FBI Law Enforcement Bulletin

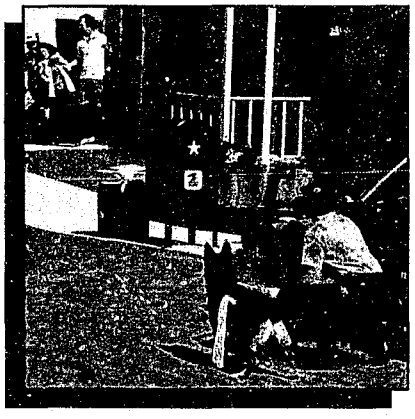
January 1991

NCIC Training

FBI
Law Enforcement Bulletin

January 1991
Volume 60
Number 1

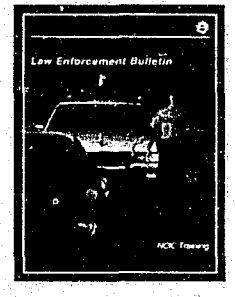
Page 4



Page 6

Features

Departments



The Cover: *Thorough NCIC training can be an important factor in the safe completion of routine vehicle stops. Cover photo of Officer Thomas Kauffman of the Upper Allen Township, Pennsylvania, Police Department is courtesy of Blair Seitz. See article p.1.*

United States Department of Justice
Federal Bureau of Investigation
Washington, DC 20535

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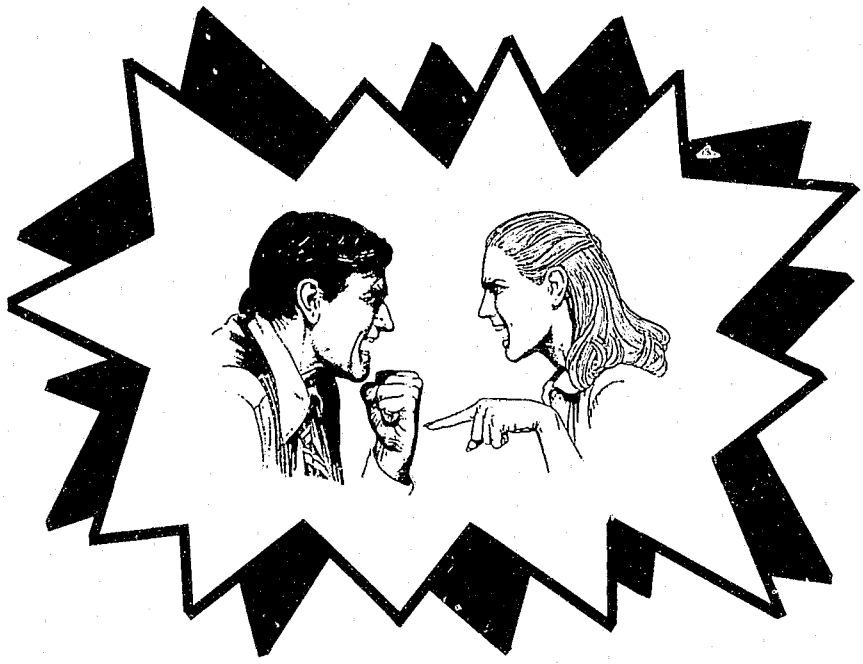
The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535.



Domestic Violence

When Do Police Have a Constitutional Duty to Protect?

By
DANIEL L. SCHOFIELD, S.J.D.

Domestic violence is a serious crime problem that presents law enforcement officers with difficult and dangerous challenges. Victims of domestic violence sometimes file lawsuits claiming that the failure of police to make an arrest violated their right to police protection. Officers responding to a domestic assault call must decide whether an arrest is legally justified and whether an arrest is the most effective police action to prevent further domestic violence. Some police departments allow for officer discretion to diffuse domestic disturbances and preserve the family unit by not making an arrest. Other departments may limit officer discretion with a policy that mandates arrest if there is probable cause to believe a crime has been committed during a domestic disturbance. The debate over how to use limited police resources to best protect citizens against domestic violence often includes a discussion of whether police have a legal duty to offer a certain level of protection.

