

LEGAL LIABILITY OF LAW ENFORCEMENT

Maria Teresa Macias was shot and killed by her estranged husband, Avelino Macias. For over one year, the Sonoma County Sheriff's Office had been unresponsive to the Teresa's repeated complaints of domestic violence by her husband. When officers did respond, they omitted key pieces of information from their reports that could have resulted in stricter criminal actions taken against Avelino. They also failed to follow mandatory policies and procedures for responding to domestic violence-related calls for assistance and enforcing domestic violence restraining orders.

Teresa's estate filed a federal lawsuit against the County of Sonoma and members of the Sheriff's Department alleging that the officers' chronic failure to respond to Teresa's complaints of domestic violence constituted a violation of her equal protection rights under the United States Constitution. Defendants filed a motion to dismiss the lawsuit. The Ninth Circuit denied their motion, holding that the estate should be allowed to proceed with its equal protection claim against defendants. In so holding, the Court recognized that domestic violence victims have a constitutional right to have police protection administered in a non-discriminatory manner. Following the Ninth Circuit's decision, defendants agreed to settle the case for \$1 million.¹

Systemic reforms are often not enough to ensure that law enforcement officers are adequately and effectively responding to domestic violence in the field. Sometimes, improvements in law enforcement response and accountability for derelict law enforcement officers may be best achieved through litigation. Although laws and court decisions establishing broad government immunity for certain misconduct have seriously limited the type of lawsuit that battered women and their survivors may bring against law enforcement, many viable federal and state claims still exist for remedying inadequate police responses to domestic violence.

Improvements in law enforcement response to domestic violence and accountability for derelict officers are sometimes best achieved through litigation.

Federal constitutional claims provide a potential basis for liability against law enforcement, even after the United States Supreme Court's decisions in *DeShaney v. Winnebago County Department of Social Services*² and *Towne of Castle Rock v. Gonzales*³ – two watershed cases which established that battered women do not have a constitutional due process right to general police protection from domestic violence under the 14th Amendment of the United States Constitution (“14th Amendment”). There are exceptions to *DeShaney*, for example, that allow parties to bring due process claims against law enforcement in cases where officers actively contributed to a victim's risk of domestic violence or acted with deliberate indifference to the rights of battered women by failing to provide adequate training to officers who regularly respond to domestic violence incidents.

Moreover, *DeShaney* and *Castle Rock* did not foreclose the possibility of bringing equal protection claims against law enforcement under the 14th Amendment. Equal protection claims are a viable remedy for addressing law enforcement's discriminatory policies and practices for responding to domestic violence crimes and domestic violence victims. If successful, these claims can send a strong message to law enforcement agencies throughout the country that domestic violence crimes must be treated as seriously as other violent and life-threatening crimes.

State tort law claims⁴ and state constitutional claims are also unaffected by *DeShaney* and *Castle Rock*. As a general matter, state law grants broad immunity to law enforcement agencies and officers from state tort claims. However, state tort law supports claims against law enforcement agencies and officers who fail to discharge duties that are mandated by state law when responding to domestic violence. State tort law also supports claims against law enforcement agencies that fail to adequately address domestic violence perpetrated by their own officers. Although often overlooked as a basis for relief, a party can also bring an equal protection claim against law enforcement under the California Constitution. In fact, the California Constitution affords equal protection claims

based on gender discrimination an even higher level of protection than federal equal protection law by requiring that government agencies have compelling and necessary reasons for discriminating against one gender.

Battered women and their survivors should consider all possible federal and state claims against law enforcement. This section addresses the history, limitations and practicalities of holding law enforcement legally liable for effectively responding to domestic violence under available theories.

CONSTITUTIONAL REMEDIES

Federal constitutional claims against individual officers, law enforcement agencies, and city governments may be brought pursuant to Title 42 of the United States Code, Section 1983 (42 U.S.C. §1983, hereinafter "Section 1983"). Section 1983 allows private individuals to seek declaratory,⁵ injunctive and/or monetary relief in federal court⁶ if they have been deprived of their federal constitutional or statutory rights by someone acting "under color of state law."⁷ In order to establish a cause of action under Section 1983, a party must show that: (1) a person (2) who was acting under color of state law (3) caused the party to be deprived of a federal constitutional or statutory right.⁸

"Persons" Who May be Liable Under Section 1983

A state is not a "person" subject to liability under Section 1983.⁹ Accordingly, a party may not bring a Section 1983 claim against a state law enforcement agency for its failure to adequately respond to domestic violence. However, a party may bring a Section 1983 claim against a state official (e.g., Commissioner of the California Highway Patrol), in his/her official capacity, so long as the claim only seeks declaratory or injunctive relief, not monetary

Federal constitutional claims against law enforcement officers, law enforcement agencies and city governments may be brought pursuant to Section 1983 of Title 42 of the United States Code (42 U.S.C. §1983).

Successful federal claims under Section 1983 can set important precedent that provides guidance to law enforcement agencies throughout the country on what constitutes “proper” and lawful responses to domestic violence.

damages, against the official.¹⁰ In order to recover monetary damages against a state official, a party must bring a Section 1983 claim against the official in his/her personal capacity alleging that the official should be held individually liable for personally depriving the party of a federal right under color of state law.¹¹

Local government entities and their agencies, on the other hand, may be considered “persons” subject to liability under Section 1983 for declaratory, injunctive and monetary relief if a party can show that the action causing the constitutional violation was performed in order to implement or execute “a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that [local government entity’s] officers.”¹² Thus, a local government body or agency cannot be held liable under Section 1983 for merely employing someone who violated a person’s constitutional rights in carrying out their official duties.¹³ Rather, liability will only be imposed if a party can demonstrate that an official municipal policy caused a public employee to violate that party’s constitutional rights.

Officers and employees of local government agencies may be sued in their official and personal capacities under Section 1983 for declaratory, injunctive and monetary relief.¹⁴ Thus, a party may bring a Section 1983 claim against individual law enforcement officers, law enforcement officials and city officials for failing to adequately respond to domestic violence. However, a limited number of government officials, such as judges and legislators, are afforded absolute immunity from liability for Section 1983 actions if the claim involves conduct that falls within the scope of their official duties.¹⁵

Acting “Under Color of State Law”

Acting “under color of state law” requires a showing that the person causing the party’s rights to be violated exercised power “possessed by virtue

of state law and made possible only because the wrongdoer is clothed with the authority of state law.”¹⁶ Generally, public officers and employees act “under color of state law” if they are acting in their official capacities or exercising their responsibilities pursuant to state law.¹⁷

Deprivation of Federal Constitutional and Statutory Rights

Conduct causing or constituting a violation of a party’s federal rights include deliberate and affirmative acts, participation in another’s deliberate and affirmative act, or the failure to perform an act that a government actor is legally required to perform.¹⁸ Purely negligent conduct is insufficient to establish liability for a Section 1983 claim involving the violation of a federal constitutional right.¹⁹ Moreover, a government actor’s state of mind may be relevant to determining whether an actionable violation of rights occurred.²⁰ For example, if a party’s claim seeks money damages against a law enforcement officer, the officer may be able to assert a “good faith” defense to this claim by arguing that he/she had a good faith, reasonable belief that the conduct causing the party’s rights to be violated was actually lawful.²¹ However, the officer will not succeed in raising this defense if the conduct at issue violated constitutional or statutory rights that are so clearly established that a reasonable person would have known that the officer’s conduct was unlawful.²²

There are several potential benefits to using Section 1983 to hold law enforcement accountable for ineffectively responding to domestic violence. Because Section 1983 actions involve federal constitutional and statutory rights, these cases can set important national precedent that provides guidance to law enforcement agencies throughout the country on what constitutes “proper” and lawful responses to domestic violence. Accordingly, successful Section 1983 actions have the power to motivate all local police departments to provide better overall protection to domestic violence victims. Furthermore, federal law provides for the recovery of attorneys fees in Section 1983 cases,²³ thereby

Substantive due process claims and procedural due process claims may be brought against law enforcement under the 14th Amendment of the Federal Constitution.

enabling more victims to seek necessary relief for deprivations of their federal rights.

Section 1983 claims involving inadequate law enforcement responses to domestic violence typically allege a violation of the domestic violence victim's constitutional rights under the 14th Amendment. The 14th Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law" and "deny[ing] to any person within its jurisdiction the equal protection of the laws."²⁴ Accordingly, battered women's Section 1983 claims have raised two main theories of liability under the 14th Amendment. First, they have alleged that law enforcement's dereliction of a duty to protect a victim from domestic violence constitutes a violation of the victim's rights under the 14th Amendment's Due Process Clause. Second, they have alleged that law enforcement policies and practices that afford domestic violence victims fewer resources and less protection than victims of non-domestic violent crimes amount to a violation of domestic violence victims' rights under the 14th Amendment's Equal Protection Clause.

FOURTEENTH AMENDMENT DUE PROCESS CLAIMS

There are generally two different types of due process claims that may be brought under the 14th Amendment – substantive due process claims and procedural due process claims. Substantive due process involves the concept that individuals have certain rights and liberties that are so fundamental to traditional notions of justice that, the government should be prohibited from interfering with or infringing upon such rights.²⁵ Procedural due process is based on the notion that there is a basic level of procedural safeguards that the government must provide to individuals (e.g., providing an individual an opportunity to be heard) to ensure that no one is deprived of their rights to life, liberty or property as a result of government proceedings or decision making without having the opportunity to address and affect the outcome of their case.²⁶

SUBSTANTIVE DUE PROCESS CLAIMS

In order to successfully raise a substantive due process claim against local law enforcement, a party must establish that they were deprived of a fundamental right to state protection as a result of inadequate law enforcement response to domestic violence. Generally, state actors²⁷ do not have a constitutional duty to protect individuals from crimes committed by others.²⁸ This principle was reinforced by the United States Supreme Court's decision in *DeShaney* which held that state actors do not have a constitutional duty to protect parties from violence inflicted by private assailants, even when a state actor is aware that a party is being subjected to repeated and ongoing acts of violence by an assailant.²⁹

Although parties do not have a general constitutional right to state protection, state actors may be held liable for a substantive due process claim under Section 1983 if a "special relationship" existed between the state and the injured party that gave rise to an affirmative duty of protection on the part of the state.³⁰ After *DeShaney*, federal courts look to the following factors in determining whether a "special relationship" exists: (1) whether the injured party or perpetrator of the crime were in the state's custody at the time of the incident; (2) whether a state actor affirmatively placed the injured party in danger; or (3) whether a state actor(s) was deliberately indifferent to a need to adequately train public employees to perform certain tasks relating to their official job functions.³¹

Substantive Due Process Claims Pre-DeShaney

Prior to the United States Supreme Court's decision in *DeShaney*, federal courts reviewing battered women's substantive due process claims issued inconsistent rulings regarding the factual circumstances that were required to establish that a "special relationship" existed between a victim and the state.³²

Some pre-*DeShaney* courts barred substantive due process claims brought against unresponsive law enforcement agencies where the perpetrator was in the state's custody and the police were fully aware of the imminent danger facing the domestic violence victim. For example, in *Turner v. City of North Charlestown*,³³ a South Carolina district court found there was no "special relationship" between the state and a battered woman in a case where the woman had a long history of contacting law enforcement for domestic violence by her abusive ex-husband, her ex-husband was legally in the state's custody (i.e., on probation) at the time that he shot her, the woman had obtained a restraining order against her ex-husband, and the woman notified the police numerous times within a two-day period immediately prior to the shooting that her ex-husband was harassing and threatening her in violation of the order.^{34, 35}

Other pre-*DeShaney* courts, in contrast, upheld domestic violence victims' substantive due process claims in cases involving substantially the same circumstances as described above. However, these favorable decisions were all later reconsidered and amended in light of the Supreme Court's holding in *DeShaney*. For instance, in the often-cited decision, *Balistreri v. Pacifica Police Department*,³⁶ the Ninth Circuit initially upheld a substantive due process claim brought by battered woman, Jena Balistreri, who had obtained a restraining order against her former husband and reported numerous violations of the order to the police, who either failed to respond at all or responded slowly and to her complaints.

