Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct

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Mentored by Judge Jesse G. Reyes[**]

I. INTRODUCTION

The last moments of Ronyale White's life were preserved by a cassette tape she placed in her pocket as her estranged husband, Louis Drexel, threatened her with a loaded gun.[1] Although White had recently obtained an emergency order of protection against Drexel to prevent his abuse and harassment, he defied the order and entered her home unlawfully.[2] As Drexel terrorized her, White called 911 four times to report that he violated the order and to plead for police assistance.[3] However, help arrived too late, and White was shot to

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1. Mickey Ciokajlo, *$4 Million Offer Told in Suit on 911 Call*, CHI. TRIB., June 22, 2006, at 7 (quoting White's final 911 call as saying, "Where are you? Where are you? My husband has a gun. He's trying to kill me.").

2. Robert A. Clifford, *Governmental Immunity: Protecting the Protectors*, CHI. LAWYER, July 2006, at 25 (explaining that it only took two weeks for Drexel to violate the emergency order of protection issued under the Illinois Domestic Violence Act); Steve Patterson, *City to Pay More Than $4 Million to Family of Murdered Woman*, CHI. SUN-TIMES, June 22, 2006, at 18; *see also* Mary Lystad et al., *Domestic Violence*, *in* FAMILY VIOLENCE: A CLINICAL AND LEGAL GUIDE 139, 170–71 (Sandra J. Kaplan ed., 1996) (describing the criticism of civil protection orders as being merely "pieces of paper," which are easily ignored).

3. Patterson, *supra* note 2, at 18 (reporting that White called 911 four times between 11:40 and 11:50 p.m., and during the last call, the dispatcher could hear a threatening male voice in the

death.[4] The recording of White's pleas for assistance and the sound of the gunshots that killed her helped to convict Drexel of murder.[5]

In addition to Drexel's criminal culpability in White's death, the Illinois Supreme Court recently held in *Moore v. Green* that two Chicago police officers could also be held civilly liable for her murder.[6] Donald Cornelius and Christopher Green, the first officers to be dispatched to White's home, took fifteen minutes to respond to the scene and never entered the house to investigate. Instead, they inspected their patrol vehicle and made personal calls while Drexel attacked White.[7] In a wrongful death action against the City of Chicago and the officers, the executor of White's estate alleged that Cornelius and Green breached their duties under the Illinois Domestic Violence Act (IDVA) by failing to respond promptly to White's 911 calls.[8] In its 2006 decision, the Illinois Supreme Court affirmed past precedent and held that law enforcement departments and officers could be held liable for willful and wanton conduct in situations of domestic violence.[9] Consequently, the City of Chicago settled the suit for over $4 million and the officers were suspended without pay.[10] The death of Ronyale White is only one of thousands of fatalities attributed annually to the national epidemic of domestic violence,[11] and her story demonstrates that inadequate police response to domestic violence altercations is a critical problem that can lead to fatal results.[12]

background).

4. *Id*. (discussing that the police officers took three times as long to arrive on the scene as they should have).

5. Jeff Coen, *Tapes of Killing Help Convict Husband*, CHI. TRIB., Aug. 30, 2005, at 1 (explaining that it only took one hour for the jury to return Drexel's guilty verdict); Stefano Esposito, *"Cold-Hearted Murderer" Convicted Of Killing Wife*, CHI. SUN-TIMES, Aug. 30, 2005, at 18.

6. Moore v. Green, 848 N.E.2d 1015, 1018 (Ill. 2006).

7. Rummana Hussain, *Council OKs $4.25 Million for Murdered Woman's Kids*, CHI. SUN-TIMES, June 29, 2006, at 62 (explaining the officers' contentions that they were searching the neighborhood after they were informed by radio that Drexel had fled the house; supervisors for the police officers testified that the response should have taken closer to three minutes).

8. *Moore*, 848 N.E.2d at 1018.

9. *Id*. at 1023 (affirming *Calloway v. Kinkelaar*, 659 N.E.2d 1322 (Ill. 1995), in which the court recognized a cause of action created by § 305 of the Illinois Domestic Violence Act).

10. Ciokajlo, *supra* note 1, at 7.

11. *See* Lystad, et al., *supra* note 2, at 140 (referring to the movement in mass media's characterization of the scale of the domestic violence problem in the United States); STAFF OF S. COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA (COMM. PRINT 1992) (labeling the domestic violence crisis facing the nation as a catastrophe and a tragedy, and highlighting the pervasiveness of domestic violence in America).

12. *See* Eve S. Buzawa & Carl G. Buzawa, *Introduction, in* DO ARRESTS & RESTRAINING ORDERS WORK? 1, 4 (1996) [hereinafter DO ARRESTS WORK] (explaining that research shows societal intervention prevents instances of domestic violence from becoming even more

Domestic violence[13] continues to be a problem of epic proportion.[14] Despite nationwide state-based legislative reform over the last three decades,[15] nearly one in three American women reports having been exposed to domestic violence by a partner at some point in her life.[16] Such abuse also has a significant impact on law enforcement agencies and officers, as domestic violence is the single most frequent form of violence that police encounter on the job.[17] However, despite the frequency with which police officers encounter domestic violence, the effectiveness of their response is often inadequate.[18] Although many police departments have implemented guidelines as to how to treat such cases, police attitudes about domestic violence are slowly evolving.[19] It has been suggested that an effective way to remedy the problem of insufficient police response and to ensure that law enforcement will

dangerous); *see also* Matthew Litsky, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 161–63 (1990) (stating that arrest is the most effective way to prevent further abuse, and noting that despite improvements in police response to domestic violence, police policy continues to stress avoidance of arrest).

13. Domestic violence for the purposes of this paper will be defined as "violence between adults who are intimates, regardless of their marital status, living arrangement, or sexual orientations. [The term domestic violence refers to such] minor aggressive acts of throwing, shoving, and slapping; as well as major aggressive acts of beatings, forced sex, threats with a deadly weapon, and homicide." Lystad et al., *supra* note 2, at 139.

14. James T.R. Jones, *Battered Spouses' State Law Damage Actions Against the Unresponsive Police*, 23 RUTGERS L.J. 1, 1–3 (1992) (describing spouse abuse as "an immense modern tragey"); *see also* U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at iii (2000) (reporting that approximately 1.5 million women are raped and/or physically assaulted by an intimate partner annually in the United States).

15. DO ARRESTS WORK, *supra* note 12, at 5; LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE 2 (1992) (outlining legislative efforts as well as the police policy "revolution" concerning the treatment of domestic violence).

16. Karen Scott Collins et al., HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN'S HEALTH 8, 27 (1999), http://www.cmwf.org/usr_doc/Healthconcerns_surveyreport.pdf (citing a study which estimates that thirty-one percent of women face domestic violence in their lifetime).

17. SHERMAN, *supra* note 15, at 1. In 2006, the City of Chicago Police Department received 204,729 domestic violence calls, averaging 561 calls per day. CITY OF CHICAGO POLICE DEPARTMENT, DOMESTIC VIOLENCE QUARTERLY STATISTIC REPORT YEAR TO DATE DEC. 2006 http://egov.cityofchicago.org:80/webportal/COCWebPortal/COC_EDITORIAL/DV4Q06.pdf (2007); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46 (1992) (explaining that "[d]omestic disturbance incidents constitute the largest category of calls received by police each year").

18. *See* Hollis L. Webster, *Enforcement in Domestic Violence Cases*, 26 LOY. U. CHI. L.J. 663, 663 (1995) (recognizing the legal system's ineffectiveness in dealing with domestic violence as one of the main reasons the Illinois General Assembly enacted the Illinois Domestic Violence Act in 1986).

19. STATE OF ILLINOIS, 2005 BASIC POLICE TRAINING CURRICULUM REVALIDATION PROJECT 97, 99–103 (2004) [hereinafter POLICE TRAINING] (outlining officer duties under the Illinois Domestic Violence Act and emphasizing domestic violence as a serious crime).

treat domestic violence as a serious crime would be to expose officers and law enforcement agencies to civil liability when their conduct falls short of appropriate intervention.[20]

Traditionally, municipal entities and their employees have enjoyed immunity from civil claims alleging failure to provide protection services or adequately perform those services.[21] However, in 2005, the United States Supreme Court held that the determination of how and when to expose law enforcement to civil liability in an attempt to spur responsiveness to domestic violence is a policy decision that should be left to the states.[22] Indeed, most states have addressed the issue of police immunity and the ability of domestic violence victims to bring suit against police officers and departments.[23] In Illinois, the legislature has enacted a domestic violence statute that limits the immunity of law enforcement personnel in order to encourage the police to carry out their duties towards victims of intimate partner abuse.[24] The Illinois Supreme Court interpreted the immunity provision of the Illinois statute to provide a remedy for victims enabling them to bring suit against the police who mishandle their case.[25] This right of action is unique as compared to the remedies established for domestic violence victims in other jurisdictions because of the breadth of protection it provides specifically to domestic violence victims for a wide variety of police misconduct.[26] This Comment suggests that the way in which Illinois has chosen to address police immunity in situations of domestic

20. Jones, *supra* note 14, at 4; *see also* Litsky, *supra* note 12, at 163–64 (describing an improvement in law enforcement's treatment of domestic violence calls after police departments in New York and Connecticut were held liable for inadequate protection).

21. ILLINOIS LAW & PRACTICE § 335 (2006) (describing the various law enforcement acts for which municipalities are not liable).

22. Castle Rock v. Gonzales, 545 U.S. 748, 768–69 (2005); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (stating that "[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes"). Laura S. Harper, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1422 (1990) (discussing the Court's ruling in *DeShaney* and how state tort claims may be a successful alternative to a constitutional claim against the police).

23. *See infra* Part IV.A (discussing select methods by which states have dealt with police immunity in situations of domestic violence, including mandatory arrest laws, domestic violence statutes, and the traditional negligence cause of action).

24. 750 ILL. COMP. STAT. 60/305 (2004); *see infra* Part III (describing the Illinois Domestic Violence Act and its immunity provision).

25. Calloway v. Kinkelaar, 659 N.E.2d 1322, 1328 (Ill. 1995) (recognizing a right of action when police officers breach their duties to victims by willful and wanton acts or omissions); *see infra* Part III (outlining the case law which has expounded upon the meaning of the immunity provision of the Illinois Domestic Violence Act).

26. *See infra* Part IV.B (comparing Illinois' treatment of police immunity in situations of domestic violence to the varying treatments in California, Washington and New York).

violence provides more complete legal protection for victims than other states provide.[27]

This Comment examines Illinois law concerning the type of immunity granted to law enforcement officials who respond to situations of domestic violence and compares Illinois to three other jurisdictions with respect to the civil remedies available to domestic violence victims who suffer police misconduct.[28] Although domestic violence victims have successfully recovered damages by asserting federal constitutional and statutory claims,[29] this Comment focuses solely on state-based statutory and common law tort claims.[30] Part II of this Comment illustrates the impact of domestic violence on the nation and Illinois, and discusses the role of law enforcement officials in deterring and responding to intimate partner abuse.[31] Part II also explores the evolution of tort immunity statutes for governmental agents in Illinois.[32] Part III describes the statutory scheme developed in Illinois surrounding domestic violence.[33] This Part also analyzes recent Illinois case law that limits law enforcement immunity in occurrences of domestic violence where police conduct is willful and wanton.[34] Part IV then analyzes Illinois law enforcement immunity in comparison to the domestic violence laws established in three other states and outlines the positive and negative aspects of the differing treatment.[35] Part IV also argues that the right of action provided for victims of domestic violence in Illinois surpasses the legal remedies available to victims in

27. *Id*.

28. *See infra* Parts III and IV (examining Illinois law with regard to police immunity, outlining the ability of victims of domestic violence to bring suit against the police for misconduct, and comparing this law with that of other states).

29. Harper, *supra* note 22, at 1393–94 (noting that domestic violence victims have achieved varying levels of success when asserting that police failed to protect their constitutional rights, and suggesting that equal protection claims may be more promising than due process claims); *See* Jones, *supra* note 14, at 56–57 (explaining the success of some abused women in bringing federal equal protection claims if the police misconduct is related to gender-based classifications).

30. *See infra* Parts III and IV (discussing statutory and common law negligence claims in Illinois and three other states).

31. *See infra* Part II (depicting the nature of the crime of domestic violence and the role of the police in dealing with abusers and victims).

32. *See infra* Part II.C (expounding on Illinois history of absolute immunity, the public duty doctrine, the special relationship exception, and the Illinois Tort Immunity Act).

33. *See infra* Part III.A (describing in detail the Illinois Domestic Violence Act).

34. *See infra* Part III.B (examining Illinois Supreme Court and appellate court rulings which have created and affirmed the cause of action for victims of domestic violence against police officers who breach their duties under the IDVA).

35. *See infra* Part IV (describing the civil remedies for victims of domestic violence in other states with respect to law enforcement).

these three other states.[36] Finally, Part V proposes several ways to encourage additional systemic change and modified police conduct.[37] It also suggests means to further strengthen the right of victims to bring suit against individual police officers and their departments.[38]

II. BACKGROUND

The concept of law enforcement immunity in Illinois has evolved significantly over the last forty years.[39] In order to understand the significance of the immunity provision of the IDVA and recent case law defining the limited immunity it provides, it is important to understand the legal history behind the concept of governmental immunity in Illinois.[40] Additionally, some background knowledge about domestic violence and the role that law enforcement plays nationally and in Illinois is required in order to comprehend why limited immunity for police is necessary to protect victims of domestic violence.[41] Accordingly, this Part first provides an overview of domestic violence as a national problem.[42] Next, this Part discusses the role that law enforcement officers play in the efforts to combat domestic violence.[43] Finally, this Part describes the statutory and common law history of sovereign immunity in Illinois.[44]

A. Domestic Violence Is a National Problem

Domestic violence has existed throughout human history and has been documented as far back as the Roman Empire.[45] The problem is

36. *See infra* Part IV.B (evaluating the strengths and weakness of the Illinois laws and comparing Illinois to other states).

37. *See infra* Part V (suggesting additional legislative and judicial action to provide incentives for better law enforcement response to domestic violence).

38. *See infra* Part V (proposing methods for making more accessible remedies for victims who choose to bring suit for police misconduct).

39. *See infra* Part II.C (outlining the evolution of common law and statutory immunity with respect to municipal entities and their employees).

40. *Id.* (recounting the evolution of municipal immunity in Illinois).

41. *See infra* Parts II.A–B (explaining the prevalence of domestic violence in the United States and Illinois and describing the important role police play in curbing rates of recidivism).

42. *See infra* Part II.A (describing the nature of domestic violence as a crime).

43. *See infra* Part II.B (discussing in detail proper police conduct with respect to domestic violence incidents and explaining reasons why such conduct is not carried out).

44. *See infra* Part II.C (explaining the creation of common law sovereign immunity, its abolishment by the Illinois Constitution of 1970, and the subsequent adoption of the Illinois Tort Immunity Act).

45. Kathleen K. Curtis, *The Supreme Court's Attack on Domestic Violence Legislation—Discretion, Entitlement, and Due Process in Town of Castle Rock v. Gonzalez*, 32 WM. MITCHELL L. REV. 1181, 1184 (2006); *see also* Arthur L. Rizer, III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 2 (2005) (explaining the "rule of thumb" in

also deeply rooted in American culture.[46] The early colonial settlements in America enacted laws that sanctioned violence against one's wife and children.[47] In fact, at that time, family violence was not only legal but expected, as society deemed it the man's role to use physical power to ensure that his wife followed certain standards of behavior.[48] It was not until the end of the nineteenth century that domestic violence and spousal abuse were criminalized in the United States.[49] Still, it was treated as a private issue within the family and was seldom reported to law enforcement.[50] When incidents were called in to police, abusive husbands were often told by responding officers to simply take time to cool off.[51] The burgeoning women's liberation movement of the 1960s and 1970s finally brought the issue to the public consciousness and helped give voice to the silent victims of family violence.[52]

which a husband was allowed to beat his wife with a stick as long as it was no thicker than his thumb).

46. *See* State v. Oliver, 70 N.C. 60, 1874 WL 2346, at *1–2 (N.C. 1874), in which the Supreme Court of North Carolina rationalized the existence of domestic violence by stating:

> [I]n order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.

Id.

47. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 23–24 (1990) [hereinafter CRIMINAL JUSTICE] (quoting early court decisions which affirmed that a "husband was legally permitted to chastise his wife without subjecting himself to vexatious prosecutions for assault and battery," (quoting L. LERMAN, PROSECUTION FOR SPOUSE ABUSE INNOVATIONS IN CRIMINAL JUSTICE RESPONSE (1981))); DEL MARTIN, BATTERED WIVES 31 (1976) (illustrating the legality of domestic violence in the nineteenth century United States by recounting a North Carolina court's holding that the judiciary should not "interfere with family government in trifling cases," which resulted in the acquittal of the abusive husband).

48. CRIMINAL JUSTICE, *supra* note 47, at 23–24 (describing moderate violence by the family patriarch as a Puritanical value believed to be necessary for following the correct path to salvation).

49. *See generally* Fulgham v. State, 46 Ala. 143 (1871) (making Alabama the first state to make spousal abuse illegal by holding "the privilege, ancient though it 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"); Rizer, *supra* note 45, at 3–4 (discussing the progress by which domestic violence became illegal throughout the United States).

50. Curtis, *supra* note 45, at 1185.

51. Raymond I. Parnas, *The Police Response to the Domestic Violence Disturbance*, 1967 WIS. L. REV. 914, 935–36 (1967) (quoting a 1965 Chicago Police Department training manual in which officers were instructed to suggest that the man leave the home for the night as "most domestic quarrels quiet down before the next morning").

52. *See* Curtis, *supra* note 45, at 1185–86 (crediting women's rights advocates with successfully developing grassroots programs to help victims escape their abuser); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 536 (1996) (describing the feminist movement as "the genesis for

1. The Difficulty of Quantifying the Prevalence of the Crime

The extent to which the problem of domestic violence still exists is not fully understood.[53] Formal statistics on the prevalence of domestic violence are difficult to collect for a variety of reasons.[54] First, institutional hurdles impede the assessment of the size of the problem.[55] For instance, police departments and service agencies in the past have had ineffective and inconsistent systems for record-keeping.[56] Further complicating the issue, instances of domestic violence are not always categorized as such by law enforcement or health care providers.[57] Additionally, some victims use multiple services after an altercation and are documented by each agency, making it difficult to compare statistics from the police, hospitals, and shelters to determine how many individual disturbances actually took place.[58]

Perhaps the most significant obstacle to understanding the pervasiveness of domestic violence is the nature of the victim and the crime itself.[59] Many women choose not to report incidents of abuse because of social embarrassment or fear of retribution from their

changing societal and legal responses to domestic violence).

53. U.S. DEP'T OF JUSTICE, *supra* note 14, at 19 (hypothesizing the reason for differences between survey results and discussing the difficulty of understanding these disparities); *See* Lystad et al., *supra* note 2, at 140 (explaining that the sociological study of domestic violence is relatively young); M. Mercedes Fort, *A New Tort: Domestic Violence Gets the Status it Deserves in* Jewitt v. Jewitt, 21 S. ILL. U. L.J. 355, 358 (1997) (claiming that while scholars are trying to understand the nature of a violent relationship, there are still no reliable statistics on the prevalence of domestic violence).

54. CRIMINAL JUSTICE, *supra* note 47, at 20–21 (outlining in detail the difficulties presented in collecting statistics about the prevalence of domestic violence); *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-07-148R, PREVALENCE OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING 2 (2006) ("No single, comprehensive effort currently exists that provides nationwide statistics on the prevalence of [domestic violence].").

55. CRIMINAL JUSTICE, *supra* note 47, at 20–21.

56. *Id*. (describing the lack of an effective mechanism for coordinating data collected by various service agencies despite the enactment of laws requiring more thorough record-keeping with regard to the incidence of domestic violence).

57. *Id*. at 21 (attributing inaccurate statistics to the habitual "down-grading" of calls by police officers who minimize the severity of domestic violence cases); *see also* G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 158 (2000) (describing the practice in the Los Angeles County Sheriff's Department of not classifying domestic violence 911 calls as emergency status thus diminishing priority treatment); *and* Parnas, *supra* note 51, at 914 n.2 (reporting that, in the past, the Chicago police department classified domestic violence as "disturbances" grouped together with teen disruptions and party noise).

58. CRIMINAL JUSTICE, *supra* note 47, at 21.

59. *Id*. at 20–21; Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLINE L. REV. 247, 249–50 (1983) (explaining the nature of the relationship between abuser and victim).

abuser.[60] Additionally, some victims choose not to rely on law enforcement for protection because of past encounters in which the police failed to respond properly or promptly.[61] Victims may avoid reporting an incident because they do not want to subject their abusers to the criminal justice system, or because they cannot afford to have their abusers incarcerated for financial or practical reasons.[62] Under-reporting of domestic violence prevents the collection of reliable data about the frequency with which family violence occurs.[63]

Furthermore, because the rate of recidivism for abuse is particularly high with domestic violence, some victims become "regulars" in the eyes of the police.[64] Unlike victims of other forms of violent crime, the risk of retaliatory abuse is increased for battered individuals because of the nature of their relationship with their abuser.[65] Victims of assault perpetrated by a stranger rarely encounter their assailant again, while domestic violence victims are typically involved in a relationship, live with, or are economically and emotionally dependent upon their

60. MARTIN, *supra* note 47, at 11–12 (stating that legal experts categorize domestic violence as one of the most underreported crimes in the United States); BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 7 (2000) [hereinafter INTIMATE PARTNER VIOLENCE] (explaining that the most commonly cited reasons for not reporting domestic violence to the police was the "private or personal" nature of the matter, and adding that nineteen percent of female victims did not report their victimization to the police for fear of reprisal by the perpetrator).

61. Jane F. Golden, *Mutual Orders of Protection in New York State Family Offense Proceedings*, 18 COLUM. HUM. RTS. L. REV. 309, 311 (1987) (describing an increase in litigation by domestic violence victims against law enforcement for inadequate response); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 223–24 (1993) (explaining that many women choose not to extend orders of protection because of inadequate enforcement by police departments).

62. INTIMATE PARTNER VIOLENCE, *supra* note 60, at 7 (documenting that about one in ten male victims and fewer than one in ten female victims said they did not report the abuse to the police because they did not want to get the offender in trouble with the law). *See also* Anne C. Johnson, *From House to Home: Creating A Right to Early Lease Termination for Domestic Violence Victims*, 90 MINN. L. REV. 1859, 1862 (2005) (explaining that some abused women are financially dependent on their abusers or would become homeless if they escaped abuse or had the abuser arrested).

63. *See* INTIMATE PARTNER VIOLENCE, *supra* note 60, at 7 (stating that only about half of all victims of intimate partner violence reported the violence to law enforcement authorities).

