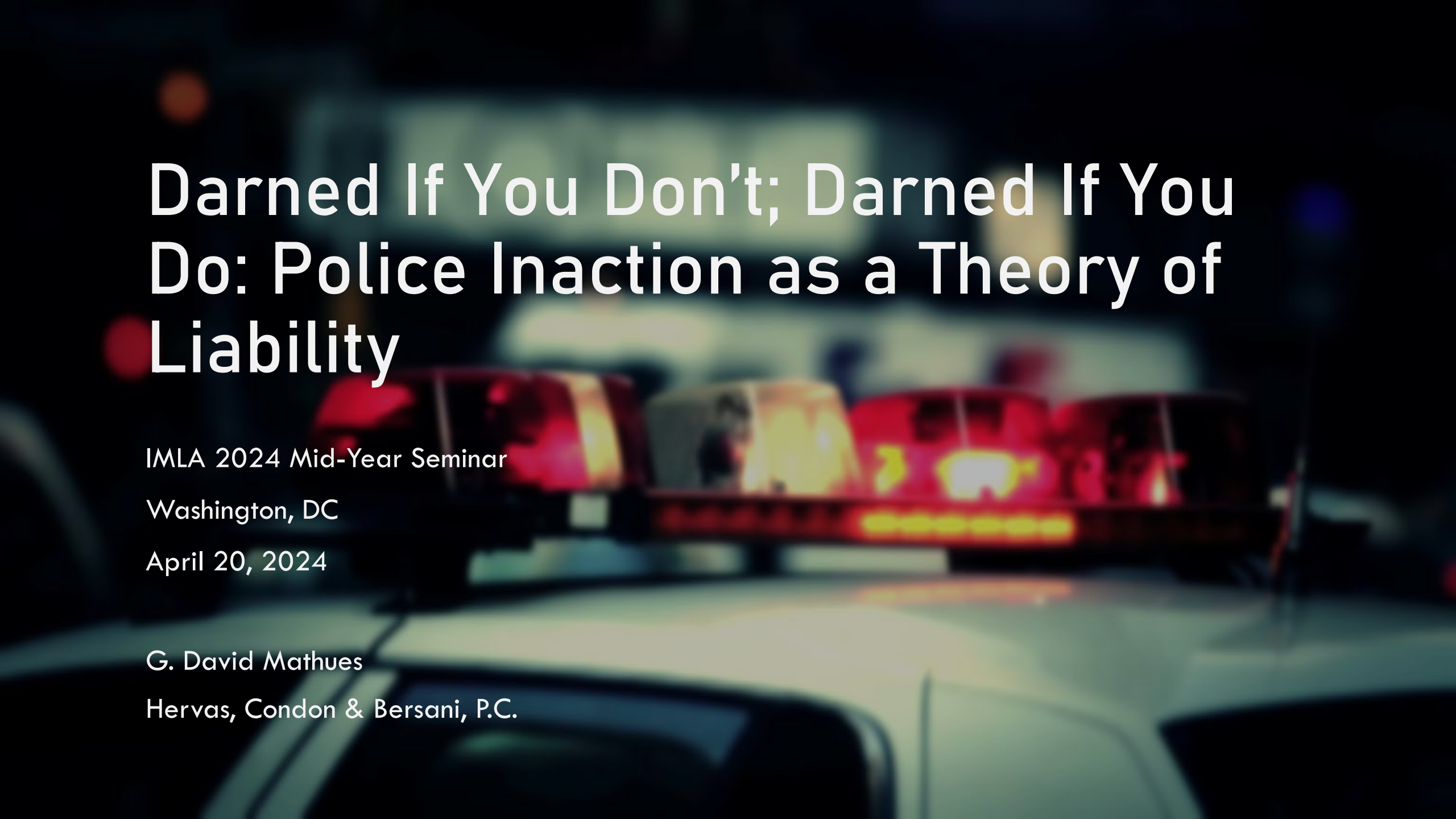


Darned If You Don't; Darned If You Do: Police Inaction as a Theory of Liability

IMLA 2024 Mid-Year Seminar

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G. David Mathues

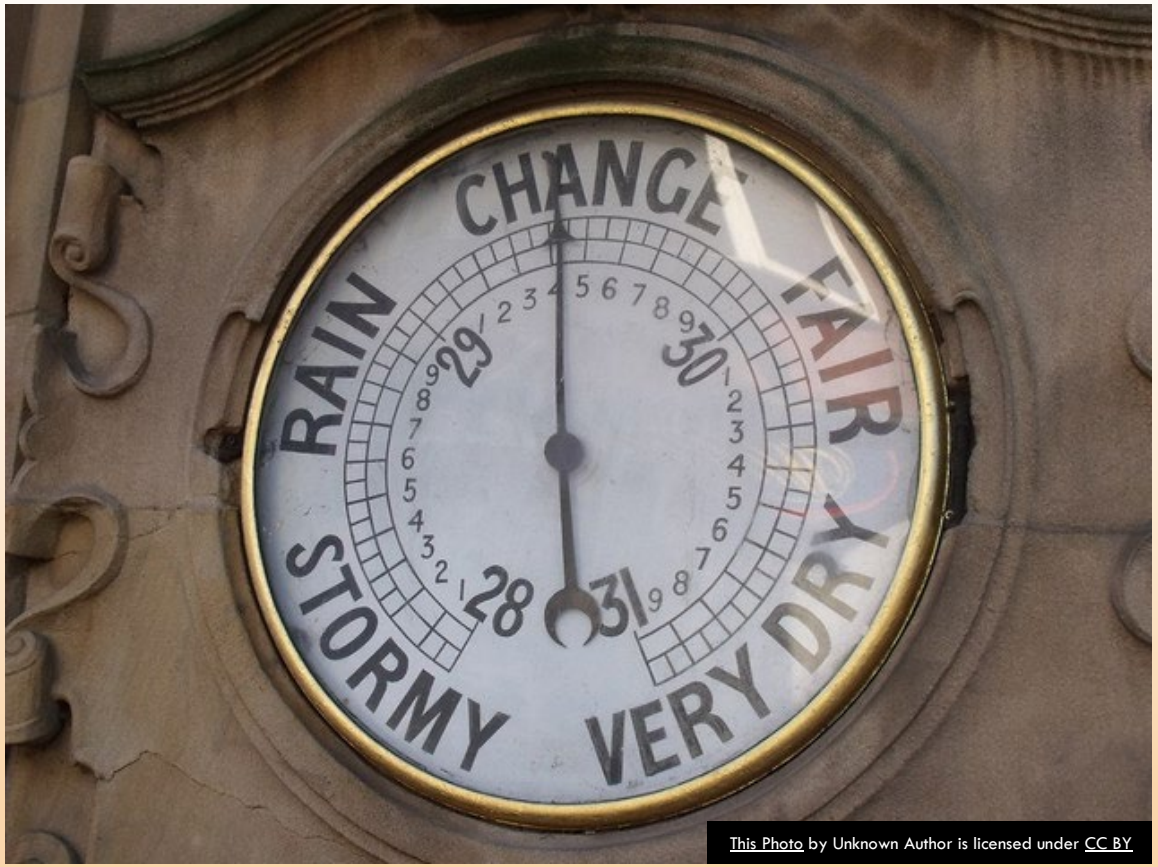
Hervas, Condon & Bersani, P.C.



"We have allowed our police department to get fetal and it is having a direct consequence."

"Officers themselves were telling me about how the news over the last 15 months have impacted their instincts – do they stop, or do they keep driving?"

-Rahm Emmanuel, October 2015



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Are Police Doing Less? Should We Care?

- *Not* trying to settle debate about *how much* police activity has declined since 2015 (or 2020).
- *Not* trying to settle debate about costs/benefits of decreased police enforcement.
- Once we go beyond generalities, in truth, *it depends*.

Officers Can't Be Sued For What They Don't Do… Right?

A common assumption, but an incorrect one.

Section 1983 liability *can* be based on police officers' *failure to act*.

Need to understand these increasingly popular theories, and how to combat such lawsuits.

