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NOTES

BATTERED WOMEN SUING POLICE FOR FAILURE TO INTERVENE: VIABLE LEGAL AVENUES AFTER *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*

Prior to the United States Supreme Court holding in *DeShaney v. Winnebago County Department of Social Services*,[1] a trend of domestic violence cases emerged in federal circuit and district courts[2] involving battered women plaintiffs suing police and municipalities under 42 U.S.C. § 1983.[3] These plaintiffs have achieved varying degrees of success in attributing their injuries to police officers' customary failure to protect their constitutional rights under the equal protection and due process clauses.[4] Collectively, these cases suggest that an equal protection claim, although burdensome in requiring evidence of discriminatory intent, may provide a more promising legal ave-

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1 109 S. Ct. 998 (1989).

2 The Third Circuit noted this trend in Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1027, 1030 (3d Cir. 1988) (citing Watson v. City of Kansas City, Kan., 857 F.2d 690 (10th Cir. 1988); Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988) (original opinion), *amended & superseded*, 901 F.2d 696 (9th Cir. 1990); Dudosh v. City of Allentown, 665 F. Supp. 381 (E.D. Pa.), *reh'g denied sub nom.*, Dudosh v. Warg, 668 F. Supp. 944 (E.D. Pa. 1987), *vacated & rem'd*, Dudosh v. City of Allentown, 853 F.2d 917 (unpublished opinion 3d Cir.), *cert. denied*, Dudosh v. Warg, 488 U.S. 942 (1988), *reh'g granted in part*, Dudosh v. City of Allentown, 722 F. Supp. 1233 (E.D. Pa. 1989); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984)).

3 42 U.S.C. § 1983 (1982) [hereinafter section 1983]. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4 *See Hynson*, 864 F.2d at 1033 (vacating order denying summary judgment on equal protection claim and remanding for further proceedings); *Watson*, 857 F.2d at 698 (reversing order granting summary judgment to city and police officers on equal protection claim and remanding to district court); *Balistreri*, 855 F.2d at 1428 (reversing district court's dismissal with prejudice of plaintiff's due process and equal protection claims); *Dudosh*, 665 F. Supp. at 396 (granting defendants' motion for summary judgment on plaintiff's due process claim and denying same motion on equal protection claim, "except insofar as the plaintiff's claim against the City . . . is premised upon the 'inadequate training' theory."); *Thurman*, 595 F. Supp. at 1531 (denying City's motion to dismiss complaint for "failure to allege the deprivation of a constitutional right" and for "failure to properly allege a 'custom' or 'policy' "). For a more detailed discussion of battered women's constitutional claims, see *infra* text accompanying notes 67-103.

nue for redress than a due process claim.[5] Specifically, uncertainties surrounding the special relationship doctrine and the extent of a state's affirmative obligation to protect individuals from domestic violence have led to inconsistent results in the courts' analyses of substantive due process claims.[6]

In the analogous child abuse context, the *DeShaney* Court addressed the question of whether a state, through its officials and governmental entities, has an affirmative constitutional duty under the due process clause to protect a citizen from private violence. If so, a state's failure to protect would render it liable under section 1983. The *DeShaney* Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[7] Further, the Court denied the existence of a special relationship triggering the state's affirmative duty to protect because the child victim was not in the state's custody when his father abused him.[8] In a footnote, however, the Court signalled the viability of equal protection claims: "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[9]

DeShaney raises important questions regarding available legal avenues for battered women. Are due process claims now foreclosed to these plaintiffs? How viable are equal protection claims based on gender discrimination? Do state tort claims provide the preferred avenue for damages resulting from police negligence and inaction? This Note directly addresses these questions.

Part I of this Note discusses the relevant legal standards for equal protection and due process violations, enforceable through section 1983. Part II reviews a chronology of domestic violence

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5 Regarding unpromising due process claims, one commentator noted:

> Holding a state liable for its inaction in effect imposes upon it an affirmative duty of protection. Recognizing this, most courts have not imposed affirmative duties on the states; they view the Constitution as, principally, a 'charter of negative liberties' designed to prohibit certain state actions rather than mandating them.

Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986) (authored by Lisa E. Heinzerling) (footnote omitted).

6 *Compare Balistreri*, 855 F.2d at 1426 (finding a special relationship triggering duty to "take reasonable measures to protect" the plaintiff from batterer-husband via restraining order and repeated police notification of abuse) *with Dudosh*, 665 F. Supp. at 390 (refusing to find a special relationship based on the defendants' awareness of a special danger to battered woman-decedent from her murderer-boyfriend). *See infra* notes 29-30 and accompanying text. *But see Balistreri*, 901 F.2d 696, 700 (9th Cir. 1990) (retracting finding of a special relationship in reponse to *DeShaney*).

7 *DeShaney*, 109 S. Ct. at 1004.

8 *Id.* at 1004-06.

9 *Id.* at 1004 n.3.

cases prior to *DeShaney*, and the *DeShaney* opinion itself. Finally, Part III assesses the viability of legal avenues after *DeShaney*. This section argues that: (1) battered women may still have a promising substantive due process avenue via a theory of liability that does not depend on the special relationship doctrine; (2) the viability of equal protection claims alleging that police pursue policies discriminating against battered women depends on the courts' willingness to infer discriminatory intent from extreme disparate impact; and (3) courts should provide battered women with a federal forum through consideration of pendent state tort claims.

I
DOCTRINAL STANDARDS: SECTION 1983 AND CONSTITUTIONAL DEPRIVATIONS

Section 1983 of the Civil Rights Act of 1871 provides private citizens with a federal remedy[10] when state officials acting "under color of state law"[11] deprive individuals of their constitutional rights.[12] An important motive for the passage of section 1983 was to provide a federal forum for civil rights claims, enabling plaintiffs to bypass state courts:

> [O]ne reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[13]

To establish an actionable section 1983 claim, "a plaintiff must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a constitutional right."[14] In addition to state officials, a municipality may be held liable as a "person" under sec-

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10 The federal remedy may take the form of damage awards or equitable relief. *See supra* note 3. Additionally, the Civil Rights' Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, permits a "court in its discretion . . . [to] allow the prevailing party, other than the United States, a reasonable attorney's fee" in section 1983 claims. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1035 (2d ed. 1985).

11 Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1029 (3d Cir. 1988) (citing Parratt v. Taylor, 451 U.S. 527, 535 (1981)).

12 *See supra* note 3.

13 Monroe v. Pape, 365 U.S. 167, 180 (1961) (emphasis added); *see also* Dimarzo v. Cahill, 575 F.2d 15, 18 n.3 (1st Cir.) ("[T]he Civil Rights Acts of 1871 were intended to safeguard constitutional rights which state authorities might deny by neglecting to enforce state statutes as well as by more affirmative action. Failure to act where there is a duty to act can give rise to an actionable claim under section 1983") (citations omitted), *cert. denied*, 439 U.S. 927 (1978).

14 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (citing Par-

tion 1983 if it follows a "policy or custom" that results in constitutional deprivations to individuals.[15]

In the domestic violence context, the viability of a battered woman's section 1983 claim turns on the second element—proving the deprivation of a constitutional right. Although no constitutional right to police protection exists on a general basis, courts have recognized two exceptions.[16] First, under the due process clause, the state owes a duty to protect an individual's liberty interests when a special relationship exists between that individual and state agents.[17] Second, under the equal protection clause, the state may not discriminate in providing protection to the public.[18] Battered women have used both exceptions, contending that police, through inaction, have violated their rights to due process and equal protection of the laws.[19] The United States Supreme Court has stressed repeatedly, however, that the scope of section 1983 is not so broad as to convert "every tort committed by a state actor into a constitutional violation."[20]

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ratt v. Taylor, 451 U.S. 527, 535 (1981); Rinker v. Napa County, 831 F.2d 829, 831 (9th Cir. 1987)).

15 City of Canton v. Harris, 109 S. Ct. 1197, 1205 (1989); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694 (1978). Regarding the meaning of "person" under section 1983, the United States Supreme Court in Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2312 (1989), held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." The Court found that the defendants, the Department of State Police and the Director of State Police in his official capacity, were not "persons" liable for damages (i.e., monetary relief) under section 1983. In a footnote, the Court qualified its holding: "[A] State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 . . . ." *Id.* at 2311 n.10. In light of this holding, battered women seeking damages against police officials should sue them in their individual capacities.

16 *See, e.g.*, *Balistreri*, 901 F.2d at 699-700 (citing Martinez v. California, 444 U.S. 277, 284-85 (1980); Ketchum v. Alameda County, 811 F.2d 1243, 1247 (9th Cir. 1987); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)); Dudosh v. City of Allentown, 665 F. Supp. 381, 388, 392 (E.D. Pa. 1987).

17 *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (finding special relationship between institutionalized mental patient and the state); cases cited *supra* note 16; *infra* notes 25-30 and accompanying text. Courts and commentators have not recognized general police protection as a property interest or property entitlement triggering procedural due process protection. *See* cases cited *supra* note 16; *see also* Comment, *supra* note 5, at 1069 & n.98. The petitioners in *DeShaney*, however, asserted a property entitlement claim to the state's protective services by virtue of state child protection statutes. 109 S. Ct. 998, 1003 n.2 (1989); *see also infra* note 126 and accompanying text. The property entitlement theory in light of *DeShaney* is discussed and assessed as a possible legal avenue for battered women in Part III of this Note. *See infra* notes 175-82 and accompanying text.

18 *DeShaney*, 109 S. Ct. at 1004 n.3; *Dudosh*, 665 F. Supp. at 392.

19 *See supra* notes 2 & 4. For a more detailed discussion of battered women's constitutional claims, see *infra* text accompanying notes 67-103.

