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## The Death of the Fourteenth Amendment: Castle Rock and Its Progeny

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THE DEATH OF THE FOURTEENTH AMENDMENT: *CASTLE  
ROCK* AND ITS PROGENY

G. KRISTIAN MICCIO\*

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## INTRODUCTION

I am in Dublin trying to write about a wrong that seems to have escaped our collective radar screen. It is quite difficult to understand why the *Castle Rock*<sup>1</sup> case has caused relatively little, if any, response from the Colorado Legislature, the Colorado battered women's community, or the advocacy community nation-wide. Here in Ireland, when I explain what happened in *Castle Rock*, the response is unrestrained disbelief at the "Alice through the Looking Glass" logic applied by the majority.

But there is more to this puzzle. In addition to the anemic reaction by legislatures and advocates, much of the post-*Castle Rock* scholarship accepts the terrain constructed by the Supreme Court.<sup>2</sup> While critical of the decision, scholars do not contest the assumptions that structure the majority opinion. This article does just that, and more.

In this article I reject the Supreme Court's decision, not because it failed to find a property interest in the enforcement of an order of protection, but because of the *values* that structure the decision and its rationale. It is my contention that nothing could or would have influenced the Court to find for Jessica Gonzales because it adhered to crabbled notions of collective responsibility in defense of the political, economic, and legal status quo.

This article also raises the rather thorny issue of our failure to contest the decision politically. The silence is deafening and destructive. No attempts have been made to reform immunity statutes that shield the police from suit when they refuse to follow mandates. No reforms have been initiated to correct the holes in mandatory arrest statutes. Rather, *Castle Rock* and its progeny reinscribe the callous disregard for women's lives and the lives of their children that was first conceived in *DeShaney*.

In Part I, a brief history of the Battered Women's Movement will acquaint the reader with the radical and feminist moorings of the movement. Indeed this movement was shaped by the second wave

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1. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

2. See, e.g., Amber Fink, *Every Reasonable Means: Due Process and the (Non)Enforcement of a Restraining Order in Gonzales v. Town of Castle Rock*, 24 *LAW & INEQ.* 375, 381-82, 394 (2006) (stating and working within the *Castle Rock* holding); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 *TEMP. POL. & CIV. RTS. L. REV.* 47, 59-60 (2006) (providing a critique of the *Castle Rock* decision); Christopher J. Roederer, *Another Case in Lochner's Legacy, the Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order Is a "Sham," "Nullity," and "Cruel Deception."* 54 *DRAKE L. REV.* 321, 332-38 (2006) (describing and working within the structure of the majority opinion).

of feminism in both ideology and methodology, locating male intimate violence as a manifestation of gender asymmetry in law and culture. To understand the importance of mandatory arrest, it is essential to place it in an historical context, rather than view it as either a “free-form” strategy or a policy crafted by governmental bureaucrats. Mandatory arrest was a statement of women’s equality before the law, with the survivor worthy of state protection and the perpetrator worthy of collective condemnation.

Part II lays out the facts of both *Castle Rock* and a Third Circuit case that incorporates the *Castle Rock* ruling and rationale. In *Burella v. City of Philadelphia*,<sup>3</sup> the Third Circuit relied on *Castle Rock* in rejecting a battered woman’s claim that the Philadelphia police violated the procedural due process prong of the Fourteenth Amendment.<sup>4</sup> In denying Jill Burella’s substantive due process claim, the Third Circuit also incorporated the *DeShaney* ruling. Part II then sets out *Castle Rock*’s rationale, but from a decidedly different approach. I characterize the trilogy of *DeShaney*, *Castle Rock*, and *Burella* as cruel deceptions or lies because they pretend to leave open the hope that mandatory arrest statutes can be reformed to pass constitutional muster, specifically in relation to Fourteenth Amendment conceptions of substantive and procedural due process.

Part III is at once my kernel of truth and the guts of this article. I argue that the guiding hand in *Castle Rock* is Justice Rehnquist and his belief that the Constitution is a negative rights document, casting protection of battered women outside the ambit of constitutional concern. Moreover, I reject the terrain constructed by the Court by introducing the idea that *Castle Rock* is no more than a reification of the legal, political and economic status quo, and that because it defends the status quo, nothing that *Gonzales*, *Burella*, or state legislatures could argue or enact would satisfy the position of this Supreme Court. As a result, any hope in due process protection is misplaced.

I unpack, as my theorist friends would say, what I mean by “the reification of the legal, political, and economic status quo,” and what drives it. Part of what drives this process is the mistaken distinction between passive and active conduct: the age-old legal duty argument which flows from the void. Throughout the article, you will note that I do not use the phrases “failure to respond” or “failure to act.” This is not a consequence of literary license, but rather a deliberate recognition that affirmative police conduct occurred when the police *chose* not to enforce the order held by Jessica Gonzales. Critical to the

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3. 501 F.3d 134 (3d Cir. 2007).

4. *Id.* at 143, 145-46.

Court's position is its defense of state political and economic power embedded in police discretion and protected by the public duty doctrine. Such conceptions of state conduct, power, and economic primacy operate at the expense of battered women and their children.

In Part IV, I turn the focus on the advocates and state actors. Using Colorado as an example, I try to understand why there has not been any movement to reform, radically alter, or confront the problems with Colorado's mandatory arrest statute or the Governmental Immunity Act. Consequently, I examine the decision not to respond to the situation created by *Castle Rock*, and more recently, *Burrella*. In this section, I draw from my own experience as a scholar, teacher, and member of the Battered Women's Movement, and from interviews with advocates in Colorado and New York.<sup>5</sup>

Finally, in Part V, I propose an antidote to *Castle Rock* by crafting a legislative alternative to the miasma created by the decision that specifically addresses liability and *mandatory* language for arrest statutes.

## I. IN THE BEGINNING G-D CREATED THE BATTERED WOMEN'S MOVEMENT

### A. A Brief Initiation to the Battered Women's Movement

In the 1970s a new movement joined the myriad political movements of that decade—the Battered Women's Movement (BWM).<sup>6</sup> The BWM was a corollary of the second wave of feminism and a direct outgrowth of the social, political, and economic upheavals of the 1960s.<sup>7</sup> Questions of race, gender, and sexual orientation were on the political front burner. Activists critiqued the position of women, men and women of color, gays and lesbians within the social fabric.<sup>8</sup> As a consequence of this critique, the relationship or status between men and women in the family, and the placement of this unit within the socio-political spectrum came under scrutiny.<sup>9</sup>

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5. Interviews were conducted in the summer and fall of 2007, and included members of the advocacy, legal, and judicial communities. All interviewees requested anonymity and therefore shall remain anonymous. Notes from the interviews are retained by the author.

6. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 248 (2005); see also SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 29 (1982) (discussing the rapid emergence of the Battered Women's Movement in the 1970s).

7. Miccio, *supra* note 6, at 248 (citation omitted).

8. *Id.* at 248-49 (citation omitted).

9. *Id.* at 249.

Feminists, long aware of the violence perpetrated in the family, named the violence, the women abused, the perpetrators, the male intimates, *and* the socio-political and legal structure that supported, condoned, and codified the violence. This was radical in the 1960s just as it is radical now. I imagine a colleague or two might recoil at the explicit naming of victim/perpetrator. But name we must, giving voice to the victim and charting accountability. Truth may enlighten but it is also painful. Indeed, one need only ask the millions of women beaten annually or the families of the 2000 to 4000 women beaten to death each year.<sup>10</sup> One only need ask Jessica Gonzales or Jill Burella.

*B. The Rise of Mandated Arrest: Antidote to Systemic Misogyny?*

I use the “M” word (misogyny) decidedly, which, I trust, creates more of a stir than the “F” word. To the skeptics I ask: How else can we explain social acceptance of male intimate violence? How else can we justify the verity of the marital rape exemption, *legally* incapacitating wives from withholding consent to sex?<sup>11</sup> And, how do we explain away the police’s, courts’, and prosecutors’ *refusal* to prosecute violence against women in the home?<sup>12</sup>

Subtle chastisement and corrective action were code words for beating and treating wives along a fault line of power—where power was based on the gender and status of the parties.<sup>13</sup> I think

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10. MICHAEL L. PENN & RAHEL NARDOS, OVERCOMING VIOLENCE AGAINST WOMEN AND GIRLS: THE INTERNATIONAL CAMPAIGN TO ERADICATE A WORLDWIDE PROBLEM 71 (2003) (citation omitted).

11. John Stuart Mill wrote in 1859:

The State, while it respects the liberty of each in what specially 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 the family relations . . . . The almost despotic power of husbands over wives need not be enlarged upon . . . .

JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 116 (John Gray ed., Oxford Univ. Press 1991) (1859) (alteration in original); *see also* People v. Liberta, 474 N.E.2d 567, 575 (N.Y. 1984) (declaring that the marital rape exemption in New York’s penal law violated equal protection under the New York Constitution); ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 94 (1987) (discussing the marital rape exception).

12. *See* RUTH W. MESSINGER & RONNIE M. ELDRIDGE, N.Y. TASK FORCE ON FAMILY VIOLENCE, BEHIND CLOSED DOORS: THE CITY’S RESPONSE TO FAMILY VIOLENCE 18, 40, 58 (1993) (reporting the failure of the New York courts and police officers to respond to family violence); *see also* SCHECHTER, *supra* note 6, at 158 (“[B]attered women’s cases ‘disappeared’ as they proceeded through the criminal justice system . . . .” (citation omitted)); Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 349 (2007) (discussing how the police treated domestic violence as “technical” violence (quoting Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 701 (2006))).

13. *See* SCHECHTER, *supra* note 6, at 216-18 (discussing the history of battering being used to chastise wives).

that “misogyny” actually understates the problem. Perhaps, as Andrea Dworkin notes, such violence is much more than misogyny, it is gynocide.<sup>14</sup>

Male intimate violence is gendered.<sup>15</sup> We know that four battered women are killed every day in the United States.<sup>16</sup> If four Jews or four African Americans were killed and the state stood by, we would call that state-sponsored genocide. Or as Professor Sarah Buel noted, “[i]f foreign terrorists were attacking [four Americans per day] . . . the Department of Defense would likely have long ago fired up the F-16’s and dispatched elite, special forces . . . .”<sup>17</sup> What have we learned? That context is key.

Male intimate violence, like racial or homophobic violence, is a problem embedded primarily in the structure of the social order—not in the psyche of individual men.<sup>18</sup> Battered women’s advocates appreciated this: they, not unlike their sisters in the suffragist movement,<sup>19</sup> understood that male privilege, of which intimate violence is a manifestation, is about power.<sup>20</sup>

The police, the critical law enforcement actor, systematically refused to arrest male intimate partners.<sup>21</sup> Such conduct was neither a consequence of coincidence, nor a matter of police discretion, as touted by Justice Scalia in *Castle Rock*. Rather it was a result of policies promulgated by the police and their counterparts in the law enforcement community. For example:

14. See ANDREA DWORKIN, WOMAN HATING 93-150 (1974) (examining how certain acts of violence against women constitute gynocide); see also MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM 233-34 (1974) (viewing medical violence against women as gynocide).

15. The federal Violence Against Women Act recognized this phenomenon and I would challenge anyone to assert, much less prove, that the U.S. Congress is a bastion of feminism.

16. Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer’s Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447, 452 (2006) (citing CALLIE MARIE RENNISTON, U.S. DEP’T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001 (2003)).

17. *Id.* at 453.

18. Michèle Harway, *Battered Women: Characteristics and Causes*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 34-36 (Marsali Hansen & Michèle Harway eds., 1993); NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 94-95 (1998).

19. See ELLEN DUBOIS, *The Last Suffragist: An Intellectual and Political Autobiography*, in WOMAN SUFFRAGE AND WOMEN’S RIGHTS 3-5 (1998) (discussing how suffragists concentrated their efforts on the inequality of the sexes in the political and social spheres).

20. David Adams, *Treatment Models on Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 178-88 (Kersti Yllo & Michele Bograd eds., 1988); SCHECHTER, *supra* note 6, at 20-24.

21. SCHECHTER, *supra* note 6, at 158 (citation omitted).

[T]he Law Enforcement and Assistance Administration (LEAA) created six model projects to train officers in “crisis intervention” to respond to domestic violence calls. 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. Such incidents were viewed as “family squabbles,” where the male partner was emasculated by the female partner. Officers were to take on the role of “counselors and mediators, trained in the skills of crisis intervention.” Arrest was perceived as totally inappropriate.<sup>22</sup>

Two cases in the 1970s illustrate what I term “police arrest avoidance”—a strategy employed by police personnel regardless of jurisdiction. In 1976, the class action suit *Scott v. Hart*, was filed against the police in Oakland, California, on behalf of women battered by their male intimate partners.<sup>23</sup> Two months after the California case, in *Bruno v. Codd*, advocates filed suit in New York against the New York City Police Department (NYPD).<sup>24</sup> Both cases alleged that police refused to respond when called in cases where women were physically attacked.<sup>25</sup> In *Bruno*, the litigants claimed that the police, courts, and probation departments chose not to comply with the laws of New York.<sup>26</sup> The trial court allowed the suit to continue against the police, opining that the police department’s blanket prohibition against arrest, and in favor of crisis intervention, presented a colorable equal protection claim.<sup>27</sup> Two years later, the NYPD, via a settlement, agreed to change procedures and arrest offenders where there was probable cause to believe that a felony, misdemeanor, or violation of a stay-away order issued by family court had been violated.<sup>28</sup>

*Hart* and *Bruno* informed advocates’ strategies in terms of working with the state and with the criminal justice system in particular. Nationally, *Hart* and *Bruno* resonated with advocates. In Colorado, the Colorado Coalition Against Domestic Violence worked with the police to change policies concerning arrest in domestic violence cases.<sup>29</sup>

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22. G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 405, 412 (2009).

