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Battered Spouses' Section 1983 Damage Actions against the Unresponsive Police after Deshaney

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BATTERED SPOUSES’ SECTION 1983 DAMAGE ACTIONS AGAINST THE UNRESPONSIVE POLICE AFTER DESHANEY

JAMES T. R. JONES*

I. INTRODUCTION ............................................. 253

II. BATTERED SPOUSES’ SECTION 1983 DAMAGE SUITS BEFORE DESHANEY ............................................. 257

A. Denial of Due Process ...................................... 261
   1. “Special Relationship” Substantive Due Process Cases ............................................. 261
   2. Board of Regents v. Roth Procedural Due Process Cases ............................................. 265

B. Denial of Equal Protection .................................. 272
   1. Abused Spouse Equal Protection Case Authorities ............................................. 273
   2. Abused Spouse Equal Protection Analysis ............................................. 279
   3. Summary of Abused Spouse Equal Protection Law ............................................. 283

C. Failure to Adequately Train the Police .................. 283

III. DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES ............................................. 290

IV. DESHANEY’S IMPACT ON BATTERED SPOUSES’ SECTION 1983 DAMAGE LITIGATION ............................................. 296

A. Denial of Due Process ...................................... 296

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1. "Special Relationship" Substantive Due Process Cases ........................................ 297
   a. General Rejection of Claims ........................................ 297
   b. DeShaney's "Custody" Test .................................. 298
   c. Summary of Abused Spouse Substantive Due Process Law ........................................ 308
2. Board of Regents v. Roth Procedural Due Process Cases ........................................ 308
   a. Roth in Spouse Abuse Cases ........................................ 309
      (1). Liberal Roth Interpretations ........................................ 309
      (2). Intermediate Roth Interpretations ........................................ 311
      (3). Restrictive Roth Interpretations ........................................ 312
   b. Analysis of Roth Spouse Abuse Case Issues ........................................ 315
      (1). Viability of Roth Claims ........................................ 316
      (2). Scope of Viable Roth Claims ........................................ 318
      (3). What Process Is Due ........................................ 321
      (4). Damage Remedy for Denial of Procedural Due Process ........................................ 327
   c. Summary of Abused Spouse Procedural Due Process Law ........................................ 330

B. Denial of Equal Protection ........................................ 331
   1. Cases Clearly Applying Pre-DeShaney Law ........................................ 331
   2. McKee v. City of Rockwall ........................................ 333
   3. Summary of Abused Spouse Equal Protection Law ........................................ 338

C. Failure to Adequately Train the Police ........................................ 339

V. The Future of Battered Spouses' Section 1983 Damage Actions ........................................ 341
   A. Denial of Due Process ........................................ 342
      1. "Special Relationship" Substantive Due Process Cases ........................................ 342
      2. Board of Regents v. Roth Procedural Due Process Cases ........................................ 347

B. Denial of Equal Protection ........................................ 351
C. Failure to Adequately Train the Police ........................................ 355

VI. Conclusion ........................................ 356

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I. INTRODUCTION

In recent years, numerous courts, commentators, and legislators

3. On the federal level, Senator Joseph Biden of Delaware has introduced a statute, the Violence Against Women Act of 1990, that recognizes the gravity of crimes against women and encompasses abused spouses. S. 2754, 101st Cong., 2d Sess., 136 CONG. REC. S8,263-69 (daily ed. June 19, 1990). Title II of the proposed bill "provides new laws, encourages new policies, and adds new funds to help in the fight against domestic violence." Id. at S8,263 (statement of Sen. Biden). It includes a federal statute authorizing interstate enforcement of state orders of protection against spouse abuse, id. § 211, 136 CONG. REC. at S8,267, and funding through grants to encourage local law enforcement officials to arrest abusive spouses. Id. § 222, 136 CONG. REC. at S8,268.

The vast majority of states have order of protection statutes which generally require the police to protect battered spouses against their abusers notwithstanding the police's general aversion to getting involved in domestic violence disputes. See infra notes 9-10 and accompanying text. For a generally current compilation of citations to these provisions, see Case Note, 40 U. MIAMI L. REV. 333, 350 n.102 (1985) (citing Lerman, A Model State Act: Remedies for Domestic Abuse, 21 HARV. J. ON LEGIS. 61, 62 n.1 (1984)). Some state courts allow those holders of protective orders the police fail to protect, with injury or death resulting, to bring common law tort damage suits against the nonresponsive police on a "special relationship" theory. E.g., Soricelli v. City of New York, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985); Baker v. City of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966); see Turner v. Distric of Columbia, 532 A.2d 662 (D.C. 1987) (child protection statute created tort duty); Florida Dep't of Health & Rehabilitative Servs. v. Yamuni, 529 So. 2d 258 (Fla. 1988) (child protection statute created tort duty). See also DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 201-03 (1989). See infra note 22. In addition, 42 U.S.C. § 1983 (1982) may authorize denial of procedural due process constitutional tort damage recoveries against the police for their deprivation, through inaction, of some battered spouses' entitlements to protection, created under such protection orders, without first providing them procedural due process. See infra notes 57-89, 254-374 and accom-
have agreed that spouse abuse of either sex is a major American, if not international, problem involving large numbers of victims who belong to all socioeconomic groups. Police reluctance to become involved in domestic disputes is a major aspect of this problem. Much harm results from law enforcement’s failure to protect battered victims from their tormenters. Scholars have identified a number of reasons for this hesitation, including the police’s desire for safety and their traditional aversion against getting involved in

4. As in Finesmith, when terms such as “battered spouse,” “spouse abuse,” and “domestic violence” are used in this article they refer to both the legally married and unmarried. Finesmith, supra note 2, at 76 n.10. See Woods, supra note 2, at 8; Comment, Does the Legal System Batter Women? Vindicating Battered Women’s Constitutional Rights to Adequate Police Protection, 21 ARIZ. ST. L.J. 705, 705 n.2 (1989); Note, Battered Women, supra note 2, at 145.

5. While the victims of spouse abuse can be either men or women, women are victimized far more often than men. See, e.g., D. RHODE, supra note 2, at 237; Taub, Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny, 9 HOFSTRA L. REV. 95, 95 & n.5 (1980); Waits, supra note 2, at 267 n.1; Comment, supra note 4, at 705 n.2; Note, The Universe and the Library: A Critique of James Boyd White as Writer and Reader, 41 STAN. L. REV. 705, 705 n.2 (1989). And while many of the remedies for battered spouses discussed in this article are equally available to both male and female victims, special problems exist when the victim is male and the theory of relief is gender-based denial of equal protection or even when the victim is female but the theory of relief is discriminatory treatment of victims of domestic violence, regardless of sex, in violation of equal protection.


7. While the sources disagree over exactly how many people are battered, all agree that the number of victims is both large and increasing. See, e.g., 136 CONG. REC. S8,263 (daily ed. June 19, 1990) (statement of Sen. Biden); D. RHODE, supra note 2, at 237; Finesmith, supra note 2, at 77-79; Waits, supra note 2, at 273; Comment, supra note 4, at 707; Comment, supra note 2, at 959; Note, Section 1983, supra note 2, at 1357; Note, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 HOFSTRA L. REV. 407, 407-08 (1985).

8. See, e.g., Finesmith, supra note 2, at 79; Kennedy & Homant, Battered Women’s Evaluation of the Police Response, 9 VICTIMOLOGY 174, 175 (1984); Comment, supra note 2, at 959-60.

domestic disputes. Whatever the cause, many believe that the best way to encourage police intervention, and thus to protect the battered, is to hold police departments and their individual officers civilly liable to those injured by abusive spouses when police inaction contributed to the harm.

Traditionally, battered spouses could sue the police on any of several theories. Courts allowed some actions based on state common law or violations of state constitutional law. In addition, they permitted due process and equal protection-based damage liability claims, as well as derivative actions based on the failure

10. See, e.g., Brown, supra note 9, at 278-80; Gondolf & McFerron, supra note 9, at 430-31, 438; Waits, supra note 2, at 299-302, 313-14; Note, The Inadequate Police Protection of Battered Wives: Can a City and Its Police Be Held Liable Under the Equal Protection Clause?, 14 Fordham Urb. L.J. 417, 434-38 (1986); Note, Battered Women, supra note 2, at 152-53. Police safety is a major issue, as the police suffer numerous deaths and injuries while on domestic disturbance calls. E.g., Brown, supra note 9, at 279-80; Waits, supra note 2, at 314; Comment, supra note 4, at 711 & n.60; Note, Battered Women, supra, at 152-53. Many authorities, however, convincingly deny that concerns over police safety justify police inaction in domestic violence cases. E.g., Marcus, Conjugal Violence: The Law of Force and the Force of Law, 69 Calif. L. Rev. 1657, 1672-73 (1981); Waits, supra note 2, at 314; Woods, supra note 2, at 19-20; Comment, supra, at 711 n.60; Note, supra note 10, at 436; Note, Battered Women, supra, at 152-53.

For a comprehensive, but not exhaustive, listing of police excuses for nonfeasance in battered spouse cases, see infra note 130.

11. See, e.g., Carlson v. Green, 446 U.S. 14, 21 & n.7 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect . . . ."); Hynson v. City of Chester Legal Dep't, 864 F.2d 1026, 1030 (3d Cir. 1988) ("It is obvious that lawsuits requesting . . . monetary awards for damages resulting from such [police] policies [dictating inaction in battered spouse situations] will cause municipal and metropolitan police agencies to reconsider their policies toward domestic violence."); D. Rhode, supra note 2, at 242; Woods, UPDATE: Litigation on Behalf of Battered Women, 15 Clearinghouse Rev. 261, 263 (1981); Comment, supra note 4, at 706, 727-28; Note, Section 1983, supra note 2, at 1382; see also Jeffries, Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82, 82 (1989) (notes unconstitutional conduct may be deterrable); Note, DeShaney v. Winnebago County: The Narrowing Scope of Constitutional Torts, 49 Md. L. Rev. 484, 507 & n.142 (1990) (argues holding social service agencies liable for their nonfeasance in child abuse situations will cause them to act to protect abused children more readily). Proposed S. 2754, see supra note 3, encourages police action in domestic violence cases by withdrawing otherwise available federal grant funds from state and local law enforcement agencies which fail readily to arrest spouse abusers. S. 2754, § 221, 101st Cong., 2d Sess., 136 Cong. Rec. S8,263, S8,267-68 (daily ed. June 19, 1990).

12. See supra note 3.


14. See infra notes 39-89 and accompanying text.

15. See infra note 90-137 and accompanying text.

to train the police municipal liability theory, under Section 1983 of Title 42 of United States Code if the abused spouses preferred a federal law remedy. At least one jurisdiction permitted suit for commission of a common law statutory tort. In the last decade suits against the police proved increasingly successful.

The United States Supreme Court significantly altered the balance in suits against the police when it decided DeShaney v. Winnebago County Department of Social Services. That holding to obtain equitable relief through a Section 1983 suit. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 111-12 (1983); Robinson v. City of Chicago, 868 F.2d 959 (7th Cir. 1989), cert. denied, 110 S. Ct. 756-57 (1990). This article deals only with Section 1983 damage remedies.

17. See supra notes 138-66 and accompanying text.

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.

Various other miscellaneous Section 1983 claims were possible. See, e.g., Note, Duties, supra note 2, at 974-75.

Proposed S. 2754, see supra note 3, would create a new federal civil rights statute, modelled on Section 1983, that outlaws gender-motivated crimes of violence and provides a cause of action for compensatory and punitive damages against anyone, including one who acts under color of state law, who deprives persons of their right not to be subjected to such attacks. S. 2754, § 301, 101st Cong., 2d Sess., 136 CONG. REC. S8,263, S8,268 (daily ed. June 19, 1990).

19. While litigants can file Section 1983 suits in state as well as federal courts, e.g., Howlett v. Rose, 110 S. Ct. 2430, 2433 (1990), the vast majority choose a federal forum. See, e.g., Herman, Beyond Parity: Section 1983 and the State Courts, 54 BROOKLYN L. REV. 1057 (1989). As is discussed more fully infra note 36, after Will v. Michigan Department of State Police, 109 S. Ct. 2304, 2307-08 (1989), a State or its officials acting in their official capacities cannot be sued for damages under Section 1983 in either state or federal court because the State and those officials are not "persons" under Section 1983. See also Howlett, 110 S. Ct. at 2442-44 (state law "sovereign immunity" defense not available to governmental body in state court Section 1983 suit because of Constitution's Supremacy Clause if defense would not be available in federal forum).


21. For example, in a trial conducted after the decision in Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984), the battered spouse recovered $2.3 million for herself from the non-responsive police and $300,000 for her three-year-old son who witnessed the attack on her. Battered Wife Who Sued Police Wins $2.3 Million, A.B.A. J., Sept. 1985 at 109. She ultimately settled her claim for $1.9 million in exchange for the police dropping their appeal. See Case Comment, supra note 2, at 668 n.14; Note, Equal Protection, supra note 2, at 795 n.31. See also Sorichetti v. City of New York, 65 N.Y.2d 461, 464, 482 N.E.2d 70, 72, 492 N.Y.S.2d 591, 593 (1985) (battered child recovered $2 million from non-responsive police).

effectively eliminated most of the due process theory-based Section 1983 actions that were then brought, and possibly adversely affected equal protection-grounded ones as well. The Court thus may have left battered spouses with a possible common law negligence action as their only effective remedy.

This article will discuss the impact of DeShaney on Section 1983 damage suits by abused spouses against the police. It will first summarize the pre-DeShaney civil rights litigation, addressing possible substantive and procedural due process, denial of equal protection, and derivative municipal failure to train liability actions. After an overview of DeShaney itself, the article will evaluate the impact of DeShaney on the field. Finally, the article will discuss the future and the policy considerations which will dictate whether, even after DeShaney, Section 1983 tort actions will be readily available for abused spouses to bring against the police who fail to protect them.

II. BATTERED SPOUSES' SECTION 1983 DAMAGE SUITS BEFORE DESHANEY

Although it could be difficult to distinguish between common law and constitutional torts, before DeShaney some courts found...
breaches of federal constitutional law in the state or local police failures to assist battered spouses. The state or local police violated abused spouses' federal constitutional rights under color of state law, and thus breached Section 1983,31 when they failed to protect the spouses against attack.32 Battered spouses usually asserted denial of their constitutional rights to due process or equal protection or both as the basis for suit.33 Sometimes, they derivatively sued the relevant municipality or municipal officials acting in their official capacities for failure to adequately train the local police.34 Under any of these

641, 643-44 (1987); Note, supra note 11, at 487 & n.32; Case Comment, Anderson v. Creighton and Qualified Immunity, 50 Ohio St. L.J. 447, 447 n.2 (1989).


30. E.g., Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988), amended and withdrawn, 901 F.2d 696 (9th Cir. 1990); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984).


32. For the elements of a Section 1983 suit, see, e.g., Parratt v. Taylor, 451 U.S. 527, 535 (1981), rev'd on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Gomez v. Toledo, 446 U.S. 635, 640 (1980); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); Note, Section 1983, supra note 2, at 1358.

33. See, e.g., Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988), amended and withdrawn, 901 F.2d 696 (9th Cir. 1990); Dudosch v. City of Allentown, 629 F. Supp. 849 (E.D. Pa. 1985).


The proximate cause requirement would prove important in domestic violence police inaction litigation. For example, the Seventh Circuit's decision in DeShaney was grounded in part in Martinez's proximate causation mandate. DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298, 302-03 (7th Cir. 1987), aff'd on other grounds, 489 U.S. 189 (1989). As the court there observed: "[The fact that state inaction might be deemed a proximate cause of the plaintiff's injury under evolving common law notions is not enough to establish a violation of the Fourteenth Amendment. The states are free in the administration of their own tort law to attenuate the requirement of causation as far as they want ... but deprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff."

Id. See Garcia v. Superior Court, 50 Cal. 3d 728, 740 n.10, 789 P.2d 960, 967 n.10, 268 Cal. Rptr. 779, 786 n.10 (1990) (Section 1983 claim). Other governmental nonfeasance cases also addressed the proximate causation issue. E.g., Commonwealth Bank & Trust Co. v. Russell, 825 F.2d 12, 14-15 (3d Cir. 1987); Ketchum v. Alameda County, 811 F.2d 1243, 1245-47 (9th Cir. 1987); Hayes v. Vessey, 777 F.2d 1149, 1153-54 (6th Cir. 1985); Jackson v. City of Joliet, 715 F.2d 1200, 1205 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Dimas v. County of Quay, 730 F. Supp. 373, 375 (D.N.M. 1990); see Wood v. Ostrander, 879 F.2d 583, 586 n.2 (9th Cir. 1989), cert. denied, 111 S. Ct. 341 (1990). After Martinez, any battered spouse or other person contemplating a Section 1983 suit against the inactive police clearly first had to establish proximate causation.

munity of individual government officials/defendants37 arose in many domestic violence police inaction cases.38

context of a Section 1983 failure to train the police derivative constitutional tort action, see infra notes 138-66, 403-15 and accompanying text.

The Section 1983 municipal liability rules established by Monell and its progeny apply to both municipalities and public officials acting in their official capacity. Monell, 436 U.S. at 690 n.55; see, e.g., Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Brandon v. Holt, 469 U.S. 464, 471-73 (1985). References to municipal liability in this article should accordingly be deemed also to refer to liability of those public officials.

This article concerns municipal, or local, government liability rather than that of state government. State government is protected from federal court damage actions by the eleventh amendment. See Edelman v. Jordan, 415 U.S. 651 (1974). And a few months after the Supreme Court issued DeShaney, it held in Will v. Michigan Department of State Police that neither states nor state officials acting in their official capacities are "persons" subject to liability under Section 1983. 109 S. Ct. 2304, 2307-08 (1989). See, e.g., Garcia v. Superior Court, 50 Cal. 3d 728, 739, 789 P.2d 960, 966, 268 Cal. Rptr. 779, 785 (1990) (Section 1983 claim). Thus, a state and its officials acting in their official capacities cannot be sued under Section 1983 for damages in either state or federal court. For more on state government, the eleventh amendment, and Section 1983, see, e.g., Brown, supra, at 627 n.16; Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Cin. L. Rev. 61 (1989); Nahmod, Government Liability Under Section 1983: The Present Is Prologue, 21 Urb. Law 1 (1989); Shreve, Letting Go of the Eleventh Amendment, 64 Ind. L.J. 601 (1989).

37. Both absolute and qualified immunity are available to individual state or local officials who are sued in Section 1983 actions. Only a few classes of persons whose activities are integral to the governmental process, such as legislators, judges, and prosecutors, are accorded absolute immunity. See, e.g., Case Comment, supra note 29, at 447-48; Qualified Immunity, 56 Geo. Wash. L. Rev. 1047, 1048 & n.3 (1988). Qualified immunity is more generally accessible, specifically to police officers and officials. Under Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Anderson v. Creighton, 483 U.S. 635 (1987), police may carry out their discretionary law enforcement duties free from suit unless they act illegally and violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818 (emphasis added). This Supreme Court-mandated protection for the police "represents a compromise between the conflicting concerns of permitting the recovery of damages for vindication of constitutional rights caused by the abuse of public office and permitting government officers to perform discretionary functions without fear of harassing litigation." Hynson v. City of Chester Legal Dept', 864 F.2d 1026, 1031-32 (3d Cir. 1988). An officer's qualified immunity is only overcome if at the time the officer acted it was clearly established that the officer's behavior was contrary to law. Harlow, 457 U.S. at 819. Qualified immunity was important in several Section 1983 domestic violence actions by battered spouses against the police. E.g., Hynson; Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988); Turner v. City of North Charleston, 675 F. Supp. 314 (D.S.C. 1987). For more on qualified immunity, see, e.g., Gildin, Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions, 38 Emory L.J. 369 (1989); Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force, 62 Temp. L. Rev. 61 (1989).

A. Denial of Due Process

The federal due process issue posed in the abused spouse predicament is whether state or local police nonfeasance through failure to protect the spouse from abuse — possibly in derogation of statute — denies the spouse due process.39 Spouses injured in such situations have claimed violations of both substantive and procedural due process tenets.40 The police misbehavior must be more than simple negligence to be actionable.41

1. "Special Relationship" Substantive Due Process Cases

Many pre-DeShaney authorities, including a number of decisions from the United States Court of Appeals for the Seventh Circuit, doubted that police inaction constituted a federal substantive due process violation and held there was no federal duty to protect the citizenry.42 Others perceived this inaction as uncon-
Dissatisfaction with the outcome of such a political choice is not a sufficient ground for declaring the structure unconstitutional." Id. at 1224), cert. denied, 109 S. Ct. 1338 (1989); Wideman v. Shallowford Community Hosp., Inc., 826 F.2d 1030, 1034-37 (11th Cir. 1987); Harpole v. Arkansas Dep't of Human Services, 820 F.2d 923, 926 (8th Cir. 1987); DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298, 301 (7th Cir. 1987) ("The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services. For such failures, political remedies (along with such legal remedies as states might see fit to provide in their own courts) were assumed to be adequate." Id. at 301), aff'd, 489 U.S. 189 (1989); Washington v. District of Columbia, 802 F.2d 1478, 1480-82 (D.C. Cir. 1986); Walker v. Rowe, 791 F.2d 507, 510 (7th Cir.) ("[T]he police have no constitutional duty to save people in danger. The bill of rights is designed to protect people from the state, not to ensure that the state supplies minimum levels of safety or comfort. . . . The level of safety to be provided by the police to the people . . . is determined by political and economic forces, not by juries implementing the due process clause." Id. at 510 (citations omitted) (emphasis in original)), cert. denied, 479 U.S. 994 (1986); Estate of Gilmore v. Buckley, 787 F.2d 714, 720-23 (1st Cir.), cert. denied, 479 U.S. 882 (1986); Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985) ("[T]here is nothing in the Constitution which requires governmental units to act when members of the general public are in danger." Id. at 185), cert. denied, 475 U.S. 1047 (1986); Hinman v. Lincon Towing Serv., Inc., 771 F.2d 189, 194 (7th Cir. 1985) ("The Constitution was designed as a charter of negative liberties; it generally does not impose any affirmative duty on federal or state governments to provide services . . . ." Id. at 194); Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984) ("[N]othing in the Constitution requires governmental units to act when members of the general public are imperiled . . . ." Id. at 1446); Beard v. O'Neal, 728 F.2d 894, 899-900 (7th Cir.), cert. denied, 469 U.S. 825 (1984); Jackson v. City of Joliet, 715 F.2d 1200, 1203-4 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment . . . sought to protect Americans from oppression by state government, not to secure them basic governmental services. . . . [N]o one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided. . . . It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise." Id. at 1203-4 (citations omitted)), cert. denied, 465 U.S. 1049 (1984); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." Id. at 618); see, e.g., Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986); Comment, Actionable Inaction, supra note 35, at 1055-57; Note, Constitutional Law—Snake Pits, Lion's Dens and Section 1983: When Does Inaction Equal Action?—DeShaney v. Winnebago County Department of Social Services, 24 Wake Forest L. Rev. 781, 788-94, 801-04, 812-21 (1989) [hereinafter Note, Snake Pits]; cf. Note, An Abused Child's Right to Life, Liberty, and Property in the Home: Constitutional Approval of State Inaction, 92 W. Va. L. Rev. 175, 180-84 (1989) [hereinafter Note, Constitutional Approval]. See generally Brown, supra note 29, at 880 (noting United States Supreme Court's recent tendency to preclude most constitutionally-based Section 1983 claims); Nahmod, supra note 29, at 1738-44, 1746-48, 1750-51 (Supreme Court's increasing use of tort language in Section 1983 cases undercuts constitutional status of these suits, notably in DeShaney).

43. See, e.g., Note, Snake Pits, supra note 42, at 804-11; Case Note, 12 HAMLIN L. REV. 421 (1989); U. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from
avert spouse abuse unconstitutionally violated substantive due process did so by holding the state had a duty to protect disadvantaged persons44 who had a "special relationship"45 with the state. They reached this point by relying on language in the Supreme Court's decision in *Martinez v. California*,46 which the lower courts construed as authorizing a due process action when a "special relationship" existed.47 The courts considered various factors in order


*Martinez* involved a Section 1983 substantive due process claim against the State of California for the murder of a girl by a parolee who was recklessly paroled five months before the crime. As the Court in *DeShaney v. Winnebago County Department of Social Services* later explained, the *Martinez* Court wished to avoid "squarely confronting the question presented [in *DeShaney*] whether the Due Process Clause imposed upon the State an affirmative duty to protect [the public against criminals]." 489 U.S. 189, 197 n.4 (1989). Instead, "we affirmed the dismissal of the claim on the narrower ground that the causal connection between the state officials' decision to release the parolee from prison and the murder was too attenuated to establish a 'deprivation' of constitutional rights within the meaning of § 1983."

Id. The *Martinez* Court did not stop there, however. Instead, it went on to observe:

"[T]he parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

*Martinez*, 444 U.S. at 285 (footnote omitted). This final language helped spawn the "special relationship" cases which would follow in the lower courts. See infra note 47 and accompanying text. See generally Comment, *Actionable Inaction*, supra note 35, at 1052-53.

For more on *Martinez* and its requirement of proximate causation in Section 1983 litigation, see supra note 35 and accompanying text.

to decide whether the requisite "special relationship" was present in a particular case. The courts disagreed over whether a "special relationship" could ever exist in a non-custodial setting (where a plaintiff was not a prison inmate, an involuntary patient in a state mental institution, or otherwise in the custody of the state).

The Ninth Circuit gave the due process clause and the supposedly Martinez-based "special relationship" rule what was probably their broadest interpretation in the original version of Balistreri v. Pacifica Police Department, a battered spouse case. The plaintiff's Section 1983 due process and equal protection claims were dismissed by the trial court, but the Ninth Circuit initially granted her relief. On


For a brief overview of the "special danger" case sub-category of pre-DeShaney special relationship right to protection law, see infra notes 233-36 and accompanying text.

48. E.g., Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425 (9th Cir. 1988), amended and withdrawn, 901 F.2d 696, 700 (9th Cir. 1990). See Comment, Abused Children, supra note 35, at 1435; Note, supra note 35, at 948-59.

49. See Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425 n.4 (9th Cir. 1988), amended and withdrawn, 901 F.2d 696 (9th Cir. 1990); Comment, Abused Children, supra note 35, at 1423-24, 1436-37.

50. 855 F.2d 1421 (9th Cir. 1988). See Note, Battered Women, supra note 2, at 145. Following the Supreme Court's DeShaney denunciation of the original panel decision in Balistreri, 489 U.S. at 197-98 & n.4, see infra note 189 and accompanying text, the panel granted a rehearing in the case and ultimately amended and withdrew the initial holding on February 27, 1990. Balistreri v. Pacifica Police Dep't, 897 F.2d 368 (9th Cir. 1990). In the new version of Balistreri, the court held no valid due process claim was present, a complete reversal from its original determination. Id. at 371-72. Then on May 11, 1990, the court issued a second amended opinion. Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990). The latter decision was essentially identical to that of February 27 except that United States District Judge Laughlin Waters' opinion, in which he concurred in part and dissented in part with the majority, 897 F.2d at 374-77, was withdrawn by him, and he concurred with the majority only in the result. 901 F.2d at 702. Thus, the decision continued in its complete reversal from its original due process holding. Id. at 699-700.

For more on Judge Waters' original dissent to the majority's finding of an equal protection claim for Jena Balistreri, 897 F.2d at 374-77, see infra note 402.

51. Jena Balistreri repeatedly was severely beaten, harassed, and threatened by her husband, whom she ultimately divorced. She continually called the police for assistance, but they failed to act even after she obtained a restraining order against her former husband's behavior. 855 F.2d at 1423. She finally sued the police for the physical and emotional injuries she suffered because of their alleged failure to control her former husband. Id.

the due process claim, the court held that a "special relationship" can exist in a non-custodial situation and that it creates a federal constitutional duty for public officials to protect a particular person, such as a battered spouse, from crime.53 The panel concluded that a judicial restraining order, coupled with the police's repeated notice of the spouse's plight, were enough to create a due process-based constitutional duty to protect her.54

Thus, before the Supreme Court decided DeShaney, certain courts held that the federal due process clause required the state to protect some persons in a custodial or non-custodial setting from harm by a third party if a "special relationship" was present.55 In the appropriate case, this could mean that battered spouses had a constitutional tort action against the police officials who failed to protect them.56 This result has not survived DeShaney in non-custodial situations.