20 *DeShaney*, 109 S. Ct. at 1007 ("[T]he [section 1983] claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional viola-

A. Due Process Violations in the Domestic Violence Context

The due process clause of the fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."[21] Battered women's substantive due process claims under section 1983 typically allege a liberty deprivation resulting from the failure of police to intervene in domestic assault situations.[22] Courts have acknowledged that an individual's right to liberty may include the "right to personal security"[23] and the "right to be free from physical harm and restraint."[24]

In this context, the special relationship doctrine, derived from tort law,[25] may trigger the state's affirmative constitutional duty, under the due process clause, to provide protective services.[26] Courts have been inconsistent in their consideration of the factors that comprise special relationships.[27] Specific factors which courts frequently, but not uniformly, consider include:

> (1) whether the state created or assumed a custodial relationship toward the plaintiff; (2) whether the state was aware of a specific risk of harm to the plaintiff; (3) whether the state affirmatively placed the plaintiff in a position of danger; or (4)whether the state affirmatively committed itself to the protection of the plaintiff.[28]

By emphasizing the second and fourth factors, a battered woman has argued successfully that a special relationship existed between her and the state by virtue of a court order of protection from abuse and police notification of domestic violence.[29] The special re-

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tion.") (citations omitted); *see also* S. BREYER & R. STEWART, *supra* note 10, at 738 ("Widespread invocation by litigants of § 1983 has led to concern, particularly within the Supreme Court, that broad construction of § 1983 and of the rights it protects would lead to significant intrusions by the federal judiciary on the autonomy of states.") (footnotes omitted).

21 U.S. CONST. amend. XIV, § 1.

22 *See, e.g.*, Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425 (9th Cir. 1988).

23 Youngberg v. Romeo, 457 U.S. 307, 315 (1982).

24 *Balistreri*, 855 F.2d at 1425 (citing Ingraham v. Wright, 430 U.S. 651, 674-75 (1977)).

25 W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984); Comment, *supra* note 5, at 1051.

26 *See supra* notes 16-17 and accompanying text.

27 *See supra* note 6; *infra* notes 95-103 and accompanying text.

28 *Balistreri*, 855 F.2d at 1425 (citations omitted); *see also* Estate of Bailey v. County of York, 768 F.2d 503, 509 (3d Cir. 1985) (relevant factors include "whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight") (citing Jensen v. Conrad, 747 F.2d 185, 194-95 n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)).

29 The Ninth Circuit found that a "restraining order together with the defendants' repeated notice of Balistreri's plight" established a special relationship. *Balistreri*, 855 F.2d at 1426 (original opinion), *amended & superseded*, 901 F.2d 696 (9th Cir. 1990) (find-

lationship doctrine, however, has not always been helpful to battered women plaintiffs.[30]

B. Equal Protection Violations in the Domestic Violence Context

The equal protection clause of the fourteenth amendment requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[31] Battered women bringing equal protection claims under section 1983 usually argue that police differentiate between domestic violence calls and nondomestic violence calls. This classification, they contend, results in less protection to domestic violence victims than to nondomestic victims.[32] Therefore, because women typically are the victims in domestic assaults, a police policy using this classification discriminates against women.[33]

Equal protection analysis of challenged classifications based on gender discrimination involves two legal standards, depending upon the type of classification involved.[34] First, if a classification represents an explicit, purposefully gender-based discriminatory policy, this policy must withstand an intermediate level of scrutiny

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ing no special relationship in light of Supreme Court's decision in DeShaney v. Winnebago County Dep't of Social Servs.). For a full discussion of *DeShaney*'s impact, see *infra* Part III.

30 *See, e.g.*, Dudosh v. City of Allentown, 665 F. Supp. 381, 390-91 (E.D. Pa. 1987) ("We do not believe that such knowledge [of a special danger to decedent from her boyfriend] . . . , by itself, can alone be a basis for a finding of a special relationship of a constitutional nature. . . . [T]o hold otherwise would recognize the fear . . . that § 1983 was becoming a federal tort claims act.").

31 U.S. CONST. amend. XIV, § 1.

32 *See* cases cited *supra* note 2.

33 *See* cases cited *supra* note 2; *see also* Downum v. City of Wichita, Kan., 675 F. Supp. 1566, 1573 (D. Kan. 1986) ("It is well established that claims of sexual discrimination are cognizable under the equal protection clause. . . . [Violations of that clause] reveal some legislative or administrative scheme or state-promulgated policy which is subject to [judicial] review.") (citations omitted); Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 799 (1986) (authored by Amy Eppler) (citing DEL MARTIN, BATTERED WIVES 14 (1st ed. 1976) (showing statistics from several cities confirming that women predominate in the class of domestic violence victims)).

34 *See, e.g.*, McKee v. City of Rockwall, Tex., 877 F.2d 409, 421 (5th Cir. 1989) (Goldberg, J., dissenting in part), *cert. denied*, 110 S. Ct. 727 (1990); *see also* Note, *supra* note 33, at 793-98 (discussing two standards of proof of equal protection violations based on gender discrimination in the domestic violence context). An alternative formulation of equal protection analysis of discriminatory classifications based on gender views the requisite element of discriminatory intent as a precondition for invoking a court's intermediate-level scrutiny to assess the classification's constitutionality. Either a court finds that a blatantly gender-based classification shows the requisite discriminatory intent, or the plaintiff proffers sufficient evidence of discriminatory intent when a classification is facially gender-neutral.

to pass constitutional muster.[35] Specifically, the government must show that the challenged policy is substantially related[36] to an important government objective or interest.[37] Second, a policy may contain a classification which is gender-neutral on its face but, as applied and administered, discriminates against women.[38] The gender-neutral standard requires that a plaintiff prove a discriminatory intent or purpose for such a policy in order to invoke a court's intermediate scrutiny.[39] The Supreme Court, however, has stressed repeatedly that a plaintiff cannot rely solely upon a showing of disproportionate impact to prove discriminatory intent.[40] Even so, the Court has not rejected disproportionate impact as irrelevant to finding a discriminatory purpose.[41] In this connection, the Court has found that certain circumstantial evidence may support the inference of discriminatory purpose: a policy's historical background,[42] extreme disparate impact,[43] or the extreme discriminatory effect of administering a facially neutral policy upon a

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35 *See* Craig v. Boren, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977); Frontiero v. Richardson, 411 U.S. 677 (1973); Note, *supra* note 33, at 793-94. For purposes of comparison, the Supreme Court has held that classifications discriminating on the basis of race trigger a strict level of scrutiny. Under strict scrutiny, the state must show that the challenged policy is closely related to a compelling state interest. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). Where race or gender discrimination does not account for a challenged policy classification, the Court has subjected the classification to the lowest level of judicial scrutiny—rational basis review. Under this test, a policy using the classification must be rationally related to a legitimate state interest. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 55, *reh'g denied*, 411 U.S. 959 (1973); *see also* Note, *supra* note 33, at 793-94 (discussing the three levels of judicial scrutiny as enunciated and applied by the Supreme Court).

36 Mississippi University for Women v. Hogan, 458 U.S. 718, 725-726 (1982) ("The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.") (footnote omitted).

37 *See* sources cited *supra* note 35.

38 *See McKee*, 877 F.2d at 421.

39 Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979); Washington v. Davis, 426 U.S. 229, 242 (1976); Watson v. City of Kansas City, Kan., 857 F.2d 690, 696-97 (10th Cir. 1988); Note, *supra* note 33, at 796.

40 *See* sources cited *supra* note 39.

41 Washington v. Davis, 426 U.S. at 242. The Court said:

> [A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race [or gender] than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial [or gender-neutral] grounds.

Id.

42 Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977).

43 *Id.* at 266; *see also* Note, *supra* note 33, at 796-97 ("In some rare cases, the Court

particular class of individuals.[44]

Courts typically invoke a gender-neutral standard to police classifications distinguishing between "domestic violence" and "nondomestic violence" situations when battered women claim that such classifications discriminate against *women* victims.[45] Thus, in order for a battered woman to establish an actionable section 1983 claim based on an equal protection violation, she must proffer the requisite showing of discriminatory intent or purpose.[46]

C. Qualified Immunity Doctrine

Should a battered woman plaintiff proffer sufficient evidence of an equal protection or due process violation, municipal police officers can still assert a qualified immunity defense.[47] Under the qualified immunity doctrine, state officers performing discretionary functions[48] are immune from lawsuits for damages provided their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[49] A municipality itself, however, cannot invoke the qualified immunity defense.[50] Thus, courts have allowed suits involving an unconstitutional policy or custom to proceed against a city even when qualified immunity shields the individual police officers who executed the challenged policy.[51]

Because qualified immunity entitles an officer to "immunity from suit," a defendant-officer must assert the defense on a motion for summary judgment.[52] If a plaintiff proffers evidence creating a

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held, the disparate impact of a policy or law might be so extreme as to permit an inference of discriminatory intent.") (footnote omitted).

44 Washington v. Davis, 426 U.S. at 242, *cited in* Note, *supra* note 33, at 797.

45 *See infra* notes 79-90 and accompanying text.

46 This Note's analysis of battered women's equal protection claims is premised on this assumption. *See infra* text accompanying notes 189-98.

47 *See* cases cited *supra* notes 2 & 4; McKee v. City of Rockwall, Tex., 877 F.2d 409, 417 (5th Cir. 1989) (Goldberg, J., dissenting in part), *cert. denied*, 110 S. Ct. 727 (1990).

48 Decisions regarding probable cause for arrest or type of intervention or response to domestic violence calls constitute examples of discretionary functions performed by police officers. *See* cases cited *supra* note 2. In Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982), the Court explained the nature of discretionary functions: "In contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions."

49 *Harlow*, 457 U.S. at 818.

50 *See* Owen v. City of Independence, Mo., 445 U.S. 622, 638, *reh'g denied*, 446 U.S. 993 (1980).

51 *See* Watson v. City of Kansas City, Kan., 857 F.2d 690, 697 (10th Cir. 1988).

52 Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1028 (3d Cir. 1988) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

genuine and material issue of fact,[53] this defense is lost and the case proceeds to trial.[54] Courts will grant qualified immunity "if reasonable officials in the defendants' position at the relevant time could have believed, in light of clearly established law, that their conduct comported with established legal principles."[55] Based on this objective test, an officer's entitlement to qualified immunity depends on the clarity of the law *as it existed* when a defendant-officer acted or failed to act.[56] "[T]he contours of the [constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates the law."[57] Section 1983 litigation involving battered women represents an evolving area of law in which the Supreme Court has not ruled, lower courts have been inconsistent, and many court opinions have either gone unpublished or cases have been dismissed due to settlements between the parties.[58] Thus, police officers can argue that the law was not "clearly established" as an authoritative guide to their conduct in responding to domestic violence situations.[59]

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53 *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (defining terms "genuine" and "material" issues of fact).