The Ninth Circuit held that police officers' "repeated notice of [her] plight," coupled with the existence of a restraining order committing the police to Jena's protection, may have been sufficient to give rise to a constitutional duty on the part of the state to protect Jena.³⁷ Although the Ninth Circuit remanded the case to the district court for further review of Jena's due process claim, the opinion in *Balistreri* was later amended in the wake of *DeShaney*. The Ninth Circuit's amended opinion held that Jena's due process claim was no longer viable in a post-*DeShaney* universe.³⁸ However, the court allowed Jena to proceed on her

equal protection claims against police, which are discussed in further detail later in this section.

Similarly, *Dudosh v. City of Allentown*³⁹ involved a substantive due process claim brought by the estate of a battered woman who had obtained an order of protection against her abusive boyfriend. The woman had repeatedly filed police reports – including one report shortly before her death – concerning her boyfriend’s continued threats and harassment in violation of the order. On the day she was murdered, police allowed the woman to accompany them to the apartment where her boyfriend was and to enter the residence first while the officers stood away from the entryway, at which point the woman was shot and killed by her boyfriend. The Pennsylvania district court initially held that the existence of the restraining order, in conjunction with the woman’s frequent contacts with the police, “placed an affirmative duty upon the police department to protect the deceased.”⁴⁰

Thereafter, the district court dismissed the substantive due process claim on the grounds that subsequent federal decisions clarified that the establishment of a “special relationship” required proof that the state affirmatively placed the injured party in a position of danger.⁴¹ The court noted that, although the evidence established that the officers knew about the danger faced by the woman, there was no evidence that the officers were responsible for placing the woman in harm’s way by requiring her to go to the apartment and enter the residence before them.⁴² Shortly after *DeShaney* was decided, the woman’s estate filed a motion for the court to reconsider the due process claim, citing *DeShaney* in favor of finding a special relationship between the woman and the state. The district court held that the Supreme Court’s reasoning in *DeShaney* supported their prior dismissal of her claim.⁴³

Finally, in *Hynson v. City of Chester, Legal Department*, police officers refused to arrest an abused woman’s boyfriend the day before he murdered her because her most recent restraining order had expired. The Pennsylvania district

The United States Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services* precludes many domestic violence victims from bringing substantive due process claims under the Federal Constitution.

court found that the woman's restraining order and her "interaction with the individual officers" established the special relationship necessary to maintain a substantive due process claim.⁴⁴ Two years later, however, the court dismissed the claim, noting that *DeShaney* constituted a significant development in the law since its initial ruling which, when applied to the facts of the case, precluded any recovery for a denial of process.⁴⁵

These decisions show the devastating impact that *DeShaney* had on the viability of substantive due process claims brought by battered women and their survivors against law enforcement agencies. Indeed, although *DeShaney* was decided after the *Balistreri*, *Dudosh* and *Hynson* cases, the opinion effectively nullified the federal court decisions in these cases supporting substantive due process claims in the domestic violence context.

DeShaney v. Winnebago County Department of Social Services

The United States Supreme Court decided *DeShaney* in 1989 in order to redefine the state's obligation to protect citizens from privately inflicted harm and resolve the "inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights."⁴⁶ The result was a highly controversial decision that severely constrains the scope of the due process clause and precludes many domestic violence victims from bringing constitutional claims.

The facts of *DeShaney v. Winnebago County Department of Social Services* are notoriously tragic. From the time he was two years old, Joshua DeShaney was brutally and repeatedly beaten by his father, who was awarded custody after divorcing Joshua's mother. In January 1982, Randy DeShaney's second wife reported the severe abuse to the Department of Social Services

("DSS"). After a brief interview, in which Randy DeShaney denied any accusation of abuse, DSS declined to consider the matter further. One year later, when Joshua was admitted to the hospital for bruises and abrasions, an examining physician suspected child abuse and notified DSS again. Although DSS obtained a court order placing Joshua in the hospital's temporary custody, Joshua was quickly returned to his father after Randy DeShaney agreed with DSS to abide by certain custodial conditions including counseling sessions.

Over the next six months, a DSS caseworker visited the DeShaney home once a month, and reported that Randy DeShaney was not adhering to the agreement terms. On more than one visit, the social worker noted "suspicious injuries" on Joshua's head. Despite the caseworker's substantial record of abuse, DSS took no action. In March 1984, when Joshua was only four years old, he received a severe beating to the head that left him comatose and required emergency brain surgery. During the operation, the surgeon found evidence of prolonged traumatic injury. Joshua is now profoundly retarded and institutionalized.

Joshua's mother brought a Section 1983 claim against the Winnebago County DSS and several DSS employees who had received complaints about Joshua's abuse. The suit alleged that DSS had violated Joshua's right to due process by "failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known."⁴⁷ The district court issued a judgment in favor of DSS and the Seventh Circuit affirmed this decision.⁴⁸ The Supreme Court, in turn, affirmed the Seventh Circuit's decision, holding that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."⁴⁹ Despite DSS' knowledge of the serious, imminent danger Joshua faced and its asserted intention to protect him, the Court rejected the argument that a special relationship existed. The Court pointed to the fact that Joshua's abuse was "private violence" which "the State played no part in creating."

The *DeShaney* decision did not completely foreclose the possibility of succeeding on a substantive due process claim in the domestic violence context.

Substantive Due Process Claims After *DeShaney*

Although not decided in the domestic violence context, *DeShaney* sounded the death knell for many substantive due process claims based on law enforcement's failure to protect victims of domestic violence. As a result of *DeShaney*, law enforcement's knowledge of an existing threat to a woman's safety – even coupled with evidence that the state had offered her protection in the past from domestic violence (i.e., issued a restraining order, provided police protection, etc.) – is no longer sufficient to create a special relationship between a domestic violence victim and the state. Law enforcement must have actively played a role in creating or increasing the danger for a victim in order to give rise to a constitutional duty to protect a victim of domestic violence.

Although *DeShaney* severely limited the state's constitutional duty to protect citizens from criminal violence, the decision did not completely foreclose the possibility of succeeding on a substantive due process claim in the domestic violence context. Battered women and their survivors can establish law enforcement liability for substantive due process violations under limited "state custody" and "state-created danger" exceptions to *DeShaney*. Moreover, the United States Supreme Court has recognized that local agencies and officials may be liable for failing to adequately train law enforcement officers.

STATE CUSTODY EXCEPTION

In *DeShaney*, the Supreme Court adopted a narrow view of what it means for someone to be in "state custody" for purposes of establishing a "special relationship" between that person and the state. Where federal courts had previously found "state custody" to be established when a perpetrator was on probation or parole at the time of the crime, the Supreme Court held that "state custody" requires either the victim or the perpetrator to be actually in the state's custody when the harm occurs, such as in a prison or mental institution.⁵⁰ For example, the Court suggested that an affirmative duty of protection may

have been established in *DeShaney* if Joshua was in foster care at the time he was abused.⁵¹ This narrow interpretation of “state custody” severely limits the type of case that may be brought under this exception in the domestic violence context.

STATE-CREATED DANGER EXCEPTION

In *DeShaney*, the Court underscored the fact that DSS did not take any action that aggravated the danger that Joshua DeShaney faced at the hands of his father. The Court thereby implied that substantive due process claims are only viable where the state plays a role in either creating or increasing the level of harm to which a party is exposed. Accordingly, federal courts will sustain due process claims under the “state-created danger exception” where (1) a state actor’s conduct creates or enhances a party’s risk of danger and (2) the state actor was deliberately indifferent to the known or obvious danger to the party.⁵²

In the domestic violence context, courts are most likely to recognize the exception where police actively interfere with otherwise forthcoming assistance to the victim or ratify and/or encourage the batterer’s conduct, thereby increasing the risk of danger and injury to the victim. For example, in *Freeman v. Ferguson*,⁵³ Geraldine Downen had obtained a restraining order against her estranged husband, Norman “Bud” Downen, Jr. The Eighth Circuit held that the police chief, a close friend of Bud, would be liable under the state-created danger theory if, as alleged in oral argument, he affirmatively told his officers not to take action against Bud, who then murdered Geraldine and her daughter, Valerie, while the restraining order was in effect. The court reasoned that an affirmative duty to protect could be inferred when police conduct interferes “with the protective services which would have otherwise been available in the community – with such interference increasing the vulnerability of decedents . . . and possibly ratifying or condoning such violent actions on [Bud’s] part.”⁵⁴

A party may succeed on a substantive due process claim if law enforcement officers played an active role in creating or increasing a domestic violence victim’s risk of danger.

The state-created danger exception was also recognized in *Smith v. City of Elyria*,⁵⁵ a case in which the police “resolved” a domestic violence situation by encouraging the batterer to return to the family home against the victim’s will. Karen Guerrant had permitted her ex-husband Alfred to move into the guest room of her house, but called the police when an argument ensued. The police refused to remove Alfred, explaining that “Karen could not ‘just put him out at her whim,’ because she had invited him.” After the police advised Alfred to reenter the home, he stabbed Karen to death and stabbed and injured Karen’s sister and Karen’s 9-year-old daughter. The Northern District of Ohio held that the police department’s handling of the incident had increased the danger that Karen faced: “Here, Alfred used the apparent authority given to him by the police to remain in his ex-wife’s home against her will, and later killed her.”⁵⁶

Courts have acknowledged that law enforcement may also empower the batterer and increase the threat of violence to a victim when they respond to a domestic violence call, knock on the door, and leave when there is no answer. In *May v. Franklin County Board of Commissioners*,⁵⁷ for example, a police officer was dispatched to a woman’s home after receiving two 911 calls from her reporting that she was being assaulted by her ex-boyfriend. The officer knocked on the door, but no one answered. The officer then peered in the window but could not see or hear anything. After a failed attempt to call inside the apartment, the officer left and “cleared” the 911 calls. The woman was found beaten to death the next day. Ruling on the officer’s motion to dismiss, the Sixth Circuit held that the woman’s due process claim could succeed as long as it could be shown that the officer’s behavior – going to the door, knocking, and then leaving – emboldened her ex-boyfriend by diminishing his fear of arrest, thereby increasing the woman’s vulnerability to harm.^{58, 59}

The state-created danger exception will only be applied, however, when the state’s affirmative acts create or enhance the danger faced by the victim. The fact that a state actor failed to protect party who was already in a dangerous position is insufficient to trigger the party’s substantive due process rights.⁶⁰

In fact, courts have dismissed substantive due process claims even where law enforcement was present when a domestic violence victim was injured by her batterer and failed to do anything to protect the victim.

In *Losinski v. County of Trempealeau*,⁶¹ for example, a police officer's presence at the victim's home emboldened the victim to have a private conversation in the bedroom with her abusive husband – a conversation that quickly turned violent and ultimately led to the victim's death. In addition, the officer's presence deterred the victim's mother and brother-in-law, who were also present, from assisting when the violent nature of the conversation became clear. Nevertheless, the Seventh Circuit refused to find that the police officer's presence and inaction increased the danger confronting the victim. While recognizing that, "[h]ad the deputy not accompanied [the victim], she may not have proceeded 'into the lion's den,'" the Seventh Circuit nevertheless concluded that "the state simply did not enhance the danger [the victim] faced."⁶²

Courts have also failed to uphold a substantive due process claim in the absence of affirmative danger-enhancing conduct by law enforcement even when officers explicitly assured the victim that she was safe from harm. For example, in *Pinder v. Johnson*,⁶³ a police officer responded to a domestic violence call at Carol Pinder's home, and found that Pinder's former boyfriend, Don Pittman, had broken into the residence, assaulted her, and threatened to murder her and her three children. Pinder informed the officer that Pittman had recently been released from prison after being convicted of attempted arson of Pinder's home approximately ten months earlier. As the officer took Pittman into custody, he assured Pinder that Pittman would not be released from jail that night, and Pinder returned to work based on the officer's reassurances.⁶⁴ Later that evening, the same officer brought Pittman before a county commissioner on misdemeanor charges. Pittman was released on his own recognizance, and the officer made no effort to warn Pinder of Pittman's release. Pittman immediately returned to Pinder's home and set it on fire, killing Pinder's three children.⁶⁵

The Fourth Circuit rejected Pinder's arguments that the officer's explicit assurance that Pittman would not be released that night created a "special relationship" between the police and Pinder, holding that under *DeShaney*, "promises do not create a special relationship."⁶⁶ While it was clear on the facts of the case that Pinder most likely would not have returned to work and left her children unprotected had the officer not persuaded her that Pittman would be held in custody overnight, the court refused to recognize that the officer had an affirmative duty to protect the plaintiff even to "an extent necessary to dispel the false sense of security that his actions created."⁶⁷

Likewise, in *Salas v. Carpenter*,⁶⁸ the Fifth Circuit rejected a substantive due process claim brought by a woman who had complained to the police and the district attorney that her estranged husband was harassing her and molesting her two daughters. In fear of harm, the woman sought refuge with a friend and did not go to work for an entire week. The woman was a clerk at the county courthouse. A judge at the court advised her that she should return to work. On the very day that she returned to work on the advice of the judge, she was taken hostage and killed by her former husband. The Fifth Circuit refused to apply the state-created danger exception despite the fact that the woman in all likelihood would not have been killed in the absence of the state's recommendation to return to work. *Pinder* and *Salas* signal that a battered woman's detrimental reliance on the state's assurances will not usually provide a basis for a due process claim.⁶⁹

DELIBERATE INDIFFERENCE TO A NEED FOR OFFICER TRAINING

One additional theory of liability may have survived *DeShaney's* blow to substantive due process claims brought by victims of domestic violence. In *City of Canton v. Harris*,⁷⁰ a case decided in the same term as *DeShaney*, the Supreme Court held that local government agencies and supervisory officials may be liable under Section 1983 for failing to adequately train its police officers.

