

## ***Domestic Violence Litigation in the Wake of DeShaney and Castle Rock***

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### Abstract:

Courts must create remedies for domestic violence victims when police officers and other state actors fail to enforce protection orders. The author begins by discussing the inadequacies of remaining remedies after the United States Supreme Court’s decisions in *DeShaney v. Winnebago County of Social Services* and *City of Castle Rock v. Gonzales*. She argues that courts cannot wait for states to recognize that there are few, if any, remedies left; instead, they must find ways to give victims recourse now. The state-created danger and special-relationship doctrines, with minor changes, provide viable means for courts to accomplish this goal.

## I. Introduction

In the last two decades, the United States Supreme Court has eviscerated federal remedies available to survivors of domestic violence when police officers refuse to enforce protective orders.<sup>1</sup> *DeShaney v. Winnebago County Dep't of Soc. Services*<sup>2</sup> (hereinafter “*DeShaney*”) has almost eliminated substantive due process as a viable remedy, while *City of Castle Rock v. Gonzales*<sup>3</sup> (hereinafter “*Castle Rock*”) has done the same with procedural due process. The remaining Equal Protection claims are rarely a realistic remedy for survivors, as the elements of a prima facie Equal Protection case require that the plaintiff-survivor prove an actual intent to discriminate.<sup>4</sup>

Survivors of domestic violence need legal remedies in order to encourage police officers to enforce their protective orders. Damages, like the two million dollars awarded to Dina Sorichetti and her mother when the New York Police Department (NYPD) failed to enforce their protective order,<sup>5</sup> can (and will) motivate police departments to clarify and update their domestic violence policies. In the wake of this case, the NYPD re-wrote its arrest policies to include mandatory arrests in domestic violence cases.<sup>6</sup> As Professor Kristian Miccio noted, the change was not the result of lobbying, guilt, or good will; instead, the change was a direct result of the

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<sup>1</sup> Throughout this note, the terms “protective order” and “restraining order” will be used interchangeably. Differences between these two orders will depend upon state law. The differences are not significant for purposes of this note, as domestic violence survivors should be able to hold state actors liable for failure to enforce court-issued orders, regardless of what states call them.

In addition, female nouns and pronouns are generally used when talking about survivors while male nouns are used when discussing batterers as well as police officers. This usage is not meant to diminish or ignore the experiences of male and/or same-sex domestic violence victims or female police officers and is merely done for greater readability.

<sup>2</sup> 489 U.S. 189 (1989).

<sup>3</sup> 545 U.S. 748 (2005).

<sup>4</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977).

<sup>5</sup> *Sorichetti v. City of New York*, 65 N.Y.2d 461, 463 (N.Y. 1985)

<sup>6</sup> N.Y. Code Crim. Proc. § 140.10 (McKinney 1999) cited in G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 170-171 (Spring 2000).

police department's liability for the two million dollar damage award.<sup>7</sup> If police officers learn there are no legal consequences for failing to enforce protective orders, there will be little incentive for officers to enforce orders, particularly if "mandatory" no longer means "mandatory."<sup>8</sup> If, on the other hand, survivors are able to hold state actors accountable for their actions, then police officers will be more willing to enforce protection orders rather than risk being sued.<sup>9</sup>

State courts must recognize remedies for survivors to provide victims with recourse now. Survivors in many states still need legislation that will provide them with the means to ensure police officers enforce domestic violence protective orders. At the same time, domestic violence victims cannot wait for legislators to recognize the need for remedies and then begin the long process of drafting and passing legislation.<sup>10</sup> Until state legislators codify remedies, courts, particularly state courts, must find alternative means to ensure domestic violence victims are not left without remedies when their protective orders are not enforced. The State-Created Danger and Special Relationship Doctrines are both viable legal doctrines that can provide survivors with recourse when municipalities and individual police officers fail to enforce protective orders.

## **II. Current Domestic Violence Remedies Are Inadequate for the Vast Majority of Domestic Violence Victims**

Where State actors have investigated abuse and returned the child to a perpetrator of violence, Substantive Due Process does not provide that child with an entitlement to state

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<sup>7</sup> Miccio, *supra* note 6.

<sup>8</sup> In addition to denying Jessica Gonzales's claim for relief under the Due Process Clause, the United States Supreme Court noted that "mandatory" does not really mean "mandatory" in the context of domestic violence arrest policies. *Castle Rock*, 545 U.S. at 760.

<sup>9</sup> Miccio, *supra* note 6.