64. *See* Wanless, *supra* note 52, at 546–47 (explaining how incidents of domestic violence are not isolated occurrences and describing the cycle of violence that leads to repeat attacks); D.J. DAWSON & J. DAVID HIRSCHEL, U.S. DEPARTMENT OF JUSTICE, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR LAW ENFORCEMENT OFFICIALS 4 (2000) (stating that "[a] small percentage of households generate a large percentage of domestic violence calls.").

65. Barbara Hart, *Battered Women & The Criminal Justice System*, *in* DO ARRESTS & RESTRAINING ORDERS WORK 98, 100 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (contrasting a battered woman to victims of other types of violent crimes).

abuser.[66] Thus, in trying to ascertain the number of households afflicted by domestic violence, it is difficult to accurately assess the number of victims based on statistics of requests for service because many of the requests are made by repeat callers.[67]

2. Domestic Violence Is a Large Societal Problem Both Nationally and in Illinois

Despite uncertainty about how many people are affected by domestic violence, it is certain that this problem is pervasive.[68] Victims of intimate partner abuse can be found in all social, ethnic, and racial groups.[69] Although both women and men are victims of abuse, the rates of victimization are significantly higher for women.[70] Studies estimate

66. *Id*. *See also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 306 (1985) (explaining the principles that should guide the legal systems treatment of domestic violence).

> In responding to abuse, the law should emphasize the nature of the harm done, and not the relationship between the parties. While it is proper to stress the similarities between domestic violence and crimes between strangers when dealing with the batterer, the law must recognize the difference between the two when dealing with the victim. Because of her relationship with the perpetrator, the battered woman will find it difficult to pursue legal remedies against him, much more difficult than does the victim who has not been rendered helpless by the criminal.

Id.

67. *See* CRIMINAL JUSTICE, *supra* note 47, at 20–21 (reporting the difficulty in translating raw police data into an accurate representation of how many individual altercations take place); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 54, at 19 (distinguishing between domestic violence statistics calculating incidence versus prevalence and contending that both are necessary for understanding the extent to which resources are needed for victims of intimate partner abuse).

68. U.S. DEPARTMENT OF JUSTICE, EXTENT, NATURE, & CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii-v (2000) [hereinafter CONSEQUENCES] (describing that findings about the frequency and scope of domestic violence suggest that it is a serious criminal justice and public health concern).

69. Lystad et al., *supra* note 2, at 140; Illinois State Police, *Facts and Myths About Domestic Violence*, http://www.isp.state.il.us/crime/dvfactsmyths.cfm (last visited Apr. 5, 2007) (verifying the diversity of individuals who are affected by domestic violence); Michelle Aulivola, *Outing Domestic Violence*, 42 FAM. CT. REV. 162, 162 (2004) (noting that domestic violence occurs at approximately the same frequency in same-sex and heterosexual couples). *But see* INTIMATE PARTNER VIOLENCE, *supra* note 60, at 3 (reporting that between 1993 and 1998, women who were young, black, single, low income earning, or living in an urban area were more likely to be victimized by an intimate partner), *and* Jennifer Rios, *What's the Hold-Up? Making the Case for Lifetime Orders of Protection in New York State*, 12 CARDOZO J. L. & GENDER 709, 713 (2006) (discussing the higher rate of domestic violence in socio-economically disadvantaged neighborhoods).

70. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE 1993–2001 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf [hereinafter CRIME DATA BRIEF] (stating that in 2001, women accounted for eighty-five percent of the victims of intimate partner violence); Patricia Tjaden & Nancy Thoennes, U.S. DEPARTMENT OF JUSTICE, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN

that annually, one-tenth to one-fifth of women in the United States are beaten by their intimate partner, totaling between four and six million women each year.[71] In fact, intimate partner abuse has been credited as the leading cause of serious injury to women.[72] Annually, it accounts for more injuries than rape, car accidents, and muggings combined.[73] The U.S. Surgeon General has reported that one-fifth of all hospital emergency room cases are attributed to domestic violence.[74]

Although women constitute a large majority of the victims of intimate partner abuse, women are not the only segment of society afflicted by domestic violence.[75] The Department of Justice found that male victims of domestic violence constitute one-third of all homicides committed by intimate partners.[76] Additionally, in homes where intimate partner abuse occurs, children are also likely to be victims.[77] At least one study found that between fifty and seventy percent of batterers who abuse an adult partner also abuse the children in the relationship.[78] Further, domestic violence is not isolated to heterosexual relationships.[79] Studies have documented that between 50,000 and 100,000 lesbians and as many as half a million gays are victimized by a partner each year.[80]

SURVEY 7 (1998) (stating that women are seven to fourteen times more likely than their male counterparts to report suffering severe physical assault from an intimate partner). *See also* Illinois State Police, *supra* note 69 (reporting that at least ninety-five percent of all cases of partner abuse involve a man beating a woman). *Cf.* Melody M. Crick, *Access Denied: The Problem of Abused Men in Washington*, 27 SEATTLE U. L. REV. 1035 (2004) (exploring the legal obstacles faced by male victims of domestic violence).

71. Fort, *supra* note 53, at 358; Johnson, *supra* note 62, at 1861; Waits, *supra* note 66, at 273.

72. Rios, *supra* note 69, at 713; Johnson, *supra* note 62, at 1861 ("In reality, a woman in the United States is abused every seven seconds, regardless of her culture, race, occupation, income level, or age.").

73. Fort, *supra* note 53, at 358; Litsky, *supra* note 12, at 149.

74. Zorza, *supra* note 17, at 46.

75. Rios, *supra* note 69, at 712.

76. Crick, *supra* note 70, at 1043–44 ("While eight of every 1,000 women are victims of intimate partner violence, one of every 1,000 men is also a victim . . . . Even more frightening is the estimate that as many as ninety percent of abused men do not report domestic violence waged against them by women partners.").

77. Rios, *supra* note 69, at 713 ("The abuse of children is generally less severe than the abuse of the female partner, but as the violence against the partner gets worse, so does the abuse against the child.").

78. *Id*.

79. Aulivola, *supra* note 69, at 162 ("Studies show that domestic violence among same-sex couples occurs at approximately the same statistical frequency and has many of the same characteristics as domestic violence among heterosexual couples . . . . On average, studies show the incidence of violence in heterosexual relationships to be between 25% and 33%.").

80. *Id*.

In abusive relationships, incidents of battery often recur frequently, monthly or even daily.[81] Research suggests that thirty-two percent of victims are re-victimized within a relatively short period of time if proper intervention is not carried out.[82] A survey compiled by the American Medical Association reports that "forty-seven percent of husbands who beat their wives do so three or more times per year and that rape is a common occurrence in fifty-four percent of violent marriages."[83] The injuries incurred by victims of intimate partner abuse are usually greater than injuries inflicted by strangers,[84] and the danger increases if the victim is pregnant.[85] Knives, guns, or other weapons are used in thirty percent of domestic violence incidences.[86] Domestic violence disturbances also tend to become more violent and dangerous over time.[87]

It is not uncommon for intimate partner violence to escalate to the point of fatality.[88] Law enforcement agencies have been able to

81. Zorza, *supra* note 17, at 46. *See also* Rizer, *supra* note 45, at 6 ("Fifty-five percent of the husbands questioned admitted that they had hit their wives at least once, and 25% said they had hit their wives from six times a year to daily."); Wanless, *supra* note 52, at 546 ("One in five women victimized by a spouse or an ex-spouse reports that she has been the victim of a series of three or more assaults in the last six months that were so similar she could not distinguish one from another.")

82. CRIMINAL JUSTICE, *supra* note 47, at 9; ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, ACHIEVING ACCOUNTABILITY IN DOMESTIC VIOLENCE CASES: A PRACTICAL GUIDE FOR REDUCING DOMESTIC VIOLENCE 7 (2005) [hereinafter ACHIEVING ACCOUNTABILITY] (reporting research results showing that without prompt law enforcement response, minor assaults often escalate into domestic homicides).

83. Fort, *supra* note 53, at 358.

84. Litsky, *supra* note 12, at 149. *See also* Zorza, *supra* note 17, at 46 ("The injuries women sustain in these attacks are at least as serious as those suffered in violent felony crimes.").

85. Fort, *supra* note 53, at 358 ("The most common injuries are to the head, face, neck, breast or abdomen, and the risk of injury increases sharply during pregnancy.").

86. Zorza, *supra* note 17, at 46. *See also* Waits, *supra* note 66, at 274 (discussing the frequency with which weapons are used in domestic assaults); Rios, *supra* note 69, at 714 ("Most women killed at the hands of partners or former partners were either shot (nearly forty percent) or stabbed (thirty-one percent). Women who were stabbed to death were two times more likely to have been killed by an intimate partner than by a non-intimate partner.").

87. ALEX R. PIQUERO ET AL., ASSESSING THE OFFENDING ACTIVITY OF CRIMINAL DOMESTIC VIOLENCE SUSPECTS: OFFENSE SPECIALIZATION, ESCALATION, AND DE-ESCALATION EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 11 (2005) (outlining studies that show that intimate partner violence increases in frequency and severity over time). *See also* Wanless, *supra* note 52, at 549 (describing how violence escalates rapidly after a woman attempts to leave or end her abusive relationship).

88. Waits, *supra* note 66, at 274 ("[T]he batterer may finally kill his victim, she may kill him, or one or the other of them may commit suicide in order to escape an unbearable situation."). *See also* Wanless, *supra* note 52, at 542 ("Despite measures implemented to assist victims (such as mediation and joint counseling) and to make the criminal justice system more responsive (such as granting police the power to make warrantless misdemeanor arrests) domestic violence has not decreased. The homicide rate for women murdered by their husbands or boyfriends remained

accurately track the number of domestic-violence-related homicides.[89] Each year, at least one-fifth of all homicides are committed within families or intimate relationships.[90] More than half of American women who are murdered are killed by a partner or ex-partner.[91] The U.S. Department of Justice Statistics reports that 1,300 women are murdered each year during domestic altercations.[92]

Economically, domestic violence is also devastating.[93] More than half of homeless women are escapees of domestic violence.[94] Lost wages, absenteeism, and sick leave due to family violence cost the American economy more than $100 million annually, with an additional five billion dollars spent on medical expenses for victims each year.[95]

Domestic violence is equally prevalent in Illinois.[96] A domestic violence altercation is reported once every four minutes in the state.[97] In 2005, there were thirty-six homicides committed by intimate partners

nearly constant from 1977 to 1992: 1.6 per 100,000 population in 1977 as compared to 1.5 in 1992.").

89. NEAL MILLER, INST. FOR LAW & JUSTICE, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 1 (2004), *available at* http://ilj.org/publications/DV_Legislation-3.pdf. *See also* DO ARRESTS WORK, *supra* note 12, at 1 (describing criminal justice statistics regarding serious domestic violence incidents as unreliable); CRIME DATA BRIEF, *supra* note 70, at 2 (calculating that three women on average are killed by their intimate partners each day in the United States).

90. Golden, *supra* note 61, at 309. *See also* Rizer, *supra* note 45, at 6 ("One such study showed that 12.5% of all murders were cases of one spouse killing the other.").

91. DO ARRESTS WORK, *supra* note 12, at 3. *See also* Rios, *supra* note 69, at 713 (stating that between 1976 and 1996, one third of all women murdered during that time were killed by a current or former intimate partner).

92. Rios, *supra* note 69, at 713 ("Between 1976 and 1996, approximately one third of all women who were homicide victims in the United States were killed by current or former intimate partners. Furthermore, women make up the vast majority of all intimate partner homicides victims; in 1998, women constituted seventy-two percent of all intimate partner homicide victims.").

93. *See* Fort, *supra* note 53, at 359 (estimating the economic cost of domestic violence to society as significant).

94. Johnson, *supra* note 62, at 1862.

95. S*ee* Rios, *supra* note 69, at 715 (explaining that the cost to society also includes mental health care services and lost earnings for victims of domestic violence over a lifetime); Wanless, *supra* note 52, at 563 (citing that the 100,000 hospitalization days and 30,000 emergency room visits annually are the result of domestic violence); BONNIE CARLSON ET AL., VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR PRACTITIONERS 17 (2000) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/199577.pdf (reporting that forty percent of the economic impact of domestic violence is attributed to medical expenses and another forty-four percent stems from property loss caused by violence in the home).

96. ILLINOIS STATE POLICE, ANNUAL UNIFORM CRIME REPORT 208 (2005).

97. *Id*. (stating that there were 115,282 domestic violence offenses reported to the Crime Report Program during 2005); NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, ILLINOIS DOMESTIC VIOLENCE FACTS, http://www.ncadv.org/files/Illinois.pdf (last visited Mar. 30, 2007) [hereinafter Facts].

and 3,728 violations of orders of protection reported in Illinois.[98] Service providers throughout the state assisted close to 50,000 adult victims of domestic violence in 2004 and ninety-five percent of those individuals were women.[99] Although current statistics regarding domestic violence in Illinois exist, little is known about the history of family violence in the state or the progress that has been made over time because the Illinois Uniform Crime Report did not collect statistics specific to domestic violence until 1996.[100]

National awareness of the vast and costly consequences of domestic violence began to increase in the 1960s.[101] Advocates and legislators recognized the inadequacy of the services and protections provided for victims,[102] and a wave of legal reform evolved to address these systemic flaws.[103] National and state legislatures enacted mandatory arrest laws, criminal sanctions for acts of partner abuse, and increased civil remedies.[104] By the 1980s, forty-nine jurisdictions had created legislation implementing a revised standard for police interaction with instances of domestic violence.[105] However, despite almost forty years of conscious effort to implement laws and public policy encouraging more effective and thorough services, advocates still debate what constitutes the appropriate law enforcement response to domestic violence.[106]

98. Facts, *supra* note 97 (adding that Illinois service programs answered 203,204 hotline calls and provided 272,651 days of shelter to victims of domestic violence and their children).

99. ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, FACT SHEET DOMESTIC VIOLENCE STATISTICS, http://www.ilcadv.org (last visited Apr. 5, 2007) (click on link "Illinois Domestic Violence Service Statistics") [hereinafter Illinois Coalition Against Domestic Violence].

100. ILLINOIS UNIFORM CRIME REPORT, CRIME IN ILLINOIS EXECUTIVE SUMMARY 11 (2003).

101. *See* Rios, *supra* note 69, at 715 (describing how states began to enact legislation to protect victims of domestic violence and to grant them more rights); Rizer, *supra* note 45, at 6 (describing the social movement that focused on supporting domestic violence victims).

102. Golden, *supra* note 61, at 311.

103. Lystad, *supra* note 2, at 167. *See also* Litsky, *supra* note 12, at 152–53 (noting that typical legislation fell into two categories, "(1) laws allowing victims to obtain protective orders against abusers and (2) laws providing aid to supportive services . . . .").

104. *See* Lystad, *supra* note 2, at 167–71 (outlining the methods of reform which also included adoption of policies for overnight incarceration and civil remedies such as ex parte emergency orders of protection). Wanless, *supra* note 52, at 534 (listing the fifteen states that had enacted mandatory arrest laws).

105. *See* CRIMINAL JUSTICE, *supra* note 47, at 12 (describing these changes as a result of societal pressure to take legislative action); Kinports & Fischer, *supra* note 61, at 165 (discussing the trend of states to enact legislation permitting civil orders of protection and explaining the criminal sanctions associated with violation of these orders).

106. Lystad, *supra* note 2, at 167; CRIMINAL JUSTICE, *supra* note 47, at 69–70 (discussing the ever-changing philosophies of advocates and legislators as to what is the proper role of law enforcement). *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1740

B. Role of Police in Situations of Domestic Violence

The role of law enforcement agencies and officers in the prevention and treatment of domestic violence is crucial.[107] Police departments are called upon to aid victims of abuse far more than any other service provider.[108] Police officers and departments provide free protection services that are available day and night.[109] Officers are uniquely qualified to defuse heated and violent situations and are trained to provide support and address safety issues.[110] Additionally, police officers are armed and can provide life-saving attention in the event a domestic disturbance escalates to violence.[111]

Police officers also function as legitimate authority figures with the power to impose criminal sanctions.[112] The courts rely upon law

(2006) (reporting that domestic violence policy makers have not reached a consensus as to the proper role of law enforcement officials in curtailing domestic violence).

107. David A. Ford et al., *Future Directions for Criminal Justice Policy on Domestic Violence*, *in* DO ARRESTS WORK 243, 250–51 (explaining the importance of law enforcement in reducing the number of incidents of domestic violence and the existence of a public sentiment that police are responsible and capable of providing protection to victims).

108. CRIMINAL JUSTICE, *supra* note 47, at 10 (citing that police intervene in as many as fourteen percent of domestic altercations and that the frequency of this contact is far more than with any other type of agency). *See also* Litsky, *supra* note 12, at 160–61 (describing how police involvement in domestic violence calls exceeds their combined responses to murder, rape, and all other forms of aggravated assault).

109. CRIMINAL JUSTICE, *supra* note 47, at 10. *See also* MARTIN, *supra* note 47, at 92 (highlighting the technological sophistication of law enforcement agencies which lead to beneficial communication and mobility capabilities).

110. POLICE TRAINING, *supra* note 19, at 99–101 (describing the steps a properly trained police officer should take when responding to a domestic violence call); U.S. DEPARTMENT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, FIRST RESPONSE TO VICTIMS OF CRIME HANDBOOK 15 (2001) [hereinafter HANDBOOK], *available at* http://www.ojp.usdoj.gov/ovc/publications/infores/firstrep/2001/NCJ189631.pdf (describing the primary responsibilities for law enforcement when responding to domestic violence calls, including providing physical safety for victims and coordinating referrals to support services).

111. *See* DAWSON, *supra* note 64, at 2 (listing the possible actions that a police officer must consider in responding to a domestic violence call).

> When a call for police assistance is placed, the responding officer(s) must determine what has occurred and the validity of the citizen complaint. The response must fit with the facts and what the law allows. The officer(s) may need to administer emergency medical care and/or summon an ambulance. The officer(s) may need to calm the situation and restrain the offender. The officer(s) may give appropriate advice regarding legal issues and victim support services. If the offender is not arrested at the scene, the victim may be given assistance in obtaining an arrest warrant or a protection order. The victim may also be transported to another location, such as a relative's home or a shelter.

Id. But see Rios, *supra* note 69, at 728 (challenging the conclusions of studies finding that orders of protection are effective).

112. *See* Miccio, *supra* note 57, at 148 (discussing the responsibilities of law enforcement arising from their level of expertise).

enforcement officials to enforce orders of protection issued against abusers by giving warnings and making arrests if necessary.[113] Studies have shown that abuse is significantly reduced if protective orders are properly enforced.[114]

Despite the critical role of law enforcement in deterring domestic violence and the positive effects that can be achieved through police involvement, police officers are frequently criticized for providing inadequate services in response to domestic violence calls.[115] Failure to meet appropriate standards of conduct may have to do with the policing institution's long history of "benevolent neglect" to victims of spousal abuse.[116] Before advocates and legislators actively sought to change policies regarding the policing of domestic disturbances, arrest statistics demonstrated that police officers generally left domestic disputes to be worked out on their own, employing arrest only as a last resort.[117] In fact, the majority of law enforcement agencies in Illinois still had policies against arrest in domestic violence situations in the late 1970s.[118] Despite the notable increase in domestic violence legislation, advocates assert that police attitudes are only slowly changing.[119]

113. *See* Litsky, *supra* note 12, at 162–63 (noting that the arrest power of police is the "linchpin" of prevention of domestic violence because it communicates societal disapproval of spousal abuse while simultaneously protecting victims from further violence).

114. *See* Kinports & Fischer, *supra* note 61, at 221–28 (discussing extensively the need for prompt and consistent enforcement of orders of protection by law enforcement and highlighting the problems that currently exist with enforcement, such as delayed service, failure to warn abuser of criminal sanctions, and lack of follow-through on punishment and arrest).

115. *See* Miccio, *supra* note 57, at 158 (stating that the Violence Against Women Act of 1994 was created in part because of the pervasive problem of police inaction in situations of domestic violence and citing several studies in Texas and California supporting that contention); Kinports & Fischer, *supra* note 61, at 220 (labeling insufficient enforcement of and response to violations of orders of protection as the "Achilles' heel" of the order protection process).

116. CRIMINAL JUSTICE, *supra* note 47, at 11; Damon Phillips, *Civil Protection Orders: Issues in Obtainment, Enforcement and Effectiveness*, 61 J. MO. B. 29, 33 (2005) (describing a history of apathy towards domestic violence by police departments and linking apathy to officer attitudes that domestic violence is less serious than other crimes). *See also* RICHARD TOON ET AL., MORRISON INSTITUTE FOR PUBLIC POLICY, LAYERS OF MEANING: DOMESTIC VIOLENCE AND LAW ENFORCEMENT ATTITUDES IN ARIZONA 2 (2005), *available at* http://www.morrisoninstitute.org (explaining the police practice of categorizing domestic violence calls as "disturbance calls," which were handled with minimal intervention).

117. *See* Wanless, *supra* note 52, at 545–46 (discussing how police are often reluctant to arrest perpetrators because of personal bias concerning domestic violence); TOON, *supra* note 116, at 2 (outlining changes in the law enforcement approach to domestic violence calls since the advent of nation-wide legislation).

118. SHERMAN, *supra* note 15, at 26. New York State also had similar policies against arrest until 1978. *Id.*

119. ACHIEVING ACCOUNTABILITY, *supra* note 82, at 2 (explaining that despite the implementation of revised law enforcement and prosecutorial techniques, change is slow, and everyday practice remains the same despite new laws); David A. Slansky, *Not Your Father's*

Research has shown that regardless of the policy or law in place, police often rely on their own experience and beliefs in making decisions while on the job.[120] Consequently, laws dealing with domestic violence and how to treat victims and perpetrators remain under-enforced.[121]

The under-enforcement of domestic violence laws is often blamed upon findings that show that some police officers simply feel that responding to disputes within the home is not a legitimate responsibility of law enforcement personnel.[122] Domestic violence calls usually require some counseling of the victim and the perpetrator, and some officers find this beyond their training or skills.[123] Even though police departments throughout the country have adopted policies that require a certain level of attention to domestic violence disturbances, and many officers no longer treat intimate partner abuse with apathy, examples of such officer misconduct continue to exist.[124] This persistence in

Police Department: Making Sense of the New Demographics of Law Enforcement, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1209 (2006) (describing police institutions as having changed very little in the last thirty years). *See also* DAWSON, *supra* note 64, at 3 (reporting that research from several jurisdictions demonstrates slow changes in attitudes and policy).

