

# THE STATE-CREATED DANGER DOCTRINE IN DOMESTIC VIOLENCE CASES: DO WE HAVE A SOLUTION IN *OKIN v. VILLAGE OF CORNWALL-ON-HUDSON POLICE DEPARTMENT*?

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## INTRODUCTION

Roy Sears began physically abusing Michele Okin after the birth of their first child.<sup>1</sup> Okin sought police protection from Sears on multiple occasions. On one occasion when a police officer intervened and arrived at their home after Sears had beaten Okin, the officer did not question or arrest Sears, choosing instead to discuss football with Sears. At the time, Sears was beating Okin every day. The abuse continued after the officer left their home. The failure of the police to intervene ensured that Sears would continue to abuse Okin. Her plight

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<sup>1</sup> *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 420 (2nd Cir. 2009).

raises questions about what recourse, if any, domestic violence victims in her situation have. Can or should a woman who has suffered domestic violence in the hands of a perpetrator bring a claim against the police officers that failed to protect her? If so, does she have a viable claim for the violation of her substantive due process rights? If there is a substantive due process violation, what standard should be applied?

Violence between intimate partners, perpetrated primarily against women, is a major societal ill.<sup>2</sup> It is the “single greatest cause of injury to women in America—more than muggings, rapes, and car accidents combined.”<sup>3</sup> A woman in the United States is more likely to be killed by her partner than by any other assailant.<sup>4</sup> Domestic violence has long been considered a private matter rather than a public one, and many police officers still treat domestic violence as an issue that should be addressed in the privacy of the home.<sup>5</sup> The police sometimes fail to take steps to protect women from domestic violence, and in some cases, police action can increase victims’ risk of domestic violence.

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<sup>2</sup> *Ninth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence and the State*, 9 GEO. J. GENDER & L. 625, 626 (Diana S. Hickey & Benet Jeanne Kearney, eds., 2008); DEFENDING OUR LIVES (Cambridge Documentary Films 1994), available at <http://www.cambridgedocumentaryfilms.org/defending.html>. The Author acknowledges that domestic violence sometimes involves the abuse of men by women and that it also exists in same-sex relationships. This Article, however, focuses only on the abuse perpetrated by men against women as it is more prevalent. Nevertheless, the solutions that grow out of challenging violence perpetrated by men against women could be applied to those other forms of domestic violence.

<sup>3</sup> DEFENDING OUR LIVES, *supra* note 2; see also Evan Stark, *A Failure to Protect: Unravelling “The Battered Mother’s Dilemma,”* 27 W. ST. U. L. REV. 29, 34 (2000).

<sup>4</sup> DEFENDING OUR LIVES, *supra* note 2.

<sup>5</sup> See generally Rebecca Hulse, *Privacy and Domestic Violence in Court*, 16 WM. & MARY J. WOMEN & L. 237 (2010).

The United States Supreme Court in *DeShaney v. Winnebago County Department of Social Services*<sup>6</sup> held that the purpose of the Fourteenth Amendment is “to protect the people from the state, not to ensure that the state protect[s] them from each other.”<sup>7</sup> *DeShaney* had a devastating effect on claims that could be brought under the Due Process Clause of the Fourteenth Amendment. Indeed, *DeShaney* created an obstacle for legitimate due process claims brought in federal court. Thereafter, courts began carving out exceptions to the rule. The “state-created danger doctrine” is one of the exceptions to this general rule.

This Article addresses the availability of redress for domestic violence victims under the state-created danger doctrine. Under the doctrine, a domestic violence victim may assert a claim against a perpetrator by showing that a state agent, such as a police officer, acting under color of law, increased her danger by condoning the perpetrator’s violent actions.

The Supreme Court has yet to adopt the state-created danger doctrine. At present, there is a split among circuit courts as to what constitutes state-created danger. Earlier cases, like *Wood v. Ostranger*,<sup>8</sup> interpreted *DeShaney* as distinguishing between cases where the state’s actions do not increase the danger to a victim, therefore not triggering the exception, and cases where the state’s actions put a victim in a more dangerous position, therefore triggering the exception. At present, individual circuits have established their own tests that a victim must meet in order to make a viable state-created danger claim. This Article focuses on the tests adopted by United States Courts of Appeal for the Second, Third, Sixth and Tenth Circuits.

The Third, Sixth and Tenth Circuits have developed tests that include four to five factors that domestic violence victims

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<sup>6</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>7</sup> *Id.* at 196.

<sup>8</sup> *Wood v. Ostranger*, 879 F.2d 583, 590 (9th Cir. 1989).

bringing due process claims must prove, including, *inter alia*, whether the harm suffered by the victim was foreseeable and fairly direct, whether defendant's conduct put the victim at substantial risk of serious, immediate and proximate harm, and whether the police officer took affirmative action to increase the danger to the victim.

Because of their very specific factors, these tests are onerous and difficult to satisfy. It is therefore not surprising that victims of domestic violence who allege state-created danger almost always fail to prove one of the prongs of the requisite tests, thereby losing the opportunity to prove their cases in court.

This Article argues that courts applying the state-created danger doctrine to domestic violence cases brought under 42 U.S.C. § 1983<sup>9</sup> should look to the flexible approach adopted by the court in *Okin v. Village of Cornwall-on-Hudson Police Department*,<sup>10</sup> a recent case decided by the United States Court of Appeals for the Second Circuit. Adopting this approach would enable courts analyzing victims' claims under the state-created danger doctrine to adjust their determinations to the particular parties before them while considering the realities of domestic violence and inadequate police response.<sup>11</sup> Under the tests adopted by other circuits, there is less room for judicial discretion.

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<sup>9</sup> Section 1983 is a civil rights statute that enables a plaintiff to obtain damages against a defendant in federal court for the violation of the plaintiff's due process rights.

<sup>10</sup> *Okin*, 577 F.3d at 420.

<sup>11</sup> As discussed below, the *Okin* court noted that there are serious risks involved in domestic violence. The court announced that if the police officers in *Okin* were not aware of the dangers of domestic violence, they lacked appropriate training. *Id.* at 431–32. The court also provided some vital statistics to show that domestic violence remains a dangerous and prevalent problem. For example, the court noted that between 1976 and 2005, thirty percent of homicides involving women were committed by intimate partners. The court also cited psychological journals and provided data explaining the issue of the psychological dependence of victims on their abusers, which may instill the fear of retaliation in victims. *Id.* at 431, n.10.

As discussed in Part III, *Okin* provides a series of optional factors rather than hard-line tests for proving a viable claim under the state-created danger doctrine. These factors include whether a police officer implicitly communicated to a perpetrator that the perpetrator would not be apprehended for his actions, thereby increasing the victim's vulnerability, or whether the officer's repeated sustained inaction in the face of violence condoned the perpetrator's acts. A victim need not prove all of the factors. She need only establish one of the factors and the state of mind requirement, namely, that the police officer's action "shocked the conscience." Under this latter requirement, to establish a violation of substantive due process rights, a victim must show that "the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."<sup>12</sup> Purposeful or intentional actions are most likely to be conscience shocking, while negligently inflicted harm is beneath the threshold of constitutional due process.<sup>13</sup> Recklessly inflicted harms are evaluated on a case-by-case basis, focusing on the context.<sup>14</sup>

The *Okin* court provided a less stringent threshold for conscience shocking actions. Unlike some courts that require willful conduct by the police, the *Okin* court required only deliberate indifference. The court established that deliberate indifference shocks the conscience in domestic violence cases. In other words, the state of mind requirement in domestic violence cases is deliberate indifference.

Therefore, in comparison with other circuit courts' tests, the *Okin* test is more conducive to promoting justice for women who have suffered domestic violence at the hands of intimate partners.<sup>15</sup> The application of the adaptable factors in *Okin* may

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<sup>12</sup> *Id.* at 431.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> This Article defines domestic violence broadly to encompass abuse in all kinds of intimate relationships between males and females, including violence perpetrated by current and ex-boyfriends and current and ex- husbands.

also provide police with an incentive to protect women from domestic violence.

Part I discusses the problems of domestic violence and inadequate police response. It describes the origin of the state-created danger doctrine and explains its parameters. Part II looks at the state-created danger doctrine in domestic violence cases only, emphasizing the division among the circuits on the issue. It also provides an in-depth survey of the facts and the court's analysis in *Okin v. Village of Cornwall-on-Hudson Police Department*.

Part III argues that the factors for assessing state-created danger in domestic violence cases applied by the court in *Okin* provide a means to remedy the violation of victims' constitutional rights and may provide incentives for police enforcement of laws protecting victims from violence. Part III stresses the flexibility of the *Okin* factors and the Second Circuit's limited emphasis on the distinction between the police's acts of omission and acts of commission and the advantages of taking this approach over emphasizing the difference between action and inaction as other circuit courts do. Part III also applies the *Okin* factors to the facts of other cases to emphasize the flexibility of the factors. However, this Article cautions that applying the flexible standards in *Okin* may have its costs; therefore, Part III also provides some possible criticisms of the *Okin* factors. Despite these criticisms, however, the *Okin* factors' advantages outweigh their disadvantages.

## **I. "Serious and Unique Risks and Concerns of Domestic Violence."<sup>16</sup>**

Domestic violence is a prevalent problem that subjects women to extreme acts of physical violence.<sup>17</sup> As the literature

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<sup>16</sup> *Okin*, 577 F.3d at 431.

<sup>17</sup> Peter S. Hovmand, David N. Ford, Ingrid Flom & Stavroula Kyriakakis, *Victims Arrested for Domestic Violence: Unintended Consequences of Arrest Policies*, 25 SYS. DYNAMICS. REV. 25, 161 (2009); see also, Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371 (2003) (considering the problem of domestic violence from a human

well documents, domestic violence is a serious societal ill.<sup>18</sup> Historically, an assault between a male and a female in an intimate relationship, especially when they were married, was considered to be a private matter to be dealt with in the home and not by the state.<sup>19</sup> Unfortunately, the antiquated notion that a man and woman had become one upon marriage, and their relationship was therefore no longer a matter for public scrutiny, remains firmly ensconced in our society even today.<sup>20</sup>

In the United States, about 1.5 million women experience physical or sexual assault from a current or former intimate

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rights perspective, the author argues that international tribunals and courts should step in because the problem is not private but official torture perpetrated on women all over the world). Domestic violence is not limited to physical acts of violence; there is also sexual, psychological and emotional abuse. MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN 4 (1992). This Article focuses primarily on physical violence because victims are more likely to seek help from the police for physical violence than other forms of domestic violence.