This article discusses the extent to which police have a Federal constitutional duty to protect citizens against domestic violence and the circumstances under which police can be held liable under 42 U.S.C. §1983 (hereinafter Section 1983) for a breach of that duty. Specifically, the article discusses Section 1983 claims against the police based on an alleged violation of: (1) Substantive due process, (2) equal protection of the law, and (3) procedural due process. The potential for liability based on these three

> ***...as a general rule, police do not have a constitutionally imposed duty to protect citizens against domestic violence.***

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Federal constitutional claims is discussed in the context of recent court decisions involving suits against the police. It should be noted that this article does not address whether police have a legal duty to protect under State law, which depends on the various laws of each State.[1]

Substantive Due Process Claims

The 14th amendment's Due Process Clause provides that "[n]o state shall...deprive any person of life, liberty, or property, without due process of law."[2] Claims against the police for a violation of substantive due process have historically alleged that a "special relationship" between police and a victim of domestic violence created a constitutional duty to protect that person from physical harm. However, the Supreme Court recently narrowed the circumstances giving rise to such "special relationships" and concluded that the Due Process Clause does not legally obligate law enforcement to protect an individual absent a custodial relationship.

General Rule—No Constitutional Duty to Protect

In *DeShaney* v. *Winnebago County Department of Social Services*,[3] a boy, who was beaten and permanently injured by his father, claimed a due process violation because local officials knew he was being abused but did not act to remove him from his father's custody. The Supreme Court concluded that the State had no constitutional duty to protect the boy because the Due Process Clause is a limitation on the State's power to act, not a guarantee of certain minimal levels of safety and security. Further, according to the Court, the Due Process Clause confers no affirmative right to governmental aid, even where such aid may be necessary to protect an individual against private violence.[4] In doing so, the Court rejected the argument that a duty to protect arose because of a "special relationship" that existed, because the State knew the boy faced a special danger of abuse and specifically proclaimed by word and deed its intention to protect him against that danger.[5]

The Court concluded that the Constitution imposes affirmative duties of care and protection only to particular individuals, such as incarcerated prisoners and involuntarily committed mental patients who are restrained against their will and rendered unable to care for themselves.[6] "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[7] The Court also noted that while the State may have been aware of the dangers the boy faced, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. And, even though the State once took custody of the boy and then returned him to his father's custody, it placed him in no worse position than he would have been in had the State not acted at all.[8]

Courts interpreting *DeShaney* have rejected claims that police have a substantive due process duty to protect individuals against domestic violence. For example, in *Balistreri* v. *Pacifica Police Department*,[9] the U. S. Court of Appeals for the Ninth Circuit rejected a claim by a woman who was allegedly beaten and harassed by her estranged husband. Despite allegations that the police knew of her plight and affirmatively committed to protect her when it issued her a restraining order, the court concluded that *DeShaney* limited the circumstances giving rise to a "spe-

cial relationship'' to instances of custody, and that no such relationship existed in this case imposing a due process duty on the police to protect the victim from her husband.[10]

Where Police Action Increases Danger

While *DeShaney* establishes the general rule that police have no Federal due process duty to protect citizens from private domestic violence, a constitutional duty to protect can arise where law enforcement action actually increases an individual's danger of, or vulnerability to, domestic violence beyond the level it would have been absent the police action.[11] For example, in *Freeman* v. *Ferguson*,[12] the U. S. Court of Appeals for the Eighth Circuit concluded that *DeShaney* establishes the possibility that police could be held liable for failure to protect an individual against private domestic violence if police conduct actually interfered with the protective services that would have otherwise been available in the community.

Freeman involved a Section 1983 action against the police chief and city for the death of a woman and her daughter at the hands of the woman's estranged husband. The plaintiff alleged that the police chief failed to perform his duties by reason of a close personal relationship with the estranged husband and that he interfered with the conduct of other officers by directing them not to enforce a restraining order.