54 *See, e.g.*, *Hynson*, 864 F.2d at 1027 (enunciating summary judgment standard to defeat police officers' qualified immunity defense); *Watson*, 857 F.2d at 694 (same); *see also infra* text accompanying note 62.

55 Anderson v. Creighton, 483 U.S. 635, 641 (1987).

56 The Court in *Anderson v. Creighton* explained that a right is not "clearly established" unless it has been recognized in similar or analogous circumstances. *Anderson*, 483 U.S. at 641.

57 *Id.*

58 *See, e.g.*, Dudosh v. City of Allentown, No. 87-1522 (3d Cir. 1988) ("Not for Publication Opinion and has no precedential value"), *rem'd*, No. 85-4066 (E.D. Pa. Order of Dismissal filed Sept. 30, 1989) (dismissing case due to settlement); Watson v. City of Kansas City, Kan., No. 84-2335 (D. Kan. April 21, 1989) (dismissing case due to settlement).

59 In granting individual police officers qualified immunity, the district court in Watson v. City of Kansas City, Kan., No. 84-2335-S (D. Kan. Feb. 2, 1989) (WESTLAW, DCTU file) reasoned:

> [The battered woman plaintiff] allege[s] that the defendants violated [her] constitutional right to equal protection by responding differently and affording less protection to victims of domestic violence than to victims of nondomestic assaults. Thus, in determining whether qualified immunity applies, the court must decide whether it was clearly established at the time of defendants' actions that the equal protection clause prohibited police officers from treating domestic and nondomestic assaults in a different manner. The court finds that the use of the equal protection clause to provide a theory of recovery in situations like the one presented in this case is a very recent and novel development in equal protection jurisprudence. There was no clearly established law regarding a city's or police officers' liability for providing less protection in domestic violence situations, until the [T]enth [C]ircuit's decision in this very case. . . . Although [the plaintiff's right] to equal protection of the laws was established, at the time of defendants' actions, it was not clearly established that responding differently to domestic and nondomestic assaults could serve as the basis of a particular equal protection claim.

The Third Circuit applied the qualified immunity doctrine to a case in which the mother and children of a battered woman-decedent brought an equal protection claim under section 1983 against police officers who failed to protect the decedent.[60] The court explained the rationale for the qualified immunity defense as "a compromise between the conflicting concerns of permitting the recovery of damages for vindication of constitutional rights caused by the abuse of public office and permitting government officers to perform discretionary functions without fear of harassing litigation."[61] The court, after reviewing general qualified immunity doctrine, enunciated the following standard for battered women's equal protection claims:

> [A] police officer loses a qualified immunity to a claim that a facially neutral policy is executed in a discriminatory manner only if a reasonable police officer would know that the policy has a discriminatory impact on women, that *bias against women was a motivating factor behind the adoption of the policy, and* that there is no important public interest served by the adoption of the policy.[62]

This standard merely restates the elements of a gender-neutral equal protection claim.[63] Regarding the intent element, a police officer can argue that a reasonable officer in his position would not know that the *originators* of the policy were biased against women, or that this bias was a reason for adopting the police policy. Thus, the Third Circuit standard exemplifies the combined effect of the qualified immunity doctrine and a gender-neutral equal protection standard—a powerful defense for police officers, and a formidable hurdle for battered women seeking redress for the deprivation of their constitutional rights.

II
THE CASES: A CHRONOLOGY

A. Pre-*DeShaney* Domestic Violence Cases

An examination of a line of domestic violence cases in the dis-

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Id. at 4-5 (WESTLAW paging).

60 Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1026-27 (3d Cir. 1988). Note that the plaintiffs also brought a due process claim based on alleged deprivations of decedent's liberty and life, but this claim did not survive summary judgment in the district court based on defendants' qualified immunity. *Id.* at 1026; *see infra* notes 95-99 and accompanying text.

61 *Hynson*, 864 F.2d at 1031-32 (citing Anderson v. Creighton, 483 U.S. 635 (1987); Stoneking v. Bradford Area School Dist., 856 F.2d 594, 598 (3d Cir. 1988), *vacated sub nom.* Smith v. Stoneking, 109 S. Ct. 1333 (1989)).

62 *Id.* at 1027.

63 *See supra* text accompanying notes 38-41.

trict and circuit courts, beginning with *Thurman v. City of Torrington*,[64] reveals the evolving standards and burdens for battered women in establishing actionable section 1983 claims.[65] Despite some analytical inconsistencies, these cases collectively suggest that a section 1983 equal protection claim provides a more viable legal avenue for redress than a due process claim.[66]

In *Thurman*, a battered woman won her section 1983 lawsuit against individual police officers based on an equal protection claim.[67] The plaintiff alleged that "the defendants [police officers and the city] use an administrative classification that manifests itself in discriminatory treatment violative of the equal protection clause."[68] While police provided full protection to nondomestic abuse victims, the plaintiff argued that the police observed a "pattern or practice" which "consistently afforded lesser protection"[69] to domestic abuse victims. Over an eight-month period of domestic assaults and harassment culminating in a brutal stabbing of the plaintiff, the police refused to arrest her estranged husband-batterer or provide protection despite the plaintiff's repeated requests.[70] The *Thurman* court found that "[s]uch an ongoing pattern of deliberate indifference raises an inference of 'custom' or 'policy' on the part of the municipality."[71]

The district court, on the city's motion to dismiss, approached the plaintiff's equal protection claim in a novel fashion. As if to acknowledge the existence of a special relationship,[72] the court noted that city officials and police officers who "have notice of the possibility of attacks on women in domestic relationships . . . are under an affirmative duty to take reasonable measures to protect [their] personal safety."[73] Further, the court took implicit judicial notice[74]

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64 595 F. Supp. 1521 (D. Conn. 1984).

65 *See* cases cited *supra* notes 2 & 4.

66 *See* cases cited *supra* notes 2 & 4.

67 *Thurman*, No. H-84-120 (D. Conn. Sept. 5, 1985) (ruling on individual defendants' motion for judgment n.o.v.). "At trial, a jury awarded Tracey Thurman $2.3 million in damages against individual police officers, but not against the City of Torrington, to compensate [her] for the brutal stabbing that resulted from the police's repeated refusal to arrest her battering husband. The parties settled for $1.9 million." Note, *supra* note 33, at 795 n.31 (citation omitted).

68 *Thurman*, 595 F. Supp. at 1526.

69 *Id.* at 1526-27.

70 *Id.* at 1524-26.

71 *Id.* at 1530 (citations omitted).

72 *See supra* notes 22-30 and accompanying text. By alluding to a special relationship, the district court seemed to draw upon due process doctrine to begin its analysis of the plaintiff's equal protection claim.

73 *Thurman*, 595 F. Supp. at 1527.

74 *See* Note, *supra* note 33, at 794 n.30 ("The Torrington police department never explicitly stated a gender-based classification, and the plaintiff never alleged the existence of such a classification.").

that the challenged domestic violence/nondomestic violence policy classification constituted explicit *gender* discrimination: "[The plaintiff's] allegations of gender-based discrimination will be taken as true. In one study of interspousal abuse it is claimed that 'in 29 out of every 30 such cases the husband stands accused of abusing his wife.' "[75] Because the city "failed to put forward any justification for its disparate treatment of women," it did not meet its burden under intermediate scrutiny.[76] Given the *Thurman* court's acceptance of the domestic assault/nondomestic assault classification as gender-based discrimination, *Thurman* was a seminal case with potentially monumental impact.[77] To date, however, other district and circuit courts have applied stricter gender-neutral standards.[78]

Three years after *Thurman*, the Tenth Circuit in *Watson v. City of Kansas City, Kansas*[79] subjected a challenged domestic violence/nondomestic violence classification to equal protection standards based on two separate grounds: (1) the class of domestic violence victims without regard to gender; and (2) gender. The *Watson* court articulated the first standard:

> [T]o survive summary judgment, the plaintiff must go beyond her pleadings and show that sbe has evidence of specific facts that demonstrate that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault victims. *She must also provide evidence that discrimination was a motivating factor* for the defendants and that she was injured by operation of the policy or custom.[80]

The plaintiff in *Watson* presented three forms of evidence which the court found collectively sufficient to meet this first standard.[81] First, the plaintiff presented *city statistics* showing a higher percentage of arrests in nondomestic assault cases versus domestic assault

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75 *Thurman*, 595 F. Supp. at 1528 n.1 (citations omitted).

76 *Id.* at 1528; *see supra* notes 35-37 and accompanying text.

77 *See* Note, *supra* note 33, at 794-95 n.30 (noting the *Thurman* court's equating a pattern and practice of discrimination in administration of the law with an explicit sex-based classification).

78 *See infra* notes 79-94 and accompanying text. Note that *Thurman* has not been overturned, however.

79 857 F.2d 690 (10th Cir. 1988).

80 *Id.* at 694 (emphasis added).

81 *Id.* at 695-96. The *Watson* court thus reversed the district court's order granting summary judgment to the city and to individuals sued in their official capacity, and remanded. The case was subsequently dismissed with prejudice, each party bearing their own costs. (Order of Dismissal, No. 84-2335 (D. Kan. April 21, 1989)). According to one of the plaintiff's attorneys, the parties settled shortly after trial began. Telephone interview with Lynne J. Bratcher, Esquire, Miller, Dougherty & Modin, Kansas City, Mo. (Feb. 8, 1990).

cases.[82] Second, the plaintiff demonstrated that the *training methods* of police officers for domestic violence cases discouraged arrests.[83] Third, the plaintiff presented a *personal history* of batterings and repeated police failure to act upon her requests for protection.[84] Regarding the plaintiff's gender discrimination claim, however, the court found that the "evidence presented does not show that a policy which discriminates against victims of domestic violence adversely affects women."[85] Thus, the court rejected her claim of gender discrimination.[86] Even if she had presented evidence of the challenged police policy's adverse impact on *female* domestic violence victims, the court explained, the plaintiff would still have a "heavy" burden in showing a discriminatory intent or purpose for the policy classification under a gender-neutral standard.[87]

Following *Watson*'s lead three months later in *Hynson v. City of Chester, Legal Department*,[88] the Third Circuit announced a newly articulated gender-neutral standard[89] tailored to battered women's equal protection claims under section 1983:

> In order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer 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.[90]

The *Hynson* court declared that this standard defined the "constitutional right which the plaintiffs must show was clearly established at the time of the alleged violation in order to negate the police officers' qualified immunity."[91] Under the facts of *Hynson*, responding

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82 *Watson*, 857 F.2d at 696 (noting that "statistical evidence alone may not be enough to prove the existence of a policy or custom").

