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Domestic Violence: What Remedies are Available to  
Victims of Gender Motivated Violence that are put  
at risk by State Actors?

Jennifer Sampson

Independent Study

December 14, 2000

Domestic Violence is a serious problem in the United States. It is a problem that effects both men and women and both heterosexual and homosexual relationships. The number of domestic violence cases each year is simply astounding. For example, it has been estimated that there are three to four million women abused in a domestic violence situation each year.<sup>1</sup> An even scarier way to look at it is to realize that every 7.4 seconds there is a woman being abused by her husband in the United States.<sup>2</sup> Even in our own area, Grand Forks, North Dakota, there has been a rise in domestic violence as reported by the Community Violence Intervention Center.<sup>3</sup> Domestic violence statistics are not easy to come by and unfortunately, do not tell the entire problem. Most statistics that are available focus on violence that is perpetuated by a male on a female. This is the predominant pattern of domestic abuse but it is not the only pattern that exists.

Female perpetrators of domestic violence do exist. However, men are less likely to report the violence and less likely to be taken seriously. The same holds true for violence that exists in homosexual relationships whether

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<sup>1</sup> National Clearinghouse for the Defense of Battered Women, Statistics Packet number 43, note 4, page 18

<sup>2</sup> Id. at 18

<sup>3</sup> See, "Domestic Violence Rises in Grand Forks County", Grand Forks Herald; March 10, 1999.

the partners are male or female.<sup>4</sup> It has been suggested that domestic violence occurs in homosexual relationships at the same rate that it occurs in heterosexual relationships.<sup>5</sup> The reasons behind homosexual domestic abuse are essentially the same as the reasons that cause heterosexual abuse.<sup>6</sup> Those reasons vary from relationship to relationship but most professionals familiar with the causes of domestic violence can agree that certain themes or reasons for violence emerge. The profile of the abuser that emerges is one of deception. Most abusers appear normal and congenial to friends and co-workers.<sup>7</sup> This enables them to hide their violent tendencies.

Not withstanding a self- and super-imposed veil of normalcy, the man who abuses his wife is simultaneously out of control and violently in control. Unable or unwilling to manage his own anger, frustration, low self-esteem, or powerlessness within the culture outside the home, the abuser develops a subculture of domination within the home. The abuser employs an arsenal of verbal and physical attacks and threats with which he satisfies a desperate need to control. Typically, abusers are excessively dependent upon their victims and are extremely jealous. Therefore, they attempt to isolate their victims from family and friends and in some

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<sup>4</sup> Murphy, Nancy E., Queer Justice: Equal Protection for Victim's of Same-sex Domestic Violence, 30 Val. U. L. Rev. 335, 339 (1995).

<sup>5</sup> Id. at 340.

<sup>6</sup> See Id.

<sup>7</sup> Truss, James Martin, The Subjection of Women...Still: Unfulfilled Promises of Protection for Women Victim's of Domestic Violence, 26 St. Mary's Law J. 1149, 1166 (1995).

cases, from any contact whatsoever with the world outside the home.<sup>8</sup>

It is important to recognize that homosexual relationship violence exists. However, due to the difficulty in obtaining any type of statistical information and the lack of research available, for purposes of this discussion homosexual violence will not be discussed any further. Rather, the paper will focus solely on male-female domestic violence in which the male is the perpetrator of the violence.

It is the hypothesis of this author that the Violence Against Women Act offers more protection to victims of domestic violence if she is put in danger or heightened danger by a state actor. A state actor is someone that is employed within a government agency. In this instance, state actors are usually defined as police officers, prosecuting attorneys and judges.

There will be two major sections to deal with. The first area will be the policy process area. In this area, agenda setting and changed attitudes toward women will be discussed. The second major area of discussion will be on implementation. This will cover the difficulty of enforcement at the local level and the remedies available to a victim of domestic violence if a state actor puts her

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<sup>8</sup> Id.

in more danger. Then, there are changes in policy. Next, there is an implementation of the policy change, and finally there is an evaluation of the policy.