120. Wanless, *supra* note 52, at 544 (describing the rationale given by police for not making arrests). Police are reluctant to arrest when called to domestic disturbances even if they serve in a state that grants them the power of warrantless arrest. *Id*. *See also* CRIMINAL JUSTICE, *supra* note 47, at 43–44 (citing a variety of reasons for law enforcement aversion to arrest, such as the victim's preferences or the officer's evaluation of the victim's conduct and the assailant's demeanor).

121. *See* Pence, *supra* note 59, at 248 (reciting statistics on the infrequency with which police officers make arrests and write reports based on domestic violence calls); SHERMAN, *supra* note 15, at 26, 36 (describing the practice of law enforcement as highly discretionary and explaining that under-enforcement still occurs even if failure to enforce the law violates official departmental policies).

122. *See* Phillips, *supra* note 116, at 33 (describing the common police mentality that domestic violence is a less serious form of crime); CRIMINAL JUSTICE, *supra* note 47, at 27–28 (claiming that police officers prefer law enforcement functions where the likelihood of action and arrest are higher).

123. *See* Wanless, *supra* note 52, at 547 (explaining that police officers are trained to enforce laws and not to serve as psychologist or social workers); *Development in the Law—Legal Response to Domestic Violence*, 106 HARV. L. REV. 1498, 1535–36 (1993) (describing how historically the police were trained to treat domestic disturbance calls as mediations); CRIMINAL JUSTICE, *supra* note 47, at 27–28 ("[I]t has long been noted that police are socialized from their earliest occupational training into a culture that doesn't highly value 'social work' roles.").

124. CRIMINAL JUSTICE, *supra* note 47, at 26. *See also* Phillips, *supra* note 116, at 33, describing one example of police refusal to interfere with a situation of family violence and the consequences of such inaction:

> A court issued an order of protection June 12, 1985 against Anthony Swiggett. "Less than two weeks [later he] was arrested for violating the order." On September 5 of that year, "police officers responded to a 911 call from" Swiggett's wife that he "had violated the order of protection again by entering her [house] and throwing her furniture out into the yard." Officers met the wife and together returned to her house and saw the furniture. Swiggett was at a neighbor's house some 20 to 30 feet away.

attitudes demonstrates that some officers believe outsiders should not interfere with spousal or intimate partner conflicts unless serious physical violence is present.[125]

Numerous sociological studies have found that a police officer's concern over his or her own personal safety is another reason he or she might try to evade domestic violence calls.[126] According to this research, some law enforcement officers believe that domestic violence calls are more dangerous than other types of calls for assistance and often lead to police fatalities.[127] This belief is predicated on the fact that domestic encounters are often heated and unpredictable.[128] However, compared to the frequency with which police officers deal with these altercations, it has not been proven that domestic violence incidents are more dangerous to the officers who respond than other police duties.[129] In fact, one study reports that statistics regarding injuries and deaths resulting from domestic disturbances have been overstated by nearly three times the real rate of injury.[130] Despite the reality of the degree of danger domestic violence calls pose to police officers, fear of injury remains a persistent perception that reinforces their reluctance to respond.[131]

> When the police officers spoke with him, they smelled alcohol on his breath. Swiggett denied moving the furniture, and no one actually saw him doing it. The officers warned Swiggett that they believed his wife, and would arrest him if they had to come back. Less than two hours later the same officers were sent back to find him. They found Swiggett "covered in blood and his pocket contained a copy of the same order of protection which the officers had seen earlier." He had stabbed his wife to death.

Id.

125. *See* SHERMAN, *supra* note 15, at 29 (noting that many police officers feel that in the absence of physical injury, no law has been broken during the domestic disturbance and thus are reluctant to intervene); MARTIN, *supra* note 47, at 94 (reporting that police avoid interfering with "domestic squabbles" because they do not want to make the abuser more aggressive and angry).

126. *See* DAWSON, *supra* note 64, at 5 (outlining the various social science studies that have been conducted regarding police perception of the dangerousness of domestic violence callas and explaining this belief to be mistaken and erroneously spread in training and through department "folklore").

127. SHERMAN, *supra* note 15, at 30. For instance, the training materials provided by some law enforcement agencies and departments encourage officers to take special precautions, such as responding to the scene as a pair, in order to avoid dangerous altercations. *Id*. *See also* HANDBOOK, *supra* note 110, at 15–16 (advising responding officers as to how to deal with victims of domestic violence to avoid personal danger).

128. SHERMAN, *supra* note 15, at 30.

129. Zorza, *supra* note 17, at 52 ("[T]he reality, however, is that domestic disturbance incidents, which account for thirty percent of police calls, account for only 5.7% of police deaths, making domestic disturbances one of the least dangerous of all police activities.").

130. CRIMINAL JUSTICE, *supra* note 47, at 30–31 (outlining a 1986 study by Garner and Clemmer which found flaws in the methodology employed by the FBI in compiling statistics about officer injury and death while in the line of duty).

131. *Id*. (stating that innovations in police responses have been discouraged because of the

Finally, some advocacy groups assert that police officers, along with other members of the criminal justice system, grow frustrated with domestic violence calls because they see responding as a futile exercise.[132] Frequently, after calming down the parties involved in a domestic disturbance, the victim does not want to press charges; she simply wants the officer to neutralize the situation and give a warning to her abuser.[133] Even when the abuser is prosecuted, the victim, who may be the only witness, might refuse to cooperate.[134] The fact that arrested abusers are seldom convicted, some suggest, adds to police reluctance to prioritize these kinds of calls.[135]

C. The Evolution of Governmental Immunity in Illinois

In order to understand the immunity provided to law enforcement agents in the IDVA, it is important to examine the evolution of municipal immunity in Illinois.[136] Prior to the Illinois Supreme Court's 1962 decision in *Molitar v. Kaneland Community Unit Dist. No. 302*, governmental bodies and their employees enjoyed sovereign immunity, meaning that these entities could not be held civilly liable for actions undertaken within their governmental roles.[137] Less than a decade later, the Illinois legislature codified the judicial decision to abolish sovereign immunity when it adopted the 1970 Illinois Constitution.[138] A similar yet distinct judicially-recognized immunity also developed within the

questionable belief that domestic violence disturbances are more dangerous than other types of police calls).

132. RICHARD DAVIS, DOMESTIC VIOLENCE: FACTS AND FALLACIES 79 (1998) (calling the interaction between an abusive relationship and law enforcement personnel as a "sad slow dance."); SHERMAN, *supra* note 15, at 31–32. *See also* ACHIEVING ACCOUNTABILITY, *supra* note 82, at 3 (describing the pessimism that criminal justice personnel encounter when trying to intervene in situations of domestic violence).

133. Waits, *supra* note 66, at 306–07; ACHIEVING ACCOUNTABILITY, *supra* note 82, at 3 (describing how inaction becomes the customary response by law enforcement officials because domestic violence victims are "uncooperative" and often do not follow through with criminal sanctions against their abusers).

134. CRIMINAL JUSTICE, *supra* note 47, at 29–31.

135. *See* DAVIS, *supra* note 132, at 71, 73 (explaining that most police officers doubt that their actions will resolve the problem and stating that "arrest is difficult, if not impossible to justify [for police officers] if there is relatively poor chance of conviction.").

136. *Compare infra* Part II.C (outlining the evolution of governmental immunity in Illinois), *with infra* Part III (discussing the explicit limitation on immunity for police officers and departments when dealing with domestic violence altercations).

137. Molitor v. Kaneland Community Unit Dist. No. 302, 182 N.E.2d 145 (Ill. 1962); Catherine Voigt, *The Death of the Special Duty Exception to Statutory Governmental Immunity*, 86 ILL. B.J. 372, 372 (1998).

138. Voigt, *supra* note 137, at 372.

common law, known as the public duty doctrine.[139] This doctrine stood for the proposition that municipalities, law enforcement agencies, and their employees had a duty to protect the public and enforce the law;[140] however, this broad obligation did not translate into any duty to particular individuals.[141] The public duty doctrine protected officers and other governmental entities from civil liability where they had not already been afforded immunity by statute.[142]

Over time, an exception to the public duty doctrine emerged.[143] The exception held that the doctrine would not apply to instances in which the governmental actor had a special relationship with the individual seeking to sue for breach of duty.[144] A four-part test developed in Illinois jurisprudence to determine whether a special relationship

139. *See, e.g.*, Schaffrath v. Vill. of Buffalo Grove, 513 N.E.2d 1026, 1027–28 (Ill. App. Ct. 1987), stating:

> [G]enerally, law enforcement officials have no duty to protect individual citizens from criminal acts. Their responsibility is to the general public. The duty of the police to preserve the well-being of the community is owed to the public at large rather than to specific members of the community. This rule rests upon public policy considerations that a police department's negligence, oversights, blunders or omissions are not the proximate or legal cause of harms committed by others. A general duty would put the police in the position of guaranteeing the personal safety of every member of the community.

Id. See generally Porter v. City of Urbana, 410 N.E.2d 610, 612 (Ill. App. Ct. 1980) (holding that the duty of law enforcement officers to preserve a community's well-being generally is owed not to specific individuals but rather to the community as a whole); Huey v. Town of Cicero, 243 N.E.2d 214, 216 (Ill. 1968) (defining the general rule of law that a municipality is not liable for its failure to provide police protection); Santy v. Bresee, 473 N.E.2d 69, 72 (Ill. App. Ct. 1984) (finding it inappropriate to hold police officers liable for a breach of a duty to the public). *See also* Voigt, *supra* note 137, at 373 (describing the development of the common law public duty doctrine in Illinois).

140. Leone v. City of Chicago, 619 N.E.2d 119, 121 (Ill. 1993) (including fire fighters and police officers as those municipal employees covered by the public duty doctrine). *See also Huey*, 243 N.E.2d at 216 (affirming the public duty doctrine "in the face of [previous] decisions holding municipalities liable for affirmative negligent or wilful acts by their employees."); Kerry A. Bute, *When Should Municipalities Be Held Liable for Injuries Negligently Caused by Illinois Police Officers?*, 17 DCBA BRIEF 30, 30 (Apr., 2005) ("[T]he rule protects municipalities from liability in tort by establishing the principle that police officers have no enforceable duty to protect individual citizens from harm.").

141. *See* Bute, *supra* note 140, at 30 (discussing how the police do not have a duty to protect individual citizens).

142. *Id.*

143. Voigt, *supra* note 137, at 373; Bute, *supra* note 140, at 30–31.

144. Burdinie v. Vill. of Glendale Heights, 565 N.E.2d 654, 658 (Ill. 1990) (explaining that special duty arises in two instances, "when the municipality acts in a private instead of a governmental capacity . . . or when it develops a 'relationship' to an individual"). *See also* Voigt, *supra* note 137, at 373 (describing the evolution of the special relationship doctrine as an exception to the public duty rule).

existed in any given case.[145] First, the court looked to whether the municipality had knowledge of a particular danger to the individual.[146] Next, it assessed whether there were specific acts or omissions on the part of the government entity, and then, the court evaluated whether the acts or omissions were affirmative and willful.[147] Finally, the test required that the injury to the plaintiff must have been sustained while he or she was under the direct control of the governmental actor.[148]

Although the judiciary moved to eliminate sovereign immunity in *Molitar*, three years after that decision, the legislature created statutory immunity for governmental actors through the Illinois Tort Immunity Act (ITIA) of 1965.[149] The ITIA provided similar protection to the common law doctrine prior to *Molitar*.[150] However, the ITIA allowed for liability of protected parties, such as police officers, for their willful

145. Doe v. Calumet City, 641 N.E.2d 498, 504 (Ill. 1994) (listing the required elements). *See also Burdinie*, 565 N.E.2d at 658–59 (outlining what is required for a special relationship to be created); Voigt, *supra* note 137, at 373 (paraphrasing the test for determining whether a special duty exists).

146. *Doe*, 641 N.E.2d at 504.

147. *Id.*

148. *Id.* (interpreting the control element to require that "the public employee initiates the circumstances which create the dangerous situation.").

149. *Burdinie*, 565 N.E.2d at 658 (describing in detail the various forms of immunity provided by the ITIA):

> For example, a local public entity is not liable for adopting or failing to adopt a particular enactment or for failing to enforce any law. There is no municipal liability for negligence connected with the administration of permits, licenses, certificates, and other authorizations, for negligence connected with the inspection of property for health or safety hazards, for negligence connected with injuries resulting from unsafe conditions of municipal property if the local government entity had no actual or constructive notice of the unreasonably unsafe condition, for negligence resulting in injuries occurring on public property intended for recreational purposes, unless the local public entity is guilty of willful and wanton conduct, for the negligent failure to supervise an activity on public property, or for negligence resulting in injuries incurred during participation in hazardous recreational activity.

Id. Voigt, *supra* note 137, at 373.

150. Illinois Tort Immunity Act, 745 ILL. COMP. STAT. 10/2-204 (2004), stating "[e]xcept as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person"; 745 ILL. COMP. STAT. 10/2-109 (2004), "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable"; 745 ILL. COMP. STAT. 10/4-102 (2004):

> Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee.

Id.

and wanton conduct.[151] The ITIA defined such behavior as "a course of action which shows an actual or deliberate intention to cause harm, or which, if not intent, shows utter indifference to or conscious disregard for the safety of others or their property."[152] The legislature created this legal protection in part to shield state budgets from depletion by costly damage awards from tort cases.[153] Illinois courts eventually expanded the special relationship exception to serve as an exception to statutory immunity.[154] Thus, immunity granted under the ITIA was not absolute if the plaintiff could establish the requirements of the special relationship test.[155]

Despite the statutory grant of governmental immunity provided by the ITIA, in 1970, the state legislature codified the *Molitar* decision by abolishing the broad common law concept of sovereign immunity when it adopted a new constitution.[156] Immunity for municipal entities from suit, from that point on, could only be provided by statute where "the General Assembly may provide by law."[157] The language of the 1970 Constitution left the immunity afforded by the ITIA intact.[158] For a time, Illinois courts also continued to apply the special relationship exception to the ITIA.[159] However, in 1998, the Illinois Supreme Court held that the application of this exception to statutory immunity was

151. 745 ILL. COMP. STAT. 10/2-210 (2004).

152. *Id.*

153. Van Meter v. Darien Park District, 799 N.E.2d 273, 279 (Ill. 2003) (describing the legislative intent behind the ITIA); Bubb v. Springfield Sch. Dist. 186, 657 N.E.2d 887, 891 (Ill. 1995) (holding that "[b]y providing immunity, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims"). *See also* Davis v. Chicago Hous. Auth., 555 N.E.2d 343, 345–46 (Ill. 1990) (citing 18 MCQUILLIN MUN. CORP. § 53.24 (1963)):

> The reason [for tort immunity of local government entities] is one of public policy, to protect public funds and public property. Taxes are raised for certain specific governmental purposes; and, if they could be diverted to the payment of the damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed. The reason for the exemption is sound and unobjectionable.

Id. See also Comments, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 NW. U. L. REV. 265, 276 (1966) (suggesting various justifications for granting immunity to municipal entities); Bute, *supra* note 140, at 30.

154. Doe v. Calumet City, 641 N.E.2d 498, 504 (Ill. 1994) (explaining that the special relationship doctrine applied to both common law and statutory immunity).

155. *Id*.

156. ILL. CONST. art. XIII, § 4. *See generally* Barnett v. Zion Park Dist., 665 N.E.2d 808, 812 (Ill. 1996) (providing a brief history of governmental immunity in Illinois).

157. ILL. CONST. art. XIII, § 4.

158. 745 ILL. COMP. STAT. 10/1-101 et seq (2004).

159. *See, e.g.*, Schaffrath v. Vill. of Buffalo Grove, 513 N.E.2d 1026 (Ill. App. Ct. 1987); Fryman v. JMK/Skewer, Inc., 484 N.E.2d 909 (Ill. App. Ct. 1985).

unconstitutional.[160] The Court found that it was beyond the power of the courts to apply a judicially-created exception to statutory immunity when the 1970 constitution gave the legislature exclusive power to create, expand, and limit immunity.[161]

The concept of municipal immunity in Illinois has undergone many changes.[162] However, despite the prevalence of domestic violence as a large societal problem with which the police frequently interact, prior to the enactment of the IDVA, the legislature had not specifically addressed police liability in situations of domestic violence.[163] It was not until the IDVA was enacted in 1986 that immunity for police officers and departments was explicitly limited in situations of domestic violence.[164]

160. Harinek v. 161 Clark Street Ltd. P'ship, 692 N.E.2d 1177, 1183 (Ill. 1998), stating:

> [W]hen a court finds, on the facts of a particular case, that the General Assembly has granted a public entity immunity from liability, the court may not then negate that statutory immunity by applying a common law exception to a common law rule. Doing so would violate not only the Illinois Constitution's provision governing sovereign immunity, but also the Constitution's separation of powers clause, which provides that no branch of government "shall exercise powers properly belonging to another" (quoting ILL. CONST. art. II, § 1).

Id.

161. *See Harinek*, 692 N.E.2d at 1183–84 (holding that the special relationship doctrine could not overcome immunity granted by the Tort Immunity Act); *see also* Zimmerman v. Vill. of Skokie, 697 N.E.2d 699, 702 (Ill. 1998) (affirming the holding in Harinek). The *Harinek* decision did not entirely eliminate the public duty doctrine and its special relationship exception. *See* Calloway v. Kinkelaar, 659 N.E.2d 1322, 1336 (Ill. 1995) (Freeman, J., concurring) (stating that the special relationship exception is still valid "in determining the existence of a legal duty in a negligence action not precluded by a statutory immunity"). Other jurisdictions that have abolished sovereign immunity have invalidated the public duty doctrine because they consider it to be another form of sovereign immunity. *See generally* Adams v. State, 555 P.2d 235, 241 (Alaska 1976), *superseded by statute*, ALASKA STAT. § 09.65.070, *as recognized in* Wilson v. Anchorage, 669 P.2d 569 (Alaska 1983) (finding that the public duty doctrine is a form of sovereign immunity which is an issue better suited to the legislature); Leake v. Cain, 720 P.2d 152, 158–59 (Colo. 1986) (describing extensively the status of the public duty doctrine in various jurisdictions and outlining the criticisms of the rule); Adam v. State, 380 N.W.2d 716, 724 (Iowa 1986) (calling the public duty doctrine a form of sovereign immunity which is "not to be amplified by court created doctrine"); Schear v. County Comm'rs, 687 P.2d 728, 730–31 (N.M. 1984) (noting that the public duty doctrine and the concept of sovereign immunity are too closely linked); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986) (explaining that sovereign immunity was abolished and that "[t]he public duty only rule, if it ever was recognized in Wyoming, is no longer viable"); Hudson v. Town of E. Montpelier, 638 A.2d 561, 566 (Vt. 1993) (declining to adopt the public duty doctrine which the court found to be disfavored by most courts considering it).

162. See *supra* Part II.C (outlining the evolution of governmental immunity in Illinois from the abolition of sovereign immunity to the application of the special relationship exception).

163. *See supra* Parts II.A, B and C (discussing the frequency of domestic violence, the important role of police and the general rules of law regarding governmental immunity).

164. *See infra* Part III (describing the language of Section 305 of the IDVA and the way in which courts in Illinois have interpreted it).

III. DISCUSSION

Beyond the general statutory and common law immunity granted to governmental bodies, Illinois law specifically addresses the need to both provide and limit immunity for law enforcement bodies and municipalities in the context of domestic violence.[165] This Part outlines the purpose of, and remedies provided by, the IDVA, one of the principal laws of the state governing the treatment of domestic violence.[166] This Part also discusses *Calloway v. Kinkelaar*, the first case in which the Illinois Supreme Court recognized a cause of action that allows victims of domestic violence to recover against police officers whose willful and wanton conduct was the proximate cause of their injury.[167] Finally, this Part reviews the Court's most recent discussion of the issue of police immunity in which it explained the interaction of the IDVA and the ITIA.[168]

A. The Illinois Domestic Violence Act of 1986

The IDVA in its comprehensive modern form was adopted in 1986.[169] A previous version of the statute had existed since 1982, but was heavily revised to create the law in its current form.[170] Aside from certain sections of the criminal code, it is the principal law in Illinois addressing domestic violence.[171]

The IDVA is divided into four articles.[172] The first article provides definitions of important terms used in the IDVA.[173] Words such as "abuse" and "harassment" are intricately spelled out and detailed examples of such behavior are provided.[174] For instance, the term

165. *See infra* Part III (outlining statutory provisions and case law in which Illinois has discussed immunity for police officers, police departments, and municipalities in the context of intimate partner abuse).

166. *See infra* Part III.A (describing in detail the purpose of the IDVA, the class of individuals protected by it, and the remedies it provides).

167. *See infra* Part III.B.1 (discussing the Court's reasoning and the cause of action created in the *Calloway* decision).

168. *See infra* Part III.B.2 (examining the line of cases stemming from *Calloway* and examining the way in which recent decisions have affirmed and expanded on the *Calloway* decision).

169. Sheila Simon, *Survey of Illinois Law: Family Law—The Illinois Domestic Violence Act*, 27 S. ILL. L.J. 719, 720 (2003) (explaining the legislative history and composition of the IDVA).

170. Illinois Domestic Violence Act, Pub. L. No. 82-0621, *reprinted in* LEGISLATIVE SYNOPSIS & DIGEST, H.B. 0366 at 922 (1982); Simon, *supra* note 169, at 720.

171. Simon, *supra* note 169, at 720.

172. 750 ILL. COMP. STAT. 60/1, et. seq. (2004).

173. 750 ILL. COMP. STAT. 60/103 (2004).

174. 750 ILL. COMP. STAT. 60/103(1) & (7) (2004) (defining abuse as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation

"harassment" includes certain stalking behaviors and threats of child abduction.[175] The first article also issues an extensive purpose statement that presents domestic violence as a grave societal concern, which has historically been ineffectively addressed.[176] The authors of the IDVA intended to support victims of domestic violence by providing them with greater remedies.[177] The purpose statement also explains how the IDVA was intended to clarify the role of law enforcement departments and officers in handling domestic violence.[178] Courts have relied upon this purpose statement as a critical piece in understanding and applying the various provisions of the IDVA, specifically the immunity provision.[179]

but does not include reasonable direction of a minor child by a parent or person in loco parentis"; also listing six different kinds of conduct as harassment which will be presumed to cause emotional distress). The broad definitions of such terms included in the IDVA are particularly important to protect victims of domestic violence. *See* CATHY HOOG, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, ENOUGH AND YET NOT ENOUGH: AN EDUCATIONAL RESOURCE MANUAL ON DOMESTIC VIOLENCE ADVOCACY FOR PERSONS WITH DISABILITIES IN WASHINGTON STATE 14–16 (2001), http://www.mincava.umn.edu/documents/wscdv/wscdv.pdf (describing the various forms of domestic violence perpetrated on members of the disabled community and describing additional obstacles disabled victims face such as mobility impairment, discrimination and untrained service providers). For instance, disabled victims of domestic violence may suffer abuse when their nutritional, medical or physical needs are ignored. *Id.* While this conduct is not the traditional form of abuse, it still qualifies as abuse under the IDVA. 750 ILL. COMP. STAT. 60/103(1) & (7) (2004)

175. 750 ILL. COMP. STAT. ANN. 60/103(7)(i)–(vi) (2004).

