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Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations

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POLICE MISCONDUCT AND LIABILITY: APPLYING THE STATE-CREATED DANGER DOCTRINE TO HOLD POLICE OFFICERS ACCOUNTABLE FOR RESPONDING INADEQUATELY TO DOMESTIC-VIOLENCE SITUATIONS

*Milena Shtelmakher**

When a state actor creates or contributes to the danger that an individual faces from a third party, the state actor can be sued pursuant to the state-created danger doctrine. In the domestic-violence context, victims can sue individual police officers pursuant to the doctrine for responding inadequately to the victims' calls for help, such as when officers refuse to arrest the batterers, fail to file incident reports, or harass the victims. However, because the doctrine formed from Supreme Court dicta, courts do not apply it uniformly. This Note proposes that Congress should enact a national standard for determining when police conduct in domestic-violence situations constitutes state-created danger. Holding police officers accountable for such conduct will force them to respond properly and, most importantly, protect victims from further harm.

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I. INTRODUCTION

In domestic-violence situations where a woman is being physically abused by a current or former spouse or boyfriend, the woman's first instinct might be to contact the police for emergency protection.[1] This seems like it would be a sensible approach, but the reality is not that simple. In fact, despite being a domestic-violence victim's possible first line of defense, police officers respond inadequately at times.[2] For example, in the Second Circuit case *Okin v. Village of Cornwall-on-Hudson Police Department*,[3] plaintiff Michele Okin was physically abused by her boyfriend.[4] Over a period of fifteen months, the police repeatedly came to the residence Okin shared with her boyfriend but failed to interview or arrest him, failed to write up domestic violence reports, and at times responded to her allegations with sarcasm.[5] As a result, Okin continued to suffer harm.[6] Where police response does not protect the victim and the victim continues to suffer harm, jurisdictions are split as to whether police officers are accountable for responding inadequately.[7]

In 2005, 1,181 women were murdered by their significant others, an average of more than three women murdered per day.[8] Additionally, women suffer two million injuries every year at the hands of their intimate partners.[9] Since its enactment, the Violence Against Women Act has served to decrease these figures.[10] Today, the nation's goal remains to decrease these statistics even further.[11]

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1. *See* RAOUL FELDER & BARBARA VICTOR, GETTING AWAY WITH MURDER: WEAPONS FOR THE WAR AGAINST DOMESTIC VIOLENCE 117 (1996).

2. *See generally* Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1297 (1995) (discussing situations in which police responses to domestic violence are inadequate and may include: "failure to respond to their calls, refusal to arrest batterers, failure to file reports on domestic disputes, and general harassment of victims of domestic violence").

3. 577 F.3d 415 (2d Cir. 2009).

4. *Id.* at 419–27.

5. *Id.*

6. *Id.*

7. *See infra* Parts III.A–B, V.D1–2.

8. FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON DOMESTIC DATING AND SEXUAL VIOLENCE 1 (2009), *available at* http://endabuse.org/userfiles/file/Children_and_Families/DomesticViolence.pdf.

9. *See id.*

10. Congress enacted the Violence Against Women Act (VAWA) on September 13, 1994. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 42 U.S.C.). *See* Nat'l Domestic Violence Hotline, Get Educated: Violence

One of the issues in the battle to decrease domestic violence is that incidents of domestic violence are severely underreported.[12] Current research suggests a correlation between the response of law enforcement and the reporting of future instances of violence.[13] That is, when a victim has confidence that the police will respond appropriately to her complaint, her confidence will lead to more reports of future violence.[14] Conversely, a victim who previously reported abuse and felt the law enforcement response was insufficient or endangered her further is less likely to report subsequent abuse; this failure to report is then likely to lead to an escalation of violence.[15] Therefore, given the large number of people adversely affected by domestic violence, law enforcement agencies must commit time, invest resources, and pay attention to domestic violence in order to prevent further harm to the victim.[16]

When police officers respond inadequately to domestic violence and a victim continues to suffer harm, the victim's best avenue for redress is to sue the individual police officers for violating the

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Against Women Act, http://www.ndvh.org/get-educated/violence-against-women-act-vawa/ (last visited June 10, 2010) (noting that since VAWA's enactment, states have passed over 660 laws to combat domestic violence and that more women reported a domestic-violence crime in 1998 (59 percent) than in 1993 (48 percent)); Posting of Tracy Russo to the White House Blog, http://www.whitehouse.gov/blog/15-Years-Later (Sept. 14, 2009, 17:51 EST).

11. President Barack Obama recognizes the significance of this issue and has committed his administration to achieving this goal. For example, Lynn Rosenthal, one of the nation's foremost experts on domestic violence policy, was appointed the White House Advisor on Violence Against Women. The Associated Press, *Lynn Rosenthal Named White House Adviser on Violence Against Women*, WASH. POST, June 26, 2009, http://voices.washingtonpost.com/44/2009/06/26/lynn_rosenthal_named_white_hou.html. This is a newly created position at the White House, dedicated specifically to advising the President and Vice President on domestic violence issues. *Id.*; Office of the Vice President, Press Release, The White House Press Office, Vice President Biden Announces Appointment of White House Advisor on Violence Against Women (June 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Vice-President-Biden-Announces-Appointment-of-White-House-Advisor-on-Violence-Against-Women/.

12. *See* Larry Miller, *Domestic Violence Hiding in the Open*, PHILA. TRIB., Aug. 7, 2009, at 1B. While this is an important concern, this Note is not intended to overshadow the other essential issues of domestic violence. In fact, progress in the fight against domestic violence will be limited until there is full awareness by "police, hospitals, social service agencies, shelters, batterers' intervention programs, offices of lawyers and prosecutors, judges, and [private individuals]." *See* FELDER & VICTOR, *supra* note 1, at 32.

13. ANDREW R. KLEIN, NAT'L INST. OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 7 (2009), *available at* http://www.ncjrs. gov/pdffiles1/nij/225722.pdf.

14. *Id.*

15. *Id.* at 8.