#### **A. Agenda Setting**

Throughout the history of humanity, women have been treated as second class citizens. Women have had to wage an all out battle to obtain even a legal identity equal to that of men.<sup>9</sup> Domestic violence was often viewed as a family matter and courts were reluctant to interfere in such areas.<sup>10</sup> It has only been within the last fifteen to twenty years that there have been legal efforts to address the problem of domestic violence in the United States.<sup>11</sup> During the 1970's, there was a feminist movement in the United States. This movement helped to heighten awareness of the problems surrounding domestic violence and brought political pressure to help foster change to the current system.<sup>12</sup> There began to be changes in policy due to this movement.

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<sup>9</sup> See, Truss, James Martin, The subjection of women...still: unfulfilled promises of protection for women victims of domestic violence, 26 St. Mary's L. J. 1149, 1150 (1995).

<sup>10</sup> See, Id

<sup>11</sup> See, Waits, Kathleen, The Criminal Justice system's Response to Battering: Understanding the Problem, Forging the Solutions, 60 Wash. L. Rev. 267, 268 (1986). Cf. Developments in the Law: Legal Response to Domestic Violence, 106 Harvard L. Rev. 1505, 1505 (1994).

<sup>12</sup> See, The Subjection of Women...Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence at 1154.

## B. Changes in policy

During the 1970's, there began to be a change in policy towards victims of domestic violence. Previously, it was thought that domestic violence was a private family matter. During the course of the seventies, there started to be a thought among state actors like the police and the judiciary that domestic violence was not a serious matter or a serious crime.<sup>13</sup> Statutes that authorized protection orders for victims of gender motivated violence became more common in the mid-1970's.<sup>14</sup> There was a major problem with enforcement until the Violence Against Women Act was enacted almost twenty years later.

"Law enforcement officers treat violence against women lightly by focusing attention on the woman as provocateur, refusing to confront the abuser as a criminal and avoiding outright their responsibility to keep the peace."<sup>15</sup> In their job as a state actor, most police officer would rather avoid the arduous task of dealing with a domestic violence situation. Even though domestic violence

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<sup>13</sup> See, Id.

<sup>14</sup> See, Id.

<sup>15</sup> Id.

situations tend to be volatile many police officers display and indifference to the plight of the victim.<sup>16</sup>

The Judiciary has not been any more sympathetic to the plight of domestic violence victims than have the police officers. Judges and prosecutors are apt to treat domestic violence cases as unimportant. Prosecutors are apt to charge perpetrators of gender motivated violence at the lowest level possible in order to make their jobs easier. Also, many prosecutors are hesitant to levy charges against an abuser if the victim is in any way hesitant or unwilling to assist in the prosecution.<sup>17</sup> The actions of these state actors have led to political pressure on Congress to provide a remedy for victims of gender motivated violence that are put in danger or put in heightened danger by the actions of a state actor.

#### **I. Implementation**

There are several options for victims of domestic violence to gain relief in the court system. The Violence Against Women Act, a due process claim and an equal protection claim are all available to women that are victims of gender motivated violence. There has been a long history of attempts of victims of violence to gain relief

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<sup>16</sup> See, Id.

<sup>17</sup> See, Id.



from the judiciary. Some arguments are more successful than other arguments are.

There has never been a duty to protect citizens from harm in battery cases. There was uncertainty in the courts over whether or not the states had a duty to protect an ordinary citizen from harm under the due process clause.<sup>18</sup>

#### **A. Due Process**

The Due Process Clause is contained within the Fourteenth Amendment to the United States Constitution. It states that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law."<sup>19</sup> In order to bring a due process claim a battered woman would assert her substantive fourteenth amendment rights as provided by a federal remedy when a state officer violates an individual citizen's constitutional rights.<sup>20</sup> This is commonly referred to as a §1983 claim. This reference refers to the statute section of the United States Code that provides relief for a citizen whose constitutional rights have been violated. In order to

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<sup>18</sup> Browne, Susanne M., Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations, 68 S. Cal. L. Rev. 1295, 1301 (1995).

