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Transportation Racism and State-Created Danger: A Civil Rights Litigation Strategy for Pedestrians Harmed by Traffic Violence

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TRANSPORTATION RACISM AND STATE-CREATED DANGER: A CIVIL RIGHTS LITIGATION STRATEGY FOR PEDESTRIANS HARMED BY TRAFFIC VIOLENCE

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Abstract: Pedestrian fatality rates in the United States are markedly high compared to peer nations and are on the rise. The distribution of these deaths shows an alarming racial gap: Black pedestrians are twice as likely to be killed compared to white pedestrians. One significant factor that explains the disparity is the greater presence of wide, high-speed roads—built to move traffic quickly at the expense of pedestrian safety—in Black neighborhoods. In some cases, there is evidence that governments intentionally placed roads through and around Black neighborhoods for racially discriminatory reasons.

This Comment argues that a pedestrian harmed or killed by a vehicle on a dangerously designed road may have a successful state-created danger claim against the municipality under 42 U.S.C. § 1983 if they can prove affirmative conduct, proximate cause, and deliberate indifference. Such claims might be successful where the municipality has affirmatively chosen to place a dangerous road with racially discriminatory motivations.

> *"Racism, specifically, is the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death."*
>
> *Ruth Wilson Gilmore*[1]

INTRODUCTION

In 2022, more than 7,500 people were killed by cars while walking in the United States—about 20 deaths every day.[2] That figure, while tragic, represents only a fraction of the total number of people harmed by traffic violence against pedestrians; in 2021, the last year for which such data has

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1. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (2007).

2. Denise Mann, *Danger Afoot: U.S. Pedestrian Deaths at Highest Level in 41 Years*, U.S. NEWS & WORLD REP. (June 22, 2023), https://www.usnews.com/news/health-news/articles/2023-06-22/danger-afoot-u-s-pedestrian-deaths-at-highest-level-in-41-years (last visited Jul. 8, 2024).

been published, cars injured an estimated 60,577 pedestrians.[3] And even this alarming number does not account for the ripple effect that violence against pedestrians has on family, friends, and other members of the victim's community.[4] The United States' pedestrian collision numbers are uniquely high when compared to those of peer nations[5] and have been on the rise for the past fourteen years.[6]

The "pedestrian safety crisis" has garnered media and governmental attention as journalists, researchers, and policymakers seek to better understand its dimensions.[7] The causes of the crisis are multifaceted and include the increased size of vehicles,[8] cultural attitudes toward drivers and pedestrians,[9] and infrastructure that facilitates the flow of high-speed traffic and de-emphasizes walking.[10]

Road infrastructure design is particularly notable because it contributes to one of the most troubling aspects of the pedestrian safety crisis: its disproportionate impact on people of color.[11] Black pedestrians in particular are more than twice as likely as white pedestrians to be killed

3. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, U.S. DEPT. OF TRANSP. 2 (2023), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813458 (last visited Sep. 11, 2024).

4. *See* Mann, *supra* note 2.

5. *See* Amanda Holpuch, *U.S. Pedestrian Deaths Are at Highest Level in 41 Years, Report Says*, N.Y. TIMES (June 27, 2023), https://www.nytimes.com/2023/06/27/us/pedestrian-deaths-2022.html (last visited July 31, 2024) ("The United States is a global outlier in roadway deaths. In recent years, other comparable developed countries have done more to reduce pedestrian, cyclist and motorcyclist deaths . . . .").

6. *See* Mann, *supra* note 2 (noting that pedestrian fatalities rapidly began trending upward in 2010 "and have continued to do so").

7. *See, e.g.*, Ryan Packer, *Legislature Contemplates Changes to Traffic Safety Laws in Face of Pedestrian Safety Crisis*, URBANIST (Jan. 17, 2022), https://www.theurbanist.org/2022/01/17/legislature-contemplates-changes-to-traffic-safety-laws-in-face-of-pedestrian-safety-crisis/ [https://perma.cc/GV45-4NNJ] (discussing the Washington State Legislature's consideration of modifying the legal standard of care for pedestrians); *see also infra* section I.C (discussing government responses to the pedestrian safety crisis).

8. Gregory H. Shill, *Regulating the Pedestrian Safety Crisis*, 97 N.Y.U. L. REV. 194, 196 (2022).

9. *See* ANGIE SCHMITT, RIGHT OF WAY: RACE, CLASS, AND THE SILENT EPIDEMIC OF PEDESTRIAN DEATHS IN AMERICA, 55–59 (2020) (discussing how pedestrians killed by cars are blamed by police, media, and online commenters, while the drivers who hit them are exculpated by passive voice framing and word choices such as "accident").

10. *See id.* at 3 (noting a "clear pattern" of increased pedestrian deaths on "wide, fast arterial roads").

11. *See* Adam Paul Susaneck, Opinion, *American Road Deaths Show an Alarming Racial Gap*, N.Y. TIMES (Apr. 26, 2023), https://www.nytimes.com/interactive/2023/04/26/opinion/road-deaths-racial-gap.html [https://perma.cc/3B2S-92U9] (connecting road infrastructure to the racial gap in pedestrian deaths).

by cars.[12] Many disproportionately Black neighborhoods face underinvestment in infrastructure and are littered with high-speed arterial roads[13] and highways.[14] Both problems can be traced to the history of local, state, and federal governments weaponizing racist land use policies to segregate cities and advantage white communities.[15] Particularly relevant to this discussion is the well-known phenomenon of governments placing highways and large arterial roads through and around Black neighborhoods to disrupt those communities or to "protect" white neighborhoods from Black encroachment with a physical barrier.[16]

Due to this history of legally sanctioned segregation and racially motivated highway and road placement, governments are culpable for the disproportionate danger faced by pedestrians in Black and Latine neighborhoods.[17] Accordingly, this Comment treats the pedestrian safety crisis as a civil rights issue.[18] In 42 U.S.C. § 1983, Congress codified a private cause of action against state actors for civil rights violations.[19] For decades now, circuit courts have recognized a "state-created danger doctrine" through which litigants can bring § 1983 suits under the theory that a state actor affirmatively created or increased a danger that caused the litigant's harm.[20] This Comment explores the state-created danger doctrine as a potential pathway for recovery for pedestrians injured on roads that municipalities placed for impermissibly racist reasons, and concludes that such suits may be viable under the right circumstances.[21]

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12. Matthew A. Raifman & Ernani F. Choma, *Disparities in Activity and Traffic Fatalities by Race/Ethnicity*, 63 AMER. J. PREVENTATIVE MED. 160, 164 (2022).

13. This Comment uses "arterial" to describe wide, multi-lane, high-speed roads that move large volumes of traffic but are not freeways. *See* SCHMITT, *supra* note 9, at 3 (describing Phoenix's North 43rd Street, a six-lane road with a forty-mile-per-hour speed limit that is lined with commercial and residential buildings, as an arterial).

14. *See* Susaneck, *supra* note 11.

15. *See infra* section I.B.

16. *See infra* section I.B.1.

17. It is worth noting that Native Americans face higher pedestrian death rates than any other racial group—they are nearly five times more likely to be killed by cars than white Americans. Angie Schmitt, *Native American Pedestrians Have Highest Death Rate*, STREETSBLOGUSA (Feb. 20, 2019), https://usa.streetsblog.org/2019/02/20/native-american-pedestrians-have-highest-death-rate [https://perma.cc/39E3-9PTX]. This figure is undeniably troubling and warrants legal scrutiny. However, because this alarming statistic is tied to underdeveloped road infrastructure on tribal lands, *id.*, it poses a problem distinct enough to be out of scope for this Comment.

18. *See infra* Part III.

19. 42 U.S.C. § 1983.

20. *See infra* Part II.

21. *See infra* Part III.

Part I discusses the connection between the pedestrian safety crisis and twentieth-century racist land use policies, with an emphasis on highway and road policy.[22] It also explores how governments have been responding to the pedestrian safety crisis.[23] Part II dives into § 1983 and its attendant state-created danger doctrine.[24] Part III concludes by arguing that a pedestrian injured by a vehicle on a dangerously designed road may have a successful state-created danger claim against the municipality under § 1983 if they can prove affirmative conduct, proximate cause, and deliberate indifference.[25]

I. PEDESTRIAN DANGER AND RACIST LAND USE POLICIES

The United States is particularly dangerous for pedestrians, especially for pedestrians of color. This Part explores the roots of the pedestrian safety crisis and the policy choices that have exacerbated the crisis in Black communities. Section I.A delves into the United States' heightened rate of pedestrian deaths and offers explanations for why the nation's roads are so dangerous.[26] Section I.B traces the history of racist land use policies and connects them to the racial gap in pedestrian deaths.[27] Section I.C examines the ways in which our governments are responding—or not—to the danger American pedestrians face.[28]

A. The United States' Pedestrian Safety Crisis

The United States' pedestrian safety crisis is unique amongst wealthy nations. Pedestrian deaths are on the rise in the United States.[29] In 2021, 7,470 pedestrians were killed by cars.[30] That number represents a 73.6% increase from 2010, when the number was 4,302.[31] And while traffic fatalities soar in the United States, peer nations with similar levels of

22. *See infra* Part I.

23. *See infra* section I.C.

24. *See infra* Part II.

25. *See infra* Part III.

26. *See infra* section I.A.

27. *See infra* section I.B.

28. *See infra* section I.C.

29. *See* Mann, *supra* note 2.

30. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN, FATALITY ANALYSIS REP. SYS. DATA TABLES, U.S. DEPT. OF TRANSP. (2022), https://www-fars.nhtsa.dot.gov/Main/index.aspx [https://perma.cc/R9M4-NV5T].

