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If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence

G. Kristian Miccio

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If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence

G. Kristian Miccio*

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I. Introduction

Male intimate violence is a constant in the lives of women and the community. We have recognized the effect of such violence on individual women, but have failed to adequately assess the impact on members of the community. Indeed, we still think of male intimate violence as the consequence of individual acts by individual men, shielded by a veil of familial privacy. Notwithstanding our protestations to the contrary, we, as a society, do not consider such violence as inimical to our survival. It is and has been viewed as significant only to the perpetrator and the survivor. As a result, the collective, the "We," are not invested in abating or contesting either the violence or the violator.

This may seem like a rather harsh or inaccurate assessment. It is harsh because it appears to discount the dedication of advocates who labor in political trenches attempting to shape public attitudes and policies; it is inaccurate given the plethora of statutory mandates that abound in state law. But the truth is, violence against women by male intimate partners is very much alive and very much ignored.

The question is why?

There are myriad reasons ranging from the psychological distance that such violence produces to the fear associated with involvement in preventing a crime. Undeniably, because of the frequency of such violence, women need psychological distance so as not to see themselves as potential victims; all of us fear being victimized by violent criminals, and batterers engender such fear, in neighbors, passers-by, and community members. But what I am referring to is a *systemic* denial of collective responsibility, reflected in such cases as *Town of Castle Rock v. Gonzales*¹ and *Burella v. City of Philadelphia*.² And this is the subject of this article.

In Part II, I introduce mandates by acquainting the reader with the historical context that birthed such statutes as mandatory arrest and mandatory reporting by doctors to law enforcement in battered women's

1. 545 U.S. 748, 760–62 (2005) (failing to make enforcement of restraining orders mandatory and holding that the Colorado Legislature failed to create a Fourteenth Amendment property interest in the enforcement of an order of protection); *see also infra* Part III.A.2 and accompanying notes (highlighting the presumed deficiencies of the *Castle Rock* opinion).

2. 501 F.3d 134, 134 (3d Cir. 2007) (holding that Burella did not have a procedural or substantive due process right to have officers enforce an order of protection); *see also infra* Part III.A.3 (suggesting that "[i]n one opinion, the 14th Amendment *in its entirety* has been foreclosed to battered women and their children; Legislative enactment be damned").

cases.³ These mandates were supported by the Battered Women's Movement (BWM) because they placed male intimate violence on the political radar screen. Mandatory arrest was viewed by the BWM as a

3. By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah, and Wisconsin had passed legislation mandating arrest for domestic violence. R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 169 (1992). The majority of states passed mandatory arrest laws in 1994. Most provisions were drafted with mandatory arrest language and a concept of the batterer regardless of sex, but arrest records would show that most batterers were male and most victims were female. "[T]he following states mandate arrest when there is probable cause to believe that a violation of a protection order has occurred": Alaska, California, Colorado, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002); see also ALASKA STAT. § 18.65.530(a)(2) (Michie 2002); CAL. PENAL CODE § 836(c) (West Supp. 2005); COLO. REV. STAT. § 18-6-803.5 (2004); KY. REV. STAT. ANN. § 403.760(2) (Michie 1999); LA. REV. STAT. ANN. § 14:79(E) (West 2004); MD. CODE ANN., FAM. LAW § 4-509(b) (Supp. 2004); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998); MICH. COMP. LAWS ANN. § 764.15b (West 2000); MINN. STAT. ANN. § 518B.01, subd. 14(e) (West Supp. 2005); MO. ANN. STAT. § 455.085(2) (West 2003); NEV. REV. STAT. ANN. § 33.070(1) (Michie Supp. 2003); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 1995); N.M. STAT. ANN. § 40-13-6(C) (Michie 1999); N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004) (to be repealed Sept. 1, 2005); N.D. CENT. CODE § 14-07.1-11(1) (2004); OHIO REV. CODE ANN. § 2935.03(B)(3) (Anderson 2003) (suggesting but not mandating arrest); OR. REV. STAT. § 133.310(3) (2003); 23 PA. CONS. STAT. ANN. § 6113(a) (West 2001); S.D. CODIFIED LAWS § 23A-3-2.1(1) (Michie Supp. 2003); TENN. CODE ANN. § 36-3-611(a) (2001); TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3), (b) (Vernon Supp. 2004–2005); UTAH CODE ANN. § 77-36-2.4(1) (2003); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West Supp. 2002); W. VA. CODE ANN. § 48-27-1001(a) (Michie 2004); WIS. STAT. ANN. § 813.12(7)(b) (West Supp. 2004).

The following states currently employ a pro-arrest standard when there is domestic violence regardless of whether a protection order has been violated: Alaska, Arizona, Connecticut, District of Columbia, Iowa, Louisiana, Maine, Massachusetts, New Jersey, New York, Ohio, Oregon, South Dakota, Texas, Utah, Washington, and West Virginia. Epstein, *supra*, at 1855 n. 42; see also ALASKA STAT. § 18.65.530(a)(1) (Michie 2002); ARIZ. REV. STAT. ANN. § 13-3601(B) (West 2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2004); D.C. CODE ANN. § 16-1031(a) (2001); IOWA CODE ANN. § 236.12(2) (West 2000) (requiring actual or intended injury to the victim before mandating arrest); LA. REV. STAT. ANN. § 46:2140 (West Supp. 2005); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (West 1998); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998) (characterizing arrest as a "preferred response" in the absence of a protection order); N.J. STAT. ANN. § 2C:25-21(a)(1) (West 1995); N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2008); OHIO REV. CODE ANN. § 2935.03(B)(3)(b) (Anderson 2003) (preferring arrest in response to domestic violence); OR. REV. STAT. § 133.310(6) (2003); S.D. CODIFIED LAWS § 23A-3-2.1(2) (Michie Supp. 2003); TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(4) (Vernon Supp. 2004–2005) (allowing, but not mandating, arrest); UTAH CODE ANN. § 30-6-8(2) (1998); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West Supp. 2001); W. VA. CODE ANN. § 48-27-1002 (Michie 2004) (allowing, but not mandating, arrest).

statement of women's equality before the law with the survivor worthy of state protection and the perpetrator worthy of collective condemnation.⁴ Because the law enforcement community effectively ignored violence against women, the BWM made criminal justice reform a key strategic component of their political agenda.⁵ Indeed, the Judiciary Committee of the United States Senate concluded that law enforcement's refusal to treat male intimate violence as a crime perpetuated such violence against women.⁶ The Judiciary Committee was kind; I would argue that police arrest avoidance operates collaboratively with the assailant in continuing such violence against women.

Part III discusses the legal disconnect between public policy and enforcement of mandates. The courts have done immeasurable violence to statutory schemes, which attempt to locate state accountability. *DeShaney v. Winnebago County Department of Social Services*⁷ laid the ground work for *Castle Rock* and *Burella*, whose combined effect is the annihilation of all things mandatory. Why? Because the absence of accountability renders "shall enforce" unenforceable. And unenforceable mandates create an *illusion* of protection which is worse than no protection at all.

The neutering of mandates is not confined to Constitutional torts. The denuding of mandates' power is further accomplished when we shield the state from accountability by blocking suits in common law negligence claims. Thus, the courthouse door is closed to battered women regardless of whether we are referencing constitutional claims or state tort claims against the state. Part III makes clear the demise of mandates.

4. There was not as much support for mandatory reporting by doctors to law enforcement because advocates believed that such a requirement was unenforceable and could be a barrier to women seeking needed medical attention. Indeed, only seven states have a proviso specifically requiring reporting to law enforcement in reporting statutes. See *supra* note 3 and accompanying text.

5. See Task Force on Family Violence, *Behind Closed Doors: The City's Response To Family Violence* (Office of New York Manhattan Borough President 1993) [hereinafter *Messinger Report*] (criticizing New York City's ineffective response to domestic violence and concluding that the system for helping battered women is putting them in further danger).

6. See, e.g., U.S. SENATE COMM. ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 103-138, at 41 (1993) [hereinafter VAWA SENATE REPORT 1993] ("[I]n over 85 percent of the family violence cases . . . police did not arrest her abuser. Moreover, family violence accounts for a significant number of murders in this country. One-third of all women who are murdered die at the hands of a husband or boyfriend.").

7. 489 U.S. 189 (1989).

In Part IV, I analyze the failure of the BWM to address the issues raised by *Deshaney*, *Castle Rock* and *Burella*. There is neither a regional nor national discussion on the issue of male intimate violence, mandates and state accountability. It is stunning that a recent U.S. Supreme Court case and a Third Circuit Court case have failed to raise either the ire or political voice of the BWM. In Part IV, I argue that this result is a direct consequence of one fact—there is no viable BWM as we move into the mid twenty-first century. There is no doubt that individual advocates, shelter programs, and coalitions are still fighting the good fight. But what is lacking is a cogent, cohesive, national, *political* strategy that can evolve from and devolve to localities to form a movement.

Part V, the conclusion, ends the article with a warning, a lamentation, and a hopeful trope. I cannot accept the political and legal terrain constructed by the courts and our collective silence.⁸ It is beyond comprehension that the Colorado Coalition Against Domestic Violence has refused to address the void left by *Castle Rock*, a case which is home grown, right here in Colorado. In Part V, I argue that the BWM needs to find its moral compass and return to its political and social roots so as to rebuild a movement that is once again a voice for those who are voiceless.

II. The Battered Women's Movement, Mandates, and a Feminist Vision of Equality

Any student of social movements knows that the BWM is an outgrowth of the second wave of feminism. Indeed, when I taught Womens Studies and Political Theory at the University of New York, I used the BWM as a prism through which to pass all things feminist, as students learned about power, politics, and patriarchy. And not unlike the women's liberation movement of the 1960s, the BWM was as varied as it was distinct because it infused a voice into the politics of the '60s that had been silenced—the voice of women.⁹

8. By our, I am referring to the BWM. I am and have been a part of this movement for over 20 years and I hold myself accountable for our failures, of which this silence is the most devastating.

9. See generally SHULAMITH FIRESTONE, *THE DIALECTICS OF SEX* (1970) (critiquing the SDS and SNCC movements as anti-female and overtly sexist.)

The BWM was "woman-identified,"¹⁰ radical, strategic, and intensely political.¹¹ Consonant with the reproductive rights strand of the Women's Liberation Movement, the heart of the BWM's politics was eradication of male intimate violence and reassertion of women's bodily integrity.¹² Bodily integrity meant being free from violence, perpetrated by individual men and by a culture steeped in misogynistic beliefs.¹³ It is important to remember that gender-motivated violence, such as male intimate violence or sexual assault, reflected a cultural belief system that subordinated the body as well as the rights of women to both patriarch and

10. By woman-identified, I am not referring to Lesbianism, although most of the movers and shakers in the nascent BWM were in fact lesbians. I am referring to what Adrienne Rich referred to as women-identified women, which means having one's primary allegiance to women. Who one "bedded," was important but not the defining characteristic of "women-identification." And while many feminist legal scholars locate women-identified as central to Catherine MacKinnon's writings, her analysis is derivative, flowing from the early radical lesbian feminist theorists such as Charlotte Bunch, Adrienne Rich, Judith Butler, and Shulamith Firestone.

11. See generally SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982). See also G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005) (examining the BWM and the conservative ideological position that has shaped movement strategy and politics since the early 1980s).

12. All law review articles have an annoying, if not distracting tradition, that of a plethora of footnotes. This tradition is about grounding our ideas in "authority," meaning something outside of the author's own thoughts so as to give legitimacy to our arguments and ideas. External authority not only demonstrates familiarity with well-worn ideas but confers authenticity on an author's beliefs. This article will not follow this tradition. The authenticity of my ideas, and I dare say their value, flows from memory. I am a member of the movement that I critique. And, as we say in law, I have first-hand knowledge of the events that I write about because I *lived* in the eye of the storm, shaped by the politics of the '60s, forged in the battles for liberation, as women, as gays, and as ethnic minorities. Consequently, much of what is written in Part II will be drawn from memory and from political experiences that shaped those memories.

13. See ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 2-47 (rev. ed., 1990) (maintaining that the principles of bodily integrity and self-determination are essential to the historical feminist view of reproductive freedom); Rosalind Pollack Petchesky, *The Body as Property: A Feminist Re-vision*, in *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION* 387 (Faye D. Ginsburg & Rayna Rapp eds., 1995) (tracing the development of women's sense of "self-ownership" across various cultures and time periods). Cf. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINIST THEORIZE THE POLITICAL* 385, 398-400 (Judith Butler & Joan W. Scott eds., 1992) (rejecting the views that champion women's proprietary rights in their bodies and arguing that such beliefs actually reinforce a definition of female sexuality as "violable property" and promote further violations of women).

Patriarchy. This is Feminism 101, regardless of whether one viewed herself as a liberal, socialist, or radical feminist. Clearly, race, class, and sexual identity combine with sex to restrict access to full citizenship and to the rights inherent in our being human. But to the foremothers of the second wave of feminism, misogyny was the nucleus of women's oppression, and such misogyny was located in both culture and law.

