MUNICIPAL ACCOUNTABILITY IN DOMESTIC VIOLENCE: A PROMISING NEW CASE

Lela Gray[*]

[*] J.D. Candidate, Albany Law School, 2011; B.A., University of South Florida, 2007. I would like to thank Professor Evelyn Tenenbaum for her invaluable guidance, dedication, and assistance with this article. Special thanks to my husband, Jamey, and my family and friends for their unwavering love and support.

INTRODUCTION

"[W]ithout an accountability paradigm, 'shall' could be construed as maybe, and mandates are merely theoretical and quite frankly meaningless."[1]

The first time Roy Sears beat Michelle Okin was in October 2001.[2] The beating left her with two broken bones.[3] Michelle was honest with her physician about the cause of her broken bones, but begged her physician not to tell anyone or record their conversations in her medical records.[4] She also confided in her psychiatrist that, even after this first abusive incident, she feared for her life because her boyfriend (Sears) was "beyond the law."[5] That likely explains why Michelle did not report the incident to the police.[6]

Unfortunately, Michelle's fear that her boyfriend was untouchable was well-founded because his abuse continued and her cries for help seemingly fell on deaf ears. Over the next few years, Michelle called the police for help more than twenty times.[7] Sears was never arrested and most of the incidents remained undocumented because the police often chose not believe Michelle and often did not even report her accusations in the incident reports.[8]

Michelle's plight is anything but unique in this country, for she is far from the only woman who has faced domestic violence. It is estimated that domestic violence touches the lives of tens of millions of Americans.[9] Great strides have been made in every

[1] G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 405, 415 (2009).

[2] Okin v. Vill. of Cornwall-on-Hudson Police Dep't, No. 04 Civ. 3679(CM), 2006 WL 2997296, at *1 (S.D.N.Y. Oct. 13, 2006), *aff'd in part, rev'd in part*, 577 F.3d 415, 420 (2d Cir. 2009). On appeal, the court stated in footnote two that they construed the facts in the light most favorable to Okin. *Okin*, 577 F.3d at 420, n.2.

[3] *Okin,* 2006 WL 2997296, at *1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at *1–10.

[9] NEAL MILLER, INST. FOR LAW AND JUSTICE, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 1 (2004), *available at* http://www.ilj.org/publications /docs/Domestic_Violence_

state to protect the victims of domestic violence and to cure this social plague.[10] For example, in the last twenty years, all fifty states have adopted anti-stalking laws, most states have abolished the marital defense for rape, and forty-nine states have authorized the warrantless arrest of a person who violates a court order of protection.[11] Unfortunately, the abuse continues.

In this paper, I argue that one reason for the continued existence of this domestic violence plague is the lack of local government and law enforcement accountability. In Part I of this paper, I discuss the general rule that the Due Process Clause of the Fourteenth Amendment confers no affirmative right to governmental protection, and the two exceptions to the general rule. I posit that even though these two exceptions were supposed to enhance governmental accountability, the courts' interpretation of these exceptions has meant that municipalities and the police are seldom held responsible in claims brought under 42 U.S.C. § 1983 (§ 1983 claims), even when they fail to adhere to the laws. This section also includes a synopsis of several § 1983 decisions over the last thirty years, the rules that have evolved from those cases, and a discussion of how those cases are responsible for this lack of legal accountability. Part II discusses two promising Second Circuit Court of Appeals cases—*Dwares v. City of New York*[12] and *Okin v. Village of Cornwall-on-Hudson Police Dep't.*[13] In this section, I argue that the Second Circuit case, *Okin*, has the potential to breathe new life into domestic violence accountability under substantive due process. *Okin* expressly recognizes, for the first time, that victims of domestic violence are left in greater danger of continued abuse by their empowered batterers when police officers act with deliberate indifference and fail to investigate properly or to arrest the batterers. I argue that *Okin* provides a vital first step in enabling the federal courts to hold the police and municipalities accountable to the thousands of battered partners who rely on the police for protection and law enforcement. Finally, Part III of this article details the great legislative strides made in New York to

Legislation.pdf.

[10] *Id.* at 3–4.

[11] *Id.* at 4, 8, 31 ("[S]tate laws in all but one state and the District of Columbia authorize warrantless arrests based on a probable cause determination that the [protection] order has been violated.").

[12] 985 F.2d 94 (2d Cir. 1993).

[13] 577 F.3d 415 (2d Cir. 2009).

protect victims of domestic violence, and how these recent strides make this the perfect time for the courts to add some "teeth" to domestic violence laws by extending the holding in *Okin* and finally beginning to hold state and local governments accountable in federal court.

I. STATUS QUO & THE LACK OF ACCOUNTABILITY

A. The Municipal Response to the Domestic Violence Problem

The U.S. Commission on Civil Rights reported in 1978 that on the issue of intimate violence, "the most serious [law enforcement] problem . . . is the failure of the police to respond to a call for help."[14] Six years later, the U.S. Attorney General's Office announced a nationwide failure of law enforcement to respond adequately in domestic violence cases.[15] Reports like these spurred the passage of mandatory arrest policies in many states;[16] however, in the 1990's the studies and reports on domestic violence continued to show an overall inadequate police response to the problem.[17] One reason for the inadequate response is a lack of local government and law enforcement

[14] G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 136–37 (2005) (quoting U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 21 (1978)).

[15] *Id.* at 137 (citing U.S. ATT'Y GEN.'S OFFICE, ATT'Y GEN.'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT iv–vii (1984)).

