Rethinking Civil Rights and Gender Violence

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ABSTRACT

Advocacy seeking justice for survivors of domestic and sexual violence historically has invoked civil rights laws and rhetoric to advance legal remedies and public policy reform. Even though two widely critiqued United States Supreme Court decisions have limited the reach of those civil rights approaches, neither decision precludes new civil-rights-based remedies for gender violence. Indeed, a civil rights frame has enduring potential to support needed reform by challenging structural inequalities that continue to inform and drive gender violence.

Nevertheless, no public outcry has coalesced in the United States demanding a civil rights-based enforcement scheme, either to seek a refashioned remedy against private individual perpetrators or to ensure state accountability for law enforcement responses to gender-based violence.

This article considers potential civil rights remedies that would address structural and systemic inequalities related to gender violence. It focuses on one area of potential reform: law enforcement accountability. The article urges a shift that views law enforcement accountability for gender violence on the same continuum as other forms of law enforcement misconduct.

Popular understandings of police misconduct typically involve over-enforcement, while cases involving gender violence typically involve under-enforcement. However, both categories involve misuse of authority and should be thought of in tandem. This shift can reinvigorate existing strategies and can generate new approaches to both law and policy. The article makes recommendations that would contribute to a new generation of progressive reform that advances the principles of equality and liberty for which civil rights long has stood.

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TABLE OF CONTENTS

Introduction ...................................................................................... 2
I. Civil rights, human rights and gender violence................................. 6
   A. Overview ............................................................................. 6
   B. Law enforcement accountability ......................................... 9
   C. Individual accountability through private right of action .......... 12
   D. Untapped potential for federal response ............................. 14
      1. Domestic violence movement’s partnership
         with the state ..................................................................... 15
      2. Limits of identity politics .................................................. 17
II. Reviving civil rights: law enforcement accountability as
    police misconduct .................................................................. 19
    A. Individual and institutional actors ..................................... 19
    B. Law enforcement accountability and civil rights ............... 21
III. Federal civil rights caselaw ............................................................. 24
    A. Substantive due process and “state-created danger” ........... 24
    B. Equal protection ................................................................. 27
    C. (In)Adequacy of relief ......................................................... 29
IV. Accountability reimagined ............................................................... 31
    A. Administrative remedies .................................................... 31
    B. Community response ......................................................... 34
V. Limitations and concerns ............................................................... 35
    A. Over-criminalization ........................................................... 35
    B. Engaging with the state ....................................................... 36
Conclusion ......................................................................................... 37

Introduction

“Civil rights” has been a powerful frame for spurring transformative reform on a range of
issues, including gender violence. Civil rights litigation beginning in the 1970’s provoked

1 This article uses the term “gender violence” to encompass acts such as domestic violence and sexual assault, which
are committed predominantly by men against women. See, e.g., Callie Marie Rennison, U.S. Dep't of Justice,
http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf (concluding that eighty-five percent of all victimizations by
intimate partners in 2001 were against women); U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal
Victimization in the United States, Statistical Tables Index, tbl.2 (reporting that ninety-two percent of all sexual
assaults in 2005 were committed against women).
significant policy reforms by challenging law enforcement’s failed responses to domestic violence calls. ² More recently, the civil rights remedy enacted as part of the 1994 Violence Against Women Act, ³ captured the imagination of advocates and the general public alike. ⁴ The civil rights frame helped spur public conversations about the relationship between gender violence and gender equality and held the potential to generate transformative change. ⁵

Two widely critiqued United States Supreme Court decisions have limited the reach of those civil rights approaches. In United States v. Morrison, the Court struck down the civil rights remedy enacted as part of the 1994 Violence Against Women Act (VAWA) as an unconstitutional exercise of Congressional power. ⁶ Five years later, in Castle Rock v. Gonzales, the Court rejected one of the theories grounded in civil rights law under which law enforcement had been held accountable for failed responses to gender violence calls. ⁷ Notwithstanding the setbacks both of those decisions represent, neither precludes advancement of new civil rights-based remedies for gender violence. The notion that gender violence constitutes a civil rights violation should not be abandoned or forgotten.

A civil rights frame has enduring potential to support much needed reform by challenging structural inequalities that continue to inform and drive gender violence. Multiple issues might be addressed. For example, legislation might provide a private right of action modeled on the

² See infra Part 1.B.
⁴ See infra Part 1.C.
⁵ See infra notes 63 to 66, and accompanying text.
⁷ 545 U.S. 748 (2005) (rejecting 42 U.S.C. § 1983 claim alleging that law enforcement’s failure to take steps to investigate or respond to allegations of protective order violation violates procedural due process). For commentary critiquing the decision, see, e.g., Caroline Bettinger-Lopez, Human Rights at Home: Domestic Violence as a Human Rights Violation, 40 HUM. RTS. L. REV. 19 (2008); Zanita Fenton, State-Enabled Violence: The Story of Town of Castle Rock v. Gonzales, in ELIZABETH M. SCHNEIDER & STEPHANIE M. WILDMAN, WOMEN AND THE LAW STORIES 379, 388 (2011); G. Kristian Miccio, The Death of the Fourteenth Amendment: Castle Rock and its Progeny, 17 WM. & MARY J. OF WOMEN & L. 277 (2011). The decision addressed Jessica Lenahan’s procedural due process claims only, and did not address law enforcement liability under other theories, such as those based on state-created danger, special relationship, or equal protection. See infra section I.B.
1994 VAWA civil rights remedy in a way that addresses the *Morrison* Court’s concerns.\(^8\) Alternatively, law reform might advance institutional accountability for gender violence-related discrimination\(^9\) or might promote economic reforms that address structural roots of abuse.\(^{10}\)

In some ways, the idea that gender-based violence constitutes a civil rights violation may be more compelling today than it has been in the past, given international human rights law’s recognition that gender-based violence violates human rights.\(^{11}\) Structural inequalities, discrimination and infringement of liberty interests continue to animate the problems faced by domestic and sexual violence survivors.\(^{12}\) Although civil rights remedies often have been crafted to provide a private right of action seeking monetary damages, civil rights remedies need not be limited to those forms.\(^{13}\) Nevertheless, in the decade since the *Morrison* decision, no public outcry has coalesced in the United States demanding a civil rights-based enforcement scheme, either to seek a refashioned remedy against private perpetrators or to ensure state accountability for law enforcement responses to gender-based violence.

This article considers potential civil rights remedies that would address structural and systemic inequalities related to gender violence and focuses on one area of potential reform: law enforcement accountability. It urges a shift that views law enforcement accountability for gender violence on the same continuum as other challenges to law enforcement misconduct. Popular understandings of police misconduct typically involve over-enforcement,\(^{14}\) while cases involving gender violence typically involve under-enforcement.\(^{15}\) However, both categories of cases

\(^8\) See infra notes 69 to 72, and accompanying text.
\(^9\) See infra Part II.
\(^{11}\) See infra notes 32 to 35, and accompanying text.
\(^{12}\) See, e.g., Caroline Bettinger-Lopez et al., *VAWA Is Not Enough: Academics Speak Out About VAWA*, http://www.feministlawprofessors.com/2012/02/academics-speak-about-vawa-reauthorization/ (applauding proposals to reauthorize VAWA while urging Congress to do more to address economic and racial inequalities that make poor women, particularly women of color, undocumented women, and Native American women, more vulnerable to intimate violence).
\(^{13}\) See infra Part IV.A.
\(^{14}\) See, e.g., Kami C. Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 360 (2011) (recognizing that police misconduct often conjures imagines of use of excessive force, but should be conceived more broadly, to include, e.g., racial profiling and corruption).
\(^{15}\) See supra Part II.B.
involve misuse of authority and should be thought of in tandem. This shift can reinvigorate existing strategies and can generate new approaches to both law and policy.

Part I starts with an overview of civil and human rights-based reform to redress gender violence. It recaps the dual focus of U.S.-based civil rights-based reforms: law enforcement accountability and a remedy against private individuals. It traces the overall trajectory of reform on both issues, including their culmination in constrained Supreme Court decisions. The section contrasts the lack of advocacy for corrective legislation in this context with legislative responses to other restrictive Supreme Court decisions and posits reasons for the absence of a robust advocacy-based reaction.

Part II argues for a revived civil rights approach. It draws on civil rights laws’ historic utility in advancing institutional reform, and argues that ongoing problems with law enforcement responses to gender violence warrant renewed consideration. Part III reviews the status of federal caselaw holding law enforcement accountable for responding to gender violence. It outlines the doctrinal arguments that remain available notwithstanding an increasingly narrowed doctrinal framework and argues that those arguments can and should be more widely used. It demonstrates that current doctrine is unnecessarily constrained and out of step with emerging international norms.

Part IV considers approaches to law enforcement accountability for gender violence that are not grounded in traditional civil rights litigation. It argues that administrative remedies typically invoked in law enforcement misconduct cases involving over-enforcement should more broadly be available to ensure accountability for gender-based claims. A shift to a civil rights lens also could galvanize community organizing and activism. Part V considers limitations of shifting focus to state accountability as a matter of civil rights enforcement. The article concludes with suggestions for future reform.

