POLICE TREATMENT OF DOMESTIC VIOLENCE AND SEXUAL ABUSE: AFFIRMATIVE DUTY TO PROTECT VS. FOURTH AMENDMENT PRIVACY

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I. INTRODUCTION

On May 7, 1998, at 2:00 a.m., Shannon Schieber screamed for help as she was attacked in her apartment.[1] A neighbor called the police for assistance. In response to the neighbor's "Priority 1" emergency call, two police officers arrived at the apartment building where the neighbor stood ready to assist. The officers knocked on Schieber's door. Receiving no answer, they made no further inquiry and did not attempt to enter Schieber's apartment. They did not call for assistance to break down the door. Neighbors, including the original 911 caller, were assured by the officers that Schieber was not home and therefore took no further action that they may have otherwise taken. The following afternoon, Schieber's brother found her raped and dead on the floor of her apartment.

These facts, as alleged by the plaintiffs in *Schieber v. City of Philadelphia*,[2] highlight a difficult tension that exists between the state interest in maintaining police accountability for the failure to protect victims of domestic violence and sexual assault, on the one hand, and the interest in preventing police intrusions upon the rights of privacy guaranteed by the Fourth Amendment, on the other. On the motion for summary judgment in *Schieber*, the Eastern District of Pennsylvania held that there was a sufficient showing to state a claim that the police had an affirmative duty to protect Schieber because the officers' conduct had increased Schieber's

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1. Scheiber v. City of Philadelphia, 156 F. Supp. 2d 451 (E.D. Pa. 2001). The facts subsequently described are drawn from this court's account of the events.

2. *Id.*

vulnerability to harm.[3] The court refused to credit the officers' contention that they lacked probable cause to enter Schieber's home, somewhat summarily dismissing the Fourth Amendment protections also owed to her.[4]

As the police conduct increased the risk of harm, Schieber had a right to protection from that harm; however, she also had a privacy interest against police intrusion into her home without sufficient cause for entry. As the sexual assault and deadly violence that occurred here often occurs in the home, which is universally afforded the greatest degree of privacy, the interest in police protection conflicts with the Fourth Amendment interest against police intrusion without sufficient cause.

This Note analyzes and attempts to reconcile both sides of the troubling tension that arises in circumstances such as those in *Schieber*. Although the Supreme Court has established a general rule that the state has no affirmative duty to protect individual citizens under substantive due process, it provided an exception to that rule if the danger was created or enhanced by the state.[5] This Note argues that the state-created danger exception is often implicated in factual circumstances such as those in *Schieber* and could serve as a means of maintaining police accountability while addressing the prevailing notions of privacy and stereotypes of women that affect police conduct. The Note also discusses the countervailing privacy interests protected by the Fourth Amendment. Analyzed through these two doctrines, the facts of *Schieber* yield two different results. In order to reconcile this conflict, this Note suggests that Fourth Amendment reasonableness balancing of privacy interests with the need for police protection would allow for the application of the state-created danger exception. Looking to the reasonableness of an intrusion and to the police goal of protection, as opposed to criminal investigation or law enforcement, in such cases justifies softening the probable cause requirement of the Fourth Amendment. Thus, police could be held accountable for their conduct and women protected from harm while still maintaining Fourth Amendment protections.

3. The District Court's decision on the motion for summary judgment is currently on appeal in the Third Circuit.

4. *Schieber*, 156 F. Supp. 2d at 458–59.

5. *See* Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200–01 (1989) (alluding to the state-created danger exception, which has since been expressly adopted by many circuits). *See infra* note 58 and accompanying text.

The introduction looks at the reasons behind the need to establish police accountability and liability in their exercise of discretion when responding to domestic violence and sexual assault. A brief summary of the various litigation strategies which litigants have used to that end is then presented. Next, this Note discusses the evolution of the state-created danger doctrine and its application in cases of domestic violence and sexual assault. Police conduct in such cases may enhance danger by expressly interfering with otherwise forthcoming assistance, as in *Schieber*, or by deterring assistance and causing a victim's detrimental reliance on their protection. Therefore, under the state-created danger doctrine, the police are compelled to actively protect in such cases. This Note next analyzes police authority to enter a home through the two models of Fourth Amendment analysis, the traditional formalistic model, which focuses on the existence of a warrant and probable cause, and the more flexible reasonableness balancing model, which the Supreme Court has afforded only limited application. As the law currently stands, the police lack the authority to enter a home on the facts of *Schieber* under both models of Fourth Amendment analysis. In order to reconcile the doctrinal conflict in such cases, this Note argues that a more expansive use of reasonableness balancing can be used to legitimize Fourth Amendment authority for police entry in cases where the state-created danger doctrine requires affirmative protection.

A. The Historical Police Response to Domestic Violence and Sexual Assault

The historical police response to domestic violence and sexual assault, and the persistence of the notions underlying that response, demonstrate the pressing need for maintaining accountability in the exercise of police discretion in such cases.

Law enforcement has historically responded to domestic violence and sexual assault informed by notions that such crimes are private. State responses to reports of domestic violence and sexual assault continue to be based upon the assumption that the state should not intervene in domestic affairs.[6] This assumption is manifested in the state's treatment of domestic violence as different from real crime and in the delayed response to victims' cries for

6. Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 207–09 (1999).

help at the point of serious injury or death.[7] Police departments have had policies of treating serious assaults between strangers as felonies, while treating family assaults of the same degree as misdemeanors, often failing to make arrests.[8] Such policies "ignore[ ] the larger social costs of domestic violence, which involve, *inter alia*, the societal subordination of women," and therefore "reflect[ ] those societal attitudes toward women that are most in need of change."[9]

Traditionally, violence by husbands against their wives was a morally and normatively legitimate form of social control. Therefore, such violence was beyond the scope of the criminal justice system, which has generally served to reinforce prevailing norms of status hierarchies.[10] The allowance of physical violence against women was a consequence of the doctrine of coverture, by which a man and woman united into one entity through marriage.[11] Police commonly responded to domestic violence by either telling women that they could not intervene or by directing one party to leave the home.[12]

Many changes have been made to the law and official police policies; spouse abuse is no longer treated as a private domestic problem but as criminal activity.[13] However, harmful stereotypes, such as the beliefs that violence and rape are provoked and invited by deviant women, that abuse could not be very bad because otherwise women would leave, and that the batterer did not intend to

7. *See id.* at 209 (citing Carolyne R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667 (1986)).

8. *See* Hathaway, *supra* note 7, at 674–75 (citing UNITED STATES ATT'Y GEN.'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 11, 23 (1984) (indicating that violence between strangers was classified as assault, while violence between family members was classified as a family squabble, not rising to the level of a real crime)). R

9. Robbins, *supra* note 6, at 207. R

10. *See* Kathleen Ferraro, *Cops, Courts, and Woman Battering*, *in* VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS 165 (Pauline B. Bart & Eileen Geil Moran eds., 1993).

11. *See* G. Kristian Miccio, *Notes From the Underground: Battered Women, The State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 157 (2000).

12. *See* Ferraro, *supra* note 10, at 166 (citing DEL MARTIN, BATTERED WIVES 2–3 (1976)). R

13. *See, e.g.,* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 987 (1991) (discussing criminal statutes that provide for spousal arrest, on the basis of battery or violation of orders of protection).

cause harm,[14] persist in the enforcement of those official policies, depriving women of freedom from physical violence.[15] One important cause of the persistence of such stereotypes is that police often view domestic violence in gender-neutral terms, as a pathological family interaction, failing to appreciate the lingering impact of women's traditionally subordinate status in perpetuating violence against women.[16]

It has been argued that the concept of marital, affective privacy has been sustained through the modernization of chastisement doctrine in a process of "preservation through transformation."[17] Chastisement, an Anglo-American common law right of subjecting one's wife to corporal punishment in order to command her obedience, was "socially contested and substantially discredited" prior to civil rights reform.[18] However, reform of the most obvious inequalities within the framework of status hierarchy has ironically served to legitimate the inequalities upon which that framework is built.[19] Thus, the notion of martial privacy has been sustained through the process of reform, leading to the reluctance of police to intervene in cases of domestic abuse.

The continued prevalence of the view that family violence is strictly within the private sphere can be seen in Congressional commentary over the federal civil rights remedy provision in the Violence Against Women Act of 1994.[20] Acts of hate were determined to be proper matters of federal concern, while those motivated by love were not. Senator Orrin Hatch commented that "[i]f a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus."[21] Such comments illustrate the unfortunate persistence of the long-established notion that "[w]here love is, law need not be."[22]

14. *See* MARY P. KOSS, ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 8–9 (1994) (charting common myths and stereotypes about male violence against women).

15. *See* Miccio, *supra* note 11, at 160. R

16. *See* Ferraro, *supra* note 10, at 167. R

17. Reva B. Siegel, *"The Rule of Love": Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

18. *See id.* at 2184.

19. *See id.* at 2119, 2184.

20. Violent Crime Control and Law Enforcement Act of 1994 tit. IV, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796, 1902 (codified in scattered sections of 42 U.S.C.).

21. Ruth Shalit, *On the Hill: Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12, 14.

22. Siegel, *supra* note 17, at 2205–06. R

Police are particularly susceptible to the influence of persisting norms of marital and sexual privacy because they retain the discretion that is inherent in evaluating probable cause for search or arrest. Notions of privacy, background assumptions about women, racial and ethnic groups, and the assumption that women will not prosecute domestic abusers, all influence police determinations of probable cause and fault.[23] As a result, maintaining police accountability for the exercise of this discretion is crucial to the enforcement of policies and laws against domestic and sexual assault.