23. *Scott v. Hart*, No. C-76-2395 (N.D. Cal. filed Oct. 28, 1976); see SCHECHTER, *supra* note 6, at 159-60 (discussing *Scott v. Hart*).

24. *Bruno v. Codd*, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev’d*, 407 N.Y.S.2d 165 (App. Div. 1978), *aff’d* 393 N.E.2d 976 (N.Y. 1979).

25. *Bruno*, 396 N.Y.S.2d at 974; *Scott*, No. C-76-2395.

26. *Bruno*, 396 N.Y.S.2d at 976.

27. *Id.* at 977. The Court of Appeals eventually dismissed the claims against the family court and the probation department. *Bruno v. Codd*, 407 N.Y.S.2d 165, 167 (App. Div. 1978).

28. SCHECHTER, *supra* note 6, at 160.

29. Interview with advocate in Colorado (2005).



Not unlike the advocates in New York and California, Colorado activists changed police procedures by working with the police, judges, and probation departments.<sup>30</sup> Lawsuits were a potential threat, but as one advocate stated, court challenges would be used only as a last resort—the “fist inside the velvet glove.”<sup>31</sup> *Hart* and *Bruno* provided the necessary incentive in shaping procedures where arrest was now *internally* mandated—not imposed by statute.

By 1994, the landscape changed dramatically. In June of 1994 a plethora of legislation came out of state houses. It is not a coincidence that June 17, 1994 was the date O.J. Simpson was charged with the murder of Nicole Brown and Ron Goldman.<sup>32</sup> The lethality of male intimate violence was part of our collective consciousness, and politicians, being political in nature, finally passed mandatory arrest legislation.<sup>33</sup> In New Jersey and New York, the state legislatures passed mandatory arrest statutes.<sup>34</sup> By 1994, thirty-two jurisdictions mandated that the police must make an arrest in cases of family violence.<sup>35</sup>

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30. *Id.*

31. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

32. Raymond Hernandez, *The Simpson Case: The Pursuit; A Spectacle Gripping and Bizarre*, N.Y. TIMES (June 18, 1994), <http://www.nytimes.com/1994/06/18/us/the-simpson-case-the-pursuit-a-spectacle-gripping-and-bizarre.html>.

33. To illustrate that passage of mandatory arrest statutes was a consequence of political expediency rather than an understanding that male intimate violence was part of a dominate/subordinate paradigm, the New York Legislature passed the Family Protection and Domestic Violence Intervention Act, which included mandatory arrest. Family Protection and Domestic Violence Intervention Act of 1994, 1994 N.Y. Sess. Laws ch. 222 (McKinney). Mandatory arrest bills had languished in legislative committees for ten years, never once getting to the floor of either the Senate or the Assembly. In June of 1994, the legislature brought it to the floor in both houses and voted to pass it. *Id.* Advocates across the state attributed this sudden conversion to the political fallout that would have occurred if New York had not passed the bill and had been upstaged by New Jersey and her sister states. How do I know this? I was one of the authors of the mandatory arrest piece of the Family Violence Prevention Act and a consistent voice in the New York State Legislature seeking its passage.

34. I was the co-author of New York State’s mandatory arrest provisions for both the Criminal Procedure Law and Family Court Act, Article 8. Because of my work as the founding director of the Center For Battered Women’s Legal Services, I have first-hand knowledge of the legislative advances in both jurisdictions. There is something to be said for longevity, if not age.

35. By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah and Wisconsin passed legislation mandating arrest for domestic violence. See R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN VIOLENCE AND SOCIAL CHANGE*, 156, 206-07 (1992) (discussing potential legislative and judicial action to combat domestic violence). 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 arrested were male and most victims were female. Alaska, California, Colorado, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin currently mandate arrest when there is probable cause to believe that a violation of a protection order has occurred.

## II. *CASTLE ROCK, BURELLA* AND THE LIES THEY CONSTRUCT

In June 2005, the U.S. Supreme Court handed down its decision in *Castle Rock*.<sup>36</sup> Two years later, in September 2007, the Third Circuit released its decision in *Burella*, reinforcing both the ruling and the dicta in *Castle Rock*, and dashing, once and for all, any hope that *Castle Rock*'s reach would be limited or that it was the result of a truly bad nightmare.<sup>37</sup> For all practical purposes, mandatory arrest has been rendered impotent and all avenues of Fourteenth Amendment due process redress have been foreclosed to battered women and their children. Since a majority of states have crabbled notions of state accountability in tort—it appears that battered women have no avenue to enforce state mandates.<sup>38</sup> Indeed, what we have is the illusion of protection, which is worse than no protection at all.

Both *Castle Rock* and *Burella*, in lengthy recitations of the facts, acknowledge the tragedy inherent in the murder of three little girls and the shooting of a wife by her police officer husband.<sup>39</sup> Both opinions demonstrate the moral paucity of our conceptions of collective accountability now grafted onto the constitutional interpretation of due process. Thus, their attempts at compassion are not only misplaced, but a cruel deception.

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ALASKA STAT. ANN. § 18.65.530(a)(2) (West 2000); CAL. PENAL CODE § 836(c)(1) (West 2001); COLO. REV. STAT. ANN. § 18-6-803.5(3)(b) (West 2007); KY. REV. STAT. ANN. § 403.760(2) (West 1999); LA. REV. STAT. ANN. § 14:79(E) (2001); MD. CODE ANN., FAM. LAW § 4-509(b) (West 1999); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998); MINN. STAT. ANN. § 518B.01(14)(e) (West 1990); MO. ANN. STAT. § 455.085(2) (West 1997); NEV. REV. STAT. ANN. § 33.070(1) (West 1996); N.J. STAT. ANN. § 2C:25-21(a3) (West 1995); N.M. STAT. ANN. § 40-13-6(D) (West 1999); N.D. CENT. CODE ANN. § 14-0.7.1-11(1) (West 1997); OHIO REV. CODE ANN. § 2935.03 (West 1997); OR. REV. STAT. ANN. § 133.310(3) (West 1999); S.D. CODIFIED LAWS § 23A-3-2.1(1), (2) (1998); TENN. CODE ANN. § 36-3-611(a)(2) (West 1996); TEX. CODE CRIM. PROC. ANN. art. 14.03(b) (West 2001); UTAH CODE ANN. § 77-36-2.4 (West 2008); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 1990); WIS. STAT. ANN. § 813.12(7)(b) (West 1994). Alaska, Arizona, the District of Columbia, Iowa, Louisiana, Maine, Massachusetts, New Jersey, Ohio, South Dakota, and Washington currently mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated. ALASKA STAT. ANN. § 18.65.530(a)(1) (West 2000); ARIZ. REV. STAT. ANN. § 13-3601(B) (2001); D.C. CODE § 16-1031(a) (2001); IOWA CODE ANN. § 236.12(2)(b) (West 2000); LA. REV. STAT. ANN. § 46:2140(1) (1999); ME. REV. STAT. ANN. tit. 19-A, § 4012(5) (1998); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998); N.J. STAT. ANN. § 2C:25-21(a)(1) (West 1995); OHIO REV. CODE ANN. § 2935.03(B)(1) (West 1997); S.D. CODIFIED LAWS § 23A-3-2.1(3) (1998); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West 2001). See Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002) (listing states with mandatory arrest statutes).

36. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 748 (2005).

37. *Burella v. City of Philadelphia*, 501 F.3d 134, 145 (3d Cir. 2007).

38. See, e.g., Colorado Governmental Immunity Act, COLO. REV. STAT. ANN. §§ 24-10-101 to -120 (West 2007) (providing immunity to public entities and employees).

39. *Castle Rock*, 545 U.S. at 751-55; *Burella*, 501 F.3d at 134-38.

## A. Castle Rock and Burrella: *The Facts*

### 1. *The Castle Rock Case*

Just as in thirty-one other jurisdictions, the police in Colorado were mandated to arrest or secure a warrant where “[t]he restrained person has violated or attempted to violate any provision of a protective order.”<sup>40</sup> Jessica Gonzales received an order that covered her and her children with the additional proviso that the respondent father, Simon Gonzales, would be subject to arrest if he violated any of the provisions contained in the order.<sup>41</sup> In June of 1999, Simon Gonzales took the three children from their home without notice to, much less consent from, their mother.<sup>42</sup> Simon Gonzales’s conduct was a cognizable violation under Colorado’s must-arrest statutes.<sup>43</sup>

Jessica immediately notified police when she realized that her three little girls were missing and correctly intuited that Simon had taken them.<sup>44</sup> When notified by Jessica, the police chose to do nothing. Over an eight-hour period the police chose not to enforce the order.<sup>45</sup> In the early morning hours following the children’s abduction, Simon appeared at the police station and opened fire with his shotgun.<sup>46</sup> Then and only then did the Castle Rock police begin to investigate.<sup>47</sup> They then recovered the bodies of the three little girls in the cab of the pick-up truck driven by Simon Gonzales, shot to death before his arrival at the police station.<sup>48</sup>

Jessica Gonzales sued the State of Colorado under 42 U.S.C. § 1983, claiming that the State violated the Due Process Clause because the City of Castle Rock and its police department had arbitrarily deprived her of the right to the enforcement of the order without due process of law.<sup>49</sup> The district court dismissed the claim and the U.S. Court of Appeals for the Tenth Circuit reversed, in part, the district court’s decision, finding that the Colorado Legislature, in passing its mandatory arrest provisions, created a property interest in the enforcement of orders of protection.<sup>50</sup> On June 27, 2005, the

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40. COLO. REV. STAT. ANN. § 18-6-803.5(3)(b)(I) (West 2004).

41. *Castle Rock*, 545 U.S. at 751-52.

42. *Id.* at 753.

43. Fink, *supra* note 2, at 375 (citing *Castle Rock*, 545 U.S. at 748-54).

44. *Castle Rock*, 545 U.S. at 753.

45. *Id.* at 753-54.

46. *Id.* at 754.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1117 (10th Cir. 2004).

U.S. Supreme Court reversed the Tenth Circuit Court in its now infamous decision.<sup>51</sup>

## 2. *The Pennsylvania Case*

In January of 2000, Jill Burella was shot by her police officer husband, George Burella, who then turned the gun on himself.<sup>52</sup> Their marriage was marked by repeated assaults and Jill's repeated requests to the Philadelphia Police Department (PDD) to enforce the numerous orders of protection issued by the courts.<sup>53</sup> The police allowed George into the marital home after he threatened his wife, refused to arrest him for the harassing and threatening phone calls that they witnessed, permitted his continued possession of his service revolver after the close of his shift, and recognized his presence on the force even after he refused to submit to psychiatric counseling as ordered by the department's psychiatrist.<sup>54</sup> The threats, entry into the marital home, and continued possession of his service revolver were all explicit violations of the protective order.<sup>55</sup>

On January 8, 2000, Jill was shot by her husband.<sup>56</sup> Subsequently, she filed suit against the City of Philadelphia under 42 U.S.C. § 1983.<sup>57</sup> On September 13, 2007, the U.S. Court of Appeals for the Third Circuit, relying on the ruling in *Castle Rock*, reversed the district court ruling that denied the police qualified immunity.<sup>58</sup>

### B. *The First Lie: DeShaney Redux*

To understand *Castle Rock* or *Burella*, one must understand *DeShaney v. Winnebago County*.<sup>59</sup> In 1985, the Rehnquist Court severed one connection to state accountability in the now infamous *DeShaney* case. 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.<sup>60</sup>

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51. *Castle Rock*, 545 U.S. at 769.

52. *Burella v. City of Philadelphia*, 501 F.3d 134, 136 (3d Cir. 2007).

53. *Id.*

54. *Id.* at 137-38.

55. *Id.* at 136-38.

56. *Id.* at 138.

57. *Id.* at 135, 139.

58. *Burella*, 501 F.3d at 135-36, 146, 149-50.

59. *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189 (1989).

60. *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

What drove the majority in *DeShaney* was Justice Rehnquist's belief that the Constitution is primarily a negative rights document that rules out positive rights claims because "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. The Clause is phrased as a limitation on the State's power to act . . ." <sup>61</sup> Consequently, there is no affirmative duty to protect unless the danger or harm is created by the State—and "created . . . by the State" is narrowly construed to mean *only* those acts that directly cause the harm or occur while the individual is in the State's custody. <sup>62</sup>

Here, the Court characterized the *cause* of the violence as private because the direct actions of Joshua's father put Joshua into a vegetative state. <sup>63</sup> The majority disaggregated the State's act of returning Joshua to an abusive father from the harm and re-characterized state conduct as inaction. <sup>64</sup> The juridical wisdom of the majority treated the State as mere observer to Joshua's beating. <sup>65</sup> As an observer, the Court found no connection between the State and Joshua's injuries; no connection to the victim's injuries meant there was no tie or connection to the victim. <sup>66</sup> Absent a link to the plaintiff, the State could not have violated Joshua's rights.