In this case, a woman who had been arrested by police collapsed and became incoherent while in police custody. Officers asked the woman if she needed medical attention, but she was too incoherent to respond. The officers left the woman on the floor and never summoned medical assistance for her. The woman was later released from custody, at which time her family took her to a nearby hospital where she was treated for several emotional ailments. Plaintiffs in that case claimed that the city was constitutionally liable for failing to adequately train its police officers to recognize when detainees required medical assistance.

In an opinion issued a week after *DeShaney*, the Supreme Court held that the city could be liable for failing to adequately train its employees if “the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”⁷¹ The Court noted that local government entities and agencies are subject to Section 1983 liability if a municipal policy directly caused the violation of a person’s constitutional rights.⁷² Accordingly, the Court concluded that, for purposes of Section 1983 liability, “deliberate indifference” may be established if specific duties assigned to officers made it obvious to local officials that failing to provide these officers with a certain level of training would result in the violation of constitutional rights.⁷³

The “deliberate indifference” exception was also applied by the Third Circuit in *Stoneking v. Bradford Area School District*.⁷⁴ In this case, a high school band director sexually harassed and victimized the plaintiff over a period of several years, despite repeated complaints to high school officials.⁷⁵ Considering the case prior to *DeShaney*, the Third Circuit initially held that a “special relationship” triggered school officials’ affirmative duty to protect the plaintiff.⁷⁶ When the Supreme Court remanded the case back to the Third Circuit for consideration of Stoneking’s due process claim in light of *DeShaney*, the appellate court concluded that the due process claim remained viable because Stoneking had alleged a theory of liability independent of the “special relationship” doctrine.⁷⁷

A party may succeed on a substantive due process claim if municipal and/or law enforcement officials were deliberately indifferent to a need for officer training.

Specifically, *Stoneking* alleged that the school district and its supervisory officials had a policy of acting with deliberately indifference toward “known or suspected sexual abuse of students by teachers,” including discouraging and concealing students’ complaints about such abuse.⁷⁸ The Third Circuit determined that evidence of “deliberate indifference” on the part of local government agencies and officials supports an independent basis for liability under Section 1983 that is unrelated to the issues decided in *DeShaney*.⁷⁹

While the “deliberate indifference” standard sets a high bar for plaintiffs, *Stoneking* and *Canton* create an opportunity for domestic violence victims to bring due process claims against local police without running into *DeShaney*. A party could allege that a city’s failure to provide specialized training to officers who regularly respond to domestic violence constitutes deliberate indifference to victims’ needs. Alternatively, a party could allege that a city maintains a policy of providing inadequate police protection for domestic violence victims, with deliberate indifference to the impact of that policy on women.⁸⁰

PROCEDURAL DUE PROCESS CLAIMS

In order to establish a procedural due process claim, a party would have to show that (1) the party has a “legitimate claim of entitlement” (i.e., property interest) in a certain government benefit under state law and (2) the state deprived the party of that benefit without meeting certain due process requirements.⁸¹ In order to confer an actual property entitlement on an individual, the state law must be truly mandatory in nature in that government employees are strictly required to comply with the law and cannot exercise their discretion otherwise.⁸²

Although *DeShaney* did not foreclose the possibility of bringing a procedural due process claim based on a battered woman’s property entitlement to police protection from abuse,⁸³ the United States Supreme Court recently issued another

disheartening decision rejecting such a claim involving law enforcement's failure to enforce a domestic violence restraining order.

In *Town of Castle Rock v. Gonzales*, Jessica Gonzales obtained a restraining order against her estranged husband, Simon Gonzales, in Colorado. Colorado law mandated that police "shall" use every reasonable means to enforce restraining orders and "shall" arrest restrained persons in violation of an order.⁸⁴ Simon took their three children while they were playing outside the family home in violation of the restraining order. Jessica called the police and asked them to enforce the restraining order, but the police refused to do so. Jessica called the police later that day to inform them that Simon was at a local amusement park with the children and asked that they put out an "all points bulletin" for him and send an officer to the amusement park. Once again, the police refused to do anything. Jessica called the police two more times that same night, but the police still would not assist her or take a report. Finally, she went down to the police station and submitted an incident report, but the officer went to dinner instead of trying to locate Simon and the children. A few hours later, Simon arrived at the police station and opened fire, at which point he was shot and killed by police. Police found the dead bodies of Jessica's three children in Simon's car, all of who had been murdered by Simon earlier that evening.

The Tenth Circuit held that the Colorado statute requiring police to enforce restraining orders created an entitlement to receive protective services in accordance with the terms of the statute – an entitlement that carries due process protection against state deprivation.⁸⁵ However, the Supreme Court reversed the Tenth Circuit decision, holding that state law did not create a legitimate claim of entitlement to police enforcement of a restraining order. The Court found that, although the Colorado statute was mandatory in nature, its mandate was not absolute as police still maintained some level of discretion in deciding whether, and what steps to take, to enforce a restraining order given the particular circumstances of each case (e.g., whether the perpetrator is present at the scene of the incident) and the other obligations that the police have at that moment.⁸⁶

The United States Supreme Court's decision in *Town of Castle Rock v. Gonzales* forecloses the possibility of bringing a procedural due process claim under the Federal Constitution involving law enforcement's failure to enforce a domestic violence restraining order.

Moreover, the Court noted that, even if police enforcement of restraining orders was truly “mandatory” under state law, it did not necessarily follow that this mandate conferred an entitlement on Jessica Gonzales, personally.⁸⁷ The Court explained that legislative mandates concerning criminal justice agencies and officers are typically intended to benefit the general public, as opposed to private interests, and nothing in the Colorado statute indicated an intention to create a personal entitlement for people protected by a restraining order.⁸⁸ Finally, the Court found that, because the right to police enforcement of a restraining order did not resemble “property” in the traditional sense in that it did not “have some ascertainable monetary value,” such a right did not constitute a “property” interest for purposes of the Due Process Clause.⁸⁹

The Supreme Court declared that its *Castle Rock* and *DeShaney* decisions, taken together, stand for the general proposition that neither procedural nor substantive due process is triggered by the fact that a party was injured as a result of a crime that may have been prevented by an arrest.⁹⁰ Instead, the Supreme Court left it to individual states to provide tort remedies for persons injured as a result of inadequate law enforcement responses to crime.⁹¹ Accordingly, the *DeShaney* and *Castle Rock* decisions send a clear message that battered women and their advocates should not look to the federal courts for relief unless their case falls into one of the exceptions to *DeShaney* described above.

EQUAL PROTECTION CLAIMS

Equal protection claims remain a viable remedy for victims of domestic violence who have been injured as a result of discriminatory policies or resource allocations by law enforcement. While *DeShaney* and *Castle Rock* pose serious obstacles for bringing due process claims, they did not foreclose the use of an equal protection claim to hold unresponsive police departments liable for failing to protect someone from private violence. In fact, the *DeShaney* Court explicitly stated that equal protection challenges to state inaction would survive

the Court's decision, observing that "[t]he state may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. . . . But no such argument has been made here."⁹²

There are generally two different types of equal protection claims that may be asserted by parties who have been injured when law enforcement responds to domestic violence in a discriminatory manner: gender discrimination or "crime-type" discrimination.⁹³

Proving Gender Discrimination by Law Enforcement

When a law enforcement policy or practice explicitly discriminates against women on its face, heightened or "intermediate" scrutiny is automatically applied by federal courts, and the policy or custom will only survive an equal protection challenge if it is substantially related to an important government interest. However, where the policy or practice at issue is facially gender-neutral – which is the case with most equal protection claims – plaintiffs must prove that the police department acted with discriminatory intent or purpose in order to invoke heightened "intermediate" scrutiny.

Specifically, plaintiffs can prevail on a gender discrimination claim involving seemingly "gender-neutral" policies and practices if they show that: (1) defendants had a policy or custom of providing less protection to victims of domestic violence than victims of other violent crimes; (2) discrimination against women was the motivating factor for the defendants' policy or custom; and (3) plaintiffs were injured as a result of the operation of this policy or custom.⁹⁴

With regard to the first element, the policy challenged by plaintiffs does not have to be a formal written policy in order to be actionable. Rather, a widespread discriminatory practice or well-settled discriminatory custom is sufficient to trigger an equal protection claim.⁹⁵ With regard to the second

Equal protection claims under the Federal Constitution remain a viable remedy for domestic violence victims who have been injured as a result of discriminatory practices or resource allocations by law enforcement.

A party may succeed on an equal protection claim under the Federal Constitution if law enforcement's failure to adequately respond to domestic violence constitutes intentional gender discrimination.

element, plaintiffs must show that the policy at issue has a disproportionate impact on women and that this disproportionate impact can be traced to a discriminatory purpose.⁹⁶ The United States Supreme Court has explained that "discriminatory purpose" involves situations where a policy maker or decision maker "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."⁹⁷ The following discussion details some of the ways in which successful equal protection claimants have demonstrated that police acted with the requisite discriminatory purpose.

Chronic Failure to Respond to Domestic Violence Complaints

In one of the most well-known domestic violence equal protection cases, *Thurman v. City of Torrington*,⁹⁸ months of apathetic police response to a victim's repeated complaints of domestic violence constituted evidence of gender discrimination. Over a period of eight months, Tracey Thurman made numerous reports to the Torrington Police Department that her estranged husband was beating her, stalking her, and threatening to kill her. The Department continuously ignored Tracy's complaints and refused to arrest her batterer. One night she called for help, but the officer on call was slow to respond to the complaint, arriving after her husband had stabbed her more than 12 times. Once present, the officer passively watched as Tracy's husband jumped on her and broke her neck. Tracy survived the attack and filed an equal protection action against the city and its officers.⁹⁹

A Connecticut district court denied the Department's motion to dismiss, finding that its dismissive treatment of Tracy's longstanding complaints illustrated that Torrington police had a "pattern or practice of affording inadequate protection, or no protection at all, to women who complain of having been abused by their husbands or others with whom they have had close relations . . ."¹⁰⁰ Applying intermediate scrutiny, the court held that, in order to justify this

discriminatory policy, the Department must “articulate an important government interest . . . to discriminate against women who are victims of domestic violence.”¹⁰¹ The court continued, “[a]ny notion that defendants’ practice can be justified as a means of promoting domestic harmony by refraining from interference in marital disputes, has no place in the case at hand.”¹⁰² Since the police could not produce any legitimate justification for their disparate treatment of battered women, Tracy Thurman won the case.¹⁰³

In *Macias v. Ihde*,¹⁰⁴ the Ninth Circuit sustained a gender discrimination claim alleging that the county and sheriff’s department deprived a domestic violence victim of equal protection by failing to arrest the victim’s husband and murderer despite numerous complaints to the police. For over one year, the police had been unresponsive to the victim’s reports of domestic violence by her husband, had omitted key pieces of information from their reports which could have resulted in stricter criminal actions taken against him, and had not abided by the procedures mandated by state law and departmental policies for dealing with domestic violence-related calls for assistance and enforcing domestic violence restraining orders.