[16] *Id.* at 135 n.120 (reporting that the following state statutes mandate arrest when there is probable cause to believe that a violation of a protection order has occurred: ALASKA STAT. § 18.65.530(a)(2) (2008); CAL. PENAL CODE § 836(c)(1) (West Supp. 2010); COLO. REV. STAT. § 18-6-803.5(3)(b)(I) (2009); KY. REV. STAT. ANN. § 403.760(2) (LexisNexis 1999); LA. REV. STAT. ANN. § 14:79(E) (2004); MD. CODE ANN., FAM. LAW § 4-509(b) (LexisNexis Supp. 2009); MASS. ANN. LAWS ch. 209A, § 6(7) (LexisNexis 2003); MICH. COMP. LAWS SERV. § 764.15b(1)(b) (LexisNexis 2003); MINN. STAT. ANN. § 518B.01(14)(e) (West Supp. 2010); MO. ANN. STAT. § 455.085(2) (West 2003); NEV. REV. STAT. ANN. § 33.070(1) (LexisNexis Supp. 2009); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 2005); N.M. STAT.ANN § 40-13-6(D) (Supp. 2010); N.Y. CRIM. PROC. LAW § 530.12(8) (McKinney 2009); N.D. CENT. CODE § 14-07.1-11(1) (2009); OHIO REV. CODE ANN. § 2935.03(B)(1) (LexisNexis Supp. 2010) (suggesting but not mandating arrest); OR. REV. STAT. § 133.310(3) (2009); 23 PA. CONS. STAT. ANN. § 6113(a) (West Supp. 2010); S.D. CODIFIED LAWS § 23A-3-2.1 (Supp. 2010); TENN. CODE ANN. § 36-3-611(a) (2005); TEX. CODE CRIM. PROC. ANN. 14.03(a)(3) (West Supp. 2010); UTAH CODE ANN. § 77-36-2.4(1) (LexisNexis Supp. 2010); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West Supp. 2010); W.VA. CODE ANN. § 48-27-1001(a) (LexisNexis 2009); WIS. STAT. ANN. § 813.12(7) (West Supp. 2009)).

[17] *See id.* at 136–38.

accountability. Expanding the applicability of the Fourteenth Amendment substantive due process exceptions would help cure this problem.

B. DeShaney: An Overly Narrow Judicial Interpretation of the Fourteenth Amendment Substantive Due Process Exceptions

Since the landmark case *DeShaney v. Winnebago County Department of Social Services*, U.S. courts have held that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where . . . necessary to secure life, liberty, or property interests . . . ."[18] *DeShaney* involved a four-year-old boy named Joshua who was removed from his home after receiving several severe beatings from his father.[19] As a condition for his return to his father, the State of Wisconsin required Mr. DeShaney to enter into a voluntary agreement allowing the State to make visits to the home to check on the boy's welfare.[20] After the written agreement was signed, Joshua continued to have suspicious injuries and Mr. DeShaney refused to allow the caseworker to see him on several occasions.[21] The State neither petitioned for surrender of the child nor sought his removal despite Mr. DeShaney's failure to comply with the agreement.[22] In the end, little Joshua DeShaney suffered severe brain damage due to his father's abuse, and his mother sued the State of Wisconsin alleging that her son's Fourteenth Amendment rights had been violated by the State's inaction given its knowledge of the situation.[23]

In finding the State unaccountable under the Substantive Due Process Clause of the Fourteenth Amendment, the U.S. Supreme Court reasoned that knowledge and negligent inaction are not the same as culpable action.[24] In the Court's opinion, standing by and doing nothing is not enough to hold a state accountable under § 1983 claims.[25] Essentially, the Court set a precedent that the State must affirmatively encourage the beating of a child before it

[18] 489 U.S. 189, 196 (1989).
[19] *Id.* at 192–93.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 193.
[24] *See id.* at 201.
[25] *See* 42 U.S.C §1983 (providing a cause of action for a violation of substantive due process); *see also DeShaney*, 489 U.S. at 203.

can be held accountable under the Fourteenth Amendment.[26]

In addition, the Court noted that even where the State takes culpable action, no liability will lie unless the State owes an affirmative duty of care to the alleged victim, and "[an] affirmative duty . . . arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him," but only from a "limitation which it has imposed on his freedom to act on his own behalf."[27]

The dissents in *DeShaney* outlined the major flaws in the Court's analysis. As Justice Brennan pointed out in his dissent, "inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it."[28] He continued that the *DeShaney* opinion "construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent."[29] Also critical of the "sharp and rigid line" drawn by the majority, Justice Blackmun thought that the flawed reasoning of the majority misinterpreted the Fourteenth Amendment and stripped "[p]oor Joshua" and his mother of the constitutional protection that was meant to be provided.[30]

Many scholars have sided with the *DeShaney* dissent, agreeing that the majority's analysis in *DeShaney* is fatally flawed because the State's choice to return little Joshua to his abusive father and leave him with no regard for his continued safety is essentially an affirmative action which lead to little Joshua being reduced to a vegetable.[31] For example, Professor G. Kristian Miccio equated the State's inaction with placing little Joshua "in front of an oncoming train."[32] The professor added: "While the State was not the sole cause or the immediate cause of the harm, it certainly contributed to it. Thus, the State's conduct *combined* with the father's to cause the harm . . . ."[33]

Additionally, in the context of domestic violence the distinction

---

[26] *See DeShaney*, 489 U.S. at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

[27] *Id.* at 200.

[28] *Id.* at 212 (Brennan, J., dissenting).

[29] *Id.*

[30] *Id.* at 212–13 (Blackmun, J., dissenting).

[31] Miccio, *supra* note 1, at 417.

[32] *Id.* at 418.

[33] *Id.*

between an affirmative act and an omission has little meaning in the lives of battered women. Some experts have argued that making such a distinction is actually dangerous "because the distinction enables the possibility of marginalizing state complicity in failing to protect women and children."[34] It has also been argued that "by focusing on the void and characterizing police conduct as inaction, courts unwittingly shielded the State from accountability and, perhaps, contributed to perpetuation of the violence."[35]

In the end the *DeShaney* decision almost sounded the "death knell for Fourteenth Amendment substantive due process claims," especially for battered women who asserted a state's failure to protect as the basis for their claim.[36] For example, after the *DeShaney* case, the Ninth Circuit Court of Appeals withdrew and amended *Balistreri v. Pacifica Police Department*, which originally held that a due process claim was possible, [37] but after *DeShaney*, the same court held that there is no due process violation even where the police knowingly fail to arrest a battering husband who is in violation of an order of protection.[38] To many domestic violence advocates, the only crack of light in the whole *DeShaney* decision was the Court's recognition of two exceptions to the general rule that the Due Process Clause confers no affirmative right to governmental protection—the "special relationship" exception and the "state-created danger" exception.[39] If these two exceptions were more broadly interpreted, our governments could be held accountable to domestic violence victims under § 1983 claims. Despite recognizing that these two exceptions exist, however, the lower courts have seldom recognized the applicability of either exception in many cases since *DeShaney*.

