

LIES, LIES PRETTY LITTLE LIES: CASTLE ROCK, BURELLA
MALE INTIMATE VIOLENCE, THE COURTS AND THE BATTERED WOMEN'S MOVEMENT¹

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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*³ 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 unreserved disbelief at the Alice through the Looking Glass [il]logic applied by the majority.

But there is more to this puzzle. In addition to the anemic reaction by legislature and advocate, much of the scholarship post-*Castle Rock* accepts the terrain constructed by the Court.⁴ While critical of the decision, scholars do not contest the underlying assumptions which 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* which structure decision and rationale. It is my contention that nothing could or would have influenced the Court to find for Jessica Gonzales since it adhered to crabbed notions of collective responsibility in defense of the political, economic and legal status quo.

¹ This article is dedicated to Vita Lucia Miccio Olds, my beloved sister, who died May 7, 2008. Vita was an amazing sister, courageous feminist, teacher and guide. She is part of me-in my heart, mind and soul.

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³ 545 U.S. 748 (2005) Hereinafter referred to as *Castle Rock*.

⁴ 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 & INEQUALITY 375 (2006); 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 (2006); Christopher Roederer, *Another Case in the Lochner Legacy, The Court's Assault on New Property Right to the Mandatory Enforcement of a Restraining Order is a "Sham," "Nullity" and "Cruel Deception,"* 54 DRAKE L. REV. 321

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 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* stands and its progeny reinscribe a callous disregard for women's lives and the lives of their children first conceived in *Deshaney*.

In Part One, 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 of feminism in both ideology and methodology, locating male intimate violence as manifestation of gender asymmetry in law and culture. It is essential to understanding the importance of mandatory arrest 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 survivor worthy of state protection and perpetrator worthy of collective condemnation.

Part Two lays out the facts of not only *Castle Rock* but of a new Third Circuit case that incorporates the *Castle Rock* ruling and reason. In *Burella v City of Philadelphia*,⁵ the Court relies on *Castle Rock* in rejecting a battered woman's claim that the Philadelphia police violated the procedural due process prong of the Fourteenth Amendment. And in denying Jill Burella's substantive due process claim, the decision also incorporated *Deshaney's* ruling. Part Two then sets out *Castle Rock's* rationale, but from a decidedly different approach. Here I characterize the unholy 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 Three 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 because it defends the status quo, nothing that Gonzales, *Burella* or State Legislatures could argue or enact would satisfy the craven 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 notion of 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 phrase "failure to respond" or "failure to act." This is not a consequence of literary license but a deliberate recognition that affirmative police conduct occurred when the police *chose* not to enforce the order held by Jessica Gonzales instead opting to go to dinner, to write a second report or to dismiss the frantic mother. Critical to the 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.

⁵ 501 F. 3rd 134 (3d Cir. 2007)

In Part Four, I turn the focus on my self, the advocates and state actors. Using Colorado as an example, I try to understand why there has been literally no 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, *Burella*. In this section, I draw from my own experience as scholar, teacher and member of the Battered Women's Movement and from interviews with advocates in Colorado and New York.⁶

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

But let me begin, from the beginning.

PART ONE: IN THE BEGINNING G-D CREATED THE BATTERED WOMEN'S MOVEMENT.

A Brief Initiation to the Battered Women's Movement.

In the 1970's a new movement joined the myriad political movements of that decade-the Battered Women's Movement (BWM).⁷ The BWM was a corollary of the second wave of feminism and a direct outgrowth of the social, political and economic upheavals of the '60's. Questions of race, gender and sexual orientation were on the front political burner. Activists critiqued the position of women, men and women of color and gays and lesbians within the social fabric. 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.

Feminists, long aware of the violence perpetrated in the family, named the violence, women abuse, the perpetrators, male intimates, *and* the socio-political and legal structure that supported, condoned and codified the violence. This was radical for the 1960's just as it is radical now. I imagine a law review editor or a colleague or two might recoil at the explicit naming of victim/perpetrator. But name we must; giving voice to victim and charting accountability. Truth may enlighten but it is also painful. Indeed, one need only ask the 3-4 million women beaten or the families of the 3-4 thousand women beaten to death each year.

One only need ask Jessica Gonzales or Jill Burella.

⁶ Interviews were conducted in the summer and fall of 2007. They included members of the advocacy, legal, judicial communities. All interviewees requested anonymity and therefore shall remain anonymous. Notes from the interviews are retained by the author.

⁷ See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservativization of the Battered Women's Movement*, 32 HOUST. L.REV. 132 (2005) [hereinafter referred to as House]; See also, SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 160 (South End Press 1982) [hereinafter referred to as Women and Male Violence].

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? ⁸ And, how do we explain away police, courts and prosecutors *refusal* to prosecute violence against women in the home?⁹

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.¹⁰ I think that misogyny actually understates the problem. Perhaps as Andrea Dworkin notes such violence is much more than misogyny, it is gynocide. ¹¹

Male intimate violence is gendered.¹² We know that four battered women are killed every day in the United States. 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, “if foreign terrorists were killing four Americans per day, it’s likely that the F-16s would be fired up and troops readied.” 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.¹³ Battered women’s advocates

⁸ John Stuart Mill recognized that the marriage certificate gave husbands license to physically and sexually abuse their wives. He wrote in 1859, “The state, while it respects the liberty of each in what specifically regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of family relations... The almost despotic power of husbands over wives need not be enlarged upon...” JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 113, 116 (John Gray, ed., Oxford Univ. Press 1991) (1859); ⁸ ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 35 (Oxford Univ. Press, 1987); *People v. Liberta*, 64 N.Y.2d 152 (1984); *Merton v. State*, 500 So. 2d 1301(1986); *Commonwealth v. Chretien*, 383 Mass. 123 (1981).

⁹ See RUTH W. MESSINGER & RONNIE M. ELDRIDGE, BEHIND CLOSED DOORS: THE CITY’S RESPONSE TO FAMILY VIOLENCE, REPORT OF THE TASK FORCE ON FAMILY VIOLENCE (1993) [hereinafter BEHIND CLOSED DOORS]; FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, THIRD INTERIM REPORT TO THE GOVERNOR AND LEGISLATURE 51 (2000) [hereinafter INTERIM REPORT] p. 46-50; See also Carissa Byme Hessick, *Violence Between Lovers, Strangers and Friends*, 85 WASH. U. L. REV. 343 (2007) (discussing how police treated domestic violence as “technical” violence).

¹⁰ *Id.*

¹¹ See generally ANDREA DWORKIN, WOMAN HATING (1974). See also MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (Beacon Press, 1974).

¹² Indeed the federal Violence Against Women Act recognized this phenomena and I would challenge anyone to assert much less prove that the U.S. Congress is a bastion of feminism.

¹³ BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 29-31; 35-36 (Marsali Hansen & Michele Harway, eds., Sage 1993) [hereinafter BATTERING AND FAMILY THERAPY]; NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 94-95 (Simon & Schuster 1998).

appreciated this: they, not unlike their sisters in the suffragist movement,¹⁴ understood that male privilege, of which intimate violence is a manifestation, is about power.¹⁵

The police, critical law enforcement actors, systematically refused to arrest male intimate partners. Such conduct was neither a consequence of happenstance, coincidence or police discretion, as touted by Justice Scalia in *Castle Rock*. Rather it was a result of policies promulgated by police and their counterparts in the law enforcement community. For example, the Law Enforcement and Assistance Administration (LEAA) created six model projects to train officers in “crisis intervention” to respond to domestic violence calls.¹⁶ 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.¹⁷ Such incidents were viewed as “family squabbles,” where the male partner was emasculated by the female partner.¹⁸ Officers were to take on the role of counselors and mediators, trained in the dynamics of crisis intervention. Arrest was perceived as totally inappropriate.

Two cases in the 1970’s illustrate what I term “police arrest avoidance”- a strategy employed by police personnel regardless of jurisdiction. In 1976, a class action suit was filed against the police in Oakland, California on behalf of women battered by their male intimate partners.¹⁹ Two months after the California case, in *Bruno v. Codd*, advocates filed suit in New York against the New York Police Department, (NYPD).²⁰ Both cases alleged that police refused to respond when called in cases where women were physically attacked. In *Bruno*, the litigants claimed that the police, courts, and probation departments chose not to comply with the laws of New York.²¹ 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.²² Two years later, the NYPD, via a settlement, agreed to change police 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.

¹⁴ See generally, Ellen Dubois, *The Last Suffragist: An Intellectual and Political Autobiography*, in WOMEN SUFFRAGE, WOMEN’S RIGHT (New York Univ. Press 1998).

¹⁵ David Adams, *Treatment Models on Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 178-88 (Kersti Yllo & Michele Bograd, eds., Sage Publications, Inc. 1988). SCHECHTER, *supra* note at 20-24.