The primacy of "sex" as a political category was radical in and of itself. Why? Because the liberation movements of the nineteenth and twentieth centuries lacked a gender/sex analysis, whether the movement addressed the needs of workers, people of color, the poor, or sexual minorities. The yardstick was maleness, and although women were 50% of any group, the focus was on men. We were invisible.

The Women's Liberation and the Battered Women's Movements changed this.

The BWM made women's experience in the home an authentic political truth. Indeed the personal, shielded from public view by the veil of familial privacy, was political. The Women's Liberation Movement and the BWM transformed how we viewed not only the family but the very nature of violence. Patriarchal power in the family combined with violence against wives was a powerful method of social control. As MacKinnon notes, male intimate violence was merely the exercise of power granted to men because of their status (husband) and their sex (male).¹⁴ To the skeptic, I ask how else do we explain social acceptance of male intimate violence? How else do we justify the verity of the marital rape exemption, *legally* incapacitating wives from withholding consent to sex?¹⁵ To the early feminists, the public nature of private violence was both evident and worthy of collective concern.

14. See CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 42-44 (1989) (referencing John Stuart Mill's *The Subjection of Women* and discussing the power dynamics of male-female relationships).

15. John Stuart Mill recognized that the marriage certificate gave husbands license to physically and sexually abuse their wives. He wrote in 1859, "The state, while it respects the liberty of each in what specifically regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of family relations The almost despotic power of husbands over wives need not be enlarged upon. . . ." JOHN STUART MILL, ON LIBERTY & OTHER ESSAYS 113, 116 (John Gray ed., Oxford Univ. Press 1991) (1859); see also ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 35 (1987); *People v. Liberta*, 64 N.Y.2d 152 (N.Y. 1984) (declaring that the marital rape exemption in New York's penal law violated due process under the New York Constitution).

In the mid to late 1960s, advocates were aware of what I have termed "police arrest avoidance" (PAA). PAA occurs when police refuse to exercise discretion, preferring instead to treat all domestic violence cases the same, regardless of injury, by not arresting the perpetrator. And this "option" was policy not merely practice. Moreover, by the 1970s, the family courts—the usual forum for domestic violence cases—"had reduced these criminal assaults to problems of individual or social pathology."¹⁶ Not only did courts' individuate the violence, but they viewed it as the fault of women.¹⁷

Social pathology gained currency within law enforcement. The Law Enforcement and Assistance Administration (LEAA) created six model projects to train officers in "crisis intervention" to respond to domestic violence calls.¹⁸ The therapeutic professionals who designed the training and who urged crisis intervention believed that most cases involving intimate violence were in fact devoid of violence.¹⁹ Such incidents were viewed as "family squabbles," where the male partner was emasculated by the female partner.²⁰ Officers were to take on the role of "counselors and mediators, trained in the skills of crisis intervention."²¹ Arrest was perceived as totally inappropriate.

Training manuals, supported by LEAA money and used by the police, reinforced both sexist and ethnic stereotypes about who battered and why. As Dobash points out, women were depicted as "depressed, menopausal, dominating and 'likely to resort to physical violence.'"²² And use of physical force was depicted as common in certain ethnic groups.²³

Because the police historically treated male intimate violence as a private matter, the new protocols reinscribed a dangerous methodology that flattened the topography of the violence. Mediation, counseling, and

16. R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 169 (1992).

17. *See id.* at 155–56 (stating that one English magistrate went so far as to conclude that "the men who appeared before him for beating their wives were often 'tortured and taunted to the verge of madness' by women, and he indicted [sic] that it was only understandable that they should use violence").

18. *Id.* at 157.

19. *See id.* at 161–63 (finding that LEAA training resources taught police officers to conclude that most domestic disputes were nonviolent because the proponents of crisis intervention viewed these occurrences as "rarely involv[ing] violence").

20. *Id.* at 161.

21. *Id.* at 163.

22. *Id.*

23. *Id.* at 159.

diversion from the criminal justice system were the only responses by the police, regardless of the degree of violence perpetrated by the offender. Absent a loss of human life, crisis intervention and mediation were the only tools in the state's arsenal to address intimate violence. The "new" professional response, conflating police practices with psychological theory, legitimized traditional police behavior.

With the institution of the LEAA project, PAA was transformed into a viable strategy supported by a segment of the psychoanalytic profession and adopted by law enforcement policy makers. Arrest was not only not the preferred course of action, it was antithetical to what constituted appropriate state (police) action.²⁴ As a consequence, perpetrators were given a walk around the block, allowed to return home to terrorize again and again. Women and children were relegated to the shadows, destined to suffer in silence, outside the view and concern of the public. Against this backdrop, advocates raised the issue of statutory mandates.

In the 1970's a series of cases illustrated PAA. In New York, advocates sued the New York City Police Department, the Probation Department and the Family Courts.²⁵ The basis of this class action suit was not only PAA but also the failure of the courts and law enforcement to treat male intimate violence as a crime, worthy of state condemnation. Three thousand miles across the United States, in California, Oakland advocates filed suit against the police claiming that law enforcement was refusing to arrest perpetrators of male intimate violence.²⁶ These cases raised the issue

24. See *id.* at 161 ("Arrest was inappropriate for solving the complex social and psychological problems evident in these non-violent 'family squabbles.'"). By 1977, 70% of large police departments—those with one hundred staff members or more—were training police in crisis intervention. *Id.* at 162.

25. See *Bruno v. Codd*, 393 N.E.2d 976 (N.Y. 1979) (alleging a practice of discrimination and misconduct by the New York City Police Department for its failure to enforce controlling statutes and regulations against "wife beating").

26. *Scott v. Hart*, No. C76-2395 (N.D. Cal. filed Oct. 28, 1976) (describing a challenge that ultimately led to a settlement with police regarding the nonintervention of Oakland law enforcement in male intimate violence cases); *Hartzler v. City of San Jose*, 120 Cal. Rptr. 5, 7 (Ct. App. 1975) (dismissing a complaint against the City of San Jose police department for wrongful death because the department enjoys absolute immunity). Cf. *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528-29 (D. Conn. 1984) (denying the city's motion to dismiss). The court stated:

A man is not allowed to . . . abuse . . . a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not "automatically decline to make an arrest [solely] because the assaulter and his victim are married to each other."

Id. (quoting *Bruno*, 396 N.Y.S.2d at 976).

of mandatory arrest as one strategy to contest the conscious disregard that had been institutionalized in the court and law enforcement systems.

It is important to note that mandatory arrest was a strategy, not the sole strategy of the BWM. Indeed, advocates understood that the collective response to male intimate violence was framed by gender asymmetry, culturally embedded and systemic. Thus, the flash point for both discourse and action was equality or rather the inequality of women. Criminal justice was merely one system that needed fixing.

Since mandatory practices first evolved as a political strategy, the discourse among feminists has been marked by reluctance and anxiety concerning interaction with the state.²⁷ Such anxiety reflects more than ambivalence; it reveals the distrust that feminists held for law enforcement.²⁸ Because police are gatekeepers to the criminal justice system, they have enforced cultural prescriptions that are essentially gendered, raced, and classed.²⁹ Thus, the anxiety associated with mandatory arrest is emblematic of the paradox inherent in working with systems that have been the source of the problem.

Feminists appreciated that the police, as agents of the state, should be held accountable for failing to protect battered women. Yet they were also cognizant of the misuse of police power in marginalized communities and how these communities may respond to policies that mandated arrest in

27. See ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 182–84 (2002); see also Suzanne LaFollette, *Beware the State*, in THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR 537, 537–41 (Alice S. Rossi ed., 1973) (describing the life of Suzanne LaFollette and her emphasis on economic independence over state interference).

28. See SCHNEIDER, *supra* note 27, at 182–84; see also Elizabeth A. Stanko, *Missing the Mark? Policing Battering*, in WOMEN, POLICING, AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES 46, 63–65 (Jalna Hanmer et al. eds., 1989) (noting that feminist criticism of policing has had positive effects as departments have followed outside suggestions). For a discussion of the varying views of radical, conservative, and liberal feminism on the public/private dichotomy and how these views have helped frame the issue of domestic violence, see KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 37–47 (2003).

29. See John Hagan & Ruth D. Peterson, *Criminal Inequality in America: Patterns and Consequences*, in CRIME & INEQUALITY 14, 22–28 (John Hagan & Ruth D. Peterson eds., 1995) (examining attitudes and reports that correlate police actions with race, gender, and class); see also FLA. SUP. CT. RACIAL & ETHNIC BIAS STUDY COMM'N., "Where the Injured Fly for Justice": *Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida* 6–9 (Deborah Hardin Wagner ed., 1991) (finding that adult and juvenile minorities in Florida receive disparate treatment from law enforcement and recommending changes to police practices and state statutes). For a series of essays that view even the nomination of a Supreme Court Justice as an inherently racial and gendered process, see RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

domestic violence cases. Finally, feminists understood that "[p]olice action cannot by itself stem the tide of violence against women."³⁰ As Elizabeth Stanko notes, "To do so would require breaking its links with other aspects of social life that maintain and perpetuate women's subordination. Police protection within the context of male domination does not and cannot promise women autonomy."³¹

Notwithstanding deep apprehension, advocates placed mandatory arrest on the table as a political strategy. In 1994, shortly after the indictment of O.J. Simpson for the murder of Nicole Brown and Ron Goldman, a plethora of states passed mandatory arrest. With great fanfare, politicians embraced the mantra of the BWM, "Zero tolerance," and in thirty-two jurisdictions across the United States law enforcement discretion was removed in domestic violence cases. Now, where probable cause was present, police must arrest. The universe of potential options shrunk to one and one only, arrest the assailant—no ifs, ands or buts.

Or so we thought.

III. The Legal Disconnect: Severing Mandates from Accountability

My daughter understood, at a very early age, that in the absence of accountability she was free to act as she chose, with no regard for the consequences. She was painfully aware that accountability was all about responsibility for actions that she chose to undertake. My child understood something that I, as architect of New York's mandatory arrest law, failed to comprehend: Mandates in the absence of accountability is no mandate at all. In other words, without an accountability paradigm, "shall" could be construed as maybe, and mandates are merely theoretical and quite frankly meaningless.

Harsh, you say? Well, I can't explain it any other way. Where accountability is lacking, so is the force of law—and in this case the requirement that police arrest in domestic violence cases and in violations of orders of protection. What we failed to comprehend was how the confluence of a negative rights constitution with common law notions of duty would operate to neuter the force and effect of mandatory arrest and reporting statutes. We did not anticipate the damage that these two views

30. Stanko, *supra* note 28, at 67.

31. *Id.*

would have on enforceability of mandates, regardless of whether suits to enforce were brought in federal or state court.

Now we know.

A. *The Unholy Trilogy of Deshaney, Castle Rock and Burrella*

1. *Deshaney Re-examined*

Starting in 1985 with *Deshaney v Winnebago County*,³² the United States Supreme Court relegated the Fourteenth Amendment to the nether zone, denying to its citizens redress for state refusal to protect against domestic violence. In spite of evidence that the State of Wisconsin had knowingly returned five-year-old Joshua DeShaney to his abusive father, the Rehnquist Court found that the State's actions did not violate the little boy's substantive due process rights.³³ The Court characterized the cause of the violence as private because Joshua was put into a vegetative state by the actions of his father.³⁴ The majority disaggregated the State's act of returning Joshua to an abusive father from the harm and re-characterized state conduct as inaction.³⁵

Juridical wisdom treated the State as mere observer to Joshua's beating.³⁶ And as an observer, the Court found that no connection existed between the State and Joshua's injuries: no connection to the victim's

32. 489 U.S. 189 (1989).

33. See *id.* at 202. Joshua DeShaney was beaten by his father numerous times. *Id.* at 192–93. After one particularly vicious attack, Joshua was hospitalized. *Id.* at 192. Because of the severity of the attack, the State of Wisconsin refused to release the little boy back into the father's home absent an agreement where Child Protective Services would monitor the child's condition in the home environment. *Id.* As part of a contract between the County and the father, the State would make unannounced visits to check on the little boy. *Id.* On a number of occasions, Joshua's father refused to permit the case-worker to see the boy. *Id.* at 193. The State did not petition against the father in family court, nor did it remove the child. *Id.* at 192–93. Instead, it did nothing to enforce the agreement. *Id.* Subsequently, the child was beaten into a vegetative state. *Id.* at 193. Joshua's biological mother filed suit against the State of Wisconsin alleging that their actions violated the child's Fourteenth Amendment rights. *Id.*

34. *Id.* at 201–03.

35. *Id.* at 200–01.

36. See *id.* at 201 (stating that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them").

injuries meant there was no tie or connection to the victim.³⁷ Absent a connection to the plaintiff, the State could not have violated Joshua's rights.

Essentially, Rehnquist views the Fourteenth Amendment as "negative," meaning its purpose is to prevent state conduct that interferes with individual rights. The catch is that the Court views "conduct" as *either* passive or affirmative, and affirmative conduct is narrowly construed. For example, in *Deshaney*, the Court characterizes the cause of Joshua's injuries as "private," since the beating was administered by Joshua's father.³⁸ The state is off the hook because the direct cause, fist to child's head, repeatedly, was the father's conduct. Interpreted in this manner the state's conduct is recast as inaction. Where there is inaction or an omission to act, the plaintiff must prove that a duty via a special relationship existed between the victim and the state.³⁹ This is a true Catch-22 because once you characterize action as inaction it is almost impossible to create the necessary link between the injured party and the state.

