. Dep't of Just., Mortality in State and Federal Prisons, 2001–2018 – Statistical Tables 2 (2021), https://bjs.ojp.gov/content/pub/pdf/msfp0118st.pdf [https://perma.cc/L68K-4ZCK].

11. *Id.* at 1.

one in every three inmate deaths.[12] The suicide crisis taking place behind the bars of American jails and prisons can plausibly be attributed to an array of factors, including deplorable conditions,[13] inadequate mental health care,[14] isolated confinement,[15] and correctional officers' encouragement of or indifference to inmate self-harm.[16]

The increasing prevalence of fatal and nonfatal suicidal behavior among middle school and high school students underscores the severity of the suicide crisis plaguing the United States.[17] For youths between the ages of ten and fourteen, the suicide rate increased threefold from 2007 to 2017.[18] And for those aged fourteen to eighteen, suicide rates escalated by almost 62% between 2009 and 2018.[19] These statistics evince tremendous cause for concern, yet they do not even encompass the number of unsuccessful suicide attempts among youths. In light of these trends and the significant amount of time youths spend in the school setting, experts have emphasized the important role school personnel can play in student suicide prevention.[20] It is crucial that such personnel are trained "in recognizing signs of suicide and responding effectively."[21] This is especially true given the myriad of risk factors present in the school context.[22]

Foremost, a prior suicide attempt is a known risk factor for—and the strongest predictor of—future death by suicide.[23] Additionally, bullying poses a considerable problem with respect to student suicide, as it is widespread and has deleterious mental effects on both the bully and the victim.[24] Involvement in bullying in any capacity is associated with an increased risk of suicide, but victims are ultimately more likely than nonvictims to experience suicidal ideation and to carry out a suicide at-

12. *See* Elizabeth Ann Carson, U.S. Dep't of Just., Mortality in Local Jails, 2000–2018 – Statistical Tables 1 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/mlj0018st.pdf [https://perma.cc/MDA3-NTYE].

13. *See* David E. Patton & Frederick E. Vars, *Jail Suicide by Design*, 68 UCLA L. Rev. Discourse 78, 86 (2020).

14. *See* Terry A. Kupers, *What to Do with the Survivors?: Coping with the Long-Term Effects of Isolated Confinement*, 35 Crim. Just. & Behav. 1005, 1007 (2008).

15. *See id.* at 1009, 1014.

16. *See* Leah Wang & Wendy Sawyer, *New Data: State Prisons are Increasingly Deadly Places*, Prison Pol'y Initiative (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality [https://perma.cc/USD4-5HST].

17. *See* Asha Z. Ivey-Stephenson, Zewditu Demissie, Alexander E. Crosby, Deborah M. Stone, Elizabeth Gaylor, Natalie Wilkins, Richard Lowry & Margaret Brown, *Suicidal Ideation and Behaviors Among High School Students — Youth* Risk Behavior Survey, United States, 2019, 69 Morbidity & Mortality Wkly. Rep. 47, 47 (2020).

18. *See* Sally C. Curtin & Melonie Heron, Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Health Stat. Data Brief No. 352, Death Rates Due to Suicide and Homicide Among Persons Aged 10–24: United States, 2000–2017, at 2 (2019) https://www.cdc.gov/nchs/data/databriefs/db352-h.pdf [https://perma.cc/Y5EE-TCYM].

19. *See* Ivey-Stephenson et al., *supra* note 17, at 47.

20. *See* Scott Poland & Sara Ferguson, *Youth Suicide in the School Context*, Aggression & Violent Behav., Feb. 5, 2021, at 1, 9.

21. Ivey-Stephenson et al., *supra* note 17, at 54.

22. *See* Poland & Ferguson, *supra* note 20, at 2–4.

23. *See id.* at 2.

24. *See* Marci Feldman Hertz, Ingrid Donato & James Wright, *Bullying and Suicide: A Public Health Approach*, 53 J. Adolescent Health S1, S1 (2013).

tempt.[25] While active intervention is therefore integral to reducing youth suicide rates, "in most schools today, bullying goes on unabated and virtually unchallenged by school officials."[26]

B. Suicide and Mental Illness: Psychiatry Versus the Law

Throughout the course of history, the law has evolved so as to mirror society's changing attitudes toward mental illness and suicide.[27] From the Middle Ages until the late nineteenth-century, suicide was considered sinful, immoral, and often the result of demonic possession.[28] Given that suicide implied culpability on the part of the decedent, it was a widely criminalized act—those who inflicted lethal self-harm were deemed felons.[29] Similarly, those with mental illness were labeled as "lunatic[s]," "madly insane," or persons of "raving madness."[30] This historical ostracism of mentally ill individuals has generated lasting effects, the most significant being the pervasive stigmatization of suicide and mental illness that persists in society today.[31]

The issue of stigma presents "the most formidable obstacle" to overcoming the nation's worsening suicide crisis.[32] The stigmatization of both mental illness and suicidality constitutes a "*per se* risk factor for suicide"[33] because it dissuades individuals from seeking help out of fear they will be shamed.[34] Even today, mental illness is commonly viewed as a personal weakness rather than a "true" illness like a physical disease.[35] And people who contemplate, attempt, or commit suicide are often condemned as weak, selfish, and immoral.[36] Yet these deep-rooted attitudes must be dismantled in order to ameliorate the suicide exigency. As such, stigma cannot be tolerated in any facet of society and must not be in-

25. *See id*; Anat Brunstein Klomek, Andre Sourander & Madelyn S. Gould, *Bullying and Suicide: Detection and Intervention*, Psychiatric Times (Feb. 2011), https://www.psychiatrictimes.com/view/bullying-and-suicide [https://perma.cc/5JV3-MYP3].

26. Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and the Constitutional, Statutory, and Tort Duties to Supervise*, 77 Temp. L. Rev. 641, 643 (2004).

27. *See* Alex B. Long, *Abolishing the Suicide Rule*, 113 Nw. U. L. Rev. 767, 772–82 (2019).

28. *See id.* at 773–74, 780.

29. *See id.* at 777–78.

30. *Id.* at 781.

31. *See* Stacey A. Tovino, *Further Support for Mental Health Parity Law and Mandatory Mental Health and Substance Use Disorder Benefits*, 21 Annals Health L. (Special Ed.) 147, 161 (2012).

32. *See* U.S. Dep't of Health & Hum. Servs., Mental Health: A Report of the Surgeon General 3 (1999).

33. Bernardo Carpiniello & Federica Pinna, *The Reciprocal Relationship Between Suicidality and Stigma*, Frontiers in Psychiatry, Mar. 8, 2017, at 1, 2.

34. *See* Julia Ludwig, Sarah Liebherz, Mareike Dreier, Martin Harter & Olaf von dem Knesebeck, *Public Stigma Toward Persons with Suicidal Thoughts—Do Age, Sex, and Medical Condition of Affected Persons Matter?*, 50 Suicide & Life-Threatening Behav. 631, 631–32 (2020); *see also* U.S. Dep't of Health & Hum. Servs., *supra* note 32, at 8 (noting that two-thirds of people with mental disorders do not seek treatment).

35. M. Pompili, I. Mancinelli & R. Tatarelli, *Stigma as a Cause of Suicide*, 183 Brit. J. Psychiatry 173, 173 (2003).

36. *See* Carpiniello & Pinna, *supra* note 33, at 3–4.

voked as "an excuse for inaction."[37]

Nonetheless, stigmatic attitudes toward suicide and mental illness are often embodied in the law today.[38] Notably, courts frequently apply what one author refers to as the "suicide rule" in proximate causation analyses; that is, courts generally conclude that suicide constitutes a superseding cause of death, even where the defendant allegedly caused the suicide.[39] Of particular concern is the "element of blameworthiness or culpability" on the part of the decedent that underlies the suicide rule.[40] The idea that suicide is a culpable act stems from the historical association of suicide with immorality and criminality; however, modern psychiatry largely refutes the notion that the suicidal decedent is blameworthy.[41] Research has shown that suicidal persons "exhibit an emotional and intellectual narrowing" and are in a "cognitive state . . . of ambivalence."[42] Moreover, it is commonly understood that "the mentally ill are . . . coerced by their illness into suicide."[43] As such, experts have concluded that most "suicidal individuals are in a special, constricted condition" under which they are incapable of making a "free" choice to commit suicide,[44] thereby impugning the law's stance on culpability.