[34] Miccio, *supra* note 14, at 121.

[35] *Id.* at 151.

[36] Miccio, *supra* note 1, at 418.

[37] Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1424–26 (9th Cir.1988), *aff'd in part, rev'd in part,* 901 F.2d 696 (9th Cir. 1990).

[38] *Balistreri*, 901 F.2d at 702.

[39] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–01 (1989). While the Court did not specifically discuss the "state-created danger" exception, most courts have cited the comment, "[w]hile the State may have been aware of the dangers that Joshua 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" as support for the establishment of the exception. *Id.* at 201.

1. The "Special Relationship" Exception

"[I]n certain limited circumstances" where a "special relationship" exists, a state may have a duty to protect individuals from private action.[40]

The *DeShaney* Court recognized that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to *particular individuals*"[41] with whom the State has created a special relationship. The *DeShaney* Court gave two examples of the types of "special relationships" which may impose such an affirmative duty of care upon the State, and both examples involve people who are involuntarily confined by the State. First, the Court cited to *Estelle v. Gamble*, which held that the State has an affirmative duty to provide adequate medical care to incarcerated prisoners because of the Eighth Amendment's prohibition against cruel and unusual punishment.[42] Second, the Court recognized that there was a special relationship in *Youngberg v. Romeo*, which held that the State has an affirmative duty to ensure that involuntarily committed mental patients are reasonably safe from themselves and others.[43]

The Court distinguished the *DeShaney* case from *Estelle* and *Youngberg* by holding that in the latter two cases, the duty of care and protection stemmed "not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[44] The Court explained that had the State removed Joshua and placed him in a foster home that was operated by the State, there *may* have been a sufficient special relationship to serve as the basis for a Due Process Clause §1983 claim.[45]

Due to the carefully crafted words used by the majority in *DeShaney* to describe the special relationship exception, many courts have refused to apply the exception where the State does not exercise direct physical custody over the victim.[46]

[40] *See id.* at 198, 201–02.
[41] *Id.* at 198 (emphasis added).
[42] Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).
[43] Youngberg v. Romeo, 457 U.S. 307, 324 (1982).
[44] *DeShaney,* 489 U.S. at 200.
[45] *Id.* at 201 n.9.
[46] *See, e.g.*, Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000).

Furthermore, the U.S. Supreme Court created a heightened standard for substantive due process claims in the 1998 case of *County of Sacramento v. Lewis*.[47] In *Lewis*, the Court made clear that a plaintiff seeking to establish a substantive due process violation must demonstrate that the State's conduct "shocks the conscience" under the particular circumstances of the case.[48] The dual prerequisites have transformed the "special relationship" exception from a narrow exception to one that has only been found applicable to a handful of cases. The end result is that the exception offers little hope for domestic violence victims.

2. The "State-Created Danger" Exception

Even before *DeShaney*, some courts recognized a second exception—the state-created danger exception—to the general rule that the Due Process Clause confers no affirmative right to governmental protection against third parties.[49] Those cases generally allowed a substantive due process claim to proceed where the state "affirmatively placed [a citizen] in a position of danger" and where that citizen was distinguishable from the general public.[50] After *DeShaney*, the inquiry became "whether the state actors involved *affirmatively acted* to *create* plaintiff's danger, or to render him or her more *vulnerable* to it."[51]

Unfortunately, like the "special relationship" exception, judicial interpretation of the state-created danger exception has greatly constricted this already narrowly-tailored exception. While a variety of tests have been adopted,[52] all courts now require that

[47] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 852–53 (1998).

[48] *See id.* at 846.

[49] *See* Cornelius v. Town of Highland Lake, 880 F.2d 348, 352–53 (11th Cir. 1989); *see also* Wood v. Ostrander, 879 F.2d 583, 594 (9th Cir. 1989).

[50] *Ostrander*, 879 F.2d at 589–90 (quoting Ketchum v. Cnty. of Alameda, 811 F.2d 1243, 1247 (9th Cir. 1987)).

[51] Kneipp v. Tedder, 95 F.3d 1199, 1207 (3d Cir. 1996) (first emphasis added) (quoting D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1373 (3d Cir. 1992)). The court in *Kneipp* also noted that the terms "'deliberate indifference', 'reckless indifference,' 'gross negligence,' or 'reckless disregard' in the context of a violation of substantive due process under the Fourteenth Amendment have not been distinguished." *Id.* at 1208 n.21 (internal citation omitted).

[52] McClendon v. City of Columbia, 305 F.3d 314, 325 n.7 (5th Cir. 2002) (citing Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) ("Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create [or] increase the risk that an individual will be exposed to private acts of violence . . . [W]e require plaintiffs alleging a

the plaintiff prove the State acted with "culpability beyond mere negligence."[53] In addition, federal courts have repeatedly emphasized the stringent requirement that a plaintiff show the State's conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[54] Thus, the U.S. Circuit Courts applying the state-created danger exception require plaintiffs to demonstrate first, that the State *affirmatively acted* to increase or create the danger that resulted in harm to the individual (culpability beyond mere negligence), and second, that such State action rose to the level of shocking the conscience.[55] As noted in *Butera v. District of Columbia*, "[n]o constitutional liability exists where the State actors 'had no hand in creating a danger but [simply] stood by and did nothing when suspicious circumstances dictated a more active role for them.'"[56] Although more substantive due process claims have arisen under the state-created danger theory as compared to the "special

constitutional tort under § 1983 to show 'special danger' in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces 'special danger' where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large."); *Kneipp*, 95 F.3d at 1208 ("[C]ases predicating constitutional liability on a state-created danger theory have four common elements: '(1) the harm ultimately 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; (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.'") (internal citation omitted); Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) ("Plaintiff must demonstrate that (1)[he] was a member of a limited and specifically definable group; (2) Defendants' conduct put [him] and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking."); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) ("[P]laintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that they otherwise would have been."); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) ("[A] constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increase[s] the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.")).