176. 750 ILL. COMP. STAT. 60/102 (2004). Specifically:

> [T]he Act shall be liberally construed and applied to promote its underlying purposes, which are to: (1) recognize domestic violence as a serious crime against the individual and society which produces family disharmony in thousands of Illinois families, promotes a pattern of escalating violence which frequently culminates in intra-family homicide, and creates an emotional atmosphere; . . .
>
> (3) recognize that the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability, and has not adequately acknowledged the criminal nature of domestic violence; that, although many laws have changed, in practice there is still widespread failure to appropriately protect and assist victims; . . .

Id.

177. 750 ILL. COMP. STAT. 60/102(4) (2004) (explaining that support must take the form of diligent enforcement of domestic violence criminal and civil laws and reduction of the abuser's access to the victim).

178. 750 ILL. COMP. STAT. 60/102(5) (2004).

179. *See infra* Part III.B (describing how courts in Illinois have determined the meaning of Section 305 of the IDVA). *See also* Calloway v. Kinkelaar, 659 N.E.2d 1322, 1326–28 (Ill. 1995) (discussing at length the IDVA and the legislative intent behind its creation); Moore v. Green, 848 N.E.2d 1015, 1023–24 (Ill. 2006) (relying on the interpretation of the IDVA in *Calloway*).

The second article defines the class of individuals who are protected by the IDVA,[180] and thoroughly lays out the remedies and support services provided to protected parties.[181] Protected individuals include any person abused by a family or household member, high-risk adults with disabilities, minor children, and dependent adults in the care of a family or household member.[182] The IDVA provides extensive remedies including orders of protection, monetary remedies, and the availability of courtroom advocates.[183] The types of orders of protection provided by the IDVA are numerous and significant.[184] The IDVA allows for orders to be tailored to prevent particular kinds of behavior and to give victims sole possession of the home and/or exclusive access to personal property.[185] Orders can also deal with child custody issues and can even require an abuser to seek counseling services.[186] Further, the IDVA allows certain remedies to be sought by the victim without notice to the perpetrator, a particularly important provision given that domestic violence often escalates if the abuser has knowledge that a victim has obtained an order.[187]

Article III creates the duties required of law enforcement departments and officers.[188] It requires that agencies develop arrest procedure

180. 750 ILL. COMP. STAT. 60/201 (2004).

181. 750 ILL. COMP. STAT. 60/202-227.1 (2004).

182. 750 ILL. COMP. STAT. 60/201(2004).

183. 750 ILL. COMP. STAT. 60/205, 214 (2004). *See also* David Taylor, *Defending the Indefensible to Further a Later Case: Sanctioning Respondents in Illinois Domestic Violence Cases*, 23 N. ILL. U. L. REV. 403, 405–06 (2003) (listing additional remedies provided by the IDVA including possession of personal property, payment of support, or prohibition of entry to the residence while under the influence of drugs or alcohol).

184. 750 ILL. COMP. STAT. 60/214 (2004) (listing seventeen possible remedies provided by orders of protection under the IDVA).

185. 750 ILL. COMP. STAT. 60/214 (2004). This provision states in part:

> (1) Prohibition of abuse, neglect, or exploitation. Prohibit respondent's harassment, interference with personal liberty, intimidation of a dependent, physical abuse, or willful deprivation, neglect or exploitation . . . .
>
> (2) Grant of exclusive possession of residence. Prohibit respondent from entering or remaining in any residence or household of the petitioner, including one owned or leased by respondent . . . .
>
> (14.5) . . . If the court is satisfied that there is any danger of the illegal use of firearms, it shall issue an order that any firearms in the possession of the respondent . . . be turned over to the local law enforcement agency for safekeeping.

Id.

186. 750 ILL. COMP. STAT. 60/214(5)-(8) (2004).

187. 750 ILL. COMP. STAT. 60/217(a)(3) (2004) (stating that the victim must show that harm will likely occur if the abuser is given notice before the remedy is granted); Kinports & Fischer, *supra* note 61, at 187 (explaining that a woman whose abuser knows of her attempt to seek protective relief is at considerably more risk).

188. 750 ILL. COMP. STAT. 60/301-06 (2004).

policies for domestic violence calls and maintain records pertaining to police response.[189] It also permits an officer to arrest without a warrant so long as the officer has adequate probable cause to believe that a crime has been committed.[190] The article also demands that officers complete reports of calls and lists the types of assistance officers shall provide to victims.[191] Failure to comply with the obligations set out by Article III can be the basis of civil suits against the police.[192] However, Section 305 limits liability to willful and wanton acts or omissions.[193] Finally, Article IV of the IDVA briefly discusses the role of health care providers in the treatment of victims of domestic violence.[194]

B. Case Law Interpreting the Immunity Provision of the IDVA

Despite the strong and clear language of the IDVA, some of its provisions have required interpretation by the courts.[195] Since the adoption of the IDVA in 1986, Illinois courts have expanded the range of relationships covered under the Act to include not only those who are married or dating, but also same-sex couples and individuals who are related to their abuser by blood or marriage.[196] Illinois courts have also been called upon to clarify the types of behavior that qualify as

189. 750 ILL. COMP. STAT. 60/301.1, 302 (2004). *See also* Webster, *supra* note 18, at 673 (describing the DuPage County Domestic Violence Protocol which was created in order to comply with Section 301.1 of the IDVA).

190. 750 ILL. COMP. STAT. 60/301(a) (2004). Stating:

> Any law enforcement officer may make an arrest without warrant if the officer has probably cause to believe that the person has committed or is committing any crime, including but not limited to violation of an order of protection . . . even if the crime was not committed in the presence of the officer.

Id.

191. 750 ILL. COMP. STAT. 60/303-04 (2004).

192. 750 ILL. COMP. STAT. 60/305 (2004). Specifically stating:

> Any act of omission or commission by any law enforcement officer acting in good faith in rendering emergency assistance or otherwise enforcing this Act shall not impose civil liability upon the law enforcement officer or his or her supervisor or employer, unless the act is a result of willful or wanton misconduct.

Id.

193. *Id*.

194. 750 ILL. COMP. STAT. 60/401 (2004) (requiring health care providers to provide victims of abuse "immediate and adequate information regarding services available to victims of abuse," and granting immunity from civil liability for good faith efforts to provide such information).

195. *See generally* Simon, *supra* note 169 (discussing in detail the various provisions of the IDVA that have been reviewed by Illinois courts).

196. 750 ILL. COMP. STAT. 60/103(6) (2004) (amending the IDVA to include dating couples as a protected class); Glater v. Fabianich, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993) (holding that the IDVA covers same-sex couples who shared a common dwelling for a set period of time); Rosenbaum v. Rosenbaum, 541 N.E.2d 872, 875 (Ill. App. Ct. 1989) (interpreting the IDVA to cover parent-child relationships).

harassment and abuse under the IDVA.[197] The IDVA has survived constitutional challenges to the extensive powers it bestows upon the judicial and law enforcement systems at the expense of the rights of alleged abusers.[198] However, it was not until 1995 that the Illinois Supreme Court considered Section 305, the immunity provision of the IDVA.[199]

1. IDVA Created a Cause of Action: *Calloway v. Kinkelaar*

The Illinois Supreme Court first analyzed the meaning of the IDVA's law enforcement immunity provision in *Calloway v. Kinkelaar*.[200] The plaintiff, a domestic violence victim, brought multiple counts against the sheriff and the county where she lived for willful, wanton and negligent failure to comply with the IDVA.[201] The circuit court dismissed the complaint citing that the plaintiff failed to plead facts establishing an exception to the public duty doctrine and, thus, the sheriff and county were immune from suit.[202] The appellate court agreed that the IDVA did not allow the plaintiff to state a claim of negligence, but reversed the dismissal of the willful and wanton claim.[203] The defendants appealed and the Illinois Supreme Court agreed to hear the case.[204]

197. People v. Peterson, 783 N.E.2d 1067, 1071–72 (Ill. App. Ct. 2003) (stalking behaviors such as repeatedly driving by the victims residence constitute actionable behavior under the IDVA); People v. Reynolds, 706 N.E.2d 49, 52–54 (Ill. App. Ct. 1999) (finding that an indirect mailing demonstrating criminal intent is harassment); People *ex rel*. Minteer v. Kozin, 697 N.E.2d 891, 895 (Ill. App. Ct. 1998) (holding that multiple phone calls were not harassment unless the plaintiff could demonstrate that such calls would cause a reasonable person distress); *In re* the Marriage of Healy, 635 N.E.2d 666, 669–70 (Ill. App. Ct. 1994) (finding that physical abuse in the form of sleep deprivation that is not repeated is not harassment); Gasaway v. Gasaway, 616 N.E.2d 610, 611–13 (Ill. App. Ct. 1993) (taking a child away from the custodial parent is harassment); People v. Zarebski, 542 N.E.2d 445, 452 (Ill. App. Ct. 1989) (violating a stay-away order and cursing at guests is harassment).

198. People v. Ramos, 735 N.E.2d 1094, 1094 (Ill. App. Ct. 2000) (upholding punishments outlined under the IDVA for violating a court order); *In re* the Marriage of Gordon, 599 N.E.2d 1151, 1183 (Ill. App. Ct. 1992) (declaring invalid an order of protection that was improperly granted in a plenary hearing); *In re* the Marriage of Lenhart, 531 N.E.2d 123, 125 (Ill. App. Ct. 1988) (holding that service is required in order for an order of protection to be valid); People v. Hazelwonder, 485 N.E.2d 1211, 1213 (Ill. App. Ct. 1985) (ruling that an order of protection may be extended at a sentencing hearing).

199. Calloway v. Kinkelaar, 659 N.E.2d 1322 (Ill. 1995).

200. *Id.* at 1324.

201. *Id.* The plaintiff lived in Effingham County, which is located in the southern part of Illinois. *Id.*

202. Calloway v. Kinkelaar, 633 N.E.2d 1380, 1381 (Ill. App. Ct. 1994).

203. *Calloway*, 633 N.E.2d at 1383. Placing emphasis on plaintiff's order of protection, the court held in part:

> The Illinois Act singles out those who are victims of domestic violence as persons in

The plaintiff, Helen Calloway, had suffered mental and physical abuse at the hands of her husband throughout their marriage.[205] In 1991, she was granted an emergency order of protection to prevent her husband from entering her home or contacting her at her workplace.[206] The order was personally served upon her husband by the sheriff.[207] Less than a month after the order was put into place, Helen's husband violated the order of protection by making threatening calls to her at work.[208] He threatened her life and warned that he would harm their child and her father.[209] Helen reported the calls and the violation of the order to the sheriff's department, warning them that her husband was armed.[210] In response to her call, the sheriff drove to Helen's home and briefly assessed the situation from his car before driving away.[211] He did not conduct any further investigation despite seeing the husband's car in the driveway.[212] A little more than two hours after Helen's call to the authorities, the husband entered her workplace with a gun, removed her from the premises, and fled with her as a captive in his car.[213] A

> need of special protection by law enforcement officials . . . . Article III of the Act requires law enforcement officials to act and assist a victim who presents an order of protection to an officer. Plaintiff herein obtained an order of protection and, thus, was singled out by the judicial process as a person in need of special protection. The sheriff had a duty to provide her with such protection.

Id.

204. *Calloway*, 659 N.E.2d at 1325. Justice McMorrow wrote the decision for the court. *Id*. at 1324.

205. *Id*. at 1324 (explaining that Michael Calloway had threatened to kill Helen and commit suicide; it was also alleged that he mentally and physically abused his children).

206. Brief of Defendants-Appellants at 6, Calloway v. Kinkelaar, 659 N.E.2d 1322 (Ill. 1994) (No. 77391), 1994 WL 16179554. The emergency order prohibited Michael Calloway from engaging in the following conduct:

> [(A)] Harassing, physically abusing, or interfering with personal liberty of Plaintiff or her children; (b) [e]ntering or remaining at the home of Plaintiff's parents; (c) [e]ntering Plaintiff's place of employment at Garden's Restaurant in Effingham, Illinois; [or] (d) [m]aking telephone calls to Plaintiff's place of employment.

Id.

207. *Id*.

208. *Id*.

209. *Id.* (describing how Michael Calloway also told Helen to go home and pick up their five-year-old daughter and threatened to kill himself in front of the child if she did not comply).

210. *Id.* at 6–7 (noting that the dispatcher told Helen to call her attorney to seek advice as to how to proceed).

211. *Id*. at 7.

212. Calloway v. Kinkelaar, 659 N.E.2d 1322, 1328 (Ill. 1995) (stating that even though there was reason to believe the husband was in the house, the sheriff chose not conduct further investigation because he did not want to "wake up anyone").

213. Brief of Defendants-Appellants, *supra* note 206, at 7 (explaining that Helen made her first call to the authorities at 5:50 a.m. and her husband arrived at 8 a.m.).

roadblock implemented by the sheriff's department stopped the car and the plaintiff escaped, but not before the husband fatally shot himself.[214]

In determining whether the plaintiff's allegations were actionable under Illinois law, the Court looked closely at the language of the IDVA.[215] It examined the purpose of the IDVA and found Sections 102(4) and 102(6) particularly important.[216] These provisions specifically called for prompt and diligent enforcement of protective orders to help curtail domestic violence and sought to establish further civil and criminal remedies to support victims.[217] The Court found that the plaintiff was clearly a member of the protected class established by the IDVA.[218] It also reviewed the definitions of such critical terms as harassment and abuse and found that the plaintiff sought to avoid these types of conduct perpetrated by her husband.[219] Finally, the Court considered the duties of law enforcement officials and reviewed the immunity provision in Section 305.[220]

The clear language of the immunity provision, the Court reasoned, unmistakably granted immunity to officers whose good-faith performance of their duties resulted in negligence.[221] However, the immunity did not extend to the willful and wanton conduct of the police.[222] The limit on protection from suit for this particular category of behavior was a necessary balance between the crucial purpose of the IDVA, to protect and empower domestic violence victims, and the need for police to be free to perform their duties without fear of sanction.[223]

214. *Id*. at 7–8.

215. *Calloway*, 659 N.E.2d at 1326–28. *See also* Kelley Quinn, *Panel Stresses Priority of Domestic Violence Law*, CHI. DAILY L. BULL., Dec. 29, 2004 (discussing the reasoning of the *Calloway* decision).

216. *Calloway*, 659 N.E.2d at 1326, 1328 (finding that these provisions "reveal the General Assembly's intent to encourage active intervention on the part of law enforcement officials in cases of intrafamily abuse").

217. *Id*. at 1326. *See also* 750 ILL. COMP. STAT. 60/102(4) (2004) (identifying as one of the purposes of the IDVA as being to "[s]upport the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser's access to the victim . . . ."); 750 ILL. COMP. STAT. ANN. 60/102(6) (2004) (stating that the IDVA is meant to "[e]xpand the civil and criminal remedies for victims of domestic violence . . . ").

218. *Calloway*, 659 N.E.2d at 1326 (holding that Helen was unmistakably a person protected by the IDVA because she was a "person abused by a family or household member").

219. *Id*. at 1326–27.

220. *Id*. at 1327.

221. *Id*.

222. *Id*.

223. *Calloway*, 659 N.E.2d at 1327.

> We believe that this partial immunity of law enforcement agents is a direct expression of legislative intent to reconcile the strongly worded purposes of the Act—primarily

Because the statute created duties to be carried out by law enforcement and specifically sought to extend the form and number of remedies available to the protected class, by recognizing a cause of action under the IDVA, the Supreme Court furthered the legislative intent behind the IDVA. [224]

For the first time since the adoption of the IDVA, the Court recognized a cause of action for victims of domestic violence against the police stemming from Section 305.[225] In order to recover, the plaintiff must show that he or she is a party protected under the IDVA, that the duties owed to him or her by the police were breached by willful or wanton conduct, and that the conduct proximately caused his or her injuries.[226] According to the Court, the plaintiff pled facts sufficient to meet these requirements and thus she was entitled to sue the sheriff for his treatment of her case.[227] Whether the sheriff breached his duties under the IDVA by willful and wanton behavior that proximately caused Calloway's injuries was a question of fact for the jury.[228]

While the analysis of the statutory language supported the conclusion that the legislature intended to limit immunity for law enforcement in instances of willful and wanton conduct, the Court found no reason to allow a negligence claim.[229] In fact, the Court held that the IDVA barred recognition of a cause of action based on ordinary negligence.[230] It interpreted the plain language of Section 305 to provide immunity for a police officer's mere negligence in good-faith performance of his

> the protection of and assistance to victims of abuse–with the recognition that officers performing their legal duties should not be held civilly liable when their efforts to enforce the Act fall short, *unless* the conduct in question can be view as willful and wanton. (Emphasis in original.)

Id.

224. *Id*.

225. *Id*. at 1328 (holding that giving judicial recognition to the right of action would give effect to the legislature's purpose in enacting the IDVA).

226. *Id*.; 9 THOMAS P. BOGGESS ET AL., ILL. LAW & PRAC., CITIES, VILLAGES AND OTHER MUNICIPAL CORPORATIONS § 335 (West 2006); Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection From Crime*, 90 A.L.R. 5TH 273, 9[b] (2001).

227. *Calloway*, 659 N.E.2d at 1329. Helen Calloway was a protected person under the IDVA. *Id*. at 1328. The sheriff was aware of the order of protection she had obtained against her husband and was informed by a dispatcher of the violations of the order, yet he allegedly did not perform the duties required of him by the IDVA. *Id*. "The sheriff did not attempt to speak to Calloway, investigate the situation further, arrest Calloway for violating the order of protection, or otherwise take reasonable steps to prevent further abuse and harassment." *Id*. at 1328–29.

228. *Id.* at 1329.

229. *Id*.

230. *Id*.

duties prescribed by the IDVA.[231] It found that granting immunity for negligent acts of law enforcement provided the necessary balance between the purpose of the IDVA and recognition that officers should not be vulnerable to civil suit when their honest attempts to enforce the IDVA fall short.[232]

Finally, the Court chose not to address the defendant's argument that the claims should be dismissed because of the common law public duty doctrine.[233] As Justice McMorrow reaffirmed, a statute that expressly provides for a limit on liability controls over a common law doctrine.[234]

2. Cause of Action Affirmed: *Sneed v. Howell* and *Moore v. Green*

The cause of action created by *Calloway* has been addressed at the appellate level only a few times since it was first recognized.[235] In these cases, both the appellate courts and the Supreme Court itself affirmed and strengthened the right of domestic violence victims to bring suit against police officers and departments who mistreat their cases.[236]

i. *Sneed v. Howell*

The Illinois Appellate Court in the Fifth District affirmed *Calloway* when it ruled that the executor of a domestic violence victim's estate stated a claim under the IDVA against the city because the police had failed to perform their statutory duties.[237] In *Sneed v. Howell*, the decedent and her abuser had been married for three years.[238] The victim attempted to end the violent relationship by divorce, but the abuse continued beyond the dissolution.[239] Two years after the marriage ended, the victim received an order of protection against her

231. *Calloway*, 659 N.E.2d at 1327, 1329 (dismissing the negligence claims and concluding that "[our] analysis of the statutory language and intent of section 305 of the Act supports the conclusion that the legislature unambiguously intended to limit the liability of law enforcement personnel to willful and wanton acts or omissions in enforcing the Act").

232. *Id*. at 1327.

233. *Id*. at 1329–30 (calling the defendant's contention legally irrelevant because Helen's complaint was based on provisions of the IDVA as opposed to common law duty).

234. *Id*.

235. Sneed v. Howell, 716 N.E.2d 336 (Ill. App. Ct. 1999); Moore v. Green, 848 N.E.2d 1015 (Ill. 2006).

236. *Id*.

237. *Sneed*, 716 N.E.2d at 344.

238. *Id*. at 338.

239. *Id*. The couple divorced on August 29, 1996, and the incident that led to this suit occurred on July 5, 1996. *Id*. *See also supra* Part II.A (describing the rate of recidivism in abusive relationships).

ex-husband.[240] In the days leading up to her death, the victim reported to the police that her ex-husband had been stalking her at work and had slashed the tires of her car.[241] The police took no action in response to these complaints.[242] The ex-husband's abuse culminated on the day he confronted the victim, forced her into her car, and fatally shot her in the chest.[243]

The appellate court emulated the reasoning employed by the Supreme Court in *Calloway* in determining whether the victim had pled sufficient facts to state a claim against the police for their response to the domestic violence altercation.[244] It determined that the decedent qualified as a protected person under the IDVA.[245] It also found that the abuser's conduct of slashing the victim's tires, abducting her, and inflicting her terminal wounds constituted abuse and harassment as defined by the statute.[246] Unlike the Supreme Court, which did not define willful and wanton conduct, the appellate court cited Illinois precedent describing actionable conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others."[247] Because the police knew of the pattern of abuse suffered by the victim, yet failed to perform the duties affirmatively created for them by Article III of the IDVA, the court found that the complaint satisfactorily pled the elements of the cause of action recognized in *Calloway*.[248] The court also affirmed the dismissal of similar counts against the State's Attorney for failure to state a claim because the duties established by the IDVA were imposed solely on police departments and personnel.[249] Actions taken by the State's Attorney were therefore covered by the

240. *Sneed*, 716 N.E.2d at 338.

241. *Id*. at 338–39.

242. *Id*. at 344.

243. *Id*. at 338–39.

244. *Compare Sneed*, 716 N.E.2d at 343–44 (analyzing the articles of the IDVA and applying them to the case), *with supra* Part III.B.1 (describing the reasoning employed by the Illinois Supreme Court in *Calloway*). *See also* Quinn, *supra* note 215 (discussing reasoning of *Calloway* decision).

245. *Sneed*, 716 N.E.2d at 343.

246. *Id*. at 344.

247. *Id*. at 343 (*quoting* Burke v. 12 Rothschild's Liquor Mart, Inc., 593 N.W.2d 522, 532 (1992)). In *Calloway*, the Court acknowledged the difficulty of determining what constitutes willful and wanton conduct, yet refused to outline specific parameters. Calloway v. Kinkelaar, 659 N.E.2d 1322, 1327 (Ill. 1995). The Court stated, "Although the line between willful and wanton misconduct and simple negligence may be difficult to draw in some circumstances, it is hardly a new issue to the courts of this State." *Id*.

248. *Sneed*, 716 N.E.2d at 344.