The federal government has recognized violence against women as "a national epidemic mandating national intervention."[24] According to data collected in 1994, one in 270 women are raped and one in 29 women are victims of assault each year.[25] In a recent study by the National Institute of Justice and the Centers for Disease Control and Prevention, 22% of surveyed women reported that they were victims of rape and/or physical assault by a spouse, cohabitating partner, or date at some time in their lives.[26] Of all women murdered, 30%, a number which has remained constant since 1976, are killed by intimate partners.[27]

State proactivity is required because domestic violence and sexual assault interfere with the most fundamental constitutional rights, the rights to life and liberty or, alternatively, the right to bodily integrity.[28] Although most states have promulgated comprehensive domestic violence laws and policies, few have incorporated provisions for municipal liability when the state does not respond appropriately.[29] Extensive state policies for the treatment of domestic violence and sexual assault are not useful in developing accountability because they do not provide mechanisms for finding liability of law enforcement officers. Absent such liability provi-

23. *See* Ferraro, *supra* note 10, at 169. R

24. Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1878 (1996).

25. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENT CRIME 1 (1996).

26. *See* PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2, 12 (1998).

27. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 1 (2000).

28. Miccio, *supra* note 11, at 167. R

29. *See* Miccio, *supra* note 11, at 169. R

sions, courts look to broader conceptions of duty, which they are often reluctant to find.[30]

New York State provides one example of a provision for municipal liability. New York's Family Court Act requires police to assess the safety of a survivor of domestic violence and her children, to provide them with written and oral notice of their rights, and to transport them to a point of safety.[31] The statute also sets a gross negligence or willful misconduct standard for municipal liability for failure to comply with the notice requirements.[32] This law provides incentive for police officers to ensure they do not leave victims in a position in which they are susceptible to future harm. However, greater liability is required to alter police behavior and to protect against their ability to increase harm, whether by interfering with forthcoming aid expressly through verbal assurances or implicitly through their presence. Such liability provisions could provide for police accountability by limiting police discretion and by effecting new policies to counteract deeply ingrained notions of privacy and acceptance of violence against women.

The federal commitment to dealing with such issues was strongly demonstrated by the Violence Against Women Act of 1994.[33] Based upon the hearings conducted in connection with the Act, Congress determined that violence against women exacts a toll both upon individual American citizens and on interstate commerce, and therefore enacted a federal remedy provision against state actors.[34] However, the Supreme Court struck down the federal remedy provision in *United States v. Morrison*.[35] That decision left us in need of a new means to create municipal liability, in order to provide an incentive for police to respond to situations of domestic violence in a way consistent with federal policy, unbiased by traditional and stereotypical notions of marital and sexual privacy.

B. Litigation Strategies to Establish Police Accountability

Litigants have tried to establish police accountability for their failure to protect women from domestic and sexual violence

30. *See* Miccio, *supra* note 11, at 169–71. R

31. *See* N.Y. FAM. CT. ACT § 812 (McKinney 1994). *See also* Miccio, *supra* note 11, at 170. R

32. FAM. CT. ACT § 812.

33. Violent Crime Control and Law Enforcement Act of 1994 tit. IV, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796, 1902 (codified in scattered sections of 42 U.S.C.).

34. *See* Maloney, *supra* note 24, at 1899 & n.101. R

35. 529 U.S. 598 (2000).

through claims under the Equal Protection and the Substantive Due Process Clauses of the Fourteenth Amendment. Constitutional claims are attractive forms of addressing police treatment of domestic and sexual violence because they are available to women in every state, unlike tort actions, which vary depending upon the particular tort laws of each state.[36] Such claims have been brought under 42 U.S.C. § 1983, which provides a civil remedy for the abridgement of federal rights by a state.[37] In order to bring a Section § 1983 suit against public officials, a plaintiff must demonstrate that the conduct in question deprived a person of rights, privileges, or immunities secured by the Constitution or federal law and that the conduct was performed under the color of law.[38] The conduct of police officers responding to domestic violence and sexual assault in their official capacity is clearly performed under the color of law.[39] Thus, the issue generally litigated in cases of domestic violence and sexual assault is whether the plaintiff was deprived of a constitutionally protected or federally granted right. Under Equal Protection theory, in order to invoke heightened scrutiny the plaintiff must establish that the police infringed upon her right to equal protection of the law, by showing that she was a part of a suspect class and was intentionally discriminated against.[40] Under the Substantive Due Process Clause, a plaintiff must establish that she had a substantive constitutional right to affirmative protection by the police, and that this right was violated by police action or inaction.[41]

Litigants bringing suit under the Equal Protection Clause have had difficulty in holding the state liable for failure to protect victims of domestic or sexual violence. In *Hynson v. City of Chester Legal Department*, the Third Circuit held that "if the categories used by the

36. *See* Caitlin E. Borgmann, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* Deshaney?, 65 N.Y.U. L. REV. 1280, 1287 (1990).

37. 42 U.S.C. § 1983 (1994).

38. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980); *see also* Berger v. City of Mayfield Heights, 265 F.3d 399, 405 (6th Cir. 2001); Finley v. Giacobbe, 79 F.3d 1285, 1296 (2d Cir. 1996); Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1216 (9th Cir. 1996).

39. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."), *quoted in* Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

40. *See* Siegel, *supra* note 17, at 2189; Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* Deshaney v. Winnebago County Dep't of Soc. Servs., 75 CORNELL L. REV. 1393, 1398–1400 (1990).

41. Harper, *supra* note 40, at 1395–97.

police in administering the law are domestic violence and nondomestic violence, this is not sufficient to raise a claim for gender-based discrimination absent a showing of an intent, purpose or effect of discriminating against women."[42] To succeed on an equal protection claim, the court continued, a plaintiff must show that "it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom."[43] If a plaintiff presents a claim of gender-based discrimination satisfying the test set forth in *Hynson*, the police policy is subjected to intermediate scrutiny, requiring the government to show that the challenged policy is substantially related to an important government purpose.[44] If a plaintiff cannot establish a sexual discrimination claim, the police conduct is subject only to rational basis scrutiny.[45]

Litigants challenging law enforcement agencies for policies of interspousal tort immunity and the exemption for "spousal" rape or for generally providing lesser degrees of protection to victims of domestic violence have been largely unsuccessful. Spousal assault policies are facially gender-neutral, as a result of the deletion of gender-specific references and discriminatory practices in response to the threat of equal protection litigation. As domestic violence policies now refer to "spousal" abuse rather than wife abuse, they merely need to survive rational basis scrutiny, despite the fact that women are disproportionately the victims of such violence.[46] The Supreme Court in *Personnel Administrator of Massachusetts v. Feeney* held that even if governmental policies crafted with neutral classifications have a disproportionate impact upon a protected class, such policies only violate the Equal Protection Clause if the disproportionate impact results from a discriminatory purpose.[47] Some courts, however, while requiring discriminatory purpose to invoke strict scrutiny review, have found the domestic violence vs. non-do-

42. 864 F.2d 1026, 1031 (3d Cir. 1988).

43. *Id.*; *see also* Shipp v. McMahon, 234 F.3d 907, 914 (5th Cir. 2000); Soto v. Flores, 103 F.3d 1056, 1066 (1st Cir. 1997); Eagleston v. Guido, 41 F.3d 865, 878 (2d Cir. 1994); Ricketts v. City of Columbia, 36 F.3d 775, 779 (8th Cir. 1994); Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988) (adopting the same three-part standard for equal protection claims brought by victims of domestic assault as in *Hynson*).

44. *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Harper, *supra* note 40, at 1398–99.

45. Siegel, *supra* note 17, at 2193–94. R

46. Siegel, *supra* note 17, at 2191, 2193–94. R

47. 442 U.S. 256, 272 (1979); *see also Shipp*, 234 F.3d at 913.

mestic violence distinction in law enforcement policy to fail the rational basis test, even absent a finding of discriminatory purpose.[48] Nevertheless, as this is a large hurdle to overcome, litigation under equal protection theory is rarely successful.[49]

As equal protection theory has been relatively ineffective in litigation and as few states have incorporated police liability into their legislative provisions,[50] this Note will focus on the use of the Due Process Clause as a litigation tool for victims of domestic violence and sexual assault. A solution lies in the application of the state-created danger doctrine, which would allow courts to find an affirmative duty to protect victims of domestic violence in cases where the police increased the harm faced. The state-created danger doctrine provides a substantive right to protection, which when infringed, serves as the basis for a § 1983 suit, providing an effective means for establishing police accountability.

II.
THE STATE-CREATED DANGER DOCTRINE: BATTERED WOMEN'S INVOCATION OF THE STATE'S AFFIRMATIVE DUTY TO PROTECT

The state-created danger doctrine, established in *Deshaney v. Winnebago County Department of Social Services*,[51] can be used to invoke the state's affirmative duty to protect. The facts of *Deshaney* are unrelated to the facts of *Schieber* and therefore this Note uses the case for the limited purpose of setting up a framework for the argument. In circumstances where police conduct creates or increases harm, the police have infringed on a constitutionally-protected substantive right for purposes of a § 1983 claim. The police can thus be held accountable for their conduct. Courts have interpreted the notion of state-created danger in different ways. Police conduct in response to reports of domestic and sexual violence often increases the harm already faced by interfering with aid that might otherwise be forthcoming, through police presence or by giving express assurances of safety. The facts of *Schieber* exemplify how police interference with other assistance can increase the danger of harm.

48. *See, e.g.*, Navarro v. Block, 72 F.3d 712, 717 (9th Cir. 1996).

49. Robbins, *supra* note 6, at 224–25 (discussing the substantial hurdles present in equal protection litigation and the limited means of overcoming them). R

50. *See supra* notes 29–33 and accompanying text. R

51. 489 U.S. 189 (1989).