Two Popular "Failure to Act" Theories

The "Provocation Rule"

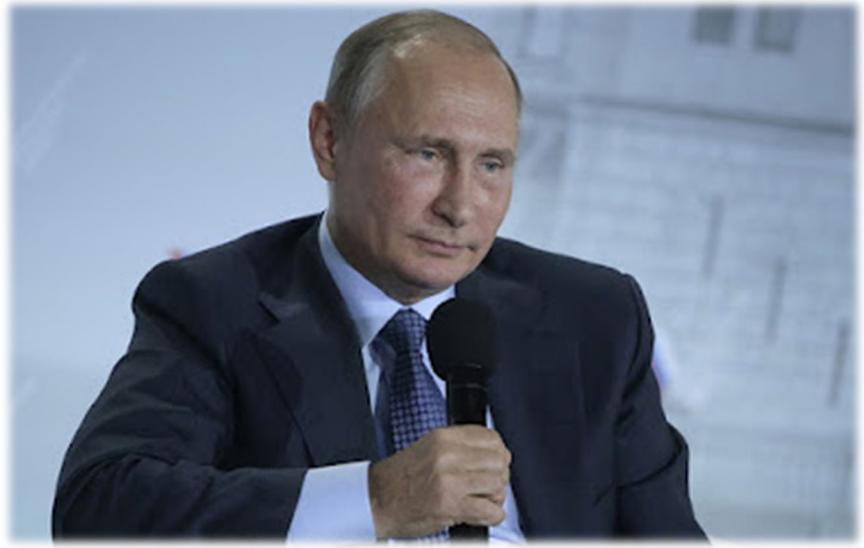
- Applies in 4th Amendment excessive force claims
- Agues that reasonable force becomes *un*reasonable because police (allegedly) failed to avoid situation where force was needed

The "State Created Danger" doctrine

- Applies in 14th Amendment substantive due process cases
- Alleges that police should have prevented some harm, but failed

Provocation Rule: Background

- The 4th Amendment governs all police use of force.
- *Graham v. Conor*, 490 U.S. 386 (1989).
  - Any force must be reasonable under of totality of the circumstances.
  - Objective test, based on officer's perception at the time.



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Typical Use of Force Case

- What happened?
  - A textbook credibility dispute
  - Sometimes resolved based on assumed facts, or, increasingly, video
- Why did it happen?
- Focus on the moment when the force was used: was it "reasonable" under *Graham?*



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Provocation Rule: The Force Was Reasonable, But the Police Still Lose

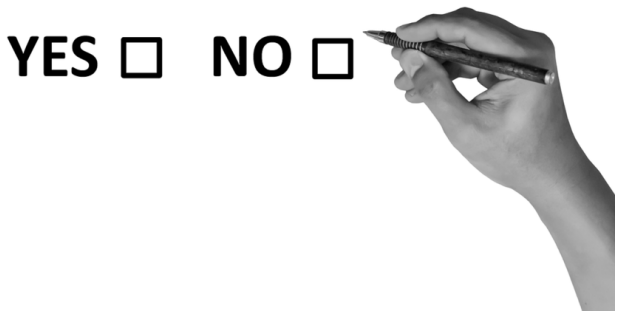
Changing the question to change the outcome:

- It's no longer "was this use of force reasonable."
- It's now "was all of the police conduct reasonable."

Theme: the police could have avoided the situation, so it's their fault no matter what!

- Relies on police failure to take steps that might have avoided use of force.
- Seeks to avoid case law and video at summary judgment.
- Plays to popular narratives and possible juror bias.

Provocation Rule – Didn't SCOTUS Speak?



Cnty. of Los Angeles, Calif. v. Mendez, 581 U.S. 420 (2017).

- On the surface, rejected 9th Circuit's "provocation rule." *Id.* at 427.
- In a footnote, refused to consider a *broader* version of the same rule.

Provocation Rule: Yes or No, SCOTUS?

"The rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force."
-- *Mendez*, 581 U.S. at 428.

"[Respondents argue that *Graham* requires] taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. We did not grant certiorari on that question and … decline to address it."

-- *Id.* at 429 n.1.

Provocation Rule: SCOTUS Fails to Speak

City of Tahlequah v. Bond, 595 U.S. 9 (2021).

- Police shoot angry man who, at close range, grabs hammer and pulls it back, and 10th Circuit relies on rebranded "provocation rule" to deny summary judgment.

- Unanimous, summary reversal in favor of police officers, but on qualified immunity, as SCOTUS declines to address 10th Circuit's "rule."