83 *Id.*

84 *Id.* (noting that: "[s]uch a pattern, when examined in the context of other evidence the plaintiff has presented, constitutes evidence of a custom or policy. . . . We doubt whether evidence of deliberate indifference in the plaintiff's case alone would be sufficient evidence of *different* treatment.") (emphasis in original). *But see Thurman*, 595 F. Supp. at 1530 (finding that history of continued assaults and threats on plaintiff despite repeated requests for police intervention was sufficient, by itself, to raise inference of an unconstitutionally gender-based municipal policy or custom).

85 *Watson*, 857 F.2d at 696.

86 *Id.*

87 *Id.* at 696-97.

88 864 F.2d 1026 (3d Cir. 1988).

89 *See supra* notes 38-39 and accompanying text; *see also Hynson*, 864 F.2d at 1027 ("Because the police policy or custom at issue here—that allegedly police officers treat domestic abuse victims differently than other victims of violent crimes—is not discriminatory toward women on its face, we must therefore apply the facially neutral policy analysis . . . .") (citation omitted).

90 *Id.* at 1031 (emphasis added).

91 *Id.*; *see supra* notes 47-51 and accompanying text.

police officers refused to arrest the decedent's boyfriend-murderer the day before her murder because the decedent's most recent restraining order had expired.[92] The plaintiffs alleged that the police "pursued a policy of ignoring domestic abuse complaints."[93] The Third Circuit vacated the district court's order denying the defendants' motion for summary judgment based on qualified immunity and remanded the case for application of its enunciated standard.[94]

The plaintiffs in *Hynson* originally alleged violations of the battered woman-decedent's due process rights to life and liberty, as well as the equal protection claim.[95] The due process claim did not survive the defendants' summary judgment motion based on qualified immunity.[96] Nevertheless, the district court's analysis of the due process claim exemplifies the uncertain state of the special relationship doctrine and the consequent advantages of an equal protection claim.

Specifically, the district court found that the decedent's "interaction with the individual officers and her membership in a protected class (by virtue of the protection from abuse order . . .) established the special relationship between herself and the state necessary to maintain a section 1983 suit."[97] Even so, the district court reasoned, the applicable law at the time of the officers' nonintervention was not so clearly established as to override the officers' qualified immunity.[98] The court noted: "In 1988 the courts are still attempting to clarify and define the parameters of what constitutes a special relationship in a due process claim for affirmative protection of life or liberty."[99]

Four months later, the Ninth Circuit fueled the uncertainties and inconsistencies in applying the special relationship doctrine to the domestic violence context. In *Balistreri v. Pacifica Police Department*,[100] the Ninth Circuit found that a special relationship existed by considering a battered woman's "restraining order together with the defendants' [police officers'] repeated notice of [her] plight."[101]

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92 *Hynson*, 864 F.2d at 1027-28.

93 *Id.* at 1027.

94 *Id.* at 1033.

95 Hynson v. City of Chester, Legal Dep't, No. 86-2913 (E.D. Pa. April 19, 1988) (WESTLAW, DCTU file).

96 *Hynson*, 864 F.2d at 1033.

97 *Hynson*, No. 86-2913 at 14.

98 *Id.* at 16.

99 *Id.* at 16-17.

100 855 F.2d 1421 (9th Cir. 1988). This opinion was recently amended and superseded in light of *DeShaney*'s narrowing of the special relationship doctrine. *Balistreri*, 901 F.2d 696 (9th Cir. 1990). For a full discussion of *DeShaney*'s impact, see *infra* Part III.

101 *Id.* at 1426. The dissent's disagreement with the majority's finding of a special relationship highlights its significance: "[n]o case has held that the existence of a restraining order establishes the requisite 'special relationship.' " *Id.* at 1428 (Laughlin, J.,

This combination of factors, the court concluded, was "sufficient to state a [due process] claim that the defendants owed [the battered woman-plaintiff] a duty to take reasonable measures to protect [her] from her estranged husband."[102] The court also found that the plaintiff had alleged sufficient facts "to suggest animus against [her] because she is a woman,"[103] thus reversing the district court's dismissal of her equal protection claim.

With *Balistreri* as a notable exception, the collective results of these cases indicate that battered women's due process claims against police officers for failing to protect them have not been as promising as equal protection claims. Courts have been more receptive to the merits of battered women's equal protection claims when these plaintiffs show that police follow a policy of providing less protection to domestic violence victims.[104] *DeShaney v. Winnebago County Department of Social Services*[105] supports these observations in the domestic violence context. In view of the ill-defined scope of the special relationship doctrine and the consequent inconsistencies regarding the extent of government's affirmative constitutional obligations, the United States Supreme Court attempted to settle these uncertainties in *DeShaney*.[106]

B. *DeShaney v. Winnebago County Department of Social Services*

1. *Facts*

Joshua DeShaney, a child abuse victim, and his mother sued Winnebago County authorities and individual social workers at the Department of Social Services (DSS) under section 1983 for "failing to intervene to protect [Joshua] against a risk of violence . . . [by his father, Randy DeShaney] of which [these respondents] knew or

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dissenting in part) (citing Dudosh v. City of Allentown, 665 F. Supp. 381, 390 (E.D. Pa. 1987); Turner v. City of North Charleston, 675 F. Supp. 314, 318-19 (D.S.C. 1987)); *see supra* notes 25-30 and accompanying text.

102 *Balistreri*, 855 F.2d 1421, 1426.

103 *Id.* at 1427. The court noted a responding police officer's alleged remark to Balistreri (he "did not blame [plaintiff's] husband for hitting her, because of the way she was 'carrying on.' "). The court found that "[s]uch remarks strongly suggest an intention to treat domestic abuse cases less seriously than other [nondomestic] assaults, as well as an animus against abused women." *Id.*

104 *See* cases cited *supra* note 2; *see also supra* text accompanying notes 64-96.

105 109 S. Ct. 998 (1989).

106 The *DeShaney* court stated:

> Because of the inconsistent approaches taken by lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, . . . and the importance of the issue to the administration of state and local governments, we granted certiorari.

Id. at 1002 (citations omitted).

should have known."[107] Specifically, Joshua and his mother alleged that the respondents "deprived Joshua of his liberty interest in 'free[dom] from . . . unjustified intrusions on personal security' "[108] under the due process clause.

Over a two-year period, Joshua sustained various injuries requiring emergency room treatment.[109] In January 1982, Randy DeShaney's second wife first notified DSS of Joshua's predicament by reporting the father's abuse.[110] Randy DeShaney denied the accusation in a follow-up interview with DSS; DSS declined to consider the matter further.[111] In January 1983, after Joshua was admitted to a hospital for bruises and abrasions, an examining physician suspected child abuse and notified DSS.[112] DSS obtained a court order placing Joshua in the hospital's temporary custody.[113] After a "Child Protection Team" determined that there was insufficient evidence of child abuse, the juvenile court released Joshua into Randy DeShaney's custody.[114] Randy DeShaney entered an agreement with DSS to abide by certain custodial conditions.[115] Over the next six months, a particular social worker visited the DeShaney home once a month, and reported that Randy DeShaney was not abiding by the agreement terms.[116] On more than one visit, the social worker noted "suspicious injuries" on Joshua's head. In March 1984, Joshua received a severe beating to the head requiring emergency brain surgery after he became comatose.[117] During the operation, the surgeon found evidence of prolonged traumatic injury.[118] Joshua is now profoundly retarded and institutionalized.[119]

The district court granted summary judgment for DSS, concluding that "the failure of a state agency to render protective services to persons within its jurisdiction does not violate the due process clause."[120] The district court found that no special relationship existed between Joshua and the state, emphasizing the fact that Joshua was not in the state's custody "at the time of or immediately

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107 *Id.*
108 *Id.* at 1002-03 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).
109 *Id.* at 1001-02.
110 *Id.* at 1001.
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* at 1002.
118 *Id.*
119 *Id.*
120 Petition for Writ of Certiorari at 73, DeShaney v. Winnebago County Dep't of Social Servs. (1989) (No. 87-154).

prior to the March 8, 1984 beating."[121]

The Seventh Circuit affirmed, concluding that a "state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty."[122] Additionally, the Seventh Circuit found that the requisite causal connection between the state's inaction and Joshua's injury was lacking.[123]

2. *The Supreme Court Decision*

The United States Supreme Court affirmed the Seventh Circuit's holding.[124] Noting the language and history of the due process clause, as well as relevant Supreme Court precedent, 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."[125] The Court declined to consider the petitioners' argument, raised for the first time in their brief to the Court, that the state's child protection statute gave Joshua a property entitlement to protection from abuse.[126]

Despite the respondents' knowledge of the special danger to Joshua, as well as their asserted intention to protect him, the Court rejected the argument that a special relationship existed.[127] The

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121 *Id.* at 71-72.

122 DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 301 (7th Cir. 1987).

123 *Id.* at 302-03.

124 DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1002 (1989).

125 *Id.* at 1004.

126 *Id.* at 1003 n.2. By declining to consider the petitioners' property entitlement claim, the Court did not reject this claim either. By analogy, battered women could use the petitioners' argument if their states have enacted domestic violence statutes that limit police discretion by mandating procedures and intervention responses. *See infra* notes 177-82 and accompanying text. Specifically, the petitioners argued:

> Under [the Wisconsin child protection statutes] the discretion of the authorities of the [Department of Social Services] is severely restricted. The response to a report, the short time for starting the investigation, the requirements for reporting to the state and to the person who originally reported the concern, and the rest of the mandates leave little if any room for doing anything other than carrying out the terms of the statute. . . .
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> . . . .
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> Petitioners urge that the scheme of the [statutes] is sufficiently extensive and detailed, and impacts heavily enough upon an endangered child . . . that it more than meets the test of *Board of Regents v. Roth*, . . . and that it creates an entitlement which the authorities may not take away without due process of law. In view of the facts of this case it is clear that the defendants violated not only their mandatory statutory duties but also Joshua's due process rights arising under the statutory scheme.