<sup>10</sup> For an abbreviated timeline of a bill's passage in the U.S. Senate alone *see*, U.S. Senate, *Legislative Process: How a Senate Bill Becomes a Law*, available for download at <http://www.senate.gov/reference/resources/pdf/legprocessflowchart.pdf> (last visited December 20, 2007).

protection, even when state actors are aware of the dangers posed to the victim by a third party.<sup>11</sup>

In *DeShaney*, the citizen who was not entitled to state protection was five-year old Joshua DeShaney whose father abused him so severely that he is now in a permanent, semi-vegetative state.<sup>12</sup> The Winnebago County Department of Social Services investigated reports of child abuse committed against Joshua DeShaney by his father for over two years.<sup>13</sup> Despite multiple reports of abuse and medical evidence of Joshua's repeated injuries, Social Services allowed Joshua to remain in the care of his father.<sup>14</sup> The United States Supreme Court held that Social Services was not liable for the injuries to Joshua since social workers had not left him in no worse position than before the state's involvement. The Due Process Clause did not require Winnebago County Department of Social Services to protect Joshua from acts of violence committed by his father.<sup>15</sup> In dicta, the Court indicated that state actors still owe a duty of care to victims of third-party violence if a special relationship exists between the victim and the state actor.<sup>16</sup> In this instance, the state would owe a duty to Joshua under the special relationship doctrine if he had still been in the physical custody of the state.<sup>17</sup>

Almost two decades after its decision in *DeShaney*, the United States Supreme Court held that Procedural Due Process likewise does not provide a victim with an entitlement to state protection, even when the victim has a valid restraining order.<sup>18</sup> In this case, the citizens who were not entitled to protection were Jessica Gonzales and her three daughters, Rebecca, Katheryn, and Leslie. On June 22, 1999, Gonzales's ex-husband abducted his daughters in direct

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<sup>11</sup> *DeShaney*, 489 U.S. at 196.

<sup>12</sup> *Id.* at 192-93.

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

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

<sup>15</sup> *Id.* at 201. They went on to note that if Joshua were removed from his home, placed in foster care, and then abused, the state might be liable. *Id.* As long as Joshua was abused at home, he was in no worse a position than before and Social Services was immune from liability.

<sup>16</sup> *Id.* at 199-200.

<sup>17</sup> *Id.*

<sup>18</sup> *Castle Rock*, 545 U.S. at 764.

violation of a restraining order and, after spending the evening with them at an amusement park, murdered the three little girls.<sup>19</sup> During this almost eight-hour ordeal, Gonzales called the police repeatedly, telling them she had a restraining order and that her husband had the girls in a nearby amusement park, in clear violation of the order.<sup>20</sup> The Castle Rock police officers on duty did not contact security at the amusement park or issue any kind of alert for the missing girls. Instead, they repeatedly told Jessica Gonzales that they could do nothing about the restraining order and that she should wait a few more hours to see if her ex-husband brought the girls home.<sup>21</sup> The night ended when Gonzales's ex-husband drove to the Castle Rock Police Department and opened fire. After the police killed him with return fire, they found the dead bodies of Rebecca, Katheryn, and Leslie Gonzales in his truck.<sup>22</sup> Jessica Gonzales sued the police officers and the City of Castle Rock for failing to enforce her restraining order, alleging procedural due process and 42 U.S.C. § 1983 violations. Gonzales claimed that Colorado Revised Code § § 18-6-803.5 required the officers to enforce her protective order and that the officers violated her civil rights when they refused to do so.<sup>23</sup> The United States Supreme Court ultimately disagreed with Gonzales and held that victims of domestic violence do not have a property interest in having their protective orders enforced,<sup>24</sup> even when the legislature has mandated arrest.<sup>25</sup>

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<sup>19</sup> *Id.* at 753-754.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1097-98 (10th Cir. 2004).

<sup>22</sup> *Castle Rock*, 545 U.S. at 754.

<sup>23</sup> The language printed on the back of the restraining order, pursuant to Colo. Rev. Stat. § 18-6-803.5(3) stated, "...A peace officer shall use every reasonable means to enforce a restraining order....A peace officer shall arrest, or...seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that (1) the restrained person has violated or attempted to violate any provision of a restraining order...." cited in *Castle Rock*, 545 U.S. at 759.

<sup>24</sup> *Castle Rock*, 545 U.S. at 764.

<sup>25</sup> 1994 Legislature Strengthens Domestic Violence Protective Orders 23 Colo. Lawyer 2327 (Oct. 1994) and Transcript February 15, 1994, House Judiciary Committee Hearings on House Bill 1253 at 2-5 & 40-42 both cited in Respondent's Brief on the Merits, *City of Castle Rock v. Gonzales* 545 U.S. 748 (2005) (No. 04-278).

In a limited number of cases, domestic violence survivors have successfully litigated Equal Protection claims under the Fifth and Fourteenth Amendments; however, these claims are not adequate remedies for most domestic violence survivors. In order to make a prima facie case for an equal protection violation, a survivor of domestic violence must establish discriminatory purpose or intent; it is not enough to demonstrate that there is a disproportionate effect of a policy.<sup>26</sup> A survivor must therefore point to specific facts beyond her own experience that show a policy or custom to provide less protection to domestic violence victims than to victims of similar crimes.<sup>27</sup> In addition to proving there is a discriminatory policy, the victim must also provide evidence that “discrimination was the motivating factor” behind the policy.<sup>28</sup>

In *Watson*, the Tenth Circuit found that police officers violated Nancy Watson’s Equal Protection rights only after she presented extensive evidence about police officer training and statistics that demonstrated that domestic violence crimes were systematically treated differently than other similar assault crimes in Kansas City. Similarly, the domestic violence survivor in *Thurman, et. al. v. City of Torrington*, provided evidence gathered over an eight-month period to demonstrate that the city systematically provided domestic violence victims with inadequate protection.<sup>29</sup> These cases are the exception rather than the rule, as most victims will not have sufficient evidence to prove that there is an official custom or policy to discriminate against domestic violence victims, much less prove that the intent to discriminate was the motivating factor behind implementing the policy. While lawyers whose clients met the exacting prima facie requirements of an Equal Protection claim should use this remedy, equal protection is, in general, too difficult to prove for the vast majority victims to use it as a viable remedy.