The failure of courts to adopt modern psychological understandings of suicide has led to the creation of legal rules that perpetuate stigmatizing and shameful attitudes toward mental illness and suicide.[45] In light of the fact that the nation's suicide crisis is only intensifying, the way many courts treat suicide is particularly concerning. Because suicide is a public health problem, its solution demands a public health approach.[46] Such an approach requires multidisciplinary collaboration, signifying that the law has a fundamental role to play.[47] Thus, as an initial matter, courts must abstain from crafting legal policies that preserve the status quo; that is, the law should not be shaped so as to perpetuate the stigmatic attitudes that so often contribute to suicides.[48] More importantly, legal rules must be "consistent with the goal of reducing the number of suicides."[49] Thus,

37. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 32, at 3.

38. *See* Long, *supra* note 27, at 782, 810–11.

39. *See id.* at 783–85.

40. *Id.* at 786.

41. *See* Allen C. Schlinsog, Jr., Comment, *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased?*, 24 J. MARSHALL L. REV. 463, 471–72, 477–79 (1991).

42. Florian Arendt, Sebastian Scherr, Thomas Niederkrotenthaler & Benedikt Till, *The Role of Language in Suicide Reporting: Investigating the Influence of Problematic Suicide Referents*, 208 SOC. SCI. & MED. 165, 166 (2018).

43. Jeanette Hewitt, *Why are People with Mental Illness Excluded from the Rational Suicide Debate?*, 36 INT'L J. L. & PSYCHIATRY 358, 362 (2013).

44. Arendt et al., *supra* note 42, at 166.

45. *See* Long, *supra* note 27, at 811–12, 821.

46. *See* Corinne David-Ferdon, Alex E. Crosby, Eric D. Caine, Jarrod Hindman, Jerry Reed & John Iskander, *CDC Grand Rounds: Preventing Suicide Through a Comprehensive Public Health Approach*, 65 MORBIDITY & MORTALITY WKLY. REP. 894, 894 (2016).

47. *See Suicide Prevention: A Public Health Issue*, NAT'L CTR. FOR INJ. PREVENTION & CONTROL (Feb. 21, 2012), https://stacks.cdc.gov/view/cdc/11794 [https://perma.cc/4MK4-AQF9].

48. *See* Long, *supra* note 27, at 820–21.

49. *Id.* at 821.

it is crucial that the law—through the threat of liability—incentivizes persons to prevent suicide in certain circumstances and effectively deters conduct that creates or enhances the risk of suicide. The law's state-created danger doctrine can serve as a vehicle for facilitating these aims.

The remainder of this Comment addresses a circuit split over whether the state-created danger doctrine is applicable to instances of suicide. In doing so, it argues that where the state creates or increases the danger to an individual—namely, the risk of suicide—and the other elements of the doctrine have been satisfied, courts should not display reluctance to impose liability simply because suicide is involved. It repeatedly emphasizes that the imposition of liability for suicide is often crucial in light of the nation's ongoing suicide crisis.

Part II discusses the origin of the state-created danger doctrine and explains how it represents an exception to the general rule that there is no governmental duty to protect. Foremost, however, Part II clarifies how § 1983 claims are to be construed—an understanding of which is crucial given that state-created danger claims must be brought under § 1983. Part III explains the current inconsistent treatment of the state-created danger doctrine by the federal circuits. Part IV analyzes the circuit split concerning the applicability of the state-created danger doctrine to suicides. The Sixth Circuit has held that it is decidedly inapplicable to instances of suicide, while the Tenth Circuit has ruled to the contrary. Part V argues that the state-created danger exception applies to suicide. In doing so, it critiques the ways in which courts treat certain elements of state-created danger claims, especially where a suicide is involved, while elaborating upon the manner in which these elements should properly be construed. Finally, Part VI addresses counterarguments concerning § 1983 liability and the state-created danger theory.

II. SECTION 1983, DUE PROCESS, AND THE DUTY TO PROTECT

A. SECTION 1983

Section 1983 provides a cause of action against state actors for deprivations of constitutional rights.[50] A successful § 1983 claim necessitates that two elements exist: (1) that the "conduct complained of was committed by a person acting under color of state law"; and (2) that the "conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States."[51] It is important to note that the

50. *See* 42 U.S.C.A. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .

Id.

51. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

statute does not itself confer any substantive rights; rather, it serves as a medium for the vindication of rights established elsewhere.[52] In other words, § 1983 provides aggrieved individuals with a vehicle for remedying violations of their constitutional rights, provided that the violation amounts to a "constitutional tort."[53]

A proper and comprehensive understanding of § 1983 is infeasible absent awareness of its historical foundations. The Civil Rights Act of 1871—the predecessor to § 1983[54]—was a response to the violent conditions that persisted in the South at the time of the statute's enactment.[55] The legislative history of the 1871 Act makes clear that such conditions represented the culmination of Ku Klux Klan activities and "the inability of the state governments to cope with it."[56] Specifically, many southern states utterly failed to uphold the rule of law by allowing the Klan's commission of barbaric acts upon African Americans to go entirely unpunished.[57] Accordingly, one of Congress's aims in enacting the 1871 Act was to provide a federal remedy[58]—a remedy "against those who[,] representing a State in some capacity[,] were *unable* or *unwilling* to enforce a state law."[59] It was this failure on behalf of the states to take affirmative action—the lack of enforcement of the law—that was at the heart of congressional action.[60]

The congressional debates surrounding the Civil Rights Act of 1871 further shed necessary light upon Congress's intent with respect to judicial interpretation of the Act and, consequently, upon interpretation of § 1983.[61] The author and manager of the bill in the House, Representative Shellabarger, exclaimed that because this statute is a remedial measure designed "in aid of the preservation of human liberty and human rights," it must be "liberally and beneficently construed."[62] An expansive construction of § 1983 is necessary not only to provide remedies to those who have been wronged by abuses of official power, but also to safeguard constitutional rights from such abuses or deprivations in the first place.[63]

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52. Albright v. Oliver, 510 U.S. 266, 271 (1994).

53. Susanna M. Kim, *Section 1983 Liability in the Public Schools After* DeShaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. Rev. 1101, 1106–07 (1994).

54. Owen v. City of Independence, 445 U.S. 662, 635 (1980).

55. Monroe v. Pape, 365 U.S. 167, 183 (1961).

56. *Id.* at 174.

57. *See* Cong. Globe, 42d Cong., 1st Sess. 505 (1871).

58. *Monroe*, 365 U.S. at 174.

59. *Id.* at 176 (emphasis added).

60. *See* Matthew D. Barrett, Note, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 Val. U. L. Rev. 177, 181 (2002).

61. See Jeremy Daniel Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 Vand. L. Rev. 165, 170–71 (2001) (noting that § 1 of the Civil Rights Act of 1871 is now codified as 42 U.S.C. § 1983).

62. Cong. Globe, 42d Cong., 1st Sess. app. at 68 (1871).

63. *See* Owen v. City of Independence, 445 U.S. 622, 651–54 (1980).

B. *DeShaney*: Origin of the State-Created Danger Doctrine

The state-created danger doctrine establishes a basis for liability when the state itself creates a dangerous situation or enhances a danger so as to place an individual in a worse position than she otherwise would have occupied absent state action.[64] State-created danger claims rely upon violations of substantive due process—which implicate arbitrary deprivations of life, liberty, or property by state officials[65]—and must be brought under § 1983.[66] However, in state-created danger cases, it is not the government that directly deprives a person of their constitutional rights; rather, a private actor or other force carries out the deprivation.[67] Nevertheless, liability befalls the state as the party that ultimately created the circumstances endangering the individual, given that the state subsequently failed to protect the individual from the resulting harm.[68]

1. DeShaney*'s No-Duty Rule*

Four-year-old Joshua DeShaney was beaten by his father to such a degree that he suffered irreparable brain injuries rendering him permanently disabled.[69] Prior to this incident, the Department of Social Services had placed Joshua in the temporary custody of a hospital after he was admitted with physical signs of child abuse.[70] Three days later, however, the Department of Social Services determined that there was insufficient evidence of abuse to keep him in the court's custody.[71] Nonetheless, over the course of the next year, Joshua continued to turn up at the emergency room with injuries that evidenced physical abuse.[72] Quite disturbingly, this abuse was occurring right under the nose of Social Services—the Department had reason to believe Joshua was being physically harmed by his father, yet it took no action.[73] After the final bout of beatings resulted in irreversible injuries, Joshua and his mother sued the Department of Social Services under § 1983, alleging that its failure to protect Joshua deprived him of liberty in violation of his due process rights secured by the Fourteenth Amendment.[74]

The Supreme Court categorically rejected this argument, holding instead that states have no affirmative duty to protect their citizens from