¹⁶ See U.S. COMM’N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY (1978) at 22–23 (describing the way various police training manuals recommend handling domestic violence situations and suggesting “family violence be treated as a crime”).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The case, *Scott v. Hart*, is described in SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT 159-60 (1982).

²⁰ *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).

²¹ 396 N.Y.S.2d at 976.

²² *Id.* at 1051. The Court of Appeals eventually dismissed the claims against the family court and the probation department. 407 N.Y.S.2d at 167.

Hart and *Bruno* informed advocates' strategy 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 police to change policies concerning arrest in domestic violence cases.²³ Not unlike the advocates in New York and California, Colorado activists changed police procedures by working with police, judges, and probation. Law suits were a potential threat but as one advocate stated, it would be used only as a last resort—the fist inside the velvet glove. *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 on June 14, 1994, O.J. Simpson was indicted for the murder of Nicole Brown and Ron Goldman. The lethality of male intimate violence was part of our collective consciousness, and politicians being political in nature, finally passed mandatory arrest legislation.²⁴ In New Jersey and New York, the State Legislature passed mandatory arrest by unanimous vote.

Now police were mandated to arrest in thirty-two jurisdictions-until *Castle Rock*.²⁵

²³ Interview with advocate in summer 2005.

²⁴ To illustrate that passage of mandatory arrest 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 Violence Prevention Act, which included mandatory arrest, by unanimous vote in both houses. Mandatory arrest bills had languished in legislative committee 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 without comment or dissent. 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.

²⁵ By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah and Wisconsin passed legislation mandating arrest for domestic violence. See R. EMERSON DOBASH & RUSSELL DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 156, 206-7 (Routledge 1992) [hereinafter *WOMEN, VIOLENCE AND SOCIAL CHANGE*]. The majority of states passed mandatory arrest laws in 1994; most provisions were drafted with mandatory arrest language and a concept of the batterer regardless of sex, but arrest records would show that most batterers were male and most victims were female. The following states mandate arrest when there is probable cause to believe that a violation of a protection order has occurred: ALASKA STAT. § 18.65.530(a)(2) (Michie 2000); CAL. PENAL CODE § 836(d) (West Supp. 2001); COLO. REV. STAT. § 18-6-803.5(3)(b) (2007); KY. REV. STAT. ANN. § 403.760(2) (Michie 1999); LA. REV. STAT. ANN. § 14:79(E) (West Supp. 2001); MD. CODE ANN., FAM. LAW § 4-509 (1999); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1998); MICH. COMP. LAWS ANN. § 764.15b (West 2000 & Supp. 2001); MINN. STAT. ANN. § 518B.01, subd. 14 (West 1990 & Supp. 2001); MO. REV. STAT. § 455.085(2) (West 1997); NEV. REV. STAT. ANN. § 33.070(1) (Michie 1996 & Supp. 1999); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 1995); N.M. STAT. ANN. § 40-13-6(C) (Michie 1999); N.D. CENT. CODE § 14-0.7.1-11(1) (1997 & Supp. 2001); N. Y. CRIM. PROC. SEC. 140 (2003); OHIO REV. CODE ANN. § 2935.03 (West 1997 & Supp. 2001); OR. REV. STAT. § 133.310(3) (1999); 23 PA. CONS. STAT. ANN § 6113 (West 2001); S.D. CODIFIED LAWS § 23A-3-2.1(1) (Michie 1998 & Supp. 2001); TENN. CODE ANN. § 36-3-611(a)(2) (1996); TEX. CRIM. PROC. CODE ANN. § 14.03(b) (Vernon Supp. 2001); UTAH CODE ANN. § 30-6-8 (1998); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 1990 & Supp. 2001); W. VA. CODE ANN. § 48-5-508 (Michie 2001); WIS. STAT. ANN. § 813.12(7)(b) (West 1994 & Supp. 2000).

The following states currently mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated: ALASKA STAT. § 18.65.530(a)(1) (Michie 2000); ARIZ. REV.

PART TWO: CASTLE ROCK, BURELLA AND THE LIES THEY CONSTRUCT.

In June 2005, the U.S. Supreme Court handed down its decision in *Castle Rock*.²⁶ Two years later in September 2007, the Third Circuit released its decision in *Burella*, reinforcing both ruling and dicta in *Castle Rock*, 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.²⁷ 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. And since a majority of states have crabbed notions of state accountability in tort—it appears that battered women have no avenue to enforce state mandates.²⁸ 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. Both opinions demonstrate the moral paucity of our conceptions of collective accountability now grafted onto Constitutional interpretation of due process. Thus, their attempts at compassion are not only misplaced but a cruel deception.

Castle Rock and Burella: The Facts

Just as in thirty-one jurisdictions, police in Colorado were mandated to arrest or secure a warrant where “[the] restrained person has violated or attempted to violate any provision of a protective order.”²⁹ Jessica Gonzales received an order that covered her and her children with the additional proviso that respondent father, Simon Gonzales, would be subject to arrest if he violated any of the

STAT. ANN § 13-3601(B) (West 2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 1995 & Supp. 2001); D.C. CODE ANN. § 16-1031 (2001); IOWA CODE ANN. § 236.12(2) (West 2000); LA. REV. STAT. ANN. § 46:2140(1) (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 4012 (West 1998); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1998); N.J. STAT. ANN. § 2C:25- 21(a)(1) (West 1995); OHIO REV. CODE ANN. § 2935.03 (West 1997 & Supp. 2001); OR. REV. STAT. § 133.310(6) (1999); S.D. CODIFIED LAWS § 23A-3-2.1(2) (Michie 1998 & Supp. 2001); TEX. CRIM PROC. CODE ANN. § 14.03(a) (Vernon Supp. 2001); UTAH CODE ANN. § 30-6-8 (1998); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West Supp. 2001); W. VA. CODE ANN. § 48-27- 1002 (Michie 2001). See Deborah Epstein, *Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002).

²⁵ See RUTH W. MESSINGER & RONNIE M. ELDRIDGE, *BEHIND CLOSED DOORS: THE CITY'S RESPONSE TO FAMILY VIOLENCE, REPORT OF THE TASK FORCE ON FAMILY VIOLENCE* (1993) [hereinafter *BEHIND CLOSED DOORS*]; VAWA, *see supra* note 3.

²⁵ See generally LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960* (1988).

²⁶ 545 U.S. 748 (2005)

²⁷ *Burella v. City of Philadelphia*, 501 F.3d 134 (3d Cir. 2007).

²⁸ See, e.g., Colorado Governmental Immunity Act, COLO. REV. STAT. §§ 24-10-101 to -120 (2007);

²⁹ COLO. REV. STAT. § 18-6-803.5(3) (b) (I) [as amended 2004].

provisions contained in the order.³⁰ In June of 1999, Simon Gonzales took the three children from their home without notice, much less consent from their mother.

Simon Gonzales's conduct was a cognizable violation under Colorado's must arrest statutes.

Jessica immediately notified police when she realized the three little girls were missing and correctly intuited that Simon had taken them.³¹ Upon notification the police chose to do nothing. Over an eight hour period police would choose to go to dinner, write another report and rebuff the frantic mother rather than enforce the order.³² In the early morning hours following the children's abduction, Simon appeared at the police station and opened fire with his shotgun. Then and only then did the Castle Rock police investigate.³³ Now they recovered the bodies of the three little girls, shot to death execution style, in the pick-up truck driven by Gonzales.³⁴ Forensics later established that the children were murdered around the time Jessica called the police telling them that Simon and the little girls were in Denver.

Jessica Gonzales sued the State of Colorado under 42 U.S. C. Sec. 1983, claiming 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.³⁵ The District Court dismissed the claim and the U.S. Court of Appeals for the Tenth Circuit reversed, in part, the District Court decision, finding that the Colorado Legislature, in passing its mandatory arrest provisions created a property interest in the enforcement of orders of protection.³⁶

On June 27, 2005, the U.S. Supreme Court reversed the Tenth Circuit Court in its now infamous decision.³⁷

In January of 2000, Jill Burella was shot by her police officer husband who then turned the gun on himself.³⁸ Their marriage was marked by repeated assaults and Ms. Burella's repeated requests to the Philadelphia Police Department (PDD) to enforce the numerous orders of protection issued by the courts.³⁹ The police allowed Burella into the marital home after he threatened his wife, refused to arrest Burella 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 permitted his presence

³⁰ Castle Rock, 545 U.S. at 751-52.

³¹ *Id.* at 753.

³² *Id.* at 753-54.

³³ *Id.* at 754.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Gonzales v City of Castle Rock*, 366 F.3d 1093, 1117 (10th Cir. 2004).

³⁷ *Castle Rock* at 769.

³⁸ *Burella* at 136. All references to Burella are in the opinion at 136-138 unless otherwise noted.