<sup>18</sup> See Ida M. Johnson, *Victims' Perception of Police Response to Domestic Violence Incidents*, 35 J. CRIM. JUST. 498 (2007); Caroline Bettinger-López, *Jessica Gonzales v. United States: An Emerging Model For Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 186 (2008) ("Domestic violence is among the most dangerous and common forms of gender-based violence in the United States.").

<sup>19</sup> Johnson, *supra* note 18, at 498; see, also., Bruno v. Codd, 396 N.Y.S.2d 974, 1051–52 (1977) (discussing that a probation officer told one of the plaintiffs whose husband broke into her apartment and threatened her with a knife, that she had no case and could not see a judge because her husband could enter and leave her apartment as he wished. The officer also told her that "a man's home is his castle; he had every right to do whatever he wanted in his apartment."); Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (explaining that under American common law, men were allowed to chastise their wives so long as it was done in moderation, that is, "he didn't use a switch any bigger than his thumb." In 1874, the North Carolina Supreme Court explained in relation to a husband beating his wife that "if no permanent injury is inflicted, and the beating was not done in malice or cruelty, it is better to draw the curtain, shut out the public gaze, and leave the parties to forgive and forget"); See generally Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353 (2008).

<sup>20</sup> See Angela Zielinski, *Attorney Fees as Necessaries of Life: Expanding a Domestic Violence Victim's Life to Safety and Justice*, 60 MONT. L. REV. 201, 206 (1999).

partner every year.<sup>21</sup> At least half of all American couples in the United States have experienced violence, with serious incidents of domestic violence occurring frequently among intimate partners.<sup>22</sup> Approximately twenty-five percent of all women in the United States have experienced physical or sexual violence perpetrated by a current or former intimate partner or date at some point in their lifetimes.<sup>23</sup> Despite the prevalence of domestic violence, there is still widespread failure to recognize how commonplace the problem is and to work towards ending it.<sup>24</sup>

The police are often the first potential sources of protection and assistance that victims of domestic violence turn to for help.<sup>25</sup> But because of the notion that domestic violence is private, police often fail to take appropriate steps to protect victims.<sup>26</sup> In the 1970s, feminist groups across the United States began to publicly criticize the police for their failure to

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<sup>21</sup> Hilary G. Harding & Marie Helweg-Larsen, *Perceived Risk for Future Intimate Partner Violence Among Women in Domestic Violence Shelter*, 24 J. FAM. VIOLENCE 75, 75 (2009).

<sup>22</sup> Johnson, *supra* note 18, at 498–510.

<sup>23</sup> Harding, *supra* note 21, at 76.

<sup>24</sup> Demie Kurz, *Separation, Divorce, and Woman Abuse*, 2 VIOLENCE AGAINST WOMEN 63 (1996).

<sup>25</sup> See Johnson, *supra* note 18, at 499.

<sup>26</sup> Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 CRIM. JUSTICE & BEHAVIOR, 306, 307 (1998);. See, also., Joanne Belknap, Heather C. Melton, Justin T. Denny, Ruth E. Flenny-Steiner, & Cris M. Sullivan, *The Levels and Roles of Social and Institutional Support Reported by Survivors of Intimate Partner Abuse*, 4 FEMINIST CRIMINOLOGY 377, 395 (2009) (noting that the frequency of intimate partner violence is well documented. The authors conducted research to determine the avenues that women who have suffered domestic violence use to obtain support. They found that police and other legal advisers were rated the least supportive of both social and institutional supporters).



effectively intervene in domestic violence cases.<sup>27</sup> There was a surge in civil action suits that served as a wake-up call for the police, but even this did not solve the problem.<sup>28</sup> States then began enacting mandatory arrest laws,<sup>29</sup> which would allow police officers to arrest perpetrators of domestic violence even when the victim did not want to file a complaint; these laws increased arrests for minor assaults in domestic violence cases.<sup>30</sup>

Today, at least twenty-two states and the District of Columbia have mandatory arrest laws.<sup>31</sup> For example, the New York Mandatory Arrest Law, a provision in the Family Protection and Domestic Violence Intervention Act of 1994,<sup>32</sup> provides in relevant part that “a police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that a felony has been committed by such person against a member of the same family or household.”<sup>33</sup>

Nevertheless, even with mandatory arrest laws, some police officers still give domestic violence calls a lower priority than other forms of violence.<sup>34</sup> Domestic violence has been labeled the “common cold” of police work.<sup>35</sup> In spite of

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<sup>27</sup> Johnson, *supra* note 18, at 499.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> Stark, *supra* note 3, at 33–34.

<sup>31</sup> NAT'L INST. OF JUSTICE, DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES, *available at* <http://www.ojp.usdoj.gov/nij/publications/dv-dual-arrest-222679/exhibits/table1.htm> (last visited May 15, 2011).

<sup>32</sup> N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1994).

<sup>33</sup> *Id.* § 140(4)(a).

<sup>34</sup> *See* Susanne M. Browne, *Due Process and Equal Protection Challenges to The Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1298 (1995).

<sup>35</sup> *Id.* (quotations omitted).

mandatory arrest requirements, police too often fail to file reports on domestic violence or arrest perpetrators.<sup>36</sup> Police attitudes can encourage domestic violence because once the police arrive at the scene of domestic violence and act in a way that communicates that nothing will be done to stop the perpetrator, the abuser will likely continue the violence with renewed vengeance.<sup>37</sup>

### A. What is the State-Created Danger Doctrine?

The state-created danger doctrine is essentially an exception to the rule established by the United States Supreme Court in *DeShaney v. Winnebago County Department of Social Services*<sup>38</sup> that “as a general matter . . . a state’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”<sup>39</sup> Some courts have

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1299.

<sup>38</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989). Joshua DeShaney was about four years old when he was brutally physically abused by his father, who had been awarded custody of him after his parents’ divorced. Joshua was admitted to the hospital on multiple occasions for multiple suspicious injuries. The state’s Department of Social Services temporarily removed Joshua from the custody of his father, but always returned him home because there was “insufficient evidence of child abuse.” In March 1984, Joshua’s father so severely beat the four year old that he fell into a lifeless coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. The brain damage was so severe that he was expected to spend the rest of his life in an institution for people with profound retardation. He and his mother brought an action against the county and its employees for violating Joshua’s constitutional rights under § 1983. The Supreme Court denied their claims. The Court concluded that due process does not provide an affirmative right to governmental protection; the state has no duty to protect an individual from private harm. *Id.* at 196. The court then expressly stated that there are exceptions to this rule. One exception is when a state involuntarily confines an individual; it has a duty to provide care for such individual. Joshua did not fall into this category because he was not harmed in the state’s custody. This is the special relations exception. *Id.* at 198. The other exception is the state-created danger doctrine that Circuit Courts have carved out of the decision. *See Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).

<sup>39</sup> *Id.* at 196.

interpreted the state-created danger doctrine as complementary to the *DeShaney* decision itself.<sup>40</sup> In essence, *DeShaney* stands for the proposition that the government is not liable for violence suffered by a victim if the harm was perpetrated by a third party.<sup>41</sup> After *DeShaney*, there emerged only two situations in which a woman who suffered domestic violence could bring a due process claim against the police: (1) if the state restrained the personal liberty of the victim by taking her into custody; or (2) if the police acted to create or increase the danger to the victim.<sup>42</sup> The first exception is generally known as the special relationship exception to the *DeShaney* rule.<sup>43</sup> The second exception, known as the state-created danger doctrine, is the subject of this Article.

After *DeShaney*, circuit courts began carving out their own interpretations of the state-created danger doctrine.<sup>44</sup> The problem with the doctrine is that almost all circuits have adopted their own standard for what constitutes state-created danger.<sup>45</sup>

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<sup>40</sup> See *Burella v. City of Philadelphia*, 501 F.3d 134, 146 (3d Cir. 2007) (quoting *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006)).

<sup>41</sup> See Erwin Chemerinsky, *Selected Excerpts: Practising Law Institute's Twenty-Third Annual Section 1983 Civil Rights Litigation: The State-created Danger Doctrine*, 23 *TOURO L. REV.* 1, 7 (2007).

<sup>42</sup> Browne, *supra* note 34, at 1305.

<sup>43</sup> The special relationship exception to the *DeShaney* rule is beyond the scope of this Article, but courts have generally recognized it. See, e.g., *Pinder v. Johnson*, 54 F.3d 1169, 1174–75 (4th Cir. 1995) (rejecting the state-created danger doctrine exception to the *DeShaney* rule and concluding that the custody exception is the only recognized exception under *DeShaney*). See, also., *Garrett v. A.C. Gilliss*, 1995, \*1 1995 WL 16810, at \*1 (6th Cir. Jan. 17, 1995) (“Even in situations where the defendant may be aware of danger to an individual . . . the defendant is under no constitutional duty to protect the individual absent the special relationship.”).

<sup>44</sup> See, e.g., *Kneipp v. Tedder*, 95 F.3d 1199, 1207 (3d Cir. 1996) (noting that several circuits had carved out the state-created danger doctrine as an exception to *DeShaney*).

<sup>45</sup> See Chemerinsky, *supra* note 41, at 11.

The United States Supreme Court has yet to adopt the doctrine.<sup>46</sup> Interestingly, the state-created danger doctrine has been applied to many different contexts besides domestic violence.<sup>47</sup>

The state-created danger doctrine creates a constitutional claim for victims injured in certain ways by state actors.<sup>48</sup> It posits that when a state actor, such as a police officer, affirmatively acts to create or increase the danger to an individual, her due process rights have been violated, and she can bring a claim against the state action under § 1983.<sup>49</sup> Thus, circuit courts have interpreted the state-created danger doctrine to require an affirmative act on the part of the state actor, rather than passivity or a failure to act.<sup>50</sup> But there is not always a clear

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<sup>46</sup> *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006).

