Enforcing the Equal Protection Clause on Behalf of Domestic Violence Victims: The Impact of Doe v. Calumet City

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ENFORCING THE EQUAL PROTECTION CLAUSE ON BEHALF OF DOMESTIC VIOLENCE VICTIMS: THE IMPACT OF *DOE V. CALUMET CITY*

PROLOGUE: THE CRIME AND AN OFFICER’S FAILURE TO ACT

On the evening of December 19, 1987, Jane Doe and her two children, Betty, twelve years old, and John, ten, attended a church service and dinner. When they returned to their apartment in Calumet City, a suburb south of Chicago, Betty fell asleep in the living room watching television, while John went to sleep in his mother's room. At about 4:30 a.m., Benjamin Valentine broke into the apartment, awakening Betty. When she asked him who he was and what he wanted, Valentine stated that he was the devil who was there to kill them. Betty ran to her mother’s room and woke Jane up. Valentine followed and, standing at the foot of the bed, again announced that he was the devil, sent by God to kill the family. He then climbed on top of Jane and, while the children were in the room, began to fondle her breasts and genital area. After Valentine threatened to rape her, Jane pleaded with him not to do anything in front of the children.

Strangely, Valentine complied with her request. He got off Jane and directed Betty and John to leave the room. As he followed the chil-

* For their generous advice and detailed criticism, I am very grateful to Susan Joy Oda-Whitmore, David Read, and Clifford Zimmerman.
2. For privacy reasons, the plaintiffs are identified by pseudonyms.
3. Valentine, 582 N.E.2d at 1343.
4. Whereas the appellate court identified the apartment as occupying the second floor, the appellants' brief noted that the unit was actually only ten to twelve feet above ground level. Appellants' Brief at 7 n.4. The apartment's height is relevant since it pertains to the officers' ability to gain access to the apartment.
5. Valentine, 582 N.E.2d at 1343.
7. Valentine, 582 N.E.2d at 1243.
8. Id.
9. Id.
11. Id. at 502.
dren out, Jane fled and tried to escape through the front door. But just as she opened the door, Valentine grabbed her by the hair. A struggle then ensued, and they both tumbled down the exterior stairs of the building. Valentine continued to attack Jane but was unsuccessful in dragging her back to the apartment.

Eventually, Valentine abandoned the assault and ran back upstairs. Jane followed him but could not enter the apartment by kicking and pushing the door. Wearing only undergarments in the predawn hours of a Chicago winter, Jane screamed to her neighbors for help. Several responded and called 911.

Shortly afterwards, an officer from the Burnham Police Department arrived. At about 4:39, Officer James Horka of the Calumet City Police Department also appeared, assumed a supervisory role, and took control of the scene. Jane told Horka how Valentine had assaulted her and threatened her children. She then pleaded with the officer to "Go and get them!" and "Break the door in!" Several neighbors intervened for Jane, begging Horka to help her and to rescue the children by breaking down the door. Horka, however, replied that he would not break down the door because he did not want to bear responsibility for the property damages. Instead, the officers asked whether Jane had a key to her apartment. When she replied that she did not, Horka decided to wait for a key to be delivered by the building's landlord, who lived in South Holland, a neighboring municipality.

During the course of the incident, Horka established radio communications with Calumet City's police command. After a police dis-
patcher asked whether the incident was a rape, Horka answered, "I don't know. I don't know what this is right now." Despite his response to the dispatcher, Horka assumed that he had been called to resolve a domestic dispute, as he asked Jane, "Where is your husband?" "Do you know the guy?" and "Why would you leave your children in the apartment if there was a strange man there?" In conversation with the other officers, he characterized Jane as "an hysterical woman," a "girl . . . freaking out," who was "not coherent anymore."

As other officers arrived, Horka ordered them to maintain positions around the building. At 4:49, Horka's supervisor, Sgt. Ernest Targonksi, radioed the officer: "[I]f that's her apartment, you've got to get in there somehow, so long as she states that that man is in there. We've got to push the door in; push it in." In response to his supervisor's order, Horka and the men in his command rang the doorbell, tapped on windows, and shone a spotlight into the unit. Even though the back door to the apartment remained unlocked, Horka and the other officers never tried to gain entry into the unit.

At approximately 5:00 a.m., Investigator Peter Miller of the Calumet City Police Department arrived. Accompanied by three policemen and, in violation of Horka's command, he entered the apartment from the unlocked back door. They discovered Valentine raping Jane’s daughter, Betty. In an attempt to subdue Valentine, one officer hit him with the butt of his pistol, and all four officers were needed to bring him under control. During the twenty-one minutes that passed before Miller entered the apartment, Valentine had repeatedly raped the twelve-year old and forced her to perform deviate sexual acts. Her brother, John, had been threatened, terrorized, and choked. As a result of the incident, Betty received both medical and

31. Id. at C9-10.
32. Id. at C10. In addition to Horka's conduct and remarks, several Calumet City officers also made patently sexist remarks: for example, "What would you expect from a woman?" and "Isn't it just like a woman" to be in this situation. Id. at C13. None of the officers were subject to any disciplinary action for their comments. Id.
33. Karwath, supra note 30, at C1.
34. Appellants' Brief at 10-11.
35. Id.
37. Appellants' Brief at 12.
38. Doe, 641 N.E.2d at 502-03.
40. Appellants' Brief at 12.
41. Id.
psychological care. Her mother and brother received psychological treatment.

INTRODUCTION

Exactly one year after the incident, Jane filed suit in Illinois state court against the municipalities and officers, alleging among other claims, gender discrimination pursuant to Section 1983. Her claims were dismissed by the trial court, and the Illinois Appellate Court affirmed the dismissal. The Illinois Supreme Court, however, found that on the civil rights claim, Jane stated a cause of action against Officer Horka and Calumet City. In Doe v. Calumet City, the Illinois Supreme Court joined a handful of other appellate courts in finding

42. Following the crime, Jane and her daughter were taken to a hospital in Hammond, Indiana for treatment. Rob Karwath, Cop Action in Rape Case Investigated, Chi. Trib., Dec. 22, 1987, at C8. While at the hospital, a Calumet City Fire Department paramedic criticized Horka for his inaction. Id. Horka had the paramedic arrested on preliminary charges of obstruction of justice. Rob Karwath, Calumet City Prosecutor Says Officer Allowed Rape to Occur, Chi. Trib., Mar. 16, 1988, at C9.

43. After a jury trial, Valentine was found guilty of aggravated criminal sexual assault, attempted criminal sexual assault and home invasion, and sentenced to concurrent terms of fifty-five, twenty-five, and seven years, respectively. People v. Valentine, 582 N.E.2d 1338, 1339 (Ill. App. Ct. 1991); Jerry Shnay, 55-Year Prison Term in Calumet City Rape, Chi. Trib., Nov. 29, 1989, at C10.

Horka was found guilty of five misconduct charges by Calumet City's Fire and Police Commission and subsequently fired. Rob Karwath, Police Officer in Rape Case Fired, Calumet City Commission Finds Him Guilty of 5 Charges, Chi. Trib., Apr. 8, 1988, at D1. Horka admitted that he would have done things differently had he known all the facts at the time. Id. However, when asked if he thought he did the right thing then, he responded: "Yes I do. I didn't get anybody killed." Id. Horka's discharge was overturned by a Cook County Circuit Judge who concluded that a police officer's split second decisions should not be governed by hindsight. Charles Mount & Laurie Goering, Judge Overturns Calumet City Cop Firing, Chi. Trib., Apr. 12, 1989, at C1. Horka, in his defense, asserted, "I never back down from anybody, but with two kids it's different." Id. He also reiterated that if put in the same situation again, he would make the same decision. Laurie Goering, Calumet City Officer Back on the Job, Chi. Trib., Apr. 20, 1989, at C1. As the case went back on remand, Horka remained a patrol officer with the department. Telephone Interview with Andrew Trader, Assistant Chief of the Calumet City Police Department, Calumet City, Ill. (Jan. 4, 1995).


45. See infra text accompanying notes 191-92 (enumerating Jane's claims). Three of the defendant officers, including Horka, were members of the Calumet City police department. Doe v. Calumet City, 641 N.E.2d 498, 501 (Ill. 1994). A fourth officer was from the Village of Burnham. Id.

46. See infra notes 191-219 and accompanying text (discussing opinions of lower courts).
47. See infra notes 220-51 and accompanying text (discussing the supreme court's opinion).
49. At the appellate level, the other pro-plaintiff decisions include Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988) and Watson v. City of Kan. City, Kan., 857 F.2d 690 (10th Cir. 1988). For a discussion of Watson and Balistreri, see infra notes 127-49 and 171-89 and accompanying text, respectively.
that the defendant police department violated the Equal Protection Clause by failing to respond to a perceived domestic assault.50

The supreme court's ruling sparked strong reactions from women's advocates, municipalities, and police departments. One advocate predicted the decision heralded "a new area of the law" that promised to "respect . . . women's and children's lives. It isn't a 'see no evil, hear no evil' world anymore."51 Attorneys for municipalities, on the other hand, argued that the ruling would expand liability for police departments and towns because officers would be subject to more litigation.52 According to a deputy corporation counsel for the City of Chicago, Doe created a species of liability unprecedented in Illinois, one that is rare, if not unheard of, nationwide.53 After the decision, the old police adage — you can't get fired for doing nothing — needed to be reconsidered.54 Significantly, many officers viewed Doe not as an unjust indictment but as a salutary reminder: because Doe's egregious circumstances could be ascribed to the rogue actions of an individual officer, the decision merely reaffirmed the need for departments to train their officers properly.55 Norval Morris agreed with this assessment. He believed that the decision would lead to more litigation but would result in liability only in extreme cases.56

As this Note will demonstrate, however, Doe cannot be marginalized by confining its holding to analogous fact patterns that are equally flagrant but rarely encountered. In order to appreciate its impact, Doe must be situated in the context of civil rights law to show where it builds upon and extends constitutional precedent. To do this, the background section of the Note provides an overview of equal protection methodology and gender classifications.57 The Note then reviews how the Equal Protection Clause has been applied to battered

50. The overriding irony in Doe is that Officer Horka chose not to respond to a violent crime against Jane and her children based upon his mistaken assumption that Jane was the victim of a domestic assault.


53. Lenckus, supra note 52, at 2.

54. Griffin & Irwin, supra note 51, at 7.

55. Dusik & Diskin, supra note 52, at A16; Griffin & Irwin, supra note 51, at 7.

56. Griffin & Irwin, supra note 51, at 7 ("Juries and judges are very reluctant to hold police responsible for decisions that have to be made under pressure in a split second . . . . It has to be willful and wanton misconduct. Standing by and watching someone be beaten up, that would be clear.").

women under Section 1983. After detailing the degree and level of judicial scrutiny applied to domestic violence cases, the Note then considers the importance of archaic and overbroad stereotypes as proof of discriminatory intent. A discussion of Doe follows, reviewing the pro-defendant opinions of the two lower courts and the supreme court’s reversal. Next, the Note analyzes the Doe opinions, showing how Jane’s narrative of sexualized violence was vulnerable to attack as unbelievable. Those who heard Jane’s account, the police and the lower courts, misinterpreted and rewrote its message to conform to their own stereotypical assumptions about how the story’s plot should develop and how much credence should be granted to someone in Jane’s position. From their perspective, Jane was an excited, unstable woman who claimed to have been assaulted but was probably roughed up by a husband or boyfriend. The Note critiques this perspective by examining gender stereotypes and the problem of belief as they apply to sexual assault and to claims of hysteria. The Note then discusses stereotypes and the problem of police inaction in the context of domestic violence. The Note concludes by underscoring the impact of Doe v. Calumet City and its relevance for domestic violence victims in civil rights actions. The Note will demonstrate that Doe’s significance is more than a reminder to police departments to serve and protect; instead, it redefines how an Equal Protection violation accrues and, in so doing, lowers the burden for domestic violence plaintiffs.