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16 See generally, Alexandra Natapoff, Underenforcement, 75 FORDHAM L. REV. 1715 (2006) (arguing that under-enforcement should be considered along with over-enforcement as symptoms of the weakness of the United States’ criminal justice system).
I. Civil rights, human rights and gender violence

A. Overview

Notwithstanding arguments that the United States’ current approach to civil rights laws has outlived its usefulness, and recent United States Supreme Court decisions narrowing the availability of remedies under a variety of civil rights protections, civil rights law and rhetoric continues to be a powerful frame for meaningful reform. The term “civil rights” has its roots in the post-slavery movement to ensure equality for African Americans. It typically is invoked to refer to principles of equality and liberty protected by the constitution. The civil rights framework is grounded in the concept that those who discriminate based on impermissible biases and stereotypes violate legal and social norms, and that the person discriminated against should be eligible for redress. The notion of “rights” has held expressive and symbolic value as part of social movements’ efforts to advance transformative change. I invoke the term to reference

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17 See generally, e.g., RICHARD FORD, RIGHTS GONE WRONG 10-11 (2011) (arguing that civil rights “do too much and not enough at the same time”).
19 For discussion of the trajectory of the civil rights movement, including attendant debates, for example, over whether law reform should seek equality of opportunity or of result, and of strategic lawyering choices, for example, over whether to prioritize ending segregation or advancing economic equality, see, e.g., RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Kenneth W. Mack, Rethinking Civil Rights Lawyerly and Politics in the Era before Brown, 115 YALE L.J. 256 (2005).
20 See, e.g., Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19, 32, 34-37 (2000) (discussing “civil rights” approaches as focusing on discrimination and unequal treatment); Will Maslow & Joseph B. Robison, Civil Rights Legislation and the Fight for Equality 1862-1952, 20 U. CHI. L. REV. 363 (1953) (defining civil rights as “those rights commonly denied because of race, color, religion, national origin, or ancestry,” and as distinct from civil liberties, which reference other rights protected by the Bill of Rights and the Constitution).
21 Diller, supra note 22, at 35-36.
22 See, e.g., PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 164 (1991) (“[t]he concept of rights, both positive and negative, is the marker of our citizenship, our relation to others. The notion of “rights” also has been critiqued as alone being insufficient to produce transformative change. See, e.g., STUART A. Scheingold, THE POLITICS OF RIGHTS (2004) (tracing the myth, politics and strategists of rights in movements for social change).
legal and other reform strategies that ground substantive and rhetorical gender violence initiatives in terms of equality and liberty, which are distinct from other substantive categories such as family law or criminal justice, even though they also invoke liberty and equality-based concerns.

Historically, civil rights initiatives to address gender violence in the United States have taken two primary forms: suits seeking to hold institutions, primarily law enforcement, accountable for their responses to gender violence, and those seeking redress from individuals who committed gender violence. Unlike other civil rights initiatives, such as those seeking racial equality, civil rights reform addressing gender violence did not proceed as part of a deliberate legal strategy. The cases can be thought of as progressing in two waves. The first series of cases began to be brought in the 1970’s and challenged law enforcement’s underresponsiveness to calls from domestic violence survivors. These cases spurred litigation seeking law enforcement accountability, often under the traditional civil rights law, 42 U.S.C. § 1983. A second strand of advocacy began in the 1990’s, and sought to frame private acts of gender violence as a civil rights violation; efforts focused on the federal civil rights statute enacted as part of the 1994 federal Violence Against Women Act. Although the legal doctrines underlying both law enforcement accountability claims and the constitutionally permissible scope of civil remedies for gender violence have suffered setbacks in court, the need for accountability has not diminished. Both institutional and individual accountability measures remain promising and needed areas for future reform.

Some maintain that the changing nature of discrimination and other civil rights violations requires a rethinking of traditional approaches, and that new frameworks for civil rights enforcement may be needed to address the complex and nuanced ways civil rights violations manifest in the twenty-first century. Against that backdrop, in recent years, advocacy on issues that historically have been addressed under the rubric of civil rights, such as equality and due

24 See infra, Parts I.B. & C.
26 See infra Section I.B.
process, has taken a human rights approach. As Cynthia Soohoo details, contemporary United States-based civil rights lawyers increasingly invoke the human rights frame, as well as human rights strategies, to advance the social and economic as well as civil and political rights that inform social change arguments. To a large and increasing extent, both human rights and civil rights campaigns seek consistent and overlapping goals.

Increasingly, international human rights decisions reflect robust interpretations of anti-discrimination and liberty-based protections directly in tension with United States’ doctrinal approaches. For example, international human rights and other countries’ national authorities increasingly recognize that gender violence violates human rights, and requires states to exercise due diligence to prevent, investigate, prosecute and punish perpetrators, and to provide protection to victims. A developing body of international human rights decisions holds states

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29 For history and discussion of the use of human rights principles in the United States, see, e.g., CYNTHIA SOOHOO, ET AL., BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS (2008).
30 Cynthia Soohoo, Human Rights and the Transformation of the “Civil Rights” and “Civil Liberties” Lawyer, vol. 2 ch. 4 in SOOHOO, supra note 29.
32 See, e.g., Jessica Lenahan (Gonzales) v. United States, Rep. No 80/11, Case 12.626 Merits (Inter-American Commission on Human Rights July 21, 2011), (finding U.S. to have violated international obligations to take reasonable action in response to domestic violence calls). For further discussion of that case see infra notes ___ to ___, and accompanying text.
accountable based on findings that they knew or should have known of real and immediate risks to an individual by another person, and failed to take reasonable steps to prevent the harm.\(^{35}\) This shift in global understandings should prod U.S. policy makers to rethink how U.S. law and policy might better ensure institutional and individual accountability for gender violence.

The following sections review civil rights-based law reform initiatives in the United States seeking both institutional and individual accountability for harms associated with gender violence. They trace the trajectory of caselaw limiting redress and posits reasons why there has been no recent advocacy for a renewed civil rights oriented response.

**B. Law enforcement accountability**

The connection between civil rights and gender violence has long roots in anti-gender violence law reform. Civil rights claims seeking state accountability for law enforcement responsiveness to domestic or sexual violence calls have played an important role in improving law enforcement policies.\(^{36}\) Beginning in the 1970’s, survivors of domestic and sexual violence

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\(^{36}\) Although this discussion is framed in terms of law enforcement accountability generally, most litigation challenging systemic responses to gender violence has focused on police responsiveness. Nevertheless, for example, the record of gender bias Congress considered in enacting the 1994 VAWA addressed both civil and criminal justice systems, and prosecutorial as well as policing functions. *See, e.g., Morrison, 529 U.S. at 620 (recognizing VAWA’s legislative record demonstrating insufficient investigation and prosecution of gender-motivated crime, state justice system participants’ perpetuation of discriminatory stereotypes and acceptably lenient sentences for perpetrators). Of course, civil rights cases brought under section 1983 as well as other statutes address related claims such as those involving gender violence that occurs in the workplace or at school, or claims
and their families brought suits to hold law enforcement accountable for failed responses to calls for assistance. Many of those claims were brought under federal civil rights statutes, and advanced arguments that law enforcement policies violated survivors’ equal protection and due process rights. Those cases were brought in an era when law enforcement officers commonly refused altogether to take action when called to respond to a “domestic” dispute, or reacted in ways that did not hold the perpetrator to account. The suits widely are recognized as having prompted constructive changes in law enforcement policy and practice.

The Supreme Court decision in Castle Rock v. Gonzales follows in this line of cases. The case illustrates the limiting trend of current United States’ doctrine and the potential of international human rights law. It is striking for numerous reasons, including the fact that although it was litigated under the bedrock civil rights law, 42 U.S.C. § 1983, (“Section 1983”), and has generated calls for reform under international human rights and local law, it has not generated mainstream or widespread calls for federal civil rights reform.

The case involved a tragic set of facts, which have been widely reported. Jessica Gonzales sued the local police under the Section 1983, alleging substantive and procedural due process violations, after local law enforcement failed to respond to her repeated requests to enforce the domestic violence protective order she had against her estranged husband. Her fears that he had abducted her children turned out to be founded; when he eventually showed up at the police department, a shooting ensured and her children were found dead in the trunk of his car.

See supra note 7. For further discussion of the case, see, e.g., Carolyn Bettinger-Lopez, 21 HARV. HUM. RTS. J. 183 (2008).

See supra note 39; see also, e.g., Meg Townsend et al, Law Enforcement Response to Emergency Domestic Violence Calls for Service, at 8-9, NIJ #215915 (Oct. 2006), available at https://www.ncjrs.gov/pdffiles1/nij/grants/215915.pdf (summarizing history of cases that establish law enforcement’s potential financial liability if they failed adequately to protect victims).
Jessica Gonzales sought accountability and redress for the immeasurable loss she had suffered.\textsuperscript{44}

By the time the case made its way to the Supreme Court, only the procedural due process claims were at issue.\textsuperscript{45} The Court rejected the procedural due process claim, and concluded that Ms. Gonzales had no protected property interest that would give rise to a procedural due process claim.\textsuperscript{46}

Having exhausted her recourse in U.S. courts, Jessica Gonzales appealed the Supreme Court’s decision to the Inter-American Commission on Human Rights (IACHR).\textsuperscript{47} The IACHR found the United States to be in violation of international human rights obligations to take reasonable steps to protect women from domestic violence.\textsuperscript{48} The Commission’s ruling is its first in a women’s rights case against the United States.\textsuperscript{49} It concluded that the United States failed to act with due diligence to protect Jessica Lenahan and her daughters from domestic violence, and that the United States’ failure violated its obligation not to discriminate and to provide for equal protection before the law.\textsuperscript{50} The Commission made numerous recommendations, including a direction that the United States adopt or reform legislation to

\textsuperscript{43} \textit{Id.} at ¶ 32.

\textsuperscript{44} The claim alleged initially brought in the U.S. District Court alleged that the town of Castle Rock violated Jessica Gonzales’ due process rights because “its police department had an official policy or custom of failing to respond properly to complaints of restraining order violations” and “of tolerating the non-enforcement of restraining orders,” and that the town’s actions “were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference” to Ms. Lenahan’s civil rights. \textit{Castle Rock}, 545 U.S. at 754.

