Journal of Criminal Law and Criminology

Volume 113
Issue 1 *Winter*

Article 5

Winter 2023

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0091-4169/23/11301-0207
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 113, No. 1

Printed in U.S.A.

HOLDING GOVERNMENT OFFICIALS ACCOUNTABLE BY APPLYING THE STATE-CREATED DANGER DOCTRINE TO CASES OF SUICIDE

Zoe Levine*

Section 1983 of the Civil Rights Act provides a means for plaintiffs whose civil rights have been violated by government officials to sue for monetary compensation. However, the doctrine of qualified immunity hampers a plaintiff's chances of success by blocking cases from going to trial and preventing government entities from paying monetary judgments on "insubstantial cases." State-created danger doctrine is a judicially created exception that can overcome qualified immunity when a government official has caused or contributed to a danger that resulted in harm to that individual. The purpose of this doctrine is to hold officials accountable who were more than negligent. Enforcing this accountability is especially important when those officials operate within the realm of the criminal legal system. Police officers and law enforcement officials are in a position to create more harm than other government officials as they have state-sanctioned authority and potential access to weapons. Moreover, creating accountability through the exception likely would incentivize the officers to act with more care in the future.

This Comment examines the state-created danger doctrine applied to cases where a government official's decisions have resulted in the suicide of an individual. In cases of suicide, this analysis reveals that plaintiffs have failed to succeed even when the actions of government officials have seemingly surpassed negligence. These cases often fail because courts interpret the decisions of government officials to be inactions rather than actions. Courts find that the threat of suicide has always existed, regardless of decisions by officials that might have exacerbated this risk. By not characterizing these decisions as actions, the courts allow qualified

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immunity to block liability. This article proposes an innovative solution: a test that reinterprets the language of DeShaney, *the originator of the doctrine, to interpret "actions" to include instances where a government official closed off and later reopened the harm to that individual through their decisions.*

This Comment will then apply this test to the fact patterns of leading suicide-related cases and those involving law enforcement officials to show how it results in more successes for plaintiffs and more consistent results overall. The Comment concludes that enforcing accountability in this sphere will better protect the public from the officials, operating in the law enforcement or general governmental sphere, who have endangered them by behaving in a way that surpasses negligence.

INTRODUCTION

Under federal law, plaintiffs whose civil rights have been violated by government officials may receive monetary compensation through Section 1983 of the Civil Rights Act.[1] However, the path to recovery is convoluted; the doctrine of qualified immunity has hampered the success of Section 1983 claims.[2] Qualified immunity blocks some cases against government entities from going to trial to prevent the government from paying money judgments on "insubstantial" cases.[3] Specific exceptions can overcome qualified immunity; the state-created danger doctrine is one such exception.[4]

At its heart, the state-created danger doctrine is an exception to qualified immunity and applies when a state official creates a danger to another person,

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[1] *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1200 (2005) (introducing Section 1983 in a discussion on state-created danger doctrine); Martin A. Schwartz, *Functional Role of Section 1983*, *in* SWORD & SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION, (Mary Massaron & Josephine A. DeLorenzo eds., 2021), Westlaw ABA-Swords 1.II.B.

[2] *See* Oren, *supra* note 1, at 1200.

[3] *See* Harlow v. Fitzgerald, 457 U.S. 800, 808, 813, 818 (1982).

[4] *See* Oren, *supra* note 1, at 1166; Stacey Hawkes Felkner, *Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or* Bivens *Actions Against Law Enforcement Officers*, *in* 59 AM. JUR. 3D *Proof of Facts* § 6.5 (2022).

and that danger harms them.[5] For example, in one case, a police officer placed a woman in danger by abandoning her in a dangerous neighborhood after pulling over the car she was in and arresting the intoxicated driver of that car.[6] Alone in the neighborhood, she was later raped.[7] The existence of this exception is valuable as it both acknowledges the reality that officials can create a risk of harm to others through their behavior and creates a mechanism through which they may be held accountable for that harm.[8] Holding government officials accountable through this exception is especially important when those officials operate within the realm of criminal justice. Police officers and law enforcement officials are in a position to create more harm than average government officials as they have a significant amount of power through their state-sanctioned authority and potential access to weapons.[9] Moreover, enforcing accountability through this exception would likely incentivize the officers to act with more care in the future.[10]

However, since it is a judicially created exception, and because the Supreme Court has not yet established a clear standard to apply the state-created danger doctrine, each circuit has devised its own test to overcome qualified immunity applying the exception.[11] The issues surrounding the

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[5] *See* Oren, *supra* note 1, at 1184–87 (discussing state-created danger doctrine and examples of its application); Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 1 (2007).

[6] *See* Wood v. Ostrander, 879 F.2d 583, 586, 596 (9th Cir. 1989).

[7] *Id.* at 586.

[8] *See id.* at 596 (describing how the genuine issue of material fact of whether the state trooper deprived plaintiff of a "liberty interest" by placing her in danger meant that the officer would not be entitled to qualified immunity if it was found that he had so deprived her).

[9] *See* The Editors of Encyclopaedia Britannica, *Police Power*, ENCYC. BRITANNICA, https://www.britannica.com/topic/police-power [https://perma.cc/BA8C-WDCN] (describing the source of police authority—constitutional police powers—in the United States); *see also* Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (Jun. 11, 2020), https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer [https://perma.cc/BA8C-WDCN] (describing the origin of the police force and the law enforcement institution as an "oppressive system.").

[10] *See* Chad Reese, *New York's Qualified Immunity Reforms are Paying Dividends*, N.Y. DAILY NEWS (Apr. 28, 2021, 7:00 AM) (describing how a bill partially repealing qualified immunity appeared to influence police behavior by prompting a police union to issue guidance warning officers not to take action in certain cases unless they were sure that they were not violating the law), https://www.nydailynews.com/opinion/ny-oped-new-yorks-qualified-immunity-reforms-are-paying-dividends-20210428-iffrwgluk5hs3da6ryesoasxvy-story.html [https://perma.cc/Y6GC-U4WN].

[11] *See* Chemerinsky, *supra* note 5, at 3–4 (describing approaches in the Fourth, Fifth, and Second circuits); *cf.* Oren, *supra* note 1, at 1215 (describing elements in various circuit tests and proposing that some elements be collapsed or analyzed together).

applications of different circuit tests have been explored extensively through academic works.[12] Within these specific tests, this Comment will examine issues within a category of lesser-known factual settings where the state-created danger doctrine is applied: cases involving suicide. For clarity, this Comment will refer to this category as the suicide subset. The suicide subset is a group of cases in which a government official's decisions lead another individual to take their own life, and that individual's estate or family sues.[13]

Within the state-created danger doctrine, the suicide subset is critical because it breaks with the traditionally applied notion that the ultimate harm that the plaintiff experienced, caused by the actions of the government official, must come from an outside third party.[14] Recognizing suicide under the state-created danger doctrine exception validates the notion that a government official's actions can cause an individual mental distress leading to physical harm, and acknowledges that this harm violates their Fourteenth Amendment due process rights.[15] In a law enforcement context, this subset could examine cases in which the actions or decisions of a police officer or other law enforcement official cause or result in another person (not in their custody) taking their own life.[16]

Allowing the state-created danger doctrine exception to apply to suicide cases is similarly valuable for several reasons. As discussed earlier, these officials are in a position where they can create more harm than average government officials. Allowing an exception to qualified immunity in these cases would incentivize these officials to exercise care in emotionally fraught situations involving individuals with known mental health issues. Moreover, these officers and officials are more likely to deal with mentally ill people regularly in situations involving their mental illness (i.e., officials may

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[12] *See* Chemerinsky, *supra* note 5, at 26. Scholars mainly argue that the Supreme Court should create a clearer framework evenly applicable across circuits. *See id.*; *cf.* Oren, *supra* note 1, at 1215.

[13] *See* Richard Fossey & Perry A. Zirkel, *Liability for Student Suicide in the Wake of Eisel*, 10 TEX. WESLEYAN L. REV. 403–04, 425 (2004) (describing how courts have treated cases involving the suicide of adolescents in school-related contexts).

[14] As discussed above, typical state-created danger cases involve a government official's actions in relation to an individual leading to a third person causing that individual harm. *See* Chemerinsky, *supra* note 5, at 1.

[15] *See* Fossey & Zirkel, *supra* note 13, at 428–30 (discussing a case where parents of child who had committed suicide filed § 1983 suit alleging, among other things, state denial of child's substantive due process rights).

