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NOTES

DOMESTIC VIOLENCE VICTIMS v MUNICIPALITIES: WHO PAYS WHEN THE POLICE WILL NOT RESPOND?

The problem of domestic violence is often exacerbated by the failure of the police to take appropriate action. When the police fail to respond, the victims of domestic violence may bring an action against the police department or municipality involved for violation of the victim's equal protection or due process rights. The author critically examines both claims, setting forth a theoretical framework for such claims.

I. INTRODUCTION

A. Domestic Violence

DOMESTIC VIOLENCE¹ IS the most common type of assault in this country² With an estimated three to four million American women abused by husbands or intimate partners each year,³

1. Throughout this note, the term "domestic violence" will be used to describe violence between intimate partners who live or have lived together. Intimate partners include husbands and wives, common law spouses, live-in lovers, ex-spouses, and ex-lovers.

2. For instance, in Shaker Heights, Ohio, approximately 94% of all assaults reported in 1987 were domestic assaults. SHAKER HEIGHTS POLICE BULLETIN, WEEK 53 (1988) (summary of part I crimes for 1988). In 1974 the Boston City Hospital reported that approximately 70% of the assault victims received in their emergency room were women assaulted in their homes; in Atlanta, 60% of all police calls on the night shift were domestic disputes. D. MARTIN, BATTERED WIVES 12 (1976).

3. Dzik, *Abuse at Home: National Domestic Violence Awareness Month*, Wash. Post, Oct. 10, 1989, at C5, col. 1 (citing the National Clearinghouse on Domestic Violence). The great majority (almost 97%) of reported domestic violence victims are women. Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 671 n.20 (1986). In light of the statistics, vic-

domestic violence has become the primary cause of injury to women in the United States.⁴ Domestic assaults typically become more frequent and severe as time passes, sometimes ending in murder.⁵ According to FBI crime reports, thirty percent of all female homicide victims are killed by their husbands or boyfriends.⁶ The risk of extreme violence can be even higher when the victim attempts to leave the abusive relationship.⁷

In many cases, police receive several calls for help before the violence reaches a homicidal level. In fifty percent of the homicides between domestic partners in Kansas City, Missouri, for instance, police had been called to the house five or more times prior to the killing.⁸ Police reluctance to intervene can mean death, kidnapping, rape, or torture for the victim.

Prompt police intervention, including arrest⁹ of the abuser, has several benefits. Arrest can break the violent cycle and decrease future violence. In a study comparing various methods of police response in domestic violence cases, the Minneapolis Domestic Violence Experiment found that arrest was the most effective of three standard methods police used to reduce domestic violence.¹⁰ The other police methods—attempting to counsel both

tims and plaintiffs will be referred to using feminine pronouns throughout this note. This usage is not intended to deny or denigrate the existence of male victims of domestic violence.

4. American College of Obstetricians and Gynecologists, *The Abused Woman*: Fact Sheet (Jan. 3, 1989).

5. LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES 3 (1980); see L. WALKER, *THE BATTERED WOMAN* 55-70 (1979).

6. Dzik, *supra* note 3, at C5, col. 1.

7. The number of women killed by abusive partners has risen in 35 states; in 25 of those states, more than half the women were killed after they had separated from or divorced their partners. L. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 65 n.* (1989).

8. POLICE FOUND., *DOMESTIC VIOLENCE AND THE POLICE, STUDIES IN DETROIT AND KANSAS CITY* 9 (1977), cited in Comment, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215-16 n.18 (1988). Similarly, 50% of the murders in Newport News, Virginia, involved family members. "In half of those cases," the police had previously responded to complaints of domestic violence. Lang, *How to Stop Crime the Brainy Way*, U.S. NEWS & WORLD REP., Jul. 21, 1986, at 55, 55.

9. Throughout this note, "arrest" as advocated in domestic violence cases means arrest whenever probable cause exists. Many states' statutes specify that a victim's statement that she has been abused is sufficient probable cause for arrest. See generally Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. REP. 271, 282-83 (1980) (comprehensive survey of state legislation).

10. Sherman & Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP., Apr. 1984, at 6, cited in Comment, *supra* note 8, at 215 n.16.

parties (mediation)¹¹ and sending assailants away from home for several hours—were found to be considerably less effective in deterring future violence.¹² An approach that favors arrest also sends a strong message to the batterer that such violence will not be tolerated by the community. Finally, the willingness of police to take serious action directly affects the victim's perception of her ability to escape from the violence.¹³

Because domestic violence is such a significant source of injury to women in this country and because police action has been shown to dramatically reduce the danger to those abused, victims and their advocates have been frustrated by the long-standing police reluctance to respond effectively to domestic calls.¹⁴ Although all states have passed laws criminalizing domestic violence,¹⁵ police have generally resisted enforcing these laws.¹⁶ Formal or informal departmental policies often reinforce the idea that domes-

11. Mediation is a method of dispute resolution widely used by police in responding to domestic calls. At one time it was promoted as a "sensitive" method of handling intrafamily disputes. However, when violence or the threat of it is part of a dispute, most experts believe that mediation is an ineffective and inappropriate response. Mediation at the time of the attack is ineffective because it presupposes that the two parties are equals. In an abuse situation, the victim is weaker and powerless. Moreover, mediation is inappropriate because it requires the powerless victim to share in the blame of the attack. Fields, *Wife Beating: Government Intervention Policies and Practices*, in *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 228, 251-52 (United States Comm'n on Civil Rights ed. 1978) (statement of Marjory Fields); see also L. WALKER, *supra* note 5, at 64-65 (temporarily calming down the assailant does not prevent subsequent abuse).

12. Sherman & Berk, *The Specific Deterrent Effects of Arrest for Domestic Violence*, 49 AM. SOC. REV. 261, 261 (1984) (scope note).

13. For a discussion of how police arrest of batterers may empower women, see Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?* 95 YALE L.J. 788, 808-09 n.84 (1986) (if society views domestic violence as a public rather than a private matter, the police will arrest the abusers, and victims will believe they have the power to stop the abuse by calling the police); Comment, *supra* note 8, at 223-24 (by arresting the assailant, the victim feels that society values her).

14. "A study of domestic violence cases in Milwaukee found that while 82% of victims requested that the batterer be arrested, arrest occurred in only 14% of the incidents." Eppler, *supra* note 13, at 788-89 n.3 (citing Bowker, *Police Services to Battered Women—Bad or Not So Bad?* 9 CRIM. JUST. & BEHAV. 476, 485-86 (1982)).

15. See generally Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 62 n.1 (1984) (listing recent enactments providing remedies to victims of domestic abuse).

16. See generally Note, *Domestic Relations: Legal Responses to Wife Beating: Theory and Practice in Ohio*, 16 AKRON L. REV. 705, 724-25 (1983) (police continue to resist arresting domestic violence offenders despite a new statute); Comment, *supra* note 8, at 214-15 (noting police resistance to arresting batterers and calling for more states to pass mandatory arrest laws); Comment, *Spouse Battering and Ohio's New Domestic Violence Legislation*, 13 TOLEDO L. REV. 347, 362-63 (1982) (discussing shortcomings in Ohio's new criminal domestic violence law).

tic violence is a low priority in law enforcement efforts. For instance, some police department policies specify a lower priority for responding to domestic assaults or state that the primary goal of any police involvement is to get the parties to "cool down" rather than to arrest the abuser.¹⁷ Also, police officers often fail to file reports or pursue investigations after receiving domestic violence calls.¹⁸

B. Growth of Section 1983 Suits

As a result of police reluctance to enforce legislation criminalizing domestic violence,¹⁹ victims have turned to the use of litigation, bringing suits against both police departments and municipalities employing police officers who have failed to take proper action. This litigation typically has aimed both at producing changes in police department policies²⁰ and at providing a remedy for victims injured by police inaction.²¹

Such suits could not be raised under section 1983²² until 1978, coincidentally the year in which the first criminal domestic violence statutes were proposed. In *Monell v Department of Social Services*,²³ the Supreme Court reversed its previous rule that

17. One policy previously followed by police in Michigan advised officers to "'a. Avoid arrest if possible. Appeal to their vanity. d. Explain that attitudes usually change by court time. e. Recommend a postponement. 1) Court not in session. 2) No judge available.'" Eppler, *supra* note 13, at 790 n.12 (quoting Eisenberg & Micklow, *The Assaulted Wife: Catch 22 Revisited*, 3 WOMEN'S RTS. L. REV. 138, 156-57 (1977) (citing INTERNATIONAL ASS'N OF CHIEFS OF POLICE, TRAINING KEY No. 16, Handling Disturbance Calls 94-95 (1968-69); WAYNE COUNTY SHERIFF, POLICE TRAINING ACADEMY: DOMESTIC COMPLAINTS Outline 2-3)); see East Cleveland Policy/Procedure: Domestic Violence and Family Disputes 2-4 (1988) (arrest of the abuser is viewed as a last resort).

18. In 1985, there were 64,443 reports of domestic disputes in Ohio. No action was taken in 41,829 of these. Ohio Att'y Gen, Domestic Disputes by County and Agency (1985) (statistical summary).

19. See *supra* text accompanying notes 14-16. One justification for not enforcing legislation is police cynicism about whether the victim will press charges. See Case Comment, *supra* note 3, at 689. However, failure to arrest the batterer only makes it more difficult for a victim to bring a complaint. For a more detailed discussion of reasons police typically refuse to intervene, see *id.* at 687-90.

20. See, e.g., Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (seeking to compel a change in a municipal police department's domestic violence policy and to prevent clerks of family courts from discouraging pursuit of legal remedies in domestic violence cases).

21. For a discussion of recent suits seeking remedies for serious injuries, see *infra* notes 38-40, 144-52 and accompanying text.

22. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988).

23. 436 U.S. 658 (1978).

municipalities were not liable under section 1983.²⁴ The Court held that a better reading of this statute was to consider municipalities "persons" liable for their actions.²⁵ Since that time, an increasing number of plaintiffs have sought to use section 1983 as a means to redress wrongs and injuries inflicted by municipal officials.²⁶

Recovery under section 1983 is predicated upon a showing of a deprivation of a constitutional right²⁷ by a person acting under color of state law²⁸ Domestic violence victims usually claim a deprivation of the constitutional right to due process or equal protection. According to the Supreme Court's interpretation in *Monell*, "under color of state law" includes actions taken by policemen pursuant to a municipal policy or custom²⁹ derived from

24. The pre-*Monell* rule was that of *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (granting municipal governments absolute immunity from section 1983 suits). *Monroe* was partially overruled in 1978 by *Monell*.

25. *Monell*, 436 U.S. at 700-01; see Nahmod, *Government Liability Under Section 1983: The Present is Prologue*, 21 URB. LAW. 1, 9-28 (1989) (a review of recent section 1983 cases against municipalities and their impact).