I. Background

The Fourteenth Amendment commands that no state shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated

59. See infra Part I.C (discussing the use of stereotypes to demonstrate discriminatory purpose).
60. See infra Part II (discussing the Illinois courts’ treatment of Doe’s Equal Protection claims).
61. See infra notes 257-59 and accompanying text (discussing how the plaintiff’s story of sexual assault was subject to misinterpretation).
62. See infra notes 265-99 and accompanying text (discussing sexual assault, hysteria and the problem of belief).
63. See infra notes 300-20 and accompanying text (discussing police lack of response to domestic violence crimes).
64. See infra notes 321-32 and accompanying text (discussing how the supreme court’s inferential analysis eases the plaintiffs’ evidentiary burden).
should be treated alike.”

Though the Equal Protection Clause does not deny the government’s ability to classify individuals in the creation and administration of laws, it does ensure that those classifications are not grounded upon “impermissible criteria or arbitrarily used to burden a group of individuals.”

One distinction based on impermissible criteria is a police department’s classification differentiating domestic from non-domestic assaults, thereby according preferential treatment to the victims of non-domestic assaults. This section will examine the Supreme Court’s evolving doctrine on gender discrimination and how lower courts have applied the doctrine to domestic violence cases.

A. Equal Protection Methodology and Classifications Based on Gender

The Supreme Court has employed three “standards of review” in its examination of governmental classifications under equal protection challenges: the rational relationship standard, the strict scrutiny test, and the intermediate scrutiny test. The Court has applied all three levels of scrutiny in the history of gender discrimination case law, beginning with the rational basis standard, pausing briefly to apply the strict scrutiny test, and finally settling upon the intermediate standard.

1. The Rational Relationship Standard

The passage of the Fourteenth Amendment in 1868 had little effect upon classifications based on gender. For the next one hundred years, the Supreme Court upheld legislation that presumed that men and women should occupy the roles traditionally allotted to them by American society. Hence, the Court treated sex-based classifications with the deferential posture reserved for economic and social

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68. See Watson v. City of Kan. City, Kan., 857 F.2d 690, 696 (10th Cir. 1988) (finding an Equal Protection violation where a city and police department followed a policy of affording less protection to domestic violence victims than to victims of non-domestic attacks).

69. NOWAK & ROTUNDA, supra note 67, § 14.3.

70. See infra notes 71-106 and accompanying text (discussing standards of review as applied to gender discrimination cases).

71. NOWAK & ROTUNDA, supra note 67, § 14.20, at 733.

72. Id.; LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-25, at 1559 (2d ed. 1988). The patriarchal attitude of the early cases is captured by Justice Bradley’s concurrence in Bradwell v. Illinois:
welfare legislation,\textsuperscript{73} asking merely whether the classification was rationally related to a legitimate state interest.\textsuperscript{74} In \textit{Goesaert v. Cleary},\textsuperscript{75} for example, the Court upheld a Michigan law that prohibited a woman from obtaining a license for tending bar unless she was the wife or daughter of the male tavern owner.\textsuperscript{76} "Since bartending by women may," according to Justice Frankfurter, "give rise to moral and social problems," it was not irrational for the Michigan legislature to believe that these problems would be minimized by the supervision of the barmaid's husband or father.\textsuperscript{77}

2. \textit{A Heightened Standard of Review: Gender as a Suspect and Quasi-Suspect Class}

The Court reexamined its traditional deferential attitude to gender-based classifications in \textit{Reed v. Reed},\textsuperscript{78} decided a century after the ratification of the Fourteenth Amendment. In \textit{Reed}, the Court struck down a statute that preferred men over women in the administration of an intestate estate.\textsuperscript{79} \textit{Reed} marked the first time the Court employed the Equal Protection Clause to invalidate a gender classification.\textsuperscript{80} Although the Court purported to apply the mere rationality

\begin{quote}

The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . .

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

\textit{83 U.S. 130, 141 (1873) (Bradley, J., concurring).}

\textit{73. The Court articulated the deferential standard reserved for economic and social welfare legislation in \textit{Railway Express Agency v. New York}: Where the classification "has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection," the Court will uphold the regulation against an Equal Protection challenge. 336 U.S. 106, 110 (1949).}

\textit{74. See, e.g., \textit{Lindsley v. Natural Carbonic Gas Co.}, 220 U.S. 61, 78 (1911) ("The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.").}

\textit{75. 335 U.S. 464 (1948).}

\textit{76. \textit{Id.} at 466-67.}

\textit{77. \textit{Id.} at 466. See also \textit{Hoyt v. Florida}, 368 U.S. 57 (1961) (holding a state statute constitutional that accorded women an absolute exemption from jury service unless they expressly waived the privilege). That court also pronounced that the relevant inquiry is whether the exemption is based on a reasonable classification. \textit{Id.} at 59-65.}

\textit{78. 404 U.S. 71 (1971).}

\textit{79. \textit{Id.} at 77.}

\textit{80. \textit{Nowak & Rotunda, supra} note 67, \textit{§ 14.22}, at 739.}
standard, the decision may be understood by assuming that "some special sensitivity to sex as a classifying factor entered into the analysis." By holding that the gender classification was "arbitrary," the Reed court must have imported some special suspicion of sex-related means from the equal protection framework: "A classification ‘must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to that object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ "

To grant a mandatory preference to one sex in order to reduce the workload in probate courts "is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."

The Court's tacit abandonment of minimal scrutiny in Reed was made explicit two years later in Frontiero v. Richardson. In Frontiero, eight justices agreed that the differential treatment accorded servicewomen's dependency benefits was a violation of the Due Process Clause of the Fifth Amendment. Justice Brennan, writing for a plurality, noted that "our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." As a result of these patriarchal attitudes, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes." Brennan drew a parallel between the nineteenth century position of women in our society and the position of blacks under the pre-Civil War codes, con-
cluding that classifications based on sex, like those based on race, are inherently suspect and therefore deserving of close judicial scrutiny.\textsuperscript{91}

Brennan's view in \textit{Frontiero} of gender as a suspect class never commanded the majority of justices voting in a single case.\textsuperscript{92} Instead, in the five years following \textit{Reed}, the Court considered a number of gender-based classifications without coming to an agreement concerning the appropriate standard of review.\textsuperscript{93} In 1976, the Court compromised, settling upon an intermediate level of scrutiny in \textit{Craig v. Boren}.\textsuperscript{94} In \textit{Craig}, the Court invalidated a statute that prohibited the sale of 3.2 percent beer to males under twenty-one and to females under eighteen.\textsuperscript{95} Justice Brennan noted for the majority that previous cases established that gender-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives if they were to withstand constitutional challenge.\textsuperscript{96} After \textit{Craig}, discrimination against women is neither suspect nor merely subject to the less exacting, deferential ra-

\begin{thebibliography}{99}
\bibitem{91} Id. See also \textit{Frontiero v. Richardson}, 411 U.S. 677, 686 (1973) (citation omitted) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' "). On the analogy between racial and gender discrimination, see R. \textsc{Wasserstrom}, \textsc{Philosophy and Social Issues} 17 (1980); Kenneth L. \textsc{Karst}, \textsc{Foreword: Equal Citizenship under the Fourteenth Amendment}, 91 \textsc{Harv. L. Rev.} 1, 23-26 (1977) (explaining that classifications based on these immutable characteristics grow out of solicitude for the victims of stigma and further lead to a society based on stereotypes).
\bibitem{92} \textsc{Nowak & Rotunda}, supra note 67, § 14.22, at 740.
\bibitem{93} Id. On the case law between \textit{Reed} in 1971 and \textit{Craig} in 1976, see generally Stanley \textit{v. Illinois}, 405 U.S. 645 (1972) (applying rational basis scrutiny, unwed father entitled to hearing before children were adopted by another person); Kahn \textit{v. Shevin}, 416 U.S. 351 (1974) (applying the "fair and substantial relation" standard of \textit{Reed}, and upholding a statute that granted widows a property tax exemption but denied any analogous benefit for widowers); Schlesinger \textit{v. Ballard}, 419 U.S. 498 (1975) (holding a legislative classification completely rational where women naval officers were given more time than men to gain mandatory promotion); Taylor \textit{v. Louisiana}, 419 U.S. 522 (1975) (holding that a state system that excluded women from jury service violated the Sixth Amendment); Weinberger \textit{v. Wiesenfeld}, 420 U.S. 636 (1975) (holding a statute unconstitutional that conferred benefits based on the earnings of a deceased husband and father to widows and minor children, but that conferred benefits based on the earnings of a deceased wife and mother only to minor children); Stanton \textit{v. Stanton}, 421 U.S. 7 (1975) (holding a statute invalid that required parents to provide support payments for sons until age twenty-one but for daughters only until age eighteen).
\bibitem{94} For critical surveys of the relevant case law through the early 1970s, see Ruth Bader Ginsburg, \textsc{Gender in the Supreme Court: The 1973 and 1974 Terms}, 1975 \textsc{Sup. Ct. Rev.} 1; Gunther, supra note 82; John D. Johnston, Jr., \textsc{Sex Discrimination and the Supreme Court 1971-1974}, 49 \textsc{N.Y.U. L. Rev.} 617 (1974).
\bibitem{95} 429 U.S. 190 (1976).
\bibitem{96} Id. at 210.
\end{thebibliography}
tional basis standard; instead, it is "quasi-suspect,"
judged by a more flexible but less predictable intermediate level of scrutiny.

Post-Craig decisions applied an elevated intermediate scrutiny to benign gender classifications, marital and family rights, statutory rape, military service, and educational programs. The Equal Protection Clause has also been applied on behalf of battered women. 

98. The adoption of the intermediate standard was opposed by Justice Stevens in his concurrence (the Equal Protection clause "does not direct the courts to apply one standard of review in some cases and a different standard in other cases") and Justice Rehnquist in dissent (the Court's enunciation of the intermediate standard "apparently comes out of thin air"). Craig, 429 U.S. at 211-12, 220 (Stevens, J. concurring and Rehnquist, J. dissenting).
99. See, e.g., Califano v. Webster, 430 U.S. 313 (1977) (upholding classification that granted higher payments to retired female workers than to similarly situated males).
100. See, e.g., Lehr v. Robertson, 463 U.S. 248 (1983) (upholding statute which allowed mothers, but only certain "putative fathers," to receive notice of and veto the adoption of an illegitimate child); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding invalid a statute which gave the husband, the "head and master" of the family, the unilateral right to dispose of property jointly owned with his wife without his spouse's consent); Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a law that required the consent of unwed mothers, but not unwed fathers, before the adoption of the child); Orr v. Orr, 440 U.S. 268 (1979) (holding unconstitutional a law that required only men to make alimony payments); Parham v. Hughes, 441 U.S. 347 (1979) (upholding a statute which allowed the mother, but not the father, of an illegitimate child to sue for the child's wrongful death).
103. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down law denying admission to men at a state nursing school because the women-only policy tended to "perpetuate the stereotyped view of nursing as an exclusively woman's job").
104. In addition to bringing claims grounded in equal protection, battered women have also sought recovery in suits based on the denial of due process and on the failure to adequately train the police. The Supreme Court's decision in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), has, however, severely curtailed women's ability to bring a successful substantive or procedural Due Process suit. In Deshaney, a child was repeatedly abused by his father until he was permanently disabled, even though county social workers, who several times observed signs of physical abuse, did nothing to protect the boy. Id. at 192-93, 201. The Court ruled that the county officials did not deny the child due process: "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Id. at 196. On the claims of battered women based upon due process and the impact of DeShaney, see Jack M. Beerman, Administrative Failure and Local Democracy: The Politics of DeShaney, 1990 DUKE L.J. 1078 (1990); Karen M. Blum, Monell, DeShaney, and Zinermon: Official Policy, Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983, 24 CREIGHTON L. REV. 1 (1990); David Winthrop Hanson, Battered Women: Society's Obligation to the Abused, 27 AKRON L. REV. 19 (1993); James T.R. Jones, Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After DeShaney, 93 W. VA. L. REV. 251 (1990-1991) [hereinafter Jones, Battered Spouses' Section 1983 Damage Actions]; Caitlin E. Borgman, Note, Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?, 65 N.Y.U. L. REV. 1280 (1990).
women under Section 1983\textsuperscript{105} but with varying results.\textsuperscript{106} One reason battered women have not enjoyed consistent success in civil rights ac-


Section 1983 provides that

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


Defendants under Section 1983 include both natural persons and local governments. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978). The elements for stating a cause of action vary depending on the identity of the defendant. To establish personal liability, the plaintiff must allege that a person, acting under color of state law, has deprived him of a federal right. Gomez v. Toledo, 446 U.S. 635, 640 (1980). To establish municipal liability, the plaintiff must allege that the defendant's "official policy [was] responsible for a deprivation of rights protected by the Constitution." \textit{Monell}, 436 U.S. at 690.