2. Board of Regents v. Roth Procedural Due Process Cases

Another due process theory apparently was viable before DeShaney. Battered spouses57 arguably had a procedural due process entitlement to governmental protection, pursuant to Board of Regents v. Roth,58 in jurisdictions having statutory provisions similar to order of protection statutes.59 The government would be liable

53. 855 F.2d at 1425-26.
54. Id. at 1426. As the court provided, "[w]e conclude that the restraining order together with the defendants' repeated notice of Balistreri's plight, as alleged in the complaint, are sufficient to state a claim that the defendants owed Balistreri a duty to take reasonable measures to protect Balistreri from her estranged husband." Id.
55. Of course, not all courts adopted this approach. E.g., Harpole v. Arkansas Dep't of Human Services, 820 F.2d 923 (8th Cir. 1987); DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298 (7th Cir. 1987), aff'd, 489 U.S. 189 (1989); Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir.), cert. denied, 479 U.S. 882 (1986). See Comment, Abused Children, supra note 35, at 1425-26.
56. E.g., Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988), amended and withdrawn, 901 F.2d 696 (9th Cir. 1990) (battered spouse); Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985) (abused child).
57. See supra note 22.
58. 408 U.S. 564 (1972).
if it or its agents deprived battered spouses of their protection right without due process of law.  

Roth held that people have a constitutionally protected procedural due process property right to a benefit when they have "a legitimate claim of entitlement to it." One also could have a liberty right in a case of entitlement. A person could not lawfully be deprived of such an entitlement without being provided whatever notice, hearing, and other remedies that were mandated by procedural due process law. A court usually ascertained whether a benefit

60. As the Supreme Court recently reiterated: "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Zinermon v. Burch, 110 S. Ct. 975, 983 (1990) (emphasis in original) (citations omitted). Accord, e.g., Amsden v. Moran, 904 F.2d 748, 753 (1st Cir. 1990); Doe v. Milwaukee County, 903 F.2d 499, 502 (7th Cir. 1990). The Court has further held that: "We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1908 (1989) (citations omitted). Accord, e.g., Colon v. Schneider, 899 F.2d 660, 666 (7th Cir. 1990).

61. 408 U.S. at 577.


63. See, e.g., Roth, 408 U.S. at 569-70. Mathews v. Eldridge, 424 U.S. 319 (1976), defined what process was due in a procedural due process case through its balancing test where the following factors are weighed:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; accord, e.g., Washington v. Harper, 110 S. Ct. 1028, 1041 (1990) ("Under Mathews v. Eldridge, we consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment."); Zinermon v. Burch, 110 S. Ct. 975, 984 (1990); Colon v. Schneider, 899 F.2d 660, 670 (7th Cir. 1990); Swank v. Smart, 898 F.2d 1247, 1255-56 (7th Cir. 1990).

In Parratt v. Taylor, 451 U.S. 527 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31 (1986), and Hudson v. Palmer, 468 U.S. 517 (1984), the Supreme Court went a step further and held that:

a deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy. The Court in those two cases reasoned that in a situation where the State cannot predict and guard in advance against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to
created an entitlement by looking at state law. A Roth claim of entitlement could be, and in the abused spouse context almost invariably was, conferred by certain sufficiently definite and restrictive state statutes. The courts in the Seventh Circuit adopted
a particularly narrow view of what constituted an entitlement. 68

In Taylor v. Ledbetter, 69 the Eleventh Circuit, en banc, held that the State of Georgia’s child foster care laws bestowed an entitlement, pursuant to Roth, upon an abused foster child 70 such that when the

1082-83 (7th Cir. 1990); Colon v. Schneider, 899 F.2d 660, 666-67 (7th Cir. 1990); Thornton v. Barnes, 890 F.2d 1380, 1386 (7th Cir. 1989). Various pre-DeShaney decisions construed statutes and regulations, many strictly, to determine whether they were sufficiently restrictive to create entitlements. E.g., Jean v. Nelson, 472 U.S. 846 (1985); Hewitt; Board of Pardons v. Dumschat, 452 U.S. 458 (1981); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Bishop v. Wood, 426 U.S. 341 (1976); Richardson v. City of Albuquerque, 857 F.2d 727 (10th Cir. 1988).

68. The Seventh Circuit held that under Roth, “a legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing.” Eidson v. Pierce, 745 F.2d 453, 459-60 (7th Cir. 1984) (emphasis added); see, e.g., Scott v. Village of Kewaskum, 786 F.2d 338, 339-40 (7th Cir. 1986); K.H. v. Morgan, No. 87-C-9833 (N.D. Ill. Sept. 8, 1989) (1989 Westlaw 105279, at 11), aff’d in part, remanded in part on other grounds, 914 F.2d 846 (7th Cir. 1990); B.H. v. Johnson, 715 F. Supp. 1387, 1399-1400 (N.D. Ill. 1989). This obviously was a very narrow view of Roth entitlements, and was derived from former Ninth Circuit Judge Shirley Hufstedler’s dissenting opinion in Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 495-96 (9th Cir. 1974) (Hufstedler, J., dissenting), see infra note 281 and accompanying text. For an extended discussion about Doe v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990), and its application of the Eidson restrictive analysis to battered spouse protective statutes when entitlements when under them are asserted, see infra notes 376-82 and accompanying text. See also Woods v. Thieret, 903 F.2d 1080, 1082-83 (7th Cir. 1990) (demonstrates very restrictive view of entitlements).


70. The child’s situation was very similar to, but arguably distinguishable from, that of a battered spouse or a non-foster abused child since the foster child was placed into the foster home by the State,
child was deprived of that entitlement without due process of law she had a Section 1983 cause of action.\textsuperscript{71} In the process the court concluded that the Georgia laws were not mere procedural guidelines; instead, they comprised a comprehensive regulatory scheme which brought a Roth entitlement into existence.\textsuperscript{72} After determining that the state statutes created an entitlement, the Taylor majority essentially ended its analysis.\textsuperscript{73} In so doing, the court apparently ignored several vexing issues, including what process the child was due in the first instance, and to what ultimate remedy was she entitled. Several dissenters vigorously disputed the majority's holding and its failure to discuss the worrisome analytical/remedial problems.\textsuperscript{74}

\textit{see DeShaney}, 489 U.S. at 201 & n.9, while the battered spouse or non-foster abused child (like Joshua DeShaney, see infra notes 192-94 and accompanying text) may have been ignored by the State but was not normally placed in a position of peril by its agents. Later cases extended Taylor's Roth analysis to the battered spouse or the abused child scenarios. \textit{E.g.}, Coffman v. Wilson Police Dep't, 739 F. Supp. 257, 263-66 (E.D. Pa. 1990) (battered spouse); Hynson v. City of Chester, 731 F. Supp. 1236, 1239-40 (E.D. Pa. 1990) (battered spouse); Doe v. Milwaukee County, 712 F. Supp. 1370, 1376-78 (E.D. Wis. 1989) (abused child), \textit{aff'd}, 903 F.2d 499 (7th Cir. 1990).

\textsuperscript{71} \textit{Taylor}, 818 F.2d at 798-800; \textit{accord Meador v. Cabinet for Human Resources}, 902 F.2d 474, 476-77 (6th Cir.) (applied Taylor rationale to Kentucky law in similar abused foster child case), \textit{cert. denied}, 111 S. Ct. 182 (1990). \textit{See infra} notes 268-72 and accompanying text.

\textit{Taylor} also featured a substantial substantive due process component. 818 F.2d at 793-98; \textit{id. at 812-18} (Tjoflat, J., concurring in part and dissenting in part). For more on this holding, and DeShaney's reference to it, \textit{see infra} note 192, \textit{infra} notes 225-28 and accompanying text.

\textsuperscript{72} \textit{Taylor}, 818 F.2d at 799. Some of the dissenters strongly contested the majority's finding of a statutory entitlement because they did not think the Georgia foster care laws restricted government activity enough to constitute one. \textit{id. at 819-22} (Tjoflat, J., concurring in part and dissenting in part). \textit{Accord Case Comment, supra} note 63, at 1212-13. Judge Anderson concurred in the majority's entitlement finding. \textit{Taylor}, 818 F.2d at 827 (Anderson, J., concurring in part and dissenting in part).

\textsuperscript{73} \textit{Taylor}, 818 F.2d at 800. The court delegated to the district court on remand “all determinations regarding the scope of authority and the extent of duties of the appellees.” \textit{id. at n.10}. The court did observe that: “Since the child's claim under Roth is a procedural due process claim, the state of Georgia may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely.” \textit{id. at 800}. Thus, the child could easily be divested of her entitlement.

\textsuperscript{74} The dissenters in Taylor emphasized what they referred to as an “analytical problem” with the majority's application of Roth analysis to the foster care statutes in question which in their view resulted in an inappropriate use of Roth. As Judge Tjoflat observed:

If a court finds that state law creates a “legitimate claim of entitlement,” the next step in the Roth analysis is to determine what process is due and whether the state provided that process. The focus of this type of analysis is on the requirements of predeprivation notice and a hearing. This case, however, is about investigation and supervision of foster homes, not about predeprivation notice and a hearing.

\textit{Taylor}, 818 F.2d at 822 (Tjoflat, J., concurring in part and dissenting in part) (citations omitted) (footnote
In *Archie v. City of Racine*\(^\text{75}\) the Seventh Circuit, en banc, adopted a markedly different approach to constitutional law claims founded upon state officials' breach of state law, including a *Roth* governmental nonfeasance assertion. It held that although a fire department dispatcher's failure to send an ambulance to a hyperventilating woman who ultimately died of respiratory failure may have given her survivors a state tort law remedy, it did not bestow a federal procedural or substantive due process right upon them.\(^\text{76}\) The *Archie* majority stated that the plaintiffs were attempting to transform a common law tort (a negligent failure to act when under a statutory duty to do so\(^\text{77}\)) into a constitutional one.\(^\text{78}\) The court then observed that a state does not violate due process merely by failing to obey the state's own law.\(^\text{79}\) Thus, the *Archie* court held that a breach of state law — such as a police officer's failure to protect the holder of a state order of protection — does not translate into a denial of due process or any other federal right enforceable in a Section 1983 action.\(^\text{80}\) The court discussed how state law sometimes can create a *Roth* entitlement whose disposition is controlled by federal procedural

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\(^{75}\) See *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), aff'd in part, remanded in part, 914 F.2d 846 (7th Cir. 1990). Accord id. at 1213-14.

\(^{76}\) Id. at 1216.

\(^{77}\) Id. See *Colon v. Schneider*, 899 F.2d 660, 672 (7th Cir. 1989).

\(^{78}\) "Mere violation of a state statute does not infringe the federal Constitution." *Archie*, 847 F.2d at 1216 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). See also *Id.* at 1216 & n.5 (collecting other cases).

\(^{79}\) Id. at 1216-17. The court acknowledged that "[a] state ought to follow its law," *Id.* at 1217, but held that:

- to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules. Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."

due process law.\textsuperscript{81} The court stated, however, that even if such a claim existed, the \textit{Archie} plaintiffs would only be entitled to a state common law tort action as their remedy.\textsuperscript{82} In any event, the majority concluded that no \textit{Roth} claim ever came into being for the plaintiffs because of the longstanding, salutary judicial rule that the dispatcher’s arguable breach of state law in no sense violated any \textit{federal} right.\textsuperscript{83} Hence, the \textit{Archie} court determined that when state officials violate state law by failing to perform their state law duties \textit{Roth} procedural due process entitlement law never comes into play\textsuperscript{84} — a dangerous precedent for potential \textit{Roth} claimants, and especially for battered spouses who wanted to enforce \textit{Roth} claims for a police failure to guard them despite their state orders of protection.\textsuperscript{85} The \textit{Archie} result

\textsuperscript{81} Archie, 847 F.2d at 1217.

\textsuperscript{82} This ruling was based upon the holdings in \textit{Parratt v. Taylor}, 451 U.S. 527 (1981), \textit{overruled on other grounds}, \textit{Daniels v. Williams}, 474 U.S. 327 (1986), and \textit{Hudson v. Palmer}, 468 U.S. 517 (1986), see \textit{supra} note 63 and accompanying text, eliminating procedural due process claims based upon a state employee’s random, unauthorized conduct. As the en banc \textit{Archie} court interpreted those precedents:

If a state erratically deprives a person of property, the remedy is not a subsequent hearing but a suit to recover damages—in other words, the opportunity to obtain redress in state court is due process when a prior hearing is either infeasible or negligently withheld. So it is here. It is hardly possible to hold hearings in advance to decide whether fire dispatchers will turn deaf ears to cries of distress. If, as the plaintiffs believe, [the dispatcher] violated his duties under state law, the opportunity to press that claim in state court is due process of law.

\textit{847 F.2d at 1217} (citations omitted) (emphasis in original). This language, of course, mirrors that of the \textit{Taylor} dissenters discussed \textit{supra} note 74. The effect of \textit{Zinermon v. Burch}, 110 S. Ct. 975 (1990), on the result in \textit{Parratt}, \textit{Hudson}, and \textit{Archie}, as well as on the dissenters’ words in \textit{Taylor}, will be assessed \textit{infra} notes 335-52 and accompanying text, \textit{infra} note 374.

\textsuperscript{83} Archie, 847 F.2d at 1217-18. As the court argued:

A rule equating a violation of a statute with a violation of the Constitution might make states less willing to help their residents, because they could not limit the resources devoted to that task. The body with the power to create a rule also has the right incentives to police it. Cities and states are not hostile to their own laws; they do not need federal courts to prod them to enforce rules voluntarily adopted . . . The political branches have little reason to afford inadequate remedies for torts. The residents as a whole gain from both the compensatory and deterrent effects of tort law; such a widely supported body of law will not wither without constitutional fertilizer; . . . A rule that may be altered by political actors ought not to be enforced as if it were constitutional; a rule created by the states should be enforced by the states.

\textit{Id.} at 1218 (citation omitted).

\textsuperscript{84} The \textit{Archie} court acknowledged that even after \textit{Snowden v. Hughes}, 321 U.S. 1 (1944), see \textit{supra} note 79, and \textit{Archie} federal equal protection law still might provide a remedy in an appropriate case where a state official violated state law for a discriminatory reason. \textit{Archie}, 847 F.2d at 1218 n.7.

\textsuperscript{85} See, e.g., \textit{Doe v. Milwaukee County}, 903 F.2d 499, 504-05 (7th Cir. 1990) (based on \textit{Archie} and \textit{Snowden}, held abused child did not have \textit{Roth} claim despite state social service agency’s arguable
would seem even more hazardous for them after the Supreme Court decided *DeShaney.* 86

Despite both its possible analytical shortcomings 87 and its vigorous dissents, *Taylor* established in at least the Eleventh Circuit that an abused spouse’s *Roth* procedural due process claim was appropriate so long as a statute clearly provided for the protection of spouses and state representatives failed to perform their duty. 88 The differing approaches of *Taylor* and *Archie* would, however, clash in *Roth* battered spouse cases soon enough. 89

B. Denial of Equal Protection

Prior to *DeShaney* the Supreme Court summed up federal equal protection law90 in *City of Cleburne v. Cleburne Living Center.* 91 As the Court there observed, the equal protection clause 92 commands that states treat all similarly situated people alike. 93 Although most

failure to comply with state child protection statute [which might have created Roth entitlement] because federal courts do not transmute violations of state law into federal constitutional violations), *infra* notes 283-87, 303-05 and accompanying text; Colon v. Schneider, 899 F.2d 660, 672 (7th Cir. 1990) (based on *Archie* and *Snowden*), held prison guard’s use of chemical mace on prison inmate in violation of state administrative regulations did not raise Roth issue despite arguable entitlement created by state law because federal courts do not transmute violations of state law into federal constitutional violations). 86. *Archie* was also based, in part, on the federalist idea that federal courts in Section 1983 suits should not transform the fourteenth amendment into a font of tort law that displaces state court adjudication of ordinary tort disputes. 847 F.2d at 1213, 1216; *id.* at 1225-26 (Posner, J., concurring). For an extended discussion of the applicability of this doctrine to battered spouses’ Roth entitlement claims against the police, as well as its wisdom, see *infra* notes 303-05, 444-52 and accompanying text.

87. See *supra* note 74 and accompanying text.

88. For a fine discussion of the Roth procedural due process issues presented by *Taylor* and its dissents, see Case Comment, *supra* note 63, at 1198-1204, 1205-06, 1207-09, 1212-15.

89. For more on the availability of a Roth procedural due process remedy in domestic violence cases, see *infra* notes 254-374 and accompanying text.


state governmental statutory classifications are upheld so long as they are rationally related to a legitimate state interest (the rational basis test), those based on race, alienage, or national origin are viewed with grave suspicion. The Court applies a strict scrutiny test to such classification schemes, and sustains them only if they serve a compelling state interest. Gender-based classifications are also subjected to a heightened, or intermediate, standard of judicial review, and fail unless "substantially related to a sufficiently important governmental interest." Obviously, the validity of a particular classification will often depend upon whether the classification is judged by the rational basis test, strict scrutiny test, or substantial relationship to an important governmental interest test.

1. Abused Spouse Equal Protection Case Authorities

A number of courts and other authorities in the pre-DeShaney period considered whether a police failure to assist battered spouses constituted a denial of their right to equal protection of the laws entitling them to a Section 1983 damage action. The ruling in Thur-
man v. City of Torrington was the first significant reported decision to raise the issue.

In Thurman, a repeatedly abused wife incessantly sought aid from, and was rebuffed by, the defendant police. She sued under Section 1983 and the equal protection clause. The district court upheld her equal protection complaint against a motion to dismiss, holding that the police have a duty to protect all citizens. The court found


class action suits brought by and on behalf of abused women . . . were based in part on

claimed violations of the equal protection clause of the fourteenth amendment. . . . [T]he plaintiffs argued that no rational basis existed for a classification that would deny full protection of the law to an assault victim simply because she was married to her attacker.

Case Comment, supra note 2, at 676-77 (footnotes omitted). The parties settled both cases before trial. Id. at 677. For more on Scott and Raguz, see, e.g., Gundel, supra note 20, at 261; Woods, supra note 2, at 13, 14-15, 20; Woods, supra note 11, at 261-63; Comment, supra note 4, at 711 n.64.

Although Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), rev'd in part, appeal dismissed in part, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), aff'd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979), did not involve federal equal protection principles, see, e.g., Woods, supra note 2, at 20-21; Case Comment, supra, at 676, it raised analogous state concerns about police practices which were resolved with a consent judgment between battered spouses and the police. See, e.g., Bruno, 64 A.D.2d at 582-83, 407 N.Y.S.2d at 166; Gundel, supra, at 261-62; Woods, supra note 2, at 25-33 (includes text of consent judgment); Comment, supra, at 711 n.64; Note, Domestic Violence: Legislative and Judicial Remedies, 2 HARV. WOMEN'S L.J. 167, 179-84 (1979). For an interesting explanation of why counsel in Bruno chose not to proceed in federal court with an equal protection claim, see Woods, supra note 2, at 20-21.


103. Id. at 1524. In her suit the plaintiff alleged that she, and others like her, were denied equal protection because the Torrington police accorded greater protection to those assaulted by someone with whom the victim had no domestic relationship than to a woman attacked by a spouse or boyfriend. Id. at 1526-27. She also alleged the police discriminated against children assaulted by a father or stepfather. Id. at 1527. Her equal protection claim on behalf of her son failed on the facts because he "did not suffer from a continuous failure of the police to provide him protection . . . ." Id. at 1529.

104. The court observed:

City officials and police officers are under an affirmative duty to preserve law and order,

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that the Torrington police were utilizing an administrative classification to carry out the law in a discriminatory way, and observed there was evidence of a police pattern or practice not to protect abused spouses. 105 Before the city could discriminate against battered spouses, the court concluded, "it must articulate an important governmental interest for doing so." 106 It had not articulated such an interest in this case, 107 and the court could not conceive of a valid justification for such police behavior. 108 Thus, recovery of damages for the denial of equal protection might be appropriate. 109

Thurman was important for its conclusion that a governmental failure to provide police protection to battered spouses in a non-

and to protect the personal safety of persons in the community . . . . This duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship as well as to all other persons whose personal safety is threatened, including women not involved in domestic relationships. 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. Failure to perform this duty would constitute a denial of equal protection of the laws.

Id. at 1527.

105. Id. The court invoked Yick Wo v. Hopkins, 118 U.S. 356 (1886), at this point. See supra note 94.

The court later highlighted the importance of evidence of such a discriminatory practice, which can support municipal constitutional tort liability. Thurman, 595 F. Supp. at 1530; see supra note 36. Such evidence in this case defeated the City of Torrington's motion to dismiss the claims against it. Thurman, 595 F. Supp. at 1530.

106. Thurman, 595 F. Supp. at 1527. (This statement obviously referred to the intermediate gender-based equal protection standard discussed supra notes 96-97 and accompanying text).

107. Thurman, 595 F. Supp. at 1528. At this point, the court noted that "[i]t may develop that the classification in the instant case is not one based on gender, but instead consists of all spouses who are victims of domestic violence—male and female." Id. n.1. The court did not pursue the point, instead accepting as true the plaintiffs' claims of gender-based discrimination. Id.

108. Thurman, 595 F. Supp. at 1528. As the court noted:

A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not "automatically decline to make an arrest simply because the assailant and his victim are married to each other." Such inaction on the part of the officer is a denial of the equal protection of the laws.

Id. (quoting Bruno v. Codd, 90 Misc. 2d 1047, 1049, 396 N.Y.S.2d 974, 976 (Sup. Ct. 1977), rev'd in part, appeal dismissed in part, 64 A.D.2d 502, 407 N.Y.S.2d 165 (1978), aff'd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979)) (citation omitted). For more on Bruno v. Codd, see supra note 101. This was hardly a fitting time, the court determined, for the police to avoid getting involved in an intrafamily controversy. Thurman, 595 F. Supp. at 1529 (citing Reed v. Reed, 404 U.S. 71, 77 (1971)).

109. As previously pointed out, Thurman was eventually settled on terms that were very favorable for the plaintiffs. See supra note 21.
discriminatory way denies them equal protection.110 Other district courts soon adopted its approach.111

110. Most commentators have agreed with Thurman's holding. E.g., Case Comment, supra note 2; Note, supra note 10, at 431-33, 439; Note, Equal Protection, supra note 2, at 794-95.

111. In Lowers v. City of Streator, 627 F. Supp. 244 (N.D. Ill. 1985), a rape victim sued the police for failing to act after she was raped initially, thus permitting a subsequent second rape by the same attacker. Id. at 245. She alleged she was so treated by the police, in violation of her right to equal protection, because she was a woman. Id. at 246. The court upheld her cause of action and then determined that, based on Thurman, she had shown a pattern of municipal behavior sufficient to state a Section 1983 equal protection claim against the city defendant. Id. at 247. For more on the municipal liability point, see supra note 36.

In Bartalone v. County of Berrien, 643 F. Supp. 574 (W.D. Mich. 1986), the plaintiff claimed she was shot by her husband after the police did not act on her earlier complaints against him. Id. at 575. She alleged a denial of equal protection, charging that the police failed to take action against her husband "because of her sex or marital status, or both." Id. at 577. The court, citing Thurman, held this stated a valid denial of equal protection cause of action. Id. Her municipal liability claim failed because she inadequately alleged the facts to support it. Id. at 579.

In Dudosh v. City of Allentown, 665 F. Supp. 381 (E.D. Pa.), reconsideration denied sub nom. Dudosh v. Warg, 668 F. Supp. 944 (E.D. Pa. 1987), vacated, 853 F.2d 917 (3d Cir.) (per curiam), cert. denied, 488 U.S. 942 (1988), a woman was shot and killed by her former companion after a long history of abuse. Id. at 383-86. The administrator of her estate, the plaintiff, sued individual police officers and the City of Allentown for, inter alia, denial of equal protection. Id. at 387. In reviewing the defendants' summary judgment motions, the court looked to Bartalone, Lowers, and Thurman as authorities and summarized the controlling equal protection law as follows:

To establish his denial of equal protection claim, the plaintiff must prove that the individual defendants intentionally discriminated against the decedent by failing to accord her the same amount of police protection they would have provided another member of the community not within the decedent's "class." . . . If it is [the plaintiff's] contention that the individual defendants failed to protect his decedent because of her sex, i.e., that the individual defendants would have accorded a man better protection, then the defendants must articulate an important government interest for doing so. . . . If it is the plaintiff's contention that the individual defendants failed to protect his decedent because she had filed a domestic complaint or because she knew her attacker, i.e., that the defendants would have afforded an individual who did not know her attacker or who had filed a non-domestic complaint better protection, then the defendants must articulate a rational reason related to a legitimate government purpose for doing such since no suspect classification or fundamental right is involved.

Dudosh, 665 F. Supp. at 392 (citations omitted) (emphasis in original). The court thus categorized the plaintiff's equal protection complaints as adequately stating that the defendants discriminated against the decedent "either on the basis of her sex or the nature of her complaint . . . ." Id. The consequences varied according to the basis of the complaint. Id. The court found evidence sufficient to defeat summary judgment on behalf of both the plaintiff's claims. Id. at 392-94. Turning to the municipal Section 1983 liability issue, the court summarized the governing law and then concluded that the plaintiff had presented enough evidence of a municipal policy to defeat summary judgment. Id. at 395. On a motion for reconsideration in Dudosh v. Warg, 668 F. Supp. 944 (E.D. Pa. 1987), vacated, 853 F.2d 917 (3d Cir.) (per curiam), cert. denied, 488 U.S. 942 (1988), the court reiterated the two theories of unlawful discrimination proposed by the plaintiff and the two avenues of justification the defendants must pursue by either articulating an "important government interest" or a "rational basis" for the classifications they made. Id. at 945 n.1, 951 n.10.

The related case of Sherrell v. City of Longview, 683 F. Supp. 1108 (E.D. Tex. 1987), involved
The original version of *Balistreri v. Pacifica Police Department* was the first court of appeals-level battered spouse equal protection opinion.\(^{112}\) In *Balistreri*, the Ninth Circuit apparently accepted the reasoning of *Thurman*;\(^{113}\) because it detected a police intention to treat domestic abuse cases as less important than other assaults in addition to a police animus towards battered women, it reinstated the plaintiff's equal protection claim despite a meagerly pled complaint.\(^{114}\) It thereby demonstrated a willingness to apply the equal protection clause in the abused spouse setting.

The Tenth Circuit was equally ready to act in *Watson v. City of Kansas City*,\(^{115}\) another Section 1983 equal protection case decided only a few weeks after *Balistreri*. The *Watson* court concluded that the police cannot discriminate when they supply police protection.\(^{116}\) The plaintiff provided statistical proof that domestic assaults in Kansas City were far less likely to be solved with an arrest than non-domestic ones, as well as confirmation that police officers were trained to use arrest as a last resort in domestic violence cases.\(^{117}\) These items, plus evidence of a police pattern of deliberate indif-
ference, supported a municipal liability equal protection claim of class-based discrimination because of the plaintiff's status as a victim of domestic violence. In *Hynson v. City of Chester Legal Department*, the Third Circuit also recognized the validity of abused spouse equal protection complaints.


119. The court was uncertain how to treat the plaintiffs' claims against the defendant police officials in their individual capacities because of the qualified immunity issue. It remanded the case for the district court to "determine whether qualified immunity shields these individual defendants notwithstanding the presence of a section 1983 claim against the city." *Watson*, 857 F.2d at 697.

On remand, the district court held the individual defendants were entitled to qualified immunity because "the law regarding a police officer's duties under the equal protection clause in responding to domestic assaults was not clearly established at the time of defendants' action . . . ." *Watson v. City of Kansas City*, No. 84-2335-S (D. Kan. Feb. 2, 1989) (1989 WSLaw, 21165, at 2). For more on the qualified immunity issue, see supra note 37.

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

The court noted that in addition to the class-based discrimination claim it upheld, the plaintiff had articulated a gender-based discrimination claim—"that she was denied police protection because of her sex." *Id.* The court rejected this contention based upon its interpretation of Personnel Administrator v. Feeney, 442 U.S. 256 (1979), saying the police protection policy lacked discriminatory purpose. *Watson*, 857 F.2d at 696-97. For more on *Feeney* and the definition of "discriminatory purpose" in the non-facially discriminatory gender-based denial of equal protection case, see infra note 127 and accompanying text.

