

NOTES

SECTION 1983 AND DOMESTIC VIOLENCE: A SOLUTION TO THE PROBLEM OF POLICE OFFICERS' INACTION

Violence against women is a serious problem in America today. Estimates of women battered yearly range from 1 million to 40 million, and a common estimate is that 1.5 million women are physically assaulted by their partner each year.¹ Because the problem has become so prevalent,² battered women must be able to rely upon the legal system to aid them. Police officers are typically the first source of help for these women,³ and therefore women depend upon the officers to render aid. When the officers fail to do so, and the failure constitutes a breach of a duty, battered women need a legal remedy against the passive officer.

Since the enactment of section 1983 in 1871, plaintiffs deprived of their constitutional rights have had a vehicle by which to bring cases in federal court.⁴ The initial inquiry in any section 1983 action

¹ A. BROWN, *WHEN BATTERED WOMEN KILL* 5 (1987).

² A National Institute of Mental Health-funded study of more than 2,000 couples showed that in any one year, approximately 1.8 million wives are beaten by husbands. *BATTERED WOMEN: ISSUES OF PUBLIC POLICY II*, UNITED STATES COMMISSION ON CIVIL RIGHTS, Washington, D.C., Jan. 30-31, 1978, citing M. Strauss, "Wife Beating: Causes, Treatment and Research Needs," Consultation Report (Jan. 1978).

³ See Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 Vt. L. REV. 59, 59 (1982).

⁴ 42 U.S.C. § 1983 (1982). Section 1983 provides that:

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

For a comprehensive history of the adoption of 42 U.S.C. § 1983, see *Monroe v. Pape*, 365 U.S. 167, 169-83 (1961). For a discussion of section 1983, its effect on constitutional tort litigation, and the subsequent impact on the legal system, see Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 641-95 (1987).

must focus upon whether two essential elements are present. The first is whether a person acting under color of state law committed the complained of conduct.⁵ The second is whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.⁶ Unfortunately, the judicial branch has been reluctant to extend the section 1983 remedy to female victims of physical abuse by men when these women have brought claims against local police officers who failed to provide protection from abusive males.⁷ The difficulty in this area is in defining the circumstances under which section 1983 applies to acts of omission.⁸

Historically, the law condoned a man's right to use physical force against a woman.⁹ Because of this societal attitude, men could often beat their wives with impunity. Three prevailing ideas seemed to condone the husband's right to abuse his wife physically. First, it was the husband's duty to make the wife behave herself.¹⁰ Second, if the wife indeed "required" punishment, it was better for the husband to administer it privately than to subject his wife to the scandal of a public trial.¹¹ Lastly, husbands relied on a long line of court decisions giving them the privilege to inflict physical punishment upon their wives.¹²

As time passed and societal attitudes changed, the legal system's response to battered women and domestic violence began to move away from passive acceptance.¹³ The heightened public awareness of the serious nature of this problem led to the enactment of statutes

⁵ *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (court stated that defendants' conduct satisfied the "under color of state law" requirement because they were state employees in positions of authority when they engaged in the disputed conduct). *Id.* at 535-36.

⁶ *Id.* at 535 (plaintiff alleged a deprivation of rights secured by the Constitution's fourteenth amendment).

⁷ See, e.g., *Turner v. City of North Charleston*, 675 F. Supp. 314, 319-20 (D.S.C. 1987); see also *Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 298-328 (Professor Kathleen Waits provides a detailed account of the plight of the abused woman and the legal system's historical failure to provide a remedy).

⁸ See *Azar v. Conley*, 456 F.2d 1382, 1387 (6th Cir. 1972).

⁹ *Waits, supra* note 7, at 268-69.

¹⁰ See *State v. Fulton*, 149 N.C. 485, 498, 63 S.E. 145, 149 (1908) (Clark, C.J., dissenting).

¹¹ See *id.*

¹² See *id.* at 499, 63 S.E. at 149 (Clark, C.J., dissenting). For a discussion of early American attitudes towards battered women, see *Stedman, Right of Husband to Chastise Wife*, 3 VA. L. REG. 241, 241-48 (1917).

¹³ See *Waits, supra* note 7, at 268-69.

in some states that require police officers to arrest men who abuse women.¹⁴ Such statutes remove discretion from the police officers and make arrest mandatory.¹⁵

In the absence of such statutes, battered women must seek other means by which to impose liability upon passive police officers. Overzealous police officers may be held liable under section 1983 when they use more force than necessary to place a person in custody,¹⁶ but courts are somewhat more reluctant to impose liability upon police officers who fail to act.¹⁷ Drawing upon the general principle that a state actor may violate section 1983 by failing to lend aid to an individual who is in need,¹⁸ courts have begun to recognize that police must assist battered women and must be held

¹⁴ See Gundle, *Civil Liability for Police Failure to Arrest: Nearing v. Weaver*, 9 WOMEN'S RTS. L. REP. (Rutgers Univ.) 258, 259-60 (Fall 1986). The article traces the history of the passage of OR. REV. STAT. § 133.055 (1985), which explicitly requires police officers to make arrests in certain domestic violence situations. The statute provides, in pertinent part:

[W]hen a peace officer is at the scene of a domestic disturbance and has probable cause to believe that an assault has occurred between spouses, former spouses or adult persons related by blood or marriage or persons of opposite sex residing together or who formerly resided together, or to believe that one such person has placed the other in fear of imminent serious physical injury, the officer shall arrest and take into custody the alleged assailant or potential assailant.

¹⁵ See Waits, *supra* note 7, at 270 n.12. Footnote 12 of Waits' article gives an extensive list of articles that discuss the law in various states: Buzawa & Buzawa, *Legislative Responses to the Problem of Domestic Violence in Michigan*, 25 WAYNE L. REV. 859 (1979); Gottlieb & Johnson, *Reform in Kansas Domestic Violence Legislation*, 31 U. KAN. L. REV. 527 (1983); Reamey, *Legal Remedial Alternatives for Spouse Abuse in Texas*, 20 HOUS. L. REV. 1279 (1983); Note, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261; Comment, *Spouse Abuse: Proposal for a New Rule of Thumb*, 17 U. RICH. L. REV. 633 (1983).

¹⁶ *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). In 1961, the United States Supreme Court held in *Monroe v. Pape* that a police officer who abuses the authority that he or she has been given by state law is acting "under color of" state law within the meaning of section 1983. 365 U.S. 167, 184 (1961). In *Shillingford*, the court held that, in order to determine whether a state officer had violated section 1983 through physical abuse of a suspect in custody, it was necessary to weigh the amount of force used in relation to the need presented, the extent of the injury inflicted, and the motives of the police officer. *Shillingford*, 634 F.2d at 265.

¹⁷ See, e.g., *Turner v. City of North Charleston*, 675 F. Supp. 314, 318-20 (D.S.C. 1987). See generally Note, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048, 1048-73 (1986); Note, *Sorichetti v. City of New York Tells the Police that Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333, 346-58 (1985); Note, *Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?*, 72 CALIF. L. REV. 661, 673-86 (1984); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 821-40 (1981) [hereinafter Note, *Failure to Prevent Crime*].

¹⁸ See, e.g., *Azar v. Conley*, 456 F.2d 1382, 1387 (6th Cir. 1972). See *infra* notes 32-40 and accompanying text for a more complete discussion of this point and of the *Azar* case.

accountable for their failure to do so if certain conditions are present.¹⁹ Some courts have used equal protection analysis as a means to impose liability upon passive police officers.²⁰ That is, if a comparison between police response to domestic violence calls and police response to general assault calls reveals that police officers treat domestic violence calls less seriously, the evidence may be sufficient to constitute an equal protection violation.²¹ Police officers may also be held liable for failure to aid battered women if a special relationship exists between the officer and the victim.²² In 1988, the United States Court of Appeals for the Ninth Circuit attempted to define clearly the conditions necessary to establish such a special relationship in recognizing a section 1983 claim against police officers who failed to lend assistance to a victim of domestic violence in *Balistreri v. Pacifica Police Department*.²³

The 1989 United States Supreme Court case of *DeShaney v. Winnebago County Department of Social Services* seriously undercuts the *Balistreri* court's efforts, and those of other courts, to provide battered women with a remedy against passive police officers.²⁴ Prior to *DeShaney*, courts had imposed a duty to act upon police officers based on the officers' authority to enforce the law,²⁵ on statutorily prescribed duties,²⁶ and on the theory of a "special relationship"²⁷ between the victim and the police officer. *DeShaney* substantially narrowed the circumstances under which a special relationship may arise,²⁸ thus forcing lower courts to rely upon alternate legal doctrines to aid battered women.

This note examines the avenues that are still open to battered women who sue passive police officers, including the limited special relationship concept. Section I surveys the various theories that

¹⁹ See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984). See *infra* notes 121-30 and accompanying text for a discussion of *Thurman*.

²⁰ See *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 696 (10th Cir. 1988).

²¹ See *id.* at 695-96.

²² See *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1426 (9th Cir. 1988). But see *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1004-05 & n.4 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987).

²³ *Balistreri*, 855 F.2d at 1426. The holding in *Balistreri* was disapproved in *DeShaney*, 109 S. Ct. at 1004 n.4 (1989). In *DeShaney*, the United States Supreme Court held that a state that fails to protect a citizen from private violence has not violated the due process clause, thus precluding any section 1983 action against the state actor. *Id.* at 1004.

²⁴ 109 S. Ct. at 1004, n.4.