64. *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J. 1165, 1200 (2005).
65. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 Fla. L. Rev. 519, 523 (2008).
66. Oren, *supra* note 64, at 1200.
67. *See* Kernodle, *supra* note 61, at 169.
68. *See id.*
69. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 193 (1989).
70. *Id.* at 192.
71. *Id.*
72. *See id.* at 192–93.
73. *See id.* at 193.
74. *Id.* The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

harm inflicted by private actors.[75] Thus, Social Services' failure to protect Joshua against the harm administered by his father did not constitute a violation of Joshua's due process rights.[76] Underlying the Court's decision is the principle that due process is "a limitation on the State's power to act," not "a guarantee of certain minimal levels of safety and security."[77] Moreover, Justice Rehnquist's majority opinion highlighted that the Due Process Clause was intended to hinder the state from wielding its power in an abusive or oppressive manner.[78] These precepts accordingly led the majority to conclude that the state's failure to protect an individual from private violence does not result in a due process violation.[79] However, the majority opinion proceeded to suggest two caveats to the no-duty rule: the "special relationship" exception and the "state-created danger" exception.[80]

2. *The Special Relationship Exception*

The special relationship exception arises when the state acts to inhibit an "individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty."[81] The *DeShaney* Court provided that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[82] Notwithstanding this proposition, the Court contemplated that there may exist "a situation sufficiently analogous to" custody that could "give rise to an affirmative duty to protect."[83] Ultimately, it is the state's restraint upon an individual's liberty to act on his own behalf—a restraint that effectively strips the individual of capacity for self-protection—that creates the special relationship and triggers the duty to protect.[84] Where a special relationship exists, the state can be liable for its action *or* inaction.[85]

3. *The State-Created Danger Exception*

DeShaney implicitly recognized the state-created danger theory as an additional basis for imposing liability upon state actors for a failure to protect.[86] The following dicta laid the foundation for the exception, which

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75. *See DeShaney*, 489 U.S. at 195.
76. *See id.* at 202.
77. *Id.* at 195.
78. *Id.* at 196.
79. *Id.* at 197.
80. Oren, *supra* note 64, at 1166–67; *DeShaney*, 489 U.S. at 199–201.
81. *DeShaney*, 489 U.S. at 200.
82. *Id.* at 199–200.
83. *Id.* at 201 n.9.
84. *See id.* at 200; Kim, *supra* note 53, at 1120.
85. *See* Jeff Sanford, Note, *The Constitutional Hall Pass: Rethinking the Gap in § 1983 Liability that Public Schools Have Enjoyed Since* DeShaney, 91 WASH. U. L. REV. 1633, 1638 (2014).
86. *See DeShaney*, 489 U.S. at 201; Oren, *supra* note 64, at 1166–67.

subsequently took root in the federal circuits:

> While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them*. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all*.[87]

The state-created danger exception thus derived from the negative implication of the majority's reasoning.[88] In other words, if the Court justified a finding of no duty by providing that the state "played no part" in the creation of the danger, that implies the state has an affirmative duty to protect individuals from dangers it actually does create.[89] As such, the exception renders actionable as a due process violation the failure of state officials to protect individuals from dangers the officials themselves created.

III. THE CURRENT LANDSCAPE OF THE STATE-CREATED DANGER DOCTRINE

A. Lack of Uniformity Due to the Absence of Supreme Court Guidance

While the basic existence of the state-created danger doctrine owes itself to *DeShaney*, the substance of the doctrine was ultimately left to the imagination of the circuit courts.[90] Given that the Supreme Court has neglected to address the state-created danger theory and, as such, has never delineated its core attributes,[91] there exists no uniform "constitutional standard . . . for analyzing state-created danger claims under § 1983 jurisprudence."[92] The federal circuits have thus constructed their own formulations of state-created danger tests, with significant variation among the circuits regarding the requisite elements that comprise a state-created danger claim.[93] This lack of uniformity is not without consequence; it has resulted in inconsistent outcomes, unpredictability, and extensive confusion in the realm of state-created danger jurisprudence.[94]

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87. *DeShaney*, 489 U.S. at 201 (emphasis added).

88. Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 149 (1991).

89. *Id.*

90. *See* Warren Haskel, Comment, *An Unreliable Gatekeeper: The Shocks-the-Conscience Standard and Substantive Due Process*, 5 DARTMOUTH L.J. 200, 215 (2007).

91. Christopher M. Eisenhauer, Comment, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 PA. ST. L. REV. 893, 893 (2016); Veronica Zhang, Note, *Throwing the Defendant into the Snake Pit: Applying a State-Created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. REV. 2131, 2150 (2011).

92. Barrett, *supra* note 60, at 241.

93. *See* Zhang, *supra* note 91, at 2150.

94. Barrett, *supra* note 60, at 210–11; Eisenhauer, *supra* note 91, at 920 (providing that the state-created danger doctrine is "[c]louded, enormously complicated, [and] endlessly circular").

Not all federal circuits have recognized the state-created danger doctrine as a basis for § 1983 liability—the Fifth Circuit has repeatedly refused to do so.[95] However, every other federal circuit has adopted the doctrine in some fashion.[96] There are three underlying attributes of *any* state-created danger claim: an intrusion upon a person's liberty, a state actor who created or increased the danger that ultimately inflicted the loss of liberty, and the requisite degree of culpability on the part of the state actor.[97] It should be noted that the first attribute generally does not pose an issue in state-created danger cases because the underlying harms are usually serious, "typically involv[ing] loss of life or bodily integrity."[98] However, the second and third components prove to be "critical" in such cases, as the state actor's culpability in creating the danger is often outcome determinative.[99]

B. Construction of the Doctrine by the Federal Circuits

As emphasized above, the federal circuits use vastly different tests to discern liability for state-created dangers under due process and § 1983. The sundry elements employed in the circuits' varying tests generate confusion about what is required to establish liability. For example, some circuits require that a *specific* plaintiff be placed at risk of danger as opposed to the public at large, while others impose no such requirement.[100] Further, the Fourth Circuit merges the special relationship and state-created danger exceptions, requiring a custodial context before any affirmative duty to protect is triggered.[101] Thus, in the Fourth Circuit, a state-created danger claim is of no use standing alone—the existence of a special relationship must be established in order for a state-created danger claim to be pressed.[102]

Despite these inconsistencies, there are certain commonalities that a majority of the circuits adhere to in their state-created danger analyses.

95. *See* Est. of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 1002 (5th Cir. 2014).

96. *See* Irish v. Fowler, 979 F.3d 65, 74 (1st Cir. 2020); Dwares v. City of New York, 985 F.2d 94, 101 (2d Cir. 1993); Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1182 (4th Cir. 1995); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066–67 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 56 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); Uhlrig v. Harder, 64 F.3d 567, 576–577 (10th Cir. 1995); Cornelius v. Town of Highland Lake, 880 F.2d 348, 359 (11th Cir. 1989); Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001).

97. *See* Oren, *supra* note 64, at 1174.

98. *Id.*

99. *See id.* at 1174, 1200.

100. *Compare Kallstrom*, 136 F.3d at 1066 (requiring that the "state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large"), *with 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.").

101. *See Pinder*, 54 F.3d at 1175; Dale Margolin Cecka, *It's Time for the Fourth Circuit to Rethink* DeShaney, 67 S.C. L. Rev. 679, 689 (2016).

102. Cecka, *supra* note 101, at 689; Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1, 15 (2007).

Specifically, most circuits tend to consider the following elements: (1) whether the state acted affirmatively or simply failed to act; (2) whether the state created or increased the risk of harm; (3) whether the harm was foreseeable; and (4) whether the state acted with a degree of culpability that shocks the conscience.

1. Affirmative Act: Act vs. Omission

Underlying the state-created danger exception to *DeShaney*'s no-duty rule is the demarcation between passivity and affirmative action.[103] Most federal circuits that recognize the exception require an affirmative act as opposed to passive conduct or failure to act.[104] Thus, if "the putative line between action and inaction" has not been crossed, then liability will generally not ensue.[105] However, the distinction between an act and an omission can be rather nebulous—at some point in the underlying story of almost any case, the state will have acted affirmatively in some manner.[106] As such, the line between action and inaction is often "in the eyes of the beholder."[107] The Seventh Circuit, in a decision preceding *DeShaney*, illuminated the issue through the well-recognized "snake pit" analogy:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.[108]

2. Causation: Created or Increased the Risk of Harm

All federal circuits require that causation be established in making a state-created danger claim.[109] Typically, this element is readily met, for it need only be shown that the state's actions were the but-for cause of the plaintiff's peril; that is, the acts of a state official must have placed the plaintiff in a position of danger that she would not otherwise have occu-

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103. *See* Laura Oren, *Some Thoughts on the State-Created Danger Doctrine:* DeShaney *is Still Wrong and* Castle Rock *is More of the Same*, 16 TEMP. POL. & C.R. L. REV. 47, 53 (2006).

104. *See* Sanford, *supra* note 85, at 1640.