<sup>47</sup> See generally Laura Oren, *Safari into the Snake Pit: the State-created Danger Doctrine*, 13 WM. & MARY BILL RTS. J., 1165 (2005); see, also., *Dwars v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (applying the state-created danger doctrine to violence perpetrated by certain “skinheads” during a demonstration where an American flag was burned and the police watched the perpetrators assault the victim); *Pena v. Deprisco*, 435 F.3d 98 (2d Cir. 2005) (applying the state-created danger doctrine to a case where the family members of a victim killed by a drunk driver who was a police officer brought a claim against other police officers for encouraging his drunkenness); *Hunt v. Sycamore Sch. Dist. Bd. of Educ.*, 542 F.3d 529 (6th Cir. 2008) (relating the state-created danger doctrine to an action brought by a teacher who claimed the school violated her substantive due process rights by subjecting her to dangerous working conditions in her job as a teacher’s aide for special education students); *Philips v. Cnty. of Allegheny*, 515 F.3d 224 (3d Cir. 2008) (applying the state-created danger doctrine to a case where a decedent’s mother brought suit against a supervisor and other 911 dispatchers for failing to warn her son and his girlfriend of impending danger, even though the supervisor was aware of the possible danger that was likely to befall them, and for essentially helping the perpetrator obtain information to track the victims. The court dismissed the case to allow the plaintiff to amend her complaint to plead facts that showed action rather than inaction. On remand, the court dismissed the case. *Philips v. Cnty. of Allegheny*, 2008 U.S. Dist. LEXIS 49709 (W.D. Pa., June 24, 2008).

<sup>48</sup> See *Bustos v. Martini Club Inc.*, No. 09-50079, 2010 WL 744301, at \*5 (5th Cir. Mar. 5, 2010).

<sup>49</sup> *Pena*, 432 F.3d at 100.

<sup>50</sup> See, e.g., *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995). The *Pinder* court explained its specific characterization and distinction between actions and inactions by contending that if the police were found liable based on

distinction between actions and inactions.<sup>51</sup> While some courts have attempted to distinguish actions from inactions, such distinctions are not convincing.<sup>52</sup> Often times “the line between action and inaction is often in the eyes of the beholder.”<sup>53</sup>

The state-created danger doctrine has been applied to domestic violence cases as well. In order to show the disparity between the different tests that circuits have adopted, the Third, Sixth and Tenth Circuit tests will be used as illustrations.<sup>54</sup>

## II. The State-Created Danger Doctrine in Domestic Violence Cases

### A. The Third Circuit’s Test

In *Burella v. City of Philadelphia*,<sup>55</sup> the court acknowledged that there was a history of physical and emotional abuse perpetrated by the victim’s husband, George Burella.<sup>56</sup>

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omissions rather than actions, then the police will be found to have created the danger every time they do anything that make injury to victims at the hands of third parties more likely, and that is not a desirable result.

<sup>51</sup> *Pena*, 432 F.3d at 109. In fact, the action/inaction distinction has been characterized as flawed for not bearing any connection to legislative intent under § 1983; Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent “State-Created Danger” Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 230 (2002) (arguing that the action-inaction distinction is an example of “a distinction without a difference.”).

<sup>52</sup> See, e.g., *Bright v. Westmoreland Cnty.*, 443 F.3d 276 (3d Cir. 2006). The state-created danger was applied in *Bright* in the context of a probation officer’s duties. The court did not find any of the officer’s inactions to suffice as actions even though the perpetrator in that case violated his terms of probation in the presence of the officer, and the officer confronted the perpetrator. *Id.*

<sup>53</sup> Laura Oren, *Some Thoughts on the State-created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 TEMP. POL. & CIV. RTS. L. REV. 47, 53 (2006).

<sup>54</sup> The Author has specifically chosen to use these three circuits’ tests because of their unique ways of interpreting and analyzing the state-created danger doctrine.

<sup>55</sup> *Burella v. City of Philadelphia*, 501 F.3d 134 (3d Cir. 2007).

George was a police officer who had been convicted of disorderly conduct for stalking his wife.<sup>57</sup> He had severe gambling problems and attempted suicide.<sup>58</sup> The domestic violence perpetrated against his wife, Jill, consisted of assaults, death threats and severe beatings over a series of years.<sup>59</sup> On one occasion, George assaulted his wife and another man at a local bar.<sup>60</sup> He went home, called his wife and threatened to shoot their son if she did not return home immediately.<sup>61</sup> Jill rushed home, and George threatened her with a gun.

Police officers arrived at the scene where George refused to surrender until an officer agreed to report the case as an “incident of domestic disturbance, rather than a more serious offense.”<sup>62</sup> The officers left, and George began beating his wife on their front lawn until her parents rescued her from him.<sup>63</sup> He then followed them to Jill’s parents’ house.<sup>64</sup> When she tried to call the police, he wrestled the phone from her, telling the operator that he was a police officer and that everything was under control.<sup>65</sup> Jill reported the incident to the Police Department’s Employee Assistance Program, but the incident was never investigated.<sup>66</sup>

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<sup>56</sup> *Id.* at 136.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 137.

<sup>60</sup> *Id.*

<sup>61</sup> *Burella*, 501 F.3d at 137.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 136.

On another occasion, after George had assaulted his wife, Jill called the police and reported the attack.<sup>67</sup> Nevertheless, the police allowed George to leave with their youngest daughter.<sup>68</sup> They took Jill home with the other children where her husband continued to beat her.<sup>69</sup> Jill obtained an order of protection; however, when she served it on George, he shouted and threatened her while a police officer watched and permitted him to enter the house.<sup>70</sup> Jill called the police on two subsequent occasions to report domestic violence, but she was told that the police could do nothing to stop George unless he was physically present at the scene.<sup>71</sup> Shortly thereafter, George went to their home and shot Jill in the chest. George also shot and killed himself.<sup>72</sup> Fortunately, Jill survived the attack.<sup>73</sup>

Applying the state-created danger doctrine to the facts of this case, the Third Circuit outlined four prongs of its state-created danger doctrine test: (1) the harm caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.<sup>74</sup>

Before applying the test to the facts in *Burella*, the court noted, in reference to *DeShaney*, that the state has no obligation to protect a victim from harm caused by a third party.<sup>75</sup> The

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<sup>67</sup> *Burella*, 501 F.3d at 137.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 138.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Burella*, 501 F.3d at 138.

<sup>74</sup> *Id.* at 147.

<sup>75</sup> *Id.* at 146.

court stated that once the state took steps to intervene in domestic violence, it was not obligated to do so in a reasonably competent manner.<sup>76</sup> The court then dismissed the case based primarily on the fourth prong of the test, that there was no affirmative act on the part of the police which created a danger to the victim or that rendered her more vulnerable to harm.<sup>77</sup> The court went on to characterize the police officers' actions, including their statements that there was nothing they could do, their continual refusal to enforce the court order and the police presence while the victim's husband threatened to kill her, as inactions that were not enough for making a sufficient claim under the state-created danger doctrine.<sup>78</sup> The court noted that the Third Circuit "explicitly require[s] an affirmative act, rather than inaction."<sup>79</sup>

## B. The Tenth Circuit's Test

In *Eckert v. Town of Silverthorne*,<sup>80</sup> the perpetrator, Tuxie Eugene Ballard III had assaulted his wife and then called the police to report an assault perpetrated on him by the victim, Linda Lou Eckert.<sup>81</sup> When the police arrived, they saw the perpetrator holding a cordless phone and bleeding from the

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<sup>76</sup> *Id.* at 145.

<sup>77</sup> *Id.* at 147.

<sup>78</sup> *Id.*

<sup>79</sup> *Burella*, 501 F.3d at 147.

<sup>80</sup> *Eckert v. Town of Silverthorne*, 25 F. Appx. 679 (10th Cir. 2001). In *Eckert*, the victim was arrested instead of the perpetrator. This problem is worse than "dual arrest" cases where a domestic violence victim is herself arrested along with the perpetrator for the act of violence against her. This may occur when arrest is mandatory, and police officers are required to make arrests if they find probable cause that the violent act occurred. See Victoria Fyre, Mary Haviland & Valli Rajah, *Dual Arrest and Other Unintended Consequences of Mandatory Arrest in New York City: A Brief Report*, 22 J. FAM. VIOLENCE 397, 404 (2007). Police officers need to be better trained to handle dual arrest cases so that they do not arrest the victim with the perpetrator because doing so may embolden the perpetrator or even validate his actions. *Id.*

<sup>81</sup> *Eckert*, 25 F. Appx. at 682.



mouth.<sup>82</sup> The victim explained that the perpetrator had caused his own injuries by striking his face with a rock and then had called the police before she was able to.<sup>83</sup> The victim showed the police physical evidence of past acts of violence caused by the perpetrator, including red marks on her arms.<sup>84</sup> The parties' son told the police that he witnessed his father hitting himself with a rock, but the officers ignored the child's attempt to show them the bloody rock.<sup>85</sup>

The victim was arrested for misdemeanor-level harassment, and the police left the party's son with the perpetrator.<sup>86</sup> When the victim tried to explain what happened to the police, she was advised that the charges against her would be dropped if she agreed to leave the state.<sup>87</sup> She supplied the police with copies of previous protective orders and an indictment against the perpetrator for past domestic violence and other information suggesting that the perpetrator had committed violent acts on previous occasions, but the police officers refused to arrest him and instead advised her to plead guilty to domestic violence.<sup>88</sup>

Charges against the victim were later dismissed for lack of evidence, but her abuser continued to harass and threaten both her and their son. She then brought a claim of state-created danger under § 1983.<sup>89</sup>

Of all the circuits that have adopted the state-created danger doctrine, the Tenth Circuit has the most burdensome

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Eckert*, 25 F. Appx. at 682.

<sup>88</sup> *Id.* at 683.