In sustaining the claim, the Ninth Circuit noted that the constitutional “deprivation” suffered by the victim was not the deprivation of her life as a result of being murdered by her abuser, but the deprivation of her right to “have police services administered in a nondiscriminatory manner – a right that is violated when a state actor denies such protection to disfavored persons.”¹⁰⁵ Following the Ninth Circuit’s decision allowing plaintiffs to go forward with their equal protection claim, defendants agreed to settle the case for \$1 million.^{106, 107}

Delayed Response to 911 Calls from Domestic
Violence
Victims

Plaintiffs can also establish gender discrimination based on police officers’

delayed response to domestic violence victims' 911 calls. For example, in *Didzerekis v. Stewart*,¹⁰⁸ police received an emergency call from a woman who frantically telephoned 911 to report that she was being attacked by her husband. The police were aware that the husband had been abusive toward his wife in the past and had a history of mental illness. Moreover, the husband was recently released on bond after having tried to kill the woman on a prior occasion. Nevertheless, when the officers arrived at the scene, they waited 40 minutes outside of the home before trying to make a forced entry into the residence.¹⁰⁹ Upon entering the woman's home, police found that she had already been stabbed to death.

The woman's estate filed a Section 1983 action alleging, in part, that the officers' conduct was governed by city policy. Although the estate did not specifically allege an equal protection claim, the Illinois district court denied the city's motion to dismiss the action, finding that the alleged facts of the case, combined with the allegation that the officers' conduct was based on city policy, were sufficient to state an equal protection claim against the city and its police officers. The court noted that the estate should have an opportunity to conduct discovery to prove that the city actually maintained a policy and practice of providing less protection to domestic violence victims than other victims of violence and that discrimination against women was a motivating factor in this discrimination.¹¹⁰

Failure to Enforce State Statutes Designed to Protect Victims of Domestic Violence

Gender discrimination can also be inferred where police fail to enforce specific statutory provisions governing police responses to domestic violence due to an overall discriminatory proclivity among police to provide less protection to female victims of domestic violence than other victims of violent crime.

For example, in *McDonald v. City of Chicago*,¹¹¹ six battered women filed a class action alleging that the Chicago police had engaged in a pattern and practice of not enforcing the Illinois Domestic Violence Act by routinely failing to record victims' statements of assault accurately, ignoring previous assaults by repeat abusers, refusing to arrest offenders, ignoring requests for transportation to shelters, and neglecting to advise victims about the preservation of evidence. Plaintiffs further alleged that the failure to enforce these provisions stemmed from a general custom and practice among police to "treat domestic violence abuse reports from women with less priority than other crimes not involving women reporting domestic violence abuse." The Illinois district court held that these allegations were sufficient to assert an equal protection claim based on gender discrimination.¹¹²

Police Animus Toward Domestic Violence Victims

While it is difficult to provide direct evidence of gender discrimination by law enforcement, discriminatory intent may be inferred when officers engage in overtly rude and insensitive conduct toward victims of domestic violence. For example, federal courts have found evidence of gender-based animus where police indicate support for the aggressive spouse, pressure the victim either not to press criminal charges or to drop pending charges, or protect an abusive partner from mandated legal action.¹¹³

For example, in *Balistreri v. Pacifica Police Department*,¹¹⁴ officers refused to make an arrest and provide medical assistance to Jena Balistreri after she had been seriously assaulted by her husband. The Ninth Circuit concluded from the evidence that the police were "rude, insulting, and unsympathetic" to Jena.¹¹⁵ One officer said that "he did not blame [Jena's] husband for hitting her because of the way she was carrying on," and another "pressured" Jena not to

press charges.¹¹⁶ Moreover, months later, after Jena's then ex-husband violated a restraining order that she obtained against him, police ridiculed and ignored Jena's cries for help and denied knowledge of her restraining order. Although a California district court granted the police department's motion to dismiss the equal protection claim, the Ninth Circuit reversed this decision and allowed Jena to proceed on her claim. In so holding, the court noted that the allegations of police animus toward Jena, "strongly suggest an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women."¹¹⁷

Proving "Crime Type" Discrimination by Law Enforcement

Where plaintiffs cannot establish that law enforcement's failure to respond adequately to domestic violence constitutes intentional gender discrimination, they still may be able to prove that a departmental policy or custom discriminates against domestic violence victims as a class.

Because "domestic violence victims" are not a class of people who are explicitly afforded constitutional protection from discrimination under the Federal Constitution, a more relaxed standard of review applies to "crime type" discrimination claims. In order to prevail, plaintiffs must show that law enforcement officials treat domestic violence cases less seriously than other violent assaults, and there is no rational relationship between the differential treatment and a legitimate government interest. Plaintiffs do not need to demonstrate an intent to discriminate against women, but rather, that law enforcement generally provides inferior police protection to victims of domestic abuse, or treats perpetrators of domestic violence less harshly than perpetrators of non-domestic assault.

Since there is a lower standard for plaintiffs to meet in "crime type" discrimination cases, law enforcement is given more leeway in justifying their discriminatory practices. Whereas in gender discrimination cases law

enforcement must show that an “important governmental interest” supports disparate treatment, in “crime type” discrimination cases police need only articulate a “legitimate reason” for policies or practices that differentiate between domestic violence and other crimes.

Notwithstanding the application of minimal scrutiny, some courts have ruled in plaintiffs’ favor because police were unable to justify their discriminatory conduct even under the lowest standard of scrutiny.¹¹⁸ For example, in *Fajardo v. County of Los Angeles*,¹¹⁹ the Ninth Circuit sustained plaintiff’s equal protection claim because the sheriff department’s justification for distinguishing between domestic violence calls and non-domestic violence calls – namely, that domestic violence “rarely” results in death or severe injury¹²⁰ – would not be deemed to be “legitimate” if plaintiffs could prove that law enforcement dispatches officers to prevent crimes that pose an equal or lesser risk of death or severe injury than domestic violence.¹²¹

Proving “crime type” discrimination can be challenging because parties may not only have to show how law enforcement generally responds to domestic violence crimes, they may have to demonstrate how law enforcement responds to other similar types of crimes as well. The following types of cases have been successful in substantiating claims of “crime type” discrimination.

Statistical Evidence of Discrimination

Statistical evidence of law enforcement’s disparate treatment of domestic violence complaints, when presented in conjunction with other evidence of “crime type” discrimination, may be sufficient to establish police liability.¹²² In *Watson v. City of Kansas City*, the Tenth Circuit held that statistical evidence that the Kansas City Police Department arrested known domestic violence offenders at a rate of nearly half that of non-domestic assault offenders (16 percent and 31 percent, respectively), combined with evidence that Department

A party may prevail on an equal protection claim under the Federal Constitution if law enforcement’s failure to adequately respond to domestic violence constitutes unlawful discrimination against domestic violence victims as a class.

training programs encouraged officers to “use arrest as a last resort” in domestic violence cases, was sufficient to demonstrate that the Department had a policy or custom of affording victims of domestic violence less protection than other assault victims.¹²³

Failure to Arrest When Abuse Occurs Outside an Officer’s Presence

Equal protection claims have also been established where it is shown that police have a policy of not arresting perpetrators of domestic assaults unless the assault was committed in an officer’s presence. For example, in *Cellini v. City of Sterling Heights*,¹²⁴ a federal court in Michigan found that police had a policy of never making an arrest for a domestic violence assault unless an officer actually witnessed the assault.¹²⁵ Applying minimal scrutiny (i.e., was the policy was rationally related to a legitimate government interest), the court found that because the police could not identify any state interest served by their discriminatory policy, an equal protection violation had been established. The court noted that “[s]uch an unexplained discrepancy in the treatment of victims of domestic assault could legitimately give rise to an inference that the police department acted with discriminatory motive in employing its domestic assault policy.”¹²⁶

Failure to Dispatch Police Officers to Emergency Domestic Violence Calls for Assistance

“Crime type” discrimination may also be shown if police customarily dispatch officers to 911 crime-in-progress calls not related to domestic violence, but do not dispatch officers to in-progress domestic violence 911 calls. For example, in *Navarro v. Block*,¹²⁷ plaintiffs alleged that the Sheriff’s Department had a policy of not treating domestic violence 911 calls as “emergency” calls. Although the Ninth Circuit found that the evidence was not sufficient to establish

an equal protection claim based on gender discrimination, the evidence did support a claim of crime-type discrimination, and plaintiffs could prove that the Department's policy was not rationally related to a legitimate government interest.¹²⁸

Likewise, in *Stevens v. Trumbull County Sheriff's Department*,¹²⁹ a police supervisor ignored the 911 call of a woman who reported that her former boyfriend was stalking and harassing her. When the officer finally made it to the scene – after repeated pleading and much delay – the woman had already been shot three times by her ex-boyfriend. An Ohio district court sustained the victim's equal protection claim, allowing her to conduct further discovery on whether the Department had a policy of treating domestic violence crimes less seriously than other violent crimes.¹³⁰

Failure to Remove Domestic Abusers from Victims' Homes

Finally, police will be liable for violating the Equal Protection Clause if they expose a domestic violence victim to further violence by failing to remove the abuser from the victim's home where there is probable cause to do so. In *Smith v. City of Elyria*,¹³¹ the police refused to remove Karen Guerrant's ex-husband from her home, telling Karen that the dispute was "a civil matter, not a police matter."¹³² The police were called a second time the same night by Karen's nine-year-old daughter, who told the dispatcher that "my daddy's beating up my mom." The dispatcher informed Karen's sister, who took the phone, that "this is a civil matter," since Karen had initially let her ex-husband into the house.¹³³ When police finally responded to a third 911 call – seventeen minutes after the call was placed – Karen had been killed and her daughter's ear had been partially severed.

An Ohio district court sustained plaintiffs' claim that police treated

The California Constitution provides a significant, but often overlooked, remedy for discriminatory law enforcement responses to domestic violence.

domestic violence differently than non-domestic disputes based on evidence that “a stranger would have been removed” under similar circumstances, and that the police policy manual directed officers to “avoid, if possible, resorting to arrest as the solution to a family dispute.”¹³⁴

Proving Gender Discrimination Under the California Constitution

The California Constitution also provides a significant, but often overlooked, remedy for discriminatory law enforcement responses to domestic violence. The Equal Protection Clause of the California Constitution¹³⁵ is applied in the same manner as the federal Equal Protection Clause, with one important exception – the state constitution provides greater protection than the federal constitution for equal protection claims involving gender discrimination.¹³⁶ The California Supreme Court has held that discrimination based on gender violates the equal protection clause of the California Constitution and triggers the highest level of scrutiny.¹³⁷ Indeed, in order to survive a valid state equal protection claim, a state actor must prove that the challenged gender distinction is “necessary” to achieve a “compelling” state interest.¹³⁸ State and local agencies, therefore, would have a harder time justifying policies and practices that discriminate against domestic violence victims on the basis of their gender.

Despite the potential advantage of bringing a state equal protection claim, such claims have not been widely asserted in the domestic violence context, and there are currently no state appellate or supreme court decisions that specifically address law enforcement’s liability under the California Constitution’s equal protection clause for gender discrimination against victims of domestic violence.

STATE TORT REMEDIES

Domestic violence victims and their representatives can attempt to remedy problems of inadequate police protection by bringing tort lawsuits in state court. In fact, the United States Supreme Court recognized in *DeShaney* that, although a state actor's conduct does not rise to the level of establishing a Section 1983 claim, such conduct may nevertheless give rise to liability under state tort law.¹³⁹

California tort law shares many of the same principles as federal constitutional law when it comes to determining law enforcement liability for failing to properly respond to domestic violence incidents. For example, California courts will only impose liability if a "special relationship" existed between law enforcement and a domestic violence victim that gave rise to an affirmative duty to protect the victim from harm. As with federal precedent, state court decisions have required that law enforcement's conduct actually make a victim more vulnerable to the injury she ultimately suffered in order to establish a "special relationship." Moreover, state law has various immunity provisions that insulate government actors, such as law enforcement, from liability for certain civil damages claims.