[53] *McClendon*, 305 F.3d at 325.

[54] Butera v. Dist. of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001) (citation omitted); *see McClendon*, 305 F.3d at 326.

[55] *See McClendon*, 305 F.3d at 326; *see also Butera*, 235 F.3d at 650.

[56] *Butera*, 235 F.3d at 650 (quoting *Reed*, 986 F.2d at 1125) (alteration in original).

relationship" exception,[57] most domestic violence claims would still be short of falling within this exception.

3. *Castle Rock*—Almost the Nail in the Coffin

Attempts by scholars and domestic violence activists to reopen the substantive due process doors to battered women have largely failed. For example, scholars believed that mandatory arrest legislation—which requires police officers to arrest batterers and violators of restraining orders—would provide the needed link to trigger a valid Fourteenth Amendment claim in domestic violence cases, but those hopes were quashed with the Supreme Court's decision in *Castle Rock v. Gonzales*.[58]

There, Ms. Gonzales' estranged husband took their three daughters while they were playing outside the family home, without making any prior arrangements to have the children that evening.[59] Over the next twelve hours, she contacted the police five separate times and advised them that she had an order of protection against her estranged husband, but each time she was told to "wait and see" what happened.[60] Almost twelve hours after her first call to the police, Ms. Gonzales' estranged husband drove to the police station, opened fire, and was shot to death by the police.[61] Their three daughters were found dead in the cab of their father's truck.[62] Thereafter, Ms. Gonzales sued the town, alleging that her Fourteenth Amendment rights had been violated because the police officers failed to properly respond to her repeated reports that her estranged husband had violated the order of protection.[63]

In that case, Justice Scalia explained that a benefit (like an order of protection) "is not a protected entitlement if [government] officials [may] grant or deny it [in their discretion]."[64] Despite arrest laws appearing to be mandatory,

[57] *McClendon*, 305 F.3d at 334 (Parker, J., dissenting) (noting that the Fifth Circuit alone received more than seven state-created danger cases between 1992 and 2002).

[58] Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 760–62 (2005); Miccio, *supra* note 1, at 418–20.

[59] *Castle Rock*, 545 U.S. at 753 (2005).

[60] *Id.*

[61] *Id.* at 753–54.

[62] *Id.* at 754.

[63] *Id.* at 751.

[64] *Id.* at 748 (citing Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 462–63 (1989)).

the enforcement of a restraining order is not truly mandated by the legislature since "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."[65] The Court held that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause . . . ."[66] Thus, with *Castle Rock* the Court signaled that it would not recognize municipal liability claims even where domestic violence statutes require police officers to arrest violators of restraining orders.[67]

The result of the narrow interpretations of the Fourteenth Amendment exceptions is that "the courthouse door is [almost always] closed to battered women" in the area of constitutional substantive due process claims against the state and local government.[68] Two Second Circuit cases in particular, however, have the potential to crack open the courthouse door and begin a swing in the right direction—*Dwares v. City of New York*[69] and *Okin v. Village of Cornwall*.[70]

II. PROMISING CASES

A. Dwares*: A Crack in the Door*

Plaintiff Steve Dwares was viciously attacked by skinheads at a Fourth of July rally where he was verbally supporting flag burning.[71] The bloody attack lasted more than ten minutes and resulted in Dwares suffering from several head and facial wounds.[72] The defendant police officers were present during the beating, but refused to intervene, pursue, or arrest the attackers.[73] Dwares contended that the officers conspired with the skinheads before the rally to allow the beating of persons supporting flag burning.[74] He sued the City of New York and the

[65] Miccio, *supra* note 1, at 425 (quoting *Castle Rock*, 545 U.S. at 759–61).
[66] *Castle Rock*, 545 U.S. at 768.
[67] *Id.* at 748.
[68] Miccio, *supra* note 1, at 408.
[69] 985 F.2d 94, 100–01 (2d Cir. 1993) *overruled on other grounds by* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993).
[70] 577 F.3d 415 (2d Cir. 2009).
[71] *Dwares*, 985 F.2d at 96.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 96–97.

individual police officers present that day for violating his constitutional rights, including his due process rights.[75]

The court in *Dwares* found that the officers "aided and abetted the deprivation of Dwares's [rights] by allowing him to be subjected to the prolonged assault in their presence without interfering."[76] The court concluded that such an "official sanction of privately inflicted injury" was appalling and violated the victim's due process rights.[77] The court reasoned that prior assurances by police officers to would-be attackers increased the likelihood that an attack would occur.[78] The agreement between the defendant officers and the attackers made the demonstrators, like Dwares, more vulnerable to assault.[79]

Dwares is an important case because the court declared that official sanction of privately inflicted injury violates the victim's due process rights.[80] The court essentially held that under the right circumstances, a state actor's deliberate indifference can be sufficiently conscience shocking to trigger a Due Process Clause violation.[81] This holding paved the way for a second breakthrough case, the *Okin* case.