\textsuperscript{45} 545 U.S. at 754-55 (distinguishing substantive due process claims from the procedural due process claim before the Court). The lower courts had concluded that Ms. Gonzales’ claim did not fall within the narrow “state-created danger” exception to the \textit{DeShaney} decision’s rule that the state has no duty to protect its citizens from harm committed by a private third party, since there was no indication that the police created or enhanced the danger posed by Simon Gonzales. \textit{See} Gonzales v. Castle Rock, 366 F.3d 1093, 1099 (10th Cir. 2004) (\textit{en banc}); Gonzales v. Castle Rock, 307 F.3d 1258, 1262-63 (10th Cir. 2002). The Tenth Circuit Court of Appeals clarified the distinction between the respective theories, see 366 F.3d at 1099-1100, and the Supreme Court did not disturb that distinction. \textit{See}, e.g., Castle Rock v. Gonzales, 545 U.S. at 755-56 (distinguishing substantive from procedural due process theories). For discussion of the significance of this limited holding, see infra note 55 to 56, and accompanying text.

\textsuperscript{46} 545 U.S. at 766.

\textsuperscript{47} Inter-American Comm’n, at ¶¶ 1, 40-44.

\textsuperscript{48} \textit{See}, e.g., Inter-American Comm’n, ¶¶115-135 (summarizing States’ legal obligation to protect women from domestic violence under international human rights law). For further discussion of the case, see infra notes 50 to 53, and accompanying text.


\textsuperscript{50} Inter-American Comm’n, ¶ 199.
ensure mandatory enforcement of protection orders.\textsuperscript{51} It also recommended the continued adoption of public policies and programs aimed at restructuring the stereotypes of domestic violence victims, and at promoting the eradication of discriminatory socio-cultural patterns that impede women and children’s full protection from domestic violence.\textsuperscript{52} Although the United States has taken the position that it is not bound to the American Declaration,\textsuperscript{53} the Commission’s decision at a minimum constitutes persuasive authority for reconsidering the adequacy of the United States’ legal and policy-based approach.\textsuperscript{54}

The IACHR decision and corresponding international developments elaborating state obligations to exercise due diligence with respect to gender violence should prod us to reconsider how existing and potential remedies can best ensure law enforcement accountability. For example, the fact that the U.S. Supreme Court decision addressed only Ms. Lenahan’s procedural due process claim is notable, particularly given that previous cases largely had been based either on equal protection or substantive due process theories.\textsuperscript{55} Accordingly, the Supreme Court decision leaves undisturbed the other, more frequently used, theories under which survivors of gender violence have held and continue to hold law enforcement accountable for failed responses to domestic and sexual violence calls.\textsuperscript{56} As a general matter, the IACHR decision serves as a reminder to think broadly about how U.S. law and policy most effectively can advance the shared interests in equality and due process that underlie both U.S. and international law and policy.

\textbf{C. Individual accountability through private right of action}

Recent legislative efforts in the United States explicitly linking gender violence and civil rights have focused on remedies holding individual perpetrators accountable. The civil rights remedy enacted as part of the Violence Against Women Act in 1994 is the most prominent of

\begin{footnotes}
\item[51] Id. at ¶ 201.4.
\item[52] Id. at ¶ 201.6.
\item[53] Inter-American Comm’n, at ¶ 55.
\item[54] See Bettinger-Lopez et al., supra note 49.
\item[56] For discussion of cases see supra, Section III. Nevertheless, as Laura Oren has observed, the Court does not appear favorably disposed to the state-created danger exception. See Laura Oren, Some Thoughts on The State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same, 17 TEMP. POL. &. CIV. RTS. L. REV. 47, 59 (2006) (recognizing Castle Rock majority’s reasoning grouping its rejection of Jessica Lenahan’s procedural due process claim with previous DeShaney ruling rejecting substantive due process claim).
\end{footnotes}
those remedies.\textsuperscript{57} That law afforded a private right of action by a victim against the perpetrator of gender-motivated violence.\textsuperscript{58} It sought to frame gender-based violence in the same category of other civil rights violations,\textsuperscript{59} and to add a remedy to then-existing federal civil rights laws, which afforded redress against private institutions,\textsuperscript{60} groups of individuals,\textsuperscript{61} or state actors, both individual and institutional.\textsuperscript{62} It was designed to fill a gap in accountability measures: no then-existing federal civil rights law provided redress against the private individuals who committed most of those violations.\textsuperscript{63} The private right of action against an individual perpetrator held the potential for practical and transformative redress: it could afford both compensation for the economic losses occasioned by the abuse and could shift conceptions of abuse from a private matter shrouded in secrecy to a matter of public concern.\textsuperscript{64}

During the years the civil rights remedy was in effect, approximately 50 to 60 decisions had addressed the civil rights remedy and virtually all had upheld its constitutionality.\textsuperscript{65} Both sexual assault and domestic violence survivors had obtained relief under the law while it was in effect.\textsuperscript{66} The Supreme Court ultimately struck down the law as an unconstitutional exercise of Congress’ powers under the Commerce Clause and under Section 5 of the Fourteenth Amendment.\textsuperscript{67} The decision was widely critiqued as reflecting both an unduly narrow view of Congressional authority, and a regressive view of women’s rights.\textsuperscript{68}

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59 \textit{See}, e.g., Goldfarb, \textit{Persistence of Privacy}, supra note 63, at 7.


64 \textit{See}, e.g., Goldfarb, \textit{supra} note 6, at 506-508 Goldscheid, \textit{supra} note 36.


66 \textit{See generally}, e.g., Goldscheid, \textit{Struck Down but not Ruled Out}, \textit{supra} note 57 (citing cases).


68 \textit{See}, e.g., \textit{supra} note 3.
Notwithstanding the *Morrison* decision, alternative approaches to civil rights remedies holding individuals accountable likely could survive review. As legislation proposed in 2001 and 2003 reflect, federal statutory responses could afford a modified remedy against a perpetrator and still advance the original statute’s goals, while nevertheless responding to the *Morrison* Court’s constitutional concerns.69 However, this legislative proposal has not galvanized Congressional attention.70 Some state and localities have picked up on the Supreme Court majority’s call for states to respond,71 and have enacted similar legislation, while other states have retained remedies authorizing private rights of actions against perpetrators of gender-based violence that had been on the books since before the VAWA civil rights remedy was enacted.72

**D. Untapped potential for federal response**

One would imagine that decisions such as *Castle Rock* and *Morrison* would spur calls for meaningful reform, much like other criticized Supreme Court decisions have led to corrective legislative responses.73 There are numerous political reasons for the absence of a call for a federal legislative response; the difficulty of galvanizing Congressional support cannot be underestimated.74 But additional factors associated with gender violence claims may be at play

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71 529 U.S. at 627.


as well. This section focuses on two: the de-politicization of the movement against domestic violence movement and the limitations of identity politics.

1. Domestic violence movement’s partnership with the state

A growing literature critiques the mainstreaming of the United States’ anti-domestic violence movement and its diminished focus on structural reform and social change. Although the anti-domestic violence movement has made tremendous strides in expanding the availability of services and focusing public attention on the problem, those advances have depended in large part on a partnership with the state. Many argue that that partnership has resulted in a de-politicization, professionalization, and standardization of the anti-domestic violence movement, with an overwhelming emphasis on criminal justice responses.

In some ways, this critique can be seen as a product of the movement’s success. Increased government funding has expanded the availability of both social services and legal advocates. Those services are critically important, and continue to be under-resourced. But it also has shifted focus from grassroots activism and calls for systemic reform to service delivery, mental health and criminal justice responses. That shift has diminished the focus on reforms that are driven by survivors’ priorities, and that are focused on structural reform, such as ending women’s subordination and increasing social and economic empowerment.

It follows that the emphasis on services and state collaboration, while valuable, will reduce the likelihood that advocates will take positions in opposition to established programs. This renders litigation against law enforcement and other state actors less likely. For example,

75 Although problems with law enforcement responsiveness plague responses to both domestic and sexual violence calls, this section focuses on the anti-domestic violence movement, which has produced a more visible and coordinated advocacy response.
78 See, e.g., GOODMAN & EPSTEIN, supra note 77, at 31-47 (tracing separation from anti-poverty activists; increased professionalization of services; narrowing range of services available to survivors).
79 GOODMAN & EPSTEIN, supra note 77, at 38.
80 See, e.g., NATIONAL TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, DOMESTIC AND SEXUAL VIOLENCE FACT SHEET, OVERWHELMING NEEDS REMAIN http://www.ncadv.org/files/VAWA%20Reauth%20ToolKit%20Final%2011%2028%2011.pdf (detailing remaining gaps between available funding and demand for services for domestic and sexual violence survivors).
81 GOODMAN & EPSTEIN, supra note 77, at 47.
policy-makers and funders often support community coordination between stakeholders, including community based organizations and criminal justice personnel, because they promote coordination and may improve the quality of services. However, they also privilege increased prosecution rates as the foremost priority of intervention and as the measure of success. Those partnerships may have the unintended consequence of reducing advocates’ inclination to challenge law enforcement’s practices, since it may become difficult to take a position adverse to an institutional and programmatic partner. As Leigh Goodmark recounts, advocates won’t be willing to publicly critique prosecutors for failing to do their job when their paychecks are being paid by the state.