<sup>89</sup> The victim also alleged the violation of her Equal Protection rights, a discussion that is beyond the scope of this Article.

test.<sup>90</sup> In applying the state-created danger doctrine to *Eckert*, the court determined that the plaintiff did not meet the requirements of the test.<sup>91</sup> Under the Tenth Circuit test, the plaintiff must show that:

(1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant's conduct put plaintiff at substantial risk of serious, immediate and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.<sup>92</sup>

Similar to the *Burella* court, the *Eckert* court made its determination by focusing on the affirmative act and the conscience shocking prongs.<sup>93</sup> Also like the *Burella* court, the Tenth Circuit in *Eckert* construed actions as inactions, immunizing the officers from any liability.<sup>94</sup> The court contended that the victim failed to show how her being arrested placed her in greater exposure to harm.<sup>95</sup> For the state of mind prong, the court concluded that the police officers had not acted recklessly and their actions did not shock the conscience.<sup>96</sup>

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<sup>90</sup> Barrett, *supra* at note 51, at 204.

<sup>91</sup> *Eckert*, 25 F. Appx. at 689.

<sup>92</sup> *Id.* at 688.

<sup>93</sup> *Id.* at 689.

<sup>94</sup> *Id.* at 688.

<sup>95</sup> *See id.*

<sup>96</sup> *Eckert*, 25 F. Appx. at 689.

Making the test more complicated, the Tenth Circuit utilized a balancing test for the conscious shocking factor.<sup>97</sup>

To determine whether police officers' actions shock the conscience, the Tenth Circuit considers: "(1) the general need for restraint; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policy decisions impacting public safety."<sup>98</sup> Therefore, the court concluded that the state-created danger doctrine should be applied only to "exceptional circumstances."<sup>99</sup> In essence, "even knowingly permitting unreasonable risks to continue does not necessarily rise to the level of conscience shocking."<sup>100</sup>

### C. The Sixth Circuit's Test

Similar to other circuits that have adopted the state-created danger doctrine, the Sixth Circuit has applied it to domestic violence cases. In *May v. Franklin County Commissioners*,<sup>101</sup> the victim, Deborah Kirk, was murdered by her boyfriend Moss.<sup>102</sup> During the conflict that led to her death, Kirk called 911 three times.<sup>103</sup> In her first phone conversation with the police, Deborah reported that there was a domestic problem, but she thought the situation was under control.<sup>104</sup> The police officer did not ask her

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (quoting *DeAnzona v. City & Cnty. of Denver*, 222 F.3d 1229, 1235 (10th Cir. 2000)).

<sup>101</sup> *May v. Franklin Cnty. Comm'rs*, 437 F.3d 579 (6th Cir. 2006).

<sup>102</sup> *Id.* at 580.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 581.

any of the eight questions required by the county for handling domestic violence calls.<sup>105</sup>

When the victim made her second call, it was clear that she was being assaulted because of the noise in the background and because the perpetrator was threatening to harm her further.<sup>106</sup> The officer coded it a “possible domestic violence dispute” and assigned it a priority 3, a mid-level priority used for domestic violence calls when there is no violence used or threatened.<sup>107</sup>

When she made her third call, the same police officer who took the second call thought the dispute was escalating and termed it a “good domestic dispute.”<sup>108</sup> When an officer arrived at the scene six minutes after the third call, he went to the door, listened, but did not see or hear any signs of a struggle.<sup>109</sup> He knocked on the door, received no answer and decided to clear the call.<sup>110</sup> Kirk’s body was removed from her apartment the next day.<sup>111</sup>

To determine whether the plaintiff could establish a claim under the state-created danger doctrine, the court enumerated the test required for alleging a viable claim:

- (1) affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence; (2) the victim faces “special danger,” in that the state’s actions place [her] specifically at risk, as distinguished from a risk that affects the

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *May*, 37 F.3d at 581.

<sup>108</sup> *Id.* at 582.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

public at large; and (3) the state must have known or clearly should have known that its actions specifically endangered an individual.<sup>112</sup>

In *May*, the court held that the plaintiff had not established that the police increased the danger to the victim.<sup>113</sup> The court stated that the due process clause serves as a protection of the people from the state and not to ensure that the state protects them from each other.<sup>114</sup> Again, like the Third and Tenth Circuits, the court construed the police officers' actions as inactions that did not suffice to establish a state-created danger doctrine claim.<sup>115</sup>

The plaintiff argued that the arrival, knocking on the door and departure of the police officer emboldened the perpetrator to believe that he could harm her without being apprehended for it, thereby increasing the likelihood that he would kill her.<sup>116</sup> The court rejected this argument and contended that dispatching an officer to the scene did not increase the risk of harm to the victim because she was already in danger of being killed by the perpetrator.<sup>117</sup> The court also contended that the police officer's clearing of the victim's call was not an affirmative act that created or increased her risk of danger.<sup>118</sup>

The court mentioned that the plaintiff produced persuasive evidence that the police officers failed to follow their domestic violence policies, and that the officers' actions were not faultless, but nevertheless concluded that none of the officers'

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<sup>112</sup> *Id.* at 584 (internal quotations omitted) (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)).

<sup>113</sup> *May*, 437 F.3d at 580.

<sup>114</sup> *Id.* at 583.

<sup>115</sup> *Id.* at 584.

<sup>116</sup> *Id.* at 585.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 586.

actions directly increased the victim's vulnerability to danger.<sup>119</sup> The victim could therefore not show that the police officers' actions were sufficient affirmative acts to sustain a claim of state-created danger.<sup>120</sup>

In another Sixth Circuit case, *Brooks v. Knapp*,<sup>121</sup> the court affirmed the district court's decision that the domestic violence victim did not establish a viable claim of state-created danger.<sup>122</sup> In *Brooks*, the assailant was the estranged husband of the victim.<sup>123</sup> The victim called the police on numerous occasions due to serious threats, assaults and violence.<sup>124</sup>

The victim first called the police when she was seriously threatened by her husband and was afraid to return home; the police escorted her home.<sup>125</sup> A month later, she was able to obtain a Personal Protection Order<sup>126</sup> against the perpetrator, which subjected him to arrest if he violated the order.<sup>127</sup> Not surprisingly, he violated the order by threatening her with a gun.<sup>128</sup> When the police failed to respond quickly, the victim fled her home with her son while the perpetrator drove after them in his car.<sup>129</sup> When the police arrived and found no one at their

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<sup>119</sup> *May*, 437 F.3d at 586.

<sup>120</sup> *Id.*

<sup>121</sup> *Brooks v. Knapp*, 221 F. Appx. 402 (6th Cir. 2007).

<sup>122</sup> *Id.* at 407.

<sup>123</sup> *Id.* at 403.

<sup>124</sup> *Id.* at 404–05.

<sup>125</sup> *Id.* at 404.

<sup>126</sup> *Id.* (noting that a PPO is equivalent to an Order of Protection).

<sup>127</sup> *Brooks*, 221 F. Appx. at 404.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

residence, they returned to the station without doing anything further.<sup>130</sup>

On another occasion, neighbors called the police when the perpetrator had threatened the victim while he was under the influence of drugs and alcohol.<sup>131</sup> He had also begun kicking and beating the victim.<sup>132</sup> He fled before the police arrived, but was captured and arrested for assault and violating the protective order.<sup>133</sup> The perpetrator was however released the next morning.<sup>134</sup>

On another occasion, the police arrived at the parties' residence after receiving a hang-up 911 call.<sup>135</sup> The assailant had physically assaulted the victim and ripped the phone off the wall when she tried to call for help.<sup>136</sup> The police put him in the back of the car but did not arrest or handcuff him.<sup>137</sup> Instead, they allowed him to use his cell phone to make calls.<sup>138</sup> He was released thereafter.<sup>139</sup> The next morning, the assailant broke into the house and shot and killed the victim and himself.<sup>140</sup>

Similar to the analysis adopted by the Third and Tenth Circuits and the *May* court, the court construed affirmative acts as inactions. The court disagreed with the plaintiff's argument

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Brooks*, 221 F. Appx. at 404.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 405.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Brooks*, 221 F. Appx. at 405.

<sup>140</sup> *Id.*

that the failure of the officers to arrest the perpetrator after they put him in the patrol car made the victim more vulnerable to harm and emboldened the perpetrator to return home to murder her.<sup>141</sup> The court went even further to say that there is no actionable state-created danger in a case where the officers not only ignored or disregarded the risk of injury, but also condoned it.<sup>142</sup>

At least one decision in the Sixth Circuit has gone the other way. In *Smith v. City of Elyria*,<sup>143</sup> the victim's ex-husband stabbed the victim twelve times and killed her.<sup>144</sup> The perpetrator also stabbed and injured his nine-year-old daughter.<sup>145</sup> In May 1986, the victim filed a complaint with the police alleging that the perpetrator threw and broke household items, grabbed her around the throat and threatened to harm her with several objects including glass.<sup>146</sup> The perpetrator was charged with "knowingly causing or attempting to cause physical harm to a family or household member," a first degree misdemeanor.<sup>147</sup> He was sentenced to six months in jail and a \$500 fine, but was given credit for time served and the sentence was suspended on the condition that he would not contact the victim in the future.<sup>148</sup>

The perpetrator violated the terms of his probation but was released on parole.<sup>149</sup> On March 2, 1989, the victim permitted

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 407.

<sup>143</sup> *Smith v. City of Elyria*, 857 F. Supp. 1203, 1210 (N.D. Ohio 1994).

<sup>144</sup> *Id.* at 1205.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Smith*, 857 F. Supp. at 1205.



the perpetrator to move into her guestroom.<sup>150</sup> The perpetrator then refused to return the keys to the house to the victim.<sup>151</sup> At a later date, the victim asked him to move out, but he refused.<sup>152</sup> The victim then called the Elyria Police Department; when the police arrived, she told them that she wanted the perpetrator to leave because he was upsetting her child.<sup>153</sup> The officers did not speak with the victim and the perpetrator separately.<sup>154</sup> The police told the victim that it was “a civil matter, not a police matter,” and she could initiate eviction proceedings if she wanted him to leave.<sup>155</sup> The officers told the perpetrator that the victim could “not put him out at her whim because she had invited him.”<sup>156</sup>

In the officers’ presence, the victim threw a plastic bag containing the perpetrator’s belongings out through the window.<sup>157</sup> When the perpetrator asked the police what he could do to be able to move back in, the police told him “just throw them back in.”<sup>158</sup> A few minutes later, the parties’ daughter called the police to report that the perpetrator was beating the victim.<sup>159</sup> When the victim’s sister took the phone, the dispatcher told her that since the victim let the perpetrator into her house,

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1206.

