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# The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit

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# THE PERILS OF UNPUBLISHED NON-PRECEDENTIAL FEDERAL APPELLATE OPINIONS: A CASE STUDY OF THE SUBSTANTIVE DUE PROCESS STATE-CREATED DANGER DOCTRINE IN ONE CIRCUIT

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*Abstract*: About 80% of federal appellate decisions are non-precedential. This Article examines the practical consequences for district courts and litigants confronting inconsistent appellate opinions issued by the same federal circuit. Specifically, this is a case study comparing the divergent binding and non-precedential opinions applying one frequently invoked constitutional theory within the U.S. Court of Appeals for the Third Circuit, the "state-created danger" theory of substantive due process.

The comparison demonstrates that the risks of non-precedential opinions are real. During the six-year interval between binding state-created danger decisions, the Third Circuit created inconsistent non-precedential opinions on the identical legal theory. Doctrinal divergence between the Third Circuit's binding and non-precedential opinions has undermined the predictive value of precedential state-created danger decisions, creating an obstacle to settlement at both the trial and appellate levels. In turn, district courts' unpredictable application of the non-precedential opinions has undermined the critical appellate functions of ensuring that like cases are treated alike, that judicial decisions are not arbitrary, and that legal issues resolved at the appellate level need not be relitigated before the district courts.

The practice of issuing non-precedential opinions is justified on efficiency grounds, as a mechanism for overburdened appellate courts to manage their dockets. But doctrinal inconsistency between the Third Circuit's precedential and non-precedential opinions undercuts the efficiency rationale because doctrinal divergences may have led plaintiffs and defendants to value cases differently—potentially leading to more litigation, fewer settlements, and additional need for judicial decision-making.

This Article proposes several reforms to reduce doctrinal inconsistency between precedential and non-precedential opinions. Because an appellate court should weigh the same considerations in making each of its publication decisions, the Third Circuit should replace its amorphous publication guideline with specific criteria. The Article concludes by suggesting that, consistent with the common law tradition of empowering the applying court

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to assess the persuasive value of a judicial decision, the Third Circuit should no longer refuse to cite its own non-precedential opinions, and should follow several circuits in expressly according persuasive value to its non-precedential opinions.

## INTRODUCTION

Shannon Schieber, a University of Pennsylvania graduate student, was murdered in her Philadelphia apartment.[1] Nadine White, the mother of a young son, was murdered in her Philadelphia apartment.[2] In both cases, neighbors had called police because of noises from the apartments. In both cases, police responded but refused to break down the door. In both cases, parents of the murder victims filed state-created danger claims in federal district court against the police officers and the city. One judge dismissed the parent's claim, expressly following a non-

1. Schieber v. City of Philadelphia, 156 F. Supp. 2d 451, 455 (E.D. Pa. 2001), *rev'd on other grounds*, 320 F.3d 409 (3d Cir. 2003).

2. White v. City of Philadelphia, 118 F. Supp. 2d 564, 566–67 (E.D. Pa. 2000).

precedential federal appellate decision.[3] The other judge allowed the parents' claim to survive summary judgment, ignoring the non-precedential appellate decision that could have foreclosed the parents' claim.[4]

While the risk that district courts will apply non-precedential opinions inconsistently raises serious concerns, non-precedential federal appellate decision-making has recently attracted public attention for other reasons. On April 12, 2006, the Supreme Court of the United States approved new Federal Rule of Appellate Procedure 32.1 which, if finalized, will prohibit federal appellate courts from restricting citation of non-precedential opinions.[5] The prospect of the rule change, among other events, reheated national debate about the legitimacy and uncertain persuasive value of non-precedential federal appellate opinions.[6] The E-Government Act of 2002 increased the accessibility and potential use of these opinions by requiring all federal circuits to post their non-precedential opinions in a "text searchable format" on their websites.[7]

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3. *Id.* at 573, 577.

4. *Schieber*, 156 F. Supp. 2d at 456.

5. Administrative Office of the U.S. Courts, Federal Rulemaking, http://www.uscourts.gov/rules/index.html#supreme0406 (last visited Apr. 23, 2006) (announcing that the new rule will take effect on Dec. 1, 2006 unless Congress enacts legislation to reject, modify, or defer it); Advisory Comm. on Appellate Rules, Table of Agenda Items (2005), http://www.uscourts.gov/rules/apdocket.pdf; How Appealing, http://legalaffairs.org/howappealing/0905.html (Sept. 20, 2005, 16:55 EST); How Appealing, http://legalaffairs.org/howappealing/0605.html (June 16, 2005, 21:20 EST). The revised proposed FED. R. APP. P. 32.1(a) provides: "**Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been; (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007." Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure, Report of Advisory Comm. on Appellate Rules (Oct. 7, 2005), *available at* http://www.uscourts.gov (follow "Federal Rulemaking" hyperlink; then follow "Pending Rules Amendments" hyperlink; then follow "Appellate Rule 32.1" hyperlink). For discussions of the proposed Rule, see, for example, Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003); Niketh Velamoor, *Proposed Federal Rule of Appellate Procedure 32.1 to Require that Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561 (2004); TIM REAGAN ET AL., FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/$File/Citatio2.pdf; Minutes of Fall 2004 Meeting of Advisory Comm. on Appellate Rules (Nov. 9, 2004), http://www.uscourts.gov/rules/Minutes/app1104.pdf; Minutes of Spring 2004 Meeting of Advisory Comm. on Appellate Rules (Apr. 13–14, 2004), http://www.uscourts.gov/rules/Minutes/app0404.pdf; Minutes of Fall 2002 Meeting of Advisory Comm. on Appellate Rules (Nov. 18, 2002), http://www.uscourts.gov/rules/Minutes/app1102.pdf.

6. *See* sources cited *supra* note 5 and accompanying text.

7. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (2003).

Moreover, as of 2002, non-precedential opinions of federal appellate courts have been printed in hard copy in their own reporter, the Federal Appendix, rendering the label "unpublished" a misnomer. The U.S. Court of Appeals for the District of Columbia Circuit amended its internal operating rules to provide that unpublished dispositions entered on or after January 1, 2002 "may be cited as precedent,"[8] even though the authoring panel itself saw no precedential value.[9] Most famously, an Eighth Circuit panel, in *Anastasoff v. United States*,[10] declared the circuit's internal rule designating unpublished opinions as non-precedential to be an unconstitutional expansion of Article III judicial power.[11] While the Eighth Circuit quickly vacated *Anastasoff* as moot, the decision sparked a lively national discussion by holding that any exercise of the judicial power must be binding on future panels because the alternative would be "an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."[12]

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Third Circuit non-precedential opinions issued before January 2002 were not released for online publication and are not searchable in electronic form. *See* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 211 & n.58 (2001). For example, a Westlaw search of the Third Circuit's unpublished database showed 10,728 documents from December 17, 1996 to June 13, 2005. Of those, approximately 5880 were issued before January 2002. But the reasoning of these opinions remains difficult to locate because only a handful (about twenty-five) are available in full text online in Westlaw and, of those, many consist solely of one- or two-line orders. Usually, the online opinion consists of the "table" citation and the few words found in the published table dispositions printed in the Federal Reporters. Since January 1, 2002, the Third Circuit has posted non-precedential opinions in counseled cases on its website. Judge Edward Becker, Statement to Advisory Committee on Appellate Rules (Apr. 13, 2004), http://www.nonpublication.com/Becker_statement.pdf.

8. D.C. CIR. R. 28(c)(1)(B), *available at* http://www.cadc.uscourts.gov/ (follow "Court Rules" hyperlink; then follow "Rules" hyperlink; then follow "Circuit Rules/FRAP" hyperlink) ("Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.").

9. *Id.* 36(c)(2).

10. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000).

11. *Id.* at 899.

12. *Id.* at 904; *see also* Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (calling for review of the circuit's "questionable practice of denying precedential status to unpublished opinions"). *But see* Hart v. Massanari, 266 F.3d 1155, 1159–80 (9th Cir. 2001) (finding that issuance of non-precedential opinions by appellate courts complies with Article III).

This Article offers a case study examining one circuit's precedential and non-precedential applications of one frequently invoked constitutional theory, the "state-created danger" theory of substantive due process. It compares the Third Circuit's divergent binding and non-precedential opinions applying this theory over a seven-year period, including the six-year interval between precedential decisions. The comparison demonstrates that the risks of courts disposing of appeals by non-precedential opinions are real.

This case study reveals that the doctrinal inconsistencies between the Third Circuit's precedential and non-precedential state-created danger opinions created a layer of hierarchical decision-making of uncertain significance that is confusing to both litigants and trial courts. The district courts' unpredictable application of the non-precedential opinions undermined the appellate functions of ensuring that like cases are treated alike, of ensuring that judicial decisions are predictable and not arbitrary, and of ensuring that legal issues resolved at the appellate level need not be relitigated before the district courts. While issuing non-precedential opinions is often defended on efficiency grounds,[13] doctrinal inconsistency between a circuit's precedential and non-precedential opinions undercuts that rationale because doctrinal divergences may lead plaintiffs and defendants to value cases differently—potentially leading to more litigation, fewer settlements, and additional adjudication.

Part I of this Article explains the rationale for producing "unpublished" federal appellate opinions that lack precedential value. Part II explores the risks of generating such opinions, including doctrinal divergence from precedent and uncertainty about how future courts and litigants will value such opinions. Part III describes the prevalence of non-precedential opinions in the Third Circuit's application of one constitutional doctrine, state-created danger. Part IV identifies four separate examples of doctrinal divergence between the circuit's precedential and non-precedential applications of the doctrine. Part V explains that applications of state-created danger frequently make law because it is invoked in widely varying factual contexts. Finally, the Conclusion proposes several reforms to promote uniformity between precedential and non-precedential opinions within the same circuit.

13. *See infra* notes 18–30 and accompanying text.

## I. THE RATIONALE FOR NON-PRECEDENTIAL OPINIONS

Most Third Circuit decisions are not precedential.[14] During the twelve-month period ending September 30, 2004, the Third Circuit disposed of 2047 appeals on the merits.[15] Only 320 resulted in published opinions, meaning 84.4% of the Third Circuit's dispositions on the merits were non-precedential.[16]

Such a huge percentage of non-precedential opinions is the norm for federal appellate courts. The thirteen courts of appeals "have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions . . . in recent years have been designated as non-precedential."[17] According to one scholar, the federal appellate

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14. Under the Third Circuit's Internal Operating Procedures, "not precedential opinions . . . are not regarded as precedents that bind the court because they do not circulate to the full court before filing," 3D CIR. IOP 5.7, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf, unless the opinion is not unanimous, *id.* IOP 5.5.4. A majority of the panel decides whether an opinion is designated as precedential or not precedential. *Id.* IOP 5.1. The distinction between not precedential and precedential is that the former "appears to have value only to the trial court or the parties," *id.* IOP 5.3, and the latter "has precedential or institutional value," *id.* IOP 5.2.

15. ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2004), *available at* http://www.uscourts.gov/ (follow "Library" hyperlink; then follow "Statistical Reports" hyperlink; then follow "Judicial Business of the United States Courts" hyperlink; then follow "2004 Annual Report of the Director" hyperlink; then follow "S-3" hyperlink).

16. *Id.* The Annual Report concluded that of the 1727 unpublished opinions, all but thirty-eight "expound[ed] on the law as applied to the facts" and "detail[ed] the judicial reasons upon which the judgment [was] based," as opposed to simply disposing of the appeal without comment. *Id.* The numbers and percentages of unpublished opinions are similar for the twelve-month periods ending September 30, 2003, *see* ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2003), *available at* http://www.uscourts.gov/judbus2003/tables/s3.pdf (1915 appeals, 84.3% unpublished), September 30, 2002, *see* ADMIN. OFFICE OF THE U.S. COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2002), *available at* http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf (1965 appeals, 84.3% unpublished), September 30, 2001, *see* ADMIN. OFFICE OF THE U.S. COURTS, 2001 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2001), *available at* http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf (1707 appeals, 85.2% unpublished), September 30, 2000, *see* ADMIN. OFFICE OF THE U.S. COURTS, 2000 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2000), *available at* http://www.uscourts.gov/judbus2000/tables/s03sep00.pdf (1657 appeals, 83.6% unpublished), September 30, 1999, *see* ADMIN. OFFICE OF THE U.S. COURTS, 1999 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (1999), *available at* http://www.uscourts.gov/judbus1999/s03sep99.pdf (1707 appeals, 81.0% unpublished), September 30, 1998, *see* ADMIN. OFFICE OF THE U.S. COURTS, 1998 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (1998), *available at* http://www.uscourts.gov/dirrpt98/s03sep98.pdf (1740 appeals, 85.4% unpublished), and September 30, 1997, *see* ADMIN. OFFICE OF THE U.S. COURTS, 1997 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (1997), *available at* http://www.uscourts.gov/judicial_business/s03sep97.pdf (1873 appeals, 83.9% unpublished).

17. Minutes of Fall 2002 Advisory Comm. on Appellate Rules (Nov. 18, 2002), http://www.uscourts.gov/rules/Minutes/app1102.pdf; *see* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.2.5, *available at* http://www.uscourts.gov/judicialfactsfigures/

courts began issuing non-precedential opinions about thirty years ago to manage increasing caseloads,[18] but "what began as an experiment has become the dominant mode of case disposition for the federal appellate courts."[19]

The practice of non-precedential decision-making assumes that federal appellate opinions serve two main functions—dispute-settling and lawmaking—and that only the latter should be precedential.[20] Federal court scholars William Reynolds and William Richman succinctly explained the underlying theory: "Law making opinions announce new law, apply settled law to new facts, or include important discussion or criticism of settled rules. Dispute-settling opinions apply uncontroversial rules of law to ordinary cases and have no value to the public."[21]

Judicial efficiency is the most commonly cited rationale for non-precedential opinions.[22] The late Eighth Circuit Judge Richard S. Arnold, the author of *Anastasoff*, was pragmatic about why the practice,

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contents.html (follow "Type of Opinion or Order Filed in Cases Terminated on the Merits After Oral Hearing or Submissions on the Briefs") (last visited Apr. 28, 2006) (showing that for all U.S. Courts of Appeals, excluding Federal Circuit, the percent of unpublished opinions during 2000–05 ranges from a low of 79.8% in 2000 to a high of 81.6% in 2005); Lauren Robel, *The Practice of Precedent:* Anastasoff, *Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 402 (2002) (noting that publication rate varies among circuits but is 23% overall).

18. Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 717 (2004) ("The modern history of the non-precedential opinion beg[an] in 1964, when the Judicial Conference of the United States passed a resolution [providing that federal courts] authorize the publication of only those opinions which are of general precedential value." (internal quotation marks and citation omitted)). By 1974, each of the federal circuits had adopted a non-publication rule. *Id.* at 718. A detailed history of the non-precedential opinion can be found in William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168–72 (1978).

19. Sloan, *supra* note 18, at 719.

20. Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 50.

21. William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 808 (1979); *see* Reynolds & Richman, *supra* note 18, at 1182–83; William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REFORM 623, 632–33 (1988).

22. *E.g.*, William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1293 (1996); Richman & Reynolds, *supra* note 21, at 623–24 (noting that circuit courts adopted these strategies to deal with the "staggering increase in the[ir] work"); Robel, *supra* note 20 ("Limited publication is a response to caseload; its rationale derives in part from the hope that significant amounts of time can be saved by not preparing opinions for publication, but simply preparing a statement suitable for the parties that explains the results of the appeal.").

which he considered unconstitutional, nevertheless took hold: "The answer lies in one word, the same word that describes the most serious problem facing all our courts today: volume."[23] Judge Arnold explained that federal courts have adopted a variety of administrative strategies to cope with increasing volume, "including more staff, with centrally located staff attorneys; a smaller proportion of cases argued orally; less time allotted to those cases that are argued; decisions by one-line order or brief memorandum; and, of course, unpublished opinions."[24] As federal court scholar Lauren Robel rightly observes, the federal judges' varied and creative administrative remedies for the overwhelming workload are themselves "testimony to [the judges'] dedication."[25]

Preparing an opinion for publication costs appellate judges time. Since non-precedential opinions are intended for use only by the parties and the decision-maker whose opinion is under review, the appellate panel can devote less time to eliminating potential ambiguity and to explaining all arguments.[26] Yet, as one scholar points out, declining to issue a precedential opinion does not eliminate the costs of researching and reaching a reasoned decision, but is instead intended "to minimize additional special production costs associated with publication . . . [such as] shor[ing] it up with citations to authority at every turn, and . . . anticipat[ing] in writing possible criticisms of the opinion."[27] Judge Alex Kozinski of the Ninth Circuit, a vociferous opponent of permitting citation of non-precedential opinions, argues that the volume

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23. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999).

24. *Id.* at 222.

25. Robel, *supra* note 20, at 6; *see also id.* at 38 (reporting that 81% of federal appellate judges surveyed reported workload is "overwhelming" or "heavy").

26. *See* Robel, *supra* note 20; Robel, *supra* note 17, at 403; *see also* Reynolds & Richman, *supra* note 18, at 1183–84; Richman & Reynolds, *supra* note 21, at 633 (a non-precedential opinion "need not contain a detailed recitation of the facts, a discussion of every legal issue raised by the parties, or a scholarly review of the governing legal principles and authorities"); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 123–24 (1995).

27. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 942 (1989); *see* Reynolds & Richman, *supra* note 18, at 1190–91; Robel, *supra* note 20, at 51; Slavitt, *supra* note 26 (summarizing the efficiency rationale as "judges do not have enough time and resources to analyze, research, and write each opinion to the extent necessary for it to become part of the system of published law"). *But see* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190 (1999) (explaining that, as sitting Sixth Circuit Chief Judge, he spends less than half as much time researching a typical unpublished opinion as a published opinion because legal questions addressed in unpublished opinions tend to be straightforward and easily answered).

of cases in that circuit affords the court time to do no more than ensure that a law clerk's or staff attorney's draft reaches the right result and adequately explains it to the parties.[28]

Non-precedential opinions often omit a detailed explanation of the facts because their target audience is assumed to know the facts.[29] Non-precedential opinions "typically are shorter . . . than published decisions, and sometimes are written with less care and detail precisely because they are solely for the use of the original parties to the lawsuit."[30] In the Third Circuit, however, this is not necessarily true. According to former Chief Judge Edward R. Becker:

> Most are not cursory; in fact they average over seven pages. . . . [T]hey uniformly set forth the ratio decidendi of the decision. These opinions are prepared in chambers under the close supervision of the judge. They are usually drafted by clerks but, to repeat, carefully reviewed and edited by Judges. In my chambers they are written by me . . . .[31]

Efficiently disposing of large appellate dockets is not the sole justification for non-precedential opinions. By designating certain decisions as non-precedential, federal appellate courts may devote more resources to producing better precedential opinions.[32] Sixth Circuit Judge Boyce F. Martin, Jr., defends the practice as "a way to pan for judicial gold while throwing the less influential opinions back in the stream,"[33] "without adding to the clutter, and sometimes confusion, of our multitudinous array of published decisions."[34] The Third Circuit's

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28. Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 38 (June 2004) ("[Many non-precedential dispositions are] drafted by the court's central staff and presented to a panel of three judges in camera, with an average of five or 10 minutes devoted to each case. During a two- or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings."); *id.* (arguing that "the process of anticipating how the language . . . will be read by future litigants and courts, and how small variations in wording might be imbued with meanings never intended—takes exponentially more time and must be reserved, given our caseload, to the cases we designate for publication"); *see also* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, CAL. LAW. 43, 43–44 (June 2000); Richman & Reynolds, *supra* note 21, at 633–34 (explaining that courts have limited the citation of non-precedential opinions in order to realize time savings "without worrying that a careless word might later come back to haunt the court").