[16] *See* Christiansen v. City of Tulsa, 332 F.3d 1270, 1277 (10th Cir. 2003) (discussing how officers' actions "to move [a situation] along" led to a man's suicide).

conduct a welfare check to verify the status of an individual who is in the midst of a mental health crisis and might currently be suicidal).[17]

The suicide subset of the state-created danger doctrine is deeply flawed. Not every circuit that has adopted the state-created danger doctrine permits the exception to apply in cases of suicide.[18] Moreover, the circuits considering the doctrine have created strict tests, causing plaintiffs to fail to prevail even in cases where it seems that government officials' actions have created or exacerbated a danger to an individual that far surpassed negligence, seemingly fitting the purpose of the exception.[19]

Part I will examine why these cases are failing for plaintiffs. It will first explore the interaction between Section 1983, qualified immunity and the state-created danger doctrine by providing an overview of each and describing where and when they overlap. Next, this Comment will examine the commonalities in each circuit test as applied to suicide.[20] Even though each circuit has a slightly different test, the primary similarity between the tests involves their success rate: plaintiffs' cases almost always fail. At the appellate level, only the Tenth Circuit has explicitly allowed the state-created danger exception to apply to suicide.[21] The Tenth Circuit case establishing

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[17] *See* Ashley Abramson, *Building Mental Health into Emergency Responses*, AM. PSYCH. ASS'N (Jul. 1, 2021), https://www.apa.org/monitor/2021/07/emergency-responses [https://perma.cc/GE9S-RGF5] (describing how officers are responding to increase in interaction with mentally ill people while on duty).

[18] See Wilson v. Gregory, 3 F.4th 844, 859 (6th Cir. 2021) (holding that the suicide subset is not recognized by the Sixth Circuit).

[19] *See* Oren, *supra* note 1, at 1167–68, 1209 (describing the purpose of the doctrine as creating a duty when the line between action and inaction has been crossed and how "'deliberate indifference' is the minimum standard required" under interpretations of the doctrine.) I argue creating or exacerbating the danger constitutes an action. The Tenth Circuit has recognized the doctrine as applying to suicide and the First, Third, Seventh, and Eleventh Circuits have considered allowing it. Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1264 (10th Cir. 1998); Hasenfus v. LaJeunesse, 175 F.3d 68, 71–73 (1st Cir. 1999); Sanford v. Stiles, 456 F.3d 298, 302 (3rd Cir. 2006); Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 712 (7th Cir. 2002); Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 564, 569–70 (11th Cir. 1997).

[20] The suicide subset has mainly been applied in appellate courts in cases involving schools, and since that is the controlling law, I will consider those cases. *See, e.g.*, *Armijo*, 159 F.3d at 1264, *Hasenfus*, 175 F.3d at 74, *Sanford*, 456 at 312–13, *Martin*, 295 F.3d at 707–12.

[21] *See* Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1264 (10th Cir. 1998) (determining that the lower court properly denied summary judgment as to two defendants because facts could be construed to demonstrate that the defendants increased risk of harm to Armijo, a student who committed suicide); Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week-July 2021*, BLOOMBERG L. (Aug. 4, 2021, 11:42 AM), https://news.bloomberglaw.com/us-law-week/circuit-splits-reported-in-u-s-law-week-july-2021 [https://perma.cc/6BQL-G5FS] (describing how the Tenth Circuit is the only one to have explicitly accepted application of the state-created danger doctrine to cases involving suicide).

the new rule is also the only appellate-level case allowing a plaintiff to succeed in a suicide-related state-created danger case.[22]

Among the circuits that have not formally allowed the state-created danger doctrine to apply to suicide-subset cases, appellate cases fail for different reasons. This Comment will compare the different tests, as applied in cases, to reveal that cases across circuits usually fail for one or more of the following reasons: (1) a finding that there was a lack of foreseeability, (2) a finding that a government official's actions were not conscience-shocking, and (3) a finding that an official did not create harm or exacerbate vulnerability. I conclude that the third reason for failure is the most problematic as it seems to block cases that would otherwise fit into the purpose of state-created danger doctrine, when an official's actions have created or exacerbated danger in a way that seems to have surpassed mere negligence.

Part II of this Comment will propose a solution. This new test would enable state-created danger claims involving suicide-related cases to succeed more equally among plaintiffs and defendants by reinterpreting the originating language of the state-created-danger doctrine. I will then revisit the appellate cases by applying the new test to each case to show how the test could lead to success for plaintiffs in those cases that seemed to suit the purpose of the state-created danger doctrine. I will also apply the new test to several cases involving law enforcement officials to show that the results would be more even in that context.

While the test stems from *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court case that originated state-created danger doctrine, my excursion through the application of circuit tests is necessary for two reasons. First, it shows exactly how circuits are applying the language of *DeShaney* to the suicide subset cases, and second, the holdings of these cases reveal how these interpretations fail to serve the purpose of state-created danger doctrine when the courts do not find that officials created or exacerbated harm. Courts often find that the officials did not cause or exacerbate the risk of harm or danger because the individual was already suicidal at the time of their interaction, so the risk of harm already existed.[23] This new test would reinterpret the language of *DeShaney* to find that a new creation or exacerbation of danger occurred if an official's actions or decisions temporarily closed off the risk of harm by creating a situation in

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[22] *See* Pazanowski, *supra* note 21.

[23] *See* Sanford v. Stiles, 456 F.3d 298, 312 (3d Cir. 2006) (describing how a guidance counselor was not responsible for a student's suicide, in part, because the student was presumably already suicidal when speaking to her); Chart *infra* Section I.C.1.

which the harm was unlikely to occur, then later reopened that risk of harm through subsequent actions or decisions.

I. PART I: THE STATE-CREATED DANGER DOCTRINE

A. SECTION 1983, QUALIFIED IMMUNITY, AND THE STATE-CREATED DANGER DOCTRINE

Section 1983 has a long history. Created in the Reconstruction Era as part of the Ku Klux Klan Act, Section 1983 was written, in part, to provide formerly enslaved people with a cause of action against the state and government officials who were failing to protect them.[24] Section 1983 gives rise to a cause of action when a person "under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes . . . [a] deprivation . . . of [another's] rights . . . secured by the Constitution and laws . . . ."[25] In other words, it can be used against officials acting in their official capacity who violates another person's civil rights.

The judiciary created qualified immunity for federal claims.[26] Qualified immunity prevents some Section 1983 claims from moving forward by providing government officials with robust protection against those claims.[27] It is an affirmative defense that shields government officials and entities from liability in Section 1983 civil rights cases even when they are at fault.[28] When deciding qualified immunity cases, courts consider whether or not government officials have "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[29] The purported purpose of qualified immunity is to shield government entities from "insubstantial claims on summary judgment."[30] Yet, this purpose is important as the state-created danger doctrine allows an exception to qualified immunity, and in so doing, implies that those cases are not insubstantial.[31]

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[24] *See* Richard Briffault, *Section 1983 and Federalism*, 90 HARV L. REV. 1133, 1137, 1154 (1977).

[25] 42 U.S.C. § 1983.

[26] Jay Schweikert, *Qualified Immunity*, 1 INSIGHTS ON LAW AND HISTORY, Dec. 17, 2020, https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity [https://perma.cc/7C2Y-WWEK].

[27] *Id.* (describing qualified immunity as "shield[ing] state actors from liability for their misconduct, even when they break the law").

[28] *See id.*

[29] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1952).

[30] *Id.*

[31] *Id.*; Wood v. Ostrander, 879 F.2d 583, 586, 596 (9th Cir. 1989) (reversing summary judgment because of the state-created danger exception).

Qualified immunity has been publicly criticized for failing to protect citizens' rights through its robust protection of state actors.[32] In a dissent, Justice Sotomayor famously described qualified immunity as "tell[ing] officers that they can shoot first and think later . . . ."[33] Qualified immunity often prevents claims from moving forward because of the standard courts use when considering whether a constitution right has been "clearly established."[34] "Clearly established" has been defined extremely narrowly, requiring plaintiffs to demonstrate a previous case with facts that are "functionally identical."[35] For example, in one case, *Baxter v. Bracey*, the court did not find a right where a police officer set a dog on a man who alleged he was sitting down with his hands up in surrender. The officer received qualified immunity even though the same circuit recognized a right in a similar case when the police had set a dog on a man lying down.[36] The slight difference in the plaintiff's posture and the fact that the court thought there was a question of fact as to whether the dog was adequately trained, though it had been state certified in the past, completely changed the result of the two cases.[37] The Supreme Court denied certiorari.[38] This way of defining a "clearly established" right creates circular logic. How can such a right ever be created without legislation prohibiting the application of qualified immunity to specific causes of action when appellate courts and the Supreme Court refuse to recognize a right because the case is not similar enough to previous cases?[39]

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[32] *See* Radley Balko, Opinion, *The Ugly Origins of Qualified Immunity*, WASH. POST (Oct. 26, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/10/26/ugly-origins-qualified-immunity [https://perma.cc/BG9P-NQCD] (describing how qualified immunity encourages ignorance of law in officers); Madeline Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021, 6:35 PM), https://time.com/6061624/what-is-qualified-immunity [https://perma.cc/GVZ8-HR62] (describing how qualified immunity shields officers by only allowing liability in nearly identical cases).