<sup>154</sup> *Id.*

<sup>155</sup> *Smith*, 857 F. Supp. at 1206.

<sup>156</sup> *Id.* (quotations omitted).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1206.

<sup>159</sup> *Id.*

there was nothing the police could do because it was a civil matter.<sup>160</sup>

Some minutes after the call, the officer who answered the phone call began attempting to contact police officers.<sup>161</sup> One officer was at lunch, and the officer who answered the phone testified that she “would not call an officer off lunch for a basic disturbance.”<sup>162</sup> A neighbor then called the police to report that the victim had been stabbed.<sup>163</sup> Two minutes later, the parties’ daughter called to report that her mother was dead.<sup>164</sup>

In applying the Sixth Circuit’s test to these facts, the court also focused on the affirmative act prong.<sup>165</sup> However, the court found that the victim established a viable state-created danger doctrine claim.<sup>166</sup> The court determined that the police officers had affirmatively acted to increase the danger to the victim.<sup>167</sup> By their actions, the perpetrator was able to use the apparent authority of the police to remain in his ex-wife’s house, which provided him with the opportunity to kill her.<sup>168</sup>

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<sup>160</sup> *Id.* at 1207.

<sup>161</sup> *Smith*, 857 F. Supp. at 1207.

<sup>162</sup> *Id.* (quotations omitted).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (noting that the state must take some action that places the victim in danger or increases the potential danger to her).

<sup>166</sup> *Id.* The plaintiff was able to establish that the police officers either created or increased the danger to the victim when the officers (1) told her in the presence of the perpetrator that she had to initiate eviction proceedings to remove him from the house; (2) told her to call back if she felt the situation was getting out of hand; and (3) told the perpetrator that he should throw his clothes back into the house if the victim threw them out. *Id.* at 1210.

<sup>167</sup> *Smith*, 857 F. Supp. at 1207

<sup>168</sup> *Id.* at 1210.

**D. The Second Circuit's Test: *Okin v. Village of Cornwall-on-Hudson Police Department***

Michele Okin and Roy Sears began their relationship in 1999.<sup>169</sup> They moved in together and became parents in May 2001.<sup>170</sup> That same year, Sears began physically abusing Okin.<sup>171</sup> Okin sought police protection from Sears on multiple occasions over a fifteen-month period.<sup>172</sup> Sears was well known by the local police as he socialized with them at a tavern of which he was part owner.<sup>173</sup> Sears often bragged that he could get away with anything in Cornwall.<sup>174</sup> Okin testified that Sears injured both her hands in October 2001, but she did not report this incident to the police.<sup>175</sup> In fact, she begged her primary care physician not to tell anyone or record the incident in her medical records because "she was afraid that Sears was beyond the law."<sup>176</sup>

The first reported domestic violence incident perpetrated by Sears was on December 23, 2001.<sup>177</sup> Okin made three 911 calls before police officers arrived at 11 Taft Place, where she and Sears resided.<sup>178</sup> Sears had grabbed her neck and choked

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<sup>169</sup> *Okin*, 577 F.3d at 420.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 420, 427. Okin, or someone acting on her behalf, called the police for protection at least sixteen times during the course of the domestic violence.

<sup>173</sup> *Id.* at 420.

<sup>174</sup> *Id.*

<sup>175</sup> *Okin*, 577 F.3d at 420.

<sup>176</sup> *Id.* It is not uncommon for victims and survivors of domestic violence to refuse to report incidents for fear of retaliation. See Browne, *supra* note 34, at 1298.

<sup>177</sup> *Okin*, 577 F.3d at 420.

<sup>178</sup> *Id.*

her.<sup>179</sup> When the police arrived, Okin asked the officer to tell Sears to stop beating her. She also showed the officer the bruises on her legs, which the officer reported to be very old.<sup>180</sup> At the time, Sears was beating her every day.<sup>181</sup> The officer's incident report also indicated that Sears told Okin that Sears told another officer that he could not "help it sometimes when he smacks Michele Okin around."<sup>182</sup> The police report indicated that Sears had beaten Okin and that she was afraid that her children would be beaten as well.<sup>183</sup> The officer wrote "bruises" next to the box for injuries, but Sears was not questioned about the bruises.<sup>184</sup> Instead, the officers bantered with Sears about football.<sup>185</sup>

On January 1, 2002, Okin again called the police to report that Sears was beating her.<sup>186</sup> Officer Weber responded to the scene but made no written report and laughed at Okin for calling the police.<sup>187</sup> On March 8, Okin called the police to report that Sears had stabbed her feet.<sup>188</sup> She asked that Sears be arrested.<sup>189</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Okin*, 577 F.3d at 420.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 422. Officer Weber claimed that there were no visible injuries. It is important to note that in several cases, the police fail to arrest a perpetrator of domestic violence because there is no evidence of physical injury on the victim's person. Such policy fails to recognize that crimes such as stalking, menacing and other misdemeanors trigger mandatory arrest in states that recognize it; New York is one of such states. See New York City Council Committee on Public Safety, NYPD's Response to Domestic Violence, 100-01 (Oct. 29, 2002) (testimony of Dorchen A. Leidholdt, Sanctuary for Families' Center for Battered Women's Legal Services).

Officer Weber responded that there had been no assault or stabbing, and he failed to file a domestic violence report.<sup>190</sup>

On March 25, Sears threatened to kill Okin, and she called the police.<sup>191</sup> An officer asked her if she wanted to sign a complaint but she refused because she said it “is going to make the situation worse.”<sup>192</sup> The same day, one of Okin’s employees reported to the police that she found a note that read “M.O. [Michelle Okin] Sleep with one [eye] open at night.”<sup>193</sup> Okin also called the police that night to report a prowler outside her residence.<sup>194</sup> Officer Weber responded and told Okin that if Sears was so violent towards her, it was in her best interest to stay away from him.<sup>195</sup> The police failed to file a domestic incident report on that occasion.<sup>196</sup>

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<sup>189</sup> *Okin*, 577 F.3d at 422.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* The police officer conceded that he had no specific training in handling a situation where a threat victim was afraid that making a report would make things worse. On another occasion on May 19, 2002, Okin called the police a day after a domestic violence incident. Officer Weber reported that that it was unknown why Okin did not call the police when the incident occurred. The officer did not file a domestic violence report, and Sears was not questioned about the incident. *Id.* at 424. A related issue is the question often asked among judges, law enforcement agents, mental health professionals, lawyers and other professions helping women who has suffered domestic violence, why doesn’t she leave? According to Mary Ann Dutton, the appropriate question should be what she has done to escape, avoid, or protect herself from the perpetrator. Many women use personal strategies beyond reporting to the police, such as hiding, active or passive self-defense, and informal help-seeking strategies. DUTTON, *supra* note 17, at 40–41.

<sup>193</sup> *Okin*, 577 F.3d at 422.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* This is a classic example of blaming the victim. It is also important to note that remedies for domestic violence almost always protect a woman’s right to safety only if she is willing to leave her partner. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End*

On May 12, Okin reported that Sears kicked, punched and slapped her.<sup>197</sup> She stated that Sears asked her, “Are you going to the police, bitch?”<sup>198</sup> and that he turned off the power in the house.<sup>199</sup> The police officer again failed to file a domestic incident report, arrest Sears, question him, or advise Okin that she could initiate a civilian arrest.<sup>200</sup>

On March 13, 2003, Okin and Sears appeared in the town justice court regarding an eviction action brought by Sears against Okin.<sup>201</sup> Sears threatened Okin and her attorney, saying that he would “get her outside,” and that he “was going to get him.”<sup>202</sup> Okin and her friend called the police that night to report the threats; however, the police failed to arrest Sears that night.<sup>203</sup> All these events led to the constitutional claims brought against the individual police officers of the Town of Cornwall and the Village of Cornwall-on-Hudson police departments.<sup>204</sup>

On May 14, 2004, Michele Okin filed a suit under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York alleging, in part, violations of her federal substantive due process rights.<sup>205</sup> Specifically, Okin contended that (1) by failing to arrest or even question Sears, the

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*the Abuse Without Ending the Relationship?*, 29 CARDOZO. L. REV. 1487, 1488–89 (2008).

<sup>196</sup> *Okin*, 577 F.3d at 423.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 424.

<sup>199</sup> *Id.* at 423.

<sup>200</sup> *Id.* at 424.

<sup>201</sup> *Id.* at 425.

<sup>202</sup> *Okin* at 425 (quotations omitted).

<sup>203</sup> *Id.* at 426.