²⁵ See, e.g., *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972).

²⁶ See, e.g., *Johnson v. Duffy*, 588 F.2d 740, 744 (9th Cir. 1978).

²⁷ See, e.g., *Lowers v. City of Streator*, 627 F. Supp. 244, 246 (N.D. Ill. 1985).

²⁸ 109 S. Ct. at 1005-06.

courts have applied to determine when police officers have a duty to act.²⁹ Section II explores the way that courts have utilized the duty-to-act theories in evaluating section 1983 claims of battered women against police officers.³⁰ Section III analyzes the law regarding battered women and offers some recommendations to these women who bring section 1983 claims against passive police officers.³¹ Section IV concludes that the enactment of statutes imposing liability on police officers who fail to take the proper action to protect battered women is the most effective solution to the problem.

I. FAILURE TO ACT UNDER SECTION 1983

The language of section 1983 seems to require that a state actor undertake some affirmative act before he or she falls within the statute's purview.³² Therefore, the threshold question in this area is whether a police officer's failure to act comes within the reach of words such as "cause" or "subject," which both imply positive action. There are a variety of theories under which section 1983 liability has been held to apply to police officers' failure to act. Under the law enforcement theory, a police officer who ignores the duty imposed upon him by his office and fails to aid someone who is within the officer's reach may be held liable under section 1983.³³ The courts have also relied upon statutes that impose upon police officers a duty to act under certain conditions.³⁴ Finally, the courts have developed the special relationship concept, under which police have a duty to act under narrow circumstances.³⁵

The failure-to-act doctrine is one that the courts began to develop outside of the battered women context. In 1972, the United States Court of Appeals for the Sixth Circuit held in *Azar v. Conley* that section 1983 is applicable to acts of omission as well as commission.³⁶ Thus, an officer's failure to take steps to aid an individual—an omission—may be actionable under section 1983, just as an officer's actions (i.e., police brutality)—commission—may be deemed

²⁹ See *infra* notes 32–116 and accompanying text.

³⁰ See *infra* notes 117–75 and accompanying text.

³¹ See *infra* notes 176–224 and accompanying text.

³² See *supra* note 4 for the text of § 1983.

³³ See *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972).

³⁴ See *Johnson v. Duffy*, 588 F.2d 740, 744 (9th Cir. 1978).

³⁵ See *DeShaney v. Winnébagó County Dep't of Social Servs.*, 109 S. Ct. 998, 1004–05 (1989) for a discussion of the current state of the special relationship concept.

³⁶ 456 F.2d 1382, 1387 (6th Cir. 1972).

actionable.³⁷ In *Azar*, Mr. Conley and his friends and relatives harassed and intimidated Mr. Azar and the other members of his family.³⁸ The Akron police took no action to assist the Azars. Mr. Conley was a police officer, and the plaintiffs alleged that the members of the force did not want to say anything about possible wrongdoing by a fellow officer.

The defendant police officers in *Azar* argued that, to state a claim under section 1983, a complaint must allege action, not merely inaction, by public officials.³⁹ In holding that section 1983 applied to acts of omission as well as commission, the *Azar* court disagreed with the defendants and stated that the defendants fundamentally misunderstood the remedy afforded by section 1983. According to the court, section 1983 was a remedy that was intended to protect citizens' fourteenth amendment rights when state law did not. Therefore, the *Azar* court held that, due to the remedial purpose behind section 1983, inaction on the part of police officers may result in liability under the statute.⁴⁰

Police officers, simply by donning their uniforms, hold themselves out as people who will provide protection and assistance to citizens who need it. Police may have a duty to act stemming from the law enforcement authority that they possess if the plaintiff can show a causal connection between this duty to protect and the injury.⁴¹ In 1967, the United States District Court for the Northern District of Illinois held in *Huey v. Barloga* that a black man who was beaten by a gang of white youths had no section 1983 claim against police officers for failure to provide protection because the police had not engaged in any specific omissions that caused the injury.⁴²

In *Huey*, a black college student, seeking employment in Cicero, was walking down the sidewalk at approximately 10:00 P.M.⁴³ A group of four white youths beat Huey severely, inflicting injuries that later caused his death.⁴⁴ The plaintiff alleged that the police were aware of the racial tensions in Cicero and that blacks were not safe on the public streets.⁴⁵

³⁷ See *id.*

³⁸ *Id.* at 1384.

³⁹ *Id.* at 1387.

⁴⁰ *Id.*

⁴¹ See *Huey v. Barloga*, 277 F. Supp. 864, 872-73 (N.D. Ill. 1967).

⁴² *Id.* at 867-68, 873.

⁴³ *Id.* at 867.

⁴⁴ *Id.* at 867-68.

⁴⁵ *Id.* at 868.

The *Huey* court held that the police officers' lack of specific omissions precluded the plaintiff's section 1983 claim.⁴⁶ The *Huey* court reasoned that, although police officers are under an affirmative duty to preserve law and order and to protect the personal safety of persons in the community, the plaintiff's mere conclusory allegation that the police had notice of the daily presence of blacks in the community and the possibility of racial disorder did not state a claim under section 1983.⁴⁷ The court noted that, in the absence of specific omissions by the police officers and a clear causal connection between the omissions and the harm suffered by Huey, he could not sustain his section 1983 claim.⁴⁸ Therefore, police officers will not be held liable every time a citizen is injured and they fail to lend aid unless the failure constitutes a breach of their public responsibility.⁴⁹

In 1972, the United States Court of Appeals for the Seventh Circuit was presented with such specific omissions in the case of *Byrd v. Brishke*.⁵⁰ The *Byrd* court, emphasizing the combination of the law enforcement authority with awareness of the consequences of a neglect of duty, held that a police officer who ignored the duty imposed by his office and failed to stop other officers who beat a third person in his presence or otherwise within his knowledge was liable under section 1983.⁵¹ In *Byrd*, the plaintiff Mr. Byrd received a bullet wound in the right thigh in a barroom shooting.⁵² As he tried to walk away from the tavern in his injured state, a police officer escorted him back inside. When Byrd went to a telephone booth to try and make a call, some police officers dragged him from the booth and began to beat him.

The *Byrd* court held that a police officer may not ignore his duty and escape section 1983 liability, especially when an unlawful act takes place right in his presence.⁵³ The *Byrd* court agreed with the plaintiff's theory that police officers could be liable under section 1983 for failing to intervene when their fellow officers summarily beat a person in the non-participating officers' presence.⁵⁴

⁴⁶ *Id.* at 867-68, 873.

⁴⁷ *Id.* at 872-73.

⁴⁸ *Id.* at 873.

⁴⁹ *See id.*

⁵⁰ 466 F.2d 6, 11 (7th Cir. 1972).

⁵¹ *Id.*

⁵² *Id.* at 9.

⁵³ *Id.* at 11.

⁵⁴ *Id.*

The court reasoned that it did not want to insulate officers from liability when those officers could reasonably foresee the consequences of the neglect of their duty to enforce the laws.⁵⁵ Thus, when a section 1983 plaintiff can show a specific omission by a police officer, such as when a beating happens in the officer's presence and he does nothing, and a causal connection exists between the omission and the plaintiff's injury, section 1983 will provide relief.⁵⁶

In addition to an officer's duty to act stemming from his law enforcement authority, statutes and regulations may also impose an affirmative duty on police officers to act in certain situations.⁵⁷ Such statutes may remove discretion from police officers and require them to perform certain functions.⁵⁸ In 1978, the United States Court of Appeals for the Ninth Circuit held in *Johnson v. Duffy* that the county sheriff's omission to act could subject him to liability under section 1983 because he violated duties imposed upon him by statute and regulations.⁵⁹ A state statute imposed upon the sheriff a duty to appoint members to a classification committee, and this committee was required by law to meet at least once weekly to assign prisoners to the various county adult detention facilities and to transfer prisoners among such facilities.⁶⁰ The committee's failure to meet or act upon prisoner Johnson's transfer resulted in the loss of money he had earned at an honor camp.⁶¹ Because the sheriff was responsible for the committee, his failure to see that it met caused the prisoner's loss.⁶²

The *Johnson* court held that a state officer's violation of a statutorily imposed duty provided a proper basis for section 1983 liability.⁶³ The *Johnson* court reasoned that to deny the prisoner his money without some type of notice or hearing violated his rights secured by the fourteenth amendment.⁶⁴ According to the court,

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See, e.g.,* *Morgan v. District of Columbia*, 468 A.2d 1306, 1314 (D.C. App. 1983). Although the court declined to impose liability on a police captain in a non-section 1983 action for failing to protect the wife of another officer, it pointed out in dicta that "a statute or regulation may describe a special duty to a particular class of individuals." *Id.*

⁵⁸ *See supra* notes 14-15 and accompanying text.

⁵⁹ 588 F.2d 740, 744 (9th Cir. 1978).

⁶⁰ *Id.* at 743.

⁶¹ *Id.* at 742.

⁶² *Id.* at 743.

⁶³ *Id.* at 744.

⁶⁴ *Id.* at 744-45.

such violations by state officials are the type for which section 1983 provides a remedy. The *Johnson* court's holding established that statutorily defined duties aid courts in analyzing the required causal connection between the state actor's omission and the individual's injury.