Even if advocates identify problems with law enforcement responses, lawyers representing survivors may not be equipped to commence civil rights litigation. Government funding has increased the availability of lawyers trained to represent survivors in family law cases. Those lawyers make critical differences in survivors’ lives, and the need far outpaces the availability of legal services. But family law attorneys typically are not trained in federal civil rights litigation and the private bar may not have the capacity, either in expertise or staffing, available to represent survivors. Only a few not-for-profit organizations frame a lack of law enforcement responsiveness to gender violence claims as a matter that civil rights laws could address. As Caroline Bettinger-Lopez has noted, the gap between the work of domestic violence service providers and civil and human rights organizations “is pronounced.”

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82 BUMILLER, supra note 77, at 164-65.
83 Id. at 165.
84 GOODMARK, supra note 39 at 27.
86 See, e.g., Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline in Domestic Violence, 21 CONTEM. ECON. POL’Y 158 (Apr. 2003) (finding increased access to legal representation helps explain decline in domestic violence during the 1990’s).
87 See, e.g., Schneider, supra note 39, at 95 (describing limited availability of lawyers trained in domestic violence issues); see also, e.g., S. 1515 National Domestic Violence Volunteer Attorney Network Act, (110th Cong., May 24, 2007) (proposing pilot program coordinating a system of volunteer attorneys to ensure safe, culturally and linguistically appropriate legal representation for domestic violence victims).
88 For example, the Women’s Justice Center explicitly calls for challenges to gender-biased law enforcement responses that deny women access to justice. See www.justicewomen.com/cj_gendered盲spot.html. The ACLU Women’s Rights Project was co-counsel in the Lenahan case at the U.S. Supreme Court and litigates cases seeking law enforcement accountability for responding reasonably to domestic violence cases. See, e.g., http://www.aclu.org/womens-rights/valdez-v-city-new-york-brief-amici-cuirae-new-york-city-bar-association-american-civil. The Women’s Law Project has had a longstanding project to address the United States’ chronic failure to report and investigate rape and sexual assault. See www.womenslawproject.org/NewPages/wkVAW_SexualAssault.html. Other organizations dedicated to gender
The net result of the shift from activism to service delivery with the accompanying increase in state funding for programs and services has reduced the likelihood that problems with law enforcement responsiveness will be framed as matters of civil rights. The absence of a vibrant civil rights frame for gender violence claims shapes public discourse accordingly. It masks problems that might surface through an equality or due process lens and in turn limits the potential for policy-based reform.

2. Limits of identity politics

The absence of a call for reform reflects another movement trend as well. Considered on their face, claims against law enforcement for failed responses to gender violence readily should be categorized as cases of police misconduct. Both often involve violations of due process, whether they result from violent infringement of liberty, or from law enforcement interventions, or lack of interventions, that increase the risk of harm to private individuals. Accordingly, both often lead to litigation under the civil rights statute, 42 U.S.C. § 1983.

But claims of law enforcement under-responsiveness to gender violence calls generally are not treated as cases of police misconduct. The distinct treatment of cases of over and under enforcement reflects the limitations of identity politics and single-identity group advocacy. Police misconduct cases involving over-enforcement typically are thought of as involving race-based misconduct while cases involving under-enforcement (typically, domestic and sexual violence) often reflect gender-based misconduct. Recent initiatives are beginning to surface the limitations of these identity-based distinctions. For example, the End Racial Profiling Act of 2011 would add gender to the list of prohibited grounds for profiling, recognizing that gender, as well as race (and often religion), often combine as the bases of biased police practices. For equality and civil rights also have litigated cases seeking law enforcement accountability for gender violence. See, e.g., Center for Constitutional Rights, http://ccrjustice.org/; Legal Momentum, http://www.legalmomentum.org/; National Women’s Law Center, http://www.nwlc.org/. By and large, these organizations engage in impact-oriented advocacy, and are not the organizations representing survivors in domestic violence cases in family and criminal courts, and their capacity for assuming cases is necessarily limited.

90 A notable exception is Alexandra Natapoff’s article on Underenforcement, which frames underenforcement, including underenforcement of domestic violence calls, as a problem of police misconduct. 75 FORDHAM L. REV. 1715 (2006).

91 See S. 1670, End Racial Profiling Act of 2011 (112th Cong., Dec. 8, 2011), Sec. 2(7)(A) (defining “racial profiling” to include practices based on, inter alia, gender). For a discussion of the intersections of race, gender and sexual
example, African American women may be profiled as users, couriers or purveyors of drugs. Women of color, including transgender women of color and immigrant women, are often profiled as being engaged in prostitution. Muslim, Arab, and South-Asian women may who wear hijab may be profiled as part of the “war on terror.” But this emerging awareness still constitutes the exception, rather than the general trend.

The traditional single-identity-based approach to police misconduct obscures the connection between over- and under-enforcement. The respective categories of cases may be seen as posing distinct issues even though over-enforcement cases involve women and may reflect gender as well as racial bias, and under-enforcement cases involve people of color, and may reflect racial as well as gender bias. To the extent the issues are publicized by advocacy groups, the distinct framing of the respective categories of cases may reflect the limitations of identity politics and the challenges of translating intersectionality theory into practice.

A call for law enforcement involvement may be met with skepticism by communities of color, and by others, such as the LGBT community, given overwhelming evidence of over-policing and its attendant harms. But those concerns should not excuse a failure to respond to calls involving gender-based violence when survivors seek law enforcement intervention. Underenforcement is especially problematic if, as studies suggest, communities of color face greater difficulty obtaining a response from law enforcement for assistance in cases of domestic violence as they relate to racial and religious profiling, see, e.g., RIGHTS working group, Racial Profiling: Gender & LGBTQ Awareness Week, http://rightsworkinggroup.org/content/racial-profiling-gender-lgbtq-awareness-week (collecting materials and blog postings). See also, e.g., JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011) (arguing that policing of sex and gender reinforces racial and gender inequalities).


92 See, e.g., GAO, U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results 10 (2000), http://www.gao.gov/assets/230/228979.pdf (finding that black women who were U.S. citizens were nine times as likely as white women to be x-rayed after being frisked or patted down, but were less than half as likely to be found carrying contraband as white women who were U.S. citizens).


94 Id.

95 See, e.g., Rights Working Group, supra note 91.

96 For example, Jessica Gonzales is part Native American and part Latina. See, Domestic Violence & Human Rights: Lenahan v. USA, www.youtube.com/watch?v=UvPtMCrI4J4. Studies indicate that poor women and women of color may be at greatest risk of law enforcement under-responsiveness to their calls for assistance. Victoria Frye et al., DUAL ARREST AND OTHER UNINTENDED CONSEQUENCES OF MANDATORY ARREST IN NEW YORK CITY: A BRIEF REPORT, 22 JOURNAL OF FAMILY VIOLENCE 397, 402, 404 (2007).


98 See infra note 200 and accompanying text.
or sexual violence,\textsuperscript{99} at the same time that they suffer the consequences of over-policing.\textsuperscript{100} Policies that endorse law enforcement discretion to disregard survivors’ calls for assistance undermine survivors’ autonomy much the same as mandatory arrest policies.\textsuperscript{101} The same critique should apply to both. That some of the cases challenging law enforcement’s under-responsiveness to gender violence have been brought by women of color underscores the importance of these cases as part of a robust civil rights response.\textsuperscript{102}

II. Reviving civil rights: law enforcement accountability as police misconduct

A new federal civil rights-based approach to gender violence might take several forms. This section focuses on institutional accountability and argues that new strategies productively could address ongoing problems with law enforcement responses to gender violence calls.

A. Individual and institutional actors

Historically, civil rights claims to redress gender violence have encompassed claims against both individual and institutional actors.\textsuperscript{103} While both are important, new approaches to institutional accountability build on civil rights laws’ historic role in holding institutions accountable for discrimination and other rights violations.\textsuperscript{104} I urge a focus on law enforcement,

\textsuperscript{99} See, e.g., Frye et al., supra note 96 (suggesting heightened problem with under-enforcement in communities of color).

\textsuperscript{100} See, e.g., Report of the Special Rapporteur on violence against Women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/17/26/Add.5 (June 1, 2011), ¶¶ 14, 50-66 (detailing compound challenges of women who face multiple forms of discrimination).


\textsuperscript{102} See supra note 96, (noting that, for example, Jessica Gonzales is part Native American and part Latina).

\textsuperscript{103} See supra Parts I.B. & C.

given ongoing problems in obtaining evenhanded responses. Even the Supreme Court majority in *Morrison* acknowledged that there is a problem with state justice systems responses to gender violence. Remedies directed against the institutional biases that continue to present barriers to justice for survivors of gender violence hold potential to produce meaningful change.

A focus on institutional accountability would be consistent with the approach of other federal civil rights laws, which, correctly or incorrectly, generally privilege institutional over individual liability. For example, Title VII claims primarily hold the institutional employer, rather than an individual discriminator, liable. Virtually all jurisdictions preclude claims against an individual under Title VII. Claims under section 1983 may be directed at individuals, although individuals often are shielded from liability through qualified immunity. Litigation seeking policy-based reform often is directed at institutions, for example, through claims holding municipalities liable for failing to train, or for maintaining a policy or practice that violates constitutional or statutory rights. Institutional accountability can advance structural reform by spurring policy and procedural change. Individual accountability no doubt is important, but in

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105 These problems are discussed in Part II.B., *infra.*

106 The *Morrison* majority acknowledged that the 1994 civil rights remedy was enacted in response to a “voluminous” record of gender bias in state justice systems *Morrison,* 529 U.S. at 620.

107 Indeed, in considering police accountability generally, an “emerging consensus” rejects the so-called “rotten apple” theory that individual “bad” officers lead to misconduct; instead inadequate management policies and practices are recognized to be more likely to be the cause. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute,* 19 GEO. MASON U. L.J. 479, 483-84 (2009).