³⁹ *Id.*

on the force even after he refused to submit to psychiatric counseling as ordered by the departmental psychiatrist.⁴⁰ The threats, entry into the marital home and continued possession of his service revolver were explicit violations of the protective order.⁴¹

On January 8, 2000, Burella was shot by her husband. Subsequently, she filed suit against the City of Philadelphia under 42 USC 1983. On September 13, 2007, the U.S. Court of Appeals, Third Circuit, relying on *Castle Rock*, reversed the District Court ruling that denied the police qualified immunity.

The First Lie: Deshaney Redoux

To understand *Castle Rock* or *Burella*, one must understand *Deshaney v Winnebago County*. In 1985, the Rehnquist Court severed one connection to state accountability in the now infamous *DeShaney*⁴² 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.⁴³

What drove the majority in *Deshaney* was Rehnquist's belief that the Constitution is primarily a negative rights document which rules out positive liberty 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. [It] is a limitation on the State's power to act."⁴⁴ 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 which directly cause the harm or occur while the individual is in the State's custody.

Here, the Court characterized the *cause* of the violence as private because Joshua was put into a vegetative state by the direct actions of his father.⁴⁵ The majority disaggregated the State's act of returning Joshua to an abusive father from the harm and re-characterized state conduct as inaction.⁴⁶ Juridical wisdom treated the State as mere observer to Joshua's beating.⁴⁷ As an

⁴⁰ *Id.*

⁴¹ *Id.* at 136-138.

⁴² 489 U.S. 189 (1989).

⁴³ *Id.* at 202. Joshua DeShaney was beaten by his father numerous times. *See id.* at 192-93. After one particularly vicious attack, Joshua was hospitalized. *Id.* at 192. Because of the severity of the attack, the State of Wisconsin refused to release the little boy back into the father's home absent an agreement where Child Protective Services would monitor the child's condition in the home environment. *See id.* As part of a contract between the County and the father, the State would make unannounced visits to check on the little boy. *See id.* On a number of occasions, Joshua's father refused entry to the case-worker. *See id.* at 193. 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. *See id.* at 192-93. Moreover, Child Protective Services did not enforce the agreement. *See id.* Subsequently, the child was beaten into a vegetative state. *Id.* at 193. Joshua's biological mother filed suit against the State of Wisconsin alleging that their actions violated the child's Due Process rights. *Id.*

⁴⁴ *Deshaney*, 489 U.S. at 195.

⁴⁵ *Id.* at 201-03.

⁴⁶ *See id.* at 200-01.

observer, the Court found no connection between the State and Joshua's injuries: and no connection to the victim's injuries meant there was no tie or connection to the victim.⁴⁸ 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 the State created the danger.⁴⁹ This crabbed notion of state action is the death 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.

The Second Lie: Castle Rock and Burella

DeShaney, *Castle Rock* and *Burella* are an unmitigated nightmare. And quite simply they are enraging. Not because the Court continues traditions that are morally despicable but because they do so wrapped in the Constitution or more aptly the Fourteenth Amendment or what they opine to be the correct version or interpretation. But here 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."⁵⁰ Oppression.⁵¹ Brennan did not mince words here but then neither shall I. The legacy left by these three decisions casts the Fourteenth Amendment as mere aspiration. In relation to State protection from male intimate violence battered women and their children are left wanting.

In *Castle Rock*, the Supreme Court held that Colorado failed to create a Fourteenth Amendment property interest in the enforcement of a protective order. In what I term the "yeah, but" theory of constitutional analysis the Court dismissed not only Jessica's claim but implicitly the claim of any one in any of the thirty-two jurisdictions where shall arrest provisions exist.

Let's review.

The Court starts from the position that the Colorado statute isn't mandatory because it permits police discretion. Yeah, but even if the statute is mandatory, because it mandates two options, arrest or seek an arrest warrant and the latter is procedural rather than "an end in itself" the legislation isn't mandatory. Even if the statute mandates a "non-discretionary duty on the part of police," the duty does not create a private right or entitlement but rather a public duty or "end" a la the criminal law. And even if it did create an entitlement, it is not a due process type entitlement because enforcement doesn't have a monetary value and enforcement is an incidental benefit of a general duty.⁵²

⁴⁷. See *id.* at 200-03.

⁴⁸. See *id.*

⁴⁹ The State created danger theory is narrowly constructed due primarily to narrow notions of affirmative conduct which will be addressed in Part III, *infra* at .

⁵⁰ *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting).

⁵¹ Brennan was responding to the idea that the applies only when the State coerces or oppresses the individual through its affirmative conduct.

⁵² *Castle Rock*, 545 U.S. at 760-67. See also Christopher Roederer, *Another Case in the Lochner Legacy, The Court's Assault on New Property Right to the Mandatory Enforcement of a Restraining Order is a Sham, "Nullity" and "Cruel Deception,"* 54 DRAKE L. REV. 321, 329 (2006) (arguing that the Supreme

Let's first take the Court's claim that Colorado never really intended to do away with police discretion when it passed its mandatory arrest statute. The Court starts from the place that police have always had discretion when dealing with crime, crime victims and perpetrators.⁵³ 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."⁵⁴ 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 thirty-two jurisdictions.⁵⁵ And while Pilon raises an important issue about tradition, he mischaracterizes tradition as that of 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. Thus, no duty owed, no way, no how.

Think for a minute what the majority uses to trump Colorado's enactment of mandatory arrest. They use a 1980 report from the ABA Standards for Criminal Justice.⁵⁶ The year 1980 is critical here because mandatory arrest was not on the horizon much less policy in a majority of the states. The issue of male intimate violence was just coming to the attention of the American people and the criminal justice system. Indeed, the first national discussion occurred in the late 1970's and the findings of the Attorney General's Task Force were not part of water cooler discussion much less legislative strategy.⁵⁷ 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, the arrest or secure a warrant language in the Colorado statute, Scalia claims that it can't possibly mandate behavior because "seeking ...an arrest warrant would be an entitlement to nothing but procedure."⁵⁸ And where there is a procedure there is discretion; thus the statute doesn't form the "basis for a property interest."⁵⁹

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. Indeed, characterizing the function of police or judges under mandatory arrest as discretionary misstates or misapprehends "discretion." The probable cause determination by court or cop is not a discretionary act. It requires assessment of the evidence. It is ministerial. Moreover, the cop or the judge is not empowered to disregard the mandate once probable cause is found to exist. Mandates then remove a universe of potential action and replace it with one option,

Court decision has rendered the 14th 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).

⁵³ *Castle Rock*, 545 U.S. at 760-62.

⁵⁴ *Id.* at 759-61.

⁵⁵ See, Roger Pilon, *Town of Castle Rock, Executive Indifference, Judicial Complicity*, 2005 CATO SUP. CT. L.REV. 101, 104 (2005), hereinafter *Town of Castle Rock*.

⁵⁶ *Castle Rock* at 758-62.

⁵⁷ U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY (1978); ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT (1984).

⁵⁸ *Castle Rock* at 764-65.

⁵⁹ *Id.*

and that option is 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 as to be credible.”⁶⁰

Points three and four are equally specious. Scalia claims that Ms. Gonzales protection vis a vis enforcement of the order was incidental.⁶¹ Yet, to claim that Ms. Gonzales was an indirect beneficiary of the must arrest statute is revisionism at its worst. While Mr. Gonzales would have been the *subject* of police attention, Jessica Gonzales was the object of both the protective order, police enforcement of the order and legislative imperative. As a battered woman she was within the ambit of *protected person* as contemplated by the Legislature and the battered women’s movement.⁶² Jessica Gonzales was a member of a specific class of individuals singled out by the statute for protection.⁶³

The Court’s final justification is as byzantine as the prior three. Scalia believes that since a monetary value can not be ascribed to enforcement, Gonzales fails to raise a cognizable property interest protected by due process. But Roth⁶⁴ 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 such intangibles as “relating to the whole domain of social and economic fact.”⁶⁵ And while this may be an in artful 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.⁶⁶

As I reread *Castle Rock*, questions emerge that are troubling. Why didn’t Scalia use the 1993 federal Violence Against Women Act Report which found that police arrest avoidance contributed to the continued perpetration of male intimate violence? Why didn’t Scalia refer to the plethora of amicus briefs which discussed in exacting detail the reasons why discretion was removed from police?⁶⁷ And finally why did Scalia effectively overrule the legislative history which supported the

⁶⁰ Pilon, *Town of Castle Rock* at 106.

⁶¹ *Castle Rock*, 545 U.S. at 754-56.

⁶² The *raison d’etre* of mandatory arrest is to abate the violence.

⁶³ See *Nearing v Weaver*, 670 P.2d 141, 143 (1983) (domestic violence protective orders “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 is to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement.”)

⁶⁴ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972).

⁶⁵ *Id.* at 571-572, 577. See also *Logan v. Zimmerman Brush*, 455 U.S. 422, 430 (1982).

⁶⁶ *Perry v Sindermann*, 408 U.S. 593, 601 (1972). The Court has found property interests created by state conferred social benefits. See *Goldberg v Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Mathews v Eldridge* 424 U.S. 319 (1976) (disability benefits); *Goss v Lopez*, 419 U.S.565 (1975) (public education).