In addition to statutory duties, courts have generally agreed that a police officer's failure to act may result in section 1983 liability when there is a "special relationship" between the police and the victim.⁶⁵ In the past, the circuits disagreed on the factors that identify this special relationship.⁶⁶ One way in which a special relationship may arise between police officers and an individual is when the police officers cause harm to the person in performing their duty or when the person is assisting them and is thereby injured. In 1979, the United States Court of Appeals for the Seventh Circuit held in *White v. Rochford* that there is an affirmative duty on the part of police officers to protect those who have been endangered due to the performance of official duties and that section 1983 liability will result for failure to provide such protection.⁶⁷

In *White*, defendant police officers stopped and arrested a driver for drag racing.⁶⁸ The driver was accompanied by his nieces and nephews and pleaded with the officers to take them to the police station or a phone booth so that they could contact their parents. The officers refused and left all three children in the abandoned automobile on the side of the road. The children suffered mental pain and anguish as a result of being left in the car and later of having to cross eight lanes of traffic on a freeway to reach a phone booth. Plaintiffs also alleged that one of the children was asthmatic and had to be hospitalized for one week.⁶⁹

⁶⁵ See *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1426 (9th Cir. 1988). But see *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1005-06 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987). See also Note, *Failure to Prevent Crime*, *supra* note 17, at 824 (citing cases). The liability of police officers under tort principles is quite different from their liability under section 1983. When faced with the problem of section 1983 actions against police officers, however, the courts have utilized the special relationship concept. See *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (Supreme Court stated that tort analogies are quite useful in establishing the elements of a section 1983 cause of action).

⁶⁶ See *infra* note 74 and accompanying text. The United States Supreme Court has attempted to resolve this disagreement. In *DeShaney*, 109 S. Ct. at 1004, 1006, the Court held that a special relationship between the state and an individual does not arise unless the state places the individual into custody and holds the person there against his or her will.

⁶⁷ 592 F.2d 381, 384 n.6 (7th Cir. 1979).

⁶⁸ *Id.* at 382.

⁶⁹ *Id.*

The *White* court held that section 1983 imposes liability upon police officers who place citizens in dangerous situations and then do nothing to neutralize the danger.⁷⁰ The *White* court reasoned that, if the police had been transporting the children themselves and had abandoned them on the highway, their action would be subject to a section 1983 claim.⁷¹ According to the court, it would not be logical to distinguish between such an act and the failure of the police to aid the children when the resulting harm was the same.⁷²

The dissent in *White* argued that there should be a distinction between the duty owed to the uncle, once arrested, and the absence of duty owed to the children, against whom no action was taken.⁷³ The circuits have disagreed on the issue of whether the special relationship may arise outside of the custodial situation into which the uncle was placed,⁷⁴ a disagreement that was settled by the United

⁷⁰ *Id.* at 384 n.6.

⁷¹ *Id.* at 384.

⁷² *Id.* at 384-85. The *White* court noted the existence of an Illinois statute, ILL. REV. STAT. ch. 23, para. 2368 (1975), regarding the abandonment of children: "Any person who shall wilfully and unnecessarily expose to the inclemency of the weather, or shall in any other manner injure in health or limb, any child, apprentice or other person under his legal control shall be guilty of a Class 4 felony." *Id.* at 384 n.6. The *White* court did not use the statute in its analysis, but pointed out the policy of protecting children in the community. *Id.* at 385 n.6. See *supra* notes 57-64 and accompanying text for a discussion of a case in which the court used a statute in its analysis.

⁷³ *White*, 592 F.2d at 392 (Kilkenny, J., dissenting); see also *Green v. Cauthen*, 379 F. Supp. 361, 369 (D.S.C. 1974) (court held that a person who is arrested and confined is entitled to medical attention if required and that failure to provide such constitutes cruel and unusual punishment and is actionable under section 1983); *Gardner v. Village of Chicago Ridge*, 71 Ill. App. 2d 373, 379, 219 N.E.2d 147, 150 (1966) (court held that police who asked the plaintiff to come to the place of apprehension to identify suspects owed him a duty to protect him against injury from the suspected persons), *cert. denied*, 403 U.S. 919 (1971); *Schuster v. City of New York*, 5 N.Y.2d 75, 86, 180 N.Y.S.2d 265, 274, 154 N.E.2d 534, 540 (1958) (court used a reciprocal duty theory to hold that a special relationship had been established when an individual supplied information leading to an arrest and later received threatening letters as a result of it becoming publicly known that he had been instrumental in the arrest). Although neither *Gardner* nor *Schuster* was a section 1983 action, the cases are useful in determining how courts have defined the special relationship in the past.

⁷⁴ See *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987) (court listed the following factors to consider in defining the special relationship: whether there is a custodial relationship created or assumed by the state; whether the state is aware of a specific risk of harm to the plaintiff; or whether the state has affirmatively placed the plaintiff in a position of danger); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927 (8th Cir. 1987) (expressly disagreeing with the Third and Fourth Circuits' holdings that a special relationship requiring affirmative protection can exist outside of a prison environment, court would require "the massive state control found in the prison environment" for a special relationship to exist); *Escamilla v. City of Santa Ana*, 796 F.2d 266, 269-70 (9th Cir. 1986)

States Supreme Court in 1989 in *DeShaney v. Winnebago County Department of Social Services*.⁷⁵ By answering this question in the negative, the dissent in *White* anticipated the Court's reasoning in *DeShaney*.

Prior to *DeShaney*, a special relationship may have arisen between the police and an individual if the police had knowledge that this person faced a specific danger or risk of harm, even though the police may not have created the danger.⁷⁶ For example, in 1985, the United States District Court for the Northern District of Illinois held in *Lowers v. City of Streator* that the police department's awareness that a woman faced special danger of a repeat rape established a special relationship between the woman and the police and gave rise to a section 1983 claim when the police failed to provide adequate protection.⁷⁷

In 1987, the United States District Court for the Eastern District of Texas implicitly reaffirmed the rule in *Lowers v. City of Streator*. The Texas court held in *Sherrell v. City of Longview* that a special relationship and hence a duty to protect may exist where the police have knowledge of specific threats of violence to an individual victim by a known attacker, yet the police refuse to act.⁷⁸ The police offi-

(In deciding whether a custodial or other relationship existed for purposes of creating a duty of protection, the court considered whether the victim was in the state's custody; whether the state affirmatively committed itself to protecting the victim; and whether the state knew of the victim's plight.); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir. 1986) (court noted that if the state assumes responsibility for a person's welfare, a special relationship may be created between the state and that person), *cert. denied*, 479 U.S. 882 (1986); *Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984) (court stated that the right to affirmative protection is not limited by a determination that there is a custodial relationship because a right to protection could arise from some other relationship), *cert. denied*, 470 U.S. 1052 (1985). This disagreement among the circuits was settled by *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1004 n.4, 1006 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987). In *DeShaney*, the United States Supreme Court rejected the argument that a special relationship can arise between the state and an individual when the state has not assumed custody over the individual. *Id.* at 1004-05. The *DeShaney* Court reasoned that the law does not impose a duty to act upon the state simply because of the state's knowledge that an individual faces special danger or its statement of intent to lend aid to him or her. *Id.* at 1006. Rather, the Court stated, the state only has a duty to protect an individual who is in its custody because the state has thereby deprived that person of the freedom to protect him or herself. *Id.*

⁷⁵ 109 S. Ct. at 1004-05.

⁷⁶ The United States Supreme Court rejected this proposition in *DeShaney*. *Id.* at 1005-06.

⁷⁷ 627 F. Supp. 244, 245-46 (N.D. Ill. 1985).

⁷⁸ 683 F. Supp. 1108, 1113 (E.D. Tex. 1987). The United States Supreme Court rejected this proposition in *DeShaney*. 109 S. Ct. at 1005-06.

cers' failure to render assistance when they possess such knowledge will result in a cognizable section 1983 claim.⁷⁹

Nevertheless, the simple fact that police officers' duties include aiding people in distress does not imply that section 1983 liability will always follow for failure to rescue. In 1983, the United States Court of Appeals for the Seventh Circuit held in *Jackson v. City of Joliet* that a mere failure to rescue does not create a justiciable section 1983 claim just because the defendant is a public official whose duties include aiding people in distress.⁸⁰

In *Jackson*, plaintiff Jerry Ross was driving his car down a road in the city of Joliet accompanied by a companion, who was six months pregnant. For some unknown reason, the car swerved off the road, crashed, and burst into flames.⁸¹ Two minutes later, a Joliet police officer came upon the scene. Although the car's wheels were spinning, its lights were on, its motor was running, and it was burning, the officer made no attempt to determine whether it was occupied and did not call an ambulance. The police officer called the fire department and returned to the road to direct traffic away from the scene of the accident. The fire department extinguished the fire approximately forty minutes after the call was made, and it was at this time that the officer and his colleagues at the scene noticed the victims slumped in the front seat of the car.⁸² The police made no attempt to remove or assist either occupant, but did call an ambulance, which arrived approximately seven minutes later. Both occupants and the fetus died in the accident.

The *Jackson* court held that a police officer's failure to rescue does not, in and of itself, create a justiciable section 1983 claim.⁸³ The *Jackson* court reasoned that the purpose behind the Constitution is to prevent the government from doing too much to the people and not to require the government to do more for them.⁸⁴ The court declined to interpret the fourteenth amendment as a mandate that the state force some of its citizens to provide services to others.⁸⁵ The *Jackson* court thus established that a police officer's

⁷⁹ *Sherrell*, 683 F. Supp. at 1113. After *DeShaney*, however, neither the *Lowers* court's analysis nor the *Sherrell* court's analysis is valid.