26. See P LOW & J. JEFFRIES, CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 16 (1988) (statistics show an increase in section 1983 litigation). Despite remedies existing under state law, most plaintiffs who can meet the requirements for a section 1983 suit appear to prefer the federal cause of action to a suit under state law. This is probably due to the attractions of a federal forum for a suit against a municipality. Under section 1983, state remedies need not be exhausted before seeking the federal remedy. *Monroe*, 365 U.S. at 183. For a discussion of why plaintiffs prefer a federal forum, see P LOW & J. JEFFRIES, *supra* at 15 (cataloging common reasons for preference of a federal forum); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-30 (1977) (analyzing contemporary preferences for a federal forum and criticizing the idea that state forums are equally competent to enforce federal rights).

27. Section 1983 suits may also allege a deprivation under federal law. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). However, a discussion of such suits is beyond the scope of this note. For further discussion of section 1983 suits alleging a deprivation under federal law, see Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*, in SECTION 1983: SWORD AND SHIELD 429, 461-65 (R. Freilich & R. Carlisle eds. 1983).

28. *Martin v. Delaware Law School of Widener Univ.*, 625 F. Supp. 1288, 1300 (D. Del. 1985), *aff'd*, 884 F.2d 1384 (3d Cir.), *cert. denied*, 110 S. Ct. 411 (1989). Section 1983 reads as follows: "Every person who, under color of any statute, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights secured by the Constitution and laws, shall be liable to the party injured" 42 U.S.C. § 1983 (1988).

Much has been written about the scope of municipal liability under section 1983. For an in-depth discussion, see S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (2d ed. 1986). This note will focus specifically on the liability of municipalities under section 1983 for failure to provide police protection to victims of domestic violence.

29. 436 U.S. at 690-91. In failure-to-protect cases, the policy or custom can either be a formal police department policy or an informal "pattern or practice" impliedly condoned

either municipal lawmakers or municipal employees having final decision-making power in that area.³⁰ Thus far, many of the appellate opinions have focused on the question of whether section 1983 domestic violence failure-to-protect claims can withstand motions for dismissal or summary judgment.³¹ Recently, several courts have affirmed that these claims are sufficient to warrant trial on the merits.³²

This note examines the trend toward holding municipalities liable under 42 U.S.C. § 1983 for failing to provide police protection to victims of domestic violence. It focuses on plaintiffs' allegations that the municipality has deprived them of equal protection or of due process. Section II discusses the equal protection claims brought to date, analyzing the type of evidence needed to bring these claims successfully and the two-track framework that courts should use in evaluating the types of discrimination alleged. Section III reviews due process theories of recovery. It examines one major theory that has recently been rejected by the Supreme Court and suggests alternative theories that offer continued viability for due process claims.

II. EQUAL PROTECTION THEORY

Suits charging that police department policies have deprived plaintiffs of equal protection of the laws have been the most consistently successful type of domestic violence failure-to-protect claims. These equal protection suits rest on the principle that although a municipality has no obligation to provide police protection to its citizens, once it undertakes to provide such services it may not provide them in a discriminatory fashion.³³ The initial suits brought under section 1983 for unequal police protection alleged racial discrimination in the allocation of police services.³⁴

by the city through its failure to halt it. *See infra* text accompanying notes 42-45.

30. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

31. *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988).

32. *See, e.g., Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (reversing district court's dismissal), *amended*, 901 F.2d 696, 700-01 (9th Cir. 1990) (district court erred by refusing plaintiff's request to amend her complaint to state an equal protection claim); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988) (reversing district court's grant of summary judgment in favor of the city); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying motion to dismiss).

33. *Watson*, 857 F.2d at 690.

34. *See, e.g., Green v. Francis*, 705 F.2d 846 (6th Cir. 1983) (sheriff's refusal to investigate charges that an elderly black couple had been harassed and their home riddled with gunfire was based on racial discrimination); *Hawk v. Perillo*, 642 F. Supp. 380 (N.D.

*Thurman v City of Torrington*³⁵ was the first case that sought to extend section 1983 protection to redress discriminatory treatment of domestic violence victims.

Thurman was a landmark case, establishing the requirements for a domestic violence equal protection claim under section 1983.³⁶ Two years later, *Watson v City of Kansas City*³⁷ clarified the two types of discrimination claims that may be made in the domestic violence failure-to-protect context and the level of evidentiary proof needed to withstand summary judgment on each.³⁸ *Watson* has provided the clearest statement of the requirements for equal protection claims to date. Nonetheless, due to the complexity of the legal principles involved, at least one court recently confused the different types of claims.³⁹

In order to allege a deprivation of equal protection of the law as part of a section 1983 suit, a plaintiff must show the following elements: (1) that a municipal policy existed at the time of her injury; (2) that the policy created a classification that discriminated impermissibly against a group of which she was a member; and (3) that her injury was causally linked to the policy⁴⁰

A. Municipal Policy

A well-supported allegation that the discriminatory provision of police services flowed from a municipal policy, either formal or informal, is a key element affecting a municipality's liability in a section 1983 suit. Hence, much attention has focused on the type of evidence needed to show the existence of such a policy. The most effective evidence of a discriminatory municipal policy is a

Ill. 1985) (police refusal to apprehend assailants was racially motivated). Racial discrimination was a type of discrimination clearly barred by the original purpose of section 1983. *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (purpose of section 1983 was to address nonenforcement of state laws against racial violence by the Ku Klux Klan), *overruled in part*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

35. 595 F. Supp. 1521 (D. Conn. 1984).

36. *Id.* at 1527-28.

37. 857 F.2d 690 (10th Cir. 1988).

38. The two types of claims are discrimination against the class of victims of domestic violence, *infra* text accompanying notes 69-77, and sex discrimination, *infra* text accompanying notes 78-93.

39. See *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988). The *Hynson* court's confusion is discussed *infra* text accompanying notes 98-104.

40. *Watson*, 857 F.2d at 694; see I. Silver, Police Civil Liability (MB) Form 9:1, at F-131 (1989) (enumerating the elements of an equal protection complaint alleging failure to provide police protection against a spouse).

written policy statement. This may be a provision in a police department general order or a handbook of police procedure specifying that domestic violence victims are to receive a lesser level of protection than victims of other types of assault. The lesser level of protection may be indicated by statements that assign a lower response priority to domestic calls or prescribe that fewer police resources (responding officers, investigators, and the like) be allotted to follow up complaints of domestic violence.⁴¹ Police training manuals and curriculum materials may also provide evidence of an express policy of discrimination. For instance, training materials may state that the preferred police response in domestic violence situations is mediation while preferring arrest of the offender in other assault situations.⁴²

In the absence of clearly discriminatory written policies, a plaintiff may be able to show that the police department had an informal policy of denying assistance to victims of abuse. To establish the existence of an informal policy, two types of evidence have emerged: facts showing a "pattern or practice" of discrimination⁴³ and facts suggesting that the municipality condoned or approved of the discrimination.⁴⁴

1. Facts Showing a Pattern or Practice of Discrimination

In *Thurman v City of Torrington*,⁴⁵ the court held that the consistent failure of the police to respond to plaintiff's complaints, repeated over a lengthy period of time, demonstrated an ongoing "pattern of deliberate indifference" to persons in the plaintiff's position and raised an inference that there was a municipal custom or policy of extending lesser protection to women victims of domestic violence.⁴⁶ In that case, the police refused to accept a complaint from a woman whose ex-husband repeatedly threatened her with violence. A few days later, the police stood by while the ex-

41. See J. FLEMING, STOPPING WIFE ABUSE: A GUIDE TO THE EMOTIONAL, PSYCHOLOGICAL, AND LEGAL IMPLICATIONS FOR THE ABUSED WOMAN AND THOSE HELPING HER 170-74 (1979); UNITED STATES COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 14, 21 (1982).

42. See, e.g., *supra* note 17 and accompanying text. The state police training guides are relevant to demonstrating municipal policies of discrimination because cities are generally required to conform police training to the state curriculum.

43. See *infra* text accompanying notes 45-57.

44. See *infra* text accompanying notes 58-65.

45. 595 F Supp. 1521 (D. Conn. 1984).

46. *Id.* at 1530.

husband screamed threats at the plaintiff in her car; they refused to intervene until he broke her windshield. When the plaintiff later attempted to have her ex-husband arrested for threatening to shoot her and violating a parole condition that he not threaten her again, the police told her to return in three weeks. Three weeks later, she was told to come back after the holiday weekend; and when she returned at that time, she was informed that the only policeman who could help her was on vacation.⁴⁷ The court had no difficulty finding that these events constituted an informal policy of denying police services to abused women.⁴⁸

Referring to one other occasion on which the plaintiff's ex-husband severely attacked her,⁴⁹ the court also noted that a "single brutal incident may be sufficient to suggest a link between a violation of constitutional rights and a pattern of police misconduct."⁵⁰ Normally, however, denials of police protection in the plaintiff's case alone are not sufficient to show policy or custom, and a plaintiff must offer additional evidence to establish that the police engaged in a practice of discrimination.⁵¹ For example, police may regularly refuse to respond to domestic calls or to document complaints of domestic violence;⁵² they may also incorrectly inform victims that an abuser cannot be arrested unless the police witness the violence themselves.⁵³

47. *Id.* at 1524-25.

48. *See id.* at 1527 (by refusing to afford plaintiff protection over an eight month period, the police were in effect operating in a discriminatory fashion).

49. On June 10, 1983, after eight months of harassment and attempted assaults, Charles Thurman appeared at the residence at which Tracey Thurman was staying and demanded to speak to her. After Tracey called the police, Charles began to stab her in the chest, neck, and throat. A police officer arrived about 25 minutes later, and in the officer's presence, Charles dropped a bloody knife and kicked Tracey in the head. Charles then ran inside and returned with his son, whom he dropped on top of his wounded ex-wife. Charles then kicked the plaintiff in the head once more. Three more police officers arrived at the scene, but no effort was made to take Charles into custody despite his continued threats toward Tracey. Charles was not arrested until he advanced toward her again while she was lying on a stretcher. *Id.* at 1525-26.

50. *Id.* at 1530 (quoting *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979)).

51. *See, e.g.,* *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988) ("We doubt whether evidence of [a pattern of] deliberate indifference in the plaintiff's case alone would be sufficient evidence of *different* treatment" to support an equal protection claim. (emphasis in original)); *Bartalone v. County of Berrien*, 643 F Supp. 574, 578-79 (W.D. Mich. 1986) (dismissing plaintiff's equal protection claim against the township on the grounds that she failed to allege sufficient facts outside her own case to show the existence of a municipal policy or custom).

52. *See supra* note 18 and accompanying text.

53. More than half the states now have laws allowing police to arrest an abuser even

Statistical evidence may be utilized to demonstrate that practice in a city amounts to discriminatory treatment. In *Watson v City of Kansas City*,⁵⁴ the plaintiff, who prevailed on her equal protection claim, produced statistics showing that the arrest rate in domestic assault cases in Kansas City was half that for nondomestic assaults.⁵⁵ The statistical evidence in *Watson* was effective because it was local (and thus relevant to the plaintiff's case), and it analyzed police response on the basis of the same classification that the plaintiff claimed existed (domestic compared with nondomestic assault victims) so that disparities could easily be seen. The plaintiff in *Watson* also offered evidence that police training for domestic violence situations was oriented toward mediation, with arrest as a last resort.⁵⁶ The court held that the statistical evidence, coupled with the training curriculum, constituted sufficient evidence of a municipal policy to withstand a motion for summary judgment and to render the municipality a proper party.⁵⁷

if the officers have not witnessed the assault. See Lerman, *supra* note 10, at 274, 282-83 (survey of state laws that permit warrantless arrest even if the police officer was not a witness to the abuse).