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<sup>26</sup> *Arlington Heights*, 429 U.S. at 264-65.

<sup>27</sup> *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 694-95 (10th Cir. 1988).

<sup>28</sup> *Id.*

<sup>29</sup> *Thurman, et. al. v. City of Torrington, et. al.*, 595 F. Supp. 1521, 1530 (D. Conn. 1984).

### **III. The State-Created Danger and Special Relationship Doctrines Provide Courts With a Means to Recognizing Remedies for Domestic Violence Victims.**

The “no duty” rule, whereby police officers do not have a general duty to individual members of the public to protect them from acts of violence committed by third parties,<sup>30</sup> prevents domestic violence survivors from recovering when police officers fail to enforce their protective orders. In suing their respective municipalities, both Joshua DeShaney and Jessica Gonzales were attempting to create exceptions to the “no duty” rule. If they had been successful, then state actors could be liable for harms caused by third parties if the actors failed to act consistently with the demands of the Due Process Clause. Unless an exception to the “no duty” rule exists, state actors are essentially immune to suits.<sup>31</sup>

The state-created danger doctrine and the special relationship doctrine remain viable exceptions to the general “no duty” rule. Many courts recognize at least one of the doctrines and apply them in other areas of the law.<sup>32</sup> While neither doctrine as currently applied in domestic violence cases is an ideal solution, both doctrines are promising remedies for survivors. Courts must be willing to adopt these doctrines and apply them within the specific context of domestic violence. Doing so can create recourse for domestic violence victims whose protective orders are not enforced by state actors.

#### **A. The State-Created Danger Doctrine**

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<sup>30</sup> See *e.g.* *Mastroianni v. County of Suffolk*, 91 N.Y.2d 198, 203 (N.Y. 1997); *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 375 (N.C. 2006); *Kane v. Lamothe*, 2007 VT 91, \*P6 (Vt. 2007).

<sup>31</sup> *Kane*, 2007 VT at \*P6.

<sup>32</sup> See, *e.g.* *Penilla v. City of Hutington Park*, 115 F.3d 707 (9th Cir. 1997) (holding that police officers could be liable under the state-created danger doctrine when they responded first to the scene of a medical emergency, cancelled medics, broke into the home, moved the obviously ill person inside the house, locked the door, and left); *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) (holding that appellants had stated a viable claim under the state-created danger doctrine when a police officer allowed an obviously intoxicated woman to go home unattended after implying that he would look after her); *Braswell v. Braswell*, 330 N.C. 363 (N.C. 1991) (explicitly adopting the special relationship exception to the “no duty” rule and holding that the sheriff’s promise to the victim was explicit enough to create a special duty exception).

Under the state-created danger doctrine, state actors can be liable for harm caused by their affirmative acts if they place a victim in a more dangerous position.<sup>33</sup> Under this doctrine, police officers can be liable for refusing to enforce protective orders if this failure to enforce places the victim in greater danger than she faced before. The elements of the exception vary slightly from state to state and circuit to circuit, but in general, the court must find that a relationship existed such that the survivor was a foreseeable victim of the state actor's actions and that the state actor affirmatively used his or her authority in a way that rendered the citizen more vulnerable to the danger.<sup>34</sup> Many courts have added the requirement that the actions be "shocking to the conscience."<sup>35</sup>

Victims of domestic violence have historically used the state-created danger doctrine with limited success. *Burella v. City of Philadelphia*, decided by the Third Circuit in 2007, is demonstrative of typical problems facing domestic violence victims who rely on this doctrine. In January 1999, a veteran police officer seriously injured his wife and then committed suicide. The officer's wife, Jill Burella, had endured years of physical and emotional abuse and had reported many of these instances of abuse to the police.<sup>36</sup> In the days before the final violent episode, she repeatedly contacted the police because her husband had continued to threaten her after she received protection orders.<sup>37</sup> The Third Circuit held that Jill Burella had not articulated a valid constitutional claim, finding that the Philadelphia Police did not create a danger that

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<sup>33</sup> *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982) (comparing state actors who put a man in a position of danger from third parties to tortfeasors who throw a person into a snake pit).

<sup>34</sup> This articulation of the requirements is an amalgam of the common articulations of this exception. Specific state and circuit articulations of the doctrine appear in discussions of cases. *See, e.g.* notes 35, 49 *infra*.

<sup>35</sup> *Burella v. City of Philadelphia*, 501 F.3d 134, 147 (3d Cir. 2007); *May v. Franklin County Bd. of Comm'rs*, 59 Fed. Appx. 786 (6th Cir. 2003); *Forrester v. Bass*, 397 F.3d 1047 (8th Cir. 2005).