16. *Id.* at 1.

victim's substantive due process rights under 42 U.S.C. § 1983.[17] However, part of determining whether police officers can be held liable for the danger individuals face from third parties depends on how circuit courts interpret the U.S. Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*.[18] In *DeShaney*, the Court held that the state was not liable for the severe injuries that a four-year-old boy suffered from his father's abuse because historically, states have not had a constitutional duty to protect individuals from violence committed by a third party.[19] The Court reasoned that the state's failure to remove the child from his abusive home was an *omission*, which does not constitute a substantive due process violation.[20] However, the Court indicated in dictum that a constitutional claim may exist pursuant to § 1983 if a state actor *created* or *contributed* to the danger that an individual faced from a third party.[21] After *DeShaney*, courts examining this concept have termed it the "state-created danger" doctrine.[22]

This Note discusses applying the state-created danger doctrine to hold individual police officers accountable for responding inadequately to domestic-violence situations. Part II describes the origin, definition, and current application of the state-created danger doctrine, the shocks-the-conscience standard, and the qualified-immunity defense. Part III critiques the current application of the state-created danger doctrine in domestic-violence contexts by

17. In order to state a valid claim under § 1983, an injured party must prove: (1) deprivation of a right secured by the United States Constitution; and (2) deprivation by a party acting under color of state law. 42 U.S.C. § 1983 (2006). While this Note argues substantive due process is the best theory for recovery, victims may sue pursuant to other theories. For example, a victim may sue for failure to provide equal protection under the Fourteenth Amendment or for police negligence pursuant to state tort claims. *See* Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* DeShaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393, 1393–94 (1990) (discussing that an equal protection claim "may provide a more promising legal avenue for redress than a due process claim").

18. 489 U.S. 189 (1989).

19. *Id.* at 193, 196–97.

20. *See id.* at 199–201.

21. *See id.* ("While the State may have been aware of the dangers that [the victim] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

22. *See* Matthew D. Barrett, Note, *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, 178 (2003).

examining the Fourth Circuit case *Pinder v. Johnson*[23] and the Third Circuit case *Burella v. City of Philadelphia*.[24] Part IV proposes that Congress should enact legislation setting forth a uniform national standard for determining whether state-created danger exists in a particular case. This part also explains that the standard should be based on the Second Circuit's analysis in *Okin*[25] and should not focus on the distinction between an action and an omission. Most importantly, the legislation must ensure that courts consider the unique nature of domestic violence while interpreting the statute. Part V provides a justification for the proposal. It explains that police culture regarding domestic violence must change because the police play a crucial role in protecting victims. The state-created danger doctrine can be a powerful tool to motivate this change. Further, domestic violence affects so many people that it requires the national attention that only a federal law can provide.

Finally, Part VI concludes that enacting federal legislation modeled after the Second Circuit's approach in *Okin* would make the state-created danger doctrine a powerful resource for combating domestic violence by recognizing the constitutional rights of domestic-violence victims. By holding police officers accountable for responding inadequately to domestic-violence calls, federal legislation would force the officers to handle these situations properly. In turn, this would send a message to the abusers that their behavior is unacceptable. But most importantly, federal legislation will provide victims with the hope of escaping the violence they live in.

II. STATEMENT OF EXISTING LAW

A. The State-Created Danger Doctrine

Generally, the state has no duty to protect individuals from violence committed by third parties.[26] However, an exception to this

23. 54 F.3d 1169 (4th Cir. 1995).

24. 501 F.3d 134 (3d Cir. 2007).

25. 577 F.3d 415 (2d Cir. 2009).

26. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 1 (2007) ("[T]he government has no duty to protect people from privately inflicted harms."). For the purposes of this Note, the term "third party" refers to non-state actors that inflict harm.

rule is the state-created danger doctrine.[27] The groundwork for the state-created danger doctrine arose from the U.S. Supreme Court decision in *DeShaney*.[28]

Joshua DeShaney was a four-year-old boy who was so severely beaten by his father that he lapsed into a life-threatening coma.[29] For two years prior to that incident, the Winnebago County Department of Social Services had monitored DeShaney and was fully aware of his father's abuse.[30] Yet despite repeatedly observing suspicious injuries on DeShaney's body, the agency never removed him from his father's custody.[31]

Through his guardian ad litem and pursuant to § 1983, DeShaney sued the Department of Social Services and the social workers who received the complaints that he was being abused.[32] DeShaney claimed that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment.[33] The District Court for the Eastern District of Wisconsin granted summary judgment to defendants, and the Seventh Circuit affirmed.[34] The Supreme Court granted certiorari to decide whether failure by a state or its agents to provide an individual with adequate protective services ever violates the individual's due process rights.[35] The Court affirmed the Seventh Circuit's holding and ruled that the state has an affirmative duty to protect private citizens from state action, but has no such duty to protect private citizens from each other's actions.[36] The Court reasoned that even though the state may have been aware of the dangers the boy faced, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[37] Further, the Court held that the state only owes a duty to protect when the

27. *Id.* at 3.
28. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).
29. *Id.* at 193.
30. *Id.* at 191–92.
31. *Id.*
32. *Id.* at 193.
33. *Id.*
34. *Id.* at 193–94.
35. *Id.* at 194.
36. *Id.* at 200–01.
37. *Id.* at 201.

state takes an individual into custody, thereby literally depriving the individual of liberty.[38]

While the Court's decision implied grim consequences for victims, circuit courts have interpreted it as leaving open the possibility that if the state itself played a role in creating or increasing the danger to a child, then the state could be liable for a substantive due process violation.[39] This interpretation laid the groundwork for the state-created danger doctrine.[40] Under this doctrine, a police officer is liable if he or she creates or substantially increases the risk of violence that leads to an individual's injuries.[41]

However, because this theory derives from Supreme Court dictum, there is a lack of guidance from the Court regarding how to apply it.[42] Thus, even though most circuits acknowledge the state-created danger doctrine, its scope and limitations are still ill-defined[43] and its application is considerably inconsistent.[44]

B. The Shocks-the-Conscience Standard

Proving state-created danger is only the first step in successfully alleging a substantive due process violation pursuant to § 1983. In addition, a domestic-violence victim has to demonstrate that the officer's conduct shocked the conscience.[45] This requirement exists because § 1983 permits a plaintiff to sue a state actor, such as a police officer, but does not create substantive rights or define what

38. *Id.* at 198–200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament . . . but from the limitation which it has imposed on his freedom to act on his own behalf.").

39. *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1166–67 (2005).

40. *See* Chemerinsky, *supra* note 26, at 3–4.

41. *See* Oren, *supra* note 39, at 1168.

42. *See* Chemerinsky, *supra* note 26, at 15.

43. *See* Barrett, *supra* note 22, at 188 (explaining that while all circuits except for the First and Fourth recognize the doctrine, they each apply a different test).

