A Summary of a Due Process Violation Under a Danger Creation Theory In the Eight Circuit Court of Appeals

Affirmative duty cases generally deal with this question: When will a state actor be found liable under 42 U.S.C. §1983 for harm imposed by private third parties?

The Due Process Clause of the Fourteenth Amendment prohibits state actors from violating a citizen's due process rights. However, the state is not under any affirmative duty to protect a citizen. The United States Supreme Court famously wrote that although the Due Process Clause "forbids the [s]tate itself to deprive individuals of life, liberty, or property without due process of law, … its language cannot fairly be extended to impose an affirmative obligation on the [s]tate to ensure that those interests do not come to harm through other means." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)).

However, an *en banc* panel of the Eight Circuit has recognized two situations where the state owes an affirmative obligation to protect its citizens:

> [We have] held that the Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual otherwise would not have faced.

Gregory, 974 F.2d 1010 (citing *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988)). Thus, state actors have an affirmative duty to protect in situations of *danger creation* or what Professor Nahmod calls "*state-created danger*." Sheldon H. Nahmod, et. al, *Constitutional Torts* 121 (1995).

In other words, failure to protect after creating the dangerous situation *is* the due process deprivation. *Doe v. Wright*, 82 F.3d 265, 268 (8th Cir. 1996) ("This Court has held that the Due Process Clause imposes a duty on state actors to protect citizens [when the state actor creates the danger].")

The Eighth Circuit first recognized a §1983 action brought under danger a creation theory in 1988. *But see Greer v. Shoop*, 141 F.3d 824, 828 (8th Cir. 1998) ("[W]e hold that the contours of the state-created danger theory, as applied to the unique facts of this case, were not clearly defined enough in 1991 to remove the defendant's qualified immunity protection.") But a review of several cases indicates that the Eight Circuit rarely finds danger creation.

In *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988), the Eight Circuit first recognized a cause of action brought under a theory of danger creation. Id. at 371 ("We are in agreement with the other courts of appeals that in these situations an affirmative right to protection by the state may arise in favor of the victim of private violence.") In *Wells*,

Arkansas prison officials, pursuant to state law, dropped Roberts, a released prisoner, off at Sanderlin's store, which was "the closest commercial transportation pick-up point." *Id*. Robertson murdered Sanderlin, and her estate sued.

Although the court recognized that Sanderlin "possessed a right of protection secured by the fourteenth amendment," because the state officials created the dangerous situation by dropping off a dangerous person without giving Sanderlin fair warning, it nevertheless dismissed her estate's claim because the defendant's were merely negligent in failing to detect Robertson's murderous tendencies. *Id*.)"Basically, plaintiffs' complaint is a statement that with adequate investigation and proper screening, the defendants should have known they were releasing a dangerous individual [ ].") Mere negligence is not actionable under the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327 (1986) (holding that prison inmates can not turn slip-and-fall accident into due process violation); *Wilson v. Cross*, 845 F.2d 163 (8th Cir. 1988) (affirming adverse judgment against plaintiff, a roller skating rink owner, whose business suffered after the local police department set up a roadblock near his business that the police "knew or should have known" was designed to harass blacks).

In *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913 (1993), the court dismissed an action brought under a danger-creation theory of liability. In *Gregory* a young man died in a car wreck while driving drunk after the police arrested his designated driver.

In *Gregory*, the police pulled-over Turner, who was driving Gregory and Fields. Turner was Gregory and Fields' designated driver. The police told Turner there was an outstanding warrant for his arrest. However, since the warrant was for a minor traffic infraction, the police allowed Turner to drive to the police station to take care of the warrant. Turner went into the police station, leaving Gregory and Fields in the car with the keys in the ignition. After waiting for 30-minutes for Turner to come back to the car, Gregory drove off. Gregory then caused a car accident. He died.

His estate sued the police officers who arrested Turner under a danger-creation theory. Namely, the police placed Gregory and Turner in a dangerous situation by arresting their designated driver.