However, there are some very important distinctions between state tort law and federal constitutional law that may make state tort remedies a more viable option for battered women and their representatives. First, unlike federal constitutional claims, negligent acts and omissions are sufficient to constitute a breach of an affirmative duty of protection by law enforcement under state tort law. Second, parties can bring claims against law enforcement agencies and officers for specific types of negligence. For example, a law enforcement agency may be liable for negligently hiring or negligently supervising derelict officers. Law enforcement officers may be liable under the doctrine of "negligence per se" when they fail to discharge a mandatory duty under state law. Finally,

Law enforcement conduct that does not rise to the level of establishing a Section 1983 claim may still give rise to liability under state tort law.

Law enforcement officers do not have any greater legal duty than the average citizen to protect, or come to the aid of, persons who are in danger.

although state law grants broad immunity to law enforcement from tort liability, it creates limited exceptions to this immunity that may be asserted to expose law enforcement to liability in the domestic violence context.

General Negligence of Law Enforcement Agencies and Officers

Under California law, law enforcement generally cannot be held civilly liable for failing to protect individuals from crimes or violence committed by others.¹⁴⁰ In fact, the California Supreme Court has held that law enforcement officers, like ordinary citizens, do not have a legal duty to protect, or come to the aid of, another person, even if that person is in grave danger.¹⁴¹ As long as the officer was not personally responsible for creating the dangerous situation, the officer's status as a law enforcement officer does not confer any greater duty than the average citizen to take action to help someone in distress.

However, the California Supreme Court has recognized that, under certain circumstances, a "special relationship" may be created between law enforcement and an individual that gives rise to an affirmative duty on the part of law enforcement to protect that person from harm.¹⁴² This "special relationship" is created when law enforcement voluntarily takes affirmative action to protect a particular individual, causing that person to rely on a false sense of security created by the officer's conduct that they would receive a certain level of police protection.¹⁴³ Once this type "special relationship" exists, the officer has a duty to exercise due care toward that person. The officer is in breach of that duty if he/she negligently provides, or fails to provide, protection to that person, causing them to be placed in danger or to suffer an increased risk of harm.¹⁴⁴

California courts have never found a "special relationship" to exist between a domestic violence victim and law enforcement, resulting in an affirmative duty to provide police protection from domestic violence. In one

of the first lawsuits brought against a police department for failing to protect a battered woman, *Hartzler v. City of San Jose*, the California Court of Appeal refused to find that the police had a “special relationship” with Ruth Bunnell despite the fact that she had called the San Jose Police Department at least 20 times over a two-year period to report violent assaults committed against her and her two daughters by her estranged husband, Mack Bunnell.¹⁴⁵ On September 4, 1972, Ruth called the police for the final time, begging for help. She informed them that Mack had just warned her over the phone that he was on his way to her house to kill her. Instead of taking immediate action, officers told Ruth to call back if and when Mack arrived. Forty-five minutes later, when the police arrived at Ruth’s house in response to a neighbor’s call, Mack had already stabbed Ruth to death.

A state trial court dismissed a wrongful death action brought by the administrator of Ruth’s estate against the City of San Jose. The California Court of Appeal affirmed the trial court’s dismissal of the action, reasoning that, absent evidence that the police actually induced Ruth to rely on an express or implied promise by them to provide her with police protection, no “special relationship” existed between Ruth and the department that would give rise to an affirmative duty of protection.¹⁴⁶

In keeping with the *Hartzler* decision, in *Benavidez v. San Jose Police Department*, the California Court of Appeal again refused to recognize the existence of a “special relationship” between law enforcement and a domestic violence victim who repeatedly sought the assistance of police concerning violence and threats by her abusive ex-boyfriend. In August 1993, Adela Benavidez contacted the San Jose Police Department after her live-in boyfriend, Richard Cortez, had beaten her. A few months later, in December 1993, there was another incident in which Richard beat Adela, threw her down some stairs and took her car. Although Adela did not call the police after this incident, she had her son call 911 the next morning when Richard returned to the home and attacked her again. Two officers responded to the 911 call. Upon arriving

at the scene, one of the officers told Adela, “Don’t worry, we’re here!” After obtaining a description of Richard, both officers left the scene, with one officer traveling to Richard’s mother’s house to look for him. Before the officers left, Adela asked them what she should do if Richard returned, and they told her to call 911.

Richard returned to the home within minutes after the officers left the scene and Adela called 911. While she was on the phone with the 911 operator, Richard broke a window and tried to enter the home. Adela ran to the window to try to stop Richard from coming in. Richard reached in, grabbed her, pulled a shard of glass from the broken window, and stabbed Adela in the head and neck. Officers arrived the scene and were able to subdue Richard and take him into custody.

The state trial court dismissed Adela’s claims that the police department had been negligent in failing to protect her and her son from the attack. The California Court of Appeal affirmed the trial court’s decision, holding that there was insufficient evidence that the officers’ conduct increased or changed Adela’s risk of harm, creating a “special relationship” between Adela and the officers.

Similarly, in *Zelig v. County of Los Angeles*,¹⁴⁷ the California Supreme Court found no evidence that law enforcement officers or court security personnel did anything to create peril or increase the risk of danger for a woman who was shot to death in the county courthouse by her ex-husband. On the day of the murder, Eileen Zelig and her husband, Harry Zelig, were at the courthouse to attend a family court hearing relating to spousal and child support issues. On at least three occasions prior to the murder, Eileen had informed the bailiff of the family court that she believed Harry would try to attack her or kill her at the courthouse. She also provided the bailiff and the family court judge with letters and phone messages evidencing Harry’s threats on her life. Moreover, Harry was subject to a restraining order obtained by Eileen prohibiting him from owning or possessing any firearms. Other than searching Harry for weapons

on at least one occasion, no action was taken by court personnel to protect Eileen.

The California Supreme Court affirmed the trial court and appellate court decisions dismissing claims brought by Eileen's children against the County for the negligence of its employees.¹⁴⁸ The Court reasoned that the bailiff's attempts to provide protection to Eileen on at least one occasion (i.e., searching Harry for weapons) did not give rise to a continuing "special relationship" with Eileen and, absent evidence that officers voluntarily assumed a duty to protect her on the day she was murdered, and then failed to do so, the county was not liable for her children's negligence claims.

Negligent Hiring, Retention and Supervision

A party may bring a state tort lawsuit against a public entity employer or public supervisory employee based on their negligent hiring, retention and/or supervision of a public employee who has tortiously injured another.¹⁴⁹ Since these claims attribute negligent conduct to public agencies and employees, a party would still have to demonstrate that a "special relationship" existed between the public employer/supervisory employee and the injured person that gave rise to an affirmative duty to protect that person from harm.¹⁵⁰ If this duty can be established, the public employer/supervisory employee is in breach of the duty if they knew or should have known that the employee posed a foreseeable risk of harm to the injured party, but failed to take measures (i.e., refusing to hire, investigate, discipline or discharge) to protect the party against the harm.¹⁵¹

These negligence theories may be used to hold law enforcement accountable for failing to take adequate measures to protect a domestic violence victim in cases where the victim's abuser is a law enforcement officer. In *Mendoza v. City of Los Angeles*,¹⁵² for example, although the California Court

A party may succeed on a state tort claim based on law enforcement's negligence in hiring, retaining and/or supervising an officer who failed to adequately respond to domestic violence or who perpetrated domestic violence against an intimate partner.

of Appeal did not hold the city liable for negligent hiring and supervision when a city police officer murdered his girlfriend, the court indicated that there may be situations in which it would be proper to impose such liability against a city or law enforcement agency.

In *Mendoza*, an off-duty officer, Edward Mendoza, shot and killed his fiancé, Clementina Maglinti, during an argument over the fact that Edward had returned home late and drunk. Edward shot Clementina with a gun that he personally owned and had purchased when he was a cadet in the police academy. Although Edward had no prior history of violence toward Clementina, he had a long history of alcohol abuse. In fact, when Edward applied for employment with the city's police department, his psychological evaluation indicated a potential alcohol problem. Clementina's children brought a wrongful death suit against the city alleging that it was negligent in hiring and supervising Edward.

In rejecting the wrongful death claim, the Court of Appeal distinguished the case from other cases in which state courts have imposed liability against a police department for an officer's violence toward members of the general public.¹⁵³ The court noted that, in these cases, the officer was required to carry his service revolver at all times and the officer's service revolver was the weapon used to inflict the violence.¹⁵⁴ In particular, the court cited a case decided under New York state law in which an off-duty officer shot his wife and then killed himself with his service revolver which he was required to carry at all times.¹⁵⁵ The officer had also displayed past signs of mental and emotional problems during his employment.¹⁵⁶

The Court of Appeal noted that, unlike the above cases, Edward was not required to be armed at all times and did not use his service revolver to kill Clementina. The court found that, when combined with the fact that Edward was off-duty and outside of his department's jurisdiction when the murder occurred, there was an insufficient connection between Edward's crime and his employment

as a police officer.¹⁵⁷ Moreover, the court found that the city's conduct did not cause Clementina's death.¹⁵⁸ The court reasoned that, although Edward exhibited signs of alcohol abuse, these signs were insufficient to demonstrate that the city should have foreseen that Edward would shoot his girlfriend in a drunken rage, particularly in light of his otherwise unblemished record. The court further reasoned that neither refusing to hire Edward nor properly supervising him in his official duties would have prevented him from accessing the murder weapon and killing Clementina.

While the court in *Mendoza* at least recognized the potential for liability, there are presently no California appellate or supreme court cases that hold a city or law enforcement agency directly liable for injuries to, or the death of, a domestic violence victim resulting from the negligent hiring, supervision or retention of an officer who was the perpetrator of domestic violence. Based on the court's reasoning in *Mendoza*, however, it seems that liability for negligent hiring, retention and/or supervision is likely to be imposed in cases involving the following facts: the officer-perpetrator was required to be armed at all times; the officer used a service weapon and/or specialized training to injure or kill his intimate partner; the officer displayed signs of emotional problems or violent conduct either prior to, or at the time of, hire or during employment; the officer was on duty or in uniform at the time he committed the crime, or had abused, harassed and/or stalked the victim in the past while on duty or in uniform; and the officer's supervisors or co-workers engaged in intentional and/or negligent conduct that increased the victim's risk of danger.

Violation of Mandatory Duty Under State Law

Public entities and public employees may be liable for "negligence per se" for injuries resulting from their failure to discharge a duty that is mandated by state law.¹⁵⁹ In order to establish liability, a party must show that (1) a legislative enactment¹⁶⁰ imposes a mandatory, as opposed to discretionary, duty on

A party may succeed on a state tort claim based on law enforcement's failure to discharge a duty that is mandated by state law.

the public entity/public employee, (2) the enactment was intended to protect against the type of injury suffered by the party, and (3) the public entity/public employee's breach of their mandatory duty was the proximate cause¹⁶¹ of the injury suffered by the party.¹⁶² If these three elements can be established, the public entity/public employee can still avoid liability by demonstrating that they exercised reasonable diligence in discharging their mandatory duty.¹⁶³

It is extremely difficult to establish a claim of "negligence per se" against a law enforcement agency or officer. First, it may be difficult to prove that a law enforcement agency and/or officer had a mandatory duty to take a particular course of action in response to criminal activity. While state law grants law enforcement specific powers to prevent and address crime, an officer's decision about when and how to exercise these powers is largely discretionary, and there are very few laws that actually require officers to take specific actions to address a situation. Second, even if you can establish a mandatory duty, state law grants broad immunity to law enforcement for claims involving a failure to provide police protection, enforce laws, or make arrests.¹⁶⁴ Accordingly, state courts have not held law enforcement liable for negligence per se in most cases.¹⁶⁵

In *Alejo v. City of Alhambra*,¹⁶⁶ however, the California Court of Appeal held that a claim for negligence per se may be properly asserted against a city and its police officers for failing to discharge a mandatory duty to investigate and report reasonable suspicions of child abuse pursuant to California's Child Abuse and Neglect Reporting Act (the "Act").¹⁶⁷ In this case, police officers failed to investigate and report suspected physical abuse against a child who subsequently suffered more severe abuse resulting in a permanent disability.