<sup>204</sup> *See id.*

<sup>205</sup> *Id.*

police officers endangered her by emboldening him, (2) the defendants acted in concert with Sears and failed to respond to her repeated complaints because they had personal relationships with Sears, and (3) the defendants increased the danger she experienced because Sears witnessed their dismissive and inappropriate behaviors toward her.<sup>206</sup>

The district court interpreted the state-created danger doctrine as requiring a plaintiff to show that a police officer implicitly or explicitly acted in a manner that communicated a sanction of violence to the private wrongdoer.<sup>207</sup> The district court concluded that the police officers treated Okin with indifference or disdain, failed to advise her of her legal options and rights as a domestic violence victim, or even to characterize her experiences as domestic violence.<sup>208</sup> Nonetheless, the district court granted defendants' Summary Judgment Motion on Okin's substantive due process, equal protection and municipal liability claims.<sup>209</sup> The district court also found that the individual defendants would be entitled to qualified immunity, even if they implicitly facilitated Sears' abuse by not arresting him.<sup>210</sup>

### **1. The Second Circuit's Decision Addressing Okin's Due Process Claim<sup>211</sup>**

The Court of Appeals for the Second Circuit began by acknowledging the *DeShaney* rule that the state has no duty to protect an individual from the violent acts of another, but the court quickly noted that the police may be liable under § 1983 if their affirmative acts create or increase the risk of private

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Okin*, 577 F.3d at 427.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> The Author omits the Court's discussion of qualified immunity as well as Okin's Equal Protection claims.

violence, thereby enhancing the danger to a victim.<sup>212</sup> An allegation that police officers had assisted in creating or increasing the danger to a victim is a violation of the victim's due process rights, triggering the state-created danger doctrine.<sup>213</sup> A victim's due process rights may also be violated when the police's affirmative conduct communicates explicitly or implicitly official sanction of private violence.<sup>214</sup> The court also noted that "repeated, sustained inaction by government officials, in the face of potential acts of violence, might constitute prior assurances rising to the level of an affirmative condoning of private violence even if there is no explicit approval or encouragement."<sup>215</sup>

Even though the district court did not address whether defendants implicitly encouraged Sears' domestic violence, the court concluded there was evidence in the record to address the issue.<sup>216</sup> The court held that defendants' actions, such as discussing football with Sears when they responded to Okin's complaints that he had beaten her, transmitted the message that his wrongdoings were permissible and he would not be penalized by the police.<sup>217</sup> The court held that defendants'

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<sup>212</sup> *Id.* at 428. Here, the court relied on its decision in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993). In *Dwares*, a demonstration that led to the burning of an American flag resulted in "skinheads" attacking the plaintiff. The attacks occurred in the presence of the defendant police officers who made no attempt to intervene or to arrest the "skinheads." In fact, the officers had told the "skinheads" that unless they got completely out of control the police would not interfere or arrest them. The plaintiff brought an action under § 1983 alleging that the defendants conspired to deprive him of his due process and equal protection rights. The court concluded that the plaintiff's due process rights had been violated because the defendants had made the demonstrators more vulnerable to the assaults by assuring the "skinheads" that unless they got out of control, the police would not interfere.

<sup>213</sup> *Okin*, 577 F.3d at 428.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* (quotations omitted).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 430. The court's reasoning is similar to that of the court in *Dwares*, where the police explicitly told the skinheads that they would not be



actions rose to the level of affirmative conduct that created or increased the risk of violence to Okin because they communicated to Sears that he could persist in perpetrating violence against her.<sup>218</sup>

## **2. The Requisite State of Mind: State Action That “Shocks the Conscience”**

The Second Circuit went on to address the state of mind necessary to establish the state-created danger doctrine. To establish a violation of substantive due process rights, a plaintiff must show that the state action was “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”<sup>219</sup> Regarding conscience shocking acts, the court explained that intentionally inflicted injuries are the actions most likely to shock the conscience, while negligent acts that result in harm are the least likely to shock the conscience.<sup>220</sup> Acts which occur as a result of recklessness are closer calls.<sup>221</sup> The court explained that deliberate indifference that shocks in one instance may not shock in other circumstances.<sup>222</sup> The court concluded

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penalized by authorities for their acts of violence against the plaintiff. Sears had told Officer Williams that he could not “help it sometimes when he smacks Michele Okin around” and Williams failed to arrest him. *Id.* The police also failed to arrest or interview Sears or file domestic violence reports on multiple occasions when Okin called for assistance. *Id.* at 420.

<sup>218</sup> *Id.* at 430. The court ruled in Okin’s favor on her substantive due process claim, regarding individual police officers Douglas, Lug, Weber and Williams. *Id.* at 437. For officers Rusty O’Dell and Edward Manion, the court concluded that she did not show repeated failures of a kind that could have emboldened Sears. *Id.*

<sup>219</sup> *Okin*, 577 F.3d at 437.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* In this context, reckless conduct is equated with deliberate indifference.

<sup>222</sup> *Id.* To explain deliberate indifference, the court compared a high-speed chase, where there is likely no deliberation, to the conditions faced by prison inmates, where opportunity for deliberation is ample. *Id.*

that Okin raised a genuine issue of material fact as to whether the defendants' actions shocked the conscience.<sup>223</sup>

In a very important paragraph the court observed that “the serious and unique risks and concerns of a domestic violence situation are well-known and documented.”<sup>224</sup> The court stated that the officers' training was deficient to the extent that they were not aware of the seriousness of domestic violence.<sup>225</sup> The police officers had sufficient time to weigh and decide on the appropriate response to take under the circumstances.<sup>226</sup> The court reasoned that in domestic violence cases deliberate indifference by the police is sufficient to show that their conduct shocks the conscience.<sup>227</sup>

In conclusion, the court held that Okin had sufficiently alleged a viable claim of state-created danger and the police officers' actions in response to Okin's complaints for assistance implicated an exception to the *DeShaney* rule.<sup>228</sup>

### III. *Okin*: A Possible Solution?

#### A. The Importance of Flexibility

It is evident that circuits that have adopted the state-created danger doctrine employ various tests that could yield

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Okin*, 577 F.3d at 432.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* The Court further explained that the officers' actions reflected “willful disregard of the obvious risks” of domestic violence. *Id.* The Court asserted that the officers ignored the serious risks faced over a fifteen-month period, and the likelihood that their conduct would increase the danger to Okin. *Id.*

<sup>228</sup> *Id.*

inconsistent results.<sup>229</sup> Beyond the problem of inconsistency however, the tests are also onerous and difficult to prove. But unlike the Third, Tenth and Sixth Circuits, the Second Circuit in *Okin* did not establish an elaborate test for showing the violation of a victim's substantive due process rights under the doctrine. To illustrate this difference, the Author has divided the *Okin* factors into four distinct parts:

**1. Affirmative Acts by Police that Create or Increase the Risk of Private Violence**

This standard is similar to the one employed by the other three circuits: what is actionable under the state-created danger doctrine is affirmative conduct that creates or increases the risk of violence as opposed to a passive failure to act.<sup>230</sup> In *Okin* however, this factor is one of the ways a victim can allege a state-created danger doctrine claim. It is not a requirement, nor is it the most important factor. In fact, the *Okin* court did not discuss this factor in detail.

**2. Affirmative Acts by Police that Communicate, Explicitly or Implicitly, Official Sanction of Private Violence**

This factor is unique to the Second Circuit in that implicit sanction of violence is enough to allege state-created danger. Although the court still requires some form of action that communicates to an assailant that he would not be arrested or punished for his violent acts toward a victim, the act could merely imply that the officer will not take action against the assailant. Explicit enhancement of violence is difficult to

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<sup>229</sup> See Jeremy Daniel Kernodle, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-created Danger Theory*, 54 VAND. L. REV. 165, 178 (2001).

<sup>230</sup> *Okin*, 577 F.3d at 428.

prove.<sup>231</sup> However, implicit affirmation is enough to satisfy the requirement of the state-created danger doctrine.<sup>232</sup>

### **3. Repeated, Sustained Inaction in the Face of Potential Acts of Violence May Constitute Prior Assurances Rising to the Level of Affirmative Condoning of Private Violence**

The *Okin* court made a powerful observation that “repeated sustained inaction in the face of potential violence may rise to the level of affirmative condoning of private violence, even if there is no explicit approval or encouragement.”<sup>233</sup> Therefore, the Second Circuit treats repeated inaction in the face of violence as affirmative condoning of violence, even if done implicitly. This is unlike any other standard that has been applied in other domestic violence cases, or other state-created danger cases for that matter. Other courts have repeatedly rejected inaction as a basis for establishing a viable claim under the state-created danger doctrine.<sup>234</sup> The *Okin* court recognized that repeated, sustained inaction may suffice as much as explicit action to show state-created danger.

### **4. State Action that Shocks the Conscience**

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<sup>231</sup> See *id.* at 429.

<sup>232</sup> *Id.* Even though the lower court did not consider implicit communication of official sanction, the *Okin* court took it upon itself to address the issue. The court concluded that the police officers’ actions of discussing football with Sears and other repeated communications, transmitted to Sears that his actions would go unpunished. *Id.* at 430. This argument has been rejected by some courts. See, e.g., *May*, 437 F.3d 579 (rejecting the plaintiff’s argument that the withdrawal of the police officer after the officer knocked on the door, listened, and cleared the victim’s call communicated to the perpetrator that he would not be apprehended for the harm caused to the victim).

<sup>233</sup> *Okin*, 577 F.3d at 428.

<sup>234</sup> See e.g., *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 282 (3d Cir. 2006) (acknowledging the fine line between action and inaction, but emphasizing that the Third Circuit has never found a viable state-created danger doctrine claim where there was no action).

To allege a sufficient claim against a police officer under the state-created danger doctrine, the officer must have exhibited the requisite state of mind.<sup>235</sup> In domestic violence cases, deliberate indifference to the victim's plight is enough to show that a police officer's conduct shocks the conscience.<sup>236</sup>

## B. Optional Factors Versus Multipronged Tests

The factors in *Okin* may be interpreted as optional as opposed to the multipronged tests adopted by other circuit courts. In other words, unlike other circuits' tests where all prongs are required for a victim to prove the state-created danger doctrine, *Okin* allows a victim to prove her case with only one factor and the state of mind requirement. The implications of using optional factors as opposed to onerous tests involving multiple requirements may not be apparent at first glance, but such tests may bind a decision-maker to respond in a determinate way to the presence of certain facts.<sup>237</sup> This will likely confine the decision-maker to facts, leaving subjective evaluations out.<sup>238</sup> Thus, a multipronged test is rigid, as every prong must be met for a claim to be successful.

Unlike multipronged tests, these optional factors allow for flexible application and some discretion in interpretation. The *Okin* factors allow for flexibility in application because they can be interpreted based not only on facts but also on other circumstances that surround a claim. In domestic violence cases, courts should look to the *Okin* factors to ensure that victims obtain remedies for harm caused, increased or condoned by the police.

There is need for flexibility in applying the state-created danger doctrine to domestic violence cases. After all, due

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<sup>235</sup> See *Okin*, 577 F.3d at 431.

<sup>236</sup> *Id.* at 432.