The court dismissed the claim because "we conclude a reasonable trier of fact could not find Officer Howell 'knew or should have known' Gregory [ ] was too intoxicated and unfit to drive." *Id*. at 1010. Moreover, "even if Officer Howell knew Gregory and Fields were intoxicated, a reasonable trier of fact could not find that Officer Howell affirmatively placed [them] in danger [ ]." *Id*. at 1011. Moreover, the police did not create a dangerous situation since "Officer Howell did not leave Gregory and Fields at the place of Turner's arrest or in a dangerous area." *Id*. Rather, it was Turner who left them stranded. *Id*.

In *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000) (en banc), the Court denied S.S's claim against social workers who returned S.S. to father who was abusive and

associated with a convicted pedophile because the state officials merely returned S.S. back into her home rather than creating the dangerous situation. The state did not increase or create the danger. *Id*. at 962. (citing *Gregory*, *supra*) ("[I]f the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a constitutional tort.") Thus, "While recognizing the correctness of that principle as a general matter is indisputable, [ ] it cannot give rise to liability in the present case" because the state did not create the danger. Rather, the social workers simply returned S.S. to an already dangerous environment. Thus, no danger creation.

In *Greer v. Shoop*, 141 F.3d 824 (8th Cir. 1998), the court granted qualified immunity to state officials who placed parolee back with a person whom the officials knew would have sexual relations with, because their placement amounted to mere negligence. The parolee was HIV positive. He had sex with and transmitted HIV to Greer, who subsequently died of AIDS. The court assumed without deciding that there was a viable danger-creation claim. *Id*. at 838 ("[W]e assume without deciding [ ] that Greer has sufficiently alleged a violation of Mora Greer's constitutional rights pursuant to the state-created danger theory.")[1] However, the court found that the state-created danger theory was not clearly established at the time of the defendants' conduct.

In *Terry B. v. Gilkey*, 229 F.3d 680 (8th Cir. 2000), the court did not find a rights violation of a child placed with aunt and uncle who subsequently abused the children because "DHS 'did not increase the danger of significant harm' [but] merely placed the children back" into a dangerous situation. (citing *S.S.,* above).

The above cases stand for the proposition that state officials will not be held liable under a theory of danger creation where the state officials merely returned a person to a dangerous situation.

Moreover, state actor must have a culpable mental state when he places the plaintiff in harm's way: negligence or gross negligence is insufficient. However, I have not been able to find a case clearly stating what the *mens rea* for a rights violation under the danger-creation theory. A claim brought directly under the due process clause for a violation of substantive due process is actionable only if the conduct is conscience

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[1] Fortunately, the Supreme Court end the pernicious practice of "assuming without deciding," and therefore allowing a state actor to later claim that the contour of the right was not clearly established, in *Saucer v. Katz*, 533 U.S. 194, 200 (2001) ("[T]he first inquiry must be whether a constitutional right would have been violated on the fact alleged; second [the courts must ask] whether the right was clearly established [ ]."

shocking. *County of Sacramento v. Lewis*, 533 U.S. 833 (1997). However, in the above danger-creation cases, the court never applies this high standard.

In actions brought by pretrial detainees under the due process clause, the deliberate indifference *is* conscience shocking. *See*, *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243-44 (1983) ("The Eighth Amendment's proscription of cruel and unusual punishments is violated by 'deliberate indifference to serious medical needs of prisoners.' *** In face, the due process rights of a [pre-trial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.")(quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). However, the Eight Circuit did not apply this standard in *Shrum v. Kluck*, 249 F.3d 773, 779 (8th Cir. 2001), a *Monell* action, where the court said that the test was whether an "official decision [is] a policy that is so deliberately indifferent to a predictable constitutional violation that is shocks the conscience." *See also*, *Hayes v. Faulkner County, Ark.*, 2004 WL 2414160 (8th Cir., Oct. 29, 2004) ("Deliberate indifference to prisoner welfare may sufficiently shock the conscience to amount to a substantive due process violation.")

But I have never seen such language required for an affirmative duty case. The *mens rea* therefore appears to remain an open issue.