A. Deshaney v. Winnebago County Department of Social Services[52]

The Constitution, through the Due Process Clauses of the Fifth and Fourteenth Amendments, guarantees that certain substantive rights will not be infringed. In *Deshaney*, the Supreme Court held that the Due Process Clause was phrased in terms of limitations on the exercise of governmental power, to protect people from the State, but not to have the State provide protection from others.[53] Therefore, the Court concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[54]

Some feminist scholars argue that *Deshaney* was wrongly decided, relying on the historical circumstances surrounding the passage of the Civil War Amendments, which were a direct response to the states' abrogation of their responsibility to protect all citizens.[55] They reason that the amendments redefined state duty as not merely "restricting the state from invading these rights [of life, liberty and property] but also protecting against invasion of these rights by *private* others."[56] The Fourteenth Amendment's Due Process Clause is therefore triggered when states fail to protect their citizens from conduct that interferes with the right to personal security and bodily integrity. Therefore, they argue that *Deshaney* has effectively served to eradicate conceptions of state accountability for domestic violence from the rights discourse.[57] While such scholars present a powerful argument, this Note suggests that an alternate route exists to maintain state accountability for domestic violence and sexual assault within the framework of *Deshaney*.

The *Deshaney* Court alluded to two limited circumstances in which substantive due process may impose affirmative duties of care and protection upon the State with respect to particular individuals: 1) when the state limits a person's freedom to act on his own behalf and to ensure his own safety, or 2) when the state played a part in creating danger or when the state rendered the victim more vulnerable.[58] The latter, in which plaintiff is metaphorically thrown into a

52. *Id.*
53. *Id.* at 195–96.
54. *Id.* at 197.
55. *See, e.g.*, Miccio, *supra* note 11, at 164–66. **R**
56. *See id.* at 166.
57. *See id.* at 164–66.
58. 489 U.S. at 200–01. Many circuits have expressly adopted the state-created danger exception alluded to in *Deshaney* as a means of establishing a constitutional claim under substantive due process and 42 U.S.C. § 1983. *See* Kneipp v.

"snake-pit,"[59] generates an affirmative duty to protect that is relevant to cases of domestic violence and sexual assault.

While *Deshaney* does not provide clear guidance regarding the degree to which the state must create or enhance danger before assuming a constitutional duty to protect, it does establish that the danger posed must be greater than it would have been absent state action.[60] Some courts have derived formal tests for determining when an affirmative duty to protect should be based upon the state-created danger theory.[61] Other courts have taken a more unstructured approach of simply determining whether police conduct increased the risk of harm.[62] Many courts have refused to find an affirmative state duty to protect because there was not sufficient police enhancement of danger.[63] In some of these cases, the fact patterns do not implicate the affirmative duty to protect because police conduct truly did not increase the victim's vulnerability to harm.[64]

Tedder, 95 F.3d 1199 (3d Cir. 1996); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

59. *See* Karen M. Blum, Deshaney*: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435 (1994) (quoting Judge Posner in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), to assert that "[I]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.").

60. *See, e.g.*, *Freeman*, 911 F.2d at 55 (citing *Deshaney*, 489 U.S. at 199–201).

61. For example, the Third Circuit adopted a four-pronged test for establishing a claim under the state-created danger theory:

> (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.

Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996).

62. *See, e.g.*, *Freeman*, 911 F.2d at 55 (looking to whether "the state has taken affirmative action which increased the individual's danger of, or vulnerability to, such [harm] beyond the level that would have been present absent state action"). The court permitted the plaintiff to amend the complaint, which was drafted before *Deshaney*, to include the arguments presented at oral argument that state conduct had increased the risk of harm. *Id.*

63. *See* Salas v. Carpenter, 980 F.2d 299, 309 (5th Cir. 1992); Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992); Losinski v. County of Trempealeau, 946 F.2d 544, 550 (7th Cir. 1991); Brown v. Grabowski, 922 F.2d 1097 (3rd Cir. 1990); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 700 (9th Cir. 1990); *see also* Richard A. Soble & Mary R. Minnet, *Spouse Abuse: Imposing Liability on the Police for the Failure to Respond to the Victims of Domestic Violence*, 73 MICH. B.J. 940, 943 n.39 (1994).

64. *See Balistreri*, 901 F.2d 696 (holding that despite the existence of a restraining order against plaintiff's husband, police failure to protect plaintiff from

However, the courts have often unfairly rejected claims of police enhancement of danger, failing to recognize the real impact of police conduct in increasing vulnerability to harm.

B. Enhancement of Danger

The difficulty that police face in responding to cases of domestic violence or sexual assault is often caused by stereotypes of women and preconceived notions of domestic and sexual violence. The pervasive myths that surround such violence create a strong likelihood that the police will act in a way that increases danger to victims of these kinds of violence.[65] Thus, the state-created danger exception is frequently implicated and should impose an affirmative duty on police to protect such victims.

For example, in *Smith v. City of Elyria*, the police refused to remove an abusive ex-husband from the home of his ex-wife, and encouraged him to reenter the house.[66] As this case illustrates, police often regard domestic violence as "'basic disturbance[s]'"[67] up until the occurrence of serious violence, at which point police intervention is too late. In *Smith*, the officer who initially arrived at the victim's home and tried to remove her ex-husband refused to get involved, saying "'that's a civil matter.'"[68] Responding to numerous phone calls reporting "yelling and screaming," the officer later refused to call another officer away from lunch to respond to the situation. By the time the police finally arrived once again, the ex-husband had stabbed the victim to death and partially severed her daughter's ear.[69]

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various episodes of violence and to investigate sufficiently did not create an affirmative duty to protect); Henderson v. City of Philadelphia, No. CIV. A. 98-3861, 1999 WL 482305, at *12 (E.D. Pa. July 12, 1999) (finding that police failure to restrain a diagnosed schizophrenic who was endangering himself and who proceeded to jump out of a window did not constitute a state-created danger because "the officers did not intervene to remove Henderson's private source of aid, his mother, and did not restrain her ability to assist her son"); Stevens v. Trumbull County Sheriffs' Dep't, 63 F. Supp. 2d 851, 855 (N.D. Ohio 1999) (finding that officer's decision to take a report over the phone instead of in person in response to a non-emergency call did not create an affirmative duty to protect, even though an emergency later arose, causing the victim paralysis; and also noting that the defendants did not give plaintiff a heightened sense of security, which may implicate an affirmative duty to protect).

65. *See* text accompanying notes 66-68.

66. 857 F. Supp. 1203 (N.D. Ohio 1994).

67. *See id.* at 1207.

68. *See id.*

69. *See id.* For a discussion of the court's holding, see text accompanying notes 75–77. **R**

1. Express Interference With Aid

Many circuits that have recognized the state-created danger exception to the *Deshaney* rule have held that interfering with aid that might otherwise have been forthcoming increases the danger that the victim faces and creates an affirmative duty to protect.[70] As courts have recognized in the cases described below, police refusal to intervene and their assurances that the victim is safe interfere with otherwise forthcoming assistance and provide apparent authority to the batterer to stay, thereby increasing the risk of danger and injury.

In *Freeman v. Ferguson*, Geraldine Downen and her daughter, Valerie, were killed by Geraldine's estranged husband, Norman "Bud" Downen, Jr.[71] At the time of their murders, there was a restraining order against Bud, prohibiting him from bothering, intimidating, harassing, or in any way interfering with Geraldine and Valerie. The Eighth Circuit held that the police chief, a close friend of Bud, could be liable under the state-created danger theory if, as alleged in oral argument, he affirmatively told his officers not to take action against the batterer, who then murdered Geraldine and Valerie. The court reasoned that an affirmative duty to protect could validly be implicated when police conduct interferes "with the protective services which would have otherwise been available in the community—with such interference increasing the vulnerability of decedents to the actions of 'Bud' Downen and possibly ratifying or condoning such violent actions on his part."[72]

The court in *Estate of Sinthasamphone v. City of Milwaukee* similarly recognized the creation of an affirmative duty arising from police interference.[73] *Sinthasamphone* involved a 14-year old Laotian boy found by two women on the street, drugged, naked and bleeding, having escaped the apartment of Jeffrey Dahmer, who had previously been convicted of sexually abusing a male child. The women called the police. When the police arrived, they refused to listen to the information the two women tried to convey, and even threatened to arrest them. The officers then took both Dahmer

70. *See, e.g.*, Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990); Estate of Sinthasamphone v. City of Milwaukee, 785 F. Supp. 1343 (E.D. Wis. 1992) (finding that a "special relationship" existed when police prevented others from helping decedent by taking decedent into custody).

71. 911 F.2d at 52. The following facts are from the court's discussion of the case.

72. *Id.* at 54.

73. 785 F. Supp. 1343 (E.D. Wis. 1992). The following facts are from the court's discussion of the case.

and Sinthasamphone into police custody, later returning them both to Dahmer's apartment, where Dahmer killed the boy. The court concluded that the officers' prevention of private citizens from helping Sinthasamphone, by refusing to listen to the information the women tried to relay as well as by taking Sinthasamphone into police custody, was sufficient to trigger an affirmative duty to protect.[74]

In *Smith v. City of Elyria*, Karen Guerrant was stabbed to death by her ex-husband, Alfred Guerrant.[75] Alfred also stabbed and injured Karen's sister, Dorice Smith, and Karen's 9-year old daughter, Elaine. Following a second divorce from Karen and a prison sentence for forging Karen's checks, Alfred was released from prison on parole. A few months later, Karen permitted him to move into the guest room of her house. Shortly thereafter, Karen and Alfred began to argue. When Karen called the police, they refused to remove Alfred from the house since "Karen could not 'just put him out at her whim,' because she had invited him"[76] and advised him to reenter the home. The Northern District of Ohio held that this police conduct increased the danger that the victim faced: "Here, Alfred used the apparent authority given to him by the police to remain in his ex-wife's home against her will, and later killed her."[77]

2. Police Presence: Deterrence of Assistance and Victim's Detrimental Reliance

Police presence can deter otherwise forthcoming assistance and cause the victim's detrimental reliance on their assistance,[78] in-

74. *Id.* at 1349–50.