On the application of Section 1983 to the battered woman context, see Gary M. Bishop, Note, \textit{Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction}, 30
tions is the courts' reluctance to find gender discrimination in these cases and then to apply an elevated standard of scrutiny.

B. Equal Protection Methodology and Domestic Violence

The first part of this section traced the Supreme Court's use of the three-tier Equal Protection standards of review to gender classifications: from minimal scrutiny (*Goesaert*) to strict scrutiny (*Fron-tiero*) to an intermediate standard (*Craig*). Notably, the evolution of domestic violence case law has proceeded in the opposite direction: from the elevated standard established by *Thurman v. City of Torrington* in 1984 to the rational basis rule adopted by post-*Thurman* courts.


Commentators have noted several ironies in the sex discrimination case law. One incongruity is that many of the cases were brought by male plaintiffs. Tribe, *supra* note 72, § 16-26, at 1564. A more telling irony is that many of the decisions concern legal questions of less than momentous significance.

For example, in Califano v. Goldfarb, 430 U.S. 199 (1977), the Court invalidated a provision of the Social Security Act that gave benefits to the widow of a deceased worker but only to a widower if he proved actual dependency. Addressing the legal issue in *Goldfarb*, Mary E. Becker underscored the "trivial" impact of the case. Given the systematic discrimination against women that pervades our society,

*Goldfarb* does nothing significant about the problems women face. Relative to the changes necessary to achieve equality between the sexes, it is trivial.

From the perspective of women's equality, the case is trivial in another sense: it involves a challenge to the award of benefits to a man. Furthermore, the woman who had made the relevant contributions to the system was dead. One would expect the case to have had only the most limited effect on the status of women in the real world during their lives and marriages . . . . The change may have been worth making, depending on the costs associated with it, but one would not imagine that it did much good . . . .

It surely would be relevant to note that the Court developed its constitutional standard for sex equality in trivial cases. It seems likely that development in such a context might affect the effectiveness of a substantive standard.


In contrast to Becker's line of "trivial" case law, the Fourteenth Amendment decisions concerning battered women would appear to take on a more critical and influential power. The marginalization of these cases may reveal something lacking, as Becker puts it, in the effectiveness of a substantive standard.

107. *See supra* notes 75-77 and accompanying text (discussing the application of the rational relationship standard in *Goesaert*).

108. *See supra* notes 78-91 and accompanying text (discussing how classifications based on sex are inherently suspect).

109. *See supra* notes 92-98 and accompanying text (discussing the adoption of the intermediate level of scrutiny for gender-based classifications).

1. Thurman v. City of Torrington: Heightened Scrutiny

A heightened standard of scrutiny was applied in the first important domestic violence decision that raised the Equal Protection argument,111 *Thurman v. City of Torrington.*112 In 1983, Tracey Thurman notified the defendant municipality that her estranged husband, Charles, had threatened both her and her children.113 Tracey’s attempts to file complaints against Charles were either ignored or rejected by police officers and the municipality.114 After a number of instances in which the police failed to arrest Charles, he again threatened Tracey, and she again phoned the police.115 When Tracey tried to reason with him on this occasion, Charles stabbed her repeatedly in the chest, neck, and throat, leaving her partially paralyzed.116

The district court in *Thurman* found that the Equal Protection Clause required that city officials and police officers have an affirmative duty to preserve law and order, and to protect the personal safety of individuals in the community.117 This duty extended to the victims of domestic violence, provided that officials have notice of the possibility of such attacks.118 Tracey Thurman alleged that the police department employed a de facto gender-based classification that afforded lesser protection when the victim was a battered woman or battered child.119 For the classification to survive constitutional scrutiny, the city had to articulate an important governmental interest, which it failed to do.120 The court rejected any suggestion that the police department’s inaction could be justified as a means of promoting domestic harmony.121 Any such justification was belied by Tracey’s own actions: she evinced no desire to work out her problems privately, but rather pleaded with the police for protection and sought a restraining order against Charles.122 After the district court ruled

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112. On cases raising the Equal Protection problem before *Thurman*, see Carolyne R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 676-77 (1986).
114. *Id.*
115. *Id.* at 1525.
116. *Id.*
117. *Id.* at 1527.
118. *Id.*
119. *Id.*
120. *Id.* at 1527-28.
121. *Id.* at 1529.
122. *Id.*
for Tracey on the civil rights claim, the jury awarded her $2.3 million for her injuries.\(^{123}\)

2. **Post-Thurman Case Law: Stricter Standards for Plaintiffs**

*Thurman* was clearly a landmark decision,\(^ {124}\) and several district courts adopted its analysis.\(^ {125}\) Other district courts and courts of appeals, however, have been more restrictive in their use of the Equal Protection Clause.\(^ {126}\)

Three years after *Thurman*, the Tenth Circuit in *Watson v. City of Kansas City, Kansas*,\(^ {127}\) delineated the terms in which most courts have applied the Fourteenth Amendment to domestic violence claims.\(^ {128}\) *Watson* involved a long history of domestic violence in which the husband, a police officer, repeatedly physically abused his wife, Nancy.\(^ {129}\) The police, in response to Nancy's claim that her husband had shaken a knife at her, replied: "[I]f you ever call the police

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123. *Officers Must Pay $2.3 Million to Wife Maimed by Husband*, *N.Y. Times*, June 26, 1985, at B6. After the case was appealed, Tracey settled out of court for $1.9 million. Dirk Johnson, *Abused Women Get Leverage in Connecticut*, *N.Y. Times*, June 15, 1986, § 4, at 8. Three years to the date after the stabbing attack, Connecticut passed into law one of the strongest family violence bills in the nation. *Id.*


126. Harper, *supra* note 104, at 1404. See also *Brown v. Grabowski*, 922 F.2d 1097, 1118 (3rd Cir. 1990) ("We believe that *Thurman* ... a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim ... to enable reasonable officials to 'anticipate [that] their conduct [might] give rise to liability for damages.' ").

127. 857 F.2d 690 (10th Cir. 1988).


129. 857 F.2d at 692. See Sharman Stein, *Cops' Spouses Face Abuse Problem Too*, *Chi. Trib.*, Nov. 15, 1994, § 1, at 1 (discussing the problem of domestic violence in Chicago where police are the abusers).
again, I will see to it that you are arrested and you'll never see those two kids again."\(^{130}\) After a tumultuous two years, the husband broke into Nancy's residence, raped and stabbed his wife, and committed suicide.\(^{131}\) One officer responding to the scene told the brutalized victim that she was at fault for marrying her husband.\(^{132}\)

According to the *Watson* court, plaintiffs may allege two types of discrimination in their Equal Protection suit: 1) that municipal policy or custom discriminates against domestic violence victims, or 2) that the failure of police departments to respond adequately to domestic violence constitutes sex discrimination.\(^{133}\) The court concluded that the plaintiff, by marshalling statistics and other evidence of police department policy, had demonstrated that the defendants provided less protection to domestic assault victims than to nondomestic assault victims.\(^{134}\) However, Nancy Watson had not shown any discriminatory purpose behind the classification, and therefore the gender discrimination claim failed.\(^{135}\)

The first type of discrimination is not predicated on gender; rather, the classification is between domestic and nondomestic crimes. If the plaintiff alleges that the municipality or police department has failed

\[^{130}\text{Watson, 857 F.2d at 692.}\]
\[^{131}\text{Id. at 693.}\]
\[^{132}\text{Id.}\]
\[^{133}\text{Id. at 696-97.}\]
\[^{134}\text{Id. at 695-96. The plaintiff in *Watson* amassed data to show that nondomestic assaults resulted in an arrest rate of 31 percent, whereas domestic assaults yielded an arrest rate of only 16 percent. \textit{Id.} The court did not decide whether statistical evidence alone would prove the existence of policy or custom. \textit{Id.} Instead, the plaintiff presented other evidence regarding police officer training: the training emphasized first defusing the domestic violence situation and using arrest as a last resort. \textit{Id.} at 696. Taken together — the statistics and the evidence of training — the court reversed the summary judgment awarded to the defendants. \textit{Id.}\text suppose the successful use of statistical evidence in *Watson* may be contrasted with its unsuccessful use in *McKee* v. City of Rockwall, Texas, 877 F.2d 409 (5th Cir. 1989). The plaintiff in *McKee* compiled comparative data over a five-year period to show that the percentage of nondomestic assaults leading to arrests was 36 percent, whereas the percentage for domestic assaults was 21 percent. \textit{Id.} at 411. The Fifth Circuit noted several problems with the figures. First, a mathematical error exaggerated the discrepancy between the two types of assaults. \textit{Id.} at 412, 415. In addition, in two of the five years surveyed, the domestic assault arrest rate was higher than the nondomestic assault arrest rate. \textit{Id.} at 415. The court also stated that the statistics did not account for the many factors that might influence the probability of the police making an arrest: whether the police witnessed the crime, whether a weapon was used, whether the victim was injured, and whether the victim refused to press charges. \textit{Id.} Finally, the *McKee* court observed that the absence of a gender-related variable made the data even less dependable. \textit{Id.} Because the statistics did not compare how many women were victims in nondomestic assaults with the number of men who were the victims in domestic assaults, no program of gender-based discrimination could be inferred. \textit{Id.} The Fifth Circuit concluded that the plaintiff did not prove that the officers' inaction resulted from discrimination against a protected minority. \textit{Id.} at 416.\]
\[^{135}\text{Watson, 857 F.2d at 697.}\]
to protect her because of her status as a domestic assault victim, then the defendant need only articulate a legitimate reason for the disparate treatment.\textsuperscript{136} Notwithstanding the application of minimal scrutiny, some courts have ruled in favor of plaintiffs when the defendants failed even to satisfy this lesser standard.\textsuperscript{137}

The second type of discrimination is based upon the sex of the victim. Commentators have argued that a police policy that devalues the importance of domestic assaults has a disproportionate effect on women because women comprise the vast majority of domestic violence victims.\textsuperscript{138} If the plaintiff claims that the police department failed to protect her because of her gender, then the defendants must articulate an important governmental interest for the classification.\textsuperscript{139} Despite the pro-plaintiff holding in \textit{Thurman}, the difficulty with this approach, as illustrated in \textit{Watson}, is that the alleged differential treatment is never embodied in any statutory classification and is thus facially neutral.\textsuperscript{140}