[33] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

[34] Schweikert, *supra* note 26; *Qualified Immunity*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/qualified_immunity [https://perma.cc/ZPR9-7GGQ].

[35] Schweikert, *supra* note 26.

[36] *Compare* Baxter v. Bracey, 751 F. App'x 869, 872–73 (6th Cir. 2018) (right not found), *with* Campbell v. City of Springboro, Ohio, 700 F.3d 779, 784, 787, 789 (6th Cir. 2012) (right found); *see also* Baxter v. Bracey – *Challenge to Qualified Immunity Doctrine, Which Shields Officials from Accountability When They Violate the Constitution*, ACLU DC, https://www.acludc.org/en/cases/baxter-v-bracey-challenge-qualified-immunity-doctrine-which-shields-officials-accountability [https://perma.cc/VL3J-ATAV].

[37] *See Baxter*, 751 F. App'x at 872–73; *Campbell*, 700 F.3d at 783–89.

[38] Baxter v. Bracey, 140 S. Ct. 1862 (2020).

[39] In this note, I will not cover the issue of whether qualified immunity should exist.

The state-created danger doctrine creates an exception to qualified immunity, meaning it can defeat qualified immunity in Section 1983 claims. Stemming from *DeShaney*, the state-created danger doctrine creates an exception to qualified immunity for situations in which the government may be liable for damages caused by risks it created in violating the plaintiff's due process rights.[40] Across federal jurisdictions, negligence is not enough to establish the state-created danger doctrine exception.[41] Instead, courts require conduct to fall under either the recklessness or the deliberate indifference standard.[42] Each circuit that has adopted the doctrine has a different test under which state-created danger is analyzed.[43]

1. The Evolution of the State-Created Danger Doctrine

DeShaney v. Winnebago County Department of Social Services originated two exceptions to qualified immunity: the state-created danger doctrine and the special relationship exception.[44] In *DeShaney*, Joshua, a four-year-old, had been returned to and left in his father's care, despite repeated reports of abuse monitored by Winnebago Department of Social Services, until his father injured him severely, causing brain damage.[45] He and his mother sued under section 1983 alleging a substantive due process violation for the respondents' alleged "fail[ure] to intervene to protect him against a risk of violence at his father's hands of which they know or should have known."[46] The Supreme Court distinguished between government action and inaction by emphasizing that the government could only be held liable for its actions.[47]

A passage in the opinion originated the state-created danger doctrine.[48] It stated:

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[40] 489 U.S. 189, 200–01 (1989); s*ee also* Chemerinsky, *supra* note 5, at 2–6 (describing how the state-created danger doctrine stemmed from *DeShaney* then elucidating how it implicates due process rights through analysis of *Town of Castle Rock v. Gonzales*).

[41] Chemerinsky, *supra* note 5, at 11.

[42] *Id.* at 12.

[43] *See id.* at 25; Oren, *supra* note 1, at 1174–87.

[44] *DeShaney* originated these exceptions through the circuit court's interpretation of language in the decision and so did not explicitly create them. In this note, I will only be analyzing the state-created danger doctrine and will not get into the related exception of special relationship doctrine. *See DeShaney*, 489 U.S. at 198, 201–02 (originating the special relationship doctrine and the state-created danger doctrine).

[45] *DeShaney*, 489 U.S. at 192–93.

[46] *Id.* at 193.

[47] *Id.* at 195.

[48] Oren, *supra* note 1, at 1166–67 (citing Uhlrig v. Harder, 64 F.3d 567, 572 n.7 (10th Cir. 1995)).

> 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*; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.[49]

The state-created danger doctrine applies in non-custodial situations in which a government official or state actor took action to place an individual in a "worse position" than they would have been in had the official or actor not acted.[50] This action may be taken by an official creating a danger themselves or by acting in a way that increases the chance of danger to the individual.[51] An official's behavior must sometimes be "conscience shocking" to meet the standard in abnormal, emergency-like situations.[52]

The Supreme Court announced the category in obiter.[53] As such, circuit courts created and applied their own tests under the new category.[54] Circuit courts have allowed state-created danger claims to defeat findings of summary judgment in various situations. In one case, police officers left a woman, the passenger of a drunk driver, on the side of the road in a dangerous area where she was later raped.[55] In another, a police officer left a voicemail on a suspect's machine despite knowledge that he might react violently towards the victim who had reported him, causing the suspect to kill the victim's boyfriend, shoot at a member of her family, and kidnap her.[56]

However, plaintiffs' claims "almost always" fail.[57] In one such case, the court found that the plaintiff did not satisfy the state-created danger doctrine exception even when the actions of a parole officer seemingly led to the death of a minor's family member.[58] In that case, the parole officer of a parolee who had previously pled guilty to corrupting the morals of a child saw their parolee in contact with a twelve-year-old—in direct violation of their

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[49] *DeShaney*, 489 U.S. at 201 (emphasis added).

[50] *Id.*; *see* Oren, *supra* note 1, at 1168.

[51] Oren, *supra* note 1, at 1168.

[52] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849–51 (1998).

[53] *See DeShaney*, 489 U.S. at 201*;* Oren, *supra* note 1, at 1166.

[54] *See* Oren, *supra* note 1, at 1167.

[55] Wood v. Ostrander, 879 F.2d 583, 586, 596 (9th Cir. 1989).

[56] Irish v. Fowler, 979 F.3d 65, 68–71, 79 (1st Cir. 2020).

[57] Chemerinsky, *supra* note 5, at 1.

[58] *See* Bright v. Westmoreland Cnty., 443 F.3d 276, 283–85 (3d Cir. 2006).

parole—and confronted them about it.[59] However, the parole officer failed to promptly file the report that would have revoked parole, and another officer told the twelve-year-old's family that he would soon be in custody.[60] During this delay, the parolee killed the twelve-year-old's sister.[61]

B. STATE-CREATED DANGER DOCTRINE APPLIED TO SUICIDE

In cases in which a government official's actions result in the suicide of an individual, the applicability of the state-created danger doctrine is even more narrowly applied. Courts have primarily considered the doctrine in cases where school officials may have created the danger leading to the suicide of a student.[62]

As discussed above, it is important to consider and recognize that the actions and decisions of government officials can create or exacerbate harm even when the ultimate harm, a suicide, is self-inflicted. The CDC noted that, in the United States, suicide was responsible for about 46,000 deaths, about 1 death every 11 minutes in 2020.[63] Considering instances where police actions lead to an individual's suicide is also essential because police officers are in a position to interact with mentally ill people regularly.[64] An estimated "20% of police calls . . . involve a mental health or substance use crisis . . . ."[65] Police report that these types of calls have increased since they started their careers.[66] The fact that police officers and people dealing with crises interact regularly should lead to suicide mandates encouraging these officers to handle situations that could result in suicide more carefully. Moreover, the fact that law enforcement officials have state-sanctioned authority and access to weapons makes it necessary to incentivize these officials to take care in these situations by enforcing liability in cases meeting the exception. Now

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[59] *Id.* at 278.

[60] *See id.* at 279–80, 283–84.

[61] *Id.* at 279.

[62] *See generally* Fossey & Zirkel, *supra* note 13 (discussing the doctrine in relation to schools).

[63] CDC, PREVENTING SUICIDE 2 (2022) https://www.cdc.gov/suicide/pdf/NCIPC-Suicide-FactSheet-508_FINAL.pdf [https://perma.cc/BEQ9-VH5C].

[64] Abramson, *supra* note 17.

[65] *Id.* (citing Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams Are Failing*, NPR (Sept. 18, 2020, 5:00 AM), https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing [https://perma.cc/NDH4-6MBP]).

[66] Abramson, *supra* note 17 (citing *Survey: Police Needlessly Overburdened by Mentally Ill Abandoned by Mental Health System*, MENTALILLNESSPOLICY.ORG, https://mentalillnesspolicy.org/crimjust/homelandsecuritymentalillness.html [https://perma.cc/QUX5-QB3M].

that we understand the importance of the doctrine, we will consider how it is applied.