75. 857 F. Supp. 1203 (N.D. Ohio 1994). The following facts are from the court's discussion of the case.

76. *Id.* at 1206.

77. *Id.* at 1210.

78. *See* Borgmann, *supra* note 36, at 1309–14 (explaining the theory of detrimental reliance as a basis for increased danger to sexual assault or domestic violence victims, in the context of orders of protection). According to Borgmann: R

> Having obtained an order of protection, she might not seek further outside assistance, or she might not take additional measures to ensure her safety, such as fleeing her home to seek protection at a shelter or with relatives or filing a criminal complaint to have the batterer prosecuted. A woman who has not received an order of protection and still believes herself to be in grave physical danger is more likely to seek other help than a woman who believes she will be protected by the state. In this way, a state that fails to enforce its protective order causes the battered woman to remain dangerously complacent in the face of an empty promise.

Id. at 1309.

Police presence at the scene of an incident of domestic violence or sexual assault similarly may cause a victim to remain dangerously complacent. There is

creasing the danger faced and invoking an affirmative duty on the police to protect the victim. Some courts have refused to find an affirmative duty to protect, failing to credit the degree to which police presence affects the behavior of the victim herself in ways that further expose her to danger. In *Losinski v. County of Trempealeau*, for example, the Seventh Circuit held that the state-created danger exception to *Deshaney* was not implicated, ignoring the fact that the presence of a police officer emboldened the victim to have a private conversation with her abusive husband in their bedroom.[79] In addition, the presence of the officer prevented her mother and brother-in-law, who were also present, from assisting when the violent nature of the conversation became clear.[80] Thus, the police officer's presence and inaction greatly increased the danger that the victim faced and ultimately resulted in her death.[81]

In *Pinder v. Johnson*, the court similarly ignored the effect of police conduct on the plaintiff's actions and refused to find that the police enhanced the danger to the victim.[82] After an episode of domestic violence, a neighbor managed to restrain the plaintiff's

the danger that such an argument could chill police conduct, preventing their arrival at the scene altogether. However, if their presence causes a victim's false sense of security and deters otherwise forthcoming assistance, perhaps chilling of police conduct is preferable. On the other hand, a theory of state-created danger that included detrimental reliance theory could lead to greater police vigilance and affirmative assistance in situations where their presence would likely invoke reliance. Police policies could be formulated to account for victims' detrimental reliance upon the appearance of police assistance.

79. 946 F.2d 544 (7th Cir. 1991).

80. *See id.* at 547–48.

81. *See id.* at 550 (reciting plaintiff's argument that the police's protective presence encouraged the victim to enter her husband's presence). In *Losinski*, a domestic fight erupted between Donald and Julie Losinski. Julie called her mother to plead for help. Her mother's husband called the Sheriff's department. When officers from the Sheriff's department arrived at the trailer home, Julie and the three children ran out of the home with their clothes and the group left the home. After Julie obtained a Temporary Restraining Order (TRO), and commenced divorce proceedings, a scheduled hearing to determine whether an injunction would replace the TRO was cancelled, so Julie made plans to pick up her belongings. Julie returned to the home with her mother, her brother-in-law, and an officer from the Sheriff's department (since the TRO was still in effect). When they arrived, Donald asked to speak to Julie alone, and with the officer present, she agreed and entered the room with Donald. When the conversation became argumentative, the officer, mother and brother-in-law entered the trailer, but allowed the conversation to continue in private in the bedroom. While in the bedroom, Donald shot Julie in the head and neck, while the officer, mother and brother-in-law waited in the adjacent hallway. *Id.* at 547–48.

82. 54 F.3d 1169 (4th Cir. 1995). The following facts are from the court's discussion of the case.

abusive boyfriend until the police arrived and arrested him. Relying on the officer's statement that her ex-boyfriend would be held overnight, the plaintiff went to work. The police released him early without notifying her. Upon his release, the ex-boyfriend burned her house down, killing the three children inside.[83] The officer's assurances that the ex-boyfriend would be detained overnight emboldened the plaintiff to go to work. Therefore, the officer's conduct clearly left the plaintiff and her children in greater danger than if he had not assured her that she was safe for the night. While the court expressly acknowledged that existing precedent "stand[s] for the proposition that state actors may not disclaim liability when they themselves throw others to the lions,"[84] it failed to hold the officer accountable by finding that there was not a sufficient basis for an affirmative duty to protect in the case at hand. The court, to its discredit, was blind to the full effects of police conduct. The officer had an affirmative duty to protect the plaintiff at least to "an extent necessary to dispel the false sense of security that his actions created."[85]

3. The Action-Inaction Distinction: What Constitutes "Affirmative" State Conduct?

Many courts that have found an affirmative duty to protect victims of domestic violence by drawing upon the state-created danger theory faced fact patterns in which the police increased the risk of harm to the victim through undeniably affirmative action.[86] The courts' emphasis on the construct of affirmative as opposed to non-affirmative conduct, a seemingly arbitrary distinction, is troubling.[87]

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83. *Id.* at 1172.

84. *Id.* at 1177.

85. *Id.* at 1181 (Russell, J., dissenting).

86. *See, e.g.*, Davis v. Fulton County, 884 F. Supp. 1245 (E.D. Ark. 1995) (holding that allowing a "trustee" detainee to unload groceries unsupervised right behind plaintiff's store created an affirmative duty to protect the plaintiff from the resulting danger because the close proximity of the victim to the location where the detainee was allowed to roam was sufficient to establish an increased level of danger to the victim); Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989) (finding that "[t]he fact that Ostrander arrested Bell, impounded his car, and apparently stranded Wood in a high-crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety").

87. Miccio, *supra* note 11, at 150. Although Miccio discusses the dichotomy in terms of a notion of duty that is prerequisite to a finding of negligence, this argument is equally applicable to courts' requirement of "affirmative" police conduct in the creation or enhancement of danger, invoking an affirmative duty to protect. *See id.* R

Courts have often refused to find an affirmative duty to protect on the grounds that police action was insufficiently affirmative, and was only mere failure to act.[88] Courts often inappropriately look to the action-inaction distinction, when looking to the actual effect of police conduct would more accurately reach the heart of the issue. Police conduct that causes a victim to place herself in danger or deters private assistance clearly increases the danger she is already facing. If police conduct has such an effect, whether it is "action" or "inaction" is irrelevant. Certainly, "the line between action and inaction, between inflicting and failing to prevent the infliction of harm" is a difficult one to draw and leads to inconsistent and unprincipled results.[89] More appropriate than this distinction is an analysis of whether state acts or omissions were the *cause* of plaintiff's injuries, and therefore, a constitutional violation.[90] The affirmative duty should therefore properly be imposed when state *conduct*, whether through action or a failure to act, placed the victim in greater danger than she otherwise faced.[91]

In *Brown-Alleyne v. White*, the Eastern District of New York properly held that the police assumed an affirmative duty to protect when they "deliberately refrained from punishing or preventing violence by a private actor, thereby increasing the danger to potential victims."[92] The court held that interference with protective services otherwise available went "well beyond allegations that the defendant officers merely stood by and did nothing."[93] As the decision to refuse aid to plaintiff increased the risk of harm that she would have faced absent that decision, causation was established and the police conduct was properly deemed to be sufficiently affirmative. The court recognized that while a failure to act does not increase the risk of harm faced by the victim, a decision to refuse and prevent aid does.[94]

88. A failure to act was determined to not be a constitutional violation in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

89. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982), *quoted in* Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992).

90. *Estate of Sinthasomphone*, 785 F. Supp. at 1349.

91. *See* Blum, *supra* note 59. R

92. No. 96 CV 2507, 1999 WL 1186809 (E.D.N.Y. Oct. 11, 1999). In *Brown-Alleyne v. White,* police officers decided not to respond to plaintiff's complaint about assaults by her ex-boyfriend, who was a corrections officer. In response to a call about another assault, officers came and escorted her ex-boyfriend out of the building, but did not provide medical assistance, and berated plaintiff for filing a false claim. *Id.* at *1.

93. *See id.* at *3 (quoting Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993)).

94. *See id.* at *2–3.

In *Pinder v. Johnson*,[95] the Fourth Circuit relied upon a false distinction between affirmative actions and failures to act. The court held that the police officer's false assurances of detaining an abusive ex-boyfriend overnight did not constitute an affirmative action giving rise to civil liability: "It cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely."[96] The court suggests that the connection between police inaction and harm is often too tenuous to justify the imposition of liability.[97] However, the court fails to recognize that in many cases, the police play a very real role in making injury at the hands of a third party more likely by rendering the victim more vulnerable to already existing dangers, as the Court understood in recognizing an affirmative duty to protect in limited circumstances in *Deshaney*.[98] In *Pinder*, the officer was not guilty of merely failing to act, but rather of affirmatively inducing the plaintiff to leave her children at home alone, leaving them more vulnerable to the ultimate attack by her ex-boyfriend. Police action was undeniably implicated in the tragic deaths of those children. The court's decision in *Pinder* is rooted in its fear of extending liability too broadly by making the state liable for, as an example, "every crime committed by the prisoners it released."[99] However, finding liability in situations where the police increased the likelihood of harm would not implicate such an unfettered extension of liability.