⁸⁰ 715 F.2d 1200, 1202 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

⁸¹ *Id.* at 1201.

⁸² *Id.* at 1201-02.

⁸³ *Id.* at 1202-03.

⁸⁴ *Id.* at 1203.

⁸⁵ *Id.* at 1203-04.

failure to rescue, even a failure rising to the level of gross negligence, would not be a colorable section 1983 claim.⁸⁶

A related principle in the application of the special relationship concept is the idea that if the police are unaware of a special risk to an individual and do nothing to create the dangerous situation, no special relationship arises. In 1986, the United States Court of Appeals for the Ninth Circuit held in *Escamilla v. City of Santa Ana* that police officers faced no section 1983 liability for failure to protect citizens from a dangerous situation that the officers neither created nor exacerbated.⁸⁷ In *Escamilla*, two undercover officers were at a bar when a shooting occurred, a shooting that they took no action to prevent.⁸⁸ Prior to the shooting, the officers witnessed a fight, and they knew that one of the participants had a criminal record. Moreover, the officers saw a gun protruding from this individual's pocket. Mary Medina, who was an innocent bystander in the bar, was killed in the subsequent shooting. Ms. Medina's children brought a section 1983 claim against the City of Santa Ana and the two undercover police officers.

The *Escamilla* court held that police officers face no section 1983 liability for failing to protect citizens when the police officers had no involvement in the creation of the dangerous situation.⁸⁹ The *Escamilla* court reasoned that there was no egregious misconduct on the part of the officers and that their mere presence did not create a special relationship between themselves and the victim.⁹⁰ Therefore, because the officers had only been negligent and had not contributed to the risk of harm to Ms. Medina, their failure to act did not create a cognizable section 1983 claim.⁹¹

Both the *Jackson* and *Escamilla* courts accurately anticipated the United States Supreme Court's application of the special relationship concept. In the 1989 case of *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court addressed the concept of a special relationship between a state and an individual arising out of the state's knowledge that the individual faces a special risk of harm.⁹² The *DeShaney* Court held the state's knowledge of

⁸⁶ *Id.* at 1202, 1206.

⁸⁷ 796 F.2d 266, 270 (9th Cir. 1986).

⁸⁸ *Id.* at 267.

⁸⁹ *Id.* at 270.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 109 S. Ct. 998, 1004 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987).

danger of physical harm to an individual, combined with its asserted intention to provide protection from the danger, insufficient to establish a special relationship.⁹³ The *DeShaney* Court interpreted the case law as establishing the proposition that there is no special relationship and subsequent duty for the state to lend aid to an individual unless the state has placed the individual in its custody.⁹⁴ The *DeShaney* Court noted further that, even if the state voluntarily minimized the danger to an individual, the action would not establish a special relationship so long as the state had done nothing to create the danger in the first place.⁹⁵ Thus, the *DeShaney* Court significantly narrowed the circumstances under which a special relationship between the state and an individual may arise.⁹⁶

In *DeShaney*, plaintiff Joshua DeShaney and his father moved to Neenah, Wisconsin while Joshua was still an infant, following the DeShaney's divorce.⁹⁷ Mr. DeShaney remarried and divorced again, and his second wife informed the Winnebago County authorities, at the time of their divorce, that Mr. DeShaney had abused Joshua in the past and had injured him. Mr. DeShaney denied these charges, and the Winnebago County Department of Social Services (DSS) did not look into the situation any further.

One year later, upon examining Joshua and noticing multiple bruises and injuries, a physician at a local hospital suspected child abuse and notified DSS.⁹⁸ A Wisconsin juvenile court issued an order to DSS, allowing the hospital to take temporary custody of Joshua. Three days later, DSS and several other child protection officials concluded that they could not leave Joshua in the court's custody because of a lack of evidence of child abuse.

One month later, an emergency room employee informed a DSS caseworker that Joshua had again been treated for suspicious injuries, but the caseworker took no action.⁹⁹ During the next six months, the same caseworker visited the DeShaney home monthly and noticed that there were suspicious injuries on Joshua's head.¹⁰⁰ Although the caseworker maintained an accurate record of her

⁹³ *Id.*

⁹⁴ *See id.* & n.4.

⁹⁵ *Id.* at 1006.

⁹⁶ *See id.* at 1004, 1006-07.

⁹⁷ *Id.* at 1001.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* The caseworker also observed that Mr. DeShaney was not living up to his agreement with DSS. *Id.*

observations, she did nothing else.¹⁰¹ Approximately four months later, emergency room personnel again informed DSS that they had treated Joshua for injuries that appeared to have been caused by child abuse.¹⁰² Mr. DeShaney informed the caseworker that Joshua was too ill to see her on her next two visits to see Joshua at home.¹⁰³ DSS again did nothing further.

Four months later, Mr. DeShaney beat his four-year old son so severely that Joshua fell into a life-threatening coma.¹⁰⁴ The brain damage was so extensive that Joshua will live the rest of his life in an institution for profoundly retarded persons. The state subsequently tried and convicted Mr. DeShaney of child abuse.

Joshua's mother then filed a section 1983 action against DSS and various individual employees of DSS, alleging that their failure to protect him from his father's violence, a danger of which they were aware or should have been aware, deprived Joshua of his liberty without due process of law under the fourteenth amendment.¹⁰⁵ In affirming the Seventh Circuit's denial of Ms. DeShaney's section 1983 claim, the United States Supreme Court reasoned that the language of the fourteenth amendment's due process clause limits the state's power to act, but it does not oblige the state to provide safety and security to its citizens.¹⁰⁶ In rejecting Ms. DeShaney's special relationship argument, the *DeShaney* Court noted that the state does have a duty to care for and protect certain individuals under specifically defined circumstances.¹⁰⁷ The *DeShaney* Court then limited the imposition of this duty to situations in which the state has either incarcerated prisoners or committed mental patients against their will.¹⁰⁸ The Court reasoned that the state may not constitutionally place an individual in a situation in which he or she is unable to care for him or herself and then refuse to provide basic bodily requirements.¹⁰⁹ Thus, because of the *DeShaney* Court's requirement that there be a custodial relationship between the state and an individual before the state will be com-

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1001-02.

¹⁰⁴ *Id.* at 1002. Surgeons performing brain surgery on Joshua found a series of hemorrhages caused by a long period of traumatic head injuries. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1002-03. U.S. CONST. amend. XIV, § 1 provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law"

¹⁰⁷ *DeShaney*, 109 S. Ct. at 1004-05.

¹⁰⁸ *Id.* at 1005.

¹⁰⁹ *Id.*

pelled to provide affirmative protection to that individual, a person who receives inadequate protection from the state outside of the state's custody must rely upon state tort law for a remedy.¹¹⁰

Justice Brennan dissented from the majority opinion in *DeShaney*, arguing that the Court had analyzed the situation from the wrong perspective.¹¹¹ Instead of focusing on the state's inaction, Justice Brennan examined the actions that the state had already taken with respect to Joshua and other similarly situated children.¹¹² He reasoned that a state's inaction becomes more constitutionally relevant when examined in light of the state's prior action.¹¹³

Justice Brennan took issue with the *DeShaney* majority's requirement that the state have direct physical control over an individual before there is a special relationship between them.¹¹⁴ Justice Brennan reasoned that a state's knowledge of an individual's dangerous situation and its declarations of intent to aid that person may hinder the individual's ability to act on his or her own behalf as much as physical restraint can.¹¹⁵ Justice Brennan argued that Wisconsin law places a duty on DSS to handle all reports of child abuse and thus relieves private citizens of the obligation to lend aid to abused children.¹¹⁶ Thus, Justice Brennan would have allowed Ms. DeShaney's section 1983 claim because in his view, the state had precluded Joshua from relying on the protection of private citizens and then had failed to prevent harm to Joshua according to its duty.

Prior to *DeShaney*, the courts had struggled to define the special relationship and the factors that will bring it into existence. After *DeShaney*, when victims of crime report the incident to the police and positively identify the perpetrator, the notice is insufficient to establish a special relationship between the police and the victim. When the police officers themselves create the danger and then do nothing to help potential victims, however, these victims may be able to rely upon the special relationship concept to impose section 1983 liability on the police. Lastly, when the police are merely present at the scene of a dangerous situation that they did nothing

¹¹⁰ *Id.* at 1005-07.

¹¹¹ *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting).

¹¹² *Id.* (Brennan, J., dissenting).

¹¹³ *Id.*

¹¹⁴ *Id.* Justice Brennan cited *White v. City of Rochford*, 592 F.2d 381 (7th Cir. 1979), for the proposition that state action other than actual physical restraint may be relevant in special relationship analysis. See *supra* notes 67-75 and accompanying text for a complete discussion of *White*.

¹¹⁵ *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting).

¹¹⁶ *Id.* at 1010-11 (Brennan, J., dissenting).

to create, and none of those present faces any kind of special danger, but is nonetheless harmed, then these individuals will be unable to rely on the special relationship analysis to establish section 1983 liability of the police.

Police officers' liability for failure to act may stem from the general duty imposed by their law enforcement authority, from statutes and regulations, or from a narrowly defined special relationship between the police and the victim. Women have employed some of these theories, and even some additional ones, in holding police officers liable when the officers fail to give assistance to battered women.