121. 864 F.2d 1026 (3d Cir. 1988). In this case, "the plaintiffs alleged that [police] officers pursued a policy of ignoring domestic abuse complaints and thereby violated the plaintiffs' decedent's right to equal protection of the laws by failing to arrest the former boyfriend of the decedent who subsequently killed her at her place of employment." *Id.* at 1027. The court referred to most of the previously discussed domestic violence equal protection decisions. *Id.* n.1.

122. *Id.* at 1029-31. The court concurred with the panel in *Watson*, 857 F.2d at 694, 696-97, that: if the categories used by the police in administering the law are domestic violence and non-domestic violence, this is not sufficient to raise a claim for gender-based discrimination absent a showing of an intent, purpose or effect of discriminating against women. In order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.

*Hynson*, 864 F.2d at 1031 (citation omitted) (footnote omitted). As in *Watson*, 857 F.2d at 696-97, *Hynson* here applied the Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979), requirement that plaintiffs in denial of equal protection through non-facial gender-based discrimination cases prove "discriminatory purpose" before they are entitled to the heightened standard of equal protection review. *Hynson*, 864 F.2d at 1031. For more on *Feeney* and "discriminatory purpose," see infra note 127 and accompanying text.

The court then liberally interpreted the law governing the individual defendant police officers' qualified immunity claims. *Hynson*, 864 F.2d at 1031-32. The court noted that a legal right is not "clearly established" under Harlow v. Fitzgerald, 457 U.S. 800 (1982), thereby defeating immunity, see supra note 37, unless it has been recognized in circumstances similar to those that gave rise to the proceeding in which the plaintiff seeks to hold the individual defendant liable in damages. *Hynson*, 864 F.2d at
2. Abused Spouse Equal Protection Analysis

A few common issues arose in most, if not all, of the Section 1983 battered spouse violation of equal protection suits against the police before DeShaney. Some authorities proposed that abused spouses use a number of theories of equal protection attack; however, the battered gained their greatest equal protection successes when alleging that the police were discriminating against abused spouses because of improper gender-based classifications that were not substantially related to sufficiently important governmental interests—a claim for the intermediate, or heightened, standard of judicial review.

In some cases the exact nature of the purportedly discriminatory police classification in question was disputed. Exactly how it was...
categorized (based on gender, or perhaps status as a victim of domestic violence) could prove critical. If the reviewing court decided a police classification was gender-based, the court would subject it to the heightened standard of review, while if it had some other basis the classification would be valid so long as it was rationally related to the achievement of a legitimate state interest. And it could be difficult to have a classification deemed gender-based. If the police classification was *facially* discriminatory due to sex it was gender-based, but if it was *not* facially discriminatory because of gender — in other words, facially neutral — a court would consider it gender-based and apply intermediate scrutiny only if the equal protection claimant established the classification’s actual discriminatory gender-based effect and the police’s deliberate purpose to discriminate.\(^{125}\) This requirement was rooted in the Supreme Court’s mandate in *Personnel Administrator v. Feeney*\(^ {126}\) that in facially neutral, supposedly gender-based classification discrimination cases the party alleging a denial of equal protection must demonstrate that the government acted with a “discriminatory purpose,” leading to a discriminatory effect, when it set up the classification at issue before the party could obtain heightened judicial scrutiny.\(^ {127}\)

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> In applying the rule that gender-based classifications are subject to intensified scrutiny, the first question is whether the government used a gender-based classification. If the government action discriminates, on its face, on the basis of gender, intensified scrutiny is applicable. If, on the other hand, the government action does not involve facial gender-based discrimination, then the [Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)] evil purpose test applies, and in order to trigger intensified scrutiny, the claimant must show that the government action discriminates in effect and purpose on the basis of gender. Galloway, *supra*, at 142. As *Feeney* itself stated:

> When a statute [or other governmental classification, see *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886), *supra* note 94] gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

442 U.S. at 274.


127. E.g., L. Tribe, *supra* note 41, at § 16-20, at 1505; Galloway, *supra* note 90, at 142; Comment, *supra* note 4, at 722-25; Case Comment, *supra* note 2, at 684-87. As the *Feeney* Court defined: ""
In many of the abused spouse equal protection cases, such as *Thurman* and some of the decisions that followed it, the courts apparently, but not clearly, found that the police classifications evidenced facial gender-based discrimination and accordingly applied the intermediate standard of review. No defendant in any of these cases ever proffered a governmental interest sufficiently important to justify a discriminatory gender-based classification under the heightened standard. Indeed, in many cases the police made no effort to justify their discriminatory classifications at all.

The *Feeney* proof of discriminatory purpose requirement helped spell doom for several pre-*DeShaney* battered spouse denial of equal protection through facially neutral, supposedly gender-based discrimination claims. *E.g.*, *Hynson*, 864 F.2d at 1031; *Watson*, 857 F.2d at 696-97.

Several commentators have noted that the court in *Thurman* found a gender-based classification and accordingly utilized a heightened standard of judicial equal protection review. *E.g.*, Case Comment, supra note 2, at 678-79; Comment, supra note 4, at 720-21; Note, supra note 10, at 431-33; Note, Equal Protection, supra note 2, at 794-95.

In a footnote the *Thurman* court left the door ajar for a finding that the discriminatory police classification at issue was based on a claimant's status as a victim of domestic violence, regardless of the claimant's sex, rather than gender. 595 F. Supp. at 1528 n.1. See Case Comment, supra, at 684-87. However, it had no need to further address this issue since it found presumably facial gender-based discrimination was present.


For an idea of some of the justifications for police inaction in domestic violence cases which were posited, and rejected, during the years before *DeShaney*, see, *e.g.*, *Finesmith*, supra note 2, at 85-86; *Waits*, supra note 2, at 299-302; *Woods*, supra note 2, at 19-20; Case Comment, supra note 2, at 687-90; Comment, supra note 4, at 721, 725-27; Note, supra note 10, at 434-38. As one of these sources noted when it compiled a list of some supposed excuses for police inaction:

The many rationalizations include preserving the traditional "principle" that "a man's home is his castle;" avoiding arrest in situations in which the physical abuse of a woman by her husband is purported to be acceptable within the couple's culture; and maintaining the efficient and economic administration of the state's law enforcement agencies by regarding wife bat-
Dudosh v. City of Allentown\(^{132}\) recognized that in addition to facial gender-based classifications, the police could be making classifications in spouse abuse situations based solely upon the type of complaint, here domestic violence, presented by the complainant.\(^{133}\) In that latter event, since the classification was purportedly not gender-based, the police need only have a rational basis underlying it unless the party challenging the classification could meet the Feeney facially neutral classification test and thus qualify for intermediate judicial scrutiny.\(^{134}\) Other courts, including Watson\(^{135}\)

- avoiding arrest in a class of cases that is alleged to have a high complainant attrition rate;
- avoiding arrest in situations in which the family could ill afford the economic impact of the husband's arrest (e.g., time lost from work);
- respecting a couple's privacy by not interfering in private marital matters; and
- preventing the possibility of harm to police officers who might be injured in attempting to arrest a violent husband. Further attempts at justification include preventing the possibility of severe retaliation against the battered wife by the arrested husband after his release; avoiding arrest in situations in which the battered wife merely wants to frighten the husband, remove him from the house, or be transported to the hospital; and preserving the marriage and family, which could be endangered by the intervention of the criminal justice process.

Note, supra, at 435 (footnotes omitted). The author promptly and convincingly demonstrated the groundlessness of all the excuses. Id. at 435-38.

For more on the harm to police issue, see supra note 10 and accompanying text.


In Dudosh v. Warg, 668 F. Supp. 944, 951-52 n.10 (E.D. Pa. 1987), vacated, 853 F.2d 917 (3d Cir.) (per curiam), cert. denied, 488 U.S. 942 (1988), the court acknowledged that the police and municipal defendants may have proffered a defense against a rational basis standard battered spouse equal protection claim.


In Dudosh the court found that the plaintiff had satisfied both the intermediate and rational basis standards of review sufficiently to defeat the police's equal protection summary judgment motion because the government had articulated neither an important governmental interest nor a rational basis for its classifications. 665 F. Supp. at 392, 394.

Some litigants and commentators contended that police "domestic violence" classifications should be considered gender-based and therefore automatically subject to the heightened standard of review. See, e.g., Case Comment, supra note 2, at 684; Comment, supra note 4, at 721-22, 723-24; cf., e.g., McKee v. City of Rockwall, 877 F.2d 409, 414 (5th Cir. 1989), cert. denied, 110 S. Ct. 727 (1990); id. at 423-24 (Goldberg, J., concurring in part and dissenting in part); Howell v. City of Catoosa, 729 F. Supp. 1308, 1311 n.5 (N.D. Okla. 1990) (Domestic violence classification "[b]y strict definition, a gender-neutral class, but predominantly women"); Thurman, 595 F. Supp. at 1528 n.1. The Hynson and Watson
and Hynson,\textsuperscript{136} agreed with Dudosh that if the police were treating victims of domestic violence differently from other citizens the rational basis standard of equal protection analysis would apply to such an arguably discriminatory system of classification unless the victims satisfied the \textit{Feeney} criteria.\textsuperscript{137}

3. Summary of Abused Spouse Equal Protection Law

Before \textit{DeShaney}, under the equal protection clause the police could not discriminate in the way they guarded the public. If they discriminated against battered women on the basis of gender, their action would be unlawful unless it were substantially related to an important governmental interest. No police defendant in the reported cases was able to prove that an important governmental interest required gender-based discrimination. If the police discriminated on some other basis, such as against the class of victims of domestic violence, their action would be upheld so long as the classification was rationally related to a legitimate state interest. If it was unclear whether the police discriminated on the basis of gender or class, the reviewing court would apply the \textit{Feeney} test to determine whether or not gender-based discrimination was involved. Equal protection law could provide the battered spouse with a reliable remedy against police inaction.

C. Failure to Adequately Train the Police

In the years before \textit{DeShaney} a victim of domestic violence could raise a derivative Section 1983 damage claim by asserting that a
The municipal defendant was liable to the victim because the municipality’s failure to adequately train its police how to deal with domestic violence incidents had caused police officers to commit unconstitutional acts, such as failures to protect in violation of due process or equal protection law, which led to the battered spouse’s harm. This failure to train the police allegation had a rather checkered history.

In *Monroe v. Pape*, the Supreme Court had ruled that a municipality could not be held liable under the terms of Section 1983. Seventeen years later the Court reevaluated the point. Under *Monell v. Department of Social Services*, a municipality cannot be held vicariously liable, through respondeat superior or otherwise, in a Section 1983 suit for the unconstitutional actions of its officials. However, it can be held liable under Section 1983 for constitutional violations which it caused through something akin to a policy or custom.

Various post-*Monell* litigants argued that a derivative municipal failure to train the police claim could be one way to establish that municipal fault produced the plaintiff’s harm. The failure to train action was derivative to the actions of a municipality’s officials in the sense that it only existed if some police officer (or other mu-
municipal representative) violated the plaintiff's constitutional rights and that underlying violation somehow was caused by the municipality's inappropriate failure to properly train the officer. Thus, a threshold question in any failure to train suit against a municipality was whether an underlying constitutional tort was committed by an inadequately trained municipal representative. If so, the municipality could be liable if its failure to train caused the victim's injury. If not, no Section 1983 failure to train claim would exist regardless of how deficient the municipality's police training program may have been.

A Section 1983 litigant who asserted that a municipality had failed to adequately train the police to deal with the myriad law enforcement situations with which they must cope had to prove various elements of the cause of action. Many United States Courts

146. See, e.g., City of Canton, 489 U.S. at 388 n.8; Brown, supra note 36, at 628 n.22; Oren, supra note 22, at 730 n.512.


148. In Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988), the Fourth Circuit summarized the then-existing failure to train law:

The way in which a municipal police force is trained, including the design and implementation of training programs and the follow-up supervision of trainees, is necessarily a matter of "policy" within the meaning of Monell. To the extent a particular training policy is fairly attributable to a municipality, it is "official municipal policy." To the extent such an official municipal policy has deficiencies resulting from municipal fault that then cause specific constitutional violations by deficiently trained police officers, the municipality is liable under 42 U.S.C. § 1983.

Such a training policy is fairly attributed to a municipality when it is designed, implemented, and its trainees supervised by municipal officials to whom the municipal governing body has effectively delegated final authority so to act. Delegation to such policymakers may be by formal directive, such as a job description, or by informal acquiescence in a known, continued exercise of authority, or by both in combination. Policymaking authority with respect to police training, as generally, is final if it is effectively final; the mere fact that the governing body or some other official retains ultimate but unexercised authority over both
of Appeal recognized the new action,\footnote{149} while others greeted it less enthusiastically.\footnote{150} The courts which accepted the claim usually only held a municipality liable in the case of a grossly negligent or reckless failure to train, or perhaps if it exhibited deliberate indifference towards the constitutional rights of its denizens.\footnote{151}

In \textit{City of Oklahoma City v. Tuttle},\footnote{152} a divided Supreme Court invalidated a $1.5 million jury verdict against the municipal defendant because the trial court had instructed the jury that it could infer the existence of a city policy for inadequate police training

\footnote{Id. at 1389-90. \textit{Accord, e.g.}, Gerhardt, \textit{supra} note 36, at 604-05.}


\footnote{151. While a few courts apparently held that the municipal defendant could be held liable on a mere showing of ordinary negligence, see, \textit{e.g.}, McKinnon v. City of Berwyn, 750 F.2d 1383, 1391 (7th Cir. 1984) (supervisor case, see \textit{supra} note 36); Brandon v. Allen, 719 F.2d 151, 153-54 (6th Cir. 1983) (supervisor case, court indicated simple negligence applicable standard but did not reach issue because concluded qualified immunity present), \textit{rev'd on other grounds sub nom}. Brandon v. Holt, 469 U.S. 464 (1985); Greenberg v. Mynczywor, 667 F. Supp. 901, 906-07 (D.N.H. 1987), most required proof of considerably greater culpability. See, \textit{e.g.}, Spell, 824 F.2d at 1390 & n.11; Bergquist, 806 F.2d at 1370; Fiacco, 783 F.2d at 326. For the final resolution of the degree of culpability dispute, see infra notes 408, 414 and accompanying text.

\footnote{152. 471 U.S. 808 (1985).}
because of one instance of extremely excessive force. A plurality of the Court concluded that more than a single unlawful act must be proved in order to justify such a failure to train recovery. The Court, which had never previously determined the soundness of a failure to train the police suit, was unable to agree whether an inadequate police training claim could ever be valid.

After Tuttle, the Dudosh v. City of Allentown court considered how the derivative inadequate police training cause of action would apply in a domestic violence case. As the court noted, neither the Supreme Court nor the Third Circuit, of which the Dudosh court was part, had definitively addressed the validity of the claim, which the Dudosh court eyed suspiciously. The court granted summary judgment for the municipal defendant on the plaintiff's denial of equal protection failure to train count without deciding whether the overall failure to train theory was viable. The court perceived that the plaintiff had not proved that the police who arguably violated the plaintiff's constitutional equal protection rights were inade-

153. Id. at 813-14.
154. Id. at 823-24.
155. See id. at 824 n.7.

The Court later missed a golden opportunity to settle the question of the validity of the Section 1983 inadequate police training cause of action once and for all and (2), if necessary, to define the standard of culpability requisite for liability, see supra note 151 and accompanying text, when it dismissed a writ of certiorari it had previously granted in a case where these issues could have been decided. Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), cert. granted, 475 U.S. 1064 (1986), cert. dismissed, 480 U.S. 257 (1987) (per curiam). See Spell, 824 F.2d at 1389 n.10.

In an extended dissent from the dismissal order, four justices, led by Justice O'Connor, discussed the merits of constitutional inadequate police training actions under Section 1983, and concluded that in their view "the 'inadequacy' of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain." City of Springfield, 480 U.S. at 268-69 (O'Connor, J., dissenting). The dissent specifically decried the First Circuit's broad application of the failure to train tort in Kibbe. Id. at 270-72. Thus, while the dissenters recognized the cause of action, they did so grudgingly and only in the most extreme of circumstances.

157. See supra note 155.
159. The court derailed the plaintiff's denial of due process failure to train count when it held that no underlying due process constitutional violation of the plaintiff's rights had been committed by the police. Dudosh v. Warg, 668 F. Supp. at 949-51; Dudosh, 665 F. Supp. at 387-91. See supra note
quately trained. If they were, the plaintiff had not demonstrated that the inadequate training caused the possible denial of equal protection that resulted in the plaintiff's death. Thus, the plaintiff had not established the elements requisite to a successful failure to train claim. In the process, the court evidenced little sympathy for the failure to train suit. Several other reported pre-DeShaney domestic violence or related nonfeasance cases at least briefly considered the derivative municipal liability cause of action. A number


In reaching this result, the Dudosh court garnered support from several earlier district court decisions from inside the Third Circuit which had also assumed the failure to train claim was valid without deciding the point and then dismissed the case for lack of proof that the training was inadequate or, if it was, that the inadequate training had caused the plaintiff's harm. Mariani v. City of Pittsburgh, 624 F. Supp. 506 (W.D. Pa. 1986); Sewell v. Dever, 581 F. Supp. 556 (W.D. Pa. 1984). The court also cited Justice O'Connor's anti-failure to train dissent in City of Springfield v. Kibbe, 480 U.S. 257, 260-72 (1987) (O'Connor, J., dissenting), see supra note 155, as support on the failure of proof of causation holding. Dudosh, 665 F. Supp. at 396.

A few months after Dudosh was decided, in Lach v. Robb, 679 F. Supp. 508 (W.D. Pa. 1988), the court also took a hard line on the failure to train cause of action. Id. at 513 (citing Chinchello v. Fenton, 805 F.2d 126, 132-34 (3d Cir. 1986)). And a few months after Lach was decided, the Third Circuit itself demonstrated in Colburn v. Upper Darby Township, 838 F.2d 663, 672-73 (3d Cir. 1988), cert. denied, 109 S. Ct. 1338 (1989), that it felt a level of hostility towards the new cause of action akin to that of the Kibbe dissenters. Thus, the Third Circuit and its subordinate courts were not the forums in which to bring successful failure to train claims in the period before DeShaney.

161. See Dudosh, 665 F. Supp. at 396. This lack of sympathy was reflected by the Third Circuit and other law the court chose to follow. See supra note 160.

162. Turner v. City of North Charleston, 675 F. Supp. 314, 320 (D.S.C. 1987) (battered spouse case, turned on failure to protect/"special relationship" substantive due process issue, since court found no underlying substantive due process violation of plaintiffs' rights, at least partially due to qualified immunity doctrine, failure to train claim evaporated as well); Balistreri v. Pacifica Police Dep't, 656 F. Supp. 423, 424-25 (N.D. Cal. 1987) (battered spouse who police did not assist despite numerous calls for assistance alleged "defendants failed to properly supervise, train and/or discipline Pacifica police officers which resulted in a deprivation of plaintiff's civil rights," id. at 424; court never addressed merits of failure to train claim because it dismissed plaintiff's allegations of underlying denial of substantive due process and equal protection constitutional rights), aff'd in part, rev'd in part, 901 F.2d 696 (9th Cir. 1990); Bartalone v. County of Berrien, 643 F. Supp. 574, 578 (W.D. Mich. 1986) (domestic violence case where court apparently endorsed failure to train police claim when there is a sufficiently culpable municipal defendant, stating that: "A conscious choice not to establish or to enforce a procedure for treating spouse abuse victims on an equal basis as other persons could constitute authorization or approval of, or knowing acquiescence in, unconstitutional conduct," and "[municipal] liability may result 'where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable.'" (quoting Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir.), cert. denied, 459 U.S. 833 (1982))); cf. Sherrell v. City of Longview, 683 F. Supp. 1108, 1114-15 (E.D. Tex. 1987) (child abused and severely injured by municipal police officer stated viable Section 1983 claim against municipality when alleged that, despite repeated complaints about officer's assaults upon child, municipal police did not arrest or otherwise control the officer because of...
BATTERED SPOUSE ACTIONS AFTER DESHANEY

of them, contrary to Dudosh, presaged a favorable reception to a failure to train claim when it arose in appropriate future litigation.163

On this record it would have been possible before DeShaney to foresee a mixed, but generally positive, future for the inadequate municipal police training litigation theory in battered spouse damage cases where an underlying constitutional violation was committed by a municipal official whose actions were attributable to a blame-worthy municipal failure to train. Dudosh, the only pre-DeShaney domestic violence case to apply the theory, was from a circuit very hostile to the cause of action. Not surprisingly, perhaps, it rejected it without really determining its merits. Had the Dudosh court been from a circuit friendlier to the claim,164 it might have made things easier for plaintiffs both on the ultimate merits of the cause of action and in such areas as proof, causation, or degree of culpability.165 Certainly, other courts indicated that they would accord a much warmer reception to the municipal failure to train in domestic violence cases assertion once it was presented to them. Ample evidence was available which established that police training for domestic violence situations was inadequate in many areas of the nation.166

municipal policy or custom not to restrict police officers' behavior in domestic violence situations); Caplan v. Roseman, 667 F. Supp. 549, 555-56 (N.D. Ohio 1987) (suit over police involvement in child custody dispute included inadequate police training and supervision complaint, court held no underlying constitutional violation had been proven in this case but observed, as dictum, that, unlike child custody and visitation cases, “this Court concurs with the plaintiffs that police officers should undergo some special training concerning the handling of domestic violence cases.”); Lowers v. City of Streator, 627 F. Supp. 244, 247 (N.D. Ill. 1985) (female rape victim who police ignored after she was attacked, thus allowing second rape by same attacker, stated Section 1983 cause of action against municipal defendant for alleged municipal policy discouraging vigorous prosecution of violent crimes against women); Jensen v. Conrad, 570 F. Supp. 114, 120-25 & n.23 (D.S.C. 1983) (estates of abused children who died from their injuries sued various defendants for failing to investigate reports of child abuse previous to children's deaths, part of case was claim that state officials in their individual capacities failed adequately to train protective service caseworkers how to investigate suspected child abuse situations), aff'd in part, dismissed in part on other grounds, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).


164. See supra note 149 and accompanying text.


166. See, e.g., Watson v. City of Kansas City, 857 F.2d 690, 696 (10th Cir. 1988); D. Rhode, supra note 2, at 239; Finesmith, supra note 2; Gondolf & McFerron, supra note 9; Note, The Case for Legal Remedies for Abused Women, 2 N.Y.U. REV. L. & SOC. CHANGE 135, 145 & n.73 (1977); Note, Duties, supra note 2, at 941-43; cf. Caplan, 667 F. Supp. at 555-56.
In any event, this potentially promising situation was the state of affairs in Section 1983 municipal inadequate police training in domestic violence claim derivative damage litigation when DeShaney was decided.

III. DeShaney v. Winnebago County Department of Social Services

As even Chief Justice Rehnquist acknowledged in his majority opinion in DeShaney, \(^{167}\), which was joined by five other justices, \(^{168}\) "[t]he facts of this case are undeniably tragic." \(^{169}\) Joshua DeShaney was severely abused by his father, Randy DeShaney, starting at as early an age as two or three. \(^{170}\) Randy DeShaney had gained custody of Joshua at the time of Randy's 1980 Wyoming divorce from Joshua's mother, and soon thereafter moved to a city in Winnebago County, Wisconsin. \(^{171}\) In January 1982 Joshua's stepmother, Randy's second wife, reported the abuse. \(^{172}\) Representatives from the Winnebago County Department of Social Services ("Department") interviewed Randy, who denied the abuse allegations, but they took no other action. \(^{173}\)

In January 1983 Joshua was hospitalized for suspected abuse, and the Department briefly had him judicially placed in the hos-

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167. 489 U.S. at 191.


169. Id. at 191.

170. Id. at 191-92.

171. Id. at 191.

172. Id. at 192.

173. Id.
hospital's custody. While the Department ultimately decided there was insufficient evidence of child abuse to keep Joshua in judicial custody, it took several steps to protect him. A month later Joshua was again treated at the hospital for probable abuse, and emergency room personnel reported their observations to the Department caseworker assigned to Joshua's case. Over a period of months the caseworker regularly visited Joshua at the DeShaney home and duly documented a series of suspicious observations which led her to believe Joshua probably was being physically abused, but she took no other actions.

When Joshua was hospitalized anew for probable abuse, the Department was again notified but the caseworker and the Department still did nothing. Finally:

In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded.

Joshua and his mother sued Winnebago County, the Department, and various individual Department employees under Section 1983 for denial of due process due to the failure to protect Joshua from his father's abuse. The United States District Court for the Eastern District of Wisconsin's unreported ruling dismissed the DeShaneys' claims on summary judgment because "the failure of a state agency to render protective services to persons within its jurisdiction does not violate the due process clause."

174. Id.
175. Id.
176. Id.
177. Id. at 192-93
178. Id. at 193.
179. Id. Randy DeShaney was later tried and convicted of child abuse, id., and sentenced to two to four years imprisonment. DeShaney v. Winnebago Dep't of Social Services, 812 F.2d 298, 300 (7th Cir. 1987), aff'd, 469 U.S. 189 (1989). The Seventh Circuit's opinion gave an even more chilling account of Joshua DeShaney's tragic story than that of Chief Justice Rehnquist. 812 F.2d at 299-300.
180. 469 U.S. at 193; 812 F.2d at 300-01.
The Seventh Circuit affirmed the trial court's action.\textsuperscript{182} It rejected the DeShaneys' claim that the Department denied Joshua due process because it failed to protect him from injury by his father pursuant to the prior Seventh Circuit and other precedents holding the government has no constitutional duty to protect its citizens.\textsuperscript{183} The panel specifically disavowed the "special relationship" due process approach followed by some courts.\textsuperscript{184}

The \textit{DeShaney} majority affirmed the Seventh Circuit's narrow view of due process. Chief Justice Rehnquist first characterized the DeShaneys' "special relationship" due process claim as a substantive due process one.\textsuperscript{185} He then declared that the due process clause does not impose a duty of protection on the State.\textsuperscript{186} "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."\textsuperscript{187} Accordingly, the majority held, "we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."\textsuperscript{188}

In the process of reaching this result, the Court specifically rejected the "special relationship" substantive due process approach employed by a number of cases, and included Balistreri by name on a list of disapproved decisions.\textsuperscript{189} It acknowledged that in a few prior cases the Court had recognized that a state can have an affirmative due process duty to care for and protect limited groups of individuals such as incarcerated prisoners or involuntarily committed mental patients.\textsuperscript{190} But the Chief Justice distinguished such

\begin{itemize}
  \item \textsuperscript{182} DeShaney v. Winnebago Dep't of Social Services, 812 F.2d 298 (7th Cir. 1987), aff'd, 489 U.S. 189. (1989)
  \item \textsuperscript{183} \textit{Id.} at 301. See supra note 42 and accompanying text.
  \item \textsuperscript{184} 812 F.2d at 303-04. See supra notes 44-56 and accompanying text.
  \item \textsuperscript{185} 489 U.S. at 195.
  \item \textsuperscript{186} \textit{Id.} at 195-96.
  \item \textsuperscript{187} \textit{Id.} at 196.
  \item \textsuperscript{188} \textit{Id.} at 197.
  \item \textsuperscript{189} \textit{Id.} at 197-203 & n.4.
  \item \textsuperscript{190} \textit{Id.} at 198-99 (citing Youngberg v. Romeo, 457 U.S. 307 (1982) (duty to protect involuntarily committed mental patients); Estelle v. Gamble, 429 U.S. 97 (1976) (duty to protect incarcerated prisoners); also cited City of Revere v. Massachusetts General Hosp., 463 U.S. 239 (1983) (duty to provide medical care for suspects in police custody who were injured while being apprehended by police)).
\end{itemize}
cases from Joshua DeShaney’s situation because in them the due process claimants were involuntarily in state custody, and therefore unable to care for themselves. When the State deprived these individuals of their freedom, the majority noted, it became obligated under the due process clause to provide them with some basic level of care and protection. The majority determined that Joshua DeShaney, on the other hand, was in a completely different category of substantive due process claimant, as he was not in state custody when his father abused him — indeed, he was in the father’s court-granted custody. While the State may have suspected the existence of Randy DeShaney’s dreadful behavior it did nothing either to create the behavior or to make Joshua more subject to it. The majority concluded that even though the State once briefly took custody of Joshua, its action did not give rise to a substantive due process right. Clearly, the custody/non-custody distinction was critical to the Court; only those in custody henceforth should bother suing for due process relief.