54. 857 F.2d 690 (10th Cir. 1988).

55. *Id.* at 695. The police defendants originally maintained that the statistics showing different arrest rates were not applicable to the case because the statistics did not take into account the determination of probable cause. The *Watson* court rejected this argument, however, stating that the determination of probable cause could also be influenced by the same discriminatory motives that the plaintiff alleged, and thus probable cause was not an objective standard. In other words, "the failure to account for probable cause does not necessarily undermine the probative value of the statistics." *Id.*

56. *Id.* at 696.

57. Note, however, that statistical evidence alone may not be sufficient for an equal protection claim. *Id.* ("[P]laintiff's statistical evidence alone may not be enough to prove the existence of a policy or custom." (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)); *c.f.* *Howell v. City of Catoosa*, 729 F. Supp. 1308, 1311-12 (N.D. Okla. 1990) (granting summary judgment on favor of the city on plaintiff's equal protection claim due to an insufficiency of statistical evidence)).

Testimony by other battered women concerning police nonresponse may also be offered as evidence of widespread discriminatory practices. Such testimony may be difficult to obtain, due to the fact that many battered women feel stigmatized by their abuse and are reluctant to come forward. In addition, this type of testimony usually provides less corroboration of the widespread nature of the discriminatory practices than statistical evidence. For these reasons, the testimony of other battered women may be somewhat less useful than statistical evidence. For an example of a case involving both the testimony of battered women and statistical evidence, see *Bruno v. Codd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

2. Facts Suggesting Municipal Approval of the Policy or Custom

Explicit approval of discriminatory police practices by the municipal government rarely exists in failure-to-protect cases. However, implicit approval of a policy will also satisfy the "policy or custom" element. Formal, written police department policies will satisfy the *Monell* requirements because they are created or approved by the police chief, who has final decision-making authority in this area.⁵⁸ As for informal policies or customs, the *Monell* Court stated that municipalities "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."⁵⁹

Courts have held that a city's silence may be taken as condoning the discriminatory practices when those practices are widespread or have occurred over a long period of time.⁶⁰ In *Thurman v. City of Torrington*,⁶¹ the Torrington police ignored the plaintiff's reports of threats and assaults over an eight month period, refused to arrest Charles Thurman even after watching him assault his ex-wife, refused to accept complaints, and refused to conduct an investigation.⁶² Reviewing these facts, the court held that tacit approval by the city allowed the individual police defendants to ignore plaintiff's numerous requests for help with impunity.⁶³ The court did not elaborate; however, it apparently accepted that many different members of the department repeatedly refused to

58. See *Pembaur v. Cincinnati*, 475 U.S. 469, 484-85 (1986) (municipal liability can be premised upon actions taken by a municipal employee with final decision-making authority).

59. 436 U.S. 658, 690-91 (1978).

60.

A municipality may be found to have adopted a policy through silence as a result of its failure to sanction its employees for a pattern of conduct of which municipal policymakers are aware. Stated in another manner, a municipality cannot "acquiesce" in a pattern of conduct by its employees, and then be heard to say that those employees were not acting pursuant to municipal policy.

Dudosh v. City of Allentown, 665 F.Supp. 381, 395 (E.D. Pa. 1987) (citing *Mariani v. City of Pittsburgh*, 624 F.Supp. 506 (W.D. Pa. 1986)), *vacated without opinion*, 853 F.2d 917 (3d Cir.), *cert. denied sub nom. Dudosh v. Warg*, 488 U.S. 942 (1988), *reconsideration granted in part and denied in part sub nom. Dudosh v. City of Allentown*, 722 F.Supp. 1233 (E.D. Pa. 1989).

61. 595 F.Supp. 1521 (D. Conn. 1984).

62. *Id.* at 1524-26; see *supra* note 49 and accompanying text (discussing the facts of the case in further detail).

63. See *id.* at 1530 (from a series of acts and omissions by the police department a pattern of indifference toward the plaintiff emerged).

help the plaintiff and that this behavior indicated a practice so widespread that the city must have known about it and condoned it.⁶⁴ Statistics such as those used by the plaintiff in *Watson* may also create an inference that the city knew of and accepted a widespread pattern of police refusal to provide protective services to abused women.⁶⁵

In summary, if there is no explicit policy that mandates less protection for victims of domestic violence, a plaintiff must show that the actual practices of the police department, combined with the city's failure to correct those practices, created a de facto policy of discrimination. Evidence that discriminatory practices are widespread or longstanding may be helpful both in showing a pattern of practice and in suggesting municipal approval. Such evidence may also help demonstrate that the municipal policy, rather than any individual officer's action, was the cause of the plaintiff's injury

B. Discrimination

There are two types of discrimination that may be alleged as part of a domestic violence equal protection suit.⁶⁶ The first type alleges that the municipal policy discriminates against victims of domestic violence. The second type of discrimination claim posits that police refusals to enforce domestic violence laws are actually a form of sex discrimination, since most domestic violence victims are female.⁶⁷ Although related, the two types of claims have different requirements and invoke different levels of judicial scrutiny

64. See *id.* ("Such an ongoing pattern of deliberate indifference raises an inference of 'custom or policy' on the part of the municipality.").

65. The plaintiff offered evidence that the domestic assault arrest rate in Kansas City was 16% while the nondomestic assault arrest rate was 31%. *Watson v. City of Kansas City*, 857 F.2d 690, 695 (10th Cir. 1988). The court in *Watson* held that "[a] suit against a municipality and a suit against a municipal official acting in his or her official capacity are the same" and that claims against the city and the individual police officers are thus one claim. *Id.* (citing *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.55 (1978)). Under this theory, the actions of the police officer are viewed as actions of the city and no evidence showing city approval of police practices is needed. However, it is unlikely that other courts will follow this reasoning, which essentially begs the question of municipal approval.

66. The two types of discrimination claims were first analyzed separately in *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). See Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers Inaction*, 30 B.C.L. REV. 1357, 1386-87 (1989).

67. See Case Comment, *supra* note 3, at 671 n.20 (almost 97% of reported domestic violence victims are female).

Therefore, courts must exercise great care in analyzing the type of discrimination alleged in order to avoid confusion between the two.⁶⁸

1. Discrimination against Victims of Domestic Violence

This type of discrimination claim alleges that lower levels of police protection are provided to victims of assault by their intimate partners than to victims of nondomestic assaults. This allegation may be proved by a municipal policy mandating that different treatment be accorded to domestic and nondomestic crimes.⁶⁹ The policy may thus discriminate against domestic violence victims on its face. Alternatively, a discriminatory policy may be shown through informal patterns of practice.⁷⁰ Because discrimination against victims of domestic violence is relatively easy to show, this has been the most commonly raised equal protection claim for domestic violence plaintiffs. Claims based on this type of discrimination survived motions to dismiss and for summary judgment in *Thurman v City of Torrington*,⁷¹ *Watson v City of Kansas City*,⁷² *Dudosh v City of Allentown*,⁷³ and *Balistreri v Pacifica Police Department*.⁷⁴

Suits involving discrimination against domestic violence victims receive the lowest level of judicial scrutiny because these victims have not been found to constitute a suspect classification.⁷⁵ A municipality need only show that the alleged disparate treatment is a rational means to a legitimate end.⁷⁶ Nevertheless, municipal-

68. See *infra* notes 94-104 and accompanying text.

69. For instance, a domestic assault may receive a lower response priority than a street assault, may be assigned fewer responding officers, and often a report is not filed. See *supra* notes 42-44 and accompanying text.

70. See *supra* text accompanying notes 41-65.

71. 595 F Supp. 1521 (D. Conn. 1984).

72. 857 F.2d 690, 696 (10th Cir. 1988).

73. 665 F Supp. 381 (E.D. Pa. 1987), *vacated without opinion*, 853 F.2d 917 (3d Cir.), *cert. denied sub nom.* *Dudosh v. Warg*, 488 U.S. 942 (1988), *reconsideration granted in part and denied in part sub nom.* *Dudosh v. City of Allentown*, 722 F Supp. 1233 (E.D. Pa. 1989) (court will reconsider equal protection claim based inadequate training).

74. 855 F.2d 1421 (9th Cir. 1988) (women were permitted to replead their defective complaint because court thought it strongly suggested an equal protection claim).

75. Suspect classifications consist of "discrete and insular minorities." See *United States v. Carolene Products Co.*, 384 U.S. 144, 152 n.4 (1937). Strict scrutiny is also employed when state action infringes upon a fundamental right that derives expressly or impliedly from the Constitution. *Plyler v. Doe*, 457 U.S. 202, 215 n.15 (1981).

76. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 55, *reh'g denied*, 411

ities have yet to meet this "rational basis" standard, indicating that courts have not been entirely deferential in examining the rationality of policies of discrimination against victims of domestic violence.⁷⁷

2. Sex Discrimination

The second possible type of claim is sex discrimination. A plaintiff may argue that the failure to enforce the laws against domestic violence harms women disproportionately, since almost all reported victims of domestic violence are female.⁷⁸ At least on their face, however, most municipal police department policies are not discriminatory with respect to women. Therefore, under the rule developed in *Personnel Administrator v Feeney*,⁷⁹ a plaintiff claiming that a facially neutral policy actually discriminates against women must show (1) an adverse impact on women, and (2) that the law or policy was motivated by an animus against women.⁸⁰

While plaintiffs bringing sex discrimination claims have usually been able to show that police refusal to enforce domestic violence laws has had a disproportionately adverse effect on women,⁸¹ they have had more difficulty demonstrating that the policy is based on a discriminatory motive.⁸² In order to satisfy the *Feeney*

U.S. 959 (1973).

77. See *infra* text accompanying notes 111-27.

78. In *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), the court quoted statistics that 29 of 30 domestic violence victims are women. *Id.* at 1528 n.1 (citation omitted); see Comment, *supra* note 9, at 213 n.1 ("95% of all assaults on spouses or ex-spouses were committed by men") (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983)); I. Silver, *supra* note 40, at 2-23 n.6 (1990) (an estimated 97% of spouse abuse victims are female)).

79. 442 U.S. 256 (1979).

80. *Id.* at 274. "'Discriminatory purpose,' implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (footnote omitted); see Case Comment, *supra* note 3, at 685-87 (describing the two-part *Feeney* test).

81. See *supra* note 78; see also *McKee v. City of Rockwall*, 877 F.2d 409, 423 (5th Cir. 1989) (Goldberg, J., concurring in part, dissenting in part) ("[N]umerous scholarly studies have recognized that women are primarily the victims of domestic abuse.").