29. Reynolds & Richman, *supra* note 18, at 1183; Slavitt, *supra* note 26.

30. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 46 (2004).

31. Becker, *supra* note 7, at 2 (emphasis in original).

32. Velamoor, *supra* note 5, at 563.

33. Martin, *supra* note 27, at 178.

34. *Id.* at 197; *see also id.* at 191 (noting that the practice is useful to prevent against "truly meritorious cases [being] lost in a flood of opinions on minor issues").

internal rules suggest a similar rationale.[35] These rules assume that the authoring panel will be able to predict before writing an opinion which decisions will have no value except to the parties and the trial court, and anticipates non-precedential opinions even where the panel reverses or is itself divided.[36]

Even if the Third Circuit could produce timely precedential decisions for the roughly two thousand appeals it disposes of annually,[37] doing so would not be optimal for judges or litigants.[38] Not only would such a volume of published opinions overtax the resources of the court, but the published opinions likely would be repetitive. While not as significant a concern in the age of online research, universal publication would involve expensive sifting to locate cases that fleshed out the governing doctrine itself or as it applied to a new set of facts,[39] and the time and expense of cite-checking would increase.[40] However, while the

35. Third Circuit Internal Operating Procedure 5.3, "Not Precedential Opinions," provides in relevant part that an opinion "that appears to have value only to the trial court or the parties is designated as not precedential and is not printed as a slip opinion but, unless otherwise provided by the court, it is posted on the court's internet website." 3D CIR. IOP 5.3, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf. Former Internal Operating Procedure 5.3 was substantially the same but did not provide for online publication of the non-precedential decisions. *See* 3D CIR. IOP 5.3 (superseded 2002) (on file with author).

36. 3D CIR. IOP 5.3, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf (providing for the issuance of not precedential opinions "without regard to whether the panel's decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief").

37. *See supra* note 16 and accompanying text.

38. *See* 3D CIR. IOP 5.5.3(a), *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf ("aspirational goal" is circulation of a draft opinion within sixty days after assignment or after close of any supplemental briefing).

39. *See* Reynolds & Richman, *supra* note 18, at 1184 (arguing that the costs of opinion publication for lawyers include extra research time); Robel, *supra* note 27 (arguing that publication increase would increase the cost of maintaining libraries); Slavitt, *supra* note 26, at 124–25 (noting that the indirect benefits of non-precedential opinions include saving judges and litigants the effort of sifting through needless repetitive decisions); Velamoor, *supra* note 5, at 563; *cf.* Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1220 (2004); Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 559–61 (1997); Memorandum from Stephen R. Barnett, Elizabeth Josselyn Boalt Professor of Law, Emeritus, to Samuel A. Alito, Jr., U.S. Court of Appeals for the Third Circuit 17–18 (Feb. 17, 2004), *available at* http://www.nonpublication.com/barnettresponse321.pdf (arguing that any increase in research time would be small because computer research hones in on relevant cases and few additional cases would be retrieved).

40. One justification is less convincing: While non-precedential decisions permit the court to allow issues to "percolate," Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 17, 24 n.28 (2000), that practice confers on circuit court panels the discretionary docket power of the en banc or Supreme Court. William M. Richman & William

justifications for non-precedential opinions are easy to grasp, their proliferation also carries specific risks.

## II. THE RISKS OF GENERATING NON-PRECEDENTIAL OPINIONS

Appellate court production of a body of non-precedential opinions that are not binding on either subsequent appellate panels or on the district courts, a "twilight zone of written-but-unpublished work,"[41] creates a number of risks for courts and litigants, including: doctrinal shifts from precedential decisions; uncertainty about the persuasive value of non-binding decisions issued by the hierarchically superior court; mistaken predictions of an opinion's future usefulness; and unpredictability of judicial outcomes. There is a consequent risk of litigant uncertainty about settlement value and litigation strategy, including the initial decision to sue.

### *A. Doctrinal Anomalies and Applications of Settled Law to New Facts*

Adherence to precedent is a principal tool in ensuring that judicial decision-making is predictable, uniform, rule-based, and fair to similarly situated litigants.[42] Non-precedential resolution does not affect a judgment's preclusive effect or alter the resolution of the parties' dispute, and therefore serves the judicial goal of resolving private disputes. But non-precedential dispositions have the potential to conflict with the lawmaking function of judicial decision-making, either if they diverge from the binding doctrine in precedential decisions,[43] or if they flesh out the meaning of a settled legal rule by applying it to a new scenario.[44] The risk of doctrinal divergence in non-precedential opinions underlies the specific publication criteria of the Sixth Circuit, which, for example, favors publication when the opinion establishes a new rule of

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L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 283 (1996).

41. Robel, *supra* note 27, at 943.

42. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987).

43. *See* Sara Hoffman Jurand, *Proposed Rule on Citing 'Unpublished' Opinions Takes First Step*, TRIAL, June 2004, at 70, 72 (not publishing decisions "'increases the risk of inconsistent decision-making, creates a perception that courts engage in results-oriented decision-making, and distorts and impedes the development of the law'" (quoting Richard Frankel of Trial Lawyers for Public Justice)); Reynolds & Richman, *supra* note 18, at 1192–94.

44. *See infra* notes 46–48 and accompanying text.

law, alters or modifies an existing rule of law, applies an established rule to a novel fact situation, or creates or resolves a conflict of authority.[45]

Further, the assumption that dispute-settling opinions have no value to the public may underestimate the value for future litigants and district courts of examples of settled rules applied to diverse factual scenarios.[46] Professors Reynolds and Richman explain: "First, the weight of precedent on a point of law hardens it, making it more difficult to overturn. . . . Second, later cases help flesh out a precedent . . . [and] fleshing out by application of principle to different facts is vital to common-law adjudication."[47] The second point deserves special emphasis. For example, as another scholar argues: "In areas of law where factual settings are diverse—due care, bad faith, unconscionability, reasonableness, duress, and proximate cause—which is perhaps the bulk of law, the true content of law is known not by the verbal rule formulations but by the application of those verbal formulations."[48]

The Third Circuit has a single criterion for determining whether its opinions will be precedential or non-precedential: if the majority of a panel predicts the decision will be valuable to others beyond the parties and the trial court, then the decision is precedential.[49] This approach

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45. 6TH CIR. R. 206, *available at* http://pacer.ca6.uscourts.gov/rules/frame.htm. Many of the circuit rules that provide specific criteria for publication appear based on the model guidelines for opinion publication published by the Federal Judicial Center in the mid-1970s. *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 578 (1981).

46. *See* Fox, *supra* note 39, at 1226 (stating that opinions that follow a new rule can be as important to the development of law as the original opinion); Perschbacher & Bassett, *supra* note 30, at 45–46; Reynolds & Richman, *supra* note 18, at 1196; Robel, *supra* note 20, at 53 (study of government litigants showed use of non-precedential decisions to make litigation decisions and write briefs); Robel, *supra* note 27, at 947 (criticizing the assumptions underlying limited publication rules in part because "the central assumption, that only lawmaking and not dispute-resolving opinions give litigants useful information, is wrong because it underestimates the varieties of information that lawyers retrieve from opinions. Even if the courts select for publication only those opinions that 'make law,' unpublished opinions contain useful information because opinions tell lawyers more than simply 'what the law is.'"); Robel, *supra* note 17, at 405–07 (finding evidence that attorneys read non-precedential opinions for reasoning that might be persuasive in the future); Slavitt, *supra* note 26, at 126.

47. Reynolds & Richman, *supra* note 18, at 1190; *see also id.* at 1176.

48. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 768–69 (2003).

49. 3D CIR. IOP 5.1, 5.3, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf; *supra* note 35.

risks erroneous predications by the authoring panel.[50] As Professors Reynolds and Richman hypothesize, "existence of inconsistency between unpublished opinions and published law and among unpublished opinions . . . constitutes evidence that judges cannot, at the time of writing, correctly distinguish between lawmaking and dispute-settling opinions."[51] More subtle is the risk that a court may overlook an opportunity to create or modify precedent in an area that needs it because "an early decision that a case does not warrant a published precedential opinion may be self-fulfilling."[52]

Judicial production of mostly non-precedential opinions is more efficient *for litigants* only if the non-precedential opinions are redundant articulations of routine legal principles applied to routine facts.[53] The appellate court efficiency rationale for non-precedential decisions does not accurately account for the reality confronted by litigants if the non-precedential decisions (1) are doctrinally inconsistent with binding precedent, or (2) apply law to a novel set of facts that gives new meaning to the legal test. Similarly, the efficiency rationale for judicial production of mostly non-precedential opinions is undercut for appellate courts—or district courts—if inconsistencies between the precedential and non-precedential decisions encourage more litigation or discourage settlement. Because "[l]awyers use precedent to evaluate how courts apply the law across a range of cases as much as to identify what a precise rule of law is," one cost of the time-saving device of non-precedential decision-making "is that it leaves the law unclear and may ultimately lead to more litigation to clarify the law."[54] The efficiency justification would be undercut if, for example, litigants make wrong

50. *See* Reynolds & Richman, *supra* note 18, at 1201 ("Even the best-intentioned and hardest-working court can make a mistake."); Robel, *supra* note 17, at 403 (noting that 30% of federal appellate judges believed they "sometimes" had to forgo writing opinions for publication in cases in which they "should be written"); Slavitt, *supra* note 26, at 125 ("[J]udges may not accurately determine the value of decisions before writing them because writing tests the reasoning process. . . . If an opinion 'won't write,' it alerts a judge that the rationale, the outcome, or both, are wrong."). *But see* Martin, *supra* note 27, at 192 (arguing that the publication decision is "almost invariably an easy call to make" and judges "seldom make mistakes").

51. Reynolds & Richman, *supra* note 18, at 1193–94.

52. Richman & Reynolds, *supra* note 21, at 635.

53. *See infra* Part IV.

54. Slavitt, *supra* note 26, at 126; *see* Cappalli, *supra* note 48, at 770 (arguing that given the number of non-precedential legal resolutions, "[i]t is difficult to doubt that considerable numbers of issues have been unnecessarily and inefficiently relitigated in both appellate and trial courts"); *see also* Boggs & Brooks, *supra* note 40, at 20–22.

choices about whether to bring or settle a suit because they wrongly predict that a court will approve a claim when non-precedential opinions make the opposite outcome more likely.[55]

Proponents of the efficiency rationale for judicial production of mostly non-precedential opinions concede that judges may be less rigorous in an unpublished analysis.[56] While some assume doctrinal uniformity,[57] others in favor of a blanket prohibition on litigants' citing unpublished opinions assume doctrinal inconsistencies between a circuit's precedential and non-precedential opinions.[58] Such proponents appear motivated by a desire to limit public attention to "actual or apparent inconsistencies" by "forc[ing] such opinions out of sight"[59] to avoid "increas[ing] public perception of judicial unpredictability and reflect[ing] negatively on the administration of justice."[60]

From the vantage of a sitting federal judge, the author of *Anastasoff*, Judge Arnold, explained the risk that the option of issuing a non-precedential opinion may tempt federal judges to sweep doctrinal problems under the rug:

> If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser. (I don't say that judges are actually doing this—only that the temptation exists.) Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result,

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55. *See infra* Part IV.

56. *See* Kozinski, *supra* note 28. Arguing against even permitting citation to a typical Ninth Circuit non-precedential opinion, Judge Kozinski stated that such opinions function well as letters to the litigants explaining the result, "even if every proposition of law is not stated with surgical precision. But as a citable precedent, it's a time bomb . . . ; language that is lifted from a bench memo and pasted wholesale into a disposition can provide a veritable gold mine of ambiguity and misdirection." *Id. See also* Martin, *supra* note 27; Robel, *supra* note 27; Slavitt, *supra* note 26.

57. Sixth Circuit Chief Judge Martin's efficiency justification of unpublished opinions is premised on the assumption of doctrinal uniformity: "Unpublished decisions tend to involve straightforward points of law—if they did not, they would be published. These types of cases . . . involve settled law and variations on the facts." Martin, *supra* note 27.

58. *See* Velamoor, *supra* note 5, at 576.

59. *Id.*

60. *Id.*

> assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug. . . . [A] system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.[61]

In sum, the proliferation of non-precedential appellate opinions risks divergence from binding doctrine, non-precedential applications of settled law to new facts that flesh out the settled rule, and mistaken predictions of an opinion's lack of value to the public.

### *B. Uncertainty About How Appellate Panels and District Courts Will Treat Non-Precedential Opinions*

If the risk of producing opinions inconsistent with precedent is realized, proliferation of opinions that do not bind future appellate panels or district courts risks inconsistent treatment of the non-precedential opinions by the courts responsible for applying the law of that circuit. Specifically, if doctrinal inconsistencies exist, there is a resulting risk of arbitrariness and unpredictability in district court decision-making. This is true where, as in the Third Circuit currently and under the proposed federal appellate rule, litigants and district courts may cite non-precedential opinions,[62] leaving the district courts discretion to assess their persuasive value.[63]

It is easy to see why a district court would follow a non-precedential decision. District court judges do not like to be reversed, for reasons of both professional reputation[64] and judicial economy. A district court

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61. Arnold, *supra* note 23, at 223; *see also* Reynolds & Richman, *supra* note 18, at 1200 ("A court might also use the cloak of non-publication to avoid the task of reconciling arguably inconsistent decisions.").

62. Third Circuit rules impose no restriction on litigant and district court citation of non-precedential authority, *see* 3D CIR. IOP 5.7, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf (circuit "by tradition does not cite to its not precedential opinions as authority"), nor does the proposed Federal Rule of Appellate Procedure 32.1(a), Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure, Report of Advisory Comm. on Appellate Rules (Oct. 7, 2005), *available at* http://www.uscourts.gov/rules/Reports/AP10-2005.pdf#page=2.

63. *See* Velamoor, *supra* note 5, at 575 (arguing for prohibition on citation of non-precedential opinions to "reduce the inter- and intra-circuit disuniformity inherent in a regime in which it is left to individual judges to decide whether unpublished opinions are legitimate sources of authority and whether the reasoning contained in any given unpublished opinion is sufficiently sound to justify reliance in a later case").

64. Reasons include: "(1) fear that their professional audience, including colleagues, practitioners, and scholars, will disrespect their legal judgments or abilities; (2) fear that a high reversal rate might

judge may consider an appellate court non-precedential decision akin to dicta from the binding circuit, probative of future decision-making and hence useful in crafting a decision likely to be affirmed.[65] Despite the circuit's designation of an opinion as non-precedential, it exists: real litigants presented real facts to the appellate court and the court evaluated them under the binding law. Even if the circuit did not painstakingly select every word, two or three judges of the circuit signed on to the result and presumably the reasoning:[66] "[U]npublished opinions are still opinions—providing insights into a court's reasoning and suggesting to advocates the arguments that could win or lose a case."[67] Although Third Circuit Judge Becker, the former Chief Judge, disputes that district court judges will mistake the meaning of "non-precedential,"[68] Judge Kozinski of the Ninth Circuit has identified the potential for district court uncertainty about the persuasive weight of non-precedential opinions as a key justification for that circuit's prohibition of citation of non-precedential opinions, since "even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written . . . by three circuit judges."[69]

While easy to grasp why a district court might follow a non-precedential opinion from the binding circuit, other possible outcomes exist. A district court might choose not to follow a non-precedential decision. Or, a district court could choose not to follow a non-precedential opinion but feel compelled to distinguish it. Finally, a district court might refuse even to acknowledge a relevant non-precedential opinion.

Similar uncertainty exists as to how a subsequent appellate panel will

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reduce opportunities for professional recognition and advancement . . . ; and (3) the perception that reversal undercuts their de facto judicial power, both in a tangible and intangible sense." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77–78 (1994) (citations omitted); *see* Reynolds & Richman, *supra* note 18, at 1196 & n.152. In rarer instances, district court judges invite reversal. Caminker, *supra*, at 79 & n.276.

65. For an explanation of how lower federal courts supplement binding precedent with reliance on dicta, see Caminker, *supra* note 64, at 75–77.

66. *See* 3D CIR. IOP 5.3, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf.

67. Robel, *supra* note 27, at 943–44.

68. Becker, *supra* note 7, at 2.

69. Kozinski, *supra* note 28, at 37; *see id.* (dispositions bearing the names of three appellate judges are different from other persuasive sources—like Shakespearian sonnets and advertising jingles, which "are not, and cannot be mistaken for, expressions of the law of the circuit").

assess the persuasive value of a non-precedential decision.[70] Inconsistent treatment of non-precedential opinions by courts purporting to apply the binding law of the circuit therefore carries the same risks, whether at the appellate or district court level. These risks include: relitigation of issues already resolved at the appellate level and different treatment of like cases, thus undermining the judicial values of uniformity, predictability, and principled decision-making.[71]

### C. *Uncertainty About How Litigants Will Treat Non-Precedential Opinions*

Appellate opinions that do not bind subsequent panels or district courts also risk inconsistent treatment by litigants bound by the law in that circuit. For example, a litigant has incentive to rely on a non-precedential opinion because of the possibility that a district court[72] or circuit panel will follow the non-precedential reasoning.[73] A litigant has incentive to use non-precedential opinions not just because the facts may be similar or the reasoning persuasive but also for "the added boost of claiming that three court of appeals judges endorse that reasoning."[74]

If there are doctrinal inconsistencies between precedential and non-precedential opinions, unpredictable application of non-precedential opinions by subsequent appellate panels and by district courts may breed uncertainty among attorneys as to how to advise their clients about

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70. By tradition, the Third Circuit does not cite its own non-precedential opinions as authority, a key difference between the Third Circuit and district courts within the Third Circuit. 3D CIR. IOP 5.7, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf ("Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."); *cf. id.* IOP 5.5.4 (stating that drafts of not precedential opinions that are not unanimous do circulate to all active judges).

71. See *infra* Part IV for a discussion of how these risks have been realized in the Third Circuit.

72. *See supra* Part II.B.

73. In the Third Circuit, the latter would be without citation. *See supra* note 70.

74. Kozinski, *supra* note 28, at 37; *see also id.* (ridiculing as naïve the Advisory Committee assertion that an opinion would be cited "for its 'persuasive value' . . . [because] the party hopes that it will influence the court as, say, a law review article might—that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning"). A Seventh Circuit judge articulated a litigant's reason for relying on non-precedential opinions as persuasive authority:

> If the cited order is the work product of our court, if we must study the facts to see if they are distinguishable from the case presently before us, if we must either follow the precise legal formulation found in the order or explain why we are not doing so—in short, if (as is inevitable) we must treat it as a full-fledged precedential opinion of the court, then it is a full-fledged precedential opinion of the court.