249. *Id*. at 339.

immunity granted by the ITIA.[250] The right of action created by the IDVA covered only the misconduct of police officers and agencies and did not provide a remedy for victims against other categories of municipal employees.[251]

ii. *Moore v. Green*

The Supreme Court of Illinois found it necessary to revisit Section 305 of the IDVA in the case described at the beginning of this Comment, *Moore v. Green*.[252] In *Moore*, the city and police, as defendants, argued that certain sections of the ITIA provided them with immunity from claims arising out of White's death.[253] In *Calloway*, the Court rejected the defendants' argument that the common law immunity doctrine granted immunity, but it had not yet clearly decided how the IDVA and the ITIA should interact.[254]

The defendants in *Moore* relied on Sections 4-102 and 4-107 of the ITIA as the bases of their motion to dismiss the claims.[255] The Court recognized that both sections were applicable to White's case.[256] Section 4-102 provides absolute immunity for failing to provide police services, and Section 4-107 grants absolute immunity for failing to make an arrest.[257] The Court found, however, that Section 305 of the IDVA was also relevant.[258] The Court employed Illinois rules of

250. *Id*. at 340–41 (determining first that based on the test from *Healy v. Vaupel*, 549 N.E.2d 1240, 1246 (Ill. 1990), the State's Attorney was a municipal employee, and, second, that he was acting within reasonable boundaries of his employment when he failed to act on the husband's violations of the order of protection).

251. 750 ILL. COMP. STAT. 60/305 (2004). *See also Calloway*, 659 N.E.2d at 1327 (quoting provisions limiting the scope of the IDVA to law enforcement officers).

252. *See supra* Part I (illustrating the facts of Moore*).*

253. Moore v. Green, 848 N.E.2d 1015, 1018 (Ill. 2006). The defendants argued that the ITIA provided them absolute immunity for failing to make an arrest and thus, Moore's claims should be barred. *Id*.

254. *Calloway*, 659 N.E.2d at 1329–30.

255. *Moore*, 848 N.E.2d at 1018.

256. *Id*. at 1020.

257. *Id*. (noting that in the typical case that is not based on domestic violence, these provisions would provide absolute immunity and bar claims against the police). Section 4-102 provides in part:

> Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals.

745 ILL. COMP. STAT. 10/4-102 (2004). Similarly, Section 4-107 states, "[n]either a local public entity nor a public employee is liable for an injury caused by the failure to make an arrest . . . ." 745 ILL. COMP. STAT. 10/4-107 (2004).

258. *Moore*, 848 N.E.2d at 1020.

statutory construction, and because it was unable to comply with the plain language of both statutes, considered the legislative intent behind the competing statutes in order to determine which law governed.[259]

Relying heavily on the language of the IDVA, and the *Calloway* decision it had handed down a decade before, the Court again explored the meaning and purpose of the IDVA.[260] The Court reiterated its previous finding that the legislature enacted the IDVA to protect and support victims of domestic violence and to encourage active intervention on the part of police officers and officials.[261] It found that the immunity provision, Section 305, operated in conjunction with Section 304, which outlined law enforcement duties, to discourage the breach of those duties.[262] Partial immunity granted by the IDVA constituted a direct expression of the legislature's intent to rectify the past shortcomings of law enforcement in dealing with victims of domestic violence.[263] To grant absolute immunity under the ITIA, an older and more general statute, would defeat the purpose of the IDVA to encourage proper police conduct and sanction inadequate police response.[264]

The Court found it legally irrelevant that claims based on domestic violence were not included in the specific language of the ITIA, which exempted other types of claims.[265] The Court held that the legislature meant to burden law enforcement officials and officers in domestic

259. *Id*. at 1020–21.

260. *Id*. at 1021–24 (mirroring the reasoning of *Calloway* while also acknowledging that "*Calloway* did not address the issue here: whether sections 4-102 and 4-107 of the Tort Immunity Act insulate [the defendants] from such liability").

261. *Id*. at 1026. Stating:

> The structure of that Act reflects a comprehensive statutory scheme for reform of the legal system's historically inadequate response to domestic violence . . . . Most importantly for this case, it details the responsibilities of law enforcement officers. As we noted in Calloway, "[t]hese provisions reveal the General Assembly's intent to encourage active intervention on the part of law enforcement officials in cases of intrafamily abuse."

Id. (alteration in original) (citations omitted).

262. *Id*.

263. *Moore*, 848 N.E.2d at 1026.

264. *Id*. at 1027. Reasoning:

> Just as the legislature exercised its constitutional prerogative to provide immunity in the Tort Immunity Act, it did so in the Domestic Violence Act as well. The legislature's intent in this regard is inconsistent with absolute immunity for municipalities under section 4-102 and 4-107 of the Tort Immunity Act.

Id.

265. *Id*. at 1019 (noting that the ITIA does not provide an exhaustive list of exemptions and quoting the appellate court decision that held that "the strongly worded language of the legislature in enacting the Domestic Violence Act cannot be ignored").

violence cases with the risk of civil liability should they fail to carry out their duties under the IDVA.[266] *Moore* clearly stands for the proposition that Section 305 of the IDVA trumps the ITIA.[267]

Based on the language of Section 305 of the IDVA, victims of domestic violence in Illinois have been granted the legal ability to bring suit against police departments and officers that act in a willful and wanton manner in responding to domestic violence calls.[268] The rulings of the Illinois courts affirm the cause of action and make it an effective tool to recover from those who are in a position to protect but fail to do so.[269]

IV. ANALYSIS

The cause of action created by the IDVA is a strong legal remedy for victims of domestic violence who also have suffered from police misconduct.[270] It greatly surpasses the legal relief provided to victims in other states in terms of the protections it provides to victims and the incentives it creates for police to adequately respond to domestic violence calls.[271] This Part first outlines the state tort remedies available to victims of domestic violence in three other states,[272] and the remedies available to victims that differ than remedies in Illinois.[273] The State of Washington was selected for comparison because it is one

266. *Id*. at 1026–27. The court states that to find absolute immunity for the defendants would be problematic:

> It would pervert the broad purposes of the Domestic Violence Act . . . . [W]e need look no farther than the language of the Domestic Violence Act to divine [its] intent. The structure of that Act reflects a comprehensive statutory scheme for reform of the legal system's historically inadequate response to domestic violence . . . . This partial immunity is a direct expression of legislative intent.

Id. at 1026.

267. *Moore*, 848 N.E.2d at 1027. *See also* Roger Huebner & Jerry Zarley, *Tort Immunity: Adequate Police Service*, 85 ILL. MUN. REV. 19, No. 6 (2006) (analyzing the impact of the *Moore* ruling by the Illinois Supreme Court).

268. *See supra* Part III.A (stating the language of Section 305 of the IDVA and explaining its impact).

269. *See supra* Part III.B (explaining the interpretation of Section 305 by courts in Illinois).

270. *See supra* Part III.B (discussing the case law that recognized and strengthened the right of action for victims of domestic violence in Illinois).

271. *See infra* Part IV.B (outlining the ways in which the cause of action in Illinois is more beneficial to victims than the remedies provided in other states).

272. *See infra* Part IV.A (examining the status of police immunity in situations of domestic violence in Washington, California, and New York, and outlining the requirements for a victim to bring suit against law enforcement and municipalities).

273. *Compare infra* Part IV.A (describing the statutory framework of Washington, California, and New York), *with supra* Part III (discussing the statutory and common law treatment of domestic violence in Illinois).

of sixteen states to have addressed the problem of domestic violence by enacting a mandatory arrest law. Thus, discussion of the right of action for victims in that state is representative of a large majority of other jurisdictions with similar statutory schemes.[274] California and New York were chosen for analysis because both states are widely recognized as legal trend-setters, and jurisprudence in those states is often later followed by other jurisdictions.[275] Therefore, understanding the ability of victims to recover for law enforcement misconduct in California and New York might serve as an indicator of how other state laws will evolve.[276] Next, this Part compares Washington, California and New York to Illinois and highlights the strengths of the Illinois cause of action under the IDVA to demonstrate how it provides more protections for victims of domestic violence than are available in other jurisdictions.[277] Finally, this Part discusses the weaknesses of the Illinois law that continue to leave victims of domestic violence vulnerable to insufficient police protection.[278]

A. Remedies Provided by Other States

While most other states have enacted comprehensive legislation regarding domestic violence, each jurisdiction has taken a different approach to limiting law enforcement immunity in situations of domestic violence and choosing what remedies to make available to

274. *See* Rizer, *supra* note 45, at 9 n.54 (listing the states which, as of 2005, had enacted mandatory arrest laws, including Alaska, Arizona, Connecticut, District of Columbia, Iowa, Louisiana, Maine, Massachusetts, New Jersey, Ohio, Oregon, South Dakota, Texas, Utah, Washington and West Virginia).

275. *See* Jonathan J. Cordone, *Protecting or Handicapping Connecticut's Children:* State v. Miranda, 32 CONN. L. REV. 329, 332 (1999) (reporting that New York leads legal trends in other areas of the law); Marsha Garrison, *Marriage: The Status of Contract*, 131 U. PA. L. REV. 1039, 1060 n.110 (1983) (recognizing California as a legal trend-setter); Rosann Torres, *Article 81 of The Mental Hygiene Law: Designed to Protect the Elderly, But Prejudicing Children's Rights*, 7 J.L. & POL'Y 303, 339 (1998) (acknowledging New York courts trend toward judicial activism); William Walsh, *Smith v. Regents of the University of California: The Marketplace is Closed*, 21 J.C. & U.L. 405, 406 (1994) (stating that California courts are often hailed as legal pioneers).

276. *See* Julia Hayward Biggs, *No Drip, No Flush, No Growth: How Cities Can Control Growth Beyond Their Boundaries by Refusing to Extend Utility Services*, 22 URB. LAW. 285, 285 (1990) ("California, almost always a legal trend-setter, once again has set the pace . . . ."); Heather L. Milligan, *The Influence of Religion and Morality Legislation on the Interpretation of Second-Parent Adoption Statutes: Are the California Courts Establishing a Religion?*, 39 CAL. W. L. REV. 137, 161 (2002) ("Other states look to California to set the legal trend."); Barbara S. Fishleder, *Why Tempt Fate?*, 54 OR. ST. B. BULL. 33, 33 (May 1994) ("Since New York's legal trends are often followed by other jurisdictions, [its] position may be taken by other states.").

277. *See infra* Part IV.B (comparing Illinois law to law of Washington, California, and New York and emphasizing the relative benefits of Illinois law).

278. *See infra* Part IV.C (reporting the flaws of the current status of Illinois law).

victims of intimate partner abuse.[279] Although these approaches may be innovative, most still pose severe challenges for the victims they serve.[280] For example, Washington uses a mandatory arrest law that imposes a limited duty on the police.[281] The cause of action in California utilizes the special relationship exception, creating obstacles for victims seeking to file suit against the police,[282] while the remedy available to victims in New York leaves those victims who have not obtained an order of protection vulnerable to police misconduct.[283]

1. Washington

The State of Washington[284] has enacted a domestic violence statute specifically to address the problem of intimate partner abuse and the under-enforcement of criminal laws prohibiting such violence.[285] The statute does not create new laws pertaining to domestic violence, but aims to encourage law enforcement personnel to enforce existing sanctions consistently in situations involving violence perpetrated by both intimate partners and strangers.[286] The statute states that the

279. *Compare supra* Part III.A (describing the statutory scheme developed in Illinois for addressing domestic violence and providing protection and remedies to victims) *with infra* Part IV.A (presenting approaches of three other states for treating police misconduct in situations of domestic violence).

280. *See infra* Part IV.B (highlighting the shortcomings of legal remedies of other states in comparison to those provided by the law of Illinois).

281. *See infra* Part IV.A.1 (discussing the police duty to domestic violence victims created by the Washington state mandatory arrest law and the way in which victims may bring suit for breach of this duty).

282. *See infra* Part IV.A.2 (discussing police immunity in California and the distinct requirements under state law for establishing a special relationship).

283. *See infra* Part IV.A.3 (examining the special relationship exception as applied in New York and the importance of orders of protection in establishing that relationship).

284. In 2005, domestic violence incidences were reported 53,770 times in the State of Washington. Crime in Washington: 2005 Annual Report ii (2005), Washington Association of Sheriffs and Police Chiefs, http://www.waspc.org/files.php?sort=dlcount (download filename 2005_CIW_small.pdf). In the same year, twenty-eight percent of all homicides in the state were domestic violence related. *Id.*

285. WASH. REV. CODE ANN. § 10.99 et seq. (West 2006).

286. WASH. REV. CODE ANN. § 10.99.010. The purpose provision of the Act reads:

> The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is

primary duty of a police officer called to the scene of a domestic disturbance is to enforce the laws that were violated.[287] To carry out this duty, Washington requires law enforcement to make warrantless arrests in situations of domestic violence.[288]

Under the law of the state, police officers who respond to domestic violence calls are required to make an arrest when one of three criteria is met: 1) there has been a felony assault; 2) there has been an injury to the victim, even if the injury is not visible to the officer; or 3) the abuser acted physically in a way that was intended to cause the victim to fear imminent bodily injury or death.[289] If none of these criteria are present when the police officer responds to the scene, an arrest is not mandatory and the officer is allowed to proceed using his discretion.[290] When any one of the criteria is present, the courts have found that the police owe a duty to the victim to arrest the perpetrator.[291]

By requiring arrest, the State of Washington sought to ensure that police officers would follow through with criminal sanctions when

> the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

Id. See also Roy v. City of Everett, 823 P.2d 1084, 1088 (Wash. 1992) (expounding on the importance of applying criminal statutes in an evenhanded manner); Rizer, *supra* note 45, at 8–9 (citing Representative Alex Wood (D) from the state of Washington, who explained that the legislature drafted and passed the statute because, "we had to do something").

287. WASH. REV. CODE ANN. § 10.99.030 (5).

288. WASH. REV. CODE ANN. §§ 10.31.100 (2)(c), 10.99.030 (6)(a) (setting forth the circumstances in which warrantless arrest is permitted). The State of Washington is one of a number of states that have enacted mandatory arrest laws in response to intimate partner abuse. *See supra* note 274 (listing the states which have adopted mandatory arrest legislation). Despite the large number of jurisdictions that have adopted mandatory arrest statutes, these laws are not without critics. *See* Vi T. Vu, *Town of Castle Rock v. Gonzales: A Hindrance in Domestic Violence Policy Reform and Victory for the Institution of Male Dominance*, 9 SCHOLAR 87, 97–98 (2006) (outlining some of the criticisms of mandatory arrest statutes). Opponents contend that such laws eliminate police discretion and are too inflexible to be practical and effective in curtailing intimate partner abuse. *Id.* at 97. Additionally, empirical studies have yet to show that making arrest mandatory has successfully reduced the incidence of domestic violence. *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1676–77 (2004) (discussing the consequences of studies regarding the effectiveness of arrest in situations of intimate partner abuse).

289. WASH. REV. CODE. ANN. § 10.31.100 (2)(c).

290. *Id. See also* Gadd v. State, No. 20330-8-II, 1997 WL 796232, at *3 (Wash. Ct. App. Dec. 31, 1997) (finding that because an officer did not know that an assault was domestic in nature, he had no duty under the statute to arrest and was permitted to act with discretion).

291. *See* Donaldson v. City of Seattle, 831 P.2d 1098, 1103 (Wash. Ct. App. 1992) ("Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so. In regard to domestic violence, the rule is the reverse. If the officer has legal grounds to arrest pursuant to the statute, he has a mandatory duty to make the arrest.").

responding to domestic disturbances.[292] Mandatory arrests also provide further protection for the victim by separating the victim from her abuser and demonstrating to the perpetrator that intimate partner abuse is not tolerated.[293] In certain circumstances, breach of the duty to arrest is actionable and victims may recover when a police officer has failed to make an arrest.[294] For instance, the Washington Supreme Court has recognized a plaintiff's right to sue for long-term, repeated failures to make arrests.[295] A claim can be based on a single instance or a pattern of non-enforcement of the law.[296]

The duty to arrest and the legal remedy available if that duty is breached, however, are subject to certain constraints.[297] These constraints restrict the scope and extent of the duty of law enforcement officers and, thus, diminish the protection provided to victims.[298] First, the police officer is expressly immunized from suits arising from arrests, enforcement of court orders, or any other actions or omissions in good faith that occur in the course of an arrest or other on-scene actions.[299] So long as the officer acted in good faith when responding to domestic disturbances, he is protected from civil liability and suits brought by both the victim and the abuser.[300] Therefore, while a victim

292. WASH. REV. CODE ANN. § 10.99.010.

293. Wanless, *supra* note 52, at 549, 552–53 (explaining why proponents of mandatory arrest laws believe imposing criminal sanctions help the victim and deter the perpetrator from committing further abusive acts). S*ee* Waits, *supra* note 66, at 304 (proposing that legal action is an important part of facilitating the batterer's change in behavior).

294. *See* Roy v. City of Everett, 823 P.2d 1084, 1085 (Wash. 1992) (holding that the plaintiff successfully stated a claim for the police's failure to arrest).

295. *See id.* (permitting the plaintiff to state a claim against the city of Everett and its police department for failure to protect her daughter who was abused and harassed by her boyfriend for more than a year before the boyfriend killed himself during his last attack on the daughter). In that case, the plaintiff asserted that the police failed to take adequate steps to prevent the boyfriend's abuse as required by the statute. *Id.*

296. *Id.*

297. *Id.* at 1088 (interpreting the statute to provide immunity for an officer's good-faith actions when responding to a domestic disturbance call). S*ee also Donaldson*, 831 P.2d at 1103 (expounding on the scope of the duty to arrest); Torres v. City of Anacortes, 981 P.2d 891, 900 (Wash. Ct. App. 1999) (discussing the time limit on the duty to arrest imposed by the statute).

298. *Roy*, 823 P.2d at 1088.

299. WASH. REV. CODE ANN. § 10.99.070. The immunity provision of the Washington statute states:

> A peace officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

Id. *See also Roy*, 823 P.2d at 1088 (interpreting the immunity provision of the statute).

300. *Roy*, 823 P.2d at 1088. *See also* Wade v. Miles, No. 46446-9-I, 2001 WL 434851, at *4 (Wash. Ct. App. Apr. 30, 2001) (holding that because the officer had probable cause for arrest

may bring suit against the police for failure to enforce the laws, once the officer has intervened in the situation, his good-faith action or inaction is covered by statutory immunity.[301]

Second, the duty to arrest only exists for four hours after the domestic disturbance is first reported to the police.[302] Once that time period has passed, the domestic violence statute no longer mandates arrest and the duty to the victim of domestic violence ceases.[303] This additional limit on police duty demonstrates that the Washington statute is geared towards protecting the victim immediately after the incident and not creating an extended duty of long-term protection.[304]

Finally, the scope of an officer's duty to the victim is limited and thus constrains the liability of law enforcement for breach of such duty.[305] While the law creates an obligation to arrest perpetrators under certain circumstances, and even gives the power to make such arrests without a warrant, the law does not create a duty to investigate.[306] Should the abuser have fled by the time the police arrive, the police are not legally required to conduct a search or proceed with a full investigation by

based on interviews with the victim and witnesses, the policeman was immune from suit).

301. *Roy*, 823 P.2d at 1088.

302. WASH. REV. CODE ANN. § 10.31.100 (2)(c).

303. *Torres*, 981 P.2d at 900. Consider, for example, that:

> The husband commits an assault on the wife at breakfast, the wife does not request law enforcement help at the time, the husband returns and at dinner a verbal dispute arises with no threats and no physical assault, and the wife then requests law enforcement help. By the explicit terms of RCW 10.31.100(2)[(c)] the officer would have no mandatory duty to arrest because more than 4 hours had elapsed since the incident. A fortiori the officer would have no mandatory duty to arrest if he found the abuser elsewhere after the 4 hours have passed. His authority to arrest under those circumstances is limited to his general statutory authority to arrest where he has probable cause to believe that a person has committed a felony and there would, of course, be no power to arrest for a misdemeanor since none was committed in his presence.

Donaldson, 831 P.2d at 1104.

304. *Id.*

305. *Id.* at 1103–04. The court reasoned that "[n]owhere in the original act . . . did the legislature create a special duty to conduct follow up investigations after the initial response where the violator is absent . . . . Liability for negligent investigation would be a substantial change in the law and is certainly not required as a necessary inference from the duty to make mandatory arrest." *Id.*

306. *Id*. *See also* Dever v. Fowler, 816 P.2d 1237, 1242 (Wash. Ct. App. 1991) (noting that no Washington court has ever recognized the tort of negligent investigation).

interviewing witnesses and following leads.[307] Thus, a victim will not be entitled to sue for failure to conduct an adequate investigation.[308]

2. California

California[309] opted not to enact a mandatory arrest law and consequently addressed police immunity and the cause of action of domestic violence victims differently.[310] Under the law of California, both victims of domestic violence and other citizens must sue under the traditional negligence theory in order to recover against the police.[311] Consequently, the cause of action includes the burden of overcoming the public duty doctrine by proving the special relationship exception in order to establish that the police owed a duty to the victim.[312]

The California analysis for tort claims brought by domestic violence victims against the police is the same as for any other citizen bringing a civil suit against a municipal entity.[313] The general rule is that neither a police officer nor a citizen has a duty to aid or protect others.[314] The

307. *Donaldson*, 831 P.2d at 1103 (holding that the police would normally have had a duty to arrest the abuser, but that the duty did not exist based on the facts of the case given that the abuser had fled by the time the police arrived).

308. *Id*. at 1103–05. The court ruled that such a duty would be too open-ended in terms of duration and intensity:

> Would [the duty to investigate] entail ignoring other calls for a domestic violence response, ignoring other reported crimes . . . ? How long does such duty continue? To the end of the officer's shift? Or is the department obligated to detail another officer to take over? . . . Law enforcement must be vested with broad discretion to allocate limited resources among the competing demands.

Id. at 1104.

309. California law enforcement received 181,362 domestic violence calls in 2005. Safe State, Domestic Violence Facts: California, http://www.safestate.org/index.cfm?navID=42. In that year, 155 homicides were the result of domestic violence. *Id*.

310. *See supra* note 274 (listing certain states that have adopted mandatory arrest statutes).

311. *See, e.g.*, Zelig v. County of L.A., 45 P.3d 1171, 1182–83 (Cal. 2002) (analyzing the suit of a victim of domestic violence against the police under the traditional negligence jurisprudence).

312. Davidson v. City of Westminster, 649 P.2d 894, 897 (Cal. 1982). The *Davidson* court stated:

> As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection."

Id. See also Baker v. City of L.A., 233 Cal. Rptr. 760, 762–63 (Cal. Ct. App. 1986) ("[The police] can not be held liable for the injuries inflicted upon the respondent . . . unless such a special relationship exists.").

313. *See, e.g.*, *Zelig*, 45 P.3d at 1182 (applying the general rules of negligence to the case of a domestic violence victim as opposed to a domestic-violence-specific law).