108 The wisdom of preferring institutional as opposed to individual liability is a question beyond the scope of this paper. For example, in urging enactment of the VAWA civil rights remedy, proponents highlighted the value of individual accountability. See, *e.g.*, MacKinnon, *supra* note 6, at 138 (discussing civil remedy as means to hold perpetrators directly accountable as a way of altering perpetrators’ behavior and valuing and restoring survivors).

109 See, *e.g.*, Fantini v. Salem State College, 557 F.3d 22, 30 (1st Cir. 2010); Van Horn v. Best Buy Stores, 526 F.3d 1144, 1147 (8th Cir. 2008); Dearth v. Collins, 441 F.3d 931, 933 (11th Cir. 2006); Foley v. Univ. of Houston Sys., 355 F.3d 333, 340 n.8 (5th Cir. 2003); Glebocki v. City of Chicago, 32 Fed. Appx. 149, 154 (7th Cir. 2002); Lissau v. Southern Food Svcs., 159 F.3d 177, 181 (4th Cir. 1998); Walthen v. General Elec. Co., 115 F.3d 400, 406 (6th Cir. 1997); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Sheridan v. E.I. Dupont de Nemours, 100 F.3d 1061, 1078 (3d Cir. 1996); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995); Miller v. Maxwell’s Int’l. Inc., 991 F.2d 583, 587 (9th Cir. 1993).

110 See Martin A. Schwartz & Kathryn R. Urbonya, Ch. 15, in *Qualified Immunity,* in *SECTION 1983 LITIGATION,* 2d Ed. (2008).

111 See *id.* at Ch. 10.

112 See, *e.g.*, *supra* note 39 (discussing policy responses to lawsuits brought against municipalities for failed responses to domestic and sexual violence).
the context of gender violence, is inherently limited in its ability to advance the practical and transformative goals of civil rights recovery.\textsuperscript{113}

The use of civil rights laws to prod law enforcement responsiveness to marginalized groups is not new. As Zanita Fenton has argued, police refusal to protect battered women is analogous to law enforcement’s historic refusal to enforce the law to protect African-Americans, which led to the enactment of the Reconstruction-era civil rights statutes, including section 1983.\textsuperscript{114} One of the core purposes of that law was to provide a federal remedy for non-enforcement of state remedies to prevent violence against individuals.\textsuperscript{115}

Implicit in the VAWA civil rights remedy’s focus on individual liability was the assumption that the bedrock civil rights statute, 42 U.S.C. §1983 (“section 1983”) would afford redress in cases alleging institutional failures involving state actors.\textsuperscript{116} Ongoing problems with law enforcement accountability demonstrate the continued need for both robust enforcement of existing legal theories, and for new and complementary strategies that would advance greater accountability.

\textbf{B. Law enforcement accountability and civil rights}

Notwithstanding the significant progress in law enforcement policies and practices in response to gender violence, problems remain. The United Nations Special Rapporteur has documented the historic and ongoing problems with enforcement of anti-domestic violence laws in the United States.\textsuperscript{117} Recent Department of Justice investigations confirm the enduring nature of these practices. For example, the Department’s investigation of the New Orleans Police Department revealed gender biased policing, based, among other things, on misclassifications of

\textsuperscript{113} See, e.g., Goldscheid, \textit{Elusive Equality}, supra note 36, at 768-77. Similar critiques of reliance on private litigation as a remedy against individuals have been raised in in other civil rights contexts. See, e.g., Olatunde Johnson, \textit{The Last Plank: Rethinking Public and Private Power to Advance Fair Housing}, 13 U. PA. J. CONST. L. 1191, 1201-1207 (2011).


\textsuperscript{115} Id.

\textsuperscript{116} Goldfarb, \textit{No Civilized System of Justice}, supra note 6, at 508. Other remedies, such as Title VII of the 1964 Civil Rights Act, provide redress in cases of private institution’s failed responses to gender violence. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

\textsuperscript{117} See, e.g., Report of the Special Rapporteur on violence against Women, its causes and consequences ¶¶ 13-17, 54, 61, 83 (UN Human Rights Council No. A/HRC/17/26/Add.5, June 1, 2011) [“Special Rapporteur Report”]; accord Inter-American Comm’n, ¶¶ 96, 97 (referencing reports).
sexual assault cases, missing or inadequate documentation, indications that staff relied on stereotypical assumptions and judgments about sex crimes and victims of sex crimes. The Department found “systemic deficiencies” in NOPD’s handling of domestic violence cases as well. It detailed the NOPD’s lack of specific guidance regarding important functions, such as protocols for 911 operators taking domestic violence calls, and procedures for investigation and follow up. It also detailed grossly inadequate training of law enforcement in how to investigate domestic violence claims, leading to failures of follow up, and minimal efforts to find and interview witnesses. The investigation resulted in a consent decree in which the NOPD agreed, among other things, to develop and implement a set of policies and procedures reflecting improved responses to sexual assault, and domestic violence.

Similarly, the Department found “troubling evidence” that the Puerto Rico Police Department (PDPD) failed to adequately police sexual assault and domestic violence cases. The investigation detailed dramatically lower numbers of reported forcible rapes as compared to murders than virtually all other jurisdictions (which reported more forcible rapes than murders). It also cited low levels of orders of protection among women who had been murdered by their partners as well as high numbers of women who had been murdered by their domestic partners. The investigation further reported that the PRPD has repeatedly failed to appropriately discipline officers who had been accused of domestic violence. Together, these

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119 Id. at 43.
120 Id. at 49.
121 Id. at 50.
122 United States v. City of New Orleans, Consent Decree Regarding the New Orleans Police Dep’t, (E.D. La., No. 12-1924, filed July 24, 2012), ¶¶ 195-211. For example, the consent decree requires the NOPD to incorporate materials on the realistic dynamics of sexual assault, including issues related to trauma response, into regular training, and prohibits police officers from coding sexual assaults in a “miscellaneous” or “non-criminal” category without the express written approval of a higher officer. Id. at ¶ 205-207.
123 Id. at ¶ 212-222. Under the consent decree, the NOPD agreed to discourage dual arrests of offenders and victims, id. at ¶ 214, to incorporate into its ongoing training materials on the dynamics of domestic violence, id. at ¶¶ 219-221, and to track dispositions of domestic violence investigations. Id. at ¶ 222.
125 PRPD Investigation, supra note 124, at 57.
126 Id. at 58.
127 Id.
concerns led the Department of Justice to conclude that the PRPD’s institutional oversight may rise to the level of a constitutional violation.\textsuperscript{128}

In another investigation, the Department similarly has raised serious concerns that the Maricopa County Sheriff’s Office failed to investigate a large number of sex crimes in a manner that may constitute gender and/or national origin discrimination.\textsuperscript{129} The Department also has announced a series of investigations into allegations that the University of Montana Office of Public Safety, and Missoula Police Department and the Missoula County Attorney’s office failed adequately to investigate and prosecute alleged sexual assaults against women in Missoula.\textsuperscript{130}

Moreover, reports indicate that those in underserved communities are most likely to be the subject of gender-biased law enforcement responses. Studies suggest that poor women and women of color may be at greatest risk of law enforcement under-responsiveness to their calls for assistance.\textsuperscript{131}

The ongoing problems with law enforcement’s responses to domestic and sexual violence in a manner consistent with constitutional and international human rights principles call for renewed attention as a matter of civil rights concern. Although current problems may not be of the stark magnitude that led to reform in the 1980’s, they highlight the need for more nuanced, but no less rigorous, responses. Civil rights frameworks advance understanding and enforcement of the bedrock principles of equality and liberty that these cases present. To be more fully responsive to the breadth of civil rights issues raised by the problem of gender violence, federal civil rights approaches should address both individual and institutional accountability. The trajectory of Supreme Court precedent, ongoing enforcement problems, and developing international human rights norms suggest shifting attention to civil rights remedies for gender violence that advance institutional accountability for law enforcement’s meaningful response.

\textsuperscript{128} Id.
\textsuperscript{130} See Dep’t of Justice, Justice Department Announces Investigations (May 1, 2012), http://www.justice.gov/opa/pr/2012/May/12-crt-561.html.
\textsuperscript{131} See, e.g., Special Rapporteur Report ¶¶ 50-61; Inter-American Comm’n, ¶ 161; see also, e.g., Frye et al., supra note 96).
III. Federal civil rights caselaw

Popular accounts would suggest that the Supreme Court’s *Castle Rock* decision eliminated all avenues of redress when law enforcement fails to enforce a protective order.\(^{132}\) The decision in fact was more limited. The Court rejected procedural due process claims as a basis for enforcing protective orders.\(^{133}\) But procedural due process had not been the theory most commonly used for holding law enforcement accountable for reasonably responding to domestic and sexual violence calls. Other theories, notably, the state-created danger exception to the *DeShaney* decision rejecting a general public duty to protect private individuals, as well as equal protection arguments, had been invoked more frequently than procedural due process, as a basis for holding law enforcement accountable to domestic and sexual violence survivors.\(^{134}\) That said, even though those theories of recovery formally remain available, the scope of relief has narrowed in recent years.\(^{135}\) This section outlines the scope of still-available relief.