B. Okin*: An Extension of* Dwares *to Domestic Violence Cases*

Michelle Okin's story is all too common. Like many victims of intimate partner abuse, Okin experienced years of physical and emotional trauma at the hands of her batterer before she was able to break free from him.[82] She and Sears began a relationship in 1999 and became parents to twin girls in 2001, the same year that Okin said Sears began abusing her.[83] She explained that Sears was friendly with the local police officers who were patrons at a tavern he owned, and that he would often brag about his

[75] *Id.* at 97.
[76] *Id.* at 99.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *See id.*
[82] *See* Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 420 (2d Cir. 2009). The Court stated in footnote two of the decision that, because the appeal was from the grant of a motion for summary judgment, they construed the facts in the light most favorable to Okin. Therefore, we will also assume, for purposes of this note, that Okin's assertions are true. *Id.* at 420 n.2.
[83] *Id.* at 419–20.

ability to get away with anything in Cornwall.[84] One physical incident with Sears resulted in fractures of the bones in her left hand and right index finger.[85] Like many abused partners, Okin did not report the incident to the police.[86] According to her, that was the last and only time she did not reach out to the police for help.[87]

The first *reported* incident of violence against Okin occurred on December 23, 2001, when she called the police after being choked by Sears.[88] Regarding that particular date, Okin testified that she had to call the police three times before officers showed up at her home, and when they did show up, no arrest was made.[89] Instead, a domestic incident report was filled out.[90] The incident report included Okin's statement that Sears told the town's Police Chief that he could not "help it sometimes when he smacks Michele Okin around."[91] One of the officers testified that Okin was "given a domestic incident report, and advised about [a telephone] help number to call for counseling."[92] Although the incident report indicated that Okin had bruises on her legs, no one interviewed Sears about the bruising.[93] Instead, Sears talked to the officers about football and they were, "'very derogatory' toward her when she said she wanted to press charges."[94]

Over the following three years, Okin called the police for help more than a dozen times.[95] Her pleas for help were met with laughter,[96] indifference or disdain,[97] no attempts at even investigating her allegations,[98] and simply leaving after doing nothing.[99] Some of the domestic incident reports were either missing altogether,[100] the wrong type,[101] or full of demeaning and

[84] *Id.* at 420.
[85] *Id.*
[86] *Id.*
[87] *See id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 421.
[91] *Id.* at 420.
[92] *Id.* at 421.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 421–26.
[96] *Id.* at 421.
[97] *See id.* at 426.
[98] *Id.* at 423–24.
[99] *Id.* at 425.
[100] *Id.* at 421–23.
[101] *Id.* at 422–24.

sarcastic tones.[102]

1. Procedural History and Ruling

Okin "filed a 42 U.S.C. § 1983 action on May 14, 2004, in the Southern District of New York, alleging violations of her federal Due Process and Equal Protection rights by individual officers of the Town of Cornwall and Village of Cornwall-on-Hudson police departments, and by the police departments themselves."[103] Similar to *Dwares*, Okin's claim was that the defendant police officers deprived her of her due process rights "through acts and omissions which emboldened her abuser and made her more vulnerable to his attacks."[104] She further claimed that her Equal Protection rights were violated because the officers failed to "equally apply the law on the basis of [her] gender, to take and investigate her complaint[] against Sears, to accurately report [her] complaints, and to provide her reasonable police protections . . . ."[105]

The defendants filed a motion for summary judgment on all claims based on qualified immunity.[106] The District Court granted summary judgment for the defendants on both Okin's due process and equal protection claims.[107] The court noted, however, that the officers' conduct toward Okin ranged from insensitive to incomprehensible, and it was clear that the police force was suffering from "either a lack of training or a lack of comprehension about the realities of domestic violence."[108] Okin then appealed.[109]

The Second Circuit reversed the Southern District of New York's dismissal of Okin's due process claim with respect to the individual police officers.[110] Since Okin's due process claim fell within the "state-created danger" exception rather than the

[102] *Id.* at 422.
[103] *Id.* at 426.
[104] Okin v. Vill. of Cornwall-on-Hudson Police Dep't, No. 04 Civ.3679(CM), 2006 WL 2997296, at *13 (S.D.N.Y. Oct. 13, 2006), *aff'd in part, rev'd in part,* 577 F.3d 415 (2d Cir. 2009).
[105] *Id.* at *18.
[106] *Okin*, 577 F.3d at 426.
[107] *Id.* at 427.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 442. The court affirmed dismissal, however, for defendants Town of Cornwall, Rusty O'Dell and Edward Manion. *Id.* The court further affirmed the dismissal of Okin's equal protection claim. *Id.*

"special relationship" exception, the court focused on comparing *Okin* to *Dwares*.[111]

The court held that a "genuine issue of material fact [existed] as to whether defendants implicitly but affirmatively encouraged Sears's domestic violence."[112] Citing *Dwares*, the court reasoned that affirmative conduct by a police officer, "may give rise to an actionable due process violation if it communicates, explicitly *or implicitly*, official sanction of private violence."[113] The court explained that the defendant officers, like those in *Dwares*, were essentially encouraging intentional violence by a private actor while in the course of their official duties.[114] The court found that any officer of reasonable competence would understand that discussing football scores with an alleged batterer after the victim complained that he had beaten and choked her, and repeatedly failing to interview or arrest the alleged batterer, or to even file domestic incident reports, would affirmatively signal to the batterer that he could continue to beat and threaten the victim without fear of police intervention, thereby contributing to the vulnerability of the complainant by emboldening her abuser.[115]

The court further explained that the individual defendants were *not* entitled to qualified immunity from suit because the "state-created danger" theory, "clearly established that police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages *intentional* violence against [him or her]."[116] Essentially, the court in *Okin* extended *Dwares* to domestic violence cases.

Okin's claims of due process violations extended beyond seeking accountability of the defendant officers, to also seeking to hold the entire town police department accountable.[117] The court found that there was, "sufficient evidence in the record to create a genuine issue of fact as to whether the officers' conduct indicates a practice, tacitly endorsed by the Village, that 'was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law.' ' "[118]

---

[111] *Id.* at 428–30.
[112] *Id.* at 430.
[113] *Id.* at 429 (emphasis added) (citations omitted).
[114] *Id.*
[115] *Id.* at 436.
[116] *Id.* at 434.
[117] *Id.* at 427.
[118] *Id.* at 440.