*DeShaney* effectively slammed shut the door to claims of substantive due process violations by the State, except where the victim/survivor was in the State's *physical* custody or when the State itself created the danger. <sup>67</sup> This crabbed notion of state action is the death

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the child's condition in the home environment. *See id.* (detailing the agreement). As part of a contract between the county and the father, the State would visit the home to check on the little boy. *See id.* (stating visits by Child Protective Services were part of the agreement). On a number of occasions, Joshua's father refused entry to the case-worker. *See id.* at 193 (stating occasions where entry was refused). The State chose not to petition against the father in family court, and it continued to allow the child to stay in the father's home. *Id.* at 192-93. Moreover, Child Protective Services did not enforce the agreement. *See id.* (detailing that Child Protective Services ignored violations of the agreement and did not act upon evidence of further abuse). 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 its actions violated the child's due process rights. *Id.* at 192-93.

61. *DeShaney*, 489 U.S. at 195.

62. *Id.* at 197, 199-203.

63. *Id.* at 201-03.

64. *See id.* at 200-01 (discussing that the Due Process Clause is triggered when the state's action, not the action of a private individual, causes harm to a person).

65. *See id.* at 200-03 (stating that, even if the State knew of the danger to Joshua, it did not have to prevent the harm because it was not a part of the danger).

66. *See id.* (stating that the State had no part in the creation or infliction of Joshua's harm).

67. *See* discussion *infra* Part III.A (discussing that the state-created danger theory is narrowly constructed due primarily to narrow notions of affirmative conduct).

knell for Fourteenth Amendment substantive due process claims, not only when battered women assert state refusal to enforce protective orders, but in cases where *any* person interposes such an argument.

*C. The Second Lie: Castle Rock and Burrella*

*DeShaney*, *Castle Rock*, and *Burrella* are an unmitigated nightmare. Quite simply, these cases are enraging not because the Court continues traditions that are morally despicable, but because it does so wrapped in the Constitution or, more aptly, what it opines to be the correct version or interpretation of the Fourteenth Amendment. Justice Brennan may have identified the heart of this trilogy when he claimed in *DeShaney*, that “oppression can result when a State undertakes a vital duty and then ignores it.”<sup>68</sup> Brennan did not mince words here, so neither shall I. The legacy left by these three decisions casts the Fourteenth Amendment as a mere aspiration.

In *Castle Rock*, the Supreme Court held that Colorado failed to create a Fourteenth Amendment property interest in the enforcement of a protective order.<sup>69</sup> In what I term the “yeah, but” theory of constitutional analysis, the Court dismissed not only Jessica’s claim, but also implicitly the claim of anyone in any of the thirty-two jurisdictions where mandatory arrest provisions exist.

The Court starts from the position that the Colorado statute permits police discretion, and so is not mandatory.<sup>70</sup> But even if the statute is mandatory, because it allows for two options, arrest or seek an arrest warrant, and the latter is procedural rather than “an end in itself,” the legislation is not mandatory.<sup>71</sup> “[E]ven if the statute mandate[s] a nondiscretionary duty on the part of the police,” the duty does not create a private right or entitlement but rather a public duty or “public end” à la criminal law.<sup>72</sup> Additionally, even if it does create an entitlement, it is not a due process type entitlement, because enforcement does not have a “monetary value”<sup>73</sup> and enforcement is “an incidental benefit of a general duty.”<sup>74</sup>

Let’s first take the Court’s claim that Colorado never actually intended to do away with police discretion when it passed its mandatory

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68. *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting).

69. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

70. *Roederer*, *supra* note 2, at 329.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* (arguing that the Supreme Court decision rendered the Fourteenth Amendment toothless and that based on the legislative intent of the Colorado mandatory arrest statute and its plain language the Court should have found a property interest).

arrest statute. The Court starts from the position that the police have always had discretion when dealing with crime, crime victims, and perpetrators.<sup>75</sup> Scalia asserts, “[w]e 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 co-existed with the apparently mandatory arrest statutes.”<sup>76</sup>

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. 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 . . . adherence to the tradition of treating the Fourteenth Amendment as a negative rights provision.<sup>77</sup>

Thus, no duty owed, no way, no how.

Think for a minute of what the majority uses to trump Colorado’s enactment of mandatory arrest. First, the Court uses a 1980 report from the ABA Standards for Criminal Justice.<sup>78</sup> The year 1980 is critical here because mandatory arrest was not on the horizon, much less a policy, in a majority of states. The issue of male intimate violence was just coming to the attention of the American people and the criminal justice system. Indeed, some of the first national discussions had only occurred in the late 1970s, and the findings of the Attorney General’s Task Force were not part of water cooler discussion much less legislative strategy.<sup>79</sup> Moreover the *idea* of mandatory arrest was in its infant stage. Therefore, it would have been impossible for the ABA to have contemplated, much less factored in, the reasons for arrest mandates in its report.

As for the second reason, Scalia claims that the arrest or seek a warrant provision cannot possibly mandate behavior because “seeking . . . an arrest warrant would be an entitlement to [do] nothing but procedure.”<sup>80</sup> “And where there is a procedure there is discretion, thus the statute does not form the ‘basis for a property interest.’”<sup>81</sup>

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75. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005).

76. *Id.* at 760.

77. Miccio, *supra* note 22, at 420 (citing Roger Pilon, *Town of Castle Rock, Executive Indifference, Judicial Complicity*, 2005 CATO SUP. CT. L. REV. 101, 116 (2005)).

78. *Castle Rock*, 545 U.S. at 760-61 (citation omitted).

79. ATT’Y GEN.’S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT iv, vi, vii, 2 (1984).

80. *Castle Rock*, 545 U.S. at 764-65.

81. Miccio, *supra* note 22, at 422.

The police, not unlike judges, must decide whether there is probable cause. But once probable cause is established, either by law enforcement or the bench, there is only one course of action—arrest or issuance of a warrant. Characterizing the function of the police or judges under mandatory arrest statutes as discretionary misstates or misapprehends “discretion.” The probable cause determination by a police officer or a court is not a discretionary act. It requires assessment of the evidence. It is ministerial. Moreover, an officer or a judge is not empowered to disregard the mandate once probable cause is found to exist. Mandates replace a universe of potential action with one option: arrest/warrant. I do not believe for one moment that Scalia was so imperceptive as to not understand the nature of “shall” in the context of law enforcement. “Scalia’s argument here is simply too precious to be credible.”<sup>82</sup>

Scalia’s third and fourth points are equally specious. Scalia claims that Jessica Gonzales’s protection vis-à-vis enforcement of the order was incidental.<sup>83</sup> Yet, to claim that Jessica was an indirect beneficiary of the must arrest statute is revisionism at its worst. While Simon Gonzales would have been the *subject* of police attention, Jessica was the *object* of the protective order. As a battered woman she was within the ambit of *protected person* as contemplated by the legislature and the Battered Women’s Movement.<sup>84</sup> Jessica Gonzales was a member of a specific class of individuals singled out by the statute for protection.<sup>85</sup>

The Court’s final justification is as Byzantine as the prior three. Scalia believes that since a monetary value cannot be ascribed to enforcement, Gonzales fails to raise a cognizable property interest protected by due process.<sup>86</sup> But *Board of Regents of State Colleges v. Roth*<sup>87</sup> tells us something entirely different, a message that Scalia refuses to recognize much less acknowledge. Property interests are varied and encompass more than “real estate, chattels, or money,” because they include intangibles “relat[ing] to the whole domain of

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82. Roger Pilon, Town of Castle Rock, *Executive Indifference, Judicial Complicity*, 2005 CATO SUP. L. REV. 101, 118 (2005).

83. *Castle Rock*, 545 U.S. at 749, 766-67.

84. The *raison d’être* of mandatory arrest is to abate the violence. See Roederer, *supra* note 2, at 323-24 (detailing the Colorado statute and its intended beneficiaries).

85. See *Nearing v. Weaver*, 670 P.2d 137, 143 (Or. 1983):

[S]tatutory arrest provisions . . . identify with precision when, to whom and under what circumstances police protection must be afforded. The legislative purpose in requiring the police to enforce individual restraining orders clearly is to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement activity.

86. *Castle Rock*, 545 U.S. at 768.

87. 408 U.S. 564 (1972).



social and economic fact.”<sup>88</sup> And while this may be an inartful way to describe property, it does get to the heart of the matter. Scalia dismisses conceptions of property worthy of due process protection by adopting a narrow definition, one that has been rejected by both the dissent in *Castle Rock* and the majority in a raft of Supreme Court decisions.<sup>89</sup>

As I reread *Castle Rock*, the questions that emerge are troubling. Why did Scalia not use the 1993 Federal Violence Against Women Act Report that found that police arrest avoidance contributed to the continued perpetration of male intimate violence?<sup>90</sup> Why did Scalia not refer to the plethora of amicus briefs that discussed in exacting detail the reasons why discretion was removed from the police?<sup>91</sup>

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88. *Id.* at 571-72, 577 (quoting *Nat'l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646, (Frankfurter, J., dissenting)); see also *Logan v. Zimmerman Brush*, 455 U.S. 422, 430 (1982) (stating that one characteristic of property rights is that they vary).

89. *Castle Rock*, 545 U.S. at 773-74 (Stevens, J., dissenting); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The Court has found property interests created by state-conferred social benefits. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (public education); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits).

90. 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].

91. See Brief for the Nat'l Ass'n of Women Lawyers and 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 ACLU et al. as Amici Curiae Supporting Respondent at 17-22, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (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, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (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 20, 28-30, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278), 2005 WL 353608 (discussing pervasiveness of domestic violence and the likely increase in such violence to result from failure to enforce protection orders); Brief for the AARP as Amicus Curiae Supporting Respondent at 4-10, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (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, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278), 2005 WL 353693 (discussing domestic violence and its consequences for children); Brief for Peggy Kerns, Former Member of the House of Representatives of Colo., and Tex. Domestic Violence Direct Serv. Providers, as Amici Curiae Supporting Respondent at 12-14, 18-21, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (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 for Nat'l Coal. Against Domestic Violence and Nat'l Ctr. for Victims of Crime as Amici Curiae Supporting Respondent at 12-17, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (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 for Int'l Law Scholars et al. as Amici Curiae Supporting Respondents at 27-28, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278), 2005 WL 328200 (discussing the impact of police failure to enforce protection orders on U.S. treaty obligations).

And finally, why did Scalia effectively overrule the legislative history that supported the plain language of the Colorado statute? He did so, not merely to reinforce police discretion and crabbed notions of “property,” but to reinforce the traditional *negative* view of constitutional protection under the Fourteenth Amendment. This is the third and final deception.

### III. THE THIRD AND DEADLIEST LIE—THE “WHY”

Don Coreleone said it better than anyone, “keep your friends close, but your enemies closer,”<sup>92</sup> and while I do not consider the Supreme Court an enemy, I do find their ruling and rationale in *Castle Rock* inimical to the welfare, rights, and lives of battered women and their children. And if we take *Castle Rock* together with *Burrella*, the stakes are raised even higher because the promise of the Due Process Clause is forever outside the reach of battered women.<sup>93</sup>

After *Castle Rock*, advocates believed that if we did what Scalia told us to do, specifically go back to the legislative drawing board and make our laws “more mandatory,”<sup>94</sup> the promise of the Fourteenth Amendment Due Process Clause would be attainable in our lifetime. Remember, Scalia told us that “shall,” meant “maybe or maybe not,” dismissing out of hand the legislative history of thirty-two states and the plain *statutory* meaning of the word.<sup>95</sup> I guess to the good Justice, the Ten Commandments are merely the ten suggestions. From a policy standpoint, I cannot envision how one makes “a peace officer shall arrest, or . . . seek a warrant,” more mandatory.<sup>96</sup> Perhaps, if the Colorado Legislature had appended the words, “and we really, really mean it, no kidding,” it would have satisfied the majority. But I think not. Nothing would have satisfied this Court. The question is why.

#### A. *The Legal “Why”*

Since *DeShaney* in 1985, scholars have commented on the negative rights aspect of the U.S. Constitution. Barbara Woodhouse profoundly understood that the turn of events in the Twentieth

92. THE YALE BOOK OF QUOTATIONS 623 (Fred R. Shapiro ed., 2006) (quoting THE GODFATHER: PART II (Paramount Pictures 1974)).

93. Clearly, if the composition of the Court changes and Justices who have a historically correct and more compassionate view of the Due Process Clause are appointed, then the effect of *Castle Rock* may be reversed. Indeed, one can hope that the Court will follow the example of *Lawrence v. Texas* by reversing itself. I do not, however, think that this outcome is probable in the near future. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

94. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

95. *Id.* at 760-61.