A. Substantive due process and “state-created danger”

Although the landmark case *DeShaney* v. *Winnebago County Board of Social Services*, precludes many substantive due process claims, it set forth exceptions under which a state may be liable for failing to carry out its duties.\(^{136}\) Those exceptions include claims based on a showing of a “special relationship” with law enforcement, for example, through a relationship created by taking someone into custody,\(^{137}\) or, more pertinent to domestic violence-related claims,
by putting someone in a more dangerous position than that which she otherwise would have experienced.138

Survivors may prevail under the state-created danger theory if they can establish that the officers’ affirmative conduct created or increased the risk of private violence.139 For example, in Okin v. Village of Cornwall, the Second Circuit Court of Appeals upheld the substantive due process and municipal liability claims of Michele Okin based on allegations that despite her repeated calls for police assistance the police neither arrested her former partner Roy Charles Sears nor interviewed him at any length about her allegations.140 The officers’ actions, such as discussing football with Sears in response to Okin’s complaint that Sears had beaten and tried to choke her, transmitted a message that Sears would not suffer any consequences for his acts of violence.141 Similarly, officers’ failure to intervene or arrest in response to Sears’ comments that he could not “help it sometimes when he smacks Michele Okin around” and their failure to file a domestic incident report, to interview Sears, or to make an arrest in response to Okin’s numerous allegations of Sears’ abuse, further supported the courts’ conclusion that the officers’ actions constituted affirmative conduct that created or increased the risk of violence to her.142


139 See, e.g., Oren, Some Thoughts, supra note 46 (collecting cases); see also Atinuke O. Awoyomi, the State-Created Danger Doctrine in Domestic Violence Cases: Do We Have a Solution in Okin v. Village of Cornwall-on-Hudson Police Department?, 20 COLUM. J. GENDER & L. 1 (2011); Milena Shtelmakher, Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations, 43 LOY. L.A. L. REV. 1533 (2010); Matthew D. Barrett, Failing to Provide Police Protection: Breeding a Viable and Consistent “State-Created Danger” Analysis for Establishing Constitutional Violations Under Section 1983, 37 Val. U. L. Rev. 177 (2002); see also, e.g., Peter Bachrach & Martin S. Baratz, Decisions and Nondecisions: An Analytic Framework, 57 AM. POL. SCI. REV. 632, 641-42 (1963) (identifying non-decision-making as action that is discernable and subject to analysis).

140 Okin v. Village of Cornwall, 577 F.3d 415 (2d Cir. 2009).

141 Id. at 430.

142 Id. at 431. The court additionally upheld Okin’s claims that the officers’ affirmative creation or enhancement of the risk of violence to her shocked the conscience, given that the “serious and unique risks and concerns of a domestic violence situation are well known and well documented.” Id. at 431-32. The court further upheld her claims of municipal liability based on allegations that the police department maintained a custom of acquiescing in the officers’ misconduct and that the “patterns of misconduct” suggested training “so inadequate” as to give rise to an inference of deliberate indifference.” Id. at 440.
Other courts similarly have upheld substantive due process and municipal liability claims when a survivor identified a pattern of conduct, such as a failure to interview, investigate, or take any meaningful steps to determine whether arrest or further law enforcement action was warranted. Courts seem particularly responsive to these claims when the alleged abuser either was a law enforcement officer, or was friends or otherwise associated with local law enforcement.

But other claims have not been as successful, and the contours of the doctrine are hard to draw. For example, it is difficult to reconcile the Okin court’s conclusion that law enforcement’s comments and actions in response to repeated calls for assistance constituted affirmative conduct that increased the survivor’s risk of violence, with the Sixth Circuit Court of

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143 See, e.g., Pearce v. Longo, 766 F. Supp. 2d 367 (N.D.N.Y. 2011) (former officer committed suicide and killed wife even though police officers were well-aware of ongoing abuse by police officer of his wife, assured her they were “all over this” in response to wife’s complaints, failed to discipline or suspend him or to confiscate his guns or to have his mental condition evaluated); Arteaga v. Waterford, No. HHDX07CV5014477, WL 2010 1611377, 49 Conn. L. Rptr. 787 (Conn. Super. Mar. 16, 2010) (pattern of law enforcement failure to interview, investigate and arrest abusive partner that may have encouraged him to commit more acts of violence); Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008) (finding affirmative act when employee provided confidential 911 computer information about ex-wife to perpetrator who went on to kill the ex-wife, her boyfriend, and her sister); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (remanding for repleading on the theory that the officers affirmatively increased the danger to decedent).

144 See, e.g., Pearce, 766 F. Supp. 2d at 372 (perpetrator Longo was close friends and former partners with police chief); Freeman, 911 F.2d at 54-55 (police chief instructed subordinates to ignore victim’s pleas for protection from her husband, who was the chief’s friend); cf., Okin, 577 F. 3d at 426 & n.8 (recounting, though not ruling on, plaintiffs’ allegations that officers had “significant personal relationships” with abusive partner and officer’s testimony disputing that allegation).

145 See, e.g., Smithers v. Flint, 602 F.3d 758 (6th Cir. 2010) (no liability when law enforcement officers arrested girlfriend for trespass, not domestic violence, and released her from custody; no suggestion that she would be held for period of time and actions may have been seen as reasonable); Culp v. Rutledge, 343 F. Appx. 128 (6th Cir. 2009) (no liability notwithstanding law enforcement assurance that abusive partner would be arrested, he was not arrested, and subsequently shot the mother of ex-girlfriend); Burella v. Philadelphia, 501 F.3d 134 (3d Cir. 2007) (no liability notwithstanding long history of physical and emotional abuse, numerous reported incidents and purported violation of protective order; officer’s failure to act not an affirmative misuse of authority); Hudson v. Hudson, 475 F.3d 741 (6th Cir. 2007) (no liability when law enforcement made no attempt to find husband after wife called police department alleging violations of police department and he subsequently killed her and two friends; inaction not an “affirmative act”); Pinder v. Johnson, 54 F.3d 1169, 1175-6 (4th Cir.), cert. denied, 516 U.S. 994 (1995) (no affirmative act when boyfriend set house on fire and killed plaintiff’s children after police responded to her call for help, assured her that he would be locked up overnight, but released him). See also, e.g., Estate of Vordermann v. City of Edgerton, 2010 WL 3788669, No. 09-cv-443-wmc. (W.D. Wisc. Sept. 23, 2010) (plaintiffs arguably may have offered “just enough” facts to conclude that officers increased the danger to decedent by persuading her to return home but rejecting claim because officers’ reasons for doing so failed to “shock the conscience”); Mayrides v. Del. County, 666 F. Supp. 2d 861, 868 (S.D. Ohio 2009) (“hesitant[ly]” dismissing claim that police response to 911 call enhanced the danger to domestic violence caller, noting that “facts of a particular case” are key to determining the existence of a violation).

146 Accord, Oren, supra note 46, at 51 (arguing that it is difficult to find a “principled difference” between cases upholding and rejecting state-created danger arguments).
Appeals’ reasoning in *Brooks v. Knapp*. There, Brenda Hernandez repeatedly called the police after incidents of threats and protective order violations by her husband, Gilbert Hernandez, including complaints that he had a gun and that he threatened to kill her. In what was to be the final incident, the police were called after Mr. Hernandez physically assaulted her and ripped the phone out of the wall when she tried to call for help. The police arrived, and put him in the back of a squad car, but did not handcuff him, allowed him to make phone calls, and, instead of arresting him, released him. A few hours later, he broke into the house, shot and killed Mrs. Hernandez, and killed himself. In the subsequent section 1983 action by surviving family members, the court did not even analyze whether the officers’ acts of releasing him and of providing assurances that additional patrols would be provided constituted affirmative acts that exposed her to increased risk of danger; instead the court rejected her substantive due process claim on the basis that the officers took no affirmative act.

**B. Equal protection**

Other cases have invoked equal protection theories to challenge law enforcement approaches to domestic violence claims. Courts have upheld arguments that law enforcement policies, for example, that treat domestic violence calls less seriously than non-domestic violence calls, could deny equal protection based on sex. Evidence such as statistical data showing that non-domestic violence complaints were more likely to lead to arrest than comparable domestic violence complaints, or that police officers were trained to “defuse” domestic violence

147 221 F. Appx. 402, 2007 WL 725741 (6th Cir. 2007).
148 Id. at 404-05.
149 Id. at 405.
150 Id.
151 Id.
152 Id. at 407.
154 See, e.g., Macias v. Ihde, 219 F.3d 1018, 1027-8 (9th Cir. 2000); Navarro v. Block, 72 F.3d 712, 716-17 (9th Cir. 1995); Hynson v. City of Chester, 864 F.2d 1026, 1030-1 (3d Cir. 1988), on remand, 731 F. Supp. 1236 (E.D. Pa. 1990); Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 701 (9th Cir. 1988); Watson v. City of Kansas City, 857 F.2d 690, 696 (10th Cir. 1988); Thurman v. City of Torrington, 595 F. Supp. 1521, 1528-9 (D. Conn. 1984).
155 See, e.g., Hynson, 864 F.2d at 1030; Watson, 857 F.2d at 696.
situations and to arrest only as a last resort,\textsuperscript{156} might allow a jury to infer discriminatory intent. The Ninth Circuit Court of Appeals has gone as far as concluding that policies distinguishing domestic violence from non-domestic violence calls could fail even the rationality test under the Equal Protection Clause.\textsuperscript{157}

The Department of Justice has recognized that inaction in the form of practices that underserve certain communities also can violate equal protection.\textsuperscript{158} Practices such as failing to investigate sexual assault and domestic violence, may constitute such discriminatory practice.\textsuperscript{159} Evidence that police downgrade sexual assault complaints or deem them “unfounded” may reflect gender bias.\textsuperscript{160} Data-driven evidence, for example, that a jurisdiction reports fewer forcible rapes than murders, also suggests policies that do not take gender-based crimes such as domestic and sexual violence seriously.\textsuperscript{161} Evidence that a jurisdiction fails to discipline officers who have been accused of domestic violence also may evidence equal protection violations.\textsuperscript{162}

Officers’ use of stereotyped comments also could support equal protection claims.\textsuperscript{163} For example, stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about victims’ perceived credibility, sexual history, or delay in contacting law enforcement, may skew law enforcement responses.\textsuperscript{164} Law enforcement may downgrade sexual assault complaints without conducting a fact-based investigation.\textsuperscript{165}

Investigations may focus on proving an allegation to be false, or on the victim’s trustworthiness, or may otherwise rely on stereotypes, for example, by asking victims why they did not resist, why they put themselves in certain situations, and why they did not immediately disclose the

\textsuperscript{156} See, e.g., Hynson, 864 F.2d at 1030; Watson, 857 F.2d at 696.