<sup>36</sup> *Burella*, 501 F.3d at 136-38.

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

would give rise to a duty exception under *DeShaney* and *Castle Rock*.<sup>38</sup> As such, the officers were entitled to immunity for their actions.<sup>39</sup> The Third Circuit's articulation of the state-created danger doctrine required Jill Burella to prove four elements: 1) the harm was foreseeable and direct, 2) the state actor acted "with a degree of culpability that shocks the conscience", 3) a relationship existed between herself and the police department such that she was a foreseeable victim of the state actor's acts, and 4) that the state actor "affirmatively used his or her authority in such a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all."<sup>40</sup>

The two elements of the state-created danger exception that currently stand in the way of domestic violence victims using the doctrine as a realistic remedy are the affirmative act and "shocking to the conscience" requirements. Rather than abandoning this doctrine because of these two elements, lawyers should argue for minor changes in the way courts define these requirements as applied to domestic violence cases. If courts are willing to consider "affirmative acts" within the specific context of domestic violence and to find that deliberate indifference to a known or obvious danger is "shocking to the conscience," then the state-created danger doctrine is still a viable remedy for survivors whose protective orders are not enforced.

### **1. The Affirmative Failure to Act**

The courts' interpretation of the affirmative action element of the doctrine prevents survivors from using this doctrine because police failing to respond or choosing not to enforce protective orders are seen as negative, rather than affirmative acts.<sup>41</sup> Nearly every police "act" or

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<sup>38</sup> *Id.* at 136. While this case concerns federal law, Jill Burella could have sought relief in state court under the same state-created danger doctrine. The problems faced by Jill Burella in getting the Third Circuit to recognize her claim are the same faced by victims seeking redress in state courts.

<sup>39</sup> *Id.* at 150.

<sup>40</sup> *Id.* at 147.

<sup>41</sup> *Id.* at 147. *See also*, *Gonzales v. Castle Rock*, 2001 U.S. Dist. LEXIS at \*10, quoting *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

“commission” can be re-characterized as a failure to act or an “omission”; e.g., allowing a batterer to return home contrary to a mandatory arrest law becomes a failure to arrest. Likewise, choosing not to alert amusement park security or Denver police that Simon Gonzales had abducted the three girls can be re-characterized as merely not making a telephone call. An act sufficiently “affirmative” enough to satisfy this element must be one that “limit[s] in some way the liberty of a citizen to act on his [of her] own behalf.”<sup>42</sup>

Characterizing police failures to enforce protective orders as negative acts not only mischaracterizes such acts, it also ignores the dynamics of domestic violence. Separation violence after victims leave their batterers and increased acts of violence after victims receive protective orders are documented phenomena.<sup>43</sup> At the same time, protective orders work in most cases. According to San Diego City Attorney Casey Gwinn, only 17% of restraining-order applications result in a 911 call.<sup>44</sup> Along the same lines, a recent study in the *Journal of the American Medical Association* noted an 80% reduction in police-reported physical violence in the year after domestic violence survivors obtained permanent protective orders.<sup>45</sup> Failure to enforce protective orders, however, will only serve to reverse these statistics. Several domestic violence organizations noted in their joint amicus brief for Jessica Gonzales that failure to

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<sup>42</sup> *Gonzales*, 2001 U.S. Dist. LEXIS at \*10, quoting *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

<sup>43</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE L.J. & FEMINISM 3, 11 (1999), citing Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH L. REV. 1, 65-71 (1991) and Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L. Q. 273, 274 & 274 n. 12-13 (1995); Caitlin E. Borgman, *Note, Battered Women’s Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1308 (1990). See also Peter Finn & Sarah Colson, U.S. Dep’t of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* 43-33 (1990) (noting that visitation with children is also one of the greatest times of danger for victims of domestic violence who have left their batterer) and U.S. Dep’t of Justice, National Institute of Justice, *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50 (1998) (noting that abuse after receiving a protective order is even higher for women who have custody of children).

<sup>44</sup> Mark Sauer, *Paper Weight; In Most Abuse Cases, Simple Restraining Orders have a Positive Impact, but Sometimes they Trigger Violent Rage*, THE SAN DIEGO UNION-TRIBUNE, Jan. 18, 2004, at E1.

<sup>45</sup> Victoria Holt et. al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, J. AM. MED. ASS’N 589, 593 (2002).

enforce domestic violence protective orders will result in increased separation violence as batterers learn that the police will not enforce these slips of paper.<sup>46</sup> Likewise, the number of women seeking protective orders will decrease as women learn that police will not enforce them and that they can trigger increased separation violence.<sup>47</sup> Inducing a woman to rely on her protective order and then failing to enforce it thus directly limits the abilities of a domestic violence victim to act on her own behalf to find protection for herself and her children.<sup>48</sup>