The court found the allegation in *Freeman* distinguishable from *DeShaney* because it constituted a claim that the violence the decedents were subjected to was not solely the result of private action, but rather resulted from an affirmative act by the police chief to interfere with the protective services that would have otherwise been available in the community. The court acknowledged that it is not clear under *DeShaney* how large a role the police must play in the creation of danger before police assume a corresponding constitutional duty to protect, but "...that at some point such actions do create such a duty."[13] Courts have also suggested that police can be held liable for escorting or removing domestic violence victims to locations that actually increase their vulnerability to danger.[14]

> **"As a matter of constitutional law, police have considerable discretion in deciding whether and when to make an arrest."**

Equal Protection Claims

The Supreme Court in *DeShaney* stated in a footnote that a State may not selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.[15] However, an earlier Federal district court decision in *Thurman* v. *City of Torrington*[16] is generally considered the seminal case spawning litigation against the police under the Equal Protection Clause.

In *Thurman*, a woman and her son were allegedly threatened and assaulted numerous times by the woman's estranged husband in violation of his probation and a restraining order, despite numerous requests to the police department that they protect her and arrest her estranged husband. It was also alleged that the police department used an administrative classification that resulted in police protection being fully provided to persons abused by someone with whom the victim has no domestic relationship, but less protection when the victim is either: (1) A woman abused or assaulted by a spouse or boyfriend, or (2) a child abused by a father or stepfather.

The *Thurman* court concluded that police are under an affirmative duty to preserve law and order and to protect the personal safety of persons in the community. The court further noted that police who have notice of the possibility of attacks on women in domestic relationships are under a duty to take reasonable measures to protect them; failure to perform this duty would constitute a denial of equal protection.[17]

It is important to note that the precedential value of *Thurman* has been substantially undermined by the holding in *DeShaney* that the government has no constitutional duty to protect citizens against private domestic violence. In addition, more recent Federal court decisions hold that extensive

evidence of intentional discrimination based on gender is required to prove an equal protection claim. These cases demonstrate the difficult burdens of proof that plaintiffs must meet in order to sustain an equal protection claim against the police for a failure to protect a victim of domestic violence.

> ***"...the Supreme Court recently...concluded that the Due Process Clause does not legally obligate law enforcement to protect an individual absent a custodial relationship."***

Police Discretion in Arrest Decisions

As a matter of constitutional law, police have considerable discretion in deciding whether and when to make an arrest. In *McKee* v. *City of Rockwall, Texas*,[18] the U. S. Court of Appeals for the Fifth Circuit interpreted *DeShaney* as endorsing the general principle that choices about the extent of governmental obligation to protect private parties from one another have been left to the democratic political process. It also held that there is no constitutional violation when the most that can be said of the police is that they stood by and did nothing when suspicious circumstances dictated a more active role.[19]

In *McKee*, a woman claimed she was injured as a result of the refusal of police officers to make an arrest after a domestic assault call and that this non-arrest was the result of a city policy that discriminated on the basis of gender in violation of the Equal Protection Clause. Evidence of this policy consisted of: (1) An alleged statement by the chief of police that his officers did not like to make arrests in domestic assault cases because the women involved either wouldn't file charges or would drop them prior to trial, and (2) statistics that purported to show a lower percentage of arrests in domestic violence calls than in non-domestic assault calls.

The *McKee* court ruled that the proffered evidence did not constitute an equal protection violation and that *DeShaney* should not be circumvented by converting every due process claim into an equal protection claim via an allegation that police officers exercised their discretion to act in one incident but not in another.[20] The court pointed out that police officers are not authorized to arrest absent probable cause, and that under *DeShaney*, officers who could have arrested the suspect in this case are not under any constitutional duty to do so.[21] The court held that *DeShaney* leaves officers and law enforcement agencies with discretionary authority regarding arrest decisions, and that officers need not fear that in any close case, they must choose between liability for a potential false arrest and liability for a potentially actionable non-arrest.[22]

Proving Discriminatory Intent

Is an equal protection violation established by proof that the failure of police to protect a victim of domestic violence resulted from a police department policy or practice of treating domestic assaults differently from non-domestic assaults and that women were disproportionately disadvantaged? The answer is "No." Courts have ruled that a police department's facially neutral policy of treating domestic assaults differently than non-domestic assaults only violates the Equal Protection Clause if it is proven that the policy disproportionately disadvantages women *and* that it was adopted with an intent to discriminate against women. The cases discussed below illustrate the significant evidentiary difficulties plaintiffs face in trying to prove discriminatory intent.