96. COLO. REV. STAT. ANN. § 18-6-803.5(3)(b) (West 2004).

Century, which reduced the Due Process Clause to a reactive rather than proactive proviso, would have devastating effects on women and on issues particular to violence against women.<sup>97</sup> Essentially, the modern reading of Fourteenth Amendment due process is basically a “keep your laws off my body” approach. This affected the decision in *Harris v. McRae*,<sup>98</sup> in which the Court held, *inter alia*, that because the state did not create poverty, it has no duty to provide poor women with abortions.<sup>99</sup> Thus, the State can restrict access to abortions by restricting the flow of funds to poor women for this medical procedure.<sup>100</sup> 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.<sup>101</sup>

Let us go back to *DeShaney* for a moment to decode the negative rights position of the Court. First, one has to start from the premise that the Constitution is a negative rights document. Second, if it is a negative rights document, there is no duty for the state to act or be proactive. Third, if there is no constitutional duty to act, then duty arises only where state conduct is characterized as affirmative. This is illustrated in the Rehnquist Court’s treatment of the harm to Joshua DeShaney. Here the Court privatized the harm because it was Joshua’s father who beat him so severely that Joshua suffered brain damage.<sup>102</sup> And the Court concluded that the State of Wisconsin did nothing to cause Joshua’s injuries; it merely failed to act or to protect.<sup>103</sup> The state’s return of the child to his father was not affirmative conduct, so state conduct was recast as *inaction*.<sup>104</sup> Because the action/inaction paradigm is a natural corollary of negative rights theory,

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97. See Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Soc’y of Sisters*, 78 U. DET. MERCY L. REV. 479, 483 (2001) (noting that the substantive due process decisions share the failings of treating “commerce and labor, the family and market as even playing fields”).

98. 448 U.S. 297 (1980).

99. *Id.* at 316-17.

100. *Id.* at 316; see also Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330-32, 336 (1985) (discussing how the abortion funding cases raise questions about negative versus positive rights).

101. Indeed, Catharine MacKinnon wrote:

If one group is socially granted the positive freedom to do whatever it wants to another group, to determine that 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 the equal of the first. For women this has meant that civil society, the domain in which women are distinctly subordinated and deprived of power, has been placed beyond the reach of legal guarantees.

CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 164-65 (1989).

102. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 187, 193 (1989).

103. *Id.* at 203.

104. *Id.*

where there is no affirmative duty the Court must find affirmative conduct in order to impose liability.<sup>105</sup>

The lexicon reaffirms crabbed notions of state action. In *DeShaney*, the state's conduct is described as a failure or omission to act.<sup>106</sup> As any first-year law student knows, where there is a failure/omission to act, one must find a legal duty to act. Just as first-year law students learn that the beachcomber, surfer, or sun worshiper has no duty to rescue the drowning swimmer, the state has no duty to rescue because the state is treated no differently than Beachcomber Bill.<sup>107</sup> Thus, if we characterize the state's "act" as inaction (omission) we need to find a legal duty before we can hold the state liable. And because the police (the state) owe only a generalized, and not a particularized, duty of care, the characterization of the act is critical when claiming a constitutional tort.<sup>108</sup>

But what if we thought about conduct differently? What if we recognized that conduct has both positive and negative elements? For example, if I am driving my car and hit a pedestrian, characterizing my conduct as *continuing* to drive would be just as correct as characterizing my conduct as failing to apply the brakes. By applying my theoretical paradigm to the facts in *DeShaney*, negative acts, or inaction, are transformed into positive or affirmative actions. The State of Wisconsin *returned* Joshua to his father with the knowledge that the boy had been beaten so severely by his father that he had been hospitalized.<sup>109</sup> And, the State continued Joshua's placement even though his father violated the agreement by refusing Child Protective Services (CPS) access to his son.<sup>110</sup> The "failure to protect," is not based on inaction but on the actions taken by the state, which placed little Joshua in a known zone of danger—no different than if CPS had placed the child in front of a speeding car. Not unlike the glass half-empty/half-full conundrum, how we characterize conduct flows from our perspective.<sup>111</sup> While such characterizations are harmless in

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105. *Id.* at 195, 199-200.

106. *Id.* at 203.

107. See G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty, and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 141 (2005) (citations omitted) (analyzing tort theories as applied to the state, including duty and conceptions of active/passive conduct, arguing that these standards permit the state to escape responsibility for the perpetuation of harm to women from male intimate partners and that these standards have been imported into conceptions of a negative rights Constitution and state accountability).

108. *Id.* at 117, 146. I would argue that the idea of a generalized duty of care flows from the priority to protect the state from lawsuits, and monetary damages, and reinscribing the reach of the Public Duty Doctrine (qualified immunity). *Id.* at 118.

109. *DeShaney*, 489 U.S. at 192.

110. *Id.* at 192-93.

111. Miccio, *supra* note 107, at 147 (rejecting the action/inaction paradigm).

the context of the glass parable, they are devastating in the context of battered women's lives. So why does the Court take such a narrow view of state conduct?

Chief Justice Rehnquist's adherence to a negative rights standard is rooted in principles of federalism that foster clear and unequivocal lines of demarcation between state and federal power.<sup>112</sup> As Michael J. Gerhardt 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.<sup>113</sup> For Rehnquist, a negative rights approach safeguards the delicate balance that federalism constructs, and perhaps more importantly, preserves.

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 protection when states refused to protect the fundamental rights of their citizens.<sup>114</sup> The Fourteenth Amendment was intended to act as an antidote to states' turning a blind eye to violations of citizens' life, liberty, and property interests by the state or by private actors.<sup>115</sup> It was to be a haven in a heartless world.

What of *Castle Rock* and *Burrella*? One could argue that my analysis up to this point seems misplaced because *Castle Rock* and *Burrella*, in part, raise procedural and not substantive due process claims. What does *DeShaney* or the negative/positive rights debate have to do with a procedural claim? Everything.

First, the distinction between procedural and substantive is artificial because "all rights, including procedural rights, are ultimately substantive"<sup>116</sup> because "what we refer to as process is merely the enforcement given to the natural rights of 'life, liberty, and estate.'"<sup>117</sup> I understand that this position is troubling for jurists and scholars who adhere to a strict reading of the Constitution and have an aversion to collapsing both the distinction between substantive and

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112. Michael J. Gerhardt, *The Ripple Effect of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 429 (1990).

113. *Id.*; see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 553 (2d ed. 1988) (discussing the approach of the *Slaughter-House* Court to the question of coterminous jurisdictions).

114. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 13 (3d ed. 2006).

115. *Id.*

116. Pilon, *supra* note 82, at 110.

117. Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1858 (2006) (examining the moral position taken by Rehnquist as a young man and how that position influenced his thinking and rulings as a Justice on the U.S. Supreme Court).

procedural, and the categories under a rubric of “natural” rights. My critics will claim that this theory gives currency to judicial activism where rights are invented, such as “privacy” in the reproductive rights cases. But for scholars such as Roger Pilon and Michael J. Gerhardt, jurists such as William J. Brennan, and philosophers such as Immanuel Kant, conceptions of life, liberty, and property flow from what we call the dignity of the individual.<sup>118</sup> Moreover, the very purpose of the state is to protect our life, liberty, and property, not because these notions are elevated to the status of rights or constitutionally protected interests, but because they are at the core of what it means to be human.<sup>119</sup> Protection is not conditioned upon the private/public nature of the violation or the violence. Jessica Gonzales had the right to governmental protection because as a member of the body politic she delegated that enforcement to the government.<sup>120</sup>

I can only imagine the degree of discomfort felt by the reader when I invoke notions of “natural rights,” but I have spared you a lengthy discussion of conceptions of “natural rights,” “the state of nature,” and “the social contract theory.”<sup>121</sup> I have also spared you

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118. See *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Brennan, J., dissenting) (stating that the United States has a “tradition of respect for the dignity of individual choice”); IMMANUEL KANT, *THE MORAL LAW: KANT’S GROUNDWORK OF THE METAPHYSIC OF MORALS* 105, 105 n.1 (H. J. Paton trans., Routledge 1991) (explaining that the basis of moral law is to be found in the subject, not the object of practical reason, a subject capable of rational will, and stating that “[a] rational being himself must be . . . the ground for all maxims of actions. . . .”); Gerhardt, *supra* note 112, at 427 (“The 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.”) (emphasis added) (citations omitted); see also JOHN RAWLS, *Justice as Fairness*, in *COLLECTED PAPERS* 47, 48 (Samuel Freeman ed., 1999) (stating that Rawls’s conception of justice centers on equal liberty for all persons).

119. See, e.g., John Locke, *An Essay Concerning the True Original Extent and End of Civil Government* (1690), reprinted in 35 *GREAT BOOKS OF THE WESTERN WORLD* 53 (Robert Maynard Hutchins ed., 1952) (“The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their [lives, liberties, and estates] . . .”).

120. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 102-03 (1960) (discussing that, by the delegation of power, law-makers must be “the servants of the people”); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (discussing liberty and equality in relation to justice); JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 15 (1947) (stating the social contract theory, under which the people cede their will to the common will).

121. See THOMAS HOBBS, *LEVIATHAN OR, THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 103-12 (Michael Oakeshott ed., Collier Books 1962) (1651) (natural laws); see also MEIKLEJOHN, *supra* note 120 (natural rights); ROUSSEAU, *supra* note 120 (social contract theory).

a lengthy discourse on the whittling away of the promise of the Fourteenth Amendment starting with the *Slaughter-House* decision in 1873.<sup>122</sup> Why? Jessica Gonzales had more than a philosophical claim to protection vis-à-vis social contract theory. She had an order of protection, issued by a state court with the proviso that if Simon violated the order, for any reason, the state would enforce that order by either arresting him or by seeking an arrest warrant.<sup>123</sup> The guarantee of enforcement was reinforced by not only the plain language of the order,<sup>124</sup> but by legislative prerogative.<sup>125</sup> Jessica asked only for the Court to honor the Fourteenth Amendment, which took fundamental rights and transformed them into national rights that deserved protection from state interference or neglect.<sup>126</sup> The majority would not honor this commitment, further eviscerating the amendment and the power vested in the people.

### *B. The Political is Personal: The Political Why*

In the late 1960s feminist activists coined the phrase the “personal is political.”<sup>127</sup> While anti-feminists ridiculed this axiom and the feminists who created it, feminists were merely transforming liberalist philosophers’ conception of the “I,” the core or *raison d’être* of government.

For the traditional liberalists, women were excluded from the “I,” because autonomy, as a corollary of individualism, was synonymous with maleness.<sup>128</sup> The autonomous person was “self-sufficient,

122. See *The Slaughter-House Cases*, 83 U.S. 36 (1873) (held that the Privileges and Immunities Clause protects privileges and immunities incident to national citizenship, not state citizenship); Gerhardt, *supra* note 112, at 412-13 (noting that *Slaughter-House* has made it easier for courts to erode the Fourteenth Amendment).

123. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751 (2005) (citing the protection order).

124. *Id.*

125. COLO. REV. STAT. ANN. § 14-10-109 (West 2010).

126. Clearly *Slaughter-House*, 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 Gerhardt, *supra* note 112, at 426-27 (discussing the history of and motivation behind the Fourteenth Amendment); see also CONG. GLOBE, 39th CONG., 1ST SESS. 2765 (1866) (statements of Senator Howard on the Privileges and Immunities Clause).

127. Carol Hanisch, *The Personal is Political*, in NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION, MAJOR WRITINGS OF THE RADICAL FEMINISTS 76, 76 (Shulamith Firestone & Anne Koedt ed., 1970).

128. In classical philosophy, the autonomous individual was gendered, and conceptions of the liberal self were inherently masculinist, because women were confined to descriptive categories rooted in irrationality and immaturity. See, e.g., MACKINNON, *supra* note 101, at 121 (quoting SIMONE DE BEAUVOIR, *THE SECOND SEX* 133 (H.M. Parshley ed. & trans., 1974)) (“Representation of the world . . . like the world itself, is the work of men; they

separate, and distinct—the rational, ubiquitous being—standing ‘above the fray,’ as Lorraine Code comments, ‘to view from nowhere the truths the world reveals.’”<sup>129</sup> The truly autonomous individual was a rational, (male) disembodied self, “freed from the vagaries of the body and the senses—disconnected from the self and from others.”<sup>130</sup> The autonomous person was not confined to the private sphere, or cut-off from civil society.<sup>131</sup>

By claiming the personal is political, feminists exploded conceptions of the autonomous self, the “I,” by making real women’s agency within the family. By recognizing that women’s experience was political, vis-à-vis conceptions of power, they turned women’s experience into an authentic political truth.<sup>132</sup> Part of this truth was the recognition that men battered and raped their wives and were protected by the political, cultural, and legal status quo.<sup>133</sup> The law provided not only the excuse, but also the cover for such violence. As Catharine MacKinnon notes, violence against women is a means of social control, maintaining the political status quo in both family and society.<sup>134</sup>

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describe it from their own point of view, which they confuse with absolute truth.”); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988) (arguing that classical liberal conceptions of autonomy are “essentially and irretrievably masculine”); see also Miccio, *supra* note 6, at 246, 310 & n.327 (theorizing about the gendered nature of Kantian notions of autonomy and human agency).

129. Miccio, *supra* note 6, at 310 (quoting Lorraine Code, *The Perversion of Autonomy & the Subjection of Women: Discourses of Social Advocacy at Century’s End*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 181, 185 (Catriona MacKenzie & Natalie Stoljar eds., 2000)); see also IMMANUEL KANT, *An Answer to the Question: ‘What is Enlightenment?’*, in KANT’S POLITICAL WRITINGS 54 (Hans Reiss ed., H.B. Nisbet trans., 1970) (positing that individual autonomy is an achievement of enlightenment—one’s achievement of “emergence from his self-incurred immaturity”).