105. Oren, *supra* note 64, at 1168.

106. *See* Kernodle, *supra* note 61, at 180; *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2281 (1990) ("[W]hether a defendant has 'acted' in the eyes of the law depends largely on how far back in the chain of events the court is willing to look.").

107. Oren, *supra* note 103, at 53; *see also* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 206 (1989) (Brennan, J., dissenting) ("Unlike the Court, . . . I am unable to see . . . a neat and decisive divide between action and inaction.").

108. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

109. *See* Kernodle, *supra* note 61, at 182; *e.g.*, Irish v. Fowler, 979 F.3d 65, 74 (1st Cir. 2020) ("The plaintiff . . . must show a causal connection between the defendant's acts and the harm.").

pied in the absence of the state conduct.[110] This requirement accords with *DeShaney*'s mandate that the state put the individual in a worse position than the one in which she would have been had the state not acted at all.[111] Thus, if a state actor creates the danger that ultimately results in harm to an individual or otherwise increases an individual's vulnerability to that danger, the state actor is the but-for cause of the ensuing harm, and the causation element is thereby satisfied.[112]

3. Foreseeable Harm

A plaintiff bringing a state-created danger claim generally must demonstrate that the harm inflicted was foreseeable, which effectively imposes some degree of a proximate causation requirement.[113] This element is best explained through illustration. In *Kneipp v. Tedder*, the Third Circuit found that injuries sustained by the victim, Samantha, were foreseeable in light of her visibly intoxicated state.[114] Police officers had stopped Samantha and her husband after she was seen leaning on a police car because she was unable to stand on her own.[115] The officers permitted her husband to leave, as their son's babysitter was waiting at their home.[116] While he assumed that the officers would take care of Samantha given her inebriated state, they did the opposite; the officers sent Samantha home unescorted in freezing temperatures, resulting in her permanent brain damage due to hypothermia.[117] The court ultimately concluded that "the harm likely to befall Samantha if separated from [her husband] while in a highly intoxicated state in cold weather was indeed foreseeable."[118]

By contrast, in *Morse v. Lower Merion School District*, the Third Circuit held that school officials could not have foreseen that, by leaving the backdoor to the school building unlocked, a mentally unstable individual would enter and murder a teacher.[119] The court placed great emphasis on the randomness of the attack and on the fact that the school was unaware that a mentally ill individual was waiting outside the building for an opportunity to inflict harm.[120] A comparison of these two cases demonstrates that foreseeability of harm is a fact-sensitive determination, ultimately hinging on the circumstances of each case and the state actor's

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110. Zhang, *supra* note 91, at 2154; Kernodle, *supra* note 61, at 183.
111. *See DeShaney*, 489 U.S. at 201.
112. *See, e.g.*, Kaucher v. County of Bucks, 455 F.3d 418, 432 (3d Cir. 2006).
113. *See, e.g.*, Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (noting that the "harm ultimately caused [must be] foreseeable"); King *ex rel.* King v. E. St. Louis Sch. Dist. 189, 496 F.3d 812, 818 (7th Cir. 2007) ("[T]he failure on the part of the state to protect an individual from a [state-created] danger must be the proximate cause of the injury . . . .").
114. *See Kneipp*, 95 F.3d at 1208–09.
115. *See id.* at 1201.
116. *Id.* at 1202.
117. *Id.* at 1202–03.
118. *Id.* at 1208.
119. *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908–10 (3d Cir. 1997).
120. *See id.* at 908–11.

knowledge or awareness of the risk of harm, perhaps in light of their experience or training.[121]

4. Culpability: The "Shocks the Conscience" Standard

Of fundamental importance in every state-created danger case is the state of mind element, as plaintiffs must always show that the official acted with the requisite degree of culpability.[122] It is well established that negligence is insufficient to give rise to a due process violation;[123] as such, the requisite mental state for state-created danger liability is lacking where the actor's conduct was merely negligent.[124] But this raises the following question: given that the state-created danger theory depends upon a due process deprivation, what degree of culpability is necessary to find a violation of the Due Process Clause? The Supreme Court addressed this question in *County of Sacramento v. Lewis*, asserting at the outset of its opinion that only government conduct that "shocks the conscience" is actionable as a due process violation.[125]

That is not the end of the matter, however, for the *Lewis* Court observed that behavior deemed conscience-shocking in one context may not shock the conscience in another.[126] More specifically, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."[127] The Court reasoned that deliberate indifference presupposes the opportunity for "unhurried judgments, . . . repeated reflection," and "actual deliberation."[128] In contexts where such opportunities are available, deliberate indifference may shock the conscience.[129] State officials act with deliberate indifference when they know of a substantial risk of serious harm and consciously disregards that risk.[130] But even without actual knowledge of a risk of harm, deliberate indifference may exist where knowledge can be inferred from the obvious—where the risk of harm is so obvious that it *should* be known.[131]

The converse of situations in which deliberation is feasible includes situations that do not allow for such forethought: prison riots, high-speed

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121. *See* Chris W. Pehrson, Bright v. Westmoreland County*: Putting the Kibosh on State-Created Danger Claims Alleging State Actor Inaction*, 52 VILL. L. REV. 1043, 1058 (2007); *e.g.*, L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 245 (3d Cir. 2016) ("[I]t was foreseeable that releasing a young child to a stranger could result in harm to the child. This inherent risk is not only a matter of experience as a teacher in charge of a kindergarten classroom, but . . . also a matter of common sense.").

122. *See* Oren, *supra* note 103, at 54.

123. Daniels v. Williams, 474 U.S. 327, 328 (1986).

124. Chemerinsky, *supra* note 102, at 11.

125. County of Sacramento v. Lewis *ex rel.* Lewis, 523 U.S. 833, 846–47 (1998).

126. *See id.* at 850–52.

127. *Id.* at 850.

128. *Id.* at 851, 853.

129. *See id.* at 851–53; Rosalie Berger Levinson, *Wherefore Art Though* Romeo*: Revitalizing* Youngberg*'s Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 560 (2013). Pursuant to this reasoning, the Court noted that deliberate indifference is generally the appropriate standard in custodial settings. *See Lewis*, 523 U.S. at 851.

130. Farmer v. Brennan, 511 U.S. 825, 843, 847 (1994).

131. *See id.* at 842–43; L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 246 (3d Cir. 2016).

police chases, and the like. Where state actors are confronted with scenarios that necessitate fast action and split-second decisions under intense pressure, deliberate indifference cannot be said to meet the shocks-the-conscience standard—a heightened degree of culpability is required.[132] Thus, in these emergency-like situations, officials must *intend* to effectuate harm for their conduct to be regarded as conscience-shocking.[133] In light of the above guidelines laid out in *Lewis*, it is clear that the culpability element of the state-created danger exception requires—at its core—a plaintiff to prove that the state official acted with a degree of culpability that shocks the conscience.

IV. THE CIRCUIT SPLIT: APPLICABILITY OF THE STATE-CREATED DANGER EXCEPTION TO SUICIDES

A. The Tenth Circuit

In a seminal state-created danger case, the Tenth Circuit "effectively but unremarkably extended application of the state-created danger theory to instances of suicide."[134] The case of *Armijo v. Wagon Mound Public Schools* involved a special education student, Philadelfio Armijo, who was suspended from school and driven home in the middle of the day without parental notification.[135] Armijo's suspension was ordered by the school principal, Mary Schutz, after Armijo threatened to harm a teacher.[136] Thereafter, Tom Herrera, the school counselor, drove Armijo home at the instruction of Schutz, yet neither Schutz nor Herrera attempted to contact Armijo's parents regarding his suspension.[137] Upon arriving home later that day, Armijo's parents found him lying dead from a self-inflicted gunshot wound to the chest.[138]

Armijo's parents brought a § 1983 action against the aforementioned school officials, alleging a violation of their son's substantive due process rights under a state-created danger theory of liability.[139] Considering the facts of the case, the court upheld the state-created danger claim's survival of summary judgment.[140] For one, because Armijo had explicitly threatened suicide to school officials in the past, the defendants possessed "knowledge that might support an inference that Armijo was suicidal."[141] What's more, Herrera and other school officials knew that Armijo had

132. *Lewis*, 523 U.S. at 852–53.
133. *See id.* at 854.
134. Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 918 (10th Cir. 2012) (citing Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1264 (10th Cir. 1998)).
135. *Armijo*, 159 F.3d at 1256–57.
136. *Id.*
137. *Id.* at 1257. Armijo's suspension contravened school disciplinary policy, which required that a student who received out-of-school suspension be placed on in-school suspension if his or her parents were not home. *Id.*
138. *Id.*
139. *Id.* at 1257–58.
140. *Id.* at 1264.
141. *Id.*

access to firearms at his home.[142] Thus, by suspending Armijo from school, thereby causing him to become distressed and angry, and subsequently driving him to his house where he was left alone with access to firearms, the defendants created the danger of suicide to Armijo.[143]