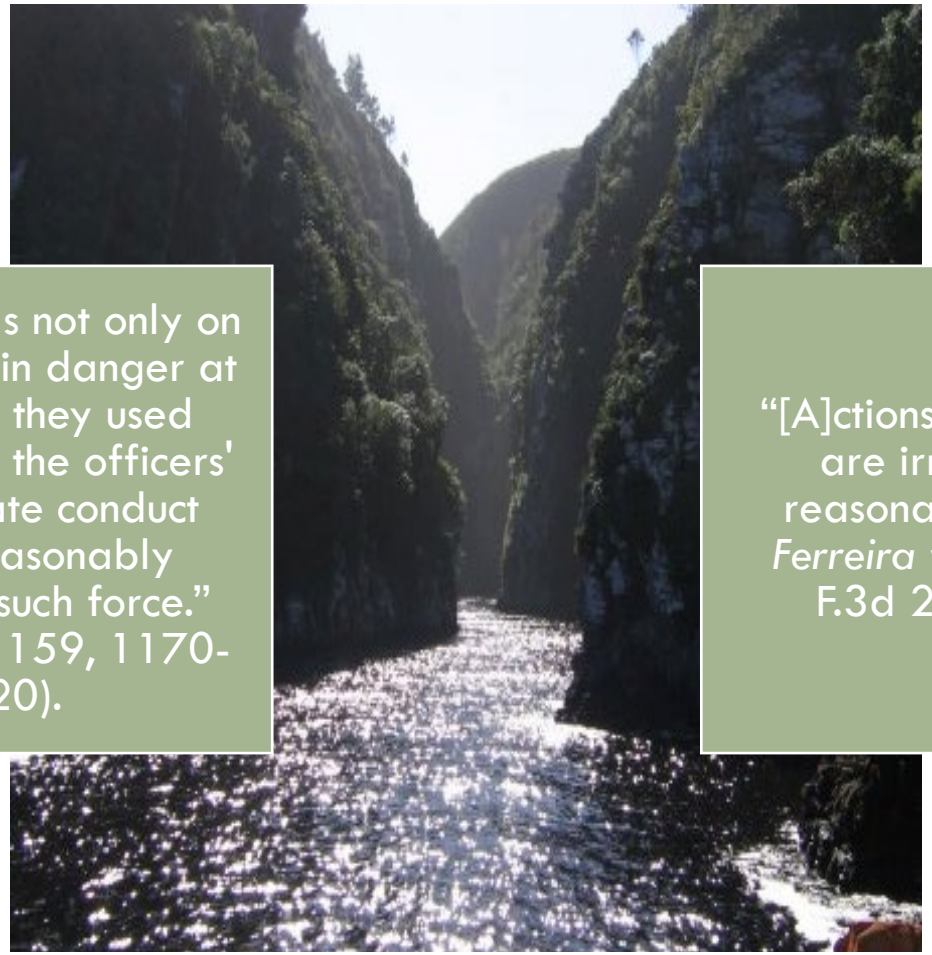


Provocation Rule: State of the Circuits

- The 9th and 10th Circuits follow a rebranded, broader "provocation rule," even after *Mendez*.
- The 2nd, 5th, 8th, and 11th Circuits have repeatedly rejected any variant of the "provocation rule."
- The remaining circuits have inconsistent precedent, or have not addressed the issue post-*Mendez*

Provocation Rule: Circuit Split

"[Reasonableness] depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Cox v. Wilson*, 971 F.3d 1159, 1170-71 (10th Cir. 2020).



"[A]ctions leading up to the shooting are irrelevant to the objective reasonableness of [the shooting]." *Ferreira v. City of Binghamton*, 975 F.3d 255, 279 (2d Cir. 2020).

Provocation Rule: Counter-strategies

- Know your circuit's law—all of it
- Expect an appeal, and preserve your right to file one
- Attack the legal basis for any "provocation rule" variant
  - It's incoherent: if a separate *unconstitutional* acts cannot turn a good use of force bad, why should *constitutional* conduct do so?
  - It's inherently speculative and based on hindsight, *contra Graham*
  - It reduces *Graham* to a negligence test
  - Any failure to act is cannot be a "search" or a "seizure"



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Provocation Rule: Counter-strategies

- Control the narrative, focusing on the focus on the moment force was used.
- Emphasize that police have the same right to self defense as anyone else. *See Gysan v. Francisko*, 965 F.3d 567, 570 (7th Cir. 2020).
- Police cannot predict what subjects will do and should not be put in lose / lose situations.
- Train officers to avoid *actual* provocation, e.g., limit no-knock SWAT raids, less gratuitous profanity, try to wait suspects out.