⁶⁷ See Brief Amicus Curiae of the National Ass’n of Women Lawyers and the National Crime Victims Bar Ass’n in Support of Respondent at 8-10, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 328201 (discussing the consequences of domestic violence and failure of police to enforce mandatory arrest statutes); Brief Amicus Curiae of the American Civil Liberties Union and ACLU of Colorado, Hon. John J. Gibbons, Hon. Timothy K. Lewis, AALDEF, California Women’s Law Center, National Asian Pacific American Women’s Forum, National Partnership for Women & Families, Northwest Women’s Law Center and Women’s Law Project in Support of Respondent at 17-22, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 328202 (explaining how police further endanger victims of domestic violence when they fail to enforce protection orders); Brief of National Black Police Ass’n, National Ass’n of Black Law Enforcement Officers, Women in Federal Law Enforcement, the National Center for Women & Policing, and Americans for Effective Law Enforcement, Inc., as Amici Curiae Supporting Respondent at 27-30, *Gonzales*, 125 S.

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. And this is the third and final deception.

PART THREE: THE THIRD AND DEADLIEST LIE-THE “WHY.”

Don Coreleone said it better than anyone, “Keep your friends close but your enemies closer,” 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 Burrell the stakes are raised even higher because the promise of the Due Process Clause is forever outside the reach of battered women.⁶⁸

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 law “more mandatory,” the promise of the Fourteenth Amendment due process clause would be attainable, in our life time. 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. I guess to the good Justice, the Ten Commandments are merely the ten suggestions. From a policy standpoint, I can not envision how one makes “a peace officer shall arrest...or seek a warrant,” more mandatory: 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.

Ct. 2796 (2005) (No. 04-278), 2005 WL 328203 (discussing police protocol with respect to domestic violence); Brief Amici Curiae of National Network to End Domestic Violence, National Network to End Domestic Violence Fund, Colorado Coalition Against Domestic Violence, Alabama Coalition Against Domestic Violence, Alaska Network on Domestic Violence and Sexual Assault, Arizona Coalition Against Domestic Violence, Arkansas Coalition Against Domestic Violence, California Alliance Against Domestic Violence, Connecticut Coalition Against Domestic Violence, D.C. Coalition Against Domestic Violence, Delaware Co., as Amici Curiae Supporting Respondent at 19-30, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 353608 (discussing pervasiveness of domestic violence and the likely increase in such violence that results from failure to enforce protection orders); Brief Amicus Curiae of AARP in Support of Respondent at 4-10, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 353692 (discussing domestic violence in the specific context of elder abuse); Brief of Amicus Curiae The Family Violence Prevention Fund, the National Center on Domestic and Sexual Violence [and Others] in Support of Respondent at 4-10, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 353693 (discussing domestic violence and its consequences for children); Brief of Peggy Kerns, Former Member of the House of Representatives of the State of Colorado, and Texas Domestic Violence Direct Service Providers, as Amici Curiae in Support of Respondent at 12-14, 19-21, *Gonzales*, 125 S. Ct. 2796 (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 of National Coalition Against Domestic Violence and National Center for Victims of Crime as Amici Curiae in Support of Respondent at 12-17, *Gonzales*, 125 S. Ct. 2796 (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 of International Law Scholars and Women’s, Civil Rights and Human Rights Organizations As Amici Curiae in Support of Respondents at 27-28, *Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 328200 (discussing the impact of police failure to enforce protection orders on U.S. treaty obligations).

⁶⁸ Clearly if the composition of the Court is changed and Justices appointed who have a historically correct and more compassionate view of the Due Process Clause, 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 am not holding my breath, however.

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 20th Century, that 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.⁶⁹ Essentially, the modern read of Fourteenth Amendment due process is basically a keep your laws off my body approach. This is one reason why we get the decision we did in *Califano v. McRae*⁷⁰, where the Court tells us, *inter alia*, that since the state didn't create poverty it has no duty to provide poor women with abortions. Thus, the State *qua* State can restrict access to abortions by restricting the flow of funds to poor women for this medical procedure.⁷¹ 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.⁷²

Let's 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's Court treatment of the harm to Joshua. Here the Court privatized the harm because Joshua's father beat him into a vegetative state. And, the Court concluded that the State of Wisconsin did nothing to cause Joshua's injuries, it merely failed to act or to protect. Return of the child by the state to his father was not affirmative conduct so state conduct was recast as *inaction*. Because the action/inaction paradigm is a natural corollary of negative rights theory, where there is no affirmative duty one must find affirmative conduct.⁷³

The lexicon reaffirms crabbed notions of state action. In *Deshaney*, the state's conduct is described as a failure or omission to act. And as any first year law student knows, where there is a failure/omission one must find a legal duty. 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.⁷⁴ Thus, if we

⁶⁹ See Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479 (2001).

⁷⁰ 433 U.S. 916 (1977).

⁷¹ *Id.* See also Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330-332, 334 (1985) (the abortion funding cases raise questions about negative versus positive rights).

⁷² Indeed, Catherine Mackinnon wrote “ If one group is socially granted the positive freedom to do whatever it wants to the other group, to determine what the second group will be and do this rather than that, no amount of negative freedom legally guaranteed to the second group will make it equal to the first. For women this has meant that civil society, the domain in which women are distinctly subordinated and deprived of power , has been beyond the reach of legal guarantees.” CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 164-165(1989) .

⁷³ Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (rejects the state action doctrine, suggesting instead that the focus should be on the nature of the right to locate the contours of state responsibility). See also Laurence Tribe, *supra* note 48 at 332-335.

⁷⁴ See generally G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Women Survivors and Conceptions of State Accountability*, 37 RUTGERS L. REV. 111 (2006) (in depth analysis of 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

characterize the state's "act" as inaction (omission) we need to find a legal duty. And because police (the state) only owe a generalized and not a particularized duty of care to folks, the characterization of the act is critical when claiming a Constitutional tort.⁷⁵

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 action. The State of Wisconsin returned the little boy to his father with the knowledge that dad had beaten the boy so severely that he was hospitalized. And, the State continued the placement even though the father violated the agreement by refusing Child Protective Services access to his son. 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 perspective.⁷⁶ And while such characterizations are harmless in 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 which foster clear and unequivocal lines of demarcation between state and federal power. As Laurence Tribe notes, Rehnquist wants to maintain separate spheres only recognizing a "coterminous" intersection between state and federal power when the state violates clearly defined negative restraints.⁷⁷ 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, were enacted to provide protection when states refused to protect the fundamental rights of its citizens⁷⁸. It was intended to act as an antidote to the state's turning a blind eye to violations of citizens' life, liberty and property interests by the state or by private actors. It was to be a haven in a heartless world.

What of *Castle Rock* and *Burrella*?

intimate partners and these standards have been imported into conceptions of a negative rights Constitution and state accountability).

⁷⁵ I would argue that the idea of a generalized duty of care flows from the priority to protect the State from suit, ergo monetary damages and concomitantly reinscribing the reach of the Public Duty Doctrine aka qualified immunity. *Id.*

⁷⁶ G. Kristian Miccio, *Exiled from the Province of Car: Domestic Violence, Duty, and Conceptions of State Accountability*, 37 RUTGERS L. REV. 111, 140-47 (2005) (article rejects the action/inaction paradigm).

⁷⁷ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 551-553(2^d ed. 1988). *See also* U.S. v Cruikshank, 92 U.S. 542, 550-551 (1876).

⁷⁸ *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 13 (3d ed. 2006).

Some would argue that my analysis up to this point seems misplaced because Castle Rock and Burella, 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”⁷⁹ since “what we refer to as process is merely the enforcement given to the natural rights of life, liberty and estate.”⁸⁰ 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 procedural and the categories under a rubric of “natural” rights. For my critics, they 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 Gerhardt, jurists such as Harry Blackmun⁸¹, and philosophers such as Immanuel Kant, conceptions of life, liberty, property⁸² flow from what we call the dignity of the individual.⁸³ Moreover, the very purpose of the state is to protect our life, liberty and property, not because they 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.⁸⁴ And 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 had delegated that enforcement to the government.⁸⁵

Now 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

⁷⁹ Pilon, *Town of Castle Rock*, supra note 55 at 110.

⁸⁰ Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1858 (2006) (examines 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.) (hereinafter cited as Mr. Rehnquist's Theory).

⁸¹ *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

⁸² As Michael J. Gerhardt states in discussing Deshaney, “[t]he dual purposes of the fourteenth amendment permeating through *all* of its provisions were (1) to provide constitutional protection for the fundamental or “God-given” or “natural” rights of all United States citizens by (2) radically altering the design of federalism ...to invest the federal government with complete authority to punish the infringement of such rights by either state or private action.” Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426-27 (1990) (footnotes omitted) (emphasis added) (hereinafter cited as *The Ripple Effects*).