II. POLICE OFFICERS' FAILURE TO RENDER ASSISTANCE TO BATTERED WOMEN

The problem of women battering has existed for quite a long time in western civilization.¹¹⁷ More recently, records from the mid-70s at Boston City Hospital showed that 70% of all assault cases treated at the emergency room were women beaten by their husbands.¹¹⁸ Because of the severity of the problem, domestic violence is an area in which several state legislatures have enacted statutes that both impose upon police officers the duty to act and protect the police when they do act.¹¹⁹ In the absence of an applicable statute, women must rely upon alternative theories to obtain relief from police who fail to act.¹²⁰

Courts have applied the special relationship concept to cases in which police officers have failed to help battered women. After

¹¹⁷ See Waits, *supra* note 7, at 267, citing Davidson, *Wife Beating: A Recurring Phenomenon Through History*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2 (M. Roy ed. 1977).

¹¹⁸ D. MARTIN, *BATTERED WIVES* 12 (1979).

¹¹⁹ See e.g., ME. REV. STAT. ANN. tit. 19, § 770(6) (1979) ("Whenever a law enforcement officer has reason to believe that a family or household member has been abused, the officer shall immediately use all available means to prevent further abuse, including . . . [a]rresting the abusing party with or without a warrant . . ."); N.C. GEN. STAT. § 50B-4 (Supp. 1983) ("A law enforcement officer shall arrest and take a person into custody if the officer has probable cause to believe that the person has violated a court order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from harassing or interfering with the victim . . ."); UTAH CODE ANN. § 30-6-8(2) (1989) ("Whenever any peace officer has reason to believe that an adult family member is being abused, . . . that officer shall use all reasonable means to prevent further abuse, including . . . arresting and taking into physical custody the assailant . . ."); see also Lerman, *supra* note 3, at 67-68.

¹²⁰ See, e.g., *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 695 (10th Cir. 1988) (no applicable statute, so court utilized equal protection analysis in recognizing section 1983 claim).

DeShaney, courts are limited in the extent to which they may use the special relationship concept. In addition to this theory, courts have also employed equal protection analysis to aid battered women. That is, courts may compare police response to domestic violence calls to police response to other calls. If the officers consistently treat domestic violence calls with less care than they treat other calls, the evidence may be sufficient to establish an intent to discriminate against women.

Courts will often compare the way that police treat domestic violence calls to the way that they treat other calls for assistance in deciding whether to impose liability under an equal protection theory. In 1984, the United States District Court for the District of Connecticut held in *Thurman v. City of Torrington* that police officers would be subject to section 1983 liability for failure to take reasonable measures to protect the safety of women when the police have notice of the possibility of attacks on these women in domestic relationships.¹²¹

The plaintiff, Ms. Thurman, notified the city of Torrington through its police officers that her estranged husband made repeated threats upon her life.¹²² The *Thurman* court focused on the police officers' indifference to Ms. Thurman's calls for help.¹²³ First, she continually pleaded with the police to offer her some measure of protection,¹²⁴ and she filed several formal complaints with the police against her estranged husband.¹²⁵ Second, Ms. Thurman sought and received a restraining order against her husband. The order forbade Mr. Thurman from assaulting, threatening, and harassing Ms. Thurman.

Approximately a month after the court issued the order, Mr. Thurman appeared at Ms. Thurman's residence and began to stab her repeatedly in the neck, chest, and throat.¹²⁶ The police did not arrive until 25 minutes after Ms. Thurman's call, and even after arriving on the scene did nothing while Mr. Thurman kicked Ms.

¹²¹ 595 F. Supp. 1521, 1527 (D. Conn. 1984).

¹²² *Id.* at 1524.

¹²³ *See id.* at 1528-29.

¹²⁴ *Id.* at 1529. During one incident, a police officer stood on the street watching Mr. Thurman scream threats at Ms. Thurman and break the windshield of the car while she was inside the vehicle. *Id.* at 1525. He was arrested, convicted of breach of the peace, and given a suspended sentence and two year "conditional discharge." *Id.* The discharge ordered him to stay completely away from Ms. Thurman and to commit no further crimes. *Id.*

¹²⁵ *Id.* at 1524-25.

¹²⁶ *Id.*

Thurman in the head.¹²⁷ Mr. Thurman then went inside the house and took his son outside, dropping him on top of his wounded mother. It was not until Mr. Thurman approached Ms. Thurman while she was lying on the stretcher that the police arrested him and took him into custody.

The *Thurman* court held that repeated police failure to answer domestic violence calls amounted to administering the Connecticut law prohibiting assault in a discriminatory fashion and gave rise to section 1983 liability.¹²⁸ The *Thurman* court rejected the notion that it is a husband's prerogative to discipline his wife physically, and the fact that a husband and wife relationship exists between an assailant and a victim is an insufficient reason for police officers to refrain from interfering.¹²⁹ Thus, the *Thurman* court established that police must respond equally to assault victims, whether in a domestic violence situation or not, and that section 1983 liability will result for failure to act.¹³⁰

Some courts have been willing to examine statistical data to determine how police officers have treated victims of domestic violence and whether the treatment constitutes an equal protection violation. In 1988, the United States Court of Appeals for the Tenth Circuit held in *Watson v. City of Kansas City, Kansas* that the police may not lawfully afford less protection to victims of domestic violence than to victims of nondomestic attacks.¹³¹ Because the findings in *Watson* implicated the equal protection rights of the fourteenth amendment, the court held that the plaintiff had a section 1983 claim against the police department.¹³²

¹²⁷ *Id.* at 1525-26.

¹²⁸ *Id.* at 1527. For an excellent and comprehensive analysis of the *Thurman* case and the equal protection issue as it applies to battered women in general, see Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 790-805; see also *Bartalone v. County of Berrien*, 643 F. Supp. 574, 576-77 (W.D. Mich. 1986). *Bartalone* was also a domestic violence case that was decided on equal protection grounds, with the court holding that a police officer who is under a duty to protect persons within the area of his authority must do so on a fair and equal basis. *Id.* at 577.

¹²⁹ *Thurman*, 595 F. Supp. at 1528.

¹³⁰ *Id.* at 1527, 1531.

¹³¹ 857 F.2d 690, 696 (10th Cir. 1988). Although the main focus of this note is police officers' liability for failure to act, plaintiffs can also sue the town or municipality under section 1983 if they can show that the police officers carried out their actions pursuant to an unconstitutional policy or custom promulgated by the official policymakers. See *id.* at 695; see also *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 817 (1985), *reh'g denied*, 473 U.S. 925 (1985); *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

¹³² *Watson*, 857 F.2d at 695. See *supra* note 6 and accompanying text for a similar point about fourteenth amendment rights.

Because the *Watson* case involved an equal protection claim, the plaintiff Ms. Watson had the burden of demonstrating that she was treated differently because of her membership in a certain class.¹³³ Courts have held that, although there is no general right to police protection, police officers may not refuse to protect a certain group or class of people under the same circumstances that they would protect others.¹³⁴ Thus, all members of the public are entitled to equal treatment in the provision of police protection.¹³⁵

The *Watson* case involved a long history of domestic violence that spanned a period of approximately five years.¹³⁶ The plaintiff, Nancy Watson, was married to Ed Watson in 1979.¹³⁷ Ed Watson abused his wife during their marriage, and they were divorced in 1981. A few days before the divorce, Ed Watson threatened his wife with a knife. When Ms. Watson called the police, the responding officers told her that if she ever called the police again, they would arrest her and take her children away from her.

In 1982, Ed and Nancy Watson began to see each other again, and the two were subsequently remarried.¹³⁸ There were numerous incidents of her husband physically abusing her, complaints to the police, and inaction on their part.¹³⁹ Nancy Watson filed for divorce in 1983, and the two separated.¹⁴⁰ The violent relationship culminated in an incident in which Ed Watson followed Nancy home, forced the family into the house, locked the dead bolts, and ripped out the telephone. He locked the children in their room and raped, beat, and stabbed Nancy. Ed Watson committed suicide shortly after the incident.

To support its holding that police response to domestic violence calls constituted an equal protection violation, the *Watson* court relied on statistics presented by the plaintiff, which showed arrest rates in nondomestic assault cases in Kansas City, Kansas, to be

¹³³ *Watson*, 857 F.2d at 696.

¹³⁴ *Id.*; see *Bartalone v. County of Berrien*, 643 F. Supp. 574, 577 (W.D. Mich. 1986); *Lowery v. City of Streator*, 627 F. Supp. 244, 246 (N.D. Ill. 1985).

¹³⁵ See *Bartalone*, 643 F. Supp. at 577. For a general discussion of equal protection analysis, see generally *TRIBE, AMERICAN CONSTITUTIONAL LAW*, ch. 16.

¹³⁶ See *Watson*, 857 F.2d at 692-93.

¹³⁷ *Id.* at 692.

¹³⁸ *Id.* During all these incidents, Ed Watson was also employed as a police officer with the Kansas City, Kansas Police Dept. In addition to the complaints filed by his wife, the department had notice of the situation through a psychological evaluation administered by the department's Internal Affairs Unit. *Id.*

¹³⁹ *Id.* at 692-93.