130. Miccio, *supra* note 6, at 310.

131. Lorraine Code, *The Perversion of Autonomy & the Subjection of Women: Discourses of Social Advocacy at Century’s End*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 181, 185 (Catriona MacKenzie & Natalie Stoljar eds., 2000); KANT, *supra* note 129, at 54-55; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 657 (1983).

132. Marjory Fields, *Wife Beating: Government Intervention Policies and Practices*, Address at the United States Commission on Civil Rights (Jan. 30, 1970), in U.S. COMM’N ON CIVIL RIGHTS, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 20-21 (1978) (“Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to call[s] for help.”).

133. *Id.* at 3-14.

134. See MacKinnon, *supra* note 131, at 657:

The private sphere, which confines and separates us, is therefore a political sphere, a common ground of our inequality. In feminist translation, the private is a sphere of battery, marital rape, and women’s exploited labor; of the central social institutions whereby women are deprived of (as men are granted) identity, autonomy, control, and self determination . . . . If the most private also most “affects society as a whole,” the separation between public and private collapses as anything other than potent ideology.



While *Castle Rock* is intensely personal to and for battered women, I have reformed the feminist axiom because *Castle Rock* does more than negate the political reality of women's lives: it distorts the balance of power between the people and the courts.

*1. A Delicate Balance: The People and the Courts*

From our first history class, Americans learn about the unique balance between the three branches of government. It is a delicate balance, where executive, legislative, and judicial actors honor their different roles. We know that government derives its power from the governed, the people, and the people are represented by the legislature.<sup>135</sup> That body is our voice in political discussions, debates, and ultimately enactments meant to prescribe individual and collective behavior.

Rehnquist understood the delicate balance. He also understood that the people are the "ultimate source of authority."<sup>136</sup> What could Rehnquist have meant by this? Essentially, we, the people, speak through our duly elected representatives, and when we speak our voices must be honored by the executive and by the courts.

In *DeShaney*, Rehnquist's use of the negative rights paradigm did not disturb the balance between the people and the courts. Though it was problematic for a myriad of reasons, the negative rights interpretation did not insert the Court's voice over, or to the exclusion of, the people's. Why? Because Wisconsin had not enacted legislation to compel the police or Child Protective Services to act in a specific manner or produce a specific outcome.<sup>137</sup> The same is not true with *Castle Rock* or *Burrella*.

In Colorado and Pennsylvania, both state legislatures passed mandatory arrest legislation as a direct response to police arrest avoidance in male intimate violence cases.<sup>138</sup> Their experience with law enforcement paralleled that of the other thirty states where man-

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135. See 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 . . ."); U.S. CONST. pmbl. ("We the People of the United States, . . . do ordain and establish this Constitution for the United States of America"); see also Locke, *supra* note 119, at 29 ("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.")

136. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976).

137. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1988).

138. COLO. REV. STAT. ANN. § 18-6-803.5(3)(b) (West 2007); 23 PA. CONS. STAT. ANN. § 6113 (West 2001).

datory arrest became law: the police were refusing to arrest in cases where the perpetrator was intimately connected to the survivor.<sup>139</sup> Indeed, the hearings for the 1993 Federal Violence Against Women Act record in exhaustive and graphic detail just how pervasive police arrest avoidance was in the fifty states; Colorado and Pennsylvania were no exception to this time honored yet loathsome practice.<sup>140</sup>

By refusing to accept the statutory scheme of the Colorado State Legislature, the Court invaded the province of the legislature and disrupted the delicate balance between court and citizen. It is important to note that, in *Castle Rock*, the Court never claims that the enactment of positive liberties by the legislature violated the Federal Constitution; rather, the Court finds that Colorado's conduct contradicted the beliefs or values held by the majority.<sup>141</sup> Scalia penned a decision that primatized a set of beliefs that effectively ran roughshod over the will of the people and upset the balance struck by the Founders.

Justice Stevens noted in his dissent that Coloradans had sought to level the playing field and to remedy police arrest avoidance by passing mandatory arrest legislation.<sup>142</sup> To Stevens, the majority substituted its judgment for that of the people.<sup>143</sup> But it is more than mere substitution or paternalism. As Professor Kmiec believes, it is judicial arrogance of the worst kind because it negates the positive aspects of political discourse and action: debate, principled compromise, and tolerable outcome.<sup>144</sup> The mandatory arrest process integrated and validated the voices of the people—people who were diverse ethnically, politically, and economically. Scalia's opinion, and that of the remaining six justices from the majority, reduced the voice of the people to a mere whisper, shifting power from the people to the Court.<sup>145</sup>

## 2. *The Political is Personal: Reliving History*

After *Castle Rock*, the word on the street was that the police did not have to arrest. They could, if they chose, revert back to the old

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139. See *supra* note 77 and accompanying text.

140. VAWA SENATE REPORT, *supra* note 90, at 41-45; see also G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Domestic Violence Against Mothers in the Age of DeShaney*, 29 COLUM. HUM. RTS. L. REV. 641, 670-77 (1998) (discussing the impact of the Violence Against Women Act).

141. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005).

142. *Id.* at 779-80 (Stevens, J., dissenting).

143. *Id.* at 773-77.

144. Kmiec, *supra* note 117, at 1863-64.

145. *Id.* ("It is hard to read the majority as saying anything more than 'We, your judicial elders, disagree or think this effort imprudent.'" (citation omitted)).

days when arrest was the exception rather than the rule. Although there is only anecdotal evidence to support the word on the street, it definitely is not a good time to be battered vis-à-vis the system.<sup>146</sup> But then, it has never been a good time.

*Castle Rock* takes us back before mandates, when the police did anything but arrest. Cases such as *Sorichetti*, *Hart*, *Bruno*, and *Thurman* were cruel reminders that legal and cultural misogyny were very much alive.<sup>147</sup> Mutilated children and the bodies of murdered and disabled women at the hands of boyfriends and husbands were not only part of legal history, but of our collective consciousness. Mandatory arrest requirements burst onto the political scene, lost momentum,<sup>148</sup> and then were revived with the Brown/Goldman murders. There was a sense that politicians finally understood what feminists had been saying for years—that women deserved equal justice and the right to live their lives free from terror and home-grown violence.

After the *Castle Rock* decision was publicized, the *Denver Post*, on its web site, held a vote as to whether or not Jessica Gonzales had the “right” to sue the police.<sup>149</sup> It seems that the Fourth Estate believes that the right to protection should be determined by a show of hands.<sup>150</sup> *Castle Rock* is more than a Supreme Court decision contained in a reporter that will in time collect dust. It is a seismic shift

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146. See *Court: Police Can't Be Sued For Not Enforcing Restraining Order*, DENVER NEWS, June 27, 2005, <http://www.thedenverchannel.com/news/4655165/detail.html> [hereinafter *Restraining Order*] (discussing the town of Castle Rock's response to the outcome in *Castle Rock v. Gonzales*).

147. See *supra* Introduction, notes 21-22 and accompanying text for a discussion of *Hart* and *Bruno*. *Sorichetti v. N.Y. Police Dep't* resulted in the largest settlement against the New York City Police Department when police failed to enforce an order of protection against the respondent-father who disemboweled his daughter and mutilated her so severely that she remains in a vegetative state twenty-five years after the attack. 482 N.E.2d 70, 70-74 (N.Y. 1985). *Thurman v. City of Torrington* was the first section 1983 case involving a battered woman who was beaten in the presence of a police officer who, while Ms. Thurman was being stomped on by her husband, remained in his police car and did not come to her aid. 595 F. Supp. 1521, 1524-26 (D. Conn. 1984).

148. Mandatory arrest stalled in states because there was much discussion and concern about its effect on communities of color among activists in the BWM. There was a belief that women of color, i.e., African-American women, would not call the police because of racism within the law enforcement community and the courts. This perception was problematic after a study found that African-American women were more likely to call police than their white counterparts. Ira W. Hutchison & J. David Hirschel, *Abused Women: Help-Seeking Strategies and Response Utilization*, 4 VIOLENCE AGAINST WOMEN 436, 451-54 (1998) (reporting that low-income and African-American women who were battered were more likely to rely on police response than were higher-income and white women who were battered).

149. *Restraining Order*, *supra* note 146.

150. THOMAS CARLYLE, *The Hero as Man of Letters, Johnson, Rousseau, Burns*, in 1 CARLYLES' WORKS SARTOR RESARTUS: HEROES AND HERO-WORSHIP 377, 386-87 (Boston, Estes & Lauriat 1884) (“Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all.”).

which holds the political power to determine how the people shall live, order themselves, and express compassion. Mandatory arrest was one way that Colorado and her sister states demonstrated to battered women and their children that they heard, recognized, and validated not only their stories, but also their pain. *Castle Rock* changed this, and it is political as well as very personal.

*C. The Economic Why: To Serve and Protect the Interests of the State*

*This result reflects our continuing reluctance to treat the Fourteenth Amendment as a “font of tort law.”*<sup>151</sup>

To this Court, not only is the Fourteenth Amendment a negative rights provision, but police arrest avoidance cases are matters best left to state courts.<sup>152</sup> Negligence claims in state court are the appropriate vehicle to raise issues of state accountability, not the Fourteenth Amendment Due Process Clause. But the confluence of the Public Duty Doctrine (PDD)<sup>153</sup> and, in Colorado’s case, the Governmental Immunity Act (GIA)<sup>154</sup> bars litigants, such as Jessica Gonzales, from filing negligence claims against the state.

In police negligence cases, the PDD recognizes a duty to the public, not to individual citizens,<sup>155</sup> unless a particularized connection exists between the police officer and the citizen—and the courts and the legislatures narrowly construe this connection.<sup>156</sup> In Colorado,

151. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (citation omitted).

152. *Id.* at 768-69.

153. It is important to draw a distinction between the doctrines of sovereign immunity and public duty. The latter is a tort doctrine created by statute that limits immunity while at the same time creating a narrow conduit through which suits against the state must pass. 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 88 (2001). Sovereign immunity is a common-law doctrine rooted in the British common-law system where the Crown was immunized from suit. According to Justice Holmes, “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.” *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

154. See Governmental Immunity Act, COLO. REV. STAT. ANN. § 24-10-110 (West 2010) (limiting the liability for public entities to actions that were “willful and wanton”).

155. 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); see also *Ryan v. State*, 656 P.2d 597, 599-600 (Ariz. 1982) (noting that certain areas of immunity for state actors remained protected even after “removing the public/private duty doctrine”); *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.”).

156. See MacKinnon, *Negligence of Municipal Employees*, *supra* note 155, at 721 (dis-

the GIA adds an additional hurdle severely restricting one's ability to sue state actors by requiring willful conduct on the part of the tortfeasor.<sup>157</sup> Thus, for Jessica Gonzales, the PDD and GIA were impenetrable barriers that could not be overcome. And, the Court knew this.<sup>158</sup>

Why was the Court so duplicitous? Because preservation of the economic status quo was more important than the truth; and the truth is, a miserly process exists at the state level providing little if any comfort or recompense for battered women and their children.

### 1. *The Floodgates Argument*

The Court bought the town's *floodgates* argument. The "floodgates" argument is quite simple: if the Court rules in favor of Respondent Gonzales, battered women will come out of the woodwork to sue the state. If this happens, and liability claims against the state are allowed and successful, potential judgments would severely cut into public monies earmarked for services.<sup>159</sup> And such a reduction would result in either cutbacks or the elimination of much needed public services.<sup>160</sup> Indeed, the *Denver Post*, in one of its less than thoughtful articles, parroted the floodgate argument.<sup>161</sup> This "Chicken Little the Sky is Falling" defense was premised on nothing more than unadulterated conjecture. It was hyperbole at its best.

Amici for the Town of Castle Rock sounded this alarm, repeatedly.<sup>162</sup> As the Petitioner noted, the "flood[gates]" would open and states would go bankrupt.<sup>163</sup> Rubbish. Why rubbish? Because *DeShaney* and restrictive policies under state tort law have shut the door on negligence claims. Hence, this argument is unfounded. As a result, there is no way to test whether a more open and flexible policy on

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cussing the particularized connection requirement and law enforcement cases that found that such connections did not exist).

157. COLO. REV. STAT. § 24-10-105(1) (2010); *see also* Miccio, *supra* note 107, at 131 (citation omitted) (discussing the Colorado Governmental Immunity Act).

158. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 769 n.15 (2005).

159. MacKinnon, *Negligence of Municipal Employees*, *supra* note 155, at 727-29; *see also* THOMAS M. COOLEY & D. HAVERY HAGGARD, 1 A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 300, 385-87 (4th ed. 1932) (discussing an officer's liability in private suits); EUGENE MCQUILLIN, 18 THE LAW OF MUNICIPAL CORPORATIONS § 53.04.25, 193-209 (3d ed. 2003) (discussing the negative effects of imposing liability on municipalities).

160. *Casey v. Geiger*, 499 A.2d 606, 614 (Pa. 1985).

161. *Restraining Order*, *supra* note 146.

162. Brief for Int'l Mun. Lawyers Ass'n. et al. as Amici Curiae Supporting Petitioner at 3-4, 8-9, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278).

163. Brief for Petitioner at 37, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2004) (No. 04-278).

state accountability would produce the outcome suggested by the majority, the town, or the town's friends. Simply put, the floodgates argument is mere speculation and a contrived "what if" game.