The two-track inquiry set forth in \textit{Watson} resulted from the Supreme Court's analysis in \textit{Personnel Administrator v. Feeney}.\textsuperscript{141} The Court held in \textit{Feeney} that a facially neutral classification with a

\begin{itemize}
  \item \textsuperscript{137} Watson, 857 F.2d at 696; Dudosh, 665 F. Supp. at 394; Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984).
  \item \textsuperscript{138} McFarlane, supra note 128, at 942. Domestic violence cases are narratives in which the roles are type-cast: the nexus between victim and gender is constant. See Nadine Taub, \textit{Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny}, 9 HOFSTRA L. REV. 95, 95 n.5 (1980) (stating that between approximately 1.8 and 3.3 million women each year are beaten by their spouses while only 280,000 men are abused by their wives). Another study demonstrated that 20 percent of husbands beat their wives on a regular basis: from once a day to six times per year. JENNIFER BAKER FLEMING, \textit{STOPPING WIFE ABUSE} 155 (1979). Other studies have indicated that a large proportion of women are victims of physical violence at some point in their lives. \textit{Id.} (up to 60 percent of all married women are victimized by their husbands sometime during their marriage); DEBORAH L. RHODE, \textit{JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW} 237 (1989) (estimates between 55 percent and 50 percent of all women are subject to some form of domestic violence during their lifetimes); Brenneke, supra note 104, at 6 (estimates between 12 percent and 50 percent of all American women). In 1990, 30 percent of the 4,399 women murder victims were slain by their husbands or boyfriends. \textit{Id.} See also RHODE, supra at 237 (one-third of all female homicide victims are killed by a family member or male friend).
  \item \textsuperscript{140} Watson, 857 F.2d at 695-96.
  \item \textsuperscript{141} 442 U.S. 256 (1979).
\end{itemize}
disproportionate impact upon women is not unconstitutional.\textsuperscript{142} In that case, a Massachusetts statute gave preferential treatment for civil service employment to veterans over non-veterans.\textsuperscript{143} Because 98 percent of the veterans in the state were men, the statute operated overwhelmingly to the disadvantage of women.\textsuperscript{144} Disproportionate impact, while not irrelevant, does not by itself trigger strict scrutiny;\textsuperscript{145} instead, a showing of purposeful discrimination is "the condition that offends the Constitution."\textsuperscript{146} For the Court in Feeney, however, "awareness of consequences" did not demonstrate discriminatory purpose.\textsuperscript{147} Intent "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not

\begin{footnotesize}

\textsuperscript{142} Id. at 281. For the application of the Feeney test in the domestic violence context, see Hathaway, supra note 112, at 684-87.

\textsuperscript{143} Feeney, 442 U.S. at 259.

\textsuperscript{144} Id. at 270-72.


\textsuperscript{146} Feeney, 442 U.S. at 274 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)). In Village of Arlington Heights v. Metropolitan Housing Development Corporation, the Court noted the ways in which the discriminatory intent test could be satisfied: "Sometimes a clear pattern [is] unexplainable on grounds other than race." 429 U.S. 252, 266 (1977). However, cases that fall into this first class are rare. The Court mentioned Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Yick Wo v. Hopkins, 118 U.S. 356 (1886), as examples. Id. It also stated that, absent such a stark pattern, "impact alone is not determinative." Id. Thus, the Court looked to other evidence such as the historical background of the decision and the legislative or administrative history. Id. at 267-68. The Court suggested that the evidentiary source should take the form of a smoking gun: the historical background is relevant if "it reveals a series of official actions taken for invidious purposes." Id. at 267. The legislative history is germane "where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Id. at 268.

In light of Arlington Heights, one may ask why in domestic violence cases a clear pattern, unexplainable on grounds other than gender, has not been identified, especially since the overwhelming majority of victims are women? In other words, why are domestic assault cases not placed within the same class as Gomillion or Yick Wo? On the disproportionate number of women victims of domestic assaults, see McFarlane, supra note 128, at 942 n.78 (twenty-nine of thirty domestic violence victims were women (citing Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 n.1 (D. Conn. 1984)); 95 percent of domestic assault victims were women (citing Bureau of Justice Statistics, U.S. Department of Justice, Report to the Nation on Crime and Justice: The Data 21 (1983)); an estimated 97 percent of spousal abuse victims were female (citing I. Silver, Police Civil Liability (MB) Form 9:1, at 2-23 n.6 (1990)).

One critic of the discriminatory purpose test observes that after Washington v. Davis every racial discrimination suit involving a facially neutral statute "would be conducted as a search for a bigoted decision-maker":

This "perpetrator perspective" sees contemporary racial discrimination not as a social phenomenon — the historical legacy of centuries of slavery and subjugation — but as the misguided, retrograde, almost atavistic behavior of individual actors in an enlightened, egalitarian society. If such actors cannot be found — and the standards for finding them are tough indeed — then such there has been no violation of the Equal Protection clause.

\textsuperscript{147} Tribe, supra note 72, § 16-20, at 1507.

\textsuperscript{148} 442 U.S. 256, 279 (1979).
\end{footnotesize}
merely ‘in spite of,’ its adverse effects upon an identifiable group.”\textsuperscript{148} The intentionality requirement of \textit{Feeney} mandated the conclusion in \textit{Watson} that even a showing of adverse impact would not overcome the plaintiff’s “heavy burden” to escape summary judgment.\textsuperscript{149}

C. Proving Discriminatory Intent: Archaic and Overbroad Stereotypes

The heavy burden placed upon the plaintiff in \textit{Watson} and other post-\textit{Feeney} domestic violence cases may be overcome by proving that the differential treatment was the product of an archaic stereotype.\textsuperscript{150} If a classification is found to be based on “archaic and over-broad generalizations about women,”\textsuperscript{151} then it is constitutionally infirm. The Supreme Court, in \textit{Mississippi University for Women v. Hogan},\textsuperscript{152} found the exclusion of men from a state nursing school invalid because it “tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”\textsuperscript{153} The Court in \textit{Hogan} observed that even though the test for judging the validity of a gender classification is straightforward,

it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.\textsuperscript{154}

The way around the \textit{Feeney} burden is the road taken by the Court in \textit{Hogan}. A showing that a policy decision is engendered by stereotypic considerations is proof of discriminatory intent, even if there is no explicit desire to harm a protected class.\textsuperscript{155}

The \textit{Hogan} Court adopted a skeptical posture toward gender classifications to guarantee that government action is “determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate assertions about the proper roles of men

\footnotesize{148. Id. See also Washington \textit{v. Davis}, 426 U.S. 229, 242 (1976) (A “law, neutral on its face . . . is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

149. 857 F.2d 690, 696-97 (10th Cir. 1988).


153. \textit{Id.} at 729.

154. \textit{Id.} at 724-75.

155. Eppler, \textit{supra} note 150, at 804.}
and women." 156 In other words, stereotypes promote laws that discriminate because "they shortcut the process of being discriminating." 157 Stereotypical generalizations based upon sex are used as a "proxy for other, more germane bases of classification," 158 the stereotype substituting for the substantial relationship that must exist between the means and the governmental objective. 159

Two decisions illustrate how stereotypical language can be the basis for an Equal Protection claim. The Supreme Court's decision in Price Waterhouse v. Hopkins 160 shows the Court's approach to stereotypes and discrimination in the employment context. The import of stereotypes in the domestic violence context may then be examined in Balistreri v. Pacifica Police Department. 161


In Price Waterhouse, the Supreme Court defined the nexus between stereotypes and differential treatment in ruling that discrimination on the basis of gender stereotypes violated Title VII. 162 In that case, Ann Hopkins was proposed for partnership in a nationwide accounting firm, the only woman among eighty-eight candidates that year. 163 Although she developed more new business than any other candidate and billed more hours, 164 the firm's policy committee decided to place her on hold for one year as a result of negative evaluations. 165 Hopkins, according to the evaluations, was lacking in interpersonal skills: she was described as "sometimes overly aggressive, unduly harsh, impatient with staff, and very demanding." 166 Many of the partners framed their criticisms in terms of sex: she was "macho," "overcompensated for being a woman," and given to the unladylike habit of

156. 458 U.S. at 726.
158. Hogan, 458 U.S. at 726 (citing Craig v. Boren, 429 U.S. 190, 198 (1976)).
159. See Califano v. Westcott:
   [T]he gender classification . . . is not substantially related to the attainment of any important and valid statutory goals. It is, rather, part of the "baggage of sexual stereotypes" . . . that presumes the father has the "primary responsibility to provide a home and its essentials, while the mother is the 'center of home and family life.'"
443 U.S. 76, 89 (1979) (citations omitted).
160. 490 U.S. 228 (1989).
161. 855 F.2d 1421 (9th Cir. 1988).
166. Id. at 234-35.
swearing.\textsuperscript{167} To improve her chances for partnership, Hopkins was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\textsuperscript{168} The Court ruled that “stereotyped remarks can certainly be evidence that gender played a part” in an employment decision.\textsuperscript{169} In forbidding employers from discriminating against persons on the basis of sex, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”\textsuperscript{170}

2. Stereotypes, Discrimination, and Domestic Violence: Balistreri v. Pacifica Police Department

In 1988, a year before \textit{Price Waterhouse} and less than a year following \textit{Watson}, the Ninth Circuit in \textit{Balistreri v. Pacifica Police Department}\textsuperscript{171} looked to a policeman’s stereotypical words to determine whether an Equal Protection claim was appropriate. In \textit{Balistreri}, the plaintiff, Jena, was severely beaten by her husband.\textsuperscript{172} The officers who responded to the call removed the husband from the residence, but did not arrest him and were “rude, insulting and unsympathetic” to Jena.\textsuperscript{173} For the next several years, she was subjected to a campaign of abuse: vandalism, harassing phone calls, and a firebomb.\textsuperscript{174} Although she named her husband — whom she subsequently divorced — as the suspect, the police steadfastly refused to intervene.\textsuperscript{175} When her former husband crashed his car into her garage, the police declined to arrest her ex-spouse or to investigate the incident.\textsuperscript{176} After Jena reported the acts of phone harassment and vandalism, the police “received her complaints with ridicule,” denied the existence of a previously issued restraining order, ignored her pleas for protection, and on one occasion hung up on her.\textsuperscript{177} When Jena’s house was firebombed, the police took forty-five minutes to respond to her 911

\textsuperscript{167} \textit{Id.} at 235.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.} at 251. \textit{See also} Usher v. City of L.A., 828 F.2d 556, 562 (9th Cir. 1987) (disparaging remarks by police calling plaintiff “nigger” and “coon” demonstrate racial animus and are sufficient to support malicious prosecution claim violating Equal Protection Clause).
\textsuperscript{171} 855 F.2d 1421 (9th Cir. 1988).
\textsuperscript{172} \textit{Id.} at 1423.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.}
The police then questioned the husband but decided he was not responsible. After Jena criticized the inadequacy of the investigation, the police replied that she should leave town or hire a private investigator.

The Ninth Circuit held that the plaintiff alleged sufficient facts to survive a summary judgment motion. The court noted in particular an officer's alleged response to the first assault that left Jena with injuries to her face and abdomen: the officer "did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on.'” Such remarks," said the court, "strongly suggest an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women." The officer's pro-defendant attitude is capable of several interpretations: perhaps he believed that women simply occupy a subordinate role in the family structure, that Jena Balistreri was a bad girl who deserved punishment, or that state officials should not intrude upon the family unit. Whatever the reason, the officer's language reflects an "increasingly outdated misconception concerning the role of females" that cannot be used as a source of differential treatment. On the basis of stereotypical language, then, the court ruled for Jena on the Equal Protection claim.