44. The Eleventh Circuit adopted the dictum verbatim but uses an ambiguous test. *Id.* at 188–89. The Second, Sixth, Seventh, Eight, Ninth, and D.C. Circuits each apply tests that poorly define what dangers or forms of conduct create liability. *See id.* at 190–99. The Third, Fifth, and Tenth Circuits apply more elaborate multi-part tests. *See id.* at 200–04. For an example of the inconsistencies, see *infra* Parts III and V.D.1–2.

45. County of Sacramento v. Lewis, 523 U.S. 833, 847–48 & n.8 (1998) (finding that in order to be liable for a violation of a constitutional right, a state actor's conduct must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience").

type of conduct creates a cause of action.[46] The requirement also ensures that a constitutional violation does not occur "whenever someone cloaked with state authority causes harm"[47] and prevents the Fourteenth Amendment from becoming a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[48]

As a result, liability thresholds for depriving an individual of constitutional rights must be stricter than state tort thresholds.[49] The lowest common denominator for tort liability is negligence, which is not enough to establish a constitutional violation.[50] On the other hand, the highest common denominator of tort liability, intentional conduct, is most likely enough.[51] For actions that fall between the two ends of the spectrum, constitutional liability may occur when the state actor's conduct can be classified as deliberately indifferent.[52]

What constitutes deliberate indifference or shocks the conscience, however, is highly dependent on the circumstances of each case[53] and differs from court to court.[54] Establishing a national standard for the state-created danger caused by officers responding

46. *See* 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:1 (2009).

47. *Lewis*, 523 U.S. at 848.

48. *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

49. *See id.* at 848–49.

50. *Id.*

51. *Id.* at 849.

52. *Id.* at 849–50; *see also* Laura Oren, *Some Thoughts on the State-Created Action Doctrine:* DeShaney *Is Still Wrong and* Castle Rock *Is More of the Same*, 16 TEMP. POL. & CIV. RTS. L. REV. 47, 54 (2006) ("[M]any courts have demanded a showing of 'deliberate indifference' that 'shocks the conscience' in order to hold state actors responsible for the crimes of third parties.").

53. *Lewis*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . .").

54. *See* Oren, *supra* note 52, at 54. In *Hart v. City of Little Rock*, 432 F.3d 801 (8th Cir. 2005), the Eight Circuit reversed a jury verdict that awarded $225,000 each to individual police officers who were retaliated against when their personal information was disclosed to drug defendants. *Id.* at 803. The Eighth Circuit held that the City was, at most, only grossly negligent. *Id.* at 808. Similarly, in *Forrester v. Bass*, 397 F.3d 1047 (8th Cir. 2005), the Eighth Circuit held the Division of Family Services did not act with deliberate indifference where they failed to remove children from an abusive home despite their receipt of complaints and investigations of the home. *Id.* at 1050–51, 1058–59. However, in *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981), the Second Circuit found that it was possible to infer that an agency acted with deliberate indifference when its failure to remove a child from an abusive foster home amounted to a pattern of deliberate inattention to its duty to protect children from abuse. *Id.* at 142–46.

inadequately to domestic violence would heighten awareness about the dangers and prevalence of domestic violence. Such awareness would force police officers, judges, and society as a whole to view the issues of domestic violence differently. And in light of this new awareness, conduct that was once considered negligent or grossly negligent would, hopefully, be considered to shock the conscience. Nevertheless, victims would still have another hurdle to overcome—the police officers' defense of qualified immunity.

C. The Qualified-Immunity Defense

Where a police officer is accused of violating an individual's due process rights, the officer is entitled to the defense of qualified immunity.[55] This protects officials from liability unless they violate a law that was clearly established at the time of their conduct.[56] According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[57]

In any given case, the burden is on the plaintiff to demonstrate that qualified immunity does not apply.[58] To accomplish this, the plaintiff must prove that his or her constitutional right has been violated and that the right was "clearly established" at the time of the conduct in question.[59] The "clearly established" standard means that the legal principle must be settled with enough specificity that the officers were put on notice that their conduct was unlawful.[60] This specificity requirement does not depend on a precedent existing in the same circuit in which the case arose, as long as the law is

55. *See generally* Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989) (discussing the derivation of the modern qualified immunity defense in § 1983 cases).

56. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) (holding that government officials are generally shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

57. Pearson v. Callahan, 129 S. Ct. 808, 815 (2009).

58. *See id.* at 815–16.

59. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). Recently, the Supreme Court held that the order of this analysis is flexible. *Pearson*, 129 S. Ct. at 813.

60. Oren, *supra* note 39, at 1201.

supported by a consensus of the circuits.[61] Furthermore, just because a case presents novel factual circumstances, the "clearly established" analysis is not automatically in favor of the officer.[62] Rather, the analysis focuses on whether a reasonable person in the officer's position would have been aware of the law.[63]

Part of the battle against domestic violence is to make adequate, and thus appropriate, action by police officers the "clearly established" law. To this end, different cities across the country have implemented programs to spread awareness regarding the most effective way to handle domestic-violence situations.

For example, a county in northern California has organized a program whereby police officers responding to domestic-violence calls are accompanied by trained volunteers.[64] The volunteers are trained to speak with the victims at the scene and to fill out temporary restraining orders.[65] In Farmington, New Mexico, the police department has given six officers specialized training to improve their communication with domestic-violence victims and to help them develop unique skills for collecting evidence.[66] This training is especially useful when officers respond to situations where victims refuse to disclose the abuse.[67] Furthermore, the added knowledge gives officers a safer way to approach each situation.[68]

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61. *See* McClendon v. City of Columbia, 305 F.3d 314, 329–31 (5th Cir. 2002) (holding that the Fifth Circuit was required to consider "'a consensus of cases of persuasive authority'" in deciding qualified immunity in a state-created danger lawsuit (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999))).

62. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

63. *See* Oren, *supra* note 39, at 1201 n.257 (stating that objective reasonableness is required for qualified immunity). If officers of reasonable competence could disagree regarding the legality of the conduct, then the objective test is met and immunity should be recognized. Malley v. Briggs, 475 U.S. 335, 341 (1986). Thus, if no officer would conclude that the conduct is lawful, then there is no immunity. *See id.* Some courts interpret this to mean that an officer who violates a clearly established law is immune if he had an objectively reasonable belief that his conduct was lawful. *See* Gilles v. Repicky, 511 F.3d 239, 246–47 (2d Cir. 2007). Other courts disagree, holding that the objectively reasonable inquiry is always part of the clearly established inquiry. *See Saucier*, 533 U.S. at 202.