The Act states, in relevant part, that any "employee of a child protective agency . . . who has knowledge of or observes a child, in his or her professional capacity, or within the scope of his or her employment, whom he or she reasonably suspects has been the victim of child abuse, shall report the . . . abuse to a child protective agency . . . and shall prepare and send a written report

thereof within 36 hours of receiving the information concerning the incident.”¹⁶⁸ The court held that this language creates both a mandatory duty to investigate, and a mandatory duty to report, known or reasonably suspected child abuse on the part of law enforcement.¹⁶⁹ In so holding, the court noted that the Act established “an elaborate system for reporting and cross-reporting” child abuse, the success of which depended on all professionals subject to the Act to comply with its provisions.¹⁷⁰ The court noted that police, in particular, were uniquely positioned to discover cases of child abuse due to their specialized training and role in the community.¹⁷¹

With regard to the remaining two elements of the negligence per se claim, the court found that, since the purpose of the Act is to protect children from abuse, the Act was intended to protect against the very type of harm inflicted upon the child in the case.¹⁷² In addition, the court found that the plaintiff should be allowed to prove that the officers’ failure to take action was the “proximate cause” of the child’s injuries. The city could not negate this element of the claim simply by arguing that, as a matter of law, the fact that the child abuser’s criminal conduct was the immediate cause of the child’s injuries made the connection between the officers’ conduct and the injuries too tenuous and speculative.¹⁷³ Since child abuse most often involves repeated and ongoing abusive conduct that only increases in severity without proper intervention, the court held that the plaintiff could prove “proximate cause” by presenting evidence that the officers should have reasonably foreseen that the child’s caretakers were likely to resume their physical abuse and inflict further injuries upon the child if the child remained in their custody.¹⁷⁴

The holding in *Alejo* supports a claim of negligence per se against law enforcement for failing to investigate known or reasonably suspected incidents of teen dating violence that fall within the purview of the Child Abuse Neglect and Reporting Act. Indeed, the Act’s definition of “child abuse” is not limited to abuse inflicted by parents and caretakers of children. Rather, it includes all physical injuries “inflicted by other than accidental means upon a child by another

Law enforcement may be liable under state tort law for failing to investigate and report cases of teen dating violence as mandated by state law.

person,” including in sexual abuse (i.e., rape, sexual assault, sodomy, etc.).¹⁷⁵ Moreover, teen dating violence, like child abuse, involves repeated abusive conduct that is likely to grow in severity over time. Thus, law enforcement may be held liable for failing to investigate and report known or suspected cases of teen dating violence, as mandated under the Act.

Alejo may provide some support for holding law enforcement accountable for responding to domestic violence against adult intimate partners. For example, state law provides that, when an officer has probable cause to believe that a domestic violence restraining order has been violated, that officer “shall . . . make a lawful arrest of the person [who violated the order] without a warrant and take that person into custody whether or not the violation occurred in the presence of the arresting officer.”¹⁷⁶ An argument can be made, therefore, that state law imposes a mandatory duty on law enforcement to arrest someone who has violated a domestic violence restraining order, and that they can be held liable if their failure to do so results in serious injury or death to the person protected by the order.

The California Supreme Court has held, however, that the mere use of the word “shall” in a statute does not automatically mean that the legislature intended to impose a mandatory duty on government agencies or employees to engage in specified conduct.¹⁷⁷ The analysis of whether a mandatory duty truly exists is a question of law to be determined by a court through the examination of more than just the statutory language, but also the body of law of which that particular statute is a part, as well as relevant principles, precedents and legislative intent.¹⁷⁸

In the case of mandatory arrest for restraining order violations, the law mandating arrest was enacted pursuant to omnibus domestic violence legislation designed to “improve the effectiveness of domestic violence protective orders (DVPO) and provide greater security and protection for victims of domestic

violence."¹⁷⁹ To this end, the omnibus legislation made numerous reforms in addition to mandating arrest, such as requiring courts to inform persons subject to a domestic violence restraining order that they are prohibited from owning or possessing firearms and requiring courts to impose specific conditions of probation in domestic violence cases.¹⁸⁰

Accordingly, it could be argued that, like the Child Abuse and Neglect Reporting Act at issue in *Alejo*, the omnibus domestic violence legislation established an elaborate, inter-agency system for protecting domestic violence victims by ensuring that their domestic violence restraining orders are effectively enforced. It could be further argued that the legislative history and intent behind the mandatory arrest law, combined with the use of the word "shall" in the arrest statute, creates a mandatory duty on the part of law enforcement to make an arrest when they have probable cause to believe that a domestic violence restraining order has been violated. In fact, in keeping with the reasoning of *Alejo*, police are uniquely positioned to identify and respond to restraining order violations.

Assuming a court finds a mandatory duty to arrest, it would not be very difficult to establish the second element of a negligence per se claim in a case where a woman protected by a domestic violence restraining order was severely injured or killed after law enforcement failed to arrest her abuser for violating the order. Indeed, since the purpose of the omnibus legislation was to provide greater protection to domestic violence victims, the legislation was intended to protect against the very type of injury inflicted against the victim in such a case. However, a party would still have to meet the third element of the claim by proving that the failure to make an arrest for the restraining order violation was a proximate cause of the injuries later suffered by the victim, which is much more difficult to establish. Moreover, the law enforcement agency/officer could still avoid liability by demonstrating that they exercised reasonable diligence in trying to make an arrest.

Law enforcement may be liable under state tort law for failing to make a mandated arrest of a perpetrator who has violated a domestic violence restraining order.

State tort claims may be limited by government immunities.

Courts are extremely reluctant to impose mandatory duties, particularly a mandatory duty to arrest, on law enforcement. Indeed, given the overwhelming number of domestic violence incidents that law enforcement must respond to on a daily basis, courts may have strong concerns that the establishment of a mandatory duty to respond to domestic violence would open up a floodgate of litigation against law enforcement. Nonetheless, until this issue is litigated, “negligence per se” remains a potentially viable claim for domestic violence victims.

Exceptions to Government Immunity

Even if a person is able to establish a valid claim of negligence against law enforcement, the offending law enforcement agency or officer may nevertheless be immune from tort liability under state law. As a general rule, state law grants public entities, such as law enforcement agencies, absolute immunity from liability for torts committed by the public entity or public employees.¹⁸¹ Public entities and employees are also immune from liability for failing to provide, or providing inadequate or faulty, police protection.¹⁸² This includes immunity for specific conduct relating to the provision of police protection such as failing to enforce the law,¹⁸³ failing to make an arrest or hold an arrested person in custody,¹⁸⁴ and deciding whether to release a prisoner or parolee.¹⁸⁵

Despite these immunities, public entities and employees may be subject to tort liability if the California Legislature enacts a statute that expressly imposes such liability on public entities and employees.¹⁸⁶ California statutory law recognizes the following limited exceptions to the broad immunity granted to public entities and employees.

Public Employer Liability for Employee Negligence

State law recognizes that public employers, like private employers, may be liable for injuries caused by the negligence of their employees so long as (1) the conduct was within the scope of the employee's duties and (2) the employee can be held personally liable for negligence.^{187, 188} Accordingly, a law enforcement agency may be held liable if an officer commits an act of battery, false imprisonment or excessive force while performing his/her duties because officers are not immune from claims involving such conduct.¹⁸⁹

Public Employer Liability for Negligent Hiring, Retention and Supervision

The California Supreme Court had held that state government immunities do not limit a party's right to bring claims of negligent hiring, retention or supervision against public employers.¹⁹⁰ Thus, law enforcement agencies may be held directly liable for their own negligence in hiring, retaining or supervising a derelict officer whom they know or should have known posed a danger of committing certain misconduct.¹⁹¹

Public Employee Liability for Their Own Torts

State law recognizes that public employees are liable for their own negligence and torts to the same extent as private individuals.¹⁹² However, state law grants immunity to public employees from liability for injuries resulting from "discretionary acts" performed within the scope of the employees' authority.¹⁹³ In the case of law enforcement, "discretionary acts" may include the decision to arrest or detain a suspect, pursue a suspect, or investigate the scene of an accident.¹⁹⁴

Public Employee Liability for Negligence in Performing Ministerial Acts

While state law grants absolute immunity to public employees for “discretionary acts,” courts have imposed liability on law enforcement where injury to another results, not from the officer’s exercise of discretion in carrying out his/her professional duties, but from the officer’s negligence in performing ministerial acts after the officer has made a discretionary decision to take a certain action.^{195, 196}

In *Carpenter v. City of Los Angeles*, for example, a witness in the criminal prosecution of an armed robbery defendant was assured by police that the criminal defendant posed no danger of harm to him. Police later learned that the criminal defendant had put a “contract” out on the witness’s life, but failed to inform the witness of this danger. The witness was subsequently the victim of an attempted murder by an unknown assailant shortly before he was to testify in the criminal trial. The witness filed a lawsuit alleging that the city, through its police force, had a duty to warn him about the threat on his life and should be held liable for the injuries he suffered as a result of its failure to do so.

The court found that the city owed the witness a duty of care which required that city police, who had lulled the witness into a false sense of security, inform the witness of the subsequent, credible threat on his life.¹⁹⁷ Moreover, the court held that neither the “discretionary act” nor “police protection” immunities barred the witness’s claims.¹⁹⁸ With regard to “discretionary act” immunity, the court noted that the decision made by police about what information to share with the witness was not a “basic policy decision” that was subject to immunity. With regard to “police protection” immunity, the court found that because warning the witness would have involved a simple phone call, not the deployment of police forces to protect the witness, this immunity also did not apply.¹⁹⁹ The court reversed the trial court’s decision in favor of the city and remanded the case for a determination of whether the city breached its duty to the witness.²⁰⁰

Similarly, in *Morgan v. County of Yuba*,²⁰¹ the court held that a wrongful death claim may be brought against a county in a case where a woman was murdered after county sheriffs failed to notify her, as promised, about the release of someone who they knew had threatened the woman's life. The sheriffs had expressly promised on two occasions to contact the woman immediately if the person was released on bail, but failed to do so. The county argued that both it and its officers were not liable for the wrongful death of the woman because public entities/employees were immune from liability for injuries resulting from their discretionary acts and decisions to release prisoners. The court concluded, however, that the negligent conduct at issue in the case involved a failure to warn, as promised, and that, even though the decision to release the dangerous prisoner may have been discretionary, notifying the protected party about the prisoner's release called for a simple ministerial act for which the county and its officers were not immune.²⁰²

Although parties must meet significant hurdles in order to successfully bring a negligence claim against law enforcement under state tort law, state law leaves open the possibility of establishing liability in such cases. Accordingly, it is important that attorneys and victim advocates remain vigilant and continue to bring state tort claims against law enforcement. Litigating cases with strong legal and factual bases for holding law enforcement civilly accountable may help clarify and expand existing limitations on law enforcement liability in this area. Another alternative is to amend state laws on government tort liability to make it easier for victims and their representatives to sue law enforcement for how it responds to domestic violence.

It is important that attorneys and victim advocates remain vigilant and continue to bring cases against law enforcement that help clarify and expand existing limitations on law enforcement liability under state tort law.

WHERE DO WE GO FROM HERE?

- **Civil rights attorneys, advocates and victims must work together to bring cases that will set strong precedents for holding law enforcement liable for inadequately responding to incidents of domestic violence.** In a post-*DeShaney* and *Castle Rock* universe, the most viable theories for asserting a constitutional due process claim are to argue that law enforcement took affirmative action that made a victim more vulnerable to domestic violence, or that law enforcement acted with deliberate indifference in failing to provide domestic violence training for officers. Since the “state-created danger” and “deliberate indifference” exceptions to *DeShaney* have not been widely tested in the domestic violence context, and since decisions applying these exceptions are somewhat inconsistent, it is advisable for attorneys to bring litigation that helps clarify and expand the scope of these critical exceptions.

Equal protection claims are also highly recommended as these claims were not impacted by *DeShaney* and they signal to law enforcement that domestic violence is not a negligible, family matter, but rather a serious, potentially lethal crime that must be dealt with in the same manner as violent crimes between strangers. Moreover, it is important to remember that, in some cases, law enforcement may be immune from civil liability unless a party can show that an officer violated a clearly established constitutional right. Increased litigation of both due process and equal protection claims will help strengthen victims’ constitutional remedies by clarifying victims’ constitutional and statutory rights under federal law and reducing the likelihood that law enforcement will be immune from liability.