But Rehnquist's analysis is fatally flawed. The State did act. It placed little Joshua in the zone of danger. Remember, the Winnebago Department of Social Services had placed a hospital hold on the boy after he had been beaten by his father.⁴⁰ Joshua was returned to his father only after his father agreed to allow Social Services into the home unannounced and at any time that the State chose to examine the child. We know that *Deshaney* refused admittance to his home on numerous occasions. We also know that the State did not file a petition, revoke the agreement, remove the child or place the child under the jurisdiction of family court.⁴¹ Here the State *chose* to return and leave Joshua in the home of a known abuser. As a result of this choice, Joshua was reduced to a vegetable.

Rehnquist's conception of affirmative conduct is rather interesting. He views the State's conduct as not only inaction but *legally* irrelevant to the harm. But think for a moment about negative/positive action or affirmative/passive conduct. If I am driving my car and I strike a bicyclist, one could say that I *failed* to apply the brakes. Yet, it would be just as correct to characterize my conduct as *continuing* to drive. Indeed, I would

37. See *id.* (holding that the "State had no constitutional duty to protect Joshua").

38. See *id.* at 195 (stating that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors").

39. See *id.* at 197 ("Such a duty may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals.").

40. *Id.* at 192-93.

41. *Id.*

argue that most acts have both "active" and "passive" components; how conduct is characterized lies in the eye of the beholder, not in fact. Unfortunately for Joshua, the Court's characterization of state conduct, while defying logic, denied him the protection he needed and deserved. Here, it was as if Winnebago County had placed Joshua in front of an oncoming train. While the State was not the sole cause or the immediate cause of the harm, it certainly contributed to it. Thus, the State's conduct *combined* with the father's to cause the harm, a fact that the Court refused to countenance.

The *DeShaney* decision effectively slammed shut the door to claims of substantive due process violations by the State except when the victim/survivor is in the State's *physical* custody. This crabbed notion of state action is the death knell for Fourteenth Amendment substantive due process claims, not only when battered women assert state failure to protect, but in cases where *any* person interposes such an argument.

The scholarship that followed *DeShaney* attempted to reconstruct the legal terrain so that state accountability was not ferreted out of the Fourteenth Amendment.⁴² Advocates and scholars alike crafted a theory that they thought would "link" battered women to the state, in other words create the connection that would make accountability possible. The centerpiece of the "theory" was statutory mandates coupled with court issued orders of protection in domestic violence cases. The reasoning was quite simple. Even though the Court had a crabbed vision of state conduct, scholars believed that a statutory mandate to arrest would provide the necessary predicate to trigger Fourteenth Amendment protection. Moreover, statutory mandates to arrest coupled with court mandated protective orders that incorporated "must arrest provisions," would certainly do the trick. Surely, the *DeShaney* Court did not craft a decision that would

42. See Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 569–81 (2006) [hereinafter Balos, *Domestic Violence Matters*] (arguing that civil protection order cases trigger a right to counsel because the state has undertaken sufficient action to meet the requirement of state action implicit in the Fourteenth Amendment); see also Caitlin E. Borgman, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1307 (1990) (arguing that orders of protection create the necessary link between battered woman and the state); Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1312–13 (1995) (stating that orders of protection constitute state action); Lauren L. McFarlane, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 958–60 (1991) (asserting that where orders of protection exist, state action exists).

sanction state conduct that consciously ignored legislative mandates, such as mandatory arrest?

We could not have been more wrong.

While we were terribly wrong, it is important to contextualize the decision to link mandates with accountability. In 1985, when *Deshaney* was decided, mandatory arrest was not on the horizon, much less a part of public policy. In fact, in *Deshaney*, there were no statutory directives that mandated a *specific* response by the state; discretion was still the better part of valor when it came to child protection. Unlike *Deshaney*, mandatory arrest severely limits the universe of options open to law enforcement by reducing it to one and only one option—arrest. Where probable cause is present—that either an order of protection has been violated or that a new offense has been committed by an intimate—the only "choice" is to arrest the perpetrator.⁴³ Elimination of police discretion was instituted because police refused to exercise that discretion. Indeed, both federal and state legislative bodies considered police arrest avoidance as not only real, but a critical factor in the continued abuse of women.⁴⁴

Castle Rock and *Burella* not only alter our thinking but remind us that *Deshaney*'s wall around the Fourteenth Amendment is impenetrable.

2. *Castle Rock and Burella: The Nails in the Coffin*

In *Castle Rock*, Justice Scalia, writing for the majority, held that the Colorado Legislature failed to create a Fourteenth Amendment property interest in the enforcement of an order of protection.⁴⁵ Scalia asserts, "We do not believe that these provisions of Colorado law truly [make] enforcement of restraining orders *mandatory*," because "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."⁴⁶ In thirty-two words, Justice Scalia invalidated not only the findings of the Judiciary Committee of the United States Senate, but the legislative history of thirty-two states as well. This is quite an amazing feat, even for the current configuration of this Court.

43. Colorado provides for either arrest, or where arrest is impractical, to secure an arrest warrant. See *infra* Part III.A.2.

44. See Miccio, *A House Divided*, *supra* note 11, at 273; see, e.g., VAWA SENATE REPORT 1993, *supra* note 6, at 38 (encouraging police arrest of abusers by law); *infra* note 48 and accompanying text.

45. See *Castle Rock v. Gonzales*, 545 U.S. 748, 760–62 (2005) (distinguishing examples of statutory language that have created rights in Colorado from the current case).

46. *Id.* at 759–61.

With the stroke of a pen, the Court wiped out the history of police arrest avoidance that characterized law enforcement conduct for over forty years. Rather than credit the findings of the Senate and thirty-two states, the Court chose to acknowledge the historic position of discretion in police practices. As Roger Pilon points out in a provocative examination of *Castle Rock*, tradition has trumped not only the text of the statute but the legislative history of two-thirds of the states.⁴⁷ And while Pilon raises an important issue about tradition, he mischaracterizes tradition as police discretion. What drives Scalia's decision to trump thirty-two jurisdictions' legislative history is not police discretion but adherence to the tradition of treating the Fourteenth Amendment as a negative rights provision. If there is any doubt that Scalia is invoking the specter of *Deshaney* and Rehnquist's negative rights paradigm, one need only examine the rationale put forth by the majority.

The Court concluded that (1) the Colorado Legislature really didn't mean "must" when it used the word "shall" more than five times in the arrest statutes; (2) the Legislature employed a process that was really discretionary, thereby placing its imprimatur on police power to decide; (3) Jessica Gonzales and her children were "indirect" beneficiaries of the state's mandatory arrest statute; and finally, (4) enforcement of a protective order doesn't fit what the Court considers a "property interest."

Such subterfuge does little to hide the real reasons for their decision, which will be discussed in section 4 of this Part. First, it truly strains the imagination to characterize "shall" as "maybe" or "maybe not." Frankly, if we follow the Court's logic, the tablets from Mt. Sinai are merely the Ten Suggestions as opposed to the Ten Commandments. Please, do not let my child know that honor thy father and mother is merely suggested behavior. Even if we take the Court's view at face value, their reliance on a 1980 ABA Report to support their "finding" reveals the moral, if not legal, paucity of their position. The Report cited by the Court was written in 1980 when mandatory arrest wasn't an idea, much less a concept. Indeed, it was not until 1978, that the UNITED STATES Government first considered male intimate violence a problem. In the report produced by the United States Civil Rights Commission, the Commission characterized police arrest avoidance as a major obstacle to abatement of male intimate violence.

⁴⁸ Then again in 1984, 1985, 1993 the UNITED STATES Attorney's

47. See Roger Pilon, *Town of Castle Rock v. Gonzalez: Executive Indifference, Judicial Complicity*, 2005 CATO SUP. CT. L. REV. 101, 104 (2005) (providing an overview of the Supreme Court's response to the *Castle Rock* case).

48. U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 20-

General's Office, the State Court Reports on Women and the Courts, and the UNITED STATES Judiciary Committee, respectively, produced reports which established both police arrest avoidance and the need to remove discretion from police.⁴⁹

When you combine the evidence of *systemic* police arrest avoidance proffered by the Federal Government with the State Courts Reports *and* the legislative history of thirty-two states, nationwide, one has to wonder why Justice Scalia preferred instead to rely on an outdated and repudiated report published by the ABA in 1980. While this is illustrative of the majority's ignorance of the issue—male intimate violence—acting on such ignorance is truly indefensible when the Court had in its control hundreds of amicus briefs that spelled out the findings of the various studies, reports and white papers conducted over the past thirty years.⁵⁰

22 (1978) ("Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to [a] call for help.").

49. *Id.*; see VAWA Senate Report 1993, *supra* note 6, at 45–46 (1993) (describing a particular case in which an investigating officer insisted that a victim who was stabbed with a screwdriver, raped, and sodomized by her attacker must have provoked the attack); see also William L. Hart, *Statement of the Chairman, in ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT* vi, vi–vii (1984) (reporting that a "victim of family violence is no less a victim than one set upon by strangers, and police are obviating their responsibility by refusing to arrest"); see, e.g., COLO. GENDER & JUST. COMM., COLORADO GENDER AND JUSTICE ANNUAL REPORT 8 (2000), available at <http://www.courts.state.co.us/supct/committees/genderjusticedocs/2000report.pdf> (noting the "tendency to blame victims continues and police fail to arrest"); COMM'N ON GENDER BIAS IN THE JUD. SYS., GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA (1991), available at <http://www2.state.ga.us/Courts/Supreme/ceadults.htm> (reporting that "[g]ender biased attitudes were demonstrated to be pervasive in the judicial and law enforcement system's handling of domestic violence cases"). For a comprehensive list of internet links to individual state-commissioned reports on gender bias in state courts, see NAT'L CTR. FOR STATE COURTS, RACE AND GENDER FAIRNESS IN THE COURTS: TASK FORCE, COMMISSION, AND COMMITTEE REPORTS, available at http://www.ncsconline.org/WC/Publications/KIS_RacEthStLnks.pdf.

50. See Brief for the Nat'l. Ass'n of Women Lawyers & the Nat'l. Crime Victims Bar Ass'n as Amici Curiae Supporting Respondent at 8–10, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278), 2005 WL 328201 (discussing the consequences of domestic violence and failure of police to enforce mandatory arrest statutes); Brief for the Am. Civil Liberties Union et al. as Amici Curiae Supporting Respondent at 17–22, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 328202 (explaining how the police further endanger victims of domestic violence when they fail to enforce protection orders); Brief for the Nat'l. Black Police Ass'n et al. as Amici Curiae Supporting Respondent at 27–30, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 328203 (discussing police protocol with respect to domestic violence); Brief for the Nat'l. Network to End Domestic Violence et al. as Amici Curiae Supporting Respondent at 19–30, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353608 (discussing pervasiveness of domestic violence and the likely increase in such violence that results from failure to enforce protection orders); Brief for AARP as Amicus

Second, the argument that Jessica Gonzales and her three little girls were indirect beneficiaries of the Colorado mandatory arrest bill is just ridiculous.⁵¹ Colorado and thirty-one of her sister states passed mandatory arrest because of, not in spite of, battered women and their children. Jessica and her three little girls, Katherine, Leslie, and Rebecca, were exactly the folks contemplated by Colorado, New York, California, Texas, Connecticut, etc., etc. To portray them as "incidental" is absolute folly. Jessica was a battered woman holding an order of protection issued by a court in the State of Colorado. Her children were derivative "holders" of the order. Thus, all three were entitled to enforcement of the order consistent with § 18-6-803.5(3)(b)(I).⁵² Jessica, Katherine, Leslie and Rebecca Gonzales were the direct beneficiaries of Colorado's mandatory arrest law; and the Court's attempt to wish this away clarifies the moral paucity of its holding.

Finally, Justice Scalia writes that Colorado's mandatory arrest law doesn't confer a property interest because, "seeking . . . an arrest warrant would be an entitlement to nothing but procedure."⁵³ And where there is a procedure there is discretion, thus the statute does not form the "basis for a property interest."⁵⁴ But Scalia is wrong.

Curiae Supporting Respondent at 4–10, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353692 (discussing domestic violence in the specific context of elder abuse); Brief for The Family Violence Prevention Fund et al. as Amici Curiae Supporting Respondent at 4–10, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353693 (discussing domestic violence and its consequences for children); Brief of Peggy Kerns, Former Member of the House of Representatives of the State of Colorado, and Tex. Domestic Violence Direct Service Providers, as Amici Curiae in Support of Respondent at 12–14, 19–21, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353694 (discussing the societal impact of domestic violence and the danger of allowing police too much discretion in enforcing protection orders); Brief of Natl. Coal. Against Domestic Violence & Nat'l. Ctr. for Victims of Crime as Amici Curiae Supporting Respondent at 12-17, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353985 (explaining police procedure and the increased danger to domestic violence victims that results from failure to enforce protection orders); Brief of Int'l Law Scholars et al. as Amici Curiae in Support of Respondents at 27–28, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 328200 (discussing the impact of police failure to enforce protection orders on U.S. treaty obligations).