31. *Id.*

economic development have made strides to improve pedestrian safety.[32] For instance, pedestrian deaths in the European Union dropped 19% between 2010 and 2018.[33] In some places the differences are incredibly stark. Oslo, Norway and Helsinki, Finland, which have population sizes comparable to Portland, Oregon and Detroit, Michigan respectively, each saw zero pedestrian deaths in 2019.[34]

Alarmingly, the distribution of pedestrian deaths in the United States shows significant racial disparities. Controlling for miles walked, Black pedestrians are 2.2 times more likely to be killed by cars than white pedestrians.[35] When it is dark out, that figure rises to 3.4 times more likely.[36] Latine pedestrians see similarly heightened risk of death; they are 1.5 times more likely than white pedestrians to be killed by cars.[37] A study of pedestrian crash locations throughout the United States found that crash "hot spots"—areas with the greatest number of crash events—were more likely to occur in disproportionately Black and Latine neighborhoods.[38] This was especially true for hot spots on urban arterial roads.[39]

Various factors contribute to the United States' disproportionately high rate of pedestrian deaths. Sport Utility Vehicles (SUVs) and pickup trucks have risen in popularity over the past several decades.[40] These large vehicles tend to have high front ends that make them more dangerous than sedans in pedestrian collisions, and they can also have enormous blind spots.[41] Culture plays a role too; the American public tends to view pedestrian fatalities "as tragic but inevitable,"[42] a mindset bolstered by the

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32. Emily Badger & Alicia Parlapiano, *The Exceptionally American Problem of Rising Roadway Deaths*, N.Y. TIMES (Nov. 27, 2022), https://www.nytimes.com/2022/11/27/upshot/road-deaths-pedestrians-cyclists.html (last visited Jul. 31, 2024).

33. *See* Shill, *supra* note 8, at 205.

34. Jessica Murray, *How Helsinki and Oslo Cut Pedestrian Deaths to Zero*, THE GUARDIAN (Mar. 16, 2020), https://www.theguardian.com/world/2020/mar/16/how-helsinki-and-oslo-cut-pedestrian-deaths-to-zero [https://perma.cc/3NKQ-S8U2].

35. *See* Raifman & Choma, *supra* note 12.

36. *Id.* at 164.

37. Susaneck, *supra* note 11.

38. Robert J. Schneider, Frank R. Proulx, Rebecca L. Sanders & Hamideh Moayyed, *United States Fatal Pedestrian Crash Hot Spot Locations and Characteristics*, 14 J. TRANSP. & LAND USE 1, 12 (2021).

39. *Id.*

40. Laura Bult, *Why Americans Love Big Cars*, VOX (Jul. 25, 2023), https://www.vox.com/videos/2023/7/25/23807518/cars-suvs-americans-big-automobiles-travel [https://perma.cc/TE3W-EH65] (noting that SUVs and trucks accounted for "80 percent of all new cars sold in the US" in 2022, compared to 52 percent in 2011).

41. *See* SCHMITT, *supra* note 9, at 79–82, 84–85.

42. *Id.* at 5.

way these crashes are typically treated by the media.[43] The media's treatment of pedestrian deaths as "routine and unsexy"[44] suppresses the civic will necessary to find and implement solutions.[45]

But perhaps the most significant factor contributing to the pedestrian fatality rates in the United States is the way roads are designed.[46] Wide, high-speed roads are common throughout the United States.[47] Both increased width and increased travel speed correlate with greater danger for pedestrians.[48] Wider roads require pedestrians to spend more time crossing, increasing the risk of collisions.[49] Compounding the issue, wider roads may encourage drivers to speed.[50] Speed in particular can be the difference between life and death; a pedestrian struck at less than 15 miles per hour faces only a 2–5% likelihood of death, a figure that shoots up to 45% when the car speed increases to 40 miles per hour.[51] To make matters worse, federal road design guidance from the Manual on Uniform Traffic Control Devices (MUTCD) de-emphasizes crosswalk placement in favor of maximizing traffic flow.[52] And while municipal traffic engineers have flexibility to deviate from MUTCD's crosswalk guidelines, they often

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43. For instance, it is common media practice to use the passive voice how pedestrians are injured: "'[a] pedestrian was hit by a car' rather than '[d]river hits pedestrian.'" *Id.* at 55. Additionally, media coverage rarely includes humanizing details about pedestrian victims, *id*. at 56, and road safety advocates criticize media outlets for using the term "accident" rather than "collision" to describe cars hitting pedestrians. *Id.* at 57–58.

44. *Id.* at 53.

45. *See id.* at 5 (noting that "[t]he general acceptance of" pedestrian deaths "has headed off the necessary work of recognizing solutions and finding the will to implement them . . . .").

46. *Id.* at 3 (identifying the design of wide arterial commercial streets as "culprit number one" in pedestrian fatalities).

47. *See* Marin Cogan, *The Deadliest Road in America*, VOX (Jul. 25, 2022), https://www.vox.com/23178764/florida-us19-deadliest-pedestrian-fatality-crisis [https://perma.cc/72AF-KKLM].

48. Stephanie Desmon, *How Narrower Traffic Lanes Could Help Reduce Crashes*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Nov. 21, 2023), https://publichealth.jhu.edu/2023/narrower-lanes-safer-streets [https://perma.cc/4YFJ-T6ZV].

49. *See* Subha Ranjan Banerjee & Ben Welle, *Bigger Isn't Always Better: Narrow Traffic Lanes Make Cities Safer*, WORLD RES. INST. (Dec. 7, 2016), https://www.wri.org/insights/bigger-isnt-always-better-narrow-traffic-lanes-make-cities-safer [https://perma.cc/9DPV-PSTP] (noting that narrower roads "ensure shorter crossing distances for pedestrians at intersections, which reduces the risk of an accident").

50. *See Urban Street Design Guide: Lane Width*, NAT'L ASS'N OF CITY TRANSP. OFFS., https://nacto.org/publication/urban-street-design-guide/street-design-elements/lane-width/# [https://perma.cc/QWU5-TY74] (recommending that transportation planners not build lanes larger than eleven feet because "they may cause unintended speeding").

51. BRIAN C. TEFFT, AM. AUTO. ASS'N FOUND. FOR TRAFFIC SAFETY, IMPACT SPEED AND A PEDESTRIAN'S RISK OF SEVERE INJURY OR DEATH 12 (2011).

52. *Id.* at 101.

decline to do so.[53] In addition to posing a general safety risk to all pedestrians, dangerous road design may help explain the racial gap in pedestrian deaths, as governments have historically targeted Black neighborhoods with racist land use policies.[54]

B. The History of Racially Discriminatory Land Use Policies

Throughout the twentieth century, local, state, and federal governments employed land use policies to intentionally create conditions of racial segregation and poverty in Black neighborhoods. These policies included the redlining of existing neighborhoods based on their racial composition,[55] segregationist loan policies by the Federal Housing Administration that facilitated the construction of all-white suburbs,[56] judicial enforcement of racially restrictive covenants,[57] and racial zoning.[58] Together, these policies of *de jure* segregation—that is, "segregation by law and public policy"[59]—worked in concert to keep Black and white neighborhoods separate in cities across the country, from the Jim Crow South[60] to the "liberal" San Francisco Bay Area.[61] State-imposed segregation has left a legacy of widespread disinvestment in Black neighborhoods, a factor that likely contributes to unsafe road conditions in those areas.[62]

Many cities took additional steps to maintain the residential segregation they had painstakingly engineered, intentionally constructing highways

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53. *Id.* at 102.

54. *See infra* section I.B.

55. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 64 (2017).

56. *Id.* at 70–71.

57. *Id.* at 82.

58. *Id.* at 44–48.

59. *Id.* at viii.

60. *See* Brief for the Central Alabama Fair Housing Center, et al. as Amici Curiae Supporting Respondents at 10, Merrill v. Milligan, 595 U.S. __, 142 S. Ct. 879 (2022) (No. 21-1086) ("The brutal reality of residential segregation in Alabama is the direct result of government action aimed at separating people by race . . . .").

61. *See* ROTHSTEIN, *supra* note 55, at 13–14 (outlining intentional government segregation in the San Francisco Bay and pointing out that "[i]f it could happen in liberal San Francisco, then indeed, it not only could but did happen everywhere").

62. Nandi L. Taylor, Jamila M. Porter, Shenee Bryan, Katherine J. Harmon & Laura S. Sandt, *Structural Racism and Pedestrian Safety: Measuring the Association Between Historical Redlining and Contemporary Pedestrian Fatalities Across the United States, 2010–2019*, 113 AMER. J. PUB. HEALTH 420, 422 (2023) ("[R]edlining is a leading contributing factor to economic disinvestment in neighborhoods, which may lead to a lack of pedestrian infrastructure in redlined neighborhoods.").

and arterial roads in and around Black neighborhoods to physically separate them from white neighborhoods.[63] Road placement became a favored tool for maintaining segregation, especially as courts began striking down policies such as racial zoning[64] and judicial enforcement of racially restrictive covenants[65] that governments had relied on in the past.[66] Section I.B.1 of this Comment discusses the landscape of legally sanctioned segregation in the twentieth-century United States. Next, section I.B.2 details the widespread pattern of governments using highways and roads to segregate and disrupt Black neighborhoods. Finally, section I.B.3 outlines the role municipalities played in discriminatory road placement.

1. Legally Sanctioned Segregation in the Twentieth Century

Various government actions in the twentieth century resulted in a landscape of *de jure* residential segregation. Federal, state, and local governments used a network of explicitly racist policies to keep Black people—and often Asian, Pacific Islander, Native American, Latine, and Jewish people[67]—from living alongside white people.[68]

One such policy, often referred to as redlining, involved the federal government actively segregating neighborhoods across the United States through mortgage and lending practices.[69] During the Great Depression, the federal government began purchasing mortgages for households and refinancing them on borrower-friendly terms to prevent people from losing their homes.[70] The government created color-coded maps of "every

63. *See infra* section I.B.2.

64. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917).

65. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

66. *See, e.g.*, ROTHSTEIN, *supra* note 55, at 129 (explaining how the Florida State Road Department intentionally routed Interstate 95 to "clear African Americans from an area adjacent to downtown" Miami several decades after first attempting to do so with an unconstitutional racial zoning ordinance); *id.* at 131 (detailing how the City of Los Angeles intentionally routed a highway through the integrating neighborhood of Sugar Hill after a state judge had anticipated the ruling in *Shelley* and declined to enforce the neighborhood's racially restrictive covenant).

67. *See, e.g.*, *Segregated Seattle*, THE SEATTLE C.R. & LAB. HIST. PROJECT, https://depts.washington.edu/civilr/segregated.htm [https://perma.cc/7VLT-XJUU] (explaining how government-imposed segregation policies in the western United States targeted these groups in addition to African Americans).

68. *See generally* ROTHSTEIN, *supra* note 55.