C. Affirmative Duty to Protect in Schieber

Based upon the arguments about the state-created danger theory set out above, the facts of *Schieber* properly implicated an affirmative duty by the police to protect Schieber from her assault and ultimate death.[100] The response of police officers to the neighbor's phone call, their arrival at the scene, and their assurances to neighbors that Schieber was not home parallel police conduct in *Freeman v. Ferguson*, in which state conduct interfered with police assistance,[101] and *Estate of Sinthasamphone v. City of Milwaukee*, in which

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

96. *Id.* at 1175.

97. *See id.*

98. *See* Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

99. *Pinder*, 54 F.3d at 1175.

100. *See supra* text accompanying note 1. **R**

101. 911 F.2d 52 (8th Cir. 1990). *See also supra* text accompanying notes 70–72. **R**

police prevented the women from helping the boy who had initially escaped from Jeffrey Dahmer's apartment.[102]

An argument could be made that requiring the police to intervene may chill police response to reports of domestic violence and sexual assault. However, liability under the state-created danger theory could be strictly circumscribed to police conduct which deters otherwise forthcoming assistance. In *Schieber*, had the police simply informed neighbors that they did not see any evidence of a break-in and that no one responded to their knocks, neighbors might have intervened nonetheless. However, the police presence, their investigation at the scene, and their assurances that Schieber was not home effectively prevented neighbors from intervening and possibly from finding her in time to save her life.

III.
FOURTH AMENDMENT PROTECTIONS: PRIVACY AND REASONABLENESS

Many cases, including *Schieber*, fall along a difficult and blurry line between necessary intervention to protect women from harm and needless and illegal intrusion into a private sphere in which no harm is taking place. The same notion of marital privacy that colors police treatment of domestic violence and sexual assault cases must be protected pursuant to provisions of the Fourth Amendment.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, *and no Warrants shall issue, but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[103] As the term "unreasonable" precedes the warrant clause, one might think that reasonableness controls all searches and seizures.[104] However, members of the Court have "stood the fourth amendment on its head" by reading the Warrant Clause as the controlling clause of the Amendment.[105] As laid out in *Katz v. United States*, the Court has traditionally combined the Warrant and Reasonableness Clauses, taking a formalistic

102. 785 F. Supp. 1343 (E.D. Wis. 1992). *See also supra* text accompanying notes 73–74. R

103. U.S. CONST. amend. IV (emphasis added).

104. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 34 (6th ed. 2000).

105. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23–24 (1969), *cited in* SALTZBURG, *supra* note 104. R

approach through which searches and seizures performed without a warrant are presumptively unreasonable.[106] However, the Court has created several exceptions to the warrant requirement, under which only the requirement of reasonableness controls.[107] More recently, the Court has explicitly used reasonableness balancing alone in its analysis of Fourth Amendment searches and seizures, reflecting a trend towards greater use of reasonableness balancing.[108] This Note will look first to the formalistic *Katz* model, and then to the more flexible reasonableness balancing model.

For purposes of Fourth Amendment analysis, threshold matters include whether there is state action, as the Bill of Rights merely protects citizens against state action,[109] and whether a Fourth Amendment event, either a search or seizure, is implicated.[110] A Fourth Amendment search is effected in situations where a "reasonable expectation of privacy" exists.[111] In circumstances in which domestic violence is occurring inside the home, these threshold matters are clearly satisfied, as it is almost always reasonable to have an expectation of privacy within one's own

106. *See* Katz v. United States, 389 U.S. 347, 356–57 (1967) (finding that in the absence of safeguards such as the obtainment of a warrant and subjection of the evidence of probable cause to detached scrutiny, "this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end"). The *Katz* court also noted that:

> [s]earches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," for the Constitution requires "that the deliberated, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Id. (internal citations omitted).

107. *See, e.g.*, Cooper v. California, 386 U.S. 58, 59 (1967); Warden v. Hayden, 387 U.S. 294, 298–300 (1967); Brinegar v. United States, 338 U.S. 160, 174–77 (1949); McDonald v. United States, 335 U.S. 451, 454–56 (1948); Carroll v. United States, 267 U.S. 132, 153, 155-56 (1925).

108. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968); *see also* SALTZBURG & CAPRA, *supra* note 104. R

109. *See* SALTZBURG & CAPRA, *supra* note 104, at 34.

110. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

111. *See id.* ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

home,[112] where the majority of domestic violence and sexual assault occurs. With retrospective knowledge of Schieber's assault and murder, the invasion of privacy interests seems easily justified. However, when analyzing the *Schieber* facts and variations on those facts through the lens of Fourth Amendment protections, it is important to maintain the privacy interests of both the perpetrator and the victim of the violence in situations where domestic violence or sexual assault is not occurring.

Had Schieber been screaming after falling down the stairs, after having an argument on the phone, or even in the midst of a passionate sexual moment, would police intrusion have been constitutionally valid?

A. The Formalistic Model of Katz*: The Requirement Of Probable Cause*

Analysis under the formalistic approach turns on the issue of whether the police had probable cause to believe that there was evidence of a crime sufficient to justify infringing on the privacy interests of an individual by searching her home.[113] If a search or seizure is to be conducted, a warrant must be issued upon a showing of probable cause. There are certain named exceptions to the warrant requirement, including response to exigent circumstances, in which there is reason to believe that a person is in need of immediate aid.[114] However, as probable cause is absolutely required under the formalistic analysis of the Warrant Clause, one does not inquire into the presence of exigent circumstances until probable cause that a crime is being committed is established.

1. Determination of Probable Cause: Certainty and Sufficiency of Evidence

The Court has often noted that probable cause is a flexible, common-sense standard.[115] Accordingly, the Supreme Court in *Illi-*

112. *See id.* ("Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); *see also* Crystal Cunningham, *Domestic Violence: I Don't Need to Have Bruises to Feel Pain—A Worthy Exception to the Warrant Requirement*, 28 PAC. L.J. 731, 735, n.32 (1997).

113. *See* SALTZBURG & CAPRA, *supra* note 104, at 80.

114. *See* Mincey v. Arizona, 437 U.S. 385, 392 (1978); *see also* Welsh v. Wisconsin, 466 U.S. 740, 749 (1984); Payton v. New York, 445 U.S. 573, 583–90 (1980); Terry v. Ohio, 392 U.S. 1, 20 (1968).

115. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 742 (1983).

nois v. Gates determined that probable cause is evaluated within the "totality of the circumstances," as defined by the two factors of the earlier *Aguilar-Spinelli* test.[116] These two main factors, which magistrate judges and courts must look to in order to determine the certainty of information constituting probable cause are: 1) the veracity of the informant, determined by the detail and sufficiency of the facts presented, and 2) the basis of the informant's knowledge.[117] Anonymous tips must be corroborated through other sources of information in order to "reduce[ ] the chances of a reckless or prevaricating tale."[118]

Corroboration of an anonymous tip that is only in the form of an officer's prior experience with a particular suspect may not satisfy the probable cause requirement. In *Hopkins v. City of Sierra Vista, Arizona*, the Ninth Circuit addressed the issue of corroboration in the context of police response to domestic violence.[119] In that case, an officer received an anonymous tip about domestic violence, and upon arrival, heard loud voices and other noises. The husband and wife sued the officer for his warrantless entry into their home.[120] The Ninth Circuit held that there were genuine issues of material fact as to whether the officer had probable cause, and reversed the district court opinion granting summary judgment to the defendant officer. The court held that had the anonymous tip been corroborated with sounds of an argument, probable cause would likely have been established.[121] However, as it was unclear whether the officer heard sounds of a loud social gathering or an argument, the court could not uphold the grant of summary judgment for the defendant. The court noted that it was questionable whether the untested anonymous tip, corroborated only with the officer's prior experience with the suspect and the knowledge that he had been drinking, would be enough to establish probable cause.[122] As a result, the court in *Hopkins* remanded for further

116. *See* Illinois v. Gates, 462 U.S. 213 (1983) (looking at the *Aguilar-Spinelli* factors in a "totality of the circumstances" approach); Spinelli v. United States, 393 U.S. 410 (1969) (using a strict two-pronged test) (abrogated by *Gates*, but still relevant when police rely in whole on an informant's tip); Aguilar v. Texas, 378 U.S. 108 (1964) (using a strict two-pronged test) (abrogated by *Gates*).

117. *Gates,* 462 U.S. at 214.

118. Jones v. United States, 362 U.S. 257, 271 (1960), *quoted in Gates*, 462 U.S. at 244–45.

119. 931 F.2d 524 (9th Cir. 1991). The facts discussed in this paragraph are drawn from the court's opinion.

120. *Id*. at 525–26.

121. *Id* at 528–29.

122. *Id.* at 529 (citing Beck v. Ohio, 379 U.S. 89, 97 (1964)).

proceedings to determine whether the sounds that the officer had specifically heard were consistent with a domestic dispute and therefore sufficiently corroborated the anonymous tip.[123]

On the other hand, ordinary citizen informants who identify themselves, like the neighbor in *Schieber*, are presumed to be reliable because their motivations, general concern for society or their own safety, as well as the threat of criminal liability if fabricated,[124] indicate little chance of fabrication.[125] While anonymous tips must be corroborated, no such corroboration is necessary to determine the reliability of a citizen informant. In addition, citizen informants generally derive their knowledge from firsthand witness experience so that the basis of knowledge requirement is also satisfied.[126] Therefore, certainty of information necessary to establish probable cause may be found in either the corroboration of an anonymous tip or an ordinary citizen informant tip.