51. *Castle Rock*, 545 U.S. at 766–67 (holding that "the alleged property interest here arises incidentally, not out of some new species of government benefit or service, but out of a function that government actors have always performed-to wit, arresting people who they have probable cause to believe have committed a criminal offense").

52. COLO. REV. STAT. § 18-6-803.5(3)(b)(I) (2004).

53. *Castle Rock*, 545 U.S. at 764.

54. *Id.*

I cannot believe that Justice Scalia lacks an understanding of the process to secure either an arrest or arrest warrant. There is nothing discretionary about either process; to be sure, these processes are anything but discretionary. Where there is probable cause that the respondent violated an order of protection, the police must arrest or seek a warrant.⁵⁵ If the police file for a warrant, and the filing is supported by probable cause, the court, in this instance, has no discretion whatsoever—it must issue the warrant.⁵⁶ Consequently, the universe is reduced to one option and one option only: arrest or get a warrant; Judicial and law enforcement discretion has been removed. For Scalia not to understand the function of arrest and issuance of arrest warrants is beyond comprehension.

In effect, the majority gutted Colorado's mandatory arrest law. If there was concern about the effect of the law or the issuance of orders of protection that carry with it arrest power, then the appropriate route would have been to amend the statute by either legislative act or by referendum.⁵⁷ The Court invaded the province of the Legislature effectively marginalizing the voice of the people. This is judicial activism at its worst; at best, it is ironic that the architect of this decision is a self-heralded states rights, strict constructionist, anti-"judicial activist" jurist.

The Court ran rough shod over a fundamental precept of American political theory; Jessica Gonzales had the right to governmental protection because as a member of the body politic she had delegated that enforcement to the government.⁵⁸ The Supreme Court denied her this right, and so much more.

55. *Id.*

56. *Id.*

57. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . ."); see also John Locke, *An Essay Concerning the True Original Extent & End of Civil Government*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 20–21 (Sir Ernest Barker ed., Read Books, 2008) (1690) ("The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it.").

58. See generally ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); JOHN RAWLS, A THEORY OF JUSTICE (1971); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

3. Burella: *A Reaffirmation of Castle Rock*

In 2007, the United States Court of Appeals for the Third Circuit ruled that Jill Burella did not have a procedural or substantive due process right to have officers enforce an order of protection, nor did she have a viable equal protection claim.⁵⁹ Although this ruling is confined to courts within the Third Circuit, it is a ruling from Hell. In one opinion, the Fourteenth Amendment *in its entirety* has been foreclosed to battered women and their children; Legislative enactment be damned.

I will not reiterate the facts. But the reader should know that the perpetrator in this case was a police officer, the survivor his wife, there was a pattern of abuse that the Philadelphia Police Department witnessed and/or had knowledge of,⁶⁰ and the perpetrator violated conduct requirements levied by the Police Department.⁶¹ It is also important to note that the statute in this case was even clearer than Colorado's, or using Scalia's lexicon, "more mandatory."⁶² In Pennsylvania, the Legislature did not insert the word "reasonable," but rather made it quite clear that, "[a] police officer or sheriff *shall* arrest" a defendant for violating an order issued under Chapter 23 of Pennsylvania Consolidated Statutes.⁶³ Moreover, the Pennsylvania Legislature *amended* the Pennsylvania Protection and Abuse Act, enacted in 1990 to clearly establish "must arrest."⁶⁴ In fact, the 1994 amendment removed the words "may arrest," and substituted *shall* arrest,

59. See *Burella v. Philadelphia*, 501 F.3d 134, 149–50 (concluding that even if her contentions are true, Jill Burella's constitutional rights to due process and equal protection of the law were not violated, despite the "terrible deficiency" of the Philadelphia Police Department revealed by her allegations).

60. See *id.* at 138 (stating that officer Reamer served the protective order on the perpetrator and not only witnessed officer Burella's violation of that order but permitted him into the marital home, and that Reamer did not arrest Burella as required by statute).

61. See *id.* at 137–38 (summarizing George Burella's repeated threats to kill his wife, violence toward his wife and others; Jill Burella's efforts to obtain police protection and legal protection orders, and police failure to comply with those orders to charge her husband for his abuse).

62. See *id.* at 151 (noting that in *Castle Rock*, the Court "held that the Colorado legislature failed to create a 'truly . . . mandatory' arrest statute because 'shall' had been used elsewhere in Colorado arrest laws to mean 'may,' and because the statute explicitly gave police officers the option of arresting or seeking an arrest warrant" (quoting *Castle Rock*, 545 U.S. at 761)). While I am paraphrasing Justice Scalia, I am in no way endorsing, agreeing with, or condoning his interpretation of the word "shall."

63. 23 PA. CONS. STAT. ANN. § 6113 (A) (2003) (emphasis added).

64. See 23 PA. CONS. STAT. ANN. § 6113 (1990) (stating that "[a]n arrest for violation of an order issues pursuant to this chapter may be made without warrant upon probable cause whether or not the violation is committed in the presence of the police").

making it crystal clear that once the order is violated the police have no other option but to arrest.

Not so.

Using *Castle Rock* to conclude that Burella, not unlike Jessica Gonzales, did not have a property interest in the enforcement of the order of protection, the Third Circuit Court relied on the "deep-rooted nature of law enforcement discretion, even in the presence of seemingly mandatory legislative commands."⁶⁵ Justice Fuentes uncritically adopted all of the arguments from the *Castle Rock* majority and reaffirmed the Supreme Court's *observation* that Colorado, and by implication her sister states, did not vest in the petitioner a right to request much less demand an arrest.⁶⁶ It is clear that the Third Circuit as well as the United States Supreme Court have little if any knowledge about male intimate violence. Mandatory arrest was considered strategic by the BWM, because it *shifted* the focus from individual battered women to the State. Rather than place a battered woman in the position of demanding or requesting arrest, mandatory arrest made that "decision" the province of the state. This was an important consideration because advocates believed that if the assailant viewed the State as the culprit, retaliation against women and children might be abated. Moreover, any demand or request for arrest by battered women was obviated by this statutory scheme: Burella and Gonzales' protective orders made any request/demand redundant and unnecessary because arrest was statutorily mandated. The Third Circuit elevated *Castle Rock* by animating an erroneous *observation* with the force of law.⁶⁷

4. *What Were They Thinking?*

Judge Ambro's concurrence in *Burella* correctly lays out the terrain after *Castle Rock*. He concludes that "my colleagues are correct to suggest that a legislature would be hard pressed to draft around *Castle Rock* in light of the well 'established tradition of police discretion [that] has long co-existed with apparently mandatory arrest statutes."⁶⁸ While I concur with

65. See *Castle Rock*, 545 U.S. at 761 (providing precedential support that even mandatory statutory language fails to deprive officers of all discretion to make arrests).

66. See *Burella*, 501 F.3d. at 145-46 (stating that petitioner fails to address the Supreme Court's observation in *Castle Rock* that even a statute mandating an arrest does not imply that a particular domestic violence victim is entitled to an arrest).

67. See *id.* at 145 (utilizing *Castle Rock* to obviate requests or demands for arrest).

68. *Id.* at 153 (Ambro, T., concurring in part) (quoting *Castle Rock*, 545 U.S. at 760).

his conclusion, Justice Ambro made the same mistake as the majority in *Castle Rock*. *Castle Rock* was the first case to raise the issue of *statutory* mandates and police discretion, thus it is incorrect to claim a well established tradition. Remember, *Deshaney* was not about mandates; in fact, there were no mandates which defined or coerced behavior on the part of Child Protective Services.⁶⁹

So what's up here? Why are the courts conjuring up "well established traditions" when none exist, torturing the common usage of the word "shall," and disregarding the legislative history of thirty-two states, the United States Senate and Federal Governmental Agencies?

Castle Rock and its progeny are the convergence of three important theories: the negative rights doctrine as applied to the Fourteenth Amendment, the rarified doctrine of sovereign immunity, and the application of the Public Duty Doctrine (PDD) in state tort cases.

a. *The Negative Rights Doctrine*

In *DeShaney*, Justice Rehnquist opined that "nothing in the language of the Due Process Clause requires the State to protect the life, liberty and property of its citizens against invasion by private actors. [It] is a limitation on the State's power to act."⁷⁰ Consequently, Justice Rehnquist starts from the position that the Constitution is a negative rights document. If the Constitution is a negative rights document, and specifically the Fourteenth Amendment, there is no duty on the part of the state to protect citizens from what is perceived as "private conduct." Essentially, the modern approach to Fourteenth Amendment Due Process protection is "keep your laws off my body."⁷¹ This is why we get the decision in *Harris v. McRae*,⁷² where the Court held, *inter alia*, that since the state did not create poverty it has no

69. See generally *DeShaney v. Winnebago Cnty Dep't of Soc. Services*, 489 U.S. 189 (1989).

70. *Id.* at 195.

71. "Keep Your Laws Off My Body" is a time-honored bumper sticker which first appeared in the 1970s.

72. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) (holding that laws that make it more difficult for an indigent woman to get an abortion do not violate the constitution because poverty is not a suspect class). In *Harris v. McRae* the question before the court was whether Title XIX of the Social Security Act required states to pay for medically necessary abortions that would otherwise be unreimbursed under the Hyde Amendment, an Annual Appropriations bill, given that the restriction of federal funding would place a greater burden on an indigent woman's ability to procure an abortion. *Id.* at 301.

duty to provide poor women with abortions.⁷³ Thus, the State can restrict access to abortions by cutting off the flow of funds to poor women who wish to exercise their Fourteenth Amendment liberty interest.⁷⁴ And because the "negative" aspect of the theory of negative rights adopts a restrictive view of state action, legal guarantees move beyond women's reach.⁷⁵

Chief Justice Rehnquist's adoption of the negative-rights standard is rooted in principles of federalism that foster clear and unequivocal lines of demarcation between state and federal power. As Laurence Tribe notes, Rehnquist wants to maintain separate spheres, of state and federal authority, recognizing only a "coterminous" intersection between state and federal power when the state violates clearly defined negative restraints.⁷⁶ For Rehnquist, a negative rights approach safeguards the delicate balance that federalism constructs, and perhaps more importantly, preserves.⁷⁷

Yet Rehnquist's narrow interpretation of the due process clause is antithetical to its origins. The Reconstruction Amendments, and specifically the Due Process Clause of the Fourteenth Amendment, were enacted to provide citizens' protection regardless of whether the harm was created by the state or by private actors.⁷⁸ As Michael Gerhardt notes,

73. See *id.* at 328 (White, J. concurring) ("As the Court points out, *Roe v. Wade* did not purport to adjudicate a right to have an abortion funded by the federal government, but only to be free from unreasonable official interference with private choice.").

74. See *id.*; see also Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330–32, 334 (1985) (discussing how the abortion funding cases raise questions about negative versus positive rights).

75. See MACKINNON, *supra* note 14, at 164–65. MacKinnon writes:

If one group is socially granted the positive freedom to do whatever it wants to the other group, to determine what the second group will be and do this rather than that, no amount of negative freedom legally guaranteed to the second group will make it equal to the first. For women this has meant that civil society, the domain in which women are distinctly subordinated and deprived of power, has been beyond the reach of legal guarantees.

Id.

76. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 551–53 (2d ed. 1988) (explaining the separate spheres of state and federal authority and the points where they intersect); see also *U.S. v. Cruikshank*, 92 U.S. 542, 550–51 (1875) ("The people of the United States resident within any State are subject to two governments: one State and the other National It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both.").

77. *Id.*

78. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 13 (3d ed. 2006) (explaining that the Reconstruction Amendments were written to protect individual citizens from state and non-state actors).

"[t]he dual purposes of the fourteenth amendment permeating through *all* of its provisions were (1) to provide constitutional protection for the fundamental or 'God-given' or 'natural' rights of all United States citizens by (2) radically altering the design of federalism . . . to invest the federal government with complete authority to punish the infringement of such rights by either state or private action."⁷⁹ By 1873, with the *Slaughterhouse* case⁸⁰ the erosion of Fourteenth Amendment protection begins. In 1985 with *DeShaney*, its promise is weakened. By 2007, the Fourteenth Amendment is invisible.

2. *Sovereign Immunity, the Public Duty Doctrine (PDD) and Conceptions of State Accountability*

Sovereign immunity is a common-law doctrine rooted in the British common-law system where the Crown was immunized from suit.⁸¹ Sovereign immunity bars all claims against the state because, "there can be no legal right as against the authority that made the law on which the right depends."⁸² The doctrine of sovereign immunity shields state actors, including police, from liability even when state conduct constitutes negligence.⁸³ It can be used to shield state actors in federal constitutional or state tort claims. The PDD is a tort doctrine created by statute that limits immunity while at the same time creates a narrow conduit through which suits against the state must pass. The PDD operates as a qualified immunity doctrine because, unlike sovereign immunity, it permits some claims against the state to go forward.

79. Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 427 (1990) (emphasis added).