## 2. *The Cost of Male Intimate Violence*

We do know the price if male intimate violence is left unabated. Yet, the Court's adoption of the floodgates argument ignores the socio-economic cost of police refusal to protect in male intimate violence cases, as is reflected in the economics of violence, depletion of human capital, and lack of accountability. As one advocate correctly noted, "It's either pay now or pay later."<sup>164</sup>

Just what are the economics of male intimate violence? According to the federal Violence Against Women Act of 1994 (VAWA), intra-familial violence is pervasive, and it disproportionately affects women.<sup>165</sup> Indeed, Surgeons General—from Koop to the present—have warned that male intimate violence is the *leading* cause of injury to women in the 15-44 age group.<sup>166</sup> Studies undertaken after the 1992 public hearings held by the Judiciary Committee confirm that male intimate violence is at the epicenter of violence against women and that it is very costly in terms of hospitalization, lost wages, court costs, and incarceration.<sup>167</sup> In his dissenting opinion in *Morrison*, Justice Souter noted that Congress estimated the cost of domestic violence at *three billion dollars a year*.<sup>168</sup> And as Joan Zorza points

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164. This comment was made by an advocate in New York City.

165. See *United States v. Morrison*, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) (commenting on the financial costs of domestic violence (citation omitted)); see also VAWA SENATE REPORT, *supra* note 90, at 38.

166. VAWA SENATE REPORT, *supra* note 90, at 38 (1993) ("Violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined." (citing Surgeon General Antonio Novella, *From the Surgeon General, U.S. Public Health Services*, 267 J. AM. MED. ASS'N 3132 (1992))); see also PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii-iv (2000) [hereinafter USDOJ NVAW SURVEY], <http://www.ncjrs.org/pdffiles1/nij/183781.pdf> (documenting the results of a study of violence against women); PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE CTRS. FOR DISEASE CONTROL & PREVENTION, RESEARCH IN BRIEF, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2 (1998), <http://ncjrs.org/pdffiles/172837.pdf> (documenting the results of another study of violence against women).

167. See, e.g., USDOJ NVAW SURVEY, *supra* note 166, at 59-61 (reporting that violence against women is predominantly intimate partner violence and detailing the social costs of such violence).

168. *Morrison*, 529 U.S. at 632 (Souter, J., dissenting) (citation omitted).

out, male intimate violence is the primary factor in women and children's homelessness.<sup>169</sup>

There are hidden costs as well. When male intimate violence remains unabated in families, it is used to sever the mother-child bond.<sup>170</sup> In New York City, the former Child Protective Services (CPS)<sup>171</sup> routinely petitioned against battered women when evidence was present that children were in the home at the time that violence occurred.<sup>172</sup> In such cases, the State charged that battered women "'engaged in domestic violence.'"<sup>173</sup>

Another possible outcome in child abuse/neglect cases is the placement of children in foster care. A family law attorney with extensive experience in representing children in New York City's Family Court remarked that the combined effect of domestic violence with the AIDS epidemic taxed the foster-care system in New York.<sup>174</sup> Indeed, this attorney speculated, and the studies support her belief that

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169. Joan Zorza, *Woman Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 384 (1994).

170. See *Nicholson v. Scopetta*, 820 N.E.2d 840, 843-44 (N.Y. 2004) (discussing an instance where a mother was separated from her child by the state as a result of suffering domestic violence); see also Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 566-78 (2004) (discussing the increasing frequency of removal of children from their battered mothers' homes and arguing that it is wrong to charge battered women with child abuse or neglect for failing to protect a child from witnessing domestic violence); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 105 (1999) ("The state's refusal to intercede as an affirmative protector of the mother-child relationship, while being altogether too willing to separate the child from her, makes the mother a disengaged stranger to the law."); G. Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1095 (1995) ("Furthermore, because of the frequency and unpredictability of violence against women by intimate partners, strict liability portends a culture in which removal of children, the break-up of the family (mothers and children), and state control over mothers and children become the rule and not the exception.") (internal citation omitted).

171. It is interesting to note that New York's CPS has undergone a series of name changes—from Child Welfare Administration to Child Protective Services to the New York City Administration for Children's Services (ACS). It appears that these name changes coincide with public scrutiny that has focused on the inadequacies within the agency. See, e.g., *Sorry, Rudy, You Had It Right the First Time*, NEWSDAY, Sept. 5, 1996, at A38 (discussing Mayor Rudolph Giuliani's creation of the Administration for Children's Services amid criticism of the City's "Child Welfare Administration").

172. See, e.g., *Nicholson*, 820 N.E.2d at 842-43 ("Plaintiffs alleged that ACS, as a matter of policy, removed children from mothers who were victims of domestic violence because, as victims, they 'engaged in domestic violence' and that defendants removed and detained children without probable cause and without due process of law.").

173. *Id.* at 842.

174. Interview with Bonnie E. Rabin, Esq., N.Y., N.Y. (Summer 2004).

if placements continued at current rates, the foster-care system in New York City would collapse by the mid-twenty-first century.<sup>175</sup>

There also are costs in terms of human capital. By human capital, I refer to human resources, such as time, energy, emotion, and psychic energy that individual women must expend to survive from day to day. When children are involved, such costs dramatically increase.

Martha Mahoney observed that battered women are constantly mediating, planning and strategizing so as to survive from day to day, week to week and month to month.<sup>176</sup> By engaging in resistant self-direction, women's inner resources are depleted. And when such resistance must be part of daily life, the expense to the individual is incalculable.

Of equal importance is how the gendered nature of such conduct remains invisible and unobserved. The failure to hold institutions accountable for such practices creates a communal as well as individual harm. VAWA hearings documented the pervasiveness of male intimate violence.<sup>177</sup> Moreover, the hearings identified myriad issues concerning the gendered nature of state conduct—and how such conduct contributed to the perpetuation of violence regardless of whether such conduct is characterized as misfeasance or nonfeasance.<sup>178</sup> The Senate Judiciary Committee found crimes that “disproportionately affect[] women are often treated less seriously than comparable crimes affecting men.”<sup>179</sup> In Washington, D.C., even though police protocols mandate arrest in domestic violence cases, arrests were made in less than fifteen percent of cases where the survivor was bleeding from her wounds.<sup>180</sup>

In *Navaro v. Black*, the Sheriff's Department in Los Angeles County, California was alleged to routinely classify domestic violence

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175. *Id.*

176. Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 64 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

177. *See, e.g.*, VAWA SENATE REPORT, *supra* note 90, at 41 (“[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.”) (internal citations omitted).

178. *See id.* at 1-3 (demonstrating the breadth of issues addressed within the Act and, impliedly, during the U.S. Senate hearings).

179. *Id.* at 49.

180. *See id.* at 41 (citing KAREN BAKER, ET AL., JOINT PROJECT, D.C. COAL. AGAINST DOMESTIC VIOLENCE & WOMEN'S LAW & PUBLIC POLICY FELLOWSHIP PROJECT AT GEORGETOWN UNIV. LAW CTR., REPORT ON D.C. POLICE RESPONSE TO DOMESTIC VIOLENCE 44 (1989)) (noting that arrests are not made in eighty-five percent of instances where the survivor is bleeding).



911 calls as emergency procedure calls.<sup>181</sup> Instead *all* domestic violence calls were routed to the bottom of the response list.<sup>182</sup> Such dumping of domestic violence 911 calls occurred even when battered women made allegations of protective order violations.<sup>183</sup>

Yet, due to crabbed notions of accountability vis-à-vis the Fourteenth Amendment and state tort law, the courthouse door slammed shut. And, when mandates are not worthy of enforcement; accountability is eclipsed.

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Well, there you have it. The Court has spoken and the news is not good. The Due Process Clause of the Fourteenth Amendment is a worthless proviso in relation to the protection of battered women from the vagaries of their batterers *and* from the state's refusal to follow mandates. But not because Colorado failed to create a valid mandate or because Jessica Gonzales did not have a valid order of protection. And certainly not because the language of Colorado's mandatory arrest statute lacked a commanding tone or lexicon. The Court's nullification of Colorado's mandatory arrest law is due to its application of the negative rights theory articulated so clearly by Chief Justice Rehnquist in *DeShaney*.<sup>184</sup> In *Castle Rock*, Rehnquist was the invisible hand guiding Scalia's pen.

#### IV. IS SISTERHOOD POWERFUL?

*Failure is impossible.*

—Susan B. Anthony<sup>185</sup>

Since *Castle Rock*, I've noted an anemic response to the Court's neutering of states' mandatory arrest statutes. It is particularly unnerving that no viable *political* response has emerged from state-wide advocacy groups in Colorado. Advocates have not lobbied to revise the Governmental Immunity Act or to locate the contours of state

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181. See *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995), *appeal after remand sub nom.* *Farjado v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999) (petitioner filed constitutional claim against state).

182. *Id.*

183. See *id.* at 715 (noting that "there were no clearly delineated guidelines for responding to domestic violence calls, and that as such, the dispatchers were allowed to exercise unbridled discretion") (citation omitted).

184. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194-203 (1988).

185. LYNN SHERR, *FAILURE IS IMPOSSIBLE: SUSAN B. ANTHONY IN HER OWN WORDS* 324 (1999).

accountability in domestic violence provisions that permeate state penal and family court acts. The question is why?

In Colorado, it appears that “reforming immunity statutes is out of the question politically.”<sup>186</sup> Out of the question politically—what could that possibly suggest? If we decode this phrase, I suspect it implies that immunity reform is unachievable. And in seeking such reform, political and economic consequences could be levied against domestic violence programs in the state. I understand the concerns and fears associated with swimming against the political tide. And I have the utmost respect for my sisters and their desire to be cautious. But I have learned, through personal experience, that there is always a price to be paid for stretching our collective consciousness by demanding accountability or, as written in the Talmud, by “speaking truth to power.”<sup>187</sup> And the truth is, unless accountability is incorporated into *every* policy related to male intimate violence, marginalization of battered women will continue unabated. This is what *Castle Rock* teaches. This is the hard lesson *we* should have learned by now. But for some, impossibility was just another word for “nothing left to lose.”<sup>188</sup>

By all standards, the struggle to enfranchise women was out of the question politically as well in 1776, when Abigail Adams sent John off with the exhortation, to “[r]emember the [l]adies,” she understood that women’s political and civil rights were invisible, not merely impractical.<sup>189</sup> Susan B. Anthony knew that the *Declaration of Women’s Rights*, which grew out of the Seneca Falls Convention in 1848, would *not* result in enfranchisement nor would such enfranchisement come without a cost.<sup>190</sup> Yet, for over 140 years, suffragists resisted the impossible. And the cost? The cost was jail, forced feedings, ridicule, beatings, and, in some instances, death.<sup>191</sup>

In *Letter from a Birmingham Jail*, Martin Luther King, Jr., reminds us that “freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed,” and it will cost the oppressed

186. From a confidential e-mail received by the author in May 2008.

187. RABBI SYDNEY SCHWARTZ, *JUDAISM AND JUSTICE: THE JEWISH PASSION TO REPAIR THE WORLD* 81-82 (2006).

188. JANIS JOPLIN, *Me and Bobby McGee, on PEARL* (Columbia Records 1971).

189. Letter from Abigail Adams to John Adams (Mar. 31, 1776), in *THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR* 10, 10-11 (Alice S. Rossi ed., 1973).

190. BILL SEVERN, *FREE BUT NOT EQUAL: HOW WOMEN WON THE RIGHT TO VOTE* 66, 69, 74 (1967).

191. *Id.* at 75. During a public address in 1905, when she was “literally deluged with floral tributes” when she rose to speak, Susan B. Anthony recalled the difficult periods of the movement, stating “[t]his is rather different from the receptions I used to get fifty years ago. They threw things at me then—but they were not roses.” IDA HUSTED HARPER, *3 THE LIFE AND WORK OF SUSAN B. ANTHONY* 1365 (The Hollenbeck Press 1908).

dearly.<sup>192</sup> Our historical memory evokes images of civil rights workers during the Mississippi Freedom Summer, who were murdered while helping to register black voters.<sup>193</sup> Registering black voters was not just out of the question politically, it was deadly—something that Mickey Schwerner, James Chaney, and Andrew Goodman came to understand.<sup>194</sup> Yet, their deaths did not stop the freedom trains. During that summer, students not only registered voters, they operated Freedom Schools,<sup>195</sup> pragmatism would not trump action or political courage. The stakes were too high. And so it was for trade unionists, women's liberationists, and gay and lesbian activists.<sup>196</sup> And so it was for battered women's activists. But something has changed: the sisterhood's power has dissipated. I wonder, what would Susan B. think of us?

#### *A. The Final Lie: It Pays to Play Nice*

During the past year, I have spent time with advocates in Colorado and New York. I have spoken with women who were involved with the BWM and have left, some who are relatively new and some who have been involved for a long time and continue to participate. What I have heard from many of the women who entered the movement in the 1960s and 1970s is that the movement has been conservatized. What started as a grass-roots political movement morphed into a social services entity. Yet, the observation of the Colorado and New York activists in 2007-2008 is not new.<sup>197</sup> In 1980,

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192. Martin Luther King Jr., *Letter from a Birmingham Jail*, in *WHY WE CAN'T WAIT* 82 (1963).