<sup>19</sup> U.S. Const. Amend. XIV

<sup>20</sup> 42 U.S.C 1983

assert a §1983 claim a battered woman would need to show two separate claims. First, she would need to show that the "conduct complained of was committed by a person acting under color of state law."<sup>21</sup> This can be problematic to prove in several respects. First, the victim will have to prove that the police officer who failed to protect her is a state actor. It is not usually problematic to prove that the police officer is a state actor. If she can prove this, she must then prove that the police officer was acting under the guidance of the state and not following their own dictates. If she can get past this hurdle she must then prove that she was deprived of a constitutional right.<sup>22</sup> A more specific guideline that the Courts tended to utilize was if the state was aware of the danger to the victim, and if the police had custody of the perpetrator just prior to his committing the violent act, and if the police had affirmatively told the victim that they would protect her then they owed her a duty to protect.<sup>23</sup> These guidelines were rarely met in full by police officers and most victims lost their claims. If these guidelines had been met prior to the DeShaney decision then it was most likely for the victim to prevail.

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<sup>21</sup> Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990).

<sup>22</sup> See Id.

Balistreri v. Pacifica Police Dept.,<sup>24</sup> is the leading decision prior to DeShaney.<sup>25</sup> This case was originally decided in favor of Jena Balistreri. After the DeShaney decision was handed down the Balistreri verdict was overturned.<sup>26</sup> Ms. Balistreri had to start all over again as her due process claim failed.

On February 13, 1982, Jena Balistreri was severely beaten by her husband.<sup>27</sup> Jena had injuries to her nose, mouth, eyes, teeth and abdomen, and was in severe need of medical attention.<sup>28</sup> The Pacifica police officers that responded to her call did not offer her any medical assistance and refused to arrest her husband.<sup>29</sup> One of the officers even told her that she deserved the beating.<sup>30</sup> After the incident, a Pacifica police officer pressured Jena into not pressing charges against her husband.<sup>31</sup>

After continual harassment by her former husband Jena obtained a restraining order.<sup>32</sup> Yet when her ex-husband crashed his car into her garage, the police refused to

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<sup>23</sup> See Jensen v. Conrad, 747 F.2d 185, 195 (4<sup>th</sup> Cir. 1984).

<sup>24</sup> 901 F.2d 696 (9<sup>th</sup> Cir. 1990)

<sup>25</sup> 489 U.S. 189 (1989)

<sup>26</sup> See Id.

<sup>27</sup> See 901 F.2d 696 (9<sup>th</sup> Cir. 1990).

<sup>28</sup> See Id.

<sup>29</sup> See, Id.

<sup>30</sup> See, Id.

<sup>31</sup> See 901 F.2d 696

<sup>32</sup> See Id.

arrest him or investigate despite the restraining order.<sup>33</sup> When Jena reported that she received harassing phone calls from her ex-husband, the police ridiculed her and denied the existence of her restraining order.<sup>34</sup> On March 27, 1983, Mr. Balistreri threw a firebomb into the window of Jena's home, causing severe fire damage to the home and a great deal of emotional distress to Jena.<sup>35</sup> The police took forty-five minutes to respond to Jena's 911 call.<sup>36</sup> When Jena complained that their investigation was inadequate they told her to hire a private detective if she did not like the results.<sup>37</sup> Mr. Balistreri was never arrested for throwing the firebomb.<sup>38</sup> Jena finally brought suit against the Pacifica Police Department for their unresponsiveness.<sup>39</sup>

Ms. Balistreri decided to pursue a 1983 action against the Pacifica Police Department. She was initially successful in her suit against the police department. The Court found a special relationship between Jena Balistreri and the police department was created when they became aware of the danger Jena was in and they had promised to protect her.<sup>40</sup> The police department appealed the decision.

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<sup>33</sup> See Id.

<sup>34</sup> See Id.

<sup>35</sup> See 901 F.2d 696

<sup>36</sup> See Id.

<sup>37</sup> See Id.

<sup>38</sup> See Id.

<sup>39</sup> See 901 F.2d 696

<sup>40</sup> See Id.

In the meanwhile, the United States Supreme Court was reaching the DeShaney decision.<sup>41</sup>

DeShaney is one of the most disturbing cases that any researcher will read. It is the standard authority for denying due process when state actors fail to protect a victim. All of our current case law stems from this decision.