82. See, e.g., *Watson v. City of Kansas City*, 857 F.2d 690, 696-97 (10th Cir. 1988) (sex discrimination claim denied because of lack of evidence of either adverse impact or discriminatory intent); *Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988) (police categorization of crimes as either domestic violence or nondomestic violence is insufficient to show intent to discriminate necessary for a successful challenge under the *Feeney* standard). Most gender discrimination claims have been dismissed for failure to satisfy

standard for discriminatory intent, the plaintiff must show that the policy in question rests on impermissible stereotypes regarding women and is not motivated by a gender-neutral purpose.⁸³ In *Feeney*, the Supreme Court held that the standard had not been met, as the pro-veteran job preference at issue had a valid, gender-neutral purpose.⁸⁴ Justice Stevens also noted that the preference disadvantaged almost as many men as it did women.⁸⁵

The *Feeney* intent standard may be met in cases where police refusal to intervene rests on stereotypic notions regarding a man's prerogative to "discipline" his wife or reflecting the belief that "a man's home is his castle."⁸⁶ Such policies reinforce the belief that women must be submissive to men in the home and send the message that women who do not please their spouse "deserve" to be abused. In *Mississippi University for Women v Hogan*,⁸⁷ the Supreme Court held that discriminatory practices based on "traditional, often inaccurate, assumptions about the proper roles of men and women" would be found invalid.⁸⁸ Municipal policies of police nonintervention in domestic assault often rest on such "traditional, often inaccurate, assumptions."⁸⁹

this second prong of the *Feeney* test.

83. For an excellent discussion of domestic violence sex discrimination claims, see Eppler, *supra* note 13, at 796-805; Case Comment, *supra* note 3, at 683-87.

84. *Feeney*, 442 U.S. at 277-78. The Massachusetts law challenged in *Feeney*, which created a preference for hiring military veterans, was found to "confer[] upon a particularly deserving [group] a competitive headstart." *Id.* at 277.

85. *Id.* at 281 (Stevens, J., concurring).

86. The husband's right to discipline his wife has a long history at common law, related to the concept of wives as chattel. For a review of the changing scope of the disciplinary prerogative at common law, see UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 41, at 1-3; Eppler, *supra* note 13, at 791-93; Note, *supra* note 16, at 705.

87. 458 U.S. 718 (1982).

88. *Id.* at 726. The Court declared:

Care must be taken in ascertaining whether the statutory objective [here, the policy decision not to intervene in domestic assaults] itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude members of one gender because they are presumed to be innately inferior, the objective itself is illegitimate.

Id. at 725.

89. "'Police response to social conflict, particularly domestic social conflict, is intertwined with traditional conceptions of male-female roles. There appears wider acceptance of the idea that a little corporal punishment to the recalcitrant wife is not all that deviant.'" J. FLEMING, *supra* note 41, at 171-72, 152 (quoting Detroit Executive Deputy Chief of Police James Bannon), *quoted in* Eppler, *supra* note 13, at 798 n.46.

Police officers have stated that they might "make an arrest depending upon the reason the man hit her." Blodgett, *Violence in the Home*, 73 A.B.A. J., May 1987, at 66, 68, *quoted in* Comment, *supra* note 8, at 217. While the abuser's justification for the assault, may have relevance as a defense at trial, it should not affect a police officer's determination

Evidence of an intent to discriminate against women may sometimes be obtained from the police themselves, through verbal statements made to the plaintiff at the scene of the assault or in deposition. In the few cases in which a domestic violence sex discrimination claim has been allowed to proceed to trial, the courts have relied on statements made by police officers that indicated their refusal to intervene was motivated by either an animus toward abused women,⁹⁰ or a view that domestic violence is a relatively nonserious crime affecting primarily women.⁹¹

Thus, a domestic violence victim may be able to bring a successful sex discrimination claim by showing that a facially neutral police policy has a discriminatory effect (disproportionate harm to women) and was motivated at least in part by gender-based biases (stereotypic notions about women).⁹² If the plaintiff is successful

of whether there has been an assault in the first place.

90. *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1427 (9th Cir. 1988) (responding officer stated that he "did not blame plaintiff's husband for hitting her, because of the way she was "carrying on"""). But in *McKee v. City of Rockwall*, 877 F.2d 409 (5th Cir. 1989), the court held the statement made by the police chief that "officers did not like to make arrests in domestic assault cases since the women involved either wouldn't file charges or would drop them," *id.* at 411, was not probative evidence of a discriminatory intent. *Id.* at 415.

91. *Dudosh v. City of Allentown*, 665 F. Supp. 381, 392-94 (E.D. Pa. 1987) (officers' statements in depositions evidenced a belief that domestic violence is a less serious crime than assault by a stranger); see Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 722-26 (1989). When the perpetrator and the victim are intimate partners, "the legal system transforms the behavior into domestic violence, an implicitly less heinous offense." *Id.* at 726.

92. Some plaintiffs have attempted to use the "discriminatory enforcement" argument first recognized in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), alleging that the discriminatory enforcement of assault laws is an intentionally maintained disadvantage to women. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (police practice of providing inadequate or no protection to women abused by close relations caused the law to be implemented in a discriminatory manner). Under *Yick Wo*, the intent to discriminate may be inferred if a law is enforced so unevenly that one class of persons is singled out to bear the entire burden of the law. *Yick Wo*, 118 U.S. at 373-74. If a municipality chooses to enforce its assault laws so that arrests are made in other types of cases, but never in domestic violence cases, a domestic violence victim injured by the discriminatory application of the laws could bring a *Yick Wo*-type claim.

In *Yick Wo*, 100% of Chinese laundry owners were denied permits, as compared to only 1% of nonChinese laundry owners. The court in *Watson* did not directly address the issue but apparently considered the disproportionality between arrest rates of 31% for nondomestic assaults versus 16% for domestic assaults insufficient to infer an intent to discriminate against women. *Watson v. City of Kansas City*, 857 F.2d 690, 695-97 (10th Cir. 1988) (while plaintiff's statistical evidence may not have been sufficient standing alone, the facts, as a whole, were sufficient to support a jury finding that city police afforded less protection to domestic violence victims than to victims of other crimes). As

in establishing a viable sex discrimination claim, the level of judicial scrutiny is heightened, and the state must articulate an important government interest to justify the discriminatory policy.⁹³ As it is unlikely that a municipality could meet this higher level of scrutiny, a well-pleaded sex discrimination claim would virtually guarantee success for the plaintiff. However, not all plaintiffs may be able to establish the discriminatory intent necessary for a gender discrimination claim.

3. The Necessity of Distinguishing between the Two Types of Discrimination Claims

While discrimination against domestic violence victims may also be used as a starting point for a sex discrimination claim, the two types of claims are different and should be analyzed separately by courts. One key distinction between the two is that sex discrimination claims impose a higher burden of proof on the plaintiff due to the necessity of showing discriminatory intent in the absence of a facially discriminatory policy. In the event that a plaintiff chooses not to bring a sex discrimination claim (or brings both types of claims but is denied on the sex discrimination claim), courts must recognize that the claim of discrimination against domestic violence victims stands on its own.⁹⁴ Courts have

Watson demonstrates, uncertainty exists as to how much disproportionality will be required to create an inference of discriminatory motive. Perhaps as a result of this unresolved disproportionality issue, no domestic violence victim has yet prevailed on a gender discrimination claim using a *Yick Wo* argument alone.

In *Watson*, the court referred to *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979), to support its assertion that plaintiffs seeking to show discriminatory intent through adverse impact bear a heavy burden. *Watson*, 857 F.2d at 696-97. The Supreme Court in *Feeney* upheld a veterans' job preference statute even though fewer than 2% of women would be eligible for the benefit, thereby disadvantaging the remaining 98%. 442 U.S. at 270, 280-81. However, the Supreme Court may simply have been unwilling to find discriminatory intent in what was clearly an attempt to help veterans. Both the plainly legitimate purpose of the statute, and the fact that the statute discriminated against almost as many non-veteran men as women, *id.* at 281 (Stevens, J., concurring), militate against taking the 98% disproportionality of *Feeney* as a true threshold for discriminatory intent.

93. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (For a gender classification to be upheld, it "must serve important government objectives and must be substantially related to achievement of those objectives."), *reh g denied*, 429 U.S. 1124 (1977). Courts have applied an intermediate level of scrutiny in *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984), and *Dudosh v. City of Allentown*, 665 F. Supp. 381, 392 (1987). See I. Silver, *supra* note 40, § 2.07, at 2-23 n.6 ("Since gender is a 'quasi-suspect' classification, and since 97% of all spouse abuse victims are estimated to be female, an intermediate level of scrutiny of the classification is proper.").

94. The court in *Watson* took exactly this two-track approach, holding that the

sometimes confused the two types of claims, the requirements of each, and the appropriate level of scrutiny that should be applied.⁹⁵ This confusion has muddled the two theories and has impaired the ability of courts to apply precedent.

In *Thurman v City of Torrington*, the plaintiff alleged that the police provided consistently less protection for women assaulted by husbands or boyfriends than for those attacked by strangers.⁹⁶ Although the sex discrimination claim was not stated separately from the claim of discrimination against victims of domestic violence, the specification that women victims of domestic abuse were being discriminated against implicitly raised both types of discrimination claims. As the complaint alleged both, the court held that the higher level of scrutiny required to justify sex discrimination should be applied.⁹⁷ While the court's willingness to recognize the implied sex discrimination claim is salutary, the court should have considered the separate requirements of each type of claim before denying dismissal on both implied claims.

In *Hynson v City of Chester*,⁹⁸ the court confused the two types of discrimination, applying the test for sex discrimination to a claim of discrimination against domestic violence victims. Although the complaint alleged that "police officers treat domestic abuse cases differently than non-domestic cases"⁹⁹ (a clear claim of discrimination against domestic violence victims), the court interpreted the allegation as raising only a sex discrimination claim.¹⁰⁰

The court's error apparently derived from a misreading of *Watson*, where the court denied the plaintiff's sex discrimination claim while allowing her claim of discrimination against domestic

plaintiff's claim of discrimination against domestic violence victims was valid, while denying her gender discrimination claim. *Watson*, 857 F.2d at 696-97.

95. See *infra* text accompanying notes 98-104.

96. *Thurman*, 595 F Supp. at 1526-27. The plaintiff also alleged that the city and its police had a similar policy of affording little or no protection to children abused by their fathers or stepfathers. However, this claim was dismissed for lack of evidence. *Id.* at 1527.

97. Sex-based classifications require a substantial relation to an important governmental interest. *Id.* at 1527 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). The court noted the possibility that at trial the classification might turn out not to be based on gender, in which case a lower level of scrutiny would apply. For the purpose of reviewing the motion to dismiss, however, the court took the plaintiff's allegations of sex-based discrimination as true. *Id.* at 1528 n.1.

98. 864 F.2d 1026 (3d Cir. 1988).

99. *Id.* at 1030.