⁸³ See IMMANUEL KANT, *THE MORAL LAW: KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS* 105 (H. J. Paton trans., Routledge 1997) (1785) [hereinafter KANT, *THE MORAL LAW*]; JOHN RAWLS, *JUSTICE AS FAIRNESS* (1958), reprinted in *COLLECTED PAPERS* 47, 48 (Samuel Freeman ed., 1999). To Kant, the basis of moral law is to be found in the subject not the object of practical reason—a subject capable of rational will. See KANT, *THE MORAL LAW*, supra, at 105. According to Kant, “A rational being himself must be . . . the ground for all maxims of actions.” *Id.* at 105 n.1.

⁸⁴ See, e.g., John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, in 35 GREAT BOOKS OF THE WESTERN WORLD 53 (Robert Maynard Hutchins ed. 1952) (1690) (“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] . . .”).

⁸⁵ See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

nature” and “the social contract theory.”⁸⁶ I have also spared you a lengthy discourse on the whittling away of the promise of the Fourteenth Amendment starting with the Slaughterhouse decision in 1873. Why? Because Jessica Gonzales had more than a philosophical claim to protection vis-à-vis social contract theory. Jessica Gonzales 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 a warrant. And the guarantee of enforcement was backed up by not only the plain language of the order but by legislative prerogative. Figuratively holding the order in her hand, Jessica was asking the Court to honor the Fourteenth Amendment which took fundamental rights and transformed them into national rights, deserving of protection from state interference or neglect.⁸⁷

The majority would not honor this commitment, further eviscerating the amendment and the power vested in the people.

The Political is Personal: The Political Why.

In the late 1960’s feminist activists coined the phrase the “personal is political.”⁸⁸ And 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* for government.

For the traditional liberalists, women were excluded from the “I,” because autonomy, as a corollary of individualism, was synonymous with maleness.⁸⁹ The autonomous person was self-sufficient, separate and distinct—the rational, ubiquitous being—standing “above the fray,” or, as Lorraine Code notes, “to view ‘from nowhere’ the truths the world reveals.”⁹⁰ The truly autonomous

⁸⁶ See generally THOMAS HOBBS, *LEVIATHAN, OR, THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL* (Michael Oakeshott ed., Collier Books 1962) (1651). See also Meikeljohn, *supra* note 85. Rousseau, *supra* note 85.

⁸⁷ Clearly Slaughterhouse which eviscerated the Privileges and Immunities Clause and *Deshaney* which neutered substantive due process protection are in play. But both turn the logic and history of the amendment on its head. See, Gerhardt, *The Ripple Effects* at 426-427; See also Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Howard)

⁸⁸ Carol Hanisch has a brief essay called “The Personal is Political” in the Redstockings collection *Feminist Revolution* -- her essay is dated March 1969 (204-205). See also ROBIN MORGAN, *SISTERHOOD IS POWERFUL* (1970).

⁸⁹ In classical philosophy, the autonomous individual was gendered, and conceptions of the liberal self were inherently masculinist, since women were confined to descriptive categories rooted in irrationality and immaturity. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* 161 (H.M. Parshley ed. & trans., Vintage Books 1974) (claiming that “representation of the world . . . itself a work of men; they 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, *A House Divided*, *supra* note, at 310 & n.327 (theorizing about the gendered nature of Kantian notions of autonomy and human agency).

⁹⁰ Lorraine Code, *The Perversion of Autonomy and 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* 54-55 (Hans Reiss ed., H.B. Nisbet trans. 1970) (positing that

individual was a rational, (male) disembodied self—freed from the vagaries of the body and the senses—disconnected from the self and from others. And the autonomous person was not confined to the private sphere, cut-off from the civil society.⁹¹

By claiming the personal is political, feminists exploded conceptions of the autonomous self, the “I”, by making real women’s agency within the family. And, by integrating the political into the private sphere, where women were destined to dwell or so the traditionalists believed, they turned women’s experience into an authentic political truth.⁹² And part of this truth was the recognition that men battered and raped their wives protected by the political, cultural and legal status quo.⁹³ The law provided not only the excuse but the cover for such violence. As Catherine MacKinnon notes violence against women is a means of social control, maintaining the political status quo in both family and society.⁹⁴ And 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.

A Delicate Balance: The People and the Courts.

From our first history class we Americans learn the unique balance struck 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.⁹⁵ That body is our voice in political discussions, debates and finally enactments meant to prescribe individual and collective behavior.

Rehnquist understood the delicate balance. He also understood that the people are the “ultimate authority.”⁹⁶ The people are the ultimate authority. What could Rehnquist have meant by this? Essentially, the people speak through their duly elected representatives, and when we speak our voices must be honored by the executive and by the courts.

individual autonomy is an achievement of enlightenment—one’s achievement of emergence from self-incurred immaturity).

⁹¹ See supra note 90.

⁹² U.S. COMM’N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 20–22 (1978) (“Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to [a] call for help.”). See also Miccio, *A House Divided*, supra note 7.

⁹³ See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987);

⁹⁴ See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC’Y 635, 657 (1983) [hereinafter MacKinnon, *Feminism*] (“The private sphere, which confines and separates us, is therefore a political sphere, a common ground of inequality. . . . If the most private also most ‘affects society as a whole,’ the separation between public and private collapses as anything other than potent ideology.”).

⁹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .”). See also John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, supra note 84, 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.”).

⁹⁶ William H. Rehnquist, *Observation, The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976).

In *Deshaney*, Rehnquist's use of the negative rights paradigm did not disturb the balance between the people and the courts. While it was problematic for myriad reasons, the negative rights interpretation did not insert the Court's voice over or to the exclusion of the peoples. Why? Because Wisconsin had not enacted legislation to compel police or Child Protective Services to act in a specific manner or produce a specific outcome. 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.⁹⁷ Their experience with law enforcement paralleled that of the other thirty states where mandatory arrest became law—police were refusing to arrest in cases where the perpetrator was intimately connected to the survivor.⁹⁸ Indeed, the hearings during the 1993 federal Violence Against Women Act, record in exhaustive and graphic detail just how pervasive police arrest avoidance was in the fifty states and Colorado and Pennsylvania were no exception to this time honored yet loathsome practice.⁹⁹

The people had spoken.

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 the Court never claims that the enactment of positive liberties by the Legislature violated the federal Constitution; rather, Colorado's conduct contradicted the beliefs or values held by the majority. Scalia penned a decision which primatized a set 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. To Stevens the majority substituted its judgment for that of the people.¹⁰⁰ But it is more than mere substitution or patronizing, as Professor Kmiec believes,¹⁰¹ 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. 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.

⁹⁷ COLO. REV. STAT. 18-6-803.5(3)(b) (2007); 23 PA. CONS. STAT. ANN § 6113 (West 2001)

⁹⁸ See Part I, *supra*.

⁹⁹ Senate Committee on the Judiciary, Report on the Violence Against Women Act of 1993, S. Rep. No. 103-138, 103d Cong., 1st Sess. 41 (1993). 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).

¹⁰⁰ *Castle Rock*, 125 S. Ct. at 2813-15 (Stevens, J. dissenting).

¹⁰¹ Kmiec, *Young Mr Rehnquist's Theory*, *supra* note 80, at 1864 states, "We, your judicial elders, disagree or think this effort imprudent."

The Political is Personal: Reliving History.

After *Castle Rock*, the word on the street was police did not have to arrest. Police could, if they chose, revert back to the old days when arrest was the exception rather than the rule. In Aurora County Colorado, the District Attorney let it be known that *Castle Rock* was the TKO for mandates. And while there is only anecdotal evidence to support the word on the street and the DA's opinion, it definitely isn't a good time to be battered vis a vis the system.¹⁰² But then it has never been a good time.

Castle Rock takes us back before mandates, when police did anything but arrest. The *Sorichetti*, *Hart*, *Bruno*, and *Thurman* cases were cruel reminders that legal and cultural misogyny were very much alive.¹⁰³ Mutilated children and the bodies of murdered and disabled women at the hands of boyfriends and husbands was not only part of legal history but of our collective consciousness. Mandatory arrest burst onto the political scene, lost momentum¹⁰⁴ and then was revived with the Simpson murders. There was a sense that politicians finally understood what feminists had been saying for years-women deserved equal justice and the right to live lives free from terror and home grown violence.

But times have changed

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.¹⁰⁵ It seems that the Fourth Estate believes that the right to protection should be determined by a show of hands.¹⁰⁶ *Castle*

¹⁰² Police Can Not be Sued for Failing to Enforce a Restraining Order, www.thedenverpost.com/news/4655165/detail.html

¹⁰³ See, Part One, *supra* at for a discussion of *Hart* and *Bruno*. *Sorichetti v NYPD*, 482 N.E.2d 70 (N.Y. 1985), resulted in the largest settlement against the New York City Police Department when police failed to enforce and order of protection against respondent-father who disemboweled his daughter and mutilated her so severely that she remains in a vegetative state twenty-five years after the attack. *Thurman v City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) 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 by her husband, remained in his police car and did not come to her aid.