The Winnebago County authorities first learned that Joshua DeShaney was a victim of child abuse when his father's second wife complained to the police.<sup>42</sup> The Winnebago County Department of Social Services (hereinafter DSS) interviewed Joshua's father, but he denied the accusation, and the allegations of child abuse were not pursued further by DSS.<sup>43</sup> In 1983, Joshua was admitted to the hospital with multiple abrasions and bruises.<sup>44</sup> The doctor who examined him suspected child abuse and obtained a court order placing Joshua in temporary custody of the hospital.<sup>45</sup> An ad hoc Child Protection Team meeting concluded that the evidence of child abuse was insufficient and Joshua was returned to his father's custody.<sup>46</sup>

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<sup>41</sup> 489 U.S. 189 (1989)

<sup>42</sup> See Id. at 192

<sup>43</sup> See, Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> See 489 U.S. 189

One month later Joshua was back in the hospital.<sup>47</sup> Based on suspicions of child abuse, a caseworker visited Joshua at home for approximately six months and found several suspicious injuries but then failed to pursue the matter any further.<sup>48</sup> In March 1984, Joshua was beaten so severely by his father that he fell into a life-threatening coma.<sup>49</sup> Emergency brain surgery revealed that Joshua had a number of hemorrhages caused by the injuries to his head.<sup>50</sup> He suffered severe brain damage and was expected to spend the rest of his life confined to an institution.<sup>51</sup> Joshua's father was finally convicted of child abuse.<sup>52</sup> His mother brought suit against DSS under 42 U.S.C. §1983, claiming that Joshua was denied liberty without due process of law because DSS failed to intervene and protect him from his father's abuse.<sup>53</sup>

The Supreme Court held in a plurality that the defendant's failure to adequately protect Joshua from his father's abuse did not violate Joshua's rights under the Due Process Clause.<sup>54</sup> The final vote was five to four. The Court distinguished between negative and positive rights.

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<sup>47</sup> See Id.

<sup>48</sup> See Id. at 192-3

<sup>49</sup> See Id. at 193.

<sup>50</sup> See 489 U.S. 189

<sup>51</sup> See Id.

<sup>52</sup> See Id.

<sup>53</sup> See Id.

<sup>54</sup> See 489 U.S. 189 at 195

The court classified the Due Process Claim as a negative right. This means that the Due Process Clause forbids the state itself from depriving individuals of life, liberty, or property without due process of the law, but does not impose an affirmative obligation to ensure that those interests are not harmed through other means.<sup>55</sup> In contrast, if the Due Process Clause were a positive right, the state would have an affirmative obligation to guarantee certain minimal levels of safety and security.<sup>56</sup> The state would be required to protect the life, liberty, and property of its citizens against invasion by private actors as well as by its own actions.<sup>57</sup> The Court held that the Due Process Clause is a limitation on state power, not a guarantee of minimal safety or protection from private individuals.<sup>58</sup> "Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."<sup>59</sup>

The Court rejected the Plaintiff's argument that an affirmative duty to protect Joshua arose out of a special relationship created or assumed by the state because of its

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<sup>55</sup> See Id. at 196.

<sup>56</sup> See Id. at 195.

<sup>57</sup> See Id.

<sup>58</sup> See 489 U.S. 189 at 195.

<sup>59</sup> Id.

awareness that Joshua was in danger.<sup>60</sup> No special relationship existed, according to the Court, because although the state was aware of the dangers that Joshua faced, it played no part in increasing his danger or acting in any way to render Joshua more vulnerable.<sup>61</sup> The Court also focused upon the fact that the state placed Joshua in no worse a position than if the state had not acted at all.<sup>62</sup> "The State does not become the permanent guarantor of an individual's safety having once offered him shelter."<sup>63</sup>

However, the Court did not go so far as to say that the Due Process Clause never imposes a duty on the State to protect individuals. "It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."<sup>64</sup> The Court explained that the State is required, for example, to provide adequate medical care to incarcerated prisoners because a prisoner is unable, by deprivation of his liberty, to care for himself.<sup>65</sup> When the state holds a person in custody against his or her will the Constitution imposes a duty to assume

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<sup>60</sup> See Id. at 197.