100. See *id.*

violence victims to proceed to trial.¹⁰¹ Although the *Hynson* court correctly concluded that proof of discrimination against domestic violence victims is not by itself enough to show intent to discriminate against women, it wrongly concluded that the two types of claims were in fact the same. The *Hynson* court defined the requirements for an equal protection claim as (1) a municipal policy or custom of providing less protection to victims of domestic violence than to other victims of violence, (2) proof that discrimination *against women* was a motivating factor behind the adoption of the policy, and (3) proof that the plaintiff was injured by the policy or custom.¹⁰² The court then found that the plaintiff had not carried her burden of showing an intent to discriminate against women and foreclosed her equal protection claims entirely.¹⁰³ The court's mistake lay in the second part of the test: the plaintiff should have had to show that the policy intentionally discriminated against *victims of domestic violence*, rather than women, since it was the discriminatory classification of domestic versus nondomestic assault victims that was alleged, not gender discrimination.

By incorrectly requiring the plaintiff to make the more difficult showing of a gender discrimination claim and dismissing her claim of discrimination against domestic violence victims, the *Hynson* court wrongly dismissed the plaintiff's equal protection claim and confused the standards for the two types of discrimination that may be alleged.¹⁰⁴ Thus, although *Hynson* is the more recent case, *Watson* remains the clearest exposition of the two types of discrimination claims and of their requirements. Courts should look to *Watson* rather than *Hynson* for guidance in domestic violence equal protection cases.

101. *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988). The plaintiff in *Watson* separately alleged each type of discrimination in her complaint.

102. *Hynson*, 864 F.2d at 1031 (emphasis added).

103. *Id.* Additionally, the court held that the defendant officers would possess a qualified immunity on the equal protection claim if a reasonable police officer would not have known that a policy of treating domestic violence cases as nonserious offenses would violate the equal protection rights of women victims. *Id.* at 1032.

104. Further evidence of the *Hynson* court's fundamental misunderstanding of the legal theories behind this line of cases is evidenced by the court's erroneous statement that *Thurman* dealt with a section 1983 due process claim. *Id.* at 1031 n.14. In truth, *Thurman* was solely an equal protection claim. *See* 595 F Supp. 1521, 1526-31 (D. Conn. 1984).

C. Causation

Although courts often cite causation—a causal link between the municipal policy or custom and the plaintiff's injury—as a separate element in section 1983 equal protection claims, in practice it is rarely addressed separately. Instead, once the existence of a municipal policy or custom has been shown, courts have assumed that the injurious actions of the individual police officers were taken pursuant to that policy, not merely on their own. In *Thurman* the court upheld the plaintiff's allegation that the police officers' inaction resulted from the city's policy; it stated that "a complaint of this sort will survive dismissal if it alleges a policy or custom of condoning police misconduct that violates constitutional rights and alleges 'that the City's pattern of inaction caused the plaintiffs any compensable injury'"¹⁰⁵ Conversely, the failure to prove the existence of a municipal policy or custom may mean that the causation element cannot be shown either. In *Bartalone v. County of Berrien*,¹⁰⁶ an otherwise valid equal protection claim was dismissed because the plaintiff failed to allege any facts demonstrating that her injury was traceable to a municipal policy or custom rather than the isolated actions of a police officer.¹⁰⁷ Evidence showing a discriminatory pattern of practice is thus necessary to establish both the elements of policy or custom and causation.

D Municipal Defenses To Equal Protection Claims

Municipalities may avoid liability under section 1983 equal protection claims if they can show either that the plaintiff's alleged harm was not caused by a discriminatory municipal pol-

105. *Thurman*, 595 F.Supp. at 1530 (quoting *Batista v. Rodriguez*, 702 F.2d 393, 397-98 (2d Cir. 1983)). The complaint alleged that the

City of Torrington acting through its Police Department, condoned a pattern or practice of affording inadequate protection, or no protection at all, to women who have complained of having been abused. Said pattern, custom or policy, well known to the individual defendants, was the basis on which they ignored said numerous complaints and reports of threats to the plaintiffs with impunity.

Id. at 1529.

106. 643 F.Supp. 574 (W.D. Mich. 1986).

107. *Id.* at 578-79. Plaintiff must allege that "the wrong she suffered was due to municipal policy and not simply the isolated action of a single nonpolicymaking wrongdoer." *Id.* at 579 (citations omitted).

icy,¹⁰⁸ meaning that the required elements for section 1983 suits are not present, or that the policy advances a state interest sufficient to justify the alleged discrimination.¹⁰⁹

With regard to the elements of a section 1983 suit, a municipality may be able to avoid liability by showing that its police policies are nondiscriminatory and provide effective protection to victims of domestic violence. To succeed on such a theory, the city may be required to show that its nondiscriminatory policy was in fact carried out, through police training in appropriate techniques and actual nondiscriminatory law enforcement. Several cities have already adopted measures to ensure equal protection for domestic violence victims and have found that these efforts reduce the police department's workload as well as the city's risk of liability.¹¹⁰

Alternatively, the municipality could demonstrate to the court that discrimination in police protection is justified. Since domestic violence victims are not a suspect classification, all that is required is that the discriminatory policy or custom bear a rational relationship to a legitimate state end.¹¹¹ In most contexts, the low level of judicial scrutiny under the "rational basis" test translates into approval of whatever justification is offered.¹¹² However, in the context of domestic violence failure-to-protect

108. *Id.* at 578-79.

109. A municipality cannot avoid section 1983 equal protection liability under qualified immunity. The Supreme Court, in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), held that individual defendant officers were protected by qualified immunity where the plaintiff's particular constitutional right was not clearly established at the time of the alleged violation. However, *Owen v. City of Independence*, 445 U.S. 622, 638 (1980), held that a city may not claim immunity through the immunity of its individual officers, so the issue of qualified immunity for individual defendants is irrelevant to the question of municipal liability. Similarly, the court in *Watson v. City of Kansas City* concluded that "there is nothing anomalous about allowing such a suit [against the city] to proceed when immunity shields the individual defendants." 857 F.2d 690, 697 (10th Cir. 1988).

110. Among these cities are Duluth, Minnesota; Concord, New Hampshire; Pittsburgh, Pennsylvania; Charleston, South Carolina; and Newport News, Virginia. *See* Comment, *supra* note 8, at 215 (detailing the success of these cities); *see also* Lang, *supra* note 8, at 55 (describing the experiences of particular cities with stricter enforcement of domestic violence laws).

111. *See* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44-53 (1973) (articulating the rational basis standard). If the claim were one of discrimination against women, any justification offered would have to meet a higher level of scrutiny. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see supra* note 97 and accompanying text. As cities have not yet presented a justification that satisfies the lowest level of scrutiny, rational basis, it is difficult to imagine a justification that could withstand the intermediate level of scrutiny.

112. *See* G. GUNTHER, *CONSTITUTIONAL LAW* 558 (11th ed. 1985) (describing the deferential rational basis standard as "minimum scrutiny in theory and virtually none in fact").

cases, courts have been willing to scrutinize the relationship between means and ends more closely and have suggested that not all justifications will be accepted.

In *Thurman v City of Torrington*, the city failed to articulate any reason for its policy in its pleadings, leaving the plaintiff's equal protection claim unchallenged.¹¹³ Nevertheless, the court took the opportunity to reject possible justifications for discrimination against victims of domestic abuse. First, the court stated that "[t]oday any notion of a husband's prerogative to physically discipline his wife is an 'increasingly outdated misconception.'"¹¹⁴ The court then rejected the "notion that [refusing to intervene in domestic violence cases] can be justified as a means of promoting domestic harmony" since the plaintiff's marital harmony has already been shattered by violence.¹¹⁵ The fact that a victim seeks police intervention clearly indicates her belief that there is a problem that she cannot handle on her own.¹¹⁶

A court that suspects irrational negative stereotypes about a group underlie the adoption of a discriminatory policy may be justified in applying a rational basis standard that is nondeferential. In this situation, courts look carefully at the means and ends of the policy, even when no suspect class is involved and the level of scrutiny is theoretically minimal. In *City of Cleburne v Cleburne Living Center, Inc.*,¹¹⁷ the Supreme Court applied a nondeferential rational basis standard to strike down a burdensome city zoning permit procedure for group homes for the mentally retarded, because they found that irrational fears about mentally retarded persons provided a partial motivation for the city's policy. The Court held that group homes for mentally retarded persons were no different from hospitals, fraternity houses, and nursing homes (for which no special permit was required). The Court stated that "mere negative attitudes unsubstantiated by factors which are properly cognizable are not permissible bases for treating a home for the mentally retarded differently. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'"¹¹⁸

113. 595 F Supp. 1521, 1528 (D. Conn. 1984).

114. *Id.* at 1528 (quoting *Craig v. Boren*, 429 U.S. at 198-99).

115. *Id.* at 1529.

116. *Id.*

117. 473 U.S. 432 (1985).

118. *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Domestic violence victims are not situated differently from other citizens in their need for protection from violence. Applying the *Cleburne* rule, a court could easily find that "mere negative attitudes" about victims of abuse lie behind the police refusal to intervene in domestic assaults. If the court finds that such negative attitudes are implicit in the city's policies, it would be appropriate to apply the nondeferential rational basis standard used in *Cleburne*. Under this test a court would examine more carefully the city's purpose and the rationality of the means used to achieve it.

The nondeferential rational basis test provides a needed check on justifications that cities may offer for discriminating against domestic violence victims. For instance, one defense that a city might offer is that it is entitled to allocate scarce resources as it sees fit, and that such allocation includes the ability to assign differing levels of police response to various crimes.¹¹⁹ Under a deferential rational basis standard, this justification would likely be accepted by a court. Under the nondeferential rational basis standard established in *Cleburne*, however, limiting the police protection available to domestic violence victims on efficiency grounds would likely be found irrational for two reasons. First, providing less assistance to victims of domestic violence is an unreasonable method of allocating the burden of crime across citizens. Because domestic violence is the leading cause of injury to women in the United States,¹²⁰ enforcement of domestic violence laws against batterers may be the single most effective method of reducing injury to local citizens. Police refusal to enforce these laws would leave an especially vulnerable class of citizens unprotected against crime, while offering more protection to citizens who may need it less. Second, as arresting batterers has been shown to reduce repeat domestic calls,¹²¹ encouraging the police to take prompt action on domestic violence complaints may actually save money over a policy of nonintervention.¹²² "This is particularly evident in

119. See Eppler, *supra* note 13, at 795 (suggesting that police may try to offer an efficiency justification based on the fact that battered women often drop charges brought against their assailants).

120. See American College of Obstetricians and Gynecologists, *supra* note 4.

121. See Sherman & Berk, *supra* note 12, at 267 (under three different statistical methods it was shown that arrest, not separation or mediation, resulted in the lowest number of repeat assaults).