For example, the court in *McKee* ruled that the plaintiff failed to prove that an alleged police department policy of discouraging arrests in domestic violence cases constituted discrimination against women in violation of the Equal Protection Clause. The court found the proffered evidence that some officers dislike making arrests in domestic cases to be different from

a policy that is binding on all officers regardless of their sentiments. In addition, the court noted that the plaintiff's statistical comparison between domestic and non-domestic assault arrests was exaggerated by an error and failed to correct for the wide variety of factors that might influence the likelihood that police would make an arrest. These factors include: (1) Whether the assault was in progress when police arrived, (2) whether a gun or knife had been used, (3) whether the victim had suffered obvious physical injuries and required medical attention, and (4) whether the victim refused to press charges when the police arrived.[23]

The plaintiff's statistics also failed to prove gender-based discrimination, since they did not indicate how many of the victims in the cleared assault cases were women or how many of the victims in the domestic violence cases were men. The *McKee* court concluded that the plaintiff was attempting to generalize a single incident of police department inaction in one case into a general policy or practice. To permit such an argument would eviscerate the discretion reserved to police officers by *DeShaney*.[24]

In *Hynson* v. *City of Chester Legal Department*,[25] it was alleged that police officers engaged in a practice of failing to respond to complaints made by females against males known to them and that they specifically failed to consider the complaint of a woman who was killed by her former boyfriend as seriously as they would consider the complaint of a female against an unknown assailant. The U. S. Court of Appeals for the Third Circuit held that to sustain an equal protection claim, "...a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom."[26] The court said merely showing that categories used by the police in administering the law are domestic violence and non-domestic violence is not sufficient evidence of gender-based discrimination, absent a showing of an intent to discriminate against women.[27]

> ***"...a constitutional duty to protect can arise where law enforcement action actually increases an individual's danger of, or vulnerability to, domestic violence...."***

Procedural Due Process Claims

Do victims of domestic violence ever have a constitutionally based right to police protection based on a "property interest" created by a State statute or a protective order?[28] In *Coffman* v. *Wilson Police Department*,[29] a spousal abuse victim claimed that her right to due process was violated because the police department never arrested or restrained her husband, despite the existence of a protective order and a contempt finding for violation of the protective order and her numerous reports to the police department of violations of this order. A Federal district court concluded that the State's Protection From Abuse Act did not create an enforceable property interest in police protection, but that a court order in the form of a protective order issued pursuant to that act stating that the appropriate police department *shall* enforce the order does create a constitutionally enforceable property right to police protection.[30] The court said "...the right is not to immediate and unthinking obedience to every request for assistance. Rather, it is the right to reasonable police response."[31] The court conceded that there is a great deal of discretion in police work and that the failure to dispatch a vehicle in response to a domestic violence call because other calls had greater importance would not necessarily constitute a violation of due process.[32]

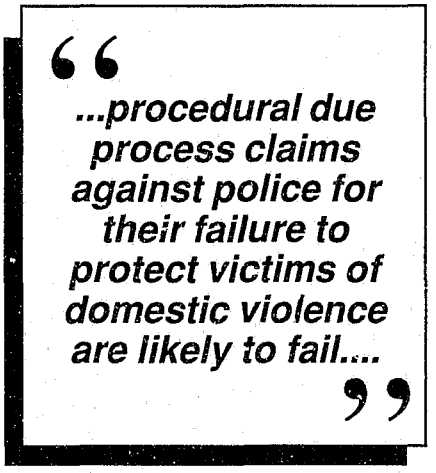
Despite the holding in this one district court decision in *Coffman*, procedural due process claims against police for their failure to protect victims of domestic violence are likely to fail for the following three reasons. First, other courts appear reluctant to adopt the rationale of the *Coffman* court that a State law and protective order creates a constitutionally recognized "property

interest'' to police protection.[33] Second, a police officer's negligent deprivation of a ''property interest'' to police protection would clearly not support a procedural due process claim, and it is not even clear whether an allegation of gross negligence or recklessness would suffice or whether intentional conduct must be proved.[34] Third, the Supreme Court in a 1990 decision in *Zinermon* v. *Burch*[35] appears to have precluded Section 1983 liability for a police agency if an officer's random and unauthorized intentional conduct in not enforcing a protective order is subject to a postdeprivation remedy in the form of a State tort action.[36]