Brief for Petitioners at 27-29, DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989) (No. 87-154).

127 *DeShaney*, 109 S. Ct. at 1004; *see supra* notes 25-30 and accompanying text.

Court thereby narrowed the special relationship doctrine to state custodial situations, such as "incarceration or institutionalization," or a "sufficiently analogous situation."[128] The Court apparently rejected the consideration of several factors previously cited by various circuit courts.[129]

The Court, however, signalled the viability of two other legal avenues which have important implications for future litigation. First, the Court qualified its holding by reaffirming the validity of an equal protection claim: "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. . . . But no such argument has been made here."[130] Second, the Court further suggested that state tort law would be a preferred "system of liability" in situations where state agents fail to act when under a state-imposed duty to do so.[131] In reiterating that tort liability is separate from due process violations, the Court stated: "not . . . every tort committed by a state actor"[132] converts to a "constitutional violation" with the assertion of a due process claim.[133] Thus, the Court refused to expand the scope of section 1983 to encompass state tort law, as if to redirect such claims to the states.[134]

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128 *DeShaney*, 109 S. Ct. at 1004-05 & n.9.

129 *Id.* at 1004 & n.4 (citing Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425-26 (9th Cir. 1988); Estate of Bailey by Oare v. County of York, 768 F.2d 503, 510-11 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185, 190-94 & n.11 (4th Cir. 1984) (dicta), *cert. denied*, 470 U.S. 1052 (1985)). The Court explained:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 109 S. Ct. at 1006 (citation omitted); *see supra* notes 25-30 and accompanying text.

130 *DeShaney*, 109 S. Ct. at 1004 n.3 (citation omitted); *see infra* notes 183-99 and accompanying text.

131 *DeShaney*, 109 S. Ct. at 1007 ("A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes."); *see infra* notes 200-15 and accompanying text.

132 *DeShaney*, 109 S. Ct. at 1007.

133 *Id.*

134 The *DeShaney* Court stated:

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. . . . But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

Id. Noting the *DeShaney* Court's apparent federalism concerns, one commentator observed: "[T]he Court might have denied relief in order to avoid treading on what, ac-

Justice Brennan dissented, joined by Justices Marshall and Blackmun.[135] Justice Brennan argued that the constitutional analysis of the petitioners' claim should have been framed from a state *action* perspective, rather than an initial fixation on inaction.[136] Specifically, Justice Brennan asserted the significance of the State's prior actions in establishing and operating a child-welfare system created to protect children from abuse.[137] Not only did the State's system displace private sources of protection, Brennan argued, but the State's subsequent inaction may have arbitrarily, and unconstitutionally, denied its protection to Joshua.[138]

III
ANALYSIS

A. The Aftermath of *DeShaney* in the Domestic Violence Context

Like Joshua DeShaney, battered women plaintiffs have relied upon section 1983 to seek federal redress for their constitutional deprivations resulting from the state's failure to intervene in domestic abuse situations. Because of this close analogy, battered women plaintiffs will feel *DeShaney*'s impact, particularly those asserting substantive due process claims. The Court's significant narrowing of the special relationship doctrine to state custodial relationships effectively forecloses this due process avenue for battered women. In *DeShaney*, however, the Court kept the equal protection avenue open,[139] thus signalling its continued availability as a legal avenue to recovery for battered women.

In a recent post-*DeShaney* domestic violence case, *McKee v. City of Rockwall, Texas*,[140] the Fifth Circuit provided the first indication of *DeShaney*'s impact by confirming *DeShaney*'s apparent foreclosure of substantive due process claims.[141] The plaintiff, a domestic assault victim, sued responding police officers and the city under section 1983 for injuries resulting from the police officers' refusal to arrest her boyfriend-assaulter. McKee asserted an equal protection viola-

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cording to some observers, should remain state responsibilities. Indeed, traces of these arguments appear between the lines of the majority's opinion." *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 167, 175-76 & nn.73 & 74 (1989). *But see supra* text accompanying note 13 (discussing original purpose of section 1983).

135 *DeShaney*, 109 S. Ct. at 1007.

136 *Id.* at 1008 (Brennan, J., dissenting).

137 *Id.* at 1010.

138 *Id.* at 1010-11.

139 *Id.* at 1004 n.3 (majority opinion).

140 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 727 (1990).

141 *Id.* at 413 (suggesting that if McKee had claimed a due process violation, her section 1983 suit would have been "directly barred by the holding in *DeShaney*").

tion, alleging that this "non-arrest was the result of a [city] policy that discriminated on the basis of gender"[142] because it discouraged officers from making arrests in domestic violence situations.

Despite the plaintiff's proffered evidence of a police chief's statement that his officers "did not like to make arrests in domestic assault cases since the women involved either wouldn't file charges or would drop them prior to trial,"[143] and city statistics comparing arrest rates in domestic violence and other assault cases,[144] the Fifth Circuit found that the plaintiff "failed to provide any evidence tending to show that the officers' inaction was a consequence of discrimination against a protected minority."[145] Therefore, the Fifth Circuit reversed the district court's denial of the police officers' motion for summary judgment and dismissed all claims against them.[146]

The *McKee* court acknowledged the significance of *DeShaney* in its analysis of the plaintiff's equal protection claim:

> Because McKee's complaint sounds in Equal Protection, rather than Due Process, it is not directly barred by the holding in *DeShaney*. *DeShaney* is nonetheless relevant to our analysis of this case. The Court's opinion in *DeShaney* endorses the general principle that choices about the "extent of governmental obligation" to protect private parties from one another have been left "to the democratic political processes." There is no constitutional violation when the "most that can be said of . . . state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role." Footnote three [of the *DeShaney* opinion] does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process claim via an allegation that state officers exercised discretion to act in one incident

142 *Id.* at 409.

143 *Id.* at 411. The majority found that the police chief's statement indicated a mere dislike, not a city policy. *Id.* at 415. Dissenting in part, Judge Goldberg argued: "When the Chief states—that women, not men, are the victims in 'domestic' assault cases—the plaintiff hurdles a barrier which is extremely difficult to ascend. This supplies the understanding that domestic assault *affects* women." *Id.* at 424 (Goldberg, J., dissenting in part) (emphasis in original). Goldberg also acknowledged that women predominate in the class of domestic violence victims, but noted: "Our equal protection jurisprudence requires evidence of a classification; judicial notice will not do." *Id.*

144 The *McKee* court rejected the statistical evidence for three reasons. First, in two of the four years involving complete data, the domestic violence arrest rate was *higher* than the cleared [nondomestic] assault rate. Second, the statistics did not adjust for other factors impacting arrests (e.g., whether the victim refused to press charges when the police arrived). Third, the statistics failed to give a breakdown by gender (e.g., the number of female victims in cleared assault cases or the number of male victims in domestic violence cases). *Id.* at 415 (majority opinion).

145 *Id.* at 416. Judge Goldberg, dissenting in part, noted that the majority's conclusion that McKee failed to establish any claim, "virtually preordains judgment for the City . . . on remand." *Id.* at 417 n.2 (Goldberg, J., dissenting in part).

146 *Id.* at 416 (majority opinion). The Fifth Circuit mentioned the fact that the district court's disposition of the case occurred prior to *DeShaney*. *Id.* at 413.

but not in another.[147]

The *McKee* court interpreted the officers' discretion not to arrest the plaintiff's boyfriend-assaulter as consistent with the *DeShaney* proposition that law enforcement officers' "authority to act does not imply . . . [their] constitutional duty to act."[148] Thus, the majority's interpretation of *DeShaney* was instrumental in its unfavorable disposition of the plaintiff's equal protection claim.

Judge Goldberg, dissenting in part, asserted that *DeShaney*, a substantive due process case, was irrelevant to McKee's equal protection claim.[149] Goldberg disagreed with the majority's interpretation of *DeShaney* "as a general statement that governmental officers, in their actions, enjoy a zone of discretion regardless of the Fourteenth Amendment right involved."[150] Further, Goldberg considered the police chief's statement a central piece of evidence which created an issue of fact regarding the discriminatory treatment of women.[151] Consequently, Goldberg argued that the plaintiff's equal protection claim should have survived the defendants' motion for summary judgment.[152]

Goldberg concurred, however, in the majority's dismissal of the plaintiff's equal protection claim against the police officers, basing the dismissal instead on qualified immunity.[153] Goldberg concluded:

> [A] reasonable officer would [not] know that a *de facto* city custom or policy, and his own actions manifesting the same notions, footed in stereotypes buried deeply in our culture, would violate the Constitution. No published decision in this Circuit sets forth such a theory of the Equal Protection Clause, and the Supreme Court has not spoken specifically on this subject.[154]

Judge Goldberg's concern with the majority's misapplication of *DeShaney*[155] sigualled the importance of reassessing available legal avenues for battered women.

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147 *Id.* at 413 (citations omitted).

148 *Id.* at 414.

149 *McKee*, 877 F.2d at 417 (Goldberg, J., dissenting in part). Goldberg suggested that the distinction between *DeShaney* and equal protection claims in the domestic violence context "is sure to stand important in the future." *Id.*

150 *Id.*

151 *Id.* at 423-24.

152 *Id.* at 417.

153 *Id.*

154 *Id.* at 425-26.

155 *See id.* at 418 ("The 'democratic political processes' upon which the [McKee] majority rests its hope that all people receive equal protection of the law is not adequate for the task of protecting people when distinctions are made upon . . . quasi-suspect classifications [like gender].") (citations omitted).

B. A Post-*DeShaney* Assessment of Legal Avenues

1. *Due Process Claims Alleging Liberty Deprivations*

By analogy, the *DeShaney* holding forecloses due process claims for battered women plaintiffs suing the police under section 1983 for alleged liberty deprivations.[156] This foreclosure rests on the *DeShaney* Court's explicit restriction of the special relationship doctrine to state custodial relationships.[157] Indeed, a battered woman plaintiff would be hard pressed to argue that her situation is "sufficiently analogous to incarceration or institutionalization"[158] to trigger a state's affirmative duty of protection.