Plaintiffs in California should also remember to look to state law remedies. Unlike federal civil remedies, state tort law allows a party to recover civilly for purely negligent conduct. However, the party must first meet the burden of showing that a “special relationship” gave rise to a duty of protection on the part of law enforcement, which has been challenging in the domestic violence context. Claims of negligent hiring, retention and/or supervision should be brought against law enforcement agencies who fail to adequately respond to domestic violence perpetrated by their own officers. Indeed, as this is an area of liability that has not been widely tested, advocates and attorneys should try to litigate these issues further when an appropriate case arises. State court decisions also lend support for bringing claims of negligence per se against law enforcement agencies that fail to discharge mandatory duties under state law, particularly in the cases of teen dating violence. Litigants should also remember to include state constitutional claims, when appropriate, given the high level of protection afforded in the California Constitution for gender discrimination.

- **Advocates should collect statistical and anecdotal data that can help support litigation aimed at improving law enforcement response to domestic violence.** In many of the cases described above, parties were successful in bringing equal protection claims because the cases took place before the systemic, criminal justice reforms established by the anti-domestic violence movement had been implemented by law enforcement. Thus, many departments still had written policies and entrenched practices that blatantly discriminated against domestic violence victims.

Now that law enforcement is more knowledgeable about, and responsive to, domestic violence, it is less likely that parties will be able to identify such explicit evidence of discrimination. Rather, discrimination against domestic violence victims is likely to take on much more subtle forms today. It is important, therefore, that advocates work with civil rights attorneys to document, on a local level, evidence of a particular department's chronic failure to respond adequately to domestic violence calls and/or repeated non-compliance with laws designed to protect domestic violence victims (e.g., mandatory arrest laws). This information may be useful in assisting attorneys and litigants with their claims.

- **Policymakers and advocates should work together to strengthen and expand state and federal laws in order to ensure that domestic violence victims and their survivors have effective statutory bases for holding law enforcement legally accountable for how it responds to domestic violence.** Government immunities and the strong reluctance of courts to interpret the law in a way that exposes government agencies to civil liability has made it extremely difficult for parties to bring successful claims against law enforcement, even in cases involving egregious and shocking conduct by officers. However, parties do not have to be constrained to working within the law as it currently exists. Advocates and policymakers can push for legislative and other reforms aimed at creating more clear and effective civil remedies for parties who have been injured as a result of faulty law enforcement responses to domestic violence.

Ensuring civil remedies for victims includes paying close attention to how legislative language is crafted. For example, in many of the cases described above, courts were able to avoid imposing liability on law enforcement for breaching mandatory duties to victims by stating numerous reasons why the use of the word "shall" in a statute fails to create a "mandatory" duty for law enforcement. Policymakers can help end this confusion by clearly stating, within the legislative language itself, whether a particular law is intended to create a mandatory duty for law

enforcement for which civil liability may be imposed. Policymakers can also specify restrictions on liability to ease concerns about opening up a floodgate of litigation against law enforcement.

- **State and local law enforcement officials should be knowledgeable about their agency's and officers' potential for liability for failing to adequately respond to domestic violence.** Law enforcement officials who are aware of their potential for civil liability are more likely to take steps to ensure that their agency and officers are effectively responding to domestic violence complaints. However, officials should not use their knowledge of liability and immunity issues to identify “bare minimum” responses to domestic violence. Rather, their goal should be to ensure that all responses are appropriate and effective, and never even raise the possibility of civil liability.

(Footnotes)

1. Sources: *Macias v. Ihde*, 219 F. 3d 1018 (9th Cir. 2000) and Marie De Santis, *Macias Case Legal History*, WOMEN'S JUSTICE CENTER, available at http://www.justicewomen.com/macias_history.html (accessed August 30, 2005).
2. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).
3. *Towne of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).
4. Tort claims are state civil causes of action that allow individuals to seek monetary damages if they have been personally injured by the negligent or intentional conduct of another. Tort claims do not include claims for breach of contract.
5. A "declaratory judgment" is a court decision in a civil case that defines the respective rights of parties to a legal dispute without awarding monetary damages or ordering the parties to do something.
6. State courts also have jurisdiction to hear 42 U.S.C. §1983 claims. *Howlett v. Rose*, 496 U.S. 356, 358 (1990).
7. 42 U.S.C. §1983.
8. *Hafer v. Melo*, 502 U.S. 21 (1991).
9. The 11th Amendment of the United States Constitution bars private parties from suing a state in federal court. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989).
10. *Id.*
11. *Hafer*, *supra* note 8 at 30-1 (Because a "personal capacity" lawsuit is asserted against a state official in his/her individual, rather than official, capacity, the plaintiff does not need to establish a connection between the official's tortious conduct and a governmental policy or custom).
12. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978).
13. *Id.* at 691.
14. *Monell*, *supra* note 12.
15. *Tenney v. Brandhove*, 341 U.S. 367, 372-6 (1951); *Pierson v. Ray*, 386 U.S. 547, 553-5 (1967).
16. *United States v. Classic*, 313 U.S. 299, 326 (1941).
17. *West v. Atkins*, 487 U.S. 42, 50 (1988).
18. 61 A.L.R. Fed. 7.
19. *Daniels v. Williams*, 474 U.S. 327 (1986).
20. *Baker v. McCollan*, 443 U.S. 137, 140, footnote 1 (1979).
21. *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 128 (1997).
22. See *Pourny v. Maui Police Dept.*, 127 F. Supp. 2d 1129 (D. Haw. 2000); *Robinson*

v. *Johnson*, 975 F. Supp. 950 (S.D. Tex. 1996); and *Clark v Beville*, 730 F. 2d 739 (CA11 Ga. 1984).

23. 42 U.S.C. §1988.

24. U.S. CONST. AMEND. XIV §1.

25. *Reno v. Flores*, 507 U.S. 292, 301-2 (1993).

26. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

27. A "state actor" is a person acting under color of state law who may be subject to liability under Section 1983 as described in this section.

28. *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988), *amended and superceded by* 901 F.2d 696 (9th Cir. 1990).

29. *DeShaney*, *supra* note 2.

30. *Balistreri*, *supra* note 28.

31. *Id.*; *DeShaney*, *supra* note 2; *City of Canton v. Harris*, 489 U.S. 378 (1989).

32. It should be noted that while the decisions of the United States Supreme Court on issues of federal law are binding on state courts in California, lower federal court decisions – including Ninth Circuit decisions – are not. *See, e.g., McLaughlin v. Walnut Properties*, 119 Cal. App. 4th 293, 297 (2004). In fact, California appellate courts have held that "[w]here the federal circuits are in conflict, the decisions of the Ninth Circuit are entitled to no greater weight than those of other circuits." *Forsyth v. Jones*, 57 Cal. App. 4th 776, 783 (1997). Lower federal courts sitting in the Ninth Circuit are, however, bound by decisions of the Ninth Circuit on issues of federal law. While the opinions of federal courts outside the Ninth Circuit may be given weight or consideration, they in no way control the decisions of federal courts within the Ninth Circuit. *See, e.g., Kanter v. Warner-Lambert Co.*, 52 F. Supp. 2d 1126, 1132 (N.D. Cal. 1999). The states that fall within the Ninth Circuit Court of Appeals' jurisdiction are California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska and Hawaii.

33. *Turner v. City of North Charleston*, 675 F. Supp. 314 (D.S.C. 1987).

34. *Id.*

35. *See also, Estate of Gilmore v. Buckley*, 787 F. 2d 714 (1st Cir.), *cert denied*, 479 U.S. 882 (1986) (Woman was kidnapped and murdered by her abuser the day after he was "released on furlough" from a state hospital where he was serving time for criminally threatening her. Doctors at the hospital knew about the abuser's history of violence against the woman and determined that he posed a "murderous" threat to her. The First Circuit Court of Appeals affirmed the dismissal of a substantive due process claim brought by the woman's estate, finding that no "special relationship" existed because there was no evidence that the state took any affirmative action to increase the woman's risk of danger).

36. *Balistreri*, *supra* note 28.

37. *Id.* at 1426.

38. *Id.* (“[T]he state’s knowledge of DeShaney’s plight and its expressions of intent to help him were no greater than its knowledge of Balistreri’s plight and its expressions of intent to help her.”); *see also Jones v. Union County*, 296 F. 3d 417, 430 (6th Cir. 2002) (order of protection does not create the “special relationship” necessary to support a due process cause of action); *O’Brien v. Maui County*, 2002 U.S. App. LEXIS 10835 (9th Cir. 2002) (fact that plaintiff had obtained restraining orders on several occasions and had alerted police officers to the threat posed by her batterer did not give rise to a special relationship).

39. *Dudosh v. City of Allentown*, 629 F. Supp. 849 (E.D. Pa. 1985), *summary judgment granted, in part*, *Dudosh v. City of Allentown*, 665 F. Supp. 381, 394 (E.D. Pa. 1987), *reconsideration denied sub nom. Dudosh v. Warg*, 668 F. Supp. 994 (E.D. Pa. 1987), *vacated*, 853 F. 2d 917 (3rd Cir.) (per curiam), *cert. denied*, 488 U.S. 942 (1988), *reconsideration granted in part and denied in part sub nom. Dudosh v. City of Allentown*, 722 F. Supp. 1233 (E.D. Pa. 1989).

40. *Id.* (629 F. Supp. 849, 855).

41. *Id.* (665 F. Supp. 381).

42. *Id.* (665 F. Supp. 381, 390).

43. *Id.* (722 F. Supp. 1233).

44. *Hynson v. City of Chester*, 827 F.2d 932 (3d Cir. Pa. 1987), *writ of certiorari denied*, *Delaware County Prison Bd. of Inspectors v. Hynson*, 484 U.S. 1007 (1988), *later proceeding at Hynson v. Chester*, 684 F. Supp. 1294 (E.D. Pa. 1988), *later proceeding at Hynson v. Chester*, 1988 U.S. Dist. LEXIS 3358 (E.D. Pa. April 19, 1988), *vacated by Hynson v. Chester, Legal Dep’t*, 864 F.2d 1026 (3d Cir. Pa. 1988), *summary judgment granted, in part, and denied, in part, by Hynson v. City of Chester*, 731 F. Supp. 1236 (E.D. Pa. 1990).

45. *Id.* (731 F. Supp. 1236).

46. *DeShaney*, *supra* note 2 at 194.

47. *Id.* at 193.

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

49. *DeShaney*, *supra* note 2 at 197.

50. *Id.* at 199-200.

51. *Id.* at footnote 9.

52. *Kennedy v. Ridgefield City*, 411 F.3d 1134, 1142-4 (9th Cir. 2005).

53. *Freeman v. Ferguson*, 911 F. 2d 52 (8th Cir. 1990).

54. *Id.* at 54.

55. *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994).

56. *Id.* at 1210.

57. *May v. Franklin County Board of Commissioners*, 59 Fed. Appx. 786 (6th Cir. 2003).

58. *Id.* at 795-6.

59. See also, *Kennedy*, *supra* note 52 (A woman was shot and her husband was shot and killed by their 13-year-old neighbor. The woman previously reported to police that she suspected the boy of molesting her 9-year-old daughter. She also reported that the boy and his family were violent and unstable and asked an officer to notify her before they informed the neighbors about the allegations against their son. The officer promised to provide such notice and promised to patrol the neighborhood, but did not follow through with either of these promises. The Ninth Circuit Court of Appeals held that the officer violated the woman's constitutional rights under the state-created danger doctrine because his failure to fulfill his affirmative promises augmented the parties' risk of danger).

60. *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001).

61. *Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991).

62. *Id.* at 550-51.

63. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir.), *cert. denied*, 116 S. Ct. 530 (1995).

64. *Id.* at 1172.

65. *Id.*

66. *Id.* at 1175.

67. *Id.* at 1177.

68. *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992).

69. See generally Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1308-11 (1995).

70. *City of Canton*, *supra* note 31.

71. *Id.* at 389.

72. *Id.* at 389-90; *Monell*, *supra* note 12.