In light of the considerations above, the 2006 case *Kennedy v. City of Ridgefield* (hereinafter “*Kennedy*”), provides a useful model for lawyers looking for remedies for survivors of domestic violence.<sup>49</sup> In this case, a mother, Mrs. Kennedy, reported the rape of her nine year-old daughter at the hands of a neighborhood boy and specifically requested that the police inform her before they approached the boy, since he was known to be particularly violent. Despite assuring Mrs. Kennedy that the police would talk to her before informing the boy’s family, an officer approached the boy’s mother first and informed her of the pending charges. The officer then informed Mrs. Kennedy that he had told the boy’s family. He assured Mrs. Kennedy that the police would patrol around both houses that night. Early the next morning, the boy broke into the house, killed Mr. Kennedy, and severely wounded Mrs. Kennedy.<sup>50</sup> The Ninth Circuit held that assuring Mrs. Kennedy that police would contact her first and would patrol the area were sufficiently affirmative acts under the state-created danger doctrine. The Court emphasized

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<sup>46</sup> Brief Amici Curiae of the National Network to End Domestic Violence, et. al, in Support of Respondent, at \*5-6, *City of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278).

<sup>47</sup> *Id.*

<sup>48</sup> U.S. Dep’t of Justice, Office of Justice Programs, *Office for Victims of Crime Bulletin*, LEGAL SERIES BULLETIN # 4 (January 2002). Available online at <http://www.ojp.gov/ovc/publications/bulletins/legalseries/bulletin4/welcome.html> (Last visited 20 December 2007).

The economic impact of domestic violence is particularly relevant here, as most victims who return to their batterers cite financial concerns as one of the main reasons (if not the main reason) they return. See, Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999). Thus, even for victims from higher socio-economic classes, finding money for private security or other protection alternatives can be daunting. For victims from lower socio-economic classes, finding alternative means of protection may be impossible.

<sup>49</sup> *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006).

<sup>50</sup> *Id.* at 1057-58.

that the acts of the officer “unreasonably created a false sense of security” that made the Kennedys more vulnerable to the danger created by the officer’s informing the boy’s mother of the pending charges.<sup>51</sup> Applying the Ninth Circuit’s reasoning in *Kennedy* to domestic violence cases, state actors thus act affirmatively to create danger when they inform a batter that he has a protective order against him (by serving him) and then create a false sense of security in the victim by allowing her to think her protective order will be enforced.

When evaluating police refusal to enforce protective orders, Courts must examine domestic violence cases with an awareness of the dynamics of abusive relationships as well as the financial (and other) constraints placed on victims. Courts must recognize that issuing protective orders and then choosing not to enforce them are not merely failures to act but instead are actions that lull victims into thinking they are safe. These refusals to honor arrest provisions in protective orders remove the ability of a victim to provide for her protection. If courts are willing to apply *Kennedy-esque* reasoning to domestic violence cases, the state-created danger doctrine can become a viable remedy for domestic violence survivors.

## **2. Deliberate Indifference is “Shocking to the Conscience”**

Courts that require the affirmative actions of the state actor to “shock the conscience” place an unnecessary hurdle in the way of domestic violence victims seeking to use the state-created danger doctrine. Not much seems to “shock the conscience” of the courts. For example, the Sixth Circuit remained un-shocked when police officers responding to several 911 calls in which the victim was screaming and the batterer could be heard inside the house, knocked on a door, looked in a window, and left, doing nothing more.<sup>52</sup> The batterer was restraining the

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<sup>51</sup> *Id.* at 1058, 1063.

<sup>52</sup> *May*, 59 Fed. Appx. at 788.

victim inside the house during the officers' visit and subsequently murdered her.<sup>53</sup> Perhaps more "shocking," the Eighth Circuit was un-shocked in 2005 when social services failed to intervene or even investigate after repeatedly receiving reports that a mother and her live-in partner were torturing and starving her five young children.<sup>54</sup>

The district court that first heard Jessica Gonzales's case is a paradigm for many of the courts that use "shocks the conscience" as an element of the state-created danger doctrine in domestic violence cases. In order to find that an act "shocks the conscience," the court stated that the act must show "a degree of outrageousness and magnitude of potential or actual harm that is truly conscience shocking."<sup>55</sup> In expounding on their illuminating statement that something that "shocks the conscience" must be "truly conscience shocking," the court stated that meeting this standard requires more than mere "intentionally or recklessly causing injury" to the victim by "abusing or misusing government power."<sup>56</sup> If an intentional abuse of government power is insufficient to shock the conscience, it is unclear exactly what, if anything, the Tenth Circuit Court that articulated this standard would be willing to label "conscience shocking."

The deliberate indifference to a known or obvious danger element, applied by the Ninth Circuit in *Kennedy*, is a better standard for domestic violence cases and courts should apply this standard in place of "shocking to the conscience."<sup>57</sup> The deliberate indifference standard, rather than relying on subjective conceptions of what is shocking, requires proof that an "actor

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<sup>53</sup> *Id.* at 789.

<sup>54</sup> *Forrester*, 397 F.3d at 1050. Two of the children died from their treatment.

<sup>55</sup> *Gonzales*, 2001 U.S. Dist. LEXIS at \*10, quoting *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995).