¹⁰⁴ Mandatory arrest stalled in states because there was much discussion and concern about its affect on communities of colour among activists in the BWM. There was a belief that women of colour, i.e. African-American women, would not call 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 in VIOLENCE AGAINST WOMEN* 436, 452-53 (1998) (reporting that African-American low-income battered women were more likely to rely on police response than were white low-income battered women).

¹⁰⁵ *Id.* at www.thedenverchannel.com/news/4655165/detail.html.

¹⁰⁶ See Thomas Carlyle, *The Hero as Man of Letters*, *Johnson, Rousseau, Burns* (Lecture V, May 19, 1840) (available at <http://www.victorianweb.org/authors/carlyle/heroes/hero5.html>) ("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.") (emphasis in original).

Rock is more than a Supreme Court decision contained in a reporter that will in time collect dust. It is a seismic shift in who holds political power to determine how the people shall live, order itself 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 their pain. *Castle Rock* changed this, and it is political and it is very personal.

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”.’¹⁰⁷

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.¹⁰⁸ 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)¹⁰⁹ and, in Colorado’s case, the Governmental Immunity Act (GMI) 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 citizens¹¹⁰ unless a particularized connection exists between police officer and citizen—and the courts and the legislatures narrowly construe this connection.¹¹¹ And in Colorado the Governmental Immunity Act which adds an additional hurdle, severely restricts one’s ability to sue state actors because it requires willful conduct on the part of the tortfeasor.¹¹² Thus, for Jessica Gonzales, the PDD and GIA were impenetrable barriers that could not be overcome; and, the Court knew this.¹¹³

¹⁰⁷ *Castle Rock*, 545 U.S. at 768.

¹⁰⁸ *Id.*

¹⁰⁹ 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. Sovereign immunity is a common-law doctrine rooted in the British common-law system where the Crown was immunized from suit.¹⁰⁹ Sovereign immunity bars all claims against the state because, “there can be no legal right as against the authority that made the law on which the right depends.”

¹¹⁰ 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) (removing the “public/private duty doctrine,” but noting that certain areas of immunity for state actors remained protected); *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.”).

¹¹¹ See *id.* (discussing the particularized connection requirement and law enforcement cases that found that such connections did not exist).

¹¹² COLO. REV. STAT. §§ 24-10-101 to -120 (2007). For a discussion of the Colorado Governmental Immunity Act, see G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 Rutgers L.J. 111, 131 (2005).

¹¹³ *Castle Roc*, 545 U.S. at 769 n.15.

Why was the Court so duplicitous? Because preservation of the economic status quo was more important than 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.

The Floodgates Argument

The Court bought the Town's floodgates argument. Simply put, their argument was if the Court found for Jessica Gonzales, the floodgates would open and battered women would sue in droves, bankrupting municipalities across the state. Indeed, the Denver Post, in one of its less than thoughtful articles, parroted the Town's claim.¹¹⁴ This "Chicken Little the Sky is Falling" defense was premised on, well, nothing more than unadulterated conjecture. It was, if you will, hyperbole at its best.

Let's dissect the floodgates argument.

It 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.¹¹⁵ And, such a reduction would result in either cutbacks or elimination of much needed public services.¹¹⁶

Amici for the Town of Castle Rock sounded this alarm, repeatedly.¹¹⁷ As one author noted, the "floodgates" would open and states would be bankrupted.¹¹⁸ Rubbish. Why rubbish--because Deshaney and restrictive policies under state tort law have shut the door on negligence claims. As a result, there is no way to test whether a more open and flexible policy on 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.

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

¹¹⁴ See, www.thedenverchannel.com/4655165/detail.html.

¹¹⁵ MacKinnon, *Negligence of Municipal Employees*, *supra* note , at 727-29; see also THOMAS M. COOLEY & D. HAVERY HAGGARD, 2 A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 300 (4th ed. 1932) [hereinafter COOLEY ON TORTS]; EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.04.25, at 199 (W. Group 3d ed. 2003) (1904) (discussing the negative effects of imposing liability on municipalities).

¹¹⁶ See *Casey*, 499 A.2d at 614.

¹¹⁷ Brief of the National League of Cities and Municipalities as Amicus Curiae on behalf of Petitioner, Town of Castle Rock at 24, *Gonzales*, 545 U.S. 748 (2005) (No. 04-278) (on file with author).

¹¹⁸ *Id.*

violence cases, as it 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.”¹¹⁹

Just what are the economics of male intimate violence? According to the federal Violence Against Women Act of 1994 (“VAWA”),¹²⁰ intra-familial violence is pervasive, and it disproportionately affects women. Indeed, Surgeons General—from Koop to the present—warn that male intimate violence is the *leading* cause of injury to women in the 15-44 age group.¹²¹ 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 is very costly in terms of hospitalization, lost wages, court costs and incarceration.¹²² In his dissenting opinion in *Morrison*, Justice Souter noted that Congress estimated the cost of domestic violence at *three billion dollars a year*.¹²³ And as Joan Zorza points out, male intimate violence is the primary factor in women and children’s homelessness.¹²⁴

There are hidden costs as well. When male intimate violence remains unabated in families, it is used to sever the mother-child bond.¹²⁵ In New York City, the former Child Protective Services

¹¹⁹ This comment was made by an advocate in New York City.

¹²⁰ Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.); *see also* United States v. Morrison, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) (commenting that domestic violence costs the United States three billion dollars annually).

¹²¹ *See, e.g.*, U.S. SENATE COMM. ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 103-138, at 38 (1993) [hereinafter VAWA SENATE REPORT 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 generally* PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000) [hereinafter FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY], available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf> (documenting the results of a study of violence against women); PATRICIA TJADEN & NANCY THOENNES, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998), available at <http://ncjrs.org/pdffiles/172837.pdf> (same).

¹²² *See, e.g.*, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, *supra* note 121, at 59-61 (reporting that violence against women is predominantly intimate partner violence and indicating the social costs of such violence).

¹²³ *Morrison*, 529 U.S. at 632 (Souter, J., dissenting).

¹²⁴ Joan Zorza, *Woman Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 384 (1994) (citing *The Violence Against Women Act: Hearing on S. 2754 Before the S. Comm. on the Judiciary*, 101st Cong. 37 (1990)).

¹²⁵ *See* Nicholson v. Scopetta, 820 N.E.2d 840, 843 (N.Y. 2004); *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.”); 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 footnote omitted).

“CPS”)¹²⁶ routinely petitioned against battered women when evidence was present that both violence and children were in the home.¹²⁷ In such cases, the State charged that battered women “engaged in domestic violence.”¹²⁸

One possible outcome in child abuse/neglect cases is 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.¹²⁹ Indeed, this attorney speculated, and the studies support her belief, that if placements continued at current rates, the foster-care system in New York City would collapse by the mid-twenty-first century.

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.¹³⁰ 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. And 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.¹³¹ 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.¹³² The Senate Judiciary Committee found crimes that “disproportionately affect[] women are often treated less seriously than comparable crimes affecting men.”¹³³ In Washington, D.C., even though police protocols

¹²⁶ 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 (New York), 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”).

¹²⁷ *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.”).

¹²⁸ *Id.* at 842 (internal quotation marks omitted).

¹²⁹ Interview with Bonnie E. Rabin, Esq. (2004).

¹³⁰ Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 65-66 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

¹³¹ *See, e.g., VAWA Senate Report 1993, supra* note 121, 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 footnote omitted).

¹³² *See generally id.*

¹³³ *Id.* at 49.

mandate arrest in domestic violence cases, arrests were made in less than fifteen percent of cases where the survivor was bleeding from wounds.¹³⁴

In Los Angeles County, California, the Sheriff's Department routinely failed to classify domestic violence 911 calls as emergency procedure calls.¹³⁵ Instead *all* domestic violence calls were routed to the bottom of the response list.¹³⁶ Such dumping of domestic violence 911 calls occurred even when allegations of protective order violations were made by battered women.¹³⁷

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

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 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 Jessica Gonzales did not have a valid order of protection. And certainly not because the language of Colorado's mandatory arrest statute lacked either 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 Rehnquist in *Deshaney*. In *Castle Rock*, Justice Rehnquist was the invisible hand guiding Scalia's pen.

PART FOUR: IS SISTERHOOD POWERFUL?

Failure is impossible.
-Susan B. Anthony¹³⁸

Since *Castle Rock* I've noted an anaemic 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. No lobbying effort to revise the Governmental Immunity Act or legislation to locate the contours of state accountability into the myriad domestic violence provisions has been undertaken. The question is why?

The answer came a few weeks ago. In Colorado, it appears that "reforming immunity statutes is out of the question politically."¹³⁹ Out of the question politically, what could that possibly suggest?