Thus, in cases of domestic violence and sexual assault, the issue of probable cause often turns on whether the quantity of information is sufficient to establish a "fair probability" of criminal activity. One court described "fair probability" to be "[s]omewhere between 'less than evidence which would justify . . . conviction' and 'more than bare suspicion.'"[127] The *Gates* Court noted that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[128] Therefore, as the Ninth Circuit determined in *Hopkins*, probable cause is a highly fact-specific determination of suspicion.

123. *Id.* at 529.

124. *See Gates*, 462 U.S. at 233–34 (finding that "if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary") (citing Adams v. Williams, 407 U.S. 143 (1972)).

125. *See, e.g.*, Massachusetts v. Upton, 466 U.S. 727, 731 (1984) (discussing the lower court's conclusion that "the common bases for determining the credibility of an informant or the reliability of her information" are that the information was "tried and true" or that an "ordinary citizen" provided information as a witness to a crime); Adams v. Williams, 407 U.S. 143, 146–47 (1972) (crediting the information of an identified informant because of the possibility of criminal liability and other indicia of reliability).

126. *See Gates*, 462 U.S. at 234 (observing that an informant's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case").

127. United States v. Prandy-Binett, 995 F.2d 1069, 1070 (D.C. Cir. 1993) (internal citation omitted).

128. *Gates*, 462 U.S. at 232.

2. Exigent Circumstances: Exception to the Warrant Requirement

Once a court finds that probable cause exists, police must then obtain a warrant to conduct a search or seizure. However, warrantless entry and search of a home is justified if the police could reasonably believe that there are exigent circumstances.[129] Exigency is one of several articulated exceptions to the warrant requirement, but while exigent circumstances excuse a warrant, they do not excuse probable cause.[130] Often, if there is probable cause to believe that an incident of domestic violence or sexual assault is occurring or has occurred, exigent circumstances correspondingly exist.[131] However, absent probable cause, analysis of exigency as an excuse for the warrant requirement is inappropriate as there is no basis for obtaining a warrant as a threshold matter.

In *Payton v. New York*,[132] the Supreme Court explained that the home is the primary zone of Fourth Amendment privacy. The Court held that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."[133] The Court went on to acknowledge the "long-settled premise that, absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitu-

129. *See* United States v. Richardson, 208 F.3d 626, 629 (7th Cir. 2000) (explaining that as is "normally the case for Fourth Amendment inquiries, the test is objective: 'the government must establish that the circumstances as they appeared at the moment of entry would lead a reasonable, experienced law enforcement officer to believe that someone inside the house, apartment, or hotel room required immediate assistance'") (quoting United States v. Arch, 7 F.3d 1300, 1304 (7th Cir. 1993)); *see also* Mincey v. Arizona, 437 U.S. 385, 392 (1978) (finding that "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they *reasonably believe* that a person within is in need of immediate aid") (emphasis added).

130. *See, e.g.*, United States v. Gray, 71 F. Supp. 2d 1081, 1084 (D. Kan. 1999).

131. *See* Hopkins v. City of Sierra Vista, 931 F.2d 524, 527 (9th Cir. 1991) (finding that "[w]here there is probable cause to believe someone is being beaten, there clearly are exigent circumstances justifying immediate entry").

132. 445 U.S. 573 (1980). In *Payton*, the Court upheld the warrant requirement for arrests within the home, while it had done away with the requirement for public arrests. *Id.*; *see also* Kyllo v. United States, 533 U.S. 27, 31 (2001) (holding that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no"); Frisby v. Schultz, 487 U.S. 474, 477, 484–88 (1988) (protecting listeners within their homes from unwanted speech); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that "mere possession of obscene material" in one's own home cannot be a crime); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

133. *Payton*, 445 U.S. at 586.

tional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within."[134] It further held that entry into a home for the purposes of a search or an arrest implicates the same privacy interests and should therefore be subject to the same scrutiny.[135]

As there is no absolute test, exigent circumstances are determined on a case-by-case basis.[136] The determination involves a mixed question of law and fact.[137] Exigent circumstances have been found when there is imminent danger of the destruction of evidence,[138] threat to the safety of law enforcement officers or the general public,[139] or a likelihood that a suspect will flee.[140] In addition, the Supreme Court has also indicated that the gravity of the underlying offense should be an important factor considered in the "exigent-circumstances calculus."[141] Therefore, exigent circumstances might only be found to justify a warrantless entry into a home when a felony has been committed, but not in cases of misdemeanors.[142] Nevertheless, courts often find exigent circumstances, permitting warrantless searches, in cases of domestic violence.[143]

Courts have held that objective manifestations of domestic violence constituted exigent circumstances justifying a warrantless search of a home. In *State v. Gilbert*,[144] for example, the Kansas Court of Appeals recognized the Fourth Amendment preservation of the sanctity of the home from government intrusion, yet determined that in circumstances of real danger, the government's interest in protecting victims of domestic violence outweighs the policies underlying the Fourth Amendment. In *United States v. Warden*,[145]

134. *Id.* at 587–88.

135. *Id.* at 588.

136. *See* United States v. Gray, 71 F. Supp. 2d 1081, 1084 (D. Kan. 1999).

137. United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir. 1992).

138. *See* Cupp v. Murphy, 412 U.S. 291, 294–96 (1973).

139. *See* Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

140. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990); *see also Gray*, 71 F. Supp. 2d at 1084.

141. Welsh v. Wisconsin, 466 U.S. 740, 751–52 (1984). The Court's analysis reflects an increased focus on the Reasonableness Clause of the Fourth Amendment. *See id.* at 750–51.

142. *See id.* at 752.

143. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1157 (1993).

144. 942 P.2d 660 (Kan. Ct. App. 1997); *see also* William (Trey) A. Alford III, Comment, *Does Domestic Violence Constitute an Exigency Justifying a Warrantless Search?*, 37 WASHBURN L.J. 763, 770–73, 775–76 (1998).

145. 886 F. Supp. 813 (D. Kan. 1995).

the District of Kansas held that a daughter's call for help because her father was abusing her mother sufficed to justify warrantless entry and search. In *State v. Menz*,[146] the Washington Court of Appeals created a three-pronged test for determining whether a search was justified by exigent circumstances: 1) the officer subjectively believed that someone likely needed assistance for health or safety purposes; 2) a reasonable person in the same situation would also believe that assistance was needed; and 3) there was a reasonable basis to associate the need for assistance with the location searched. Finally, in *People v. Thompson*,[147] the Colorado Supreme Court found that spent casings, broken glass and the apparent injuries of the victim provided a reasonable basis for determining exigency justifying a search.

While outcries or other objective manifestations of extreme danger would certainly justify entry under the exigent circumstances exception to the warrant requirement, they are not necessary for a finding of exigency.[148] The First Circuit, in *Fletcher v. Town of Clinton*, noted that such dramatic indications of danger are often absent in cases of domestic violence because "[d]omestic violence victims may be intimidated or suffer from a dependence inherent in the abusive relationship. The signs of danger may be masked."[149] The court consequently supported the officers' determination that there were exigent circumstances despite the fact that the plaintiff, who was thought to be in danger, expressed her desire that they not enter the home. The Court found that the officers' knowledge of previous incidents of violence between the plaintiff and her boyfriend, an order of protection against him, his violation of both the protective order and his bail conditions, and a suspicion of the boyfriend's presence at the plaintiff's house suf-

146. 880 P.2d 48 (Wash. Ct. App. 1994).

147. 770 P.2d 1282 (Colo. 1989).

148. *See* United States v. Brown, 64 F.3d 1083, 1086 (7th Cir. 1995) (noting that "[w]e do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams. Doubtless outcries would justify entry, but they are not essential") (citation omitted); Fletcher v. Town of Clinton, 196 F.3d 41, 49 (1st Cir. 1999) (finding that "[e]vidence of extreme danger in the form of shots fired, screaming, or blood is not required for there to be some reason to believe that a safety risk exists"); Tierney v. Davidson, 133 F.3d 189, 198 (2d Cir. 1998) (finding that "the absence of blood, overturned furniture or other signs of tumult" did not render a finding of exigency unreasonable).

149. *Fletcher*, 196 F.3d at 50.

ficed for the officers to reasonably find exigent circumstances justifying entry into the plaintiff's home.[150]

Similarly, in *Tierney v. Davidson*, the Second Circuit found that the police belief that there were exigent circumstances was objectively reasonable when an officer who was trained to anticipate and detect violence responded to a "bad" domestic disturbance.[151] Although he heard nothing upon arriving at the scene and found only a broken window pane, the court determined that he reasonably believed that the antagonists remained in the house and that someone inside could be injured or in danger.[152] Thus, in determining the existence of exigent circumstances, several courts have acknowledged that police experience with domestic violence may compensate for a lack of objective manifestations of such danger.

Additionally, many courts have found 911 calls to be a sufficiently reasonable basis for a finding of exigent circumstances justifying warrantless entry into a home. For example, in *United States v. Richardson*,[153] the Seventh Circuit noted that "[m]any 911 calls are inspired by true emergencies that require an immediate response. Those factors have led both this court and others to conclude that 911 calls reporting an emergency can be enough to support warrantless searches under the exigent circumstances exception, particularly where, as here, the caller identified himself."[154]

B. Reasonableness of State Search or Seizure: Balancing Under the Reasonableness Clause

Analysis through the formalistic *Katz* model provides one way of understanding the substantive rights that the state may not abridge under the Fourth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments. Reasonableness balancing provides a slightly different understanding of the substantive rights afforded by the Fourth Amendment.

Formalistic analysis under the Fourth Amendment defines reasonableness as adherence to the procedural provisions of the Warrant Clause and therefore limits Fourth Amendment protections to procedural privacy.[155] However, the Supreme Court has diverged

150. *Id.* at 51–52.