In explaining that the state-created danger doctrine is "a means by which state actors may be held constitutionally liable for acts of *private violence*," the Tenth Circuit recently reiterated that third-party violence is not required.[144] In other words, third-party violence is not "a precondition to invoking the state-created danger theory, but rather only private violence."[145] And, said the court, suicide is "undeniably another form of private violence."[146] Therefore, the application of the state-created danger doctrine in the Tenth Circuit is adequately triggered by suicide—a wholly self-inflicted harm.[147]

B. The Sixth Circuit

In stark contrast to the Tenth Circuit's approach stands that of the Sixth Circuit, which outright rejects the applicability of the state-created danger exception to any instance of suicide. The Sixth Circuit has indeed *contemplated* suicide liability "in the context of the state-created danger doctrine," but recently reaffirmed "that [its] cases have treated suicide differently."[148] As such, the exception is "not yet" applicable in the Sixth Circuit to "instances of suicide by someone not in official custody."[149] In *Cutlip v. City of Toledo*, the Sixth Circuit articulated a rationale for its staunch position on the matter.[150] Noting that suicide "does not fit neatly into the state-created-danger doctrine," the court explained that it is "uniquely difficult to assign constitutional liability" to a state actor where "the non-custodial victim harms himself."[151]

In effectively assigning fault for the risk of suicide to the decedent alone, the court stated that "where a person makes a free and affirmative choice to end his life, the responsibility for his actions remains with him."[152] And the fact that the state actively created or enhanced the risk of suicide is immaterial: "That a state official somehow contributed to a person's decision to commit suicide does not transform the victim into the state's agent of his own destruction."[153] Hence, when officials falling within the jurisdiction of the Sixth Circuit create or augment the danger of suicide, liability will not attach—officials are shielded from state-cre-

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142. *Id.* at 1256, 1264.
143. *See id.* at 1264.
144. Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 917, 918 n.6 (10th Cir. 2012).
145. *Id.* at 918 n.6.
146. *Id.* at 918.
147. *See id.* at 928 n.16.
148. Wilson *ex rel.* Huelsman v. Gregory, 3 F.4th 844, 859 (6th Cir. 2021).
149. *Id.*
150. Cutlip v. City of Toledo, 488 F. App'x 107, 115–16 (6th Cir. 2012).
151. *Id.*
152. *Id.* at 116.
153. *Id.*

ated danger liability merely by reason of the fact that the ensuing harm was self-inflicted.

C. The First, Third, Seventh, and Eleventh Circuits

The contrasting positions taken by the Tenth and Sixth Circuits represent polar ends of the spectrum—no other federal circuit takes such an explicit stance on the state-created danger exception's applicability to suicides. Nevertheless, many circuit courts (and district courts) have evaluated the aptness of state-created danger liability for suicides that have occurred in various contexts.[154] In *Hasenfus v. LaJeunesse*, the First Circuit considered the application of the state-created danger doctrine to the suicide attempt of a fourteen-year-old girl, Jamie, who tried to hang herself in the locker room of her middle school.[155] The incident took place after Jamie was reprimanded by her teacher in front of her classmates and ordered to return to the locker room.[156] While the court seemed to recognize that by publicly reprimanding Jamie and sending her to the locker room alone, the teacher acted in the affirmative, the court ultimately found no liability because the teacher's conduct did not shock the conscience and the teacher had no knowledge that could lead him to infer that Jamie was suicidal.[157] The First Circuit then concluded that "[i]f sound, the Tenth Circuit decision [in *Armijo*] is at the outer limit" of state-created danger cases, but that it "does not come close to embracing [the teacher's] actions" in *Hasenfus*.[158]

The First Circuit had another chance to consider the exception in *Coscia v. Town of Pembroke*, a case involving a twenty-one-year-old boy who committed suicide fourteen hours after his release from the temporary custody of a police station.[159] Again, the court declined to impose liability, reasoning that there existed no evidence demonstrating "that the treatment by the police gave rise to a suicidal inclination on the decedent's part" or that "his self-destructive tendency was intensified by state action."[160] Nonetheless, the court's rationale seems to indicate that the state-created danger doctrine could apply where state action creates or intensifies the risk of suicide committed "by a prior detainee after release from custody," such that the state's conduct rendered the individual more suicidal after release than he or she was before detainment.[161]

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154. *See, e.g.*, Hasenfus v. LaJeunesse, 175 F.3d 68, 73–74 (1st Cir. 1999) (school); Coscia *ex rel.* Coscia v. Town of Pembroke, 659 F.3d 37, 39–41 (1st Cir. 2011) (post-detention); Deemer v. County of Chester, No. 03–6536, 2004 WL 1175696, at *3–4 (E.D. Pa. May 27, 2004) (holding cell of police station); Sloane *ex rel.* Sloane v. Kanawha Cnty. Sheriff Dep't, 342 F. Supp. 2d 545, 551–53 (S.D. W. Va. 2004) (police interrogation of adolescent).

155. *See Hasenfus*, 175 F.3d at 69–70.

156. *Id.*

157. *Id.* at 73.

158. *Id.* at 74.

159. *Coscia*, 659 F.3d at 38. The decedent was suicidal upon arrival at the police station—he continually uttered suicide threats and was engaging in self-destructive behavior (e.g., licking electrical outlets). *Id.*

160. *Id.* at 40.

161. *See id.* at 41.

The Third Circuit recently appeared to contemplate—without any hesitation—the applicability of the state-created danger doctrine to an instance of suicide following a knock-and-announce.[162] *Haberle v. Troxell* involved a police officer who learned that a man named Timothy Nixon had stolen a firearm and was planning to commit suicide.[163] The officer went to the apartment where Nixon was located and, rejecting the other officers' suggestions, knocked and announced his presence instead of waiting for trained crisis support professionals to arrive.[164] Nixon then immediately shot and killed himself.[165] Although the court declined to impose liability upon the officer, its decision was based on a finding that the culpability element was lacking—the officer's conduct was not deemed conscience-shocking.[166]

Finally, the Seventh and Eleventh Circuits have evaluated state-created danger claims against school officials based on student suicides. In *Martin v. Shawano-Gresham School District*, the Seventh Circuit held that the school did not have a duty to protect a thirteen-year-old student who committed suicide after school hours because school officials did not create or increase the risk that the student would commit suicide "by suspending her and then allowing her to return home at the end of the school day."[167] This was the case even though the suspension caused the student to become severely emotionally distressed.[168] However, the court failed to offer any explanation as to its conclusion; while it may be true that the school did not create or increase the risk of suicide, the court neglected to articulate *why* this is so.[169]

In a similar case, the Eleventh Circuit rejected the imposition of state-created danger liability upon school officials for a student's suicide where no affirmative action was taken by those officials.[170] However, the court noted that if the school *had* affirmatively acted to prevent the student's mother or anyone else from helping the student, "perhaps [its] analysis would have been different."[171] The Eleventh Circuit thereby left open the possibility that, with the proper set of facts, suicide could give rise to liability under the state-created danger doctrine.

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162. *See* Haberle v. Troxell, 885 F.3d 170, 176–78 (3d Cir. 2018).
163. *Id.* at 174.
164. *Id.*
165. *Id.*
166. *Id.* at 178 ("[T]he fact that Troxell chose to immediately knock while other officers counseled waiting manifests only a disagreement over how to manage a risk, not a disregard of it.").
167. Martin *ex rel.* Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 712 (7th Cir. 2002).
168. *Id.* at 710.
169. *See id.* at 710, 712.
170. *See* Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 570 (11th Cir. 1997).
171. *Id.* at 570.

V. THE STATE-CREATED DANGER OF SUICIDE

By rendering the state-created danger doctrine applicable to suicides, the Tenth Circuit undoubtedly takes the correct approach, for there exists no tenable rationale for precluding the harm of suicide from the exception's reach. Where courts decline to impose state-created danger liability upon state actors for a decedent's suicide, several recurrent concerns and issues underlie their decisions: the perceived absence of affirmative acts, the (un)foreseeability of suicide, the lack of culpability on the part of the state actor, and the mere fact that suicide is involved. As explained below, however, these points of apprehension are largely unjustified.