\textsuperscript{157} See Navarro, 72 F.3d at 717.

\textsuperscript{158} NOPD Investigation, supra note 118, at 32.

\textsuperscript{159} \textit{Id.} at 43-51. The Department detailed a range of problems in New Orleans, including inadequate policies, training and supervision, improper classification of complaints, and inadequate investigations. \textit{Id.}

\textsuperscript{160} \textit{Id.} at 45. See, e.g., Testimony of Carol E. Tracy before the Senate Committee on the judiciary, Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases, (Sept. 14, 2010), http://www.judiciary.senate.gov/pdf/09-14-10%20Tracy%20Testimony.pdf; Cassia Spohn & Katharine Tellis, Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Dep’t, the Los Angeles County Sheriff’s Dep’t, and the Los Angeles County District Attorney’s Office, NCJRS # 2009-WG-BX-009, (Feb. 2012), https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf.

\textsuperscript{161} See, e.g., PRPD Investigation, supra note 124, at 57-58.

\textsuperscript{162} \textit{Id.} at 58.

\textsuperscript{163} See, e.g., Balistreri, 901 F.2d at 700 (recognizing that comments such as an officer’s response to plaintiff’s domestic violence complaint by stating that he “did not blame plaintiff’s husband for hitting her, because of the way she was ‘carrying on,’” “strongly suggest” an intention to treat domestic violence claims less seriously than other assaults as well as an “animus against abused women”).

\textsuperscript{164} NOPD Investigation, supra note 118, at 43.

\textsuperscript{165} \textit{Id.} at 45-46.
Civil Rights and Gender Violence
July 2012

assault to police, family or friends. Investigators may perpetuate stereotypes, for example, by asking blaming or leading questions. They may rely on characterizations rather than the victims’ own first-hand account, and may rarely question suspects. Notwithstanding the prevalence of these practices, equal protection claims generally have proven to be difficult to sustain, primarily due to the challenges of establishing discriminatory intent or motive.

C. (In)Adequacy of relief

The resulting doctrine under 1983 charts a patchwork of potential arguments that set a high threshold for relief. Unless a survivor can prove that an officer took affirmative acts that increased the risk of private violence, or unless she can prove that a policy intentionally was implemented to discriminate on the basis of gender (or another prohibited ground), section 1983 will not afford relief. The preceding summary of federal civil rights doctrine highlights both the formal availability of theories for redress and those theories’ practical limitations as remedies for survivors. For example, the current section 1983 framework would hold law enforcement

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166 Id. at 46.
167 Id. at 47-48. For example, in an interview of a teenager who reported being assaulted by her mother’s boyfriend, a detective recounted that in the victim’s explanation of whether she resisted, she “didn’t yell or scream, nor did she try to use her cell phone to call her mom or the police.” Id. The detective noted that “the accused never threatened or implied to have a weapon or cause her physical harm.” Id. at 48. He described the victim and her mother’s demeanor as “very nonchalant.” Id. In other cases, investigators may preclude investigations based on erroneous conclusions that forensic evidence would not be available if not immediately reported. Id. at 49.
168 Id.
170 State remedies also may be available, but may take similarly restrictive approaches. See, e.g., Valdez v. City of New York, 18 N.Y.3d 69 (Ct. App. 2011) (rejecting domestic violence survivor’s negligence claim against police after her estranged boyfriend shot her after her call to police in which a law enforcement officer assured her that he would be arrested immediately). Other courts, however, have recognized that victims may have a remedy for law enforcement officers’ willful and wanton violation of the statutory duty created under the state Domestic Violence Act. See, Calloway v. Kinkelaar, 168 Ill. 2d 1322 (Ill. 1995); see also, e.g., Matthews v. Pickett County, 996 S.W. 2d 162 (Tenn. 1999) (rejecting “public duty” defense to negligence action because restraining order created “special duty” to protect plaintiff); Campbell v. Campbell, 682 A. 2d 272, 274 (N.J. Super. 1996) (finding non-discretionary duty to enforce restraining order); Donaldson v. Seattle, 831 P.2d 1098, 1103 (Wash. App. 1992) (law enforcement
accountable for cases in which officers took action that might be deemed to encourage private violence, but not in cases of flat inaction, and for cases in which policies could be proved to be intentionally discriminatory, but not for those that inadvertently discriminate.

We should ask whether this framework encourages meaningful and effective responses. Some worry that the current framework will encourage law enforcement to ignore domestic violence calls, which would produce a return to the widely critiqued circumstances that led to the adoption of mandatory arrest policies in the first place. Others have raised concerns that the framework encourages survivors and community members to take the law into their own hands, when trained law enforcement officers more effectively could respond. Still others argue that, as a form of underenforcement, law enforcement’s failure appropriately to respond to domestic violence claims casts doubt on the legitimacy of the criminal justice system.

These inconsistencies and limitations of the current framework should be challenged. As Natapoff has argued, a response to the problem of underenforcement calls for a different approach to police responsiveness, not simply for more policing. Advocacy urging a more responsive role of the state could bring the United States into greater compliance with international human rights directives. Arguments advocating a reimagined state role in addressing the needs of those who are most vulnerable reflect a similar vision. One might consider challenges to the negative rights philosophy reflected in DeShaney v. Winebago and Castle Rock v. Gonzales, which could lay a foundation for a more nuanced and effective floor for state intervention. Congress could chart an approach to state accountability more in line with international human rights standards and could recognize states’ positive obligations to hold law

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171 Miccio, If not now, when?, supra note 201, at 424 (arguing that recent decisions have eviscerated mandatory law enforcement intervention).
172 Fenton, supra note 114, at 406.
173 See Natapoff, supra note 114, at 1775.
174 Natapoff, supra note 114, at 1773.
175 See supra notes 33-35, and accompanying text.
176 See, e.g., MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS (2010); Martha A. Fineman, The Vulnerable Subject and the Responsive State, 60 Emory L.J. 251, 273-75 (2010); Laura Spitz, Theorizing the more responsive state: Transcending the national boundaries of law, Ch. 20, in Martha A. Fineman, TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY (2011).
177 Future scholarship could address how arguments challenging the DeShaney doctrine might be fashioned.
enforcement accountable for exposing survivors to danger.\(^{178}\) It could propose a statutory response to *Castle Rock* confirming that law enforcement officers’ conduct can constitute affirmative conduct that increases victims’ vulnerability to violence and is actionable under section 1983.\(^{179}\) Short of that transformative vision, advocacy could challenge, or at least aim to clarify, the distinction reflected in the state-created danger exception between action and inaction.\(^{180}\) At a minimum, increased public attention to and discussion of the shortcomings as well as successes of law enforcement intervention, framed in the language of human or civil rights, would generate dialog that could inform productive new initiatives.\(^{181}\)

### IV. Accountability reimagined

A reimagined civil rights approach would take a fresh look at how civil rights frameworks could support law enforcement accountability. New approaches could incorporate alternative strategies in addition to the statutory and litigation-based responses outlined above. This section elaborates two: administrative accountability and community-based response.

#### A. Administrative remedies

A reimagined civil rights response might include remedies other than traditional civil litigation. If law enforcement’s under-responsiveness to domestic and sexual violence claims were to be viewed on the continuum of police misconduct, additional remedies come into view. For example, two federal statutes authorize Department of Justice investigation of claims that law enforcement officers and criminal justice agencies discriminate on enumerated protected

\(^{178}\) See, e.g., G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN’S L.J. 133 (2000) (critiquing the DeShaney Court’s approach to the role of the state in establishing accountability for responding to domestic violence); G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2005) (urging frameworks of state accountability for law enforcement responses to domestic violence); Oren *supra* note 46 (arguing that both DeShaney and Castle Rock are wrong and should be challenged). For additional suggestions for doctrinal reform, see, e.g., Awoyomi, *supra* note 139; Barrett, *supra* note 139; Shtelmakher, *supra* note 139.

\(^{179}\) In other words, a federal statutory response could codify the approach of the Okin court.


grounds, or engage in a pattern or practice of violating the constitution of federal law. These laws respectively identify somewhat different prohibitions and procedural requirements, and both contemplate injunctive relief rather than compensation. Nevertheless, they both afford vehicles for investigation and review of law enforcement practices that offer an alternative to private litigation.

Although both of those statutes are most often invoked to address cases of racial misconduct, their statutory scope encompasses cases involving gender-based discrimination and abuse. Recent investigations have found gender-biased police practices, such as the failure to investigate sexual and domestic violence, and inadequate policies, procedures and training with respect to sexual and domestic violence cases, to be among identified patterns and practices of

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182 See 42 U.S.C. §3789d (2010) (prohibiting pattern or practice of discrimination on the ground of race, color, religion, national origin or sex in any program or activity funded by the Office of Justice Programs). This provision was enacted as part of the Justice System Improvement Act of 1979, which, inter alia, established the Law Enforcement Assistance Administration. See Pub. L. 96-157, 93 Stat. 1167 (Dec. 27, 1979).