64. Lydia M. Harris, *New Effort Targets Domestic Violence*, ORLAND PRESS-REG., Feb. 5, 2010.

65. *Id.*

66. Elizabeth Piazza, *Farmington Police Unit Gets Special Training to Combating Domestic Violence*, THE DAILY TIMES (Maryville, TN), Feb. 7, 2010.

67. *Id.*

68. *Id.*

Louisville, Kentucky, also implemented a domestic-violence awareness program. There, a council committee approved a separate domestic-violence court because these courts "make a difference in cutting down on violence and the number of murders" in the cities that utilize them.[69]

Despite the above and other programs, women suffer two million injuries at the hands of their intimate partners every year.[70] Implementing a national standard for state-created danger could be an effective tool for making police officers aware of the danger of domestic violence by making them accountable for their conduct.

III. CRITIQUE OF EXISTING LAW

The state-created danger doctrine developed from Supreme Court dictum.[71] Because the dictum provided no guidance on the doctrine, circuit courts differ in their applications of it.[72] For example, the Fourth Circuit rejects the doctrine completely,[73] while the First Circuit rejects it "with some hesitation."[74] In the remaining circuits that have acknowledged the state-created danger doctrine, the result is usually not in the plaintiff's favor.[75]

A. The Fourth Circuit's Approach

The Fourth Circuit declined to apply the state-created danger doctrine in a tragic domestic violence case that ended in the death of three young children.[76] In *Pinder v. Johnson*, Officer Donald Johnson responded to a domestic-violence call at Carol Pinder's residence.[77] Pinder alleged that her former boyfriend, Don Pittman, broke into her house, pushed her, punched her, and threatened to kill her and her

69. Jon Chrisos, *Committee Approves Resolution to Establish Domestic Violence Court*, WAVE 3 NEWS (Louisville), Feb. 3, 2010, http://www.wave3.com/Global/story.asp?S=11929979. In Chicago, a similar domestic violence court was recently approved because "'domestic violence continues to be a serious threat and deserves the added attention.'" Barbara Vitello, *New Court Division to Focus on Domestic Violence Issues*, CHI. DAILY HERALD, Dec. 10, 2009, at 4.

70. *See* FAMILY VIOLENCE PREVENTION FUND, *supra* note 8.

71. *See* Chemerinsky, *supra* note 26, at 3.

72. *See* Barrett, *supra* note 22, at 188.

73. Pinder v. Johnson, 54 F.3d 1169, 1178 (4th Cir. 1995).

74. Barrett, *supra* note 22, at 205–07.

75. *See* Oren, *supra* note 39, at 1173–74.

76. *Pinder*, 54 F.3d at 1172, 1178–79.

77. *Id.* at 1172.

three children.[78] As a result, Johnson arrested Pittman.[79] Before Johnson left, Pinder explained to the officer that Pittman had recently been released from prison after a conviction for attempted arson of Pinder's residence.[80] Pinder said she was afraid for her family's safety and asked Johnson whether it was safe for her to return to work that night.[81] Johnson assured her that Pittman would be locked up overnight.[82] Based on this assurance, Pinder returned to work.[83]

Unfortunately, when Johnson brought Pittman for an appearance before a county commissioner, the commissioner only charged him with trespass and malicious destruction of property, both misdemeanor offenses.[84] As a result, Pittman was released on his own recognizance.[85] Immediately after his release, while Pinder was at work, he made the ten-minute walk from the police station to Pinder's house and set it on fire.[86] Her three children slept inside while the house burned and all three died of smoke inhalation.[87]

Pinder sued Officer Johnson pursuant to § 1983 alleging that he was liable under the state-created danger doctrine because he "created or enhanced" the danger she faced by assuring her of her safety but failing to charge Pittman with a serious offense.[88] However, the Fourth Circuit ruled that there was no state-created danger in this case.[89] The court reasoned that a police officer does not create or enhance the danger an individual faces "every time [that the officer] does anything that makes injury at the hands of a third party more likely."[90] The court added that "the most that can be said of [Johnson] . . . is that [he] stood by and did nothing when suspicious circumstances dictated a more active role for [him]."[91]

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Pinder v. Comm'rs of Cambridge, 821 F. Supp. 376, 381 (D. Md. 1993).

86. *Id.*

87. *Pinder*, 54 F.3d at 1172.

88. *Id.* at 1172, 1175.

89. *Id.* at 1175.

90. *Id.*

91. *Id.* (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989)).

B. The Third Circuit's Approach

In the Third Circuit, it is extremely difficult for domestic-violence victims to prevail in § 1983 proceedings against police officers. The circuit generally applies a four-part test for analyzing claims under the state-created danger doctrine.[92] However, in a recent domestic-violence case, the circuit narrowly focused on one of the elements and concluded that no state-created danger existed.[93]

In *Burella v. City of Philadelphia*,[94] George Burella, a police officer, abused his wife, Jill, for many years.[95] Jill complained to the police, George's supervisor, and Internal Affairs.[96] On one occasion, George assaulted Jill at a bar but left before the police arrived.[97] Upon arriving at home, he called Jill and threatened to kill their son if she did not return home.[98] When she arrived at their house, George had a gun and threatened to shoot her.[99] When the police arrived, they reported the incident as a domestic disturbance.[100] After they left, George continued to beat Jill until her parents came and removed her from the home.[101] George followed them to Jill's parents' house and when Jill attempted to call the police, he wrestled the phone away from her.[102]

On another occasion, George assaulted Jill while she met with a friend.[103] When the officers arrived, they allowed George to leave with his and Jill's daughter. Then the officers took Jill home, where George continued to beat her.[104] One week later, an officer served George with a protection order that prohibited him from threatening Jill or entering their home, but George immediately violated the

92. Burella v. City of Phila., 501 F.3d 134, 147 n.17 (3d Cir. 2007) (outlining four elements of a state-created danger claim: (1) the harm caused was foreseeable and direct; (2) the state action shocks the conscience; (3) plaintiff was a foreseeable victim of defendant's acts; and (4) a state actor affirmatively created the danger to a citizen).

93. *Id.* at 146–48.

94. 501 F.3d 134.

95. *Id.* at 136–38.

96. *Id.*

97. *Id.* at 137.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 138.