State-Created Danger

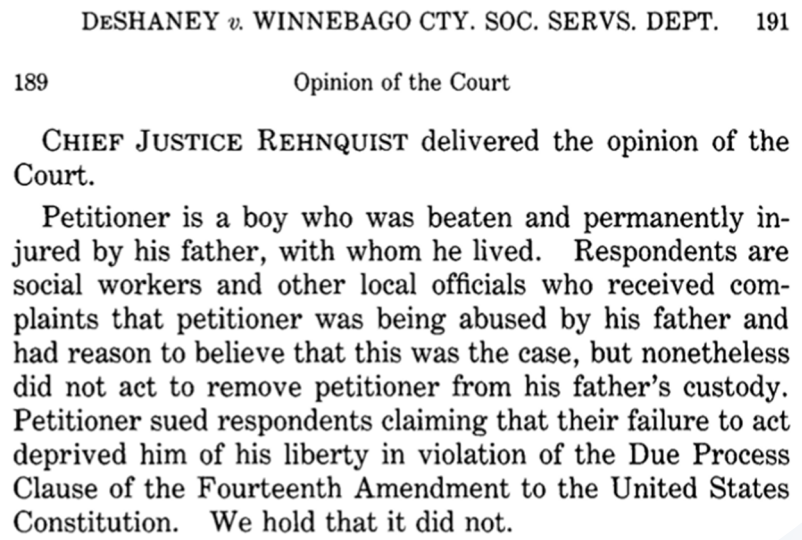


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DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

Set rule that state inaction is not a due process violation.

- "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196.
- "A State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.



DESHANEY *v.* WINNEBAGO CTY. SOC. SERVS. DEPT. 191

189 Opinion of the Court

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

DESHANEY CRITICISMS

Advocates have seized on two lines in the case in their repeated errors to limit or evade its holding:

1. *Deshaney* noted that the State does have a duty of care if it takes person into custody or restricts their liberty. *Id*. at 200.
2. *DeShaney* said that while the state officials *knew* about the danger they "played no part in their creation" and did not "render him any more vulnerable to them." *Id*. at 201.

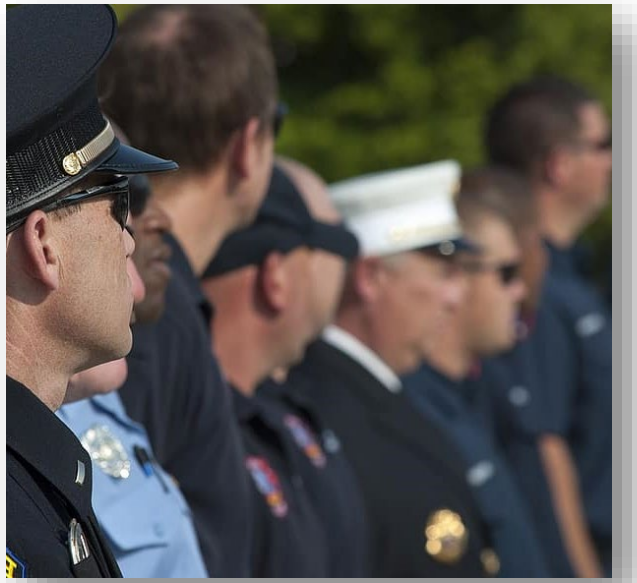
State Created Danger: Rise of a New Theory

Lower courts turned "played no part in their creation" and "render more vulnerable" phrases into a basis for liability

- *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989) (police arrest driver and leave passenger alone in high crime area).
- *L.W. V. Grubbs*, 974 F.2d 119, 120-22 (9th Cir. 1992) (jail allows inmate with history of violence to work alone with nurse).
- *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990) (police halt private attempts to rescue drowning minor).