<sup>61</sup> See Id.

<sup>62</sup> See 489 U.S. 189 at 200.

<sup>63</sup> Id. at 201.

<sup>64</sup> Id. at 198.



responsibility for the person's safety and general well being.<sup>66</sup> "Had the State by the affirmative exercise of its power removed Joshua... and placed him in a foster home[,]... we might have a situation sufficiently analogous to incarceration... to give rise to an affirmative duty to protect."<sup>67</sup>

The Court hinted that there are also some non-custodial situations in which an affirmative duty to protect may still arise. "It is the State's affirmative act of restraint of personal liberty - which is the 'deprivation of liberty' triggering the protections of the Due Process Clause...."<sup>68</sup> The Court further hinted that an affirmative duty to protect an individual might arise in situations in which the state's behavior increases the level of danger faced by the victim. "While the State may have been aware of the dangers that Joshua faced, ... it played no part in their creation, nor did it do anything to render him more vulnerable to them."<sup>69</sup> "It placed him in no worse position than that in which he would have been had it not acted at all"<sup>70</sup>

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<sup>65</sup> See Id. at 198-9.

<sup>66</sup> See 489 U.S. 189 at 199-200.

<sup>67</sup> Id. at 201, fn. 9.

<sup>68</sup> Id. at 200.

<sup>69</sup> Id. at 201.

<sup>70</sup> Id.

Essentially, the Supreme Court decided that Joshua DeShaney and his mother were not entitled to a §1983 due process claim against the State of Wisconsin, the social service agency, and the individual social workers who failed to act because Joshua had no right of protection from the state. The state is the one who interceded and offered to look after Joshua DeShaney and make sure through home visits that his father did not abuse him anymore. It does not logically make sense to offer someone "protection" and then when the state fails to follow through on that offer to claim it is of no consequence. The state can not be held liable for its own failure to act even though the state made a promise to act. If this had been a private citizen there would be tort remedies or contractual remedies available depending upon the facts of the case. It is simply wrong for the state to hide behind the Supreme Court for its failure to protect Joshua DeShaney and other children and victims of domestic violence in the same or a similar situation.

There are some options available under due process claims after DeShaney. Under a substantive due process claim a victim of gender motivated violence could bring a claim against the police if the police were to create a "special relationship" with the abused woman. A victim of

gender motivated violence could also sue under a substantive due process claim if the police had her in their custody and failed to provide her with adequate protection.

A special relationship is difficult to define. In order to create a special relationship, a woman must show that she, as the victim, was offered protection from the police beyond ordinary measures. It has been held by some courts that a protection order alone does not create this special relationship.<sup>71</sup> There does not seem to be one definable definition of what will create a special relationship but the judiciary has defined what will not create a "special relationship".

The second way to establish a substantive due process claim is for a woman to show that she was in police custody and therefore was owed more protection than the ordinary citizen is owed. When the police impinge on the rights of a private citizen whether through incarceration, commitment or other means then they must protect their charge.<sup>72</sup> If a woman cannot protect herself because she is in the custody of the state and cannot adequately protect herself because of this custody then the state must afford the citizen the protection that she cannot provide herself.

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<sup>71</sup> See 489 U.S. 189 at 199-200.

Very few domestic violence victims will fit into these narrowly drawn exceptions to the DeShaney decision. Very few woman find themselves in police custody when a violent domestic situation occurs. Also, very few woman are offered any extraordinary measures of protection from the police. Due to this situation, a due process claim under §1983 is not feasible for most victims of domestic violence. Equal Protection is another option available to victims of gender motivated violence.

#### **B. Equal Protection**

There are two types of gender discrimination under equal protection. The first is overt discrimination. Overt discrimination occurs when a law is discriminatory on its face. If a law is facially discriminatory then the victim would not need to prove either discriminatory intent or discriminatory practice. The second type of discrimination is covert discrimination. This is a much more difficult type of discrimination to prove. Covert discrimination is facially neutral law but is a law that is applied in a manner that is discriminatory.

Equal protection has a long and storied history in the United States. The 'granddaddy' of all equal protection

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<sup>72</sup> See Id.

cases was decided in 1886.<sup>73</sup> This is the eminent equal protection clause case in the United States.