122. See Comment, *supra* note 8, at 216 (citing great decreases in the rate of domestic violence-related homicides in Newport News, Virginia, and assaults in Duluth, Minne-

light of evidence indicating that, of the standard modes of police intervention in cases of [domestic] abuse, arrest is the most effective means of reducing domestic violence."¹²³ For these reasons, the "allocation of scarce resources" would not be a rational justification for nonenforcement of domestic violence laws under a nondeferential standard of review.¹²⁴

In the equal protection cases brought to date, municipalities have not offered any justification for their discriminatory policies,¹²⁵ apparently preferring to defend on the ground that the city had no policy of discrimination in the first place. By making this choice, municipalities avoid having to meet the nondeferential rational basis standard of *Cleburne*. However, even under the most deferential rational basis standard, courts so far have allowed every properly established equal protection claim brought by domestic violence victims to proceed to trial.¹²⁶ Therefore, equal protection continues to be the most effective theory of recovery for plaintiffs injured by police unwillingness to assist domestic violence victims.¹²⁷

III. DUE PROCESS THEORY

Although equal protection claims continue to be asserted in

sota, after adoption of mandatory arrest policies in those cities).

123. Case Comment, *supra* note 3, at 690 (citing Sherman & Berk, *supra* note 12, at 267).

124. For a review and rebuttal of other possible municipal justifications, see Case Comment, *supra* note 3, at 687-90.

125. See, e.g., *Thurman*, 595 F Supp. at 1528 ("In its memorandum and at oral argument, the city has failed to put forward any justification for its disparate treatment of women.").

126. See *supra* notes 33-40. For cases in which equal protection claims were not properly established, see *McKee v. City of Rockwall*, 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 727 (1990); *Howell v. City of Catoosa*, 729 F Supp. 1308 (N.D. Okla. 1990); *Bartalone v. County of Berrien*, 643 F Supp. 574 (W.D. Mich. 1986).

127. In *McKee*, the Fifth Circuit expressed the view that the Supreme Court's holding in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989), requires courts to view equal protection claims cautiously to ensure that plaintiffs do not "circumvent the rule in *DeShaney* by converting every Due Process claim into an Equal Protection Claim." *McKee*, 877 F.2d at 413, (cited with approval in *Howell*, 729 F Supp. at 1312. If other courts follow *McKee's* cautious view, equal protection claims may be more difficult to prove. However, the court's statement in *McKee* is completely without support in *DeShaney* and is almost certainly wrong. The footnote referred to by the *McKee* court states that "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney*, 489 U.S. at 197 n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). This language does not support the cautious tone suggested by the *McKee* court.

section 1983 failure-to-protect cases, due process claims have provided an additional theory of recovery. Due process claims allow an avenue of recovery for the plaintiff who can show that she was injured by action taken pursuant to a municipal policy or custom, but who may not be able to prove the discriminatory effect or intent needed for an equal protection claim.

The central tension in due process failure-to-protect cases concerns the issue of whether a state can be liable under the fourteenth amendment for failing to act. Traditionally, the state must take some affirmative action that deprives an individual of life, liberty, or property in order to trigger the protection of the due process clause. In failure-to-protect cases, however, the deprivation is caused by state inaction. The challenge for plaintiffs seeking to bring due process claims lies in showing that the state's failure to act violated the fourteenth amendment. Two approaches have been developed to resolve this action/inaction dilemma.

The first approach is the special relationship theory. This theory posits that in certain circumstances the state has an obligation to act, and by failing to act the state violates the constitutional rights of the person toward whom it owes the obligation.¹²⁸ However, this approach was recently rejected by the Supreme Court in *DeShaney v Winnebago County Department of Social Services*.¹²⁹ The second approach holds that the creation of an arbitrary governmental policy of inaction toward certain citizens itself constitutes state action.¹³⁰

A. Special Relationship Theory

The primary method of tying a state's inaction to a due process violation has been the special relationship theory. Normally, the state does not owe a duty of protection to any specific person, since the duty to protect is a general one owed to the public at large.¹³¹ In failure-to-protect cases, plaintiffs have attempted to show that a "special relationship" existed between themselves and the state at the time of their injury, distinguishing them from the general public and rendering the state's failure to protect them actionable.

This theory has always been somewhat tenuous, drawing its

128. See *infra* text accompanying notes 131-54.

129. 489 U.S. 189 (1989).

130. See *infra* text accompanying notes 162-89.

131. See *Martinez v. California*, 444 U.S. 277, 284-85 (1980).

strength mainly from tort principles imported into constitutional law to provide a familiar system for deciding liability issues in section 1983 cases. As a result of the Supreme Court's 1989 decision in *DeShaney v Winnebago County Department of Social Services*,¹³² the special relationship theory has lost much of its applicability in the failure-to-protect context. The origins of special relationship theory in failure-to-protect cases are traced below, and the impact of *DeShaney* is analyzed.

1. Development of the Theory

In dictum, the *Thurman v City of Torrington* court uttered a statement that has been used repeatedly in domestic violence failure-to-protect cases:

City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community. If officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an *affirmative duty to take reasonable measures to protect* the personal safety of such persons in the community.¹³³

This declaration served as an underpinning for section 1983 claims brought under the due process clause alleging an "affirmative duty" on the part of police to provide protection to persons known to be in danger of domestic assault. Nevertheless, the concept of an affirmative duty to protect is of dubious validity. As the cases discussed below indicate,¹³⁴ defining the circumstances under which a duty to protect is triggered has been problematic and continues to be a source of conflict.

The phrase "special relationship" grew out of the "special custodial or other relationships created or assumed by the state" identified by the Fourth Circuit in *Fox v Custis*.¹³⁵ The concept of special relationship was first applied to prisoners in *Estelle v Gamble*.¹³⁶ The Supreme Court held that since an inmate in the custody of the state is dependent on the state for certain needs, failure to meet those needs may be a violation of the eighth

132. 489 U.S. 189 (1989).

133. 595 F. Supp. 1521, 1527 (D. Conn. 1984) (citation omitted) (emphasis added).

134. See *infra* notes 146-54 and accompanying text.

135. 712 F.2d 84, 88 (4th Cir. 1983) (reciting instances in which state liability in failure-to-protect cases might arise).

136. 429 U.S. 97 (1976).

amendment for which the state is liable under section 1983.¹³⁷ This duty to protect individuals in custody was later held applicable under the fourteenth amendment as well. According to the Court, "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—trigger[s] the protections of the Due Process Clause"¹³⁸ The scope of the custodial relationship under the fourteenth amendment has been expanded to include nonprisoners for whom the state has assumed legal responsibility, such as state psychiatric hospital inmates¹³⁹ and foster children.¹⁴⁰

Efforts to extend the special relationship concept beyond the custodial context have been problematic. Courts have turned to tort principles such as foreseeability of harm and causation to set coherent limits on state liability.¹⁴¹ For example, in *Martinez v California*,¹⁴² the Supreme Court held that the state was not liable for a parolee's murder of a fifteen year old girl because the killing was "too remote" a consequence of the state's decision to release the parolee.¹⁴³ These tort concepts have been integrated

137. *Id.* at 101-05. In *Estelle*, the plaintiff alleged that the State's failure to provide adequate medical attention for his back injury was cruel and unusual punishment. *Id.* at 99-101.

138. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989).

139. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (state had constitutional duty to provide safety, medical attention, and some type of training to mentally retarded patient). *But cf. Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (state had no duty to protect member of the public from released schizophrenic who killed her).

140. *See Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981) (nonperformance of custodial duties to a foster child may violate section 1983).

141. For a discussion of the use of tort principles in section 1983 due process claims, see Note, *Defining the Scope of the Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 CORNELL L. REV. 940 (1985) (discussing causation); Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986) (same).

142. 444 U.S. 277 (1980).

143. *Id.* at 285. Courts have continued to deny state liability when the danger was to the public as a whole rather than to a known individual. *See, e.g., Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983) (section 1983 claim dismissed because released arsonist did not have special relationship to plaintiff whose house was burned down); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (no constitutional right to be protected from murderers).

Courts have been more willing to entertain claims when the state knew that former criminal or psychiatric inmates posed a danger to identifiable individuals and failed to act to protect those individuals. *See, e.g., Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (repeated notice to police of husband's danger toward wife created special relationship and duty to protect); *Sherrell ex. rel. Wooden v. City of Longview*, 683 F Supp. 1108 (E.D. Tex. 1987) (repeated reports to police of child abuse by a certain indi-

into the factors used to determine whether a special relationship exists. In *Jensen v Conrad*,¹⁴⁴ the Fourth Circuit reviewed the special relationship line of cases and summarized the factors to be considered as: (1) whether the criminal or victim was in state custody during or shortly before the incident; (2) whether the state committed itself to protecting a particular class or specific individuals; and (3) whether the state knew of the danger to the victim.¹⁴⁵

2. Special Relationship Theory in the Context of Domestic Violence Cases

Victims of domestic violence have premised their failure-to-protect claims on similar tort-based special relationship theories. In *Dudosh v City of Allentown*,¹⁴⁶ the court found that a special relationship existed between the plaintiff and the city police department based on the police department's knowledge of repeated attacks on the victim and the fact that the department had been served with a protection order that "placed an affirmative duty upon the police to protect" the victim.¹⁴⁷ The court's finding was

vidual was sufficient to create a special relationship). This type of state liability is similar to the liability imposed on psychiatrists who are aware of the danger their patients pose to specific people. See *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

144. 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

145. *Id.* at 194 n.11. These three factors are equivalent to the tort concepts of state assumption of duty and foreseeability of harm.

146. 629 F Supp. 849 (E.D. Pa. 1985) [hereinafter *Dudosh I*], *summary judgment granted in part and denied in part*, 665 F Supp. 381 (E.D. Pa. 1987) [hereinafter *Dudosh II*], *vacated without opinion* 853 F.2d 917 (3d Cir.), *cert. denied sub nom. Dudosh v. Warg*, 488 U.S. 942 (1988), *reconsideration granted in part and denied in part sub nom. Dudosh v. City of Allentown*, 722 F Supp. 1233 (E.D. Pa. 1989) (*reconsideration granted with respect to equal protection claim on inadequate training and denied with respect to due process claim*).

147. *Dudosh I*, 629 F Supp. at 855. In *Dudosh II* the court granted summary judgment on the due process claim, in part because the facts were insufficient to prove special relationship. *Dudosh II*, 665 F Supp. at 390. An individual may have a constitutionally protected liberty interest in bodily security. See *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977) (discussing whether corporal punishment in schools violates the due process clause). Deprivation of this liberty interest without due process violates the fourteenth amendment. See *id.*

The *Dudosh I* court was following the lead of the Third Circuit in *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985) (vacating the dismissal of a case brought by an abused child's estate), which in turn relied heavily on *Jensen*. The *Dudosh I* court also noted that the court in *Bailey* cited approvingly the language in *Thurman* that "[c]ity officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community." *Dudosh I*, 629 F Supp.

interpreted as having been based solely on the *Jensen* "state knowledge" factor; therefore, it substantially reduced the level of evidence needed to establish a special relationship. Two subsequent domestic violence cases, *Lowers v City of Streator*¹⁴⁸ and *Sherrell ex rel. Wooden v City of Longview*,¹⁴⁹ held that a special relationship could be created solely by the city's awareness of the victim's plight.