2. Why *Okin* is Important

Okin is the proverbial foot in the courthouse door for domestic violence cases, which is now ripe for a swing in the right direction. *Okin* is an enormously important case for victims of domestic violence in at least two respects. First, the court held that police officers' deliberate indifference to the circumstances surrounding repeated incidents of domestic violence is sufficient, by itself, to shock the conscience and thereby rise to the level of a violation of the substantive due process clause of the Fourteenth Amendment.[119] Second, the decision clarifies that where police officers condone the batterer's intentional violence, whether explicitly or implicitly, they can be held liable in monetary damages, both compensatory and punitive, to the victim for any injuries suffered at the hands of the abuser.[120]

Okin should be broadly applied by the courts to cover all cases where police officers and other governmental officials act with deliberate indifference and fail to properly investigate and act upon reported domestic violence incidents. *Okin* was a case that involved recurring cries for help over an extended period of time and police officers' repeated unwillingness to take any action against the alleged batterer. [121] Victims of domestic violence, however, should not have to engage in calls for help over a substantial period in order to compel police officers to take action against a batterer. The repeated indifference of police officers empowers abusers by letting them know that their actions will not subject them to criminal sanctions. As the court explained in *Okin*, "[t]he serious and unique risks and concerns of a domestic violence situation are well known and well documented. The officers' awareness of the serious consequences of domestic

[119] *Id.* at 431–32. The court explained its reasoning by noting that "[t]he serious and unique risks and concerns of a domestic violence situation are well known and well documented . . . [g]iven that domestic violence is a known danger that the officers were prepared to address upon the expected occurrence of incidents, the officers who responded to Okin's complaints had ample time for reflection and for deciding what course of action to take in response to domestic violence . . . [t]his is a case where deliberate indifference is the requisite state of mind for showing that defendant's conduct shocks the conscience." *Id.*

[120] *Id.* at 437 ("We conclude . . . that police conduct that encourages a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior will not be confronted by arrest, punishment, or police interference, gives rise to a substantive due process violation.").

[121] *Id.* at 420–24, 432 (mentioning that Okin complained over a fifteen month period).

violence is further supported by their training and their knowledge of New York law on domestic violence."[122]

Although Okin did not initially have an order of protection, the court still found that the police officers' actions were enough to shock the contemporary conscience because continued and even heightened violence was a foreseeable result, given the numerous reports of violence, even without an order of protection.[123] A substantive due process claim, however, should be even stronger where the victim has obtained an order of protection. In these cases, the police should know that a court has already found the abuser to be enough of a danger to the victim to warrant an order of protection in the first place. Repeated inaction under these circumstances implicitly empowers the abuser by indicating that even court action and the issuance of an order of protection will not subject the abuser to arrest or other punitive action. Therefore, where an order of protection has already been issued, the polices' failure to take action in even a couple of instances against an alleged batterer should be viewed as implicitly condoning intentional violence that can give rise to substantive due process liability. Surely it shocks the contemporary conscience when police officers who are acting pursuant to official policy or custom fail to respond to reports of abuse or foreseeable harm attributable to an alleged violation of an order of protection, and their failure to act results in serious injury to the victim.

Moreover, this broad application of *Okin* would not conflict with the U.S. Supreme Court's holding in *Castle Rock* because the cases are distinguishable on two main grounds. First, the Court in *Castle Rock* held that there is no violation of a protected property interest under the Due Process Clause of the Fourteenth Amendment in failing to enforce a restraining order or a mandatory arrest law.[124] Liability in *Okin* is attributable to the police officers' affirmative conduct in not arresting an alleged batterer which implicitly led the batterer to believe that he could use intentional violence against Okin, without any consequences.[125] The Court in *Castle Rock* therefore addressed a different legal issue (i.e., whether there is a protected property interest that arises from mandatory language in an order of protection to arrest an alleged batterer who violates the terms of

[122] *Id.* at 431–32.
[123] *Id.* at 425, 432.
[124] Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005).
[125] *Okin,* 577 F.3d at 432.

the court order).

Additionally, the two cases arose in very different factual contexts. In *Castle Rock*, all of the reports by Ms. Gonzales occurred within a time frame of only about twelve hours, a relatively short period of time.[126] Furthermore, her estranged husband was legally allowed parenting time with his children, even though no parenting time had been scheduled on the day of that heinous crime.[127] Under those circumstances it may be easier to understand how the police may not have believed or foreseen that the Gonzales children were in grave danger. A reasonable police officer in that position may have thought that Mr. Gonzales just wanted some extra time with his children. In contrast, Okin reported her abuse to police officers more than a dozen times over the course of a few years.[128] Indeed, even if the abuse had been reported only a few times over the course of just a few days, a reasonable officer would be hard-pressed to argue a lack of foreseeability of danger because in those situations the officers would have had "ample time for reflection and for deciding what course of action to take in response to domestic violence."[129] Moreover, as the court noted in *Okin*, no reasonable officer would think it prudent to discuss football scores with an alleged batterer instead of investigating the situation or arresting the batterer.[130] The court in *Okin* found that the police officers' should have foreseen continued and even heightened violence would result from their deliberate indifference, even before Okin was ever issued an order of protection.[131]

By expressly recognizing for the first time that victims of domestic violence can be left in greater danger by the deliberate inaction of a few police officers, the Second Circuit took a vital step towards strengthening domestic violence protections throughout the State of New York. Municipalities and police departments throughout the state should take notice of this case. The next step should be to expand *Okin* in tandem with new, hard-fought domestic violence legislation discussed in the next part of this paper.

---

[126] *Id.* at 754–55.
[127] *Id.*
[128] *Okin*, 577 F.3d at 420–25.
[129] *Id.* at 432.
[130] *Id.* at 436.
[131] *Id.* at 431–32.