80. Clearly *Slaughterhouse*, which eviscerated the Privileges and Immunities Clause, and *DeShaney*, which neutered substantive due process protection, are in play. But both turn the logic and history of the amendment on its head. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Howard).

81. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

82. *Id.* at 353.

83. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 657 (1980) (holding that the public should accept the loss resulting from the negligence of government employees because the public, and derivatively individuals, benefit from government and the services they provide).

The PDD first appeared in the United States in *South v. Maryland*,⁸⁴ a case involving police failure to protect an individual from a marauding mob.⁸⁵ The Court in *South* held that the police are not liable for injuries to an individual member of the community, even where the police unreasonably neglected to assert their authority.⁸⁶ The PDD has been widely adopted by the states to shield the actions of its political subdivisions from suit and from public scrutiny.⁸⁷ The principle underlying this doctrine is quite clear; the police owe a duty to the public, not to individual citizens.⁸⁸ More importantly, however, police are treated no differently than the common man/woman. Just as there is no duty to rescue, to protect or to prevent crime on the part of Jane Doe, there is no duty to rescue, protect or prevent crime on the part of the police absent a special relationship.⁸⁹ Consequently, no particularized duty of care is allocated to individuals in the absence of a "special relationship."⁹⁰ And, as

84. 59 U.S. 396, 403 (1855) (holding that a sheriff's refusal to assist a citizen who was in danger did not breach or restrain any of the citizen's rights under the constitution).

85. See *id.* at 401 (stating the facts of the case that an individual citizen asked for assistance from a sheriff but the sheriff refused assistance).

86. See *id.* at 403 (stating that no breach or restraint of rights occurs where law enforcement maliciously refuse to act).

87. See, e.g., Amy Felman, Comment, *The Special Duty Doctrine: A Just Compromise*, 31 ST. LOUIS U. L.J. 409, 418–19 (1987) (discussing the adoption of the PDD by various state courts); Cynthia Zellner MacKinnon, Note, *Negligence of Municipal Employees: Re-Defining the Scope of Police Liability*, 35 U. FLA. L. REV. 720, 724–29 (1983) [hereinafter MacKinnon, *Negligence of Municipal Employees*] (discussing cases accepting or rejecting the PDD).

88. See MacKinnon, *Negligence of Municipal Employees*, *supra* note 87, at 725 ("Because police have a general duty of public protection, no liability follows a breach of that duty to an individual.") (citation omitted); see also *Ryan v. State*, 656 P.2d 597, 599–600 (Ariz. 1982) (removing the "public/private duty doctrine," but noting that certain areas of immunity for state actors remained protected) *overruled by* *Johnson v. Superior Court In & For County of Pima*, 763 P.2d 1382 (Ariz. App. Div. 1988); *Shore v. Town of Stonington*, 444 A.2d 1379, 1381–82 (Conn. 1982) (discussing the distinction between public and private duties); *Riss v. City of N.Y.*, 240 N.E.2d 860, 861 (N.Y. 1968) ("[T]here is no warrant in judicial tradition or in the proper allocation of the powers of government for the courts, in the absence of legislation, to carve out an area of tort liability for police protection to [individual] members of the public.").

89. *South*, 59 U.S. at 401, 402–03 (1855); see also *supra* notes 87–88 and accompanying text.

90. See THOMAS M. COOLEY & D. HAVERY HAGGARD, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 2 § 300, at 385–89 (4th ed. 1932) [hereinafter COOLEY ON TORTS], (articulating the underlying principles of the PDD); see also *South*, 59 U.S. at 403. The Court stated:

The declaration in the case before us . . . alleges no special individual right, privilege, or franchise in the plaintiff, from the enjoyment of which he has been

the cases strongly suggest, the current trend is to find no special relationship, even when police fail to follow procedures that are specifically enumerated by statute or departmental mandates.⁹¹

Judicial policy considerations which justify the PDD are imported from conceptions of sovereign immunity. First, suits against the state or its sub-divisions (municipalities) would deplete the public coffers and result in diminished public services,⁹² and second, by substituting the judgment of the court for that of the public official, the court would be in terrain where it lacked expertise.⁹³ Moreover such "second-guessing" would result in the usurpation of legislative prerogative.⁹⁴

Let's take each justification one at a time. The depletion of public coffers argument is quite simple: if liability claims against the state are allowed and successful, potential judgments could severely reduce public

restrained or hindered by the malicious act of the sheriff. . . . Consequently, we are of opinion that the declaration sets forth no sufficient cause of action.

Id.; *Riss* 240 N.E.2d at 860–61 (N.Y.) (finding that the city could not be held liable in tort for police failure to protect an individual member of the public in the absence of an undertaking of responsibilities to that particular individual); *Williams v. State*, 664 P.2d 137, 139, 140 n.3 (Cal. 1983) (asserting that the general rule is "[a] person does not, by becoming a police officer, insulate himself from any of the basic duties which everyone owes to other people, but neither does he assume any greater obligation to others individually. The only additional duty undertaken by accepting employment as a police officer is the duty owed to the public at large."); *see, e.g., Ryan*, 656 P.2d at 599 (characterizing the distinction between discretionary and ministerial acts as "semantic legerdemain");

91. *See supra* note 90 and accompanying text.

92. *See, e.g., Gerneth v. City of Detroit*, 465 F.2d 784, 787 (6th Cir. 1979) ("[T]he imposition of . . . liability . . . would impose an undue burden upon municipal corporations, and might in fact substantially interfere with the licensing and investigatory functions of such . . . corporations."); *see also Casey v. Geiger*, 499 A.2d 606, 614 (Pa. Super. Ct. 1985) ("[I]t is questionable how long any municipality could maintain its parks, playgrounds and swimming pools. Due to the cost of increased insurance premiums and added police protection, municipalities will lack the necessary funds to provide recreational services. The end result is that the welfare of the public will suffer.").

93. *See, e.g., MacKinnon, Negligence of Municipal Employees, supra* note 87, at 726 ("Local government decisions which affect large groups of people involve a delicate balancing of conflicting interests. Respecting this balance, some courts prohibit tort suits against municipal officers to avoid inappropriately substituting judicial judgment for that of the legislature.").

94. *See, e.g., id.* at 727 (noting that those who support the PDD often assert that abandonment of the doctrine would lead to judicial usurpation of legislative power); *see also Porter v. City of Urbana*, 410 N.E.2d 610, 612 (Ill. App. Ct. 1980) ("[A] public rather than private duty provides little if any consolation to the aggrieved individual. Yet violations of the public duty may be punished in criminal proceedings. The rule is sometimes justified on the somewhat murky distinction between proprietary and governmental functions; police work falls within the latter category." (citing *Keane v. City of Chicago*, 240 N.E.2d 321 (1968))).

monies earmarked for services.⁹⁵ Such a reduction would result in either cutbacks or elimination of much needed public services.⁹⁶ Indeed, Amici for the Town of Castle Rock sounded this alarm in their briefs in opposition to Ms. Gonzales's claim of a property interest in her order of protection.⁹⁷ Apparently, as one author noted, the "floodgates" would open and the states would be bankrupted.⁹⁸

But this "chicken little the sky is falling" argument is hyperbole. As Justice Keating noted in *Riss*: "no municipality has gone bankrupt because it has had to respond in damages when a policeman causes injury through carelessly driving or in the thousands of situations where . . . the State . . . has been held liable for the tortuous conduct of their employees."⁹⁹ Moreover, the City of Los Angeles did not go bankrupt due to the Rampart's scandal which resulted in hundreds of judgments against the LAPD for manufacturing evidence against defendants in drug sweep cases.

What we do know and what is not subject to unfettered conjecture is the cost of male intimate violence to the family, to the community and to the State. Male intimate violence is the leading cause of injury to women between the ages of fifteen and forty-four, and studies conducted after the 1992 public hearings held by the Judiciary Committee, confirm that male intimate violence is very costly in terms of hospitalization, lost wages, court costs, and incarceration.¹⁰⁰ Justice Souter noted that Congress estimates the cost of domestic violence at three billion dollars a year.¹⁰¹ And as Joan Zorza points out, male intimate violence is the primary factor in women's and children's homelessness.¹⁰²

95. See EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.04.25, at 199 (West 3d ed. 2003) (1904) (discussing the negative effects of imposing liability on municipalities); see generally MacKinnon, *Negligence of Municipal Employees*, *supra* note 87, at 727-29; COOLEY ON TORTS, *supra* note 90, § 300.

96. *Casey*, 499 A.2d at 614.

97. Brief of the Natl. League of Cities and Municipalities as Amicus Curiae on behalf of Petitioner, Town of Castle Rock, at 24, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278) (on file with author).

98. *Riss v. City of New York* 22 N.Y. 2d 579

99. *Id.* at 585 (Keating, J., dissenting).

100. See, e.g., NAT'L INST. OF JUSTICE, *FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY* 59-61, available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (reporting that violence against women is predominantly intimate partner violence and indicating the social costs of such violence).

101. *U.S. v. Morrison*, 529 U.S. 598, 632 (2000) (Souter, J., dissenting).

102. Joan Zorza, *Woman Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 384 (1994) (citing *The Violence Against Women Act: Hearing on S. 2754 Before the S. Comm. on the Judiciary*, 101st Cong. 37 (1990)).

The cost of male intimate violence is documented: the cost to the State as a result of lawsuits for state torts or Constitutional torts is purely speculative and a not-so-sophisticated "what if game." In spite of the facts, courts and legislatures rely on the latter claim in refusing to reform or reinterpret either the Fourteenth Amendment, sovereign immunity or the PDD doctrine. As a result, battered women and their children are barred from filing suit. This not only harms battered women but the community as a whole.

For the battered woman, there is the illusion of protection, which is worse than no protection at all. Not unlike Jessica Gonzales and Jill Burella, millions of battered women nation-wide rely on the promises made by the State *vis-a-viz* mandatory arrest and other statutory mandates which prescribe a particularized set of behaviors from police and other state actors. And yet, when police or other state actors refuse to follow mandates, there is no remedy for battered women and their children. As a result of crabbed notions concerning state accountability, responsibility and duty, state actors can continue to ignore mandates by choosing to do nothing. This outcome creates an untenable situation because it dupes the public into thinking that "we" are taking steps to abate male intimate violence while the opposite is in fact occurring.

New York conducted a state-wide study about the effectiveness of mandatory arrest and the criminal justice system. Six years after the passage of its mandatory arrest law, the New York State Office for the Prevention of Domestic Violence (OPDV) found that a significant number of cases continued to fall out of the system with virtually no consequences to the offender and little safety to the victims.¹⁰³ The Interim Report reported that the range for bail in four of eight research sites was \$200–500 resulting in only 9–14% of suspects remaining in jail.¹⁰⁴ In six of the eight sites studied, very few convictions resulted in more than fines, although probation and jail-terms were options.¹⁰⁵ And in the two remaining sites, offenders received almost no punishment because over half of the sentences imposed were conditional discharges.¹⁰⁶ Yet, as noted by the evaluators in

103. STATE OF NEW YORK, DIVISION OF CRIMINAL JUSTICE SERVICES, OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, THIRD INTERIM REPORT TO THE GOVERNOR AND LEGISLATURE 51 (2000) [hereinafter INTERIM REPORT].

104. *Id.* at 46.

105. *Id.* at 48.

106. *Id.* at 46.

New York, fines have not been shown to reduce recidivism.¹⁰⁷ Conditional discharge is problematic because it provides neither supervision nor control over the offender.¹⁰⁸ At the very least, the data from New York challenges the notion that punish and protect are consistently part of a criminal justice repertoire.

As for arrest, OPDV reported low arrest rates in cases where suspects fled the scene. The evaluators found that in all eight sites studied, none of the police departments were "structured to routinely pursue suspects who fled."¹⁰⁹ Yet two of the research sites were New York City precincts, which have follow-up procedures for investigation and apprehension of suspects who have left the scene in stranger cases.¹¹⁰ At the very least, follow-up should have taken place in these two jurisdictions.

It appears that the obstacle to police follow-up in suspect-absent cases is one of police attitude, not limited resources or structural impediments. For example, the Interim Report recommended that the legislature "make clear that mandatory arrest extends to suspect-absent cases."¹¹¹ This recommendation implies that police arrest avoidance is due to the absence of explicit language mandating arrest in suspect-absent cases.

Yet, suspect presence at the scene is not the trigger for mandatory arrest, nor is it required by the state's general arrest statutes.¹¹² To trigger mandatory arrest in domestic violence cases, one must find probable cause that a felony or violation of a stay away order has been committed by a member of the same household, and household is broadly construed. Consistent with the state's general arrest statute, there is no requirement for a site arrest, nor is there a bar to subsequent off-site arrests. Indeed, arrests are made routinely in suspect-absent stranger cases.¹¹³

107. *Id.*

108. *Id.* at 48.

109. *Id.* at 4.

110. *Id.* at 2.