The Court then noted that a state might impose common law tort liability upon itself in a case like Joshua’s. But that, the Court

191. Id. at 198-200.
192. Id. at 201.

At this point, the Court observed that if instead of being in his father’s custody when he was abused Joshua had been placed by the State in a foster home and been cruelly treated there, he might have had a due process right of protection because his situation might have been sufficiently analogous to that of the incarcerated prisoner or the involuntarily committed mental patient. Id. n.9. The Court referred to some of the federal appellate decisions which had found such a right existed in foster home situations. E.g., Taylor v. Labeled, 818 F.2d 791, 794-97 (11th Cir. 1987) (en banc), cert. denied, 109 S. Ct. 1337 (1989); Doe v. New York City Dep’t of Social Services, 649 F.2d 134, 141-42 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983). This discussion could prove important, both for its potential addition to the rights of abused foster children and because it helps indicate the exact parameters of DeShaney’s custody prerequisite to a due process right of protection. See infra notes 225-28, 429 and accompanying text.

193. 489 U.S. at 201.
194. The Court stated:
That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

195. Id. at 201-03. This, of course, is something some states definitely might do. See supra notes 3, 13, 20 and accompanying text.
WEST VIRGINIA LAW REVIEW

concluded, did not mean that a federal constitutional tort had been committed.\(^\text{196}\) The Court left it for the people of Wisconsin, if they wished, to require, pursuant to their common law system of tort law, that Joshua and others like him be compensated by the State for the injuries they sustained under such sad circumstances.\(^\text{197}\) The Supreme Court would not require the people to do so under the guise of federal substantive due process.\(^\text{198}\)

The Chief Justice included two footnotes in his opinion which may prove extremely important in battered spouse constitutional tort litigation. In one, the Court affirmed that "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."\(^\text{199}\) While arguably this language endorsed equal protection claims for some battered spouses in police nonfeasance cases in accordance with the existing equal protection law, their status is not entirely clear.

In the other footnote, the Court dealt with the Board of Regents v. Roth\(^\text{200}\) procedural due process cause of action which may help battered spouses in jurisdictions with certain types of spousal protection statutes. The DeShaneys' employed both Roth and Taylor v. Ledbetter\(^\text{201}\) in their briefs,\(^\text{202}\) contending that the Wisconsin child protection statutes applicable to Joshua created entitlements because they were similar to the Georgia laws construed in Taylor.\(^\text{203}\)

\(^{196}\) 489 U.S. at 202.

\(^{197}\) Id. at 203. In so doing, the majority adopted the approach frequently employed by the Seventh Circuit decisions cited supra note 42. See, e.g., Archie v. City of Racine, 847 F.2d 1211, 1223-24 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1338 (1989); Walker v. Rowe, 791 F.2d 507, 510-11 (7th Cir.), cert. denied, 479 U.S. 994 (1986); Jackson v. City of Joliet, 715 F.2d 1200, 1205-06 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Bowers v. DeVito, 686 F.2d 866, 616 (7th Cir. 1982).

\(^{198}\) 489 U.S. at 203.

\(^{199}\) Id. at 197 n.3 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). See supra note 94. The Court observed that no such equal protection argument had been made in DeShaney. 489 U.S. at 197 n.3.

\(^{200}\) 408 U.S. 564 (1972).

\(^{201}\) 818 F.2d 791 (11th Cir. 1987) (en banc), cert. denied, 109 S. Ct. 1337 (1989).

\(^{202}\) Brief for Petitioners at 24-29, Reply Brief for Petitioners at 9-11, DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, (1989) (No. 87-154).

\(^{203}\) As the Court observed: "Petitioners also argue that the Wisconsin child protection statutes gave Joshua an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in [Roth]." 489 U.S. at 195 n.2.

For more on Taylor and the Georgia statutes construed there, see supra notes 69-74 and accompanying text.
Chief Justice refused to entertain the claim because the DeShaneys only first raised it in their Supreme Court brief on the merits.\footnote{204}{As the Court stated: But this argument is made for the first time in petitioners' brief to this Court: it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here. 489 U.S. at 195 n.2 (citations omitted).} It is uncertain how the Court would regard a properly presented Roth due process argument in a battered spouse case.

The DeShaney dissenters challenged what they perceived as the Chief Justice's negative view of constitutional rights.\footnote{205}{Id. at 204-06 (Brennan, J., dissenting).} Justice Brennan read the earlier Supreme Court precedents upholding a due process right of protection in situations the majority characterized as solely custodial far more broadly.\footnote{206}{"I would read [those precedents] to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction." Id. at 207.} He believed the Wisconsin child protection statutes created a Departmental obligation for positive action which was constitutionally enforceable,\footnote{207}{Id. at 208-10.} and generally decried the majority's decision.\footnote{208}{489 U.S. at 212-13 (Blackmun, J., dissenting).} Justice Blackmun agreed with Justice Brennan's approach, advocating in the process a broad, or sympathetic, reading of the fourteenth amendment rather than the restrictive one adopted by the majority,\footnote{209}{See supra note 42 and accompanying text.} as well as various courts below.\footnote{210}{See supra note 42 and accompanying text.}

DeShaney was a landmark decision for the field of abused spouse litigation against police inaction. It resolved the division in the lower courts over the special responsibility federal denial of due process claim by adopting the Seventh Circuit's narrow reading of the fourteenth amendment. Only those individuals who were in some form of state custody would be able, post-DeShaney, to raise a substantive due process-based objection to a governmental failure to act. Since none of the reported domestic violence cases arose when the victims were in any form of state custody, DeShaney presumably struck a mortal blow to battered spouses' denial of substantive due process
claims against the non-responsive police. Apparently, the only causes of action the DeShaney Court clearly endorsed for governmental nonfeasance cases, and which would be available in abused spouse situations, were state common law negligence-based ones. The next segment of this article will recount DeShaney’s reception by both courts and commentators, hopefully clarifying in the process its impact on domestic violence victim Section 1983 damage litigation against the police.

IV. DeShaney’s Impact on Battered Spouses’ Section 1983 Damage Litigation

Not surprisingly, perhaps, DeShaney’s result and rationale, with its custody/non-custody dichotomy in “special relationship” substantive due process cases, have been roundly condemned by the vast majority of the commentators who have studied the decision.211 Only a few authors have supported the DeShaney majority opinion.212 Still, its effect on at least some battered spouse Section 1983 damage suits against the non-responsive police has been quick and dramatic. DeShaney most affected the denial of substantive due process “special relationship” cause of action in non-custodial situations, possibly followed in at least one court by the denial of equal protection claim. Also influenced was the less-frequently raised Board of Regents v. Roth procedural due process assertion. DeShaney indirectly, but significantly, affected the derivative municipal failure to adequately train the police contention.

A. Denial of Due Process

Before DeShaney, the vast majority of the due process challenges to police inaction in domestic violence situations were substantive attacks on the failure to protect.213 After DeShaney, the Roth pro-

211. E.g., Braverman, supra note 167, at 592-93; First, supra note 68, at 534; Gerhardt, supra note 167; Oren, supra note 22; Soifer, supra note 167; Strossen, supra note 167, at 875; Supreme Court, supra note 167, at 172-77; Note, supra note 11, at 508; Note, Section 1983, supra note 2, at 1389; Case Note, 12 HAMLIT. REV. 421, 446 (1989); Case Note, 25 LAND & WATER L. REV. 251, 260-65 (1990).
212. E.g., Note, Snake Pits, supra note 42, at 812-21; Recent Development, supra note 167, at 410-11.
213. See supra notes 44-56 and accompanying text.
cedual due process allegation generally proved more fruitful.

1. "Special Relationship" Substantive Due Process Cases

a. General Rejection of Claims

As one would expect, the lower federal courts immediately enforced the Supreme Court's *DeShaney* mandate in substantive due process failure to protect cases. Upon reconsideration, the *Balistreri*\(^{214}\) court reversed its previous pro-battered spouse holding and dismissed the substantive due process claim. Based on *DeShaney*, the *Dudosh v. City of Allentown*\(^{215}\) court, in its most recent reported decision,\(^{216}\) refused on reconsideration to reinstate such a cause of action despite the administrator of the deceased battered spouse's estate's argument that his decedent should be considered to have been in custody at the time of her death and thus should still have been allowed to recover despite *DeShaney*.\(^{217}\) Other courts rushed to invalidate non-custody "special relationship" substantive due process causes of action, and have consistently continued to do so.\(^{218}\) Several of these

214. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699-700 (9th Cir. 1990). For more on the various *Balistreri* opinions, see supra note 50.


216. For more on *Dudosh*'s various incarnations and issues, see supra notes 111, 132-34, 156-61 and accompanying text, infra notes 411-12 and accompanying text.

217. On the day of Kathleen Dudosh's death, her former male cohabitant unlawfully entered Dudosh's apartment. Dudosh called the police, and when two officers arrived she met them outside her home and showed them a copy of a state court Protection-from-Abuse order which required the former cohabitant to leave her alone. Dudosh then voluntarily escorted the officers upstairs to her apartment door. She unlocked the door, and when it opened the former cohabitant shot her dead through the doorway. Soon thereafter, he committed suicide. *Dudosh v. City of Allentown*, 665 F. Supp. 381, 384-86 (E.D. Pa.), reconsideration denied sub nom. *Dudosh v. Warg*, 668 F. Supp. 944 (E.D. Pa. 1987), vacated, 853 F.2d 917 (3d Cir.) (per curiam), cert. denied, 488 U.S. 942 (1988). Dudosh's administrator contended that this fact situation established that Dudosh was in police custody when she was murdered, but the court on reconsideration held she was not in custody and accordingly, pursuant to *DeShaney*, refused to alter its previous grant of summary judgment to the defendants on the substantive due process claim. *Dudosh*, 722 F. Supp. at 1235.

218. *E.g.*, *Ross v. United States*, 910 F.2d 1422, 1428 (7th Cir. 1990); *Bryson v. City of Edmond*, 905 F.2d 1386, 1392-93 (10th Cir. 1990); *Doe v. Milwaukee County*, 903 F.2d 499, 502 (7th Cir. 1990); *Piechowicz v. United States*, 885 F.2d 1207, 1214-15 (4th Cir. 1989); *de Jesus Benavides v. Santos*, 883 F.2d 385, 387-88 (5th Cir. 1989); *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 166-68 (3d Cir. 1989); *Milburn v. Anne Arundel County Dep't of Social Services*, 871 F.2d 474, 476-77, 479 (4th Cir.), cert. denied, 110 S. Ct. 148 (1989); *Jordan v.
cases, in addition to Balistreri and Dudosh, featured abused spouses' police inaction due process claims which either were derailed by DeShaney or would have been so treated had the substantive due process point been raised.\textsuperscript{219}

b. DeShaney's "Custody" Test

Some litigants have attempted to evade DeShaney, arguing they met its custody test, by demonstrating that they were subjected to a "similar restraint of liberty" to incarceration or involuntary institutionalization.\textsuperscript{220} For example, in Pagano v. Massapequa Public Schools,\textsuperscript{221} the district court held that a public elementary school student who was required by law to attend school was, as a student, sufficiently close to being in custody that the school he attended owed him a duty of protection.\textsuperscript{222} Accordingly, the student's suit survived the school system and individual school officials' motion to dismiss.\textsuperscript{223} This fairly broad interpretation of what constituted a

\textsuperscript{219.} E.g., Coffman, 739 F. Supp. at 263-64; Hynson, 731 F. Supp. at 1238-39.

\textsuperscript{220.} See supra notes 190-91 and accompanying text.

\textsuperscript{221.} 714 F. Supp. 641 (E.D.N.Y. 1989).

\textsuperscript{222.} The student had had an extended series of abusive acts perpetrated against him by other students. When the student had advised school officials of the attacks the officials had promised to protect him, but allegedly failed to do so. Id. at 642.

“similar restraint of liberty” and “custody” under DeShaney was, according to the Pagano district court, justified by a footnote in DeShaney which noted, but expressed no view on, several cases which had held foster children placed in foster homes by the State could raise substantive due process failure to protect objections when they were abused. Doe v. New York City Department of Social Services and Taylor v. Ledbetter, the abused foster child cases to which DeShaney referred, have generated considerable interest since DeShaney arguably indicated a substantive due process “custody” status might be available to their class of plaintiffs. Several recent courts have upheld substantive due process failure to protect claims by abused state-placed foster children because they were deemed by the courts to have their liberty sufficiently restrained to be in the DeShaney mandated state “custody.”

Other cases have stretched the limits of DeShaney’s custody concept. In Horton v. Flenory, for instance, the Third Circuit held...
that a casual employee of a private club, who was beaten to death during questioning by the club’s owner about a burglary at the club, had his liberty sufficiently restricted to be in state custody when the municipality had an official policy relegating law enforcement in private clubs to their proprietors and in this case a police officer knew about the proprietor’s investigation and took no steps to avert the employee’s ultimate demise.\textsuperscript{230} The court contrasted \textit{DeShaney}’s passively neglectful social workers with \textit{Horton}’s more actively dormant police officer, and concluded that the municipal and individual officer defendants could be held liable due to what \textit{DeShaney} would consider a significant state restriction of the employee’s freedom.\textsuperscript{231}

Some post-\textit{DeShaney} decisions have focused during custody status determinations on a pre-\textit{DeShaney} sub-category of “special relationship” cases which held that persons have a due process claim against the state when state action placed the persons in a position of danger and the state then failed to protect them.\textsuperscript{232} Leading il-

\begin{itemize}
  \item \textsuperscript{230} Id. at 455-58.
  \item \textsuperscript{231} Id. at 458. Later courts have noted that \textit{Horton} apparently somewhat expanded \textit{DeShaney}’s custody concept. E.g., Coffman v. Wilson Police Dep’t, 739 F. Supp. 257, 263 n.6 (E.D. Pa. 1990); Hynson v. City of Chester, 731 F. Supp. 1236, 1239 n.2 (E.D. Pa. 1990); see also Fisher v. City of Reading, No. 89-8148 (E.D. Pa. April 2, 1990) (1990 WESTLAW 39872, at 5 n.7). Without clearly so stating, the \textit{Horton} court may have applied the “special danger” special relationship law discussed \textit{infra} notes 232-49 and accompanying text.
  \item The \textit{Horton} court further concluded that the state had delegated the state function of criminal investigation to the club owner, and thus was responsible for his actions. 889 F.2d at 458. This finding, of course, could support the panel’s decision upholding a verdict for the plaintiffs regardless of the rightness of the \textit{DeShaney} custody determination. \textit{See id.} (citing authorities).
  \item For a discussion concerning whether \textit{Horton} was a \textit{DeShaney} custody case at all, see \textit{infra} note 252 and accompanying text.
  \item \textsuperscript{232} E.g., Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 1784 (1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 341 (1990); see Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (“It is not clear . . . how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty . . . a constitutional duty to protect an individual against private violence \textit{may} exist in a non-custodial setting if the state has taken affirmative action which increases the individual’s danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.”) (citations omitted) (emphasis added); Archie v. City of Racine, 847 F.2d 1211, 1226 (7th Cir. 1988) (en banc) (Posner, J., concurring) (“The distinction between putting someone in a place of danger and enhancing the danger faced by someone who already is in danger (but through no fault of government) is a subtle one. . . . [I]n the former case the government’s conduct is apt to create a greater incremental probability of harm, and thus be a more palpable cause of the victim’s injury, than in the latter case. The distinction is only one of degree, but perhaps of sufficient degree to make a constitutional difference . . . .”), \textit{cert. denied}, 109 S. Ct. 1238 (1989); G-69 v. Deegman, 745 F. Supp. 254, 264-65 (D.N.J. 1990).
\end{itemize}
Illustrations of these "special danger" cases were *White v. Rochford*\(^{233}\) and, to a lesser degree, *Nishiyama v. Dickson County*.\(^{234}\) Cases that followed *White* frequently considered it the exception to the general rule of no recovery in governmental inaction cases because of the position of danger to which police officers actively exposed the plaintiff children when the officers left them stranded on the roadside following the arrest of their driver.\(^{235}\) *Nishiyama* was interpreted similarly.\(^{236}\) Some post-*DeShaney* courts have equated these "special

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233. 592 F.2d 381 (7th Cir. 1979). In *White v. Rochford*, police officers arrested a driver on a Chicago-area expressway for a traffic offense and took him away, knowingly leaving behind three child passengers in the driverless car. The weather was inclement and the driver begged the officers to transport the children to a safer place, but they refused. *Id.* at 382. The Seventh Circuit upheld a Section 1983 claim for the children, holding, according to a later court, that "a police officer may be liable under section 1983 when he abandons passengers of arrested drivers under circumstances which expose them to unreasonable danger." *Wood*, 879 F.2d at 593.

234. 814 F.2d 277 (6th Cir. 1987) (en banc). In *Nishiyama*, the court held that when the Dickson County Sheriff permitted a convicted felon who was an inmate on "trusty" status in the Dickson County Sheriff's Department's custody to drive a marked Department patrol car and he used the car to pull over a woman who he then beat to death, *id.* at 279, a special relationship was established towards the woman such that the defendants could be held liable for denial of due process. *Id.* at 282-83. Without so stating, the court applied "special danger" case analysis. *Id.* See *Nishiyama v. Dickson County*, 779 F.2d 52 (6th Cir. 1983) (text in *Westlaw*, at 4-5, 6), vacated, 814 F.2d 277, 278-79 (6th Cir. 1987) (en banc); Note, *Snake Pits*, supra note 42, at 817 & n.349.

235. *E.g.*, *Archie v. City of Racine*, 847 F.2d 1211, 1226 (7th Cir. 1988) (en banc) (Posner, J., concurring), *cert. denied*, 109 S. Ct. 1338 (1989), *see supra* note 232; *DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298, 303 (7th Cir. 1987) ("If the state, having arrested a child's parents, leaves the child alone in a situation where he is quite likely to come to grief because no one is watching over him, and he is injured, the state is a cause of the injury."). *aff'd on other grounds*, 489 U.S. 189 (1989); *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985) (classified *White v. Rochford* with prisoner and mental patient cases of the type that *DeShaney* later held give rise to custodial status), *cert. denied*, 475 U.S. 1047 (1986); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983) (classified *White v. Rochford* with prisoner cases of the type that *DeShaney* later held give rise to custodial status), *cert. denied*, 465 U.S. 1049 (1984); *Mendez v. Rutherford*, 655 F. Supp. 115, 119-20 (N.D. Ill. 1986) (classified *White v. Rochford* with *Estelle v. Gamble*, 429 U.S. 97 (1976), and other prisoner and mental patient cases of the type that *DeShaney* later held give rise to custodial status); *see Escamilla v. City of Santa Ana*, 796 F.2d 266, 269 (9th Cir. 1986); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). As *Bowers* said: "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."


While neither *Doe nor Taylor* cited to either *White v. Rochford* or *Nishiyama*, each may have been, at least in part, a "special danger" case. See *Taylor*, 818 F.2d at 797-98 (citing and quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)'s "special danger" language); Note, *Snake Pits*, supra note 42, at 817 & n.349.
danger” cases with the post-DeShaney custody mandate, and said the endangered persons’ status should be considered as custodial. 237 Certain language in DeShaney itself may support such a confering of custodial status. 238

237. See Griffith v. Johnson, 899 F.2d 1427, 1439 & n.8 (5th Cir. 1990) (court listed cases that exemplify apparent categories of “similar restraint[s] of personal liberty” that satisfy DeShaney’s custody test, including Doe, Taylor, and White v. Rochford; Griffith court acknowledged that “[t]he ‘liberty interests’ recognized in these cases have not been considered by our court or by the Supreme Court.”); Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), cert. denied, 110 S. Ct. 1784 (1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 111 S. Ct. 341 (1990); G-69 v. Degnan, 745 F. Supp. 254, 264-65 & n.10 (D.N.J. 1990); B.H. v. Johnson, 715 F. Supp. 1387, 1394-95 (N.D. Ill. 1989); Garcia v. Superior Court, 50 Cal. 3d 728, 740-41 n.11, 789 P.2d 960, 967-68 & n.11, 268 Cal. Rptr. 779, 786-87 n.11 (1990) (Section 1983 claim); Note, supra note 11, at 501-04 (“position of danger” test may determine DeShaney custodial status); Note, Snake Pits, supra note 42, at 817 (“position of danger” test may determine DeShaney custodial status); see also Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990) (when police arguably increased danger battered spouse faced from abusive husband she might have been in DeShaney custody); Swader v. Commonwealth of Virginia, 743 F. Supp. 434, 439 (E.D. Va. 1990) (“special danger” case where prison nurse and her daughter resided on prison premises pursuant to State rule requiring that employees do so, daughter raped and murdered by unsupervised inmate, court held she was in DeShaney custody); White v. New York City Health & Hosps. Corp., No. 88 Civ. 7536 (S.D.N.Y. Mar. 19, 1990) (1990 Westlaw 33747, at 12 n.17) (hospital admitted infant plaintiff as voluntary patient, would not allow parents to stay overnight with her, child abducted allegedly due to hospital policy not to enforce security precautions, which arguably created a “special danger,” court observed in dicta that “combination of affirmative action and a custodial relationship that may or may not have been voluntary” (emphasis added) might satisfy DeShaney custody requirement); Comment, Actionable Inaction, supra note 35, at 1062-63. But see Wood, 879 F.2d at 599-600 (Carroll, J., dissenting); cf. Jordan v. State of Tennessee, 738 F. Supp. 258, 260 (M.D. Tenn. 1990) (voluntary resident of state residential facility for twenty-four hour care of severely retarded individuals was not in DeShaney custody and hence no duty to protect was owed by State to him despite allegations of unsafe conditions at facility due to understaffing, poor maintenance, improper staff training, and failure adequately to fence in pond where resident drowned).

The custody finding in Horton arguably was at least partially based on its municipal defendant’s endangering the murdered private club employee through its policy for dealing with private club disturbances and the police officer’s subsequent inaction. Horton, 889 F.2d at 458. The court’s custody determination could also be attributed to a general view that when the effect of the municipal policy was coupled with the officer’s inexcusable behavior, custody resulted. See id. See also supra note 231.

238. In DeShaney, as described supra note 194, the Supreme Court pointed out that when the Winnebago County, Wisconsin Department of Social Services once briefly took Joshua DeShaney from his abusive father’s custody and then returned Joshua to the father it had not placed Joshua in more danger of harm than he would have faced had it never intervened. DeShaney, 489 U.S. at 201. One can guess what the Court would have said if the State had put Joshua in greater danger because of its actions. Arguably, he then might have merited substantive due process protection through a custody finding, or otherwise have had a substantive due process protection right. See Freeman v. Ferguson, 922 F.2d 52, 54-55 (8th Cir. 1990); Swader v. Commonwealth of Virginia, 743 F. Supp. 434, 436-44 (E.D. Va. 1990); cf. DeShaney, 489 U.S. at 205-06 (Brennan, J., dissenting) (argued substantive due process ought to cover such situations).
For example, in *Wood v. Ostrander* the Ninth Circuit liberally construed *DeShaney*’s custody requirement in a “special danger” situation. In that case, at 2:30 a.m. a Washington State Trooper stopped a car in which the plaintiff was a passenger, arrested the driver for driving while intoxicated, and impounded his car, leaving the plaintiff on the side of the road in a high crime area. The plaintiff ultimately was raped by an unknown man with whom she accepted a ride. The *Wood* court, relying heavily on *White v. Rochford*, maintained that the trooper’s action in arresting the driver, impounding his car, and apparently stranding the plaintiff created a “special danger” which was, in turn, sufficient to satisfy *DeShaney*’s mandate and thus support a substantive due process governmental nonfeasance recovery. Like *Horton*, *Wood* seemed to expand the bounds of *DeShaney*, whose existence it barely acknowledged — indeed, the lone dissenter in *Wood* strongly argued that the *Wood* plaintiff was never in state custody, that the State did not create the unknown dangers she faced from the man who picked her up (thus discounting any “special danger” custody status rule), and that the majority was ignoring *DeShaney*’s custody requirement. Still, considerable justice may support the *Wood* result.

239. 879 F.2d 583 (9th Cir. 1989), cert. denied, 111 S. Ct. 341 (1990).
240. Id. at 586. It was disputed whether the officer offered to assist the plaintiff in obtaining transportation home. Id.
241. Id.
242. Id. at 590.
243. Id.
244. Id. at 598-600 (Carroll, J., dissenting). As Judge Carroll contended:

[Like Joshua DeShaney], [the plaintiff] was never in the State’s custody. The person from whom [the plaintiff] accepted a ride and who allegedly raped her was not a state actor. Assuming the State was aware of the speculative dangers that [the plaintiff] faced . . . the State played no part in their creation. Neither did the State render her more vulnerable than any other member of the general public in that area . . . .

The State patently did not become the guarantor of [the plaintiff’s] safety when it arrested the drunken driver of the car in which she was riding. . . . Consistent with *DeShaney*, the State owed no constitutional duty to [the plaintiff].

Id. at 599-600.

Judge Carroll attacked the *Wood* majority’s reliance on *White v. Rochford* and pointed out that in Justice Brennan’s *DeShaney* dissent, 489 U.S. at 205 (Brennan, J., dissenting), the Justice arguably recognized that *White v. Rochford was inconsistent with the DeShaney holding. Wood, 879 F.2d at 600 (Carroll, J., dissenting); accord Note, Section 1983, supra note 2, at 1372 & n.114. Whether Judge Carroll was correct in his attack on the *Wood* majority’s implicit custody finding is questionable. Justice
And in Cornelius v. Town of Highland Lake,\textsuperscript{245} another "special danger" case, the Eleventh Circuit found that a municipal employee sufficiently established DeShaney custody for a court to permit her case to go to trial when she alleged her Alabama municipal employer and various public officials placed her in danger, failed to protect her, and caused her considerable harm.\textsuperscript{246} The panel held there was

\begin{verbatim}
Brennan's DeShaney dissent's reference to White v. Rochford was sufficiently ambiguous not to preclude a finding of custody in such a situation. Arguably, sufficient state restraining action occurred in White v. Rochford (and Wood and Horton, as well as in Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), cert. denied, 110 S. Ct. 1784 (1990)) that a post-DeShaney Court might uphold a finding of custody there. See infra notes 431-41 and accompanying text.

Judge Carroll argued that the police behavior in Wood was not sufficiently active to meet DeShaney's custody test. Wood, 879 F.2d at 600 (Carroll, J., dissenting). The best response to his position may be to refer again to the language from DeShaney, see supra note 220, and ask what more the trooper in Wood needed to have done to the plaintiff than he did before he would have restrained her freedom enough to establish "special danger" status/meet the custody test—he stopped the car in which she was riding, arrested her driver, and impounded the vehicle by having it towed away, thus leaving her alone and exposed on the road. See Archie v. City of Racine, 847 F.2d 1211, 1222-23 (7th Cir. 1988) (en banc) ("When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When a state cuts off sources of private aid, it must provide replacement protection." Id. at 1223.), cert. denied, 109 S. Ct. 1338 (1989); First, supra note 68, at 532.

As for Judge Carroll's contention that White v. Rochford was only decided as it was because children were affected by the police action, Wood, 879 F.2d at 603-05 (Carroll, J., dissenting) ("Could anyone fairly conclude that the White [v. Rochford] court would have found the same 'constitutional' violation if [the adult] Ms. Wood had been the passenger left sitting in the car on the Chicago Skyway, rather than the minor children? I submit not." Id. at 605 (emphasis in original)), although some later decisions did at least somewhat focus on that aspect of White v. Rochford, see, e.g., Archie, 847 F.2d at 1223; DeShaney v. Winnebago County Dept.'s of Social Services, 812 F.2d 298, 303 (7th Cir. 1987), aff'd on other grounds, 489 U.S. 189 (1989); Walker v. Rowe, 791 F.2d 507, 511 (7th Cir.), cert. denied, 479 U.S. 994 (1986); Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986); Mendez v. Rutherford, 655 F. Supp. 115, 119 (N.D. Ill. 1986), they did not limit the application of its principle to child victim cases. E.g., Griffith v. Johnson, 899 F.2d 1247, 1439 & n.8 (5th Cir. 1990); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); G-69 v. Degnan, 745 F. Supp. 254, 264 n.10 (D.N.J. 1990); Mendez, 655 F. Supp. at 119. Child victim status should be only one factor, albeit a very important one, in a DeShaney "similar restraint of liberty" custody determination inquiry. It might prove significant in a close case, but generally should not be dispositive.