¹³⁴. *Id.* at 41 n.12 (citing KAREN BAKER, ET AL., JOINT PROJECT, D.C. COALITION AGAINST DOMESTIC VIOLENCE & WOMEN'S LAW & PUBLIC POLICY FELLOWSHIP PROJECT AT GEORGETOWN UNIVERSITY LAW CENTER, REPORT ON D.C. POLICE RESPONSE TO DOMESTIC VIOLENCE 44 (1989)).

¹³⁵. *See* Navarro v. Block, 72 F.3d 712, 714-15 (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).

¹³⁶. *See id.*

¹³⁷. *See id.* at 713-15.

¹³⁸ The Columbia World of Quotations (1996), available at <http://www.bartleby.com/66/73/3773.html>.

¹³⁹ From an e-mail received by the author in May 2008.

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.¹⁴⁰ 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.¹⁴¹

But for some, impossibility was just another word for “nothing left to loose.”¹⁴²

By all standards, the struggle to enfranchise women was “out of the question politically.” Indeed, in 1776 when Abigail Adams sent John off with the exhortation, “Remember the ladies,” she understood that women’s political and civil rights were invisible not merely impractical.¹⁴³ Susan B. 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.¹⁴⁴ Yet, for over one-hundred and forty-four years, suffragists resisted the impossible. And the cost? The cost was jail, forced feedings, ridicule, beatings and, in some instances, death.¹⁴⁵

In *Letter from a Birmingham Jail*, Martin Luther King reminds us that “freedom is never given voluntarily by the oppressor, it must be demanded by the oppressed,” and it will cost the oppressed dearly.¹⁴⁶ And we know this. Our historical memory evokes images of civil rights workers during Mississippi Freedom Summer, who were murdered while helping to register black voters.¹⁴⁷ Registering black voters wasn’t just “out of the question politically,” it was deadly—something that Mickey Schwerner and James Chaney and Andrew Goodman came to understand.¹⁴⁸ Yet, their deaths did not stop the freedom trains. During that summer students not only registered voters they operated Freedom Schools; pragmatism would not trump action or political courage. The

¹⁴⁰ **CITE TO TALMUD**

¹⁴² *Me and Bobby Magee*, by Kris Kristofferson. Track 4 on the album *Pearl*, (Janis Joplin, album released posthumously in 1971).

¹⁴³ Letter from Abigail Adams to John Adams, in *THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR*, at 10 (Alice S. Rossi, ed., 1988).

¹⁴⁴ BILL SEVERN, *FREE BUT NOT EQUAL: HOW WOMEN WON THE RIGHT TO VOTE 74-77* (1967).

¹⁴⁵ *Id.* “This is rather different from the receptions I used to get fifty years ago. They threw things at me then—but they were not roses.” Susan B. Anthony, available at *The Columbia World of Quotations* (1996), <http://www.bartleby.com/66/69/3769.html>.

¹⁴⁶ <http://www.africa.upenn.edu/Articles-Gen/Letter-Birmingham.html>

¹⁴⁷ In 1964, hundreds of college students joined the freedom train and buses to help register black voters during Freedom Summer. Organized by SNCC, the Student Non-Violent Coordinating Council, black and white kids packed up and left of Mississippi. 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: There is no citation for memory.

¹⁴⁸ Schwerner, Chaney and Goodman were murdered by members of the Klu Klux Klan in the summer of 1964. Their beaten bodies were found in an earthen dam by the FBI. The men accused of the murder were acquitted by a local jury, however all but one of the defendants was convicted of violating the three civil rights workers civil rights in federal court and were sentenced to terms ranging from 3-10 years.

stakes were too high. And so it was for trade unionists, women's liberationists and gay and lesbian activists.¹⁴⁹

And so it was for battered women's activists. But something has changed: The sisterhood's power has dissipated.

And I wonder, what would Susan B. think of us?

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 and continue to participate. What I have heard from many of the women who entered the movement in the 1960's and '70's 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.¹⁵⁰ In 1980, Lois Ahrens wrote that the shelters had devolved into "...institutionalized social service agencies" from "...feminist, nonhierarchical, community-based organizations."¹⁵¹ 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.¹⁵²

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; resituated male intimate violence, from gender violence to family violence; and recharacterized women's actions as passive, a consequence of learned helplessness.¹⁵³ Because battered women's shelters were the nucleus or ideological center of the movement, their shift from political to social services entity is critical because it altered the ideological construct of the movement. And the changes, cataloged by Ahrens and her contemporaries, profoundly affected not only the movement, but 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

¹⁴⁹ See, e.g., DANIEL JACOBY, *LABORING FOR REFORM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA* 94 (1998) (discussing the Ludlow Massacre in Colorado); RACHEL KRANZ & TIM CUSICK, *GAY RIGHTS* 167-184 (rev. ed. 2005) (chronology of events in gay rights movement).

¹⁵⁰ Lois Ahrens, *Battered Women's Refuges: Feminist Cooperative vs. Social Service Institution*, 3 *RADICAL AM.* 41 (May-June 1980).

¹⁵¹ *Id.* at 41.

¹⁵² *Id.* See also G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement*, 42 *HOUST. L. REV.* 237 (2005) (analyzing the intellectual and political history of the battered women's movement through the lens of mandatory arrest and conceptions of autonomy and will).

¹⁵³ *Supra note* 149 at 41-47.

served the mentally handicapped, abused children and the elderly.¹⁵⁴ Their political edge¹⁵⁵ was lost, as was their political agenda which named the violence¹⁵⁶, the perpetrators and the need for accountability by the state and state actors.¹⁵⁷

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.¹⁵⁸ At this meeting, it appeared as if the advocates were back pedaling on the issue of mandatory arrest, rather than examining how non-compliance undercuts the "mandatory" part of the arrest statute. For example, much discussion was held on the "fact" that mandatory arrest should be renamed probable cause arrest so as to instruct police officers of the minimum standard for arrest. But, if such practices were in fact common place, then law enforcement needed a quick lesson in Constitutional predicates for detention, rather than 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 which brought together advocates from various states and former advocates-

¹⁵⁴ Interview conducted in summer 2005 and 2007.

¹⁵⁵ 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 opinion 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 curriculum for the judges and in facilitating such trainings for new and existing judges. The group correctly identified the need to have a hands-on approach when dealing with the judiciary and training. 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 wasn't interested in the Bar Associations help and there was already training by the office of court administration. See January 9, 2008 minutes at www.cober.org/index.cfm/ID/20475/subID/DPFVP. I understand the reticence of non-lawyers and in some cases lawyers, in challenging the perception and conduct of members of the judiciary and their counterparts in state government, but the issue of judicial lack of compliance with the law will reoccur unless it is treated as worthy of legal/political action. Indeed, as the April minutes indicate another problem has surfaced. See, *id.* at Minutes for February-April 2008.

¹⁵⁶ 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. The power of naming gives voice to social phenomenon, while making visible, the invisible. And it constructs how we interpret certain experiences. Indeed, descendants of slaves, named by their slave masters—whose surnames were passed through generation after 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. Naming, as the Talmud tells us, breathes life into a person, into a people. 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." See Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 34–35 (1988) (postulating that language is the means by which "people represent and understand their world"). See MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 201 (1965). See also LIVING TALMUD, THE WISDOM OF THE FATHERS AND ITS CLASSICAL COMMENTARIES 22–23 (Judah Goldin trans., 1957) ("If I am not for myself, who then? And being for myself, what am I? And if not now, when?").

¹⁵⁷ *Id.*

¹⁵⁸ 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, Human Services Agency of the City of Denver and my self. Meeting held in September 2005.

turned-academicians.¹⁵⁹ 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. The feeling that drove such a choice not to act was that *Castle Rock* was too confusing, or too difficult to understand, and while I don't 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.¹⁶⁰ And while funding did change the composition of shelters and therefore the movement-and not for the better-this would be an interesting claim for the Colorado BWM.¹⁶¹ Colorado is one of two states that does not give a cent to domestic violence programs for overall operational expenses.¹⁶² 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.¹⁶³ From 2004-2006, I conducted a study involving close to 400 doctors in Denver and Eagle Counties.¹⁶⁴ Sixty percent of doctors who responded, self-reported that they do not make reports to law enforcement. And when I asked the former District Attorney of Denver County, now Governor of Colorado, whether he would prosecute doctors who violated the reporting law, I received an unequivocal "No."¹⁶⁵ Perhaps mandates should be on the table-regardless of whether those mandates compel 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.¹⁶⁶

¹⁵⁹ Call facilitated by the Battered Women's Justice Project. Author a member of the conference call.

¹⁶⁰ There is no doubt that funding streams and their requisite demands played an inordinate part in the conservatization of the BWM. See Miccio, *A House Divided*, supra note 7, at 146-157. See also Ahrens, supra note 149, at 41-47. See also SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 93-98 (declaring that money was a "mixed blessing" for shelters and detailing how the funding "undermined important movement principles" in some shelters).