¹⁴⁰ *Id.* at 693.

significantly higher than those in domestic assault cases.¹⁴¹ Ms. Watson also presented evidence that the training police officers received for domestic violence encouraged them to "defuse" the situation and use arrest as a last resort.¹⁴²

Although the *Watson* court supported the jury's finding that the police afforded less protection to victims of domestic assault than to other assault victims, it affirmed the district court's grant of summary judgment for the police on Ms. Watson's claim of class-based discrimination based on sex because she had failed to show that the classification was adopted purposefully to discriminate against women.¹⁴³ Thus, the *Watson* court established the principle that statistical evidence of police failure to treat domestic violence situations as they would treat any other assault will be a telling factor in a determination of whether there is a policy of treating these calls differently.¹⁴⁴ If such statistics are combined with another factor, such as evidence of police officers' inadequate training in handling domestic violence situations, section 1983 liability for the police will result.¹⁴⁵

Some courts, in dealing with the issue of battered women who receive inadequate police protection, have accurately anticipated the *DeShaney* rule and held that a police department's repeated notice of the victim's plight combined with its knowledge of the perpetrator's identity is insufficient to establish a special relationship and give rise to a section 1983 cause of action.¹⁴⁶ For example, in 1987, the United States District Court for the District of South Carolina held in *Turner v. City of North Charleston* that the fact that a perpetrator was in legal custody prior to the incident did not establish a

¹⁴¹ *Id.* at 695. The plaintiff presented evidence showing that out of 608 nondomestic assault cases in Kansas City, Kansas, from January 1, 1983, to September 8, 1983, where there was a known perpetrator, there were 186 arrests for an arrest rate of 31%. Out of 369 domestic assaults, there were only 69 arrests for a rate of 16%. *Id.*

¹⁴² *Id.* at 696. Such evidence tended to establish that the police were acting pursuant to an official policy. *Id.* See *supra* note 131. See also *Waits, supra* note 7, at 311 (discussion of how police tend to treat a domestic violence situation when called to it).

¹⁴³ *Watson*, 857 F.2d at 697-98.

¹⁴⁴ See *id.* at 695-96.

¹⁴⁵ See *id.* at 696.

¹⁴⁶ See *Morgan v. District of Columbia*, 468 A.2d 1306, 1317-18 (D.C. App. 1983). The *Morgan* court held that there was no special relationship between the police department and the wife of a police officer who had been threatened by her husband with his service revolver because the police captain did not affirmatively undertake the obligation of protecting the officer's wife and the wife did not rely on the police captain to protect her. *Id.* This was not a section 1983 case, but the analysis is quite similar.

special relationship when the state had expressed no desire to provide affirmative protection to a specific group of individuals.¹⁴⁷

In *Turner*, a husband injured his wife in an ongoing domestic dispute.¹⁴⁸ The record in the *Turner* case indicated a series of quarrels at the house, with Ms. Turner being cut with a butcher knife, assaulted, and raped. Ms. Turner was thereafter divorced from her husband, Vernon Fair. She obtained a temporary restraining order against him which was later made permanent.¹⁴⁹ Subsequent to the issuance of the order, Mr. Fair entered Ms. Turner's home and threatened her with a knife. He also made phone calls to her, threatening her safety and that of her children. At this point, Ms. Turner phoned the City of North Charleston Police Department, informing them not of the specific threats, but of her fear that Mr. Fair might attempt to harm her.¹⁵⁰ On the next day, Ms. Turner phoned the police again and told them that Mr. Fair had just telephoned and threatened her.¹⁵¹

Ms. Turner and her children made two more calls over the course of the day to tell the police that Mr. Fair was threatening them, but the police simply responded that a warrant could not be obtained over the phone.¹⁵² That evening, Mr. Fair entered Ms. Turner's home, shot her several times in the head, and attempted to shoot her son.¹⁵³ The police at that point dispatched a car to the area.

The *Turner* court held that these facts were insufficient to establish a special relationship between Ms. Turner and the police.¹⁵⁴ According to the court, the qualified immunity defense protected the police officers from section 1983 liability.¹⁵⁵ In general, the qualified immunity doctrine states that an official will not be held liable for violating an individual's rights unless the right was so clearly established and its contours so sharply defined at the time of the action that a reasonable official would understand that he

¹⁴⁷ 675 F. Supp. 314, 318-19 (D.S.C. 1987).

¹⁴⁸ *Id.* at 317.

¹⁴⁹ *Id.* The order forbade Mr. Fair from following Ms. Turner on foot or in an automobile, from physically abusing her, or harassing or harming her in any way. *Id.*

¹⁵⁰ *Id.* Ms. Turner was to appear on the following day at a hearing regarding Mr. Fair's probation violation. *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 317-18. All these calls involved requests for a patrol car to be sent to the area. *Id.*

¹⁵³ *Id.* at 318.

¹⁵⁴ *Id.* at 319.

¹⁵⁵ *See id.*

was violating that right.¹⁵⁶ The *Turner* court reasoned that, due to the absence of specific guidelines to determine when a special relationship existed, the officers here, even acting reasonably, could not have understood that their actions violated any rights.¹⁵⁷ In the *Turner* court's view, a reasonable official would not understand that he or she was violating someone's constitutional right by failing to return telephone calls.¹⁵⁸ Thus, the *Turner* court established that no special relationship exists unless the state places the victim in the position of danger or specifically singles out the victim and places her in its care.¹⁵⁹

Subsequent decisions that attempted to revive the importance of restraining orders and the importance of police officers' knowledge of threats to a specific victim are probably not good law after *DeShaney*. A discussion of these cases is useful, however, in order to understand the evolution of the special relationship concept up to the *DeShaney* decision. In 1988, the United States Court of Appeals for the Ninth Circuit held in *Balistreri v. Pacifica Police Department* that a restraining order together with the police department's repeated notice of the plaintiff's plight were sufficient to state a claim that the police owed the plaintiff, Ms. Balistreri, a duty to take reasonable measures to protect her from her estranged husband.¹⁶⁰ The factors were sufficient to establish a special relationship between Ms. Balistreri and the police and to hold them liable under section 1983 for their failure to provide adequate protection.¹⁶¹

Initially, the United States District Court for the Northern District of California dismissed the complaint in the *Balistreri* case.¹⁶² The district court held, in accordance with the Supreme Court's subsequent *DeShaney* decision, that Ms. Balistreri had not alleged

¹⁵⁶ See *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987); *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982).

¹⁵⁷ 675 F. Supp. at 319.

¹⁵⁸ *Id.* The state of South Carolina had enacted a "Protection from Domestic Abuse Act". The court reconciled its holding with the statute by stating that "the Act does not appear to create an initial, express duty of protection, or intervention, in domestic abuse cases, but rather provides only that law enforcement officers take certain protective measures *when responding to a domestic abuse incident.*" *Id.* (emphasis added).

¹⁵⁹ *Turner*, 675 F. Supp. at 319.

¹⁶⁰ 855 F.2d 1421, 1426 (9th Cir. 1988). But see *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003-04 & n.4 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987) (Supreme Court held that a special relationship between the state and an individual can only arise when the state places the individual in its custody).

¹⁶¹ See *Balistreri*, 855 F.2d at 1424-26.

¹⁶² See *Balistreri v. Pacifica Police Dep't*, 656 F. Supp. 423, 426 (N.D. Cal. 1987).

adequate facts to establish a special relationship.¹⁶³ Because the state had not assumed a custodial relationship over her,¹⁶⁴ or affirmatively placed her in danger or instigated the actions of her former husband, the special relationship did not exist.¹⁶⁵ The district court went on to say that the police officers' awareness of Mr. Balistreri's dangerous nature was not sufficient to establish a special relationship between the police and Ms. Balistreri.¹⁶⁶

Judge Fletcher of the Ninth Circuit based her reversal of the district court decision in *Balistreri* on two grounds: its failure to consider whether the state had affirmatively undertaken any duty to protect Balistreri; and its conclusion that the state's awareness of the victim's plight will only give rise to a special relationship within a custodial context.¹⁶⁷ The *Balistreri* court asserted that special relationships may be found outside the custodial context.¹⁶⁸

The *DeShaney* Court explicitly rejected this analysis and stated that it is not the state's knowledge of an individual's dangerous situation that gives rise to a duty to protect that individual, but only the state's act of placing the individual in a custodial situation and limiting that person's freedom to act on his or her own behalf.¹⁶⁹ Although *DeShaney* disapproved the special relationship *Balistreri* rule, *Balistreri* is still important for its contribution to the equal protection component of police officers' reponse to battered women. The Pacifica Police Department argued in *Balistreri* that Ms. Balistreri's complaint contained no facts demonstrating discrimination against any class or that Ms. Balistreri was a member of any class.¹⁷⁰ The defendants correctly pointed out that a party asserting a claim for equal protection must show intentional discrimination by the state against a class of persons.¹⁷¹ Defendants relied on the

¹⁶³ *Id.* at 425.

¹⁶⁴ *Id.* See *supra* note 74 and accompanying text.

¹⁶⁵ *Balistreri* 656 F. Supp. at 425.

¹⁶⁶ *Id.* at 426.

¹⁶⁷ *Id.* See *Escamilla v. City of Santa Ana*, 796 F.2d 266, 269-70 (9th Cir. 1986). In *Escamilla*, the Ninth Circuit acknowledged that, in addition to the custodial context, a court could also look at whether the state affirmatively committed itself to protecting the victim and whether the state knew of the victim's plight. The *DeShaney* Court rejected this analysis.

¹⁶⁸ *Balistreri*, 855 F.2d at 1426.

¹⁶⁹ *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1006 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987).

¹⁷⁰ Brief for Appellees at 12, *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (No. 87-1969).