Jurand, *supra* note 43 (quoting the Honorable Diane Wood, United States Court of Appeals for the Seventh Circuit).

bringing or settling claims. The basic theory of settlement "has long been recognized: A rational party should settle only if it can obtain at least what it would achieve by proceeding to trial and verdict, taking into account all of the economic and noneconomic costs of both settlement and trial."[75] A lawyer values a claim for settlement in part by predicting the likely judicial resolution of the claim,[76] a process impeded by doctrinal divergence between precedential and non-precedential decisions. Thus, just as one district court may be persuaded by a non-precedential opinion and a different district court may reject any reliance on that decision, so too litigants may differently value non-precedential opinions, reducing potential for settlement.[77]

Specifically in the context of Third Circuit state-created danger claims, if the appellate court's non-precedential opinions interpret the doctrine more narrowly than precedent, then issuing non-precedential opinions may undermine judicial efficiency by encouraging litigation, discouraging settlement, and causing issues resolved at the appellate level to be relitigated in district courts.[78]

## III. THE PREVALENCE OF "UNPUBLISHED," NON-PRECEDENTIAL THIRD CIRCUIT STATE-CREATED DANGER DECISIONS

The state-created danger theory of substantive due process liability is a frequently invoked constitutional theory litigated under 42 U.S.C. § 1983. The theory is an exception to the general rule set forth by the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*[79] that a state is not constitutionally obligated to protect its citizens from the violent acts of private persons.[80] Under the state-

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75. Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 3–4 (footnotes omitted); *see also id.* at 4 ("A plaintiff, for example, should never accept less in settlement than what it estimates it would receive in the way of a verdict at trial, discounting for the expected expenses of proceeding to trial and for any other anticipated economic, social, psychological, and legal costs. Similarly, a defendant should not pay out in settlement any more than what it expects to lose at trial, increased by the expense of trial and any other expected economic and noneconomic costs that trial would entail.").

76. *See* Becker, *supra* note 7, at 4 (lawyers want non-precedential opinions for persuasive value and evaluation for settlement).

77. *See infra* Parts IV.A.5, B.2, C.4, D.3.

78. See *infra* Part IV for a summary of how these risks have been realized.

79. 489 U.S. 189 (1989).

80. *Id.* at 195.

created danger exception, state actors may be held liable for private violence when the state actors create the risk of the privately inflicted harm.[81] State-created danger claims are litigated in a wide variety of factual contexts. For example, claims may be brought against state actors such as police, public school officials, emergency medical technicians, or security guards for increasing the risk of harm suffered by a plaintiff, even though the state actors did not themselves inflict the harm.[82] While the Supreme Court has not directly ruled on the validity of the state-created danger theory,[83] this exception to the general rule of *DeShaney* is now widely accepted by the federal courts as establishing a substantive due process claim.[84]

Since 1996, when the Third Circuit first adopted the state-created danger theory,[85] district courts within the circuit have issued more than eighty state-created danger decisions.[86] Despite such volume in the district courts, the Third Circuit itself published only one precedential state-created danger decision in the seven-year period following its adoption of the state-created danger theory.[87] A single precedent in seven years does not reflect the total number of Third Circuit dispositions of state-created danger appeals between 1996 and 2003.

81. *See infra* notes 83–87; *infra* note 89 and accompanying text.

82. *See infra* notes 84–87; *infra* note 89 and accompanying text.

83. The state-created danger exception to *DeShaney*'s broad rule may become more significant since the Supreme Court's 2005 rejection of an attempt to circumvent *DeShaney* on a theory other than state-created danger. *See* Town of Castle Rock v. Gonzales, ___ U.S. ___, 125 S. Ct. 2796 (June 27, 2005).

84. *See, e.g.*, Jones v. Union County, Tenn., 296 F.3d 417, 430–31 (6th Cir. 2002); Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 708–12 (7th Cir. 2002); Butera v. District of Columbia, 235 F.3d 637, 649 n.10 (D.C. Cir. 2001) (canvassing circuits); *see also* McLendon v. City of Columbia, 305 F.3d 314, 330–32 (5th Cir. 2002) (canvassing circuits); *cf. id.* at 334 (Parker, J., dissenting) (criticizing the Fifth Circuit for "never explicitly rejecting or adopting" the state-created danger theory).

85. *See* Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996).

86. *See, e.g.*, DiJoseph v. City of Philadelphia, 953 F. Supp. 602 (E.D. Pa. 1997), *aff'd*, 156 F.3d 1224 (3d Cir. 1998); Tazioly v. City of Philadelphia, No. CIV.A. 97-CV-1219, 1998 WL 633747 (E.D. Pa. Sept. 10, 1998); Gonzalez v. Angelilli, 40 F. Supp. 2d 615, 618–21 (E.D. Pa. 1999); Sciotto v. Marple Newton Sch. Dist., No. CIV. A. 98-2768, 1999 WL 972011 (E.D. Pa. Oct. 22, 1999); Hansell v. City of Atlantic City, 152 F. Supp. 2d 589 (D.N.J. 2001), *aff'd*, 46 F. App'x 665 (3d Cir. 2002); Pokalsky v. Se. Pa. Transp. Auth., No. CIV. 02-323, 2002 WL 1998175 (E.D. Pa. Aug. 28, 2002); Tittensor v. County of Montgomery, No. Civ. A. 02-CV-8011, 2003 WL 22358450 (E.D. Pa. Sept. 9, 2003); Hillard v. Lampeter-Strasburg Sch. Dist., No. Civ.A. 03-2198, 2004 WL 1091050 (E.D. Pa. May 13, 2004); Pappas v. City of Lebanon, 331 F. Supp. 2d 311 (M.D. Pa. 2004); Deemer v. County of Chester, No. Civ. A. 03-6536, 2005 WL 182719 (E.D. Pa. Jan. 25, 2005).

87. *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997).

That number is likely known only by the Circuit itself, since the Third Circuit's non-precedential opinions issued before January 2002 were not released to West or Lexis and are not searchable in electronic form.[88] An informal survey of Third Circuit opinions reveals that in the fifty-three months from July 1998 to December 2002 *alone*, the Third Circuit issued at least thirteen non-precedential opinions addressing state-created danger claims.[89] Despite evidence that state-created danger is a frequently litigated constitutional doctrine invoked in a wide variety of factual settings, and despite at least thirteen opportunities to do otherwise, the Third Circuit declined to issue any precedent on the doctrine for the six years between 1997 and 2003.

## IV. THE DIVERGENCE BETWEEN PUBLISHED BINDING PRECEDENT AND "UNPUBLISHED," NON-PRECEDENTIAL THIRD CIRCUIT STATE-CREATED DANGER OPINIONS: FOUR EXAMPLES

This Part compares the divergent binding and non-precedential opinions applying the state-created danger doctrine within the Third Circuit. The comparison demonstrates that the risks of non-precedential

88. Barriers to researching pre-2002 non-precedential decisions are formidable. They generally are not available in electronic form but exist only in hard copy from archived court files or directly from a litigant. *See supra* note 7. To obtain certain decisions discussed here, over a period of several weeks my research assistant first tried unsuccessfully to obtain them from counsel of record, then repeatedly telephoned the Third Circuit Clerk's Office to schedule an appointment at the archive, then traveled to a warehouse in Pennsylvania to photocopy the opinions, one of which had been misplaced.

89. *See* Curtis v. McHenry, No. 97-3673 (3d Cir. July 29, 1998) (unpublished and non-precedential) (on file with author); Solum v. Yerusalim, No. 99-1607 (3d Cir. Mar. 8, 2000) (unpublished and non-precedential) (on file with author); Estate of Burke v. Mahanoy City, No. 99-1357 (3d Cir. Mar. 31, 2000) (unpublished and non-precedential) (on file with author); Estate of Henderson v. City of Philadelphia, No. 99-1579 (3d Cir. May 2, 2000) (unpublished and non-precedential) (on file with author); O'Delli v. N. Belle Vernon Borough, No. 99-3654 (3d Cir. July 6, 2000) (unpublished and non-precedential) (on file with author); Bumpess v. Phila. Hous. Auth., No. 99-1730 (3d Cir. Sept. 5, 2000) (unpublished and non-precedential) (on file with author); Marcolongo v. Sch. Dist. of Phila., No. 99-2015 (3d Cir. Mar. 12, 2001) (unpublished and non-precedential) (on file with author); Cannon v. Beal, No. 00-1208 (3d Cir. Apr. 23, 2001) (unpublished and non-precedential) (on file with author); Webb v. City of Philadelphia, Nos. 99-1980, 00-1647 (3d Cir. Aug. 31, 2001) (unpublished and non-precedential) (on file with author); Pahler v. City of Wilkes-Barre, 31 F. App'x 69 (3d Cir. 2002); Combs v. Sch. Dist. of Phila., 32 F. App'x 653 (3d Cir. 2002); Jordan v. Houstoun, 39 F. App'x 795 (3d Cir. 2002); Hansell v. City of Atlantic City, 46 F. App'x 665 (3d Cir. 2002). As an appellate attorney for the Philadelphia Law Department, the author supervised the Philadelphia appellees' briefs in *Henderson* and *Cannon*, and drafted the appellees' brief in *Webb*, but had left the Law Department by the date of the *Webb* Third Circuit oral argument.

opinions are real. During the six-year interval between binding state-created danger decisions, the Third Circuit created inconsistent non-precedential opinions on the identical legal theory. This Part examines the following four doctrinal divergences in Third Circuit precedential and non-precedential state-created danger decisions: (1) inconsistent mental culpability standards; (2) inconsistent analysis of derivative claims by family members; (3) inconsistent state action requirements; and (4) inconsistent municipal liability standards.

### *A. Example One: State of Mind Requirement*

If non-precedential opinions simply apply established law, then the mental culpability standards applied in the Third Circuit's precedential and non-precedential state-created danger decisions should be identical. They are not. Rather, non-precedential opinions recognized a Supreme Court-mandated doctrinal shift in the state of mind requirement for state-created danger[90] years before Third Circuit precedent did.[91] The non-precedential opinions issued between the Third Circuit's precedential decisions—that is, between 1997 and 2003—demonstrate that this was a confused area of the law, where Third Circuit judges were struggling to articulate the doctrinal ramifications of the Supreme Court's decision in *County of Sacramento v. Lewis*[92] for the Third Circuit state-created danger test. Further, since 2003, the Third Circuit precedential state-created danger decisions reveal ongoing doctrinal disagreement about "the vexing problem"[93] of the correct mental culpability standard in "this elusive area of the law,"[94] suggesting that this doctrine even now remains insufficiently settled for routine application. Finally, the Third Circuit's refusal until 2003 to grapple in a precedential opinion with the doctrinal implications of the Supreme Court's *Lewis* decision[95] left district courts and litigants uncertain about the binding law, which likely encouraged litigation and discouraged settlement.[96]

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90. *See infra* Part IV.A.3.

91. *See infra* Part IV.A.4.

92. 523 U.S. 833 (1998).

93. Brown v. Commonwealth of Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 479 (3d Cir. 2003).

94. Estate of Smith v. Marasco, 318 F.3d 497, 509 (3d Cir. 2003).

95. *See infra* Part IV.A.4.

96. *See infra* Part IV.A.5.

### 1. *Under the Third Circuit's Pre-*Lewis *Precedent, the State of Mind Requirement for a State-Created Danger Claim Was "Willful Disregard/Deliberate Indifference"*

Before the Supreme Court's decision in *Lewis*, Third Circuit precedent permitted government actors to be held liable for creating a danger if they "willfully disregarded" the safety of the plaintiff. In *Kneipp v. Tedder*,[97] the Third Circuit adopted the state-created danger theory and applied a four-part test:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) the state actor *acted in willful disregard* for the safety of the plaintiff;
>
> (3) there existed some relationship between the state and the plaintiff; and
>
> (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.[98]

The Third Circuit adopted a single fault standard for all state-created danger claims—"willful disregard," which it equated with "deliberate indifference"[99]—and specifically rejected the "shocks the conscience" standard.[100] In the seven years between the adoption of the theory (in 1996) and 2003, the Third Circuit issued only one state-created danger precedent.[101] That opinion applied the "willful disregard for the safety of

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97. 95 F.3d 1199 (3d Cir. 1996).

98. *Id.* at 1208 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (first articulating the test)) (emphasis added).

99. The Third Circuit appeared to equate willful disregard/deliberate indifference with "reckless indifference," "gross negligence," or "reckless disregard" as those terms had been used in the context of substantive due process violations. *Id.* at 1208 n.21. It has since interpreted its state-created danger precedent to have equated willful disregard and deliberate indifference. *See, e.g.*, Ziccardi v. City of Philadelphia, 288 F.3d 57, 65 n.5 (3d Cir. 2002) (*Kneipp* mental culpability standard was "deliberate indifference"). Although the author's name appears as co-counsel for the City of Philadelphia appellants in *Ziccardi*, the author had left the Philadelphia Law Department by the time the appeal was briefed and argued.

100. *Kneipp*, 95 F.3d at 1207–08 ("[T]he . . . shocks the conscience standard is limited to police pursuit cases, and accordingly, we are not bound to follow that standard in the case before us.") (citing Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir.1994)). The Third Circuit has employed the "shocks the conscience" standard in other high speed police car chases since *Kneipp* rejected it as a general standard for state-created danger cases. *See, e.g.*, United States v. Johnstone, 107 F.3d 200, 206 n.5 (3d Cir. 1997) (citing *Kneipp* for view that the "shocks the conscience standard is limited to police pursuit cases").

101. *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997) (quoting *Kneipp*,

the plaintiff" standard, again equating it with "deliberate indifference."[102]

### 2. *The Supreme Court Subsequently Held that All Substantive Due Process Claims Must Shock the Conscience*

After the Third Circuit adopted the state-created danger theory in 1996, the Supreme Court announced a new analytic framework to determine the mental culpability standard for *all* substantive due process claims arising from executive action, of which state-created danger is a subset. In *Lewis*, the Supreme Court held that the threshold question is what fault standard along the continuum from deliberate indifference to intent to harm will "shock the conscience": "[T]he cognizable level of executive abuse of power [is] that which shocks the conscience."[103]

"Shocks the conscience" is a not a single standard. Rather, it encompasses a spectrum of fault from more than negligence[104] to intent to harm.[105] According to the Supreme Court, whether fault will be conscience-shocking in the "middle range, following from something more than negligence but 'less than intentional conduct,'"[106] depends upon the factual context, including (1) whether the state actor has time to deliberate and (2) whether the state actor must weigh interests that compete with the plaintiff's.[107] More culpability is required to shock the conscience if the state actor was acting in a pressurized situation, with

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95 F.3d at 1211).

102. *Id.* (quoting *Kneipp*, 95 F.3d at 1208). As recently as 2002, in a substantive due process decision outside of the state-created danger context, the Third Circuit referred to the state-of-mind requirement in the state-created danger context as "deliberate indifference." *Ziccardi*, 288 F.3d at 66 n.6. Yet by noting that its state-created danger test "preceded *Lewis*," the court hinted that the Supreme Court's decision in *Lewis* might have altered the state-created danger doctrine, just as it had altered all substantive due process claims arising from executive action. *Id.* at 65 n.5 ("In *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), which preceded *Lewis*, we held that deliberate indifference sufficed in a case in which state actors placed the plaintiff in a dangerous situation and the plaintiff was harmed by a nongovernmental actor.").

103. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

104. Negligence would not shock the conscience, and no liability would attach at that extreme of the fault spectrum. *Id.* at 849 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." (citing Daniels v. Williams, 474 U.S. 327, 328 (1986))).

105. At the other extreme of the fault spectrum, the conduct of a state actor who "intended to injure in some way unjustifiable by any governmental interest" would most likely shock the conscience. *Id.*

106. *Id.* (citation omitted).

107. *Id.* at 849–53.

little time for reflection,[108] or if the state actor was balancing competing legitimate interests—such as a pursuing police officer's balancing of the risks of the chase against the risks of permitting the suspect to escape.[109] The Supreme Court recognized that it had held "deliberate indifference" to shock the conscience *only* in the context of medical care for prisoners, where the state actors had "the luxury" of "time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations."[110]

### 3. *Divergence Between Precedential and Non-Precedential Third Circuit State-Created Danger State of Mind Requirements Between 1997 and 2003*

The Third Circuit entered no precedential state-created danger decisions between 1997 and 2003. During those years, while the Circuit's precedents required only "willful disregard" and expressly rejected the "shocks the conscience" standard, several Third Circuit panels issued non-precedential opinions either casting doubt on the continued doctrinal viability of the Third Circuit's state-of-mind requirement[111] or explicitly holding that aspect of its doctrine to have

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108. *Id.* at 852–53.

109. *Id.* at 850–54.

110. *Id.* at 853. The breadth of the Supreme Court's decision in *Lewis* was clarified by the Third Circuit's application of the *Lewis* "shocks the conscience" analytic framework to substantive due process claims outside of the police chase context. *See, e.g.*, Ziccardi v. City of Philadelphia, 288 F.3d 57, 66 (3d Cir. 2002) (holding that paramedics' conduct must shock the conscience, meaning that they "consciously disregarded, not just a substantial risk, but a great risk that serious harm would result"); Nicini v. Morra, 212 F.3d 798, 806–08 (3d Cir. 2000) (en banc) (analogizing foster care to institutionalization and recognizing that a social worker had time to make unhurried judgments, and holding that deliberate indifference could shock the conscience); Miller v. City of Philadelphia, 174 F.3d 368, 375–76 (3d Cir. 1999) (holding that a social worker must have exhibited "gross negligence or arbitrariness that indeed 'shocks the conscience'"; the author briefed and argued *Miller* on behalf of municipal defendants).

111. *See* Burke v. Mahanoy City, No. 99-1357, at 8 n.6 (3d Cir. Mar. 31, 2000) (unpublished and non-precedential) (on file with author) (noting that *Lewis* "may suggest" that the mental culpability prong of Third Circuit precedent "be modified," but declining to decide what higher level of fault would now be required by the *Lewis* "shock the conscience" spectrum since the facts did not even rise to the level of the binding "willful disregard" standard); Estate of Henderson v. City of Philadelphia, No. 99-1579, at 12 (3d Cir. May 2, 2000) (unpublished and non-precedential) (on file with author) (refusing to decide the doctrinal ramifications of *Lewis* yet acknowledging that (1) the Third Circuit already had recognized the *Lewis* "shock the conscience" framework controlled a substantive due process claim outside of the police pursuit context; and (2) other federal circuits had updated their state-created danger doctrines to apply the *Lewis* "shock the conscience" standard); *id.* ("In light of *Lewis* and the burgeoning number of state created danger cases, the City urges us to refine the second *Kneipp* prong to make liability turn on a showing of deliberate indifference (or

been narrowed by the intervening Supreme Court endorsement of the "shocks the conscience" analytic framework for all substantive due process claims.[112] Inexplicably, the Third Circuit twice chose *non-precedential* decisions to announce this change in state-created danger doctrine, bypassing the opportunity to clarify the doctrinal confusion.[113]

Meanwhile, compounding the doctrinal confusion, other Third Circuit non-precedential opinions applied the binding "willful disregard/deliberate indifference" standard, but without wrestling with *Lewis*'s threshold inquiry into what fault level would "shock the conscience," or with *Lewis*'s acknowledgment that courts had held "deliberate indifference" to violate substantive due process only where

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willful disregard) that shocks the conscience. Because plaintiff cannot satisfy [a different aspect of the Third Circuit state-created danger doctrine], we need not reach this issue even though we are cognizant of support for such a position in our case law and that of other Courts of Appeals."). There may be other state-created danger decisions similarly recognizing this doctrinal shift before 2002 but because the Third Circuit's non-precedential decisions before 2002 are not searchable in electronic form, the obstacles to researching these decisions are great. *See supra* note 88.