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

<sup>57</sup> Arguably, a court can keep the "shocking to the conscience" language articulated in its jurisdiction's definition of the state-created danger doctrine. Rather than completely restate the law, courts can simply hold that deliberate indifference to the obvious danger posed to domestic violence victims when their protective orders are not enforced constitutes behavior that is "shocking." Given that the Family Violence Prevention Fund estimated that more than half a million American women were victims of nonfatal violence at the hands of their intimate partners in 2001 and that more than three women are murdered by intimate partners each day, it does not seem a stretch to hold that ignoring the danger posed to victims of domestic violence is "shocking." See, Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence, 1993-2001*, February 2003.

disregarded a known or obvious consequence of his actions.”<sup>58</sup> In *Kennedy*, the Court emphasized the boy’s extensive violent history as well as the officer’s notification of the boy’s family despite this knowledge. In addition, the Court noted that the officer assured the Kennedys that he would provide surveillance, an act that either did not happen or was woefully inadequate.<sup>59</sup> The Ninth Circuit held that these behaviors were sufficient to prove a deliberate indifference to a known consequence of the officer’s actions.<sup>60</sup>

Applying the *Kennedy* standard to the facts of *Castle Rock* demonstrates why deliberate indifference is a preferable element of the state-created danger doctrine. First, the danger to Jessica Gonzales was known or obvious to the police officers given that Jessica Gonzales possessed a permanent restraining order (PRO) with language excluding her ex-husband from the house. Under Colorado law, a victim of domestic violence with a PRO can exclude her batterer from the house only if the court issuing the order found that “physical or emotional harm would result if [the batterer] were not excluded from the family home.”<sup>61</sup> Gonzales’s protective order, which she showed to Castle Rock’s police officers, specifically contained the above language which should have indicated to officers responding to her 911 calls that her husband posed a danger to her and her three daughters.<sup>62</sup> In addition, throughout the night, Jessica Gonzales called the police station five times and spoke with officers in person at least twice.<sup>63</sup> After their initial contact with Jessica Gonzales, the police never attempted to enforce the PRO again, despite the fact that they knew where her ex-husband and the children were; instead, they told

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<sup>58</sup> *Kennedy*, 439 F.3d at 1064, quoting *Christie v. Iopa*, 176 F.3d 1231, 1240 (9th Cir. 1999). The Ninth Circuit further pointed out that it had specifically refrained from articulating a mental state standard that used “shocking to the conscience” because such a standard “sheds more heat than light” on the mental state of the actor. *Id.* at 1064-65.

<sup>59</sup> *Id.* at 1065.

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

<sup>61</sup> *Gonzales v. Castle Rock*, 366 F.3d 1096-97 (10th Cir. 2004), citing Colo. Rev. Stat. § 14-10-108(2).

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

<sup>63</sup> *Id.* at 1067-68.

her to simply wait.<sup>64</sup> In light of Colorado's mandatory arrest laws as well as the specific language of Jessica Gonzales's protective order, it is reasonable to conclude that the acts of the Castle Rock police officers were deliberately indifferent to a known danger faced by Jessica, Rebecca, Katheryn, and Leslie Gonzales.

In order to make the state-created danger doctrine a viable remedy in domestic violence cases, state and federal courts must apply the more objective "deliberate indifference" standard instead of relying on their own concepts of what is "shocking to the conscience." Under this test, the inquiry shifts from subjective evaluations of an officer's mental state to 1) whether there was a known or obvious danger and 2) whether the officer's actions demonstrate deliberate indifference to the known or obvious danger.

The deliberate indifference standard, while being easier for victims to meet than "shocking to the conscience," does not remove immunity for most state actors. Merely negligent acts and well-intentioned but misguided acts of state actors will not result in liability since victims are required to point to specific instances in the record that demonstrate a deliberate indifference to the danger they face.<sup>65</sup> Only the most culpable state actors, the deliberately indifferent, are liable under this conception of the state-created danger doctrine.

## **B. The Special Relationship Doctrine**

Though limited to use in state courts, the special relationship doctrine is another exception to the general no-duty rule that can provide survivors with causes of action against officers who fail to enforce protective orders.<sup>66</sup> The United State Supreme Court's interpretation

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

<sup>65</sup> *See, e.g., Kennedy*, 439 F.3d at 1064-65 (emphasizing that Mrs. Kennedy pointed to individual assurances and acts on the part of the officer to articulate her state-created danger exception).

<sup>66</sup> After *DeShaney*, the special relationship doctrine cannot be used in due process litigation in federal courts as an exception to the no duty rule unless the state had the victim in actual physical custody at the time of the injury. *DeShaney*, 489 U.S. at 199.

of the Due Process Clause is not binding on the state courts' interpretations of their own constitutions; therefore, courts are free to recognize a special relationship exception where the victim was not in actual physical custody of a state actor.<sup>67</sup> The special relationship doctrine articulated by New York state courts provides an exception to the general no-duty rule by imposing a duty to act on state actors who 1) have assumed an affirmative duty to act either by promises or actions, 2) know that inaction on their part can lead to harm, and 3) have had direct contact with the victim. In addition, New York requires 4) that the victim's reliance on the actor's affirmative undertaking be "justifiable."<sup>68</sup> As discussed below, this fourth requirement is problematic as applied in domestic violence cases. At the same time, New York's articulation of the doctrine provides other courts with a starting point for recognizing special relationships.