By 1988 courts had begun to back away from this bold position. In *Balistreri v Pacifica Police Department*,¹⁵⁰ the Ninth Circuit noted that although state awareness may be considered in the special relationship determination, "[t]he district court [was] probably correct in its suggestion that the state's awareness of the victim's plight, by itself, will not create a 'special relationship.'"¹⁵¹ The Ninth Circuit identified four factors to be weighed in determining the existence of a special relationship:

- (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.¹⁵²

The court concluded that, while awareness of risk was insufficient standing alone, state awareness plus a state commitment to protect the victim¹⁵³ was enough to validate the plaintiff's claim of a special relationship.¹⁵⁴

at 855 n.6 (quoting *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (citation omitted)).

148. 627 F. Supp. 244, 246 (N.D. Ill. 1985) (defendant's knowledge that plaintiff faced a certain danger from a known individual found to have created a special relationship).

149. 683 F. Supp. 1108, 1113 (E.D. Tex. 1987) (defendant's awareness of repeated threats to the child by a specified individual created a special relationship).

150. 855 F.2d 1421 (9th Cir. 1988), *superseded*, 897 F.2d 368 (9th Cir.), *withdrawn and superseded*, 901 F.2d 696, 700 (9th Cir. 1990) (following *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)).

151. *Balistreri*, 855 F.2d at 1426 (district court cited *Jensen v. Conrad*, 747 F.2d 185, 195 n.11 (4th Cir. 1984)).

152. *Balistreri*, 855 F.2d at 1425.

153. The court found allegations that the state had made a commitment to provide the plaintiff with protective services when it issued her a protection order sufficient to satisfy the fourth factor of its special relationship test. *Id.* at 1426.

154. *Id.* While *Dudosh I* is read as establishing the proposition that only state awareness is required for a special relationship claim, *see supra* notes 144-45 and accompanying text, in fact, the *Dudosh I* court based its holding on awareness plus the existence of a valid protection order. *Dudosh I*, 629 F.Supp. at 854-55, *cited in Balistreri*, 855 F.2d at

3. The Effect of *DeShaney* on Special Relationship Theory

In *DeShaney v Winnebago County Department of Social Services*,¹⁵⁵ the Supreme Court ruled that the state owed no duty of protection to an abused child, although the Department of Social Services had documented the child's injuries and the state had committed itself to protecting abused children by passing child protection legislation.¹⁵⁶ Casting doubt on the Ninth Circuit's holding in *Balistreri*, the *DeShaney* Court held that state awareness of danger to a specific person, coupled with an express state commitment to protect a class including that person, was insufficient to create a special relationship between the state and the individual.¹⁵⁷ As there was no special relationship, the state had no affirmative duty to protect the child and thus its subsequent failure to provide adequate protection could not result in section 1983 liability.¹⁵⁸

Instead, the Court limited the duty to protect to the custodial context discussed above.¹⁵⁹ "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."¹⁶⁰ Regarding the due process clause as intended to protect citizens from oppression by the state, the Court declared that "a State's failure to protect an individual against private violence simply

1426. Thus, *Balistreri* seems to have come full circle to the actual holding of *Dudosh* without gaining any new ground. The court in *Dudosh II*, in granting summary judgment on the due process claim, apparently ignored the existence of the protective order and found that awareness alone was insufficient for finding a special relationship. *Dudosh II*, 665 F Supp. at 390.

155. 489 U.S. 189 (1989).

156. *Id.* at 192-93, 195 n.2.

157. *Id.* at 197-98.

158. *Id.* at 198-201. The Court suggested that the state's failure to protect Joshua might give rise to a cause of action under state tort law, although it would not do so under section 1983 for due process violations. *Id.* at 201-02.

In *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055-58 (2d Cir. 1990), the court upheld a special relationship theory essentially identical to that discussed here in a state negligence claim.

159. *DeShaney*, 489 U.S. at 199-200; see *supra* notes 135-40 and accompanying text (duty to protect in the custodial context).

160. *DeShaney*, 489 U.S. at 200. This language raised an outcry from some observers, since Joshua DeShaney was a three year old child who was certainly unable to "act on his own behalf" to protect himself from abuse by his father. Indeed, the state was the only actor conscious of Joshua's plight that was capable of legally removing him from his father's home, since his mother lived out of state and was unaware of the abuse.

does not constitute a violation of the Due Process Clause."¹⁶¹

Clearly, the practical effect of *DeShaney* on failure-to-protect cases is to eliminate due process claims based upon the special relationship theory. Although *DeShaney* did not expressly overrule the special relationship holdings of *Dudosh*, *Lowers*, *Sherrell*, and *Balistreri*, its rejection of the special relationship theory outside of the custodial context effectively removed the foundation on which these cases rested.

B. Affirmative State Action Theories

The Supreme Court's strong preference for state action, rather than state inaction, as a basis for fourteenth amendment claims is clear from the *DeShaney* opinion. Discussing its decision to limit the state's duty to protect to custodial relationships, the Court stated:

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 [privately inflicted] harms¹⁶²

Unlike *DeShaney*, domestic violence failure-to-protect cases may be construed as involving affirmative state action in one of two ways. One form of state action is the creation of a municipal policy, such as a policy of nonintervention in domestic violence cases.¹⁶³ When a city creates a policy that results in an individual

161. *Id.* at 197.

162. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989). The Supreme Court would also probably find the state action necessary for claims based on the fourteenth amendment when the state itself has created the danger that caused the plaintiff's injury. *See, e.g., White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (policeman arrested parent, leaving three children alone in a car on a busy highway).

163. The presence of a municipal policy also answers several other implicit concerns of the Supreme Court in *DeShaney*. In addition to the Court's hesitancy to base a due process claim on state inaction, the *DeShaney* Court was also influenced by long-standing concerns regarding judicial intrusion into the executive sphere. *See DeShaney*, 489 U.S. at 203. Evidence of a municipal policy addresses the desire to limit the Court's role in overseeing local governmental units by limiting actionable claims to instances of specific and intentional unconstitutional actions taken pursuant to a policy. Requiring the presence of a policy for due process failure-to-protect claims also narrows the breadth of potential governmental liability, a concern for courts in the wake of numerous section 1983 suits in recent years. *See generally* Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990) (discussing

being deprived of a fundamental right, it affirmatively acts in a way that may give rise to a valid substantive due process claim. A second form of state action exists when a state law grants citizens a right to expect a particular level of police protection. If the police summarily refuse to render that level of protection to an individual, the deprivation of protection is state action that violates procedural due process. The two types of claims are distinguished here primarily on the basis of the kind of right invaded. Substantive due process claims are based on the deprivation of fundamental constitutional rights, while procedural due process claims focus on the deprivation of rights created by state law without due process.

1. Substantive Due Process: Municipal Policy as State Action

As stated above, a policy of nonintervention is itself an affirmative state action;¹⁶⁴ in creating or condoning a policy, a municipality engages in the type of interest-weighting process that is the essence of state action. A policy of nonenforcement of domestic violence laws enables private actors to assault their intimate partners with impunity, secure in the knowledge that they will not be punished. The governmental decision that some persons, arbitrarily selected, should receive little or no protection goes far beyond the simple failure to intervene that has been rejected by the Supreme Court in the past.¹⁶⁵ If a deprivation of the fundamental right to bodily integrity¹⁶⁶ results from the city's policy, the city has violated the due process clause.

The elements of a substantive due process claim are straightforward: (1) the deprivation of a constitutionally protected right (2) by governmental action. Once these elements are present, the gravity of the deprivation is balanced against the governmental interest involved.¹⁶⁷ A municipal policy that discriminatorily denies protection to domestic violence victims meets both requirements of a due process claim and is unlikely to be outweighed by any valid governmental interest.

ways in which courts handle the apparent deluge of civil rights claims).

164. For example, every domestic violence case discussed in this note has alleged the existence of a municipal policy of nonintervention in domestic violence, usually as part of an equal protection claim. No allegation of a similar policy was raised before the Supreme Court in *DeShaney*.

165. See, e.g., *DeShaney*, 489 U.S. at 200.

166. See *infra* notes 168-75 and accompanying text.

167. See G. GUNTHER, *supra* note 112, at 182.

The right to bodily integrity is a "constitutionally protected liberty interest,"¹⁶⁸ and has also been called a fundamental right.¹⁶⁹ In *Ingraham v Wright*, the Supreme Court stated that "[a]mong the historic liberties so protected [from deprivation without due process] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security"¹⁷⁰ The fourth amendment also protects the "right of the people to be secure in their persons." This has been interpreted as establishing a right to bodily integrity.¹⁷¹ The right has been recognized in cases involving the rights of terminally ill patients to refuse medical treatment¹⁷² and of the mentally ill to refuse antipsychotic drug treatment.¹⁷³

In addition, the Supreme Court has held that a right is fundamental if it is "implicit in the concept of ordered liberty"¹⁷⁴ State condonations of physical violence violate the right to bodily integrity that is "implicit in the concept of ordered liberty," whether one thinks of "ordered liberty" as a bulwark created in response to the intolerable intrusions of the British or as an anti-

168. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

169. "The right of the people to be secure in their persons," U.S. CONST. amend. IV, has been widely held to apply to intrusions on personal dignity and safety authorized by the state. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966) (The fourth amendment's function "is to protect personal privacy and dignity against unwarranted intrusion by the State."); *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded than the right of every individual to the possession and control of his own person, free from all restraint or interference of others"); *Bee v. Greaves*, 744 F.2d 1387, 1392-93 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985) (the fundamental right to privacy encompasses the right to decide whether to accept or reject the administration of dangerous drugs).

Fundamental rights may be viewed either as emerging directly from the Constitution itself, either from the text or from the "penumbra" of enumerated rights, see *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965), or may be "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

170. *Ingraham*, 430 U.S. at 673.

171. *Id.* at 673 n.42.

172. See *Cruzan v. Missouri Dep't of Health*, 110 S.Ct. 2841, 2846-52 (1990) (tracing the development of the right to refuse medical treatment). The Supreme Court has stated that the right to refuse medical treatment is "properly analyzed in terms of a Fourteenth Amendment liberty interest," rather than the constitutional right of privacy. *Id.* at 2851 n.7. But see *Foster v. Tourtellotte*, 704 F.2d 1109, 1112 (9th Cir. 1983) ("no court has yet found an absolute constitutional right to refuse life saving medical treatment").

173. See *United States v. Charters*, 829 F.2d 479, 490-500 (4th Cir. 1987), cert. denied, 110 S. Ct. 1317 (1990); *Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985); *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983); *In re Roe*, 383 Mass. 415, 434, 421 N.E.2d 40, 51 (1981).

174. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

dote to the violent conspiracies of the post-Civil War South.¹⁷⁵ Therefore, both legal and historical precedent establish the right to bodily integrity as a constitutionally protected right.

In due process failure-to-protect cases, the governmental action element is also met. The Supreme Court has declared, "[o]ur prior decisions leave no doubt that the mere existence of efforts by the State to authorize, encourage, or otherwise support [the deprivation of constitutional rights] constitutes illegal state involvement in those pertinent private acts of [deprivation] that subsequently occur."¹⁷⁶ If the state ratifies the perpetration of domestic violence through its policies, it is involved in the abuse itself.