¹⁶¹ *Id.*

¹⁶² The Legislature has given money for legal services; however more than 22% of the \$500,000 in 2008 was awarded to Legal Services of Colorado.

¹⁶³ COLO. REV. STAT. § 12-36-135 (2007). See, e.g., CAL. PENAL CODE § 11160 (Supp. 2008); OHIO REV. CODE ANN. § 2921.22(F) (2003); R.I. GEN. LAWS 12-29-9 (2002); TEX. FAMILY CODE ANN. 91.003 (Vernon 2003)

¹⁶⁴ 800 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. Data on file with author.

¹⁶⁵ For myriad reasons, not the subject of this article, I happen to agree with the Governor, the doctors who fail to report and the forty-three states which do not explicitly included DV injuries as reportable. But the issue of this article is unenforceability of mandates.

¹⁶⁶ See, e.g., COLORADO COALITION AGAINST DOMESTIC VIOLENCE, 2007 ANNUAL REPORT (available at <http://www.ccadv.org/publications/80648%20CO%20Coalition%20Domestic%20Annual%20Report.pdf>); NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, 2008 CONFERENCE MANUAL (available at <http://www.ncadv.org/files/FullWorkshopDetails7.10.08.pdf>).

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 has neither a cogent political platform nor political strategy nor the requisite political courage to make the necessary changes in policy and law foisted upon it by *Castle Rock*. It is as if we have battened down the hatches, 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 liberation of women and children from homes marked by terror.¹⁶⁷

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.

PART FIVE: 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's* 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 and this will require reworking state tort law 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 public standards of responsibility."¹⁶⁸ 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."¹⁶⁹

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 police-as-ordinary-citizen denies the integral position that law enforcement should play in our communities. Moreover, by situating police officer on the same level as ordinary citizen, we obscure how law enforcement's negligent conduct contributes to the perpetuation of male intimate violence.¹⁷⁰

Such formalized equality belies the fact that police *qua* police are empowered to enforce the cultural prescriptions and prohibitions that shape individual and collective behavior. Yet the law

¹⁶⁷ See generally Introduction: *Stonewall at 25*, 29 HARV. C.L.-C.R. L. REV. 277 (1994); Genna Rae McNeil, *Before Brown: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431 (2003).

¹⁶⁸ Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 504 (2005).

¹⁶⁹ *Id.*

¹⁷⁰ See Cynthia Zellner Mackinnon, Note, *Negligence of Municipal Employees: Redefining the Scope of Police Liability*, 35 U. FLA. L. REV. 720 (1983).

regards law enforcement officers as no different from ordinary citizens, wishing away the training, power, and authority consonant with their professional and community status.¹⁷¹

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.¹⁷² The question that remains is: What shall be done?

The Reformation: Toward a Principled Notion of State Accountability

The law's actual effect in the world matters more than the law's simply being in the world. 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.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵ Police are ignoring mandates with impunity.

And why shouldn't they? Indeed, the United States Supreme Court found that "shall," as in "shall arrest," means maybe or maybe not.¹⁷⁶ According to the Court, mandatory policies do not compel conduct, they merely suggest behavior.¹⁷⁷ While this approach seems tortured, it logically follows notions of a negative rights Constitution and on the state level public duty and private rights in police protection cases.¹⁷⁸ If police are treated as the ordinary disengaged stranger, protecting individual citizens cannot be compelled. It is this "logic" that needs reforming.

¹⁷¹ *Id.*

¹⁷² *See supra* notes 122-129 and accompanying text (detailing the cost of domestic violence).

¹⁷³ *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.").

¹⁷⁴ *Supra* note 57. *See, e.g.*, N.Y. TASK FORCE REPORT ON WOMEN IN THE COURTS (1985, updated 1990, 1995) (on file with author). For later versions of reports by state courts, see generally COLORADO GENDER AND JUSTICE COMM'N, 2000 COLORADO GENDER & JUSTICE ANNUAL REPORT (2000), available at <http://www.courts.state.co.us/supct/committees/genderjusticedocs/2000report.pdf> (noting the "the tendency to blame victims continues"), and COMM'N ON GENDER BIAS IN THE JUDICIAL SYS., GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA (1991), available at <http://www2.state.ga.us/Courts/Supreme/cetoc.htm> (reporting pervasiveness of gender bias in domestic violence cases in the courts).

¹⁷⁵ *See generally* 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, FINAL REPORT TO THE GOVERNOR AND LEGISLATURE ("Final Report") (2001), available at http://www.opdv.state.ny.us/criminal_justice/police/finalreport/contents.html. The Final Report noted that even with the mandatory arrest provision as part of New York's Criminal Procedure Law, police in the eight sites studied were not making arrests for a myriad of *spurious* reasons. *See id.* at 46-48. For a discussion of the Final Report, see Miccio, *A House Divided*, *supra* note 7, at 298.

¹⁷⁶ Castle Rock, 545 U.S. at 761.

¹⁷⁷ *See id.* at 758.

¹⁷⁸ *See id.* at 760-66.

Making Public Policy Accountable to Battered Women and to the Community

A Higher Standard to Care

It is essential that where legislation mandates police behavior, public policy must explicitly include a presumption of duty between 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 she is a member of a specific class of individuals singled out by statute for protection.

Moreover, police status creates the duty, regardless of statutory mandate. Here, all citizens are dependent upon police to address crime and to provide protection. Police, not the individual citizen, 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 police, citizen and protection.

We are not out of the woods yet, however. Legislation must (shall?) 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 plaintiff and 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.¹⁷⁹ Knowledge of the harm by one officer is imputed to all officers at a specific precinct.¹⁸⁰ 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 where rage, anger and violence were indelibly marked on our collective memory. It

¹⁷⁹ 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.

¹⁸⁰ Constructive knowledge is not a novel approach. The court in *Sorichetti v. City of New York* used constructive knowledge. See *Sorichetti*, 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 police. See *Cuffy*, 505 N.E.2d 937, 941 (N.Y. 1987).

is also hard to forget how police took O.J. on the proverbial walk around the block—even with mandatory arrest policies in force in California. 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 police "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.¹⁸¹ *All* recognized that systemic neglect contributes to perpetuation of male intimate violence. *All* specifically pointed to police arrest avoidance as a major factor in systemic accountability failures. 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 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 police (failed) efforts to arrest or secure a warrant. Additionally, such a stringent standard could produce a draconian response from police where mutual arrest of battered women and batterers becomes the rule rather than the exception; a shield transformed into a sword.¹⁸²

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 warrants issued.¹⁸³ Therefore, legislation should create a rebuttable presumption that the state can refute by evidence of *due diligence* on the part of 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 discretion in police is retained, a rebuttable presumption is appropriate but the standard to refute the presumption should be reasonable efforts.¹⁸⁴ If the

¹⁸¹ See sources cited *supra* note 121.

¹⁸² 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. *State v. Lucas*, 795 N.E.2d 642 (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.

¹⁸³ 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 the likes of batterers. See Miccio, *A House Divided*, *supra* note 7, at 240.

¹⁸⁴ I would agree with scholars who opine that courts should not substitute their judgment for police in jurisdictions where discretion has been retained. See, e.g., Nicole M. Quester, Note, *Refusing to Remove an*

state can show that police conduct was reasonable, then the state will prevail, even though 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.”¹⁸⁵

-Jessica Lenahan (Gonzales)

On March 7, 2007, the Inter-American Commission on Human Rights heard Jessica Lenahan (Gonzales) recount the horror that eclipsed all emotion on June 9, 1999.¹⁸⁶ 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 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 marks more than Jessica’s chance to speak, to give 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. In 2008, 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 my self along with the battered women’s movement. 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 doesn’t matter what the reasons are; the result is that public policies such as “mandatory” arrest are futile because

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).

¹⁸⁵ Part of statement made by Jessica Lenahan (Gonzales) on March 2, 2007 before the Inter-American Commission on Human Rights. Columbia Law School Journal, Spring 2008 p. 49

¹⁸⁶ Ms. Lenahan is represented by the Human Rights Clinic at Columbia Law School. Prof. Carrie Bettinger-Lopez and her students seem to be the only advocates still standing beside Jessica as she fights her battle to bring accountability into our discourse on justice.

accountability is absent. And we, the movements' movers and shakers have collaborated in this cruel deception.

I suspect that some may find my critique harsh. I find our silence harsher.¹⁸⁷

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 political cost. My hope is that we will *live* the dream of Susan B. 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, "[I]f not now, when?"¹⁸⁸

¹⁸⁷ At this juncture, I need to recognize the incredible work of Prof. Joan Meier and her clinic at George Washington Law School. The DV Appeals Clinic consistently inserts the voice of battered women in appellate cases which have a profound affect on the how 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 DV community as opposed to individual advocates, many of whom are tireless in the struggle for battered women's rights.

¹⁸⁸ Pirke Avot