104. *Id.*

order by threatening Jill.[105] Even though the officer witnessed George's conduct, he allowed George to enter the house.[106] All of this abuse culminated when George shot Jill in the chest, severely wounding her, and then shot and killed himself.[107]

The Third Circuit ruled that Jill did not have a cognizable due process claim under § 1983 because she failed to demonstrate affirmative state action.[108] Instead, the court held that the facts simply demonstrated an omission—"that the officers failed to act."[109] Because the Third Circuit considered affirmative state action an element of state-created danger, it found no constitutional violation.[110]

IV. PROPOSAL

In cases arising from domestic-violence complaints, federal courts apply the state-created danger doctrine inconsistently. Therefore, Congress should enact legislation establishing a standard for determining whether an individual police officer's conduct constitutes state-created danger. Currently, 42 U.S.C. § 3796gg provides states with federal grants to combat violent crimes against women.[111] The purpose of § 3796gg is to help states "to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women."[112] To further this purpose, Congress should make the adoption of the state-created danger law a condition of states receiving grants under § 3796gg.

The most important aspect of the law is that it should reflect the sensitive and unique nature of domestic violence.[113] To this end, the law should be modeled after the Second Circuit's analysis in *Okin*.[114]

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 146 (reasoning that Jill failed to allege that the "officers *affirmatively* exercised their authority in a way that rendered her more vulnerable to her husband's abuse").

109. *Id.* at 147.

110. *Id.* at 147–48.

111. 42 U.S.C. § 3796gg (2006).

112. *Id.* § 3796gg(a).

113. *See infra* Part V.A–C.

114. *See infra* Part V.D.

Specifically, the law should state that state-created danger exists when a police officer's affirmative act or omission creates or enhances the danger to the victim. However, the affirmative act or omission does not have to be explicit. Instead, an affirmative act by law enforcement may be implicit, such as when officers' conduct communicates to an abuser that the officers will not interfere to stop the private violence.

Additionally, the law should reflect that state-created danger does not exist when the only action taken by an officer is responding to a domestic-violence call, with no interaction between the officer and the victim or the abuser. Furthermore, courts should not apply the state-created danger doctrine where doing so would place officers in a predicament that subjects them to liability whether they take action or fail to do so.

V. JUSTIFICATION

There are several reasons why Congress should enact legislation setting forth a national standard for applying the state-created danger doctrine. First, law enforcement's attitude regarding domestic violence must change on a national level. Second, because domestic violence tends to escalate,[115] there is a need for accurate reporting so that officers can step in before it is too late; also, current research indicates that the quality of the police response to a domestic-violence call affects whether victims will report subsequent acts of violence.[116] Finally, because domestic violence is a national problem, it necessitates a federal remedy.

A. Attitude Adjustment

"Prior to the late nineteenth century, laws and cultural practices in the United States . . . support[ed] a man's right to physically abuse his wife without [police] intervention."[117] Violence by husbands against their wives was a legitimate form of control and therefore

115. *See* Abby Simons & Maria Elena Baca, *Wife's Worst Fears Come True*, STAR TRIB. (St. Paul, Minn.), Oct. 3, 2009, at A1.

116. *See supra* notes 12–14 and accompanying text.

117. *See* Sarah Lorraine Solon, *Tenth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence*, 10 GEO. J. GENDER & L. 369, 373 (2009).

was beyond the scope of the criminal justice system.[118] By 1920, while all the states prohibited physical violence by a husband against his wife, law enforcement still treated domestic violence as a private matter and maintained a policy of nonintervention.[119] However, in the 1970s a number of high-profile lawsuits brought national attention to the damaging effects of the nonintervention policy.[120] Fearing similar lawsuits, police departments implemented more aggressive policies concerning domestic violence.[121] Additionally, the Minneapolis Domestic Violence Experiment found a correlation between increased arrests and decreased recidivism in batterers, which led many jurisdictions to implement mandatory arrest statutes.[122]

Nevertheless, stereotypes of women's traditional subordinate status and of domestic violence itself continue to influence law-enforcement practices.[123] One way to change law-enforcement culture is to "confront[] officers' own biases and assumptions about male entitlement that negatively impact the application of the law."[124] Because police officers are a victim's initial hope for immediate relief from physical abuse—and possibly their last hope for effective relief from physical abuse—they play a critical role in eradicating domestic violence.[125] Therefore, when the police fail to respond

118. Kapila Juthani, Note, *Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy*, 59 N.Y.U. ANN. SURV. AM. L. 51, 54 (2003).

119. *See id.* at 54–55 (stating that the usual police response to domestic violence was either telling the female that the police could not intervene or asking one party to leave the house); Solon, *supra* note 117, at 373.

120. Solon, *supra* note 117, at 399–400 (discussing cases that involved women suing police departments for failing to protect them from domestic abuse). The O.J. Simpson trial also had a large impact on the public perception of domestic violence and spurred legislative evaluation of some domestic violence laws. *Id.* at 400 n.232.

121. *Id.* at 400.

122. *Id.* at 400–02. However, while the Minneapolis Domestic Violence Experiment did find that arrests reduced violence for some categories of abusers, later studies have shown they actually increased violence by African-American and unemployed batterers. *Id.* at 400.

123. Dee Aker, *The World Is Watching: New Approach To Domestic Abuse Saves Women's Lives*, CHI. TRIB., Aug. 11, 1996, at 1 ("[P]olice are actually obstructing public safety by not dealing with their attitudes about domestic violence."). One study showed that "rules about reporting and prosecuting would not work without serious adjustment of the attitudes of police . . . ." *Id.* at 2.

124. *Id.* at 1. (internal quotation marks omitted) (quoting Detective Sergeant Anne O'Dell).

125. Gary M. Bishop, Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357, 1357, 1381–82 (1989) ("Police officers are typically the first source of help for these women, and therefore women depend upon the officers to render aid.").

adequately, they must be held accountable for their conduct. Furthermore, police culture and attitude must be changed on a national level because domestic violence is a national problem affecting a tremendous number of people.[126]

B. Accurate Reporting

When police officers have a more sensitive and understanding attitude toward domestic violence, their response to victims' calls for help will improve. In turn, victims will have more trust in the police and, therefore, will call on them whenever violence erupts.[127] This is extremely significant because one of the biggest problems with domestic violence is that victims do not report all the instances of abuse that they suffer.[128]

Domestic violence is often described as a cycle.[129] The common notion that an unhappy victim would simply leave her abuser is a misconception.[130] Victims stay for various reasons, including but not limited to lacking the financial means to leave,[131] fearing retaliation by the abuser and others,[132] or being ashamed that society will judge them.[133] But when violence is reported, it increases the chances of breaking the cycle.[134] Additionally, reporting is important because domestic violence tends to escalate, and it is crucial for police to intervene early, before serious injury or even death results.[135] Finally, accurate reporting leads to accurate statistics, which allow governments to address domestic-violence issues as effectively as possible.[136]

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126. *See* Solon, *supra* note 117, at 370–72.