112. *See* Cannon v. Beal, No. 00-1208, at 5–6 (3d Cir. Apr. 23, 2001) (unpublished and non-precedential) (on file with author) (quoting the binding willful disregard standard but approving the trial court's recognition that the Supreme Court's "shock the conscience" standard had superseded the Third Circuit state-created danger doctrine three years before); *id.* ("Given the requirement of *Lewis* that the actions of the state actor must 'shock the conscience' in order to trigger § 1983 liability . . . the District Court correctly concluded that if [plaintiff] is to prevail on the [state-of-mind] prong of the *Kneipp* analysis, she must prove that the defendant police officers' actions shock the conscience. . . . [W]e find no error in the District Court's application of *Kneipp*, as modified by *Lewis*. As the District Court observed, the police officers in this case were acting in a situation so pressured as to inhibit their ability to act in a deliberate fashion: a large-scale manhunt for an armed suspect (entailing the additional activities of securing the crime scenes, locating and interviewing witnesses and collecting evidence) who had caused a serious multi-vehicle road accident, fled the police, shot an officer, and invaded at least one private residence. Evaluating the effect of such chaotic circumstances in light of . . . *Lewis* and *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999), we cannot conclude that the police officers' failure immediately to transport [plaintiff] to the hospital, while arguably negligent, rose to the requisite level of culpability under § 1983 and *Kneipp*: an action or omission 'so ill-conceived or malicious that it "shocks the conscience."' *Miller*, 174 F.3d at 375, quoting *Lewis*, 118 S.Ct. at 1717."); Pahler v. City of Wilkes-Barre, 31 F. App'x 69, 71 (3d Cir. 2002) (reasoning that the *Lewis* "shock the conscience" standard governed all substantive due process claims and that which level of culpability will shock the judicial conscience will vary depending on the factual context); *id.* ("We held in *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999), that *Lewis* requires a court, in all substantive due process cases, to determine if the state actor's behavior shocks the conscience. The precise degree of wrongfulness to reach the 'conscience-shocking' level depends upon the circumstances of a particular case. In this case, the District Court held that the second factor of the [state-created danger] test has been modified by the 'shock the conscience' standard, and what rises to that level will ultimately depend on the factual scenario of the case at hand. We agree. Accordingly, a plaintiff seeking to recover under a 'state-created danger' theory must show that the actor acted with a willful disregard for or deliberate indifference to plaintiff's safety that rises to the level of shocking the conscience.").

113. *Cannon*, No. 00-1208, at 5–6; *Pahler*, 31 F. App'x at 71.

there is an opportunity to deliberate and an absence of competing interests—in the custodial context of prison medical care.[114]

### 4. *Precedential Acknowledgement that* Lewis *Changed the State-Created Danger Doctrine*

The Third Circuit broke its years of precedential silence on the state-created danger doctrine by issuing three precedential decisions in a single month of 2003.[115] While the different opinions did not speak in unison about the ramifications of *Lewis* for state-created danger analysis, all three precedents agreed that the Third Circuit's doctrine had been superseded by the Supreme Court's *Lewis* decision five years earlier—the doctrinal shift first articulated in non-precedential opinions at least as early as 2001.[116] The first precedent clarified "the vexing problem" of "the appropriate lens through which we must view actions in the state-created danger context"[117] by establishing that the *Lewis* "shocks the conscience" standard governed a claim against emergency medical

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114. *See* Hansell v. City of Atlantic City, 46 F. App'x 665, 666–67 (3d Cir. 2002) (quoting "willful disregard," despite a litigant's argument that *Lewis* required a higher standard, but disposing of the appeal on a different prong of state-created danger test); Webb v. City of Philadelphia, Nos. 99-1980, 00-1647 (3d Cir. Aug. 31, 2001) (unpublished and non-precedential) (on file with author) (quoting and applying "willful disregard," which it used "interchangeably" with "deliberate indifference); Solum v. Yerusalim, No. 99-1607 (3d Cir. Mar. 8, 2000) (unpublished and non-precedential) (on file with author) (quoting and applying "willful disregard," which it equated with deliberate indifference); *see also* Jordan v. Houstoun, 39 F. App'x 795, 797 (3d Cir. 2002) (affirming for the reasons stated by the district court, which had applied a "willful disregard" standard); Marcolongo v. Sch. Dist. of Phila., No. 99-2015 (3d Cir. Mar. 12, 2001) (unpublished and non-precedential) (on file with author) (affirming the "thorough analysis" of the district court, which had applied "willful disregard" and equated it with "deliberate indifference"); Bumpess v. Phila. Hous. Auth., No. 99-1730 (3d Cir. Sept. 5, 2000) (unpublished and non-precedential) (on file with author) (affirming jury verdict where the jury had been instructed to apply "willful disregard" or "deliberate indifference" and plaintiff objected to the trial court's definition of those terms).

115. *See* Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003); Estate of Smith v. Marasco, 318 F.3d 497, 509 (3d Cir. 2003); Brown v. Commonwealth of Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 480 (3d Cir. 2003).

116. *See* Cannon v. Beal, No. 00-1208 (3d Cir. Apr. 23, 2001) (unpublished and non-precedential) (on file with author).

117. *Brown*, 318 F.3d at 479. The panel originally issued an opinion in 2002. Brown v. Commonwealth of Penn. Dep't of Health Emergency Med. Servs. Training Inst., 300 F.3d 310 (3d Cir. 2002). In a single sentence, that decision recognized that the *Lewis* shocks the conscience standard governed but did not discuss what that standard would mean, and the result turned on a different prong of the four-prong state-created danger test. The panel later vacated the 2002 opinion and granted panel rehearing, resulting in the 2003 decision that focused on the implications of *Lewis*.

technicians.[118] In a second precedent, the Third Circuit again recognized the doctrinal shift "in this elusive area of the law" mandated by the Supreme Court in *Lewis* five years earlier,[119] by clarifying that the Third Circuit already had read the shocks the conscience framework both (1) to encompass degrees of wrongfulness ranging from deliberate indifference to intent to harm, depending on the factual circumstances,[120] and (2) to be the framework for all substantive due process cases arising from executive action.[121]

Within weeks, the Third Circuit issued a third precedential opinion, again recognizing what the non-precedential opinions had articulated years earlier: "[O]ur summary of the law regarding state created dangers in [1996] needs to be updated to reflect the Supreme Court's subsequent decision in [*Lewis*]."[122] In a one-judge opinion with a concurrence in the judgment, Judge Walter K. Stapleton fleshed out the doctrinal shifts already suggested in non-precedential opinions:

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118. *Brown*, 318 F.3d at 475–77. Unfortunately, rather than reading the *Lewis* "shocks the conscience" framework to encompass a range of conduct from deliberate indifference to intent, with the conscience-shocking level to be dependent on the existence of competing legitimate interests and the opportunity for deliberation, *Brown* misread *Lewis* to limit the shocks the conscience standard to situations where the state actor must act quickly and without the chance to deliberate. *See id.* at 480. *Brown* essentially read the "shocks the conscience" standard to mean a single standard of mid-level fault, "'at least *something* more than subjective deliberate indifference in circumstances requiring somewhat urgent state action.'" *Id.* (quoting Ziccardi v. City of Philadelphia, 288 F.3d 57, 65 (3d Cir. 2002)).

119. *Smith*, 318 F.3d at 509; *see also id.* at 507 (acknowledging that "recent cases have refined certain elements" of the Third Circuit's state-created danger doctrine).

120. *Id.* at 508.

121. *Id* at 507. *Smith*, however, held that the fault standard for state-created danger claims should be derived by evaluating whether the defendant had time and opportunity to deliberate, a formulation that leaves out the Supreme Court's additional factor of whether the state actor was confronted by competing legitimate interests (such as a prison guard weighing both the safety of inmate rioters and that of other inmates when restoring order during a riot). *See id.* at 508–09; County of Sacramento v. Lewis, 523 U.S. 833, 852–53 (1998) (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). *Smith* is equivocal on the relevance of competing legitimate interests. It summarized the mental culpability analysis required by *Lewis* in the state-created danger arena as follows:

> We think based on our reading of the precedents in this elusive area of the law that, except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience.

*Smith*, 318 F.3d at 509. However, Judge Morton I. Greenberg's opinion alluded to the existence of legitimate interests competing with the plaintiff's safety by recognizing that the highest level of fault, intent to cause harm, would not apply in the barricaded gunman situation confronting police in *Smith* in part because "police had no reason to be concerned about the safety of third parties." *Id.*

122. Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003).

(1) the *Lewis* "shocks the conscience" analytic framework applies to all substantive due process claims involving executive action, "and we must, of course, apply it" to state-created danger;[123]

(2) shocks the conscience is not a single standard but describes a range of conduct from deliberate indifference to intent to harm, depending on the factual context;[124] and

(3) five years earlier, *Lewis*'s shocks the conscience analytic method had superseded the Third Circuit's blanket willful disregard standard for state-created danger claims.[125]

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123. *Id.* ("Since *Lewis*, we have had occasion to apply this substantive due process standard in a number of different settings and we must, of course, apply it here."); *id.* ("[T]o prove a violation of substantive due process in cases involving executive action, the plaintiff must show that the state acted in a manner that 'shocks the conscience.'" (quoting *Lewis*, 523 U.S. at 846)).

124. *Id.* ("Whether executive action is conscience shocking and thus 'arbitrary in the constitutional sense' . . . depends upon the particular circumstances that confront those acting on the state's behalf.").

125. *Id.* at 418 ("with the guidance of *Lewis* and its progeny, I will undertake the required 'exact analysis of [the] circumstances'" facing the state actors to determine the appropriate culpability level); *id.* at 419 ("There are several lessons from *Lewis* that are relevant here. The first, of course, is that negligence is not enough to shock the conscience under any circumstances. The second is that more culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. Moreover, the same is true to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests."). Unlike the Third Circuit's two precedents issued just weeks before, Judge Stapleton's opinion correctly read the Supreme Court in *Lewis* to require a higher culpability standard both when the state actor must act in haste and under pressure and also when the state actor must "judg[e] between competing, legitimate interests." *Id.*; *cf.* Brown v. Commonwealth of Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 480 (3d Cir. 2003) ("[T]he 'shocks the conscience' standard should apply in all substantive due process cases if the state actor had to act with urgency."); *Smith*, 318 F.3d at 509.

The Third Circuit again unmistakably accepted in 2004 that "recent cases [had] refined" the mental culpability standard for state-created danger liability to require conduct that shocked the conscience, a variable standard depending upon the factual situation. *See* Rivas v. City of Passaic, 365 F.3d 181, 194–96 (3d Cir. 2004) (referring to *Lewis* and its Third Circuit precedential progeny). But the concurrence more clearly explained the breadth of the *Lewis* holding and its doctrinal consequences for state-created danger, including overruling the Circuit's mental culpability standard. *Id.* at 202–04 (Ambro, J., concurring in the judgment against emergency medical technicians). The concurrence chastised the district court for relying on binding Third Circuit state-created danger doctrine because "[i]n so doing, it cited principles that have since been refined, if not superseded altogether," *id.* at 202 (criticizing the district court's reliance on *Kneipp*), and criticized the majority for "continuing to cite the *Kneipp* test as 'good law,' [because that] minimizes the extent to which the law of state-created danger in our Circuit has changed," *id. See* Bright v. Westmoreland County, No. 05-2005, ___ F.3d ___ (3d. Cir. Apr. 4, 2006), slip op. at 12 (holding the mental culpability standard for state-created danger to be "a state actor acted with a degree of culpability that shocks the conscience"); *see also id.* at 29 n.9 (Nygaard, J., dissenting) (noting that "[r]ecently, Judge Ambro accurately charted modifications to our test, leading him to question the

Even though the fault standard was not dispositive, Judge Stapleton sought to guide future courts and litigants by carefully explaining the analytical method *Lewis* prescribed to determine the applicable fault standard.[126] That thoughtful guidance could have been undertaken three years earlier by at least two Third Circuit panels which similarly had found the precise fault standard not dispositive, but chose to issue non-precedential opinions, thus perpetuating the doctrinal ambiguity.[127]

### 5. *Practical Consequences of Doctrinal Inconsistency for District Courts and Litigants*

The Third Circuit's belated precedential adherence to Supreme Court doctrine is inconsistent with the appellate function.[128] The Third Circuit's refusal until 2003 to wrestle in precedent with the doctrinal ramifications of *Lewis* on state-created danger left district courts and litigants within the Third Circuit uncertain as to whether the single "willful disregard" standard had survived the Supreme Court's 1998 endorsement of the shocks the conscience spectrum-of-fault framework. Many district courts concluded that the *Lewis* "shocks the conscience" standard superseded Third Circuit precedent.[129] One relied on the Third

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appropriateness of continuing to refer to the Deshaney exception as the Kneipp test"). While beyond the scope of this Article, it is troubling that even after the precedential recognition that the Third Circuit's state-created danger test had been altered by intervening Supreme Court precedent, some Third Circuit non-precedential opinions continued to quote to the superseded "willful disregard" mental culpability standard. *See, e.g.*, Buchholz v. Midwestern Intermediate Unit IV, 128 F. App'x 890, 894 (3d Cir. 2005) (quoting but not applying "willful disregard"); Liedy v. Borough of Glenolden, 117 F. App'x 176, 179 (3d Cir. 2004) (same); Green v. City of Philadelphia, 92 F. App'x 873, 875 (3d Cir. 2004) (same).

126. *See Schieber*, 320 F.3d at 418–21. That is, Judge Stapleton did not reach whether the fault standard applicable to the police response to a 911 call in that case was the highest level (intent to harm) or was the intermediate level ("subjectively apprecia[ting] and consciously ignor[ing] a great, i.e., more than substantial, risk" that serious harm would result from defendant's conduct) because the police conduct did not meet the even lower level of subjective deliberate indifference as it was no more than negligent. *Id.* at 422–23.

127. *See* Burke v. Mahanoy City, No. 99-1357, at 8–9 n.6 (3d Cir. Mar. 31, 2000) (unpublished and non-precedential) (on file with author); Estate of Henderson v. City of Philadelphia, No. 99-1579, at 12 (3d Cir. May 2, 2000) (unpublished and non-precedential) (on file with author). There may well have been additional state-created danger opinions decided post-*Lewis* and issued before January 1, 2002. *See supra* notes 7, 88 (describing the difficulty of researching pre-2002 Third Circuit non-precedential decisions).

128. *See supra* Introduction, Part II and sources cited therein.

129. *See* Hansberry v. City of Philadelphia, 232 F. Supp. 2d 404, 410–11 (E.D. Pa. 2002); Estate of Smith v. Marasco, 227 F. Supp. 2d 322, 354–55 (E.D. Pa. 2002), *aff'd in part and rev'd in part*, 318 F.3d 497 (3d Cir. 2003); Grazier v. City of Philadelphia, No. Civ.A. 98-CV-6063, 2001 WL

Circuit's non-precedential endorsement of "shocks the conscience" as "not entitled to precedential effect" but "instructive."[130] Another district court emphasized the importance of resolving the doctrinal implications of *Lewis*.[131] Despite that evidence of a need for appellate guidance, the Third Circuit nevertheless chose to affirm the district court's judgment in a non-precedential opinion—an appellate opinion that purported to alter binding law.[132] Even after the Third Circuit's two non-precedential opinions purporting to update the state-of-mind requirement to "shocks the conscience"[133]—decisions that certainly should have been precedential—district courts were not sure whether to follow the "willful disregard" standard of Third Circuit precedent, as some did,[134] or instead apply a standard different from Circuit precedent as others did.[135] Doctrinal divergence between precedential and non-precedential decisions undermined the predictive value of precedent, resulting in litigant uncertainty about litigation strategy and settlement value. For

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1168093, at *6 (E.D. Pa. July 26, 2001); Schieber v. City of Philadelphia, 156 F. Supp. 2d 451, 458–59 (E.D. Pa. 2001), *rev'd on other grounds*, 320 F.3d 409 (3d Cir. 2003); Roberson v. City of Philadelphia, No. CIV. A. 99-3574, 2001 WL 210294, at *9–10 (E.D. Pa. Mar. 1, 2001); White v. City of Philadelphia, 118 F. Supp. 2d 564, 570 (E.D. Pa. 2000); Combs v. Sch. Dist. of Phila., No. CIV.A.99-3812, 2000 WL 1611061, at *5–6 (E.D. Pa. Oct. 26, 2000); Robert S. v. City of Philadelphia, No. CIV.A. 97-6710, 2000 WL 341565, at *3–4 (E.D. Pa. Mar. 30, 2000).

130. Brozusky *ex rel.* Brozusky v. Hanover Twp., 222 F. Supp. 2d 606, 613 (M.D. Pa. 2002).

131. *See* Cannon v. City of Philadelphia, 86 F. Supp. 2d 460, 469–70 (E.D. Pa. 2000), *aff'd*, No. 00-1208 (3d Cir. Apr. 23, 2001) (unpublished and non-precedential) (on file with author). The district court reasoned that the intervening Supreme Court precedent had overridden the Third Circuit's limitation of the "shocks the conscience" standard to the police pursuit context; that "because state-created danger is a subset of substantive due process, *Lewis* and *Miller* require that, in a state-created danger case, the actions of the state actor must shock the conscience to trigger liability"; and that, depending on the circumstances, a state of mind less egregious than intent to injure could shock the conscience. *Id.*

132. *See* Cannon v. Beal, No. 00-1208, at 5–6 (3d Cir. Apr. 23, 2001) (unpublished and non-precedential) (on file with author).

133. *Id.* at 5–6; Pahler v. City of Wilkes-Barre, 31 F. App'x 69, 71 (3d Cir. 2002).

134. *See* Petrone v. Pike County Prob. Dep't, 240 F. Supp. 2d 317, 321 (M.D. Pa. 2002); Dimitris v. Lancaster County Prison Bd., 2002 WL 32348283, at *10 (E.D. Pa. June 7, 2002); Leuallen v. Paulsboro Police Dep't, 2001 WL 1700432, at *18 (D.N.J. Dec. 5, 2001); Hansell v. City of Atlantic City, 152 F. Supp. 2d 589, 604–06 (D.N.J. 2001), *aff'd* 46 F. App'x 665 (3d Cir. 2002).