In an analogous post-*DeShaney* case, however, a sexual assault victim found an avenue around the special relationship barrier, even though her section 1983 claim alleged a liberty deprivation. In *Stoneking v. Bradford Area School District*,[159] a high school band director sexually harassed and victimized the plaintiff over a period of several years, despite repeated complaints to high school officials.[160] The Third Circuit initially considered the case prior to the Supreme Court's decision in *DeShaney*.[161] It found a special relationship under applicable state and common law which triggered the school officials' affirmative duty to protect students' liberty interests under the due process clause.[162] The Third Circuit affirmed the district court's denial of summary judgment to the defendants based on

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156 Under *DeShaney*'s reasoning, the actor inflicting injury on a battered woman is her battering husband or boyfriend, not a *state* actor. Since the state has no affirmative duty to protect individuals against private violence, the police's failure to intervene in battering situations does not constitute a due process violation.

157 *See supra* notes 127-28 and accompanying text. Recent case law, decided during publication of this Note, confirms this assertion. In a second amended opinion filed May 11, 1990, the Ninth Circuit retracted its original finding of a special relationship in Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990). Affirming the district court's dismissal of the battered woman's due process claim, the Ninth Circuit found *DeShaney* controlling: "We conclude that the state's knowledge of DeShaney's plight and its expressions of intent to help him were no greater than its knowledge of Balistreri's plight and its expressions of intent to help her." *Id.* at 700; *see supra* text accompanying notes 100-02.

158 *DeShaney*, 109 S. Ct. at 1006 n.9. The Court explained:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 1006 (footnote omitted).

159 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 840 (1990).

160 *Id.* at 722.

161 Stoneking v. Bradford Area School Dist., 856 F.2d 594 (3d Cir. 1988), *vacated sub nom.* Smith v. Stoneking, 109 S. Ct. 1333 (1989).

162 *Stoneking*, 882 F.2d at 723.

their lack of qualified immunity.[163]

The Supreme Court remanded to the Third Circuit to reconsider Stoneking's due process claim in light of *DeShaney*. The Third Circuit found that Stoneking's section 1983 due process claim remained viable even if the defendants had no "predicate duty"[164] to protect the plaintiff, because the plaintiff alleged a distinct theory of liability independent of the special relationship doctrine.[165] Specifically, the plaintiff alleged that the defendants, "with deliberate indifference to the consequences, established and maintained a policy, practice, or custom which directly caused her constitutional harm."[166] Under this theory, the plaintiff argued:

> [D]efendants are liable because of their own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct. . . . [T]hese practices, customs or policies created a climate which . . . facilitated sexual abuse of students by teachers in general, and that there was a causal relationship between these practices, customs or policies and the repeated sexual assaults against her by [the band director].[167]

The *Stoneking* court endorsed the plaintiff's theory, stating: "This is an independent basis for liability . . . which is unrelated to the issue decided in *DeShaney*. Liability of municipal policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed."[168]

The United States Supreme Court recently upheld a similar theory of municipal liability in *City of Canton v. Harris*,[169] decided six days after *DeShaney*. In *Canton*, the Court found the City of Canton

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163 *Id.* at 722-23.

164 *Id.* at 725.

165 *Id.*

166 *Id.*

167 *Id.* at 724-25.

168 *Id.* at 725. Note that the Supreme Court could have granted certiorari if the *Stoneking* court had misinterpreted its decision in *DeShaney*. Indeed, the Third Circuit in *Stoneking* stated:

> Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates. As the Supreme Court recently reconfirmed in *City of Canton v. Harris* . . . , a municipality may be liable under section 1983 where its policymakers made "a deliberate choice to follow a course of action . . . from among various alternatives," . . . and the policy chosen "reflects deliberate indifference to the constitutional rights of [the city's] inhabitants."

Id. at 725 (citations omitted).

169 109 S. Ct. 1197 (1989). Indeed, the Third Circuit in *Stoneking* relied on the *Can-*

liable for constitutional violations resulting from its failure to adequately train its police officers to recognize when detainees required medical assistance.[170] To invoke the "failure to train"[171] theory, the Court required that this failure amount to the city's "deliberate indifference to the rights of persons with whom the police come into contact."[172]

That the plaintiff-detainee was in police custody at the time of her alleged liberty deprivation presumably would have been enough to establish a special relationship after *DeShaney*. The *Canton* Court, however, neither invoked the special relationship doctrine in deciding this case nor mentioned *DeShaney* in its opinion. Rather, the *Canton* Court treated the plaintiff's "failure to train" theory of municipal liability as a distinct substantive due process claim.[173]

Canton and *Stoneking* suggest a potentially promising legal ave-

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ton decision as validation for the plaintiff's theory of liability. *Stoneking*, 882 F.2d at 725. The *Stoneking* court discussed the reasoning in *Canton*:

> [I]f the need for more or different training [of its employees] is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, "the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." It continued, "[i]n that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."

Id. (citations omitted).

170 *Canton*, 109 S. Ct. at 1204.

171 *Id.* at 1203.

172 *Id.* Regarding the "deliberate indifference" standard, the Court explained:

> To adopt [a] lesser standard of fault . . . would open municipalities to unprecedented liability under § 1983. . . . It would also engage the federal courts in an endless exercise of second-guessing municipal employee training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.

Id. at 1206 (citations omitted).

173 The *Canton* Court relied upon Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), for the proposition that a municipality can be held liable under section 1983 by executing a policy which causes constitutional deprivations to individuals. *Canton*, 109 S. Ct. at 1203. The Court in *DeShaney* did not address this theory of liability, stating in a footnote:

> Because we conclude that the Due Process Clause did not require the State to protect Joshua from his father, we need not address respondents' alternative argument that the individual state actors lacked the requisite "state of mind" to make out a due process violation. Similarly, we have no occasion to consider whether . . . the allegations in the complaint are sufficient to support a § 1983 claim against the county and its Department of Social Services under *Monell v. New York City Dept. of Social Services*, and its progeny.

DeShaney, 109 S. Ct. at 1007 n.10 (citations omitted). One could interpret this footnote to mean that the Court's reason for not considering the *Monell* theory was its finding, in the first instance, that no special relationship existed to trigger the State's affirmative duty to protect. The *Canton* Court, just six days after *DeShaney*, did not make an explicit finding of a special relationship a precondition for invoking the "failure to train" theory. *Canton*, 109 S. Ct. at 1203. ("[O]ur first inquiry in any case alleging municipal liability

nue for battered women plaintiffs. These plaintiffs could argue analogously that a municipality's liability is triggered when it maintains, or persists in following, a policy of lesser protection for domestic violence victims with deliberate indifference to the policy's disproportionate impact on women. Because this theory circumvents the special relationship doctrine, a battered woman could still claim a liberty deprivation under the due process clause. A battered woman might also assert a "failure to train"[174] claim if she could proffer evidence that a city's inadequate police training regarding domestic violence calls amounted to deliberate indifference to the need for heightened protection for these victims.

2. *Due Process Claims Alleging Property Entitlements to Police Protection*

DeShaney did not address the validity of a section 1983 claim based on an alleged property entitlement to the state's protection.[175] Even though the *DeShaney* majority explicitly declined to consider this theory,[176] Justice Brennan's dissenting argument—that the state assumed a duty to protect children from abuse via statute and then iguored that duty in Joshua's case—could be construed as an implicit acknowledgment of an abused child's property entitlement to the state's protection.[177] A withdrawal of its protection

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under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.").

174 *Canton*, 109 S. Ct. at 1203.

175 *DeShaney*, 109 S. Ct. at 1003 n.2; *see supra* note 126 and accompanying text. The Supreme Court has found that state statutes can create a property entitlement to government benefits or services. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Comment, *supra* note 5, at 1069. These statutes must sufficiently limit the discretion of government officials in determining whether a particular individual qualifies as a beneficiary. *See* Board of Pardons v. Allen, 482 U.S. 369, 382 (1987) (O'Connor, J., dissenting). Once an individual meets the qualifying criteria, the individual may assert a protected property interest in the state's services or benefits which a legitimate claim of entitlement supports. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); *see also* Comment, *supra* note 5, at 1065, 1068-69, 1073 (discussing property entitlement argument for foster children). This commentator elaborated:

> [P]roperty interests 'are created . . . by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits.' Hence, due process safeguards do not exist to protect benefits for their own sake, but rather to protect the expectation a state creates by making promises on which individuals rely; in short, the Court has held that a state acts unfairly when it arbitrarily goes back on its promises.

Id. at 1065 (citation omitted). If government officials decide to withdraw benefits, these officials would be required to comply with procedural due process requirements (*e.g.*, providing the individual with notice and an opportunity to be heard). *See id.*

176 *DeShaney*, 109 S. Ct. at 1003 n.2.

177 *Id.* at 1010 (Brennan, J., dissenting). Brennan would have allowed the petitioners "the opportunity to show that respondents' failure to help [Joshua] arose . . . from the kind of arbitrariness that we have in the past condemned." *Id.* at 1011.

would therefore oblige the state to meet certain procedural due process requirements to justify that withdrawal.[178]

By analogy, a property entitlement theory might work for battered women.[179] Although police protection provided on a general basis is not a protected property interest under the due process clause,[180] state domestic violence statutes that limit police discretion in responding to domestic violence calls arguably create property entitlements to police protection.[181] The validity of this theory,

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178 One commentator proposed and developed this argument based on Goldberg v. Kelly, 397 U.S. 254 (1970) (finding an entitlement to welfare under state statute):

> As in *Goldberg*, the question is not whether government benefits are constitutionally required in the first instance, but under what circumstances those benefits, once conferred, may be constitutionally withdrawn. On this view, the "greater" power to deny all benefits does not include the "lesser" power to withdraw benefits arbitrarily. . . . [T]he state's failure to follow through on its promises is fundamentally different from the failure to act when no promise was made.

Comment, *supra* note 5, at 1066-67.