127. *See supra* notes 12–14 and accompanying text.

128. *See* Miller, *supra* note 12, at 1B.

129. LENORE WALKER, THE BATTERED WOMAN 49–50 (1979).

130. *See* FELDER & VICTOR, *supra* note 1, at 18–20.

131. *Id.* at 19.

132. *See* Ariel Zwang, *Domestic Violence Victims Must Not Be Intimidated*, N.Y. DAILY NEWS, Feb. 28, 2010, http://.nydailynews.com/opinions/2010/02/28/2010-0228_domestic_violence_victims_must_not_be_intimidated.html.

133. *See* FELDER & VICTOR, *supra* note 1, at 19.

134. *See* Tammy Baldwin, Editorial, *Help Break Vicious Cycle of Violence*, MADISON CAP. TIMES, Oct. 22, 2005, at 11A (explaining that VAWA's passage encouraged victims to report violence and made police and prosecutors aware that violence only stopped with intervention).

135. *See* Simons & Baca, *supra* note 115, at A1.

136. *See* STEPHANIE RIGER ET.AL., EVALUATING SERVICES FOR SURVIVORS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT 45 (2002).

C. Federal Remedy

Because domestic violence is a national problem, there should be a federal remedy. Without a federal remedy, domestic-violence cases are confined to overburdened and underfunded state dockets that are ill-suited for handling them.[137] Additionally, litigating state-by-state may result in different interpretations of domestic-violence cases.[138] As a result, a battered woman in Maryland may receive different treatment and remedies than a battered woman a few miles away in Washington, D.C.[139] "These few miles may mean the difference between meaningful protection and none at all."[140] Conversely, a federal cause of action, like the proposed legislation in Part IV, *supra*, would recognize that domestic violence is systemic and institutional, and would allow victims to seek judicial protection regardless of where they live.[141] Further, this federal legislation would provide a federal remedy in an area where the Supreme Court has recently limited such recourse.[142]

D. The Model Approach

The above considerations were factored into the Second Circuit's approach to state-created danger in the recent domestic-violence case, *Okin*. Thus, the proposed legislation should be modeled on the approach in that case.

In *Okin*, Michele Okin stated her boyfriend, Roy Sears, was physically abusing her.[143] During a fifteen-month period, Okin made more than sixteen complaints to the police, hoping they would protect her.[144] Unfortunately, every time that the police responded to Okin's calls for help, they failed to respond adequately.[145] They

137. *See* Solon, *supra* note 117, at 375 ("[S]tate dockets have tighter schedules and less funding than federal courts.").

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. *Id.* at 374–75 (citing *United States v. Morrison*, 529 U.S. 598 (2000), where the U.S. Supreme Court invalidated a portion of a law that provided a federal civil remedy for the victims of gender-motivated violence, and *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), where "the Court held that protective orders were not 'property' worthy of due process protections").

143. Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 420 (2d Cir. 2009).

144. *Id.* at 420–26.

145. *Id.*

never arrested or interviewed Sears about Okin's allegations, and they only filed a domestic incident report one time.[146]

The only occasion when a domestic incident report was filed was when Okin called the police alleging that Sears grabbed her neck and choked her.[147] Okin claimed this incident occurred because Sears had told her about an earlier conversation he had with the police chief, in which Sears told him "that he could not 'help it sometimes when he smacks Michele Okin around[.]'"[148] After hearing this, Okin tried to call the police, but Sears "stopped her by grabbing her neck."[149] When the police arrived, Okin showed them her neck as well as bruises on her legs and asked one of the officers, "Can you please tell Roy to stop beating me. That is all I want."[150] Instead, the officers spoke with Sears about football.[151] Furthermore, they were "'very derogatory' toward [Okin] when she said she wanted to press charges."[152] In the end, the officers did not arrest Sears.[153]

In the ensuing months, Okin continued to seek police assistance to no avail. On January 1, 2002, she complained that Sears was beating her.[154] A police officer responded to the house, but made no written report.[155] On March 8, 2002, Okin complained that Sears stabbed her foot and assaulted her the previous night at a hotel in New Windsor.[156] The responding officer filed a general incident report stating that Okin was confused and that, as a lawyer, she should understand the fact that he had no jurisdiction to help her with the New Windsor matter.[157] On March 25, 2002, Okin complained that Sears threatened to kill her but that she was afraid of filing a complaint against him because it would make the situation worse.[158] The responding officer did not know how to "handl[e] a situation in

146. *Id.* at 420.
147. *Id.*
148. *Id.* at 430.
149. *Id.* at 420.
150. *Id.*
151. *Id.* at 421.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 422.
157. *Id.*
158. *Id.*

which a threat victim says that filing a complaint will just make things worse," and he did not file a domestic incident report.[159] On April 12, 2002, Okin complained that Sears was stalking her.[160] The responding officer checked the area around the house but did not interview Sears.[161] On May 12, 2002, Okin's neighbor called the police because Okin and Sears were fighting and the situation was "threatening-looking."[162] The responding officer did not file a domestic incident report, did not arrest or interview Sears, and did not interview the neighbor.[163] On May 19, 2002, Okin called the police complaining that the previous day Sears came to her house and threatened to shoot her.[164] The responding officer did not interview Sears about the threat and filed a general incident report stating there were neither victims nor suspects.[165]

Based on these and additional incidents, Okin alleged that the responding police officers violated her due process rights.[166] Okin claimed that the officers' conduct "affirmatively increased the danger she faced" because it was witnessed by Sears.[167] The Second Circuit agreed and held that a reasonable jury could conclude that the police officers' conduct fell within the state-created danger exception.[168]

In reaching its conclusion, the Second Circuit interpreted the *DeShaney* decision as articulating that state-created danger exists when state action in some way creates or increases the danger to the victim.[169] Expanding on that, the court reasoned that the state action can be either explicit or implicit.[170] The court found that police conduct is explicit when officers directly communicate to private actors that they have the freedom to harm others without the risk of

159. *See id.* at 423.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 424.
164. *Id.*
165. *Id.*
166. *Id.* at 426.
167. *Id.*
168. *Id.* at 427–31.
169. *See id.* at 428.
170. *Id.* at 428–29.

law-enforcement intervention.[171] However, even if the police do not explicitly approve or encourage private violence, their repeated, sustained inaction can communicate that they will not interfere in the violence.[172]