### **1. Protection Orders, Assuming a Duty, and Knowledge that Inaction Can Lead to Harm**

The special relationship doctrine as articulated by the New York courts holds promise for victims of domestic violence because possession of a protection order immediately satisfies the first two elements of the relationship. In New York, orders of protection "shall constitute authority" for officers "to arrest a person charged with violating the terms of such order of protection."<sup>69</sup> In *Cuffy v. City of New York*, the Court noted that the order represented a legislative and judicial determination that the holder was entitled to a certain degree of protection from a specific individual.<sup>70</sup> The court's issuing a protective order therefore imposes an affirmative duty to act on police officers responsible for enforcing the protective order. Once a

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<sup>67</sup> *See, Id.* at 202 (stating that States are free to impose duties and provide protection through their courts and legislatures); *Castle Rock*, 545 U.S. at 768-69 (noting that Colorado was free to enact a system that could hold police departments financially liable for crimes despite the fact that the framers had not intended to do so when they enacted the Fourteenth Amendment).

<sup>68</sup> *Mastroianni*, 91 N.Y.2d at 204, citing *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (N.Y. 1987). *See also, Sorichetti*, N.Y.2d at 468 (noting that the special relationship doctrine is an exception to the general rule that police officers do not owe citizens a duty of protection from violent acts of third parties).

<sup>69</sup> N.Y. Family Ct. Act § 168, quoted in *Sorichetti*, 65 N.Y.2d at 469 and in *Mastroianni*, 91 N.Y.2d at 204.

<sup>70</sup> *Cuffy*, 69 N.Y.2d at 260; quoted in *Mastroianni*, 91 N.Y.2d at 204.

victim presents a valid order of protection, an officer is bound to investigate and take “appropriate action.”<sup>71</sup> Likewise, the protection order is “presumptive evidence” that the court has already found that the person named on the order is dangerous.<sup>72</sup> Once a victim shows an officer her protection order, he immediately knows, or should know, that inaction in the face of threats by the person named on the order will lead to harm.<sup>73</sup>

## 2. Direct Contact Between Victims and State Actors

The direct contact element of the special relationship exception will likewise be a simple element for most survivors to prove, particularly in light of the fact that New York courts use a “flexible approach” to the element when a victim has a protective order. It is important to note that a protective order alone does not satisfy this element; however, the courts do take such orders into account.<sup>74</sup> The court in *Mastroianni v. County of Suffolk*, for example, found that the police officers responding to a 911 call and watching the victim move her furniture back into the house for over an hour constituted direct contact.<sup>75</sup> In *Mastroianni*, the officers’ responding to the 911 call was, in fact, the only contact the officers had with the victim, as she had been murdered by her batterer the next time they saw her.<sup>76</sup>

Other state courts evaluating the direct contact element should adopt a similar discretionary approach when a survivor has a protective order. As long as there is direct face-to-face contact during which officers speak with the victim, courts should be willing to find that this element is satisfied. Courts should also flexibly evaluate cases where contact between state actors and victims is limited to telephone communications. In these instances, police contact

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<sup>71</sup> *Sorichetti*, 65 N.Y.2d at 469.

<sup>72</sup> *Cuffy*, 69 N.Y.2d at 260; quoted in *Mastroianni*, 91 N.Y.2d at 204.

<sup>73</sup> *Id.*

<sup>74</sup> *Mastroianni*, 91 N.Y.2d at 204.

<sup>75</sup> *Id.* at 202, 204. In this case, the batterer had violated the order of protection, entered the house, and begun throwing the victim’s furniture into the yard.

<sup>76</sup> *Id.* at 203.

should be evaluated in terms of reasonableness. If an officer acted reasonably in responding to a domestic violence 911 call and simply did not arrive in time to prevent injury, this officer should not be liable for harm to the victim absent other contacts. On the other hand, if an officer chooses to go to dinner rather than respond to a plea for help from a domestic violence victim, the court should evaluate the reasonableness of the officer's acts and find that he did have direct contact sufficient to satisfy this element.

### **3. "Justifiable Reliance" and the Problems Created by Domestic Violence**

The requirement that reliance on the state actor be "justifiable" creates a problem for victims of domestic violence since at least one court has held that repeated or prolonged contacts with police officers render reliance unjustified.<sup>77</sup> The line between justified and unjustified reliance is unclear. Under this standard, it is possible that reliance is never justified unless police have responded before and enforced an order. On the other hand, perhaps reliance is always justified unless police have failed to enforce a victim's protective order in the past. The line may be in the middle—it is justifiable to rely on officers who tell a victim to wait for an hour and a half<sup>78</sup> but perhaps after being told to wait for eight hours, the reliance is no longer justified. Ultimately, the determination of what is reliable will depend upon the facts in the specific case.

Courts must consider the dynamics of domestic violence when deciding whether reliance on state actors is justified. The issuance of a protection order should be sufficient to justify reliance, especially where language on the order leads the possessor to believe that police officers are required to enforce the order.<sup>79</sup> One study found that 95% of women seeing

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<sup>77</sup> *Cuffy*, 69 N.Y.2d at 263-64.