179 The question of "what process is due" for procedural due process protection, however, may limit the utility of a property entitlement claim for battered women. Predeprivation procedures (*e.g.*, hearings or opportunities to be heard) arguably are infeasible when police receive a request for immediate assistance from a battered woman, but intentionally or recklessly fail to intervene. As if to respond to this concern, one commentator stated:

> [T]he [procedural] protections required may look quite different from the evidentiary hearing ordered in *Goldberg* [*v. Kelly*]. Often it will be quite easy to determine whether an individual falls within the class of persons who are entitled to rely on the state's self-imposed obligation to act; for example, it is easy to identify foster children who have been explicitly granted certain kinds of protection by the state. Since such a decision does not involve factual determinations that are best made in a full hearing, a state need only provide enough procedure to make the decision reasonably accurate. At the same time, if the correct decision is plain, evidence that the state incorrectly decided it will probably suffice to show that the procedures *were* inadequate. Moreover, in the state inaction cases . . . , the complaint is not simply that the state provides inadequate procedures, but that it provides no procedural protection at all.
>
> . . . Where procedures would have resulted in the state conferring the benefit it promised, the state is liable to the full extent of the injury that would have been prevented. For example, a foster child who would have been saved from abuse had the state adequately considered its decision to withdraw promised protection would be able to recover for all injuries resulting from the abuse.

Comment, *supra* note 5, at 1071-72 (emphasis in original).

180 *See* Comment, *supra* note 5, at 1069; *supra* note 16 and accompanying text.

181 Florida, for example, has a provision in its Domestic Relations statute enumerating law enforcement officers' investigation responsibilities in responding to incidents of domestic violence. These responsibilities include both providing the victim with notice of legal rights and remedies and mandatory reporting of the domestic violence incident. FLA. STAT. ANN. § 741.29 (West 1986). Similarly, New Jersey has a Prevention of Domestic Violence Act that declares: "It is . . . the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide." N.J. STAT. ANN. § 2C:25-2 (West 1982 & Supp. 1989). Subsequent sections describe mandatory responsibilities and procedures for law enforcement officers to follow in responding to domestic violence calls. *Id.* §§ 2C:25-4 to :25-8. One provision requires:

albeit untested,[182] may well depend on a state's specific statutory terms (e.g., whether the terms sufficiently limit police discretion), and federal courts' sensitivity to intrusions on the states' autonomy.

3. *Equal Protection Claims*

In domestic violence cases prior to *DeShaney*, battered women tended to be more successful in asserting equal protection claims than due process claims.[183] As *DeShaney* reaffirmed the viability of equal protection claims under section 1983, this trend should continue.[184] And yet, recent summary judgment standards articulated

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"[A]ll training for law enforcement officers on the handling of domestic violence complaints shall stress the enforcement of criminal laws in domestic situations, the protection of the victim, and the use of available community resources." *Id.* § 2C:25-4; *see also* ILL. ANN. STAT. ch. 40, paras. 2313-1 to 2313-5 (Smith-Hurd Supp. 1989) (clarifying responsibilities of law enforcement officers in clear and sufficient terms, thereby restricting officers' discretion in "provid[ing] immediate, effective assistance and protection for victims of domestic violence"); *id.* ch. 40, para. 2311-2(4). For comprehensive surveys of domestic violence legislation, see Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL 74 (1983); Lisa G. Lerman & Franci Livingston, *State Legislation on Domestic Violence*, 6 RESPONSE, No. 5, Sept./Oct. 1983 (available from Center for Women Policy Studies, Washington, D.C.). As if to draw a distinction between domestic violence statutes and statutes creating police forces for protection of the general public, one commentator noted:

> Laws creating police forces . . . do not limit discretion in this way. They do not specify a particular class of citizens that is to benefit specially from police protection, nor do they limit the state's discretion in deciding when to provide such protection; rather, such laws are designed to provide protection on a general basis and not to any particular individual or class. This kind of statute does not create a property interest for a particular individual that could be invoked in a section 1983 case.

Comment, *supra* note 5, at 1069-70.

182 *DeShaney*, 109 S. Ct. at 1003 n.2 (1989); *see supra* note 126. The courts have not yet ruled definitively on the validity of the property entitlement theory for battered women plaintiffs. *But cf.* Turner v. City of North Charleston, 675 F. Supp. 314, 318-19 (D.S.C. 1987) (finding, under special relationship doctrine, that State's Protection from Domestic Abuse Act did not create an "express duty of protection, or intervention, in domestic cases, but rather provides only that law enforcement officers take certain protective measures when responding to a domestic abuse incident."); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (finding the state foster care statutory scheme supported a child's entitlement claim of procedural due process for deprivation of a liberty interest in personal safety). The court said: "Since the child's claim under [*Board of Regents v.*] *Roth* is a procedural due process claim, the state . . . may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely." *Id.* at 800.

183 *See* cases cited *supra* note 2; *see also supra* text accompanying notes 69-94.

184 *DeShaney*, 109 S. Ct. at 1004 n.3; Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir.) (second amended opinion filed May 11, 1990). In reversing the district court's dismissal with prejudice of a battered woman's equal protection claim, the court stated:

> Plaintiff's . . . equal protection claim was based upon sex and marital status. The response [to the motion to dismiss] stated that plaintiff "has alleged facts indicating that as a woman, she was discriminated against when seeking police protection from a known danger, her former husband." The response cited as support for its legal theory *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), one of several district

by the Tenth Circuit in *Watson v. City of Kansas City, Kansas*[185] and the Third Circuit in *Hynson v. City of Chester Legal Department*[186] impose heavy evidentiary burdens on battered women to override police officers' qualified immunity defense. Since municipalities cannot invoke that defense,[187] battered women plaintiffs have been able to proceed to trial against city-defendants via a "policy or custom" claim.[188] Thus, battered women should actively seek recovery against municipalities rather than municipal employees in their individual capacities.

Because courts will apply a heightened level of scrutiny[189] to classifications based on gender, battered women's chances for recovery are enhanced if they can establish that a police policy classification discriminates against women. Gender-neutral standards[190] requiring evidence of discriminatory intent will pose unjustly difficult hurdles for plaintiffs if courts remain unwilling to accept evidence of extreme disparate impact on women as sufficient evidence of discriminatory intent. Despite studies showing that women predominate the class of domestic violence victims,[191] and that police are well aware of this,[192] courts may find insufficient evidence of

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court decisions which have held that police failure to respond to complaints lodged by women in domestic violence cases may violate equal protection.

Id. at 701.

185 857 F.2d 690 (10th Cir. 1988) (class-based discrimination based on status as domestic violence victim).

186 864 F.2d 1026 (3d Cir. 1988) (gender discrimination).

187 *See supra* note 50 and accompanying text.

188 *See supra* notes 50-51 and accompanying text.

189 *See supra* notes 35-37 and accompanying text. As Judge Goldberg noted in McKee v. City of Rockwall, Tex., 877 F.2d 409, 423-24 (5th Cir. 1989):

> Under our classification-based equal protection jurisprudence, whether a female plaintiff falls into a class of domestic abuse victims, or *female* domestic abuse victims, may determine the appropriate level of scrutiny . . . for her [equal protection] claim. . . . The labels domestic violence or domestic assault tend to hide the gender of the victims in such cases. . . . A general observation of our society confirms . . . that women are the victims in domestic violence situations.

(Goldberg, J., dissenting in part) (footnote omitted) (emphasis in original).

190 *See supra* notes 38-41 and accompanying text; *see also supra* text accompanying notes 89-91.

191 *See* Note, *supra* note 33, at 799 n.49 (citing DEL MARTIN, BATTERED WIVES 14 (1st ed. 1976) (showing statistics from several cities)); Bruno v. Codd, 47 N.Y.2d 582, 582 n.2, 393 N.E.2d 976, 977 n.2, 419 N.Y.S.2d 901, 902 n.2 (1979) (citing 1978 study by Henry Street Settlement Urban Life Center, showing 29 out of 30 domestic violence complaints in New York City made by women).

192 One commentator, noting statistical tracking studies, asserted:

> Police are aware that their non-arrest policy disproportionately harms women, because the domestic violence victims that they see on their jobs are mostly women. Police manuals and testimonial admissions further demonstrate police officers' awareness that women are the major victims of domestic violence. Even if police do not know that arrest is the

discriminatory intent if other police justifications adequately explain challenged policy classifications. For example, police may argue that domestic violence victims typically drop charges or request that their batterers not be arrested.[193] Consequently, to improve efficient police resource allocation, police may adopt a policy differentiating between domestic and nondomestic assaults.[194]

Courts, police departments, and municipalities should not disregard the statistical fact[195] that affording less protection to domestic violence victims means that women will be adversely affected. Many municipalities have acknowledged this and are revising their policies accordingly.[196] Since it is unlikely that courts will judicially notice explicit gender-based classifications given the neutral labels of domestic violence/nondomestic violence, battered women should be prepared to present evidence of disparate impact and treatment. Courts and juries could infer discriminatory intent against women from police statistics showing that women comprised the majority of domestic assaults, and that domestic assault arrest rates were consistently lower than other assault arrest rates.[197] Evidence of police training methods that discourage arrests in domestic violence cases or rationalize different treatment for domestic violence victims may support statistical discrepancies between domestic and nondomestic

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> best means of preventing violence, they do know that failure to arrest will leave a battered woman in an unprotected position, with the batterer still present and facing no restraints to stop him from beating her again.

See Note, *supra* note 33, at 799 (footnotes omitted).

193 *See, e.g.*, McKee v. City of Rockwall, Tex., 877 F.2d 409, 411 (5th Cir. 1989) (quoting affidavit with police chief's statement explaining non-arrest of batterer); *see supra* note 143 and accompanying text.

194 *See* Note, *supra* note 33, at 795 ("In some cases, police may try to justify their failure to arrest batterers as a waste of time and resources because battered women often drop the charges against their assailants. Thus police may defend their policy as substantially related to the important state interest of using limited resources most efficiently."). This commentator also noted:

> Discriminatory intent can . . . be shown by examining more closely the police justification of "family privacy." . . .
>
> [S]uch a rationale becomes suspect when it is used to justify state inaction in the face of a battering situation. The willingness of police to ignore both battering men's criminal behavior and battered women's pleas for help demonstrate police intent to allow women to be harmed by men. Such respect for male rule is a stereotype which harms women, and provides evidence of discriminatory intent.

Id. at 800-01 (footnotes omitted).

195 *See* Note, *supra* note 33, at 799 n.49 (citing DEL MARTIN, BATTERED WIVES 14 (1st ed. 1976) (showing statistics from several cities)).

196 *See* MARJORY D. FIELDS, MUNICIPAL LIABILITY FOR POLICE FAILURE TO ARREST IN DOMESTIC VIOLENCE CASES (1987) (noting New York State police policy revisions requiring arrests in appropriate cases of domestic violence and responses addressing the criminal nature of domestic violence).