The record in *Okin* gives no indication that the officers made explicit assurances to Sears that he could act with impunity.[173] However, there was a genuine issue of material fact as to whether the officers implicitly conveyed to Sears that his violence was permissible and would not cause him any problems with the authorities.[174] For example, when responding to Okin's complaint that Sears had beaten and tried to choke her, the officers responded by speaking with Sears about football.[175] On another occasion, the chief of police did not arrest Sears when Sears told him "that he could not 'help it sometimes when he smacks Michele Okin around[.]'"[176] Furthermore, on numerous occasions, the police responded to Okin's complaints without filing a domestic incident report, interviewing Sears, or arresting him.[177]

Additionally, the Second Circuit ruled that the officers' conduct could be viewed as increasing the danger to Okin.[178] The officers "expressed camaraderie with Sears and contempt for Okin."[179] For the entire time that Okin was contacting the police for help, Sears was aware of the officers' dismissive and indifferent attitude toward Okin's complaints.[180] Therefore, the deterrent capacity of law

171. *Id.* at 428 (citing Dwares v. City of New York, 985 F.2d 94, 97, 99 (2d Cir. 1993) (finding state-created danger where police officers told a group of skinheads that "unless they got completely out of control, the police would neither interfere with their assaults nor arrest them," because the police officers were officially sanctioning privately inflicted injury)).

172. *Id.* at 428–29 (citing Pena v. DePrisco, 432 F.3d 98, 111 (2d Cir. 2005) (finding state-created danger where police officers and supervisors went drinking with an off-duty officer and then allowed him to drive, which resulted in him killing three people. By participating in the drinking and allowing it to continue, the officers implicitly communicated to the off-duty officer that he would not be disciplined for the conduct)).

173. *Id.* at 429.

174. *Id.* at 429–30.

175. *Id.* at 430.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *See id.* at 430–31.

enforcement was nullified and may have caused Sears to continue his violence against Okin.[181]

The Second Circuit's approach to state-created danger did not focus on the affirmative-act-versus-omission distinction that the Third Circuit focused on in *Burrella v. City of Philadelphia.*[182] In *Burella*, the court's focus on affirmative state action was surprising because in an earlier case, *Morse v. Merion School District*,[183] it specifically stated that foreseeability was the most important factor of its test.[184] In reaching that conclusion, the *Morse* court stated that the characterization of state action as an "affirmative act" or an "omission" may be irrelevant.[185] Moreover, the *Morse* court commented that a state creates an opportunity for harm if "the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was . . . an affirmative act or an omission."[186]

Additionally, in *Burella*, the Third Circuit should not have focused on the affirmative-act-versus-omission characterization because the line between the two concepts is unclear.[187] Conventional wisdom suggests that the Constitution is a charter of negative liberties, meaning that it is a series of prohibitory constraints on the government's power rather than a list of rights to have the government do or provide anything.[188] But that notion assumes that the government can only harm through action and does not take into account that the government can do as much harm by failing to promulgate rules or by failing to supervise.[189] The same concept also fails to consider that the government has created individual

181. *Id.*

182. *See supra* Part III.B.

183. 132 F.3d 902 (3d Cir. 1997).

184. *See id.* at 914.

185. *See id.* at 915.

186. *Id.* at 914–15.

187. *See id.* at 914 ("The case law addressing . . . what constitutes an affirmative act for purposes of liability, is less than clear. Conduct that has been held to be an affirmative act under one set of facts has not met that standard in a similar setting."); *see also* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989) (finding no liability where the State failed to remove a child from his abusive home despite knowing of the abuse, even though the State *acted* when it judged the home to be safe and returned the boy to the home).

188. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273–75 (1990).

189. *See id.* at 2284.

dependency on its services and in some areas has displaced private alternatives.[190]

Furthermore, in applying the affirmative-act-versus-omission logic, the Third Circuit erred in deciding that there was no affirmative action in *Burella*. Unlike the *Okin* court, the *Burella* court did not recognize that when police fail to question or arrest the batterer, the victim faces an increased level of danger because the police validated the batterer's actions.[191] The *Okin* court held that police officers "affirmatively act" when they communicate to the abuser that he can act with impunity, whether they communicate explicitly or implicitly.[192] In *Burella*, just like in *Okin*, the abuser was never arrested, and the officers allowed him to continue his reign of terror, even when it occurred in their presence.[193] And as a result, Jill Burella was severely injured.[194]

Similarly, in *Pinder*, the Fourth Circuit failed to treat Pinder's case as serious domestic violence and instead simply referred to it as involving "suspicious circumstances."[195] The court reasoned that a police officer does not create or enhance the danger an individual faces "every time [that the officer] does anything that makes injury at the hands of a third party more likely."[196] However, the court failed to recognize that for injury from an abusive boyfriend where the police mishandle a domestic-violence claim is not simply *more* likely, but *very* likely.[197] In recognizing that domestic violence often turns tragic,[198] the Second Circuit attempted to prevent such tragedy by holding law enforcement accountable for responding to domestic-

190. *See id.* at 2321–22 ("[Government] has . . . required or encouraged reliance on its own regulatory structure in numerous areas, including licensing of professionals, inspection of buildings, food and drugs, and supervision of child welfare. . . [I]t has stripped citizens of self-help remedies in numerous areas." (footnote omitted)).

191. *See* Browne, *supra* note 2, at 1309.

192. Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 429–31 (2d Cir. 2009).

193. Burella v. City of Phila., 501 F.3d 134, 136–39 (3d Cir. 2007).

194. *Id.* at 138.

195. Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (quoting Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989)).

196. *Id.*

197. *See* Ian Urbina, *Philadelphia to Handle Abuse Calls Differently*, N.Y. TIMES, Dec. 30, 2009, at A13 (calculating that of the 35 domestic homicides recorded in Philadelphia in 2009, 21 of those killed accounted for a total of 178 prior calls to the police).

198. In 2005, 1,181 women were murdered by their significant others. FAMILY VIOLENCE PREVENTION FUND, *supra* note 8.

violence situations in ways that blatantly ignore the deadly threat facing victims.[199] Thus, the *Okin* decision should be the model for national legislation. The following two examples illustrate support for this approach as well as how its scope should be limited.