193. In 1964, hundreds of college students joined the freedom train and buses to help register black voters during Freedom Summer. Organized by the Student Non-Violent Coordinating Council (SNCC), black and white kids packed up and left for Mississippi. *Eyes on the Prize*, PBS.ORG, [http://www.pbs.org/wgbh/amex/eyesontheprize/story/09\\_summer.html](http://www.pbs.org/wgbh/amex/eyesontheprize/story/09_summer.html) (last visited Jan. 31, 2011). They were beaten and shot at and some were murdered. The faces of the dead, images on a TV screen, are imprinted on my memory.

194. Schwerner, Chaney, and Goodman were murdered by members of the Klu Klux Klan in the summer of 1964. Shadi Rahimi, *Ex-Klansman, 80, Gets 60 Years in Prison for 1964 Killings*, N.Y. TIMES, June 23, 2005, <http://www.nytimes.com/2005/06/23/national/23cnd-killen.html>. Their beaten bodies were found in an earthen dam by the FBI. *Id.* The men accused of the murder were acquitted by a local jury, however all but one of the defendants were convicted of violating the three civil rights workers' civil rights in federal court and were sentenced to terms ranging from three to ten years. *Id.*

195. *Freedom School Curriculum*, EDUC. & DEMOCRACY, [http://www.educationanddemocracy.org/ED\\_FSC.html](http://www.educationanddemocracy.org/ED_FSC.html) (last visited Jan. 31, 2011).

196. See, e.g., DANIEL JACOBY, *LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA* 94 (1998) (discussing the Ludlow Massacre in Colorado resulting from union miner strikes); RACHEL KRANZ & TIM CUSICK, *GAY RIGHTS* 167-184 (rev. ed. 2005) (outlining the chronology of events in the gay rights movement).

197. See Lois Ahrens, *Battered Women's Refuges: Feminist Cooperative vs. Social Service Institutions*, RADICAL AM. 41, 41 (May-June 1990) (discussing the phases of development

Lois Ahrens wrote that the shelters had devolved from “feminist, non-hierarchical, community-based organizations [in]to institutionalized social service agencies.”<sup>198</sup> Ahrens predicted that the core of the BWM, the shelters, would shift from political to social; ideologically disaggregating the cause from its political roots, gender dominance, and methodologically abandoning the collective process model for a traditional top-down organizational structure.<sup>199</sup>

I do not believe that Lois Ahrens understood the significance of her 1980 piece. It presaged not only the political shift of shelters, but of a critical core within the movement. Ahrens’s analysis of what happened to a shelter in the American Southwest charted a seismic change nationally that reallocated power from resident to staff, re-situated male intimate violence from gender violence to family violence, and recharacterized women’s actions as passive—a consequence of learned helplessness.<sup>200</sup> Because battered women’s shelters were the nucleus or ideological center of the movement, their shift from a political entity to a social services entity is critical because it altered the ideological construct of the movement. The changes, cataloged by Ahrens and her contemporaries, profoundly affected not only the movement, but also social policy that was generated by movement activists and state actors. As an advocate from Colorado opined, the movement was transformed into discrete agencies that looked no different from the social service agencies that served the mentally handicapped, abused children, and the elderly.<sup>201</sup> Their political edge was lost,<sup>202</sup> as was their political agenda, which named the violence,<sup>203</sup>

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of social service entities as refuges for battered women).

198. *Id.*

199. *Id.* at 41-42; *see also* Miccio, *supra* note 6, at 248-56 (analyzing the intellectual and political history of the battered women’s movement through the lens of mandatory arrest and conceptions of autonomy and will).

200. Ahrens, *supra* note 197, at 42.

201. Interview conducted in summers of 2005 and 2007.

202. A good example of the dull blade wielded by the advocates is the issue of judicial training raised by members of the Access to Justice Committee of the Colorado Bar Association. At a series of meetings, advocates correctly identified the judiciary as a problem in the Denver courts. Two judges were invited to give their opinions and insights, and interestingly, they reinforced what advocates had been saying about judicial ignorance of the law and of best practices when dealing with battered women. It was decided that advocates should have a hand in setting up training, developing a curriculum for the judges, and facilitating such trainings for new and existing judges. The group correctly identified the need to have a hands-on approach in training the judiciary. A member of the committee was instructed to contact the person charged with judicial training. As the minutes of this meeting indicate, judicial training was placed on the back burner, because the state actor charged with such training really was not interested in the Bar Association’s help and there was already training by the Office of Court Administration. *See* Colorado Bar Association, Family Violence Program Legal Representation for Domestic Violence Survivors Committee Minutes (Jan. 9, 2008),

the perpetrators, and the need for accountability by the state and state actors.

This political fact of life has had a profound affect on how battered women's advocates interact with state actors. After *Castle Rock*, a meeting was held in Denver at the Sturm College of Law, attended by advocates, state actors, and members of law enforcement.<sup>204</sup> At this meeting, it appeared as if the advocates were backpedaling on the issue of mandatory arrest, rather than examining how non-compliance undercuts the "mandatory" part of the arrest statute.<sup>205</sup> For example, much discussion centered on the "fact" that mandatory arrest should be renamed "probable cause arrest" so as to instruct police officers of the minimum standard for arrest.<sup>206</sup> But, if such practices were in fact commonplace, then law enforcement needed a lesson in constitutional predicates for detention, which could not be accomplished by simply renaming a statutory mandate.

Colorado is not the only state where no viable plan has emerged. In spring of 2007, I was part of a conference call that brought together advocates from various states and former advocates-turned-

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<http://www.cobar.org/repository/Family%20Violence/Legal%20Representation%20for%20DV%20Survivors/Minutes/2008%20Minutes/1.9.08%20Minutes.pdf>. I understand the reticence of non-lawyers, and in some cases lawyers, to challenge the perception and conduct of members of the judiciary and their counterparts in state government, but the issue of judicial compliance with the law will reoccur unless it is treated as worthy of legal and political action.

203. Adrienne Rich understood the power of naming. She recognized that empowerment of a people is derived, in part, through the act of naming—naming the source of oppression and the site of pain. *READING ADRIENNE RICH: REVIEWS AND REVISIONS, 1951-81* 100 (Jane Roberta Cooper ed., 1984). The power of naming gives voice to social phenomena, while making visible the invisible. And it constructs how we interpret certain experiences. Descendants of slaves, named by their slave masters—whose surnames were passed from generation to generation—understood this most basic of human dignities. Perhaps that is why Malcolm X cast off the slave name "Little" and replaced it with an "X" to remind us that naming is an act of empowerment and a claim of identity. *MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X* 216-17 (1965). Naming, as the Talmud tells us, breathes life into a person, into a people. *LIVING TALMUD, THE WISDOM OF THE FATHERS AND ITS CLASSICAL COMMENTARIES* 69 (Judah Goldin trans., 1957) ("If not I for myself, who then? And being for myself, what am I? And if not now, when?"). "Language is a system through which meaning is constructed and cultural practices organized and by which, accordingly, people represent and understand their world, including who they are and how they relate to others." Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 *FEMINIST STUD.* 33, 34 (1988) (postulating that language is the means by which "people represent and understand their world").

204. Meeting at Sturm College of Law discussing *Castle Rock* (Sept. 2005) (author in attendance). Present at the meeting were members of the Colorado Coalition Against Domestic Violence, the Denver Police Department, the Sturm College of Law Civil Litigation Clinic, and Human Services Agency of the City of Denver.

205. *Id.*

206. *Id.*

academics.<sup>207</sup> During this conference call, *Castle Rock* was gently raised by the law professors and quickly dispatched by the advocates from at least four state-wide coalitions.<sup>208</sup> The feeling that drove such a choice not to act was that *Castle Rock* was too confusing, or too difficult to understand.<sup>209</sup> While I do not doubt for a moment that the opinion reads like an unsolved mystery, perhaps there was something we could have done to turn a sow's ear into silk. But nothing came of the conference call or the meeting at Strum.

Again the question is why? Some would argue it has to do with money and funding streams that may flow from the state.<sup>210</sup> And while funding did change the composition of shelters and therefore the movement, this would be an interesting claim for the Colorado BWM.<sup>211</sup> Colorado is one of two states that does not provide funding to domestic violence programs for overall operational expenses.<sup>212</sup> It appears that the movement in Colorado has been co-opted even before it has received money from the political establishment.

But there must be more to this. Perhaps advocates are uneasy about mandatory arrest. If this is indeed the case, then we need to have a serious discussion about mandates, especially in the age of *Castle Rock*. In Colorado and a handful of other states, doctors are mandated to notify law enforcement if an injury seems to be the result of domestic violence.<sup>213</sup> From 2004 to 2006, I conducted a study involving close to 400 doctors in the Denver and Eagle Counties.<sup>214</sup> Sixty percent of doctors who responded reported that they do not

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207. Conference call with advocates facilitated by the Battered Women's Justice Project (2007) (author was a participant in call).

208. *Id.*

209. *Id.*

210. There is no doubt that funding streams and their requisite demands played an inordinate part in the conservatization of the BWM. See Miccio, *supra* note 6, at 256-58 (discussing the history of the BWM); see also Ahrens, *supra* note 197, at 41-47 (discussing the effect of funding on the development of shelters into social service entities and the importance of remaining true to feminist ideals); SCHECHTER, *supra* note 6, at 93-98 (declaring that money was a "mixed blessing" for shelters and detailing how the funding "undermined important movement principles" in some shelters).

211. See *supra* note 210 and accompanying text.

212. The Legislature has given money for legal services; however more than twenty-two percent of the \$500,000 in 2008 was awarded to Legal Services of Colorado. Memoranda on file with author.

213. CAL. PENAL CODE § 11160 (West 2010); COLO. REV. STAT. ANN. § 12-36-135 (West 2010); OHIO REV. CODE ANN. § 2921.22(F) (West 2010); R.I. GEN. LAWS ANN. § 12-29-9 (West 2010); TEX. FAM. CODE ANN. § 91.003 (West 2010).

214. G. Kristian Miccio, Study on the Reporting of Domestic Violence (2006) (unpublished study) (on file with author). 800 surveys were sent to doctors in Denver and Eagle Counties. 365 doctors responded, and of those who responded 60% claimed that where injuries were likely caused by domestic violence, the doctors did not make the required reports.

make reports to law enforcement.<sup>215</sup> Perhaps mandates should be on the table, regardless of whether those mandates compel the police or doctors, because they are not being followed and, with *Castle Rock*, they are unenforceable. But this issue is not part of the legislative conference, or discursive agenda of the leaders of either the state-wide or national advocacy community.<sup>216</sup>

The failure of the BWM to address *Castle Rock* is emblematic of a much larger problem. It is not about a difference of political opinion or strategy; rather, as illustrated by the goings on in Colorado, the BWM lacks a cogent political platform, a political strategy, and the requisite political courage to make the changes in policy and law foisted upon it by *Castle Rock*. It is as if we have battened down the hatches and kept our heads down while deciding to play nice. But as social movements before us learned, nice girls (and boys) are irrelevant when the struggle is about the liberation of a people, and here it is about the liberation of women and children from homes marked by terror.<sup>217</sup> And while I have the utmost respect for my sisters and brothers in the BWM, I am concerned that our failure to confront *Castle Rock* head on is a missed opportunity, a missed opportunity to raise and address the issue of state accountability in an age of denial.

## V. WHAT SHALL WE DO?

What shall we do? The answer rests in reforming state tort law, not in attempting to raise constitutional torts. The Supreme Court's adherence to a negative rights constitution makes any claims analogous to *Castle Rock* a worthless enterprise unless the Court is reconstituted with Justices who view the Constitution as a compendium of negative and positive liberties. Thus, we need to look to negligence actions against the state. This will require reworking state tort law

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215. *Id.*

216. See, e.g., COLO. COAL. AGAINST DOMESTIC VIOLENCE, 2009 ANNUAL REPORT, available at [http://www.ccadv.org/images/2009\\_CCADV\\_Annual\\_Report.pdf](http://www.ccadv.org/images/2009_CCADV_Annual_Report.pdf) (demonstrating a general lack of public focus on the arrest mandates for police officers or the medical reporting mandates for doctors); NAT'L COAL. AGAINST DOMESTIC VIOLENCE'S 14TH NAT'L CONFERENCE ON DOMESTIC VIOLENCE, CONFERENCE AGENDA (2010), <http://www.ncadv.org/files/2010%20Detailed%20Agenda%2062210.php> (demonstrating a general lack of public focus on the arrest mandates for police officers or the medical reporting mandates for doctors).

217. See *Introduction: Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277, 278, 280 (1994) (describing the correlation between the more aggressive activist-minded nature of individuals and the progress of the gay and lesbian agenda from a social movement to a liberation movement); Genna Rae McNeil, *Before Brown: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1435 (2003) (describing the transformation of the Black Freedom Movement marked by insistent "demands for justice" and protests that were "more vigorous, sustained, and multifaceted") (citations omitted).

by limiting the affect of the PDD and, where applicable, state immunity acts in cases of police refusal to enforce orders of protection.