C. BROAD OVERVIEW OF CURRENT STATE-CREATED DANGER CASE LAW INVOLVING THE SUICIDE SUBSET

As stated above, the suicide subset of the state-created danger doctrine is mainly examined in the context where a student has committed or attempted to commit suicide after interactions with school officials. Only the Tenth Circuit has adopted the suicide subset of the state-created danger doctrine at the appellate level.[67] Other circuits that have considered the doctrine at the appellate level have never found for a plaintiff under the doctrine, but have not explicitly rejected the doctrine's application to cases involving suicide either.[68] In doing so, those circuits have arguably recognized the potential that a case in the future may allow them to adopt the doctrine. Other circuits have considered applying the principle to suicide at an appellate level but have failed to find a constitutional violation generally, so they did not apply the doctrine to those cases.[69] Others still have only considered an application of the subset at the district level.[70] Finally, only the Sixth Circuit has explicitly declined to extend its existing doctrine and seems

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[67] Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1264 (10th Cir. 1998).

[68] *See* Hasenfus v. LaJeunesse, 175 F.3d 68, 74 (1st Cir. 1999); Sanford v. Stiles, 456 F.3d 298, 312–13 (3d Cir. 2006); Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 707–12 (7th Cir. 2002).

[69] *See, e.g.*, Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 569–70 (11th Cir. 1997) (holding no constitutional right established as it did not decide school had duty to warn a family about their child's suicide attempts in school); Spring *ex rel.* Spring v. Allegany-Limestone Cent. Sch. Dist., 655 F. App'x 25, 28 (2d Cir. 2016) (quoting Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 432 (2d Cir. 2009)) (affirming dismissal of a section 1983 substantive due process claim because it determined the claim did not meet the "'deliberate indifference' standard" necessary to establish a substantive due process claim); Est. of Manstrom-Greening *ex rel.* Manstrom v. Lane Cnty., 845 F. App'x 555, 557 (9th Cir. 2021) (holding the government official's conduct did not meet the deliberate indifference standard necessary for constitutional violation because the record did not sufficiently show that the state official, the decedent's father, knew of the risk and intended to expose the decedent to that risk).

[70] *See, e.g.*, Sloane v. Kanawha Cnty. Sheriff Dep't, 342 F. Supp. 2d 545, 553 (S.D.W. Va. 2004) (holding a case involving suicide survived a motion to dismiss); O'Grady v. City of Ballwin, 866 F. Supp. 2d 1073, 1078 (E.D. Mo. 2012) (rejecting the notion that state danger could be applied to suicide when it briefly stated "the danger [a decedent who committed suicide] faced came about as the result of his own unfortunate action; [d]efendants in no way created it."); Mertes *ex rel.* Capouch v. City of Rogers, 2019 WL 3306147, at *6 (D. Minn. July 23, 2019) (holding that a case involving suicide failed due to a lack of conscience-shockingness, lack of risk being disregarded, and lack of clearly established right).

unlikely to do so in the future because its "cases have treated suicide differently."[71]

I will now analyze the leading cases in which courts have adopted, considered adopting, and denied applying the suicide subset of the state-created danger doctrine.[72] First, I will discuss the Tenth Circuit's decision in *Armijo v. Wagon Mound Public Schools*, the only case at the appellate level to allow a plaintiff's claim that falls into the suicide subset to survive.[73] Next, I will analyze the leading case law alongside police-focused case law to reveal several trends that exist amidst varying circuit tests.[74] Through analysis of the current case law, I conclude that these cases commonly fail for a lack of foreseeability that an individual's suicide would occur, a lack of "conscience shockingness"[75] in the actions of state officials, and/or a finding that the decisions of state officials do not amount to the creation or exacerbation of harm. These three elements were also considered in *Armijo* and were deemed to have been met in that case.

From this analysis, a viable conclusion is that the "non-creation/non-exacerbation" element is the most problematic of the three as it blocks cases which seem to otherwise suit the purpose of the doctrine: to allow plaintiffs a cause of action if government officials fail to protect them in a situation in which those officials created or exacerbated the danger the plaintiffs faced.[76] After a description of the reasons each case failed, this comment will apply a new test and describe the results.

1. Analysis of Case Law by Numbers

The table below depicts the reasons for failure and success of the cases analyzed. Failure for creation or exacerbation of harm appears in three of five columns involving failure, stating the most common reasons for failure. Six of the eight cases that unsuccessfully applied the doctrine included failure for creation of harm as the reason or one of the reasons that plaintiffs failed to

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[71] *See* Wilson v. Gregory, 3 F.4th 844, 859 (6th Cir. 2021).

[72] *Wilson* is the only appellate police-centered case that has gotten to the point of analyzing state created danger at an appellate level, the other police cases are district court cases where the exception was considered.

[73] *See* Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253 (10th Cir. 1998).

[74] Here, I considered cases specifically involving law enforcement officials.

[75] Courts consider whether a situation is so bad that it "shocks the conscience," i.e., is so awful that it's more than negligent. *See* Hasenfus v. LaJeunesse, 175 F.3d 68, 73 (1st Cir. 1999).

[76] *See* Oren, *supra* note 1, at 1166–68 (describing how the state created danger doctrine has been interpreted and applied as imposing liability when the "line between action and inaction [has been crossed by officials] by creating the danger or substantially increasing [the danger to a third party].").

move past summary judgment. Lack of conscience-shocking behavior was the second most common reason for failure, appearing in two of the five columns involving failure. Four of the eight failing cases cited a lack of conscience-shocking behavior as a reason for failure.

Plaintiff Succeeds	**Failure for Lack of Conscience -Shocking Behavior**	**Failure for lack of Conscience-Shocking Behavior and Failure to Create or Exacerbate a Danger**	**Failure for Lack of Foreseeability and Lack of Creation or Exacerbation of Harm**	**Failure for No Creation or Exacerbation of Harm**	**Failure for Lack of Clearly Established Right**
Tenth Circuit *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*	First Circuit *Hasenfus v. LaJeunesse*	Third Circuit *Sanford v. Stiles*	Seventh Circuit *Martin v. Shawano-Gresham Sch. Dist.*	Eleventh Circuit *Wyke v. Polk Cnty. Sch. Bd.*	Sixth Circuit *Wilson v. Gregory*
		Tenth Circuit *Christiansen v. City of Tulsa*		District Case: *Bynum ex. rel Bynum v. City of Magee* (S.D. Miss.)	
		District Case: *Ferreira v. City of East Providence (D.R.I)*			

II. PART II: REWORKING THE STATE CREATED DANGER DOCTRINE

A. A NEW INTERPRETATION OF *DESHANEY* THAT THE SUPREME COURT SHOULD ADOPT

There is a lack of streamlined analysis across jurisdictions when analyzing state-created danger claims in cases involving non-custodial

suicide; not only does each jurisdiction use and apply slightly different tests, but there has also been direct disagreement over whether the state-created danger doctrine should even apply to non-custodial suicide.[77] Nevertheless, these tests tend to produce cohesive results across jurisdictions; plaintiffs' claims tend to fail. The table above shows that only one of the nine cases analyzed succeeded. Only that case, *Armijo*, recognized the potential for liability in a case involving suicide at the appellate level.[78] This consistency is alarming, as this result remained consistent even in cases where the actions of state officials could be reasonably interpreted as more than negligent.[79] As discussed above, when the plaintiffs' claims failed, it was often due to a finding that the suicide was not foreseeable, officials' behavior was not conscience-shocking, and/or officials did not create or exacerbate the risk of harm. Among the appellate cases that failed due to a finding that officials did not create or exacerbate the risk of harm, there were two cases where the officials' actions seemed more than negligent: *Sanford* and *Wyke*, with officials' seemingly poor decisions leading to the suicides of students.[80]

1. New Test: Expanding State-Created Danger to Protect More Civilians from Officials' Actions and Decisions

As described earlier, the applicable language in *DeShaney* has been read to create an exception where the State "render[s] [an individual] . . . more vulnerable" to danger, or where it "place[s] [an individual] in [a] worse position than . . . [they] would have been had it not acted at all . . . ."[81] The

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[77] *Compare* Armijo, 159 F.3d 1253, 1264 (defeating summary judgment as to two defendants after the suicide of a special education student driven home by a school official), *with* Wilson v. Gregory, 3 F.4th 844, 859 (6th Cir. 2021) (declining to extend the state-created danger doctrine to suicide because officials could not be on notice of a right since precedent treated suicide "differently").

[78] In the entirety of my research, I was only able to find two other cases that even considered recognizing the potential for liability at the district level. *See* O'Grady v. City of Ballwin, 866 F. Supp. 2d 1073, 1078 (E.D. Mo. 2012); Sloane v. Kanawha Cnty. Sheriff Dep't, 342 F. Supp. 2d 545, 553 (S.D.W. Va. 2004).