If, of course, a court should conclude that a case like Wood, Horton, White v. Rochford, or Cornelius was not controlled by DeShaney at all because the relevant governmental behavior was too active, custody might no longer be an issue. For more on the applicability of DeShaney in such circumstances, see infra note 252 and accompanying text.


246. "[W]ith gross negligence and deliberate indifference ... [to] her constitutionally protected liberty interests ...." Id. at 351. Ms. Cornelius claimed the defendants did so by having inadequately supervised prison inmate work squads, with dangerous criminals as members, laboring in the community. They toiled, among other places, in the town hall where Ms. Cornelius worked as Town Clerk. Two work squad prisoners abducted Ms. Cornelius from her job site and held her hostage for three days while she and the inmates fled across three states. The escapees finally left Ms. Cornelius tied to a Georgia tree. Id. at 349-50.
\end{verbatim}
a factual question whether a special relationship existed between the employee and the defendant municipality and public officials that met the custody mandate after citing various pre-DeShaney “special danger” cases, \(^\text{247}\) with a particular focus on Nishiyama, \(^\text{248}\) and reviewing DeShaney’s “similar restraint of liberty” custody test language. \(^\text{249}\)

These liberal interpretations of DeShaney’s custody requirement are potentially important for domestic violence litigation against the inactive police. The more the DeShaney custody rule is extended, the more battered spouses can rely upon it. For example, if the Dudosh court had followed such an approach, it might have found custody present under the particular facts of that case. \(^\text{250}\) At present,

\(^{247}\) Id. at 354-55.

\(^{248}\) The court extensively discussed the similarity it perceived between Ms. Cornelius’s situation and that of the “special danger” case plaintiff in Nishiyama. Cornelius, 880 F.2d at 355-59. In so doing the panel seemed to view DeShaney less like a “bright line limit to the substantive component of the Due Process Clause . . .,” McKee v. City of Rockwall, 877 F.2d 409, 417 (5th Cir. 1989) (Goldberg, J., concurring in part and dissenting in part), cert. denied, 110 S. Ct. 727 (1990). See Note, Snake Pits, supra note 42, at 816, and more like a mere continuation of pre-DeShaney “special danger”/“special relationship” law.

\(^{249}\) Cornelius, 880 F.2d at 355-56. As the panel observed:

In this case, the defendants did indeed create the dangerous situation of the inmates’ presence in the community by establishing the work squad and assigning the inmates to work around the town hall. Moreover, the defendants increased Mrs. Cornelius’s vulnerability to harm by regularly exposing her to the work squad inmates by virtue of her position as Town Clerk. These actions, coupled with the degree of control the town officials exercised over Mrs. Cornelius as Town Clerk, lead us to conclude that there is a genuine issue relevant to the existence of a special relationship between the town officials and the plaintiff implicating her due process rights.

\(^{250}\) See supra notes 215-17 and accompanying text. The argument might have been that the police
custody appears to require a case-by-case determination which must be addressed in any battered spouse or other substantive due process case in which it is disputed. The dispositive question in each case will be whether, pursuant to DeShaney, the restraint on the plaintiff's freedom is sufficiently similar to penal incarceration or involuntary commitment to equate with them,\(^{251}\) or even whether DeShaney and its custody rule apply at all.\(^{252}\) Some courts, like those

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E.g., who witness fellow officers unlawfully beating third persons are liable for failing to protect them. Precedents may give rise to custody status in the similar on custody issue to

No. 87-C-7697 (N.D. Ill. Mar. 31, 1989) (1989 WESTLAW 48892, at 4) (non-battered spouse case otherwise similar on custody issue to Dudosh, court ultimately held police not liable for plaintiff's stab wounds).

251. Another species of governmental nonfeasance which is closely related to the “special danger” precedents may give rise to custody status in the post-DeShaney era of Section 1983 substantive due process law. In Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972), the Seventh Circuit held that police officers who witness fellow officers unlawfully biting third persons are liable for failing to protect them. \(\text{Id.}\) at 10-11. As the court observed, “one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge.” \(\text{Id.}\) at 11. Both supervisory and nonsupervisory officers owe others the Byrd v. Brishke duty. \(\text{Id.}\) A number of subsequent decisions have reaffirmed the validity of this type of failure to protect liability. E.g., Rason v. Hardiman, 803 F.2d 269, 276 (7th Cir. 1986) (collecting cases); Masel v. Barrett, 707 F. Supp. 4, 8-9 & n.4 (D.D.C. 1989) (collecting cases). Several pre-DeShaney Seventh Circuit decisions categorized a Byrd v. Brishke claim with one under White v. Rochford, holding both involved a custodial status and hurling a pedestrian into a Bowers v. DeVito, 685 F.2d 616, 618 (7th Cir. 1982), snake pit which gave rise to a “special relationship.” E.g., Archie v. City of Racine, 847 F.2d 1211, 1222-23 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1338 (1989); Jackson v. Byrne, 738 F.2d 1443, 1446-47 (7th Cir. 1984). See Note, supra note 11, at 503 n.120. Although no post-DeShaney cases have considered a Byrd v. Brishke scenario, it can be anticipated that courts which follow the lead of Wood, Cornelius, or Horton would assign custody status to its victims as readily as to those asserting claims under the White v. Rochford or Nishiyama v. Dickson County “special danger” lines of authority. Few battered spouses may qualify for the Byrd v. Brishke cause of action, cf. Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988) (police officer repeatedly abused his wife and police responded inadequately to wife's calls for assistance); Sherrell v. City of Longview, 683 F. Supp. 1108 (E.D. Tex. 1987) (police officer attacked child after other officers failed to arrest him for previous abusive behavior); Morgan v. District of Columbia, 468 A.2d 1306 (D.C. App. 1983) (police arguably failed to prevent police officer from ultimately murdering his wife, state law negligence “special relationship” case), but those who do should be able to enjoy the fruits of DeShaney custody status. See First, supra note 68, at 532.

252. Ward v. City of San Jose, 737 F. Supp. 1502 (N.D. Cal. 1990), opined that cases like Horton, Wood, Cornelius, and White v. Rochford may not fall under the DeShaney substantive due process umbrella at all because they featured more active police behavior than the governmental nonfeasance cases such as DeShaney or Balistreri. But see Wood, 879 F.2d at 599-600 (Carroll, J., dissenting). Cases like these were different from the DeShaney scenario, the Ward court contended, because in those cases the government agent helped cause the harm. “Many courts have established a person's right to be free from being placed in a dangerous situation by a police officer or other government employee.” Ward, 737 F.Supp. at 1507. The independent substantive, see DeShaney, 489 U.S. at 195, due process right involved. Ward stated, is one of governmental protection when the state itself has put a person in danger.
deciding *Horton*, *Wood*, and *Cornelius*, might be particularly susceptible to a custody argument in a "special danger" situation where

737 F. Supp. at 1507-08. Such a cause of action could prove highly useful in some battered spouse cases which the *DeShaney* custody mandate otherwise would bar. It might have meant, for example, a recovery against the police who escorted Kathleen Dudosh to her death.

If *DeShaney* does not apply to *Horton*, *Wood*, *Cornelius* or *White v. Rochford*, they tell nothing about its custody condition, and may instead illustrate a new substantive due process remedy for domestic violence victims and others endangered by the actions of government officials such as the police. If, however, it does, they are important to the determination of custody status in similar cases since they, at least between the lines, necessarily featured pro-custody rulings as prerequisites to their favorable holdings for their plaintiffs. And the *Ward* court was probably ill-advised in the creative analysis which led it to conclude that *DeShaney* was inapplicable to such decisions. *Ward*, 737 F. Supp. at 1509, held that the new due process cause of action exists based upon various pre-*DeShaney* "special relationship" precedents which in fact did not go so far as to create a new claim. See, e.g., Ketchum v. Alameda County, 811 F.2d 1243 (9th Cir. 1987); Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986); Walker v. Rowe, 791 F.2d 507 (7th Cir.), cert. denied, 479 U.S. 994 (1986); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982); *White v. Rochford*; see also *Wood*. Instead, all but *Wood* merely held that the plaintiff was, or might have been, in a position of "special danger" and therefore qualified for a due process right of protection under the pre-*DeShaney* law. After *DeShaney* such a plaintiff would have a good claim for custody status, but not for a separate cause of action *DeShaney* did not control. And *Wood* apparently also stands for the proposition that a position of danger case like it similarly merits such treatment.

None of the authorities *Ward* cited have been construed elsewhere to create an independent substantive due process right not to be placed in danger by a government official's actions. In *Horton*, the court clearly believed *DeShaney* applied to its fact pattern, and prominently featured a *DeShaney* custody analysis. 889 F.2d at 458. See also Jordan v. State of Tennessee, 738 F. Supp. 258, 259-61 (M.D. Tenn. 1990) (voluntary resident of state residential facility for twenty-four hour care of severely retarded individuals was not in *DeShaney* custody and hence no duty to protect was owed by state to him despite allegations of unsafe conditions at facility, court extensively discussed *DeShaney*); *White v. New York City Health & Hosps. Corp.*, No. 88 Civ. 7536, (S.D.N.Y. Mar. 19, 1990) (1990 WESTLAW 33747 at 12 n.17) (hospital admitted infant plaintiff as voluntary patient, would not allow parent to stay overnight with her, child abducted allegedly due to hospital policy not to enforce security precautions, court repeatedly discussed *DeShaney*). *Wood*'s slightly different treatment of *DeShaney*, see supra note 243 and accompanying text, might support *Ward*'s premise that an independent substantive due process right was involved, but only barely. *Cornelius* certainly paid at least lip service to *DeShaney*. 880 F.2d at 355-56.

After *DeShaney*, it appears unlikely that the Supreme Court, or any lower court, will authorize any new substantive due process rights in the general right of protection field such as that suggested by the *Ward* court. If, however, the approach to *DeShaney* "special danger" case custody analysis discussed above is not accepted in an appropriate case where governmental behavior places someone in danger and that danger results in injury—or in the parlance of *Bowers*, if a government agent throws them into the proverbial snake pit, they get bitten, and become ill or die, see 686 F.2d at 618—*Ward*'s approach, with its independent right not to be placed at risk by government action, may merit reconsideration by the person's counsel. See also *Swader v. Commonwealth of Virginia*, 743 F. Supp. 434, 443-44 (E.D. Va. 1990) ("special danger" case where prison nurse and her daughter resided on prison premises pursuant to State rule requiring that employees do so, daughter raped and murdered by unsupervised inmate, court arguably held situation gave rise to independent cause of action outside the scope of *DeShaney*).
the State has arguably placed the plaintiffs at risk and then failed to adequately protect them.\(^{253}\)

c. Summary of Abused Spouse Substantive Due Process Law

The overwhelming majority of post-*DeShaney* Section 1983 substantive due process governmental inaction claims have been summarily rejected by the state and lower federal courts, exactly as the *DeShaney* majority intended. The only current real hope for battered spouses with substantive due process cases is to convince the relevant court that they were in state custody at the time of injury, or perhaps that *DeShaney* does not apply to their claim at all. In most situations such arguments will fall on deaf judicial ears. The typical abused spouse now needs to pursue other, non-substantive due process Section 1983 remedial damage options against the inactive police such as the denial of procedural due process or equal protection causes of action, as well as the inadequate police training derivative claim.

2. *Board of Regents v. Roth* Procedural Due Process Cases

Following the Supreme Court’s grudging *DeShaney* footnote reference to the *Board of Regents v. Roth* procedural due process remedy in governmental inaction situations,\(^{254}\) a number of courts in Section 1983 actions addressed the remedy at least briefly in non-feasance cases.\(^{255}\) None of them expressly stated that *DeShaney* had

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253. But see, e.g., de Jesus Benavides v. Santos, 883 F.2d 385, 387-88 (5th Cir. 1989), infra note 439 and accompanying text. So far, the Supreme Court has failed to resolve the validity of these courts’ *DeShaney* custody determinations by denying the petitions for writs of certiorari filed by the unsuccessful governmental defendants in *Cornelius* and *Wood*. Thus, the custody question in “special danger” cases, and the other custody determinations reviewed supra notes 220-49 and accompanying text, remains unresolved. See White v. New York City Health & Hosps. Corp., No. 88 Civ. 7536 (S.D.N.Y. Mar. 19, 1990) (1990 Westlaw 33747, at 12 n.17) ("[T]he line between conduct that is actionable and that which is not actionable under DeShaney has not yet been clearly defined . . . .") (1990 Westlaw 33747, at 12 n.17) (comparing cases).

For more on the merits of the post-*DeShaney* custody decisions, including *Horton, Wood, Cornelius*, and *Pagano*, see infra notes 429-43 and accompanying text.

254. See supra notes 200-04 and accompanying text.

any effect on the Roth claim, and all applied the previously outlined
procedural due process law precedents. The cause of action re-
ceived varying judicial treatments in domestic violence and child
abuse cases.

a. Roth in Spouse Abuse Cases

(1). Liberal Roth Interpretations

The first group of post-DeShaney Roth spouse abuse decisions
wholeheartedly endorsed the procedural due process doctrine’s ap-
plication to such claims. In Coffman v. Wilson Police Department,
a battered spouse case, the district court addressed the plaintiff’s
contention that the defendants deprived her of the entitlement to
police protection from abuse she derived from Roth and the Penn-
sylvania Protection From Abuse Act, an order of protection pro-
vision, and thus denied her procedural due process. After
summarizing the Roth holding, the court proceeded to determine
whether the Protection From Abuse Act created a property right
under Pennsylvania law. The court concurred in an earlier court’s
finding that the Act itself did not do so. Rather than stopping
there, however, the Coffman court looked further. It concluded that

v. Morgan, No. 87 C 9833 (N.D. Ill. Sept. 8, 1989) (1989 WESTLAW 105279, at 10-12) (abused foster
child case), aff’d in part, remanded in part on other grounds, 914 F.2d 846 (7th Cir. 1990); B.H. v.
256. See supra notes 57-89 and accompanying text.
257. See supra note 22.
259. In Coffman, a long history of spousal abuse had characterized Terry Coffman’s marriage to
Wayne Barber and led her to obtain a temporary protective order against him. The Wilson Police
Department was fully aware of the order yet allegedly failed adequately to respond to Ms. Coffman’s
frequent complaints about her husband’s violations of it. Her husband ultimately shot her, causing her
permanent bodily and mental injuries. Id. at 259-60.
262. Id. at 264. For more on the use of state law to determine entitlement status, see supra note
64 and accompanying text.
a court order, like an order of protection, could create a Roth entitlement to police protection, and did so in this case, because a Pennsylvania state court would recognize a common law special relationship in an order of protection/police nonfeasance situation. That state right was definite enough to render the judicial order an entitlement.

264. The court noted that no such order was involved in Hynson v. City of Chester, 731 F. Supp. 1236, 1239-40 (E.D. Pa. 1990), the prior precedent that held that the Act did not create a statutory entitlement, see infra note 273. Coffman, 739 F. Supp. at 264 n.8. In Hynson, the battered spouse/murder victim's previous protection from abuse order against her former boyfriend had expired on October 11, 1984. A hearing had been held on that date and a new order was approved, but it was not signed until October 16, 1984. The boyfriend murdered the abused spouse on October 15, 1984.

265. See supra note 3.

266. Coffman, 739 F. Supp. at 265-66. The court first observed that a judicial order of protection was as unambiguous and mandatory as any Roth statutory entitlement. Id. at 264. Nothing, it argued, precluded a judicial decree from entitlement status:

Although, in the context of Roth, property interests generally arise from sources other than judicial orders, it is in no way remarkable that an order could create an entitlement. After all, courts have held that employment contracts can create property interests removable only by due process of law. Courts are more clearly sources of state law than are middle-ranking functionaries in a college employment office. Furthermore, the court derived its power to issue orders from the legislature. Although the legislature did not itself grant a protectible interest, it enabled the court to create one (just as the legislature may not have created an interest in continued employment by a state employee, but may have empowered a state actor to create such an interest by issuing an employment contract).


Next, the court turned to the particular judicial order in question and inquired whether Pennsylvania law recognized it had a special status. It noted that in general, like most states, Pennsylvania held there is no common law duty for the State to protect individual citizens. Coffman, 739 F. Supp. at 265. However, a state law special relationship can create such a duty, and the court concluded that the order of protection did so in this case. Id. It cited both Baker v. City of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966), supra note 3, and Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983), supra note 20 and accompanying text, for the proposition that protective orders create common law special relationships. Coffman, 739 F. Supp. at 265.

Finally, the court determined, after utilizing a weighing process, that the property right in question was sufficiently definite to merit protection as an entitlement:

The plaintiff's property right is to reasoned police response ... There is, of course, a great deal of discretion in police work, and so the property right here is not reducible to a sum certain. But this is true of most property rights; a right to hold a job, for example, carries with it the qualifications that one may be fired for cause, or if financial straits require it, or for any of a number of other justifications. The well-developed body of case law and practice that governs proper police response makes the scope of this property interest certain enough to be protectible.

Id.

In sum, the court decided that a judicial order can create a Roth property entitlement and that the order of protection in this case did so because at common law it would have created a special
Coffman clearly was the least restrictive abused spouse Roth procedural due process decision to date. No other case in that field has extended entitlement status to a judicial, rather than legislative, decree. Still, adequate precedent may support the Coffman court’s analysis and result.267

The other, and more orthodox, decision enthusiastically to apply Roth in such a setting was the Sixth Circuit’s opinion in Meador v. Cabinet for Human Resources.268 In Meador, an abused foster child case, the Sixth Circuit followed the ruling in Taylor v. Ledbetter269 applying Roth to the Georgia child foster care laws when similar Kentucky statutes were at issue.270 The Meador court concluded that, like the Georgia provisions, “[t]he Kentucky statutes at issue in the instant case create a . . . framework of entitlements” of which foster children could not lawfully be deprived without due process of law.271 In the process, it demonstrated a willingness to liberally construe statutes when the court was confronted with the question whether the provisions were sufficiently definite and restrictive to create an entitlement. Like the majority of the en banc Eleventh Circuit in Taylor v. Ledbetter, the Meador panel apparently overlooked several potentially significant procedural due process issues when it ceased its analysis at a preliminary stage.272

(2). Intermediate Roth Interpretations

Not all post-DeShaney cases were as willing to apply Roth to specific statutes in the battered spouse setting as Meador. Three decisions implicitly acknowledged that state statutes could create an
entitlement in such actions, but determined that the state statutes in question were insufficiently mandatory/excessively discretionary to create a legitimate claim of entitlement. Each seemed to parse the pertinent statute far more closely than, for instance, the en banc majority of the Eleventh Circuit in *Taylor v. Ledbetter* or the Sixth Circuit panel in *Meador*.

(3). Restrictive Roth Interpretations

A final post-*DeShaney* case, which built on Seventh Circuit procedural due process entitlement law precedents, entirely ruled out any procedural due process claims for battered spouses based on the Roth entitlement theory pioneered by *Taylor v. Ledbetter*.

In *Doe v. Milwaukee County* (Doe II), a Seventh Circuit panel viewed the implication of entitlements from protection statutes far more restrictively than the cases employing an intermediate Roth level of scrutiny. Unlike them, the Doe II court's analysis precluded all abused spouses from achieving entitlement status under any state statutory scheme. The panel first stated that not all state or local

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The B.H. court cited various Seventh Circuit precedents including *Eidson v. Pierce*, 745 F.2d 453, 459-60 (7th Cir. 1984), see supra notes 68, 74, infra note 282 and accompanying text, as it determined whether state law had created an entitlement, and noted that:

In *Hewitt v. Helms*, [459 U.S. 460, 471-72 (1983)], the Supreme Court held that for state statutory language to create a legitimate claim of entitlement, mandatory language must be combined with “specific substantive predicates.” Thus, under *Hewitt*, an entitlement is created only where the occurrence of a specific predicate event triggers provision of specific services... the cited provisions do not contain the “specific substantive predicates” required by *Hewitt*. Indeed, plaintiffs concede as much when they agree that, while the mandatory language gives [the Illinois Department of Children and Family Services (DCFS)] no discretion as to whether to provide services, the broad statutory language grants DCFS discretion about what particular services to provide. This is insufficient to establish a liberty or property right under *Hewitt*.

715 F. Supp. at 1400 (emphasis in original). Like *Doe II* and *Eidson*, B.H. made it extremely difficult to establish that a governmental-bestowed right was a Roth entitlement.

The court in *Doe I* noted that “[a]n entitlement is not present where an individual has only ‘an abstract need or desire’ for the benefit. ‘He must have more than a unilateral expectation of it.’” 712 F. Supp. at 1377 (quoting Roth, 408 U.S. at 577).

274. See supra note 68.

275. 903 F.2d 499 (7th Cir. 1990).

276. Due to its somewhat confused presentation, it often is difficult to ascertain the exact order of Doe II’s holdings and analysis. What it determined, however, appears clear and is described infra notes 277-87 and accompanying text.
statutes or regulations create Roth entitlements, and that mere state law procedural guarantees do not give rise to a fourteenth amendment property right. Then it rejected the lower court’s apparent belief that a statute like the Wisconsin child protection statute in question could, if worded appropriately, create a Roth entitlement. It did so because it considered the protections such a statutory scheme would provide to be merely procedural and thus insufficient to create “benefits” under due process jurisprudence. It held that a legitimate claim of entitlement only comes about when one holds “a legally enforceable interest in receiving a governmentally conferred benefit, the initial receipt or the termination of which is conditioned upon the existence of a controvertible and controverted fact.” When the case presented no such fact issue, there was no reason to hold a due process hearing and accordingly no entitlement was present.

Stepping beyond the cases that strictly defined entitlements, the Doe II court finally held that the plaintiffs had no claim regardless of whether the state right in question otherwise would grant an entitlement because they had no underlying due process right in the first instance. It based its rejection of the plaintiffs’ entitlement argument on Archie v. City of Racine, which it interpreted as hold-

278. “It is by now well-established that in order to demonstrate a property interest worthy of protection under the fourteenth amendment’s due process clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance.” Id. at 503 (quoting Cain v. Larson, 879 F.2d 1424, 1426 (7th Cir.), cert. denied, 110 S. Ct. 540 (1989)); accord, e.g., Archie, 847 F.2d at 1217. “[C]onfusion would . . . result from elevating a state-mandated procedure to the status of a constitutionally protected property interest.” Id. at 503.
279. Doe II, 903 F.2d at 503-04.
280. Id. at 503.
281. Id. (quoting Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 495-96 (9th Cir. 1974) (Hufstedler, J., dissenting)). “Such an interest cannot be impaired or destroyed without prior notice to the beneficiary and a meaningful opportunity for him to be heard for the purpose of resolving the factual issue.” Id. (quoting Geneva Towers, 504 F.2d at 496 (Hufstedler, J., dissenting)).
282. Id. at 504. Under prior Seventh Circuit precedents, see supra note 68, the Doe II panel noted, “a legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing.” Doe II, 903 F.2d at 503 (quoting Eidson v. Pierce, 745 F.2d 453, 459-60 (7th Cir. 1984)).
ing, in a precursor to the Supreme Court’s *DeShaney* decision,\(^{284}\) that an act of governmental nonfeasance, “while possibly tortious, did not amount to a violation of substantive or procedural due process.”\(^{285}\) Such was the case, the *Doe II* court determined, because “not every violation of state law infringes upon constitutional rights.”\(^{286}\) The plaintiffs’ remedy, the *Doe II* panel concluded in accordance with *Archie*, was through an action in Wisconsin state court, not under Section 1983 for either a procedural or substantive due process violation.\(^{287}\)

Although it barely referred to *DeShaney* in the procedural due process context,\(^{288}\) portions of the Seventh Circuit’s ultimate *Doe II* holding have clear parallels to *DeShaney* and its predecessor Seventh Circuit due process cases, most notably *Archie*.\(^{289}\) *DeShaney, Doe II*, and *Archie* all concluded that governmental inaction in the face of state law, standing alone, does not violate federal due process rights.\(^{290}\) They each left the plaintiffs before them to a state law remedy in the courts of Wisconsin.\(^{291}\) *Doe II* and *Archie* merely extended the *DeShaney* spirit somewhat further than it had been previously.\(^{292}\) Perhaps they were *DeShaney*’s logical expansion. In any event, at least one other post-*DeShaney* decision applied enti-

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284. And subsequent to its panel decision in *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).
285. *Doe II*, 903 F.2d at 504.
286. *Id.* (citing *Archie*, 847 F.2d at 1216-18).
287. *Id.* at 504-05. A denial of equal protection claim might merit different treatment. *See Archie*, 847 F.2d at 1218 n.7, *supra* note 84.
288. *See Doe II*, 903 F.2d at 504 n.9.
289. *See supra* note 42 and accompanying text.
290. *E.g., DeShaney*, 489 U.S. at 195-97; *Doe II*, 903 F.2d at 504-05; *Archie*, 847 F.2d at 1216-18, 1220-23. As the *DeShaney* Court explained:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

489 U.S. at 195.
292. *Compare Doe II*, 903 F.2d at 504-05 and *Archie*, 847 F.2d at 1216-18 with *DeShaney*, 489 U.S. at 195 n.2.
tlement law in the governmental inaction field in a similarly narrow fashion.293 If Doe II is generally adopted, it could sound the death’s knell for battered spouses’ Roth procedural due process claims even more completely than DeShaney did for substantive ones.

b. Analysis of Roth Spouse Abuse Case Issues

The post-DeShaney Roth cases raised a number of questions about the existence and nature of Roth procedural due process remedies for victims of domestic violence. The first consideration is whether their cause of action against the police is viable at all.294 The next problem is, assuming the assertion is valid in theory, to what statutes or other provisions does it apply.295 A third question is to what process is the Roth claimant due.296 The final issue is what remedies would be available to the plaintiffs who successfully proved the police improperly denied them the process they were due before the police deprived them of their entitlement to police assistance.297

293. K.H. v. Morgan, No. 87 C 9833 (N.D. Ill. Sept. 8, 1989) (1989 WESTLAW 105279), aff’d in part, remanded in part on other grounds, 914 F.2d 846 (7th Cir. 1990), was another abused foster child case where the abused plaintiff alleged, inter alia, that the defendant Illinois Department of Children and Family Services and some of its officials “deprived [the plaintiff] of her procedural due process right to notice and hearing before she was deprived of certain entitlements created by federal and state statutes all in violation of the fourteenth amendment.” Id., slip op. at 1, 1989 WESTLAW 105279, at 2. The K.H. court summarized Seventh Circuit procedural due process Roth entitlement law, including Eidson v. Pierce, 745 F.2d 453, 459-60 (7th Cir. 1984), and then addressed Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1337 (1989), which the plaintiff had offered as precedent for her Roth claim. K.H., slip op. at 5, 1989 WESTLAW 105279, at 10-11. Instead of following the Taylor majority’s approach, as the K.H. plaintiff had hoped it would do, the K.H. court found the partial dissents more compelling. It focused on Judge Tjoflat’s contention, Taylor, 818 F.2d at 822 (Tjoflat, J., concurring in part and dissenting in part), that a Roth action was analytically and remedially unsuited to a governmental nonfeasance case. K.H., slip op. at 5, 1989 WESTLAW 105279, at 11. The K.H. court ultimately concluded that no Roth claim was present in the plaintiff’s action due both to the Eidson line of Seventh Circuit authorities and Judge Tjoflat’s view that a governmental nonfeasance Roth case was inconceivable because it was analytically unsound and remedially unworkable. K.H., slip op. at 5, 1989 WESTLAW 105279, at 10-11.

Although Doe II’s ideological approach may endure and even prevail, K.H.’s is less vital in light of recent developments in procedural due process law. See infra notes 318-72 and accompanying text, infra note 374.

294. See infra notes 298-307 and accompanying text.
295. See infra notes 308-17 and accompanying text.
296. See infra notes 318-52 and accompanying text.
297. See infra notes 353-72 and accompanying text.