135. *See* Hansberry v. City of Philadelphia, 232 F. Supp. 2d 404, 410–11 (E.D. Pa. 2002); *Brozusky*, 222 F. Supp. 2d at 613; Smith v. Marasco, 227 F. Supp. 2d 322, 354 n.33 (E.D. Pa. 2002), *aff'd in part and rev'd in part*, 318 F.3d 497 (3d Cir. 2003) ("The second *Kneipp* factor addresses the standard of fault necessary in order to trigger liability. This element requires that the state actor acted with willful disregard for, or deliberate indifference to, the plaintiff's safety. *Lewis* and *Miller* require that the state actor's conduct shock the conscience."); Grazier v. City of Philadelphia, No. Civ.A. 98-CV-6063, 2001 WL 1168093, at *7 (E.D. Pa. July 26, 2001).

example, in one case where settlement negotiations terminated based on the plaintiff's reading of Third Circuit state-created danger precedent, the Third Circuit went on to reject the plaintiff's claim in a non-precedential opinion that characterized the claim as "border[ing] on frivolity."[136]

The doctrinal ambiguity perpetuated by the Third Circuit's refusal to issue precedential state-created danger decisions likely encouraged litigation and discouraged settlement, thus undercutting the efficiency rationale for non-precedential opinions. In 2004, a Third Circuit judge candidly acknowledged that the doctrinal uncertainty following *Lewis*, which the Third Circuit now recognizes as having substantially narrowed state-created danger, likely encouraged plaintiffs to characterize state tort claims as constitutional violations: "[T]he most important of the recent modifications" to the circuit's state-created danger precedent involved the Supreme Court's imposition of the shocks the conscience standard:

> [I]t is no longer enough that [the state actor] has acted in "willful disregard" of the plaintiff's safety . . . . [T]he substitution of "shocks the conscience" for willful disregard is a significant limitation. In this context, our continued adherence to *Kneipp* [Third Circuit precedent], if only in name, *colors plaintiffs' perception of their burden and tempts them to allege constitutional violations where none exist.*[137]

During the Third Circuit's six-year precedential silence, the appellate court repeatedly chastised plaintiffs for alleging state-created dangers on facts that should have been alleged in tort.[138] In 2002, for example, a non-precedential opinion not only refused to reach the issue of whether

136. Webb v. City of Philadelphia, Nos. 99-1980, 00-1647, at 5 (3d Cir. Aug. 31, 2001) (unpublished and non-precedential) (on file with author).

137. Rivas v. City of Passaic, 365 F.3d 181, 202–03 (3d Cir. 2004) (Ambro, J., concurring in the judgment against emergency medical technicians) (emphasis added).

138. *See, e.g.*, Brown v. Commonwealth of Pa. Dep't of Health Emergency Med. Servs. Training Inst., 2002 WL 1815859, at *2 (3d Cir. Aug. 8, 2002) ("This case presents another example of a trend among plaintiffs who try to transmute their garden variety torts into cases of federal constitutional dimension."), *withdrawn and superseded by* 318 F.3d 473 (3d Cir. 2003); *Webb*, Nos. 99-1980, 00-1647, at 4 ("[M]ere negligence is not sufficient to state a claim under the state-created danger theory."); *id.* at 5 ("[T]his record simply does not come close to establishing liability under the state-created danger theory, and [the plaintiff's] assertions to the contrary border on frivolity."); Solum v. Yerusalim, No. 99-1607, at 7 (3d Cir. Mar. 8, 2000) (unpublished and non-precedential) (on file with author) (finding that defendants "could not have acted with willful disregard for the plaintiffs' liberty interests"); *id.* at 9 ("This suit is, when all is said and done, a tort action arising from the condition of [the highway].").

*Lewis* raised the Third Circuit's lower fault standard to a shocks the conscience standard, as the district court had held, but rebuked plaintiffs for believing they had a constitutional claim at all: "We are faced in this appeal with another case in which plaintiffs have tried to transmute their state-law claims into constitutional torts."[139] But given the divergence between precedential and non-precedential opinions and the Third Circuit's refusal to publish its many rejections of state-created danger claims, plaintiffs' error may not have been careless lawyering but, rather, evidence of a need for appellate guidance. However, the mental culpability standard is only the first of the doctrinal divergences between precedential and non-precedential opinions. The second is explored below.

### *B. Example Two: State-Created Danger Claims by Family Members*

The reasoning of one Third Circuit non-precedential opinion would preclude family members of most victims of state-created danger from alleging derivative state-created danger claims, yet the circuit has never issued a precedential opinion barring such actions. The practical consequence of that innovation is starkly illustrated by the irreconcilable analyses in two district court cases concerning similar claims by family members that police failed to rescue a murder victim. One followed the non-precedential opinion to reject the family's claims. The other did not consider the non-precedential opinion and allowed certain of the family's claims.

#### *1.* Solum v. Yerusalim *Likely Would Preclude State-Created Danger Claims by the Primary Victim's Family*

Some state-created danger precedents have been litigated by relatives of the injured person in their individual capacities (in addition to claims by the injured person or the estate).[140] The Third Circuit has not issued a

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139. Jordan v. Houstoun, 39 F. App'x 795, 797 (3d Cir. 2002) (affirming "essentially for the reasons given by the District Court" in *Kepner v. Houstoun*, 164 F. Supp. 2d 494, 499–500 (E.D. Pa. 2001) (adopting the shocks the conscience standard)); *see also id.* ("We use a not-precedential opinion in cases such as this, in which a precedential opinion is rendered unnecessary because the opinion has no institutional or precedential value.").

140. In one, the husband and minor child of a murdered school teacher claimed that their rights of association with the wife/mother were violated by school officials' failure to prevent the victim's murder in a public school. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 904 (3d Cir. 1997). In another, the parents and sibling of a murdered woman claimed that their rights of association with the woman were violated by the police officers' failure to prevent her murder. Schieber v. City of

precedential decision that separately addresses direct claims of the injured person and the derivative claims of relatives. Yet one non-precedential opinion likely would preclude derivative state-created danger claims by family members of the victim.

In *Solum v. Yerusalim*,[141] the Third Circuit directly confronted a derivative claim because the sole plaintiffs were the parents of a young woman killed in a car accident and not the estate. The woman's parents alleged that the defendant state transportation officials had known that the portion of the highway where the fatal accident occurred was unsafe.[142] The Third Circuit rejected the parents' claim on two broad grounds, each of which would preclude most state-created danger claims by relatives of the victim if *Solum* were precedential.[143] In *Solum*, the Third Circuit clarified that, even if the state-created danger *victim's* claim could succeed, the relatives' claims independently must satisfy the four-prong state-created danger test.[144] *Solum*'s reasoning would foreclose most relatives from showing two of the four prongs: (1) that harm to the family member by the state actor's conduct was foreseeable and fairly direct and (2) that the government defendants acted with the requisite mental culpability toward the family members' liberty interests in the companionship of the victim.[145]

Had it been precedential, *Solum*'s reasoning would preclude most derivative state-created danger claims by relatives because the harm to family members of the primary victim would be too attenuated. Specifically, in *Solum* the Third Circuit found the constitutional harm alleged—deprivation of an assumed right to associate with the plaintiffs' daughter—was not a foreseeable and fairly direct result of the state

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Philadelphia, No. CIV.A. 98-5648, 1999 WL 482310, at *1–5 (E.D. Pa. July 9, 1999). In the subsequent Third Circuit opinion in the litigation, Judge Stapleton "expressed 'no view' on whether the Schiebers, as parents, had a liberty interest in the continued companionship of their adult, emancipated child," noting the split in the circuits. Schieber v. City of Philadelphia, 320 F.3d 409, 423 n.6 (3d Cir. 2003). It is not always clear whether decisions concern individual state-created danger claims by relatives of the injured party since such claims by relatives are derivative of the injured person's state-created danger claim; therefore, the court has no need to discuss the relatives' claims if the injured person's state-created danger claim fails, as occurred in *Morse* and *Schieber*.

141. No. 99-1607 (3d Cir. Mar. 8, 2000) (unpublished and non-precedential) (on file with author).

142. *See id.* at 3–4.

143. The parents' claim also failed the third and fourth prongs of the state-created danger test, but for reasons that would not necessarily preclude state-created danger claims by relatives of persons injured by state action under different circumstances. *See id.* at 7–8.

144. *See id.* at 6–7.

145. *See id.*

employees' actions because the harm was "just too attenuated."[146] For the same reason, that the constitutional harm alleged was too remote from the state actors' conduct of not ensuring a safe stretch of highway, the parents' state-created danger claim also failed to satisfy the mental culpability standard.[147] That the plaintiffs were family members of the injured person was dispositive:

> [The parents] brought this action on their own behalf alleging the loss of their right of association with their daughter has harmed them. However, that injury is just too attenuated to support liability under § 1983. . . . The foreseeable injury here, given the problems with this stretch of highway, is the death of [the daughter], not the loss of any assumed constitutional right to associate with one's child.[148]

The reasoning in *Solum* likely would preclude derivative state-created danger claims by relatives of people injured by a state-created danger whenever the state actors should not be expected to realize that their conduct toward Person A would deprive Person A's family member, Person B, of a constitutionally protected liberty interest in associating with Person A.[149] For example, following *Solum*'s reasoning, when police respond to a 911 call alerting them to noises from a woman's apartment, and do not break down the door, a foreseeable deprivation of a liberty interest would be physical injury to the woman inside, not the loss of any assumed constitutional right of the woman's parents or children to associate with the woman. And if the police could not realistically foresee that their response to the noises from the woman's apartment could deprive the woman's parents or children of a

146. *Id.*

147. *See id.* at 7 (finding that since the defendants "could not realistically have foreseen the constitutional injury" asserted, "as a matter of law, they could not have acted with [the requisite mental culpability] for the plaintiffs' liberty interests").

148. *Id.* The Third Circuit assumed without deciding in *Solum* that parents of an emancipated daughter had a constitutionally protected liberty interest in continued association with their adult daughter, an issue that has split the federal circuits and was then an open issue in the Third Circuit. That issue is no longer open. Since *Solum*, the Third Circuit has held that parents do not have a protected liberty interest in the continued companionship of adult, emancipated children and for that reason alone can no longer bring derivative state-created danger claims based on an injury to the adult son or daughter. McCurdy v. Dodd, 352 F.3d 820, 830 (3d Cir. 2003). The author filed an amici brief in *McCurdy* on behalf of four New Jersey and Pennsylvania cities, urging the Third Circuit to so rule. *See* Sarah E. Ricks, *Evolution of a Doctrine: The Scope of the Parental Liberty Interest Protected by Substantive Due Process After* McCurdy, 3 RUTGERS J. L. URB. POL'Y 138 (2005) (reprinting amici brief with introduction).

149. *See Solum*, No. 99-1607, at 6–7.

constitutional right to associate with the woman, then police could not have acted with the requisite mental culpability toward the family members' liberty interests.[150]

### 2. *Unpredictable Application of the Non-Precedential Decision: Irreconcilable District Court Analyses of Claims by Family Members of Two Murder Victims*

The existence of an unpublished, non-precedential opinion that would foreclose most derivative state-created danger claims by family members created uncertainty about how the Third Circuit would require district courts to treat such claims and therefore how attorneys should advise their clients. A stark illustration of the practical consequences of the doctrinal ambiguity are the irreconcilable analyses by the two district courts in this Article's introductory vignette, each confronting claims by family members of murder victims shortly after the Third Circuit issued *Solum*. In both cases, neighbors of a woman called police because of noises from the woman's apartment; in both cases, police responded but refused to break down the door; in both cases, the women were later found dead in their apartments; and in both cases, relatives of the dead women alleged that their individual liberty interests in companionship with the dead women had been deprived by the state-created danger.[151] The similarity between the two cases was expressly noted by one judge at oral argument.[152]

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150. Some derivative family claims still would be permitted under *Solum*'s reasoning. Certain state defendants can reasonably foresee that their conduct could deprive a family member of the person injured by a state-created danger of the family member's protected liberty interest in association with the victim. That could be true whenever state action focused on the parent/child or other family relationship, such as a government decision to alter a child custody situation.

151. *See* Schieber v. City of Philadelphia, 156 F. Supp. 2d 451, 454 (E.D. Pa. 2001), *rev'd on other grounds*, 320 F.3d 409 (3d Cir. 2003); White v. City of Philadelphia, 118 F. Supp. 2d 564, 566–67 (E.D. Pa. 2000). As a Senior Attorney for the City of Philadelphia Law Department, the author edited the brief in support of the motion to dismiss in *White* and drafted part of the summary judgment brief in *Schieber*.

152. At the summary judgment oral argument in *Schieber*, which took place after each district court had decided motions to dismiss, and the other district court, in *White*, had dismissed the claim, the *Schieber* trial judge raised the similarity:

> THE COURT: [*White*] was a somewhat similar case, wasn't it?
>
> MR. WINEBRAKE: It's very similar, Your Honor. . . . You know, when you have a—when you have a District Court who holds a month and a half or two months ago that in an almost identical case—I mean where literally plaintiffs appear to have pulled the Shannon Schieber complaint out of the Clerk's Office and almost copied it word for word, setting forth the same—
>
> THE COURT: They tried to have it assigned to me as related.

In *White v. City of Philadelphia*,[153] one district court rejected the state-created danger claims of the murdered woman's mother and minor child against the police officers who did not break down the door of the woman later found murdered.[154] Specifically, that court held that the relatives' claim must itself satisfy the state-created danger test, that the officers could not have foreseen that their conduct would deprive the victim's relatives of their right to associate with the dead woman, and that the relatives' claims therefore failed to satisfy the "foreseeable and fairly direct" injury element.[155] For the same reason, the relatives' claims failed the mental culpability prong of the state-created danger test.[156]

In rejecting the relatives' claims, the district court followed the Third Circuit's non-precedential opinion in *Solum*, noting that "this unreported memorandum opinion has no precedential value, but [the district court] finds it instructive."[157] The district court explicitly followed the non-precedential reasoning to reject the family members' individual state-created danger claims because, as the district court noted, "the Third Circuit addressed the question whether parents could bring a due process claim for loss of association with their child" and, "[a]s the [Third Circuit] observed, even where injury to an individual is foreseeable, it does not necessarily follow that injury suffered by the parents of the injured party in the form of a loss of an 'assumed constitutional right to associate' with that child is foreseeable."[158] While the district court's rejection of the family members' claims on a second prong of the state-created danger test, the mental culpability prong, was not explicitly based on the non-precedential opinion, it was a logical consequence of

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. . .

MR. WINEBRAKE: Well, we know it went to another Judge, and—

THE COURT: And he disagreed with me.

MR. WINEBRAKE: —and he disagreed, and I believe Judge DuBois' decision is correct and Your Honor's decision was incorrect. . . .

Transcript of Oral Argument at 22–23, Schieber v. City of Philadelphia, No. 98-5648 (E.D. Pa. Dec. 14, 2000).

153. 118 F. Supp. 2d 564 (E.D. Pa. 2000).

154. *Id.* at 566–67.

155. *See id.*

156. *See id.* ("[b]ecause the defendants could not have foreseen that [decedent's mother] and [decedent's son] would suffer a constitutional injury," the officers' actions could not be conscience shocking).

157. *Id.* at 573 n.8.

158. *Id.* at 573; *see id.* ("[I]nterference with an 'assumed constitutional right to associate' suffered by [the parent and child] was not a foreseeable consequence of defendants' actions.").

the non-precedential reasoning as it turned on the absence of foreseeable injury to the relatives of the murdered woman.[159]

By contrast, in *Schieber v. City of Philadelphia*,[160] a different district court considering claims against police by relatives of a murder victim allowed the parents' state-created danger claims,[161] without analyzing them separately from the estate's claims.[162] Rather, the district court held that the parents had a liberty interest in companionship of their adult daughter, and then allowed the parents' claim.[163] Had *Solum*'s analysis been precedential and, thus, binding upon the district court, the existence of a liberty interest would have been necessary but not sufficient: the district court would have been required to separately analyze whether the parents' claim met the state-created danger test and whether *Solum*'s reasoning precluded the attenuated claim of the parents, as is likely. But, since *Solum* was non-precedential, the district court was free to disregard it.

The different analyses of the two claims by the two district courts in *White* and *Scheiber* demonstrate that doctrinal inconsistency between precedential and non-precedential decisions can result in similar cases being treated differently by district courts bound by the same circuit law. One followed a non-precedential decision to reject the family members' individual claims on grounds that likely would preclude most family members from pursuing derivative state-created danger claims.[164] The other ignored the non-precedential opinion and allowed the family

159. *Id.*

160. 156 F. Supp. 2d 451 (E.D. Pa. 2001), *rev'd on other grounds*, 320 F.3d 409 (3d Cir. 2003).

161. *Id.* at 454, 461.

162. *See id.* at 457–61.

163. *See id.* at 456–57 (analyzing the existence of a parental liberty interest in the companionship of their adult daughter). Even without *Solum* as guidance, the district court should not have assumed that the existence of a constitutional right disposes of the different issue of whether that right has been violated. On appeal, the Third Circuit declined to decide whether such a parental liberty interest existed because the murdered woman's estate state-created danger claim failed the culpability prong and the court therefore did not need to discuss the parents' derivative state-created danger claims. *See* Schieber v. City of Philadelphia, 320 F.3d 409, 423 n.6 (3d Cir. 2003). More recently, the Third Circuit ruled that parents do not have a protected liberty interest in the continued companionship of adult, emancipated children. *See* McCurdy v. Dodd, 352 F.3d 820, 830 (3d Cir. 2003). If decided today, in other words, the parents' claim would fail without reaching whether the government conduct deprived the parents of a constitutional right because no such constitutional right exists: substantive due process does not protect the parental liberty interest asserted by the parents in *Schieber*.

164. *See supra* notes 151–59 and accompanying text (summarizing the reasoning of *White*).

members' individual claims to survive summary judgment.[165] Unpredictable application of non-precedential opinions undermines the appellate functions of ensuring that like cases are treated alike, that judicial decisions are not arbitrary, and that legal issues resolved at the appellate level need not be relitigated before the district courts. This, in turn, undermines litigants' ability to predict how district courts will rule, which undermines the ability to evaluate claims for settlement. Explored below is the third way in which non-precedential opinions are inconsistent with Third Circuit precedent.

### C. *Example Three: Necessity of Affirmative Government Action*

The state action prong of the Third Circuit's state-created danger test requires a plaintiff to show that "'the state actors used their authority to create an opportunity that otherwise would not have existed'" for the harm to be inflicted on plaintiff.[166] Third Circuit precedential decisions disagree on whether the state action prong can only be satisfied by affirmative conduct or whether state actors can be culpable for omissions. While the Third Circuit has reconciled the inconsistent precedent on the "use of authority" prong, it chose to do so in non-precedential opinions. Confronting inconsistent precedent on the necessity of affirmative government conduct to satisfy the state action requirement has had practical consequences for district courts and litigants attempting to predict Third Circuit dispositions of state-created danger claims, as well as for settlement of those claims.