[79] *See* Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 564, 569–70 (11th Cir. 1997) (concluding that the trial court did not err when it granted school board's motion for judgment as a matter of law on a Section 1983 claim even when a dean of students dealt with a student's suicide attempt on school by calling the student into his office and reading and discussing Bible verses with him without contacting his parents).

[80] *See* Sanford v. Stiles, 456 F.3d 298, 302 (3rd Cir. 2006) (describing how a guidance counselor who was warned of a student's potential for suicide merely questioned the student without contacting his parents); *Wyke*, 129 F.3d at 564 (describing how a dean read Bible verses to a student with a known suicide attempt without contacting his parents).

[81] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989). *See, e.g.*, Oren, supra note 1, at 1178, 1180, 1189, 1199 (describing cases from various circuits

plain meaning of this statement would seem to apply to any situation where the State has taken an action that increases the risk of harm to an individual. However, in *DeShaney*, the Supreme Court swiftly contradicted itself by stating that releasing an abused child from their custody did not qualify since the danger (the child's violent father) already existed. Since the Court found that the danger had already existed, it concluded that the danger was not exacerbated by the child's release into that custody.[82] This interpretation ignores the fact that, at a specific moment in time (when the State took custody of the child), the danger had been closed, and that, by unreasonably releasing him back to his father's custody, the Department of Social Work created a new risk to him (one that had not existed when he had been taken into custody).[83]

Because the purpose of the state-created danger doctrine is to protect individuals from the risk of harm that government officials created or exacerbated, *DeShaney* should be partially overturned: The language should be kept but should be reinterpreted to include situations in which the State had an opportunity to close a risk, but instead opened or created a new risk through its actions. The foreseeability requirement, included in all circuit tests, should also continue to apply. This new theory can be examined through cases where suicide occurred after the State took action to reduce, then reopen, the risk of harm to the suicidal individual.[84] When this reinterpretation is applied to cases within the suicide subset, the outcomes are more varied based on the facts of each case, which better distinguishes negligent conduct from conduct that is more than negligent.

This Comment will now analyze specific cases to discuss the reasons for success and failure in more detail and will then apply a new test and describe how the results would change under it. Applied to current case law, the test would still find that the plaintiff in the Tenth Circuit's *Armijo* would defeat the defendant's motion for summary judgment. Moreover, the result in the First Circuit's *Hasenfus* would remain the same. On the other hand, the holding in Third Circuit's *Sanford* would likely be reversed. If the Eleventh Circuit's *Wyke* had been found to have a constitutional law claim, *Wyke* would also be reversed. Similarly, the Sixth Circuit's *Wilson* would likely be reversed if a claim was recognized. Finally, the Seventh Circuit's *Martin* would be categorized as a borderline case that could go either way.

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where courts have considered whether government officials' actions render individuals more vulnerable to harm.)

[82] *DeShaney*, 489 U.S. at 201.

[83] *See id.* (noting that the state had sheltered Joshua previously).

[84] The Supreme Court should also recognize the suicide subset to apply evenly across all jurisdictions.

B. DETAILED ANALYSIS OF CASE LAW AND NEW TEST APPLIED TO THOSE CASES

1. The Only Circuit to Have Adopted the State Created Danger Doctrine in the Suicide Subset at the Appellate Level—The Tenth Circuit

The most influential case considered within the suicide subset of the state-created danger doctrine is *Armijo* of the Tenth Circuit.[85] This case is impactful because it is the only appellate case to adopt the state-created danger doctrine suicide subset.[86] In this case, a special education student, Philadelfio Armijo, took his own life after a school official drove him home from school.[87] The official drove him after he had been suspended, an action against school policy; the school was aware of the student's suicidal threats, was aware that the student had access to firearms, and did not tell the student's parents of their actions.[88] The Tenth Circuit held that the district court properly denied summary judgment to school employees, the principal and a school counselor, because the facts alleged were sufficient to allow the claim to move forward.[89] The court applied the Tenth Circuit's state-created danger test from a previous case to the facts surrounding Armijo's suicide.[90]

The Tenth Circuit's test was defined and applied to Armijo's situation as follows:

> (1) Armijo was a member of a limited and specifically definable group—special education students who have expressed threats of suicide,
>
> (2) [The School Officials'] conduct put Armijo at substantial risk of serious, immediate and proximate harm by suspending him from school, which caused him to become distraught and to threaten violence, and then taking him to his home and leaving him alone with access to firearms,
>
> (3) they had some knowledge that might support an inference that Armijo was suicidal and distraught, was unable to care for himself, was home alone, and at least some of the Individual Defendants knew Armijo had access to firearms,

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[85] Armijo *ex rel.* Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253 (10th Cir. 1998).

[86] *See* Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week-July 2021*, BLOOMBERG L. (Aug. 4, 2021, 11:42 AM), https://news.bloomberglaw.com/us-law-week/circuit-splits-reported-in-u-s-law-week-july-2021 [https://perma.cc/6BQL-G5FS] (describing how the Tenth Circuit is the only circuit to have explicitly accepted application of the state-created danger doctrine to cases involving suicide).

[87] *Armijo*, 159 F.3d at 1256–57.

[88] *Id.*

[89] *Id.* at 1264.

[90] *Id.* (referencing Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995)).

> (4) by taking this action, knowing of Armijo's vulnerability and risks of being left alone at home, [The School Officials] acted recklessly in conscious disregard of the risk of suicide, and
>
> (5) such conduct, if true, when viewed in total, possibly could be construed as conscience-shocking, depending on context as determined after a full trial. In addition, these facts taken as true also could be construed to show
>
> (6) that [the School Officials] increased the risk of harm to Armijo.[91]

The court affirmed that due process rights are violated in a situation where affirmative and egregious actions were taken against a vulnerable student that ultimately caused the student harm because the student took his own life. Though the court in *Armijo* allowed the plaintiff to succeed by finding that the plaintiff met all elements of its test, the Tenth Circuit test contains the three elements that often cause plaintiffs' cases to fail: foreseeability, conscience-shockingness, and creation of danger. The second element of the Tenth Circuit's test considers whether "conduct put [the student] at substantial risk . . . of . . . harm," which speaks to the creation of danger on the part of the officials.[92] The third element establishes the requirement of foreseeability in the actions leading to the student's suicide.[93] The fourth element similarly requires that the officials must have acted "in conscious disregard of" that risk, speaking towards the connection between foreseeability and action.[94] Finally, the fifth element explicitly considers if the officials' actions were "conscience-shocking."[95] It is important to note that, even in this case, where the plaintiffs succeeded, the court interpreted the doctrine conservatively, emphasizing that even these facts just barely met the threshold needed to establish the state-created danger doctrine.[96]

Under this Comment's suggested test, *Armijo* would reach the same result. First, considering whether the school closed and reopened a harm, one can find that the school undoubtedly created a risk of harm when a school counselor drove the student home in the middle of the school day. Moreover, it was foreseeable that he may take his own life since the school was aware of his suicidal threats, access to firearms, and left him at home without contacting his parents. Finally, this behavior, taken directly against school

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[91] *Id.*

[92] *Id.*

[93] *See id.* ("[T]hey had some knowledge that might support an inference that Armijo was suicidal and distraught . . . .").

[94] *See id.*

[95] *Id.*

[96] *Armijo*, 159 F.3d at 1264 n.9 ("[W]e cannot help but observe that the facts presently before us are very thin to establish a number of the six factors required for liability.").

policy, is conscience-shocking since a reasonable person would not expect these actions to have been taken given the circumstances of the student's suspension.