314. Lugtu v. Cal. Highway Patrol, 28 P.3d 249, 257 (Cal. 2001) ("[L]aw enforcement

gravity of the peril and the ease of the rescue are irrelevant; one cannot be held liable for failing to help another.[315] However, if a special relationship exists between the police and the victim, a duty may arise for the officer to control the conduct of another or to warn those endangered by that conduct.[316]

In California, as with Illinois common law, if the special relationship exception is established, liability may be imposed upon an officer or department who breaches the duty arising from that relationship.[317] To determine whether this special relationship is found between the police and the victim, the courts will consider several factors.[318] First, the special relationship may exist if the officer voluntarily assumed a duty by performing certain affirmative actions.[319] Second, the officer may have a special relationship to the victim if he induced the individual to rely on police protection by making representations or acting in a way that signifies a promise to provide protection.[320] Finally, if the officer contributed, increased, or changed the risk to the individual by way of affirmative actions, the court will find that a special relationship exists.[321]

officers, like other members of the public, generally do not have a legal duty to come to the aid of [another] person."). *See also* Williams v. State, 664 P.2d 137, 140 (Cal. 1983) (noting that there is no police duty to protect "[i]n spite of the fact that our tax dollars support police functions").

315. Benavidez v. San Jose Police Dep't, 84 Cal. Rptr. 2d 157, 161 (Cal. Ct. App. 1999) (explaining that the rule applies to both the general public as well as police officers).

316. *Zelig*, 45 P.3d at 1182–83.

317. Ellsworth v. County of Orange, 2001 WL 1515802, at *3 (Cal. Ct. App. Nov. 28, 2001) ("'Generally, there is no legal 'duty,' and hence no liability for negligence, unless there is a special relationship between the police and . . . the victim'." (quoting Lopez v. City of San Diego, 235 Cal. Rptr. 583, 585 (Cal. Ct. App. 1987)); Lee v. City of Oakland, 2006 WL 2046011, at *8 (Cal. Ct. App. July 24, 2006) (noting that such a relationship only arises in "a few narrow circumstances," including situations where the misrepresentation of a police officer "induced a specific individual's reliance, placed a specific individual in harms way, or lulled a specific citizen into a false sense of security and then withdrew essential safety precautions.").

318. 46 CAL. JUR. 3D *Negligence* § 18 (2006).

319. Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 7 (Cal. Ct. App. 1975) (reasoning that a special relationship exists, "[e]ven though there is initially no liability on the part of the government for its acts or omissions, once it undertakes action on behalf of a member of the public, and thereby induces that individual's reliance . . . ").

320. *See Ellsworth*, 2001 WL 1515802, at *3 (holding that removal of the abuser by the police from the premises was not an implied promise to protect and thus no duty of care arose); *see also Zelig*, 45 P.3d at 1183 (finding that plaintiff did not allege facts that any officer had done anything to induce the victim to rely upon special protection).

321. Benavidez v. San Jose Police Dep't, 84 Cal. Rptr. 2d 157, 164 (Cal. Ct. App. 1999). In *Benavidez*, the victim had called the police to report that her boyfriend was attacking her. *Id*. at 160. The boyfriend escaped shortly after the 911 call. *Id*. When the police arrived, they interviewed the victim and offered to take her to the hospital, but she refused. *Id*. Shortly after the police left, the boyfriend returned to the victim's home. *Id*. The victim again called the police. *Id*. During the delay, the boyfriend broke the victim's window and stabbed her in the

In addition to these common law rules, the California Tort Claims Act (CTCA) also addresses the liability of the police, police departments, and municipalities.[322] The statute provides immunity to public entities except where otherwise provided by statute.[323] Section 845 of the CTCA states that failure to exercise care or make an arrest will not result in liability.[324] Further, police officers are immune from negligence suits arising from discretionary actions.[325]

The requirement that the police must increase the risk to the victim is a significant obstacle to victims because it requires misfeasance on the part of law enforcement.[326] Failure to act or an inadequate response would not be actionable because the victim would not be any worse off than if they had not called the police for help.[327] In order to satisfy this

head and neck with a shard of glass. *Id.* The court rejected the victim's argument that the police increased her injury by using her as "bait" to entice her boyfriend to return to the home, providing them with the opportunity to arrest him. *Id.* at 165. Consequently, no special relationship was deemed to have existed. *Id.* at 167. *See also* Baker v. City of L.A., 233 Cal. Rptr. 760, 763–64 (Cal. Ct. App. 1986) (holding that the police did not increase the risk of harm to the plaintiff, a victim of domestic violence, by returning a gun to her abuser, because the officer who returned the gun was different than the officer who originally voluntarily entered into a special relationship with the plaintiff by confiscating the gun).

322. California Tort Claims Act, CAL. GOV'T CODE § 815 et seq. (West 1995).

323. *Id.* at § 815. Section 815 provides:

> Except as otherwise provided by statute:
>
> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> (b) The liability of a public entity established by this part . . . is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

Id.

324. CAL. GOV'T CODE § 845 (West 1995). Section 845 provides:

> Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service.

Id. See also Zelig, 45 P.3d at 1192 (listing examples of other types of immunity granted by Section 845, including failure to provide police patrol and delay in responding to a call for assistance against an assailant or a robber); Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 6–7 (Cal. Ct. App. 1975) (interpreting § 845).

325. CAL. GOV'T CODE § 820.2 (West 1995):

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Id. See also Ellsworth, 2001 WL 1515802, at *4 (holding that the officer could not be held liable for failure to arrest or confine the subject because the decision to arrest was within the officer's discretion).

326. *See Zelig*, 45 P.3d at 1183 (emphasizing the reluctance to impose liability on an officer for nonfeasance).

327. *See Ellsworth*, 2001 WL 1515802, at *3 (stating that failure to confine the abuser when there was no duty to arrest him or to warn the victim that the abuser was still free did not increase

requirement of the special relationship exception in California, the police would have to have acted in a way that made the situation worse than before they became involved.[328]

In California, the determination of how much police protection should be provided to the public and how it should be executed is considered a political question for the legislature to address, as it did in the CTCA.[329] In contrast, the judiciary is not adequately informed to make such policy decisions.[330] To date, the California General Assembly has not found it necessary to limit the immunity of police officers, specifically in situations of domestic violence.[331]

3. New York

In New York,[332] the success of a civil suit by a domestic violence victim against the police also relies on the special relationship exception, albeit with slightly different requirements than those in California.[333] Although the existence of a special relationship between the police and the victim is difficult to prove, the law of New York lightens the burden for victims who have obtained an order of protection

her risk of harm).

328. *Id*. "'[S]uch a relationship has been held to depend on representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed.'" *Id*. (quoting *Lopez*, 235 Cal. Rptr. at 585).

329. CAL. GOV'T CODE § 845 (West 1995) Law Revision Commission Comments. "To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions." *Id.* (citing 4 CAL. L. REV. COMM. REPORTS 801 (1963)).

330. *See* Mann v. State, 139 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977). "[S]ection [845] was designed to prevent political decisions of policy-making officials of government from being second-guessed by judges and juries in personal injury litigation. In other words, essentially budgetary decisions of these officials were not to be subject to judicial review in tort litigation." *Id*. (internal citation omitted).

331. 6 WITKIN SUMMARY OF CALIFORNIA LAW TORTS § 858, at 220–21 (9th ed. 1988).

332. In 2001, almost half of New York homicide cases where the relationship was reported involved a relative or an intimate partner. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 2000–2001 CRIME AND JUSTICE ANNUAL REPORT—PART 1: CRIMES REPORTED, http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/sec1a.pdf. Additionally, over half of homeless mothers in New York City have a history of being victims of domestic violence. Youth Services Opportunities Project, *Homelessness in New York City*, http://www.ysop.org/statistics.htm. In New York City especially, which is densely populated, the need for domestic violence services is acute; however, there is a lack of emergency services available in the city and for every one woman who is able to access these services, fifty are turned away. The New York Women's Foundation, *Communities Coordinated Against Violence: A Model Program*, http://www.nywf.org/family_violence_project.html.

333. *See, e.g.*, Kircher v. City of Jamestown, 543 N.E.2d 443, 445 (N.Y. 1989) (applying the general rules of negligence to the case of a domestic violence victim, as opposed to a domestic-violence-specific law).

against their abuser.[334] In contrast, victims who have not been granted an order are not afforded the same leniency and thus experience further difficulty in proving the special relationship.[335] This inequity may leave some victims and their children vulnerable and with fewer viable remedies for police misconduct.[336]

As in California, no distinct cause of action for domestic violence victims exists in New York.[337] Instead, victims must assert negligence claims to recover against the municipality in which they live and the police officers serving that municipality.[338] Because governmental entities are immune from civil claims under the public duty doctrine, a negligence claim will only be successful in New York if the plaintiff first establishes the existence of a special relationship between herself and law enforcement.[339]

In order to establish that a police officer owed a duty as a result of a special relationship, a domestic violence victim in New York must establish four elements.[340] First, the municipality must have assumed a duty to act on behalf of the victim by its promises or actions.[341]

334. *See* Berliner v. Thompson, 578 N.Y.S.2d 687, 689 (N.Y. App. Div. 1992) (describing how an order of protection serves as proof of several elements of the test used to determine whether a special relationship exists).

335. *See* Sorichetti v. City of New York, 482 N.E.2d 70, 75–76 (N.Y. 1985) (noting that "[i]n extraordinary instances" a special relationship was found, and limiting, for the most part, the class to which a duty is owed to those who are included within the terms of the order of protection).

336. *See id*. (placing such importance and emphasis on the existence of an order of protection that the inference can be drawn about the legal disadvantages a litigant without one may face).

337. *See supra* note 311 and accompanying text (explaining that the legal remedy for domestic violence victims against the police in California is the same as the remedy for any other citizen seeking to sue a municipal entity).

338. *See, e.g.*, Cuffy v. City of New York, 505 N.E.2d 937, 939–42 (N.Y. 1987) (analyzing a domestic violence victim's suit against the police for failure to protect under negligence law).

339. *Id*. at 940 (recognizing the right to recover for negligent failure to provide police services where a special duty exists to a particular individual).

340. Raucci v. Town of Rotterdam, 902 F.2d 1050, 1055–56 (2d Cir. 1990) (listing the elements of the special relationship exception); G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 160 (2005) (describing the four-factor test employed by New York courts in determining whether a special relationship exists).

341. *Raucci*, 902 F.2d at 1055–56. Mr. and Ms. Raucci were involved in an abusive relationship and a violent custody dispute over their son, Chad. *Id*. at 1052. Mr. Raucci had threatened Ms. Raucci on numerous occasions, including one incident in which he tried to drive her off the road. *Id*. Ms. Raucci reported the abuse to the Rotterdam police on several occasions and informed them of the order of protection she had been granted. *Id*. at 1052–53. Instead of confronting Mr. Raucci after the complaints were made by Ms. Raucci, the police trained Ms. Raucci to tape threatening calls made by her husband for evidentiary purposes. *Id*. at 1053. One day, Mr. Raucci followed Ms. Raucci in his car, waited for her to park and pulled a rifle on her when she got out of her car. *Id*. During the scuffle that ensued, Chad was shot and killed and Ms. Raucci was wounded. *Id*. Ms. Raucci sued the Town of Rotterdam for negligence. *Id*. The

Second, the municipality or its agent must have known that inaction would lead to harm.[342] Third, direct contact between the agent and the victim must have occurred.[343] And finally, the victim must demonstrate that she reasonably relied on the affirmative actions of the police.[344] Once a plaintiff has presented sufficient evidence to state a cause of action, the officer's actions are subjected to further analysis to determine whether those actions were reasonable.[345]

Although an order of protection is not necessary to establish a cause of action in New York, a plaintiff who has been issued an order by the court has a significant advantage.[346] The courts have been clear in stating that the existence of an order of protection does not absolutely establish a special relationship or prove that one existed.[347] However, courts in New York have found that an order of protection evinces a judicial determination that the victim requires protection from his or her abuser, who has been categorized by a judge as violent and dangerous.[348] Further, the order is evidence that harm might result in

court found that the police had assumed a duty to Ms. Raucci by training her to tape the calls, and because the police had notice of violations of an order of protection, there was a duty to respond and investigate. *Id*. at 1056. Thus, the first element of a special relationship was satisfied. *Id.*

342. *Id.* at 1055–56. The court found that the police knew through statements by Ms. Raucci and the telephone call recordings that Mr. Raucci was dangerous. *Id.* at 1056. Additionally, the court held that the order of protection was evidence that inaction on their part would lead to harm. *Id*.

343. *Id.* at 1055–56. The interactions Ms. Raucci had with the police department satisfied the direct contact element of the special relationship test. *Id*. at 1057. Additionally, because of the order of protection, the mother's direct contact also substituted for Chad's direct contact with the police. *Id*.

344. *Id.* at 1055–56. The fact that Ms. Raucci never changed her schedule over the period of time that her husband harassed her served as adequate evidence that she reasonably relied on promises of protection made by the police department. *Id.* at 1058.

345. Sorichetti v. City of New York, 482 N.E.2d 70, 76 (N.Y. 1985) (stating that the actions of a governmental employee will be analyzed using the reasonableness standard); Mastroianni v. County of Suffolk, 691 N.E.2d 613, 617 (N.Y. 1997) (finding that the reasonableness of the conduct of the officer and police department is a question for the fact finder).

346. *Compare Mastroianni*, 691 N.E.2d at 616 (reasoning that the existence of an order of protection automatically satisfies two elements of the cause of action), *with* Berliner v. Thompson, 578 N.Y.S.2d 687, 689 (N.Y. App. Div. 1992) (finding that "the order satisfies proof of an affirmative duty to act, knowledge that inaction could lead to harm and justifiable reliance on the defendant's affirmative undertaking. All that remains is the direct contact necessary to apprise the police of the existence of the order and its violation.").

347. *Sorichetti*, 482 N.E.2d at 76.

> The fact that an injury occurs because of a violation of an order of protection does not in itself create municipal liability. An arrest may not be warranted in each case, and the failure of the police to take such action will not alone be determinative of the reasonableness of their conduct.

Id.

348. *Id*. *See also Berliner*, 578 N.Y.S.2d at 689 (affirming the finding in *Sorichetti* that an

the absence of protection, and violations, thus, should be promptly responded to and thoroughly investigated.[349] Therefore, in New York, an order of protection is sufficient evidence to satisfy the first three elements of the special relationship test.[350] Even where the order of protection does not automatically establish these elements, the analysis is more flexible for plaintiffs who have been issued an order.[351] Therefore, victims of domestic violence are significantly advantaged if they have obtained an order, and face further legal obstacles if they have not.[352]

An order of protection is also crucial in New York in instances where a child is involved in the domestic dispute and is injured by the misconduct of law enforcement personnel.[353] Because of the insubstantial nature of the interaction between a child and an officer on most domestic violence calls, a child would normally be precluded from bringing a claim.[354] However, New York courts have held that in instances where the parent of the child has obtained an order of protection, the existence of the order satisfies the direct contact element for the child.[355] The standards are relaxed when an order exists because it represents the municipality's previous involvement in the case.[356]

order of protection "is presumptive evidence that the individual whose conduct is proscribed [is] . . . a dangerous or violent person." (quoting *Sorichetti*, 482 N.E.2d at 75)).

349. *Sorichetti*, 482 N.E.2d at 75–76.

350. *Berliner*, 578 N.Y.S.2d at 689. *But see Mastroianni*, 691 N.E.2d at 616 (noting that only two elements were satisfied).

351. *Mastroianni*, 691 N.E.2d at 616 (determining that whether an order of protection satisfies the direct contact element depends on the facts of each case).

352. The courts in *Sorichetti*, 482 N.E.2d at 75–76, *Berliner*, 578 N.Y.S.2d at 689, and *Mastroianni*, 691 N.E.2d at 616 each relied heavily on the fact that an order of protection had been issued on behalf of the plaintiff in determining whether or not a special relationship existed.

353. *See* Kircher v. City of Jamestown, 543 N.E.2d 443, 446–47 (N.Y. 1989) (noting the importance of the outstanding order of protection in *Sorichetti*, whereas no such order existed in this case); Cuffy v. City of New York, 505 N.E.2d 937, 941 (N.Y. 1987) ("Moreover, the presence of a judicial order of protection contributed to our conclusion in *Sorichetti* that an actionable relationship existed.").

354. *See Sorichetti*, 482 N.E.2d at 75 (holding that a special relationship requires that there be some direct contact between the police and the injured party).

355. Raucci v. Town of Rotterdam, 902 F.2d 1050, 1057 (2d Cir. 1990) (holding that the order of protection obtained by the mother extended to her children and, thus, established direct contact with the police). *See also Cuffy*, 505 N.E.2d at 941 (explaining the rationale of waiving the direct contact requirement for a child whose mother had obtained an order of protection); *Sorichetti*, 482 N.E.2d at 75 (holding that the mother's contact with the police also created a special relationship between the police and her child); *Kircher*, 543 N.E.2d at 446–47 (acknowledging previous judicial flexibility under circumstances of mother and child, but refusing to waive the direct contact requirement for individuals engaged in other types of relationships).

356. *Kircher*, 543 N.E.2d at 446–47 (explaining the reasoning in *Sorichetti* that "[an] outstanding judicial order of protection signif[ies] the municipality's prior involvement in the domestic turmoil that ultimately led to the infant's injuries, thus providing a justification for

In addition to the obstacles that domestic violence victims face in establishing the special relationship exception and successfully bringing a claim against the police, the cause of action in New York was not specifically crafted to protect victims of domestic violence.[357] It is available to any citizen who has been subjected to police misconduct and can satisfy the burdens of the special relationship test.[358] However, in reality, there is only a very narrow class of cases that can satisfy these requirements.[359] The language of the rulings in this line of cases demonstrates that New York courts consciously sought to limit the number of claimants who could successfully sue a municipality, law enforcement agencies, and the agencies' personnel.[360] The courts have stated that law enforcement agencies should be allowed extensive discretion with regard to officer conduct and resource allocation.[361] The difficult elements of the special relationship exception demonstrate the judicial effort to diminish the number of successful suits.[362]

B. Illinois Law Surpasses That of Other States

The cause of action created by the IDVA is more comprehensive than the remedies available to victims of domestic violence in other states.[363] It provides more expansive protection to victims in their interactions with law enforcement, and it also successfully addresses many of the legal challenges in other jurisdictions that prevent victims from

relaxing the direct contact requirement.").

357. *See generally* Schuster v. City of New York, 154 N.E.2d 534 (N.Y. 1958) (applying the test to the case of a citizen being threatened after supplying information to the police leading to the arrest of a fugitive); *Cuffy*, 505 N.E.2d 937 (evaluating the nature of the relationship between police and victim in a violent landlord-tenant dispute).

358. *Cuffy*, 505 N.E.2d at 940.

359. *Sorichetti*, 482 N.E.2d at 75–76 (describing how the special relationship exception only exists in "extraordinary instances" and explaining how a court's reliance on orders of protection "necessarily limit[s]" the class of victims to whom the police owe a duty).

360. *See Raucci*, 902 F.2d at 1055.

> The reason for limiting this exception is that a municipality's duty to provide police protection is owed to the public at large rather than to any individual or class of citizens, and questions of resource allocation, such as how much protection [to] provide to an individual or class, are left to the discretion of the municipal policy makers.

Id.

361. *Cuffy*, 505 N.E.2d at 940 (describing how a municipality's duty to provide police protection is owed to the public, not to individuals, and has long been regarded as a resource-allocating function that should be left to policy makers).

362. *See id*. (explaining the rationale behind declining to subject government entities and law enforcement agencies to tort liabilities).

363. *See infra* Part IV.B (analyzing the Illinois cause of action for victims of domestic violence as compared to those available in other states).

prevailing in civil suits against the police.[364] Compared to other states, the right of action for domestic violence victims in Illinois is available to a larger class of individuals, including victims in a variety of different types of relationships as well as certain family members.[365] The Illinois cause of action also enables victims of domestic violence to sue for a wider variety of police misconduct.[366] Furthermore, the Illinois cause of action specifically recognizes the unique problem of inadequate police response to situations of domestic violence and properly limits immunity to encourage police action and to allow victims to recover in the event of police misconduct.[367]

1. The Illinois Right of Action Is Available to a Larger Class

The right of action created by the IDVA is available to more individuals than remedies in other states.[368] Any plaintiff who is a member of the protected class as designated by Article II can potentially bring a claim under the IDVA.[369] Courts in Illinois have interpreted this protected class to encompass a broad group of individuals that includes not only the victim herself, but also her children and other family members.[370] This inclusiveness is critical given the fact that domestic violence often affects and threatens the safety of individuals other than the victim.[371] Police protection is equally necessary for

364. *Id.*

365. *See infra* Part IV.B.1 (discussing the expansive class of individuals protected under the IDVA as it compares to the more exclusive groups covered in other states).

366. *See infra* Part IV.B.2 (arguing that victims of domestic violence in Illinois are protected against more forms of police misconduct than in other states).

367. *See infra* Part IV.B.3 (explaining how the Illinois cause of action was crafted specifically to address the needs of domestic violence victims in a way unlike any other state).

368. *See supra* Part III.A (describing the IDVA's protected class). *Cf. supra* Part IV.A (analyzing the limitations placed on the causes of action in other states).

369. 750 ILL. COMP. STAT. 60/201(2004). The individuals protected by the Act include:

> (i) any person abused by a family or household member; (ii) any high-risk adult with disabilities who is abused, neglected, or exploited by a family or household member; (iii) any minor child or dependent adult in the care of such person; and (iv) any person residing or employed at a private home or public shelter which is housing an abused family or household member.

Id. See also Calloway v. Kinkelaar, 659 N.E.2d 1322, 1328 (Ill. 1995) (defining who is eligible to bring a claim under the IDVA).

370. *See supra* note 196 (listing cases in Illinois which have expanded the protected class under the IDVA); Leslie Landis, Project Manager for the City of Chicago Domestic Violence Project, Presentation at Loyola University Chicago School of Law (Sept. 6, 2006) (on file with author) (describing the types of relationships protected by the IDVA as very broad).