111. *Id.*

112. N.Y. CRIM. PROC. LAW § 140.10(1)(b) (McKinney 2004) (authorizing a police officer to arrest a suspect "when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise"). And reasonable cause is defined as probable cause. *Id.*

113. As a former New York City prosecutor, I was aware of numerous arrests made by police after the suspect fled the scene. If an arrest was not made within a short time following the initial investigation, it would be referred to the Detective Bureau where it would be assigned for further investigation and possible arrest. In fact in New York City, the NYPD has a form—the DD-5, which is a Detective Follow-Up Form; so much for no subsequent procedures after the initial investigation. In one suspect-absent case that I handled—which was a domestic violence case—I dispatched the District Attorney Detective

There appears to be a new twist to police arrest avoidance, the practice police departments engaged in during the 1970s and 1980s prior to the institution of mandatory arrest. During that period, police routinely refused to arrest offenders even when police witnessed the violence because they believed such acts were private.¹¹⁴ Such conduct by police was the reason mandatory arrest was instituted in the jurisdictions—to correct police abuse of discretion. Now more than thirty years after this issue first came to light police are engaging in similar tactics by finding an imagined loophole in the legislation.

Rather than investigate and arrest, police in the eight jurisdictions have passed this responsibility on to the survivor. If an arrest is to be made, it is her responsibility to file for and secure either a warrant or summons.¹¹⁵ But mandatory arrest was instituted as a protective measure, thereby removing the survivor from the arrest process. The Interim Report's findings suggest that current police practices have compromised not only survivor autonomy but her safety.

In California, refusal to arrest is equally pervasive and pernicious.¹¹⁶ In *Zelig v. County of Los Angeles*,¹¹⁷ the California Supreme Court reversed the court of appeals, leaving in place the trial court's dismissal of a case involving a battered woman murdered by her husband in the courthouse waiting room.¹¹⁸ While the outcome is disturbing, it is the reason for the outcome that is disquieting.

Squad to arrest an alleged batterer in a *Lords and Taylor* department store. This arrest was made under the NYPD mandatory-arrest procedures in domestic violence cases—procedures that were part of the *Bruno v. Codd* settlement agreement. The NYPD procedures subsequently became the foundation for the statewide mandatory-arrest law.

114. See *Bruno*, 396 N.Y.S.2d at 976 (alleging police failed to act on domestic abuse "even [when] the physical evidence of the assault [was] unmistakable and undenied"); see also *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (alleging a lower form of protection is afforded to victims of domestic abuse).

115. INTERIM REPORT, *supra* note 103, at 2.

116. In 2005, California Attorney General Lockyer released a report that found that police arrest avoidance is epidemic in the state. Press Release, State of Cal., Office of the Attorney Gen., Attorney General Lockyer Report on Domestic Violence Finds Criminal Justice System Is Failing to Protect Victims, *Families: AG's Task Force Makes 44 Recommendations to Reduce Domestic Violence* (July 26, 2005), <http://caag.state.ca.us/newsalerts/2005/05-060.htm> (on file with author). While I applaud Attorney General Lockyer for his diligence and for the recommendations, I am struck by the fact that not one of the recommendations called for an overhaul of the PDD or California's Tort Claims Act. Once again, accountability falls off the radar screen.

117. 45 P.3d 1171 (Cal. 2002).

118. *Id.* at 1175–80.

The court reinforced the no-duty rule, as that rule applies to state actors and the prevention of crime.¹¹⁹ Citing *Williams v. State*,¹²⁰ the court held that protection from crime was not required because the nature and extent of police protection is best left to political branches.¹²¹ The court referenced Government Code Section 845, passed by the California Legislature to limit municipal liability, which "grants a general immunity for failure to provide police protection or for failure to provide enough police protection."¹²² Moreover, the court opined that the California Tort Claims Act was intended to restrict rather than expand governmental liability.¹²³ And, in noting the comments of the California Law Revision Commission, the court commented that the intent of the legislature in passing the Tort Claims Act was to continue, not withdraw, immunity.¹²⁴

The effect of *Zelig* is that the general no-duty rule applies unless a special relationship exists, and special relationship in "protection cases" has been narrowed to situations where police voluntarily assumed a duty to provide a particular level of protection and failed or undertook an affirmative act that increased the harm.¹²⁵ And "affirmative act" follows the same logic as "affirmative" when claiming a Fourteenth Amendment violation by the State. The existence of an order of protection or the existence of a statutory mandate does not create the duty. Indeed, in Colorado, the Governmental Immunity Act specifically states that mandates do not constitute "duty," the necessary predicate that triggers responsibility on the part of the State.¹²⁶

119. *Id.* at 1184–85, 1191. The California Tort Claims Act shields a municipality from liability for its own conduct "except as otherwise provided by statute," or where harm occurs due to a state actor's misconduct that occurred during the scope of his or her employment. CAL. GOV'T CODE § 815 (West 1995).

120. 664 P.2d 137 (Cal. 1983).

121. *See Zelig*, 45 P.3d at 1181.

122. *Id.* at 1191 (quoting CAL. LAW REVISION COM. com., 32 WEST'S ANN. GOV. CODE (1995 ed.) foll. § 845, p. 452); *see also* CAL. GOV'T CODE § 845 ("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.").

123. *Zelig*, 45 P.3d at 1192.

124. *Id.* at 1193.

125. *See id.* at 1183 (stating that a duty may arise if a special relationship exists that gives someone a right of protection).

126. *See* COLO. REV. STAT. § 24-10-106.5 (2001) ("The adoption of a policy or a regulation to protect any person's health or safety does not give rise to a duty of care on the part of the State."). One could argue that mandates are more than an "adoption," of a policy or regulation, in that it requires specific conduct and, therefore, a duty to act in a proscribed

California and Colorado created statutory mandates that failed to amend tort claims acts which codified the PDD and conceptions of qualified sovereign immunity.¹²⁷ As a result the "mandate" in statutory mandates does not create a duty for state actors to act consonant with the statutory scheme, whether that scheme is mandatory arrest, reporting or transport. As Gary Schwartz notes, the expansion of duty, and therefore negligence claims, has not been replicated in the public sector.¹²⁸

The second justification for the PDD and conceptions of immunity seems misplaced. The shield that protects police was constructed so that courts would not usurp legislative prerogative, specifically immunity

manner, but I doubt that *if* the court was aware of this section it would put its imprimatur on location of a duty.

127. *Id.*; see also CAL. GOV'T CODE § 815 (West 1995) (stating that, 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"). New York employs a four-factor test to determine whether police conduct is actionable in negligence. New York looks at whether (1) the municipality has assumed an affirmative duty to protect; (2) there is awareness on the part of police that inaction could lead to harm; (3) there is direct contact between the police and the victim; and (4) the victim justifiably relied on police promises. All four factors must be present to find a special relationship. See *Cuffy v. City of N.Y.*, 505 N.E.2d 937, 940 (N.Y. 1987). In contrast, Minnesota considers four distinct factors to determine whether a duty arises between an individual citizen and police officer: (1) actual knowledge of the dangerous condition; (2) whether there was reasonable reliance on the governmental unit's representations and conduct that caused the person to forego alternatives to protect herself; (3) whether an ordinance or statute set forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and (4) whether the governmental unit used due care to avoid the risk of increasing the harm. Minnesota courts are careful to note that the factors are not exhaustive nor do they create a "bright line test." See *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806–07 (Minn. 1979); see also *Radke v. County of Freeborn*, 694 N.W.2d 788, 794 (Minn. 2005) (employing the four factor inquiry articulated in *Cracraft* to determine if a special duty existed).

128. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 619, 640–43 (1992) (explaining that courts have been construing tort liability in a way that has halted its expansion); see also TERRANCE F. KIELY, MODERN TORT LIABILITY: RECOVERY IN THE '90s (1990) (discussing *Deshaney* and how that decision "casts serious doubts about the utility of civil rights actions" in the area of tort liability). One of the most interesting cases which expands duty is *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), which held that mental health professionals have a duty to warn or to take other reasonable steps to protect a third party when a patient presents a serious danger of violence to that third party. While the court expanded a duty of care to parties that were not in any relationship with one another, it failed to include campus police within the ambit of duty to warn. This is particularly instructive because in *Tarasoff*, the campus police were instructed to hold the patient for a psychiatric evaluation to determine if he should be civilly committed under California law. They did not; instead, the patient/perpetrator was released, subsequently murdering plaintiff's daughter Tatiana Tarasoff. *Id.* at 341.

statutes such as the Colorado Governmental Immunity Act¹²⁹ and the California Tort Claims Act.¹³⁰ In both of these jurisdictions, however, we have mandatory arrest statutes, and in the case of California a mandatory transport protocol implemented by the San Jose Police Department, which states, "[o]fficers shall assist victims of domestic violence . . . in making arrangements to transport the victim to an alternative shelter."¹³¹ In relation to mandatory arrest, the legislature *has* spoken and it requires that police exercise no other option than arrest. The problem rests with the legislatures' failure to amend immunity statutes so they comport with the intent of the mandatory arrest provisions.

Some readers may argue that, in and of itself, imposition of a mandate does not give rise to a legal duty. Indeed that was the position of the court in *Benavidez v San Jose Police Department*.¹³² In *Benavidez*, the court found that the protocol did not create a duty to transport; rather, it could be used as evidence of a breach,¹³³ and the court of appeals agreed.¹³⁴ But this position defies logic. The common interpretation of "duty" is "what you have to do," or "responsibility," or "obligation."¹³⁵ If truth be told, "duty" is synonymous with "must"¹³⁶ or its statutory equivalent "shall."¹³⁷ No attempt at obfuscation will alter or change its meaning, even if attempted by a state trial court or the United States Supreme Court. Indeed, the Colorado

129. COLO. REV. STAT. § 24-10-106.5 (2004).

130. CAL. GOV'T CODE § 815 (West 1995).

131. See *Benavidez v. San Jose Police Dept.*, 84 Cal. Rptr. 157, 160–61 (noting that *Benavidez* testified in a declaration in opposition to defendant's motion for summary judgment that she specifically asked to be taken to a shelter, but the police officers did not respond to her inquiry) (quoting the 1993 City of San Jose Police Duty Manual and the Police Chiefs' Domestic Violence Protocol for Law Enforcement); see also SAN JOSE POLICE DEP'T, GENERAL ORDER [ON DOMESTIC VIOLENCE] § L2194.40 (1986) (on file with author); G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 137–42 (2000) [hereinafter *Miccio, Notes*] (discussing the *Benavidez* case).

132. See *Benavidez*, 84 Cal. Rptr. 2d at 167 (finding no special relationship existed requiring the police to protect the victim from *Benavidez*).

133. See *Miccio, Notes, supra* note 131, at 141–42 (discussing the three factors used by the trial court).

134. See *Benavidez*, 84 Cal. Rptr. 2d at 159, 167 (explaining that without a finding of a special relationship the police owe no duty to the victim and without a duty to breach, there can be no cause of action for negligence).

135. ROGET'S II THE NEW THESAURUS 317 (3rd ed. 1995).

136. *Id.*

137. See BLACK'S LAW DICTIONARY 1143 (8th ed. 2005) (stating the definition of "shall" as "has a duty to").

Legislature understood this when it specifically included the "no duty proviso" as part of its Governmental Immunity Act.¹³⁸

The justification that underlies the various configurations of immunity is antithetical to the conceptions of responsibility that frame statutory mandates. It is time that we either reject immunity or mandates because as it now stands, the existence of both renders mandates unenforceable regardless of whether battered women seek redress in federal or state court. As Deborah Rhode notes and the Supreme Court acknowledges, "the right to sue and defend in the courts . . . is the right conservative of all other rights and lies at the foundation of orderly government."¹³⁹ In 2009, this right is lost to women and children battered by husbands, fathers and paramours . . . and by an irresponsible system.

IV. The Battered Women's Movement (BWM): Morally and Politically Purposeless.

On March 20, 2009, a reunion of sorts was held at St. John's Law School, which brought together the leading feminist scholars and law professors during the past thirty years who have influenced theory and the law on male intimate violence cases. In attendance were the first generation, Professors Sarah Buel, Donna Coker, Holly Maguigan, Elizabeth Schneider, and advocate, lawyer, and writer Joan Zorza; the second generation, Professor Cheryl Hanna, Elaine Chiu, Emily Sack, and myself; and the third generation, represented by Professor Carolyn Bettinger-Lopez. The purpose of the conference was to "think outside the box" and to discuss possible strategies to combat domestic violence in the twenty-first century. I was proud and humbled to be part of this group, many of whom were mentors and role models as I moved through law school and up the academic food chain.

In the Belson Moot Court Room on March 20th were the scholars who crafted workable defenses for the women who fought back,¹⁴⁰ raised the importance of a coordinated community response to male intimate

138. See COLO. REV. STAT. § 24-10-106.5 (2004) (making explicit that a "public employee shall not be deemed to have assumed a duty of care where none otherwise existed by the performance of a service or an act of assistance for the benefit of any person").

139. *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907); see also Deborah Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1799 (2001) (quoting *Chambers*, 207 U.S. at 148).

140. Professors Elizabeth Schneider and Holly Maguigan.

violence,¹⁴¹ brought to life prosecution strategies within the framework of due process,¹⁴² created a new legal standard in child protective proceedings when battered women were charged with failure to protect for failure to stop the abuse to themselves,¹⁴³ developed a new paradigm for the use of international law in homegrown male intimate violence cases,¹⁴⁴ crafted federal, state, and local legislation aimed at abating male intimate violence,¹⁴⁵ and infused accountability into statutory schemes.¹⁴⁶ These women were instrumental in creating legal doctrine, strategy, and public policy that put male intimate violence on the political as well as the legal radar screen. And, they brought their work into the classroom by developing courses and casebooks on domestic violence, law, morality, and accountability and conceptions of social justice.