<sup>237</sup> See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

<sup>238</sup> See *id.*

process, if properly construed, should protect persons from abuses of government power.<sup>239</sup> Examples of such abuses include failures by police officers to protect a woman who has suffered harm from an intimate partner, where the police communicated to the perpetrator that his actions would go unpunished, or where there had been repeated inaction by the police in the face of danger to the victim.<sup>240</sup>

Multipronged tests may also paralyze women who bring claims against the police for emboldening a domestic violence perpetrator. The tests adopted by other circuits may even discourage victims from bringing federal claims against perpetrators of domestic violence altogether, thereby sending a negative message to victims who should be supported and empowered.

The *Okin* factors are more likely to empower victims to step forward to bring state-created danger doctrine claims against those who embolden domestic violence perpetrators. This will ensure that society continues to move forward toward reducing violence perpetrated against women and condoned by the police.

### C. The Action/Inaction Dichotomy

Most courts require the showing of affirmative acts by state actors in order for domestic violence victims to prove their claims under the state-created danger doctrine.<sup>241</sup> But the distinction between acts of commission and acts of omission depends largely on interpretation.<sup>242</sup> Police officers always act in some way. Courts that have construed police actions as inactions often narrow the scope of the activities that constitute actions.

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<sup>239</sup> Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath*, 66 WASH. L. REV. 107, 127 (1991).

<sup>240</sup> See *id.* at 128.

<sup>241</sup> Kernodle, *supra* note 229, at 180.

<sup>242</sup> See *id.*

The *Okin* factors recognize this false dichotomy and allow police behavior to be characterized as action in general.<sup>243</sup> It is also noteworthy that the court did not focus on the first factor requiring affirmative acts that create or increase the danger to a victim. Rather, most of the *Okin* court's analysis focused on affirmative acts that communicated implicitly that the police would not apprehend Sears.

In some ways, this factor changes the affirmative act requirement by allowing any act that could communicate to the perpetrator that he could continue abusing the victim. The *Okin* factors are adaptable in that acts of omission are not distinguished from acts of commission. For instance, a court in the Third, Sixth or Tenth Circuits may well construe the police officer's discussion of football with Sears as a mere failure to act, while the *Okin* court construed the fact as an affirmative act that communicated implicit police sanction of violence.<sup>244</sup>

By rigidly focusing on affirmative police acts that explicitly sanction domestic violence without acknowledging certain kinds of police conduct as action, courts deprive many victims of the opportunity to hold police officers who countenance and encourage domestic violence accountable because they couch those actions as inactions. Take for example the *Burella* court which construed the police officers' actions of refusing to enforce the court order and their presence while the victim's husband threatened to kill her as inaction. The result of such rigid interpretation is the legal powerlessness of women who could otherwise have viable claims.

Moreover, requiring explicit affirmative acts may create incentives for deliberate police inaction toward protecting victims.<sup>245</sup> Police officers may simply decide not to do anything knowing that they will not be liable. This trend may delay progress in ensuring that police officers work to prevent or

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<sup>243</sup> *Okin*, 577 F.3d at 430.

<sup>244</sup> *Id.*

<sup>245</sup> Eaton & Wells, *supra* note 239, at 131.

reduce the occurrence of domestic violence. It is important to the goal of stemming the tide of domestic violence for the police and the courts to work together to protect victims from potential or actual violence and to hold perpetrators accountable. In addition to leaving victims unprotected, this rigid approach confers impunity on domestic violence perpetrators.

In sum, explicit affirmative acts by police officers are relevant, but courts' analyses should not end there. The *Okin* court considered whether actions may implicitly communicate police sanction of violence. In some cases, repeated inaction by the police could suffice to prove a claim under the state-created danger doctrine. The *Okin* factors truly blur the purported distinctions between affirmative commissions and omissions.

#### **D. Application of the *Okin* Factors to the Facts of Other Cases**

The three circuit courts used as illustrations in this Article are similar in their analysis because of their focus on affirmative acts. To provide the reader with a clear understanding of why the factors in *Okin* are better suited to domestic violence cases brought under § 1983, this section applies the *Okin* factors to those cases.

##### **1. *Okin* Factors Applied to the Facts of *Burella***

Unlike the *Okin* court, which considered affirmative acts that communicate explicit or implicit sanction of private violence, the *Burella* court required actual action on the part of the police.<sup>246</sup> By focusing on affirmative acts, the court narrowed the focus of its analysis to exclude dangerous police conduct from consideration.

Applying the *Okin* factors to the facts of *Burella* does the opposite; it broadens the court's ambit so that if a victim cannot prove one prong of the test, she may still be able to prove another, thereby maintaining a viable claim under the state-

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<sup>246</sup> *Burella*, 501 F.3d at 147.



created danger doctrine. For instance, had it applied the *Okin* factors to the facts of *Burella*, the court might have found implicit communication of police sanction that increased the danger to the victim.

Jill Burella was beaten by her husband. She subsequently called the police, but instead of taking action to protect her as the victim, the police allowed the perpetrator to leave with his and Jill's daughter. On another occasion the police watched and permitted the perpetrator to enter the house after he had threatened Jill. These actions arguably communicated to the assailant that he was free to harm the victim and that he would not be apprehended for doing so.

The next question is whether the police officers' actions shocked the conscience. In other words, were the officers deliberately indifferent to the harm Jill Burella suffered? Of course an action that shocks the conscience in one instance may not shock in another,<sup>247</sup> and for the court to apply the deliberate indifference standard, there must have been time for deliberation.<sup>248</sup> Deliberation may not be practical in every situation, such as for decisions made under haste or pressure, like the police chase of a suspect, or during a prison riot, where a police officer cannot truly have time to reflect before making decisions.<sup>249</sup>

The facts in *Burella* reveal that the police had time to reflect and deliberate before taking action. Jill called the police on multiple occasions to report domestic violence, and they failed to take action, and when they did, they allowed Jill's abusive husband to leave the scene of the domestic violence with their daughter.<sup>250</sup> They also allowed him to enter the house on

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<sup>247</sup> *Okin*, 577 F.3d at 431; *Pena*, 432 F.3d at 113.

<sup>248</sup> *Pena*, 432 F.3d at 113.

<sup>249</sup> *Id.*

<sup>250</sup> *Burella*, 501 F.3d at 137.

another occasion.<sup>251</sup> There was deliberation in all of these circumstances.

But do these actions shock the conscience? The *Burella* court had a high threshold for meeting this state of mind requirement. The *Burella* court required “willful disregard for the safety of the victim.”<sup>252</sup> This is an intent standard that is difficult to prove. After all, how can one possibly claim that a police officer intended for a domestic violence victim to suffer greater harm?

The *Burella* court concluded that the officer’s action did not shock the conscience and further asserted that knowingly permitting unreasonable risks to continue does not necessarily shock the conscience. Under the *Okin* court’s interpretation of the state of mind requirement, deliberate indifference or willful disregard in domestic violence cases does shock the conscience.<sup>253</sup>

The *Okin* court therefore allowed for a broader interpretation of conscience shocking actions in domestic violence cases. This alerts the police to the fact that if they have time to deliberate in domestic violence cases, but refuse to take action to protect the victim, they can be held accountable for their failure to respond.

## 2. The *Okin* Factors Applied to the Facts of *Eckert*

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<sup>251</sup> *Id.* at 138.

<sup>252</sup> *Id.* at 147.

<sup>253</sup> The *Okin* court concluded that in a case like *Okin*’s, deliberate indifference is the requisite state of mind for showing that the police officers’ conduct shocks the conscience. The *Okin* court was particularly sensitive to domestic violence issues. In a footnote, the Court provided statistical information about the harm caused by domestic violence cases in the United States, including that it is the number one cause of death of women in this country. *See Okin*, 577 F.3d at 431, n.10. Like the *Okin* court, it is important for courts to recognize the benefits of being sensitive to the issues of domestic violence when deciding cases where domestic violence victims bring claims against police officers for the violation of their due process rights.

The police officers' emboldening actions in *Eckert* were conspicuous because the victim was arrested instead of the perpetrator.<sup>254</sup> The police officers' actions clearly communicated to the assailant not only that he would not be apprehended, but that he was not at fault for his violent actions. The police officers arrested the victim in the presence of the assailant even though there was evidence that the perpetrator had abused the victim on prior occasions, and the parties' son corroborated the victim's explanation that the perpetrator caused his own injuries.<sup>255</sup> The officers' actions shocked the conscience because they had the opportunity to consider the clear danger the victim was in but failed to protect her from the assailant.

### 3. The *Okin* Factors Applied to the Facts of *May*

*May* creates a more difficult case for the application of the *Okin* factors. However, because the *Okin* factors are flexible, they can be applied to a wide spectrum of cases. The *Okin* court could have decided that the police officer's action in *May* implicitly communicated to the perpetrator that he would not be apprehended. Even though the responding officer was aware that the victim was in danger,<sup>256</sup> the officer only knocked, listened, and left the scene.<sup>257</sup> The court in *May* rejected the victim's emboldening argument.<sup>258</sup> Indeed, it is arguable that by leaving the scene of domestic violence after knocking while the perpetrator was terrorizing the victim, the police officer implicitly communicated to the assailant that he was free to harm her. By relying on only affirmative acts however, the *May* court considerably narrowed the scope of its analysis.<sup>259</sup>

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<sup>254</sup> *Eckert*, 25 Fed. Appx. at 682.

<sup>255</sup> *Id.*

<sup>256</sup> As stated above, the police knew this was a "good domestic" case.

<sup>257</sup> *May*, 437 F.3d at 582.

<sup>258</sup> *Id.* at 580.

<sup>259</sup> *Id.* at 586 (concluding that *May* was not able to show that any of the officers' actions constituted affirmative acts).

The *Okin* court would likely have concluded that the officers' actions shocked the conscience because the police had time to deliberate. The police officers that responded to the victim's calls in *May* treated this case as a domestic dispute rather than an act of violence that required police attention.<sup>260</sup> The victim called the police three times before an officer came to her aid. When the officer arrived, he increased her vulnerability by acting and subsequently not protecting her from the perpetrator.

### E. Possible Criticism of *Okin*

There are possible arguments that could be levied against the state-created danger doctrine interpreted in such a flexible manner because the *Okin* factors could be regarded as overly expansive.