III. NOW IS THE TIME!

A. New York is Ripe for Change

Newly passed domestic violence legislation makes New York ripe for change. After a twenty-year struggle fought by the New York Coalition for Fair Access to Family Court, the long-sought-after Expanded Access to Family Court Act passed in 2008.[132] This recent Act greatly expanded the civil domestic violence laws and protections to cover non-married, childless persons who fit in the category of those having an "intimate relationship" with one another.[133] This means that thousands of New Yorkers who were previously denied access to civil orders of protection are no longer denied that access—homosexual victims of domestic violence, teen victims of domestic violence, siblings, grandparents, etc.[134]

1. Prior to the New Legislation, New York's Domestic Violence Laws were Severely Underinclusive

Prior to August 2008, New York was the only state in the country that refused to allow unwed persons and unrelated persons to obtain a civil order of protection.[135] Every other state recognized either cohabitating couples and/or victims of dating-intimate partner violence when granting civil orders of protection.[136] Even Patti Jo Newell, the Director of Public Policy for the New York Coalition Against Domestic Violence, was surprised to discover that traditionally conservative states like Alabama, North Carolina, and Georgia offered more protections for domestic violence victims than New York.[137] She commented that this fact made New York "a danger zone for the non-traditional family."[138]

---

[132] *See* Jayne Bigelsen, *Ease Access to Family Court*, TIMES UNION (Albany, N.Y.), Jan. 3, 2008, at A11.

[133] *Id.*

[134] *Id.*

[135] *See* Introducer's Memorandum from George H. Winner, N.Y.S Senator, in Support Legis., S. 8665, 231st Sess. (2008); Sponsor's Memorandum from Helene Weinstein, N.Y.S. Assemblywoman, in Support of Legis., A. 11707, 231st Sess. (2008); *see also* Patti Jo Newell, *Senate Blocks Help For Domestic Violence Victims*, TIMES UNION (Albany, N.Y.), June 20, 2002, at A14.

[136] Bigelsen, *supra* note 132, at A11.

[137] John Caher, *Bill Would Define 'Family' More Broadly*, N.Y. L.J., May 31, 2002, at 1.

[138] *Id.*

In addition to access to civil orders of protection, unwed and unrelated persons were also denied other important heightened protections available in other states to victims of domestic violence. For example, because these people had no access to the Family Courts and had to pursue orders of protection through the criminal court system, where the burden of proof is greater, they were often denied longer order of protection periods, inclusion of the protective order in the State-wide domestic violence registry, and the benefit of mandatory arrest provisions.[139]

The exclusion of non-married couples posed a huge problem because at least half of New York's incidents of domestic violence involve persons in this excluded group.[140] Some of the sub-groups within this excluded group include: unwed heterosexual couples, teens, ex-dating couples, all same-sex couples, and elderly people who live with people to whom they are not related.[141] Domestic violence data shows that these groups experience violence at comparable or even higher levels than married couples.[142] For example, assault of a boyfriend or girlfriend was the most frequently reported domestic violence crime involving intimate partners, accounting for forty-four percent of all the domestic violence assaults against an intimate partner.[143] Due to these astounding numbers, New York domestic violence groups knew that stronger legislation was needed to adequately protect thousands of New York citizens.

---

[139] *Id.*

[140] Winner, *supra* note 135; Weinstein, *supra* note 135 (citing that data from reports prepared by the State Division of Criminal Justice Services and the Office for the Prevention of Domestic Violence show that a large proportion of domestic violence victims are not protected by the narrow definition of "victim" in New York's current law).

[141] Caher, *supra* note 137, at 1.

[142] *See*, *e.g.*, Matthew Fetzer, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., CRIMINAL JUSTICE RESEARCH REPORT: DOMESTIC VIOLENCE VICTIMIZATIONS IN IBR JURISDICTIONS OF NEW YORK STATE, 2007,. at 2 (2009) *available at* http://criminaljustice.state.ny.us/pio/annualreport/ibr_dv_report2007.pdf.; Maura O'Keefe, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, TEEN DATING VIOLENCE: A REVIEW OF RISK FACTORS AND PREVENTION EFFORTS 1 (2005), http://www.vawnet.org/Assoc_Files_VAWnet/AR_TeenDatingViolence.pdf; *see also* Patricia G. Barnes, *'It's Just a Quarrel': Some States Offer No Domestic Violence Protection to Gays*, 84 A.B.A. J. 24, 24 (1998).

[143] Fetzer, *supra* note 142, at 5.

2. New Yorkers Fought Long and Hard to get this Legislation Passed

The long-contested showdown over civil legal recognition of these thousands of domestic violence victims began in 1988 when Assemblywoman Helene E. Weinstein, a Brooklyn Democrat, sponsored similar legislation to the Act.[144] After 1988, Assemblywoman Weinstein continued to sponsor new, similar legislation every year.[145] Yet, for close to two decades, the legislation passed in the State Assembly, but died in the Senate.[146]

The oft cited reason for the Senate denying protection to thousands of unwed persons was the fear that a flood of new cases would ensue and completely clog the already overburdened family courts.[147] This fear was exacerbated by a lawsuit filed by the then New York State Court of Appeals Chief Judge, Judith Kaye, in 2008 which brought lack of judicial resources to the forefront of state legislative problems.[148] Then Chief Judge Kaye publicly called for an additional thirty-nine Family Court judges to be hired statewide to deal with soaring caseloads.[149] Former Chief Judge Kaye also publicly expressed concern that the family court system would suffer a crisis of over-capacity if the Act passed.[150] This concern was echoed in a memorandum by the Office of Court Administration which noted that although the Office took no position on the substantive legislative decision, "without the addition of a meaningful number of new Family Court judgeships, implementation of [the] measure [would] be a challenge."[151] In the face of shrinking state funds, expanding responsibilities, and the deep concern of a leading state judge

[144] Danny Hakim, *Albany to Expand Domestic Violence Law to Include Dating Relationships*, N.Y. TIMES, July 10, 2008, at B3.

[145] *Id.*

[146] Bigelsen, *supra* note 132, at A11.

[147] *Id.*; Newell, *supra* note 135, at A14; *see also* Stephanie Nilva & Leslie Crocker Snyder, Letter to the Editor, *It Is Criminal, but It Does Not Have to Be*, N.Y.L.J., June 18, 2008, at 2 (describing reasons why legislation expanding protection for victims of domestic violence has stalled in the past).

[148] Editorial, *Repairing New York's Justice System*, N.Y. TIMES, June 2, 2008, at A18.