69. *See* Candace Jackson, *What is Redlining?*, N.Y. TIMES (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/realestate/what-is-redlining.html (last visited Jul. 8, 2024) (noting that in modern parlance, "'redlining' has become shorthand for many types of historic race-based exclusionary tactics in real estate . . . ." But that the term originates from New Deal-era "government homeownership programs.").

70. ROTHSTEIN, *supra* note 55, at 63–64.

metropolitan area in the nation" that intended to convey which neighborhoods would be safe for lending.[71] Government assessors relied partially on the racial composition of each neighborhood to determine its coding, grading white neighborhoods more highly than those with high concentrations of people of color and immigrants.[72] Homeowners in these "riskier"[73] redlined neighborhoods were more likely to be denied government loans.[74]

In addition to redlining, the federal government developed several other methods of enforcing residential segregation. During the first half of the twentieth century, the Federal Housing Administration declined to insure mortgages in integrated neighborhoods.[75] And in the mid-twentieth century, the government extended its segregationist policies to newly built suburbs all over the United States.[76] The federal government heavily subsidized the development of suburbs across the country, conditioned on those suburbs being all white.[77] As a result, Black Americans were unable to move to new suburbs that were rapidly being constructed all over the country and were left with little choice but to stay concentrated in urban neighborhoods.[78] Overcrowding ensued in these neighborhoods, "strain[ing] limited public services[] and reinforc[ing] racial segregation."[79]

Additionally, many neighborhoods employed racially restrictive covenants, which governments condoned and enforced, to remain all-white. Restrictive covenants required new buyers in these neighborhoods

71. *Id.* at 64.

72. *See* Cassandra Robertson, Emily Parker & Laura Tach, *Historical Redlining and Contemporary Federal Place-Based Policy: A Case of Compensatory or Compounding Neighborhood Inequality?*, 33 HOUS. POL'Y DEBATE 429, 430–31 (2021).

73. Redlined neighborhoods were not always genuinely riskier for lending than white neighborhoods; for instance, predominantly black neighborhoods would be graded poorly even if they were solidly middle-class. ROTHSTEIN, *supra* note 55, at 64.

74. *Id.* ("Although the HOLC did not always decline to rescue homeowners in . . . redlined neighborhoods[], the maps had a huge impact and put the federal government on record as judging that African Americans, simply because of their race, were poor risks.").

75. The Federal Housing Administration created an Underwriting Manual offering guidance on when it would insure mortgages. *Id.* at 65. The manual explicitly discouraged lending to protect certain neighborhoods from "the infiltration of . . . inharmonious racial and nationality groups." *Id.*

76. *See id.* at 71–72.

77. *Id.*

78. *See* Deborah N. Archer, "*White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1288–89, 1288 n.181 (2020).

79. *See id.* at 1287–88.

to agree never to sell or rent the home to a person of color.[80] Although these covenants were, on their face, private contracts rather than government actions, state and federal governments openly participated in their creation and enforcement.[81] In 1948, the Supreme Court ruled in *Shelley v. Kraemer*[82] that court enforcement of racially restrictive covenants introduced an element of state action that violated the Fourteenth Amendment.[83] But lower courts and federal agencies dragged their feet for years on honoring *Shelley*.[84] For the next five years, parties continued to bring claimed violations of racially restrictive covenants to state courts,[85] sometimes winning on grounds that *Shelley* had forbidden courts from evicting Black buyers but not from awarding damages to aggrieved white neighbors.[86] The Supreme Court finally closed this loophole in 1953 in *Barrows v. Jackson*.[87]

Local governments also acted directly to segregate their cities through racial zoning policies. In 1910, Baltimore adopted the nation's first racial zoning ordinance that explicitly decreed that Black people could not live in certain neighborhoods.[88] In the years following the Baltimore ordinance, many cities enacted similar policies, especially in the South.[89] Racial zoning was deemed unconstitutional in 1917 when the Supreme

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80. ROTHSTEIN, *supra* note 55, at 79. For instance, the Home Owners Association bylaws of Seattle's Blue Ridge neighborhood contained the following racially restrictive language for many years: "No property in said Addition shall at any time be sold, conveyed, rented or leased in whole or in part to any person or persons not of the White or Caucasian race." James Gregory, *Understanding Racial Restrictive Covenants and their Legacy*, RACIAL RESTRICTIVE COVENANTS PROJECT WASH., https://depts.washington.edu/covenants/segregation.shtml [https://perma.cc/5JGR-RGPS].

81. The Federal Housing Administration advocated for the use of restrictive covenants in its Underwriting Manual, which even contained "a model restrictive covenant" until 1948. JAMES LOEWEN, SUNDOWN TOWNS 129 (2d ed. 2018). State and federal courts actively facilitated residential segregation by rubber-stamping racially restrictive covenants on the grounds that they were private agreements. ROTHSTEIN, *supra* note 55, at 82; *see also* Corrigan v. Buckley, 271 U.S. 323 (1926) (Supreme Court case enforcing a racially restrictive covenant in the District of Columbia).

82. 334 U.S. 1 (1948).

83. *Id.*

84. ROTHSTEIN, *supra* note 55, at 86–90.

85. *Id.*

86. *See* Weiss v. Leaon, 225 S.W.2d 127, 131 (Mo. 1949) (holding that courts "may hear and determine an action for damages for the breach of [a] restriction agreement . . . without violating any provision of the Federal or State Constitutions"); *see also* Correll v. Earley, 237 P.2d 1017, 1022 (Okla. 1951) (holding that while a court may not cancel a deed conveyed to a Black person in violation of a restrictive covenant, "no such thought need deter the courts in the matter of . . . damages").

87. Barrows v. Jackson, 346 U.S. 249, 258 (1953) ("This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity . . . .").

88. ROTHSTEIN, *supra* note 55, at 44.

89. *Id.* at 45.

Court held in *Buchanan v. Warley*[90] that Louisville, Kentucky's ordinance violated the Fourteenth Amendment.[91] But many cities simply ignored the decision and continued to adopt and enforce racial zoning ordinances under the pretext that their rules "differed slightly from Louisville's."[92] In some cases, cities were able to rely on these ordinances for decades before courts struck them down[93] or the cities repealed them voluntarily.[94]

As this section demonstrates, twentieth-century governments used a variety of different legal strategies to enforce residential segregation in American cities. As Court rulings such as *Shelley* and *Buchanan* began chipping away at the viability of some of these strategies, anxiety about integration motivated some white communities and the governments that answered to them to seek alternative methods.[95] Conveniently for these segregationists, their anxiety coincided with the rise of highway development in the United States.[96]

2. Racially Motivated Highway and Road Design

Governments at all levels frequently approved construction of major highways and arterial roads through or on the borders of Black neighborhoods with the intent to entrench segregation, displace Black communities, or avoid disrupting white areas.[97] During the twentieth century, federal, state, and local government officials frequently targeted

90. 245 U.S. 60 (1917).

91. *Id.* at 82.

92. ROTHSTEIN, *supra* note 55, at 46.

93. *See, e.g.*, City of Birmingham v. Monk, 185 F.2d 859, 862 (5th Cir. 1950) (holding that Birmingham, Alabama's racial zoning ordinance violates *Buchanan*).

94. *See, e.g.*, Dowdell v. City of Apopka, 511 F. Supp. 1375, 1378 (M.D. Fla. 1981) (describing how the city of Apopka, Florida, had a racial zoning ordinance prohibiting Black people from living north of the city's railroad tracks before repealing it in 1968).

95. *See* Noel King, *A Brief History of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021), https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways [https://perma.cc/2LFU-5RC7].

96. *See id.*; *see also* Archer, *supra* note 78, at 1281 (explaining that some interstate highways were placed "in an attempt to contain and confine Black residents and skirt constitutional prohibitions on racial zoning.").

97. *See* Susaneck, *supra* note 11; *see also* U.S. DEP. OF TRANSP., EQUITY ACTION PLAN (2022) [hereinafter EQUITY ACTION PLAN] ("[H]ighways routed directly through Black and brown neighborhoods, often in an effort to divide and destroy them, continue to affect the well-being of the residents who remain."); Sarah B. Schindler, *Architectural Exclusion: Discrimination and Segregation through Physical Design of the Built Environment*, 124 YALE L. J. 1934, 1966 (2015) (Policymakers "purposeful[ly]" decided to route highways through the center of cities, often with the intent "to destroy low-income and especially black neighborhoods in an effort to reshape the physical and racial landscapes of the postwar American city").

Black neighborhoods and business districts for "urban renewal" or "slum clearance" projects to make room for highways.[98] In many cases, these Black neighborhoods were thriving and healthy before the government cleared them to make way for new roads.[99] Even at the time, the term "slum" was a known euphemism for a Black neighborhood, and "urban renewal" a euphemism for the removal of such neighborhoods.[100]

One instance of so-called "urban renewal" occurred in Richmond, Virginia. In the 1950s, Richmond city officials planned for Interstate 95 to bisect the Black neighborhood of Jackson Ward.[101] At the time, Jackson Ward was a vital hub for Black life, earning "cultural comparisons to Harlem and financial comparisons to Wall Street."[102] But while city officials intentionally avoided "well-established suburban communities" in planning its highway routes, predominantly Black "well-established urban communities" such as Jackson Ward were fair game for demolition.[103] Today, Jackson Ward remains "a center of Black life and business in Richmond," but the costs of Interstate 95 are acutely felt.[104] The segment of the neighborhood north of the freeway has twice the unemployment rate and one-third the average household income compared to the segment south of the freeway.[105]

In other cases, government officials built highways and roads around Black communities rather than through them, with the goal of creating "a

98. *See* Archer, *supra* note 78, at 1278–79 ("In many states, highway builders went out of their way to avoid white homes and community institutions but also went out of their way to route the highway right through the heart of Black communities.").