Moreover, it is apparent that courts have largely ignored the central purposes of § 1983 in construing state-created danger claims—to *liberally* grant remedies for violations of constitutional rights and to function as a deterrence mechanism against future governmental abuses of power.[172] Rather, most courts have taken action that is antithetical to the aim of § 1983 "by rejecting or severely limiting" the state-created danger doctrine.[173] Because due process guarantees serve as integral constraints upon government power, it is troubling that courts so often restrict state-created danger claims and thereby permit officials to evade liability for violating individuals' due process rights.[174] In order to adequately preserve constitutional rights, it is critical that courts broadly recognize due process claims, specifically those rooted in a state-created danger theory; for where liability is a legitimate threat, "[a]rbitrary deprivations of liberty . . . are less likely to occur."[175]

A. The Problematic Nature of the Action/Inaction Distinction

In virtually all state-created danger cases, courts are resolute and unduly stringent with respect to the affirmative act requirement. This requirement, however, is inherently problematic in a number of ways. For one, it conditions liability wholly upon "the tenuous metaphysical construct which differentiates sins of omission and commission."[176] To afford outcome-determinative weight to an illusory distinction that is merely one of perspective seems illogical.[177] Moreover, by clinging to the action versus inaction divide, courts inevitably create perverse incentives.[178] Namely, because the risk of liability hinges upon the occurrence of an affirmative act, state officials are incentivized to forego action[179]—to refrain from preventing a suicide, saving a life, helping an abused child, or interfering with the occurrence of bullying.

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172. *See* Owen v. City of Independence, 445 U.S. 622, 651–54 (1980).
173. Levinson, *supra* note 65, at 536.
174. *See id.* at 524, 587.
175. *Id.* at 524.
176. White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979).
177. *See id.*; *see also* Zhang, *supra* note 91, at 2153.
178. *See* Eaton & Wells, *supra* note 88, at 131–32.
179. *See id.*

Crucially, in strictly construing the affirmative act requirement, courts thereby disregard the key fact that § 1983 was enacted with the very aim of addressing government *inaction*.[180] Moreover, courts' insistence upon an affirmative act as a precondition to liability is rooted in the erroneous idea that only government action can precipitate an abuse of power.[181] However, as Justice Brennan stated in his *DeShaney* dissent, "inaction can be every bit as abusive of power as action."[182] Yet courts habitually fail to grasp that state actors "can harm by [their] ostensible omissions, as seriously as, and often more efficiently than, by [their] direct, tangible actions."[183] Instead, courts rely upon fallacious logic in order to maintain the harsh action/inaction distinction:

> Consider the proposition that government inaction is not actionable because it is not an abuse of power. This conclusory proposition begs the question of why inaction is not an abuse of power. If government can do harm to constitutional values through its inaction, insulating the inaction from judicial scrutiny has no apparent justification.[184]

The Second Circuit takes a noteworthy approach to the affirmative act requirement, disregarding the mistaken logic that other circuits hastily rely upon. Specifically, it recognizes instances in which conduct may be deemed "affirmative," even without perceptible action.[185] Where the behavior of state actors *implicitly* condones private violence, that behavior may rise to the requisite level of affirmative action for purposes of state-created danger liability.[186] Importantly, the approval of private misconduct need not be communicated explicitly; it is enough that state actors provide *implicit* encouragement or permission by partaking in misconduct themselves *or merely by allowing it to continue*.[187] As succinctly stated by the Second Circuit, it is often the case that "deliberate silence is equivalent to explicit permission," and in such instances, silence may plausibly satisfy the affirmative act element.[188]

More recently, a handful of lower courts have tacitly acknowledged that *inaction* by state officials can constitute an abuse of power giving rise to a claim for suicide liability under the state-created danger doctrine. For example, in 2017, a district court found a valid state-created danger claim where school officials had knowledge of severe and pervasive bullying experienced by a fifteen-year-old student, yet neglected to address the

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180. *See supra* notes 58–59 and accompanying text.

181. *See* Bandes, *supra* note 106, at 2293.

182. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Brennan, J., dissenting).

183. Bandes, *supra* note 106, at 2284.

184. *Id.* at 2285.

185. *See* Okin v. Vill. of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 428–30 (2d Cir. 2009).

186. *See id.* at 429; Pena v. DePrisco, 432 F.3d 98, 111–12 (2d Cir. 2005).

187. *Pena*, 432 F.3d at 110–12, 110 n.15.

188. *Id.* at 112.

bullying, ultimately resulting in the student's suicide.[189] Not only were school officials aware that the student had previously attempted suicide as a result of being bullied, but other students had also killed themselves due to bullying in the years prior.[190] Accordingly, the court concluded that the school officials' conduct increased the risk that the student would commit suicide "in that their *failure* to act on reports of bullying and creation of a culture in which bullying was accepted escalated the bullying, and caused victims to feel hopeless."[191]

Similarly, in finding that a state-created danger claim was adequately made out against school officials for increasing the risk of a student's suicide, one court emphasized that a failure by officials "to enforce rules against bullying . . . gave students license to act with impunity."[192] As such, the court held that, where inaction on the part of school officials "enable[es] a pattern of . . . abuse to persist," effectively "embolden[ing]" students to continue bullying, liability may ensue for resulting harm.[193] In other words, when bullying proceeds unbridled through the halls of a school, school officials may not then evade state-created danger liability by "tak[ing] shelter under the label 'inaction.'"[194]

These decisions are undoubtedly correct, for they recognize that oftentimes "[c]onscious non-motion is a greater assertion of personality than casual acting."[195] While the decisions represent positive change in the law with respect to bullying and suicide prevention, they are the exception, not the rule. Few other courts have been willing to extend the scope of the affirmative act requirement to reach nearly identical instances of misconduct by state actors. As a result, the law is practically devoid of any incentive to intervene—school officials may turn a blind eye to rampant bullying, effectively forcing students to weather such abuse without facing any legal repercussions for doing so.[196]

However, if the student suicide crisis is ever to wane, legal incentives must comport with "the realities of schooling and the seriousness of" the bullying and suicide problem among students.[197] When students arrive at school each morning, they are divested of parental protection—students must necessarily rely upon school employees for their security during

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189. Lewis v. Blue Springs Sch. Dist., No. 17–cv–00538, 2017 WL 5011893, at *1, *10 (W.D. Mo. Nov. 2, 2017).

190. *Id.* at *10.

191. *Id.* (emphasis added). Specifically, the court noted that by ignoring claims of persistent harassment, school officials created an environment that enabled and actually encouraged the bullying to continue. *See id.* at *2.

192. Est. of Olsen v. Fairfield City Sch. Dist. Bd. of Educ., 341 F. Supp. 3d 793, 803 (S.D. Ohio 2018) (quoting Shively v. Green Loc. Sch. Dist. Bd. of Educ., 579 F. App'x 348, 356 (6th Cir. 2014)).

193. *Id.* (quoting *Shively*, 579 F. App'x at 356).

194. *See* Morrow v. Balaski, 719 F.3d 160, 196 (3d Cir. 2013) (Fuentes, J., dissenting).

195. Bandes, *supra* note 106, at 2280 (quoting George Fletcher, Rethinking Criminal Law § 6.4.1, at 421 (1978)).

196. Weddle, *supra* note 26, at 643.

197. *Id.* at 644.

school hours.[198] Hence, both students and parents may stand in a position of powerlessness, with the school often being "the only entity able to intervene effectively to stop the bullying and remedy its effects."[199] Thus, it is fundamentally important that school officials face the prospect of liability for creating a dangerous school environment through their action *or inaction*, as such a threat crucially incentivizes officials to address bullying in their schools.[200] In accordance with the positions of the Second Circuit and these district courts, where the conduct of school officials *implicitly* communicates—whether through deliberate silence or otherwise—that bullies may continue in their harassment with impunity, such conduct should thereby satisfy the affirmative act element.

While the preceding district court cases depict inaction by state officials in the school context, the overarching principles drawn therefrom are seemingly applicable to similar forms of inaction in other settings as well. As the cases illustrate, however, in no way does the action versus inaction line precisely segregate abuses of power from non-abuses of power, for the line itself is largely fictitious. Therefore, each circuit ought to take an approach that mirrors the Second Circuit's and refrain from placing such heavy reliance upon whether something constitutes an "act" or an "omission." When the relevance of the distinction is minimized, state actors would simply no longer be capable of eluding liability for creating or enhancing the danger of suicide, regardless of whether such danger is perceived as a product of action or inaction.

B. The Foreseeability of Suicide

The law has traditionally barred liability for causing or increasing the risk of suicide by taking the position that suicide is an unforeseeable act, and therefore a superseding cause of death.[201] Courts have tended to conceptualize suicide as an "impulsive" act, thereby implying that the decedent merely "snapped," was unable to control him or herself, or made the decision "on a whim."[202] Yet this approach to suicide flouts modern psychiatry. Recent studies indicate that most suicides are preceded by extensive planning, such that they are in fact foreseeable under many circumstances.[203] Indeed, current research demonstrates that "impulsive suicides . . . are vanishingly rare," for the decision to take one's own life is seldom made in the spur of the moment.[204] To the contrary, individuals must harbor the *desire* and the *capability* to take their own lives, both of

198. *See id.* at 670; Kim, *supra* note 53, at 1130.