State Created Danger: The Theory Expands



- Police release tape of tip from anonymous informant leading to informant's murder. *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998).
- Police officers chat about sports and other matters on domestic violence call and do not arrest suspect. *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415 (2d Cir. 2009).
- Police put informant in dangerous undercover operation, where he is killed. *Butera v. Dist. of Columbia*, 235 F. 3d 637 (D.C. Cir. 2001).



The Theory Expands Even Further

Nicini v. Mora, 212 F.3d 798 (3d Cir. 2000) (social worker "acquiesced" in foster child's choice of home)

Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (1998) (student suspended from school for threatening teacher, sent home, and committed suicide)

Rivas v. City of Passaic, 365 F.3d 181 (3d Cir. 2004) (paramedic makes false claim to police officer of assault by a patient)

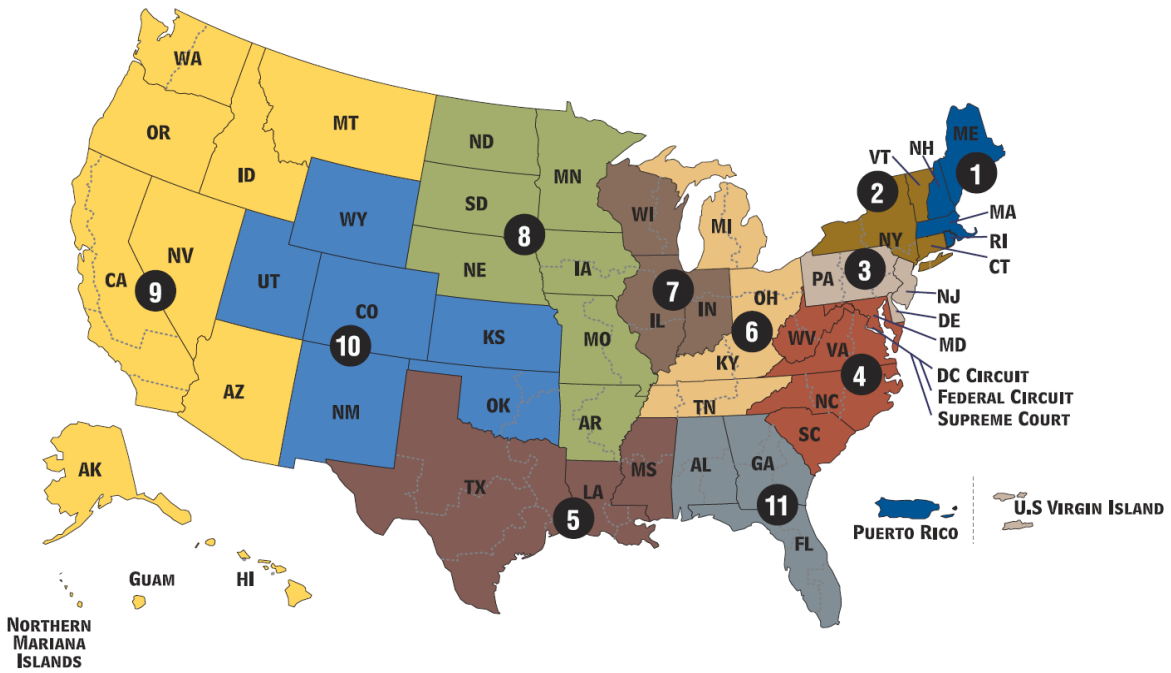
Lipman v. Budish, 974 F.3d 726, 735 (6th Cir. 2020) (child interviewed in front of parents)

Pauluk v. Savage, 836 F.3d 1117 (9th Cir. 2016) (worker assigned to office with mold)

Kendra v. Schroeter, 876 F.3d 424 (2017) (police recruit shot in training accident)

State Created Danger: Circuit "Consensus"

- Every circuit but the 5th Circuit has adopted this theory.
- Every circuit has a slightly different test. *See Murguia v. Landon*, 73 F.4th 1003, 1112-13 (Bumatay, J., dissenting).
  - All say that state must create or increase danger.
  - Most require that the state (in)action "shock the conscience," that danger be "obvious" or "foreseeable," and the danger specific to specific people.



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State Created Danger: Why?

The actual perpetrator is judgment proof.

Section 1983 allows attorney fees.