371. Friends or other family members of the victim are also often represented among the fatalities associated with domestic violence. U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, About Domestic Violence, http://www.usdoj.gov/ovw/domviolence.htm (last

children and other household members exposed to domestic violence.[372] By including blood relatives in the class of protected people to whom the police owe a duty, Illinois has recognized the practical effects of domestic violence in a way that other states have not.[373]

For instance, in New York, the success of a suit for police misconduct brought on behalf of a child relies heavily on the existence of an order of protection.[374] In Illinois, on the other hand, a suit against law enforcement can be brought on behalf of a child regardless of whether there is an order of protection because children are part of the IDVA's protected class.[375] In abusive households, children are frequently victims of domestic violence and by extending the unlimited right of action to this vulnerable population, Illinois law protects them more thoroughly than does New York law.[376]

Furthermore, no additional limitations have been placed on those who are permitted to bring a suit against the police under the IDVA.[377] The Illinois cause of action does not favor victims who have obtained an order of protection.[378] Instead, it provides an identical remedy to all victims of domestic violence by allowing a victim to sue the police for misconduct regardless of whether an order of protection was

visited on Mar. 31, 2007) (reporting that domestic violence can also have an impact on friends, co-workers and other member of the victims family). In Washington, family members and friends constitute twelve percent of all homicides stemming from domestic violence. John Iwasaki, *Woman Finds Brother Stabbed*, SEATTLE POST-INTELLIGENCER, Sept. 26, 2006, at B5. *See also* DOMESTIC VIOLENCE COORDINATING COUNCIL, Dynamics of Domestic Violence, http://www.dvcc.delaware.gov/dynamics.html (last visited on Mar. 30, 2007) (explaining that one technique used by abusers is to threaten the victim's children, relatives, or pets).

372. *See supra* notes 77–78 and accompanying text (explaining the rate at which children of abusive relationships are abused themselves). *See also* Marielsa Bernard, *Domestic Violence's Impact On Children*, MD. B. J., May-June 2003, at 12 (estimating that somewhere between three and ten million children are exposed to domestic violence every year).

373. Illinois Coalition Against Domestic Violence, *supra* note 99 (reporting that Illinois domestic violence service programs served over 10,000 children in 2005).

374. Sorichetti v. City of New York, 482 N.E.2d 70, 75–76 (N.Y. 1985)

375. 750 ILL. COMP. STAT. 60/201 (2004); Calloway v. Kinkelaar, 659 N.E.2d 1322, 1328 (Ill. 1995); Rosenbaum v. Rosenbaum, 541 N.E.2d 872, 875 (Ill. App. Ct. 1989) (holding that the IDVA covered the abusive relationship of a mother and her adult son).

376. *See* Maureen K. Collins, Nicholson v. Williams*: Who Is Failing To Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services To Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725, 725–26 (2003–2004) (explaining the link between domestic violence and child abuse and suggesting the two issues should be treated together to better protect both mother and child).

377. *Calloway*, 659 N.E.2d at 1328 (stating that anyone who is protected under the IDVA can potentially bring a claim against the police).

378. *Id*. (listing the requirements for bringing a cause of action and not mentioning an order of protection among those elements).

obtained.[379] While Article II of the IDVA facilitates the granting of orders of protection and considers such orders an important remedy for victims of domestic violence, the Illinois Supreme Court did not create a lesser burden for victims protected by a court order.[380] Some domestic violence victims do not obtain an order of protection, either out of choice or necessity, yet they still require police protection in instances where intimate partner abuse recurs or escalates.[381] Therefore, unlike New York, where a victim may satisfy three of the elements of the cause of action with an order of protection, an individual in Illinois has an equal chance of recovering from a police officer regardless of whether an order of protection was been issued on the victim's behalf.[382]

2. The Right of Action Is Available for More Types of Police Misconduct

Under the IDVA, law enforcement officers owe more duties to victims of domestic violence than in other states, and thus, victims benefit from more thorough and effective police response.[383] Consequently, victims can recover for a wider range of police misconduct when any one of these duties is breached in a willful and wanton manner.[384]

379. *Id.*

380. 750 ILL. COMP. STAT. 60/214 (2004) (providing for the issuance of orders of protection). The purpose statement of the IDVA explains the legislature's view that orders of protection are a crucial part of protecting victims of domestic violence. 750 ILL. COMP. STAT. 60/102(4) (2004). The IDVA was created to:

> [s]upport the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser's access to the victim and address any related issues of child custody and economic support, so that victims are not trapped in abusive situations by fear of retaliation, loss of a child, financial dependence, or loss of accessible housing or services.

Id. See also Taylor, *supra* note 183, at 406 (outlining the process through which victims can obtain an order of protection rapidly and effectively).

381. *See* Landis, *supra* note 370 (describing how, in drafting the IDVA, advocates and legislators took into account the fact that not all victims of domestic violence would seek an order of protection); *see also supra* notes 60–63 and accompanying text (outlining the obstacles that prevent domestic violence victims from reporting abuse or seeking legal protection, such as orders of protection).

382. *Calloway*, 659 N.E.2d at 1328. *See also supra* notes 332–52 and accompanying text (describing the special relationship exception test in New York).

383. *Compare supra* Part III.A (discussing the duties required of law enforcement under the IDVA), *with supra* Part IV.A (describing the remedies for police misconduct in Washington, California, and New York).

384. 750 ILL. COMP. STAT. 60/304(a) (2004) (listing law enforcement's duties to domestic violence victims, which also include seizing and taking inventory of weapons, accompanying the

In order to adequately respond to a domestic violence call, the IDVA states that a police officer must use all reasonable means to prevent further abuse, for example by arresting the perpetrator, escorting the victim to safety, or engaging in various other activities outlined in Section 304.[385] If a law enforcement agent fails to perform these duties, or executes them in an egregious manner, and the action is willful and wanton, the victim can bring civil suit against the officer.[386] In Illinois, both affirmative acts and failure to act can constitute misconduct under the IDVA cause of action.[387]

The remedy available to victims in Illinois is more expansive compared to the Washington remedy because the Washington mandatory-arrest statute only imposes a duty to arrest under certain circumstances.[388] This duty only arises once the officer is on the scene and able to assess whether the requisite criteria exist.[389] Importantly, a victim in Washington may only state a claim against the police if the criteria are met and the mandatory arrest is not carried out.[390] Since the police duty to victims of domestic violence in Washington is limited to arrest, the duty ceases after four hours, and there is no duty for the police to continue an investigation after the abuser has escaped, victims in Washington, as compared to Illinois, are limited in the type of police misconduct for which they may recover.[391]

The IDVA cause of action is also applicable to more forms of police misconduct than the remedy provided by California law.[392] A police

victim to her place of residence to remove personal belongings, offering the victim immediate and adequate information about relief available, providing referrals to service agencies, and advising the victim to seek medical attention to treat injuries and preserve evidence).

385. *Id.*

386. 750 ILL. COMP. STAT. 60/305 (2004); *Calloway*, 659 N.E.2d at 1329 (reasoning that analysis of legislative intent supports the conclusion that the "legislature unambiguously intended to limit the liability of law enforcement personnel to willful and wanton acts or omissions in enforcing the Act."); Moore v. Green, 848 N.E.2d 1015, 1026 (Ill. 2006).

387. 750 ILL. COMP. STAT. 60/305 (2004) (creating immunity for a police officer's willful and wanton acts or omissions).

388. *See supra* notes 289–91 and accompanying text (listing the circumstances in which there is a statutory duty to arrest under Washington statute).

389. *See supra* notes 297–308 and accompanying text (explaining that the Washington Domestic Violence Act has been interpreted to limit the mandatory duty to arrest and does not create an ongoing duty to investigate).

390. DAVID K. DEWOLF & KELLER W. ALLEN, 16 WASHINGTON PRACTICE SERIES: TORT LAW AND PRACTICE § 14.11 (3d ed.).

391. Donaldson v. City of Seattle, 831 P.2d 1098, 1105 (Wash. Ct. App. 1992) (stating that law enforcement duties under the Washington Domestic Violence Prevention Act are limited to arrests while the perpetrator is still at the scene).

392. *Compare supra* Part III.A (describing the law enforcement duties under the IDVA), *with supra* Part IV.A.2 (assessing the limited duties required of police in California).

officer can be liable for both his acts and omissions in responding to a domestic violence call in Illinois.[393] In other words, the right of action recognized by *Calloway* allows the plaintiff to sue for police nonfeasance, such as delay in responding to calls or failure to interfere in a violent altercation.[394] In contrast, California requires that an officer have contributed to the victim's harm by affirmative action.[395] Therefore, only police misfeasance is actionable in California.[396]

For instance, consider the case of Ronyale White.[397] In Illinois, under the cause of action created by the IDVA, White's executor was able to state a claim based on evidence that officers Green and Cornelius took an exceedingly long time to reach White's home after her 911 call.[398] This delay, combined with evidence showing they never entered the victim's home or investigated her call, was sufficient to constitute a claim in Illinois.[399] In California, however, the deficient conduct of Green and Cornelius would not be actionable because inaction or nonfeasance does not support a finding of a special relationship.[400] Green and Cornelius never took affirmative action that increased the harm to White.[401] Thus, the claim brought by the executor of White's estate would have been precluded in California.[402]

393. 750 ILL. COMP. STAT. 60/305 (2004); Moore v. Green, 848 N.E.2d 1015, 1018 (Ill. 2006) (allowing the plaintiff to state a claim for law enforcement failure to act). *See also supra* note 247 (quoting the definition of actionable conduct as defined by Illinois courts).

394. 750 ILL. COMP. STAT. 60/305 (2004).

395. *See supra* notes 318–20 and accompanying text (describing the special relationship requirement in California which makes it difficult for a victim of domestic violence to sue for police nonfeasance).

396. Zelig v. County of L.A., 45 P.3d 1171, 1183 (Cal. 2002) (citing Hoff v. Vacaville Unified School Dist., 968 P.2d 522, 527 (Cal. 1998) (explaining that courts in California have been reluctant to impose liability for nonfeasance and, therefore, police may only be held liable for their affirmative actions). *See also* Miccio, *supra* note 340, at 149–50 (describing an action/inaction paradigm in California law and how courts incorrectly categorize failure to act as nonfeasance when it is actually misfeasance—the police action is merely "not carried to fruition").

397. *See supra* Part I (describing the facts of the murder of Ronyale White).

398. *See supra* note 9 and accompanying text (explaining the holding in *Moore*).

399. *See supra* notes 6–7 and accompanying text (illustrating Green's and Cornelius's willful and wanton conduct).

400. *See supra* notes 317–21 and accompanying text (describing what is necessary to establish the special relationship exception in California).

401. Moore v. Green, 822 N.E.2d 69, 71 (Ill. App. Ct. 2004) (reporting that a witness saw the police car arrive at White's house and then leave without investigating or providing assistance); Hussain, *supra* note 7 (illustrating the inadequate response of the Chicago police officers after White's 911 call).

402. See supra Part IV.B.2 (describing what is required for a plaintiff to succeed in a negligence suit against the police in California).

3. The Right of Action Specifically Addresses Domestic Violence

The Illinois cause of action more effectively addresses the epidemic of domestic violence and the under-enforcement of laws protecting victims than do the remedies provided by other states.[403] The IDVA and the right of action recognized in *Calloway* were specifically tailored to the unique characteristics of the crime of domestic violence and the needs of victims in abusive relationships.[404] The Illinois General Assembly enacted the IDVA to address the problem of domestic violence by providing support for victims and encouraging active police intervention.[405] The IDVA outlines remedies for protected parties, police duties, and limits liability for law enforcement, with the goal of aiding domestic violence victims and reducing the rate of intimate partner abuse.[406]

Furthermore, Illinois has succeeded in facilitating litigation by victims against the police as a tool to ensure proper law enforcement conduct.[407] The Illinois Supreme Court's interpretation of Section 305 in *Calloway* ensures that police duties to domestic violence victims are carried out in compliance with the IDVA.[408] As the holding in *Calloway* states, the cause of action is an effective mechanism for ensuring that the important purposes of the IDVA are actively pursued within the law enforcement community.[409]

In contrast, neither of the remedies provided by California or New York were crafted with the intention of providing specialized protection to domestic violence victims or incentives for appropriate police response to that particular crime.[410] In fact, in both states, victims must

403. *Compare* 750 ILL. COMP. STAT. 60/102 (2004) (explaining that the legislature actively sought to reduce the incidence of domestic violence in Illinois and improve protections for victims), *with supra* Part IV.A.2 & 3 (discussing the right of action against municipal entities in California and New York, which are not specifically geared toward domestic violence victims).

404. 750 ILL. COMP. STAT. 60/102 (2004); Calloway v. Kinkelaar, 659 N.E.2d 1322, 1326–27 (Ill. 1995).

405. 750 ILL. COMP. STAT. 60/102(1), (4) & (5) (2004). *See also supra* notes 216–17, 221–24 and accompanying text (explaining the Illinois Supreme Court's interpretation of the legislative intent behind the IDVA).

406. *See supra* Part III.A (discussing the provisions of the IDVA).

407. *See generally Calloway*, 659 N.E.2d at 1326–27 (creating a cause of action specifically geared towards victims who seek to sue the police for their inappropriate response to a domestic violence call). *See also* Webster, *supra* note 18, at 674 (suggesting that suits against the police by victims of domestic violence under the limited immunity provision of the IDVA are a successful way to "encourage police officers' compliance with law enforcement protocols").

408. Moore v. Green, 848 N.E.2d 1015, 1026 (Ill. 2006).

409. *Calloway*, 659 N.E.2d at 1328 (reporting that the cause of action was created "[t]o give effect to the legislature's purpose and intent in enacting the Domestic Violence Act.").

410. *See supra* notes 311, 337–38 and accompanying text (explaining that police duties in

sue under the same negligence theory as would be asserted by any other individual who seeks to bring civil suit against the police.[411] While Illinois law emphasizes the special duties that police owe to victims of domestic violence and enables victims to bring suit for police wrongdoing,[412] the law in both New York and California holds that police rarely have a duty to anyone and aims to discourage suits against the police by victims of crime.[413] Law enforcement officers in New York and California are not encouraged to treat domestic violence differently than any other type of crime, yet statistics and studies show that intimate partner abuse is a distinct type of crime that requires special police intervention.[414] Illinois acknowledges the difference between intimate partner abuse and other types of violent crime and created the IDVA and the *Calloway* cause of action to provide appropriate police services and protect victims of domestic violence in a way that the other states have not.[415]

C. The Weaknesses of Illinois Law

Changes in attitudes and practices toward domestic violence are slow, and Illinois law still does not protect victims of domestic violence to the fullest possible extent.[416] Despite pro-victim legislation, police training, and public pressure, police still under-enforce the laws and respond inadequately to domestic disturbances.[417] Law enforcement is a critical key to reducing this violence, but little progress will be made if police departments and personnel fail to fulfill their assigned duties.[418] The cause of action in Illinois still presents obstacles for

both New York and California are the same for all citizens, including domestic violence victims).

411. *See generally* Zelig v. County of L.A., 45 P.3d 1171 (Cal. 2002) (requiring domestic violence victims to establish the special relationship exception to the public duty doctrine that applies to all citizens); Sorichetti v. City of New York, 482 N.E.2d 70, 74 (N.Y. 1985) (same).

412. 750 ILL. COMP. STAT. 60/304 (2004) (listing police duties to domestic violence victims); 750 ILL. COMP. STAT. 60/305 (2004) (creating limited immunity for police officers whose conduct in responding to domestic violence altercations is willful and wanton).

413. *See supra* notes 309–12, 333, 357–62 and accompanying text (describing the law regarding police duties in California and New York and the way in which both states have attempted to limit the number of suits filed again police officers and departments).

414. *See supra* notes 59–63 and accompanying text (explaining how domestic violence is a unique crime and assaults perpetrated by intimate partners are different and more likely to be repeated than assaults by strangers).

415. 750 ILL. COMP. STAT. 60/102 (2004).

416. *See* Miccio, *supra* note 340, at 164 (describing the continuing "callousness" of law enforcement despite their sworn duty to "protect and serve").

417. *See supra* note 115 (characterizing domestic violence prevention laws and police policies as still under-enforced).

418. Webster, *supra* note 18, at 668–69 (suggesting that, with respect to orders of protection, victims are not safe unless police "respond sternly to reported violations").

victims who wish to bring civil suit against the police,[419] and even when a victim succeeds in stating a claim, the suit may be quietly settled, resulting in very little systemic change.[420] Moreover, further difficulties arise under the IDVA cause of action when the victim chooses to sue the individual officer whose willful and wanton conduct is the reason for the claim.[421]

Although the right of action created by the IDVA is more accessible to a larger number of individuals for a wider variety of misconduct, it still presents an uphill battle for the victim who elects to bring suit.[422] In order to state a claim, the police officers must have breached their duty to the victim in a willful and wanton manner.[423] The plaintiff must show that the police engaged in "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others."[424] In situations of domestic violence, this standard is too high because such egregious misconduct may lead to fatalities.[425] As the cause of action exists now, police may be liable for willful and wanton behavior but not for negligent response to domestic violence calls, which can be equally harmful.[426] By granting immunity to police for their negligent actions, under-enforcement of the law will persist, victims in Illinois will remain vulnerable, and the risk of escalation of abuse will continue to exist.[427]

419. *See infra* Part IV.C (outlining the various deficiencies in protection for victims of domestic violence under the IDVA); Moore v. Green, 848 N.E.2d 1015, 1027 (Ill. 2006) (noting that while the cause of action recognized by *Calloway* serves the purposes of the IDVA, "a plaintiff seeking relief under the Act has a heavy burden to carry.").

420. Andrea A. Curcio, *Breaking The Silence: Using a Notification Penalty and Other Notification Measures in Punitive Damages Cases*, 1998 WIS. L. REV. 343, 377 (1998) (suggesting that confidential settlement agreements can increase risk to the public by "hiding information critical to the public health and safety").

421. *See generally* Moore v. Green, 848 N.E.2d 1015 (Ill. 2006) (allowing plaintiffs to state a claim of statutory negligence against the police based on their willful and wanton treatment of the victim's case which lead to her death).

422. *See supra* Part IV.B.1 (suggesting that the cause of action under the IDVA provides remedies to more individuals affected by domestic violence by protecting victims, their children and other family members).

423. 750 ILL. COMP. STAT. 60/305 (2004).

424. Sneed v. Howell, 716 N.E.2d 336, 343 (Ill. App. Ct. 1999).

425. *See generally* Calloway v. Kinkelaar, 659 N.E.2d 1322 (Ill. 1995) (police failure to respond led to plaintiff's abduction at gunpoint); Sneed v. Howell, 716 N.E.2d 336 (Ill. App. Ct. 1999) (ex-husband shot and killed victim after police failed to respond to victim's repeated calls); Moore v. Green, 848 N.E.2d 1015 (Ill. 2006) (abuser shot and killed victim when police delayed in responding and investigating).

426. *Calloway*, 659 N.E.2d at 1322 (specifically rejecting the notion that a police officer could be held liable for negligent performance of his duties under the IDVA).

427. PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 102–

Even when victims do prevail in stating a claim against the police, the claim is often settled out of the public eye.[428] Municipalities may choose to pay the victim to avoid litigation and public scrutiny.[429] While the victim may be made whole by receiving a settlement, the police department will be less likely to enact systemic change within the police force than if they had been found liable for misconduct in a trial and subjected to public scrutiny for their actions.[430] The current law in Illinois could go further to encourage substantive changes in police practice at an institutional level.[431]

Finally, there are strategic problems associated with civil suits under the IDVA against individual officers who mistreat victims of domestic violence.[432] If a victim brings suit against the individual police officer for his misconduct, the officer might be insolvent and the victim would not be made whole.[433] Also, if the individual police officer is found liable, he might be sanctioned professionally or even fired, but a suit against the individual officer does not ensure that the police department

107 (1983) (correlating the amount of official liability to the probability that particular misdeeds will be deterred—more liability results in more deterrence).

428. DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE 6 (3d ed. 2003) (reporting statistics for settlements from police departments in various populous cities). The majority of litigation against the police is settled out of court. *Id*. In New York City alone, the police department paid out $44 million in settlements for police misconduct from 1987 to 1991. *Id*.

429. Curcio, *supra* note 420, at 344–45. "[S]ettlements frequently are conditioned upon a plaintiff's consent to secrecy, even when withholding information from the public presents a risk to the public health, safety or welfare." *Id.*

430. Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 357 (1996) (citing failure to publicize settlements and punitive damage awards as a significant reason why these remedies do not have full deterrent effect).

431. ANN JONES, NEXT TIME, SHE'LL BE DEAD 141 (1994) [hereinafter NEXT TIME] (discussing how litigation against police departments has encouraged reform within law enforcement institutions).

432. Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2017 (1998) (listing several inadequacies of remedies provided in suits against individual officers, including plaintiff's inability to identify the officer who caused the injury, the inability of police to satisfy judgments against them, and the fact-finder's reluctance to hold a "hard working, underpaid" police officer liable).

433. Myriam E. Gilles, *In Defense Of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854 (2001) (reporting that police who are liable for damages are not always indemnified by their municipal employers). *See also* William C. Mathes & Robert T. Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 912 (1965) (characterizing the practice of indemnification with governmental entities as irregular); Wayne W. Schmidt, *Recent Developments In Police Liability*, *in* POLICE CIVIL LIABILITY 3, 9 (Dr. Leonard Territo, ed., 1984) (reporting that in Illinois, officers who are found liable in civil suits are only indemnified if their conduct is deemed negligent).

as a unit will change its attitudes towards victims of domestic violence.[434]

The right of action created by the IDVA and recognized by the Illinois courts is unique as compared to the remedies established in Washington, California and New York because of the breadth of protection it provides specifically to domestic violence victims for a wide variety of police misconduct.[435] Yet, there is room to expand and strengthen the remedy through further legislative reform and litigation strategy.[436]

V. PROPOSAL

In terms of state tort remedies for police misconduct, the unique cause of action created by the IDVA has many advantages.[437] However, in the spirit of continuing to seek ways to thwart domestic violence and provide support for victims, the Illinois legislature should consider several adaptations to the law and the way it is utilized to expand the rights the claim provides and further its power to correct law enforcement officer conduct and department policy.[438] In response to the weaknesses of Illinois law with respect to the rights of domestic violence victims, this Part proposes various judicial and legislative actions that would bolster the existing remedies and encourage further enhancements of police response to domestic violence.[439]

A. Further Facilitate the Victim's Ability to State a Claim

Although the cause of action created by the IDVA creates fewer legal obstacles prohibiting victims of domestic violence from bringing suit than do the laws in other states, since its recognition by *Calloway* in 1996, it has seldom been tested or utilized.[440] Both *Moore* and *Sneed*

434. Ciraolo v. City of New York, 216 F.3d 236, 249 (2d. Cir. 2000). In his opinion on the appropriateness of damage awards for unconstitutional police conduct, Judge Calabresi discussed the limited deterrent effect of damage awards against individual officers. *Id*. "[D]amages premised on individual guilt are unlikely to be efficacious. Moreover, the incapacity of individual offending officials to pay significant damage awards inevitably limits such officials' responsiveness to the threat of suits." *Id*. (citation omitted).

435. *See supra* Part IV (comparing Illinois' treatment of police immunity in situations of domestic violence to the varying treatments in California, Washington and New York).

436. *See supra* Part IV.C (suggesting some flaws in the law in Illinois as it currently exists).