151. *Tierney*, 133 F.3d at 197.

152. *Id.*

153. 208 F.3d 626, 630 (2000).

154. *Id.* (citing United States v. Cunningham, 133 F.3d 1070, 1072–73 (8th Cir. 1998) and United States v. Salava, 978 F.2d 320, 321 (7th Cir. 1992)).

155. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1642–45 (1998).

from this traditional formalism in some instances. In very limited situations, the Court has refused to allow a search or seizure despite the existence of probable cause and a warrant when the violence involved in the search or seizure make such steps unreasonable.[156] The Court, however, has refused to extend this analysis to more common intrusions, emphasizing in *Whren v. United States*[157] that "[w]here probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner." The Court has therefore determined that the existence of probable cause and a warrant presumptively make a search reasonable, requiring an additional reasonableness inquiry only when the violence of the intrusion reaches a somewhat arbitrary threshold.

However, the Court has more broadly adopted a reasonableness balancing approach in settings implicating law enforcement interests outside the realm of criminal investigations, such as searches pursuant to a regulatory scheme[158] and cases in which "special needs" are implicated.[159] The Court also adopted the balancing approach when dealing with "stops and frisks"[160] because

156. *See* Tennessee v. Garner, 471 U.S. 1, 9–12 (1985) (holding that police use of deadly force against an unarmed, non-dangerous suspect is an unreasonable "seizure"); Winston v. Lee, 470 U.S. 753, 767 (1985) (holding that surgical probing for evidence was unreasonably intrusive, in spite of the presence of probable cause and a warrant, when the risks were uncertain and no compelling need was shown); *see also* Colb, *supra* note 155, at 1649–50.

157. 517 U.S. 806, 817–18 (1996).

158. *See* New York v. Burger, 482 U.S. 691 (1987) (balancing the government interest behind a regulatory scheme with the owner of a regulated industry's privacy interest, requiring a heightened interest and narrow tailoring of the regulatory scheme).

159. Through a balancing approach, the Court allowed *suspicionless* searches in cases that implicated "special needs." *See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding a search of a student's handbag for cigarettes with only reasonable suspicion because the "special needs" of the school for maintaining healthy environment outweighed the student's privacy interest, since there is a diminished expectation of privacy in the school environment); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding federally mandated suspicionless drug tests of railroad workers involved with an accident because the privacy interests implicated were minimal and the important governmental interest would be jeopardized by a requirement of individualized suspicion); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding mandatory suspicionless drug testing of school athletes because there is a diminished expectation of privacy in the school context, drug testing is minimally intrusive, and there is a very important governmental interest in its role *in loco parentis*).

160. A "stop" is a seizure that falls short of an "arrest" and a "frisk" is a search that falls short of a typical "search," which the Court has held is governed by the requirement for probable cause. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court

the governmental interest in stopping people who appear to be about to commit a crime requires greater police flexibility and therefore justifies a balancing approach.[161] The Court's use of this approach, focusing on the reasonableness clause in *Terry*, "demonstrated that resort to reasonableness balancing might comfortably go hand in hand with a requirement that virtually any individual intrusion . . . must be based upon evidence tending to show that the particular person to suffer the intrusion was engaged in criminal or otherwise illegal activity."[162]

The Court specifically applied the reasonableness balancing approach to the issue of privacy in the bedroom in *Griswold v. Connecticut*,[163] in which the Court constitutionalized the notion of marital privacy by deriving it from both the Substantive Due Process Clause and the Fourth Amendment, among others. The Court looked beyond the procedural interests of a warrant and probable cause protected by the formalistic model, and invalidated a Connecticut statute's ban on contraceptives as infringing upon the privacy interest within the marital bedroom.[164] Thus, the Court has used the Reasonableness Clause of the Fourth Amendment to both increase privacy-based restrictions on law enforcement, as in the case of *Griswold*, and to decrease such restrictions, as in the case of *Terry*.

Arguing to extend the Court's use of the reasonableness balancing approach, Professor Sherry Colb contends in her article, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"*[165] that the "reasonableness" required by the Reasonableness Clause of the Fourth Amendment should take into account both procedural and substantive privacy interests. She proposes a balancing approach in

held that a lower amount of suspicion was required for the lesser degree of an intrusion that a "stop and frisk" constituted.

161. *See id.*

162. Colb, *supra* note 155, at 1691.

163. 381 U.S. 479 (1965) (invalidating Connecticut's ban on contraceptives within marriage as it violated the constitutionally derived notion of marital privacy).

164. The Connecticut statute's ban on contraceptives in pursuance of the state interest in reducing adultery was deemed insufficiently narrowly-tailored to overcome the privacy interests implicated, despite the existence of probable cause under the Connecticut statute. *See id.* at 485–86 ("Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'") (quoting NAACP v. Alabama, 377 U.S. 288 (1964)); *see also* Colb, *supra* note 155, at 1695–97.

165. Colb, *supra* note 155, at 1649–50.

which "Supreme Court doctrine recognize[s] that an 'unreasonable' search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated," construing Fourth Amendment "reasonableness" as having a qualitative component in addition to the well-established quantitative one.[166]

C. State Authority to Search Under the Fourth Amendment in Schieber

Viewed through the lens of Fourth Amendment jurisprudence, the officers in *Schieber* lacked authority to enter Schieber's home because it is unlikely that they had probable cause. While the reliability of the neighbor informant was clearly established,[167] it is questionable whether the fact that she heard a scream would be sufficient to establish a "fair probability" that a crime was occurring. If the neighbor reported specifically hearing Schieber scream "help," or heard a series of screams that could only be understood as a response to attack, her report would likely be sufficient. But hearing a scream alone would not be "more than bare suspicion,"[168] as a scream could reflect reaction to a wide variety of circumstances aside from an attack. Furthermore, as the officers did not find any additional evidence of a crime at Schieber's home to support the suspicion aroused by the neighbor's report, a court would probably not find probable cause.

In *Schieber*, the Eastern District of Pennsylvania used the formalistic *Katz* approach but dismissed the officers' contention that they lacked probable cause to enter Schieber's home by holding that "[w]hen home entry is for rescue purposes, the standard is not 'probable cause,' but 'reasonable belief.'"[169] As a result, the court held that the determination of whether the police had a "reasonable belief" of exigency was dependent upon disputed material facts, requiring the denial of the motion for summary judgment.[170] The court appears to have conflated the two standards of probable cause for a search and reasonable suspicion to excuse a warrant in the case of exigency. Since exigency only excuses a warrant and not

166. *Id.* at 1645.

167. *See* Illinois v. Gates, 462 U.S. 213, 233 (1983). The neighbor in *Schieber* called the police when she heard a scream, and stood ready to assist the police when they arrived at the scene.

168. *See* United States v. Prandy-Binett, 995 F.2d 1069, 1070 (D.C. Cir. 1993) (stating that probable cause is lower than the level needed to obtain a conviction but more than a "bare suspicion").

169. Schieber v. City of Philadelphia, 156 F. Supp. 2d 451, 458–59 (E.D. Pa. 2001).

170. *Id.* at 459.

probable cause, in order to enter a home without a warrant, the police must have both probable cause to believe that a crime had occurred or was occurring as well as a reasonable belief that exigency existed justifying a warrantless entry.[171] There would easily be a finding of exigent circumstances, as there was a 911 call from an identified neighbor.[172] However, as exigency does not excuse probable cause and merely excuses the need for a warrant,[173] the likely absence of probable cause would preclude entry into Schieber's home, with or without a warrant.

If a court found that the threshold issue of probable cause was established, then entry without a warrant would have to be justified by a reasonable belief of the presence of exigent circumstances.[174] As the victim might face further violence if the police left the victim with the abuser in order to obtain a warrant,[175] a finding of exigent circumstances would be critical to assisting the victim.

Based on the factual depiction presented in *Schieber*, in which the only indication was an ambiguous scream, probable cause did not exist. Therefore, formalistic Fourth Amendment analysis applied by the court in *Schieber* indicates that the police officers who arrived at Schieber's house did not have the authority to enter her home and properly avoided entrance. Consequently, this analysis produces a result directly in tension with the requirement for police entrance based upon the analysis of the state-created danger doctrine. A means to protect the policies underlying each doctrine may be found in a broader use of reasonableness balancing under the Fourth Amendment, a sensitive balancing of the severity of the harm at issue, consideration of the fact of limited means for protecting women in their homes, and recognition of the possibility of strictly-circumscribed searches.

171. *See supra* note 130 and accompanying text.

172. *See* United States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000) (noting that "[m]any 911 calls are inspired by true emergencies that require an immediate response. Those factors have led this court and others to conclude that 911 calls reporting an emergency can be enough to support warrantless searches under the exigent circumstances exception, particularly where, as here, the caller identified himself") (citing United States v. Cunningham, 133 F.3d 1070, 1072–73 (8th Cir. 1998); United States v. Salava, 978 F.3d 1070, 1072–73 (8th Cir. 1998)).

173. *See, e.g.*, United States v. Gray, 71 F. Supp. 2d 1081, 1084 (D. Kan. 1999).

174. *See* Mincey v. Arizona, 437 U.S. 385, 392 (1978).