¹⁷¹ *Id.* at 13. See *supra* notes 132-35 and accompanying text for a brief discussion of equal protection analysis.

words of Ms. Balistreri's complaint to argue that she was treated identically to any other member of the public.¹⁷²

In its opinion, the Ninth Circuit conceded that Ms. Balistreri's equal protection claim was not well pleaded and that there was no specific claim that the defendants' conduct discriminated against her based on her status as a female victim of domestic violence.¹⁷³ The *Balistreri* court was willing to overlook the poor drafting, however, and noted that sufficient facts were alleged to suggest discrimination against Ms. Balistreri because she was a woman.¹⁷⁴ The *Balistreri* court pointed out that certain remarks made by the police officers responding to one of Ms. Balistreri's assault complaints strongly suggested an intention to treat domestic abuse cases less seriously than other assaults and a certain animosity against abused women.¹⁷⁵

In summary, the *DeShaney* decision severely limits the circumstances under which courts will find a special relationship to have arisen between police officers and domestic violence victims. Factors such as police knowledge that a person faces a special danger and knowledge of the threatening party's identity are no longer sufficient to establish a special relationship. Domestic violence victims will be more successful in relying upon the equal protection analysis used in *Watson* and *Thurman*. If a woman is able to establish that police officers treat domestic violence calls differently than other calls, she no longer needs to prove the existence of a special relationship.

III. A POSSIBLE SOLUTION FOR BATTERED WOMEN

As the roles of men and women in our society change, police officers are more likely to be held accountable for failure to respond and render assistance to battered women.¹⁷⁶ The law no longer accepts the idea that men have the right to use force in order to "discipline" their wives.¹⁷⁷ Because police officers are a battered woman's initial hope for immediate and effective relief from severe physical abuse, they play a particularly critical role in eradicating

¹⁷² Brief for Appellees at 13, *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (No. 87-1969).

¹⁷³ *Balistreri*, 855 F.2d at 1427.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., *Balistreri*, 855 F.2d at 1426; *Thurman*, 595 F. Supp. at 1527.

¹⁷⁷ See Waits, *supra* note 7, at 268-70.

the problem of domestic violence.¹⁷⁸ When the police fail to respond, the courts and the legislature must be willing to impose liability on the police for their inaction and thereby help battered women.¹⁷⁹

Battered women still have several legal theories under which they can sue passive police officers under section 1983. If the courts strive to limit *DeShaney* to its facts, the special relationship concept may provide an avenue of relief for battered women who receive no aid. Also, the law enforcement theory may still be an option after *DeShaney*. Because the theory requires that the officer be close to the scene before he or she has a duty to intervene on behalf of the victim, however, it is of little help to battered women. The equal protection argument is an effective one for battered women, and recent decisions such as *Watson* seem quite receptive to it. The best course of action is for state legislatures to enact statutes requiring police officers to take affirmative steps to aid domestic violence victims. Because the statutes impose clear duties, they are the most effective way to combat the problem.

Courts faced with the problem of battered women and passive police officers are now compelled to define the special relationship without the benefit of the factors relied upon by the *Balistreri*,¹⁸⁰ *Lowers*,¹⁸¹ and *Sherrell*¹⁸² courts. The *Balistreri* court focused on elements such as the restraining order and the repeated calls for assistance in defining the special relationship.¹⁸³ The *Balistreri* court stated that these elements were important in determining whether a special relationship came into existence.¹⁸⁴ In *DeShaney v. Winnebago County Department of Social Services*, the United States Supreme Court disapproved this line of reasoning.¹⁸⁵ Because the *DeShaney* Court held that a special relationship may only arise between the state and an individual when the state assumes custody over that individual,¹⁸⁶ the *Balistreri* court's definition of special relationship is probably no longer valid.

¹⁷⁸ See *id.* at 308.

¹⁷⁹ See *id.* at 298-329. Professor Waits states that: "[n]o other social institution has the legal system's clout to protect victims and to force batterers to face the consequences of their transgressions." *Id.* at 302.

¹⁸⁰ See *Balistreri*, 855 F.2d at 1426.

¹⁸¹ See *Lowers v. City of Streator*, 627 F. Supp. 244, 246 (N.D. Ill. 1985).

¹⁸² See *Sherrell v. City of Longview*, 683 F. Supp. 1108, 1113 (E.D. Tex. 1987).

¹⁸³ *Balistreri*, 855 F.2d at 1426.

¹⁸⁴ *Id.*

¹⁸⁵ 109 S. Ct. 998, 1005-06 (1989), *aff'g* 812 F.2d 298 (7th Cir. 1987).

¹⁸⁶ *Id.*

Thus, the *DeShaney* Court's holding leaves victims of domestic violence like Ms. Balistreri at a severe disadvantage, unless these women can afford to hire their own private protection. As Justice Brennan stated in his dissent in *DeShaney*, the state need not have direct physical control over an individual to hinder that individual's ability to act on her own behalf.¹⁸⁷ The Pacifica Police Department's knowledge of the risk of harm to Ms. Balistreri, combined with the fact that they were public officers with the duty to aid citizens in distress, precluded Ms. Balistreri from seeking assistance from other sources.¹⁸⁸ Thus, the police department in effect prevented Ms. Balistreri from helping herself, but, according to *DeShaney*, should not have been held liable for such action.

Limiting the special relationship to the custodial context, as the United States Supreme Court did in *DeShaney*, will allow police officers to escape liability for failing to aid battered women. According to the *DeShaney* Court's reasoning, the only women who will have cognizable section 1983 claims against passive police officers are those women who are already in a police officer's custody when the abuse occurs.¹⁸⁹ This remedy obviously offers little hope for women. It is difficult to imagine a man inflicting harm upon a woman who is in the protective custody of the police. As Justice Brennan argued in dissent in *DeShaney*, the state's direct physical control over an individual should not be the only situation in which the state has a special duty to protect that individual.¹⁹⁰ Relief for battered women must come, at least initially, from police officers, and the state controls this avenue of relief¹⁹¹ by controlling its police officers. As Justice Brennan argued, when the state monopolizes a certain area, certain positive duties should be and are imposed on it.¹⁹² Thus, when the state employs police officers to lend aid to those in need, and the officers fail to fulfill their duties, the harmed individuals should be allowed to bring a section 1983 action against the police.

Nevertheless, extending the special relationship concept to a situation where a woman is beaten and a police officer fails to respond does not mean that police officers will always be liable for

¹⁸⁷ *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting).

¹⁸⁸ See *Balistreri*, 855 F.2d at 1423. One of the officers investigating an incident at the Balistreri home suggested to Ms. Balistreri that she hire a private investigator. *Id.*

¹⁸⁹ See *DeShaney*, 109 S. Ct. at 1005-06.

¹⁹⁰ *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting).

¹⁹¹ *Id.* (Brennan, J., dissenting).

¹⁹² *Id.*

such inaction. Whether the officer had a duty to aid a particular victim will necessarily depend upon the facts and circumstances of each case. A court would want to examine the extent of the notice to police, the action in which the officers were engaged when they received the call, and the seriousness of the physical harm to the woman.

In addition, the qualified immunity argument is available to the police officer.¹⁹³ This argument will be successful if the special relationship was not clearly established and the police officer could not have known of its existence. Thus, the qualified immunity protection is potentially available to the police officer in every case, no matter what definition of special relationship a court utilizes. An argument for an expansive special relationship concept is not an argument for more liability on police officers, but one for greater protection for battered women.

Clearly, Justice Brennan's special relationship concept will go further in deterring domestic violence than the theory that requires police to act as a result of their law enforcement authority.¹⁹⁴ The court in *Huey v. Barloga* utilized this law enforcement theory in refusing to find the police officers liable under section 1983.¹⁹⁵ The *Huey* court would have required a specific omission by the police that caused the injury, and notice of the possibility of danger to the plaintiff was insufficient.¹⁹⁶ Such a requirement would limit the extent to which battered women could use this theory.

The court in *Byrd v. Brishke* held the police officers liable under this law enforcement theory.¹⁹⁷ The *Byrd* court's analysis, however, relied upon the fact that the incident took place right in the very presence of the offending officers.¹⁹⁸ The analysis approached the requirement of a custodial situation between the victim and the police officers. Although the *Byrd* court did state that a police officer would have a duty to intervene even if the action was not in his presence but "otherwise within his knowledge," the court never defined the limits of this part of the test.¹⁹⁹ Therefore, even the

¹⁹³ See *Turner v. City of North Charleston*, 675 F. Supp. 314, 319 (D.S.C. 1987). See *supra* notes 155-58 and accompanying text for a discussion of qualified immunity.

¹⁹⁴ See *supra* notes 41-56 and accompanying text for a discussion of the law enforcement theory.

¹⁹⁵ 277 F. Supp. 864, 873 (N.D. Ill. 1967).

¹⁹⁶ *Id.*

¹⁹⁷ 466 F.2d 6, 11 (7th Cir. 1972).

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

Byrd court's analysis provides little help to a battered woman who sends a call for help to a police officer who is some distance away.

Further, it is not clear whether this prong of the test would be a viable source of relief for battered women against passive police officers after *DeShaney*. The *DeShaney* Court rejected the argument that a special relationship existed simply because the state knew that the victim faced a special danger of abuse.²⁰⁰ Although the Court was not addressing the law enforcement theory used in *Byrd*, it would seem that a police officer's mere knowledge of potential danger to a person would be an insufficient basis for section 1983 liability under any theory. Because the *DeShaney* Court required more than mere knowledge in the special relationship context, any argument that relies only on knowledge will likely fail.