Why do I feel a need to tell this story? Because all of us had to admit, on this day in March 2009, that we are still discussing the same issues raised in the 1970s—perhaps with more sophistication—but identical issues, all the same. And we faced the sad fact that the BWM is morally and politically adrift, or perhaps—purposeless.

What happened?

A. From Radical Feminists to Agents and Agencies of the State: Or How a Movement Was Transformed into a Network of Social Service Agencies

In Part II, I introduced the reader to a brief history of the BWM. One needs to understand the historical moorings of this movement to grasp how it has regressed, or at the very least, lost its all-important political "edge" and relevancy.

The BWM¹⁴⁷ was the product of the social movements of the 1960s that challenged conceptions of power based on race, sex, and sexual

141. Professors Donna Coker and Sarah Buel.

142. Professors Cheryl Hanna and Sarah Buel.

143. Professor Kris Miccio.

144. Professor Carolyn Bettinger-Lopez.

145. Professors Schneider, Maguigan, Coker, Buel, Miccio, Hanna, and Zorza.

146. Professor Miccio.

147. I am well aware of the complexity of the women's movement in general and the battered women's movement in particular. The mere fact that the ideological basis spans an enormous political spectrum demonstrates its textured nature. Notwithstanding this political reality, there is a thread that unites all of the ideologies—the existence of patriarchy as a macro-organizing force. It should also be noted that though the early movement incorporated a race analysis, it did not consistently address this issue in its methodology.

orientation.¹⁴⁸ This movement was integral to the women's liberation movement because it challenged male hegemony over women's bodies in the home. It made the personal very political and blurred the cultural and legal distinction between "public and "private" while developing an ideology that contested the appropriation of women's bodies, challenged conceptions of male supremacy in the family, and analyzed how the individual power of the patriarch was supported and legitimized by the state.¹⁴⁹ In other words, it exploded the myth that the family was a safe

Though there were shelters that addressed ethnic and racial asymmetry, such as La Casa de Las Madres, Casa Myrna Vazquez, which was started by a multiracial group of women in Boston, there was not a coherent ethnic or racial analysis regarding shelter organization; shelters' methodologies constituted staff, programs, and selection of issues. As the shelters became "professionalized," the chasm between methodology and a race-ethnic consciousness widened. Yet it is incorrect to characterize the battered women's movement as a white women's movement. This notion is incorrect because it makes invisible the women of color who were instrumental in its formation and because it marginalizes those women within the movement who struggled over conceptions of ideological and methodological inclusivity. Finally, women-of-color groups that addressed issues of gender asymmetry in the ethnic civil rights movement and racism in the women's movement influenced the discourse. The Combahee River Collective (Collective), perhaps the most notable of the women-of-color groups, challenged conceptions of patriarchy and race on such issues as intimate violence, abortion rights, and sterilization abuse. The Collective was comprised of black lesbian feminists, but unlike the white lesbian separatist feminists of that era, the Collective did not align with the politics of separatism. Instead, it built alliances with progressive black men in addressing issues of gender, class, and racial violence. The Collective served as a powerful reminder of the connections between race, ethnicity, and gender in the oppression of women and ethnic minorities. Indeed, Kimberle Crenshaw's work on "intersectionality," is neither new nor novel; it is in fact derivative of the theoretical framework first articulated by the women in the Combahee River Collective. See The Combahee River Collective, *A Black Feminist Statement*, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 362, 365-66 (Zillah R. Eisenstein ed., 1979) (describing the Combahee River Collective's beliefs); see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1262-65 (1991) (asserting that shelters marginalize battered minority women because of the shelters' focus on the dominant racial group); SCHECHTER, *supra* note 11, at 61 (describing the shelter's kitchen as an emotional battlefield of racial mixing).

148. GLORIA I. JOSEPH & JILL LEWIS, COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES 63-65 (1981); Dale Carpenter, *The Limits of Gaylaw*, 17 CONST. COMMENT. 603, 612-13 (2000) (reviewing WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)); Deb Friedman, *Rape, Racism & Reality*, 5 QUEST: A FEMINIST Q. 40, 40-41 (Summer 1979); Selma James, *Sex, Race and Working Class Power*, in SEX, RACE AND CLASS 9, 9 (1975) (on file with author); *Third World Women: The Politics of Being Other*, 2 HERESIES: A FEMINIST PUBLICATION ON ART & POL. 1 (1979) (on file with Author); E. Francis White, *Listening to the Voices of Black Feminism*, 18 RADICAL AM. 7, 7-9 (1984).

149. Diversity of thought within the feminist movement in general, and the battered women's movement in particular, is striking. Differences of thought were distributed along a political spectrum that included liberal, socialist, Marxist, radical, and lesbian feminism.

haven for women and children and it made this violence a *political* and *cultural* issue.

The nucleus or backbone of the BWM was the shelters. In fact, it would be fair to characterize the BWM as a shelter movement. Susan Schechter in her ground breaking book published in 1982,¹⁵⁰ documents the phenomenon commonly referred to as the shelter movement; and not unlike the rape crisis movement of the early 1970s, the BWM understood that safety and individual and systemic accountability were important components of any political strategy. Moreover, by situating male intimate violence within a cultural paradigm, the battered women's movement focused on altering the social conditions that produced, created, and supported such abuse. In the lexicon of the early movement, what needed fixing was not the survivor but the culture. Shelter programs and the nascent coalitions that formed in the late 1970s and early 1980s crafted an agenda that focused on social as well as legal change.¹⁵¹

It is fascinating that the early shelters survived, much less thrived, since they were cash poor and lacked a sound funding base. Shelters were

See generally FEMINIST THEORY: A CRITIQUE OF IDEOLOGY (Nannerl O. Keohane et al. eds., 1982) (compiling essays about feminist theory spanning several systems of thought). Each ideological category constructed a political paradigm that located the source of women's subordination as either a consequence of rights inequality, class, control of capital or the means of "[re]production, or sex hegemony." Yet, all of the ideological positions included patriarchy as either constitutive of, or in collaboration with, other social categories in the subordination of women. Thus, regardless of label, patriarchy was a critical component of women's oppression.

150. *See* SCHECHTER, *supra* note 11 and accompanying text and accompanying text.

151. Coalitions sprang up nationwide. Of particular interest were coalitions in New York, Colorado, and Illinois. The Chicago Abused Women's Coalition (CAWC) started a legal newsletter that identified gender asymmetry in law enforcement. *See* SCHECHTER, *supra* note 11, at 71 (describing the CAWC and its effect on gender asymmetry in law enforcement). Additionally, in the first two years of its existence, CAWC spoke to hundreds of community groups, women's organizations, and professional agencies. *Id.* Their presentations attempted to dispel the myths of survivor blaming, to identify the broader social conditions that created the abuse, and to challenge mental health professionals to avoid pathologizing women's choices. *Id.* The Coalition of Battered Women's Advocates of New York City and the New York State Coalition Against Domestic Violence began lobbying legislators to change laws that restricted court access to women. *See* NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, ABOUT THE COALITION, *available at* <http://www.nyscadv.org/about.htm> (highlighting public policy services that promote judicial responses to domestic violence). The Colorado Coalition (Denver) began to work with local law enforcement in examining unequal treatment of battered women by police. *See* CO. COALITION AGAINST DOMESTIC VIOLENCE, LAW ENFORCEMENT TRAINING MANUAL v-vi (2d ed., 2003), *available at* http://www.ccadv.org/publications/law_enforcement_manual_11-03.pdf (recalling that police treated domestic violence less seriously than other crimes in the past).

funded by community members who donated cash, clothing, furniture, and food.¹⁵² Shelter workers were often formerly battered women who staffed programs, drawing upon their expertise as battered women. Thus, credentials were not an M.S.W or a law degree; credentials were acquired via the school of hard knocks. Battered women taught each other and they taught us—the advocates who fell outside the ambit of their collective experience.

For example, Women's Advocates, a shelter program in St. Paul, Minnesota, emerged from a consciousness-raising (CR) group, in which participants felt the need to "do something" for battered women.¹⁵³ The women in the CR group first developed legal materials to instruct women on what to do if battered.¹⁵⁴ Then, armed with individual pledges of \$350 from women throughout the community, the CR group rented a small apartment for sheltering battered women and their children.¹⁵⁵ Fifteen-hundred miles away, in New York, women opened their apartments and convinced others to do the same in establishing a number of safe houses to shelter women and their children.¹⁵⁶ This cluster of apartments subsequently became Sanctuary for Families, one of the largest shelter programs in New York State and nationally.

Safe homes sprang up across the United States throughout rural, urban, and suburban America. Not unlike the underground railroad of the nineteenth century, advocates, many of whom were formerly battered women, created a network of individual safe homes to help women escape the violence and oppression that had defined their lives.

The advocates turned to women within their community for economic, social, emotional, and political support.¹⁵⁷ What was characteristic about the movement at this stage of development was its self-reliance. Community women created the power base for shelters. Power was derived

152. See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 189 (1987) (stating that in addition to these things, community members also donated office space); SCHECHTER, *supra* note 11, at 62–63.

153. *Id.* at 62.

154. See *id.* (describing the legal materials and the grants received to create them).

155. See *id.* at 62–63 (describing the sources of funding).

156. Telephone Interview with the late Sarah Burke, first Board President, Sanctuary For Families, Inc. (Summer 2004).

157. Advocates were also unwilling to accept state funds due to state approbation of male intimate violence and concern over issues of co-option and control. This became a key issue as the movement developed politically and organizationally. See SCHECHTER, *supra* note 11, at 93–98 (discussing the "mixed blessing" of money).

from the group, and in this way women learned a unique lesson: power was generative, relational, and defining—both individually and collectively.¹⁵⁸

I do not idealize the early shelters. I recognize that shelter workers and residents clashed over internal politics, ideological positions, and cultural questions particular to ethnicity and class. Yet the methodology employed did much to "empower" women, regardless of role, ethnicity, or class.¹⁵⁹ And unlike the modern shelters, professional credentials were not a proxy for effectiveness as a shelter staff member. There was real currency in being a survivor. Survivors supported, taught, encouraged, challenged, and cajoled one another. More importantly, survivors performed the same tasks as workers in configuring shelter life. Women's self-determination, a key organizing principle, was practiced through the egalitarian traditions employed by the advocates.

Yet such equality would be sacrificed in the latter part of the twentieth century.¹⁶⁰ With the influx of money from federal, state and local governments, the shelters experienced both an ideological and methodological shift. Additionally, "once the issue of battering gained legitimacy and funding was made available, more established organizations took over the issue grassroots women had worked so hard to raise."¹⁶¹

The shelters formed by a feminist politic were forced to abandon the non-hierarchical paradigm that shaped organizing principles. Decision making would be vested in a Board of Directors and an Executive Director. Consensus and shared decision making among workers and residents were shelved. As a result, residents were transformed into "clients" with no

158. See DONILEEN R. LOSEKE, *THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE* 29–30, 149–151, 154 (1992) (exploring the relationship between unique individuals and the collective representation of the "battered woman").

159. The early shelters were often plagued by internecine struggles involving ideology and strategy. Because the feminist shelters stressed consensus, such struggles were corollaries of structural dynamics. Additionally, as Pleck correctly emphasizes, the most radical shelters oftentimes collapsed because of limited finances and no viable funding stream. Inadequate funding was a consequence of the political nature of the shelters, not of shelter politics. See PLECK, *supra* note 15, at 190–93 (examining the transition of the first shelters from self-help organizations to social agencies).

160. *Id.* at 190–94 (illustrating how the involvement of private and governmental funding sources, in turn, contributed to the conservatism of shelter ideology and methodology).

161. *Id.* at 75; see also Lois Ahrens, *Battered Women's Refuges: Feminist Cooperative vs. Social Service Institution*, 3 *RADICAL AM.* 41, 44–47 (1980) (arguing that the new "professionalized" social service institution [was] divorced from the community" and had failed to consider the "societal, cultural, and political implications of why women are the ones in the family so often beaten").

decision making power and workers were turned into staff, with limited decision making power. And workers who lacked traditional credentials, such as social work degrees, were either demoted or let go. The hierarchical or corporate model of governance was the key organizing principle, principally dictated by the funding agencies. Egalitarianism was replaced by hierarchy, and political purpose was replaced by psychological imperatives. Not unlike traditional social service agencies, the shelters reinterpreted women's needs to be problems of "low self-esteem," and not the far-reaching claims for the social and economic prerequisites of independence.

The shelters had lost their historical and political moorings, and such dislocation altered a movement's vision. Put another way, the BWM had been co-opted.

2. Colorado as Case in Point

The Colorado battered women's community has not addressed the issues that *Castle Rock* raises. It has not had a discussion about state accountability, the effect of mandates, the Governmental Immunity Act, or the construction of the mandatory arrest statute passed by the Colorado Legislature in 1994. All of these issues are critical to conceptions of protection of battered women and their children. But Colorado is not alone. There haven't been meaningful, or even non-meaningful, discussions about *Castle Rock* in the various state coalitions or the National Coalition.