99. *See id.* at 1289 ("In Richmond, Virginia, the highway plowed through the middle of a stable Black community, devastating its business community."); Sam Ross-Brown, *Transportation Secretary Foxx Moves to Heal Scars of Urban Renewal*, AMER. PROSPECT (Sep. 30, 2016), https://prospect.org/civil-rights/transportation-secretary-foxx-moves-heal-scars-urban-renewal/ [https://perma.cc/9BKR-JJB2] (explaining that city officials in Pittsburgh labeled the Hill District neighborhood a "slum" and built Interstate 579 through it in the late 1950's despite the fact that it was a thriving cultural and economic center for Pittsburgh's Black Community, and indicating that "today 40 percent of its residents live below the poverty line . . . ."); Carolyn G. Loh, Opinion, *I-375 Was a Mistake. Here's What We Can Learn From It*, DETROIT FREE PRESS (Dec. 11, 2017), https://www.freep.com/story/opinion/contributors/2017/12/11/detroit-freeways-375/936815001/ [https://perma.cc/4VMT-UF26] (explaining that the city of Detroit cleared the "vibrant" African-American neighborhood of Black Bottom to construct Interstate 375).

100. Archer, *supra* note 78, at 1276–77.

101. Jahd Khalil, *Reconnect Jackson Ward Aims to Make Residents Whole Again*, VPM (Oct. 14, 2022), https://www.vpm.org/news/2022-10-14/reconnect-jackson-ward-aims-to-make-residents-whole-again [https://perma.cc/TST6-M628].

102. *Id.*

103. CHRISTOPHER SILVER, TWENTIETH-CENTURY RICHMOND: PLANNING, POLITICS, AND RACE 192–293 (1984).

104. Khalil, *supra* note 101.

105. *Id.*

permanent racial barrier between white and Black neighborhoods."[106] In Chicago, for instance, the construction of the Dan Ryan Expressway in the 1960s separated predominantly Black Bronzeville from "all-white" Bridgeport,[107] the neighborhood then-Mayor Richard J. Daley had grown up in.[108] Bridgeport residents had historically employed violent tactics to keep Black people out of their neighborhood,[109] and the construction of the expressway cemented its segregated nature.[110] Tellingly, the original design for the expressway placed it through Bridgeport.[111] But ultimately highway planners moved it several blocks to the east to instead create a "firewall" between Bridgeport and neighboring Black communities.[112]

In some cities, officials routed highways through Black neighborhoods so that they would not disrupt white ones. In Birmingham, Alabama, Interstate 59 departs acutely from its northeastern trajectory to "bisect [a] predominantly black portion of East Birmingham."[113] Officials chose this course in lieu of a more direct and likely less expensive route to avoid cutting through the predominantly white Woodlawn neighborhood,[114] even though it required a "sharp turn in the highway" that increased the danger of vehicular accidents.[115]

By engineering conditions of residential segregation and then targeting neighborhoods of color with high-speed roads and highways,

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106. Archer, *supra* note 78, at 1266.

107. *See* Jacqueline Serrato, Charmaine Runes & Pat Sier, *Mapping Chicago's Racial Segregation*, S. SIDE WKLY. (Feb. 24, 2022), https://southsideweekly.com/mapping-chicagos-racial-segregation/ [https://perma.cc/FF8C-ZPNG]; *see also Photo Essay: Explore the Complicated Legacy of Mayor Richard J. Daley's Building Boom*, WTTW [hereinafter *Photo Essay*], https://interactive.wttw.com/chicago-stories/boss-and-the-bulldozer/photo-essay-explore-the-complicated-legacy-of-mayor-richard-j-daley-building-boom [https://perma.cc/9Q9P-Q3DV] (naming Bronzeville as the neighborhood the Dan Ryan Expressway separated from Bridgeport); ROTHSTEIN, *supra* note 55, at 146 (describing Mayor Richard J. Daley's Bridgeport nieghborhood).

108. *Photo Essay*, supra note 107.

109. *See* ROTHSTEIN, *supra* note 55, at 146 (citing a 1964 episode in which a white mob in Bridgeport pelted rocks at the home of a white civil rights activist who had rented to Black college students); *see also* Rachel Kim, *In Bridgeport, Past and Present Live Side by Side*, S. SIDE WKLY. (June 9, 2020), https://southsideweekly.com/bridgeport-past-present-live-side-side-vigilantes/ [https://perma.cc/4GLD-WLKJ] (describing Bridgeport as the home to white "athletic clubs" that physically assaulted Black people to stop them from encroaching on the neighborhood, and noting that Mayor Daley once belonged to one of these clubs).

110. Serrato et al., *supra* note 107.

111. *Id.*

112. ROTHSTEIN, *supra* note 55, at 265.

113. CHARLES CONNERLY, "THE MOST SEGREGATED CITY IN AMERICA": CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM, 1920–1980, at 158–159 (2005).

114. *Id.* at 160.

115. *Id.* at 159.

governments created dangerous environments for pedestrians in those communities. Given this history, it is unsurprising that Black neighborhoods are disproportionately likely to contain large arterials and highways.[116] And formerly redlined neighborhoods, which tend to face economic disinvestment and lack important pedestrian infrastructure,[117] have a heightened ratio of pedestrian deaths.[118] Consider East Palo Alto, California, a formerly redlined historically Black neighborhood, as an explicit example of the link between racist land use policies and pedestrian danger.[119] East Palo Alto, "the most segregated city in the Bay Area,"[120] is now predominantly Latine, and remains disproportionately Black compared to the rest of the region.[121] The construction of Highway 101 "sliced through" East Palo Alto,[122] largely separating it from its whiter, more affluent western neighbor, Palo Alto.[123] But the highway also left a strip of East Palo Alto itself separated from the rest of the city.[124] Today, many East Palo Altans must cross the highway to access services such as schools and churches or to visit friends, but the crossing is dangerous and sees a disproportionate number of pedestrian collisions.[125] This example illustrates how racist government policies and the physical imposition of high-speed roads can interact to create increased danger to pedestrians of color.

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116. *See* Susaneck, *supra* note 11.

117. Taylor et al., *supra* note 62, at 422.

118. *Id.* at 424.

119. Stephen Menendian, Samir Gambhir & Arthur Gailes, *The Most Segregated (and Integrated) Cities in the SF Bay Area*, OTHERING & BELONGING INST. (Nov. 18, 2020), https://belonging.berkeley.edu/most-segregated-and-integrated-cities-sf-bay-area [https://perma.cc/D67H-QZKT].

120. Lauren Hepler, *Palo Alto's Housing Debate is a Battle Over Silicon Valley Segregation*, S.F. CHRON. (May 3, 2021), https://www.sfchronicle.com/local/article/Palo-Alto-s-housing-debate-is-a-battle-over-16142750.php (last visited Jul. 8, 2024).

121. Menendian et al., *supra* note 119 (East Palo Alto is 64.4% Latine. It also remains disproportionately Black—16%—compared with the rest of the Bay Area).

122. Bryan Goebel, *Divided by a Highway, East Palo Alto Looks To Reconnect Its West Side*, STREETSBLOG SF (Oct. 25, 2012), http://sf.streetsblog.org/2012/10/25/divided-by-a-highway-east-palo-alto-looks-to-reconnect-its-west-side [http://perma.cc/B8C2-LGHP].

123. *Id.*; *see also* Hepler, *supra* note 120 (noting that Palo Alto is affluent and predominantly white).

124. Goebel, *supra* note 122.

125. *Id.*; *see also* Sue Dremann, *Work Begins on New University Avenue Pedestrian and Bike Overcrossing*, PALO ALTO ONLINE (Nov. 15, 2023), https://paloaltoonline.com/news/2023/11/15/work-begins-on-new-university-avenue-pedestrian-and-bike-overcrossing [https://perma.cc/LK4W-Y4Z8] (indicating that work on a pedestrian bridge over Highway 101 in East Palo Alto began construction in late 2023).

3. Municipal Participation in Discriminatory Road Placement

Because local governments, unlike states and the federal government, can be sued for damages under § 1983,[126] it is important to further highlight the significant role that municipalities played in deciding to place dangerous roads in Black neighborhoods. This section shows that although the interstate highways were built with federal money and with federal and state input, local governments sometimes had final decision-making power as to where highways would and would not be placed—and used that authority to further racially discriminatory goals.

For example, in mid-twentieth century Atlanta, city officials regularly made placement decisions with racist motivations in mind.[127] Before interstate highway construction began, Atlanta city officials requested a report from the Georgia State Highway Department and the Federal Public Roads Administration to analyze possible expressway locations.[128] Upon receiving the report, "city officials became actively engaged in" developing highways in Atlanta to further racist goals such as residential segregation. [129] "Wherever the highway/road system could possibly serve a racial function, it was developed with that in mind."[130] The Atlanta Bureau of Planning explicitly admitted that its chosen route for Interstate 20 was intended as a racial buffer between the white neighborhood of Adamsville and the Black neighborhoods to its north.[131]

Atlanta was not alone in using road planning to entrench segregation. In Chicago, as discussed above, original plans for the Dan Ryan Expressway had it running through Mayor Richard J. Daley's all-white neighborhood of Bridgeport.[132] But in 1956, Daley and the city council relocated the highway to Wentworth Avenue to the east,[133] cementing racial segregation between Bridgeport and its Black neighbors.[134] In New Orleans, local officials stopped an interstate highway from running

126. *See infra* section II.A.

127. RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 61 (1996).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See *supra* section I.B.2.

133. *Properties Claimed for Construction of Dan Ryan Expressway, 1953–1954*, ENCYCLOPEDIA OF CHI., http://www.encyclopedia.chicagohistory.org/pages/11536.html [https://perma.cc/T3V4-DBMJ].

134. Serrato et al., *supra* note 107.

through the French Quarter.[135] But they permitted Interstate 10 to be placed through a "thriving [Black] business district" in the neighborhood of Tremé, ignoring the community's protests.[136] And in Birmingham, city officials exerted influence to ensure that a segment of Interstate 59 was placed to maintain the racial barrier between all-white College Hills and several Black neighborhoods to its north.[137] In 1957, Birmingham's mayor and several city commissioners pledged to "'explore all possible routes' to aid white property owners in the preservation of the character of their neighborhood."[138] These comments came as the city was working with the Alabama Highway Department to plan the path of Interstate 59.[139] The route ultimately chosen in 1958 "coincides exactly with [Birmingham's] racial zoning boundary that had been drawn prior to the demise of racial zoning."[140]

In addition to highways, some cities constructed local arterial roads for racially discriminatory purposes. Atlanta officials regularly used this tactic to create boundaries between Black and white neighborhoods.[141] For instance, in 1954 the Metropolitan Planning Commission and several local interest groups agreed to construct a new access road to "provide an artificial line at least 200 feet wide" between the existing white neighborhood of Collier Heights and a planned Black housing development to its west.[142]

Overall, twentieth-century governments at all levels played an active role in segregating and displacing Black communities through highway and road placement. Municipalities, which often made direct decisions about where high-speed roads would go, were no exception. Given the heightened danger that high-speed roads pose to pedestrians, the intentional placement of such roads in and around Black neighborhoods helps to explain the racially disparate impact of the pedestrian safety crisis and demands government attention.[143]

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135. Otis R. Taylor Jr., *America's Highway System Is a Monument to Environmental Racism and a History of Inequity*, KQED (Mar. 13, 2023), https://www.kqed.org/news/11943263/americas-highway-system-is-a-monument-to-environmental-racism-and-a-history-of-inequity [https://perma.cc/A8CN-GA6C].