199. Weddle, *supra* note 26, at 651.

200. *See id.* at 699; Kim, *supra* note 53, at 1137.

201. *See* Long, *supra* note 27, at 783–84; Schlinsog, *supra* note 41, at 471.

202. April R. Smith, Tracy K. Witte, Nadia E. Teale, Sarah L. King, Ted W. Bender & Thomas E. Joiner, *Revisiting Impulsivity in Suicide: Implications for Civil Liability of Third Parties*, 26 Behav. Scis. & L. 779, 779 (2008); Long, *supra* note 27, at 811.

203. *See* Smith et al., *supra* note 202, at 779.

204. *Id.* at 782.

which arise over an extended period of time.[205] The desire to commit suicide "stems from a thwarted sense of belongingness and the feeling of being a burden on others,"[206] and the capability to inflict lethal self-harm is acquired through "exposure to repeated painful and provocative experiences."[207] Only when desire and capability intersect can suicide occur.[208]

The notion that oftentimes suicide *is in fact* a foreseeable consequence of third-party misconduct can—and should—have important implications for liability under the state-created danger doctrine.[209] But in order for the legal consequences of foreseeability to come to fruition, it is essential that courts abandon the discredited view that decedents' own impulses represent the sole cause of their death; courts must align legal rules with scientific understandings of suicidal behavior. Accordingly, where state actors create or enhance the risk that an individual will commit suicide, and suicide is a foreseeable harm under the circumstances, courts should not exhibit reluctance to impose liability for the resulting suicide.

The determination as to whether suicide was a foreseeable consequence of state conduct will ultimately be a highly contextual one. When an individual is at risk for suicide and a state official knows or should know of that risk, courts should be more inclined to deem the suicide as foreseeable. As a past suicide attempt represents the greatest risk factor for eventual death by suicide,[210] awareness of the decedent's prior attempt(s) should generally be enough to result in a finding of foreseeability.[211] So, too, should courts recognize that suicide is normally a foreseeable result of bullying: "If a school *is aware* of a student being bullied but does nothing to prevent the bullying, it is reasonably foreseeable that the victim of the bullying might resort to self-harm, even suicide."[212] Additionally, mental illness poses a risk factor for suicide;[213] while knowledge of mental illness alone may be insufficient to render a suicide foreseeable, when it is coupled with other factors, foreseeability may plausibly be deduced in appropriate circumstances.[214] In essence,

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205. Tracy K. Witte et al., *"Impulsive" Youth Suicide Attempters Are Not Necessarily All That Impulsive*, 107 J. AFFECTIVE DISORDERS 107, 108 (2008).

206. *Id.*

207. *Id.* at 113.

208. *See id.* at 108.

209. *See* Smith et al., *supra* note 202, at 786–90.

210. Poland & Ferguson, *supra* note 20, at 2.

211. *See supra* notes 139–143 and accompanying text; *see also* Moore v. Hamilton Se. Sch. Dist., No. 1:11–cv–01548–SEB–DML, 2013 WL 4607228, at *10 (S.D. Ind. Aug. 29, 2013) ("[A] school need not possess a 'crystal ball' to understand that a student who has already attempted suicide once may do so again . . . .").

212. Tumminello v. Father Ryan High Sch., Inc., 678 F. App'x 281, 288 (6th Cir. 2017).

213. Smith et al., *supra* note 202, at 790.

214. *See, e.g.*, Est. of Henderson v. City of Philadelphia, No. CIV. A. 98–3861, 1999 WL 482305, at *7 (E.D. Pa. July 12, 1999). In light of a man's known mental illness and the facts of the case—the officers witnessed the man tell his mother that he did not want to go to the hospital, allowed the man to go upstairs alone, were warned that the man may jump out of a window, and did nothing to control the man's actions for three to four minutes following the warning—it was foreseeable that he would jump out of a window to avoid undesired hospitalization.

while a court's foreseeability determination will ultimately be contingent upon the particular circumstances surrounding any given suicide, modern psychology implores courts to take into account what research reveals to be true—that a great deal of suicides are in fact foreseeable, with impulsive suicides being few and far between.

C. The Culpability Inquiry: Focus Must Remain on the Official's State of Mind and Cannot Shift to that of the Suicidal Decedent

Where the harm accompanying state-created danger claims is that of suicide, it is critical that courts not lose sight of the correct individual's state of mind upon which focus must remain. In other words, the tendency—perhaps unconscious—of courts to exert notions of blame and culpability upon a suicidal decedent cannot thereby taint the proper culpability inquiry. It is the state actor whose culpability must necessarily be evaluated, not that of the victim. And the court's focus cannot shift merely because the victim succumbed to suicide. Thus, where the deliberate indifference of state actors to an individual's known or obvious risk of suicide shocks the conscience, courts should not hesitate to impose liability under § 1983 where the other elements of a state-created danger claim have been met.

The apparent gravity of a suicide risk is important in discerning whether a state actor displayed deliberate indifference to that risk. A variety of factors may enhance the gravity of such a risk: clear and *seemingly legitimate* warnings or indications of an individual's suicidal desires,[215] imminence of a possible suicide,[216] and outward manifestations of mental distress,[217] to name a few. For example, where one student threatened to kill himself in a note, yet "no one"—including the student's ex-girlfriend, mother, or uncle—believed the student was *legitimately* at risk of self-harm, the gravity of that risk was minimal; as such, the school counselor's actions in failing to call the student's mother about the suicide note did not display deliberate indifference.[218] On the other hand, where school officials are aware that a student who previously attempted suicide is being bullied, the risk of another suicide attempt by that student is arguably quite substantial.[219] If the officials then fail to address the bullying, a strong argument exists that they acted with deliberate indifference to the student's considerable risk of suicide.[220]

In the context of incarceration, an official's deliberate indifference to an inmate's risk of suicide may be conspicuous. For instance, where of-

215. *Cf.* Sanford v. Stiles, 456 F.3d 298, 311 (3d Cir. 2006).
216. *See, e.g.*, *Est. of Henderson*, 1999 WL 482305, at *9.
217. *See, e.g.*, Est. of Rhoad v. E. Vincent Twp., No. 05–5875, 2006 WL 1071573, at *6 (E.D. Pa. Apr. 18, 2006).
218. *Sanford*, 456 F.3d at 311.
219. *See* Lewis v. Blue Springs Sch. Dist., No. 17–cv–00538, 2017 WL 5011893, at *10 (W.D. Mo. Nov. 2, 2017).
220. *See id.*

ficers placed a pretrial detainee known to be a significant suicide risk in a cell with tie-off points, gave him a blanket, and failed to monitor the detainee, the Fifth Circuit readily concluded that the officers displayed deliberate indifference to the detainee's risk of suicide.[221] The court placed great emphasis on the following factors: the officers were taught to refrain from giving blankets to suicidal inmates, had observed media reports of inmate deaths due to hanging, and knew that suicide by bedding hanging was the leading cause and manner of death in Texas jails.[222]

D. The Fact of Suicide Improperly Tends to Limit the Imposition of Liability

The very fact that suicide is involved in a case often muddles the legal analysis and tends to restrict the imposition of liability.[223] Given that the "topic of suicide produces considerable uneasiness in most people,"[224] perhaps it is unsurprising that many courts display reluctance to the idea of holding third parties responsible for causing another person's suicide.[225] However, there exists a concern in suicide cases that courts may be employing antiquated moral judgments in reaching their decisions, and doing so "under the guise of proximate cause."[226] But the historical notion that individuals who commit suicide are culpable wrongdoers, and thus solely responsible for their own deaths, has been discredited by modern psychology.[227] When courts nonetheless invoke this outdated idea, they not only preserve stigmatizing rhetoric, but also allow the truly culpable individual to evade liability for causing a grave harm.

Several state-created danger cases exhibit problematic ideas and language that should be but a historical relic. For example, one court stated that "[b]ecause [the decedent] ultimately caused her own death," none of the affirmative acts by the officers were "sufficient to trigger the [state-created danger] exception."[228] Similarly, per another court: "[T]here [was] no factual dispute as to the cause of Decedent's death. Decedent took his own life . . . ."[229] And perhaps most insensitive is the following statement by the Sixth Circuit: "[W]here a person makes a *free* and *affirmative choice* to end his life, the responsibility for his actions remains with him."[230]

221. Converse v. City of Kemah, 961 F.3d 771, 776–81 (5th Cir. 2020).
222. *Id.* at 777–78.
223. *See* Long, *supra* note 27, at 782, 792.
224. Victor E. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 Vand. L. Rev. 217, 217 (1971).
225. *See* Long, *supra* note 27, at 771.
226. *Id.* at 808–10; *see also supra* text accompanying notes 38–44.
227. Schlinsog, *supra* note 41, at 477.
228. Ferreira *ex rel.* Ferreira v. City of East Providence, 568 F. Supp. 2d 197, 211 (D.R.I. 2008).
229. Briggs *ex rel.* Briggs v. County of Monroe, 293 F. Supp. 3d 379, 390 (W.D.N.Y. 2018).
230. Cutlip v. City of Toledo, 488 F. App'x 107, 116 (6th Cir. 2012) (emphasis added).