In terms of the evolution of domestic violence case law, Doe v. Calumet City is more closely related to Balistreri than to Watson. Whereas Watson concentrated upon the differential treatment accorded domestic violence victims based upon statistical evidence and police training, Balistreri identified stereotypic language as evidence of discriminatory purpose. The Doe court then extended the Balistreri analysis: whereas in Balistreri the stereotypical assumptions were briefly articulated and obvious, in Doe the assumptions were less obvious but no less illegitimate.

178. Id.
179. Id.
180. Id.
181. Id. at 1427.
182. Id. at 1423, 1427.
183. Id. at 1427.
184. See infra text accompanying notes 309-10 (listing reasons given by the police for their failure to intervene).
186. Balistreri v. Pacifica Police Dep't, 855 F.2d at 1427. The Thurman court rejected any stereotypical justification for wife beating: "Today... any notion of a husband's prerogative to physically discipline his wife is an 'increasingly outdated misconception.' As such it must join other 'archaic and overbroad' premises which have been rejected as unconstitutional.” 595 F. Supp. 1521, 1528 (D. Conn. 1984) (citations omitted).
Watson’s focus upon governmental means and ends is not unrelated to Balistreri’s emphasis on animus against a burdened class. If the governmental justification does not rely on “reasoned analysis” but on “the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women,” 187 then the requisite direct nexus between the objective and the means will probably be absent. 188 If a purported police objective “reflects archaic and stereotypic notions” regarding women, the Supreme Court has held “the objective itself is illegitimate.” 189

II. Subject Opinion 190

A. The Trial Court’s Decision

Jane, on behalf of herself and her children, brought suit in Illinois state court against Calumet City, the police officers, and the police departments to which the officers belonged. 191 The plaintiffs alleged five counts against the defendants: (1) negligence grounded upon a duty to protect or special relationship; (2) loss of society; (3) family expense; (4) intentional infliction of emotional distress; and (5) gender discrimination pursuant to 42 U.S.C. § 1983. 192 In 1990, the Circuit Court of Cook County dismissed the complaint. 193

In its treatment of the gender discrimination claim, the court applied different analyses to the municipality and to Officer Horka. 194 Because the plaintiffs had not alleged that Calumet City had adopted a policy of discrimination and because Horka was not a high-level officer — that is, not a policymaker — the court struck the allegation against the city. 195 The circuit court was also unsympathetic to the Equal Protection claim against Horka. It analyzed Horka’s language

188. Id. at 725-26.
189. Id. at 725.
190. See supra notes 1-43 and accompanying text (presenting facts of the case).
191. The suit was filed in state, not federal, court because of the plaintiffs’ perception that the Seventh Circuit would be less tolerant of a special relationship Due Process claim. Interview with Clifford Zimmerman, attorney for plaintiffs-appellants, DePaul University College of Law, Chicago, Ill. (Aug. 18, 1994). The plaintiffs’ perception proved correct. Before Doe was filed in 1988, the Seventh Circuit decided DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (7th Cir. 1987). Two years later, the Supreme Court affirmed the court of appeals’ decision. DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989). On DeShaney’s negative impact on Due Process claims brought by domestic violence victims, see supra note 104.
192. Appellants’ Brief app. at II.A.
193. Id. at I.A.1, I.A.2.
194. Id. at II.A.8.
195. Id. at II.A.8-9.
when he described Jane to his commander and the other officers: as “an hysterical woman” who was “freaking out” and “not coherent anymore.”

To the court, the remarks connoted no invidious distinction but merely denoted Horka’s innocent characterization of a distressed woman. To suppose otherwise would “carry[y] gender-based discrimination an awful long way.”

The plaintiffs argued that evidence for a valid Equal Protection claim was demonstrated by Horka’s rude tone of voice and through questions he directed to Jane: “Where is your husband?” “Do you know the guy?” “Why would you leave your children in the apartment if there was a strange man there, and why did you leave your apartment without the key?”

Horka’s questions revealed his stereotypical assumption: that he had responded to a domestic disturbance, and therefore, a non-interventionist approach was appropriate. The court read the officer’s speech in a literalist fashion, denied that any archaic stereotype could be identified, and dismissed the cause of action.

B. The Appellate Court’s Opinion

Jane appealed the circuit court’s order, relying upon *Price Waterhouse* on the question of stereotyping and on *Watson* and *Lowers v. City of Streator* on the issue of domestic violence. In 1992, the Appellate Court of Illinois, by a 3-0 vote, affirmed the judgment of the trial court on the sex discrimination claim.

196. *Id.* at 5.
197. *Id.* app. at II.B.4-7.
198. *Id.* at II.B.4.
199. *Id.* at II.B.5-6.
200. *Id.* at II.B.6.
201. By “literalist,” the author is not suggesting that the trial judge consciously applied a form of strict constructionism to Horka’s alleged speech. The author uses the term to indicate that the judge confined himself to the words in the complaint and refused to draw any inferential conclusions from the record.
203. *See supra* notes 162-70 and accompanying text (discussing the relationship between stereotypes and discrimination in *Price Waterhouse*).
204. *See supra* notes 127-35 and accompanying text (discussing the application of the Equal Protection Clause to the domestic violence context in *Watson*).
206. Doe v. Calumet City, 609 N.E.2d 689, 700 (Ill. App. Ct. 1992). The vote to sustain the special duty negligence claim was 2-1. Justice Manning, in her dissent, argued that the majority decision . . . relieves the City of Calumet City and its police officers of any obligation to do more than show-up at the scene of a crime. Once at the scene, they are free to stand by and observe without incurring liability for their action, likened to spectators at a wrestling match. This is true even if the officers have special knowledge that harm will be done to a victim who cries out for help.
The court found that all the cases relied upon by Jane were distinguishable on the facts.\textsuperscript{207} Whereas in \textit{Price Waterhouse} the Supreme Court found a smoking gun in the plaintiff's employment file,\textsuperscript{208} in \textit{Doe} Jane had not demonstrated that Horka's remarks were based on preconceived notions about women.\textsuperscript{209} Further, the plaintiff in \textit{Price Waterhouse} proved that her employer "in no way disclaimed reliance on the sex-linked evaluations."\textsuperscript{210} Jane, by contrast, had not made such a showing.\textsuperscript{211} The court believed that Jane had also not demonstrated that Horka had a pattern of asking these types of questions of women nor that he would not have put the same questions to a man in a similar predicament.\textsuperscript{212}

The court also concluded that Jane's reliance upon two domestic violence cases, \textit{Watson} and \textit{Lowers}, was misplaced.\textsuperscript{213} In \textit{Watson}, the plaintiff alleged an unwritten policy or custom of differential treatment and, in support, offered statistical evidence of disproportionate impact.\textsuperscript{214} In \textit{Lowers}, the plaintiff submitted evidence detailing a pattern of inaction over a six-month period that indicated a policy by the defendant to discourage vigorous prosecution of violent crimes against women.\textsuperscript{215} In contrast to the court's position, Jane Doe argued that she need not prove the existence of a municipal policy or custom.\textsuperscript{216} In the alternative, if a policy must be shown, Jane pointed to Calumet City's unconstitutional policy of strip searching female arrestees.\textsuperscript{217} The majority, however, found the nexus between the strip search policy and Horka's language too attenuated\textsuperscript{218} and affirmed the circuit court on the dismissal of the Equal Protection claim.\textsuperscript{219}

\textsuperscript{207} \textit{Id.} at 703.
\textsuperscript{208} \textit{Id.} at 698.
\textsuperscript{209} See supra notes 166-70 and accompanying text (discussing the importance of the gender-based comments in \textit{Price Waterhouse}).
\textsuperscript{210} 609 N.E.2d at 698.
\textsuperscript{211} \textit{Id.} (citing \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228, 251 (1989)).
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.} at 699.
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.} See \textit{Doe v. Calumet City}, 754 F. Supp. 1211, 1212-15 (N.D. Ill. 1990) (discussing Calumet City's unconstitutional policy of strip searching female arrestees). Although bearing identical case names, the plaintiff in the 1994 case is not a member of the class in the earlier case.
\textsuperscript{218} The court noted that the Supreme Court required that "[a]t the very least there must be an affirmative link between the policy and the particular violation alleged." \textit{Doe v. Calumet City}, 609 N.E.2d 689, 699 (Ill. App. Ct. 1992) (citing \textit{City of Okla. City v. Tuttle}, 471 U.S. 808, 823 (1985)).
\textsuperscript{219} \textit{Id.}
C. The Supreme Court’s Opinion

In 1994, the Illinois Supreme Court, by a unanimous vote, reversed the appellate court on the state tort claims.\textsuperscript{220} On the federal gender discrimination claim, the court, by a 5-2 margin, found that Jane had made out a cognizable claim against Horka and Calumet City.\textsuperscript{221} Because of the different requirements for personal liability and municipality liability, the court separated the gender discrimination count between the individual officer and the municipality.\textsuperscript{222}

1. The Majority Opinion

a. Section 1983 claim against Horka

The court applied a contextualist,\textsuperscript{223} totality-of-the circumstances approach to Horka’s language and the surrounding factual circumstances. When Horka addressed Jane, she had just suffered a sexual attack and had escaped from Valentine in her undergarments.\textsuperscript{224} She related to Horka her fear for her children, who remained trapped with the suspect.\textsuperscript{225} Against this backdrop, not considered by the lower courts, Horka’s “rude and demeaning tone” of questioning was suspect and suggestive of sex discrimination.\textsuperscript{226} Other incongruous factors, unexplainable otherwise, make sense if one adopts Horka’s stereotypical perspective. According to the court, Horka’s discriminatory attitude explained why the officer stated that Jane was not “coherent,” while her neighbors had no trouble comprehending her.\textsuperscript{227} He also referred to Jane, a woman old enough to have two children, as a “girl.”\textsuperscript{228} A reasonable trier of fact, the court held, could determine that Horka’s conduct demonstrated he discredited Jane’s statements because she was a woman.\textsuperscript{229}

\textsuperscript{220} Doe v. Calumet City, 641 N.E.2d 498, 503-09 (Ill. 1994). The state tort claims were negligence based upon a special duty relationship and upon willful and wanton conduct, and intentional infliction of emotional distress. \textit{Id}. The court rejected the negligence claim based upon a special duty relationship, but found for the plaintiff on the remaining tort theories. \textit{Id}.  
\textsuperscript{221} \textit{Id}. at 509-12.  
\textsuperscript{222} \textit{Id}. at 509.  
\textsuperscript{223} By “contextualist,” the author is referring to a mode of interpretation that makes use of the historical and structural context of the text.  
\textsuperscript{224} Doe, 641 N.E.2d at 510.  
\textsuperscript{225} \textit{Id}.  
\textsuperscript{226} \textit{Id}.  
\textsuperscript{227} \textit{Id}.  
\textsuperscript{228} \textit{Id}.  
\textsuperscript{229} \textit{Id}.
The court cited *Thurman*\(^{230}\) and *Balistreri*\(^{231}\) as precedents supporting potential Equal Protection violations where police failed to respond to domestic violence complaints lodged by women.\(^{232}\) Jane Doe, like Tracey Thurman and Jena Balistreri, was assaulted. She notified the police, but was ignored, and the violence continued.\(^{233}\) The court also examined Horka's questions to Jane: e.g., was the attacker her husband?\(^{234}\) The court placed these questions within their factual setting: they were addressed after Jane informed the officer of Valentine's attack and after Horka decided not to break down the door.\(^{235}\) The court acknowledged, as the lower courts had concluded, that the officer's words were capable of an innocent construction.\(^{236}\) Nonetheless, placed against the backdrop of Horka's conduct towards Jane, a reasonable trier of fact could infer that the officer dismissed Jane's plea "because he continually believed this was a domestic situation less deserving of his attention."\(^{237}\) Applying the equal protection methodology for gender-based classifications, the court stated that "[s]uch conduct is not at all related to any governmental purpose."\(^{238}\)