136. *Id.*

137. Charles E. Connerly, *From Racial Zoning to Community Empowerment: The Interstate Highway System and the African American Community in Birmingham, Alabama*, 22 J. PLAN. EDUC. & RSCH. 99, 104 (2002).

138. *Id.* (internal citation omitted).

139. *Id.*

140. *Id.*

141. *See* Bayor, *supra* note 127, at 63–65.

142. *See id.* at 64.

143. *See* Susaneck, *supra* note 11.

C. Government Responses and the Legal Landscape of Pedestrian Safety

Governments at all levels have begun to address the pedestrian safety crisis with varying degrees of success. For example, beginning in the 2010s, some cities started committing to "Vision Zero" campaigns mirroring those in European cities, with the goal of reducing pedestrian deaths to zero.[144] But few of these cities have seen much success—in fact, in most of these cities pedestrian fatalities are surging, following national trends.[145] Many municipal governments aiming to make necessary safety improvements have ultimately folded to opposition, whether externally from wealthy communities or internally from transportation departments and city council members or mayors.[146]

At the federal level, the United States Department of Transportation (USDOT) is beginning to encourage cities to make safety-related infrastructure changes. In January 2022, USDOT initiated the Safe Streets and Roads for All Grant Program (Safe Streets Program), offering grants to local governments for road safety audits and installation of pedestrian safety measures such as sidewalks and improved crosswalks.[147] This program acknowledges racial disparities in roadway safety, but leaves the implementation of equity-focused solutions to the USDOT Equity Action Plan and President Joe Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.[148]

The Equity Action Plan, released around the same time as the Safe Streets Program, outlines actions USDOT will take to expand transportation access to "underserved, overburdened, and disadvantaged

144. David Zipper, *Why "Vision Zero" Hit a Wall*, BLOOMBERG (Apr. 11, 2022), https://www.bloomberg.com/news/features/2022-04-11/-vision-zero-at-a-crossroads-as-u-s-traffic-death-rise [https://perma.cc/79WC-FTYR] (citing Los Angeles, San Francisco, Chicago, New York City, Portland, Hoboken, Philadelphia, Austin, and Washington, D.C. as cities that have committed to Vision Zero programs).

145. *Id.*

146. *Id.*

147. U.S. DEP'T OF TRANSP., NAT'L ROADWAY SAFETY STRATEGY (2022) [hereinafter NAT'L ROADWAY 2022]; *see also* U.S. DEP'T OF TRANSP., *Planning and Demonstration Activities – SS4A*, https://www.transportation.gov/grants/ss4a/planning-and-demonstration-activities (last visited Aug. 15, 2024) (offering grants for road safety audits); U.S. DEP'T OF TRANSP., *Implementation Grants – SS4A*, https://www.transportation.gov/grants/ss4a/implementation-grants (last visited Aug. 15, 2024) (offering grants for sidewalks and improved crosswalks).

148. NAT'L ROADWAY 2022, *supra* note 147, at 7; *see generally* EQUITY ACTION PLAN, *supra* note 97.

communities."[149] It highlights USDOT's intention to facilitate the discretionary grant application process for underserved communities and acknowledges that historical and existing land use policies may make it difficult for members of these communities to walk safely in their neighborhoods.[150] Their planned actions in the realm of "Expanding Access" to safe transportation—including walking—throughout the next several years focus mostly on improving data collection.[151]

While governments have begun turning their attention toward improving pedestrian safety—an encouraging trend—altering city landscapes will not happen overnight. And in the meantime, many pedestrians have limited options when they are injured on dangerous roads because most states immunize their governments from liability for street design.[152] This governmental immunity sometimes extends beyond the state and its agencies to protect municipalities from liability.[153] In the all-too-common case where the driver in a pedestrian collision lacks sufficient assets to pay a judgment, [154] pedestrians in states that protect municipalities from tort liability for dangerously designed roads are left with no recourse. In the face of this legal barrier, potential plaintiffs might consider a federal civil rights claim as a possible avenue for recovery.

II. SECTION 1983 AND THE STATE-CREATED DANGER DOCTRINE

Over the last several decades, a legal theory known as the "state-created danger doctrine" has arisen and seen some success in holding governments and their officials liable under 42 U.S.C. § 1983 for third-party harms that they played a role in creating.[155] Section 1983 traces its origins to the 1871 Ku Klux Klan Act,[156] which invoked the

149. EQUITY ACTION PLAN, *supra* note 97, at 2.

150. *Id.* at 1, 10.

151. *Id.*

152. *See* Michael E. Lewyn, *Why Pedestrian-Friendly Street Design Is Not Negligent*, 47 U. LOUISVILLE L. REV. 339, 358 (2008).

153. *See, e.g.*, Swieckowski by Swieckowski v. City of Ft. Collins, 934 P.2d 1380, 1386–87 (Colo. 1997) (construing Colorado's sovereign immunity rules to shield the City of Fort Collins from liability for a dangerously designed road); S.C. Code Ann. §§ 15-78-30(d), (h), 60(15) (explicitly protecting governments in South Carolina, including local governments, from liability for highway and road design).

154. Michelle J. White, *The "Arms Race" on American Roads: The Effect of Sport Utility Vehicles and Pickup Trucks on Traffic Safety*, 47 J.L. & ECON. 333, 351 (2004) (noting that "many drivers are judgment proof").

155. *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL OF RIGHTS J. 1139, 1167–68 (2005).

156. Ku Klux Klan Act, Pub. L. No. 42-22, 17 Stat. 13 (1871).

Fourteenth Amendment to create a statutory scheme to combat states' tacit permission of racist violence.[157] Section 1 of the Act, later codified as § 1983, allowed private suits "against those who under color of state law deprived persons of their constitutional rights."[158] Section 1983 was essentially "dormant"[159] until the Civil Rights Era, when the Supreme Court resuscitated it in *Monroe v. Pape*.[160]

Broadly, a § 1983 claim has two essential elements: (1) a violation "committed by a person acting under color of state law" of (2) "a right secured by the Constitution and laws of the United States."[161] This section expands on these elements in the context of how they might be implicated by a state-created danger claim for pedestrian injury. Section II.A details when municipalities can be liable as "persons" in a § 1983 action. Section II.B discusses the development of the state-created danger theory, including an overview of the constitutional right to substantive due process that underlies it.

A. Municipal Liability Under § 1983

Unlike state governments,[162] municipalities can be held liable in § 1983 lawsuits. The Supreme Court in *Monell v. Department of Social Services of City of New York*[163] held that local governing bodies such as municipalities constitute "persons" under § 1983.[164] To hold a municipality liable under § 1983, a municipal policy or custom must have caused the constitutional violation.[165] For instance, in *City of Canton, Ohio v. Harris*[166] the Court determined that a city's use of an inadequate medical training program for its police force might constitute a "policy."[167] If so, a plaintiff who received insufficient medical care from

157. *See* Monroe v. Pape, 365 U.S. 167, 171, 174–75 (1961).

158. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982).

159. Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135–36 (1977).

160. 365 U.S. 167 (1961).

161. West v. Atkins, 487 U.S. 42, 48 (1988).

162. Will v. Mich. Dep't of State Police, 491 U.S. 58, 70–71 (1989) (holding that the Eleventh Amendment protects state governments, departments, and officials from § 1983 liability).

163. 436 U.S. 658 (1978).

164. *Id.* at 690.

165. *Id.* at 694.

166. 489 U.S. 378 (1989).

167. *Id.* at 390.

an officer while in custody could hold the city itself liable for a due process violation.[168]

Still, the "policy or custom" standard is widely acknowledged to be difficult to meet.[169] Plaintiffs can show a policy or custom in one of four ways: "an express law or policy authorizing the constitutional violation[;] a final decision by a person with policymaking authority[;] a widespread pattern of conduct[;] or a municipal failure to . . . adequately screen, train, or supervise municipal employees."[170] The perception that municipal liability is particularly difficult to obtain may stem from the fact that "widespread pattern of conduct" and "municipal failure to screen, train, or supervise" claims are both more common and significantly less likely to be successful than claims stemming directly from policymaker actions or laws.[171] The relatively high rate of success for municipal § 1983 claims based on policymaker conduct is intuitive: when the state actor in question is a policymaker rather than a lower-level employee, there are simply fewer steps to proving that a policy or custom caused the violation.[172]

Section 1983 suits against local governments based on policymakers' infrastructural decisions are among those that have seen success. For instance, a plaintiff beaten by another inmate while in a "sobering cell" successfully proved that the County of Los Angeles's practice of housing inmates in cells that lacked audio and video monitoring caused his injury.[173] Another litigant successfully asserted that the City of New York could be liable for wrongfully demolishing a building that she owned.[174] And another lawsuit, *Guertin v. Michigan*,[175] held the City of Flint liable for "the Flint Water Crisis" that occurred after policymakers chose to

168. *Id.* at 380–81.

169. Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 350 (2023) (noting that judges and scholars have criticized the policy or custom requirement as being "virtually prohibitive to recovery for plaintiffs").

170. *Id.* at 349 (footnotes omitted).

171. In an empirical study of municipal liability under § 1983, Nancy Leong analyzed every 2019 federal appellate case citing *Monell*. She coded claims under four categories: "policymaker statements or actions," "written municipal policies," "widespread patterns of conduct," and "municipal failures." *Id.* at 364–65. The success rates for claims under each category were as follows: 30% for policymaker statement claims, 45.5% for written policy claims, 16.2% for pattern of conduct claims, and just 12.1% for municipal failure claims. *Id.* at 366.

172. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (suggesting that a constitutional violation by a local government "could be inferred from a single decision" made by policymakers, whereas, "[a]t the other end of the spectrum," an unreasonable police shooting would require more to implicate the municipality that employed the officer).

173. Castro v. County of Los Angeles, 833 F.3d 1060, 1075 (9th Cir. 2016).

174. Burtnieks v. City of New York, 716 F.2d 982, 983 (2d Cir. 1983).

175. 912 F.3d 907 (6th Cir. 2019).

process the city's water at an unsafe water treatment plant, causing widespread illness.[176]

B. Substantive Due Process and the Development of the State-Created Danger Doctrine

Today, most federal circuits recognize a doctrine of state-created danger,[177] whereby the government can be liable for Due Process violations under § 1983 when it affirmatively acts to expose a plaintiff to harm.[178] In state-created danger cases, the constitutional right at issue is typically conceived of as a substantive due process right.[179] Substantive due process derives from the Fourteenth Amendment of the Constitution, which prohibits the state from "depriv[ing] any person of life, liberty, or property, without due process of law."[180] The Due Process Clause is intended to prevent "exercise of [state] power without any reasonable justification in the service of a legitimate governmental objective."[181]

While substantive due process is notoriously ambiguous in application, one prominent scholar offers a useful definition: a person can claim a violation of their substantive due process right if the government deprives them of life, liberty, or property without "sufficient substantive justification[—]a good enough reason for such a deprivation."[182] To determine whether conduct was justified, courts evaluate the state actor's level of culpability.[183] The Supreme Court has not conclusively established what standard of culpability is required,[184] but it has asserted

176. *Id.* at 915–16.

177. *See* Irish v. Fowler, 979 F.3d 65, 73, 75 (1st Cir. 2020) (acknowledging that the First Circuit and nine others recognize the state-created danger doctrine). *But see* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849, 865 (5th Cir. 2012) (declining to adopt the state-created danger doctrine in the Fifth Circuit).

178. *See* Oren, *supra* note 155, at 1168 ("Liability under the Due Process Clause of the Fourteenth Amendment will attach only if the State can be said to have crossed the putative line between action and inaction by creating the danger or substantially increasing it.").

179. *See, e.g.*, Pena v. DePrisco, 432 F.3d 98, 108 (2d Cir. 2005) (recognizing that "a state created danger can be the basis of a substantive due process violation").

180. U.S. CONST. amend. XIV, § 1.

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

182. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) [Hereinafter Chemerinsky, *Substantive Due Process*].

183. *See County of Sacramento*, 523 U.S. at 839.

184. Chemerinsky, *Substantive Due Process*, *supra* note 182, at 1526.

that mere negligence is not enough for a substantive due process violation.[185]

DeShaney v. Winnebago County Department of Social Services[186] is a substantive due process case that is widely considered the "genesis" of the state-created danger doctrine,[187] though courts have since evaluated several older cases under the framework.[188] In *DeShaney*, a man beat his young son, Joshua DeShaney, so severely that the child incurred permanent brain damage.[189] The event occurred after the Winnebago County Department of Social Services had repeatedly evaluated Joshua's situation and returned him to his father's custody despite evidence and accusations of child abuse.[190] Joshua and his mother sued Winnebago County on the grounds that its failure to intervene constituted a violation of Joshua's substantive due process right to liberty under the Fourteenth Amendment.[191] The *DeShaney* Court held that the government has no affirmative duty to protect citizens from third-party harm,[192] but also outlined two exceptional circumstances under which such a duty might arise: when the plaintiff is in state custody, or when the government played a role in creating the danger to the plaintiff.[193] This latter exception laid the groundwork for the state-created danger theory.[194]

In the wake of *Deshaney*, circuit courts began analyzing and deciding cases under the state-created danger framework, starting with *Wood v. Ostrander*[195] in the Ninth Circuit. In *Wood*, a police officer pulled over a car late at night and arrested its driver for operating the vehicle while intoxicated.[196] The officer took possession of the keys and impounded the

185. Daniels v. Williams, 474 U.S. 327, 328 (1986); *see also County of Sacramento*, 523 U.S. at 846 (characterizing *Daniels* as a substantive due process case).

186. 489 U.S. 189 (1989).

187. *See* Oren, *supra* note 155, at 1167.

188. *See* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 11–12 (2007) [Hereinafter Chemerinsky, *State-Created Danger*] (noting that *Daniels* and its companion case, *Davidson v. Cannon*, 474 U.S. 344 (1986), which predate *DeShaney* by three years, appear to be state-created danger cases).

189. *DeShaney*, 489 U.S. at 193.

190. *Id.* at 192–93.

191. *Id.* at 193.

192. *Id.* at 202.

193. *Id.* at 201 ("[T]he harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced . . . , it played no part in their creation, nor did it do anything to render him any more vulnerable to them.") (footnote omitted).

194. Chemerinsky, *State-Created Danger*, *supra* note 188, at 3.

195. 879 F.2d 583 (9th Cir. 1989).

196. *Id.* at 586.

car.[197] In the process, he ordered the car's only passenger, Linda Wood, to exit the car, and then left her at the scene—an area known to have a high aggravated crime rate—without ensuring she had a safe way home.[198] Wood began the five-mile walk back to her home before accepting a ride from a stranger, who subsequently raped her.[199] Wood sued the officer under § 1983.[200] The Ninth Circuit ruled in Wood's favor, reversing the district court's summary judgment ruling on the grounds that Wood "raised a genuine factual dispute regarding whether [the officer] deprived her of a liberty interest protected by the Constitution by affirmatively placing her in danger and then abandoning her."[201] Other circuits soon followed suit in accepting the state-created danger theory.[202]

Today, ten of the twelve circuits have adopted some version of the state-created danger doctrine,[203] though the tests they use are largely inconsistent with one another.[204] All ten circuits agree that a required element of a successful state-created danger claim is an affirmative act by the state that "create[s] or enhance[s] a danger to the plaintiff."[205] Because

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 596.

202. *See* Chemerinsky, *State-Created Danger*, *supra* note 188, at 15.

203. *See* Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020).

204. *See* Chemerinsky, *State-Created Danger*, *supra* note 188, at 26 (noting that the circuits "have quite different tests").

205. *See Irish*, 979 F.3d at 74 ; *see also* Okin v. Vill. of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 428 (2d Cir. 2009) ("[S]tate actors may be liable under section 1983 if they affirmatively created or enhanced the danger of private violence."); Mears v. Connolly, 24 F.4th 880, 884 (3d Cir. 2022) (listing as a necessary element of state-created danger that "the state 'affirmatively used [its] authority' to 'create[] a danger'") (alteration in original) (citation omitted); Burns-Fisher v. Romero-Lehrer, 57 F.4th 421, 425 (4th Cir. 2023) (applying the state-created danger doctrine "when the state affirmatively acts to create or increase the risk that resulted in the victim's injury." (internal quotation marks and citation omitted)); Lipman v. Budish, 974 F.3d 726, 744 (6th Cir. 2020) ("To show a state-created danger, plaintiff must show . . . an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence . . . .") (citation omitted); First Midwest Bank *ex rel.* LaPorta v. City of Chicago, 988 F.3d 978, 988 (7th Cir. 2021) (applying state-created danger doctrine "when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced" (internal quotation marks and citation omitted)); Anderson *ex rel.* Anderson v. City of Minneapolis, 934 F.3d 876, 882 (8th Cir. 2019) (state-created danger liability requires that a state actor "has taken affirmative action which increases the individual's . . . vulnerability . . . beyond the level it would have been at absent state action" (alteration in original) (internal quotation marks and citation omitted)); Sinclair v. City of Seattle, 61 F.4th 674, 681 (9th Cir. 2023) ("For a plaintiff to prevail on a state-created danger claim, the government must 'affirmatively create[] an actual, particularized danger [that the plaintiff] would not

state-created danger cases are ultimately substantive due process cases, they also require a certain level of culpability on the part of the actor. Most circuits have decided that the standard of culpability for state actors under the state-created danger doctrine is "deliberate indifference" to the danger they caused the plaintiff.[206]

Courts have held that city officials act with deliberate indifference when they make a policy choice that is not in service of the "legitimate government purpose" that the Due Process Clause demands, as in *Guertin v. Michigan*, the Flint Water Crisis case.[207] There, city officials in Flint had switched the city's water sources to "a plant they knew was not ready to safely process the water"[208] to cut costs[209] and then made several public statements assuring residents that the water was safe to drink.[210] In fact, the water was not safe to drink—Flint residents began losing their hair, developing rashes, and contracting illnesses such as E. coli and Legionnaire's disease.[211] Blood tests of Flint children revealed "dangerously high blood-lead levels."[212] Flint residents harmed by "drinking and bathing in the lead-contaminated water" sued several government entities, including the City of Flint, for violating "their right to bodily integrity as guaranteed by the Substantive Due Process Clause of the Fourteenth Amendment."[213] The *Guertin* court assessed the state

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otherwise have faced.'") (citation omitted); Matthews v. Bergdorf, 889 F.3d 1136, 1150 (10th Cir. 2018) ("A state-created danger necessarily involves affirmative conduct on the part of a state actor in placing a plaintiff in danger of private violence.") (citation omitted); Butera v. District of Columbia, 235 F.3d 637, 650 (D.C. Cir. 2001) (listing "affirmative conduct by the State to increase or create the danger that results in harm to the individual" as a "key requirement" for a state-created danger claim).

206. *See Sinclair*, 61 F.4th at 680. Many circuits use the terminology of "shock[ing] the conscience" to describe the mental state required for a due process violation, but a look under the hood reveals that in most cases, deliberate indifference is enough to satisfy that seemingly higher standard. *See, e.g.*, *id.* (stating that because only "conduct that shocks the conscience is cognizable as a due process violation . . . [,] to make out a successful claim under the state created danger doctrine, a plaintiff must allege facts sufficient to establish that the defendant acted with deliberate indifference to a known or obvious danger" (internal quotations omitted)); Gladden v. Richbourg, 759 F.3d 960, 966 (8th Cir. 2014) ("To shock the conscience, the [defendant's] acts must at least demonstrate deliberate indifference to [the plaintiff's] constitutional rights." (internal quotations omitted)). When state actors' decisions are made in non-emergency contexts, circuit courts have "consistently held that deliberate indifference or recklessness is sufficient to show liability if there is a state-created danger." *See* Chemerinsky, *State-Created Danger*, *supra* note 188, at 13.