2. The First Circuit—Failure for Lack of Conscience-Shocking Behavior

The First Circuit considered allowing the state-created danger doctrine to be applied in cases of suicide in *Hasenfus v. LaJeunesse*.[97] In *Hasenfus*, a fourteen-year-old student attempted to commit suicide at school by trying to hang herself.[98] She did so after she was reprimanded by a teacher for misconduct during her physical education course and was sent to the locker room alone.[99] She tried to hang herself in the locker room but was found by other students.[100] She survived but suffered "permanent impairments."[101] The plaintiffs sued the town, board of education, superintendent of schools, school principal, and gym teacher under Section 1983 alleging that "specific acts and omissions by defendants acting under color of state law deprived [the student] of her Fourteenth Amendment rights, including, *inter alia*, rights to life and physical safety."[102]

The complaint alleged that the teacher who sent the student to the locker room should have been aware of the student's particular vulnerabilities not sent her "alone and unsupervised away from the area he was monitoring when he knew or should reasonably have known that she was despondent or distressed."[103] The complaint also alleged that the school should have acted with more care because seven other students had also attempted to commit suicide in the three months leading to the event.[104]

The First Circuit considered the Tenth Circuit's *Armijo* and distinguished it from *Hasenfus* because the officials in *Armijo* "knew both of the suicide threat and the available gun" and because "the facts in that case [went] a step beyond the typical endangerment cases cited by the Tenth Circuit . . . [which] involve[d] manifestly outrageous behavior by the authorities certain to cause harm."[105] The First Circuit found that the actions of the gym teacher in this case "[did] not come close" to that of the *Armijo*

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[97] 175 F.3d 68, 71–73 (1st Cir. 1999).
[98] *Id.* at 69–70.
[99] *Id.*
[100] *Id.* at 70.
[101] *Id.*
[102] *Id.*
[103] *Id.* (internal quotation marks omitted).
[104] *Id.*
[105] *Id.* at 74.

officials.[106] The First Circuit however distanced itself from *Armijo* by choosing to not comment on whether the behavior at issue was "conscience-shocking and not merely seriously negligent . . . ."[107] The First Circuit ultimately rejected the claim because it felt that the official's behavior was not conscience-shocking, stating that the facts "would be hard to wrest even a claim of negligence out of . . . ."[108]

Under my new test, the court's determination in favor of the defendants would remain the same. Because it was not foreseeable that the student in that case would kill herself after being sent to the locker room as there was no prior indication that she was suicidal, the school official did not create a risk by allowing her to go to the locker room alone. There was not a clear moment where the school had a chance to stop the risk, so the school did not reopen a risk through their actions.

3. The Third Circuit—Failure for Lack of Conscience-Shocking Behavior and Failure to Create or Exacerbate a Danger

The Third Circuit considered the suicide subset in *Sanford v. Stiles*.[109] In this case, a student committed suicide after being released by a school guidance counselor.[110] The guidance counselor had talked to him after another student reported a concerning note that she had received from the student who ultimately committed suicide.[111] That note contained language referencing suicide.[112] When the guidance counselor spoke to the student, the student denied that he was suicidal and said that he had moved past the situation that led to the note being written.[113] The student later committed suicide.[114]

The Third Circuit applied their version of the state-created danger test to the facts of the case. That test had four elements:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the [S]tate and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a

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[106] *Id.*
[107] *Id.*
[108] *Id.* at 73.
[109] 456 F.3d 298 (3d Cir. 2006).
[110] *Id.* at 302.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 302.

> discrete class of persons subjected to the potential harm brought about by the [S]tate's actions, as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the [S]tate not acted at all.[115]

The court also considered standards to assess the gravity of the risk when considering whether the official's behavior was conscience shocking.[116] The court stated:

> The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases. In a "hyperpressurized environment," an intent to cause harm is usually required. On the other hand, in cases where deliberation is possible and officials have the time to make "unhurried judgments," deliberate indifference is sufficient.[117]

The court concluded that the case failed the Third Circuit's *Ziccardi v. City of Philadelphia* standard,[118] a subtest applied in certain situations, "requir[ing] that the defendants disregard a great risk of serious harm rather than a substantial risk."[119] The court reasoned that nobody thought the student would kill himself because notes from students about suicidal thoughts had been common in the past and suicidal language was often hyperbolic.[120] Under *Ziccardi*, the court determined that the official had not "disregarded" a risk since the guidance counselor took action after receiving the note by speaking with the student, and made a "conscious judgment" about the risk, assessing it as low.[121]

Considering the elements of the state-created danger test, the court decided that the second element was not met—the behavior of the guidance counselor was not conscience-shocking—because the student had not exhibited any other suicidal signs.[122] The court determined that the fourth

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[115] *Id.* at 304–05 (quoting Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006) and omitting internal quotation marks).

[116] *See Sanford*, 456 F.3d at 309–10.

[117] *Id.* at 309 (first quoting from *Est. of Smith v. Marasco*, 318 F.3d 497 (3d. Cir 2003); then quoting from Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998)).

[118] *Sanford*, 456 F.3d at 311 (referencing Zaccardi v. City of Philadelphia, 288 F. 3d 57 (3d Cir. 2002)).

[119] *Id.* at 310. This court applied different tests for conscience-shockingness depending on whether or not the situation was considered to be an emergency. *Id.* at 309–10. The court decided to apply the *Ziccardi* standard because there was "some urgency" in the situation that required "hurried deliberation." *Id.* at 310 (internal quotation marks omitted).

[120] *Id.* at 311.

[121] *Id.* (internal quotation marks omitted).

[122] *Id.*

element, requiring that an official's actions render an individual "more vulnerable" than if she had taken no action, was not met because the connection between the counselor's actions and the student's death were "too attenuated" since the student had only ever been to her office twice and had never seemed suicidal through his behavior or communications during these visits.[123] Moreover, the court felt that the guidance counselor did not create the risk because there was no evidence that the student relied on the guidance counselor.[124] The court also determined that the student's actions further attenuated the risk when he "repeatedly" told her that nothing was wrong.[125] Finally, the court found that the guidance counselor was not at fault for creating a dangerous situation because she had not taken any actions that could have led to his death or increased the risk of him taking his own life, characterizing her decisions as a "failures" rather than as "actions."[126] Ultimately, the court concluded that the case was a "failure to *prevent*."[127] Therefore, it failed for a lack of conscience-shocking behavior, and a lack of creation of harm.

Under the new test, the court's determination in *Sanford* would be reversed and the case would proceed to trial to determine whether the school official should be held liable. This was a case where the risk was stopped by the State. The risk was temporarily halted when the guidance counselor received the note expressing the student's suicidal intentions and when that counselor spoke with the student. By releasing the student without informing the student's parents or others who could help, the school officials reopened the potential for harm. The existence of the note, alone, made it foreseeable enough that the student could commit suicide. The school failed to take reasonable actions to stop the potential harm they had reopened. Viewing the guidance counselor's decision as a reopening of harm rather than a "failure to prevent" also makes her actions conscience-shocking by acknowledging that her decision created a new risk.

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[123] *Id.* at 311–12 (internal quotation marks omitted) (first quoting Bright v. Westmoreland Cnty, 443 F.3d 276, 281 (3d Cir. 2006); then quoting the district court, Sanford v. Stiles, No. Civ.A. 03-CV-5698, 2004 WL 2579738 (E.D. Pa. 2004), *aff'd* 456 F.3d 298 (3d Cir. 2006)).

[124] *Sanford*, 456 F.3d at 312.

[125] *Id.*

[126] *Id.* at 312. The court used a hypothetical to imply that if the guidance counselor had encouraged the student not to talk to his mother, that behavior might have met the threshold by interfering with the parental relationship between the student and his mother. *Id.*

[127] *Id.*

4. The Seventh Circuit - Failure for Lack of Foreseeability and Lack of Creation or Exacerbation of Risk of Harm

The Seventh Circuit applied its state-created danger doctrine to a case involving suicide in *Martin v. Shawano-Gresham School District*, and ultimately ruled that the facts of the case were not enough for the plaintiffs to prevail.[128] In that case, the school suspended a student after she was caught with a cigarette.[129] The student was sent home at the end of the school day even though she was in tears during the conversation with the school official.[130] The official, while speaking to the crying student, picked up a phone call from another student's mother.[131] The bell rang during this call and the official asked the student, who was still crying, if she needed to take the bus home and then allowed her to do so.[132] The official did not contact her family or inform them of the suspension until after the student left school for home.[133] The student committed suicide after she returned home.[134] The plaintiffs alleged that the defendants "violated [the student's] substantive due process rights by suspending her from school, thereby causing her severe emotional distress, and then by failing to affirmatively protect [her] from that distress. This, according to the [plaintiffs], caused her to commit suicide."[135]

The court applied its state-created danger test to the facts of the case. Quoting from a previous Seventh Circuit case, the court stated "that plaintiffs . . . may state claims for civil rights violations if they allege state action that created, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to danger [than] they otherwise would have been."[136] The plaintiffs argued that the school officials created the risk of suicide or made the student more vulnerable to that risk by suspending her.[137] They further argued that since "the school created or increased the danger," school officials should have taken affirmative steps, like keeping her at school until her parents were available to pick her up, to prevent the harm.[138] The plaintiffs asserted: (1) that the school had knowledge of or should have

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[128] Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 712 (7th Cir. 2002).

[129] *Id.* at 704.

[130] *Id.* at 704–05, 710.

[131] *Id.* at 704-05.

[132] *Id.* at 705, 713.

[133] *Id.* at 705.

[134] *Id.*

[135] *Id.* at 707.

[136] *Id.* at 708 (internal quotation marks omitted) (quoting from Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993)).

[137] *Id.*

[138] *Id.* at 708–09.