As in all Section 1983 cases, see supra note 35, Roth claimants must establish causation of their losses by the governmental defendants. See Archie, 847 F.2d at 1225 (Posner, J., concurring); Coffman, 739 F. Supp. at 266.
Viability of Roth Claims

The stated, and fundamental, reason for the holdings in Archie and Doe II that Roth procedural due process protections are unavailable in all government nonfeasance situations is that the plaintiffs there, according to the Archie and Doe II courts,298 were merely alleging violations of state tort law299 and then attempting, by employing a syllogism,300 to transform them into constitutional violations actionable in a Section 1983 suit. The Archie and Doe II courts based their rejection of this effort on a long line of precedents, many from the Seventh Circuit, which have held in a variety of situations that simple violation of state common law or statutes does not transgress the Constitution, but rather should be dealt with in state court (or, presumably, a federal diversity court in the rare event one should be available301).302 They also relied303 upon Supreme Court and re-

298. Doe II, 903 F.2d at 504-05; Archie, 847 F.2d at 1216-17.
299. See DeShaney, 489 U.S. at 201-03, supra notes 195-98 and accompanying text.
300. Archie explained the syllogism the majority determined the plaintiffs attempted to employ there in an effort to transmute a common law tort into a constitutional tort: state law required [the fire department dispatcher] to render competent rescue services; this was a duty; officials of the government must do their duty; failure to do one's duty is an abuse of one's office; abuse of office is abuse of governmental power; abuse of governmental power violates the Constitution.
847 F.2d at 1216.

The Seventh Circuit detected a similar syllogism in Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984), where it observed that "the plaintiffs have another argument: The Fourteenth Amendment forbids a state to deprive anyone of his life without due process of law; to deprive a person of his life through negligence is the antithesis of due process; therefore the complaints state a cause of action under section 1983." Id. at 1204. The court rejected this contention, as "[t]o accept the plaintiffs' syllogism would be to impose by another route a duty to provide basic services [such as law enforcement or fire protection]." Id.


302. Snowden v. Hughes, 321 U.S. 1, 11 (1944), recited, in pertinent part, that "[n]e violation of a state statute does not infringe the federal Constitution." Archie, 847 F.2d at 1216-17, and numerous prior and subsequent courts have followed this idea. See, e.g., Screws v. United States, 325 U.S. 91, 108-09 (1945); Hebert v. State of Louisiana, 272 U.S. 312, 316 (1926); Barney v. City of New York, 193 U.S. 430, 437-38 (1904); Colon v. Schneider, 899 F.2d 660, 672 (7th Cir. 1990); Chicago Cable
lated authorities which were opposed to making the fourteenth amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the states."\textsuperscript{304} \textit{DeShaney}


303. \textit{Archie}, 847 F.2d at 1213, 1216.


Interestingly enough, in Easter House v. Felder, 879 F.2d 1458, 1481 n.1 (7th Cir. 1989) (en banc) (Cudahy, J., concurring in part and dissenting in part), \textit{vacated on other grounds and remanded}, 110 S. Ct. 1314 (1990), Seventh Circuit Judge Richard Cudahy, the author of \textit{Doe II}, had bitterly objected to Seventh Circuit Judge Frank Easterbrook's inference that a federal procedural due process claim should be resolved by state courts, pursuant to \textit{Parratt} and on the basis of \textit{DeShaney} and \textit{Archie}. \textit{Id.} at 1478 (Easterbrook, J., concurring). Judge Cudahy argued that the claim of a procedural due process entitlement holder such as the \textit{Easter House} plaintiff — or, arguably, the abused child plaintiff in \textit{Doe II} — "has a much firmer grounding in the text of the fourteenth amendment than the arguments advanced in either \textit{DeShaney} or \textit{Archie}." \textit{Id.} at 1482 n.1 (Cudahy, J., concurring in part and dissenting in part) (emphasis in original). It is unclear how Judge Cudahy went, in less than a year, from championing the cause of the procedural due process claimant in \textit{Easter House} against the onslaught of \textit{DeShaney} and \textit{Archie} to using \textit{Archie} in \textit{Doe II} to institute the complete abrogation of abused children's claims.
itself echoed this concern against preempting state tort remedies with fourteenth amendment actions in the substantive due process context.\textsuperscript{305} When these federalist\textsuperscript{306} concepts were joined, it is possible to see how \textit{Archie} and \textit{Doe II} could have concluded that a \textit{Roth} procedural due process cause of action could not coexist with them in the standard governmental inaction case.\textsuperscript{307}

The courts which have recognized the theoretical validity of \textit{Roth} claims in spouse abuse cases obviously have either not accepted the Seventh Circuit's reasoning in \textit{Archie} and \textit{Doe II} or not considered it. In many jurisdictions the same sort of reception greeted the Seventh Circuit cases that ultimately were embraced by the Supreme Court in \textit{DeShaney}. Such Supreme Court acceptance eventually may also be accorded to \textit{Archie} and \textit{Doe II} by a Court which wants to minimize interference with state court adjudication of what are really state tort law cases. Meanwhile, it is necessary to address the next step in \textit{Roth} case analysis — assuming the cause of action is available in at least some inaction situations, which specific statutes or other provisions give rise to \textit{Roth} entitlements.

(2). Scope of Viable \textit{Roth} Claims

The battered spouse who desires to successfully assert a \textit{Roth} procedural due process violation of an entitlement right must first

that they had been deprived of an entitlement without being accorded procedural due process. \textit{Compare Easter House}, 879 F.2d at 1458 with \textit{Doe II}, 903 F.2d at 499.

\textsuperscript{305} As the \textit{DeShaney} Court held, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." 489 U.S. at 202.


\begin{quote}
a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. \textit{Id.}
\end{quote}

\textsuperscript{307} See infra notes 444-52 and accompanying text.
convince the reviewing court that the state order of protection or related statute in question is not a mere procedural guideline, but rather that it creates a legitimate claim of entitlement. A litigant may experience considerable difficulty in proving that the requisite meaningful statutory limitation of governmental discretion exists.

Of all the government inaction Roth decisions, only in Meador did the court unanimously find that a statutory entitlement was present. In Taylor, the court divided over whether the statute under review sufficiently restrained state officials to create an "entitlement," with the majority holding that it did. In the intermediate Roth interpretation cases, the plaintiffs lost their Roth claims because the courts found the statutes insufficiently restrictive to generate "entitlements," and in Coffman, K.H. v. Morgan, and Doe II the courts also agreed that no statutory entitlements were present. Other cases have demonstrated how difficult it can be to establish a Roth statutory entitlement, although it certainly can be done. Moreover, as mentioned above, the Seventh Circuit and its constituent lower courts make it particularly difficult to prevail in Roth cases by recognizing statutory entitlements only under a very few statutes which are extremely restrictive of governmental discretion, and even then only when a due process hearing would prove beneficial. Still, in the appropriate case even the Seventh Circuit rules can lead to findings of statutory entitlements.

308. See supra notes 268-71 and accompanying text. For more on entitlement law, see supra notes 61-68 and accompanying text.

309. See supra notes 69-72 and accompanying text.

310. No. 87 C 9833 (N.D. Ill. Sept. 8, 1989) (1989 WESTLAW 105279), aff'd in part, remanded in part on other grounds, 914 F.2d 846 (7th Cir. 1990), see supra note 293.

311. See supra notes 263, 273, 276-82, 311 and accompanying text.


313. See supra notes 68, 273, 276-82 and accompanying text.

314. See, e.g., Continental Training Servs., Inc. v. Cavazos, 893 F.2d 877, 893 (7th Cir. 1990); Thornton v. Barnes, 890 F.2d 1380 (7th Cir. 1989); Easter House v. Felder, 879 F.2d 1458, 1465 (7th Cir. 1989) (en banc), vacated on other grounds and remanded, 110 S. Ct. 1314 (1990); Fleury v. Clayton, 897 F.2d 1229, 1231-32 (7th Cir. 1989); Marvin v. King, 734 F. Supp. 346 (S.D. Ind. 1990).
of protection statutes should be parsed carefully in the process of ascertaining entitlement status, at least some courts in Section 1983 cases probably will continue, like those in Taylor and Meador, to permit the claims to survive this degree of scrutiny.

*Coffman* raised a different, albeit related, procedural due process law question — whether an entitlement can be bestowed by something besides a statute, such as, perhaps, a government employment contract or a court order like the judicial order of protection featured in *Coffman*.315 *Roth*’s companion case, *Perry v. Sinderman*,316 determined that an employment contract could generate an entitlement. Other liberal entitlement determinations have indicated that interests akin to a judicial order of protection could qualify for entitlement status.317 The *Coffman* language is compelling and should control, such that all other things being equal to a statutory entitlement, a clear and definite judicial order can create a procedural due process law entitlement.

315. See supra note 264 and accompanying text.
316. 408 U.S. 593, 601-03 (1972).

> So plastic is the language of the due process clause of the Fourteenth Amendment . . . that a respectable textual argument can be made in favor of the proposition that [the defendant dispatcher] deprived [the hyperventilating decedent] either of her property or her life without due process of law. It is true that a right to the dispatch of an ambulance is remote from conventional notions of property, but this is not decisive against the argument, because the Supreme Court has, for purposes of the due process clause in any event, jettisoned those notions in favor of equating property to entitlement, and by doing so has brought within the protection of the clause all sorts of interests, such as tenure-employment rights, that are remote from traditional conceptions of property. See [*Roth*], and particularly *Goss v. Lopez* [419 U.S. 565, 573 (1975)], where the right to attend public school was deemed a property right of which the plaintiff was held to have been deprived by a brief suspension. Although an entitlement for these purposes cannot be built on an expectation created merely by practices or probabilities . . . the ordinances and policies of the City of Racine can be viewed as a commitment to the residents of the city to dispatch an ambulance without fail in the event of an emergency.

*Archie*, 847 F.2d at 1225 (Posner, J., concurring) (citations omitted) (emphasis in original).
(3). What Process Is Due

Assuming that (1) notwithstanding Doe II and Archie, a Roth claim is viable in the governmental nonfeasance context, and (2) despite the restrictive entitlement determination rules, a court decides that a specific statute or other decree has created a Roth entitlement for the particular claimant involved, the next question which must be addressed in a battered spouse case is what process did the police owe the victims of domestic violence before they more than negligently decided not to provide them the protection mandated by the order of protection at issue.

Under Mathews v. Eldridge, predeprivation notice and a hearing comprise the process which is normally required. But some prior precedents have concluded that the idea of a predeprivation hearing makes no sense in the context of the usual domestic violence case, which features a random unauthorized action by some state official, usually a police officer, who failed to provide the security mandated by an order of protection. In situations like this, the Su-

319. An abused spouse should, pursuant to Mathews, qualify for predeprivation notice and hearing under the Mathews tripartite test, see supra note 63. First of all, the private interest to be affected by the deprivation is extremely significant, since the consequences of a police failure to enforce an order of protection could easily range from severe personal injury to death. E.g., Coffman; Hynson; Dudosh v. City of Allentown, 665 F. Supp. 381 (E.D. Pa.), reconsideration denied sub nom. Dudosh v. Warg, 668 F. Supp. 944 (E.D. Pa. 1987), vacated, 853 F.2d 917 (3d Cir.) (per curiam), cert. denied, 488 U.S. 942 (1988); cf., e.g., DeShaney; Doe II; Meador. Second, the police practices or policies that lead to the deprivation risk erroneous deprivation of the entitlement to protection, and predeprivation notice and hearing could greatly reduce, if not outright eliminate, this risk. Finally, the burden on the government to provide predeprivation notice and hearing is far outweighed by the cost of not requiring them. For all these reasons, although a case-by-case determination of what process is due will usually be made by the court applying the Mathews test, as a general rule in domestic violence situations predeprivation notice and hearing are the process that is due before the police fail to enforce the entitlement created by an order of protection. See, e.g., Zinermon v. Burch, 110 S. Ct. 975, 984, 987 (1990); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Goss v. Lopez, 419 U.S. 565, 579 (1975); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Doe II, 903 F.2d at 504; Colon v. Schneider, 899 F.2d 660, 670 (7th Cir. 1990); Taylor, 818 F.2d at 822 (Tjoflat, J., concurring in part and dissenting in part); Coffman, 739 F. Supp. at 265; K.H., slip op. at 5, 1989 Westlaw 105279, at 10; supra note 63.

320. See, e.g., Doe II, 903 F.2d at 504; Archie, 847 F.2d at 1217; Taylor, 818 F.2d at 822 (Tjoflat, J., concurring in part and dissenting in part); id. at 827 (Anderson, J., concurring in part and dissenting in part); K.H., slip op. at 5, 1989 Westlaw 105279, at 11.
The Supreme Court held in Parratt v. Taylor\textsuperscript{321} and Hudson v. Palmer\textsuperscript{322} that the state need only provide an adequate postdeprivation remedy, usually a state law tort action\textsuperscript{323} for erroneous negligent or intentional deprivation,\textsuperscript{324} to the person deprived of procedural due process in place of any federal deprivation remedy. This was the case because such an adequate postdeprivation was the only remedy the state reasonably could be expected to provide for such an unpredictable action.\textsuperscript{325} Thus, the Court determined there was no fourteenth amendment violation in those cases at all.\textsuperscript{326} This ruling was intended to minimize federal court intrusion into the resolution of state law problems and preclude turning the fourteenth amendment into the dreaded "font of tort law."\textsuperscript{327} In these cases the postdeprivation state law litigation remedy was the only process that was due under Mathews.\textsuperscript{328}

The Archie court and a Taylor dissenter said that Parratt and Hudson effectively precluded Roth procedural due process claims in battered spouse and related cases because those decisions would leave victims of domestic violence with state court tort claims as their only process.\textsuperscript{329} This may well have been true—while the Parratt/Hudson result could be avoided in a number of ways, such as by showing that the deprivation of procedural due process was caused by an established state procedure and thus was exempt from Parratt

\textsuperscript{322.} 468 U.S. 517 (1986).
\textsuperscript{323.} See supra notes 3, 20 and accompanying text; see also supra note 13 and accompanying text.
\textsuperscript{324.} Parratt involved a negligent deprivation, Hudson an intentional one. Zinermon v. Burch, 110 S. Ct. 975, 985 (1990). Parratt was decided before the Supreme Court held in Daniels v. Williams, 474 U.S. 327, 336 (1986), that negligent acts of government officials do not violate due process. Zinermon, 110 U.S. at 985 n.14; see supra note 41 and accompanying text.
\textsuperscript{325.} See Zinermon, 110 S. Ct. at 984-85; supra notes 63, 82 and accompanying text.
\textsuperscript{326.} Hudson, 468 U.S. at 531, 533; Parratt, 451 U.S. at 542-43.
\textsuperscript{327.} Parratt, 451 U.S. at 544 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)). See supra notes 86, 303-05 and accompanying text, infra notes 444-52 and accompanying text.
\textsuperscript{328.} Zinermon, 110 S. Ct. at 985. "[N]o matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process." Id. (citation omitted) (emphasis added).
\textsuperscript{329.} Archie, 847 F.2d at 1217, see supra note 82 and accompanying text; Taylor, 818 F.2d at 827 (Anderson, J., concurring in part and dissenting in part), see supra note 63. See Case Comment, supra note 63, at 1203, 1208, 1214-16.
and *Hudson*, that it was not random or unauthorized, that pre-deprivation due process was not impossible, or that no adequate state remedy was available to satisfy the requirements of due process, many decisions indicate how difficult it was in many courts to evade the clutches of *Parratt* and *Hudson*. Only if an abused spouse were among the relative few fortunate enough to be able to prove that the deprivation fell outside of the scope of *Parratt/Hudson* and that predeprivation notice and a hearing were required under *Mathews* was a federal damages remedy available. This status quo was significantly altered when the Supreme Court decided *Zinermon*
v. Burch;335 afterwards, the standard for what process was due to battered spouses who were denied the security to which orders of protection entitled them apparently was considerably broader due to Zinermon’s limitation of the reach of Parratt and Hudson.

In Zinermon, the majority336 of the Court apparently significantly limited the Parratt/Hudson rule.337 Initially, the Court implicitly determined that, under Mathews, a predeprivation hearing was necessary to protect the former mental patient plaintiff’s rights.338 Then, turning to the Parratt/Hudson exception, which could eliminate the predeprivation hearing otherwise required, the Court held it was unavailable in Zinermon. When the state argued that the problem was the random and unauthorized actions of individual state officials so that the only process to which the patient was due was a post-deprivation state law suit under Parratt and Hudson,339 the Court held those decisions inapplicable because (1) the official’s actions were not unpredictable, but rather could be anticipated at a specific point in the voluntary/involuntary state mental hospital admission process,340 (2) predeprivation procedural safeguards were possible to prevent state officials from admitting mentally incompetent persons under the voluntary admission process,341 and (3) the officials’ actions were not “unauthorized” since the state delegated to the officials the authority to do exactly what they did.342 Since the Parratt/Hudson defense was unavailable in Zinermon, the Court observed that the patient could pursue his Section 1983 deprivation of procedural due process suit and might be able to recover actual damages for the state’s failure to provide him with a predeprivation hearing.343

336. Zinermon was decided on a five-to-four vote, with Chief Justice Rehnquist and Justices Kennedy and Scalia joining in Justice O’Connor’s dissent to Justice Blackmun’s majority opinion. Id. at 977.
337. As the Court noted, it granted certiorari in Zinermon to resolve the then-existing conflict that had arisen “in the Courts of Appeals over the proper scope of the Parratt rule.” Id. at 978 & n.2. Apparently it did so, and in a manner restrictive of Parratt and Hudson.
338. See id. at 984.
339. Id. at 986.
340. Id. at 989.
341. Id. at 989-90.
342. Id. at 990.
343. Id. at 988 & n.19. As the Court observed, the patient could recover actual damages, in
In dissent, Justice O’Connor, on behalf of herself and the three other dissenters, vigorously and extensively argued that the Zinermon majority was drastically restricting the Parratt/Hudson test by holding that the test did not preclude federal relief for a plaintiff whose claim clearly fit its traditional parameters. The dissenters obviously believed that the majority had severely undermined Matthews, Parratt, and Hudson in Zinermon. Some subsequent decisions have agreed with the dissenters that Zinermon cut back strongly on Parratt and Hudson such that their scope in future cases will be far less than that in those before it was issued. Whether

accordance with Carey v. Piphus, 435 U.S. 247, 266-67 (1978), and its progeny, if he can show either that if the proper procedure had been followed he would have remained at liberty and that he suffered harm by being confined, or that even if he would have been committed anyway under the involuntary placement procedure, the lack of this procedure harmed him in some way. Zinermon, 110 S. Ct. at 988 & n.19. See infra notes 353-72 and accompanying text.

344. See supra note 336 and accompanying text.

345. Zinermon, 110 S. Ct. at 990-97 (O’Connor, J., dissenting). As Justice O’Connor stated: “The Court’s opinion unnecessarily transforms well-established procedural due process doctrine and departs from controlling precedent.” Id. at 990. She contended that: “Only by disregarding the gist of [the respondent]’s complaint—that state actors’ wanton and unauthorized departure from established practice worked the deprivation—. . . can the Court attempt to distinguish this case from Parratt and Hudson.” Id. at 990-91 (emphasis in original). She argued that the state officials’ behavior reviewed in Zinermon was random and unauthorized by the State so that the respondent should, under Parratt and Hudson, find the process due him solely in the adequate postdeprivation remedies available pursuant to state law. Id. at 992.

346. Id. at 995-96. Justice O’Connor said: “In place of the border clearly dividing the duties required by Mathews from those required by Parratt, the Court marks out a vast terra incognita of unknowable duties and expansive liability of constitutional dimension.” Id. at 996 (emphasis in original). She later referred to the “strained reading of controlling procedural due process law that the Court today adopts.” Id. at 997. Apparently the majority had resolved the conflict over the scope of Parratt and Hudson. See supra note 337.

347. See, e.g., Matthias v. Bingley, 906 F.2d 1047, 1056-57 (5th Cir. 1990); id. at 1058 (Jones, J., concurring); Caine v. Hardy, 905 F.2d 858, 862 (5th Cir. 1990) (“The lesson of Zinermon is that the Parratt/Hudson doctrine is restricted to cases where it truly is impossible for the state to provide predeprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor.” (emphasis in original)), reh’g en banc granted, 905 F.2d 867 (5th Cir. 1990) (en banc); id. at 865-66 (Jones, J., dissenting) (“Zinermon requires a hard look at a Parratt/Hudson claim to determine whether the state official’s conduct, under all the circumstances of the deprivation, could have been adequately foreseen and addressed by procedural safeguards. If it could, then the case requires classic Mathews balancing and has stated a claim for relief. . . . Zinermon employs and hence requires case-by-case analysis of the deprivation at issue.” (emphasis in original)). But see Katz v. Klehammer, 902 F.2d 204, 207 & n.1 (2d Cir. 1990); Swank v. Smart, 898 F.2d 1247, 1261-62 & n.5 (7th Cir. 1990) (Manion, J., concurring in part and dissenting in part).

A few days after the Court handed down Zinermon, it vacated and remanded for reconsideration in light of Zinermon two of the broader expansions of the Parratt/Hudson doctrine, see supra note
these predictions ultimately prove to be correct remains to be seen.

Zinermon should prove to be extremely important in domestic violence victims’ Roth cases due to its apparent retrenchment of Parratt and Hudson. Just like the mental patient in Zinermon, battered spouses can argue that their deprivation of notice and a hearing before the police declined to honor their orders of protection was not unpredictable.348 Second, they will contend that predeprivation process was possible since the state could anticipate the police failure to enforce protection orders and take steps to preclude its happening without predeprivation due process (if at all).349 Finally, they may assert that police behavior that fails to honor their protection orders is not unauthorized since the state delegates law enforcement power, including that to enforce orders of protection, to individual officers and must be responsible for their failure properly to exercise it.350

334 and accompanying text, Easter House v. Felder, 879 F.2d 1458 (7th Cir. 1989) (en banc), vacated and remanded, 110 S. Ct. 1314 (1990), and Fields v. Durham, 856 F.2d 655 (4th Cir. 1988), vacated and remanded, 110 S. Ct. 1313 (1990). As one later court has observed, this action bodes ill for future broad applications of Parratt and Hudson. Caine, 905 F.2d at 862. Caine also pointed adversely to another broad pre-Zinermon Parratt/Hudson decision, Holloway v. Walker, 790 F.2d 1170 (5th Cir. 1986) (on rehearing), see supra note 334. Caine, 905 F.2d at 861.

On remand from the Supreme Court, the Fourth Circuit ultimately upheld the Parratt/Hudson termination of the plaintiff’s procedural due process claim in Fields v. Durham, 909 F.2d 1387 (7th Cir. 1990) (en banc).

348. See Zinermon, 110 S. Ct. at 989. Arguably, the state’s situation in the battered spouse case more resembles that in Parratt, 451 U.S. at 541, and Hudson, 468 U.S. at 533, where the deprivation was random and unpredictable, than in Zinermon, when it would arise at a given moment during the admission process. 110 S. Ct. at 989. The exact level of randomness and predictability present will have to be determined in future individual abused spouse case Parratt/Hudson/Zinermon analyses. Some courts might consider the deprivation to be at least somewhat predictable, as it could only arise after an order of protection was issued. That might or might not be deemed more predictable than the official actions in Parratt and Hudson.

349. See Zinermon, 110 S. Ct. at 989-90. Again, arguably the battered spouse case raises different issues concerning the possibility of predeprivation process than were addressed in Zinermon, as the time, place, and manner of deprivation are far less predictable or avoidable. As in the predictability case, future Roth courts will have to assess the relationship of domestic violence case scenarios and the Parratt/Hudson/Zinermon test. See Katz v. Klehammer, 902 F.2d 204, 207 & n.1 (2d Cir. 1990).

350. See Zinermon, 110 S. Ct. at 990. But it will be awfully difficult to distinguish on a factual basis between the relative lack of authority that the Court found in Parratt and Hudson justified the postdeprivation state law remedy rule, see Zinermon, 110 S. Ct. at 994-95 (O’Connor, J., dissenting), and the “broad authority” which precluded it in Zinermon. Zinermon, 110 S. Ct. at 990. Which way the facts point in domestic violence victims’ Roth suits will have to be decided on a case-by-case basis, see id. at 995 (O’Connor, J., dissenting); Caine v. Hardy, 905 F.2d 858, 865 (5th Cir.) (Jones, J., dissenting), reh’g en banc granted, 905 F.2d 867 (5th Cir. 1990) (en banc), with the court focusing each time on how much authority the government gave the officials who deprived the battered spouses of protection. See Zinermon, 110 S. Ct. at 990.
BATTERED SPOUSE ACTIONS AFTER DESHANEY

It is by no means certain that Zinermon frees abused spouses’ Roth suits from the shackles of the Parratt/Hudson rule to which previous nonfeasance cases probably had condemned them. Reasonably compelling arguments can be posited to explain why Parratt and Hudson should still apply. Still, Zinermon will be significant in battered spouse Roth cases both because of whatever degree to which it actually reduced the expanse of the Parratt/Hudson rule and for its general tone indicating that lower courts should be less eager to terminate procedural due process cases on the grounds of Parratt and Hudson and more willing to send the claimants’ actions on for a determination of what remedy to which they are entitled.

(4). Damage Remedy for Denial of Procedural Due Process

If battered spouses employ the apparent window of opportunity provided by Zinermon to get past the Parratt/Hudson hurdle (or avoid it altogether in case of a defective state procedure), the remaining matter to be determined is the appropriate remedy for the government’s failure to give notice and a hearing to them before it deprives them of their order of protection-granted right to protection. One form of relief for a police failure to provide a battered spouse with a predeprivation hearing could be an injunction barring deprivation of the plaintiff’s rights without due process and restoration of the status quo before the original deprivation. This remedy, of course, would be essentially worthless to a battered spouse who had already been injured or killed. Compensatory, and even

351. See supra notes 348-50; see also Caine v. Hardy, 905 F.2d 858, 865-66 (5th Cir.) (Jones, J., dissenting), reh’g en banc granted, 905 F.2d 857 (5th Cir. 1990) (en banc). Even if Zinermon does not help them, battered spouses can still escape Parratt and Hudson by demonstrating that they were deprived of their procedural due process right to notice and a hearing before the police decided not to enforce their right to protection pursuant to an established state procedure. See supra note 330 and accompanying text. Once they show this, they are free to seek a Section 1983 damage remedy, see infra notes 353-72 and accompanying text.

352. Zinermon’s tenure could be brief. Supreme Court Associate Justice William Brennan cast one of the five majority votes in that case. 110 S. Ct. at 977. Now that Associate Justice David Souter has taken Justice Brennan’s seat on the Court, Parratt and Hudson quickly could be revitalized (to the extent that Zinermon devitalized them).

353. See supra note 330 and accompanying text.

354. Taylor, 818 F.2d at 822 (Tjoflat, J., concurring in part and dissenting in part) (citing Mathews, 424 U.S. at 349). But see supra note 16 and accompanying text.

355. See Taylor, 818 F.2d at 822 (Tjoflat, J., concurring in part and dissenting in part).
punitive,\textsuperscript{356} damages also could be available to such victims of domestic violence or their survivors.\textsuperscript{357}

Section 1983 money damages for the governmental failure to provide the process due under an entitlement are appropriate, albeit sometimes difficult to quantify.\textsuperscript{358} In \textit{Carey v. Piphus}\textsuperscript{359} the Supreme Court recognized that those who are deprived of procedural due process can recover actual damages in a Section 1983 action to compensate them for those losses they suffered which were caused by the deprivation.\textsuperscript{360} The Court specifically acknowledged that such deprivations can cause compensable mental and emotional distress to those deprived of the process due them.\textsuperscript{361} The Court held that if a deprivation is substantively justified but procedurally defective, only damages for the injury caused by the deficient procedure will be recoverable; nothing is owed for the substantively correct action.\textsuperscript{362} Both \textit{Carey} and the subsequent \textit{Memphis Community School District v. Stachura}\textsuperscript{363} agreed that the level of damages recoverable in Section 1983 actions should be determined in accordance with

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\item \textsuperscript{359} 435 U.S. 247 (1978).
\item \textsuperscript{360} See \textit{id.} at 254, 255-57, 260, 263.
\item \textsuperscript{361} \textit{Id.} at 263-64. \textit{Accord, e.g.}, \textit{Memphis Community School Dist. v. Stachura}, 477 U.S. 299, 307 (1986).
\item \textsuperscript{362} \textit{Carey}, 435 U.S. at 263 & n.19.
\item \textsuperscript{363} 477 U.S. 299 (1986).
\end{itemize}
common law tort principles, and that the purpose of such damages is to \textit{compensate} plaintiffs for the injuries caused them by defendants' constitutional torts. Many Section 1983 claimants have been awarded substantial compensatory damages for the tangible injuries they suffered because of the violation of their rights.