**b. Section 1983 claim against Calumet City**

Lastly, the court considered Jane's sex discrimination claim against Calumet City. The majority listed the two elements for municipal liability in a Section 1983 action: the plaintiffs must establish that (1) they were deprived of a constitutional interest; and (2) that the deprivation was caused by the government's policy or custom.\(^{239}\) Because the court had already concluded that Jane had stated a cognizable claim of gender discrimination, the sole issue remaining was whether the constitutional injury was caused by an official custom, policy, or usage of the city.\(^{240}\)

\begin{itemize}
\item \(230.\) See *supra* notes 111-23 and accompanying text (discussing the rationale and significance of *Thurman*).
\item \(231.\) See *supra* notes 171-86 and accompanying text (discussing the rationale and significance of *Balistreri*).
\item \(232.\) Doe v. Calumet City, 641 N.E.2d 498, 510 (Ill. 1994).
\item \(233.\) See id. at 502-03 (illustrating the excessive amount of time taken by the police to act on Jane Doe's plea for help).
\item \(234.\) Id.
\item \(235.\) Id. The court observed that Horka's questions were irrelevant given the danger posed by Valentine: "Whether the attacker was Jane's husband or someone she knew would not change the nature of the attack on Jane or the danger to Betty and John." Id. at 510.
\item \(236.\) Id.
\item \(237.\) Id.
\item \(238.\) Id.
\item \(239.\) Id. at 511 (citing Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978)).
\item \(240.\) Id.
\end{itemize}
To demonstrate that Calumet City engaged in a policy or custom of
gender discrimination, Jane alleged five factors: (1) the conduct of
Horka on the morning of December 20, 1987; (2) Calumet City’s prac-
tice between 1982 and 1987 of strip-searching women who had been
arrested for non-felony offenses;241 (3) the city’s ratification of the dis-
parate treatment of women by failing to implement a counter-policy
to the strip-search practice; (4) the city’s ratification of Horka’s con-
duct by failing to discipline him for sex discrimination;242 and (5) the
sexist jokes made at the scene by other officers.243

When viewed individually, the Court found, many of these factors
did not rise to the level of municipal policy.244 In other words, Horka
as a rank-and-file officer did not have the power to issue edicts repre-
senting municipal policy.245 Further, the strip-search policy was not
the “cause” of Horka’s actions; there must be an “affirmative link be-
tween the policy and the particular constitutional violation in-
volved.”246 Moreover, the failure of Calumet City to institute a policy
to counteract the strip-search practice was too attenuated to be the
proximate cause of Jane’s constitutional injury.247

Because Jane did not show that the conduct of Calumet City policy-
makers was implicated, she needed to rely on a showing of custom.248
According to the majority, Jane satisfied this burden. She had not
merely pleaded facts implicating “one rogue officer.”249 Rather, the
court adopted a contextualist approach that considered the actions
and inaction of Horka and the city as part of an interrelated whole.250
The majority held that a reasonable trier of fact could determine that
“gender discrimination in general was so settled and widespread that
the policymakers had either constructive or actual notice of such
conduct.”251

241. See Doe v. Calumet City, 754 F. Supp. 1211 (N.D. Ill. 1990) (holding that the strip
searches were unconstitutional).
242. Whereas the Calumet City Fire and Police Commission found Horka guilty of five mis-
conduct charges, Karwath, supra note 30, at C1, none of the charges concerned sex
discrimination.
244. Id. at 512.
245. Id.
246. Id. (citing City of Okla. City v. Tuttle, 471 U.S. 808, 823 (1985)).
247. Id.
248. Id.
249. Id.
250. Id.
251. Id.
2. The Dissent

Two justices joined in dissenting from the majority's opinion on the Equal Protection claim.\footnote{252} The dissent asserted that a cause of action does not lie "whenever someone is offended by the frictions that occur from day-to-day human contact."\footnote{253} In support of its thesis, the dissent recast the plaintiffs' complaint twice, once in paraphrase and once by quoting from nine paragraphs from the complaint.\footnote{254} The dissent concluded as it began:

The Fourteenth Amendment does not guarantee that a student of Emily Post or Amy Vanderbilt will arrive at the scene when one calls the police for assistance. Section 1983 does not provide a cause of action whenever a word or phrase is spoken which happens to be on the current list of politically incorrect utterances. Neither the Constitution nor the Federal statutes require officers to speak tactfully or deferentially to a person because of his or her gender.\footnote{255}

In sum, the dissent found Jane's claim of gender discrimination "untenable and, indeed, wholly ridiculous."\footnote{256}

\footnote{252} Id. at 513-14 (Heiple and Bilandic, JJ., dissenting).
\footnote{253} Id. at 513 (Heiple and Bilandic, JJ., dissenting). The dissent's reasoning was anticipated by Thomas J. Tyrrell, Horka's defense attorney in the 1988 dismissal hearing. Tyrrell was informed that several witnesses would testify against his client because Horka "wasn't real nice" in responding to their requests that he break into the apartment. Rob Karwath, \textit{Tape May Hold Fate of Officer in Calumet City Rape Incident}, \textit{Chi. Trib.}, Mar. 15, 1988, at C4. Tyrrell, in reply, stated: "He's not going to get an award for being Officer Friendly .... But that's not why you discharge a policeman, because he wasn't compassionate." \textit{Id.}

\footnote{254} Doe v. Calumet City, 641 N.E.2d 498, 513-14 (Ill. 1994) (Heiple and Bilandic, JJ., dissenting).
\footnote{255} Id. at 514 (Heiple and Bilandic, JJ., dissenting).
\footnote{256} Id. (Heiple and Bilandic, JJ., dissenting). A major flaw in the dissent's approach is that its criticism is directed at the wrong claim. The dissent argued that a gender discrimination claim does not lie when someone is offended by the frictions and irritations of everyday life. \textit{See supra} note 255 and accompanying text. But Jane never argued that it did. It is not necessary that the person "making an alleged illegitimate distinction be Attila the Hun. Malice and evil will are not the constitutional standards. [P]urposeful discrimination is the "condition that offends the Constitution."" \textit{McKee v. City of Rockwall, Tex.}, 877 F.2d 409, 422 (5th Cir. 1989) (Goldberg, J., dissenting) (citation omitted). Moreover, it is not necessary that the constitutional injury have a devastating effect. According to the congressional debates on the Ku Klux Klan Act, from which Section 1983 was derived, "'[t]he deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages.'" Monroe v. Pape, 365 U.S. 167, 180 (1961) (quoting \textit{CONG. GLOBE}, 42d Cong., 1st Sess. app. 216 (1871) (statement of Sen. Thurman)).


Jane claimed that the defendants denied her equal protection because she was a woman, not that she was personally offended by an officer's unchivalrous comments. The dissent's argument
The Illinois courts focused their analyses on the language exchanged by Jane and Horka: what their words represented on a purely textual level and what they signified or failed to signify on a subtextual level. The analysis section of this Note will also concentrate on the linguistic effect of the participants' language. To do this properly, the Note first sets the scene by outlining the chronology as pled versus the appellate court's fictional version. Next, the section includes an extended discussion of stereotypes, or what might be termed an identification and critique of the unspoken text situated below the spoken word.

III. ANALYSIS

A. Jane's Story: Interpretation and Misinterpretation

At one level, the crime described by Jane to Horka, Horka's reaction, and the interpretation of three courts to the description and reaction may be approached in terms of the mechanics of interpretation, of how a woman's story of sexualized violence remains suspect and is vulnerable to attack as unbelievable. Jane, after escaping from the apartment, told her narrative to Horka: Valentine had sexually assaulted her and had threatened her two children. Horka misread the story, bypassing the text's literal level and substituting instead the more congenial and familiar account of a domestic dispute.

Having preempted Jane's story with one of his own, Horka's seemingly irrelevant questions and posture of inaction made sense given the premises of his narrative. As his questions reveal, if the attacker were her husband or boyfriend, perhaps Jane was not entirely blame-
As the text of Jane's complaint was successively read by the three state courts, her story and Horka's reworking of it were subject to further glosses, retellings, and interpretive corrections. However, to argue that a series of misreadings distorted Jane's authentic narrative and compounded the original crime is not to repeat the fashionable tenet that the essence of interpreting consists of "forcing, adjusting, abbreviating, omitting, padding, inventing, [and] falsifying." Rather, it is important to recognize that the Illinois Supreme Court produced a superior reading of Jane's story, an interpretation that respected Jane's authorial intention and placed her story within the appropriate cultural history.

B. Just the Facts

In order to understand correctly how a piece of evidence functions or how language should be construed, the evidence or language must be placed in its context. The reasonability of this proposition is self-evident. Nonetheless, the Illinois Appellate Court abused this fundamental evidentiary and interpretive principle when it reworked the context to give the factual circumstances, from the defendants' perspective, a coherence and consistency that was altogether lacking.

The appellate court's rendition retells the story of how Horka should have acted or rather how the court wished the narrative should have come out. By manipulating the chronology and deemphasizing parts of the complaint, Horka's actions were granted an air of reasonability and respectability. However, the original, unrevised chronological sequence, as laid out in the complaint, preserves Horka's unreasonable conduct and buttresses the Equal Protection claim. As pled by Jane, Horka announced his refusal to enter the apartment, after which he questioned Jane about whether the suspect was her husband. In other words, before he asked his leading questions, the officer had drawn his own conclusion: this was a domestic dispute.

258. If, as Horka's questions assume, Jane knew her attacker, then she was not "really" raped. Instead, hers would be a case of "simple" rape, which implies that Jane may have contributed to or assumed the risk of injury. On the difference between real and simple rape, see infra note 269.


262. The first thing the supreme court did was to get the chronology right and to include in its analysis a representative sample of Horka's language. The appellate court was willing to deny any stereotypical import to Horka's remarks because, considered in the abstract, the words ap-
Horka’s refusal to act is consonant with the traditional police approach to domestic assaults which is to accord them a less serious status than other assaults. The devaluation of domestic crimes burdens a particular set of victims, giving rise to an impermissible gender-based classification that violates the Equal Protection Clause.

peared less patently the product of an archaic generalization than, for example, the employer’s remarks did in Price Waterhouse. Of course, Horka’s words were not written down for purposes of an internal and confidential memo, as were the remarks in Price Waterhouse. Believing their words to be private, the partners at Price Waterhouse could afford to be offensive.

263. See infra notes 309-10 and accompanying text (enumerating reasons police choose not to intervene in domestic assaults).

264. The Fourteenth Amendment directs that all persons who are similarly situated should be treated alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). One way in which discriminatory conduct may be measured is to determine what a government’s well-established procedures are and how state actors deviate from them in their treatment of one group of persons. Id. The government has an obligation not to draw “illegitimate distinctions among those to whom the government provides services.” McKee v. City of Rockwall, Tex., 877 F.2d 409, 418 (5th Cir. 1989) (Goldberg, J. dissenting). An examination of standard police operating procedure — and Horka’s deviations from it — underscores the Equal Protection claim.