In weighing the gravity of the constitutional deprivation against the governmental interest involved, it is apparent that the gravity of the harm done by these state policies is severe, while the governmental interest is comparatively slight.¹⁷⁷ The application of the balancing test leaves little doubt that a governmental policy of refusing to enforce domestic violence laws violates substantive due process.

The Supreme Court has struck down similar types of unconstitutional state action before. In *Reitman v Mulkey*,¹⁷⁸ the Court found an initiative that repealed a state civil rights law and allowed private racial discrimination in housing to be an unconstitutional state action within the meaning of the fourteenth amendment.¹⁷⁹ The initiative in *Reitman* is similar to the municipal policies at issue in this note in that both are governmental decisions to condone private violation of individuals' constitutional rights. As such, they must be seen as state action, rather than

175. The primary constitutional sources that "order" the relations between individual liberty and state authority are contained in the Bill of Rights, enacted following the Revolutionary War, and the fourteenth amendment, enacted during Reconstruction. Both periods were noteworthy for the routine invasions of personal bodily integrity carried out or condoned by the government.

176. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 202 (1970) (Brennan, J., dissenting in part and concurring in part) (referring to racial discrimination).

177. Enforcing marital harmony or recognizing men as the dominant authority within a household are not valid governmental interests that would support a governmental policy of ignoring domestic violence, see *supra* notes 86 & 113-18 and accompanying text. This leaves only goals such as allocation of scarce financial resources, which is not a particularly compelling governmental interest in this context. See *supra* text accompanying notes 119-25. For a discussion of the counterbalancing harm to individuals, see *supra* text accompanying notes 2-8.

178. 387 U.S. 369 (1967).

179. *Id.* at 378-79.

mere inaction.

Section 1983 was created to address not only arbitrary enforcement of the laws, but also their nonenforcement.¹⁸⁰ If a city police department adopts a policy or custom of refusing to take any action to redress assaults upon domestic violence victims, even though the state has enacted laws making such assaults criminal, then the police department's policy constitutes, for the purposes of the fourteenth amendment, state action that abrogates a constitutionally protected interest. The nonenforcement of laws and subsequent harm to the bodies and lives of domestic violence victims therefore state a valid substantive due process claim under section 1983.

2. Procedural Due Process Theory

A second approach to due process resting on affirmative state action is the procedural due process theory. The Supreme Court, in *DeShaney*, the possibility that failure-to-protect claims may be based on a violation of procedural due process.¹⁸¹ Under this theory, a right granted under state law may become a property interest, and the state may not arbitrarily deprive an individual of that interest without due process.¹⁸²

A victim of assault by an intimate partner may raise a viable procedural due process claim if the state in which the assault occurred created an enforceable statutory right to protection from domestic violence. Since the clarity and definiteness of statutes granting a right to protection vary from state to state, the viability

180. *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961) ("It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the Civil Rights Act of 1871]."), *overruled in part*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

181. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 n.2 (1989). In *DeShaney* the petitioners argued that state child protection statutes gave children an entitlement to protective services, which was denied without due process when state officials failed to protect them. However, the Court refused to consider the argument since it had not been raised below. *Id.*

Other commentators have also suggested that procedural due process theory may provide an alternative to special relationship claims in failure-to-protect cases. *See, e.g.*, Note, *supra* note 141, at 966 n.179; Comment, *supra* note 141, at 1063-72. *But see* *Hynson v. City of Chester*, 731 F. Supp. 1236 (E.D. Pa. 1990) (rejecting a procedural due process claim raised by a domestic violence victim).

182. The right will become a property interest if an individual could have a reasonable expectation that the right existed and that he was entitled to the right. *See generally* *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests are created and their dimensions are defined by an independent source such as state law.").

of procedural due process claims based on such a right will also vary from state to state. The statutory right to protection is clearest in states having laws that mandate arrest or other specific police intervention in the event of domestic violence.¹⁸³ Such statutes create an entitlement to the specified action if probable cause exists. If police officers fail to act, a victim of domestic violence would have a section 1983 procedural due process claim.¹⁸⁴

In states where the statutory grant of protection is less clear, a procedural due process violation would be more difficult to establish. For instance, some state statutes require responding police officers to do everything in their power to "ensure the safety" of the victim, including, among other options, arresting the batterer.¹⁸⁵ A court considering a procedural due process claim arising in such a state would have to determine whether the plaintiff was entitled to more protection than she actually received.

In states that permit a warrantless arrest for the crime of domestic violence but do not mandate it,¹⁸⁶ a court may be even less likely to find a statutory entitlement to any particular level of protection. For instance, in *Hynson v City of Chester*,¹⁸⁷ the court held that the Pennsylvania Protection from Abuse Act did not create any enforceable rights in the plaintiff because police action remains discretionary under the Act.¹⁸⁸ Therefore, whether a plaintiff can bring a viable claim on a procedural due process theory depends on the statute in the state in which she lives. At the

183. See, e.g., ME. REV. STAT. ANN. tit. 19, § 770(6) (1981) (requiring that police take definite action to prevent further abuse and specifying arrest of the abuser as one means); OR. REV. STAT. §§ 133.055(2), 133.310(3) (1981); UTAH CODE CRIM. PROC. § 77-36-2 (1990). Some state statutes direct that the officer shall arrest if there is probable cause that a protection order has been violated and that the officer may arrest otherwise. E.g., N.C. GEN. STAT. § 50B-1 to -7 (Supp. 1981). These statutes, although less comprehensive, will be considered "mandatory arrest" statutes for the purposes of this note since they grant an identifiable level of protection. See generally Lerman & Livingston, *State Legislation on Domestic Violence*, RESPONSE, Sept.-Oct. 1983, at 1 (analysis of state statutory provisions providing remedies to domestic abuse victims); Lerman, *supra* note 9, at 282-83. Many of the states mandating arrest have also passed laws limiting police liability for arrests made under the domestic violence statute.

184. The victim might have a claim under state law as well. See *infra* note 191 and accompanying text.

185. For a discussion of the effectiveness of such statutes, see Lerman, *supra* note 15, at 126-28.

186. See, e.g., ARIZ. REV. STAT. ANN. § 13-3601 (1989); MASS. GEN. L. ch. 276, § 28 (Supp. 1990); OHIO REV. CODE ANN. 2935.03(B) (Baldwin 1990). For a more comprehensive list, see Lerman, *supra* note 9, at 282-83.

187. 731 F Supp. 1236 (E.D. Pa. 1990).

188. *Id.* at 1239-40.

moment, there are few states with statutory grants of protection clear enough to support these claims.¹⁸⁹ As a result, this theory is currently of limited usefulness.

In summary, due process claims in the domestic violence context are still valid, but they must overcome past reliance on the special relationship theory. Application of this theory beyond the custodial setting was rejected in *DeShaney*. Due process failure-to-protect claims can survive *DeShaney* only by demonstrating that the element of affirmative state action is in fact present.

In domestic violence cases, the state action may take the form of either municipal policy making that results in the deprivation of a constitutional right or deprivation of a state-created right under procedural due process analysis. Both of these arguments promise domestic violence victims due process claims that rest on more solid foundations of affirmative state action than special relationship theory.

IV CONCLUSION

Thus far, the section 1983 failure-to-protect cases that have been brought have been based upon equal protection and the due process special relationship theory. The equal protection theory remains strong, having been reaffirmed in *DeShaney*.¹⁹⁰ However, care must be taken to distinguish between the two types of equal protection claims and their separate requirements, using the *Watson* two-track analysis.

As for due process theories, while *DeShaney* struck down the due process special relationship claims outside of the custodial context, claims based on affirmative state action offer a valid alternative. A strong substantive due process argument can be made that municipal policy making itself constitutes state action. Procedural due process theory offers another potential cause of action, but only in those states with statutes granting an identifiable level of protection to domestic violence victims. Finally, a plaintiff seeking compensation for police inaction may pursue state tort law claims.¹⁹¹

189. See generally Lerman, *supra* note 9, at 276-83 (itemizing statutory protections afforded domestic violence victims by each state).

190. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989); see *supra* text accompanying note 127.

191. A discussion of such claims is beyond the scope of this note. The leading domestic violence cases brought under state tort law are *Raucci v. City of Rotterdam*, 902 F.2d

Considering the interests of both municipalities and domestic violence victims, the most effective approach in the area of domestic violence remains the enactment of mandatory arrest laws or policies. Domestic violence victims benefit from access to an effective source of aid and may gain psychological and emotional benefits from the knowledge that such a law enforcement policy exists.¹⁹² Mandatory arrest laws also benefit the state and municipalities, reducing their liability by removing the source of the suit — the offensive law or policy.¹⁹³

Another benefit arising from mandatory arrest legislation is an increase in the ability of police officers to understand what is expected of them and to predict how they can best avoid unconstitutional conduct.¹⁹⁴ The number of suits filed would be likely to decrease because the probability of a police officer or department committing an actionable wrong decreases when there is a clear statement of what action is required and what is not. Moreover, the cost of complying with mandatory arrest legislation is generally lower than the potential costs of litigation.¹⁹⁵

Municipalities can enact mandatory arrest policies individually, without waiting for the state to take the lead.¹⁹⁶ Municipal arrest policies share the same advantages as state legislation, the principal difference being that municipal policies benefit fewer domestic violence victims and fewer police officers than statewide laws. For either a state or a municipality, there are essentially two steps to avoiding liability. The first step is creating a policy that

1050 (2d Cir. 1990) (civil rights and state negligence claims brought against the city and its police officers); *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985) (negligence action brought by mother of an abused child for injuries inflicted by the father after police failed to respond); *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (N.Y. Sup. Ct.), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 162 (N.Y. App. Div.), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (court has the power to compel the police to perform their duty to protect battered wives reasonably and nonarbitrarily); and *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983) (police potentially liable if they knowingly fail to enforce a protective order).

192. See *supra* text accompanying notes 11-13.

193. Some states have shielded themselves further by limiting police liability for taking action, including limits on liability for false arrest. See generally Lerman, *supra* note 15 (discussing methods of limiting liability for arrest).

194. See Comment, *supra* note 8, at 220-24 (discussing benefits of mandatory arrest laws).

195. For discussion of how a law enforcement approach may lower costs, see *supra* text accompanying notes 121-23.

196. For a partial list of cities that have adopted mandatory arrest policies, see *supra* note 110.

provides adequate protective services to victims of domestic violence. Once the policy is in place, the second step is to ensure that police officers follow it.

In recent years, municipalities have become concerned about the scope of their potential liability under section 1983. However, municipal liability for failure to protect domestic violence victims is an overall benefit to society. It encourages municipalities to adopt nondiscriminatory policies and holds them to a reasonable standard of care in their actions. Municipalities may avoid liability under section 1983 for failing to protect their citizens by adopting a policy of police action that provides more than nominal protection to victims of domestic violence.

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