Before \textit{Roth} claimants can recover compensatory monetary damages for a procedural due process violation they must prove what actual injury was caused by the deprivation, either distress attributable to the denial of due process or the injuries caused by the deprivation which due process would have averted. In the case of a battered spouse who was severely injured, or even murdered, by the person subject to an order of protection, that should be a simple matter through the standard methods of proof of personal injury, emotional distress, and unlawful death. Presumably the police could never establish that deprivation of a domestic violence victim's entitlement to protection was substantively justified unless, perhaps, the order of protection itself somehow was invalid.

Once Section 1983 claimants prove violation of procedural due process and damages, they will prevail in their cases unless defendants can demonstrate by a preponderance of the evidence that there was no causal connection between the plaintiffs' injuries and the constitutional lapse — i.e., that the plaintiffs would have suffered the harm complained of regardless of whether due process had been provided them, or that public policy precludes the imposition of liability for so remote an injury. As one commentator has observed

\begin{itemize}
  \item[366.] See, e.g., \textit{Rodriguez v. Comas}, 888 F.2d 899, 906 (1st Cir. 1989); \textit{Gutierrez-Rodriguez v. Cartagena}, 882 F.2d 553, 578-79 (1st Cir. 1989); \textit{Jackson v. Crews}, 873 F.2d 1105, 1109 (8th Cir. 1989); \textit{Davis v. Little}, 851 F.2d 605 (2d Cir. 1988); \textit{Spell v. McDaniel}, 824 F.2d 1380, 1400 (4th Cir. 1987), \textit{cert. denied}, 484 U.S. 1027 (1988). \textit{See also Zinermon}, 110 S. Ct. at 988 & n.19, \textit{see supra} note 343 and accompanying text.
\end{itemize}
about cases where the state has failed to act, to the detriment of injured persons:

Where procedures would have resulted in the state conferring the [entitlement] it promised, the state is liable to the full extent of the injury that would have been prevented [had it done so]. For example, a foster child who would have been saved from abuse had the state adequately considered its decision to withdraw promised protection would be able to recover for all injuries resulting from the abuse. 369

Abused spouses should be able to avoid any cause in fact 370 or proximate causation 371 problems by demonstrating, as they should be able to do, that if the police had followed procedural due process mandates and accorded them notice and a hearing before deciding not to enforce their valid orders of protection, the police invariably would have decided to enforce the orders and would have arrested the abusive spouses or taken other steps which would have prevented the attacks which caused the injuries suffered by the battered spouses. Public policy, through the proximate cause doctrine, should not preclude a recovery in such a case so long as it permits the basic Roth cause of action to exist in the first place.

Few of the reported battered spouse/abused child Roth cases have clearly considered the remedial or causation issues. Only Coffman overtly recognized the two points; the court there indicated that a battered spouse’s Roth action could satisfy both remedial and causation tests. 372 This approach may, and ought to, prevail.

c. Summary of Abused Spouse Procedural Due Process Law

Battered spouses who allege the state has denied them procedural due process must cover a number of analytical steps. First, they

370. See Archie, 847 F.2d at 1225 (Posner, J., concurring) (noted causation was present in potential Roth governmental nonfeasance situation).
372. Coffman, 739 F. Supp. at 266.
must meet a threshold requirement by convincing the reviewing court that procedural due process law extends to protect their interests. If they do so, they then must prove that they had an entitlement because of the statute or judicial order that gave them the right of protection that was to be enforced by the police.

Assuming that an entitlement is present, the next issue is what process are domestic violence victims due. Since the Supreme Court handed down its decision in *Zinermon v. Burch* the application of the rule in *Parratt* and *Hudson* seems to have changed, at least for now, so that henceforth it will be easier to keep federal procedural due process claims in a court applying federal law. If battered spouses avoid the *Parratt/Hudson* trap, the *Mathews v. Eldridge* tripartite test should mandate predeprivation notice and a hearing before the police deprive them of their entitlement to police protection. The police will violate the right to this notice and hearing when, as often happens, they unilaterally fail to enforce orders of protection.

Once a court holds the police deprived abused spouses of their entitlement to procedural due process, the remaining question will be what remedy is appropriate for the deprivation. Under *Carey v. Piphus* and its progeny, victims of domestic violence should be able to recover actual damages to compensate them for any physical injury or emotional distress they suffered. Their survivors would be able to recover for their deaths. Punitive damages may also be available. Causation can present a particular hazard in the procedural due process field, but many courts should accept the clear, albeit rambling, causation present in the abused spouse scenario.

**B. Denial of Equal Protection**

1. Cases Clearly Applying Pre-DeShaney Law

Most authorities would agree that the evolving body of Section 1983 equal protection law applied to suits by victims of domestic violence...
violence against the nonresponsive police was generally unaffected by\textit{ DeShaney}. For example, the final post-\textit{DeShaney} version of \textit{Balistreri} contained the same equal protection holding, and essentially the same analysis, as that in the original pre-\textit{DeShaney} edition. On remand to the district court in \textit{Hynson v. City of Chester}, the court also applied the pre-\textit{DeShaney} standard of equal protection analysis of battered spouse case classifications. And in \textit{Coffman v. Wilson Police Department}, the district court declined to dismiss the denial of the equal protection count of the plaintiff's complaint because of the precedents set by \textit{Hynson, Balistreri, Watson, and Thurman}.  

\footnote{375. 901 F.2d 696 (9th Cir. 1990). The court concluded that Ms. Balistreri's response to the defendants' motion to dismiss, and a reference to \textit{Thurman}, articulated a denial of equal protection cause of action. \textit{Id.} at 700-02.  
377. The court first outlined the nature of the denial of equal protection assertion:  
Plaintiffs' equal protection claim is based on the alleged discriminatory impact of a policy of the Chester Police Department to treat incidents of domestic violence less seriously than nondomestic violence. The claimed discrimination occurs because the class of domestic violence victims in Chester are predominantly women. Thus, as a result of the policy, plaintiffs maintain that women receive a lower level of police protection. \textit{Id.} at 1240.  
After quoting the equal protection standard that the Third Circuit set in \textit{Hynson} in applying the \textit{Personnel Administrator v. Feeney} test, see \textit{supra} note 122, the district court reviewed the plaintiffs' "expert's analysis of the characteristics of victims of violence and the subsequent police response in Chester . . . Central to the report are statistics demonstrating a lower level of police response to female victims of domestic violence." 731 F. Supp. at 1240. The judge concluded that this evidence was sufficient to defeat the defendants' summary judgment motion, \textit{id.} — it met the \textit{Feeney} requirement that plaintiffs in denial of equal protection through facially neutral gender-based classification cases prove discriminatory purpose and effect before they qualify for the intermediate standard of judicial equal protection case scrutiny. Thus, the expert's study revived a previously moribund equal protection claim.  
For a summary of the facts in \textit{Coffman}, see \textit{supra} note 259. Terry Coffman sued various defendants for, \textit{inter alia}, denial of equal protection "by creating a policy of failing to respond properly to complaints by women of spousal assault or abuse . . . ." \textit{Coffman}, 739 F. Supp. at 260—an apparent claim of a facially gender-based discriminatory police classification.  
Another battered spouse equal protection case, \textit{Howell v. City of Catoosa}, 729 F. Supp. 1308 (N.D. Okla. 1990), also arguably endorsed the \textit{Thurman} line of holdings. \textit{Id.} at 1311-12. The \textit{Howell} court, citing \textit{Watson, id.} at 1312, determined after considerable discussion that the \textit{Howell} plaintiffs' statistical evidence of police/municipal gender or class (domestic violence victim) based discrimination was insufficient for their denial of equal protection claim to survive summary judgment. \textit{Id.} at 1311-12. In so doing it obviously recognized the applicability of the previously discussed domestic violence equal protection precedents such as \textit{Thurman, Watson, and Hynson}. The \textit{Howell} court also discussed McKee v.
2. McKee v. City of Rockwall

Not all post-DeShaney courts may have viewed the equal protection claim so benignly. In McKee v. City of Rockwall, the majority of a Fifth Circuit panel seemed to assess DeShaney's impact on battered spouse equal protection cases somewhat differently than Balistreri, Hynson, and Coffman. McKee featured another domestic violence situation in which a denial of equal protection was alleged. The court granted summary judgment against the plaintiff's facially neutral discriminatory gender-based classification claim because it concluded she provided insufficient evidence of discrimination, a not particularly controversial ruling which was certainly in line with pre-DeShaney equal protection law. But the majority went further than this ruling on the merits of the case. In dicta, it
construed *DeShaney* as holding that, in either a substantive due process or equal protection context, as a general principle the """"democratic political processes"""" should decide how much the government must do to protect private parties from one another. The majority determined that parties cannot automatically bring as equal protection claims all actions that *DeShaney* bars as substantive due process suits merely by alleging state officials have unequally exercised their discretion in governmental inaction situations.

Judge Irving Goldberg vigorously dissented from the *McKee* court's *DeShaney* reasoning, although he concurred in most of its ultimate result. He noted the majority's statement that *DeShaney* 's substantive due process analysis applied in an equal protection case as well, and concluded from this that """"[t]he majority apparently views *DeShaney* as a general statement that governmental officers, in their actions, enjoy a zone of discretion regardless of the Fourteenth Amendment right involved."""" He then argued that *DeShaney* has no role in an equal protection case.

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383. 877 F.2d at 413 (quoting *DeShaney*, 489 U.S. at 196). The majority further noted that under *DeShaney*: """"There is no constitutional violation when the 'the most that can be said of . . . state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role.'"""" Id. (quoting *DeShaney*, 489 U.S. at 203).

384. Hence, the majority decided: """"Footnote three [of *DeShaney*] does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised their discretion to act in one incident but not in another."""" 877 F.2d at 413 (emphasis in original). See Howell v. City of Catoosa, 729 F. Supp. 1308, 1312 (N.D. Okla. 1990), infra note 400 and accompanying text.

385. Judge Goldberg concurred in the dismissal of the plaintiff's equal protection claims against the individual officer defendants because he concluded they were entitled to the qualified immunity defense. 877 F.2d at 425-26 (Goldberg, J., concurring in part and dissenting in part). He compellingly argued that, contrary to the majority's finding, Ms. McKee *had* presented sufficient statistical and affidavit evidence to defeat the defendants' summary judgment motion, id. at 423-25, and possibly enough to prevail in her claim against the individual officer defendants but for their use of the qualified immunity defense.

In the course of an extensive review of applicable federal gender-based discrimination law, Judge Goldberg cited various of the pre-*DeShaney* battered spouse equal protection precedents, including *Blistieri, Watson, Hynson*, and *Thurman*, as enduring statements of the governing law. Id. at 421-24. Thus, he signalled his belief that *DeShaney* had not adversely affected their validity.

386. *Id.* (Goldberg, J., concurring in part and dissenting in part) (emphasis in original). As discussed *infra* notes 389, 394-95 and accompanying text, Judge Goldberg thought the majority's language gave government officials a license to discriminate invidiously.

387. """"*DeShaney* seeks to define a bright line limit to the substantive component of the Due Process Clause. *DeShaney* specifically does not address claims based upon illegitimate distribution of public services in contravention of the Equal Protection Clause."""" *McKee*, 877 F.2d at 417-18 (Goldberg, J., concurring in part and dissenting in part) (citation omitted) (emphasis in original).
ences some perceive between substantive due process and equal protection values, whereby due process protects against the state's affirmative act of interference with an individual's freedom to act while equal protection is concerned with preventing the government from making improper distinctions among those it serves. Because of these differences, Judge Goldberg concluded, the majority was ill-advised when it arguably held *DeShaney* permits government officials to discriminate because "'[t]here can be no 'discretion' to discriminate invidiously.'"

The exact import of the *McKee* majority's observations about *DeShaney*'s role in equal protection cases is somewhat unclear due, in large part, to the majority's failure to fully explain the ramifications of its comments. Both the *McKee* majority and Judge Goldberg apparently applied the previously-described body of pre-*DeShaney* victim of domestic violence denial of equal protection law in *McKee*, the majority doing so automatically without ever really discussing what law controlled. This action would seem to indicate that neither had any real doubt that the old law was still valid. Yet there remains the majority's *DeShaney* colloquy. The majority's words could merely mean that *DeShaney* protects police officers or other officials from equal protection liability in nonfeasance situations when they exercise their discretion not to act. In the battered spouse context, for example, the majority might have been saying that when the police counsel peace between the spouses and refuse to arrest the abusive party they are not liable for their actions unless

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388. *Id.* at 418. *But see infra* note 399 and accompanying text.
389. 877 F.2d at 418 (Goldberg, J., concurring in part and dissenting in part). Judge Goldberg further stated:

The "democratic political processes" upon which the majority rests its hope that all people receive equal protection of the law is not adequate for the task of protecting people when distinctions are made upon suspect and quasi-suspect classifications. We hold dear equal protection values, in large part, because the legislative process may fall short of the Constitution's commands.

*Id.* (citations omitted).
390. *See supra* notes 382, 385 and accompanying text.
391. *McKee*, 877 F.2d at 414. As the majority put it: "The *DeShaney* rule leaves officers and law enforcement agencies with some discretionary authority: they need not fear that, in any close case, they must choose between liability for a potential false arrest and liability for a potentially actionable non-arrest." *Id.*
they do so with discriminatory motives. If they act with such a purpose, the majority may have been saying, the police can be held liable for an equal protection violation in a Section 1983 suit. If they do not, on the other hand, they cannot be forced to pay in a denial of equal protection action for their DeShaney-authorized discretionary choice not to act.

If this interpretation of the McKee majority’s DeShaney dicta is correct, the observations are hardly controversial, if somewhat unnecessary, and would not alter pre-DeShaney equal protection law. DeShaney, according to the McKee majority, would merely have added weight to the view that a simple police exercise of discretion, standing alone, is not actionable.

Judge Goldberg, however, feared that the majority’s words meant far more than a small exclamation point added to prior equal protection law language, and that they would seriously damage what he referred to as “equal protection values.” He believed the majority used DeShaney to create a new unfettered discretion for public officials that would let them make improper distinctions among those otherwise entitled to government services. Judge Goldberg emphasized the “illegitimate distribution” of such services that so concerned him, and spoke of “invidious” governmental discrimination. But the McKee majority never either obliquely or explicitly authorized illegitimate or invidious government actions—it seemingly merely said that before a police exercise of discretion

392. Id. “McKee can sustain her claim only by showing that the non-arrest [of Harry Streetman] was the result of discrimination against a protected class.” Id.

393. Id.

394. McKee, 877 F.2d at 417 (Goldberg, J., concurring in part and dissenting in part) (emphasis added).

395. Id. at 418 (emphasis added).

Judge Goldberg created a hypothetical to illustrate his concern about the ramifications of the majority's DeShaney language:

Imagine that in DeShaney, Winnebago County had an intentional policy to intervene only in family abuse cases when the family is white, not to intervene when the family is black, that Joshua DeShaney was black and died because of the County's failure to intervene. The majority would have us believe that no equal protection violation exists because “[f]ootnote three [of DeShaney] does not permit plaintiffs to circumvent the rule of DeShaney by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised discretion to act in one incident but not in another.”

Id. (emphasis in original) (quoting McKee, 877 F.2d at 413). See infra note 396.
not to act in a particular situation would violate equal protection, it must be based on discriminatory motives.\textsuperscript{396} Thus, both the majority and Judge Goldberg applied essentially the same pre-\textit{DeShaney} equal protection law, with perhaps a slightly different ideological twist.

If, of course, the \textit{McKee} majority actually found, as Judge Goldberg feared, that \textit{DeShaney} in fact gave state officials a license to discriminate by providing state services to only a favored few under the guise of exercising their discretion, it would be a dramatic, and highly questionable, result. Not incidentally, such a holding would seem to fly in the face of both footnote three of \textit{DeShaney}\textsuperscript{397} and the Seventh Circuit decisions which preceded it.\textsuperscript{398} The majority opinion, however, cannot fairly be said to call for such a conclusion. As for Judge Goldberg’s contrast of equal protection and substantive due process values,\textsuperscript{399} it is jurisprudentially informative but functionally irrelevant in light of the majority’s true holding.

\begin{itemize}
\item \textsuperscript{396} Thus, the answer to Judge Goldberg’s hypothetical, supra note 395, is that under the majority’s dicta \textit{DeShaney} would not protect the public officials in question if a discriminatory motive drove their failure to intervene. Since under the hypothetical they probably had such a purpose, they would be liable for a denial of equal protection unless they could establish a nondiscriminatory explanation for their seemingly blameworthy behavior.
\item \textsuperscript{397} See supra note 199 and accompanying text.
\item \textsuperscript{398} See, e.g., Archie v. City of Racine, 847 F.2d 1211, 1218 n.7 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1338 (1989); Jackson v. Byrne, 738 F.2d 1443, 1448 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
\item \textsuperscript{399} See supra note 388 and accompanying text.
\end{itemize}

Professor Cass Sunstein’s article, upon which the “equal protection values” portion of Judge Goldberg’s opinion at least partially was based, grew out of equal protection cases that attempted to resolve whether the substantive due process \textit{Bowers} v. \textit{Hardwick}, 478 U.S. 186 (1986), decision also applied in the denial of equal protection context. See Sunstein, \textit{Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection}, 55 U. Chi. L. Rev. 1161, 1161-70, 1178 (1988). Professor Sunstein contended that \textit{Bowers} did not because of the differences between the values that gave rise to the due process and equal protection clauses. \textit{Id.} at 1170-78, 1179. He argued that \textit{Watkins} v. United States Army, 847 F.2d 1329, 1339-42 (9th Cir. 1988), correctly held \textit{Bowers} inapplicable to an equal protection case because of the distinctions between due process and equal protection precepts, and criticized \textit{Padula} v. \textit{Webster}, 822 F.2d 97, 103 (D.C. Cir. 1987), which took the contrary position and utilized \textit{Bowers} in an equal protection setting. Sunstein, supra, at 1164-70. \textit{Watkins}, however, was withdrawn, \textit{Watkins} v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990), in a decision that explicitly avoided reaching the equal protection issues discussed in the prior panel opinion. \textit{Id.} at 705. \textit{But see id.} at 716-20 (Norris, J., concurring) (agreed with Professor Sunstein’s position that due process and equal protection values should be viewed differently), \textit{Contra} \textit{High Tech Gays} v. \textit{Defense Indus. Sec. Clearance Office}, 895 F.2d 563,
The only reported decision to directly refer to the McKee majority's DeShaney dicta said nothing to cause one to challenge this characterization of it. Instead, it simply paraphrased McKee's principle as a statement that there is no due process or equal protection violation when government officials simply stand around and do nothing. This is hardly inconsistent with the added gloss that this rule applies only so long as those officials have no invidious motives underlying their inaction.

3. Summary of Abused Spouse Equal Protection Law

In sum, DeShaney had no significant impact on the pre-existing corpus of the equal protection law applied in victim of domestic violence situations. Even McKee, the one equal protection case to significantly deal with DeShaney, saw all judicial parties apply the prior law when they reached the merits of the dispute. The ju-

573 n.9 (9th Cir. 1990) (rejected Judge Norris' Watkins concurrence pro-Sunstein argument). Ultimately, the circuits addressing the scope of the Bowers issue have all agreed that a substantive due process doctrine is applicable to an equal protection problem. See, e.g., High Tech Gays, 895 F.2d at 573 n.9; Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990); Woodward v. United States, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), cert. denied, 110 S. Ct. 1295 (1990); Padula, 822 F.2d at 103. Contra High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 378-79 (9th Cir. 1990) (Canby, J., dissenting from denial of petition for rehearing en banc). Thus, in at least the Bowers area none of the circuits which have considered fears of the type Judge Goldberg voiced about the mingling of due process and equal protection values, regardless of their absolute merit, ultimately have respected them.

400. Howell v. City of Catoosa, 729 F. Supp. 1308, 1312 (N.D. Okla. 1990), stated that: "McKee . . . explains that DeShaney v. Winnebago, while sounding in due process rather than equal protection, holds that there is no constitutional violation when the most that can be said is state functionaries stood by and did nothing when suspicious circumstances dictated a more active role." Id. (emphasis in original) (citation omitted).

401. See First, supra note 68, at 534.

Should proposed S. 2754, see supra notes 3, 18 be enacted, it should at least indirectly improve the status of battered spouses' denial of equal protection claims against the inactive police because of its inclusion of a provision outlawing, in language similar to that of Section 1983, any person's, including state actors', gender-motivated crimes of violence. S. 2754, § 301, 101st Cong., 2d Sess., 136 Cong. Rec. S8263, S8268 (daily ed. June 19, 1990). Among the findings of that section is one stating that "crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to equal protection of the laws." Id.

402. Judge Laughlin Waters' partial dissent to the 897 F.2d 368 (9th Cir. 1990) version of Balistreri is also consistent with this result. Judge Waters argued that the Balistreri majority had stretched equal protection law beyond its limits when it found Ms. Balistreri had stated a denial of equal protection claim, but did so because he perceived she inadequately had pleaded her gender-based discrimination claim. Id. at 374-77 (Waters, J., concurring in part and dissenting in part). He never questioned the
risprudential effect of the spirit of DeShaney may prove to be a more troubling matter.

C. Failure to Adequately Train the Police

The Supreme Court's decision in DeShaney at least indirectly adversely affected battered spouses' Section 1983 municipal failure to train the police damage litigation. A municipality is only liable for the actions of its representatives, which are caused by its failure to adequately train them and result in injury, if they violated the Constitution. DeShaney eliminated many of the pre-existing constitutional claims domestic violence victims could assert against unresponsive police officers and officials, thus limiting the number of potential failure to train recoveries. DeShaney did not, however, preclude failure to train liability in all cases.

A week after it issued DeShaney, the Court decided City of Canton v. Harris. On its surface, City of Canton seemed favorable to the failure to train contention since the Court finally formally recognized the assertion. However, significant strings were attached to this acceptance. The Court resolved the question that

validity of the underlying body of battered spouse equal protection law, and never mentioned any adverse effect of DeShaney on it. Indeed, he cited both Thurman and Bartalone v. County of Berrien, 643 F. Supp. 574 (W.D. Mich. 1986), with apparent approval. Balistreri, 897 F.2d at 376 (Waters, J., concurring in part and dissenting in part). Judge Waters ultimately withdrew his partially concurring and partially dissenting opinion without stating the reason for his action. Balistreri, 901 F.2d 696, 702 (9th Cir. 1990) (Waters, J., concurring). He may have done so because the majority altered the procedural/appellate remedy status of Ms. Balistreri's equal protection case between the 897 F.2d and 901 F.2d versions of its decision, possibly in accordance with his prior partial dissent. Compare Balistreri, 897 F.2d at 374 with Balistreri, 901 F.2d at 701-02.

For more on the various versions of Balistreri, see supra note 50.

403. For an overview of pre-DeShaney failure to train and related law, see supra notes 138-66 and accompanying text.

404. 489 U.S. 378 (1989). Geraldine Harris' failure to train claim alleged the City of Canton failed properly to train its police supervisors how to evaluate detainee's medical needs, to her detriment. Id. at 381-82.


405. See supra note 155 and accompanying text on the history of the Supreme Court's treatment of inadequate police training cases.

406. 489 U.S. at 387-89.

407. See supra note 151 and accompanying text.
had existed over the exact level of municipal culpability that was requisite to failure to train liability by holding liability would exist only when the failure to train amounted to "deliberate indifference" to the rights of those the police encounter. The Court contrasted "deliberate indifference" against the mere gross negligence culpability standard applied by some pre-City of Canton courts. Thus, after City of Canton, battered spouses could recover in failure to train suits, but only if they demonstrated the defendant municipalities were deliberately indifferent towards the constitutional rights of the abused when they trained their police and this indifference and the resulting lack of training caused the police to violate the abuseds' constitutional rights.

Victims of domestic violence lost little time in asserting their newly recognized rights under City of Canton. In Dudosh v. City of Allentown, the district court reconsidered its grant of summary judgment against the plaintiff administrator of the deceased battered spouse's estate on a failure to train claim because of the new Supreme Court precedent. The court acknowledged that it originally had imposed a greater burden of proof on the plaintiff than the City of Canton Court had required, and allowed the plaintiff to proceed to trial. There, the administrator would have to establish deliberate indifference and causation to ultimately prevail. Similarly,

408. City of Canton, 489 U.S. at 388. The Court listed two examples of what might constitute "deliberate indifference" in a failure to train the police case setting:

For example, city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need.

Id. at 390 n.10 (citation omitted).

409. Id. at 388 n.7. See, e.g., Berry v. City of Muskogee, 900 F.2d 1489, 1495-96 (10th Cir. 1990).

410. For more on causation in the municipal liability context, see, e.g., City of Canton, 489 U.S. at 385, 391-92; id. at 393, 394 (O'Connor, J., concurring in part and dissenting in part); Sims v. Mulcahy, 902 F.2d 524, 541-42 (7th Cir. 1990); Berry v. City of Muskogee, 900 F.2d 1489, 1499 (10th Cir. 1990); Gerhardt, supra note 36, at 601-03; Kritchevsky, "Or Causes to Be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis, 35 UCLA L. Rev. 1187 (1988).


412. Id.
in *Coffman v. Wilson Police Department*, the court, recognizing that the failure to train the police cause of action may be appropriate in a battered spouse setting, denied the defendants' motion to dismiss and deferred the deliberate indifference issue to a later date. While other domestic violence failure to train cases may be scarce, more can be anticipated from those victims who can satisfy *City of Canton'*s stringent "deliberate indifference" culpability standard.

As was the case before *DeShaney*, after *City of Canton* the failure to train the police cause of action apparently has potential in abused spouses' actions against the municipalities that employ and train the nonresponsive, and non- or ill-trained, police.

V. THE FUTURE OF BATTERED SPOUSES' SECTION 1983 DAMAGE ACTIONS

The future relationship of Section 1983 damage actions and the battered spouse is somewhat uncertain. Much depends on how

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414. A number of non-battered spouse cases have actually applied *City of Canton*'s "deliberate indifference" standard. *City of Canton* itself helped define it in such a way that recovery in failure to train suits apparently often will not be possible. 489 U.S. at 389. See, e.g., Schepp v. Fremont County, 900 F.2d 1448, 1455-56 (10th Cir. 1990); Lewis v. City of Irvine, 899 F.2d 451, 455 (6th Cir. 1990); Santiago v. Fenton, 891 F.2d 373, 381-82 (1st Cir. 1989); Dorman v. District of Columbia, 888 F.2d 159, 162-65 (D.C. Cir. 1989); Merritt v. County of Los Angeles, 875 F.2d 765, 771 & n.10 (9th Cir. 1989). Still, some litigants are successful at establishing deliberate indifference. E.g., Roman v. Jeffes, 904 F.2d 192, 197 (3d Cir. 1990); Horton v. Flency, 889 F.2d 454, 458-59 (3d Cir. 1989) (upheld $65,899 jury verdict partially on liability for municipal policy that, with deliberate indifference to consequences, deferred law enforcement in private clubs to their proprietors); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725-26, 730-31 (3d Cir. 1989) (evidence sufficient to create material fact issue whether policy of deliberate indifference to teacher misconduct existed which contributed to student's sexual abuse by teacher), cert. denied, 110 S. Ct. 840 (1990); Robert G. v. Newburgh City School Dist., No. 89 Civ. 2978 (S.D.N.Y. Jan. 8, 1990) (1990 WESTLAW 3210, at 1-2) (sufficient evidence of deliberate indifference to defeat motion to dismiss when substitute teacher sexually assaulted female student and school had policy to hire substitute teacher who had lengthy criminal record); Simmons v. City of Philadelphia, 728 F. Supp. 352, 355-56 (E.D. Pa. 1990) (evidence of lack of training of jailers concerning how to handle intoxicated detainees supported finding of deliberate indifference). Perhaps it is noteworthy that the Third Circuit, which formerly was so inhospitable to the failure to train cause of action, see supra notes 150, 160-61 and accompanying text, now embraces it so enthusiastically.