Yick Wo involved a challenge to a San Francisco ordinance that barred the operation of hand laundries in wooden buildings unless the operators had received a permit from the Board of Supervisors.<sup>74</sup> The Board of Supervisors granted permits to all but one of the non-Chinese applicants and denied permits to all of the two hundred Chinese applicants.<sup>75</sup> Yick Wo along with several others applied for the necessary permits to keep operating his laundry but he and his fellow Chinese countrymen were denied licenses in droves.<sup>76</sup>

The Court stated that although the ordinance was neutral on its face, it was administered in such a discriminatory manner that discriminatory intent on the part of the Board of Supervisors could be inferred.<sup>77</sup> Therefore, the Court held that the ordinance violated the Equal Protection Clause.<sup>78</sup> The Court stated that the power granted to the Board of Supervisors was used arbitrarily and without guidance and restraint.<sup>79</sup>

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<sup>73</sup> See Yick Wo v. Hopkins, 118 U.S. 1064 (1886).

<sup>74</sup> See Id.

<sup>75</sup> See Id.

<sup>76</sup> See Id. at 1066

<sup>77</sup> See Id. at 1068.

<sup>78</sup> See 118 U.S. 1064 at 1067-68

<sup>79</sup> See Id.

Extreme discriminatory effects of a facially neutral policy can imply discriminatory purpose on the part of the sponsoring agency. In the case of gender violence, a facially neutral policy would be determined to unfairly discriminate against women in its execution. This is typically the best way for a woman that has had to deal with police failure to act properly in a violent situation. If the victim of gender related violence does prove that the policy is applied in a discriminatory manner the state actor has the opportunity to assert that there is an important governmental objective and that the objective is substantially related to the achievement of the objective. Of course, the objective must not be discriminatory.

### **C. Violence Against Women Act**

The Violence Against Women Act, hereinafter VAWA I, was originally passed by Congress in 1994.<sup>80</sup> It was passed by a bipartisan effort. VAWA I was originally passed at a time when President Clinton had sent a big crime bill to Congress. There was a lot of press coverage about the crime bill and the VAWA I was able to ride this media exposure into existence as a law. Women's groups, particularly, NOW, the National Organization for Women, had been pushing for an act like VAWA I for sometime. They

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<sup>80</sup> 42 U.S.C. §13891

were able to successfully utilize the media and stories like those of Jena Balistreri's in order to show the need for legislation about gender-motivated violence.<sup>81</sup>

Unfortunately, the Act had no real teeth to it in terms of penalties for violators of VAWA I and had funding issues. VAWA I was not given any appropriations to carry out its stated purposes. The purpose of the original VAWA is "to protect the civil rights of victims of gender motivated violence."<sup>82</sup> Without funding, VAWA I seemed largely symbolic. In theory it afforded more protection to women who were victims of gender motivated violence. However, without funding, there were no resources with which to help victims.

In 1998, Congress reaffirmed its commitment to the Violence Against Women Act, hereinafter VAWA II.<sup>83</sup> Congress also eliminated problems with funding that the original VAWA I had faced in its attempts to enforce its provisions. Originally, Congress did not provide any appropriations to accomplish the various provisions outlined by VAWA I. Other than appropriations, VAWA stayed essentially the same. There were a few wording changes so that the intent of Congress would be clear in VAWA II. Funding helped

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<sup>81</sup> "Violence Against Women Act", Violence Against Women Office, Dept. of Justice.

<sup>82</sup> Id. at section a

change the Violence Against Women Act from a largely symbolic law into an actual substantive piece of legislation. Due to the approved appropriations, some of the programs outlined in VAWA could actually be implemented.