197 *See, e.g.*, Watson v. City of Kansas City, Kan., 857 F.2d 690 (10th Cir. 1988); *see also supra* notes 42-44 and accompanying text.

categories.[198]

These forms of evidence might also be proffered to support a *Stoneking* (policy or custom) or *Canton* (failure to train) theory of liability.[199] Battered women could argue that municipal policymakers' deliberate indifference can be inferred from statistically evident disproportionate harm to battered women as a result of persistent unequal protection by police policies or inadequate police training.

4. *State Tort Law Claims*

DeShaney endorsed state tort law as a legal avenue for plaintiffs injured by state officers' failure to protect when under a state-imposed duty to do so.[200] Special relationships can exist between certain individuals and the state which trigger affirmative duties of protection cognizable under state tort law.[201] As the *DeShaney* Court instructed, "[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes."[202] The Court's endorsement should be a signal to battered women plaintiffs that a state tort action might provide a viable alternative to section 1983 claims. In numerous cases, battered women have been successful in bringing tort actions against police in state courts.[203]

In federal courts, however, battered women have achieved mixed results when bringing pendent state tort claims in section 1983 actions.[204] For example, in *Thurman v. City of Torrington*,[205] the

198 *See Watson*, 857 F.2d at 690.

199 *See supra* notes 164-74 and accompanying text.

200 *DeShaney*, 109 S. Ct. at 1006-07 (1989).

201 *Id.*; *see, e.g.*, DeLong v. Erie County, 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

202 *DeShaney*, 109 S. Ct. at 1007.

203 *See* Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983); Barnes v. Nassau County, No. 12433 (N.Y. Sup. Ct. 1982); Tedesco v. Alaska, No. 4FA-81-593 (Alaska 1981); Doe v. City of Belleville, No. 81-5256 (Ill. 1981); Kubitschek v. Winnett, No. 8587 (Or. Cir. Ct. 1980); Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); Sorichetti v. City of New York, 95 Misc.2d 451, 408 N.Y.S.2d 219 (1978), *aff'd* 70 A.D.2d 573, 417 N.Y.S.2d 202 (1979); Baker v. New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966); Jones v. Herkimer, 51 Misc.2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966)); *see* Note, *supra* note 33, at 805 n.74 (citing same cases).

204 *Compare* Watson v. City of Kansas City, Kan., 857 F.2d 690 (10th Cir. 1988) (exercising pendent jurisdiction over plaintiff's state tort claim against a police officer for negligently failing to detain battering husband and reversing grant of summary judgment to defendants) *with* Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (declining to exercise pendent jurisdiction over plaintiff's state tort claim). The Second Circuit in Miller v. Lovett, 879 F.2d 1066 (2d Cir. 1989) defined pendent jurisdiction:

> The modern doctrine of pendent jurisdiction derives from *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). *Gibbs* established that federal courts have jurisdiction to hear claims under state law whenever (1) there is a claim arising under the constitu-

district court declined to exercise pendent jurisdiction over the plaintiff's state tort claim. The court reasoned that it wished to avoid " 'needless decisions of state law . . . as a matter of comity and to promote justice between the parties.' "[206] The court, in its discretion, emphasized two jury-related issues weighing against pendent jurisdiction. First, the *Thurman* court anticipated jury confusion with different standards and burdens of proof for liability under the state statute and section 1983.[207] Second, the *Thurman* court expressed concern with potential jury prejudice against other police defendants if the jury became aware of the city's indemnitor obligation to pay for any damages assessed against them.[208]

Courts declining pendent jurisdiction of state tort claims impose a barrier to the advantages of a federal forum.[209] In *Miller v. Lovett*,[210] the Second Circuit recently found that a district court abused its discretion in declining to exercise pendent jurisdiction over state tort claims in a section 1983 action.[211] The Second Circuit noted the principles favoring federal pendent jurisdiction of

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> tion or federal laws; (2) the relationship between the federal claim and the state claim permits the conclusion that the entire action comprises but one constitutional case; (3) the federal claim has substance sufficient to confer subject matter jurisdiction on the court; and (4) the state and federal claims derive from a common nucleus of operative fact.
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> . . . *Gibbs* was . . . a response to the "hesitancy of federal courts to recognize jurisdiction over state-law claims," and was intended "not only to clarify, but also to broaden, the scope of federal pendent jurisdiction."

Id. at 1071 (citations omitted) (quoting Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988)).

205 595 F. Supp. 1521 (D. Conn. 1984).

206 *Id.* at 1531.

207 *Id.*

208 *Id.*

209 *See supra* note 13 and accompanying text. While section 1983 contains no limitations on recovery, state tort claims acts often place a cap on recovery and do not provide for punitive damages. *See, e.g.*, IND. CODE ANN. § 34-4-16.5-4 (Burns 1986); WIS. STAT. ANN. § 893.80(3) (West 1983). State legislatures may also impose a barrier to a federal forum. *See* David E. Beller & Carolyn A. Quattrocki, *Maryland's Tort Claims Act Grants Limited Remedy*, 22 MD. B.J., July/Aug. 1989, at 17 (discussing such limitations as a 180-day notice-of-claim requirement, cap on damages, no pendent or diversity jurisdiction for tort claims act lawsuit in federal court due to immunity provisions, percentage caps on attorney's fees for settlements and judgments under Maryland's Tort Claims Act, MD. STATE GOV'T CODE ANN. §§ 12-101 to 12-110 (1984 & 1988 Supp.)); *see also* Comment, *supra* note 5, 1067 n.93. This commentator observed:

> The purpose of [section 1983] was to provide a federal cause of action and a federal forum for citizens who suffer a "deprivation" of their constitutional rights. It is irrelevant to this purpose whether the states may provide some form of alternative remedy; the statute grants plaintiffs access to a federal forum in which to bring their claims if they choose to avail themselves of it.

Id. (citation omitted).

210 879 F.2d 1066 (2d Cir. 1989).

211 *Id.* at 1068. The Second Circuit rejected the district court's cursory rationale for dismissing the state claims: "Courts in this district have repeatedly discouraged pendent

state-law claims in cases presenting federal questions: "judicial economy, convenience and fairness to litigants,"[212] and "the interrelationship between state-law claims and questions of federal policy."[213] Finding the district court's dismissal of the state tort claims perfunctory in light of these principles,[214] the Second Circuit remanded the case for reinstatement of the plaintiff's state-law claims.[215]

Given the recovery advantages of a federal forum for battered women plaintiffs and the strong rationales favoring federal pendent jurisdiction, federal courts should willingly entertain state tort claims in the domestic violence context. The close interrelationship between the federal constitutional harms that battered women suffer and the injuries they sustain as a result of police negligence and inaction cognizable under state tort law outweighs federalism rationales in the context of a national problem in need of reform.[216]

Battered women who face formidable burdens for establishing actionable claims under section 1983 may consider bringing state constitutional claims, in addition to tort claims, in state courts. Many state constitutions provide more expansive protections to individual rights than the federal constitution.[217] State constitutional

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claims in section 1983 litigation." *Id.* at 1073. The plaintiff brought this action against police officers who used excessive force during an arrest. *Id.*

212 *Id.* at 1071 (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

213 *Id.* at 1072.

214 *Id.* at 1073.

215 *Id.*

216 Consider the following national statistics:

- Every 15 seconds a woman is beaten. (FBI statistics).
- Three to four million women per year are battered. (National Clearinghouse on Domestic Violence).
- Thirty percent of all female homicide victims are killed by their husbands as opposed to six percent of all male homicides. (1986 FBI statistics).
- Men commit 95% of all assaults on spouses. Five percent of the cases are committed by women against men. (National Crime Survey Data from 1973-77).
- A greater number of women are treated in emergency rooms as a result of wife/partner battering than the number of women treated for rapes, automobile accidents, and muggings combined. (National Center for Disease Control).

Statistics obtained from Massachusetts Coalition of Battered Women's Service Groups, Boston, Mass.

217 Noting a trend of "new judicial federalism" whereby state courts are "bas[ing] the protection of individual rights on independent interpretations of state constitutional rights rather than U.S. constitutional rights," one commentator observed:

> Where a provision in a state [constitution] is the same as, or similar to, a provision of the U.S. Bill of Rights, a state court may interpret the state provision more broadly than the U.S. Supreme Court interprets the U.S. provision . . . .
>
> . . . .
>
> State courts may also . . . giv[e] an independent interpretation to a

claims may indeed become an increasingly important avenue for recovery given recent limiting interpretations of federal constitutional rights by the Supreme Court.[218]

CONCLUSION

Although the Supreme Court in *DeShaney* signalled the foreclosure of battered women's due process claims by narrowing the special relationship doctrine, the Court left other avenues open. As suggested in Part III, battered women should actively pursue these avenues. In particular, these plaintiffs may make more promising section 1983 claims by alleging municipal liability under a "failure to train" theory or a "policy or custom" theory. The future viability of equal protection claims alleging gender discrimination requires that courts accept extreme disparate impact as an evidentiary means of inferring discriminatory intent against women. The courts' refusal to accept such evidence of intent may well render the burdens of summary judgment for battered women plaintiffs impossible to bear. Alternatively, state courts may provide a more hospitable forum for redressing violations of battered women's rights under state constitutional and tort law.

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state constitutional right that is not found in the U.S. Constitution. For example, 18 state constitutions explicitly prohibit gender discrimination. . . .

Most state constitutions contain some rights that are not found explicitly in the U.S. Constitution. Among these are rights to . . . "individual dignity," . . . [and] victims' rights.

John Kincaid, *State Court Protections of Individual Rights Under State Constitutions: The New Judicial Federalism*, 61 J. ST. GOV'T, Sept./Oct. 1988, at 163-64.

218 *See id.* at 165. This commentator noted:

[S]ince 1970, state high courts have issued more than 400 rulings in which they have either granted broader rights protections under state constitutions than the U.S. Supreme Court has granted under the U.S. Constitution, or based their rights protection decisions entirely on state constitutional grounds.

. . . .

The most commonly cited reason for state high court activism in individual rights protection is the perceived conservatism of the U.S. Supreme Court under Chief Justices Warren E. Burger and William H. Rehnquist.

Id.