"Deliberate indifference" should certainly be provable in at least some abused spouse cases. As discussed above, special police training in the handling of domestic violence confrontations is needed in many jurisdictions. See supra note 166 and accompanying text. And as in *City of Canton*'s footnote ten example, see supra note 408, city policy makers should know "to a moral certainty" that their police officers will have to cope with an abundance of such cases. Thus, their need to train the officers how to act may be "so obvious" that their failure to do so could constitute "deliberate indifference" to battered spouses' constitutional rights.

415. See Oren, supra note 32, at 730 (failure to train cause of action available and promising in some child protection service inaction cases).
broadly the courts interpret *DeShaney* in the substantive due process field and whether the Supreme Court, or lower courts, expand it to cover the procedural due process and equal protection causes of action as well. This section of this article will discuss the future status of domestic violence victims' Section 1983 claims, including how they ought to be treated and how they probably will be handled.

A. Denial of Due Process

Battered spouses’ post-*DeShaney* Section 1983 due process suits against the police were most affected by *DeShaney*. The greatest impact was on the substantive due process cause of action, but *DeShaney* may prove equally influential in *Roth* procedural due process cases.

1. “Special Relationship” Substantive Due Process Cases

*DeShaney* has proved to be an extremely controversial decision. Debate has raged over whether the Seventh Circuit’s federalist negative liberty approach to the fourteenth amendment, which Chief Justice Rehnquist adopted in his *DeShaney* majority opinion along with the federalist doctrine against transforming every tort committed by a state official into a constitutional violation, is appropriate. While this article is not the forum for yet another extended pro- or anti-negative rights litany, it must be acknowledged that the negative rights stand has considerable appeal in the usual abused spouse case setting. The due process clause itself is worded in the negative. A mere governmental failure to act, like that featured

416. *Compare supra* note 211 and accompanying text *with supra* note 212 and accompanying text.
417. *See supra* note 42 and accompanying text; *see also* Currie, *supra* note 42.
420. *See supra* note 39; *see also* Currie, *supra* note 42, at 865.
in most battered spouse cases,\(^{421}\) simply does not call the clause into play.\(^ {422}\) Those few cases which merit governmental responsibility for its inaction will qualify for a substantive due process recovery because they will meet DeShaney's custody test.\(^ {423}\) A broader substantive due process rule would risk causing ruinous federal interference in the states' allocation of their increasingly scarce monetary and related resources,\(^ {424}\) as well as possibly bringing about a "razor's edge" scenario.\(^ {425}\) Thus, the negative liberty doctrine result in DeShaney can be supported against its host of critics.\(^ {426}\)

The DeShaney Court's federalist font of tort law point is at least as important as the negative liberty one. Much has been written, pro and con, about the federalism doctrine.\(^ {427}\) At its best, it holds

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\(^{421}\) The exception, of course, would be the various "special danger" cases discussed supra notes 232-49 and accompanying text and infra notes 431-41 and accompanying text. This distinction from pure governmental nonfeasance cases could explain, see Archie v. City of Racine, 847 F.2d 1211, 1226 (7th Cir. 1988) (Posner, J., concurring), cert. denied, 109 S. Ct. 1338 (1989), see supra note 232, why the special danger ones merit recovery, even after DeShaney, on a custody or related theory. See Note, Snake Pits, supra note 42, at 813-14.

\(^{422}\) See Note, Snake Pits, supra note 42, at 812-13.

\(^{423}\) See id. at 819-20.


\(^{425}\) The Seventh Circuit feared putting every state welfare department, via substantive due process law, "on the razor's edge, where if it terminates parental rights [to an abused child] it is exposed to a section 1983 suit . . . by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by the child . . . ." DeShaney, 812 F.2d at 304. Accord, DeShaney, 489 U.S. at 203. It is questionable how compelling the "razor's edge" argument would be if it were standing alone. See Oren, supra note 22, at 717-21. Joined with the negative liberty and anti-font of tort law doctrines, however, it effectively dictates the restrictive interpretation of due process law reached by the Court in DeShaney.

\(^{426}\) Contra, e.g., Gerhardt, supra note 167; Oren, supra note 22, at 686-92.

\(^{427}\) Compare, e.g., Durchslag, Federalism and Constitutional Liberties: Varying the Remedy to Save the Right, 54 N.Y.U. L. Rev. 723 (1979) (negative view of Supreme Court's version of federalism) and Gerhardt, supra note 167, at 411-12 (same) and Weinberg, The New Judicial Federalism, 29 Stan. L. Rev. 1191 (1977) (same) and Wells & Eaton, Affirmative Duty And Constitutional Tort, 16 U. Mich. J.L. Ref. 1, 29-31 (1982) (same, argues federalism ought not to restrain the law of constitutional torts) with Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Soc. Ord. 557, 578-79 (favors federalism and other methods to preserve integrity of state court system) and Brown, supra note 29, at 815-17, 820, 878-80 (favorable towards concept of federalism, although not towards way Supreme Court has attempted to protect it) and McConnell, Book Review, 54 U. Chi. L. Rev. 1484 (1987) (positive view of Supreme Court's view of federalism) and Nichols, supra note 306, at 1009-10 (favorable towards concept of fed-
that federal fourteenth amendment actions ought not to displace state law, tort and otherwise, in the disposition of what are really state tort claims. Certainly, the state’s failure to protect many abused spouses is actionable under state law. Thus the wisdom of DeShaney becomes apparent: (1) most litigants correctly are left to their state law remedies, (2) a select few are so much at the mercy of the state that they are in DeShaney custody and can bring federal substantive due process claims, and (3) federalism is protected.

Correctly or not, DeShaney has derailed almost all substantive due process failure to protect cases brought by battered spouses and others. The remaining issue is which cases should escape DeShaney and still provide their plaintiffs a substantive due process Section 1983 right of action. DeShaney’s custody test means that incarcerated prisoners and involuntarily committed mental patients still qualify for such relief. Who should fit its alternative “similar restraint of personal liberty” inquiry? At the outset, clearly the spirit of DeShaney mandates that its escape clause be narrowly interpreted. Indeed, if so appealing a plaintiff as Joshua Deshaney did not qualify for federal substantive due process protection, it is difficult to imagine that very many others would do so. And this is fitting. It makes no sense to foster federalism by limiting federal court interference with state law concerns and then make broad, frequent exceptions to the rule. The proper way to apply DeShaney is to follow its lead and find few “similar restraint of personal liberty” deviations in the difficult line-drawing exercise that DeShaney custody determination necessarily entails.

Turning to the actual cases, the first major class of “similar restraint” alternatives are the abused foster child cases DeShaney itself noted. The class of abused foster children ought to, and undoubtedly does, meet the custody test. As a rule, they are taken by the state and placed in foster care with little to say about the matter.

ermalism, although not towards way Supreme Court has attempted to protect it) and Smolla, Displacement, supra note 68, at 886 (positive view of Supreme Court’s view of federalism, suggests some alterations in Parratt/Hudson test); see also, e.g., Brown, supra note 306, at 906-09 (predicts that federalism will become increasingly important to the Supreme Court); Burnham, supra note 29, at 520-22; Whitman, supra note 306.

428. E.g., Brown, supra note 29, at 820; see supra notes 304-05 and accompanying text.
If anyone besides an incarcerated inmate or involuntarily committed mental patient meets the DeShaney custody requirement, it is the foster child. 429 Public school students are distinguishable. While state law may require that they attend school, that ought not to be enough to grant custody status to them, or related persons who would assert Section 1983 liability for a failure to protect. 430 Otherwise, DeShaney’s custody requirement will be gradually eroded until multitudes of claimants are deemed to satisfy it.

The other major group who assert they suffered a “similar restraint of liberty” are the “special danger” case proponents. Here the state agent acted far more actively than in DeShaney or the other nonfeasance situations; here, the State affirmatively placed the plaintiffs in danger of falling into the proverbial snake pit and then failed to protect them from it. 431 Should this difference be enough to confer custody status on “special danger” plaintiffs? In many cases the answer is yes. As it does in the case of the incarcerated prisoner or the involuntarily institutionalized mental patient, the state in a number of the special danger actions has “restrain[ed] the individual’s freedom to act on his own behalf,” 432 and thus should be held responsible under substantive due process law for any harm that results. DeShaney itself may support this conclusion. 433 There is at least a difference in degree between the circumstances of public school students or hospital patients and “special danger” plaintiffs, as the State has more directly placed the latter in positions where they are unable to take care of themselves as they normally would do when unfettered. 434

Thus, in Horton v. Flenory, 435 the official municipal policy and the individual police officer significantly contributed to the dece-
dent’s death by setting the scene for this event and failing to forestall it when there was still time to do so. This was the sort of restraint of liberty the DeShaney Court must have intended to remain actionable under the fourteenth amendment in a Section 1983 suit. Similarly, in Wood v. Ostrander,436 the police officer put the plaintiff in peril when he left her at the side of a dangerous road very early in the morning. She was isolated and far less able to defend herself than she normally would have been. Like the child plaintiffs in White v. Rochford,437 she accordingly should have been considered to be in DeShaney custody.

In Cornelius v. Town of Highland Lake,438 state representatives also took steps which left the plaintiff unable to fully take care of herself. However, her case is less compelling than the situations in Horton and Wood, as she was, after all, in the town hall at her job site when she was attacked. Her liberty previously was “restrained” by her employer only to the extent that she was required to be at the town hall in order to retain her position. Courts should accordingly view her DeShaney custody status differently, as she falls beyond the line custody determination requires drawing.439

In any “special danger” case, the court should not automatically assume that custody status is present. Instead, it should analyze the

436. 879 F.2d 583 (9th Cir. 1989), cert. denied, 111 S. Ct. 341 (1990). This reading of the facts takes the plaintiff’s proof in its best light. See supra note 240. 437. See Wood, 879 F.2d at 592-93 (equates Wood and White v. Rochford, 592 F.2d 381 (7th Cir. 1979)). But see id. at 603-05 & n.5 (Carroll, J., dissenting). 438. 880 F.2d 348 (11th Cir. 1989), cert. denied, 110 S. Ct. 1784 (1990). 439. See, e.g., de Jesus Benavides v. Santos, 883 F.2d 385, 387-88 (5th Cir. 1989) (jailers attacked in correctional facility by inmates not in DeShaney custody while locked up in jail work site; unlike prisoners, who clearly were in custody, jailers could quit their jobs whenever they pleased and thus their liberty was not sufficiently restrained for them to be in custody); Washington v. District of Columbia, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986) (same under pre-DeShaney special relationship law); Walker v. Rowe, 791 F.2d 507, 511-12 (7th Cir.), cert. denied, 479 U.S. 994 (1986) (same). But see Swader v. Commonwealth of Virginia, 743 F. Supp. 434, 436-44 (E.D. Va. 1990) (prison nurse and her daughter resided on prison premises pursuant to State rule requiring that employees do so, daughter raped and murdered by unsupervised inmate, court held she was in DeShaney custody).

The result in Swader is as objectionable as that in Cornelius — again, a prison worker and her family ought not to be considered to be in DeShaney custody simply because they live on prison property as a condition of the worker’s employment. Like the jailers in de Jesus Benavides, if the prison nurse in Swader did not want to dwell on the prison grounds she was free to work, and live, elsewhere. Her liberty was not sufficiently restrained by the State for her, and her daughter, to merit DeShaney custody status.
relevant facts and ascertain whether the State caused sufficient restraint of the plaintiff's personal liberty to justify a custody finding. It certainly should not so find when a custody claim is as dubious as that in Cornelius.

The foster child, "special danger," and related exceptions to DeShaney's general bar of substantive due process claims for governmental failures to protect those in danger from third parties are important to battered spouses because they sometimes may fit within them. But the domestic violence victim must remember the federalism-based narrowness of the DeShaney custody exception. Courts should not find "similar restraints of personal liberty" easily, as to do so will be to convert federal courts back into the surrogate state tort fora from which DeShaney set out to transform them. Thus, most abused spouses will need to turn elsewhere for Section 1983 damage relief.

2. Board of Regents v. Roth Procedural Due Process Cases

The battered spouses who are barred by DeShaney from substantive due process Section 1983 damage relief from the inactive police may turn to procedural due process law for assistance. If the spouses were the holders of valid state orders of protection the police refused to enforce without first offering them procedural due process in the form of predeprivation notice and a hearing on the refusal, thus, it is doubtful that the deceased battered spouse in Dudosh v. City of Allentown, 722 F. Supp. 1233 (E.D. Pa. 1989), see supra note 217 and accompanying text, qualified for custody status. Kathleen Dudosh voluntarily led police officers to her door with the intention that they evict her former cohabitant from her apartment. The officers did not force her to accompany them. Their actions ought not to be considered sufficiently restrictive of Ms. Dudosh's liberty to render her condition custodial. See supra note 250 and accompanying text.

441. Custody issues also could arise in the Byrd v. Brishke police misconduct situation and would certainly warrant a finding of custody because of the governmental restraint of victimized persons' freedom to care for themselves present there. See supra note 251.

442. See supra note 250 and accompanying text.

443. Courts should reject the premise of Ward v. City of San Jose, see supra note 252, and arguably at least some of that of Swader v. Commonwealth of Virginia, see supra note 252, that an independent substantive due process cause of action is available to those endangered by governmental officials and subsequently injured. The most that can be said for such a claim is that in those cases where governmental-caused danger leads to harm, a "special danger" DeShaney custody claim should be entertained by the court and, if appropriate, be upheld. The spirit of DeShaney and federalism certainly would not support an independent substantive due process right to redress such an injury.
they may have a viable procedural due process damage claim. Various cases have recognized the cause of action in both theory and application, and may continue to do so. However, those courts which honor the spirit of DeShaney will disavow such litigation.

DeShaney spoke out in favor of federalism and not converting the fourteenth amendment into a font of tort law. Doe v. Milwaukee County (Doe II) travelled in its footsteps in the procedural due process theatre when it adopted the approach of Archie v. City of Racine and concluded that Board of Regents v. Roth claims have no place in battered spouse police nonfeasance cases. Not only does allowing such claims go against well-established doctrine which holds that a simple violation of state law does not violate the federal Constitution, it also furthers the expansion of the fourteenth amendment and the preemption of state law remedies. Doing so is just as inappropriate in the procedural due process arena as in the substantive — as was true there, it would improperly "transform [the] tort committed by a state actor into a constitutional violation." Permitting such claims would merely encourage litigants to dress up their state law tort claims in procedural due process language as they masquerade behind a federal constitutional tort facade. Despite the havoc arguably wrecked in this area by the Court's recent Zi-nermon v. Burch decision, Doe II properly resolved the procedural due process issues raised in battered spouses' Roth suits when it applied the time-honored federalist precedents and theory to them. Subsequent courts ought to follow its lead.

Those battered spouses endeavoring to assert Roth claims may respond to this approach by noting that traditional Roth procedural due process analysis holds that once the government offers people a benefit which is sufficiently definite and restrictive of governmental discretion to constitute an entitlement they cannot later be deprived of it without first being accorded procedural due process. This

444. 903 F.2d 499 (7th Cir. 1990).
should be true, they would argue, even though the deprivation consists of governmental nonfeasance in the face of danger. DeShaney's holding that the state has no duty to protect its citizens against attack by other private citizens, such as those by abusive spouses against abused ones, might be inapplicable in such an inaction case, they would contend, because there is a considerable difference between saying that there is no duty to protect at all and that once the State has assumed such a duty by creating an entitlement it cannot unilaterally abandon it without first offering the protected persons procedural due process. When an entitlement to protection takes effect according to a state order of protection statute, the assertion would be, it should have to be either honored or else removed pursuant to procedural due process dictates regardless of what DeShaney might say about the person for whom no entitlement ever existed.

This line of reasoning would not preclude a court from applying the DeShaney rationale to procedural due process governmental inaction cases. The concept of federalism would not distinguish between nonfeasance actions depending on whether or not an entitlement was involved — state law adjudication should control in either situation because the due process clause does not impose an affirmative duty for the government to protect individuals from third parties whether they had entitlements or not. Battered spouses ought not to obtain procedural due process relief through circuitous and syllogistic reasoning. So long as the police do not discriminate improperly when they decide not to enforce specific orders of protection, the fourteenth amendment and Section 1983 ought never to be called into action.

Notwithstanding the persuasive logic of the Seventh Circuit in Doe II and Archie, some courts will entertain the battered spouse's

449. See, e.g., Taylor v. Ledbetter, 818 F.2d at 800; Comment, Actionable Inaction, supra note 35, at 1066-67; Note, supra note 11, at 499 n.98.

450. Or perhaps a judicial order, see Coffman, 739 F. Supp. at 260-66; see supra notes 308-17 and accompanying text.


452. See Archie v. City of Racine, 847 F.2d 1211, 1216 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1338 (1989); Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983), cert. denied, 455 U.S. 1049 (1984); supra note 400 and accompanying text.
Roth claim. When they do so, they need to consider a variety of issues. First, the courts must determine whether the state right of protection statute in question creates a benefit which qualifies for Roth entitlement status. When doing so, they should construe the statutory language carefully and recall that not every state statute creates a Roth entitlement—possibly very few state order of protection statutes will bestow entitlement status. The spirit of DeShaney would require no less. If a judicial order is sufficiently definite and restrictive of governmental discretion that it would create an entitlement if it were a statute, it should qualify as a Roth entitlement as well.

If the court considering domestic violence victims' Roth claims against the police decides that the state order of protection statute in question is one of the few to create an entitlement to procedural due process, it next must ascertain to what process they were entitled. Mathews v. Eldridge\textsuperscript{453} apparently would dictate predeprivation notice and a hearing in such a case unless the Parratt/Hudson test restricted battered spouses to a postdeprivation state law damage action as the only process they were due. A court applying Parratt and Hudson should remember the desire to minimize federal court intervention in what were really state tort claims that underlay them,\textsuperscript{454} and accordingly apply them broadly. Zinermon may have cut back on Parratt and Hudson in some settings, but nowhere did it set aside their underlying rationale. Thus, abused spouses who were deprived of their entitlements to protection should not automatically be led around the Parratt/Hudson hurdle. Instead, they should be forced to prove why they merit exemption from it. Often, their deprivation will have been perpetrated by a low-ranking police officer who acted randomly and without the approval of superiors. If this were the case, Parratt and Hudson would mandate leaving them with a state court tort claim as their only process unless no adequate state remedy were available. Most jurisdictions provide such an "adequate remedy," especially when one considers the term's broad definition under Parratt and its progeny.\textsuperscript{455} Even under Zi-

\textsuperscript{453} \textsuperscript{424} U.S. 319 (1976).

\textsuperscript{454} See supra note 327 and accompanying text.

\textsuperscript{455} See supra note 333 and accompanying text.
nermon, only when the deprivation truly was not random or unau-
thorized, such as when it was pursuant to an established state
procedure, ought the abused spouse to be able to proceed on in the
procedural due process analysis. If courts apply Parratt and Hudson
narrowly, as DeShaney would require, relatively few battered spouses
will avoid them.

It is entirely appropriate that those few domestic violence victims
who progress to the procedural due process remedial stage recover
compensatory, and in the right case even punitive, damages. A police
department that has something akin to an established procedure not
to accord due process to battered spouses clearly violates procedural
due process law, if not equal protection law as well. Damages and
other Section 1983 relief may properly be awarded to its victims by
a court that first strictly applies the law of cause in fact and prox-
imate causation. Any other spouse who reaches this point is due
similar treatment.

In summary, procedural due process Roth entitlement analysis
should not be available to battered spouses at all under DeShaney
and the principles of federalism. Courts that disagree still should
rarely grant relief in such cases due to the requisite strict construction
of order of protection statutes in entitlement analysis and the impact
of Parratt and Hudson on those cases that survive that far. Thus,
while procedural due process law may offer a viable due process
action for at least some domestic violence victims even after De-
Shaney, very few should benefit from it.

B. Denial of Equal Protection

Abused spouses’ Section 1983 denial of equal protection damage
suits against the police were far less directly affected by DeShaney.
The question that must be resolved is whether the spirit of DeShaney
should inhibit such claims. The answer is probably not.

As University of Chicago Professor Cass Sunstein persuasively
argued,\textsuperscript{456} denial of equal protection cases ought to be viewed dif-
ferently from substantive or procedural due process ones. Due process law protects against the State interfering with a person’s freedom and in the battered spouse case context asks whether the State normally has a duty to protect a person against third party attackers. Equal protection law, on the other hand, requires that when the State acts, or chooses not to act, it treat all similarly situated people alike. A governmental choice not to protect anyone ought to be viewed far differently than a decision to protect some but not others. Depending on what motivated this latter choice, it could and ought to be unlawful. The government simply cannot be permitted to discriminate improperly, and if it does so in the domestic violence case setting it should be held accountable according to standard equal protection law principles. Thus, DeShaney, a substantive due process decision, should play no direct role in denial of equal protection disputes.

But even if it were appropriate to mingle due process and equal protection precedents, DeShaney ought not to affect the disposition of equal protection cases. DeShaney itself acknowledged that if the State selectively denies otherwise available protection services from certain disfavored minorities, it is liable for a denial of equal protection. The Seventh Circuit precedents which preceded DeShaney agreed that an unsuitably discriminatory denial of such services would violate equal protection. Neither of these lines of authority felt that the concerns of federalism overcome the antidiscrimination tenets of equal protection law. And nothing in McKee v. City of Rockwall went against this conclusion. McKee completely supports the retention of pre-DeShaney equal protection law such that any governmental exercise of discretion not to act is actionable if founded on improper discriminatory motives. Thus, the problem in the battered spouse case is not establishing that state-sponsored inappropriate discrimination would transgress equal protection, but rather proving that specific police classifications of domestic violence cases and

457. See DeShaney, 489 U.S. at 194-96.
458. Notwithstanding the post-Bowers v. Hardwick, 478 U.S. 186 (1986), equal protection cases discussed supra note 399, there really should be a difference in the application of equal protection and due process principles.
their subsequent response to them are themselves unsuitably discriminatory.

Police classifications that are facially based on a gender foundation must be subjected to heightened scrutiny under the intermediate standard of equal protection analysis. Those not so grounded need merely be rationally related to a legitimate state interest. When the police respond to domestic violence cases in a manner openly attributable to the sex of those calling for assistance, their classification is facially gender-based. The problem in most cases is ascertaining whether the police response is, in fact, founded on the gender of the victim. If it is not manifestly so based, the reviewing court must apply the Personnel Administrator v. Feeney test to see if a discriminatory purpose underlay the classification and a discriminatory effect resulted. It will only be deemed gender-based if it meets this standard. Many battered spouses' equal protection suits collapse at this point, as they cannot prove the police failed to help them because of a classification grounded on gender and a non-gender-based classification can withstand the rational basis test.

One way an abused spouse could get around this dilemma would be to establish that a domestic violence victim classification is actually per se gender-based because almost all such victims are women. If courts so deemed this classification, all battered spouse equal protection cases, except presumably for those with men as victims, would qualify for heightened scrutiny and have a far greater chance for ultimate success. But should the domestic violence situation classification be so regarded? Some have argued loudly that it ought to be, and their claim is at least somewhat compelling. The overwhelming majority of battered spouses are women, and the police have to be aware of this fact and use this awareness in planning their actions when they decide to respond to abused spouses' calls for aid in a different way than they treat those from other crime victims. However, there are some problems with this ap-

461. See supra note 5.
462. See supra note 134.
463. See, e.g., Comment, supra note 4, at 723.
proach. Because not all domestic violence victims are female, it is difficult to argue that a police classification of domestic violence cases is purely gender-related. After all, the Supreme Court has held classifications were not facially gender-based even though they involved a uniquely female condition, pregnancy. Thus, although the police’s domestic violence case categorization of women’s battered spouse complaints probably ought to be considered gender-based, at least some courts will continue to join Hynson v. City of Chester Legal Department, Watson v. City of Kansas City, McKee, and related decisions which held such classifications were facially neutral.

Assuming the domestic violence categorization is facially neutral, the female battered spouse with an equal protection complaint has a potentially difficult battle ahead of her. Various recent decisions, particularly the majority opinion in McKee and the district court holding in Howell v. City of Catoosa, have shown how much evidence of the police’s discriminatory purpose and effect a battered wife must produce to overcome the Feeney test. The police undoubtedly will attempt to undercut any evidence of discriminatory purpose that the abused spouse presents by articulating a benign rationale for the domestic violence classification. They may be successful in doing so despite the basic unworthiness of most of the grounds they could posit. Still, in the appropriate case, it should be possible for the domestic violence victim to prove, pursuant to Feeney, that the police employed a discriminatory facially neutral classification that was, in fact, gender-derived. It most likely would be overturned in any court’s intermediate scrutiny equal protection analysis.

465. 864 F.2d 1026 (3rd Cir. 1988).
466. 857 F.2d 690 (10th Cir. 1988).
468. 729 F. Supp. 1308 (N.D. Okla 1990); see supra note 379.
469. See supra note 130.
470. Presumably, a male domestic violence victim would not profit from such a ruling and could
In conclusion, a Section 1983 denial of equal protection damage action may well be the post-DeShaney battered spouse's most profitable Section 1983 remedy. Female spouses will be best off if they can establish a facially gender-based police classification. Failing that, they should generate compelling evidence of discriminatory police purpose and effect by a facially neutral classification. In either case, once the proper showing is made the classification will be evaluated under the heightened standard of review, with the litigant's ultimate success reasonably certain. If neither of these scenarios applies, or the abused spouse is male, the police classification would not be gender-based and would stand if a rational basis supported it. This is an appropriate result, since the government should not discriminate in the way it provides protective services, even after DeShaney.

C. Failure to Adequately Train the Police

The failure to train the police municipal liability theory seems to offer real hope for redress against a municipality for the domestic violence victim whom the police did not assist. When a deliberately indifferent municipality fails to train its officers properly for domestic violence situations and this lack of training causes them not to help a battered spouse in violation of due process or equal protection law, the municipality is liable for its inaction. DeShaney indirectly affected the failure to train cause of action to the extent it reduced the number of police actions that can constitute the underlying constitutional violations which are actionable under Section 1983 in municipal failure to train cases.

Many domestic violence victims may not profit from the failure to train cause of action because after DeShaney they will not be able to prove an underlying constitutional violation. Still, as Coffman v. Wilson Police Department\(^{471}\) and Dudosh v. City of Allentown\(^{472}\) have recognized, the spouse who can meet City of Can-

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ton v. Harris's\textsuperscript{473} stringent deliberate indifference standard and get around its causation roadblock has a good shot at an eventual recovery from the municipality whose deliberate indifference to the training of its police led to post-DeShaney unconstitutional police inaction which produced the spouse's injuries.

VI. CONCLUSION

Spouse abuse is a serious national and international problem. Police unwillingness to help its victims is a major aspect of the predicament. One of the best ways to encourage police action may be to hold them liable for damages when they fail to perform their duty.

Many states impose liability in police inaction spouse abuse cases, and this is the preferred means of redress for the battered spouse with a claim against the police. But some want a federal law damage remedy, and would turn to Section 1983 for assistance. Since DeShaney, few domestic violence victims qualify for a Section 1983 substantive due process recovery. Under a federalist system, this is an appropriate result. While some courts currently will permit a few abused spouses to recover under federal procedural due process law, they should recognize that they do so against the spirit of DeShaney.

Battered spouses ought to be able to recover for properly documented denials of equal protection; such governmental behavior should be actionable even in a federalist judicial system.

Under DeShaney and other authorities, when the abused can prove that the police violated their federal constitutional rights by failing to protect them they can recover from the municipality employing the police for a failure to train if they can demonstrate that (1) the municipality exhibited deliberate indifference to their rights, and (2) that the resulting failure to train caused the police not to help them.

Thus, after DeShaney Section 1983 should provide limited damage relief to domestic violence victims with claims against the unresponsive police. Exactly how much will actually prove to be

\textsuperscript{473} 489 U.S. 378 (1989).
available in a particular case may depend on how broadly or narrowly the reviewing court regards *DeShaney* and the principles of federalism that governed it. Meanwhile, the victims ought to vigorously pursue their state law remedies.