In any event, because the law enforcement theory requires close proximity of the officer to the scene²⁰¹ and showings of specific omissions and causal connections,²⁰² it would be more difficult for battered women to use it in establishing section 1983 liability of police officers for failure to act. Thus, it suffers from the same deficiency as the special relationship concept that the United States Supreme Court promulgated in *DeShaney*.²⁰³ Indeed, one of the more positive aspects of the special relationship concept, as Justice Brennan defined it in his *DeShaney* dissent,²⁰⁴ is that the victim can take steps in establishing it by notifying the police of the danger that she faces.²⁰⁵ Courts should therefore heed the suggestions of the *Balistreri* court and Justice Brennan's *DeShaney* dissent and extend the special relationship test beyond the custodial context to protect battered women.

Despite the *DeShaney* decision, however, the equal protection argument still remains a strong one for battered women.²⁰⁶ Its

²⁰⁰ *DeShaney*, 109 S. Ct. at 1004.

²⁰¹ See *Byrd*, 466 F.2d at 11.

²⁰² See *Huey*, 277 F. Supp. at 873.

²⁰³ 109 S. Ct. at 1004-05.

²⁰⁴ *DeShaney*, 109 S. Ct. at 1009-10 (Brennan, J., dissenting).

²⁰⁵ See *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1426 (9th Cir. 1988) (An important factor to the court was the police officers' repeated notice of Ms. Balistreri's plight, notice that she provided herself.); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1525 (1984) (Ms. Thurman made numerous calls and complaints to the police about the abuse she was receiving).

²⁰⁶ In footnote 3 of the *DeShaney* opinion, the Court noted that selective denial of protective services to certain classes would violate the equal protection clause. *DeShaney*, 109 S. Ct. at 1004 n.3. According to the Court, Ms. DeShaney failed to make the equal protection argument. *Id.*

strength lies not only in the courts' willingness to use it, but in their expansive concept of equal protection as applied to battered women. The *Balistreri* court's equal protection analysis suggests that it will look to two separate areas in defining a class. First, it would examine the class of people who are victims of domestic violence to see if they are treated differently than other assault victims.²⁰⁷ Then it would look to women to see if they are treated differently than men in a similar situation.²⁰⁸ The *Balistreri* court's broad definition of class will serve as an effective vehicle for battered women who receive insufficient police protection to bring section 1983 claims against officers.²⁰⁹

The Tenth Circuit in *Watson v. City of Kansas City, Kansas* also engaged in this two-track analysis.²¹⁰ The *Watson* court was willing to consider statistical data in reaching its conclusion that the defendants provided less police protection to victims of domestic assault than to other assault victims.²¹¹ The *Watson* court reached this conclusion despite the plaintiff's failure to show that the classification was adopted purposefully to discriminate against women.²¹² Thus, the *Balistreri* and *Watson* courts established that a battered woman is a member of two classes. This rule will substantially increase a woman's chances of obtaining section 1983 relief against passive police officers who have breached their duty by failing to provide protection.

This two-pronged definition of class is an effective way for the courts to combat the problem of police failure to respond to domestic violence calls. It will help to protect all victims of domestic violence, not just women.²¹³ Because there is likely to be more evidence available on police responses to specific kinds of calls, such as the statistics used in the *Watson* case, than on police officers' treatment of women in general, discrimination against domestic violence will be easier to prove from an evidentiary point of view than discrimination against women. In addition, police will be liable under section 1983 for their inaction, even in the absence of a purpose to discriminate against women.²¹⁴ Such a broad definition

²⁰⁷ *Balistreri*, 855 F.2d at 1427.

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ 857 F.2d 690, 696-97 (10th Cir. 1988).

²¹¹ *See id.* at 695-96.

²¹² *Id.* at 697.

²¹³ *See Sherrell v. City of Longview*, 683 F. Supp. 1108, 1113 (E.D. Tex. 1987).

²¹⁴ *See Watson*, 857 F.2d at 696-97.

of class not only will provide domestic violence victims and specifically women with two theories of recovery against the police under section 1983, but it will also send a message to police officers of how seriously the courts treat this problem. Thus, the *Balistreri* court's two-class analysis for women victimized by domestic violence extends the equal protection analysis of *Thurman v. City of Torrington*, where the court concentrated specifically on women as a class and not on all victims of domestic violence as a separate class.²¹⁵

Nevertheless, the emerging use of equal protection analysis to hold police officers liable under section 1983 for failure to act does not negate or even minimize the need for statutes that will impose a duty on police officers, not only to aid battered women, but to make arrests in domestic violence situations.²¹⁶ The enactment of such statutes is the most effective way to combat the problem of police inaction. Failure to comply with the statutory requirements will result in section 1983 liability. *Johnson v. Duffy* illustrated the effectiveness of statutorily defined duties on police officers.²¹⁷ The *Johnson* court had little difficulty in holding that the sheriff had a legal duty to act because the duty was defined in the statute.²¹⁸

As commentators have pointed out, arresting the perpetrator will insure the safety of the victim as well as help to calm the perpetrator by removing him from the scene.²¹⁹ By mandating arrest, domestic violence statutes benefit all parties. Certainly the victim benefits by the removal of the perpetrator from her presence.²²⁰ The perpetrator also benefits because he will be prevented from inflicting further injury. And lastly, the police will benefit because they will not have to question the propriety of an arrest from situation to situation. Their duty will be clearly defined, and they need only carry it out.

The existence of such statutes will further enable courts to establish the causal connection between the police officer's failure

²¹⁵ 595 F. Supp. 1521, 1527 (D. Conn. 1984). The *Thurman* court concentrated upon women who are victims of domestic violence. *Id.*

²¹⁶ See *supra* note 119 for examples of some of these statutes. See also Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 HARV. WOMEN'S L.J. 167, 167-86 (1979).

²¹⁷ 588 F.2d 740, 744 (9th Cir. 1978). See *supra* notes 57-64 and accompanying text for a discussion of *Johnson*.

²¹⁸ *Johnson*, 588 F.2d at 744. But see *Turner v. City of North Charleston*, 675 F. Supp. 314, 318-19 (D.S.C. 1987) (court gave a strained interpretation to a Protection from Domestic Abuse Act to relieve the police officers from liability for failure to act).

²¹⁹ See *Waits*, *supra* note 7, at 308-19. (an extensive analysis of why arrest is one of the most effective ways to combat the problem of abuse against women).

²²⁰ *Id.* at 309.

to act and the battered woman's injury. If a domestic violence statute specifically imposes upon the police officer a duty to arrest and remove the perpetrator, and the police officer fails to do so, then any further injury inflicted upon a woman may be directly attributed to the officer's failure to act. The courts will not have to struggle with the issue of whether a failure to act may "cause" a person to be deprived of his or her constitutional rights within the meaning of section 1983,²²¹ because the causal link will be established in the statute itself. Thus, such statutes may greatly enhance the protection available to battered women.

Of course police officers may protest and claim that the presence of such statutes will subject them to liability more often if they fail to make arrests. If a court employs equal protection analysis or the special relationship analysis as enunciated in Justice Brennan's *DeShaney* dissent, the police still may argue absence of intention to treat a member of a class differently²²² and qualified immunity,²²³ and thus escape liability. With a statutorily defined duty, however, it would be more difficult for police officers to make such arguments.²²⁴ Again, the main objective is not to impose liability upon police officers, but to afford battered women more protection and to provide them with a theory of relief when they do not receive such protection. In the final analysis, the clear enunciation of duty and removal of doubt would seem to be more beneficial to police officers. Thus, the enactment of such statutes can further aid women in their need for police protection from physical abuse.

IV. CONCLUSION

Domestic violence, particularly violence against women, is a serious problem. A major hindrance in combatting this violence has been anti-women attitudes that accepted such behavior. Police officers were not expected to take actions to prevent violence against women, at least not to the extent that they were expected to combat other assault situations.

Courts have employed several methods of analysis in order to hold police officers liable for failure to act in certain situations. The enactment of section 1983 made it even more difficult for police

²²¹ See *supra* note 4 for the full text of section 1983.

²²² See *supra* notes 133-35 and accompanying text for a discussion of this requirement in an equal protection claim.

²²³ See *supra* notes 155-58 and accompanying text for a discussion of qualified immunity.

²²⁴ See *Johnson v. Duffy*, 588 F.2d 740, 744 (9th Cir. 1978).

officers to escape liability. The courts have begun to enunciate clearly the circumstances necessary to hold police officers liable for failure to act. Although *DeShaney v. Winnebago County Department of Social Services* limits the situations in which section 1983 plaintiffs may establish a special relationship, Justice Brennan's dissenting opinion provides fertile ground for such plaintiffs to try and persuade courts that the decision should be narrowly interpreted.

The best solution to remedy the uncertainty is for state legislatures to draft statutes that require police officers to provide affirmative protection to victims of domestic violence and to make arrests when arriving at the scene of the violence. A statutorily defined duty provides clarity for both police officers and domestic violence victims as to the extent of the police officer's required actions and the possibility of liability for failure to act. Many states have already enacted statutes requiring protection and even arrest of the perpetrator, but more needs to be done. It would be unfortunate if police officers were subject to civil liability more frequently as a result of the passage of such statutes. It would be even more unfortunate, however, if battered women continue to receive no help from police officers.

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