#### 1. *State-Created Danger Precedent Requires Affirmative State Conduct*

Until 1996, the Third Circuit plainly interpreted the state-created danger theory to require affirmative state conduct. The Third Circuit held en banc in *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical School*[167] that, to fit the state-created danger exception to the general no-duty rule of *DeShaney*, a plaintiff must show that the government acted affirmatively to increase the risk of harm: "Liability

165. *See supra* notes 160–63 and accompanying text (summarizing the district court reasoning of *Schieber*). The judgments in the two cases can be reconciled since survival of the estate's state-created danger claim is necessary for the survival of the family's derivative claims, and the estate's claim in *White* failed on prongs of the state-created danger test unaffected by *Solum*.

166. *Schieber*, 320 F.3d at 417 (quoting Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996)).

167. 972 F.2d 1364 (3d Cir. 1992) (en banc).

under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger."[168] The Third Circuit refused to adopt the state-created danger theory on the facts of *D.R.* because the sexual assaults the plaintiff school children suffered at school were not attributable to state action.[169] Rather, the victims alleged a series of omissions by state actors: failure to assign an experienced teacher, failure to supervise the classroom, failure to investigate, and failure to report abuse to parents or other authorities.[170] The "indefensible passivity" of some school defendants "show[ed] nonfeasance but . . . d[id] not rise to the level of a constitutional violation."[171] Rather, just as the Supreme Court had held in *DeShaney*, where social workers did not prevent a father from beating his son, "'[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.'"[172]

The facts on which the Third Circuit adopted the state-created danger theory involved government conduct that, in a later opinion, it characterized as barely affirmative.[173] In *Kneipp*, on a cold winter night, a police officer stopped a husband and wife for causing a disturbance on the street and noticed that both were intoxicated.[174] Other police officers arrived, and the husband crossed the street to ask another officer if he could go home to relieve the babysitter watching the couple's son, to which the officer replied, "Yeah, sure."[175] The husband then walked home, about one-third of a block, assuming that because his wife was drunk, the police would bring her either to a hospital or a police

168. *Id.* at 1374; *see id.* (finding that in cases upholding state-created danger claims, "the state can fairly be said to have affirmatively acted to create the danger to the victims").

169. *See id.* at 1373–76.

170. *See id.* at 1373.

171. *Id.* at 1376.

172. *Id.* (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989)) (alteration in original). Similarly, while again declining to adopt the state-created danger theory where an off-duty volunteer firefighter destroyed the plaintiff's business by arson, the Third Circuit recognized that substantive due process liability could be imposed where the harm "is the product of state action that legitimately can be characterized as affirmative conduct." Mark v. Borough of Hatboro, 51 F.3d 1137, 1151 (3d Cir. 1995).

173. *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 914 n.14 (3d Cir. 1997) ("Whether the officers's [sic] actions in *Kneipp* constituted an affirmative act or an act of omission is a close question.").

174. Kneipp v. Tedder, 95 F.3d 1199, 1201, 1203 n.14 (3d Cir. 1996).

175. *Id.* at 1201–02.

station.[176] Police did not accompany the wife home, and when she was found unconscious outside later that night, exposure to the cold had permanently rendered her unable to normally walk, see, sit, swallow, or speak.[177]

In *Kneipp*, the Third Circuit held that a reasonable jury could find that telling the husband "'you can leave,' . . . reasonably implied that [police] would take care of his wife," and that "[t]his affirmative action on the part of the police led [the husband] to leave his wife unattended, something he alleges he otherwise would not have done."[178] The Third Circuit held that a reasonable jury could find this satisfied the state action prong because "the danger was created when [the wife] was separated from her private source of rescue and subsequently abandoned by police."[179]

### 2. *Subsequent State-Created Danger Precedent Does Not Require Affirmative State Conduct*

The following year, 1997, in *Morse v. Lower Merion School District*,[180] the Third Circuit retreated from its holding that state-created danger required affirmative action to satisfy the state action prong, and shifted the focus to the foreseeability of the harm.[181] The court first characterized the state action in the drunken woman case as scarcely affirmative—"[w]hether the officer's actions in [the drunken woman case] constituted an affirmative act or an act of omission is a close question"[182]—but then decided that "[w]hether an affirmative act rather than an act of omission is required under the state-created danger theory" was not the proper focus of the state action inquiry.[183] Rather, the court held in *Morse* that "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission."[184]

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176. *Id.*

177. *Id.* at 1202 n.9, 1203 & n.16.

178. *Id.* at 1202 n.7.

179. *Id.* at 1202 n.9.

180. 132 F.3d 902 (3d Cir. 1997).

181. *See id.* at 915.

182. *Id.* at 914 n.14.

183. *Id.* at 915.

184. *Id.*; *see also id.* at 904, 915–16 (ruling that where a public school unlocked a door to permit

The Third Circuit's precedential decision in *Morse* appeared to remove the requirement of affirmative government conduct, to collapse the state action prong into the foreseeability of the harm, and to suggest that, where the harm suffered by plaintiff was foreseeable, an omission by the state would satisfy the plaintiff's burden. These are considerable expansions of the state-created danger doctrine since government actors—such as social workers, police officers, school officials, firefighters, and security guards—frequently undertake to protect discrete classes of citizens from foreseeable dangers.

### 3. *Non-Precedential Reconciliation of the Apparent Conflict*

The Third Circuit subsequently reconciled its apparently inconsistent precedents on the need for affirmative state conduct—but chose to do so in a non-precedential decision. In *Estate of Henderson v. City of Philadelphia*,[185] police responded to a mother's request to involuntarily commit her mentally ill son and, within minutes of the officers' arrival, while police stood on the first floor of the house reading the commitment papers, the son walked upstairs and jumped out a window, resulting in severe and permanent head injuries.[186]

In a non-precedential decision in *Henderson*, the same Third Circuit judge who authored the precedent that eliminated the requirement of affirmative government conduct reconciled the apparently conflicting precedential requirements by clarifying that a government's failure to rescue a plaintiff from harm can only be culpable conduct when an affirmative duty to rescue arises from government intervention that increased the risk of harm.[187] The non-precedential opinion apparently read as dicta the precedential decision's suggestion that inaction could be culpable in the face of foreseeable harm.[188]

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workmen temporary access to the interior, through which a murderer entered and killed a teacher, the state defendants had not placed the victim in harm's way because the murderer's attack was "not a foreseeable and fairly direct result of defendants' behavior"). The Third Circuit read its earlier en banc decision in *D.R.* to have turned not on the absence of affirmative government conduct to expose the school children to sexual assaults but on the absence of a direct causal connection between the "acts or omissions of the state" and the harm suffered by plaintiffs; it was not "the act or omission of the state actor that directly placed the victim in harm's way." *Id.* at 915.

185. No. 99-1579 (3d Cir. May 2, 2000) (unpublished and non-precedential) (on file with author).

186. *Id.* at 3–7.

187. *See id.* at 14.

188. The court held:

> The defendant officers did not 'use their authority [as police officers] to create an opportunity that otherwise would not have existed' for Henderson to harm himself. *Kneipp*, 95 F.3d at

The clarification that government inaction can only be culpable state action when it follows an affirmative use of government authority to create the harm was a significant retreat from the broad language in Third Circuit precedent.[189] But the reconciliation was not precedential. Had the Third Circuit's significant narrowing of its 1997 precedent been precedential, district courts and litigants could have relied on it to reconcile the inconsistent dictates on the state action prong of the state-created danger test.[190]

### 4. *Practical Consequences of Doctrinal Inconsistency for District Courts and Litigants*

The doctrinal inconsistency between the Third Circuit's varying statements on the necessity of affirmative government conduct to satisfy

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1208. In fact, the heart of the plaintiff's allegation asserts the opposite—the police failed to exercise their authority as police officers to place Salim Henderson in custody as soon as they arrived at the Henderson home.

> Although we have suggested that inaction by government actors can be the basis for liability under Section 1983, *see Morse*, 132 F.3d at 915, in the cases in which we have found liability, inaction has been preceded by a deliberate exercise of authority. In *Kneipp*, for example, we found the defendant officers potentially liable for leaving Mrs. Kneipp to find her own way home, but predicated that on their having acted to separate her from any private source of assistance. *See Kneipp*, 95 F.3d at 1210 ("The affirmative acts of the police officers here created a dangerous situation, requiring that they take additional measures to ensure [Kneipp's] safety."). Here, there is no allegation the defendant officers separated Salim Henderson from his private source of assistance nor did anything more than respond to Mrs. Henderson's call.

*Id.*

189. *See supra* notes 181–84 and accompanying text (summarizing the reasoning of *Morse*).

190. As this Article was going to press, a Third Circuit majority—over vehement dissent—attempted to reconcile earlier Third Circuit precedent with the suggestion in *Morse* that an omission could be sufficient for culpability. *See* Bright v. Westmoreland County, No. 05-2005, ___ F.3d ___ (Apr. 4, 2006), slip op. at 16 n.7. Writing for the majority, Judge Stapleton quoted the *Morse* "observ[ation]" that foreseeability of harm rather than affirmative action was dispositive of the fourth prong but judged it "important to put this observation in context." *Id.* The majority concluded that the omission language was essentially dicta:

> [W]e do not read *Morse*'s language to suggest liability can be based on an omission alone or a failure to act. We read it to clarify that the relevant test involves asking whether a state actor's behavior constituted an affirmative act, and, if so, whether the affirmative act created a foreseeable opportunity for harm.

*Id.* The dissent focused entirely on the majority's reading of the fourth element of the state-created danger test to require affirmative state action and addressed the tension between this holding and *Morse*:

> Our recent cases have shifted away from inquiring into the existence of affirmative acts as a standard to establish the fourth element of our test . . . . [A]s *Morse* represents a controlling case, I cannot join in the majority's assertion to the contrary, that the hallmark of our test is whether the acts can be characterized as affirmative.

*Id.* at 31–32 (Nygaard, J., dissenting).

state action undermined the predictive value of precedent and had practical consequences for district courts and litigants evaluating settlement of state-created danger claims. Some government litigants relied on the Third Circuit's non-precedential reconciliation of its conflicting positions, its recognition that a failure to rescue is only culpable state action where the state had first acted affirmatively to increase the risk of danger to plaintiff.[191]

Other district courts and litigants relied on the Third Circuit's precedential ruling that an omission could be sufficient for state action. For example, in ruling that a rational jury could find police liable for not breaking down a crime victim's door and for telling neighbors to do nothing but call 911 if they heard additional noises from the victim's apartment, a district court held that "inadequate intervention" could have increased the risk of harm, and quoted the Third Circuit's ruling that state placement of the victim in a foreseeably dangerous position was dispositive, "'not whether the act was more appropriately characterized as an affirmative act or omission.'"[192] In a suit against courthouse security, another plaintiff similarly read the Third Circuit's precedent to have collapsed state action into foreseeability of the harm.[193] There, Family Court administrators knew that litigants had been attacked in the courthouse and, to reduce that risk, instructed guards to limit access to

191. *See, e.g.*, Brief of Appellants at *23, Schieber v. City of Philadelphia No. 01-2312, 2001 WL 34117938 (3d Cir. Aug. 20, 2001) ("Although dicta in *Morse* suggested that inaction alone might satisfy the state created danger theory, *Morse*'s author, the Hon. Anthony J. Scirica, subsequently clarified that this Court, including the *Kneipp* panel, has never found inaction to be sufficient in the absence of a 'deliberate exercise of authority' . . . ." (quoting *Henderson*, No. 99-1579, at 14)); Brief of Appellees at *19, Cannon v. Beal, No. 00-1208, 2000 WL 33993771 (3d Cir. Dec. 18, 2000) ("As the *Henderson* panel explains, in [the drunken woman case, the police officer] was liable under the state created danger theory not because he abandoned Samantha on her cold walk home; he was liable only because that omission was preceded by a 'deliberate exercise of his authority' to separate Samantha from her private source of rescue, her husband. No. 99-1579, slip op. at 14, sal12. Thus in *Henderson*, a panel of this court determined that police officers were not liable for failing to act on Mrs. Henderson's statement that her son might jump from an upstairs window because they had merely failed to act rather than putting Mrs. Henderson's son in that dangerous situation themselves or using their authority to prevent Mrs. Henderson from rescuing him herself.").

192. Schieber v. City of Philadelphia, 156 F. Supp. 2d 451, 460 (E.D. Pa. 2001) (quoting *Morse*, 132 F.3d at 915). The Third Circuit ultimately ruled the police conduct no more than negligent. *See* Schieber v. City of Philadelphia, 320 F.3d 409, 423 (3d Cir. 2003).

193. Brief and Appendix Volume I for Appellant at *3–10, *33, Webb v. City of Philadelphia, Nos. 99-1980, 00-1647, 1999 WL 33620403 (3d Cir. Aug. 31, 2001). The Third Circuit later ruled that conduct no more than negligent. *Webb*, Nos. 99-1980, 00-1647, at 4.

litigants themselves.[194] The plaintiff, a subpoenaed litigant attacked by a person who should have been barred by security, argued that state action was satisfied by the guard's omission, which placed the victim in a foreseeably dangerous position.[195]

The Third Circuit's apparent approval of omissions by government actors as satisfying use of state authority likely encouraged litigation and impeded settlement by causing litigants and district courts to overvalue claims based on negligent conduct. Since non-precedential opinions issued by the Third Circuit before 2002 are not available in electronic form,[196] litigants and district courts would know the 1997 precedent that apparently expanded state-created danger to include inaction but would be unlikely to know of the 2000 non-precedential retreat from that holding. Those relying on the published law may have perceived constitutional claims when the facts were more likely to be viewed by the Third Circuit as state law torts, thus encouraging litigation, impeding settlement,[197] and undermining the efficiency rationale for non-precedential opinions.

### *D. Example Four: 42 U.S.C. § 1983 Municipal Liability*

A final doctrinal divergence between precedential and non-precedential opinions concerns municipal liability for state-created danger. In 1994, Third Circuit precedent held that municipalities could be liable under 42 U.S.C. § 1983 for constitutional wrongdoing even in the absence of liability by an individual state actor.[198] This precedent was widely criticized.[199] Perhaps in response to such criticism, in two non-precedential opinions in 2000, the Third Circuit purported to modify its precedential theory.[200] Even after the 2003 issuance of a precedential opinion on municipal liability for state-created danger in the absence of

194. Brief and Appendix Volume I for Appellant at *3–10, *15–16, *23, *Webb*, Nos. 99-1980, 00-1647.

195. *See id.* at *3–6, *16–17, *32–33.

196. *See* 3D CIR. IOP 5.3, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf (providing, in Internal Operating Rules effective July 1, 2002, that non-precedential opinions are to be posted on the court's website); *supra* note 7 and accompanying text.

197. *See* Hoffman, *supra* note 75, at 2 ("[I]f . . . a plaintiff values a case too high or the defendant too low, settlement becomes difficult or impossible.").

198. *See infra* Part IV.D.1.

199. *See infra* Part IV.D.1.

200. *See infra* Part IV.D.2.

individual liability,[201] the contours of the theory remain too unclear for non-precedential application, which should be limited to applications of settled doctrine.

### 1. *Third Circuit Precedent Required Examination of Municipal Liability Even in the Absence of Constitutional Wrongdoing by Individual Actors*

The Supreme Court held in *Collins v. City of Harker Heights, Texas*[202] that a municipal liability claim under 42 U.S.C. § 1983 should be analyzed in two steps: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation."[203] Over a decade ago, the Third Circuit apparently read the Supreme Court's statutory standard for holding a government liable for the constitutional wrongdoing of its employee to instead create a direct *constitutional* theory of municipal liability. In *Fagan v. City of Vineland*,[204] a high speed police chase case, the Third Circuit held that municipal liability under § 1983 for a substantive due process violation does not depend on the individual employee's liability and that a constitutional violation can exist even if no individual police officer violated the Constitution.[205]

A year after *Fagan*, in a precedential state-created danger decision, the Third Circuit acknowledged "some inconsistency in our circuit as to

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201. *See infra* Part IV.D.4.

202. 503 U.S. 115 (1992).

203. *Id.* at 120.

204. 22 F.3d 1283, 1291–94 (3d Cir. 1994) (summarizing district court reasoning).

205. *Id.* at 1292, 1293 n.4. The Third Circuit reversed the district court, which had relied on the Supreme Court's straightforward holding in *City of Los Angeles v. Heller*:

> [None of] our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the department regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

*Id.* at 1291 (summarizing district court reasoning and quoting City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)). The Third Circuit ruled *Heller* "should not be read so broadly as to automatically preclude municipal liability absent an individual police officer's liability." *Fagan*, 22 F.3d at 1291. *Fagan* distinguished *Heller* as (1) not concerning an independent § 1983 claim against the municipality but instead based on respondeat superior; and (2) limited to Fourth Amendment claims. *Id.* at 1291–93. While the officers in hot pursuit could only be liable if their conduct shocked the conscience, *Fagan* held that the city could be liable "if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner . . . ." *Id.* at 1292. The *Fagan* panel did not cite *Collins*.

the standard governing the underlying constitutional violation in policy, custom or practice cases"[206] because the *Fagan* panel may have misread the statutory standard for holding a municipality liable for an employee's constitutional wrongdoing to instead describe a *separate constitutional* standard.[207] The court suggested that the *Fagan* panel had skipped the first prong of the municipal liability analysis required by the Supreme Court in *Collins*:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the 'deliberate indifference' prong of the *Collins* test, the panel opinion did not apply the first prong—establishing an underlying constitutional violation.[208]

Federal and state courts have widely rejected the *Fagan* panel decision and both courts and commentators have criticized it as inconsistent with Supreme Court doctrine.[209] The validity of that

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206. Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 n.13 (3d Cir. 1995).