Conclusion

The cases discussed in this article suggest that as a general rule, police do not have a constitutionally imposed duty to protect citizens against domestic violence. While exceptional circumstances may create such a duty and give rise to potential liability under Section 1983, lawsuits against the police for a failure to protect may have a greater likelihood of success in State court under a State-created duty to protect. Therefore, law enforcement administrators must decide how to most effectively allocate limited police resources to protect all the citizens in their communities.

Any potential exposure to liability under Federal or State law for an alleged failure to protect can be reduced if law enforcement organizations take the following three initiatives. First, law enforcement agencies should promulgate a written policy regarding the handling of domestic assault calls that includes a clear statement of department policy setting forth the extent of officer discretion in making arrest decisions. Second, police departments should document the training officers receive in handling domestic violence situations and ensure that officers also understand what resources are available in the community to assist victims of domestic violence. Third, any statistical disparity in arrest rates that may exist between domestic and non-domestic assaults should be carefully evaluated to ensure that such disparity is not caused by any officer bias or animus toward female victims of domestic violence and that the disparity can be explained in terms of legitimate law enforcement interests.



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Footnotes

[1] *See*, ''Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection,'' 21 Ariz. St. L. J. 705, at 711 n. 64 (1989).
[2] U.S. Const. amend. XIV, §1.
[3] 109 S.Ct. 998 (1989).
[4] *Id.* at 1003.
[5] *Id.* at 1004.
[6] *Id.* at 1005.
[7] *Id.* at 1006.
[8] *Id.*
[9] 901 F.2d 696 (9th Cir. 1990).
[10] *Id.* at 700. In *Bryson* v. *City of Edmond*, 905 F.2d 1386 (10th Cir. 1990), the court held that the fact police surrounded a post office where there was a hostage situation and did not attempt to enter the building for more than 1 1/2 hours did not create a special situation in which affirmative duties of protection arose. A contrary rule would impose constitutional duties on the police whenever they respond to reports of violence and assemble at the scene contrary to the holding in *DeShaney*.
[11] In *Horton* v. *Flenory*, 889 F.2d 454 (3d Cir. 1989), the court concluded that the holding in *DeShaney* is limited to situations in which the State is not involved in the harm, either as a custodian or as an actor.
[12] 911 F.2d 52 (8th Cir. 1990).
[13] *Id.* at 55.
[14] *See, e.g., Dudosh* v. *City of Allentown*, 722 F.Supp. 1233 (E.D. Pa. 1989).
[15] 109 S.Ct. at 1004, n. 3.
[16] 595 F.Supp. 1521 (D. Conn. 1984).
[17] *Id.* at 1527.
[18] 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 727 (1990).
[19] *Id.* at 413.
[20] *Id.*
[21] *Id.* at 414.
[22] *Id.*
[23] *Id.* at 415.
[24] *Id.* at 416.
[25] 864 F.2d 1026 (3d Cir. 1988).
[26] *Id.* at 1031.
[27] *Id. See also, Watson* v. *City of Kansas City, Kansas*, 857 F.2d 690 (10th Cir. 1988); and *Howell* v. *City of Catoosa*, 729 F.Supp. 1308 (N.D. Okla. 1990).
[28] For a general discussion, *see*, ''Actionable Inaction: Section 1983 Liability for Failure to Act,'' 53 U. Chi. L. Rev. 1048 (1986).
[29] 739 F.Supp. 257 (E.D. Pa. 1990).
[30] *Id.* at 264.
[31] *Id.* at 265.
[32] *Id.* at 266.
[33] *See, e.g., Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499 (7th Cir. 1990); and *Hynson* v. *City of Chester*, 731 F.Supp. 1236 (E.D. Pa. 1990).
[34] *Daniels* v. *Williams*, 106 S.Ct. 662 at 666, n.3 (1986).
[35] 110 S.Ct. 975 (1990).
[36] *Id.* at 984.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.