207. Guertin v. Michigan, 912 F.3d 907, 926 (6th Cir. 2019).

208. *Id.*

209. *Id.* at 915.

210. *Id.* at 927.

211. *Id.* at 915.

212. *Id.*

213. *Id.* (the court characterizes the Flint Water Crisis as a "government-created environmental disaster").

actors' choice to switch Flint's water source to a water treatment system they knew was outdated in order to save costs and determined that the decision was not in service of a legitimate government purpose.[214] That finding was a major factor in the court's ruling that the state had acted with deliberate indifference[215] and could be held liable under § 1983.[216]

Additionally, most circuits have recognized some form of a proximate cause requirement for state-created danger claims, typically requiring a foreseeable injury and sometimes a foreseeable victim.[217] Such foreseeable victim elements tend to require that the state "created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public."[218] Some circuits' foreseeable victim requirements are rooted in pattern-matching to previously successful state-created danger cases,[219] while others have derived such requirements from *Martinez v. California*,[220] a pre-*DeShaney* due process case.[221]

The Third and Ninth Circuits provide examples of foreseeable plaintiff doctrines derived from pattern matching. In *Sinclair v. City of Seattle*,[222] a 2023 case out of the Ninth Circuit, the court clarified for the first time that a state-created danger must be "directed at a specific victim."[223] The court justified its holding by insisting that "[a] survey of [its] cases" made the requirement "clear."[224] It referenced several successful state-created danger cases, noting that they all had in common a known victim.[225] For

214. *Id.* at 926 ("The decision to temporarily switch Flint's water source was an economic one and there is no doubt that reducing cost is a legitimate government purpose. . . . [But] jealously guarding the public's purse cannot, under any circumstances, justify the yearlong contamination of an entire community.").

215. *Id.* at 924–25 ("[F]or us to find deliberate indifference, . . . we must find not only that the governmental actor chose to act (or failed to act) despite a subjective awareness of substantial risk of serious injury, but we also must make some assessment that he did not act in furtherance of a countervailing governmental purpose that justified taking that risk. . . . [T]hese considerations weigh in favor of finding that the generally alleged conduct was so egregious that it can be said to be 'arbitrary in the constitutional sense.'").

216. *Id.* at 927.

217. *See e.g.*, Sinclair v. City of Seattle, 61 F.4th 674, 680 (9th Cir. 2023) (requiring the plaintiff's injury to be "foreseeable"); Mears v. Connolly, 24 F.4th 880, 883 (3d Cir. 2022) (requiring plaintiff to be "a foreseeable victim").

218. Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020).

219. *See infra* text accompanying notes 223–232.

220. 444 U.S. 277 (1980).

221. *See infra* text accompanying notes 233–235.

222. 61 F.4th 674 (9th Cir. 2023).

223. *Id.* at 682.

224. *Id.*

225. *Id.* at 683.

an inverse example, the court highlighted *Johnson v. City of Seattle*,[226] a failed state-created danger case involving a plaintiff whose harm arose out of the city's failure to implement adequate crowd control measures during a festival[227]—and who was not specifically foreseeable to the government defendants.[228] The *Sinclair* court cited *Johnson* as a particularly apt case to illustrate the requirement that danger be directed at a "specific victim."[229] In the Third Circuit, the court in *Mark v. Borough of Hatboro*,[230] reasoned that a "review of the cases" revealed that previous successful state-created danger claims shared some existing "relationship between the state and the plaintiff."[231] On those grounds, it established a requirement of "specific knowledge by the defendant of the particular plaintiff[]."[232]

Other circuits have derived their foreseeable plaintiff requirements in whole or in part from *Martinez v. California*. In *Martinez*, which was decided nine years before *Deshaney*, the Court ruled that the state was not liable for a woman's murder by a man it had paroled from prison.[233] The Court reasoned that the resultant injury was too remote to attribute to the state's action in part because "the parole board was not aware that [the victim], as distinguished from the public at large, faced any special danger."[234] This language from *Martinez*, or a slight variation of it, is found in several circuit tests as a foreseeable plaintiff element.[235]

In summary, reviewing the various circuit tests for state-created danger reveals three basic elements of a successful claim: (1) an affirmative governmental act that increases risk of danger, (2) proximate cause, and (3) deliberate indifference on the part of the state actor. The following Part applies these elements to pedestrian injury claims.

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226. 474 F.3d 634 (9th Cir. 2007).

227. *Sinclair*, 61 F.3d at 682 (citing *Johnson*, 474 F.3d at 637).

228. *Id.* at 683 (citing *Johnson*, 474 F.3d at 640).

229. *Id.* at 682–83 (contrasting *Johnson* with a series of successful state-created danger cases that *did* involve a foreseeable plaintiff to justify imposing a foreseeable plaintiff rule).

230. 51 F.3d 1137 (3d Cir. 1995).

231. *Id.* at 1152–53.

232. *Id.* at 1153.

233. Martinez v. California, 444 U.S. 277, 285 (1980).

234. *Id.*

235. *See, e.g.*, Lipman v. Budish, 974 F.3d 726, 744 (6th Cir. 2020) (listing as an element of state-created danger claims "a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large." Tracing the citations for this element reveals that the language originated in *Martinez*).

III. THE STATE-CREATED DANGER DOCTRINE AS A VEHICLE FOR PEDESTRIAN LITIGATION

Under certain circumstances, the state-created danger doctrine may prove a viable vehicle for injured pedestrians to recover damages from municipalities. This Part outlines how a pedestrian-plaintiff might meet the doctrine's three requirements. Section III.A suggests that where a municipality exercised decision-making power to place a dangerous road, their action qualifies as affirmative conduct. Section III.B argues that road placement decisions proximately cause pedestrian injuries, notwithstanding whether the specific pedestrian injured was foreseeable. Section III.C concludes that where a municipality makes a road placement decision for racially discriminatory reasons, it may have acted with deliberate indifference.

A. Municipalities Act Affirmatively to Place Roads

It is common for municipalities to exercise decision-making power to place roads within their borders, and such placements satisfy the affirmative conduct requirement of the state-created danger doctrine. Every metropolitan region with a population of 200,000 or greater has its own metropolitan planning organization (MPO) that is responsible for regularly instituting transportation plans for its region, often with the aid of federal funding.[236] These plans require MPOs to design and place roads.[237] This structure has been in place since it was mandated in the Federal-Aid Highway Act of 1962,[238] which was implemented to ensure a level of municipal control in highway placement decisions.[239] Even before 1962, the historical record shows that municipal governments sometimes had significant control over placement of both local roads and highways.[240]

Pedestrians who wish to sue municipalities under § 1983 on a state-created danger theory may have to present factual evidence that the

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236. ROBERT D. BULLARD, GLENN S. JOHNSON & ANGEL O. TORRES, HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY, 6–7 (2004).

237. *Id.*

238. Federal-Aid Highway Act of 1962, 23 U.S.C. § 101 (2018).

239. *See* Deborah N. Archer, *Transportation and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2137 (2015) (citing the desire "to protect parks, historic districts, and other environmentally sensitive places," concerns typically raised by white communities, as an impetus for the legislation).

240. *See supra* section I.B.3 (illustrating how the municipal governments of Atlanta, New Orleans, and Birmingham made several decisions regarding local road and highway placement before 1962).

municipality had a decision-making role in placing the road on which the pedestrian was harmed.[241] But litigants can certainly find such evidence, and when present it should satisfy the state-created danger doctrine's requirement that the state must have affirmatively acted to create the heightened danger.[242]

B. Placement of Dangerously Designed Roads Proximately Causes Pedestrian Injuries, even if the Specific Plaintiff Was Not Foreseeable

Pedestrians injured on high-speed roads may also be able to recover under a state-created danger theory because the municipality's placement of those roads is a proximate cause of pedestrian injury. This connection between dangerous roads and pedestrian injury is generally accepted in the tort context, as evidenced by the fact that pedestrians can have successful claims against municipalities for dangerously designed roads in states that have not waived sovereign immunity.[243] It is reasonably foreseeable that a pedestrian is likely to be injured on a high-speed road, especially on one that, for instance, includes a poorly-designed crosswalk[244] or is excessively wide in a way that encourages speeding.[245] Pedestrians suing under § 1983 should be prepared to prove some inherently dangerous condition in the design of the road in question.

The foreseeable plaintiff standards that several circuits have adopted[246] should not be a roadblock for pedestrian litigants because such requirements lack constitutional grounding and are at odds with the widely accepted proposition that municipalities can be held liable for

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241. *See supra* sections III.A–B.

242. *See supra* section II.B.

243. *See, e.g.*, Xiao Ping Chen v. City of Seattle, 153 Wash. App. 890, 896–898, 911, 223 P.3d 1230, 1234, 1241 (2009).

244. *See id.* at 1234 (widow of pedestrian killed where a "combination of the crosswalk distance, problems of human perception, and the volume and speed of vehicular traffic passing through the intersection combined to create a dangerous condition at the crosswalk" successfully recovered against the City of Seattle. The city did not dispute the proximate cause element).

245. *See* Turturro v. City of New York, 68 N.E.3d 693, 698, 705 (N.Y. 2016) (mother of a child struck on his bicycle while crossing a wide street mid-block by a vehicle traveling twenty-four miles per hour over the speed limit successfully recovered against the City of New York. The Court held that, where the city had failed to implement any traffic-calming measures on a road designed to encourage speeding, the city had proximately caused the accident).