73. *City of Canton*, *supra* note 31 at 389-90.

74. *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Cir. 1989).

75. *Id.* at 722.

76. *Id.* at 722-23.

77. *Id.* at 725.

78. *Id.* at 725-6.

79. *Id.* at 725.

80. See Laura S. Harper, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1417 (Sept. 1990).

81. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

82. *Town of Castle Rock*, *supra* note 3 at 2803.

83. Rather, the *DeShaney* Court declined to consider petitioners' argument, raised for the first time in their brief to the Supreme Court, that an Illinois child protection statute gave Joshua a property entitlement to protection from abuse under the Supreme Court's 1972 decision in *Board of Regents of State Colleges v. Roth*. See *DeShaney*, *supra* note 2 at 195, footnote 2.

84. COLO. REV. STAT. §18-6-803.5(3) (2005).

85. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1264 (10th Cir. 2004).

86. *Town of Castle Rock*, *supra* note 3.

87. *Id.* at 2808-10.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* The Supreme Court cited the following cases upholding claims involving police failure to enforce restraining orders: *Donaldson v. Seattle*, 65 Wn. App. 661(1992); *Matthews v. Pickett County*, 996 S.W.2d 162 (Ten. 1999); *Campbell v. Campbell*, 294 N. J. Super. 18 (1996); *Sorichetti v. New York*, 65 N. Y. 2d 461 (1985); and *Nearing v. Weaver*, 295 Ore. 702 (1983).

92. *DeShaney*, *supra* note 2 at footnote 3.

93. One of the first equal protection cases involving law enforcement response to domestic violence was filed in 1976 by a class of female, African-American domestic violence victims against the Oakland Police Department. One of the claims alleged by the class was that the department violated the Equal Protection Clause of the 14th Amendment by maintaining a policy of discouraging arrests in domestic violence situations. The case eventually settled, and the Department agreed to adopt better policies for responding to domestic violence, including a policy requiring officers to make arrests whenever there was probable cause to believe that a felonious assault had occurred or that a misdemeanor assault had been committed in an officer's presence. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970 – 1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 62-3 (Spring 1992); Michaela M. Hoxtor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 651-2 (May 1997).

94. *Watson v. Kansas City*, 857 F. 2d 690, 694 (10th Cir. 1988).

95. *Monell*, *supra* note 12 at 691.

96. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 273-5 (1979).

97. *Id.* at 279.

98. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

99. *Id.*

100. *Id.* at 1527-8.

101. *Id.*

102. *Id.* at 1529.

103. *Id.* at 1528.

104. *Macias*, *supra* note 1.

105. *Id.* at 1028.

106. *Macias Case Legal History*, *supra* note 1.

107. Some plaintiffs have not been as successful in bringing gender discrimination claims due to chronic police unresponsiveness to domestic violence complaints. *See Watson*, *supra* note 93 (finding that, despite evidence of repeated inaction by police to a victim's complaints of domestic violence, as well as evidence that police had a policy of providing less police protection to domestic violence victims than victims of other violent crime, the victim failed to state a prima facie case of gender-based discrimination because she could not show that defendants' policy was adopted to purposefully discriminate against women); *Williams v. City of Montgomery*, 21 F. Supp. 2d 1360 (M.D. Ala. 1998), *vacated*, 48 F. Supp. 2d (M.D. Ala. 1999) (finding no evidence of gender discrimination despite victim's repeated calls to police to report violent incidents and threats over an eighteen-month period); *Shipp v. McMahon*, 199 F.3d 256 (5th Cir. 2000) (finding that officers were immune from liability after repeatedly refusing to respond to victim's complaints of domestic violence and failing to intervene on one occasion until after she had been raped and shot in the chest by her abuser; officers were immune because standards governing a party's right to bring an equal protection claim based on gender discrimination were not "clearly established law" at the time that the alleged improper conduct occurred).

108. *Didzerekis v. Stewart*, 41 F. Supp. 2d 840 (N.D. Ill. 1999).

109. *Id.* at 842.

110. *Id.* at 847-8.

111. *McDonald v. City of Chicago*, 1994 U.S. Dist. LEXIS 18445 (N.D. Ill. 1994).

112. *Id.* at 13.

113. *See Blackwell, B.S., and Vaughn, M.S., Police civil liability for inadequate response to*

domestic assault victims, JOURNAL OF CRIMINAL JUSTICE 31(2),129-146, 135 (2003); Browne, *supra* note 69 at 1324.

114. *Balistreri, supra* at note 28.

115. *Id.* at 698.

116. *Id.* at 701.

117. *Id.*

118. See, e.g., *Watson, supra* note 94; *Dudosh, supra* note 39.

119. *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999).

120. *Id.* at 699

121. *Id.* at 700.

122. See *Blackwell & Vaughn, supra* note 113 at 138 (“[W]hile statistical data can be employed, it must be combined with other evidence that ‘ripens into proof’ that domestic violence victims are treated differently than other victims.”) (citing cases).

123. *Watson, supra* note 94 at 696; see also *Hakken v. Washtenaw County*, 901 F. Supp. 1245, 1254 (E.D. Mich. 1995) (statistical evidence allowed to support claim that police customarily provided less protection to domestic assault victims than to non-domestic assault victims).

124. *Cellini v. City of Sterling Heights*, 856 F. Supp. 1215 (E.D. Mich. 1994).

125. *Id.* at 1222.

126. *Id.*

127. *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995), *aff’d Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999).

128. *Id.* at 716-7.

129. *Stevens v. Trumbull County Sheriff’s Department*, 63 F. Supp. 2d 851 (N.D. Ohio 1999).

130. *Id.* at 856-7 (court also sustained plaintiff’s gender discrimination claim, but rejected her substantive due process claim because officers did not engage in any affirmative acts that increased her risk of danger).

131. *Smith, supra* note 55.

132. *Id.* at 1206.

133. *Id.* at 1207.

134. *Id.* at 1208.

135. CAL. CONST. ART. I, §7, SUBD. (a).

136. *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 31-2 (2001).

137. *Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 17-20 (1971).

138. *Id.* at 16-7.

139. *DeShaney*, *supra* note 2 at 201-2.

140. *Zelig v. County of Los Angeles*, 27 Cal. 4th 1112, 1126 (2002).

141. *Id.*

142. *Williams v. State of California*, 34 Cal. 3d 18, 23-5 (1983).

143. *Id.*

144. *Id.*

145. *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6 (1975).

146. *Id.* at 10.

147. *Zelig*, *supra* note 140.

148. Eileen's children brought various negligence claims (i.e., negligence, negligent infliction of emotional distress, wrongful death) against the County of Los Angeles and the Los Angeles County Sheriff's Department, as well as a constitutional civil rights claim pursuant to 42 U.S.C. §1983. *Id.*

149. *John R. v. Oakland Unified School District*, 48 Cal. 3d 438 (1989); CAL. GOV. CODE §§820 and 820.2 (2005).

150. *Doe v. City of Murietta*, 102 Cal. App. 4th 899, 917-8 (2002).

151. *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1054 (1996).

152. *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333 (1998).

153. *Id.* at 1340 [citing *Marusa v. District of Columbia*, 484 F. 2d 828 (D.C. Cir. 1973); *Corridon v. City of Bayonne*, 129 N. J. Super. 393 (1974); and *McCrink v. City of New York*, 296 N. Y. 99 (1947)].

154. *Id.*

155. *Id.* [citing *Bonsignore v. City of New York*, 683 F. 2d 635 (2d Cir. 1982)].

156. *Id.*

157. *Id.* at 1340-2.

158. *Id.*

159. CAL. GOV. CODE §815.6 (2005).

160. An "enactment" is defined to include constitutional provisions, statutes, charter provisions, ordinances or regulations. CAL. GOV. CODE §810.6 (2005).

161. "Proximate cause" is defined as an "original event which in natural unbroken sequence produces a particular foreseeable result, without which the result would not have occurred." *The Law Dictionary*, ANDERSON PUBLISHING COMPANY (2002). There may be more than one proximate cause of an injury.

162. *Becerra v. County of Santa Cruz*, 68 Cal. App. 4th 1450, 1458 (1998).

163. CAL. GOV. CODE §815.6 (2005); *Sullivan v. City of Sacramento*, 190 Cal. App. 1070, 1079 (1987).

164. CAL. GOV. CODE §§821, 845, and 846 (2005).

165. See *Shelton v. City of Westminster*, 138 Cal. App. 3d 610 (1982) (city and its police officers did not have a mandatory duty to provide the family of a murdered boy with his dental records in a timely manner); *Stout v. City of Porterville*, 148 Cal. App. 3d 937 (1983) (police officers did not have a mandatory duty to arrest an intoxicated person who was later hit by a car after being stopped and questioned by police); and *Fleming v. State of California*, 34 Cal. App. 4th 1378 (1995) (state parole officers did not have mandatory duty to arrest a parolee whom they knew was in violation of parole and were immune from liability under Government Code §845.8).

166. *Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180 (1999).

167. CAL. PEN. CODE §§11164, et seq. (2005).

168. CAL. PEN. CODE §11166(a) (2005).

169. *Alejo*, supra note 165 at 1185-7.

170. *Id.*

171. *Id.*

172. *Id.* at 1189.

173. *Alejo*, supra note 165 at 1190.

174. *Id.* at 1190-1.

175. CAL. PEN. CODE §§11165.1 and 11165.6 (2005).

176. CAL. PEN. CODE §836(c) (2005).

177. See *Morris v. County of Marin*, 18 Cal. 3d 901 (1977); *Nunn v. State of California*, 35 Cal. 3d 616 (1984); *Stout*, supra note 164.

178. *Id.*

179. CALIFORNIA SENATE BILL 218 (Chaptered October 10, 1999); *Senate Floor Analysis of Senate Bill 218*, CALIFORNIA STATE SENATE RULES COMMITTEE, OFFICE OF SENATE FLOOR ANALYSES, available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0201-0250/sb_218_cfa_19990910_112146_sen_floor.html (accessed July 25, 2005).

180. *Id.*

181. CAL. GOV. CODE §815 (2005).

182. CAL. GOV. CODE §845 (2005). Courts have held that this immunity applies to discretionary budgetary and policy decisions involving the hiring or deployment of police force. *Carpenter v. City of Los Angeles*, 230 Cal. App. 3d 923 (1991).

183. CAL. GOV. CODE §§821 and 818.2 (2005).

184. CAL. GOV. CODE §846 (2005).

185. CAL. GOV. CODE §845.8 (2005).

186. *Becerra, supra* note 161.

187. CAL. GOV. CODE §815.2 (2005).

188. Thus, if a public employee is immune from liability for certain negligent acts, so is the public entity-employer. *Sava v. Thomas*, 249 Cal. App. 2d 281, 284 (1967).

189. *Blessed Herve v. City*, 2004 U.S. Dist. LEXIS 25281 at 21-5.

190. *Grudt v. City of Los Angeles*, 2 Cal. 3d 575, 583-85 (1970); *Farmers Insurance Group v. County of Santa Clara*, 11 Cal. 4th 992, 1022 (1995).

191. *Id.*

192. CAL. GOV. CODE §820 (2005).

193. CAL. GOV. CODE §820.2 (2005). Discretionary acts are defined broadly to include basic governmental policy or quasi-legislative decisions that involve the exercise of professional discretion vested in the employee. Immunity applies even if the discretionary act is malicious or constitutes an abuse of the employee's discretion. *Caldwell v. Montoya*, 10 Cal. 4th 972, 979-82 (1995).

194. See *McCorkle v. Los Angeles*, 70 Cal. 2d. 252 (1969); *Gibson v. Pasadena*, 83 Cal. App. 3d 651 (1978); and *Michenfelder v. Torrance*, 28 Cal. App. 3d 202, 206-7 (1972).

195. *Sullivan, supra* note 162 at 1080-81.

196. State law distinguishes "discretionary acts" from purely "ministerial acts" that are performed merely to implement a policy that has already been formulated. *Caldwell, supra* note 192.

197. *Carpenter, supra* note 182 at 931-2.

198. *Id.* at 935.

199. *Id.* at 934-5.

200. *Id.*

201. *Morgan v. County of Yuba*, 230 Cal. App. 2d 938 (1964).

202. *Id.* at 942-6.