State tort immunity might bar tort claim.

State's *failure* to act or protect does not fit anywhere else.

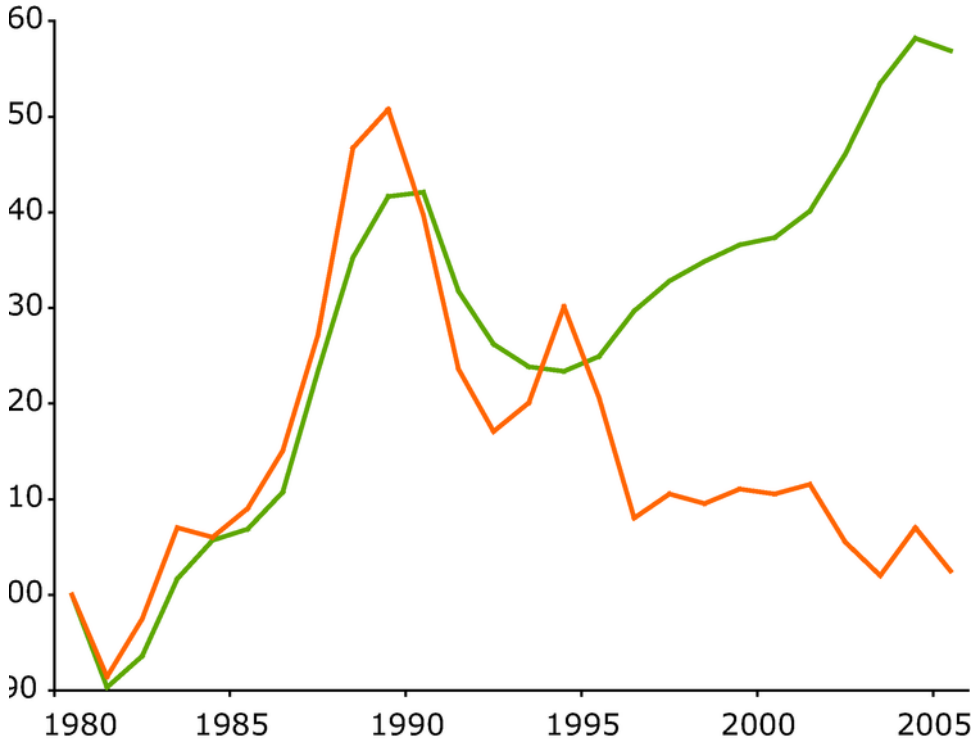
Bad facts make bad law.

State Created Danger: Trends Observed

Quantity and variety of claims increasing.

A majority of claims dismissed, but …

- Similar expansion of liability in (some) state courts.
- Extremely inconsistent rulings.



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State Created Danger: A New Trend?

- "Every once in a while, a court should step back and ask whether local jurisprudence matches the instructions from higher authority. " *Weiland v. Loomis* 938 F.3d 917, 921 (7th Cir. 2019).
- *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019).
- *Murguia*, 73 F.4th at 1003 (five judges dissent from denial of rehearing en banc).

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State Created Danger: Counter-strategies

Pick your battles.

Preserve the issue.

- Always argue that the doctrine should be overturned or reshaped.
- There's a circuit split, and appellate judges pushing certiorari.

Point to state court, where these cases (usually) belong.

- SCOTUS has held that the 14th Amendment does not import state tort law.
- State level immunities. may or may not apply
- States should, and indeed have, shaped scope of liability



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State Created Danger: Counter-strategies



- Precedent is all over the map; find some that helps you.
- Recast the complaint as about police inaction.
  - Two can play the came of labels.
  - The real cause of harm is almost always *failure* to act.
- Emphasize the lose / lose dilemma: intervene, and get sued under the 4th Amendment; don't, and violate the 14th.
- The Obama foreign policy rule—teach your officers DDSS.

Take aways

- Sometimes, police can be sued for failure to act.
- Two notable, and increasingly popular, theories:
  - "Provocation rule" in use of force cases.
  - "State created danger" doctrine in due process cases.
- These theories are inconsistent, often put police in a lose/lose situation, and fit poorly with SCOTUS precedent, despite their wide acceptance in the lower courts.
- Most cases invoking such theories should be vigorously resisted.



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Questions?

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