Known of the student's suicidal intent because the student's locker, which had been searched by school officials attempting to find the contraband cigarette, contained a book about suicide; (2) because the student was crying "hysterically" when talking to a school official; and (3) because previous suicides had occurred involving other students.[139]

The court held that the school officials did not create or increase a risk of suicide by suspending the student even if that suspension had caused severe emotional distress.[140] The court cited precedent where the arrest of a man caused him severe emotional distress but determined that the emotional distress did not increase the risk of danger to him in that case.[141]

The court distinguished *Martin* from *Armijo* because they found that the officials had not taken any affirmative action in the case.[142] The court determined that, in this case, the school had released the student as usual, as they would have done even if she were not suspended, so the release was not an affirmative act.[143] The court also stopped short of adopting *Armijo*, stating, "Even if we were to accept the *Armijo* standard that the school created a danger and thus could be liable under *DeShaney*, the Martins' argument would still not succeed."[144]

The court also compared *Martin* to the First Circuit's *Hasenfus* decision, stating that both cases had a lack of evidence that the school was on notice that the student had been suicidal.[145] The court stated that "unlike [the student in *Hasenfus*], [the student in *Martin*] did not attempt suicide during school hours or on school premises. Thus, the plaintiffs c[ould] only succeed if they establish[ed] that the school had a duty to protect [the student] from suicide *after* the school day ended."[146] The court ultimately concluded that the defendants "did not create or increase a risk" to the student through the suspension or by "allowing her to return home at the end of the school day . . . ."[147] Therefore, the case failed for a lack of foreseeability and for a holding that the officials had not created or exacerbated the student's risk of harm.[148]

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139 *See id.* at 710.
140 *Id.*
141 *Id.* at 709–10 (citing Collingnon v. Milwaukee Cnty., 163 F.3d 982 (7th Cir. 1998)).
142 *Id.* at 711.
143 *Id.*
144 *Id.*
145 *Id.* at 711–12.
146 *Id.* at 712.
147 *Id.*
148 *Id.* at 710–13. Plaintiffs also failed under an equal protection claim. *Id.* at 713.

Using the proposed test, it is unclear if the result in *Martin* would change. The school clearly caused emotional distress to the student in this case. The risk was closed when the student was called into a meeting with the school official. But the risk was then reopened when the official allowed the student to return home without immediately informing her parents of her suspension or the distress it had caused her. The official only made attempts to inform them of the suspension after the student left to go home. However, it is unclear if the mere presence of a book about suicide in her backpack paired with her distress would be enough to put the school on notice of her suicidal tendencies. Without any more information, the result would likely remain the same as the case would likely fail for lack of foreseeability.

5. The Eleventh Circuit—Failure for No Creation or Exacerbation of Risk of Harm

The Eleventh Circuit has not applied its state-created danger test to suicide at the appellate level. Like the Ninth Circuit, the Eleventh Circuit only considered a case from the suicide subset at the appellate level in *Wyke v. Polk County School Board* but concluded that no constitutional claim was made.[149] The lack of a constitutional claim resulted in the court not applying the elements of its test to the suicide case. Though the Eleventh Circuit's state-created danger test was not applied in that case, the case ultimately failed, in part, due to the court's conclusion that no constitutional claim existed because the officials had not created or exacerbated danger to the student.[150]

In *Wyke*, the mother of a deceased student sued under Section 1983 for a failure to train its employees in suicide prevention, which she argued constituted a substantive due process violation.[151] In that case, a thirteen-year-old committed suicide at home after twice attempting to commit suicide at school.[152] The school was aware of the attempts, but did not inform the student's family.[153] The school found out about the first attempt after another student's mother informed them (the other student had caught the decedent in his attempt).[154] The mother told the dean of students about the attempt and he told her "that 'he would take care of it.'"[155] The mother took no further action and testified at trial that she would have informed the student's family

[149] Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 568–70 (11th Cir. 1997).
[150] *Id.*
[151] *Id.* at 565.
[152] *Id.* at 563.
[153] *Id.*
[154] *Id.* at 564.
[155] *Id.*

of the incident herself had she known that the dean would not tell them.[156] The dean called the decedent into his office, and read verses of the Bible with him.[157] He testified that he did not notify anyone else because there was "too much red tape" and because he felt that he had the situation "under control."[158]

The decedent's second attempt at school was indirectly witnessed by a school custodian who went to the bathroom to check on the decedent who had been gone for a while.[159] The decedent told the custodian that "if he had stayed in the restroom any longer, he would have killed himself."[160] The custodian responded jokingly, and they both laughed.[161] However, the custodian entered the bathroom after the decedent had left and found a cord and a hanger.[162] She then informed the vice principal of the school, but could not identify the student.[163]

The court determined that the plaintiff had "failed to establish a violation of any constitutional right."[164] In doing so, the court upheld the granting of the motion for judgment as a matter of law against the plaintiff.[165] The court reasoned that to succeed "on a § 1983 claim against a local government entity, a plaintiff must prove both that her harm was caused by a constitutional violation and that the government entity is responsible for that violation."[166] One of the mother's claims was that the school rendered the student "more vulnerable to harm" by "cutting off" his "private sources of aid."[167] The court rejected this contention, using the reasoning in *DeShaney* to hold that when the school official told the other student's mother that he would "take care of it," it was not enough to create harm because that mother made the decision not to also call the decedent's family herself.[168] The court also rejected the arguments that the school had an obligation to prevent the minor from harming himself due to compulsory

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156 *Id.*
157 *Id.*
158 *Id.* (internal quotation marks omitted).
159 *Id.* at 564–65.
160 *Id.* at 565 (internal quotation marks omitted).
161 *Id.* at 565.
162 *Id.*
163 *Id.* at 564-65.
164 *Id.* at 568.
165 *Id.* at 570.
166 *Id.* at 568.
167 *Id.* at 569 (internal quotation marks omitted).
168 *Id.* at 569–70.

attendance laws and that the school had an independent duty to inform the student's mother of his suicide attempts.[169]

The court found that the trial court did not erroneously grant the school board's motion for judgment as a matter of law on the plaintiff's § 1983 claim by reasoning that both decisions of the officials—to tell a separate party that he would "take care of it" and the decision to not notify the student's parents—did not create or exacerbate a danger since the Dean did not prevent the third party "from picking up her telephone" and because a duty to notify in the case of a suicidal student was "unchartered waters."[170]

The plaintiffs' failure to establish a claim in this case seems problematic as the actions of the officials were arguably more than negligent, since they knew the student had attempted suicide and the dean of students responded by quoting the Bible. The actions of school officials did render the student more vulnerable. If *Wyke* was found to have a valid claim under constitutional law, and applying the new test, the plaintiff would likely prevail. In this case, the risk of harm was stopped when the dean called the student into his office. At that time, the dean had the student in a position where it would be unlikely for the student to commit suicide in his presence. That risk was reopened when the dean released the student from his custody and took no further action to inform anyone else or the student's family of his suicide attempt. If the only allegation was related to the custodian's interaction with the student, the defendants would likely succeed because the custodian learned of the risk of suicide after the student had left her presence and took steps to tell a higher authority, though that action was unsuccessful since she could not identify the student.

C. POLICE CASES

1. The Only Circuit to have Officially Rejected Application of the Suicide Subset at the Appellate Level: The Sixth Circuit—Failure for Lack of a "Clearly-Established Right"

The Sixth Circuit is the only circuit to have explicitly declined to extend the state-created danger claim to cases involving suicide. It did so in its analysis of *Wilson v. Gregory*.[171] In *Wilson*, deputies were called to the home of a man who was expressing suicidal thoughts and who might have guns in the house.[172] The deputies arrived, conducted interviews, and concluded that

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169 *Id.* at 569–70.

170 *Id.* 564, 569–70 (internal quotation marks omitted) (first quoting the record).

171 Wilson v. Gregory, 3 F.4th 844 (6th Cir. 2021).

172 *Id.* at 849–50.

the situation might just be a domestic dispute rather than a mental health crisis because they thought that the man seemed rational.[173] Because of this, one of the deputies called off the emergency medical services that arrived on the scene and were prepared to perform a basic mental health assessment on the man.[174] The deputy talked to his supervisor and was approved to call the mobile crisis unit to assess the man and, potentially, his wife instead.[175] Even though the man's wife, who was present at the scene, "begged and begged" a deputy not to leave the husband alone in the house, the deputy left the man alone and returned to his squad car for nine minutes.[176] The husband ended up committing suicide with a gun in his home during the deputy's absence.[177]

The court concluded that the defendants were entitled to qualified immunity when it considered whether a constitutional right had been "clearly established," a requirement to overcome qualified immunity.[178] The court considered applying the state-created danger doctrine exception to the case, but determined that past Sixth Circuit precedent had never been used to extend the exception to similar cases of suicide by someone who was not in official custody.[179] The court decided they would not extend it here because the lack of precedent meant that state officials lacked "sufficient warning of the possible unconstitutionality of their conduct."[180] Because the right could not be clearly established, the court declined to analyze whether the decedent's constitutional rights had been violated, so the plaintiffs' Section 1983 claims failed.[181] The outcome in this case is problematic because the actions of the officials were arguably more than negligent given the clear knowledge the officers had of the decedent's suicidal intent.