Under a section added to VAWA II, the Act also is intended to "promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes motivated by gender."<sup>84</sup> Seemingly, this would indicate that any person who is a victim of domestic violence could use this law. Instead, law has actually been used to create more shelters, more programs, and intervention centers. There have been cases brought under VAWA but they have been challenged for various reasons and in most cases the challenges have been successful. VAWA has also been used to enforce protection orders when the victim crosses state lines. Previously, some women had trouble enforcing a protection order when they would travel from one state to another. For example, in our own area, a woman who lived in East Grand Forks, Minnesota but who worked in Grand Forks, North Dakota could find it difficult to get the North Dakota police to arrest a perpetrator for violating a

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<sup>83</sup> See, 42 U.S.C. §13891



Minnesota protection order. This problem has been eliminated by VAWA. Protection orders now follow the person and not the jurisdiction.<sup>85</sup>

According to subsection c of the VAWA, "A person (including a person who acts under color of any statute, ordinance, regulation, custom or usage of state) who commits a crime of violence motivated by gender... shall be liable to the party injured..."<sup>86</sup> The language of this subsection seems to indicate that a state actor could be held responsible for injuries suffered by a victim of domestic violence. The situation in which a state actor would most likely be held responsible for gender motivated violence is when the state actor creates the violent situation or puts the victim at risk of violence. Another way to look at it is if a state actor such as a police officer heightens the danger through his or her actions as a police officer, he will be held liable according to the plain language of the VAWA. However, if one looks at the language with more scrutiny it becomes apparent that this is not the case.

If the language of the VAWA is scrutinized more closely it becomes obvious that in order for a victim to be

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<sup>84</sup> Id.

<sup>85</sup> See, Id.

<sup>86</sup> Id. at section c

successful in suing a state actor for responsibility for gender motivated violence the victim must first prove that there was some discriminatory intent on the part of the state actor.<sup>87</sup> Discriminatory intent is difficult to prove unless it is a clearly stated written policy. It would not be an outlandish assumption to declare that state actors such as police officers and the judiciary do not have written policies that instruct them, as state actors, to discriminate against a victim of gender motivated violence. Without such a written policy, the state actor would essentially have to admit a discriminatory intent on their part. This is not likely to happen in a lawsuit.

The other remedy for a victim of domestic violence is to sue under an ordinance or some other form of statutory law that is discriminatory in its intent or application. This is unlikely to happen all that often. Furthermore, an equal protection claim, which has already been discussed, would bring the same relief to the victim.

The Violence Against Women Act was recently set to expire. However, a rider re-authorizing the act was attached to a transportation bill and was approved by both

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<sup>87</sup> See, Id.

houses of Congress. On October 28, 2000, President Clinton signed the bill that allowed for VAWA to continue.<sup>88</sup>

VAWA has good intentions but the fact is for most victims of gender motivated violence they will do nothing more than to provide them with counseling, shelter, and a means to enforce an already existing protection order no matter what jurisdiction the victim finds herself in at the time of the violation.

## II. Conclusion

There are no easy answers for a woman that is injured by the failure of a state actor to protect her in a domestic violence situation. The Violence Against Women Act seemingly provides an opportunity to hold a state actor responsible for their inaction but has been shown to require substantially more to prove the claim. Victims must turn to an equal protection claim and not a VAWA claim if they wish to pursue action against a state actor. Post DeShaney, a due process claim is no longer a viable option for victims of gender motivated violence due to the extraordinarily narrow exceptions that DeShaney drew under a §1983 claim. Equal protection seem to be the most viable claim for a domestic violence victim to obtain satisfaction

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<sup>88</sup> AP wire reports, Oct. 28, 2000

for the failure of a state actor to offer adequate protection in a gender motivated violence situation.

The original hypothesis of the author was incorrect. VAWA is not the great panacea that it was supposed to be for women because it does not afford any more protection to victims of domestic violence than other remedies that were already in place. VAWA is adept at providing funding for shelters and grant programs. VAWA has also significantly increased the availability of protection orders for women. However, it has failed in the entirety to offer any protection to women that suffer violence due to the inaction of a state actor.

VAWA needs to be modified so that women who are put in heightened danger by a state actor have legal recourse. A change in the language of VAWA so that a victim does not have to prove discriminatory intent would be highly effective. Discriminatory intent is nearly impossible to prove. Hence, if this requirement were removed from the language of VAWA then it would likely lead to more protection for women who are harmed by the actions or inaction of state actors. This would also move VAWA closer to its original intent as stated by Congress in 1994 in the original Violence Against Women Act.