When Officer Horka arrived upon the scene at 4:39 a.m., he took a supervisory role and assumed control of the scene. Appellants’ Brief at 8. As police procedure manuals point out, proper procedure entails more than merely surrounding the apartment building and making tentative efforts to test the door locks and shine spotlights into windows. Rather, the police officers should have acted in an expeditious manner to avert the crime and to protect the victims from any further attack. 1 CHARLES P. RUNKEL ET AL., THE ILLINOIS LAW ENFORCEMENT OFFICER 271, 286 (1989); 2 RUNKEL ET AL., supra, at 219. Horka also deviated from established procedure by discounting Jane’s statements. Training texts advise police that the victims of crimes are typically the best source of information and their statements should be regarded as reliable. Id. at 224. By contrast, the conduct of Inspector Miller, who acted “by the book,” exemplifies good police work. See supra notes 36-38 and accompanying text (discussing Miller’s role in entering the apartment and apprehending Valentine). For Miller, the gender of the victim did not matter.

Had Horka questioned Jane in line with established police procedure, he would have asked her about substantive matters regarding the crime in progress: details about the suspect’s appearance or whether he was armed. Appellants’ Brief at 32. Instead, Horka’s questions suggesting that Jane knew her attacker were, as the supreme court observed, beside the point. “Whether the attacker was Jane’s husband or someone she knew would not change the nature of the attack on Jane or the danger to Betty and John.” Doe v. Calumet City, 641 N.E.2d 498, 510 (Ill. 1994). The incongruity of Horka’s line of questioning is laid bare if one reconstructs the facts with John Doe replacing Jane Doe. If a man had appeared half-clothed in the middle of a December night and pleaded with the police to save his children from an intruder, it is virtually inconceivable that Horka would respond, “Where is your wife?” or “Why would you leave your children in the apartment if there was a strange woman there?” Unlikely as it may seem, such a scenario was proposed and accepted by both the circuit court and the appellate court. Appellants’ Brief at 33; Doe, 609 N.E.2d at 698. The officer’s comments only make sense if one adopts Horka’s stereotypical perspective. Absent the stereotype, the questions lack any logical framework.
C. Stereotypical Assumptions and Doe v. Calumet City

1. Sexual Assault, Stereotypes, and the Problem of Belief

Horka's failure to take Jane at her word — that she had been sexually assaulted — and his depiction of her as an incoherent, hysterical woman are symptomatic of a widely recognized stereotype: society's deep-seated distrust of the female rape victim. The problem of belief and fear of the false rape charge were noted two centuries ago by the Lord Chief Justice Matthew Hale. Though "rape is a most detestable crime," according to Hale, "it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." Hale's influential dictate along with special evidentiary requirements used for rape cases are emblematic of the institutionalization of the law's distrust of women victims.

The timeliness of Hale's seventeenth-century instruction was brought home in The 1990 Report of the Illinois Task Force on Gender Bias in the Courts. The Task Force Report observed that "[u]ntil recently, the police routinely minimized and discounted rape com-

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265. Although, to be precise, Jane was sexually assaulted and not raped, the distinction is without a difference for the analysis.


268. See SUSAN ESTRICH, REAL RAPE 29-56, 63 (1987) (discussing requirements for victim resistance, corroboration, sexual history, cautionary jury instructions, fresh complaint, and force). These extraordinary procedural requirements serve to place the rape victim on trial. See also NANCY GAGER & CATHEEEN SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 129-66 (1976) (discussing the many obstacles a rape victim must overcome); RHODE, supra note 138, at 246-49; Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977) (discussing the problems with a judicial system which in effect puts the victim on trial); Pamela Lakes Wood, Note, The Victim in a Forcible Rape Case: A Feminist View, 11 AM. CRIM. L. REV. 335, 349-51 (1973) (discussing the investigative procedure a victim must go through before she is faced with the ordeal of trial).

269. ESTRICH, supra note 268, at 28. In her original and influential book, Estrich distinguishes between what she terms "real" or traditional rape and "simple" or non-traditional rape. Id. at 2-7. Real rape is an aggravated assault by a stranger. Id. at 4. Simple rape is an assault by an acquaintance or spouse and does not include any aggravating factors. Id. Whereas real rape is prosecuted more frequently and more successfully than other violent crimes, society is less willing to prosecute those accused of simple rape. Id. The paradox in Doe v. Calumet City is that Jane, a victim of sexual assault and threatened with real rape, was treated as the victim of a simple rape; Horka's reclassification of Jane's status as a victim allows for the discrediting of Jane's statements and implicitly opens the door to a host of stereotypical doubts: Did she ask for it? Did she assume the risk? Did she resist?
plaints” and “suspicion of rape victims’ credibility” was at the heart of the problem. Despite the efforts of many Illinois police departments to increase the sensitivity of law enforcement personnel to victims, the Task Force admitted that some officers retain a stereotypical distrust towards women victims.

The Task Force Report explains in part the facts of an earlier Illinois case, *Lowers v. City of Streator*, a case the appellate court in *Doe* distinguished as inapplicable. In *Lowers*, a man broke into the plaintiff’s home and raped her. Emily Lowers immediately reported the crime to the police department, and identified the suspect from police photographs. After an investigation of the crime scene, one officer told Emily he had seen situations similar to hers and warned her the suspect would return and rape again. About once a week thereafter, Emily inquired of the police about the progress of the investigation and offered to identify the rapist in a lineup. Despite her efforts, the police department took no action. The officer’s prediction proved accurate: some months later, the same man broke into Emily’s house and raped her again.

Emily Lowers was successful in stating Equal Protection and Due Process claims, but the case still illustrates the problem of belief for sexual assault victims. Although she gave a statement, provided a description of the rapist, identified him from photographs, submitted to and passed a polygraph examination, and followed up with the police

270. *The 1990 Report of the Illinois Task Force on Gender Bias in the Courts* 101 [hereinafter *TASK FORCE REPORT*]. According to the *Task Force Report* the Chicago Police Department in 1982 “unfounded” 48 percent of reported rapes. *Id.* Police use the term “unfounded” to describe reported offenses which they have failed to investigate to solution or have categorized as non-offenses. The *Task Force Report* also noted that a similarly high rate of unfounded cases existed in Chicago’s suburbs, such as Calumet City. *Id.*

271. “The credibility of sexual assault victims is mistrusted to a degree which is not typical of other crimes.” *Id.* at 104. Attorneys surveyed for the *Task Force Report* said that almost half of the dismissals in sexual assault cases are because “state’s attorney and police don’t believe victim [sic].” *Id.* at 106. Forty percent of the prosecutors and 50 percent of the defense attorneys subscribed to this belief. *Id.*

272. *Id.* at 102.

273. *Id.* at 106.

274. 627 F. Supp. 244 (N.D. Ill. 1985).


276. 627 F. Supp. at 245.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 246-47.
on a weekly basis, the defendants, in the words of the Task Force Report, "routinely minimized and discounted" her story. The officers' distrust of Emily Lovers' credibility is analogous to Officer Horka's suspicion of Jane's complaint. In each case, the word of a sexual assault victim was ignored, and police inaction further exacerbated the violence.

Hale was skeptical of rape charges because the accusations are easily made but difficult to defend, even by an innocent party. Horka provided another reason: the source of the charge, Jane Doe, fit the stereotypical pattern of the hysterical woman.

2. Hysteria, Stereotypes, and the Problem of Belief

In a taped radio transmission of the Calumet City incident, Horka told a police dispatcher he did not know whether the crime involved a rape. Horka's willful denial of what Jane had experienced and what her daughter was presently experiencing was the result, according to Horka, of Jane's unstable, hysterical condition. Horka's diagnosis of Jane as a woman overborne by hysteria epitomizes the officer's stereotypical perspective, which made it easier for him to devalue Jane's credibility. Hysteria has always been defined as a peculiarly female phenomenon and has also carried with it a pejorative connotation. The condition entailed an emotional regression and instability

283. Id. at 245.
284. TASK FORCE REPORT, supra note 270, at 101.
285. When the dispatcher asked whether the incident was a rape, Horka replied: "I don't know. I don't know what this is right now." Karwath, supra note 30, at C1.
286. At the end of the nearly half hour ordeal, Betty was repeatedly raped and forced to perform deviate sexual acts. Appellants' Brief at 12.
287. Id. at 10. See also Karwath, supra note 30, at C1 (indicating that, according to Horka's defense attorney, the officer did not rescue Betty immediately because Jane was "'hysterical' and couldn't clearly tell Horka what had happened").
288. CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 197 (1985). Though hysteria was one of the classic diseases of the nineteenth century, modern psychiatrists continue to recognize the hysterical personality, which they describe as one characterized by "'excitability, emotional instability, over-reactivity, self-dramatization, attention seeking, immaturity, vanity and unusual dependence." Id. at 197, 212.

Hysteria has been defined as a quintessentially female ailment. SMITH-ROSENBERG, supra, at 204 (quoting THOMAS MORE MADDEN, CLINICAL GYNECOLOGY 474 (1895)).
that was rooted in a woman's very nature. By terming Jane "hysterical," Horka invoked the social construct of Jane as a dependent, fragile, and emotional figure.

Horka's diagnosis of Jane is comparable to how the defendant officers in McKee v. City of Rockwall, Texas treated another battered woman. When Gayla McKee complained to police officers that her boyfriend had beaten her, threatened to kill her, and disabled her car to prevent her from escaping, the officers replied that she exaggerated the threats and that she should talk matters out with her boyfriend. After she requested that the officers take her to the station so she could file a complaint, the officers responded that once she had calmed down she would probably decide not to file. Judge Goldberg, writing in dissent, found the treatment Gayla received to be in keeping with the image of the febrile woman as hysteric. The hysterical woman is paranoiac, exaggerating threatened violence, who, when allowed to calm down and consider the matter rationally, will decide not to take any action. Undoubtedly, Gayla McKee and Jane Doe were upset: both were recent victims of sexualized violence that promised to strike again. But their emotional reactions, given the surrounding circumstances, were entirely rational and understandable, not irrational and hysterical.

By labelling Jane "hysterical," Horka also calls into question the reliability of her word. If Jane were emotionally disturbed or enfeebled, then her account of her sexual assault might be discounted. The nineteenth-century medical notion of the hysterical as highly impressionable and suggestible was legitimized in legal circles early in the twentieth century by John Henry Wigmore, author of the most cele-

289. SMITH-ROSENBERG, supra note 288, at 206. The female nervous system, physicians argued, was physiologically more sensitive. Id. Other doctors believed that woman's blood was thinner than man's, resulting in nutritional inadequacies to the central nervous system. Id. Many also assumed that hysteria was closely tied to woman's reproductive cycle. Id.

290. See 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 104-05 (Robert Hurley trans. 1978) (discussing the hysterization of women's bodies, a nineteenth-century figure invested by the deployment of sexuality).

291. Historically, physicians were concerned that hysteria was a functional illness rather than a true organic malady. SMITH-ROSENBERG, supra note 288, at 204. The hysterical woman was, not surprisingly, described as emotionally indulgent, morally weak, and lacking in willpower. Id. at 205. This judgment was affirmed by Oliver Wendell Holmes who described "a hysterical girl [as] a vampire who sucks the blood of the healthy people about her." Id. at 207 (citing S. WEIR MITCHELL, FAT AND BLOOD 37 (Philadelphia, J.B. Lippincott 1881)).

292. 877 F.2d 409 (5th Cir. 1989).

293. Id. at 410.

294. Id.

295. Id. at 425.

brated treatise on evidence. Wigmore maintained that the mental distress of "errant young girls and women" could very well produce a rape accusation that was easily made but hard to prove: "Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men." Wigmore conjoins the notion of the unstable hysterical with Hale's suspicion of women victims. Horka draws upon this stereotypical matrix to reduce the power of Jane's speech and rewrite the plot of the crime, translating a sexual assault into a domestic assault.