Each of these statements reflects how courts use proximate causation to reach a finding of no liability—the decedent is wholly to blame for her own death, and therefore the state actor is relieved of liability for any part he played in causing the suicide. Yet this position is simply incorrect, for modern psychiatry maintains that suicide can in fact "be caused by forces other than the decedent's own impulses and that third parties may be the source of these causes."[231] Additionally, this position is harmful in that it perpetuates shameful attitudes that so often deter individuals from seeking mental help. If the law is going to play a role in ameliorating the nationwide suicide crisis, the messages conveyed by courts should "highlight attributes [of suicidality] that *absolve* the individual of an exclusive responsibility" rather than paint the decedent as a culpable, blameworthy individual.[232] Moreover, labeling the decision to commit suicide as a "free and affirmative choice," as did the Sixth Circuit, is particularly troublesome; suicide is *not* a free choice, and characterizing it as such promotes the misunderstanding that people who commit suicide are selfish.[233] And as one medical expert stated: "People who die by suicide aren't making a [free] choice—they're losing a fight against intolerable pain, emotional turmoil, and loss of hope."[234]

VI. ADDRESSING CONCERNS OF EXPANSIVE LIABILITY

The tendency of courts to restrict state-created danger claims under § 1983 reflects an underlying fear of expansive liability[235]—a fear that is only compounded when suicide is involved.[236] Indeed, courts will often go to great "lengths . . . to absolve state governments and their officials of responsibility under § 1983."[237] Some scholars have taken the position that this apprehension on behalf of courts is well-founded, arguing that recognizing liability in a single case would lead to a flood of similar § 1983 lawsuits.[238] Others argue that broadening state-created danger liability would deter government officials from taking necessary risks or otherwise adequately carrying out their proper functions.[239] Moreover, it is urged that state actors would thereby be forced, out of fear of legal consequences, "to deliberate more about [their] own interests rather than the

231. Smith et al., *supra* note 202, at 784.
232. *See* Ludwig et al., *supra* note 34, at 639 (emphasis added).
233. *See supra* text accompanying notes 33–42; Stephanie Chandler, Opinion, *Please Don't Give Up*, WASH. POST (June 8, 2018, 4:32 PM), https://www.washingtonpost.com/opinions/please-dont-give-up/2018/06/08/b3cb84aa-6b42-11e8-bf8c-f9ed2e672adf_story.html [https://perma.cc/MAS8-BGUV].
234. John M. Grohol, *Is Suicide a Free Choice or a False Choice?*, PSYCHCENTRAL (Aug. 18, 2014), https://psychcentral.com/blog/is-suicide-a-free-choice-or-a-false-choice#1 [https://perma.cc/R28U-QM5C].
235. *See* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1034–35 (1996).
236. *See* Long, *supra* note 27, at 813–14.
237. Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1510 (1999).
238. *See* Bandes, *supra* note 106, at 2327.
239. *See* Kernodle, *supra* note 61, at 201.

interests of the public at large."[240]

While these contentions are not entirely groundless, they fail to account for the fact that the culpability requirement significantly limits the scope of liability under § 1983.[241] No due process violation, and thus no state-created danger violation, may be found "unless accompanied by the requisite state of mind."[242] And that state of mind must be one that is conscience-shocking—it inculpates only the "most egregious, deliberate, and unreasonable forms of unconstitutional conduct."[243] Thus, there is no reason why state actors should feel compelled to fixate upon the likelihood of litigation in calculating their every decision; so long as they are not deliberately indifferent or intentional in their misconduct, state-created danger liability will not ensue.

Additionally, the arguments in favor of narrowing § 1983 liability turn a blind eye to the fundamental necessities for imposing such liability in the first place. One author, in arguing against expansion of state-created danger claims, relied in part on the fact that § 1983 liability "often leads to enormous personal detriment for a government actor, including reputation harm, litigation expenses, and monetary damages."[244] But don't these consequences reflect the precise object of constitutional tort claims? In other words, is it not the very purpose of § 1983 to provide monetary remedies to injured plaintiffs, hold government officials accountable for harms they have caused, and thereby deter future misconduct?[245] Indeed, it is widely recognized that, as a remedial statute, one of § 1983's primary aims is "to deter government . . . from violating constitutional rights by forcing government agencies [and officials] to internalize the monetary costs of their constitutionally problematic conduct."[246] Stated differently, by remedying injuries through monetary damages, § 1983 correspondingly "sets adequate monetary disincentives to unconstitutional action" on the part of government actors.[247]

Thus, the "personal detriment" that befalls state actors as a result of being held liable for their constitutional torts simply reflects the elementary concept of accountability—state actors must be held responsible for the harm they cause.[248] The fact that officials will be forced to pay monetary damages and may suffer reputational harm should not provide a basis for courts to shy away from imposing liability upon them. When courts restrain § 1983 liability, they "protect government and its officials in situ-

240. *Id.*
241. *See* Kim, *supra* note 53, at 1136; Haskel, *supra* note 90, at 211.
242. Eaton & Wells, *supra* note 88, at 165.
243. John L. Worrall, *Culpability Standards in Section 1983 Litigation Against Criminal Justice Officials: When and Why Mental State Matters*, 47 Crime & Delinq. 28, 49 (2001).
244. Kernodle, *supra* note 61, at 201.
245. *See* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 Harv. C.R.–C.L. L. Rev. 393, 393, 397 (2003); Brown, *supra* note 237, at 1540.
246. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 346 (2000).
247. Park, *supra* note 245, at 397.
248. Brown, *supra* note 237, at 1540.

ations in which citizens would be held accountable," thereby "send[ing] a poor message to the people" that wreaks of "license and privilege."[249]

While it is true that government officials should not live in constant fear of being bogged down by endless lawsuits, it is equally imperative that courts not simply grant officials a get-out-of-jail-free card in cases where they are undeniably at fault. And it does not require any significant degree of knowledge to grasp that unchecked abuses of government power beget further abuses of power.[250] Courts have a fundamental role to play in ensuring that such abuses do not spiral out of control, for the Constitution itself "contemplates a judicial 'check' on the political branches" to ensure that the government respects the rights of its citizens.[251] Thus, courts not only flout the very purposes of § 1983 when they restrict state-created danger liability where it should otherwise be imposed, they also neglect to fulfill a fundamental responsibility imposed upon them by the Constitution.

VII. CONCLUSION

The United States is presently experiencing an ever-intensifying suicide crisis, the eventual amelioration of which necessarily demands certain action by the law—action that comports with modern psychology. Thus, as an initial matter, the law must abandon the use of language that typifies stigmatic attitudes about mental illness and suicide. Because stigma deters individuals from seeking help and thus constitutes a risk factor for suicide, the use of stigmatic rhetoric only worsens the suicide crisis. Beyond that, the law must be shaped with a view toward the critical need for a steep reduction in the number of suicides. As such, this Comment suggests that the imposition of liability for certain instances of suicide is a chief mechanism by which the law can play an instrumental role in reducing the nation's suicide rates. And the state-created danger doctrine, the focus of this Comment, provides a legal basis for imposing such liability.

As reflected by the current split between the Tenth and Sixth Circuits, the disorder and confusion inherent in the state-created danger doctrine is only compounded when suicide is added to the mix. Yet the mere fact that suicide is involved (as opposed to some form of third-party violence) should not automatically preclude liability under the state-created danger theory, contrary to the Sixth Circuit's outdated position. Rather, in accordance with the Tenth Circuit's approach, there is no plausible reason why the state-created danger doctrine should be rendered inapplicable to suicides. As discussed in this Comment, the affirmative (in)action, foreseeability, and culpability elements are capable of being met where the danger created by the state results in the self-inflicted harm of suicide. Thus, where the state creates or enhances the danger that an individual

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249. *Id.*
250. *See* Eisenhauer, *supra* note 91, at 915.
251. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991).

will commit suicide, it is critical that liability follows; for when the threat of liability is truly legitimate, perhaps state officials will then heed the necessary incentives to prevent the tragic occurrence of suicide.