246. *See* Oren, *supra* note 155, at 1185–87 (discussing foreseeable plaintiff requirements in the Third and Tenth Circuits); *see also* Sinclair v. City of Seattle, 61 F.4th 674, 682 (9th Cir. 2023) (establishing a "specific victim" requirement for state-created danger claims); *see also* Lipman v. Budish, 974 F.3d 726, 744 (6th Cir. 2020) (listing "a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large" as an element for a successful state-created danger claim).

policies that violate constitutional rights. Constitutional scholars have expressed skepticism as to the validity of foreseeable plaintiff requirements.[247] Unlike other aspects of circuits' state-created danger tests, the requirement that the plaintiff be "specifically in danger, compared to the general public[,]" does not appear to have been "derived from the principles articulated by the Court in *DeShaney*."[248] Indeed foreseeable plaintiff requirements generally stem from pattern-matching to past cases or to imprecise readings of *Martinez v. California* rather than originating from *DeShaney* or well-articulated principles of substantive due process.[249]

To start, the pattern-matching rationale that underlies some circuits' foreseeable plaintiff requirements is highly questionable. Even if most successful state-created danger cases in the past have involved a plaintiff who is known to the state actor, it does not necessarily follow that the absence of such a foreseeable plaintiff should be fatal to a claim. For instance, consider *Sinclair v. City of Seattle*, the case that established a foreseeable plaintiff requirement in the Ninth Circuit based on a review of past cases.[250] The problem with *Sinclair*'s reasoning is revealed by taking a closer look at *Johnson v. City of Seattle*,[251] the failed state-created danger case the *Sinclair* court reviewed and cited as lacking a "specific victim."[252] While it is likely true that the city was not specifically aware of the plaintiffs in that case, the *Johnson* court did not discuss that issue—let alone decide on that basis.[253] Instead, *Johnson* held that the city's failure to implement crowd control measures that might have prevented harm to festival-goers did not give rise to liability because it was not affirmative conduct; the unforeseeability of the plaintiff was irrelevant to the court's decision.[254] *Sinclair*'s treatment of *Johnson* reveals a wider problem with using pattern-matching to invent foreseeable plaintiff

247. *See* Chemerinsky, *State-Created Danger*, *supra* note 188, at 16; *see also* Oren, *supra* note 155, at 1186 ("the Third and Tenth Circuits erred in emphasizing a 'foreseeable' class of victim, because such an element does not make constitutional sense.").

248. Chemerinsky, *State-Created Danger*, *supra* note 188, at 16.

249. *See supra* section II.B.

250. 61 F.4th 674, 683 (9th Cir. 2023).

251. 474 F.3d 634 (9th Cir. 2007).

252. *Sinclair*, 61 F.4th at 682.

253. *See Johnson*, 474 F.3d at 641 (holding the state-created danger claim was not viable on grounds unrelated to the foreseeability of the plaintiffs).

254. *Id.*

requirements: they are judicial creations that lack a clear constitutional basis.[255] As such, they should not serve as a hurdle to litigants.

Additionally, courts that derive a foreseeable plaintiff requirement from *Martinez* may have read that case too broadly. In *Martinez*—decided nine years before *Deshaney* and the birth of the state-created danger doctrine—the Court held that the plaintiff's harm was too remote to support liability based on a combination of factors, only one of which was the fact that the plaintiff was unknown to the state actors.[256] To hold out the unforeseeability of the plaintiff as dispositive is to render the rest of the context in *Martinez* irrelevant by implication. Such reasoning is at odds with *Martinez*'s decision that the specific "circumstances" of that case as a whole made the plaintiff's death "too remote a consequence" of the state's action to support liability,[257] and with the Court's intent to keep its holding narrowly tied to the facts at hand.[258]

Further discrediting the validity of foreseeable plaintiff requirements is the well-settled principle that municipalities can be sued for policy decisions that violate people's civil rights under § 1983.[259] The Court in *City of Canton, Ohio v. Harris*[260] explicitly held, in the context of a Due Process claim, that municipalities can be liable for failing to train their employees if that failure stems from city policy.[261] Surely the city in that case did not know that Geraldine Harris specifically would be harmed if it deliberately chose not to train its officers to administer medical care.[262] Imposing such a requirement would foreclose municipal liability in all but the extremely unusual case in which a city intentionally targeted a specific citizen for unconstitutional treatment. The Supreme Court has never endorsed such a position, instead making clear that a municipality can be liable under § 1983 for policies that demonstrate "'deliberate indifference' to the rights of [city] inhabitants."[263] For all of these reasons, a foreseeable plaintiff should not be a requirement to prove proximate cause in a state-created danger case. In the absence of the foreseeable

255. *See supra* notes 247–248 and accompanying text.

256. Martinez v. California, 444 U.S. 277, 285 (1980).

257. *Id.*

258. *See id.* (evincing an intent to maintain a narrow holding by declining to "decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole[,]" instead focusing on the "particular circumstances of this parole decision").

259. *See* Monell v. Dept. of Soc. Servs. of the City of New York, 436 U.S. 658, 690 (1978).

260. 489 U.S. 378 (1989).

261. *Id.* at 380–81.

262. *Id.* at 381 (naming the plaintiff).

263. *Id.* at 389.

plaintiff roadblock, pedestrian litigants who can assert that a road was dangerously designed can satisfy the proximate cause element.

C. Where Municipalities Intentionally Place Dangerous Roads for Racially Discriminatory Reasons, They Have Acted with Deliberate Indifference

In circumstances where municipalities had racially discriminatory reasons for placing dangerous roads in Black neighborhoods, their conduct likely satisfies the deliberate indifference requirement of the state-created danger doctrine. It has been widely understood for over a century that roads with automobiles pose a danger to the safety of pedestrians, especially when those vehicles are traveling at high speeds.[264] Twentieth century city governments were certainly aware that roads were likely to produce pedestrian injuries, as evidenced by the ubiquity of "jaywalking" prohibitions by the 1930s.[265] Thus, every road placement decision—and especially every decision to place a high-speed road—is to some extent a determination of which communities will be exposed to a heightened danger of pedestrian injury. To be sure, governments must regularly make difficult decisions of this nature and deserve a certain degree of deference. But it is impermissible for state actors to allow racially discriminatory motivations to infect their decision-making process.[266]

Courts should analyze cases in which municipal governments placed roads for discriminatory reasons along the same lines as *Guertin v. Michigan*,[267] the Flint Water Crisis case. There, the court held that the city had been deliberately indifferent to the safety of its residents when it intentionally began processing Flint's water at an unsafe treatment plant to cut costs.[268] The court reasoned that the city's decision to knowingly expose people to harm was made without a "legitimate government

264. *See* SCHMITT, *supra* note 9, at 69 (discussing the political struggle between drivers and pedestrians in the 1910s and '20s over who would control the streets, and highlighting a "major flashpoint" in 1923 in which Cincinnati residents fought to require speed governors in cars which would not permit them to exceed twenty-five miles per hour).

265. *See id.* at 70 (noting that after the U.S. Department of Commerce backed a recommendation that pedestrian access be limited to crosswalks in 1927, cities quickly began adopting jaywalking laws).

266. *See supra* sections I.B.2–3 (discussing state actors making infrastructural decisions for racist reasons).

267. 912 F.3d 907 (6th Cir. 2019).

268. *Id.* at 915, 933.

purpose."[269] Similarly, placing a highway around or through a Black neighborhood to segregate or disrupt it, or to avoid placing it in a white neighborhood, is an action without a legitimate government purpose. Yet as outlined above, in the mid-twentieth century city officials placed many roads and highways for explicitly discriminatory purposes.[270] Pedestrian-plaintiffs can argue that the illegitimate purpose behind these road planning decisions demonstrates deliberate indifference on the part of the municipality.

It is worth noting that in some cases—indeed, probably most—the historical record will be devoid of straightforward declarations by the municipality that their road placement was intended to target a Black neighborhood. In these cases, deliberate indifference may be challenging to prove, and litigants should seek to find as much circumstantial evidence of discriminatory intent as possible.[271] To that end, this Comment encourages historians and journalists to dig into the history of their cities' transportation policies. Unearthing more evidence of roads and highways that were placed by municipalities with racially discriminatory motives would increase the viability of pedestrian state-created danger claims. In particular, additional scholarship into the history of arterial road placement would be valuable. High-speed arterial roads are common sites of fatal pedestrian collisions,[272] but compared to racist highway placement, racist arterial road placement is relatively understudied. More research of this nature could help pave the way for successful pedestrian lawsuits.

An analysis of these three most commonly accepted elements of the state-created danger doctrine reveals a potential path for injured pedestrians to recover under § 1983 when they can prove they were injured on a dangerous road that a city built for an impermissibly racist reason.

CONCLUSION

Federal, state, and local governments bear immense responsibility for policies that have littered the United States with unsafe streets and created disproportionate danger to pedestrians of color. Section 1983 could

269. *Id.* at 926.

270. *See supra* section I.B.3 (demonstrating the explicitly discriminatory motivations expressed by the municipal government of Atlanta when determining placement of some roads and highways).

271. *See, e.g.*, Taylor Jr., *supra* note 135 (discussing how local officials in New Orleans stopped an interstate highway from running through the French Quarter but permitted an interstate to be run through a "thriving [Black] business district" in spite of community protests).

272. *See supra* note 46.

provide one small avenue for rectifying the harms of these policies by offering potential recourse for injured pedestrians to recover damages from municipalities, and hopefully introducing some incentive for cities to redesign dangerous streets in neighborhoods of color.

That said, a comprehensive solution to this problem will require much more than a few successful individual lawsuits. To make streets safer for pedestrians, local governments need to redesign them with pedestrians in mind. In a highly car-centric culture, this is no easy task; the mixed success of cities' Vision Zero projects demonstrates how such efforts can quickly fail in the face of opposition. Part of the solution must include reducing how much Americans need to rely on cars to travel effectively in their environments. For instance, cities and states should focus on creating safe, robust, and efficient public transportation systems to provide viable alternatives to automobile travel. If fewer Americans need cars to live their lives, they may be more amenable to road changes that benefit pedestrians and deprioritize the interests of drivers.[273] The twentieth century was the century of the automobile. In the twenty-first, governments must change their transportation policy priorities to make communities safer, more sustainable, and more equitable.

273. *See* Sarah Wesseler, *American Society Wasn't Always So Car-Centric. Our Future Doesn't Have to Be, Either.*, YALE CLIMATE CONNECTIONS (Oct. 3, 2023), https://yaleclimateconnections.org/2023/10/american-society-wasnt-always-so-car-centric-our-future-doesnt-have-to-be-either/ [https://perma.cc/8RD9-6KVW] (highlighting a widespread "assumption that driving is the only realistic form of transportation in most of the U.S." and noting that "people in car-heavy nations . . . tend to habitually overlook the negative effects of auto-centric transportation").