3. Domestic Violence, Stereotypes, and the Problem of Police Inaction

The Illinois Supreme Court ruled that Horka's questions — e.g., was the attacker her husband? — indicated that the officer dismissed Jane's plea for immediate action because he believed that the incident was a "domestic situation less deserving of his attention." As with society's deep-seated distrust of the rape victim and the hysterical, the definitions and causes of domestic violence are socially constructed. Our modern response or, perhaps more precisely, lack of response, to domestic violence has been conditioned through our culture, particularly our legal culture. Eighteenth-century English common law gave to the husband the right to physically discipline his wife. Subsequently, American common law followed suit.
This disciplinary right was codified by William Blackstone in his authoritative commentaries on the common law. Because the husband is to answer for his wife’s misbehavior, “the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement.” By the end of the nineteenth century, however, courts began expressly to repudiate the common law right of chastisement, and by 1870 most American states had declared the practice illegal.

But despite the criminalization of spousal abuse, enforcement of the law has proved tenuous at best. Traditional police practices have implicitly endorsed the common law attitude expressed by Blackstone by preferring not to intervene in domestic disturbances. Police departments have advanced a panoply of justifications for official inaction in spousal abuse cases: (1) deference to family privacy; (2) avoiding arrest because a man’s home is his castle; (3) the preservation of private marital affairs from the intervention of the criminal justice system; (4) unofficial sanction within the couple’s culture; (5) wife abuse as a victimless crime, or at best, a minor crime; (6) high complainant attrition rate; (7) the husband’s retaliation against the wife after his release; (8) the family’s inability to afford the economic deprivation of the husband’s absence from work; (9) police officer’s possible injury.

305. 1 William Blackstone, Commentaries *444. Blackstone noted that “[h]is power of correction was confined within reasonable bounds.” Id. “The civil law,” in addition, “gave the husband the same, or a larger authority over his wife: allowing him, for some misdemeanors, flagellis et fustibus acriter verberare uxorem [to beat his wife severely with scourges and sticks]; for others, only modicam castigationem adhibere [to use moderate chastisement.]” Id. at 444-45 (translations by J.W. Ehrlich, Ehrlich’s Blackstone 85 (1959)).
306. Sue E. Eisenberg & Patricia L. Micklow, The Assaulted Wife: “Catch 22” Revisited 3 Women’s Rts. L. Rep. 138, 139 (1977). See also Fulgham v. State, 46 Ala. 143, 146-47 (1871) (“The privilege, ancient though it may be, to beat her with a stick, to pull her hair, choke her, spit in her face, or kick her about the floor, or to inflict upon her like indignities is not now acknowledged by our law.”).
307. Elizabeth Pleck, Wife Beating in Nineteenth-Century America, 4 Victimization 60, 71 (1979). Blackstone also observed how “this power of correction began to be doubted” during “the politer reign of Charles the second.” Blackstone, supra note 304, at *445. Nevertheless, “the lower rank of people . . . still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.” Id.
308. The Illinois Task Force on Gender Bias in the Courts indicated that some police still did not believe that domestic violence was a serious crime, and they continued to enforce the law selectively. Task Force Report, supra note 270, at 137.

The linguistic transformation, modifying a “domestic assault” into the more euphemistic “domestic disturbance,” reinforces the traditional legal response that these crimes are relatively unimportant and that intervention is for the most part ineffective. Rhode, supra note 138, at 239. The euphemistic manipulation also applies to the formal process in which police departments categorize these types of assaults. See Eve S. Buzawa & Carl G. Buzawa, Domestic Violence 21 (1990) (listing ambiguous classifications: “persons investigated,” “services rendered”).
(10) police socialization perceiving domestic assaults as social work and not as crime fighting; (11) police organizational disincentives and inadequate training; and (12) high administrative costs in pursuing an interventionist policy.\textsuperscript{309} Horka's rationale for not intervening, the exorbitant cost of repairing a door,\textsuperscript{310} is a subset of the last justification.

The supreme court concluded that Horka's refusal to act, based on his conjecture that "this was a domestic situation," was "not at all related to any governmental purpose."\textsuperscript{311} In so holding, the plaintiffs' allegation satisfied both parts of the Feeney/Watson gender discrimination analysis.\textsuperscript{312} According to Feeney and Watson, because the defendants had not articulated a legitimate reason for the disparate treatment, the plaintiffs in Doe, like the plaintiffs in Watson, \textit{Dudosh v. City of Allentown},\textsuperscript{313} and Balistreri, had successfully alleged that the municipality discriminated against domestic violence victims.\textsuperscript{314} And because the defendants had not articulated an important governmental interest, Jane, like the plaintiffs in Thurman, had successfully alleged that the city discriminated against women. \textit{Doe} is therefore one of the rare cases where a court held that any interest or justification advanced by the municipality would not withstand either minimal or intermediate judicial scrutiny.

But the court's ruling is indebted to the analyses of sex stereotypes in \textit{Price Waterhouse} and \textit{Balistreri} as much as it is to the analyses of Equal Protection standards of review in \textit{Feeney} or \textit{Watson}. Classifications that treat domestic assaults differently and less seriously than other assaults reinforce archaic stereotypes of female inferiority and


\textsuperscript{310} Appellants' Brief at 9.

\textsuperscript{311} \textit{Doe v. Calumet City}, 641 N.E.2d 498, 510 (Ill. 1994) (emphasis added). \textit{See also} Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) ("[T]he City has failed to put forward any justification for its disparate treatment of women.").

\textsuperscript{312} \textit{See supra} notes 127-49 and accompanying text (discussing gender discrimination analysis outlined by Watson and Feeney).


\textsuperscript{314} In actuality, Jane declined to allege this type of discrimination. Appellants' Brief app. at III.A.
old notions of wives as the property of their husbands. It is not
difficult to identify and criticize the stereotypical views and unproven
assumptions that undergird each of the police justifications enumer-
ated above. For example, the excuse that the police defer to family
privacy rests upon the assumption of the home as safe haven and
therefore free from intrusion. For the battered wife, however, the
home is unsafe, and the state should intervene so as to reestablish the
function of the home as sanctuary. The excuse that wife abuse is a
minor crime is belied by the statistics of the Task Force Report that
show 253,000 women were victims of domestic violence in Illinois and
five million nationwide. The belief that intervention is dangerous
and that police officers might be injured can be logically but improp-
erly extended to bar officers from any duties in which an officer is at
risk.

An examination of the treatment of archaic and stereotypic notions
in Price Waterhouse, Balistreri, and Doe reveals not only Doe's simi-
larities to those cases but also its differences. It is especially the differ-
ences that make Doe an important decision. In Price Waterhouse,
many of the partners' remarks that evaluated the performance of Ann
Hopkins were expressed in terms of gender: she was a macho woman
who, to improve her chances for partnership, should walk, talk, and
dress like a lady. The stereotyping at Price Waterhouse was tangible,
obvious, and unambiguous. "This [was] not," said the Court,
" 'discrimination in the air' ... [but] rather . . . 'discrimination brought
to ground and visited upon' an employee." In Balistreri, the evidence of stereotyping was less ample but just as damaging to the de-
defendants. After Jena Balistreri was severely beaten by her husband,
one responding officer stated that the husband was not to blame "be-
cause of the way she was 'carrying on.' " As with the partners' com-
ments in Price Waterhouse, the officer's words were stereotypical
on their face, signifying an "animus against abused women."

315. Hathaway, supra note 112, at 684.
316. See supra text accompanying note 309 (listing the various justifications police depart-
ments have advanced for official inaction in spousal abuse cases).
317. Lisa Lerman, A Model State Act: Remedies for Domestic Abuse, 21 HARV. J. ON LEGIS.
318. Id. at 70.
319. TASK FORCE REPORT, supra note 270, at 130. See supra note 138 and accompanying text
(demonstrating statistically the widespread scope of domestic violence).
320. Shapiro, supra note 309, at 436.
322. Id. at 251.
323. 855 F.2d 1421, 1427 (9th Cir. 1988).
324. Id.
In *Doe*, by contrast, the evidence of stereotyping was less direct. There, the court based its conclusion on Horka's rude and demeaning questions, his statements that Jane was hysterical, and his belief that she was a domestic assault victim and therefore deserving of less attention. In *Doe*, as opposed to *Price Waterhouse* and *Balistreri*, the defendants' reliance on stereotyping was less tangible and not as obvious. Horka, for example, never spoke about a domestic assault. His questions imply that he had been called to one, but it is the court that traced by inference the sequence from Horka's questions to the imagined domestic assault which then provided the (illegitimate) rationale for the officer's inaction. Identifying stereotypical assumptions in *Doe* involved an inferential analysis, deriving logical conclusions from the defendants' assumed premises, a method of reasoning that was unnecessary in *Price Waterhouse* and *Balistreri*.

*Doe* is an influential decision because of the unique mode of analysis employed by the Illinois Supreme Court. In its willingness to go beyond the literal significance of a state actor's remarks and consider his underlying stereotypical views, the *Doe* court extended the Equal Protection principles in *Thurman, Watson, Lowers*, and *Balistreri*.

**IV. Impact**

As the introduction to this Note indicated, several municipalities and commentators discounted the impact of *Doe* because it was based on such egregious circumstances. Since Horka's conduct was so extreme and the underlying facts so bizarre, the decision would not change routine police work. As one police chief observed matter of factly, "If we engage in willful and wanton conduct, we should be held liable, as should anybody else." However, a Fourteenth Amendment claim does not have to be predicated on willful and wanton conduct but rather may be based on "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." Horka's assumption about the appropriate offi-

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325. 641 N.E.2d 498, 509-10 (Ill. 1994).
326. The complaint alleged that other Calumet City police officers made what were obviously sexist remarks: "What would you expect from a woman?" and "Isn't it just like a woman?" to be in this situation. Appellants' Brief at 13. If included in the majority opinion, these remarks would have made *Doe* much more analogous to *Balistreri*. It is noteworthy that the majority did not find the words necessary to establish an Equal Protection violation.
327. See infra notes 51-56 and accompanying text (discussing the reactions of police departments, municipalities, and commentators to *Doe*).
328. Griffin & Irwin, supra note 51, at 7.
329. Id.
cial response to domestic violence is not on its face egregious precisely because it is so traditional. Doe undercuts the complacent response that reduces the decision's impact as the unauthorized conduct of a rogue officer. After Doe, state actors are liable not only for their willful and wanton actions but also for their inaction based on a seemingly innocuous assumption about the proper role of women.

In McKee, Judge Goldberg observed that in an Equal Protection case, "[s]moking guns . . . are not required" to prove gender discrimination. But Judge Goldberg was the lone dissenter in McKee. Price Waterhouse and Balistreri are easier cases than Doe precisely because of the presence of smoking guns. Doe, on the other hand, is a closer case, and because it is, its impact for women plaintiffs is profound. Doe stands for the proposition that discriminatory intent may be discerned by reading between the lines of a defendant's remarks, by uncovering inferentially the embedded stereotype. Because Doe illustrates Judge Goldberg's thesis, it lessens the evidentiary burden for battered women in Equal Protection claims.

CONCLUSION

Thurman was decided in 1984, Doe in 1994. Although Thurman promised to be a harbinger of Fourteenth Amendment protection for battered women, it proved to be a false one. In the intervening ten years, the Supreme Court decided DeShaney, effectively closing the door on Due Process claims for domestic violence victims. In 1988, the Watson court's adoption of the two-part Feeney test presaged the application of stricter gender-neutral standards. In 1994, however, the Doe court extended the gender discrimination analyses in Price Waterhouse and Balistreri, and breathed new life into the Equal Protection clause. With Doe, the unfulfilled promise of Thurman was at last satisfied, and battered women could again rely upon the Fourteenth Amendment for protection and relief.

Daniel P. Whitmore

331. 877 F.2d 409, 423 (5th Cir. 1989).
332. Id. at 416.
333. See supra note 104 (discussing the negative impact of DeShaney on battered women's Due Process suits).