207. *Id.*

208. *Id.*

209. The First Circuit declined to follow *Fagan* because it "improperly applied the Supreme Court's teachings" by "ignor[ing]" the initial requirement that the plaintiff's harm be caused by a constitutional violation and instead treated the statutory requirement of deliberate indifference as a separate constitutional theory of municipal liability. Evans v. Avery, 100 F.3d 1033, 1039–40 (1st Cir. 1996); *see* Trigalet v. City of Tulsa, 239 F.3d 1150, 1155 n.4 (10th Cir. 2001); Thompson v. Boggs, 33 F.3d 847, 859 n.11 (7th Cir. 1994) (rejecting *Fagan's* distinction of *Heller* and following "the clear holding of *Heller*"); Hildebrandt v. City of Fairbanks, 957 P.2d 974, 977 (Alaska 1998) (rejecting *Fagan* because "[t]he Third Circuit's approach appears to conflict with the United States Supreme Court's interpretation of Section 1983 as set forth in *City of Canton* and *Collins*"). Similarly, despite usually following Third Circuit interpretations of federal law, a state court within the Third Circuit rejected *Fagan*'s independent theory of municipal liability because "[i]t has not stood the test of time even in the Third Circuit" and the response of other circuits "has been even less sanguine." Thomas v. City of Philadelphia, 804 A.2d 97, 111 (Pa. Commw. Ct. 2002). Professor Karen Blum argued that the Third Circuit in *Fagan* omitted the constitutional inquiry required by *Collins* by confusing the *statutory* issue of whether a city could be held accountable for its employee's constitutional wrongdoing for an independent *constitutional* theory of municipal liability:

> *Fagan* rests on the premise that a plaintiff who can show injury and . . . deliberate indifference on the part of the city may hold the city liable under § 1983 for that injury. . . . With no constitutional violation committed by the non-policymaking employee(s) and with a showing of only . . . deliberate indifference, there is simply no constitutional violation made out and there is no basis for § 1983 liability on anyone's part. The Third Circuit's mistake in *Fagan* is in treating proof of statutory responsibility under *Canton*'s deliberate indifference standard as proof of constitutional liability under *Collins*.

criticism is beyond the scope of this Article. What is significant here is that Third Circuit precedent has adhered to *Fagan*.[210] In its precedent adopting the state-created danger doctrine, the Third Circuit chastised the district court for failing to evaluate the claim against the city because "[t]he precedent in our circuit requires the district court to review the plaintiffs' municipal liability claims independently of the § 1983 claims against the individual police officers."[211] Yet the Third Circuit continued to send conflicting signals to litigants and district courts by acknowledging Supreme Court authority for the proposition that a municipal liability claim will fail in the absence of an underlying constitutional violation.[212]

### 2. *Non-Precedential Municipal Liability Opinions Permitted Rejection of Claims Against Individuals to Be Dispositive of the Municipal Liability Claim*

Following criticism of *Fagan*, the Third Circuit issued two non-precedential opinions in 2000 that permitted rejection of claims against individuals to be dispositive of municipal liability claims by distinguishing *Fagan* on analytically unsound grounds. In both non-precedential opinions, the Third Circuit held that plaintiffs failed to show substantive due process violations by the individual police officers and that this conclusion was dispositive of the § 1983 claims against the

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Karen M. Blum, *Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the* Canton *Case from the* Collins *Case*, 48 DEPAUL L. REV. 687, 704–05 (1999); *see* Roger W. Kirst, *Constitutional Rights of Bystanders in the War on Crime*, 28 N.M. L. REV. 59, 65 (1998) (noting that that "result appears to conflict with the Supreme Court's position in cases such as *Collins* and *DeShaney*"); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 850, n.10 (1998) (citing *Canton* for the proposition that deliberate indifference is the standard of culpability "to sustain a claim of municipal liability for failure to train an employee who causes harm by unconstitutional conduct for which he would be individually liable"); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 n.10 (1989) (holding consistently with *Heller* that, because substantive due process did not require the government to protect a child against private violence inflicted by the boy's father, the Court did not need to consider plaintiff's § 1983 claim against the county).

210. In its precedent criticizing *Fagan*, the Third Circuit first concluded that failure to show a constitutional violation was conclusive of the municipal liability claim, then proceeded to "assume" a state-created danger violation in order to analyze the municipal liability claim, in deference to the binding *Fagan* analysis that absence of constitutional wrongdoing by individuals is not dispositive of the claim against the city. *See Mark*, 51 F.3d at 1153–54.

211. Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996).

212. *Id.* at 1212 n.26; *see In re* City of Phila. Litig., 49 F.3d 945, 972 (3d Cir. 1995) (one judge questioning *Fagan*'s municipal liability analysis).

municipalities.[213] The Third Circuit's non-precedential distinction of *Fagan* was accomplished with semantic sleight of hand: the panels inquired only into constitutional wrongdoing by the individual defendants and, without inquiring into direct constitutional wrongdoing by the municipality as *Fagan* requires, concluded there had been no constitutional wrongdoing, and therefore no municipal liability.[214] The non-precedential decisions reasoned identically, using nearly identical language, suggesting one followed the other:

> Whether there is an underlying constitutional violation also will help clarify municipal liability *for if there is no violation, there can be no municipal liability. Cf. City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officers, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.").[215]
>
> . . .
>
> *The absence of a constitutional violation also resolves the question of municipal liability.* Although it is undoubtedly true that a municipality's "liability under section 1983 for a substantive due process violation does not depend upon an individual officer's liability," *Fagan*, 22 F.3d at 1293, it is equally true that a Section 1983 claim requires a constitutional violation. *See Heller*, 475 U.S. at 799. *As there is no constitutional violation, there is no municipal liability.*[216]

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213. Estate of Henderson v. City of Philadelphia, No. 99-1579, at 7–9, 15 (3d Cir. May 2, 2000) (unpublished and non-precedential) (on file with author); Estate of Burke v. Mahanoy City, No. 99-1357, at 6, 12 (3d Cir. Mar. 31, 2000) (unpublished and non-precedential) (on file with author). In *Burke*, the estate of a partygoer shot and killed by a drunken party guest alleged that the defendant police officers had violated his substantive due process rights by failing to protect him from the dangerous situation the officers helped to create by their response to a fight at the party, and that the municipality was liable for its custom of turning a blind eye to public drunkenness. *Burke*, No. 99-1357, at 3–5. In *Henderson*, the estate of a mentally ill young man alleged that the defendant police officers had violated his substantive due process rights by failing to protect him from the dangerous situation the officers helped to create while attempting to involuntarily commit him, resulting in severe and permanent head injuries, and that the municipality was liable for inadequately training and supervising the officers. *Henderson*, No. 99-1579, at 3–8.

214. *See Henderson*, No. 99-1579, at 8–9; *Burke*, No. 99-1357, at 6.

215. *Burke*, No. 99-1357, at 6 (first emphasis added) (citation omitted); *Henderson*, No. 99-1579, at 8–9 (identical wording).

216. *Burke*, No. 99-1357, at 12 (emphasis added); *see Henderson*, No. 99-1579, at 15 (using near-identical wording).

Whether consistent with Supreme Court teaching, the non-precedential distinction of *Fagan* is not consistent with how the Third Circuit had instructed district courts to apply *Fagan*'s theory of direct municipal liability for substantive due process claims.[217] Neither opinion explained the failure to undertake *Fagan*'s theory of direct municipal liability once the individual defendants had been absolved of inflicting "a constitutional injury."[218] The appellate court function of ensuring doctrinal uniformity was undermined by the Third Circuit's broad reading of the Supreme Court's *Heller* decision in two non-precedential decisions because the Third Circuit's precedential decisions required district courts and litigants to analyze its direct theory of constitutional wrongdoing by the municipality itself.[219]

The two non-precedential opinions were not, however, the circuit's only state-created danger municipal liability decisions. The court issued non-precedential opinions on at least seven other state-created danger claims concerning municipal liability between its precedential decisions in 1997 and 2003. Two did not differentiate claims against individuals from those against the municipality.[220] But five appear consistent with

217. *Kneipp*, 95 F.3d at 1213.

218. *Henderson*, No. 99-1579, at 9 n.5 ("This is not to say that there must be actionable conduct by the defendant officers for the City or former Commissioner Neal to be held liable. *See Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994) ('A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer.'). There must, however, be a constitutional injury for the municipality to be held liable under [42] U.S.C. § 1983.").

219. The *Fagan* independent theory of constitutional wrongdoing by a municipality is predicated on differing fault standards for substantive due process violations by the individual and by the municipality. Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994). The two Third Circuit non-precedential decisions that distinguished *Fagan* without engaging its direct theory of municipal liability (*Burke* and *Henderson*) both discussed whether the mental culpability standard for individual liability under the state-created danger theory should be "shocks the conscience" but did not resolve the issue because the facts in those cases did not meet the lower threshold of willful disregard, which is interchangeable with the deliberate indifference fault standard applicable to "direct" constitutional wrongdoing by the municipality, according to *Fagan*. But because proof of fault would differ for the individual and municipal defendants, a faithful reading of *Fagan* would seem to have required separate analysis of the city liability claim, a choice the Third Circuit declined in favor of its shortcut distinction of *Fagan*. In the non-precedential opinion which did adopt the "shocks the conscience" standard for individual employee substantive due process violations, the Third Circuit did separately analyze the municipal liability claim under the deliberate indifference standard, which is consistent with *Fagan*. *See* Cannon v. Beal, No. 00-1208, at 6–7 (3d Cir. Apr. 23, 2001) (unpublished and non-precedential) (on file with author).

220. *See* Marcolongo v. Sch. Dist. of Phila., No. 99-2015 (3d Cir. Mar. 12, 2001) (unpublished and non-precedential) (on file with author) (agreeing with "thorough analysis" of district court); Solum v. Yerusalim, No. 99-1607 (3d Cir. Mar. 8, 2000) (unpublished and non-precedential) (on file with author) (providing no separate discussion of municipal liability but affirming judgment for municipality).

*Fagan* as each analyzed constitutional wrongdoing by the municipality despite the absence of constitutional wrongdoing by an individual.[221]

### 3. *Practical Consequences of Doctrinal Inconsistency for District Courts and Litigants*

The lack of doctrinal uniformity left litigants and district courts confused about how to apply the Third Circuit's criticized theory that municipal liability in substantive due process cases can be independent of claims against individual state actors, rather than derivative of claims against individuals. Some government litigants relied on the non-precedential distinction of *Fagan*.[222] Meanwhile, district courts were struggling to reconcile the independent theory of municipal liability articulated in *Fagan* both with Supreme Court decisions that preexisted *Fagan* (*Heller*, *Collins*, and *City of Canton, Ohio v. Harris*[223]) and with Supreme Court decisions that postdated *Fagan* (*Lewis*).[224]

Doctrinal inconsistency may have caused federal courts to expend more resources in resolving state-created danger litigation and discouraged settlement of municipal liability claims, thus undercutting the efficiency rationale for issuing non-precedential opinions. For

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221. *See* Hansell v. City of Atlantic City, 46 F. App'x. 665 (3d Cir. 2002); Pahler v. City of Wilkes-Barre, 31 F. App'x 69 (3d Cir. 2002); Combs v. Sch. Dist. of Phila., 32 F. App'x 653 (3d Cir. 2002) (appeal after five-day trial of state-created danger claim against a school district where no individual violated plaintiff's constitutional rights); Webb v. City of Philadelphia, Nos. 99-1980, 00-1647 (3d Cir. Aug. 31, 2001) (unpublished and non-precedential) (on file with author) (failing to cite *Fagan* but reaching municipal liability in absence of individual constitutional wrongdoing); *Cannon*, No. 00-1208; *cf. Henderson*, No. 99-1579; *Burke*, No. 99-1357 (essentially following *Heller*).

222. Brief for Appellees at *50, Webb v. City of Philadelphia, 2001 WL 34112171 (3d Cir. Mar. 19, 2001); Brief for Appellees at *41–42, Cannon v. Beal, 2000 WL 33993771 (3d Cir. Dec. 18, 2000).

223. 489 U.S. 378 (1989).

224. *See, e.g.*, White v. City of Philadelphia, 118 F. Supp. 2d 564, 575–76 (E.D. Pa. 2000); Brown v. Commonwealth, No. 99-4901, 2000 WL 562743, at *8 (E.D. Pa. May 8, 2000) (disapproving municipal litigant's reliance on *Heller* and indicating that precluding municipal liability for lack of individual liability "is not the law in the Third Circuit"), *aff'd* 300 F.3d 310 (3d Cir. 2002); Cannon v. Beal, 86 F. Supp. 2d 460, 473 (E.D. Pa. 2000) ("[R]eading *Canton*, *Collins*, and *Fagan I* together, the applicable standard of fault in a municipal liability case, in which the individual state actors did not commit a constitutional tort, remains unclear."); Estate of Henderson v. City of Philadelphia, No. 98-3861, 1999 WL 482305, at *21 (E.D. Pa. July 12, 1999); Estate of Burke v. Mahanoy City, 40 F. Supp. 2d 274, 285 (E.D. Pa. 1999); *see also* Leddy v. Twp. of Lower Merion, 114 F. Supp. 2d 372, 377 (E.D. Pa. 2000) (outside of state-created danger context, noting "there is some inconsistency in our circuit as to the standard governing the underlying constitutional violation" in municipal liability cases).

example, one district court required a trial of state-created danger claims against the municipality even after granting judgment to all individual defendants.[225] Other district courts instead ignored the Third Circuit's independent theory of municipal liability and treated substantive due process claims against cities as derivative of claims against individual defendants.[226] At least one district court suggested that the Third Circuit revisit its theory of municipal liability independent of individual substantive due process violations while acknowledging it was meanwhile bound by *Fagan*.[227]

Because they are unavailable on Westlaw or Lexis and are not published in a print reporter,[228] many district courts likely were unaware of the non-precedential opinions issued before 2002. However, one district court flatly rejected a municipal litigant's attempted reliance on one of the non-precedential decisions discussed above, which the litigant had cited in distinguishing *Fagan*.[229] Further, the district court criticized another district court for having followed the non-precedential opinions:

> THE COURT: . . . Do you rely on [a non-precedential Third Circuit opinion]?
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> MR. WINEBRAKE: We rely on [the] District Court decision in [that case], and we apprised the Court of the unpublished

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225. *Compare* Combs v. Sch. Dist. of Phila., No. 99-3812, 2000 WL 1611061, at *7 (Oct. 26, 2000) (granting summary judgment to all individual government defendants but denying judgment to government), *with* Combs v. Sch. Dist. of Phila., 32 F. App'x 653, 655 (3d Cir. 2002) (noting that the trial against the government took five days).

226. *See* Bright v. Westmoreland County, No. 03-1072, 2003 U.S. Dist. LEXIS 25825 (W.D. Pa. Sept. 30, 2003), *rev'd on other grounds*, 380 F.3d 729, 736 (3d Cir. 2004); Rowland v. City of Philadelphia, No. 97-2143, 1997 WL 677165, at *4 (E.D. Pa. Oct. 28, 1997) (without citing *Fagan*, applying *Heller*: "Where there is no constitutional violation by a municipal employee, there can be no liability on the part of the municipality."); *see also* Doman v. City of Philadelphia, No. 99-6543, 2000 WL 1224906, at *4 (E.D. Pa. 2000) (outside of state-created danger context, dismissing municipal liability claim upon finding no individual city employee violated plaintiff's constitutional rights and citing *Fagan* as "*but cf.*"), *appeal dismissed sub nom.* Doman v. Pa. Dep't of Pub. Welfare, 33 F. App'x 647 (3d Cir. 2002).

227. Gillyard v. Stylios, No. 97-6555, 1998 WL 966010, at *7 (E.D. Pa. Dec 23, 1998); *see also* Thomas v. City of Philadelphia, No. 01-2572, 2002 WL 32350019, at *4 (E.D. Pa. Feb. 7, 2002) (outside state-created danger, summarizing criticism of *Fagan* but conceding it is binding "[u]ntil the Court of Appeals decides to the contrary"); *Cannon*, 86 F. Supp. 2d at 475–76 ("The confusion regarding how to evaluate a municipality's liability is buttressed by the . . . Third Circuit's recognition in *Mark* of *Fagan I's* failure to evaluate the applicable standard for the underlying constitutional violation.").

228. *See supra* notes 7, 88.

229. Transcript of Oral Argument at 23–24, Schieber v. City of Philadelphia, No. 98-5648 (E.D. Pa. Dec. 14, 2000).

> opinion because we think it's good to know that the Third Circuit in a seemingly well thought out opinion written by Judge Scirica upheld [the district court].
>
> THE COURT: Well, that's very interesting. It was not for publication and has no precedential value. At a conference of the Third Circuit, the Court of Appeals defended their unpublished opinions on the ground that they're not well reasoned, they don't give them much thought. So it's hard to say that that's a well-reasoned opinion that has any precedential value.
>
> MR. WINEBRAKE: Well, we concede—
>
> THE COURT: It's instructive on what they'll do without much thought.
>
> MR. WINEBRAKE: True. But it's instructive, Your Honor, and it's also—it's also interesting to see how they handled some of the issues—how they handled the *Fagan* issue, for example.
>
> THE COURT: I don't intend to rely on the affirmance by the Court of Appeals in [the non-precedential opinion]. I think it was incorrect of [another district court judge] to cite [Third Circuit non-precedential state-created danger opinions] as he did. What I mean—
>
> MR. WINEBRAKE: Your Honor—
>
> THE COURT:—[The other district court] may be correct in his ultimate decision [citing non-precedential opinions], but I think that the Court of Appeals has instructed us not to rely on unpublished opinions, and we're obliged to comply with that instruction.[230]

Had the non-precedential distinction of *Fagan* instead been precedential, and therefore binding on the district court, the district court would not have been free to ignore the Third Circuit's retreat from its criticized municipal liability theory.[231]

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230. *Id.*

231. Compounding the doctrinal confusion about the Third Circuit's theory of direct municipal liability for substantive due process claims is its suggestion in *Mark* that the state-created danger theory is inapplicable where the state actor alleged to have created the danger is the municipality itself. The Third Circuit ruled in *Mark* that a claim against a municipality under the state-created danger theory runs afoul of the requirement that there be some relationship between the plaintiff and the state actor, because policies are not promulgated to apply to specific persons:

> When the alleged unlawful act is a policy directed at the public at large—namely a failure to protect the public by failing adequately to screen applicants for membership in a volunteer fire company—the rationale behind the rule disappears—there can be no specific knowledge by the

### 4. *The Doctrine of Independent Municipal Liability for State-Created Danger Is Insufficiently Settled for Non-Precedential Application*

Recent Third Circuit state-created danger precedent suggests that, even now, the contours of *Fagan*'s theory of independent substantive due process violations by a municipality remain insufficiently settled for routine, non-precedential application. A precedential opinion issued by the Third Circuit in 2003 acknowledged the widespread criticism of *Fagan*.[232] That 2003 precedent could be read broadly to link the existence of *constitutional* harm to the conduct of the individuals, eviscerating the Third Circuit's theory of independent municipal liability for state-created danger claims,[233] and thereby making precedential the distinction of *Fagan* first articulated in non-precedential opinions years earlier.[234] But the 2003 precedent simultaneously adhered to *Fagan*, holding that "[i]t is possible for a municipality to be held independently

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defendant of the particular plaintiff's condition, and there is no relationship between the defendant and the plaintiff.

Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir. 1995).

232. Brown v. Commonwealth of Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 482 n.3 (3d Cir. 2003) (citing *Mark*, 51 F.3d at 1153 n.13; Trigalet v. City of Tulsa, 239 F.3d 1150, 1154–55 (10th Cir. 2001); Young v. City of Mount Ranier [sic], 238 F.3d 567, 579 n.9 (4th Cir. 2001); Evans v. Avery, 100 F.3d 1033, 1040 (1st Cir. 1996); Thompson v. Boggs, 33 F.3d 847, 859 n.11 (7th Cir. 1994)). Further, another 2003 precedent appears to limit *Fagan's* theory of direct constitutional wrongdoing by a municipality to its facts—a police chase. *See* Grazier *ex rel.* White v. City of Philadelphia, 328 F.3d 120, 124 n.5 (3d Cir. 2003).