[149] *Id.*

[150] *See* Jennifer Cranstoun et al., *What's an Intimate Relationship, Anyway? Expanding Access to the New York State Family Courts for Civil Orders of Protection*, 29 PACE L. REV. 455, 468–69 (2009).

[151] Memorandum from Office of Ct. Admin. to N.Y. Sen. Winner & N.Y. Assemblywoman Weinstein, *in*, 2008 N.Y. Sess. Laws 2327 (McKinney).

about family court caseloads, the Senate killed the Act.

Proponents of the legislation, however, refused to give up and argued that the Senate's fear was unfounded for several reasons. First, family offenses make up a small portion of family court filings—only eight percent.[152] Additionally, and more specific to the legislation, orders of protection cases "use fewer resources and are resolved more quickly than" other family court matters like divorce and child custody cases.[153] Proponents also pointed out that it would be more beneficial to handle these cases in civil court as opposed to criminal court because fewer resources are required and the cases proceed more quickly in the civil arena.[154] Thus, the criminal courts would benefit from passage of this legislation.

Many proponents of the Act believe that the real reason the Senate refused to pass this legislation for so long was because they were afraid that expanding the definition of family to include same-sex couples would legitimize homosexual relationships and erode New York's stance on gay marriage.[155] Despite these concerns, a growing state-wide awareness of the social impact of domestic violence, spurred by a surge in anti-domestic violence activism, eventually turned the tide.

New York's domestic violence coalitions and activists have grown in size and organization over the past several decades.[156] Among the coalitions in New York is the New York Statewide Coalition for Fair Access to Family Court, which vocally campaigned for passage of the Act.[157] Due to the acts of these coalitions and the growing support of state political leaders like former Governor George Pataki, then Chief Administrative Judge Jonathan Lippman,[158] and State Senators such as Nicholas Spano and James Lack, the tide began to turn.[159]

---

[152] Newell, *supra* note 135, at A14.

[153] *See* Memorandum from N.Y. City Bar Ass'n Domestic Violence Comm. to N.Y. Sen. George H. Winner & N.Y. Assemblywoman Helene Weinstein (2008), http://www.nycbar.org/pdf/report/Updated_FC_Memo.pdf (last visited Jan. 13, 2011) (recommending passage of the Act and noting that studies show one in five teenage girls are subjected to physical or sexual abuse by a dating partner).

[154] *See id.*

[155] *See* Bigelsen, *supra* note 132, at A11.

[156] Cranstoun et al., *supra* note 150, at 457.

[157] *See id.*

[158] Currently the Chief Judge of the New York State Court of Appeals. *See* Jeremy W. Peters, *Senate Confirms Top Judge on State Court of Appeals*, N.Y. TIMES, Feb. 12, 2009, at A1.

[159] *See* Cranstoun et al., *supra* note 150, at 457*; see also* Caher, *supra* note

In 1996, then Governor Pataki defied conservative allies and signed an executive order creating a task force to investigate domestic violence cases involving same-sex and unmarried couples.[160] Many advocates of the Act ultimately credit Governor Paterson for finally pushing the legislation through the Senate. Governor Paterson personally took up the issue with the then Senate Majority Leader Joseph Bruno and was able to secure an agreement.[161]

After a long and hard-fought battle, a significant piece of domestic violence legislation was finally passed.[162] This new legislation, however, shares a common link with all domestic violence legislation: it is now up to the courts to ensure that this legislation does not become meaningless.

3. Why Cases Like *Okin* Are Critical to the Act

Without *Okin*, the Expanded Access to Family Court Act loses much-needed enforceability because police departments and municipalities might not fear liability when they fail to protect the new group of domestic violence victims that the Act was designed to protect. After all, what good would the Act be for the thousands of unwed and childless, homosexual, and teen victims of intimate partner violence, if there is no liability when a few police officers simply talk sports with batterers violating protection orders rather than arresting them? By expanding *Okin* in tandem with the Act and other domestic violence statutes, legal accountability ensures that victims are getting the protection mandated by law.

CONCLUSION: THE COURTS MUST BE THE CATALYSTS

While there are certainly many valid and necessary reasons for the continued protection of the State from liability, there are also times when legal liability must be permitted. This is precisely what the courts have recognized over the years as the two Fourteenth Amendment substantive due process exceptions

137, at 1.

[160] Raymond Hernandez, *Pataki Defies Some Allies on Violence In the Home*, N.Y. TIMES, Oct. 2, 1996, at 7.

[161] Hakim, *supra* note 144, at B3.

[162] *See* Expanded Access to Family Court Act, 2008 N.Y. Laws 3397.

developed in the case law. However, both the "special relationship" exception and the "state-created danger" exception have been applied only in the most flagrant cases, which effectively stripped the exceptions of any usefulness in the area of domestic abuse. While this narrow application is sound in most areas of the law, there is a sore need and good reason for expansion and broad application of these exceptions in the area of domestic violence.

Unlike other criminals, batterers often continue to abuse the same victim(s) day-after-day. Also unlike other crimes or torts, domestic violence is not a random crime and the victims of domestic violence are not sporadically chosen. Because domestic violence is so widespread and the victims are often re-victimized again and again, empowerment of batterers is particularly troublesome. When officers like those in the *Okin* case empower batterers, they send a message that the continued torment of the victim is permissible.

The Battered Women's Movement and other activist groups have done their jobs and pushed for over twenty years to get the attention and backing of the New York Legislature. Likewise, Congress and other State Legislatures have made great strides nationally in the area of domestic violence, enacting domestic violence statutes over the past twenty years both federally and in every state in the nation.[163] Without local government accountability in federal court, domestic violence laws remain nearly meaningless. Extending *Okin* and allowing §1983 claims against state and local governments in the area of domestic violence will help ensure that batterers are not empowered by deliberate indifference and a custom of inaction. This expansion and a broader application of substantive due process in domestic violence cases will add teeth to the current domestic violence laws as local governments and police face accountability under § 1983. Without accountability, the huge strides made in domestic violence legislation over the past twenty years will remain but words on a page.

[163] MILLER, *supra* note 9, at 1.