184 For example, 42 U.S.C. § 3789d authorizes Department of Justice investigations and authorizes a private right of action by an individual after exhaustion of administrative (DOJ) remedies. 42 U.S.C. § 14141 is both broader and more limited than § 3789d. It is broader in that it authorizes the Attorney General to investigate and bring suit to remedy a “pattern or practice of conduct” that “deprives persons of rights privilege or immunities secured or protected by the Constitution or laws of the United States,” and thus reaches beyond discriminatory conduct. It is narrower in that it does not permit a claim by an individual, even if she has exhausted her administrative remedies of complaining to the DOJ.

185 42 U.S.C. § 14141 authorizes a civil action by the Attorney General for “equitable and declaratory relief to eliminate the pattern or practice.” 42 U.S.C. §14141(b). 42 U.S.C. § 3789d contemplates injunctive or other relief “as necessary or appropriate to insure the full enjoyment of the rights proscribed in this section, including … repayment” of the OJP funds, 42 U.S.C. § 3789d(c)(3), and authorizes recovery of attorney fees by a prevailing plaintiff in the event a private person brings a civil action to enforce compliance after exhaustion of her administrative complaint with DOJ. 42 U.S.C. §3789d(c)(4)(B). For a discussion of the Department of Justice’s enforcement practices with respect to these statutes, see, e.g., U.S. Dep’t of Justice, Civil Rights Division, Special Litigation, Conduct of Law Enforcement Agencies, http://www.justice.gov/crt/about/spl/police.php.


police misconduct. At least one investigation led to oversight of domestic violence committed by law enforcement officers. These reports demonstrate the potential of viewing responses to gender-based violence on the police misconduct continuum.

Administrative responses through Department of Justice investigation can offer a useful alternative to private litigation as a mechanism for complaint, investigation and oversight. The administrative approaches created under 42 U.S.C. §§ 14141 and 3789d have several advantages to traditional private litigation. Individuals can seek investigations regardless whether they have a lawyer or can afford court fees. Administrative enforcement complements the inherent limitations of the private enforcement scheme favored under most federal civil rights laws. The approach squarely frames problems of law enforcement accountability as a civil rights problem, and creates the potential for a uniform federal floor for accountability, much as with other civil rights claims.

On the other hand, the departmental capacity for undertaking investigations will be constrained by the availability of administrative resources, which may vary depending on the administration in office. Since the statutes don’t authorize a direct, private right of action, and since they set a threshold of liability for patterns or practices of wrongdoing, they may not afford redress in individual cases of misconduct. In addition, they do not authorize financial compensation, which may render them unappealing and inadequate for complainants seeking compensation for financial losses in addition to changes in policies and practices.

Nevertheless, steps can be taken to build on these existing enforcement mechanisms. For example, federal legislation might confirm that the Department of Justice’s existing civil rights investigatory authority applies to all state agencies involved in the investigation and prosecution

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188 For discussion of these investigations, see supra notes 117 to 130, and accompanying text.
189 An investigation resulted in a consent decree in U.S. v. City of Pittsburgh, which, *inter alia*, required documentation of all claims or suits in which a police officer is named in a domestic violence matter. See *http://www.justice.gov/crt/about/spl/documents/pittssa.php*, at para.12a.
192 For a summary of other critiques, see, e.g., Harmon, supra note 190, at 20-21.
193 Under 42 U.S.C. §3789d, an individual can bring a private suit, but only after exhausting the administrative complaint procedure after filing a complaint with the offending program. 42 U.S.C. § 3789d(c)(4)(A).
of domestic and sexual violence. An administrative guidance might confirm the Department of Justice’s investigatory authority to investigate claims of gender-biased law enforcement practices. Expanding the range of available remedies and publicizing their ability can go a long way toward shifting our popular understandings and promoting needed redress.

B. Community response

To some extent, the absence of a widespread call for reform reflects the fact that public discourse and rhetoric do not frame under-policing of gender violence as a matter of civil rights. It follows that increased public education and community organizing could support reinvigorated reform. For example, community organizer Ejim Dike argues that community members may not be aware that United States law currently does not impose a duty on the government to provide protection from violence perpetrated by private actors. Increased awareness of the limitations of current accountability schemes could generate engaged discussion and activism. It could foster new collaborations between grassroots groups and human rights projects that frame gender violence as a human rights violation. As an issue that spans racial and gender justice concerns, it could support new coalitions and partnerships. That type of activism could generate fresh approaches to law reform as well as policy-based change at the local level.

Local human rights ordinances affirming that freedom from domestic violence is a basic human right constitute one such approach. Law school clinics in Cincinnati, Baltimore and Miami drafted local human rights ordinances, each of which subsequently were adopted by their

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194 By authorizing Department of Justice investigations into discriminatory or otherwise unconstitutional law enforcement practices, that approach would be similar to the proposals enumerated in the Civil Rights Restoration Acts of 2001 and 2003, which, inter alia, would authorize civil action by the Attorney General for equitable relief upon “. . . [r]easonable cause to believe that any State or political subdivision of a State, . . . or other person acting on behalf of a State or political subdivision of a State has discriminated on the basis of gender in the investigation or prosecution of gender-based crimes and that discrimination is pursuant to a pattern or practice of resistance to investigating or prosecuting gender-based crimes.” H.R. 394 (108th Cong., Jan. 28, 2003); H.R. 429 (107th Cong. Feb. 7, 2001).
195 For example, a guidance analogous to the Department of Justice’ guidance of the use of race in law enforcement could elaborate impermissible gender-biased practices. See Dep’t of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (2003), http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.
196 See Ejim Dike, Community Organizing, in Bettinger-Lopez, et al., supra note 49 at __.
197 Id. (referencing, e.g., the Center for Women’s Global Leadership “16 Days of Activism” campaign; International Human Rights Day, Dec. 10; International Women’s Day, March 8; periodic reports due to international human rights treaty bodies).
respective local city councils.199 Those resolutions now can be used to advance public awareness and constitute an additional tool to support legal and policy-driven advocacy on behalf of survivors and their families.

V. Limitations and concerns

This proposal to promote mechanisms for advancing law enforcement accountability may raise several concerns. This section addresses two: the risk that such efforts will contribute to the existing over-criminalization of domestic violence, and concerns about the dangers of engaging with the state.

A. Over-criminalization

One issue raised by proposals to promote law enforcement accountability is the concern that responses would exacerbate the current emphasis on law enforcement interventions for domestic and sexual violence. As others have detailed, the extent to which criminal justice interventions have dominated the United States’ legal and policy-based response to domestic and sexual violence has proved problematic, particularly for undocumented survivors, for those in communities of color and for the LGBT community.200 But the question of the wisdom of supporting law enforcement initiatives as a preferred policy response to gender violence is analytically distinct from the question whether law enforcement should be accountable when

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survivors affirmatively seek intervention. Critiques of over-criminalization should not mitigate the importance of consistent and non-discriminatory responses when survivors choose to reach out to law enforcement for assistance. Advancing law enforcement accountability when survivors seek intervention would further, not thwart, efforts to support survivors’ agency and empowerment. Advocating for responsive and non-discriminatory policing is not a wholesale endorsement of criminal justice based responses. Instead, a call challenging over- as well as under-policing as misconduct reflects a practical, if incremental, approach to civil rights reform.

B. Engaging with the state

An additional concern may rest with the challenges associated with state intervention. The history of feminists’ calls for increased state responsiveness has been mixed at best. For example, within the context of domestic violence, state involvement has meant the increase of funding and resources for a wide range of services. Yet some argue that engagement with the state comes at a high price. For example, Leigh Goodmark argues that anti-domestic violence advocates have invested power in the state at the expense of grounding policy in the voices of survivors. Kristin Bumiller elaborates the complications of relying on the state for assistance, and argues that well-meaning reforms may even worsen dependencies. On the other hand, feminists also propose reforms that would allocate resources to support a more responsive state.

These concerns raise significant issues that must be parsed in the context of particular proposed reforms. Here, the proposal to bolster avenues for checking misuse of state power would give voice to survivors’ experiences, and should not exacerbate the concerns about state supervision or state-supported dependency that have been the core of objections to a more robust

201 Cf., e.g., Fenton, supra note 114, at 392-93 (arguing that police discretion leads to both over and under enforcement in poor communities and in communities of color); G. Kristian Miccio, If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 405, 414-15 (2009) (“If Not Now, When?”) (describing battered women’s movement’s dual concerns with under-enforcement in domestic violence cases and with an aversion to partnering with the state).

202 See, e.g., Natapoff, supra note 114 at 1773 (arguing that the problem of underenforcement should be countered by more or different policing that increase police responsiveness and democratic sensitivity to all stakeholders in the policing process).

203 Cf. GOODMARK, supra note 39, at 118-25.

204 See GOODMARK, supra note 39, at 6

205 BUMILLER, supra note 77, at 96-98.

206 See, e.g., supra note 176, and accompanying text.
state response. That said, charting an appropriate role for state intervention requires a delicate balance; one that is subject to checks and balances by government and community groups alike.

**Conclusion**

Framing law enforcement under-responsiveness to gender violence through the lens of underenforcement allows a re-imagining of how law and policy might meaningfully advance the federal interest in law enforcement accountability. At a minimum, the combined impact of the Inter-American Commission’s decision in *Lenahan v. United States* and the increasing global recognition of the ways gender violence violates civil and human rights, suggest that we broadly consider new approaches that will most meaningfully and effectively deter and end all forms of gender violence.

This article calls for two shifts in approaches to anti-gender based violence advocacy. It urges a renewed focus on institutional accountability as a matter of civil rights. It argues that cases alleging law enforcement’s failure to respond to domestic or sexual violence calls be treated as cases of police misconduct. As a practical matter, these shifts would make useful contributions to improving justice system responses to gender violence. They also would contribute to a new generation of progressive reform that advances the principles of equality and liberty for which civil rights long has stood.