If the doctrine was analyzed using the new interpretation of the language in *DeShaney*, this case would likely survive summary judgment and go to trial. Here, the deputies knew, or should have known, that there was a risk of the individual's suicide from the 911 call that indicated that he was suicidal, and from their discussions with his wife at the scene.[182] By arriving on the

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[173] *Id.* at 851–54.

[174] *Id.* at 851–52.

[175] *Id.* at 853.

[176] *Id.* at 849, 852 (internal quotation marks omitted) (quoting the record), 854.

[177] *Id.* at 854.

[178] *Id.* at 855–59.

[179] *Id.* at 855–59.

[180] *Id.* at 859.

[181] *Id.* at 859.

[182] *See id.* at 850–52. While the parties dispute whether or not the content of the 911 call was communicated to the deputies prior to arriving at the home, they had enough evidence after arriving at the scene and hearing his wife's account of the situation. *See id.* Their

scene, they temporarily closed the risk of harm, but created a new risk through their decisions. They reopened this risk by calling off the EMS and leaving him in his home alone after removing his wife. The fact that the man's wife had urged that he not be left alone and the fact that the officers were aware of guns in the home also points to the foreseeability of the man taking his own life if he was left alone. The deputies therefore created a new risk when they removed his wife and themselves from his presence, and he took that chance to commit suicide.

2. The Tenth Circuit—Christiansen—Failure for Lack of Danger Creation and Lack of Conscience-Shocking Behavior

In *Christiansen v. City of Tulsa*, the police were called to the scene of the home of a suicidal man who was inside the home with a gun.[183] After hours of negotiations, the police cut the man's phone line so that he could only be contacted through them, and launched a "flexible baton" into a window "to move the [negotiation] process along."[184] The man shot himself soon after.[185] The court determined that the defendants had not "created" the danger since the danger existed before they arrived and that they had not intentionally increased the risk of harm because their actions demonstrated intent to resolve the situation.[186] Finally, the court determined that the officials' actions were not "conscience shocking" because they were reasonable for the situation.[187]

Christiansen would have the same result with the new test: a holding for the defendants.[188] In *Christiansen*, the officials never had the chance to stop the harm because the decedent was inside the home with a weapon for the entire duration of the interaction. Therefore, they had no opportunity to reopen the harm through their actions. Moreover, even if the officials were found to have stopped and reopened the risk of harm, the foreseeability of the officers' acts creating more harm was tenuous at best because the risk was continuously high throughout this emergency situation.

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characterization of the man's wife as "hysterical" should not excuse their choice to ignore her account of the situation. *See id.* at 853 (internal quotation marks omitted).

[183] Christiansen v. City of Tulsa, 332 F.3d 1270, 1275 (10th Cir. 2003).

[184] *Id.* at 1277 (internal quotation marks omitted).

[185] *Id.*

[186] *Id.* at 1281 (internal quotation marks omitted) (quoting Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996)).

[187] *Id.* at 1281–82 (quoting Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995)).

[188] *See id.* at 1274.

3. District Case—Ferreira (D.R.I.)—Failure for Lack of Danger Creation and Lack of Conscience-Shocking Behavior

In *Ferreira v. City of E. Providence*, the defendants, police officials, were granted summary judgment on claims including a state-created danger claim.[189] In *Ferreira*, a woman who had previously been visited by the police earlier in the day for a domestic altercation with her boyfriend, took guns with her from her car and later killed herself with one of the guns.[190] The police were aware of the guns, but were not aware of her suicidal intent until her brother learned of that intent and called 911.[191] The police executed a "hasty" plan to try to prevent her from committing suicide, but did not succeed.[192]

The court determined that the state-created danger doctrine did not apply because the decedent ultimately took her own life, and because the failure to confiscate the guns from her boyfriend's home without cause earlier and the failed "hasty" plan did not constitute an affirmative action under the exception.[193] Finally, the court determined that even if the exception had been triggered, the officers' actions were not conscience-shocking.[194]

Under the new test the result of this case would remain the same and the defendants would succeed. As with the analysis of *Christiansen* under the new test, the officers did not do anything to reopen a harm in this case. Only the failure to confiscate her guns may have potentially reopened a risk as they had allowed her to take them with her, but they had no knowledge of her suicidal intent at that time. Moreover, their actions in the hasty rescue plan did not foreseeably cause the harm because the risk of harm was high during the entire time they were with the decedent.

4. District Case—Bynum (S.D. Miss.)—Failure for Lack of Danger Creation

In *Bynum ex rel. Bynum v. City of Magee*, a man was found by police officers during a suicide attempt and was taken home by police.[195] Later, police were called to his home where he had barricaded himself inside and was threatening to commit suicide.[196] The police officers allegedly refused to

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189 Ferreira v. City of E. Providence, 568 F. Supp. 2d 197, 202, 216 (D.R.I. 2008).
190 *Id.* at 203–05.
191 *See id.* at 203.
192 *Id.* at 205.
193 *Id.* at 211–12.
194 *Id.* at 212.
195 Bynum *ex rel.* Bynum v. City of Magee, 507 F. Supp. 2d 627, 630 (S.D. Miss. 2007).
196 *Id.*

take any action or enter the home despite requests from his family to do so and one officer threatened the father with arrest if they were called again.[197] The man killed himself three days later.[198] The court partially granted the municipal defendants' motion to dismiss and held that the state-created danger doctrine exception did not apply because the officers did not create or increase the decedent's risk of danger because he was already suicidal from the time they first found him.[199] The analysis did not include the second instance where the police allegedly refused to intervene at his home.[200]

Under the new test, this case is borderline; it may go either way for the plaintiffs or defendants. Here, it is arguable that the police closed a risk when they took the decedent home, and when they arrived on the scene of the decedent barricading himself in the home. However, they then reopened that risk both times by leaving the decedent at his home, and by refusing to intervene. Despite this reopening of risk, it is unclear if the time difference of three days between their last interaction with him and his suicide would be enough to establish foreseeability.

CONCLUSION

The state-created danger doctrine should overcome qualified immunity in situations where a government official's decisions or actions have put another at risk of suicide. Analysis under the new interpretation of the state-created danger doctrine exception would lead to varied results but would create a more plaintiff-friendly environment by allowing more of their claims to survive summary judgment.

It is important to allow these claims to go to trial when the behavior of government officials is more than negligent, and it would hold these officials accountable for not practicing due care. Allowing the state-created danger doctrine to apply to suicides is especially necessary for situations involving law enforcement officials because those officials are more likely than the average official to encounter suicidal or mentally ill individuals.[201] By allowing this exception, the law enforcement officials and their departments would likely be encouraged to train these officials to identify and weigh the risk of suicide in situations where they encounter potentially suicidal

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[197] *Id.* at 630–31.

[198] *Id.* at 631.

[199] *Id.* at 630, 634–35. The court denied the municipal defendants' motion to dismiss regarding an equal protection claim. *Id.* at 635.

[200] *See id.* at 634–35.

[201] *See* Abramson, *supra* note 17 (describing how officers are responding to an increase in interaction with mentally ill people during their work).

individuals or would encourage the departments to give officials access to mental health professionals who could assist in these types of situations.[202]

Creating an increased potential for liability against these officials will doubtlessly draw criticism for putting public funds at a greater risk, but we must be able to hold government officials accountable when they have foreseeably rendered a member of the public, that they are there to protect, more vulnerable to harm than they would have been otherwise. This liability will likely incentivize law enforcement officials to take more care in situations involving individuals with known mental health issues. It is similarly important to hold these officials accountable in this way due to the authority they hold by virtue of their position, which creates an uneven balance of power between them and the individual with whom they interact.

Finally, we must consider instances in which police reopen a risk to be instances of the creation of a new harm or instances of the exacerbation of the current harm because dismissing a claim solely for the reason that no affirmative act occurred would defeat the purpose of the state-created danger doctrine exception. The purpose is to hold government officials who are more than negligent, by virtue of creating or exacerbating a risk, accountable. The reopening of the risk of suicide can and should be considered such a creation or exacerbation of harm. To not hold government officials accountable in these instances would be an injustice to the civilian individuals who rely on those government officials every day.

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[202] *See id.*