437. *See supra* Part IV.B (analyzing the strengths and benefits of the cause of action available to victims of domestic violence under the IDVA).

438. *See infra* Parts V.A, B & C (proposing some ways in which the Illinois right of action could be further ameliorated).

439. *Id*.

440. *See generally* Sneed v. Howell, 716 N.E.2d 336 (Ill. App. Ct. 1999) (recognizing the cause of action created by *Calloway*); Moore v. Green, 848 N.E.2d 1015 (Ill. 2006) (adopting the

were examples of successful suits against the police, however they are among the only cases in which Illinois courts addressed Section 305 of the IDVA.[441] Additionally, in Illinois and throughout the United States, suits against police are frequently asserted by the domestic violence victim's estate.[442] Thus, the legal system should facilitate victim-plaintiffs' ability to utilize this cause of action before the police misconduct leads to fatalities or serious permanent injury.[443]

In order to facilitate recovery by victims of domestic violence, the Illinois legislature should codify the requirements necessary to state a cause of action against the police under the IDVA to make the legal remedy created by the *Calloway* decision more widely recognized in the legal community.[444] This would enable non-legal advocates and service providers who are familiar with the IDVA to learn of the remedy and educate victims about their rights.[445] Further guidance should also be provided by the legislature as to what kind of behavior is actionable in the domestic violence setting to permit courts throughout Illinois to make consistent decisions about when to hold the police liable.[446]

Calloway reasoning).

441. *Id.*

442. Typically in Illinois, the suits in which plaintiffs prevail against the police involve either a fatality or a serious physical injury. *See generally Sneed*, 716 N.E.2d at 338–39 (explaining that the victim bled to death after she called the police to help protect her from her abuser); Calloway v. Kinkelaar, 659 N.E.2d 1322, 1324–25 (Ill. 1995) (reporting that the plaintiff's abusive husband shot himself before the police could take him into custody); *Moore*, 848 N.E.2d at 1018 (detailing the case of a woman who was shot to death by her husband before the police arrived on the scene). In *Calloway*, *Sneed* and *Moore*, either the abuser or the victim died in the course of the domestic violence altercation before the police could properly intervene. *Id*. One of the first successful suits by a domestic violence victim against the police involved a woman who was severely beaten and stabbed repeatedly by her husband while a police officer stood nearby. Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). *See also* NEXT TIME, *supra* note 431, at 49–53 (recounting in detail the story of Tracey Thurman, her suit against the City of Torrington police department and the impact her legal victory had on police departments throughout the country).

443. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 160–61 (1982) (suggesting that litigation against police and police departments are an effective way to enact social change and to spotlight the "institutional complicity" that allows domestic violence to persist).

444. *See supra* Part III.B.1 (describing the Illinois Supreme Court's decision which recognized the cause of action for victims of domestic violence).

445. *See generally* Suzanne J. Schmitz, *What's the Harm?: Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*, 10 WM. & MARY J. WOMEN & L. 295 (2004) (discussing issues surrounding domestic violence victims' access to legal remedies). Many victims of domestic violence do not have access to the legal system for financial and other practical reasons. *Id*. at 297–98. And victims who do not have help from those with legal expertise are often unsuccessfully in obtaining orders of protection or other remedies provided by the law. *Id*. at 296. Lay advocates often provide counseling and assistance that would otherwise be unattainable to victims. *Id*. at 295.

446. *Calloway*, 659 N.E.2d at 1327 (recognizing that the determination of what constitutes

In addition, by lowering the standard for liability from willful and wanton behavior to negligence, more suits could be initiated for inappropriate police behavior.[447] The current strict standard sends a pro-police message that most police conduct, even if harmful, is beyond reprimand.[448] It also allows for litigation only when the behavior is egregious.[449] Given the magnitude of the domestic violence problem, the vulnerable position of victims and the incidence with which police officers fail to perform their duties, it may be necessary to further limit immunity for law enforcement in domestic violence situations in order to spur active and appropriate police response.[450] By amending Section 305 to allow civil suit for police conduct that is negligent, police will have even greater incentive to comply strictly with their training and the duties outlined in Article III of the IDVA.[451]

To suggest that law enforcement immunity be further limited is a proposal that may be met with criticism, as municipal immunity has a long history in Illinois jurisprudence and the Illinois Supreme Court has often noted the importance of police immunity.[452] In fact, proponents of municipal and police immunity from negligence claims traditionally assert several justifications for preserving immunity for negligent acts of governmental actors.[453] Some argue that it is wrong to allow public funds meant to be used for the public benefit to be used to remedy

willful and wanton behavior is a line "difficult to draw" and citing to several Illinois courts which have tried to define such conduct).

447. *See* SCHUCK, *supra* note 427, at 100, 111 (suggesting that if "liability for official misconduct is substantially expanded, society can enjoy significant and unambiguous gains.").

448. Gilles, *supra* note 433, at 853 (describing the negative effect of pro-police bias as one of the main critiques of broad law enforcement immunity and suggesting that liability should be based on social utility of the conduct).

449. 750 ILL. COMP. STAT. 60/305 (2004).

450. *See supra* Part II.A (describing the omnipresent nature of domestic violence as a crime).

451. Moore v. Green, 848 N.E.2d 1015, 1026 (Ill. 2006) (reasoning that Section 305 of the IDVA is necessary to encourage police officers to fulfill their duties as outlined in Section 304). For instance, Section 304 requires that a law enforcement officer escort a victim of domestic violence to her residence to retrieve her personal belongings. 750 ILL. COMP. STAT. 60/304 (2004). Even if the officer is merely negligent in performing this duty, there is still a high probability that the victim could be injured. *See also* SCHECHTER, *supra* note 443, at 158 (reporting that sometimes police fail to respond to domestic violence emergency calls, and when they do respond, they ignore the victim's fear and intimidation and ultimately fail to perform their duties adequately).

452. *See* Calloway v. Kinkelaar, 659 N.E.2d 1322, 1327–28 (Ill. 1995) (recognizing the value of balancing the need to protect victims of domestic violence with the need to shield police officers from civil suit arising from their good-faith efforts to uphold the law). *See also supra* Part II.C (discussing the history and evolution of governmental immunity in Illinois).

453. Note, *Municipal Tort Immunity in Virginia*, 68 VA. L. REV. 639, 643–49 (1982) (describing in detail the rationales for governmental immunity from tort suits).

private injuries.[454] Others suggest that by doing away with immunity for municipal agents, states and municipalities would be exposed to limitless liability.[455] Additionally, it has been argued that eliminating immunity would interfere with the police officer's discretion and would cause the officer to conduct his duties under the constant shadow of potential liability.[456]

However, despite the arguments in support of immunity for the police, there have been a growing number of cases criticizing such broad protection from suit and the rationales listed above have gradually been considered less persuasive.[457] Further, the Illinois state legislature has found it necessary to limit governmental immunity in other instances, and the gravity of the problem of police response to domestic violence justifies additional limitations on immunity.[458]

B. Victim-Plaintiffs Should Seek Injunctions

In addition to monetary relief, Illinois courts should issue injunctions against police officers or police departments that are found liable.[459] Injunctive relief would enable the courts to target specific problematic policies or require certain conduct in a way that could not be accomplished by the imposition of a financial penalty upon the law enforcement defendant.[460] Such court orders would also have more

454. *Id.* *See also supra* note 153 (discussing language from Illinois courts regarding the importance of preserving tax funds for public purposes as opposed to damage claims).

455. Stewart F. Hancock, Jr., *Municipal Liability Through a Judge's Eyes*, 44 SYRACUSE L. REV. 925, 931 (1993).

456. Note, *Assessment of Police Conduct During High-Speed Chases in State Tort Liability Cases: The Effects of* Fiser v. City of Ann Arbor *and* Rogers v. City of Detroit, 46 WAYNE L. REV. 325, 350 (2000). *See also* Shea Sullivan, City of Rome v. Jordan*: Georgia Is a Public Duty Doctrine Jurisdiction With No Waiver of Sovereign Immunity—A Good "Call" by the Supreme Court*, 45 MERCER L. REV. 533, 537 n.18 (1993) ("The need for such broad limitations on liability in the area of police protection is generally justified by public policy considerations which center on the functional aspects of police activity [which are] that police require a substantial amount of discretion . . . ."). *See also supra* note 223 (stating the Illinois Supreme Court's view on partial immunity for law enforcement agents as stated in the *Calloway* ruling).

457. *See* Kelly Mahon Tullier, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 887 (1992) (explaining increasing disapproval of governmental immunity and the public duty doctrine which has led courts to "narrow[ ] its scope or reject[ ] it altogether").

458. 745 ILL. COMP. STAT. 10/2-101 (2004). The Illinois Tort Immunity Act provides that, despite otherwise extensive immunity, the liability of public employees based on certain statutes, including the Worker's Compensation Act, the Worker's Occupational Disease Act and the Illinois Uniform Conviction Information Act, remains intact. *Id.*

459. SCHUCK, *supra* note 427, at 182–83 (explaining how the federal courts have employed such alternative remedies to increase specific deterrence of official misconduct and have successfully avoided the pitfalls of other public tort remedies).

460. *Id.* at 150 (describing the change achieved by such remedies as "more specific,

impact on larger municipalities who, in the face of monetary sanctions, might be willing to pay the judgment in cases in which a victim-plaintiff prevailed without enacting systemic change.[461] Although some experts suggest that injunctions would only be useful in departments where police misconduct is severe and pervasive,[462] this may be the case in many circumstances considering the prevailing attitude of intolerance and misunderstanding by police towards domestic violence victims.[463]

By employing injunctive relief to require the amelioration of police conduct and department policy with regard to intimate partner abuse, future populations of domestic violence victims would benefit from the success of a particular victim's litigation.[464] In the public sector, this

predictable and rapid"). Injunctions can take two forms: prohibitory and affirmative. Schmidt, *supra* note 433, at 10. Prohibitory injunctions prevent officers from participating in certain conduct. *Id.* Affirmative injunctions require departments to take action to correct past misconduct. *Id.*

461. SCHECHTER, *supra* note 443, at 160 (describing mandated reform stemming from a class-action suit against the New York City Police Department in which practices and policies regarding the treatment of domestic violence incidences were dramatically altered to ameliorate law enforcement response). *See also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979) (illustrating how systemic problems can be decreased when a judge orders structural reform through injunctions); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 416–17 (2000) (hypothesizing that, in the context of unconstitutional governmental conduct, complex injunctions successfully prevent misconduct where "a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the [inappropriate] activity.").

462. Levinson, *supra* note 461, at 417 (suggesting that "[s]tructural reform brings enormous difficulties and costs, however, and may only be worthwhile in circumstances of severe and pervasive government wrongdoing").

463. *See supra* Part II.B (outlining the role of police officers in situations of domestic violence and presenting some of the reasons for under enforcement of domestic violence laws). Injunctive relief would work to change police behavior and policy much like the consent judgment agreed upon by the parties in *Bruno v. Codd*. Bruno v. Codd, 393 N.E.2d 976 (N.Y. 1979). In *Bruno*, twelve victims of domestic violence brought suit seeking injunctive relief against the New York City Police Department, the Family Court in New York City and officials of the New York City Department of Probation for their failure to protect domestic violence victims. *Bruno*, 393 N.E.2d at 977. As a result of the suit, the police department negotiated a consent judgment with the plaintiffs, whereby it agreed to ameliorate its policies and standards. *Id.* at 980. The court found this agreement sufficiently satisfied the plaintiffs' claims, such as to obviate the need for injunctive relief against the remaining defendants. *Id.* The court stated:

> By its terms the police have agreed hereafter to respond swiftly to every request for protection and, as in an ordinary criminal case, to arrest the husband whenever there is reasonable cause to believe that a felony has been committed against the wife or that an order of protection or temporary order of protection has been violated. Moreover, officers are to remain at the scene of the alleged crime or violation in order to terminate or prevent the commission of further offenses and to provide the wife with other assistance. To assure that these undertakings are fulfilled, supervisory police officers are to make all necessary revisions in their disciplinary and other regulations.

Id. at 980.

464. *See* Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 51–52 (1980)

type of remedy has historically been very successful in initiating long-term and permanent reform in a way that monetary damages have not.[465] Even though only minimal numbers of victims will have the resources and courage to challenge the actions of the police who inadequately respond to their emergency calls, any success achieved by those representative plaintiffs in the form of injunctive relief would benefit other victims who cannot come forward.[466]

C. Litigation Between Victims and Law Enforcement Should Be Publicized

The legislature should also require policing institutions to publicize litigation against them by domestic violence victims to reveal institutional flaws and police misconduct.[467] The legislature should require law enforcement agencies to actively report the details of police misconduct giving rise to legal action to members of the community either by way of mass media or another form of community alert.[468] Notifying the public of cases brought by victims of domestic violence under the IDVA would increase officer accountability to the community and would facilitate citizens' ability to learn of law enforcement inadequacies with regard to domestic violence response without having to personally search the public record.[469] Because such publicity would

(explaining that one of the benefits of equitable relief over monetary damages is that they can be more profitably employed by courts to deter future wrongs).

465. Gilles, *supra* note 433, at 876 (calling injunctions "uniquely appropriate remed[ies]" for the public sector and citing *Roe v. Wade* and *Brown v. Board of Education* as cases in which "plaintiffs . . . sought to reform the institutions, laws, or customs that had injured them" and "sought not only redress for themselves, but protection for society at large against the harms they had personally suffered").

466. *Id.*

467. *See* Curcio, *supra* note 430, at 357 (explaining that, in the corporate context, public knowledge of punitive awards and the reason for the grant of those awards leads to increased deterrence of misconduct). The case of Tracey Thurman, who successfully sued the city in which she lived for failure to protect her from her abusive estranged husband was widely publicized in not only the legal and law enforcement communities but also in the popular culture. *See* NEXT TIME, *supra* note 431, at 49–53 (discussing the Thurman case). The details of the case, which was one of the first to bring attention to the problem of inadequate police response to domestic violence, was even made into a television movie entitled *A Cry For Help: The Tracy Thurman Story*. *Id.* In response to the multi-million-dollar verdict against the city and its police department, law enforcement agencies and municipalities throughout the nation began to strengthen policies for handling domestic violence in order to prevent being held liable themselves. *Id.*

468. *See* Curcio, *supra* note 430, at 343 n.8. "To enable the information publicized to reach as wide an audience as possible, it is important that the information be publicized in print and broadcast media forums as well as on the 'information superhighway'." *Id.*

469. *Id.* at 358 (describing that public notification of defendant wrongdoing, in both criminal and civil law, serves to educate and protect the public, deter further offenses and further the

result in public scrutiny and activism, municipalities and police departments would have the incentive to make positive changes to support domestic violence victims within their organizations in order to avoid lawsuits and negative publicity.[470] Additionally, over the course of litigation, valuable information about police practices could be exposed, providing community leaders and domestic violence advocates with knowledge of problem areas upon which to focus their reform efforts.[471]

Further, the IDVA should be amended to require that settlement information and figures be reported to the public and the media in order to prevent police departments from paying the plaintiff simply to avoid uncovering their inadequacies.[472] For instance, the *Moore* case received

rehabilitation of the offender). For instance, the publication of wrongdoing has been employed to educate and safeguard the public in the case of sexual offender registration requirements and to encourage manufacturers' compliance in products liability litigation. *See, e.g.* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 326–27 (2006) (addressing the rationale behind Megan's Law which requires convicted sexual offenders to submit certain information to a database that is accessible to law enforcement and the public); Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759, 768–71 (1989) (illustrating the way in which the historical concept of public humiliation as a form of punishment has been adapted into contemporary forms of punishment); Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 320–23 (1993) (explaining how adverse publicity, in the corporate context, increases deterrence and accountability on the part of the offending party).

470. DONALD O. SCHULTZ, THE POLICE AS THE DEFENDANT 56 (1984) (outlining the negative impact publicity of police misconduct can have on the individual officer). *See also* Gilles, *supra* note 433, at 860 (citing commentators' theory that institutional change is induced by the desire to avoid adverse publicity); Curcio, *supra* note 420, at 372–73 (suggesting that scrutiny of practices and policies that result from publicity of an award reduces the likelihood that the misconduct will reoccur).

471. Curcio, *supra* note 420, at 372–73 (discussing how publication of wrongdoing encourages internal and external scrutiny that leads to reformed practice); Frank Main & Fran Spielman, *Watching cops who rack up complaints: 20 claims from public trigger official action*, CHI. SUN-TIMES, Oct. 23, 2006, at 6 (describing how publicized scandals have placed the spotlight on police misconduct and have caused more departmental accountability for incidents of wrongdoing). *See also* Gilles, *supra* note 433, at 859 ("When [ ] tort victims pursue litigation, motivated by the availability of compensatory damages, valuable information is unearthed and exposed.").

472. *See* Emily Fiftal, Note, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RES. L. REV. 503, 503 (2003). Many settlements are made pursuant to confidentiality agreements and do not become public record unless the parties file the information with a court to later be able to enforce the terms of the settlement agreement. *Id*. at 504. Orders by the court and other court records, such as jury verdicts and court decisions, can be sealed to prevent public access. *Id*. at 506. Thus, the media and the general public would not be privy to these records and information unless the parties agreed to its disclosure or the court mandates that the information be unsealed. *Id*. Some advocates for the public argue that certain categories of cases, such as products liability and sexual assault should be made accessible because of the strong public interest that exists in the

large amounts of publicity given the size of the settlement, the nature of the crime, and the media sound bites of the 911 tapes of White's last living moments.[473] This exposure heightened awareness throughout the City of Chicago about the ongoing frequency of domestic violence and the failure of police to properly respond.[474]

Some scholars and attorneys argue that divulging such private litigation information may not be in the best interest of the victim.[475] By agreeing to keep court records sealed, victims may be able to extract larger settlement sums.[476] Additionally, it has been suggested that if victims want to keep the information about their lawsuit private, the courts should not prevent them from doing so.[477] In situations of domestic violence, where victims are already reluctant to report their injuries for a number of reasons, protecting the victim's privacy should they choose to litigate might be a competing concern to be weighed against the public's right to the information.[478] Although a balancing test may be appropriate to weigh the privacy interest of the victim against the public's right to know of law enforcement misconduct, the social utility and public policy arguments favoring the disclosure of this information are great.[479] Additionally, some courts have rejected the argument that publicizing the suit would embarrass the parties or damage their reputation, as injury to personal reputation is "an inherent risk in almost every civil suit."[480]

information. *Id.* at 505–06.

473. *See supra* notes 1–2, 5 & 7 (describing the numerous newspaper articles and television programs that publicized White's murder, the criminal conviction of her husband, and the civil suit against officers Green and Cornelius).

474. *Id.*

475. Sharon L. Sobczak, *To Seal or Not to Seal?: In Search of Standards*, 60 DEF. COUNS. J. 406, 407 (1993) (discussing the advantages and disadvantages of choosing to seal court records for both plaintiffs and defendants).

476. *Id.* (explaining that plaintiffs may be able to use the option of agreeing to confidentiality as a bargaining chip over the course of litigation).

477. *Id.* (describing that some view litigation as a form of dispute resolution between private parties and that information regarding that process should be kept from the public purview if the parties so desire).

478. *See supra* Part II.A (discussing the obstacles that prevent domestic violence victims from reporting abuse).

479. *See* Anne-Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 127–28 (1990) (outlining the competing interests involved with the unsealing of court documents and discussing the balancing test employed by judges in determining whether or not to unseal the information).

480. *Id.*

D. Encourage Victims to Sue Police Departments Directly

Finally, to ensure that law enforcement agencies are fully accountable for their shortcomings with respect to response and treatment of domestic violence calls, victims who elect to bring suit should be encouraged to sue police departments directly for the misconduct of their officers.[481] By adjudicating the culpability of municipalities or departments, as whole entities as opposed to the individual officer, the harmful behavior cannot be blamed on a few "bad apples" in the police force.[482] Sanctions against specific officers would not sufficiently address the problem and thus further institutional change would be required to address the totality of the deficiency.[483]

Bringing suit against a police department or municipality would also prevent the negative implications of holding individual defendants liable.[484] When officers are aware that they personally are at greater risk of being sued civilly, they often change their behavior to avoid the hazardous situation altogether.[485] Police officers may choose not to act or to delay action in order to minimize the opportunities that open them up to liability.[486] This self-protective behavior would simply reinforce the under-enforcement problem that exists with police response to

481. Note, *supra* note 432, at 2017. "The goal of providing compensation for victims of tortious conduct is enhanced under a system of governmental, not individual, liability." *Id*.

482. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 (2002) (explaining the "bad apple theory" which stands for the proposition that, in the context of damage awards for constitutional claims against the police, when individuals are found liable, municipalities are less likely to make significant changes to correct improper officer behavior because they can fault particular officers).

483. Whitman, *supra* note 464, at 49–50 (explaining that awards against individuals are not the most effective way to avoid future injuries as many problems arise from systemic flaws); *see also* Note, *supra* note 432, at 2017 (discussing problems of holding individuals liable).

484. Note, *supra* note 432, at 2014–16 (describing in detail the police reaction to being held personally liable for tortious behavior).

485. Gilles, *supra* note 482, at 31 (explaining that self-protective behavior often prevents the officers from vigorously performing their duties); *see also* Note, *supra* note 432, at 2015 (suggesting that, in the face of liability, government agents will consciously seek to minimize personal risk by exercising certain strategies).

486. SCHUCK, *supra* note 427, at 71–73, 75 (describing in detail the way in which public officials and employees use inaction and delay to avoid liability; also describing how officials may substitute a risky kind of action for another relatively faultless act, "[p]arole officers may refrain from recommending release in order to minimize the risk of being sued by potential victims" or "[s]upervisors may promote . . . malingering or disruptive employees in order to be free of them rather than invite a suit for wrongful dismissal").

domestic violence.[487] By suing the law enforcement agency as a whole, the plaintiff could prevent this unfavorable reaction.[488]

VI. CONCLUSION

Victims of domestic violence are a vulnerable population exposed to a dangerous, repetitive, and often fatal crime. They rely heavily on law enforcement personnel to keep them safe and cannot afford to be subjected to further danger resulting from police misconduct. Illinois created an effective tool through civil litigation to encourage police officers to comply with proper protocol and to allow victims to recover from wrongdoings suffered at the hands of the police. However, the cause of action created by Illinois law is only the first important step in protecting victims of domestic violence. In order to guarantee that law enforcement agencies and employees effectively respond to intimate partner abuse, the Illinois legislature and courts need to increase the ability of victims to prevail in civil suits against the police and encourage society to react accordingly when the police are found to have acted inappropriately.

487. *See supra* Part II.A (describing the important role of police officers in deterring domestic violence and inadequate response).

488. Gilles, *supra* note 482, at 31 (reasoning that suing municipalities, as opposed to individual officers, for § 1983 violation better serves the recovery goals of the plaintiff).