<sup>78</sup> *Sorichetti*, 65 N.Y. 2d at 471.

<sup>79</sup> *See, e.g.* language printed on the back of Jessica Gonzales's protection order stating that police "shall enforce" the order, *supra* note 23. *See also*, Brief Amicus Curiae of the American Civil Liberties Union and ACLU Colorado, et. al. in Support of Respondent at \*18, *City of Castle Rock v. Gonzales* 545 U.S. 748 (2005) (No. 04-

protective orders believed that police would respond rapidly if their batterer violated their protective order.<sup>80</sup> Under a strict interpretation of justifiable reliance, approximately 95% of women seeking protective orders in 1995 were unjustified in relying on the police. In addition, when state actors tell victims to “go home and wait,” courts should find that victims’ reliance on the police is justified since many victims have no alternatives, particularly if a victim has never called the police before and is unaware that officers will not enforce her order.<sup>81</sup> Victims are entitled to notice if their protective orders will not be enforced. Until they receive this notice, their reliance is reasonable.

Courts that take domestic violence into account when evaluating justifiable reliance are not stripping police officers of their immunity outright. Changing the special relationship doctrine to be more flexible for abuse survivors does not mean a police officer will immediately be at risk of being sued any time he interacts with a survivor. Once a court finds a special relationship exists, it must still evaluate the officer’s conduct for reasonableness.<sup>82</sup> The reasonableness standard does not require that police officers be infallible in their decision-making. The inquiry focuses on the reasonableness of the officer’s acts in light of the circumstances as he knew them at the time of the incident.<sup>83</sup> Only those police officers who do not act reasonably when faced with a domestic violence victim bearing a protective order in hand will be liable.

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278) (arguing that the protective order placed Jessica Gonzales at risk of retaliatory violence and the order specifically provided that police would address this risk).

<sup>80</sup> Karla Fischer & Mary Rose, *When “Enough is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414, 417 (1995).

<sup>81</sup> *See, e.g. Sorichetti*, 65 N.Y. 2d at 471 (holding that the “helpless and distraught” mother in this instance had no alternatives to seeking assistance from the police, as such, her reliance was justified). *See also, Office for Victims of Crime Bulletin*, *supra* note 48 (discussing how inducing domestic violence survivors to rely on protective orders and then failing to enforce them limits the abilities of victims to act on their own behalf).

<sup>82</sup> *Mastroianni*, 91 N.Y.2d at 205.

<sup>83</sup> *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

#### **4. Applying the Special Relationship Standard to the Facts of *Castle Rock***

Jessica Gonzales meets the requirements of the special relationship exception articulated by the New York courts. First, Jessica Gonzales had a valid restraining order issued against her ex-husband.<sup>84</sup> By issuing the order, Colorado state actors affirmatively assumed a duty to protect her.<sup>85</sup> Second, when Gonzales showed the officers her restraining order, the officers immediately knew (or should have known) that inaction on their part could lead to harm.<sup>86</sup> Over the next eight hours, Jessica Gonzales called the police five times and spoke with police officers face-to-face twice.<sup>87</sup> Seven contacts over eight hours absolutely satisfies the direct contact prong of the special relationship test. Finally, Jessica Gonzales's reliance on the police officers to enforce her order was justified in light of her circumstances. She was justified in believing that if a court would issue a protective order then police officers would enforce it. She was justified in reading the language on the back of her restraining order to mean that police officers would enforce the order.<sup>88</sup> She was justified in calling the police and relying on them to act when she informed them that her ex-husband had abducted her three daughters. She was justified in continuing to rely on police officers eight hours after she first called them because by that point, she had nothing else to rely on.

#### **V. Conclusion and Recommendations**

Courts must provide recourse to domestic violence victims now before more batterers learn that police officers will not enforce protection orders. While state legislation can be a clearer and, in many ways, preferable method for creating remedies for domestic violence

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<sup>84</sup> *Castle Rock*, 545 U.S. at 750-53.

<sup>85</sup> *Cuffy*, 69 N.Y.2d at 260; quoted in *Mastroianni*, 91 N.Y.2d at 204.

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

<sup>87</sup> *Id.* at 753-54.

<sup>88</sup> Colo. Rev. Stat. § 18-6-803.5(3), *supra* note 23.

victims, courts cannot wait for state legislators to act. The state-created danger and special relationship doctrines are legal theories already recognized in other areas of law and in several jurisdictions. Adopting and applying these standards to domestic violence litigation should not be a stretch.

In addition, lawyers representing domestic violence victims should be willing to use special exceptions to the general “no duty” rule, like the state-created danger and special relationship doctrines. In arguing for remedies for their domestic violence clients, lawyers should emphasize the constraints created by domestic violence, particularly when arguing about what constitutes an “affirmative act” or “justifiable reliance.” Finally, the courts, lawyers, and victim advocates must also continue to advocate for safety planning, particularly in light of documented instances of separation and retaliation violence. Even in jurisdictions where police officers enforce protective orders, safety planning can be vital to the survival of these women.