Why?

In 2007, a conference call took place among scholars and representatives of various state coalitions. During the call, questions about the *Castle Rock* case were raised; specifically, what were the plans of the various coalitions regarding the cultural reading of the U.S. Supreme Court decision, namely the unenforceability of mandates?¹⁶² All of the representatives responded that the case was "difficult," "hard to understand," and the discussion was aborted.

I would agree with my sisters that this case is difficult. I would also agree that the position of the Court in *Castle Rock* is difficult to understand in light of the legislative history, both at the state and federal levels, concerning mandates in domestic violence cases. I would also concur that

162. I was one of the advocates-turned-scholars who participated in the conference call. I also raised the issue concerning *Castle Rock*.

planning a political strategy is both complex and intricate. Yet none of the reasons put forth legitimize *doing nothing*.

Indeed, it took one hundred and forty years to enfranchise women and give us a political voice. The fact that the women's vote was attacked by the Church, the State, and powerful folks did not deter the suffragists from taking on this issue. Women marched, went on hunger strikes, were beaten, jailed, and ostracized because they dared to defy what American society believed was the "natural order of things" as ordained by Divine Ordinance.¹⁶³

Those women, and kindred men, transformed conceptions of gender and the appropriate role of men and women in the family and the body politic. This was truly a cultural revolution where sex/gender roles were reconstituted.

During the Second Wave of Feminism, the feminists of the '60s took the work started by the suffragists a step further. Regardless of their ideological positions, Second Wave feminists challenged pre-ordained values that structured cultural, political, economic, and social roles. The Marxist/Socialist Feminists challenged Marx's conclusion that housework was non-productive because it was non-wage labour.¹⁶⁴ As a result, the Congress of Neighborhood Women and the group 9-5 advocated for wages for housework. The Radical Feminists challenged patriarchy as an organizing principle in the home, in the labour market, and in politics by setting up women (womyn) only communes, businesses, and publishing houses.¹⁶⁵ The Liberal Feminists contested gender asymmetry in pay by advocating for comparable worth.¹⁶⁶ *All* challenged male hegemony in the family and the right to violence accorded males in our culture.

163. *Bradwell v Illinois*, 83 U.S. 130, 141 (1872) *see also* *Muller v Oregon*. 208 U.S. 412, 426 (1908) ("That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."); BILL SEVERN, *FREE BUT NOT EQUAL: HOW WOMEN WON THE RIGHT TO VOTE 74-77* (1967).

164. *See generally* BATYA WEINBAUM, *THE CURIOUS COURTSHIP OF WOMEN'S LIBERATION AND SOCIALISM* (3d ed. 1999).

165. The Kate Millet space constructed in upstate NY is an example of a commune, while Olivia Records and Olivia Cruises are examples of women-owned businesses.

166. I have named just a few areas contested by the Second Wave feminists. There were challenges to Freudian Psychology, to the architects of women's body (such as Michel Foucault), and to the portrayal of women in advertising. For more on this subject, see JULIET MITCHELL & SANGAY K. MISHRA, *PSYCHOANALYSIS AND FEMINISM: A RADICAL REASSESSMENT OF FREUDIAN PSYCHOANALYSIS* (2d ed. 2000). *See also* JANA SAWICKI, *DISCIPLINING FOUCAULT: FEMINISM, POWER AND THE BODY* (1991).

During the Second Wave of Feminism, the Women's Liberation Movement took the standard from the suffragists and forced policy changes that affected collective thought and conduct in relation to women in the home and in the body politic. Not unlike their sisters and brothers in the eighteenth and nineteenth centuries, members of the Women's Liberation and Battered Women's Movements were ridiculed, jailed, and in some instances raped and murdered for their beliefs and for their political activism.

Difficult? Hell yes!

So why have we become passive and dismissive? First, the co-optation of the shelters has had a profound effect on political organizing and strategizing. For many in the BWM, the issue of economic support from the government or from private foundations lacking in a feminist politic was cited as the chief reason for the ideological shift.¹⁶⁷ Quite simply, one does not bite the hand that feeds. While this is definitely an issue, it carries no weight in Colorado, because the Colorado Legislature gives not a dime to DV shelters. And while Colorado advocates support a bill that would funnel money to their programs, in this economic climate such a bill will be hard pressed to pass during the 2008–2009 legislative session. The "don't bite the hand that feeds you" excuse is a non-starter, at least in Colorado.

It seems that advocates in Colorado, at least those still willing to talk about *Castle Rock*, believe that taking on the Governmental Immunity Act is politically unfeasible. If this was the standard that guided feminists from the first or second wave, I doubt that I would be a professor at a law school, or an "out" lesbian or even a former prosecutor from the Bronx District Attorney's Office. Surely, gender roles, sex-role stereotyping, repeal of marital rape exemptions, and criminalization of male intimate violence would be aspirational.

If political feasibility was the yardstick that guided political activism, we would be hard pressed to believe that an African-American would be able to sit in the front of the bus, much less ascend to the presidency. And it is doubtful that mining companies, nuclear power plants, or white collar offices would give a thought to occupational safety issues on the job. And if feasibility governed political action, the labor union, women's liberation, racial/ethnic liberation, and gay/lesbian/bi-sexual/transgendered liberation movements would be illusory as opposed to a real part of United States

167. Discussion with advocates in New York, California, and Colorado in the summer of 2005.

history. All of these movements crafted political agendas and actions that were difficult and unfeasible because they contested the roots of racial, ethnic, sexual, gender, and class asymmetry in our lives and our laws. They contested what Howard Zinn characterized as the web of power.¹⁶⁸

Political activism carries with it risk: the risk of damage to one's reputation, loss of acceptance from or approbation by the power brokers, and perhaps exile to a cultural gulag. The feminists and suffragists from the past recognized and acknowledged this reality. They persevered, however, because achieving women's liberation from homes marked by terror or accomplishing access and parity in male-dominated occupations was more important than individual recognition or approbation by the state. To these feminists, "failure was impossible" because attainment of the political goals that defined a movement was of greater importance. In 2009, we have become risk-averse or perhaps identified too closely with the power elite. As a result, our moral and political compass is skewed.

Susan B. Anthony, Sojourner Truth, Audre Lorde, and Florence Kennedy would be ashamed of us. Why? Because after *Castle Rock*, our silence marginalizes violence against women by male intimate partners and transforms Jessica Gonzales' pain into purposelessness.

V. *If Not Now, When?*

"When I dare to be powerful, to use my strength in the service of my vision, then it becomes less important whether or not I am unafraid."¹⁶⁹

The BWM needs a new feminist vision that honors our past while transforming our future. By honoring our past, I am referencing our understanding of patriarchal power in the home and in civil society. How this power is actualized is through intimate violence in the home and lack of accountability by the state for the perpetuation of male intimate violence. This contextualizes the violence and correctly frames it as the confluence of individual and state action. Jill Burella, Jessica Gonzales, and Adela Benevidez were harmed by the actions of their husbands/boyfriends and by the state. And our message? The state does not get a pass because of the ignoble tradition of non-accountability protected by sovereign immunity, the PDD, or a negative rights interpretation of the Fourteenth Amendment.

168. *See generally*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT (2003) (telling the stories of the American people whose beliefs and actions set them apart from the perceived common culture of the United States).

169. AUDRE LORDE, THE CANCER JOURNALS 15 (1980).

Accountability is not the moral, legal, or political equivalent of *unfettered* state power. Rather, it forces the state to account for its conduct. Within the context of mandatory arrest, accountability demands responsibility for choosing to abide by or to ignore statutory or departmental mandates. *How* the state should be held accountable is both a local and national issue.

Regardless of jurisdiction, however, abatement of the violence, adherence to due process standards, and protection of women's autonomy and lives should be the overall guiding principles. And if our principles force us to reevaluate the efficacy of statutory mandates, we must be willing to engage this process. Consequently, the BWM needs to account for its political, legal, and cultural choices.

By transforming our future, the BWM's vision should accommodate a critique of generic violence in our culture. Violence against women by male intimate partners is merely part of the violence that defines our culture. The Second Wave feminists understood this and linked violence against women to the violence of poverty,¹⁷⁰ the violence of sex role stereotyping,¹⁷¹ the violence of war and United States imperialism,¹⁷² the violence of racism, sexism, homophobia, and classism,¹⁷³ and finally the violence of enforced silence and invisibility.¹⁷⁴

170. See The Combahee River Collective, *supra* note 147; FEMINIZATION OF POVERTY: ONLY IN AMERICA? (Gertrude Schaffer Goldberg & Eleanor Kremen eds., 1990) (looking at intersections of poverty and gender from global perspectives); see also JEAN BAKER MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (2d ed. 1986) (stressing the need to fundamentally reevaluate how women see themselves and re-conceptualize the understanding of male and female roles).

171. See also WILLIAM POLLACK, REAL BOYS RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD (1999) (challenging the conventions of raising boys through a toughening process, instead promoting a fuller development of emotional maturity). See generally MILLER, *supra* note 170.

172. See ZILLAH R. EISENSTEIN, HATREDS: RACIALIZED AND SEXUALIZED CONFLICTS IN THE 21ST CENTURY (1996) (exploring the politics of war and hatred, especially as it relates to ethnic conflicts and the post-Communist landscape); FRANTZ FANON, BLACK SKIN, WHITE MASKS (Charles L. Markmann trans., 1967) (framing the concept of a black psyche in a white world).

173. See SIMON DEBEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., 1953) (containing an exhaustive analysis of woman as Other and the violence this conception engenders); see also BUT SOME OF US ARE BRAVE: ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN: BLACK WOMEN STUDIES (Gloria T. Hull et. al. trans., 1982) (exploring the integration of race/gender analyses); CHARLOTTE BUNCH, LESBIANISM AND THE WOMEN'S MOVEMENT (1975) (examining the inclusion/exclusion of lesbians in the women's movement); CHARLOTTE BUNCH, PASSIONATE POLITICS: FEMINIST THEORY IN ACTION (1987) (situating the interrelationship between the asymmetry of race/sex/class).

174. See TILLE OLSEN, SILENCES (1978) (exploring how marginalization of people

If the BWM decides to develop a more comprehensive politic, which explores and contests state sanctioned violence in both the home and civil society, it will need to understand the roots of such violence. As MacKinnon notes, war, poverty, sexual slavery, intimate violence, and the "-isms," are formed by, and formative of, a culture where power is denied to the many and the exclusive province of the few.¹⁷⁵ And axes of domination are constructed by race, class, gender, and sexual orientation. The subordinate/dominant paradigm is about power and it is along this fault line of power that a patriarchal right to violence in the family is constructed. Taking MacKinnon's theory a step further, when the state allows male intimate violence to remain unchallenged, it operates as a cultural accomplice to the violence. At the very least, it is a cause of the harm suffered by women and their children.

To reclaim its place among purposeful social and political movements, the BWM must commit to contesting state power whenever that power is used to subordinate women, and in a broader sense, whenever the state chooses to use its power as a means of social control. Yet, crossing ideological boundaries is difficult and a contested strategy. During the second wave of feminism, there was some resistance to integrating a race/class/gender analysis into feminist ideology and methodology.¹⁷⁶ Feminist theorists located women's oppression in patriarchy.¹⁷⁷ But patriarchal power could not and did not explain the subordination of people based on race or class or sexual orientation. Indeed, Patricia Williams is correct when she claims that we are not partialized, but the sum of our parts, demonstrating how our race, class, gender, and sexual orientation combine to either oppress and marginalize or empower.¹⁷⁸ Understanding violence against women in the home requires an acknowledgment of how

based on gender, sex, class, and race operates to silence.); *see also* KATE MILLET, *SEXUAL POLITICS* (1970) (discussing sexism in literature).

175. *See generally* CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHERINE MACKINNON, *WOMEN'S LIVES MEN'S LAWS* (2007); CATHERINE MACKINNON, *ARE WOMEN HUMAN AND OTHER INTERNATIONAL DIALOGUES* (2007).

176. *See supra* Part IV.A.2 (discussing the second wave feminism).

177. *See supra* Part IV.A.2.

178. *See generally* PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); *see also* G. Kristian Miccio, *Closing my Eyes and Remembering Myself: Reflections of a Lesbian Law Professor*, 7 *COLUM. J. GENDER & L.* 167 (1997) (reflecting on how sexual orientation and the law have collided and discussing the lessons that have been drawn from this collision).

the -isms create a violent paradigm that harms both the "I" and the collective "we."

Methodologically, we need to build alliances with organizations committed to ending violence in our homes and in our communities. I know this is a tall order, but if we choose to remain ideologically and organizationally insular, we will not begin to address those issues that affect battered women from communities of color or communities where poverty, underemployment, street violence, or the effects of war sap the strength and vitality of all women, men, and children. It is time to not only show the connections but to contest the underlying assumptions about power that distort our lives.

And finally, we must dare to be powerful, use our strength, and work for our vision; if we do, we will not be afraid because we will become the leaders we have been waiting for.

NOTES