233. *See Brown*, 318 F.3d at 481–83. In *Brown*, the Third Circuit cited *Fagan* but did not define the constitutional right by parsing the differing intent of the individuals and of the municipality but rather applied a single definition of the plaintiff's constitutional right against both the individual and the municipal defendant. *Id.* at 482–83. Reading *Brown* broadly in a non-precedential opinion, the Third Circuit held the absence of individual liability to be conclusive of municipal liability because if the individual actors did not create a danger to the plaintiff, the harm caused was not *constitutional* harm. Liedy v. Borough of Glenolden, 117 F. App'x 176, 181 (3d Cir. 2004). In *Liedy*, the Third Circuit rejected the state-created danger claims of the estate of a murder victim and of her daughter, a rape victim, against the police who released the sex offender from custody, disposing of municipal liability in a single sentence: "[B]ecause we conclude that there was no constitutional tort in this case, there is also no municipal liability." *Id.*; *see* Green v. City of Philadelphia, 92 F. App'x 873, 876 (3d Cir. 2004) (citing *Fagan* but affirming judgment for municipality without analyzing differing states of mind of the city and of individuals because "*Heller* controlled" where "officers' liability is the predicate for the City's liability" and officers' return of confiscated gun to shooter did not violate constitution by creating danger to victim); Crawford v. Beard, No. 04-0777, 2005 WL 139082, at *4 (E.D. Pa. Jan. 19, 2005) (following *Brown* in rejecting municipal liability for state-created danger claim "[b]ecause there was no constitutional tort").

234. *See* Estate of Henderson v. City of Philadelphia, No. 99-1579 (3d Cir. May 2, 2000) (unpublished and non-precedential) (on file with author); Estate of Burke v. Mahanoy City, No. 99-1357 (3d Cir. Mar. 31, 2000) (unpublished and non-precedential) (on file with author).

liable for a substantive due process violation even in situations where none of its employees are liable."[235] Direct municipal liability for state-created danger, therefore, remains insufficiently clear for non-precedential application, which should be restricted to application of settled law.

## V. LAWMAKING IN THE DIVERSE FACTUAL CONTEXTS OF STATE-CREATED DANGER

Making new law is likely in state-created danger appellate decisions because the doctrine draws meaning from its application in widely varying factual contexts. The state-created danger claims discussed in this Article arose in diverse scenarios—e.g., a courthouse security slip-up,[236] police response to a drunken man's threats,[237] emergency medical technicians' botched rescue of a baby,[238] student-on-student public school violence,[239] and highway administrators' maintenance of a dangerous stretch of road.[240] While the focus of this Article is on doctrinal divergence, application even of settled law to new facts can make law[241] because "fleshing out by application of principle to different facts is vital to common-law adjudication."[242] The Third Circuit's obligation to explain the law in precedential decisions is perhaps greater in the substantive due process context because the legal standard of "shocks the conscience" draws its meaning from particular factual applications.[243] Third Circuit judges themselves have labeled "shocks the conscience" as "amorphous and imprecise"[244] and "hardly a test at all."[245] More specifically, in the state-created danger arena lawmaking

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235. *Brown*, 318 F.3d at 482 (citing Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994)).

236. Webb v. City of Philadelphia, Nos. 99-1980, 00-1647 (3d Cir. Aug. 31, 2001) (unpublished and non-precedential) (on file with author).

237. *Burke*, No. 99-1357.

238. *Brown*, 318 F.3d at 475.

239. Combs v. Sch. Dist. of Phila., 32 F. App'x 653 (3d Cir. 2002).

240. Solum v. Yerusalim, No. 99-1607 (3d Cir. Mar. 8, 2000) (unpublished and non-precedential) (on file with author).

241. *See supra* Part IV.B.

242. Reynolds & Richman, *supra* note 21; Reynolds & Richman, *supra* note 18, at 1190; *id.* at 1196, 1176, 1182–83; *supra* notes 46–48 and accompanying text.

243. *See* Cappalli, *supra* note 48.

244. Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir.1994).

245. *Id.* at 1319 (Cowen, J., joined by Becker, Scirica, & Lewis, JJ., dissenting).

by application is likely since the test is inherently ambiguous,[246] derives meaning from factual contexts,[247] and applies to widely differing factual circumstances. For all of these reasons, appellate courts should hesitate before disposing of state-created danger claims in non-precedential opinions.

## CONCLUSION

Federal appellate courts are overworked and need relief. While non-precedential opinions usually are justified as an efficient solution to overburdened federal appellate courts, the doctrinal inconsistency between a circuit's precedential and non-precedential opinions demonstrated in this case study *of a single constitutional doctrine* undercuts that rationale because doctrinal divergences may result in relitigation of issues resolved at the appellate level and may lead plaintiffs and defendants to value cases differently. Doctrinal inconsistency can potentially result in more litigation and fewer settlements.[248] This Article demonstrates that the risks posed by issuing non-precedential opinions have been realized by the Third Circuit's application of one doctrine—state-created danger—over a seven-year span. That demonstration suggests that the current system should be reformed.

The elimination of non-precedential appellate opinions is neither realistic nor desirable as it likely would result in repetitive opinions, increased workload for individual judges,[249] and an increased need for en banc overruling of inconsistent precedent.[250] Nor would it be a desirable alternative to eliminate non-precedential opinions in favor of a wholesale return to judgment orders, which generally are very short orders unanimously affirming the judgment reviewed.[251] As federal court

246. *See supra* Parts IV.A., C.

247. Cappalli, *supra* note 48, at 779.

248. *See supra* Parts IV.A.5, B.2, C.4, D.3.

249. *See supra* notes 20–39 and accompanying text.

250. *See* Slavitt, *supra* note 26, at 130 (arguing that "[i]f publication were universal, judges and litigants would be able to refer to and review the entire body of precedent rather than a limited and unrepresentative subset" but acknowledging that "[i]f writing a wellcrafted opinion for every case is not possible, then universal publication could result in more carelessly written decisions that might distort the system of precedent.").

251. *See* 3D CIR. IOP 6.2.1, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf ("A judgment order is filed when the panel unanimously determines to affirm the judgment or order of the district court . . . and determines that a written opinion will have no precedential or institutional

scholar Lauren Robel has observed, the judgment order option "has proven unattractive to litigants and judges alike: summary decision serves none of the legitimating functions of appeal and may leave parties with the feeling that the court never considered their arguments."[252] However, use of judgment orders in certain appeals might help the overburdened Third Circuit to manage its docket. An appellate judgment order might be used without frustrating litigants where the reasons for affirmance are spelled out by the district court opinion.[253] At least one Third Circuit judge, the Honorable Theodore A. McKee, would endorse the "considered use of judgment orders in civil cases where the district court opinion can be affirmed substantially for the reasons stated by the district court."[254]

Further, the evidence in this Article supports incremental reforms to promote uniformity between published and unpublished opinions. As an initial step, ending the Third Circuit's tradition of prohibiting its own citation of its non-precedential opinions would promote doctrinal uniformity.[255] A finding by a Third Circuit panel that an unpublished opinion is helpful would simply demonstrate that the prediction of "no future usefulness" made by the authoring Third Circuit panel was incorrect. Moreover, proposed new Federal Rule of Appellate Procedure 32.1 prohibits the circuits from imposing restrictions on the citation of non-precedential opinions and, should the draft Rule approved by the Supreme Court take effect, which will happen unless Congress acts, the new Rule likely will supersede the Third Circuit's self-imposed restriction.

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value."). A judgment order for civil cases "may contain one or more references to cases or other authorities." *Id.* IOP 6.3.2.

252. Robel, *supra* note 27, at 943; *see* Slavitt, *supra* note 26, at 132 ("When a court hands down an opinion without stating its reasoning, the litigant may perceive that the court has not fulfilled its promise of justice."). The Third Circuit was criticized for its former more frequent reliance on judgment orders. Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157 (1998). The Third Circuit reduced reliance on judgment orders when Judge Becker became Chief Judge: "I persuaded my colleagues that we owed a greater duty to our colleagues at the bar and to their clients . . . as a matter of respect . . . and accountability. . . . [O]ne line orders should not be the way the Courts of Appeals do business." Becker, *supra* note 7, at 4–5.

253. 3D CIR. IOP 6.3.2, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf ("A judgment order may state that the case is affirmed by reference to the opinion of the district court or decision of the administrative agency . . . .").

254. Telephone Interview with the Hon. Theodore A. McKee, U.S. Court of Appeals for the Third Circuit, in Phila., Pa. (Feb. 7, 2006).

255. 3D CIR. IOP 5.7, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf; *see supra* note 70.

A more significant step toward ensuring doctrinal uniformity would be to expressly accord non-precedential opinions persuasive value, consistent with the common law tradition of empowering the applying court to assess the persuasive value of a judicial decision. This also could be accomplished by amendment of internal circuit rules. Persuasive value is not precedential value: "the decision must persuade on its own argumentative merits, without regard for its status as a precedent or for any notions of *stare decisis*."[256] This is the model adopted by the trial court that, in the opening vignette of this Article, rejected the parent's claim by relying in part on a non-precedential opinion.[257] This is also the model followed by the trial court that invoked the Third Circuit's non-precedential update to the "shocks the conscience" standard.[258] The Third Circuit should put its imprimatur on this practice.

While the Third Circuit does not currently limit litigant or district court reliance on its non-precedential opinions, conferring persuasive value would serve the values of uniformity, fairness, and predictability by reducing district court (or panel) reluctance to rely on non-precedential opinions.[259] Expressly conferring persuasive value on non-precedential opinions would encourage district courts to rely on them as they would appellate dicta: as "probative of future decisionmaking, to promote judicial economy by avoiding appellate reversal."[260] A district court persuaded by a non-precedential opinion could confidently rely on it as legitimate authority, promoting district court judicial economy by reducing incentives to buttress the ruling with alternate grounds.[261] Former Third Circuit Chief Judge Becker supported permitting parties to cite non-precedential opinions because they "give us the benefit of the

256. Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix*: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 11 (2002).

257. *See* White v. City of Philadelphia, 118 F. Supp. 2d 564, 573 (E.D. Pa. 2000) (relying on *Solum*, a non-precedential lawmaking opinion that applied the state-created danger doctrine to the novel facts of a direct claim by the parent of the decedent).

258. *See* Brozusky *ex rel.* Brozusky v. Hanover Twp., 222 F. Supp. 2d 606, 613 (M.D. Pa. 2002) (relying on *Pahler*); *see also* Smith v. Dep't of Gen. Servs., No. 04-0997, 2005 WL 1563505, at *1 (M.D. Pa. July 1, 2005).

259. *See supra* note 230 and accompanying text (district court refusing to rely on non-precedential opinion and stating that "it was incorrect of [another district court judge] to cite [a non-precedential state-created danger opinion]").

260. Caminker, *supra* note 64, at 76.

261. *See White*, 118 F. Supp. 2d at 573–74 (relying on non-precedential ruling but articulating alternate grounds); *Brozusky*, 222 F. Supp. 2d at 613–16 (same).

thinking of a previous panel and help us to focus on or think through the issues[,] . . . help District Judges in the same way they help us . . . [, and] are sufficiently lucid that their citation can be valuable."[262] Those reasons equally support explicit permission for courts and litigants to rely on non-precedential opinions for their persuasive value. Building on the models of the Fifth, Eighth, Tenth, and Eleventh Circuits,[263] such a rule should expressly permit panels and district courts to rely on a non-precedential opinion as persuasive authority without discouraging such reliance.

The alternative view has obvious force—that the proper role of a federal trial court is to apply binding law, not to predict the future course of binding law, using non-precedential opinions as divining rods.[264] But the goal of promoting doctrinal uniformity in circuit decisions, thus eliminating the dilemma for district courts, is better served by transparency. The goal of promoting doctrinal uniformity is better served, that is, by increasing the likelihood that non-precedential reasoning will surface in district court decisions, if persuasive to a federal judge.

Citation of unpublished opinions for persuasive value, rather than citation as precedent, as the District of Columbia Circuit permits,[265]

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262. Becker, *supra* note 7, at 1–2.

263. *See* 5TH CIR. R. 47.5.4, *available at* http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf (unpublished opinions issued on or after January 1, 1996, are "not precedent" but such opinions "may, however, be persuasive," and may be cited); 8TH CIR. R. 28(A)(i), *available at* http://www.ca8.uscourts.gov/newrules/coa/localrulesdec05.pdf (unpublished opinions "are not precedent and parties generally should not cite them," but parties may do so if the opinion "has persuasive value on a material issue and no published opinion of this or another court would serve as well"); 10TH CIR. R. 36.3, *available at* http://www.ca10.uscourts.gov/rules.cfm?part=8&ID=135 (unpublished decisions "are not binding precedents," and their citation is "disfavored," but an unpublished decision may be cited if it has "persuasive value with respect to a material issue that has not been addressed in a published opinion" and it would "assist the court in its disposition"); 11TH CIR. R. 36-2, *available at* http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG05.pdf (unpublished opinions "are not considered binding precedent," but "may be cited as persuasive authority"); *Id.* R. 36-3, IOP 6, *available at* http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG05.pdf ("Reliance on unpublished opinions is not favored by the court.").

264. *See* Caminker, *supra* note 64, at 73 ("[O]pportunities for successful prediction of the behavior of courts of appeals by district courts would likely be few, given ex ante uncertainty about which judges would actually make up the reviewing appellate court panel.").

265. D.C. CIR. R. 28(c)(1)(B), *available at* http://www.cadc.uscourts.gov/ (follow "Court Rules" hyperlink; then follow "Rules" hyperlink; then follow "Circuit Rules/FRAP" hyperlink) ("All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent."). The Third Circuit's tradition of requiring en banc reversal of a precedential panel opinion, *see* 3D CIR. IOP 9.1, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf, is not the only law-of-the-circuit tradition. *Cf.* 7TH CIR. R. 40(e), *available at*

would allow a Third Circuit panel to overturn the non-precedential decision in a precedential decision, without en banc review.[266] The Third Circuit could reject non-precedential reasoning without convening en banc because

> the law-of-the-circuit rule apparently does not apply to unpublished opinions, because they are not "precedents." The "persuasive authority" approach thus enables a circuit panel to reject an unpublished opinion as unpersuasive—with reasons, of course—without having to take the case en banc or otherwise to formally overrule the opinion.[267]

Such a process would help to ensure efficiency by conserving judicial resources.

Adopting specific internal rules for determining publication, in place of the existing panel prediction that the opinion has value only to the trial court or parties, would be a further step toward reducing doctrinal divergence in non-precedential opinions.[268] While a detailed publication policy is no guarantee of adherence, "plans with specific criteria are preferable to broad, generally worded plans . . . because of the difficulty of appreciating 'precedential value' at the time of decision."[269] The internal policy should reflect concern not only for the court's law-declaring function—such as when the district court has wrestled with a Supreme Court decision issued since the last circuit precedent—but also for the litigants' and district courts' need for examples of established doctrine applied to novel facts. Appellate courts should incline toward publication whenever the legal doctrine has a vague and indeterminate legal test or the cases applying that doctrine arise in widely variable factual circumstances—or both, as is true of the state-created danger doctrine—because the appellate panel cannot predict with certainty that such decisions will not be useful to future courts or litigants.[270] More

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http://www.ca7.uscourts.gov/Rules/rules.htm#cr40 ("Rehearing Sua Sponte Before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.")

266. Barnett, *supra* note 256, at 22–23.

267. *Id.*

268. A non-precedential opinion "appears to have value only to the trial court or the parties," 3D CIR. IOP 5.3, *available at* http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf, while a precedential opinion "has precedential or institutional value," *Id.* IOP 5.2. *See also supra* note 14.

269. Reynolds & Richman, *supra* note 18, at 1177.

270. *See supra* notes 46–52, 54 and accompanying text.

specifically, the Third Circuit should incline to publish state-created danger claims against municipalities because the Third Circuit's direct municipal liability doctrine is still evolving and not susceptible to routine application.[271]

Patterned on existing detailed circuit court publication guidelines, such an internal policy should counsel publication as precedent when the opinion:

- establishes, alters, modifies, clarifies, criticizes, or explains a rule of law;
- applies an established rule to novel facts or otherwise serves as a significant guide to future litigants and district courts;
- contains a historical review of a legal rule that is not duplicative;
- involves a legal or factual issue of significant public interest;
- resolves an apparent conflict between panels of this court, or creates a conflict with a decision in another circuit; or
- is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.[272]

Further, such an internal policy should allow for the possibility that an outsider to the litigation will recognize an opinion's precedential significance even if the appellate panel and parties to the litigation have concluded otherwise. The policy therefore should expressly permit any person to request that a non-precedential opinion be published as precedent, for any of the above reasons, and within a short period of time.[273] Conversely, a publication policy might counsel against publication as precedent when the opinion concerns primarily state and

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271. *See supra* Part IV.D.4.

272. The above suggested criteria are based on the Model Rule drafted by the Advisory Council on Appellate Justice, *see* Reynolds & Richman, *supra* note 18, at 1171 n.28, 1176, and on the internal operating procedures of the 1st, 4th, 5th, 6th, 7th, 9th and D.C. Circuits. 1ST CIR. LOC. R. 36, *available at* http://www.ca1.uscourts.gov/files/rules/RulesApril10_06.pdf; 4TH CIR. LOC. R. 36(a)–(b), *available at* http://www.ca4.uscourts.gov/pdf/rules.pdf; 5TH CIR. R. 47.5, *available at* http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf; 6TH CIR. R. 206(a), *available at* http://www.ca6.uscourts.gov/internet/rules_and_procedures/pdf/rules2004.pdf; 7TH CIR. R. 53, *available at* http://www.ca7.uscourts.gov/Rules/rules.htm; 9TH CIR. R. 36-2, *available at* http://www.ca9.uscourts.gov (follow "FRAP & Local Circuit Rules" hyperlink, then follow "FRAP & Local Circuit Rules" hyperlink); D.C. CIR. R. 36(a), *available at* http://www.cadc.uscourts.gov (follow "Court Rules" hyperlink; then follow "Rules" hyperlink; then follow "Circuit Rules/FRAP" hyperlink). The above suggested criteria do not address how the publication decision should be affected by whether the decision reviewed was itself published, whether the decision is on remand from the U.S. Supreme Court, or other important considerations addressed in the publication plans of various federal circuits but beyond the scope of this Article.

273. *See, e.g.*, D.C. CIR. R. 36(d), *available at* http://www.cadc.uscourts.gov (follow "Court Rules" hyperlink; then follow "Rules" hyperlink; then follow "Circuit Rules/FRAP" hyperlink).

not federal law.[274] Non-precedential opinions are an administrative remedy for the excessive workload of federal appellate judges. This article's documentation of doctrinal divergence between precedential and non-precedential opinions supports the incremental policy changes outlined here but could also support structural reforms proposed elsewhere to address the core problem of docket volume. Evaluation of the many existing proposals for structural reform—for example, either to reduce the size of the job or to increase the number of judges handling the job—is a rich subject for future exploration.

274. I am grateful to the Honorable Theodore A. McKee, United States Court of Appeals for the Third Circuit, for pointing this out. Telephone Interview with the Hon. Theodore A. McKee, U.S. Court of Appeals for the Third Circuit, in Phila., Pa. (Feb. 7, 2006).