1. Ninth Circuit Support for the Model Approach

The Ninth Circuit recognizes the importance of the state-created danger doctrine, and its analysis in a recent case demonstrates that its approach is similar to that of the Second Circuit. In *Kennedy v. Ridgefield*,[200] a woman complained to the police that a violent teenage neighbor molested her nine-year-old daughter.[201] The woman requested that the police contact her before they contact the neighbor because she was afraid of what he might do.[202] Nevertheless, a police officer notified the neighbor and his mother first, and then fifteen minutes later told the woman that he had spoken with the neighbors.[203] The officer told the woman not to worry because there would be extra police cars patrolling the area that night.[204] Relying on the officer's comments, the woman and her husband decided to stay home and leave early the next morning.[205] Unfortunately, that night the neighbor broke into the couple's house and shot the couple while they slept, injuring the woman and killing her husband.[206]

The Ninth Circuit found the police officer liable because he "affirmatively created an actual, particularized danger [the victim] would not otherwise have faced."[207] Furthermore, by telling the woman there would be extra police patrol that night, the officer misrepresented the danger the woman and her husband faced and thus aggravated the dangerous situation he had created.[208]

The Ninth Circuit's application of the state-created danger doctrine rested on state actors engaging in affirmative acts that

199. Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 434 (2d Cir. 2009).
200. 439 F.3d 1055 (9th Cir. 2006).
201. *Id.* at 1057.
202. *See id.* at 1058.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 1063.
208. *Id.*

created or increased the danger to the victim.[209] The court's interpretation of "affirmative" was similar to the Second Circuit's analysis in *Okin*. In *Kennedy*, the court found that the police officer acted affirmatively when he notified the violent teenage neighbor and his mother of the molestation allegations before notifying the woman and consequently provided the violent teenage neighbor with the opportunity to shoot the woman and her husband before they could take protective measures.[210] Similarly, in *Okin*, the court found the police officers acted affirmatively when they failed to interview or arrest Sears even though they knew he had abused Okin, and thereby enabled Sears to continue his abuse.[211] Thus, if the Ninth Circuit is presented with a domestic-violence case alleging inappropriate conduct by police officers, its application of the state-created danger doctrine would likely be similar to the Second Circuit's approach in *Okin*.

2. Limitation on the Model Approach

The purpose of the proposed legislation is to help and protect victims of domestic violence, not to make it easier to sue police officers. A domestic-violence case from the Sixth Circuit demonstrates a good balance between these two important concerns.

Deborah Kirk, the victim in *May v. Franklin County Commissioners*,[212] called 911 three times during a fight with her boyfriend Marvin Moss.[213] During the first conversation, Kirk told an officer that there was a domestic problem but that it was under control.[214] A second conversation between Kirk and the dispatcher several minutes later made it clear to the dispatcher that Kirk was being assaulted and that Moss was threatening to harm her further.[215] As a result, a police car was dispatched to Kirk's apartment to investigate a possible domestic disturbance.[216] After receiving a third call from Kirk, the dispatcher escalated the call to a "good domestic"

209. *See* Oren, *supra* note 52, at 49–50.

210. *See Kennedy*, 439 F.3d at 1063.

211. *See* Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 429–30 (2d Cir. 2009).

212. 437 F.3d 579 (6th Cir. 2006).

213. *Id.* at 581.

214. *Id.*

215. *Id.*

216. *Id.*

disturbance.[217] When the officer arrived at the apartment and knocked on the door, no one answered.[218] Not seeing or hearing any sign of a struggle, the officer cleared the call with the call center and left.[219] The next day, Kirk's body was discovered in the apartment.[220] She had died of blunt trauma to the neck.[221]

The Sixth Circuit held that there was no state-created danger because dispatching an officer to Kirk's apartment was not an affirmative act by a state actor.[222] First, the officer did not create the risk by arriving at Kirk's apartment because Kirk and Moss were fighting before the officer arrived.[223] Furthermore, there was no proof that the officer's knock on the door increased the risk to Kirk.[224] The court claimed that recognizing an affirmative act here would place police officers in a "Catch-22" where they face liability whether they take action to help or they fail to do so.[225]

The *May* court did not recognize state-created danger in this domestic-violence situation because the facts are distinguishable from the facts in *Okin*. Unlike Kirk, Okin complained to the police over fifteen times in a fifteen-month period.[226] The police repeatedly interacted with Okin and were fully aware of the dangers and risks she faced from Sears.[227] Furthermore, Sears was aware of the officers' disregard of Okin's complaints, which may have increased his violence if he believed the police would not interfere.[228] In *May*, there was no reason to conclude that Moss believed the police would not interfere if he continued to abuse Kirk.

Therefore, if a situation similar to the situation faced by the plaintiff in *Okin* were to present itself in the Sixth Circuit, or any

217. *Id.* at 582.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 584–86.

223. *Id.* at 584.

224. *Id.* at 584–85. However, the plaintiff's expert testified that the police arrival, lack of intervention, and withdrawal may have encouraged Moss to continue his violence without fear of any consequences from the police. *Id.*

225. *Id.* at 585–86 (stating that the call center would "face legal and moral objections" if it failed to dispatch an officer to Kirk's apartment after her calls).

226. Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 420–26 (2d Cir. 2009).

227. *Id.*

228. *Id.* at 430–31.

other circuit, and a federal standard like the one proposed in Part IV were available to the reviewing court, that court could appropriately and quickly decide the matter as the Second Circuit did in *Okin*. In fact, the *May* decision is not a "loss" for state-created danger cases in the domestic-violence context because it demonstrates that the goal is not to flood courts with suits against police officers, but to ensure that the police act to protect victims of abuse.

VI. CONCLUSION

A national standard setting forth guidelines for state-created danger analysis in domestic-violence situations would greatly aid the fight against domestic violence. Police officers receive battered victims' initial call for immediate relief from abuse, and their response affects whether victims will continue to seek police assistance if the violence continues. Therefore, they must be held accountable for responding inadequately to victims' calls for help. Currently, the state-created danger doctrine is applied inconsistently by the circuit courts, but the Second Circuit's approach in the *Okin* case has been the most effective way to help domestic-violence victims. The court did not focus on an action-versus-inaction classification. Instead, it concluded that police action can be implicit, such as when an officer's conduct communicates to an abuser that the police will not interfere.[229] Therefore, the federal law should be enacted to reflect the Second Circuit's approach in the *Okin* case. Additionally, the law would not give domestic-violence victims carte blanche to sue police officers and should not be applied in situations where officers face liability regardless of whether they take action. Until Congress enacts such legislation and unifies the circuits, courts that are faced with cases in which police officers responded inadequately to domestic-violence situations should follow the Second Circuit's approach in *Okin*.

229. *Id.* at 429–31.