One argument against it is that the leniency and flexibility of the factors will open the flood gates to frivolous claims in federal court every time police officers act in ways that increase victims' vulnerability.<sup>261</sup> The danger is that expanding domestic violence victims' substantive due process rights is a step down the slippery slope of liability.<sup>262</sup> It could be argued that states' resources are limited and could be better spent on programs to

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<sup>260</sup> *Id.* at 582. The police classified domestic violence calls into different categories, such as "possible 20" or possible domestic disturbance, which is only a priority 3 level. *May's* case was at a priority 3 level by the second call. By the third call, she had moved to a "good domestic disturbance call fitting all the criteria." At that time, there was yelling and an unclear low voice in the background. *Id.* at 581–82.

<sup>261</sup> See G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. C.R. & SOC. JUST. 405, 431 (2009).

<sup>262</sup> See *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995) (arguing that if "every time a police officer incorrectly decided it was not necessary to intervene in a domestic violence dispute, the victims of the ensuing violence could bring a § 1983 action . . . officers faced with ambiguous circumstances would be forced to inject themselves into private affairs to foreclose the complaint that they should have done more"); See, also., Miccio, *supra* note 261.

help citizens than on damage awards.<sup>263</sup> This argument is not without force, but the possible costs to the government if police officers increase victims' vulnerability to domestic violence must be considered.<sup>264</sup>

Intimate partner violence is a major public health issue in the United States, and it is too costly to be ignored.<sup>265</sup> Some major costs include the exorbitant expenses of mental health and medical care, such as outpatient clinic visits, emergency department visits, ambulance transport, physician, physical therapy, dental visits and inpatient hospitalization.<sup>266</sup> Other costs include lost productivity or lost wages, court costs and incarceration.<sup>267</sup> A study conducted by the Center for Disease Control found that the cost of domestic violence may be near six billion dollars annually.<sup>268</sup> In addition, domestic violence perpetrated by men is the primary factor in women's and children's homelessness.<sup>269</sup>

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<sup>263</sup> See Eaton & Wells, *supra* note 239, at 127–29 (“It is necessary to take account of conflicting demands for public resources and of the need to maintain leeway for officials to exercise their judgment.”); see also Miccio, *supra* note 261, at 431.

<sup>264</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 1 (2003), available at <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf> (reporting on data from the National Violence Against Women Survey, which estimates 5.3 million acts of domestic violence against women who are at least eighteen years old happens annually).

<sup>265</sup> In 2003, Congress funded the Centers for Disease Control and Prevention (CDC) to conduct a study to obtain national estimates of the occurrence of injuries caused by intimate partners, “to estimate their costs to the health care system, and to recommend strategies to prevent [such] violence and its consequences.” *Id.* at 1.

<sup>266</sup> *Id.* at 410.

<sup>267</sup> Miccio, *supra* note 261, at 431.

<sup>268</sup> CTRS. FOR DISEASE CONTROL, *supra* note 264, at 32.

<sup>269</sup> Miccio, *supra* note 261, at 431.

Considering the expenses of domestic violence and its effects on women's health, the application of flexible standards like the factors in *Okin* is advantageous to society as a whole. State actors will eventually adjust their behaviors in such a way as to alleviate the harm suffered by women, which will ultimately serve the public interest.<sup>270</sup>

According to one court, imposing such a high burden on police is beyond their reasonable capacities because they are called upon to make difficult decisions.<sup>271</sup> Although police officers make tough decisions, the costs to society at large and the harm suffered by many women in the United States each year greatly burdens society. If the police are aware that they are exposed to liability for not acting to prevent violence from being perpetrated on women, they will likely be incentivized to act to protect victims rather than condone perpetrators' violent behaviors.<sup>272</sup>

In the same vein, opponents of the state-created danger doctrine may be concerned about police discretion in performing their day-to-day duties. This is certainly a valid concern because if police officers are always worried about civil liability, their performance may be affected. However, part of the duty of police officers is to arrest perpetrators of domestic violence. Mandatory arrest laws were enacted to ensure that police officers perform this duty.<sup>273</sup> Although not free from criticisms,<sup>274</sup>

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<sup>270</sup> See Geoffrey Rapp, *Reconsidering Educational Litigation: Property-Owners As Litigants, Constructive Trust as Remedy*, YALE L. & POL'Y REV. 463, 483 (2000).

<sup>271</sup> *Pinder*, 54 F.3d at 1177.

<sup>272</sup> See Eaton & Wells, *supra* note 239, at 127–28.

<sup>273</sup> See Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1203 (2009).

<sup>274</sup> Many legal scholars have criticized mandatory arrest laws on the theory that even though they may deter abusers in some circumstances, in others, they may backfire to increase violence to victims. See Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 71 (2000).

mandatory arrest laws should be encouraged, as research has shown that arrest and protective orders that accompany arrest deter domestic violence perpetrators.<sup>275</sup>

In addition, the doctrine of qualified immunity will provide the police with relief from liability in cases where a police officer's failure to act was reasonable because it was unclear whether domestic violence was occurring or because of well-founded concerns about the veracity of the ostensible victim's allegations.<sup>276</sup>

"The doctrine of qualified immunity requires a court to limit its examination of the allegations to the objective reasonableness of the state actor's conduct . . . ."<sup>277</sup> Police officers may therefore "be shielded from liability for civil damages if their actions did not violate clearly established statutory and constitutional rights of which a reasonable person would have known."<sup>278</sup> In essence, qualified immunity ensures that police officers are not subjected to suit unless they are on notice that their conduct is unlawful.<sup>279</sup> They will be on notice if

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<sup>275</sup> See generally Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Violence Assault*, 49 AM. SOC. REV. 261 (1984); see also Pavlidakis, *supra* note 273, at 1211–12. Pavlidakis discusses the advantages of mandatory arrest statutes, noting that:

The failure to arrest gives credence to the view that intimate partner violence is a private matter to be handled in the home. By arresting batterers, the state shows that it is taking a firm stance against intimate partner abuse as arrest communicates to the batterer and to the society that intimate partner violence is a crime with serious legal consequences.

*Id.*

<sup>276</sup> See Eaton & Wells, *supra* note 239, at 131.

<sup>277</sup> Hemphill v. Schott, 141 F.3d 412, 419 (2d Cir. 1999) (quotations omitted).

<sup>278</sup> Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

<sup>279</sup> *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

it is sufficiently clear that a reasonable officer would understand that what he or she is doing violates a right, regardless of whether that act has been previously held to be unlawful.<sup>280</sup> Nevertheless, in light of existing law, the unlawfulness of the act must be apparent.<sup>281</sup>

Qualified immunity will protect those police officers who truly must make tough decisions about their actions when it is not apparent, or where reasonable officers would not clearly know that their actions violate the law.<sup>282</sup> Those cases are unlikely to be cases where case law provides the requisite standard for police officers to follow.

Finally, a possible concern may be that domestic violence victims already have a remedy in tort for police action that emboldens their abusers.<sup>283</sup> In *County of Sacramento v. Lewis*,<sup>284</sup> the United States Supreme Court explained that the Constitution is not “a font of tort law to be superimposed upon whatever systems may already be administered by the states . . . the Constitution does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabilities for injuries . . .”<sup>285</sup> But unlike in tort law, negligently inflicted harm is not enough to satisfy the requirements of the violation of due process. The Supreme Court in *Lewis* recognized that although negligence is not enough to satisfy the requirements under the

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<sup>280</sup> *See id.*

<sup>281</sup> *Id.*

<sup>282</sup> *See Eaton & Wells, supra* note 239, at 131.

<sup>283</sup> *See Eckert*, 25 F. Appx. at 689.

<sup>284</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

<sup>285</sup> *Id.* (explaining that negligently inflicted harm is below the threshold of constitutional due process). But the court further explains that some conduct between negligent and intentional conduct may be actionable under the Constitution. In particular, deliberately indifferent conduct “must also be enough to satisfy the fault requirement of due process claims based on the medical needs of someone jailed while awaiting trial.” *Id.* at 850.



due process clause, deliberate indifference is sufficient to create an actionable claim involving a vulnerable group.

Police officers' deliberate indifference to the harm suffered by domestic violence victims should be a major societal concern. Domestic violence victims are a vulnerable population that should be protected by the state. Because of the seriousness and prevalence of domestic violence, the police should assume the responsibility of protecting vulnerable women from the risk of domestic violence.<sup>286</sup> If the police instead increase the danger or vulnerability of victims, the idea that the state is protecting its citizens will be an illusion.<sup>287</sup> "The illusion of protection . . . is worse than no protection at all."<sup>288</sup> Police departments and courts should work together to enforce laws to protect victims and provide redress for women who have suffered further harm because of police action.

Although opponents of the state-created danger doctrine may be concerned about the implications of applying the flexible standards in *Okin* to domestic violence cases brought under the due process clause, the societal and legal benefits of applying the factors outweigh such concerns.

## CONCLUSION

Circuit Courts have interpreted the Supreme Court's decision in *DeShaney* to permit an exception beyond the special relationships exception expressly stated by the Court. This exception, the state-created danger doctrine, allows a domestic violence victim to bring an action against a police officer acting under the color of state law for causing or increasing the danger she suffered at the hands of a third party. Unlike other circuits with onerous tests, the court in *Okin* adopted a flexible approach to the state-created danger doctrine. This flexibility affords critically important judicial discretion in interpreting the

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<sup>286</sup> See Schneider, *supra* note 19, at 358.

<sup>287</sup> See Miccio, *supra* note 261, at 432.

<sup>288</sup> *Id.*

doctrine, which allows domestic violence victims to prove claims alleging the violation of their due process rights against police officers in federal court.

Because of the societal impact of domestic violence and its effects on women, courts should be willing to use a less stringent standard, such as the state-created danger doctrine factors in *Okin*, in evaluating victims' due process claims. By doing so, domestic violence victims will be empowered to bring due process claims against police officers for emboldening or condoning perpetrators and thereby increasing the harm they suffer. Empowering women to bring these claims will in turn increase the likelihood that police officers will arrest perpetrators. If police officers arrest perpetrators of violence, there will likely be less domestic violence perpetrated against women.