175. *See* Cunningham, *supra* note 112, at 735. R

IV.
REASONABLENESS OF IMPOSING AN AFFIRMATIVE DUTY TO PROTECT ON THE FACTS OF *SCHIEBER*

The notions of marital privacy that often underlie insufficient protection and danger-enhancing behavior by police in cases of domestic violence and sexual assault are the very same notions legitimately protected and reinforced by the Fourth Amendment protections and by substantive due process based on *Griswold v. Connecticut*[176] and its progeny.[177] Because of the state interest in preventing violence against women,[178] there is a need for balancing the *Deshaney* interests with the goal of protecting women.[179] The application of state-created danger theory to cases of domestic and sexual violence produces a framework within which women are protected from abuse and assault because police are held accountable for their failure to act when they enhance the danger experienced by the victim. In addition, this approach enhances the ability of law enforcement agents to protect women because victims are more likely to call if they are assured of a response. Police behavior, absent the affirmative duty to protect, often discourages victims from calling for help out of fear that the police will not believe their story or make arrests. Police conduct thus actually "perpetuates the problem of domestic violence," and "increases the risk of repeated abuse by the attacker."[180] Within a system of greater police accountability, women would hopefully have the assurance that the police will not act in a way that would enhance the danger they face and therefore would be more likely to call the police for assistance. Police will also have the incentive to try to more objectively assess the danger involved, and will be compelled to restrain preconceived notions regarding the private nature of violent domestic disputes.

176. 381 U.S. 479 (1965).

177. *See supra* text accompanying notes 6–23. **R**

178. *See supra* text accompanying notes 24–27, 33–35.

179. As violence against women happens within the "private" sphere, there are few alternative means for prevention, without maintaining police accountability for their enhancement of the danger women face.

180. Jennifer R. Hagan, Note, *Can We Lose The Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 937 (2001).

A. Reasonableness Balancing to Allow for Police Accountability

As this Note has demonstrated, analysis of the facts of *Schieber* through the lens of the doctrines of state-created danger theory and the Fourth Amendment generates two opposing results. While under the traditional, formalistic *Katz* model of analysis, probable cause would often not exist in circumstances like those in *Schieber*, the interest in protecting women from domestic violence and sexual assault suggests a need to look to a different kind of analysis that would allow for balancing of the two competing policies. More extensive use of reasonableness balancing, as advocated by Professor Colb,[181] allows for maintenance of Fourth Amendment policies while accounting for the specific difficulties of law enforcement in the field of domestic violence and sexual assault through the state-created danger doctrine.

Professor Colb proposes a balancing approach in which "Supreme Court doctrine recognize[s] that an 'unreasonable' search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated."[182] This Note argues that in looking to the gravity of the offense, the qualitative element of the Reasonableness Clause also requires looking to the state interest involved and the options for addressing that interest. While Professor Colb argues for use of balancing to increase Fourth Amendment protections when a warrant and probable cause exist, this Note argues that reasonableness in cases of domestic violence and sexual assault requires a reduction in Fourth Amendment protections when police conduct could increase the danger faced by the victim through increased victim complacency or interference with forthcoming assistance. Although the effect of police conduct on the level of danger faced is often much clearer in retrospect, allowing police entry upon a reduced level of suspicion would allow police departments to change their policies prospectively in favor of greater police vigilance and assistance of victims.

Protecting women from domestic and sexual violence is a sufficiently compelling state interest to reduce the level of suspicion required for a search to be constitutional, just as the Court did in *Terry v. Ohio* to address the compelling state interest in stops and frisks prior to the commission of criminal activity.[183] In *Terry*, the Court determined that stops and frisks "must be tested by the

181. Colb, *supra* note 155. *See supra* text accompanying notes 165–67.

182. Colb, *supra* note 155, at 1645. R

183. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968).

Fourth Amendment's general proscription against unreasonable searches and seizures,"[184] and not by the formalistic requirements of the Fourth Amendment because "as a practical matter, [it] could not be."[185]

In its reasonableness inquiry, the *Terry* Court first looked to the governmental interest that justifies the official intrusion, in order to balance the need to search or seize against the intrusion on Fourth Amendment protections limiting searches and seizures.[186] The countervailing interest addressed in *Terry* was "more than the governmental interest in investigating crime."[187] The Court looked to police officers' interest in protecting themselves and other prospective victims of violence in cases where they lack probable cause to arrest.[188] The driving force behind the Court's decision in reducing the standard in *Terry*, the pressing need to protect the immediate safety of the officer or others,[189] is particularly applicable in the case of police intervention to protect a woman's safety during a possible incident of domestic violence or sexual assault. Thus, *Terry* provides support for using reasonableness balancing under the Fourth Amendment to reduce the standard for entry, by reducing the amount of information required to enter a home under these circumstances. In addition, the policies that justify suspicionless "special needs" searches, which serve a purpose separate from criminal law enforcement, further support the reasonableness of such an entry designed to serve the "special need" of protecting women from violence in their homes—different than a home search that is part of a criminal investigation.[190] However, the certainty required to establish sufficient cause must still be met, under the doctrine established by the Supreme Court in *Illinois v. Gates, Spinelli v. United States,* and *Aguilar v. State of Texas*.[191]

The entry, once legitimized by the reduced standard, must then be narrowly restricted to the extent required for rescue purposes, making it "reasonably related in scope to the circumstances which justified the interference in the first place."[192] In *Terry*, the reduction in the standard for a reasonable search or seizure was, in

184. *Id.*
185. *Id.*
186. *See id.* at 21 (quoting Camara v. Mun. Court, 387 U.S. 523, 534–37 (1967)).
187. *Id.* at 23.
188. *See id.* at 23–24.
189. *Id.* at 27.
190. *See supra* note 160.
191. *See supra* notes 116–127 and accompanying text. R
192. *Terry*, 392 U.S. at 20.

part, dependent upon the theoretically reduced intrusiveness of a stop and frisk, compared with a search or seizure. The intrusion into one's home is substantially more intrusive than a brief stop and frisk. However, that intrusion in cases of domestic violence and sexual assault, which often only take place in the privacy of the home and the bedroom, is reasonably necessary for there to be any prevention of harm before probable cause is found, at which point, the serious violence has already occurred. Such a search would still be "strictly circumscribed by the exigencies which justify its initiation," as is required by the reasoning of *Terry*.[193] Furthermore, this search would only be allowed when the state-created danger doctrine is implicated and police conduct could increase the danger faced.

The potential for abuse that could emerge from such a reduced standard for entry and the broader implications of reducing the level of privacy afforded within the home can be limited through the strict circumscription of the permitted search. Following the reasoning of *Terry*, such a search would be limited specifically to looking for a victim of domestic violence or sexual assault. Unlimited searches of areas in which a victim could not be present, like drawers, would be beyond the scope of the search allowed. Although privacy of one's home in such a situation would certainly be compromised through the allowance of police entry and through the potential for the search and seizure of items in plain view,[194] the difficulties related to police response to "private" violence justify the reduction in the privacy.

A danger also exists that a reduced standard for entry would allow for police searches of any home under the guise of a call reporting domestic violence or sexual assault. For example, any individual who wanted police to search a specific home could call in a false report of domestic violence or sexual assault. However, in order for there to be a sufficient level of suspicion, an anonymous call would still have to be corroborated in order for the certainty of the suspicion to be established.[195] Therefore, an anonymous caller would be unable to use the proposed reduced standard in order to force a police search. Furthermore, it is unlikely that an identified citizen informant would perpetrate such an abuse of the standard.

Greater use of balancing as a legal tool preserves the policy underlying the Fourth Amendment of preventing searches that un-

193. *Id.* at 26.

194. *See* Horton v. California, 496 U.S. 128, 142 (1990) (holding that if police officers are lawfully present in a location, they may search and seize anything that is in plain view).

195. *See* text accompanying note 118–121. **R**

reasonably intrude upon privacy interests while providing for the protection of women. Domestic violence and sexual assault occur within the most highly protected spheres of the home. Thus, when police conduct increases the harm that victims face, a *reasonable* means for actively protecting women in these situations is to weaken the Warrant Clause provisions slightly, allowing for the maintenance of police accountability through the affirmative duty to protect.

CONCLUSION

The facts of *Schieber v. City of Philadelphia* clearly indicate a tension that exists between two significant lines of constitutional doctrine. Analyzed through the doctrine of the affirmative duty to protect and the state-created danger theory, the police officers should have entered Schieber's home. By turning away the neighbor who called them, they prevented Schieber from receiving assistance which might have saved her life.

According to the formalistic *Katz* model of analysis, the police likely did not have probable cause to enter Schieber's home, and the presence of exigency did not replace the need for probable cause. Thus, the police in this case faced a dilemma between two controlling doctrines, violating one by entering and the other by failing to intervene. In order to resolve this tension, police officers could refuse to arrive at the scene of an alleged incident of domestic or sexual assault absent probable cause to enter. However, arrival at the scene is often the only way to gather sufficient information to establish probable cause. Furthermore, such a tactic would be wholly contrary to the government's interest in preventing violence against women.

This Note has argued that the appropriate resolution to this troubling tension is to utilize the balancing approach under the Reasonableness Clause of the Fourth Amendment as used in *Terry v. Ohio*. In that case, such balancing allowed police entry into a home when police conduct could increase the harm the victim faced, in order to protect women from violence that generally only occurs within the home when they have less than probable cause that some act of domestic or sexual violence is occurring. Reasonableness balancing, therefore, allows for the application of the state-created danger doctrine while also maintaining the policies behind the Fourth Amendment protections of privacy.

In *Schieber*, based upon the neighbor's alarm at hearing Schieber's scream, "a reasonably prudent [officer] in the circum-

stances would be warranted in the belief"[196] that she was under attack. However, as outlined above, without any corroboration, the neighbor's information would likely not have been sufficient for probable cause. Police arrival at the scene prevented Schieber from receiving assistance, increasing the harm that she faced, and imposed upon the police an affirmative duty to protect her. Absent probable cause, the police were therefore caught in the tension between these two doctrines. The proposed reduction in the standard for entry would have allowed police entry into Schieber's home absent probable cause, and possibly saved her life.

196. *Terry*, 392 U.S. at 27.