We know that tort law plays an “epistemic role in our society . . . by illuminating relationships in the light of our public standards of responsibility.”<sup>218</sup> It not only attempts to remedy injustice; it also exposes normative cultural beliefs concerning legal relationships “between parties by articulating and applying conceptions of responsibility.”<sup>219</sup>

The normative beliefs that define state accountability vis-à-vis police conduct are disturbing because, when police accountability is part of the calculus, common sense is abandoned and replaced by an obtuse notion of responsibility. For example, the construct of the police officer-as-ordinary-citizen denies the integral position that law enforcement should play in our communities. Moreover, by situating the police officer on the same level as the ordinary citizen, we obscure how law enforcement’s negligent conduct contributes to the perpetuation of male intimate violence.

Such formalized equality belies the fact that the police are empowered to enforce the cultural prescriptions and prohibitions that shape individual and collective behavior. Yet the law regards law enforcement officers as no different from ordinary citizens, wishing away the training, power, and authority consonant with their professional and community status.

The confluence of the PDD with conceptions of duty creates a non-accountability paradigm that distorts notions of responsibility, adversely affecting the lives of battered women and the community.<sup>220</sup> The question that remains is: What shall be done?

#### *A. The Reformation: Toward a Principled Notion of State Accountability*

The law’s actual effect in the world matters more than the law’s existence. It means that if we are not getting socially positive results from law as it is, we need to focus more on law as it should be.<sup>221</sup>

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218. Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 504 (2005).

219. *Id.*

220. *See supra* notes 167-183 and accompanying text (detailing the cost of domestic violence).

221. *See* ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING & LEGAL THEORY* 6 (2006) (“Concrete and stable legal successes are grounded, consciously or not, on theoretical foundations. If theories don’t work in practice, they are not very good theories.”).



You need spend only a few minutes with Jessica Gonzales to know that the current accountability paradigm is not working. And if you have never spoken with a battered woman, simply read the narratives of women-survivors contained in the pages of testimony from the VAWA, the state court reports, or the hearings conducted by the Attorney General and the Commission on Civil Rights.<sup>222</sup> Their words remind us that accountability is lacking, even where policies mandate police conduct, such as arrest, in cases where battered woman have called the police.<sup>223</sup> The police are ignoring mandates with impunity.

And why shouldn't they? Indeed, the U.S. Supreme Court found that "shall," as in "shall arrest," means "maybe or maybe not."<sup>224</sup> According to the Court, mandatory policies do not compel conduct—they merely suggest behavior.<sup>225</sup> Although this approach seems tortured, it logically follows notions of a negative-rights Constitution, and on the state level, of public duty and private rights in police protection cases.<sup>226</sup> If a police officer is treated as the ordinary disengaged stranger, protecting individual citizens cannot be compelled. It is this "logic" that needs reforming.

*B. Making Public Policy Accountable to Battered Women and to the Community: A Higher Standard of Care*

It is essential that, where legislation mandates police behavior, public policy explicitly includes a presumption of duty between the police and the object of the mandate. The *raison d'être* for such mandates is to abate violence directed against battered women. Furthermore, where legislation mandates arrest for violent felonies such as aggravated assault or battery, or violation of a stay-away or no-contact order, the *subject* of the mandate is the perpetrator and the *object* is the battered woman. Consequently, a duty to care for battered women derives from the mandate and the fact that the battered woman is a member of a specific class of individuals singled out by the statute for protection.

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222. See, e.g., COMM'N ON GENDER BIAS IN THE JUDICIAL SYS., GENDER AND JUSTICE IN THE COURTS 1-3 (1991) (reporting the pervasiveness of gender bias in domestic violence cases in the courts and the testimonies heard by the courts).

223. See N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS 45-48 (2001) [hereinafter MANDATORY ARREST] (noting that even with the mandatory arrest provision in New York's Criminal Procedure Law, some police officers in the eight sites studied were not making arrests for a myriad of *spurious* reasons); Miccio, *supra* note 6, at 298 (discussing the report).

224. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

225. See *id.* (noting that there is police discretion).

226. See *id.* at 760-66 (determining that Gonzales did not have a personal entitlement).

Moreover, police status creates the duty, regardless of statutory mandate. Here, all citizens are dependent upon the police to address crime and to provide protection. The police, not the individual citizens, are trained to spot crime, conduct investigations, and effectuate an arrest, even with force. Reliance upon police protection then is a given, unless we are willing to devolve into a society where vigilantism defines protection. I doubt that we are willing to endorse either vigilantism or self-help. Consequently, accountability constructs should reflect the reality concerning the police, the citizen, and protection.

We are not out of the woods yet, however. Legislation must clearly articulate standards concerning foreseeability and harm. And the appropriate standard should be determined by the nature of the policy initiative.

Where legislation or administrative directive *mandates* behavior, foreseeability of the harm is irrelevant. What controls is the *existence* of the harm and whether the plaintiff and the defendant are members of the class defined by statute. Once harm and class are established, accountability is required and liability should be assessed. Essentially, mandatory legislation creates a type of strict liability.

Where legislation creates a quasi-mandatory directive or a policy where discretion remains undisturbed, a hybrid objective/subjective standard should define foreseeability; thus, constructive knowledge would suffice.<sup>227</sup> Knowledge of the harm by one officer is imputed to all officers at a specific precinct.<sup>228</sup> Particularized knowledge would not be required and should be specifically excluded from a statutory or administrative scheme.

There is ample evidence to support this position. Culturally, male intimate violence has achieved notoriety, as have the social policies that sanctioned the violence. Indeed, if nothing else was gained by the O.J. Simpson trial, the American viewer was schooled in how male privilege and police unaccountability make for a deadly combination. It is hard to forget the 911 call by Nicole Brown Simpson through which rage, anger, and violence were indelibly marked on our collective memory.<sup>229</sup> It is also hard to forget how the police took O.J. on the proverbial walk around the block—even with mandatory arrest

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227. A hybrid standard raises the question: What should a reasonable, prudent police officer have known under the circumstances? The reasonably prudent police officer is subjectively qualified. A balance is struck between the mythical objective person, which in this case is a police officer, and circumstances particular to the officer on the scene.

228. Constructive knowledge is not a novel approach. The court in *Sorichetti v. City of New York* used constructive knowledge. 482 N.E.2d 70, 76 (N.Y. 1985). This standard was reaffirmed in subsequent cases, such as *Cuffy v. City of New York*, when assessing liability on the part of the police. 505 N.E.2d 937, 940-41 (N.Y. 1987).

229. Transcript excerpts of Nicole Brown Simpson call to 911 (Oct. 25, 1993), available at <http://walraven.org/simpson/911-1993.html>.

policies in force in California.<sup>230</sup> Consequently, what responding officers knew in the O.J. case should have been imputed to every officer from the Brentwood precinct; thus, what one *should* know derives from common knowledge of the collective.

The question of harm is more textured, however, because it raises critical questions as to harm's constitutive nature. Where legislation imposes mandatory arrest for violations of stay-away orders, no-contact provisions, or violent felony offenses, should the police's "failure" to secure either an arrest or warrant constitute *per se* harm? Or should public policy require "failure plus," with "plus" amounting to subsequent violations, physical injury, or both?

To answer this we need to refer back to findings by the Civil Rights Commission, the U.S. Attorney General's report, the state task force reports on women and the courts, and the Federal VAWA.<sup>231</sup> *All* recognized that systemic neglect contributes to perpetuation of male intimate violence.<sup>232</sup> *All* specifically pointed to police arrest avoidance as a major factor in systemic accountability failures.<sup>233</sup> Moreover, an examination of the legislative findings during the debate on mandatory arrest produces the same result—the social harm that mandatory arrest was thought to abate was two-fold: the violence perpetuated by the batterer and the violence that police neglect created. If we follow this logic, then police arrest avoidance constitutes the harm. Thus, failure to arrest or secure an arrest warrant would meet the harm requirement; "failure plus" is contrary to legislative intent.

While I recognize the validity of this approach because it is supported by legislative findings nationwide, I am sympathetic to those who claim that it could overlook the police's (failed) efforts to arrest or secure a warrant. Additionally, such a stringent standard could produce a draconian response from the police where mutual arrest of battered women and batterers becomes the rule rather than the exception; a shield transformed into a sword.<sup>234</sup>

It is also important to note that feminists who crafted mandatory arrest laws were more interested in infusing care and accountability into police behavior than in upping the number of arrests made or

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230. CAL. PENAL CODE ANN. § 836 (West 2010).

231. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994); *supra* notes 79, 223, 224 and accompanying text.

232. 42 U.S.C. § 13981.

233. *Id.*

234. In *State v. Lucas*, Ohio attempted to hold a battered woman criminally liable as an accomplice to a contempt of court charge when she permitted her ex-husband to attend their child's birthday party. 795 N.E.2d 642, 642-43 (Ohio 2003). The prosecutor claimed that she helped her husband violate a stay-away provision in the protective order by allowing his attendance at the party. *Id.* at 643. Fortunately, the Ohio Supreme Court struck down her conviction. *Id.* at 648.

warrants issued.<sup>235</sup> Therefore, legislation should create a rebuttable presumption that the state can refute by evidence of *due diligence* on the part of the police. This standard strikes a balance between accountability interests and financial concerns. What should constitute the harm is police behavior that marginalizes male intimate violence as opposed to failure to arrest or secure a warrant.

Unlike mandatory arrest provisions, where police discretion is retained, a rebuttable presumption is appropriate. The standard to refute the presumption, however, should be reasonable police efforts.<sup>236</sup> If the state can show that police conduct was reasonable, then the state will prevail, even though the police failed to arrest or secure a warrant.

Finally, where restrictions on police discretion are necessary to ensure protection, legislation that merely creates the restriction is not enough. Any statutory or administrative scheme must contemplate how accountability is to be measured, and where appropriate liability is to be assessed. Experience has taught us that merely articulating “shall” does not create accountability because cultural and legal prerogative protects the state at the expense of the individual. If we learned anything in the years since imposition of mandatory arrest statutes, it is that public policy must specifically enumerate accountability standards or else “shall” will be construed as merely rhetorical or unworkable abstraction.

#### CONCLUSION

*You have afforded me a courtesy that my own country has not afforded me, in allowing me to tell my story for the first time.*<sup>237</sup>

—Jessica Lenahan (Gonzales)

On March 7, 2007, the Inter-American Commission on Human Rights heard Jessica Lenahan (Gonzales) recount the horror that

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235. I was one of the authors of New York’s mandatory-arrest law. I therefore speak from first-hand experience. The motivation for New York’s law was accountability, not filling jails with batterers. See Miccio, *supra* note 6, at 240.

236. I would agree with scholars who opine that courts should not substitute their judgment for that of the police in jurisdictions where discretion has been retained. See, e.g., Nicole M. Quester, Note, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court’s Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391, 421-22 (2007) (noting the Supreme “Court substituted its own policy judgments for those of the Colorado Legislature” (citation omitted)).

237. Paul Wochter, *The Long Wait for Justice*, COLUM. L. SCH. MAG., Spring 2008 at 46, 49 (quoting Jessica Lenahan Gonzales).

eclipsed all emotion on June 9, 1999.<sup>238</sup> For the first time, a legal tribunal was privy to the pain, the lost promise, and the unmitigated despair associated with the murder of three little girls while the Castle Rock police turned a blind eye and a deaf ear to their mother's repeated requests to enforce an order of protection.

March 7, 2007, marked more than Jessica's chance to speak, but gave a voice to her three children. It is a shameful reminder that for battered women and their children, the Fourteenth Amendment is a hollow promise, a cruel deception. Yet, March 7 is more than a reminder of a constitutional failure or a miscarriage of justice; it tells us that our laws and courts will not extend to battered women the protection that they deserve. Today battered women are disengaged strangers to law and to compassion. But there is more to this lesson.

We have deserted Jessica Lenahan, and by we, I include myself along with the BWM. It is as if her story was a headline today only to be forgotten tomorrow. Perhaps this is a consequence of shortsightedness or political naïveté. But it really does not matter what the reasons are; the result is that public policies such as "mandatory" arrest are futile because accountability is absent. And we, the movement's movers and shakers, have collaborated in this cruel deception.

I suspect that some may find my critique harsh. I find our silence harsher.<sup>239</sup> So what shall we do? *Act.*

My hope is that we will find the political courage to write accountability into every piece of public policy that affects the lives of battered women and children regardless of the political cost. My hope is that we will *live* the dream of Susan B. Anthony and the advocates who understood that change is costly, it is painful, and it is inescapable. And because change is inescapable, the question is whether we shall be the architects of that change or defer, out of misplaced caution or abiding fear, to those whose craven sense of justice and compassion marginalizes battered women's lives and rights.

As Hillel said, "if not now, when?"<sup>240</sup>

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238. Ms. Lenahan is represented by the Human Rights Clinic at Columbia Law School. Professor Caroline Bettinger-Lopez and her students seem to be the only advocates still standing beside Ms. Lenahan as she fights her battle to bring accountability into our discourse on justice.

239. At this juncture, I need to recognize the incredible work of Professor Joan Meier and her clinic at George Washington Law School. The Domestic Violence Project consistently inserts the voice of battered women in appellate cases that have a profound effect on the way we parse rights/responsibility. And while I have raised these difficult questions, my concern rests with the battered women's movement, or rather the established domestic violence community, as opposed to individual advocates, many of whom are tireless in the struggle for battered women's rights.

240. PIRKE ABOTH 34 (R. Travers Herford ed. & trans., 3d rev. ed. 1945).